



# RECASTING JUSTICE:

SECURING DALIT RIGHTS  
IN NEPAL'S NEW CONSTITUTION



## **About the Center for Human Rights and Global Justice and the International Human Rights Clinic**

The Center for Human Rights and Global Justice (CHRGJ) brings together and expands the rich array of teaching, research, clinical, internship, and publishing activities undertaken within New York University (NYU) School of Law on international human rights issues. Philip Alston is the Center's Faculty Chair; Smita Narula and Margaret Satterthwaite are Faculty Directors; Jayne Huckerby is Research Director; and Veerle Opgenhaffen is Program Director.

The International Human Rights Clinic at NYU School of Law (a program of the Center) provides high-quality, professional human rights lawyering services to individual clients and non-governmental and intergovernmental human rights organizations, partnering with groups based in the United States and abroad. Working as legal advisers, counsel, co-counsel, or advocacy partners, clinic students work side-by-side with human rights activists from around the world. The Clinic is co-directed by Professor Smita Narula and Professor Margaret Satterthwaite of the NYU faculty; Mattie Johnstone is Clinical Fellow and Michelle Williams is Clinic Administrator.

In its work on discrimination, the CHRGJ and the NYU International Human Rights Clinic have focused on caste discrimination in South Asia, collaborating extensively with the International Dalit Solidarity Network, of which Professor Narula is a co-founder, and with Dalit NGO partners throughout South Asia. In August 2005, during a meeting of the then-United Nations (UN) Sub-Commission on the Promotion and Protection of Human Rights, the CHRGJ released a 65-page report entitled *The Missing Piece of the Puzzle: Caste Discrimination and the Conflict in Nepal*, and in November 2005, provided an oral statement to the UN Committee Against Torture urging the Committee to investigate torture against Dalits in its State Party examination of Nepal. In February 2007, the CHRGJ produced *Hidden Apartheid: Caste Discrimination against India's "Untouchables."* This was a "shadow report" co-published with Human Rights Watch in response to India's periodic report to the UN Committee on the Elimination of Racial Discrimination. In May 2007, Professor Narula testified before the US Congressional Human Rights Caucus on the situation of Dalit women in India.

All publications and statements of the CHRGJ can be found at its website: [www.chrgj.org](http://www.chrgj.org).

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***Recasting Justice: Securing Dalit Rights in Nepal's New Constitution***

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## Methodology

*Recasting Justice* analyzes Nepal's Interim Constitution to help inform the ways in which the new constitution may be drafted in accordance with the country's international human rights obligations to secure Dalit rights. The report was produced in close cooperation with Dalit advocates and members of the legal community in Nepal. It draws on the expertise of Nepalese academics and international constitutional scholars, as well as CHRGGJ's own expertise on caste discrimination and international human rights law. The report's recommendations, which are addressed to members of the Constituent Assembly, are based on a detailed analysis of Nepal's obligations under a number of international human rights treaties. The report additionally reflects extensive research on human rights abuses against Dalits in Nepal, drawn from a variety of credible sources.

In November 2007, CHRGGJ conducted numerous in-person interviews with Dalit advocates, lawyers, national and international non-governmental organization representatives, and UN and other international experts in Kathmandu, Nepal. Also in November 2007, CHRGGJ participated in an academic Regional Seminar on Caste Discrimination in South Asia organized by the International Dalit Solidarity Network and the Indian Institute of Dalit Studies in Kathmandu where the authors were able to consult with a number of regional experts on the report. CHRGGJ also solicited written feedback on earlier drafts of the report from a variety of experts

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## Glossary

1990 Constitution:	Constitution of the Kingdom of Nepal 2047 (1990)
CAT:	Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CEDAW:	Convention on the Elimination of All Forms of Discrimination Against Women
CEDAW Committee:	UN Committee on the Elimination of Discrimination Against Women
CERD Committee:	UN Committee on the Elimination of Racial Discrimination
CHRGJ:	Center for Human Rights and Global Justice, NYU School of Law
CRC:	Convention on the Rights of the Child
CRC Committee:	UN Committee on the Rights of the Child
ESCR Committee:	UN Committee on Economic, Social and Cultural Rights
ICCPR:	International Covenant on Civil and Political Rights
ICDC:	Interim Constitution Drafting Committee
ICERD:	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR:	International Covenant on Economic, Social and Cultural Rights
ILO:	International Labor Organization
Interim Constitution:	The Interim Constitution of Nepal, 2063 (2007)
NDC:	National Dalit Commission
NHRC:	National Human Rights Commission
OHCHR:	UN Office of the High Commissioner for Human Rights
TADO:	Terrorist and Disruptive (Control and Punishment) Ordinance of 2004
UN:	United Nations

## I. INTRODUCTION

### A. NEPAL'S CONSTITUTIONAL MOMENT—A FRESH START

On January 15, 2007, Nepal promulgated the *Interim Constitution of Nepal* (“Interim Constitution”).<sup>1</sup> The decision to adopt the Interim Constitution was made in the context of broader negotiations concerning Nepal’s ongoing peace process.<sup>2</sup> In these negotiations, the position of a number of entities, particularly the Maoists, was that the constitution in force—the *1990 Constitution of the Kingdom of Nepal*<sup>3</sup>—would not enable Nepal’s transition to a democratic and inclusive government.<sup>4</sup> The 1990 Constitution was perceived as flawed, both because of its lack of substantive rights protections<sup>5</sup> and because it had been drafted under “monarchical authority” with very limited public participation.<sup>6</sup>

The Interim Constitution seeks to break this constitutional tradition and “institutionalize the achievements of the revolution and movements till this date.”<sup>7</sup> It is the controlling law in Nepal until the new constitution is created by elected members of the Constituent Assembly<sup>8</sup>—a process for which the Interim Constitution provides and one that is expected to take years.<sup>9</sup>

In drafting the new constitution, the Constituent Assembly may determine that some of the Interim Constitution’s provisions are “useful.”<sup>10</sup> As a predictor of the kinds of constitutional arrangements being envisaged in Nepal, the Interim Constitution enables an assessment of the shape such arrangements must take in order for the Constituent Assembly to meet two of its key responsibilities in drafting the new constitution: crystallizing the peace after Nepal’s prolonged civil war<sup>11</sup> and enabling Nepal to fulfill its international legal obligations to secure fundamental rights. As noted throughout this report, these two responsibilities can only be met if the rights of Nepal’s Dalit population—a group that has faced more than 2,000 years of systematic discrimination on the basis of caste—are fully realized.

Although this report focuses on the inclusion of rights and protections for Dalits in Nepal’s new constitution, the Center for Human Rights and Global Justice (CHRGJ) emphasizes at the outset that such rights and protections should not come at the expense of *other* marginalized groups in Nepal. This report focuses on Dalits because of the Center’s expertise regarding their history and treatment in Nepal, along with its general expertise on the human rights implications of caste-based discrimination wherever it exists.<sup>12</sup> The Center strongly urges the Constituent Assembly to observe the input and recommendations of other organizations regarding all marginalized groups in Nepal.

### B. THE IMPORTANCE OF DALIT RIGHTS IN NEPAL’S CONSTITUTIONAL MOMENT

In fulfilling its first responsibility of crystallizing the peace after Nepal’s prolonged civil war, the Constituent Assembly must recognize that the political, social, and economic exploitation of Dalits and other minorities in Nepal was a root cause and legitimating factor of the “People’s War.”<sup>13</sup> A failure now to move towards the eradication of those same practices invites future instability in the transitional period.<sup>14</sup> Further, the constitutional

reform experiences of several other countries have exemplified the transformative power of a constitution grounded in human dignity that explicitly seeks to further human rights.<sup>15</sup>

The second responsibility—realizing the rights of Dalits, who have been characterized as the “most marginalized and deprived group of Nepal”<sup>16</sup>—presents the true test of the seriousness with which the Nepalese government implements its human rights obligations.<sup>17</sup> While the *1990 Constitution of the Kingdom of Nepal* prohibited caste discrimination,<sup>18</sup> it was littered with exceptions that significantly weakened rights protections.<sup>19</sup> Moreover, the prohibition against caste discrimination was neither consistently implemented nor enforced.<sup>20</sup>

### **C. CHARTING AN ANALYSIS OF NEPAL’S INTERIM CONSTITUTION FROM A DALIT HUMAN RIGHTS PERSPECTIVE**

This report analyzes Nepal’s Interim Constitution to help inform the ways in which Nepal’s new constitution may be drafted in accordance with the country’s international human rights obligations to secure Dalits’ human rights. Nepal’s poor constitutional record of addressing Dalit rights, along with its dismal record of enforcing human rights obligations with respect to Dalits, makes such an analysis all the more vital.

There are two starting points for this report’s analysis: first, an assessment of the nature and extent of human rights violations against Dalits in Nepal helps to outline the profound need for change; and, second, an overview of Nepal’s international binding legal obligations to prevent and provide remedy for such violations grounds the analysis in legal terms. Against this factual and legal backdrop, the report assesses both the substantive rights guarantees contained in the Interim Constitution (primarily in its Part 3), as well as the mechanisms it envisages for the enforcement of such guarantees. On the latter, the report first focuses on one of the key mechanisms for ensuring the protection of Dalit rights in the new constitution—the Constituent Assembly itself.

The report then turns to analyze the impact of the Interim Constitution’s articles on Dalit rights in several critical areas: access to citizenship; non-discrimination and equality; civil and political rights; economic, social, and cultural rights; women’s rights; children’s rights; freedom from torture; and the right to remedy. Each of these areas is analyzed through a four-step process: (1) an outline of Nepal’s relevant legal obligations as set out in the international human rights treaties to which Nepal is a party and therefore bound;<sup>21</sup> (2) a factual overview of the situation of Dalits in Nepal with respect to that particular area; (3) an evaluation of the likely impact of the Interim Constitution’s provisions on Dalit rights; and (4) recommendations for how Nepal’s new constitution might improve on the Interim Constitution to ensure that Nepal’s international obligations are met. The report concludes by briefly addressing the primary challenges Nepal is likely to meet in implementing its constitutional provisions and by assessing the enforcement mechanisms contained within the Interim Constitution.

## **II. THE CONSTITUTIONAL MOMENT IN CONTEXT: FACTUAL AND LEGAL STARTING POINTS**

### **A. THE DALIT EXPERIENCE IN NEPAL**

As described throughout this report, Nepal's "all-pervasive" caste system has a "hegemonic hold" on Nepalese society,<sup>22</sup> a fact that the Nepalese government itself recognizes.<sup>23</sup> Stripped of its historical underpinnings and religious justifications, it is a social hierarchy that is nothing other than a *discrimination* system<sup>24</sup> by which certain groups of people, based exclusively on their birth into a particular social group, are forever branded as inferior.<sup>25</sup>

This distinction defines every conceivable aspect of a Dalit's existence; her citizenship,<sup>26</sup> her access to land,<sup>27</sup> her education,<sup>28</sup> her livelihood,<sup>29</sup> her choice of spouse,<sup>30</sup> her place of worship,<sup>31</sup> her security,<sup>32</sup> her health,<sup>33</sup> and her bodily integrity<sup>34</sup> are all principally limited by caste.<sup>35</sup> The grossest manifestation of this discrimination system is the practice of "untouchability"—the complete repudiation and segregation of Dalits from members of other castes, including a prohibition on touching non-Dalits and their possessions based on the belief that Dalits are "polluted."<sup>36</sup>

Caste discrimination and the practice of "untouchability" have ensured the complete subordination of Dalits who, based on some unofficial estimates, may comprise up to 25 percent<sup>37</sup> of Nepal's population and 80 percent of the country's "ultra poor."<sup>38</sup> While some Dalits have excelled despite the caste system's substantial constraints, a large percentage of Dalits remain vulnerable to extreme forms of exploitation. "Upper-caste" community members typically force Dalits to live in segregated communities, forbid them from entering public spaces, deny them access to food, water, and land, and coerce them into caste-based occupations considered too "ritually impure" for "higher castes."<sup>39</sup> Attempts by Dalits to defy this prescribed social order are met with punitive violence and social ostracism.<sup>40</sup>

The caste system's hierarchal precepts are so entrenched in Nepal that they are enforced among and by Dalits themselves. An unfortunate but key reality in Nepal is the existence of discrimination among the more than 16 Dalit castes themselves,<sup>41</sup> where oppression and exploitation increases along the caste hierarchy.<sup>42</sup> In addition, Dalit women and girls in Nepal endure the intersectional burden of both caste and gender discrimination.<sup>43</sup> They "lag far behind Dalit men and 'upper-caste' women in terms of healthcare, education, and remuneration for their labor."<sup>44</sup> They also bear the brunt of exploitation and violence and in addition to coercion into caste-based occupations, may also sometimes be forced into sex work.<sup>45</sup>

### **B. NEPAL'S INTERNATIONAL HUMAN RIGHTS OBLIGATIONS**

#### **1. Scope of Application of Nepal's International Human Rights Obligations**

As a general matter, human rights treaties require the protection of individuals within the State Party's "jurisdiction."<sup>46</sup> The scope of this jurisdiction, and therefore the

reach of a State's human rights obligations, is set out in each treaty. Although these treaty formulations differ and are subject to some interpretation, each requires, at the very minimum, that a State must apply its human rights obligations within its sovereign territorial limits.<sup>47</sup> Discussions over what constitutes "jurisdiction" for the purposes of application of human rights norms are inherently linked to questions concerning the extent to which States owe obligations to non-citizens both within and outside of their territory. This particular debate has significant implications for ensuring Dalits' rights protections in Nepal because of the difficulties that Dalits have in gaining access to citizenship.<sup>48</sup>

Although international human rights law recognizes that States can make distinctions between citizens and non-citizens for the provision of certain rights, there are a number of rights that have been recognized by international law as being guaranteed to non-citizens.<sup>49</sup> One key right enjoyed by non-citizens is the prohibition on discrimination<sup>50</sup>—distinctions between citizens and non-citizens can only be made if they serve a legitimate State objective and are proportionate to the achievement of that objective; in other words, if they are not discriminatory.<sup>51</sup> In addition to the prohibition on discrimination, States owe non-citizens a range of civil and political rights, including the "full right to liberty and security of person," and the "inherent right to life, protected by law."<sup>52</sup> Non-citizens are also protected from torture and other cruel, inhuman, and degrading treatment or punishment, as well as slavery and servitude.<sup>53</sup> Moreover, non-citizens are entitled to "equal protection by the law" and "equality before the courts and tribunals."<sup>54</sup> States are also not permitted to make distinctions between citizens and non-citizens with respect to social and cultural rights.<sup>55</sup> Although there is a limited scope for developing countries to determine the extent to which economic rights guarantees will encompass non-citizens,<sup>56</sup> the UN Committee on the Elimination of Racial Discrimination (CERD Committee) has made it clear that States must "remove obstacles that prevent the enjoyment of economic, social and cultural rights by non-citizens, notably in the areas of education, housing, employment, and health"<sup>57</sup> and that State Parties are required to "respect the right of non-citizens to an adequate standard of physical and mental health by, *inter alia*, refraining from denying or limiting their access to preventive, curative, and palliative health services."<sup>58</sup>

In light of these obligations, and the fact that many Nepalese Dalits lack citizenship certificates, the Constituent Assembly will need to construct the new constitution to ensure that it appropriately extends rights protections to both citizens and non-citizens. This would mean amending articles in the Interim Constitutions that are presently limited in their application to citizens, including, but not limited to: Articles 12(3)(a), (b) and (f) (under which only citizens have rights to freedom of opinion and expression, freedom of peaceful assembly, freedom to practice any occupation); Article 13 (1) – (3) (pursuant to which only citizens are protected from discrimination on the grounds of religion, race, sex, caste, tribe, origin, language, or ideological conviction); and Article 107 (enabling only citizens to petition the Supreme Court to declare laws unconstitutional).

## **2. Content of Nepal's International Human Rights Obligations with Respect to Caste Discrimination**

Nepal's implicit and explicit endorsement of caste discrimination is illegal under international law. Nepal is a party to the following international human rights treaties that

reject the inherently discriminatory features of the caste system: the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD),<sup>59</sup> the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW),<sup>60</sup> the International Covenant on Civil and Political Rights (ICCPR),<sup>61</sup> the International Covenant on Economic, Social and Cultural Rights (ICESCR),<sup>62</sup> the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT),<sup>63</sup> and the Convention on the Rights of the Child (CRC).<sup>64</sup> These treaties create binding obligations that must be carried out in good faith.<sup>65</sup> Domestically, *Nepal's Treaty Act of 1990* further indicates that international human rights treaties ratified by Nepal shall prevail over inconsistent national laws, although there are indications that this has not always been the case in practice.<sup>66</sup>

These treaties unequivocally obligate Nepal to undertake the following with respect to caste discrimination:

- Pursuant to ICERD, Nepal is obligated to eliminate all forms and manifestations of direct and indirect descent-based discrimination, which includes caste discrimination;<sup>67</sup> to ensure non-discrimination in the fulfillment of civil, political, social, economic, and cultural rights; and to take positive measures to ensure equality for Dalits and other marginalized groups.<sup>68</sup>
- Pursuant to CEDAW, Nepal is obligated to pursue policies to eliminate discrimination against women and to take positive measures to ensure equality for women<sup>69</sup> in relation to all substantive rights guarantees to which women are entitled. These include the enjoyment of economic, social, and cultural rights,<sup>70</sup> as well as civil and political rights.<sup>71</sup>
- Pursuant to the CRC, Nepal is obligated to protect the rights of children, including protection from all forms of sexual exploitation and sexual abuse,<sup>72</sup> prostitution and other unlawful sexual practices,<sup>73</sup> and child labor.<sup>74</sup>
- Pursuant to the ICCPR, Nepal is obligated to guarantee civil and political rights to all individuals within its territory or subject to its jurisdiction.<sup>75</sup> Among other things, the ICCPR forbids the arbitrary denial of the right to life;<sup>76</sup> torture or cruel, inhuman, or degrading treatment or punishment;<sup>77</sup> slavery, servitude, and certain instances of forced or compulsory labor;<sup>78</sup> arbitrary arrest or detention;<sup>79</sup> arbitrary interferences with privacy, family, and correspondence;<sup>80</sup> and unlawful attacks on honor and reputation.<sup>81</sup> Further, the ICCPR mandates that Nepal allow for freedom of opinion and expression;<sup>82</sup> freedom of assembly<sup>83</sup> and association;<sup>84</sup> the right to marry freely;<sup>85</sup> freedom to take part in the conduct of public affairs, directly or through freely elected representatives;<sup>86</sup> the right to vote;<sup>87</sup> and the right to enjoy culture and practice religion freely.<sup>88</sup> Moreover, Nepal is obligated to treat as equal all persons before the law and to provide, without discrimination, equal protection of the law.<sup>89</sup>

- Pursuant to the ICESCR, Nepal is obligated to guarantee certain economic, social, and cultural rights. These rights include, but are not limited to, the right to work in a field freely chosen;<sup>90</sup> fair and equal remuneration for work; pay that provides a decent living for workers and their families; safe and healthy working conditions; reasonable limitations on working hours and days;<sup>91</sup> the right to organize with regard to labor and employment issues;<sup>92</sup> social security and social insurance programs;<sup>93</sup> the right of everyone to an adequate standard of living (including adequate food, clothing, and housing and the continuous improvement of living conditions);<sup>94</sup> the right of everyone to the highest attainable standard of physical and mental health;<sup>95</sup> the right to an education;<sup>96</sup> and the right of everyone to take part in cultural life, enjoy the benefits of scientific progress, and benefit from the protection of the moral and material interests resulting from any scientific, literary, or artistic production of which they are the author.<sup>97</sup> The ICESCR also guarantees that the rights enunciated therein will be exercised without discrimination of any kind as to race, color, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status.<sup>98</sup>
- Pursuant to its accession to CAT, Nepal is obligated to prevent, prohibit, and punish acts of torture<sup>99</sup> and other forms of cruel, inhuman, or degrading treatment or punishment<sup>100</sup> and to ensure that victims of torture can obtain redress in the State's legal system.<sup>101</sup>

Nepal's human rights record has been examined by each of the treaty bodies that monitor the implementation of these treaties. These bodies have found that Nepal has not fulfilled many of its obligations under ICERD,<sup>102</sup> CEDAW,<sup>103</sup> CRC,<sup>104</sup> ICCPR,<sup>105</sup> ICESCR,<sup>106</sup> or CAT.<sup>107</sup> These obligations continue to apply to Nepal, irrespective of the political mechanisms that are envisaged in the transition to democracy.<sup>108</sup>

### **3. Nepal's International Human Rights Obligations and the Role and Representativeness of the Constituent Assembly**

The Interim Constitution tasks the Constituent Assembly with creating the new constitution.<sup>109</sup> International human rights law binding on Nepal requires that Dalits participate on equal terms with non-Dalits in decision-making processes,<sup>110</sup> such as those embodied in the Constituent Assembly. In human rights treaties, the requirement of equality means both formal or *de jure* equality and substantive or *de facto* equality.<sup>111</sup> In addition, the substantive equality obligation requires that attention be paid to ensuring the participation of those marginalized *within* the Dalit community,<sup>112</sup> including Dalit women<sup>113</sup> and those in "lower" Dalit castes.<sup>114</sup>

Under the obligation to ensure substantive equality, Nepal was required to take measures to ensure adequate representation of Dalits in the Constituent Assembly (including through the adoption of special measures if necessary), and must now also ensure the capacity of Dalits in the Constituent Assembly to participate on equal terms, including in key decision-making positions.<sup>115</sup>

This challenge is particularly significant in light of the fact that Dalits were excluded from the drafting processes of both the 1990 and Interim Constitutions. As mentioned above, the 1990 Constitution was drafted under “monarchial authority” and “denied people and their representatives the authority to prepare and promulgate the Constitution.”<sup>116</sup> The Interim Constitution was drafted by the Interim Constitution Drafting Committee (the ICDC), which, despite pledging dedication to equality, was initially only comprised of seven non-Dalit males.<sup>117</sup> Dalits were again excluded when, following a public outcry over the Committee’s lack of diversity, the ICDC expanded to 16 members.<sup>118</sup> Only after the Interim Constitution was substantively complete and toward the end of the ICDC’s tenure, was a Dalit reportedly added to the ICDC.<sup>119</sup> In addition to forming new constitutional provisions, the Constituent Assembly is also charged with departing from these discriminatory constitutional decision-making processes.



### **III. SECURING DALIT RIGHTS IN THE NEW CONSTITUTION**

#### **A. ACCESS TO CITIZENSHIP**

##### **1. Nepal's International Human Rights Obligations Regarding Access to Citizenship**

In addition to the norms discussed above concerning citizens and non-citizens under international law, Nepal also has international legal obligations concerning access to citizenship. While each State may determine by law who qualifies for citizenship, the relevant criteria must be in accordance with international human rights law protecting the rights of individuals on matters relating to nationality and citizenship.<sup>120</sup> Specifically, States, like Nepal, which are party to treaties such as ICERD, are required to ensure non-discrimination in access to citizenship and to “...pay due attention to possible barriers to naturalization that may exist for long-term or permanent residents.”<sup>121</sup>

##### **2. The Challenge of Access to Citizenship for Dalits**

For many years, Nepal's laws on citizenship contravened its international human rights obligations. In 2004, the UN Committee on the Elimination of Discrimination Against Women (CEDAW Committee) determined that Article 9 of the 1990 Constitution (the relevant provision on citizenship) ran counter to Nepal's CEDAW commitments because it allowed children to obtain citizenship only through their fathers and because it denied the foreign spouses of Nepalese women the right of citizenship, while affording that right to the foreign spouses of Nepalese men.<sup>122</sup> Nepal's 1990 Constitution also violated its commitments under the CRC and, in fact, the UN Committee on the Rights of the Child (CRC Committee) has criticized Nepal for preventing “children born to foreign fathers, abandoned children, orphans, children born to single mothers, and children from the [Dalit] Badi community who may not be able to identify their fathers” from obtaining citizenship rights.<sup>123</sup>

Dalits' ability to access citizenship has also been undermined through the requirements for obtaining a citizenship certificate. Under these requirements, certain documentary evidence<sup>124</sup> demonstrating that an individual is Nepalese must be produced in order to obtain a citizenship certificate;<sup>125</sup> a requirement that is often difficult—if not impossible—for many Dalits. For example, evidence of property ownership is considered sufficient evidence for obtaining a Nepalese citizenship certificate,<sup>126</sup> yet most Dalits are unable to own land and/or produce evidence of land ownership.<sup>127</sup> Moreover, the requirements give the officers processing applications undue discretion in issuing citizenship certificates. For example, if an individual is unable to submit the requisite documentary evidence, the “designated authority” can undertake a “spot investigation” to evaluate the individual and determine whether or not to issue the certificate.<sup>128</sup> These restrictive processes have had a profound impact. In fact, one study found that roughly 70 percent of Dalits in Nepal's most populous Dalit district, Saptari, did not have citizenship certificates.<sup>129</sup> This lack of citizenship has prevented Dalits from enjoying a number of constitutional rights and government services, from accessing jobs and other opportunities, to being able to travel abroad for employment.<sup>130</sup>

### **3. Analysis of the Interim Constitution on Access to Citizenship**

#### **a. Article 8: Citizenship at the commencement of the Constitution**

- (1) Persons who have citizenship at the commencement of this Constitution and persons who are eligible to acquire citizenship by virtue of the provisions of this Part shall be the citizens of Nepal.
- (2) At the commencement of this Constitution, the following persons who have their domicile in Nepal shall be deemed to be citizens of Nepal by descent
- (a) a person who has acquired citizenship by descent before the commencement of this Constitution, and
  - (b) any person whose father or mother was a citizen of Nepal at the birth of such person.
- (3) Any child who is found within the territory of Nepal and whose parents are not known shall, until the father or mother of the child is traced, be deemed to be a citizen of Nepal by descent.
- (4) Whenever any territory is acquired by way of merger into Nepal, every person having his domicile within such territory shall become a citizen of Nepal, as provided for by the existing law.
- (5) Any person born and living permanently in Nepal before the end of Chaitra, 2046 (mid April, 1990) shall acquire the citizenship of Nepal by birth in accordance with the existing law. Provided that application to that effect shall be submitted once in accordance with existing laws within the prescribed timeframe.
- (6) A woman of foreign nationality who is married to a Nepali citizen may acquire naturalized citizenship, if she desires to do so, as provided for by the existing law.
- (7) Notwithstanding anything contained elsewhere in this Article, in the case of a person born to a woman citizen of Nepal married to a foreigner, if such a person is born in Nepal and has been residing permanently in Nepal and has not acquired citizenship of the foreign country by virtue of the citizenship of his or her father, he or she may acquire naturalized citizenship of Nepal according to the existing law.

#### **b. Article 11: Citizenship team to be assigned**

The Government of Nepal may assign a Citizenship Distribution Task Force to grant citizenship to persons eligible to acquire citizenship as provided for in existing laws.

The Interim Constitution seeks to overcome these barriers to citizenship in some respects. For example, Article 8(2) of the Interim Constitution enables the children of both Nepalese mothers and Nepalese fathers to be recognized as citizens of Nepal.<sup>131</sup> Article 8 also repeals the requirements of naturalization that were formerly present in the 1990 Constitution, such as the ability to read and write in Nepali, and the need to be employed.<sup>132</sup> Additionally, Article 11 of the Interim Constitution provides for the establishment of a “Citizenship Distribution Task Force” to “grant citizenship to persons eligible to acquire citizenship.”<sup>133</sup>

Despite these advances, the Interim Constitution (and the Nepal Citizenship Act 2063 (2006))<sup>134</sup> continues to discriminate against women and likely discriminates against Dalits and other marginalized groups.<sup>135</sup> Contrary to CEDAW requirements, the Interim

Constitution's Article 8(7) (and the Act's Section 4) still makes it more difficult for a child of a Nepalese mother and a foreign father to gain citizenship than for a child of a Nepalese father and a foreign mother.<sup>136</sup> Article 8(6) of the Interim Constitution and Section 5 of the Citizenship Act also continue to prevent a foreign partner of a Nepalese woman—but not a Nepalese man—from qualifying for citizenship.<sup>137</sup> Further, Article 10 of the Interim Constitution indicates that the acquisition and termination of citizenship will be “in accordance with the existing law,” however, the UN Office of the High Commissioner for Human Rights (OHCHR)-Nepal has concluded that the existing law—the Citizenship Act—is contrary to the obligations of Nepal as a State Party to CEDAW, the ICCPR, and ICERD.<sup>138</sup> For example, Section 8 of the Citizenship Act requires the presentation of certain documentation likely to create obstacles for Terai Dalit community members<sup>139</sup> and others who have historically lacked access to land rights, have been excluded from censuses, or otherwise do not have the documents necessary for citizenship.<sup>140</sup>

Additionally, although citizenship distribution teams have begun disseminating citizenship certificates to eligible people in rural regions in Nepal since the beginning of 2007,<sup>141</sup> the process has been slow and fraught with problems and, on some occasions, Dalits have been unable to understand the nature of the documents required of them and/or to afford the costs involved in obtaining these documents.<sup>142</sup> In addition to the textual recommendations for the new constitution set out below, Nepal should ensure that the “existing law” referenced in Article 10 of the Interim Constitution is in compliance with human rights.

#### **4. Key Recommendations on Access to Citizenship**

In drafting the new constitution, the Constituent Assembly should additionally:

- Include language allowing foreign spouses of Nepalese women to acquire citizenship in the same way as foreign spouses of Nepalese men; *and*,
- Include language enabling children to be equally eligible for citizenship whether it is their mother or father who is foreign.

### **B. THE RIGHT TO EQUALITY AND NON-DISCRIMINATION**

#### **1. Nepal's International Obligations Regarding Equality and Non-Discrimination**

Non-discrimination protections are fundamental principles of the various human rights treaties to which Nepal is a party. Pursuant to these treaties, Nepal must ensure that no aspect of its policy has the purpose or effect of discriminating on the basis of grounds such as race, color, descent, sex, language, religion, political or other opinion, national origin, social origin, association with a national minority, property, birth, or other status.<sup>143</sup> The prohibition on racial discrimination includes descent-based discrimination,<sup>144</sup> which in turn includes caste discrimination.<sup>145</sup> The prohibition on discrimination under international law means that Nepal cannot engage in either direct or indirect discrimination on the proscribed grounds. Direct discrimination occurs when a policy or measure has the purpose of

discriminating against a particular group.<sup>146</sup> Indirect discrimination occurs when a policy or measure, even if neutral on its face, has a disparate impact on that group.<sup>147</sup>

## **2. Discrimination against Dalits in Nepal**

In the 1990 Constitution, Article 11 was the primary provision addressing non-discrimination and caste.<sup>148</sup> Despite its clear prohibition of discrimination and “untouchability,” legal prohibitions against caste or gender-based discrimination in Nepal are not absolute.<sup>149</sup> For example, under Nepal’s civil code, punishment for the act of “untouchability” is merely discretionary<sup>150</sup> and the civil code as amended in 1992 essentially allows for discriminatory “traditional practices” to occur in “religious places.”<sup>151</sup> Additionally, the Nepalese Supreme Court has in some instances condoned discrimination out of deference to traditional societal practices and norms, despite acknowledging constitutional protections against such practices.<sup>152</sup>

Nepal has been severely criticized by international human rights treaty monitoring bodies for its failure to end caste discrimination in law and in practice. For example, in 1994 the UN Human Rights Committee<sup>153</sup> was “particularly disturbed by the fact that the principle of non-discrimination and equality of rights suffers serious violations in practice and deplores inadequacies in the implementation of the prohibition of the system of castes.”<sup>154</sup> Likewise, in its 2004 Concluding Observations of Nepal’s compliance with ICERD, the CERD Committee articulated “...deep concerns at the persistence of *de facto* caste-based discrimination and the culture of impunity that apparently permeates the higher strata of a hierarchical social system.”<sup>155</sup> It expressed particular concern regarding:

the existence of segregated residential areas for Dalits, social exclusion of inter-caste couples, restriction to certain types of employment, and denial of access to public spaces, places of worship and public sources of food and water, as well as allegations that public funds were used for the construction of separate water taps for Dalits.<sup>156</sup>

Further, the CERD Committee expressed alarm at “the allegation of ill-treatment and ineffective protection of and discrimination against Dalits and other vulnerable groups in society, by law enforcement officials, especially the police.”<sup>157</sup> The Committee also expressed “concern over the situation of forced prostitution of girls and women of the Badi caste.”<sup>158</sup>

Similarly, in 2004, the CEDAW Committee rebuked Nepal for the country’s poor record regarding discrimination against women<sup>159</sup> and noted that “the State Party has not taken sufficient action to amend prevailing discriminatory laws.”<sup>160</sup> The Committee expressed concern over the fewer educational opportunities for rural, “lower-caste” women, and the health status of rural women,<sup>161</sup> many of whom are Dalits.<sup>162</sup> The Committee also expressed concern at the practice of prostitution among young girls of the Badi caste.<sup>163</sup>

Additionally, in 2005, the CRC Committee expressed concerns over the *de facto* discrimination of Dalit children and their related vulnerability to “abuse and exploitation.”<sup>164</sup> The CRC Committee referred to the *de facto* caste-based discrimination identified by the CERD Committee’s 2004 Concluding Observations on Nepal and linked it with “harmful effects...on the physical, psychological, and emotional well-being of the Dalit children in the

State Party.”<sup>165</sup> The CRC Committee also noted the “particular health vulnerabilities” of Dalit children,<sup>166</sup> adding that Dalit children “remain deprived of educational opportunities,”<sup>167</sup> and that “many thousands of [D]alit bonded labourers...including children, are reported to be working in agriculture in Western Nepal and in the plains.”<sup>168</sup>

### **3. Analysis of the Interim Constitution on Equality and Non-Discrimination**

The above treaty monitoring bodies’ criticisms demonstrate the inadequacies of Nepal’s constitutional non-discrimination protections. Nonetheless, their inclusion is essential for, *inter alia*, providing the legal framework and political justification for remedial steps and for judicial enforcement of rights.<sup>169</sup> Nepal’s Interim Constitution improves upon its 1990 predecessor by including a more fully expressed catalogue of non-discrimination protections. However, the new constitution must go further in order to ensure that Nepal meets its international human rights obligations with respect to non-discrimination and equality.

#### **a. The Preamble**

WE, THE PEOPLE OF NEPAL, IN EXERCISE OF THE SOVEREIGN POWERS AND STATE AUTHORITY INHERENT IN US;  
Recognizing the mandate of the Nepali People expressed, from time to time, since before 1951 until now, through historical struggles and people’s movements for democracy, peace, and progress;  
Having determined upon the progressive restructuring of the state in order to resolve the existing problems of the country relating to class, caste, region and gender;  
Expressing our full commitment to democratic norms and values including a system of competitive multiparty democratic rule, civil liberties, fundamental rights, human rights, adult franchise, periodic elections, full freedom of the press, independence of the judiciary and concepts of the rule of law;  
Guaranteeing the basic rights of the Nepali people to frame a Constitution for themselves and to participate in the free and impartial election of the Constituent Assembly in a fear-free environment;  
AND keeping democracy, peace, prosperity, progressive economic-social changes and sovereignty, integrity, independence, and dignity of the country at the centre of our concerns;  
NOW THEREFORE, in order to institutionalize the achievements of the revolution and movements till this date, hereby promulgate this INTERIM CONSTITUTION OF NEPAL, 2063 (2007), prepared through a political consensus and to be in force until a new Constitution is framed by the Constituent Assembly.

The Preamble to the Interim Constitution reflects Nepal’s determination to proceed with “...progressive restructuring of the state in order to resolve the existing problems of the country relating to class, caste, region and gender.”<sup>170</sup> It is important that caste is mentioned here as constitutional preambles foreshadow the key issues that constitutions seek to remedy.<sup>171</sup> However, as currently worded, the Interim Constitution’s Preamble does not adequately frame the document as one rooted in a commitment to equality, human dignity, and human rights. Rather, paragraph four lists the commitment to human rights alongside other goals such as “independence of the judiciary” and “full freedom of the press” which, in essence, fails to recognize that many of the listed commitments fall under the human rights paradigm. Similarly, paragraph six omits human rights from Nepal’s

“centre of...concerns.” In the new constitution, the Constituent Assembly might consider elevating the observance of human rights as a central focus of the Preamble.

**b. Article 13: Right to equality**

(1) All citizens shall be equal before the law. No person shall be denied the equal protection of the laws.

(2) There shall be no discrimination against any citizen in the application of general laws on grounds of religion, race, gender, caste, tribe, origin, language or ideological conviction or any of these.

(3) The State shall not discriminate among citizens on grounds of religion, race, caste, tribe, gender, origin, language or ideological conviction or any of these.

Provided that nothing shall be deemed to prevent the making of special provisions by law for the protection, empowerment or advancement of the interests of women, Dalit, indigenous ethnic tribes [Adivasi Janjati], Madeshi or farmers, labourers or those who belong to a class which is economically, socially or culturally backward, or children, the aged, disabled or those who are physically or mentally incapacitated.

(4) There shall be no discrimination with regard to remuneration and social security between men and women for the same work.

Part 3 of the Interim Constitution guarantees certain “fundamental rights.” The seminal non-discrimination provisions in Part 3 include Article 13 (“Right to equality”) and Article 14 (“Right against untouchability and racial discrimination”). While improving upon the 1990 Constitution with respect to caste discrimination, these articles contain several deficiencies, inconsistencies, and imprecise uses of language that should be addressed in the new constitution for Nepal to comply with its international human rights treaty obligations.

The new constitution’s “right to equality” provision should improve upon Article 13 of the Interim Constitution in several key respects. For example, the list of proscribed grounds of discrimination in Article 13(2) and (3) does not explicitly include all of the proscribed grounds listed in the ICCPR<sup>172</sup> (which additionally lists color, sex, political or other opinion, national or social origin, property, birth, or other status) and in ICERD<sup>173</sup> (which includes “colour, descent, or national or ethnic origin” within the definition of racial discrimination). The new constitution’s prohibition on discrimination should include the entire catalogue of “grounds” set forth in the international human rights treaties by which it is bound.<sup>174</sup> Moreover, such lists of grounds should—consistent with the approach taken in such treaties—be non-exhaustive.<sup>175</sup>

The new constitution should also incorporate those same non-exhaustive lists of proscribed grounds of discrimination with regard to its remuneration and “social security” guarantees set out in Article 13(4) of the Interim Constitution. As presently drafted, Article 13(4) only prohibits discrimination in remuneration and social security between men and women. This fails to account for the vast disparity in Nepal between compensation of marginalized groups (including Dalits) and non-marginalized groups for similar work.<sup>176</sup> This change in the new constitution would harmonize the constitution with Nepal’s

international human rights obligations, and indeed with Nepal's stated position against discrimination with regards to pay for equal work.<sup>177</sup>

Article 13 (3)'s "special provisions" language raises two additional issues that must be addressed in the new constitution for Nepal to be fully compliant with its international legal obligations. First, in the Interim Constitution, the English translated text stating "Provided that nothing shall be deemed to prevent the making of special provisions by law for the protection, empowerment, or advancement of..." does not effectively convey that the creation of "special measures" is contemplated by CEDAW, the ICCPR, ICERD, and ICESCR in situations where it is necessary to achieve substantive equality.<sup>178</sup> Second, the new constitution should make clear that the list of persons in respect of whom special provisions may be made is not exhaustive and emphasize that failure to do so risks placing Nepal in violation of its international human rights obligations to ensure substantive equality for all, including other unlisted groups that might need similar provisions now or in the future.

**c. Article 14: Right against untouchability and racial discrimination**

- (1) No person shall, on the ground of caste, descent, community or occupation, be subject to racial discrimination and untouchability in any form. Such a discriminatory act shall be liable to punishment and the victim shall be entitled to the compensation as provided by the law.
- (2) No person shall, on the ground of caste or tribe, be deprived of the use of services, conveniences or utilities, or be denied access to any public place, or public religious places, or be prevented from performing any religious act.
- (3) No person belonging to any particular caste or tribe shall, in relation to the production or making available of any goods, services or conveniences, be prevented from purchasing or acquiring such goods, services or conveniences; and no such goods, services or conveniences shall be sold or distributed only to members of a particular caste or tribe.
- (4) No one shall be allowed to purport to demonstrate superiority or inferiority of any person or a group of persons belonging to any caste, tribe or origin; or to justify social discrimination on the basis of caste and tribe, or to disseminate ideas based on caste superiority or hatred; or to encourage caste discrimination in any form.
- (5) Any act contrary to the provisions of sub-clauses (2), (3) and (4) shall be punishable in accordance with law.

Unlike the 1990 Constitution, the Interim Constitution devotes a separate article (Article 14) to the prohibition of racial discrimination and "untouchability." From a Dalit rights perspective, Article 14's expansive repudiation of "untouchability" and racial discrimination is one of the Interim Constitution's most positive features and should be emulated in the new constitution. A separate article devoted to racial discrimination and "untouchability" acknowledges both the enormous impact that discrimination—particularly through the caste system—has had on Nepal and the importance of eliminating its effects.<sup>179</sup> However, in order to fully comply with Nepal's human rights obligation to eliminate discrimination in both purpose and effect, the new constitution should provide stronger and wider protections.

First, to minimize difficulties of implementation and potential protection gaps, the equivalent provision in the new constitution should employ more consistent and comprehensive language than that utilized in Article 14 of the Interim Constitution. Article 14(1) prohibits “racial discrimination and untouchability of any form” on four grounds (“caste, descent, community, or occupation”). However, the other sub-articles in Article 14 do not refer to all of these grounds, instead limiting their applicability on the basis of either “caste or tribe” or “caste, tribe, or origin.” In the absence of any explanation for these differences—and in light of Nepal’s ratification of ICERD—the list of prohibited grounds of discrimination should include those grounds enumerated in Article 1(1)’s definition of racial discrimination in ICERD.<sup>180</sup> This means adding “national or ethnic origin” to Article 14’s prohibition of racial discrimination on the basis of “caste, descent, community, or occupation” as well as “tribe.”

Second, the new constitution should add to Article 14’s protections by specifically prohibiting the *imposition* of certain occupations on the basis of the agreed list of proscribed grounds.<sup>181</sup> As described above, the caste system and the concept of “untouchability” are intrinsically tied to occupation,<sup>182</sup> as the very concept of “untouchability” stems from the belief that Dalits are “impure” because of the “polluting” jobs they perform and that only they can perform those jobs because they are “impure.” The new constitution should explicitly reject the occupational hierarchy that the caste system and “untouchability” structures uphold.

Furthermore, the new constitution must explicitly prohibit private acts of discrimination. For example, Article 14(2) prohibits discriminatory denial of access to “any public place, or public religious places,” but does not explicitly prohibit the types of private discrimination that are rife in Nepal, such as segregating Dalits in eateries and prohibiting their entry into privately owned businesses.<sup>183</sup> Nepal’s international human rights obligations extend to prohibiting discrimination by both State and non-State actors.<sup>184</sup>

#### **4. Key Recommendations on Equality and Non-Discrimination**

**In drafting the new constitution, the Constituent Assembly should additionally:**

- **Consider including human rights as a central concern of the Preamble;**
- **Extend the guarantee on equality and non-discrimination to non-citizens by stating that the guarantee applies to “all persons”;**
- **Ensure that the grounds on which discrimination is prohibited are non-exhaustive and fully include those covered by international human rights law;**
- **Ensure that the prohibition on discrimination in remuneration or social security benefits is extended to discrimination on the basis of all grounds used in the “right to equality” provision;**
- **Make clear that any list corresponding to groups eligible for “special provisions” is non-exhaustive, so that other groups not listed may also be considered eligible**



for “special provisions” as needed;

- Include a consistent list of grounds throughout the new constitution’s anti-untouchability and anti-racial discrimination article. This list should include “national or ethnic origin” as enumerated in ICERD’s definition of racial discrimination, along with caste, descent, community, occupation, and tribe;
- Include in any relevant equality and/or non-discrimination provision(s) an explicit prohibition on the imposition of certain occupations on the basis of caste and other proscribed grounds; *and*,
- Include in any relevant equality and/or non-discrimination provision(s) an explicit prohibition of private acts of discrimination.

## **C. CIVIL AND POLITICAL RIGHTS**

### **1. Nepal’s International Human Rights Obligations Regarding Civil and Political Rights**

The human rights treaties to which Nepal is a party clearly prohibit the civil and political rights violations that Dalits have experienced in Nepal. The ICCPR requires every State Party to guarantee civil and political rights to all individuals within its territory or subject to its jurisdiction.<sup>185</sup> It forbids the arbitrary denial of the right to life;<sup>186</sup> torture or cruel, inhuman, or degrading treatment or punishment;<sup>187</sup> slavery, servitude, and certain instances of forced or compulsory labor;<sup>188</sup> arbitrary arrest or detention;<sup>189</sup> arbitrary interferences with privacy, family, and correspondence;<sup>190</sup> and unlawful attacks on honor and reputation.<sup>191</sup> Under the ICCPR, Nepal is obligated to guarantee a host of rights regarding the criminal justice system.<sup>192</sup> Further, the ICCPR mandates that Nepal allow for freedom of opinion and expression;<sup>193</sup> freedom of assembly<sup>194</sup> and association;<sup>195</sup> the right to marry freely;<sup>196</sup> the freedom to take part in the conduct of public affairs, directly or through freely elected representatives;<sup>197</sup> the right to vote,<sup>198</sup> and the right to enjoy culture and practice religion freely.<sup>199</sup>

Article 18 of the ICCPR provides all people the freedom to “manifest their religion or belief in worship, observance, practice, and teaching.”<sup>200</sup> However, the freedom to manifest religion cannot be used to promulgate or justify the violation of fundamental non-discrimination rights. Article 18(3) of the ICCPR states, “[f]reedom to manifest one’s religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to...the fundamental rights and freedoms of others.” Further, the Human Rights Committee has declared that, “[n]o manifestation of religion or belief may amount to...or advocacy of national, racial, or religious hatred that constitutes incitement to discrimination, hostility, or violence...States parties are under the obligation to enact laws to prohibit such acts.”<sup>201</sup>

The ICCPR also guarantees the right to freedom of movement and freedom of residence to every person lawfully within a State’s territory; these freedoms can only be

restricted as provided by law and when “necessary to protect national security, public order...public health or morals, or the rights and freedoms of others, and are consistent with the other rights recognized in the [ICCPR.]”<sup>202</sup> The ICCPR further contains specific provisions regarding states of emergency. Article 4(1) of the ICCPR declares that public emergencies can only be declared in response to situations “which threaten(s) the life of the nation.” The phrase “which threaten(s) the life of the nation” contemplates only extreme situations of the most dire circumstances. Indeed, the Human Rights Committee has emphasized that “[n]ot every disturbance or catastrophe qualifies as a public emergency which threatens the life of the nation, as required by article 4, paragraph 1 [of the ICCPR.]”<sup>203</sup> Pursuant to Article 4(1), States may derogate from their obligations during public emergencies only “to the extent strictly required by the exigencies of the situation.”<sup>204</sup> The derogation language “reflects the principle of proportionality” and requires States to carefully justify both the declaration of the state of emergency and any actions taken as a result thereof.<sup>205</sup> Crucially, under Article 4(1), any derogation measures must not “...involve discrimination solely on the ground of race, colour, sex, language, religion, or social origin.”<sup>206</sup> Furthermore, even during a state of emergency, the ICCPR forbids derogation from the following articles: Article 6 (right to life);<sup>207</sup> Article 7 (prohibition of torture or cruel, inhuman, or degrading treatment or punishment);<sup>208</sup> Article 8(1) (prohibition of slavery);<sup>209</sup> Article 8(2) (prohibition of servitude);<sup>210</sup> Article 11 (prohibition against imprisonment merely on the ground of inability to fulfill a contractual obligation);<sup>211</sup> Article 15 (protection against retroactive criminalization);<sup>212</sup> Article 16 (the “right to recognition everywhere as a person before the law”);<sup>213</sup> and Article 18 (freedom of thought, conscience, and religion).<sup>214</sup>

## **2. Violations of Dalits’ Civil and Political Rights**

The caste system has denied Dalits many of their civil and political rights, resulting in the exclusion of millions from political processes.<sup>215</sup> This exclusion ensures Dalits’ continued subjugation and their unequal receipt of the State’s resources.<sup>216</sup> In fact, prior to 2008, only 14 Dalits, all of them men, have become members of the Parliament (upper house) since 1958 and only one Dalit has been elected to the House of Representatives.<sup>217</sup> In the 330-member Interim Legislature established in 2006, only 18 members, or six percent, are Dalit.<sup>218</sup> This pattern of exclusion is repeated at the local government level, where Dalits are severely underrepresented in the administrative system.<sup>219</sup> Further, this pervasive control of local and national leadership posts by “upper-caste” members<sup>220</sup> has resulted in wholesale disregard for Dalit issues, while attempts at building effective Dalit political movements have in some instances been met with punitive violence.<sup>221</sup> Dalits are also largely unrepresented in leadership positions and executive committees within Nepal’s major political parties.<sup>222</sup>

The 1990 Constitution was simply silent on the issue of Dalit representation in Nepal’s political machinery. There was no inclusion of any “special provisions” or “reservations”<sup>223</sup> language in the “Fundamental Rights” section, nor was any such language contained within the non-justiciable “Directive Principles and Policies of the State” section. In the absence of any constitutional guarantees of special provisions or reservations, Dalit rights and issues have largely been ignored.<sup>224</sup> Indeed, in October 2004, and pursuant to the 1990 Constitution, the Nepalese Supreme Court ruled that reservations for Dalits could not be provided unless explicitly mandated by legislation.<sup>225</sup>

The political exclusion of Dalits has been noted by the UN's OHCHR<sup>226</sup> and has been acknowledged by the Nepalese Government as a dereliction of its obligations under ICERD.<sup>227</sup> In 2004, echoing this recognition, the CERD Committee welcomed Nepal's efforts to implement special measures on behalf of those experiencing discrimination but expressed concern "over the under-representation of disadvantaged groups in government, legislative bodies, and the judiciary," and specifically recommended that Nepal "continue to enforce special measures to guarantee to members of disadvantaged groups the right to participate in elections, to vote and stand for election, and to have due representation in government, legislative bodies, and the judiciary."<sup>228</sup>

In its 2003 report to the CERD Committee, the Nepalese Government provided an apt description of the nature and effects of Dalits' political exclusion:

The historical exclusion of Dalits from resources and the decision-making process has not only kept them outside the social, economic, and political mainstream [but] has also been a loss to the country in terms of their input to nation-building. [The] Government of Nepal is committed to the socio-economic and political empowerment of Dalits. Besides strong legal measures, improving the socio-economic conditions of the Dalits is a must for ending existing attitudinal discrimination against them and their community.<sup>229</sup>

The Maoist-led Nepalese "People's War" capitalized on Dalits' exclusion from Nepal's political landscape to legitimate its armed struggle against the government.<sup>230</sup> The insurgency itself also contributed to further violations of civil and political rights, both during and after the conflict.<sup>231</sup> During the conflict, for example, the practices of arbitrary and unlawful use of lethal force,<sup>232</sup> torture,<sup>233</sup> and enforced disappearances<sup>234</sup> proliferated, as both the Maoist insurgents and Nepalese security forces targeted rural Dalits for their presumed support of the other<sup>235</sup> and perpetrated "grave human rights abuses"<sup>236</sup> to deter sympathy for the other side.<sup>237</sup> Additionally, the Government has engaged in arbitrary and unlawful arrest and detention, as well as lengthy pretrial detention,<sup>238</sup> restrictions on the right to assemble, and obstruction of citizens' rights to change the Government, all while granting impunity to security forces.<sup>239</sup> The bulk of these civil and political rights violations occurred as a result of government-declared "states of emergency" in 2001<sup>240</sup> and 2005.<sup>241</sup> The end result has been an increasingly unstable environment for Dalits, who have been plagued by fear, subject to arbitrary applications of force, and living in a context of exacerbated caste dynamics.<sup>242</sup> Although the severity of these violations has since abated, the long-term impact of these violations continue to harm the Dalit community and additional violations have occurred.

In addition to the types of violations outlined above, Dalits have been denied their fundamental right to freely practice religion, particularly through the ongoing practice of barring Dalits from entry to Hindu temples.<sup>243</sup> A 2005 survey conducted by the International Labor Organization (ILO), disclosed that roughly 60 percent of Dalits were threatened with exclusion from religious gatherings.<sup>244</sup> Additionally, as the doctrinal source of the caste system and its reliance on the notion of ritual purity,<sup>245</sup> the observance of religious practices often serves as a justification for non-Dalits of their discriminatory behavior towards Dalits.

The 1990 Constitution proved inadequate to offset the violations of basic civil and political rights. To some extent, this may have been possible due to the fact that the 1990 Constitution did not have a provision ensuring the right to life. However, Article 14 of the 1990 Constitution did contain solid protections regarding criminal justice which, if properly enforced, could have stemmed the widespread criminal justice abuses described above. Ultimately, a lack of implementation and enforcement of these basic fundamental rights strongly contributed to their violation.<sup>246</sup>

Accordingly, international human rights treaty monitoring bodies have strongly censured Nepal for its violations of civil and political rights. Indeed, as early as 1994, before the “People’s War” ensued, the Human Rights Committee expressed its concerns regarding summary and arbitrary executions, enforced or involuntary disappearances, and the impunity afforded to the alleged perpetrators.<sup>247</sup> In 2005, the UN Committee Against Torture (CAT Committee) expressed concern over: “the number of detainees in prolonged detention without trial under the Public Security Act and the Terrorist and Disruptive (Control and Punishment) Ordinance (TADO) of 2004;” and “[t]he extensive resort to pretrial detention lasting up to 15 months and the lack of fundamental guarantees under the Terrorist and Disruptive (Control and Punishment) Ordinance 2005 of the rights of persons deprived of liberty, including the right to challenge arrest, resulting in numerous alleged cases of incommunicado detention.”<sup>248</sup>

In 2007, while noting improvements since the cessation of hostilities, the OHCHR stressed that “many challenges remain [in Nepal] with regard to ending serious ongoing abuses such as arbitrary detention, abductions, torture and ill-treatment, and to upholding and strengthening respect for human rights,” as well as “deeply-rooted discrimination and other abuses against women and other marginalized communities such as Dalits, Madhesi, and ethnic groups.”<sup>249</sup> Special procedures of UN human rights system have also expressed concern over the violations of civil and political rights which have occurred in Nepal.<sup>250</sup>

### **3. Analysis of the Interim Constitution on Civil and Political Rights**

#### **a. Article 12: Right to freedom**

...

(2) Except for the provision in law no person shall be deprived of his/her personal liberty.

(3) Every citizen shall have the following freedoms:

- (a) freedom of opinion and expression;
- (b) freedom to assemble peaceably and without arms;
- (c) freedom to form political party or organizations
- (d) freedom to form unions and associations;
- (e) freedom to move and reside in any part of Nepal;
- (f) freedom to practice any occupation, be engaged in employment, industry and trade

Provided that,

(1) nothing in sub-clause (a) shall be deemed to prevent the making of laws to impose reasonable restrictions on any act which may undermine the sovereignty and integrity of Nepal, or which may jeopardize the harmonious relations subsisting among the peoples of various castes, tribes, religion or communities, or on any act of defamation, contempt of court or incitement to an offence; or any act which maybe contrary to decent public behavior or morality

(2) nothing in sub-clause (b) shall be deemed to prevent the making of laws to impose reasonable restrictions on any act which may undermine the sovereignty and integrity of Nepal, and order situation of Nepal.

(3) nothing in sub-clauses (c) and (d) shall be deemed to prevent the making of laws to impose reasonable restrictions on any act which may undermine the sovereignty and integrity of Nepal, or which may jeopardize the harmonious relations subsisting among the peoples of various castes, tribes, religion or communities, or which may instigate violence, or which may be contrary to public morality.

(4) nothing in sub-clause (e) shall be deemed to prevent the making of laws which are in the interest of the general public, or which are made to impose reasonable restrictions on any act which may jeopardize the harmonious relations subsisting among the peoples of various castes, tribes, religion or communities.

(5) nothing in sub-clause (f) shall be deemed to prevent the making of laws to impose restriction on any act which may be contrary to public health or morality, to confer on the State the exclusive right to undertake specific industries, businesses or services; or to impose any condition or qualification for carrying on any industry, trade, profession, or occupation.

The Interim Constitution commendably improves upon the 1990 version with regard to certain civil and political rights. Notably, Article 12—the “Right to freedom” provision states that “[e]very person shall have the right to live with dignity...”<sup>251</sup> However, there is still room for improvement with the new constitution in order to fully square Nepal with its international obligations with regard to civil and political rights.

First, the list of freedoms in Article 12(3)(a)–(f) is framed as an exhaustive one which does not, at this stage, reference freedoms that are included elsewhere in the Interim Constitution, such as freedom of religion, as well as other freedoms required by Nepal’s international human rights obligations. For example, such a list should include the right to freely marry a person of one’s choosing,<sup>252</sup> as inter-caste marriages—in particular between Dalit and non-Dalits—are traditionally forbidden in Nepalese society and Dalits who marry “upper-caste” spouses can face severe repercussions.<sup>253</sup>

Second, sub-clause (4) might have the effect of stripping Article 12 of any real meaning with regard to Dalits’ rights to reside in any part of Nepal. Sub-clause (4) allows the Government to impose laws that restrict the right to reside anywhere in order to maintain “harmonious relations subsisting among the peoples of various castes, tribes, religions, or communities.” This broad language may be impermissibly interpreted to enable limitations on the freedom of movement beyond those allowed under international law, according to which such limitations must be “necessary to protect national security, public order...public health or morals or the rights and freedoms of others” as stated in Article 12 of the ICCPR. Accordingly, to avoid such an illegal interpretation, the new constitution should only limit the freedom to movement to the extent allowed by the ICCPR.

Similarly, sub-clause (5) might be improperly interpreted and/or applied to deny Dalits the right to practice any occupation. This right, and elements related to it, is guaranteed not only in Article 12(f), but also through Article 18 (employment and social security); 19 (labor); and 29 (exploitation). However, against such fundamental rights guarantees, sub-clause (5) purports to allow the Government to restrict the right to practice any occupation in order to maintain “public health or morality.” This has potentially grave

implications for Dalits' rights protections. For Dalits, asserting the right to practice any occupation strikes at the core of the caste system and the "public health or morality" in which it is embedded. To some degree it is therefore axiomatic that the assertion of this fundamental right will offend "public health or morality." Such a risk, however, cannot be cited as a justification for the continued subordination of Dalits' occupational rights and the Constituent Assembly should avoid using similar conditional language in the new constitution, the presence of which may be used as a pretext for denying Dalits the opportunity to enjoy their constitutional freedoms.<sup>254</sup>

**b. Political Inclusion of Dalits**

*i. Article 21: Right to social justice*

Women, Dalits, indigenous ethnic groups [Adivasi Janajati], Madhesi communities, oppressed groups, the poor farmers and labourers, who are economically, socially, or educationally backward, shall have the right to participate in state structures on the basis of principles of proportional inclusion.

*ii. Article 33(d1): Responsibilities of the State*

The State shall have the following responsibilities:

...(d1) To enable Madhesi, Dalits, indigenous groups [Adivasi Janajati], women, labourers, farmers, the physically impaired, disadvantaged classes and disadvantaged regions to participate in all organs of the State structure on the basis of proportional inclusion.

*iii. Article 35(8): State Policies*

The State shall pursue a policy of encouraging maximum participation of women in national development by making special provision for their education, health and employment.

The Interim Constitution takes some important steps toward reversing the significant under-representation of Dalits in political decision-making bodies and processes. For example, Article 142 forbids the Election Commission from registering any political party that discriminates in its membership policy on the basis of caste.<sup>255</sup> Additionally, Article 21—the "Right to Social Justice"—specifically mandates "proportional inclusion" of Dalits and other marginalized groups within the "state structures."<sup>256</sup> These are welcome additions as Dalits have been systematically excluded from Nepal's state structures, including from the legislature-parliament, executive bodies, and the judiciary.<sup>257</sup> From a Dalit perspective, a compulsory provision on proportional inclusion in State bodies is both welcome and needed<sup>258</sup>—as described by the Nepalese Government in 2003, the country's

ingrained caste system is a “harsh truth,” an “evil practice,” and a “deeply rooted element of Nepalese social structure,” that is “widespread,” and constitutes a “major social problem.”<sup>259</sup>

Proportional representation of Dalits and other marginalized groups is a good starting point;<sup>260</sup> it does not, however, automatically equate to the achievement of substantive equality in the exercise of political voice. It is therefore important that the new constitution’s equivalent to Article 13(3) (which provides that nothing shall be deemed to prevent the making of special provisions) be robustly applied in the enforcement of the new constitution’s equivalent to Article 21 (the right to social justice). It is clear that because Article 13 (right to equality, including through special measures) and Article 21 (right to political inclusion in the state’s institutions on the basis of proportionality) appear in Part 3, alleged infringements of the fundamental rights guaranteed by these articles are constitutionally enforceable. This means that if Nepal fails to ensure the equality and political inclusion envisaged under Articles 13 and 21 then affected individuals have judicial recourse to challenge this lack of implementation. The fact that policies related to these fundamental rights guarantees (Articles 33(d1) and 35(8)) are included in that part (Part 4) of the Interim Constitution which purports to be non-justiciable does not, as a legal matter, detract from either the core obligations that Nepal has under Articles 13 and 21 or the rights of affected individual to judicially enforce such obligations. However, in order to ensure the robust enforcement of Articles 13 and 21, relevant and related articles currently under Part 4 may be usefully moved to the Part 3 Fundamental Rights section.

Additionally, the Constituent Assembly needs to carefully consider *how* the appropriate proportion of Dalits (and other marginalized groups) will be determined. As previously mentioned, there exists a significant discrepancy between the official government census figures on the percentage of Dalits as part of the country’s overall population (estimated at roughly 15 percent) and percentage estimates based on field surveys by Nepalese academics and civil society groups, who have estimated that population as between 20 to 25 percent).<sup>261</sup> Given concerns regarding the reliability of the existing census data on Dalits,<sup>262</sup> accurate accounting of Dalits and other marginalized groups must be ensured. Ideally this would be achieved through a new, unbiased census, free of the previously cited influences which contributed to the underestimation in the 2001 census.<sup>263</sup>

*iv. Article 142: Registration required for securing recognition for the purpose of contesting elections as a political party*<sup>264</sup>

- |  |
|--|
| <p>(1) Any political party wishing to secure recognition from the Election Commission for the purposes of elections shall be required to register its name with the Election Commission in accordance with the procedure determined by the Commission. Political parties that fail to register their names shall be removed from the list of the Election Commission...</p> <p>(3) Political parties shall fulfil the following conditions while filing an application pursuant to clause (1):...</p> <p>(c) There should be a provision for the inclusiveness of members from neglected and oppressed groups including women and Dalits in the executive committees at various levels</p> <p>(4) The Election Commission shall not register any political party if any Nepali citizen is discriminated against in becoming a member of the political party on the basis of religion, caste, tribe, language, or gender...</p> |
|--|

Article 142 of the Interim Constitution commendably seeks to ensure non-discrimination in political party membership<sup>265</sup> and seeks to address the great extent to which Dalits are under-represented in political parties and the fact that they comprise a very small percentage of leadership positions in the executive committees of these parties.<sup>266</sup> While Article 142 creates the potential for increased Dalit leadership within political parties, the Interim Constitution does not currently prohibit registration of political parties that discriminate against individuals when nominating candidates for election (registration is prohibited when political parties discriminate against individuals becoming members of the political party). The Nepalese Government has recognized that caste-based exclusion by political parties in the nomination process necessarily leads to a political system that does the same.<sup>267</sup> Given the need for non-discriminatory nominations by political parties, the Constituent Assembly should expand Article 142 to prohibit registration of a political party if it discriminates in contravention of Article 14 in its nomination of individuals for political positions. Further, the new constitution should prohibit or revoke registration if a political party discriminates in either its membership or leadership positions.<sup>268</sup>

**c. Article 23: Right to religion**

(1) Every person shall have the right to profess, practice, and preserve his or her own religion as handed down to him or her from ancient times paying due regards to social and cultural traditions. Provided that no person shall be entitled to convert another person from one religion to another, and no person shall act or behave in a manner which may infringe upon the religion of others.

(2) Every religious denomination shall have the right to maintain its independent existence, and for this purpose to manage and protect its religious places and religious trusts, in accordance with law.

Article 23 of the Interim Constitution appropriately protects the fundamental human right to freedom of religion, as set out in Article 18 of the ICCPR.<sup>269</sup> However, Article 23 of the Interim Constitution does not adequately foreclose the use of religion as a justification for caste-based discrimination, which is routinely cited by non-Dalits as validating the practice. The language of Article 23(1), which provides every person “the right to profess, practice, and preserve his or her own religion as handed down to him or her from ancient times paying due regards to social and cultural traditions,” is particularly problematic given that many of these “social and cultural traditions” of Nepalese religions include traditions of caste discrimination.<sup>270</sup> Considering the contextual intersection of religion and caste-based discrimination in Nepal, the second sentence of Article 23(1) should not just prohibit infringement on the religion of others but rather, it should explicitly prohibit the use of religion to encroach upon all fundamental rights and freedom of others, which includes the freedom to practice religion, as well as other rights protected by the Interim Constitution, such as the right to equality and non-discrimination.<sup>271</sup>

Such an amendment should also be mirrored in Article 23(2) of the Interim Constitution. Article 23(2) as presently drafted could be used to permit acts that are commonplace in Nepal, such as denying Dalits entry into temples, as well as other acts purportedly undertaken in the name of protecting a religious place which, in practice, violate



others' fundamental rights, including but not limited, the rights to non-discrimination and freedom of religion.

**d. Article 143: Emergency Powers**

(1) If a grave emergency arises in regard to the sovereignty or integrity of Nepal or the security of any part thereof, whether by war, external aggression, armed rebellion or extreme economic disarray, the Council of Minister of the Government of Nepal, may, by Proclamation or Order, declare a state of emergency in Nepal or any specified part thereof...

(7) During the time of the Proclamation or Order of the State of Emergency made by the Council of Ministers of the Government of Nepal, pursuant to clause (1), the fundamental rights provided in Part 3 may be suspended so long as the Proclamation or Order is in operation. Provided that clauses (1), (2) of article 12 and sub-clause (c) and (d) of clause 3, Article 13 and 14, clause (2) and (3) of Article 15, Article 16, 17, 18, 20, 21, 22, 23, 24, 26, 29, 30 and 31 and the right to constitutional remedy related to Article 32 and the right to *Habeas Corpus* shall not be suspended.

The Interim Constitution's provision regarding emergency powers comports to some extent with Nepal's international human rights obligations. For example, the emphasis on the need for the presence of a "grave emergency" indicates Nepal's recognition that under international law, it may only declare a state of emergency in a situation that constitutes a threat to the life of the nation.<sup>272</sup> As the Nepalese people have experienced firsthand the wide array of human rights violations that occur during declared "states of emergency," it will be important for the new constitution to strictly define the circumstances in which the Government can make such declarations and limit their use to apply only in the most extreme situations of national crisis as contemplated by Article 4(1) of the ICCPR.

In addition, Article 143(7) does not fully comport to the requirements in Article 4 of the ICCPR. First, it does not list all the rights that the ICCPR indicates are non-derogable. Specifically, it does not prohibit derogations of the rights guaranteed in Article 11 of the ICCPR, which specifies that "[n]o one shall be imprisoned merely on the ground of inability to fulfill a contractual obligation,"<sup>273</sup> and Article 16 of the ICCPR, which further declares that "[e]veryone shall have the right to recognition everywhere as a person before the law."<sup>274</sup> The equivalent to Article 143(7) in the new constitution should include within its list of non-derogable rights the guarantees contained within Article 11 and Article 16 of the ICCPR, and ensure that these rights are reflected in the new constitution.<sup>275</sup>

Furthermore, Article 143(7) of the Interim Constitution seeks to permit wholesale suspensions of rights in Part 3, except for those listed in the Article as non-derogable. Instead of providing for blanket suspension of rights, and in order to comply with Nepal's international obligations, the new constitution should indicate that any derogation measures must be limited to the extent strictly required by the exigencies of the situation.<sup>276</sup>

#### **4. Key Recommendations on Civil and Political Rights**

In drafting the new constitution, the Constituent Assembly should additionally:

- Include in the “Right to freedom” provision freedoms included elsewhere in the constitution or otherwise required by Nepal’s international human rights obligations;
- Limit the freedom to movement only to the extent allowed by the ICCPR;
- Avoid using any language that may limit Dalits’ freedom to practice any occupation based on potential offenses to “public health or morality”;
- Consider moving the Article 33(d1) equivalent (on proportional inclusion) and Article 35(8) equivalent (on special provisions for women) and related articles to the Fundamental Rights Part of the constitution;
- Prohibit or revoke registration of political parties that unlawfully discriminate in either their membership, leadership, or their nomination of individuals for political positions;
- Prohibit the use of religion to encroach upon all fundamental rights and freedoms of others, including non-discrimination rights and the freedom to practice religion;
- Ensure that the new constitution’s equivalent to Article 23(2) contains a similar clause prohibiting the encroachment on the religious rights of others;
- Include within the new constitution’s list of non-derogable rights during a state of emergency the rights guarantees contained within Article 11 and Article 16 of the ICCPR and ensure that these rights are reflected in the constitution; *and*,
- Indicate that any derogation measures during a state of emergency must be limited to the extent strictly required by the exigencies of the situation.

#### **D. ECONOMIC, SOCIAL, AND CULTURAL RIGHTS**

Caste discrimination in Nepal fundamentally undermines Dalits’ ability to live with human dignity and to acquire the most basic needs of survival. The Nepalese Government has itself noted that, while Nepal has achieved some progress in education and health, Nepal’s socio-cultural and historical legacies, as well as ineffective “interventions,” have resulted in a lack of progress in socio-economic development for Dalits.<sup>277</sup> Additionally, it has been argued that a key goal of the People’s Movement was to confront the social and economic injustices plaguing marginalized and vulnerable populations.<sup>278</sup> As such, the constitution’s ability to address economic, social, and cultural rights of such groups is politically, as well as legally, significant.

## 1. Nepal's International Human Rights Obligations Regarding Economic, Social, and Cultural Rights

Nepal is obligated to progressively realize economic, social, and cultural rights.<sup>279</sup> Despite the fact that the ICESCR allows for “progressive realization,” it is important to note that there are two obligations that apply fully and immediately to all economic, social, and cultural rights, irrespective of the availability of resources:<sup>280</sup> first, there is the obligation to ensure non-discrimination in the provision of economic, social, and cultural rights (as enshrined in Articles 2(2) and Article 3 of the ICESCR) and, second, an obligation “to take steps” toward the realization of these rights.<sup>281</sup> The UN Committee on Economic, Social and Cultural Rights (ESCR Committee) has confirmed that the guarantee of equality and prohibition on discrimination in the ICESCR have the same meaning as elsewhere in human rights instruments, namely that they mandate both formal and substantive equality.<sup>282</sup> The Committee has also indicated that in eliminating discrimination and inequality in the enjoyment of economic, social, and cultural rights<sup>283</sup> States may take temporary special measures.<sup>284</sup>

The ICESCR enumerates a number of economic, social, and cultural rights of particular importance to Dalits in Nepal. First, it requires State Parties to recognize and protect the right to work, which includes “the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts.”<sup>285</sup> Related to this, the ICESCR provides for the right to the “enjoyment of just and favourable conditions of work,” including, remuneration, fair wages, “equal remuneration for work of equal value without distinction of any kind,” and “safe and healthy work conditions.”<sup>286</sup> Second, the ICESCR requires that State Parties take special measures of protection and assistance on behalf of all children and young persons without any discrimination. Both the ICESCR and the CRC call for their protection from economic and social exploitation and prohibit child labor.<sup>287</sup> Third, State Parties are to respect everyone’s right to education and to ensure that education enables “the full development of the human personality and the sense of its dignity.”<sup>288</sup> Fourth, Article 12 of the ICESCR requires State Parties to recognize the fundamental right of everyone to “enjoy the highest attainable standard of physical and mental health.” Fifth, State Parties are required to “recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions.”<sup>289</sup> It also provides, in particular, the fundamental right for everyone to be free from hunger.<sup>290</sup> Related to this, State Parties are also required to recognize everyone’s right to “social security, including social insurance.”<sup>291</sup>

In addition to the rights guaranteed by the ICESCR—and in recognition of the importance of economic, social, and cultural rights for marginalized minorities—the ICERD also calls on States to take within the social, economic, cultural and other fields, “special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms.”<sup>292</sup> ICERD also obligates State Parties to prohibit and eliminate racial discrimination (which includes caste discrimination) in all its forms and to guarantee the right of everyone to equality before the law in the enjoyment of economic, social, and cultural rights.<sup>293</sup>

## **2. Violations of Dalits' Economic, Social, and Cultural Rights in Nepal**

### **a. Employment**

Dalits perceive employment discrimination as one of the most pervasive kinds of discrimination they face.<sup>294</sup> Their employment challenges range from forced labor, to an inability to access non-caste-based professions and unequal compensation. In fact, many Dalits suffer direct and indirect forced labor.<sup>295</sup> Among the Dalits most vulnerable to forced labor include: the Haliya,<sup>296</sup> who are bonded agricultural workers; Dalits belonging to the Badi caste, who are forced into prostitution;<sup>297</sup> and Dalits engaged in carcass disposal.<sup>298</sup> Further, people from other castes typically call on Dalits to carry out odd jobs or run errands for little or no compensation.<sup>299</sup> According to a 2005 ILO report, Dalits are systematically threatened for resisting forced labor.<sup>300</sup>

As the country's largest employer, the Nepalese Government is directly implicated in employment discrimination.<sup>301</sup> Employment discrimination, together with Dalits' low education levels, makes it difficult for Dalits to enter into, much less excel at, non-caste-based occupations.<sup>302</sup> White collar jobs in medicine, science, technology, and engineering<sup>303</sup> are also largely unavailable for Dalits and "untouchability" precludes Dalits from successfully engaging in any profession that involves handling food and water that non-Dalits will consume, which applies to any work carried out in restaurants, shops, households, or businesses.<sup>304</sup> The professions in which Dalits are permitted to participate bring relatively low economic returns and, as a consequence, Dalits have the lowest annual per capita income, expenditure, savings, and investment in Nepal.<sup>305</sup>

Dalits are also denied equal compensation for their work. A 2003 ILO survey revealed that 71 percent of Dalits reported being paid lower wages and salaries compared to other Nepalese in comparable private and informal sectors.<sup>306</sup> The study showed that Dalits received an average of 96 Nepalese Rupees (NRs) [US\$1.50] for a day's work, compared to the mean market wage rate of NRs 105 [US\$1.64] for the same kind of job in the general population.<sup>307</sup>

The ESCR Committee, the CERD Committee, and the CRC Committee have repeatedly expressed concerns that despite the 2002 abolition of the bonded labor system in Nepal,<sup>308</sup> freed bonded laborers (the ex-Haliyas) still face significant difficulties with their access to work, credit, land, livelihood, and appropriate education for their children.<sup>309</sup> Many freed bonded laborers lack alternative employment opportunities and, as a result, have had to return to bonded labor in Western Nepal and in the plains.<sup>310</sup> The ESCR Committee, the CEDAW Committee, and the CERD Committee have also all called on Nepal to address the violation of those within the Badi community who are coerced into prostitution.<sup>311</sup>

### **b. Child Labor and Exploitation**

According to the ILO's 2005 study, an estimated 18 percent of Dalit children between five and 14 years of age were involved in their families' traditional occupations.<sup>312</sup> Among the more than 6.2 million children in this age range in Nepal, an estimated 2.5 million were found to be working under intolerable conditions.<sup>313</sup> Around eight percent of all Dalit

children were victims of slavery or slavery-like practices, which included Badi girls forced into sex work and the recruitment of countless Dalit children in armed conflicts.<sup>314</sup> Dalit children were additionally involved in “hazardous and arduous jobs such as picking and collecting rags, metal scraps, and glasses; disposing of carcasses; cremating dead bodies; disposing of human waste; portering; and working in coal mines.”<sup>315</sup> Dalit children also “worked to pay back their parents’ debts or helped their parents in cultivating the land of ‘upper caste’ households in return for food or shelter, or both.”<sup>316</sup>

In both its 2001 and 2008 recommendations, the ESCR Committee asked Nepal to address the high incidence of child labor in rural Nepal and other areas.<sup>317</sup> The CRC Committee also expressed concern that children belonging to vulnerable groups were likely to fall victim to abuse and exploitation as a result of discriminatory attitudes and practices.<sup>318</sup> The ESCR Committee, the CEDAW Committee, and the CERD Committee have also called on Nepal to address the prostitution of Badi girls.<sup>319</sup>

### **c. Education**

Caste discrimination has compromised both the quality and availability of education for Dalit children. According to the 2001 census, 76 percent of Terai Dalits and 43 percent of Hill Dalits had not been to school, compared to less than 30 percent of Brahmins, Chetris, and Newars,<sup>320</sup> and it is worth noting that the situation is significantly worse for Dalit girls.<sup>321</sup> In comparison with Nepal’s 2001 average literacy rate of about 50 percent for the general population, only 24.2 percent of Dalits were literate.<sup>322</sup>

Experts have identified four levels of discrimination that result in the educational marginalization of Dalits.<sup>323</sup> First, Dalit children face “structural discrimination” stemming from the discriminatory physical infrastructure and social environment of schools.<sup>324</sup> Schools are typically located far from Dalit communities, Dalit students must sit in the back of the classroom, and they do not have equal access to resources available to other students.<sup>325</sup> Second, Dalit students face “silent discrimination”<sup>326</sup> in that School Management Committees are silent about prejudice against Dalits by school teachers, non-Dalit students, and the Management Committees themselves, and tend to discourage, ignore, and neglect the participation of Dalit children in all facets of student life.<sup>327</sup> Third, Dalit students face “direct discrimination” through their treatment as “untouchables” by both teachers and non-Dalit students, resulting in higher dropout rates among Dalits students.<sup>328</sup> Fourth, there is also “pedagogical discrimination” in schools, where teachers use discriminatory curricula and fail to appreciate any positive aspects of Dalit knowledge, skills, and culture.<sup>329</sup> Additionally, Dalit teachers are typically socially segregated from non-Dalit teachers.<sup>330</sup>

Discrimination and economic barriers to Dalits’ primary education has a visibly disastrous impact on their higher education, with Dalits making up less than 1 percent of those in Nepal with a Bachelors of Arts or higher degree.<sup>331</sup> According to the 2001 census, not a single Badi, Chamar, Bantar, or Halkhor community member had a Bachelor’s degree or higher.<sup>332</sup> While the Nepalese Government has introduced Dalit Scholarship programs, the scholarships have been largely misused because of a lack of effective monitoring and prejudice by “high-caste” officials and teachers.<sup>333</sup>

The CRC Committee has expressed concern about the great disparity in primary school enrollment schools between children of different castes, and, along with ESCR Committee called on Nepal to adopt a policy of compulsory education.<sup>334</sup> The ESCR Committee expressed concern that even though in theory primary education was free, fees for school supplies and uniforms prevented it from being free in practice.<sup>335</sup>

**d. *Wealth and Land***

Despite comprising a significant percentage of Nepal's population,<sup>336</sup> in 2001 Dalits possessed only one percent of the nation's wealth.<sup>337</sup> According to a 2004 survey, an estimated half of all Nepalese Dalits lived in poverty compared with 31 percent of the overall population.<sup>338</sup> As noted above, Dalits comprise 80 percent of the "ultra-poor" in Nepal.<sup>339</sup> In some rural areas, even those Dalits with adequate purchasing power find it difficult to buy good quality foods from other caste members who practice caste discrimination at vegetable markets, meat shops, and dairy cooperatives, or who literally refuse to accept money handed to them by Dalits.<sup>340</sup>

Land is a root cause of both conflict<sup>341</sup> and poverty<sup>342</sup> in Nepal, such that addressing the land challenge<sup>343</sup> is critical to resolving the national and localized conflicts<sup>344</sup> and to supporting poverty reduction efforts.<sup>345</sup> Caste discrimination has had grave implications for Dalits' ability to own land.<sup>346</sup> An estimated 22 percent of Nepal's landless people are Dalit and furthermore, a great majority of Dalit households are "functionally landless", meaning that they cannot fit more than a house lot on their land and are therefore dependent on "higher castes" for their livelihoods.<sup>347</sup> Altogether, Dalits own just one percent of Nepal's arable land, while only three percent of Dalits own more than a hectare of land.<sup>348</sup> As a consequence of not owning land, Dalits are more susceptible to exploitative arrangements; squatter colony inhabitants and Haliyas (landless bonded laborers) are overwhelmingly Dalit.<sup>349</sup> Accessing land is particularly challenging for Dalit women, who face intersectional discrimination on the basis of both caste and gender. Despite the fact that women comprise 51 percent of Nepal's population and are responsible for 60 percent of the agricultural production, they own only 8 percent of the land.<sup>350</sup>

As the Nepalese Government has stated, "in an agrarian society like Nepal, land is the most important source of livelihood. The landholding size of the household also correlates with social, economic, and political entitlements of the family members."<sup>351</sup> Not only are landless persons foreclosed from gaining significant access to economic and political resources, they are also significantly hindered in their ability to obtain citizenship certificates, and in turn may be denied benefits that the Nepalese State accords its citizens.<sup>352</sup> The situation is particularly dire for the Haliya, who till the land of landowners in order to pay off debts.<sup>353</sup>

**e. *Health, Food, and Water***

Caste-based discrimination has a range of devastating consequences on the physical and mental health of Dalits. For example, they are systematically denied access to communal water sources for fear that they will "pollute" the water supply.<sup>354</sup> As a result, Dalit women and girls are often forced to fetch water at long distances because they risk ostracism and

punitive violence if seeking to access nearby, “non-Dalit” water supplies.<sup>355</sup> State agencies have further perpetuated this aspect of caste discrimination by constructing separate water taps for different castes.<sup>356</sup>

Second, Dalits face disproportionate occupational health hazards as a consequence of being relegated into professions that involve handling human excrement and animal flesh.<sup>357</sup> Members of the Badi community that are forced into prostitution are particularly vulnerable to HIV/AIDS and sexual violence.<sup>358</sup>

Third, Dalit landlessness can have a negative impact on their health, as it means that Dalits are often forced to migrate and work in dangerous conditions.<sup>359</sup> Fourth, Dalits’ physical and mental health is undermined by the fact that they must often endure punitive social violence, which may include being forced to eat human excrement as a form of punishment and humiliation, and which can have devastating consequences on both physical and mental health.<sup>360</sup> Finally, while the majority of Dalits cannot afford private health care, the discrimination they face at low-cost government clinics also makes it difficult for them to access public health services.<sup>361</sup> The precarious health situation of Dalits is reflected in the fact that, on average, Brahmans and Newars live 11 to 12 years longer than Dalits and that a Dalit child is twice as likely to die in his or her first year than either a Brahman or Newar child.<sup>362</sup>

The CERD Committee has expressed concern that many persons of “lower” castes are denied access to public wells, “thereby directly threatening their right to an adequate standard of living and their right to the highest attainable standard of health.”<sup>363</sup> The ESCR Committee has recommended that Nepal take “urgent steps to ensure food security and access to water for all, particularly those who belong to the most disadvantaged and marginalized groups.”<sup>364</sup> In addition, the CRC Committee has pointed out that the prevailing socio-economic discrimination against Dalits has had harmful effects on the physical, psychological, and emotional well-being of Dalit children.<sup>365</sup>

### **3. Analysis of the Interim Constitution on Economic, Social, and Cultural Rights**

As acknowledged by the ESCR Committee, Nepal’s Interim Constitution is commendable for its considerable efforts to constitutionalize economic, social, and cultural rights.<sup>366</sup> Going further than the 1990 Constitution, the Interim Constitution includes certain economic, social, and cultural rights in the fundamental rights section (Part 3) and thereby secures their justiciability.<sup>367</sup> This section analyzes the relevant articles with respect to Dalits.

One threshold matter that applies to most of the economic and social rights defined by the Interim Constitution is the fact that provisions defining these rights are often qualified with the caveat “as provided for in the law.” For example, Article 18 states that “every citizen shall have the right to employment as provided for in the law,” and Article 17 provides every citizen with the right to “receive free education from the State up to secondary level as provided for in the law.” It is important to point out that these caveats run the risk of being used as loopholes in order to deny the meaning of the rights in question

and to reiterate that the laws in question must themselves be compliant with Nepal's human rights obligations.

**a. Article 14: Right against untouchability and racial discrimination**

Article 14 has been analyzed in greater detail above, but it is worth revisiting it here to identify its implications for Dalits' economic, social, and cultural rights. Article 14(2)'s provision that "[n]o person shall, on the ground of caste or tribe, be deprived of the use of services, conveniences or utilities available to the public, or be denied access to any public place, or public religious places..." has important ramifications for Dalits who, as previously discussed, are prevented from accessing water and other public resources. Further, Article 14(3)'s prohibition on caste discrimination in the production, distribution, and purchase of any goods, services, or conveniences will have positive effects on Dalits' abilities to freely engage in their chosen work and to access higher quality food and health services.

**b. Article 16: Right regarding environment and health**

- |   |
|---|
| <p>(1) Every person has the right to live in a clean environment.<br/>(2) Every citizen shall have the right to basic health services free of cost from the State as provided for in the law.</p> |
|---|

Under the Interim Constitution, and for the first time in Nepal, every citizen now has the constitutional right to free basic health services.<sup>368</sup> While a commendable provision, the new constitution will need more expansive guarantees in order to comply with Nepal's obligations with respect to the right to health.<sup>369</sup> First, the ICESCR obligates State Parties to "recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health."<sup>370</sup> This right extends not only to access to appropriate health services as set out in Article 16(2) of the Interim Constitution, but also to ensuring access to the "underlying determinants of health, such as...safe and potable water and adequate sanitation, an adequate supply of safe food, nutrition and housing, healthy occupational and environmental conditions, and access to health-related education and information."<sup>371</sup>

The ESCR Committee has also emphasized that the right to health is closely related to, and dependent upon, the realization of other human rights, including the rights to "food, housing, work, education, human dignity, life, non-discrimination, equality, the prohibition against torture, privacy, access to information, and the freedoms of association, assembly, and movement."<sup>372</sup> The realization of women's rights to health require additional elements such as "the removal of all barriers interfering with access to health services, education, and information,"<sup>373</sup> and undertaking "...preventive, promotive, and remedial action" to ensure that women are not affected by harmful traditional cultural practices.<sup>374</sup> Under CEDAW, Nepal is obligated to ensure women "appropriate services in connection with pregnancy, confinement, and the post-natal period, granting free services where necessary..."<sup>375</sup> In order to encompass these different facets of Nepal's obligations with respect to the right to health, the new constitution should, at the very least, include an additional provision that guarantees every person's right "to enjoy the highest attainable standard of physical and mental health."<sup>376</sup> This provision should precede the current sub-article (2).



Additionally, it should be noted that one of Nepal's core obligations with respect to economic, social, and cultural rights is to "ensure the right of access to health facilities, goods, and services on a non-discriminatory basis, especially for vulnerable or marginalized groups."<sup>377</sup> ICERD also specifically requires that Nepal guarantee the right of everyone to equal enjoyment of the right to public health and medical care.<sup>378</sup> CEDAW contains a similar requirement in its Article 12, pursuant to which Nepal must "...take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning."<sup>379</sup> In light of these guarantees of non-discrimination, Nepal will be in breach of its international obligations with respect to the right to health, as well as with respect to the right to non-discrimination and equality, if it fails to ensure in practice equal access to health care by Dalits, including Dalit women.

The ICESCR obligates State Parties to improve all aspects of environmental and industrial hygiene,<sup>380</sup> an obligation that is especially significant for Dalits who are forced to work in unhealthy environments. Accordingly, State Parties must, *inter alia*, implement "preventative measures in respect of occupational accidents and diseases"; ensure "an adequate supply of safe and potable water and basic sanitation";<sup>381</sup> prevent and reduce exposure to harmful substances such as harmful chemicals; and minimize, "so far as is reasonably practicable, the causes of health hazards inherent in the working environment."<sup>382</sup>

**c. Article 17: Education and cultural rights**

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| <ol style="list-style-type: none"><li>(1) Each community shall have the right to receive basic education in their mother tongue as provided for in the law.</li><li>(2) Every citizen shall have the right to receive free education from the State up to secondary level as provided for in the law.</li><li>(3) Each community residing in Nepal shall have the right to preserve and promote its language, script, culture, cultural civilisation and heritage.</li></ol> |
|--|

Article 17(2) of the Interim Constitution is commendable for providing a constitutional right to free primary and secondary education for every citizen.<sup>383</sup> This is consistent with Nepal's obligation under the ICESCR to make primary education available "free to all,"<sup>384</sup> and to ensure that secondary education is made "generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education."<sup>385</sup> Under the ICESCR, Nepal must also ensure that fundamental education is "encouraged or intensified as far as possible for those persons who have not received or completed the whole period of their primary education."<sup>386</sup> Additionally, "education must be accessible to, especially the most vulnerable groups, in law and fact, without discrimination."<sup>387</sup> Under CEDAW, Nepal is required to "take all appropriate measures to eliminate discrimination against women in order to ensure to them equal rights with men in the field of education...."<sup>388</sup> In this regard, the ESCR Committee has made clear that the adoption of temporary special measures intended to bring about *de facto* equality for men and women and for disadvantaged groups is not a violation of the right to non-discrimination with regard to education.<sup>389</sup>

In light of these obligations, the Constituent Assembly should consider amending the equivalent article in the new constitution to more effectively address the historical obstacles that Dalits, women, and other marginalized groups have faced in attaining education, and to enable these groups to use education as a means of safeguarding and furthering other rights.<sup>390</sup> This should include introducing language into this article that takes specific account of Nepal's obligations with respect to higher education and fundamental education as set out in the ICESCR's Article 13(2).<sup>391</sup> To this end, the new constitution should enshrine Nepal's obligation to progressively introduce free higher education and to encourage or intensify fundamental education for those who have not received or completed all of their primary education.

Article 17(3) of the Interim Constitution, which gives each community residing in Nepal the "right to preserve and promote its language, script, culture, cultural civilisation and heritage," could be problematic to the extent that it might be interpreted as preserving "untouchability" practices which are fundamentally incompatible with Nepal's human rights obligations. The equivalent provision in the new constitution should explicitly prohibit the use of such rights to encroach upon the fundamental rights and freedoms of others, in particular, the constitutional prohibition on discrimination.

**d. Employment and Exploitation**

*i. Article 18: Right regarding employment and social security*

- (1) Every citizen shall have the right to employment as provided for in the law.
- (2) Women, laborers, the aged, disabled as well as incapacitated and helpless citizens shall have the right to social security as provided for in the law.
- (3) Every citizen has the right to food sovereignty as provided for in the law.

*ii. Article 30: Right regarding labour*

- (1) Every employee and worker shall have the right to proper work practices.
- (2) Every employee and worker shall have the right to form trade unions, to organise themselves, and to engage in collective bargaining for the protection of their interests in accordance with law.

Article 18(1) of the Interim Constitution stipulates that "Every citizen shall have the right to employment as provided for in the law." This provision is insufficient both for addressing the systemic work-related abuses that are the foundation of caste discrimination and for allowing the country to fulfil its international obligations regarding the right to work.<sup>392</sup> The right to work is a fundamental right recognized in the ICESCR and several other international human rights treaties.<sup>393</sup> Article 6 of the ICESCR recognizes "the right to work, *which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts...*" (emphasis added).<sup>394</sup> The ESCR Committee emphasizes that this right to

freely accept or choose work implies “not being forced in any way whatsoever to exercise or engage in employment and the right of access to a system of protection guaranteeing each worker access to employment.”<sup>395</sup> Nepal’s new constitution should, at a minimum, explicitly recognize the right to freely accept or choose work.

Article 30(1) of the Interim Constitution provides every employee and worker the right to “proper work practices.” In order to give meaningful content to Article 30(1) and to ensure that Nepal complies with its human rights obligations, the new constitution should provide further guidance on the meaning of the word “proper” or, alternatively, use language provided in Article 7 of the ICESCR, which states that workers are entitled to “just and favourable” work conditions. Under the ICESCR, just and favorable conditions of work also include fair wages, equal remuneration for work of equal value without distinction of any kind, and a decent living.<sup>396</sup> It also creates obligations to ensure the provision of “safe and healthy working conditions,”<sup>397</sup> “equal opportunity for everyone to be promoted in his employment,” and “[r]est, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays.”<sup>398</sup> As with all human rights, the right to work imposes three levels of obligation: the obligations to respect, protect, and fulfill.<sup>399</sup>

Article 18(2) of the Interim Constitution also gives various sections of the population the important right to social security. As a party to the ICESCR, Nepal is required to “recognize the right of everyone to social security, including social insurance.”<sup>400</sup> It would be helpful if the equivalent provision in the new constitution included the additional clause “including social insurance” after the right to social security is mentioned. In addition, a key aspect of the right to social security is that it must be guaranteed without discrimination. For example, the ESCR Committee has explained that:

[t]he right to social security encompasses the right to access and maintain benefits, whether in cash or in kind, *without discrimination* in order to secure protection, inter alia, from (a) lack of work-related income caused by sickness, disability, maternity, employment injury, unemployment, old age, or death of a family member; (b) unaffordable access to health care; (c) (and) insufficient family support, particularly for children and adult dependents.<sup>401</sup> (emphasis added).

The ESCR Committee also emphasizes that in accordance with the non-discrimination provision article 2(1) of the ICESCR, State parties must take effective measures, “within their maximum available resources, to fully realize the right of all persons *without any discrimination* to social security, including social insurance.”<sup>402</sup> (emphasis added). As presently worded, Article 18(2) of the Interim Constitution only extends the right to social security to “Women, labourers, the aged, disabled as well as incapacitated and helpless citizens.” Although making particular provision for such marginalized groups is consistent with Nepal’s particular international economic, social, and cultural rights obligations with respect to vulnerable members of society,<sup>403</sup> it should not be at the expense of Nepal’s general obligation of non-discrimination. It would therefore be advisable for the new constitution to guarantee the right to social security, including social insurance, without discrimination, paying particular attention to marginalized groups such as women, labourers, the aged, disabled as well as incapacitated and helpless citizens, and to add Dalits to this list.

It should also be borne in mind when implementing the new constitution's provision on social security, that Nepal's other core obligations in satisfying the minimum essential levels of the right to social security include: respecting "existing social security schemes and protecting them from unreasonable interference"; adopting and implementing "a national social security strategy and plan of action"; and taking targeted steps to implement a national social security scheme that protects, in particular, "disadvantaged and marginalized individuals and groups."<sup>404</sup>

Article 18(3) of the Interim Constitution commendably provides every citizen the right to food sovereignty, but in its current formulation, it is unclear what exactly this constitutes in practice. The Constituent Assembly should clarify the protections afforded under the right to food sovereignty, which should at a minimum include the right to "the minimum essential food which is sufficient, nutritionally adequate and safe, to ensure their freedom from hunger" as required by the ICESCR.<sup>405</sup>

*iii. Article 29: Right against exploitation*

- (1) Every person shall have the right against exploitation.
- (2) No person shall be exploited in the name of custom, tradition and practice, or in any other way
- (3) No person shall be subjected to human trafficking, slavery or bonded labour.
- (4) No person shall be subject to forced labour.

Provided that nothing in this clause shall prevent the enactment of a law requiring citizens to be engaged in compulsory service for public purposes.

These provisions against exploitation are particularly salient for Dalits who have been historically exploited in a variety of ways, including through forced and bonded labor, as discussed earlier in this section. Nevertheless, enforcement of these rights is crucial, since the inclusion of similar provisions in the 1990 Constitution<sup>406</sup> did not prove sufficient to curb the forced labor and exploitation of Dalits. While the new clause in the Interim Constitution (Article 29(2)) states that "no person shall be exploited in the name of custom, tradition, and practice or in any other way," the new constitution should also prohibit exploitation in the name of "religion" in order to further strengthen the right against exploitation, particularly in relation to caste.<sup>407</sup> Additionally, the Article 29 language that states: "Provided that nothing in this clause shall prevent the enactment of a law requiring citizens to be engaged in compulsory service for public purposes," should not be implemented in a manner that contravenes the constitutional prohibition against discrimination or "untouchability."

**e. Article 19: Right to property**

(1) Every citizen shall, subject to the existing laws, have the right to acquire, own, sell and otherwise dispose of property.

(2) The State shall not, except in the public interest, acquire, or create any encumbrance on the property of any person.

Provided that this clause shall not be applicable to property acquired through illegal means.

(3) Compensation shall be provided for any property requisitioned, acquired or encumbered by the State in implementing scientific land reform programmes or in the public interest in accordance with law. The amount and basis of compensation, and relevant procedure shall be as prescribed by law.

ICERD requires State Parties to undertake to prohibit and eliminate racial discrimination in all its forms (which includes caste discrimination) and to guarantee every person's right to equality in the enjoyment of the right to own property.<sup>408</sup> As discussed earlier in this section, the systemic barriers Dalits face in accessing land and other property have far-reaching ramifications for their ability to enjoy numerous human rights<sup>409</sup>—unequal land access has prevented a disproportionate number of Dalits from enjoying their rights to fair wages, equal remuneration, and just and favorable conditions of work.<sup>410</sup> Moreover, land ownership is an important criterion for obtaining citizenship in Nepal.<sup>411</sup> Nepal cannot effectively fulfill its obligations to ensure an adequate standard of living, including adequate food, clothing, and housing,<sup>412</sup> without addressing Dalits' inability to own, use, or otherwise control land.<sup>413</sup> Alongside these entrenched issues, Nepal has additionally failed to implement adequate land reforms.<sup>414</sup>

Article 19 of the Interim Constitution is unlikely to sufficiently address the historical impediments to Dalits' ability to access land, as the Article does not explicitly reference and/or provide redress for past inequalities in regard to property access. Unless there is constitutional redress for these abuses against Dalits, the repressive impact of discriminatory property laws will continue to interfere with Dalits' rights to citizenship and economic and social rights.<sup>415</sup> In terms of how this might be done, the new constitution could add specific language securing an entitlement to tenure or comparable redress in cases where land tenure has been compromised by previous discrimination.<sup>416</sup>

**f. Articles 33, 34, 35: Responsibilities, Directive Principles, and Policies of the State on Economic, Social, and Cultural Rights**

The Interim Constitution has several provisions in its "Responsibilities, Directive Principles and Policies of the State" section that specifically address the economic, social and cultural rights of Dalits. Unlike the fundamental rights discussed earlier in this section,<sup>417</sup> according to the Interim Constitution these principles and policies are not justiciable, but are instead policies around which the Nepalese State "shall mobilize or cause the mobilization of the required resources and necessary means for [their] implementation."<sup>418</sup>

**33. Responsibilities of the State:**

The State shall have the following responsibilities:...

(f) to pursue a policy of adopting scientific land reform programmes by gradually ending feudalistic land ownership,...

(h) to pursue a policy of establishing the rights of all citizens to education, health, housing, employment and food sovereignty,

(i) to adopt a policy of ensuring socio-economic security and provide land to the economically backward classes, including the landless, bonded labourers [kamaiyas], tillers [haliyas], farm labourers and shepherds [haruwa charuwa], ...

**34. Directive Principles of the State:**

...

(4) The fundamental economic objective of the State must be to give priority and protection to making the national economy independent, self-reliant and progressive by preventing the concentration of available resources and means of the country within a limited section of society, by making arrangements for equitable distribution of economic gains based on social justice, by making such a provision as will prevent economic inequality and exploitation of any caste, gender, tribe, origin or individuals, and by giving priority and encouragement to national private and public enterprises....

**35. State Policies:**

...

(8) The State shall pursue a policy of encouraging maximum participation of women in national development by making special provision for their education, health and employment...

(10) The State shall pursue a policy which will help to uplift the economically and socially backward indigenous ethnic groups [Adivasi Janajati], Madhesis, Dalits, as well as marginalized communities, and workers and farmers living below the poverty line by making provisions for reservations in education, health, housing, food security and employment for a certain period of time...

(14) The State shall pursue a policy of making special provision on the basis of positive discrimination for the minorities, landless, squatters, bonded labourers, persons with disability, backward communities and sections, and the victims of conflict, including women, Dalits, indigenous tribes [Adivasi Janajati], Madhesis and Muslims.

The above provisions are commendable for their potential to advance Dalits' economic, social, and cultural rights but there are a few facets that require further consideration. The first is the basis for classifying certain economic, social and cultural provisions as "Responsibilities, Directive Principles and Policies of the State." It is arguable that there are a number of provisions in this section that according to Nepal's international human rights obligations should properly be considered as obligatory and justiciable. Indeed, some of the responsibilities, directive principles, and policies address substantive rights that are obligatory and justiciable under the Interim Constitution's Part 3 fundamental rights section. The appearance of these fundamental rights in the non-justiciable responsibilities, directive principles, and policies part of the Interim Constitution should not detract from the fact that they are obligatory human rights. For example, under Article 35(10) of the Interim Constitution "[t]he State shall pursue a policy which will help to uplift the economically and socially backward indigenous ethnic groups [Adivasi Janajati], Madhesis, Dalits, as well as marginalized communities, and workers and farmers living below the poverty line by making provisions for reservations in education, health, housing, food

security, and employment for a certain period of time.” Under international law it is incumbent on States to take special measures, when circumstances warrant, ensuring rights enjoyment.<sup>419</sup> The circumstances of Dalits in Nepal, combined with Nepal’s obligation to ensure substantive equality,<sup>420</sup> suggest that the taking of special measures should be included in the fundamental rights section of the new constitution. Indeed, Article 13 of the Interim Constitution, which as discussed above appears in the fundamental rights section of the Interim Constitution, enables this by stating under Article 13(3) that such measures would not constitute prohibited discrimination.<sup>421</sup>

Further, Article 33(h) of the Interim Constitution notes that the State has a responsibility “to pursue a policy of establishing the rights of all citizens to education, health, housing, employment, and food sovereignty.” As discussed above, while the ICESCR allows for “progressive realization,” there are two obligations that apply fully and immediately to all economic, social, and cultural rights irrespective of the availability of resources: the obligation to ensure non-discrimination and the obligation “to take steps” toward the realization of these rights.<sup>422</sup> The State’s commitment to pursue a policy of establishing economic, social, and cultural rights is encompassed within the obligation “to take steps” and is therefore not properly within the non-justiciable Part 4 of the Interim Constitution. Similarly, under Article 35(8) of the Interim Constitution, the “State shall pursue a policy of encouraging maximum participation of women in national development by making special provisions for their education, health, and employment.” As discussed above, Nepal’s international human rights obligations include ensuring substantive equality for women and ensuring women’s full participation in decision-making processes, including through the adoption of special measures.<sup>423</sup>

This section would also benefit from some specific textual clarifications and improvements. For example, given the particular problems Dalits have faced with landlessness, Article 33(i)’s equivalent in the new constitution should include Dalits on the list of groups that should benefit from “a policy of ensuring socio-economic security and provid[ing] land to the economically backward classes....” Additionally, to minimize the risk of excluding certain groups, the new constitution should adopt a more general, non-exhaustive language of application in this provision.

#### **4. Key Recommendations on Economic, Social, and Cultural Rights**

**In drafting the new constitution, the Constituent Assembly should additionally:**

- **Include a provision guaranteeing every person’s right to enjoy the highest attainable standard of physical and mental health;**
- **Expand the right to education to include progressive introduction of free higher education and encouragement or intensification of fundamental education for those who have not received or completed all of their primary education;**
- **Prohibit the use of the right to preserve and promote language, script, culture, cultural civilization, and heritage to infringe on the fundamental rights and freedoms of others, particularly the right to non-discrimination;**

- Explicitly state that the right to freely choose or accept employment is a component of the right to work;
- Clarify the content of the right to proper work practices or specify that workers are entitled to “just and favorable” work conditions;
- Amend the language on the right to social security to establish it as a right to “social security, including social insurance,” specify that the right is to be enjoyed without discrimination, and indicate that particular attention should be paid to marginalized groups, including Dalits;
- Clarify that the meaning of the right to food sovereignty includes the right to the minimum essential food, which is sufficient, nutritionally adequate and safe, in order to ensure freedom from hunger;
- Include language that explicitly prohibits exploitation in the name of religion;
- Add specific language securing an entitlement to tenure or comparable redress in cases where land tenure has been compromised by previous discrimination;
- Review and amend the placement of provisions related to economic, social, and cultural rights in the constitution so as to ensure their justiciability; *and*,
- Add Dalits to the list of groups that should benefit from “a policy of ensuring socio-economic security and provid[ing] land to the economically backward classes,” and ensure that this list is non-exhaustive so as to ensure access to socio-economic security to all who need it.

## **E. WOMEN’S RIGHTS**

### **1. Nepal’s International Human Rights Obligations Regarding Women’s Rights**

Under international human rights law, Nepal has an obligation to ensure that women enjoy all substantive civil and political rights as well as economic, social, and cultural rights on the basis of equality and non-discrimination. These guarantees of equality and non-discrimination are set out with particular clarity in CEDAW but they are also part of the other treaties that bind Nepal and create the full range of substantive rights guarantees discussed throughout this report. Specifically, as a party to CEDAW, Nepal is obligated to take steps to eradicate discrimination against women<sup>424</sup> and to take “all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.”<sup>425</sup> As mentioned earlier, this obligation is one of substantive equality.<sup>426</sup> Pursuant to CEDAW, Nepalese women are entitled to equal rights in political and public life;<sup>427</sup> the opportunity to participate in government;<sup>428</sup> equality in education,<sup>429</sup> employment,<sup>430</sup> health care,<sup>431</sup> economic and social benefits;<sup>432</sup> and equal



protection under the law.<sup>433</sup> Moreover, CEDAW affirms that women's enjoyment of their fundamental rights cannot be restricted on the basis of culture and tradition.<sup>434</sup> Finally, CEDAW requires that Nepal give special attention to the particular challenges faced by rural women.<sup>435</sup>

## 2. Situation of Dalit Women in Nepal

As highlighted throughout this report, Dalit women face the intersectional burden of caste and gender discrimination.<sup>436</sup> For example, the report's treatment on citizenship (Section III, part A) touched on the particularly devastating consequences of discriminatory laws on women's access to citizenship. A subsequent discussion on civil and political rights (Section III, part C) demonstrated how the patriarchal nature of both the public and private spheres has worked to exclude Dalit women from participation in the country's governance. Furthermore, as detailed in the exploration of economic, social, and cultural rights (Section III, part D) the report has shown that Dalit women have also faced various challenges in accessing education, healthcare, and an adequate standard of living and, in addition, that the general status of Dalit women in Nepal has made some of them susceptible to sexual coercion and exploitation. Finally, in the forthcoming section on torture (Section III, Part G), the report also details some of the types of torture, cruel, inhuman, and degrading treatment that Dalit women have been forced to endure.

The CEDAW Committee has expressed strong concerns about Nepal's poor record regarding discrimination against women.<sup>437</sup> Among other things, it has emphasized Nepal's failure to amend prevailing discriminatory laws;<sup>438</sup> the fact that there are fewer educational opportunities for rural women; the generally poor health status of rural women;<sup>439</sup> the practice of prostitution among young girls of the Badi caste;<sup>440</sup> and the gender-based discrimination inherent in Nepal's citizenship laws.<sup>441</sup>

## 3. Analysis of the Interim Constitution Regarding Women's Rights

### a. Article 20: Rights of women

- (1) No women shall be discriminated against in any way on the basis of gender.
- (2) Every woman shall have the right to reproductive health and other reproductive rights.
- (3) No physical, mental or any other form of violence shall be inflicted on any woman, and such an act shall be punishable by law.
- (4) Sons and daughters shall have equal rights to ancestral property.

Article 20 sets forth specific rights with respect to women. As no such article existed in the 1990 Constitution, this is a welcome improvement, and it is imperative that a similar provision be included in the new constitution. However, in order to effectively combat gender discrimination, the new constitution's provision must more closely follow CEDAW and more fully track the CEDAW Committee's recommendations.

In accordance with Articles 1 and 2 of CEDAW, Article 20(1) of the Interim Constitution prohibits gender-based discrimination.<sup>442</sup> However, Article 5 of CEDAW also

requires that States take all appropriate measures to “...modify the social and cultural patterns of conduct of men and women.”<sup>443</sup> This requirement should be reflected in the text of the new constitution. Furthermore, the new constitution—either in its text or in its implementation—should recognize the extent to which gender intersects with other forms of discrimination, such as caste.<sup>444</sup> Finally, to bring it in line with CEDAW and ICESCR, the new constitution should also contain specific rights concerning family relations,<sup>445</sup> For example, the new constitution should guarantee, on the basis of equality of women and men, the same rights with respect to: entry into marriage; the dissolution of marriage; parental rights and responsibilities; family planning; relations with children; and property rights.<sup>446</sup>

In its present form, the guarantee of the “right to reproductive health and other reproductive rights” lacks meaningful content. To bring the new constitution firmly into compliance with Nepal’s international human rights obligations, the equivalent provision in the new constitution should include a list of the kinds of reproductive rights guaranteed by CEDAW and the ICESCR, including, but not limited to, equal access to reproductive health care services<sup>447</sup> and the right to be fully informed regarding medical options.<sup>448</sup> These provisions are particularly important in light of the health issues faced by those Dalit women who have, as a result of their economic vulnerability, been forced into prostitution.<sup>449</sup>

#### **4. Key Recommendations on Women’s Rights**

**In drafting the new constitution, the Constituent Assembly should additionally:**

- **Add a provision requiring all appropriate measures to modify the social and cultural patterns of conduct of men and women;**
- **Include specific rights concerning family relations, including the equal rights of men and women with respect to entry into marriage; dissolution of marriage; parental rights and responsibilities; family planning; relations with children; and property; *and*,**
- **Include within the “right to reproductive health and other reproductive rights” provision a list of the kinds of reproductive rights guaranteed under international human rights law, including but not limited to, equal access to reproductive health care services and the right to be fully informed regarding medical options.**

#### **F. CHILDREN’S RIGHTS**

##### **1. Nepal’s International Human Rights Obligations Regarding Children’s Rights**

State Parties to the CRC are required to ensure the rights set forth in the Convention “to each child within their jurisdiction without discrimination of any kind, irrespective of the child’s or his or her parent’s or legal guardian’s race, color, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth, or other status.”<sup>450</sup> Under the CRC, Nepal is also obligated to ensure that “in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law,

administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”<sup>451</sup> Nepal must also ensure that each child is “registered immediately after birth” and has the right “from birth to a name” and the right to “acquire a nationality.”<sup>452</sup> Further, State Parties to the CRC are required to “ensure to the maximum extent possible the survival and development of the child,”<sup>453</sup> and to “recognize the right of every child to a standard of living adequate for the child’s physical, mental, spiritual, moral and social development.”<sup>454</sup> They must also “recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health,”<sup>455</sup> and protect children from “all forms of sexual exploitation and sexual abuse.”<sup>456</sup> Also relevant for Dalit children is the fact that Nepal is required to “recognize the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child’s education, or to be harmful to the child’s health or physical, mental, spiritual, moral, or social development.”<sup>457</sup>

## **2. Situation of Dalit Children in Nepal**

Dalit children are an especially vulnerable group whose rights have not been fully realized. This report has detailed numerous human rights abuses against Dalit children in Nepal, including the effect of discriminatory laws on children’s access to citizenship (Section III, Part A), the prominence of child labor and exploitation practices in Nepal (Section III, Part D), and examples of the educational marginalization of Dalits (Section III, Part D). Additionally, and as noted above, the CRC Committee has expressed concern at these harmful effects of caste-based discrimination on Dalit children in Nepal.<sup>458</sup>

## **3. Analysis of the Interim Constitution Regarding Children’s Rights**

### **a. Article 22: Rights of the children**

- (1) Every child shall have the right to his or her own identity and name.
- (2) Every child shall have the right to be nurtured, to basic health and social security.
- (3) Every child shall have the right not to be subjected to physical, mental or any other form of exploitation. Any such an act of exploitation shall be punishable by law and any child so treated shall be compensated as determined by law.
- (4) Helpless, orphan, or mentally retarded children, children who are victims of conflict or displaced and street children at risk shall have the right to receive special privileges from the State to ensure their secure future.
- (5) No minor shall be employed in factories, mines or in any other hazardous work nor shall be used in army, police or in conflicts.

Article 22 of the Interim Constitution is commendable for introducing explicit constitutional rights for children. If enforced, these provisions could have a tremendously positive impact on Dalit children’s rights, particularly in advancing their economic and social rights given the prohibition on child exploitation and the guarantee of the rights to basic health and social security contained therein. However, some improvements could also be made to the article in order to ensure its full compliance with Nepal’s international human

rights obligations. For example, the Constituent Assembly should consider strengthening the new constitution's provision on child labor. Currently, the Interim Constitution only prohibits children from working in "factories, mines, or in any other hazardous work" (Article 22(5)). Because the provision lists specific hazardous industries, to the exclusion of others, it may not be interpreted in a way that is broad enough to prohibit the employment of Dalit children in sex work, carcass removal, and other hazardous caste-based occupations. In accordance with the CRC, the way in which the Constituent Assembly should strengthen this right is to stipulate that children are protected from "performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral, or social development."<sup>459</sup> The Constituent Assembly should further strengthen Article 22 by including an affirmation that the best interests of the child will be the standard applied in actions concerning children as required under the CRC. Similarly, Article 22 could be strengthened by including an affirmation that children have a voice in all matters affecting them in all spheres of society, particularly in the family, in school, and in their communities, as laid out in Article 12 of the CRC.

#### **4. Key Recommendations on Children's Rights**

In drafting the new constitution, the Constituent Assembly should additionally:

- Clarify that children are prohibited from performing work or providing services that place children's well-being, physical or mental health, or spiritual, moral or social development at risk;
- Affirm that the best interests of the child is the primary consideration in all actions concerning the rights of children, including actions taken by public or private social welfare institutions, courts of law, administrative authorities, or legislative bodies; *and*,
- Affirm that children have a voice in all matters affecting them in all spheres of society, particularly in the family, school, and in their communities.

#### **G. RIGHT TO BE FREE FROM TORTURE AND OTHER CRUEL, INHUMAN, OR DEGRADING ("CID") TREATMENT OR PUNISHMENT**

##### **1. Nepal's International Human Rights Obligations Regarding Torture<sup>460</sup> and Other CID Treatment or Punishment**

The prohibition against torture has been universally recognized as a customary international law norm and as a *jus cogens* norm applicable in times of war and peace, from which no derogation is permitted.<sup>461</sup> Of particular relevance for Dalits in Nepal, CAT explicitly prohibits torture and other cruel, inhuman, or degrading acts that are carried out for "any reason based on discrimination of any kind."<sup>462</sup> The CAT Committee has also underscored that gender is a key factor that intersects with other identifying characteristics such as race or caste to determine the ways that women are subject to or at risk of torture and other CID acts.<sup>463</sup>

Pursuant to this prohibition on torture and other CID treatment, Nepal is obligated under international law to take effective legislative, administrative, judicial, or other measures to prevent,<sup>464</sup> criminalize,<sup>465</sup> investigate<sup>466</sup> and punish<sup>467</sup> acts of torture and other CID treatment or punishment. These obligations apply both to acts of the State and of private individuals.<sup>468</sup> The CAT Committee has also emphasized that “the protection of certain minority or marginalized individuals or populations especially at risk of torture is part of the obligation to prevent torture or ill-treatment” and that State Parties should ensure their protection by “fully prosecuting and punishing all acts of violence and abuse against these individuals.”<sup>469</sup>

Nepal is also required to ensure victims’ rights to remedies in cases of torture and other CID treatment or punishment<sup>470</sup> and to ensure that law enforcement, civil, military, and medical personnel, and public officials are educated and informed regarding the prohibition of torture and other acts of CID treatment or punishment.<sup>471</sup>

## **2. Torture and Other CID Treatment or Punishment of Dalits**

### **a. Failure to Prevent Torture and other CID Treatment or Punishment**

The practice of torture in Nepal is notoriously widespread<sup>472</sup> and systematic to this day.<sup>473</sup> Laws such as the Terrorist and Disruptive Activities (Control and Punishment) Ordinance (TADO)<sup>474</sup> have facilitated the Nepalese Government’s arbitrary detention and torture of individuals,<sup>475</sup> for which Dalits and other minorities are at a particularly high risk.<sup>476</sup> In addition to police torture, Dalits are often targeted by Maoist insurgents, who use coercive tactics to ensure their support.<sup>477</sup> Furthermore, Dalit women are subject to certain kinds of violence that amount to at least CID treatment, and in some cases qualify as torture. These include “extreme verbal abuse and sexual epithets; being paraded naked; dismemberment; being forced to drink urine and eat feces; branding; pulling out of teeth, tongue, and nails; and violence, including murder, after proclaiming witchcraft.”<sup>478</sup>

These discriminatory patterns of violence were recognized by the CAT Committee in November 2005, when the Committee expressed grave concerns about “the continued deeply rooted discriminatory practices committed on a large scale against marginalized and disadvantaged groups or castes, such as the Dalits.”<sup>479</sup> At that time, the Committee also called on Nepal to take specific steps to “safeguard their physical integrity and ensure that accountability mechanisms are in place guaranteeing that caste is not used as a basis for abuses, unlawful detention, and torture...”<sup>480</sup> This recommendation for accountability mechanisms reflects the Committee’s more general concern about Nepal’s “prevailing climate of impunity for acts of torture and ill-treatment...,”<sup>481</sup> as discussed further below.

### **b. Failure to Effectively Criminalize, Punish, and Compensate for Torture and other CID Treatment or Punishment**

In contravention of its international legal obligations, Nepal does not sufficiently criminalize torture (including acts of attempted torture, complicity to torture, and participation in torture) or make such criminal offences punishable in a manner proportionate to the gravity of the crimes committed.<sup>482</sup> For example, while the 1996

Compensation Relating to Torture Act seeks to provide victims and their families the right to be free from torture, it does not obligate the Government to punish perpetrators in a manner consistent with Nepal's international human rights obligations. Rather, it merely suggests that perpetrators may be subject to "departmental action" such as demotions or delayed promotions.<sup>483</sup>

Further, Nepal's legal framework—including its 1996 Compensation Relating to Torture Act—has several elements that prevent it from ensuring fair and adequate compensation and rehabilitation for victims of torture, as required under Nepal's international obligations. These elements include a requirement under the Act<sup>484</sup> that individuals file a claim within 35 days of the alleged act of torture or release from detention;<sup>485</sup> the fact that the Act only accepts the medical reports of doctors working in government hospitals as a basis for claims;<sup>486</sup> the absence of provisions of protection for victims and witnesses;<sup>487</sup> the imposition of fines on those parties found by a court to have made groundless claims;<sup>488</sup> and the fact that the Act places the burden of proof on the victim.<sup>489</sup> The obstacles to compensation are further reflected in the fact that the Act places a cap of NRs 100,000 (equivalent to approximately US\$1,500) on the maximum amount of compensation a victim can receive, while failing to provide a lower limit for compensation.<sup>490</sup> In cases where compensation is awarded, there is often undue delay in the payment, or the non-payment, of compensation ordered by the courts or the National Human Rights Commission (NHRC).<sup>491</sup>

**c. *Failure to Investigate Acts of Torture and other CID Treatment or Punishment***

Nepal's general duty to investigate allegations of torture, CID treatment, or punishment is compromised by several factors, including a lack of judicial independence;<sup>492</sup> the lack of representation of Dalits and other minority groups among the police and security services;<sup>493</sup> the lack of implementation of existing laws and orders including, for example, the ineffective implementation of the Compensation Relating to Torture Act of 1996<sup>494</sup> and the failure to ensure that security forces comply with court orders;<sup>495</sup> and the weakness of the NHRC which, though authorized to investigate rights violations,<sup>496</sup> has been routinely blocked by the government when trying to intervene in certain cases or else just witnessed the government's wholesale disregard for the Commission's recommendations.<sup>497</sup>

**d. *Failure to Educate and Train Government Officials***

Police in Nepal reportedly perceive certain acts of torture and other CID treatment or punishment as an effective means of "solving crime," and have received promotions and monetary awards from their Police Departments for their unlawful activities.<sup>498</sup> The CAT Committee has called on Nepal to intensify its efforts to educate and inform State officials about the prohibition of torture and to introduce evaluation and monitoring mechanisms to assess their impact.<sup>499</sup>

### 3. Analysis of the Interim Constitution on Torture and Other CID Treatment or Punishment

#### a. Article 26: Right against torture

(1) No person who is detained during investigation, or for trial or for any other reason, shall be subjected to physical or mental torture, or be treated in a cruel, inhuman or degrading manner.

(2) Any such an act pursuant to clause (1) shall be punishable by law, and any person so treated shall be compensated in a manner determined by law.

The only significant difference between the right against torture, as provided in the Interim Constitution, and that in the 1990 Constitution is that torture and other CID treatment shall now be “punishable by law,” thereby constitutionally mandating that torture and other CID treatment be punishable under Nepalese law.<sup>500</sup>

Despite this improvement, Article 26 is still inadequate in ensuring that Nepal adheres to its international legal obligations. First, it only prohibits torture and other CID treatment in the context of individuals who are “detained.” The definition of torture in Article 1 of CAT is not limited to situations of detention and certainly not intended to be so limited. The CAT Committee has called on each State Party to “prohibit, prevent, and redress torture and ill-treatment in all contexts of custody or control, for example, in prisons, hospitals, schools, institutions that engage in the care of children, the aged, the mentally ill or disabled, in military service, and other institutions as well as contexts where the failure of the State to intervene encourages and enhances the danger of privately inflicted harm.”<sup>501</sup> The CAT Committee has called attention to the fact that serious discrepancies between CAT’s definition of torture and that incorporated into domestic law creates “actual or potential loopholes for impunity.”<sup>502</sup> The CAT Committee thus calls upon each State Party to “ensure that all parts of its government adhere to the definition set forth in the Convention for the purpose of defining the obligations of the State.”<sup>503</sup>

Further, the Interim Constitution’s focus on detention means that torture and other CID acts involving non-state actors may go unpunished. This contravenes Nepal’s international obligations, including those pursuant to which the State bears responsibility for its failure to exercise due diligence to prevent, investigate, and punish acts of torture or ill-treatment by private actors.<sup>504</sup> It is particularly important for Dalits that the new constitution’s definition of torture and other CID acts be broadened beyond acts committed in detention, given the high level of torture and ill-treatment leveled against them by non-State actors, especially in cases of gender-based violence against Dalit women.

Additionally, Article 26(1) and Article 26(2) as read together, may not explicitly comply with Article 4 of CAT. Article 26(1) provides that “No person who is detained during investigation, or for trial or for any other reason, shall be subjected to physical or mental torture, or be treated in a cruel, inhuman or degrading manner” and Article 26(2) penalizes “[a]ny such an act pursuant to clause(1)...” However, Article 4 requires State Parties to ensure that “all acts of torture” are offenses under its criminal law, including “acts by any

person which constitutes complicity or participation in torture.”<sup>505</sup> To ensure that Article 26 prohibits all such acts, and not just the act of torture or CID treatment itself, it would be helpful if the new constitution made this clear, including for example, by amending the text of Article 26(2) to read that “[a]ny and all such acts pursuant to clause(1)” should be punishable.

In order to facilitate the enforcement of the rights identified in Article 26(2) in the full manner contemplated under international human rights law, Article 26(2) could also usefully be expanded in accordance with CAT to stipulate that acts will be punishable by law and “*by appropriate penalties which take into account their grave nature*”<sup>506</sup> and to specify that “any person so treated shall be compensated in a manner determined by law *and in accordance with the individual’s enforceable right to fair and adequate compensation.*”<sup>507</sup> (italics represent proposed text).

#### **4. Key Recommendations on the Right to be Free from Torture and Other CID Treatment or Punishment**

In drafting the new constitution, the Constituent Assembly should additionally:

- Ensure that the definition of torture and CID treatment extends beyond those acts occurring in traditional custodial detention;
- Ensure that all acts of torture and CID treatment, including those acts which constitute complicity or participation in torture and CID treatment, are punishable;
- Ensure that all such acts will be punishable by law and by appropriate penalties which take into account their grave nature; *and,*
- Ensure that the compensation for torture and CID treatment shall be determined in accordance with an individual’s enforceable right to fair and adequate compensation.

#### **H. REALIZING CONSTITUTIONAL RIGHTS AND PROTECTIONS IN NEPAL: ISSUES OF IMPLEMENTATION AND ENFORCEABILITY**

##### **1. Nepal’s International Human Rights Obligations Regarding Realization of Rights**

Nepal has a general obligation to respect, protect, and fulfill its binding human rights commitments.<sup>508</sup> The obligation to respect requires Nepal to refrain from taking action that violates human rights, the obligation to protect requires Nepal to protect individuals from abuse, including by private actors, and the obligation to fulfill requires positive steps, including ensuring that appropriate remedies are both available and accessible and that courts and other tribunals are sufficiently able to provide redress.<sup>509</sup>



Nepal's obligation to ensure the right to an effective remedy for human rights violations, which includes ensuring that its institutions and agents are competent to enforce human rights, is also set out in a number of provisions of human rights law binding on Nepal.<sup>510</sup> As affirmed in the Universal Declaration of Human Rights, "[e]veryone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law."<sup>511</sup> The ICCPR requires Nepal to ensure that *any person* whose political and civil rights or freedoms have been violated has "an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity."<sup>512</sup> It also obligates Nepal to ensure that "any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative, or legislative authorities, or by any other competent authority provided for by the legal system of the State,"<sup>513</sup> and to "ensure that the competent authorities shall enforce such remedies when granted."<sup>514</sup>

The ICERD also requires that Nepal "assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination."<sup>515</sup> Related to the enforcement of economic, social and cultural rights, the ESCR Committee has recognized that States must domestically apply the ICESCR in a way that enables "...individuals to seek enforcement of their rights before national courts and tribunals."<sup>516</sup> ICESCR requires Nepal to progressively realize the rights recognized therein "by all appropriate means, including particularly the adoption of legislative measures."<sup>517</sup> Similarly, under CEDAW, Nepal is obligated to "adopt all necessary measures at the national level aimed at achieving the full realization of the rights" recognized therein.<sup>518</sup> As discussed above, as a State Party to CAT, Nepal is obligated to investigate acts of torture and other CID, and to ensure that victims have the right to complain and to have their cases examined by competent authorities.<sup>519</sup> It must also "ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation."<sup>520</sup> Finally, it is also important to note that the right to an effective remedy for human rights violations applies to both citizens and non-citizens in Nepal.<sup>521</sup>

Under international law, the right to remedy necessitates competent governmental authorities to enforce human rights.<sup>522</sup> In order to meet its obligations to fulfill the right to remedy, Nepal must improve the functioning of its judicial, legislative, and law enforcement systems. As described below, Nepal's failure to improve the functioning of these systems has to date severely undermined the protection of Dalit rights.

## 2. Factors Undermining Realization of Rights

Nepal's 1990 Constitution was seen as revolutionary<sup>523</sup> because it replaced a constitution that banned political parties and had made the king the source of all legislative, executive, and judicial power.<sup>524</sup> In addition to unequivocally prohibiting "untouchability" and defining the rights to equality, freedom, criminal justice, and the right to be free from exploitation,<sup>525</sup> the 1990 Constitution also created an unprecedented possibility for the enforcement of rights through public interest litigation.<sup>526</sup>

Nevertheless, the 1990 Constitution's impact on Dalits in Nepal has been extremely limited,<sup>527</sup> a fact highlighted by the ESCR Committee in early 2008, when it noted that "in spite of the provisions in the Interim Constitution prohibiting caste-based discrimination, such discrimination persists with impunity."<sup>528</sup> Drawing lessons from the implementation of the 1990 and Interim Constitutions, this section considers how the new constitution might structure judicial, governmental, and other mechanisms to ensure the realization of Dalit rights.

**a. *Compromised Judicial Enforcement***

The judicial enforcement of Dalits' rights has been compromised by several factors, including: the lack of independence and representative capacity of the judiciary;<sup>529</sup> the failure of legal personnel administering public interest litigation to register the majority of cases concerning discrimination against Dalits;<sup>530</sup> a lack of or inappropriately low penalties such as minimal fines and non-custodial sanctions for violations against Dalits;<sup>531</sup> and the failure of the Supreme Court to clearly pronounce a law or practice as unconstitutional.<sup>532</sup> In addition, judicial willingness to rule against the Government has been undermined by the Government's failure to fully implement legal decisions.<sup>533</sup> For example, the Government failed to comply with a Supreme Court directive order asking the Government to work with Dalit representatives in the enactment of a comprehensive law on the elimination of "untouchability" in furtherance of its ICERD obligations.<sup>534</sup> This lack of implementation undermines public faith in the judicial system, as well as the willingness of Dalits to complain about caste-based discrimination.<sup>535</sup> In recognition of the significant issues regarding judicial enforcement of rights, Article 162(3) of the Interim Constitution takes a positive step forward in that it provides for "gradual reforms in the judicial sector to make it independent, clean, impartial, and competent."<sup>536</sup>

**b. *Government Inaction and Failure***

The Nepalese government has consistently failed to implement legislation protecting Dalit rights. The Government acknowledges its failure to adopt effective legislation to enforce the 1990 Constitution's prohibition on caste-based discrimination.<sup>537</sup> For example, victims of caste-based discrimination must rely on Civil Code 1963 for redress, yet the Code leaves punishment for such offenses up to the judge's discretion.<sup>538</sup> There are also insufficient instructions establishing the appropriate procedures that law enforcement officials must take against perpetrators of caste-based offenses.<sup>539</sup> These problems are compounded by the absence of sensitization and training of government officials concerning the gravity of "untouchability" offences<sup>540</sup> and the lack of accountability when government officials fail to effectively enforce decisions related to caste discrimination.<sup>541</sup> In addition, it is estimated there are some 58 laws that are discriminatory against Dalits.<sup>542</sup>

**c. *Ineffective Government Commissions and Committees***

The Government has established several commissions and committees whose mandates include addressing caste-based discrimination. Many Dalit activists believe that the effectiveness of these bodies is undermined by their lack of political independence.<sup>543</sup> The

National Dalit Commission (NDC),<sup>544</sup> for example, has been criticized for lacking “statutory authority guiding law, autonomy, and sovereignty.”<sup>545</sup> The NHRC has a mandate to work with the NDC in the protection of Dalit rights, but has been largely ineffective<sup>546</sup> and has been criticized by the ESCR Committee.<sup>547</sup> Similarly, the effectiveness of the Nepal Excluded, Oppressed and Dalit Class Development Committee<sup>548</sup> has been undermined by budgetary constraints,<sup>549</sup> frequent personnel changes,<sup>550</sup> and misallocation of resources to non-Dalits.<sup>551</sup>

**d. Law Enforcement Brutality and Complicity**

Law enforcement officials are generally seen as a significant obstacle to Dalits’ abilities to enjoy the rights and protections envisioned by the 1990 Constitution.<sup>552</sup> In addition to failing to inform alleged perpetrators of complaints against them and failing to investigate cases of caste-based discrimination,<sup>553</sup> law enforcement officials themselves often perpetrate caste-based violence. In 2007, the CAT Committee expressed grave concern about the “exceedingly large number of consistent and reliable reports” of “widespread use of torture and ill-treatment by law enforcement personnel” and the absence of measures to ensure the effective protection of all members of society.<sup>554</sup> The CAT Committee called on Nepal to take “specific steps to safeguard their physical integrity, ensure that accountability mechanisms are in place guaranteeing that caste is not used as a basis for abuses, unlawful detention and torture, and take steps to ensure more diverse caste and ethnic representation in its police and security forces.”<sup>555</sup>

**3. Analysis of the Interim Constitution on Realization of Rights**

**a. Obligation to Respect, Protect, and Fulfill Rights**

As evidenced above, even the most robust constitution is likely to fail in securing human rights unless Nepal conducts various institutional and procedural reforms. Article 33 of the Interim Constitution sets out the Responsibilities of the State, including the responsibility “to implement effectively international treaties and agreements to which the State is a party” (Article 33(m)) and “to repeal all discriminatory laws” (Article 33(n)). To supplement these and other enforcement provisions in the Interim Constitution, it would be advisable for the new constitution to include threshold sections in the new constitution’s counterpart to the Interim Constitution’s Part 3 that identify those rights as the “cornerstone” of Nepal’s democracy; to indicate they are binding on the legislature, executive, judiciary, and all other state organs;<sup>556</sup> and to mandate that the State must respect, protect, and fulfill the rights established under the constitution.<sup>557</sup>

**b. The Right to Constitutional Remedy and the Jurisdiction of the Supreme Court**

*i. Article 32: Right to constitutional remedy*

The right to proceed in the manner set out in Article 107 for the enforcement of the rights conferred in this Part is guaranteed.

*ii. Article 107: Jurisdiction of the Supreme Court*

- (1) Any Nepali citizen may file a petition in the Supreme Court to have any law or any part thereof declared void on the ground of inconsistency with this Constitution because it imposes an unreasonable restriction on the enjoyment of the fundamental rights conferred by this Constitution or on any other ground, and extra-ordinary power shall rest with the Supreme Court to declare that law void either ab initio or from the date of its decision if it appears that the law in question is inconsistent with the Constitution.
- (2) The Supreme Court shall, for the enforcement of the fundamental rights conferred by this Constitution, for the enforcement of any other legal right for which no other remedy has been provided or for which the remedy even though provided appears to be inadequate or ineffective, or for the settlement of any constitutional or legal question involved in any dispute of public interest or concern, have the extraordinary power to issue necessary and appropriate orders to enforce such rights or settle the dispute. For these purposes, the Supreme Court may, with a view to imparting full justice and providing the appropriate remedy, issue appropriate orders and writs including the writs of habeas corpus, mandamus, certiorari, prohibition and quo warranto. Provided that, except on the ground of absence of jurisdiction, the Supreme Court shall not, under this clause, interfere with the proceedings and decisions of the Legislature-Parliament concerning violation of its privileges and any penalties imposed therefor.
- (3) The Supreme Court shall have jurisdiction to hear original and appellate cases, to examine decisions referred for confirmation [Sadhak janchne], review cases and hear petitions as defined by law.
- (4) The Supreme Court may review its own judgments or final orders subject to the conditions and in the circumstances prescribed by law. Such a review shall be carried out by judges other than those who were involved in making the decision that is the subject of review.
- (5) Other powers and procedures of the Supreme Court shall be as prescribed by law.

Article 32 of the Interim Constitution guarantees the right to enforce Part 3 fundamental rights in the manner detailed in Article 107. Article 107 is located in Part 10 (Judiciary) of the Interim Constitution. It provides that any Nepali citizen can petition the Supreme Court to have a law declared unconstitutional (Article 107(1)) and empowers the Supreme Court to issue appropriate orders to enforce rights (Article 107(2)). Unlike Article 107(1), Article 107(2) is not explicitly limited to Nepali citizens.<sup>558</sup> In order to comply with Nepal's international legal obligations, the new constitution will need to ensure that both citizens and non-citizens have the constitutional right to petition the Supreme Court to have a law declared unconstitutional.<sup>559</sup>

**c. National Commissions**

Part 15 of the Interim Constitution establishes the NHRC as a constitutional body (Article 131);<sup>560</sup> identifies its functions, duties, and powers (Article 132); and sets out its annual reporting obligations (Article 133). The ESCR Committee has noted with concern that “there is no provision in the Interim Constitution dealing with the financial autonomy of the Commission.”<sup>561</sup> Accordingly, the new constitution should include such a provision and should additionally establish the National Dalit Commission as a constitutional body in order to increase its authority and capacity.<sup>562</sup>

**4. Key Recommendations on Realization of Rights**

In drafting the new constitution, the Constituent Assembly should additionally:

- Include threshold sections in the new constitution’s equivalent of Part 3 that emphasize the importance of the rights; their binding nature; and the obligation to respect, protect, and fulfill the rights established under the constitution;
- Ensure that both citizens and non-citizens have the constitutional right to petition the Supreme Court to have a law declared unconstitutional;
- Provide for the financial autonomy of the National Human Rights Commission;  
*and,*
- Establish the National Dalit Commission as a constitutional body.

#### **IV. CONCLUSION**

The 2006 pro-democracy movement in Nepal marked the widespread rejection of monarchical rule and of social and economic injustices suffered for centuries by marginalized populations. On the heels of Nepal's April 2008 elections, it is widely understood that Nepal's new constitution will play a crucial role in achieving the goals of democracy and social and economic justice and development. The new constitution can also help ensure that Nepal develops a legal framework capable of fulfilling its obligations as a party to several international human rights treaties. The Constituent Assembly must seize this important opportunity to create a transformative constitution that simultaneously fulfills the goals of the pro-democracy movement and faithfully adheres to Nepal's international human rights obligations.

This report has sought to analyze the Interim Constitution with a view to making recommendations for ensuring Dalit rights and human rights more generally in the new constitution. Political, civic, economic, and social structures have worked for more than 2000 years to oppress and marginalize Dalits in Nepal. On its own, a constitutional provision that prohibits caste discrimination is insufficient to ensure Dalit rights. This report has therefore sought to critically examine provisions on access to citizenship; equality and non-discrimination rights; civil and political rights; economic, social, and cultural rights; women's rights; children's rights; and the right to be free from torture and other CID treatment or punishment. In addition, the report noted that due attention to the implementation and enforcement of these provisions is critical to closing the gap between constitutional vision and the social reality that has characterized Nepal's human rights record to date.

A faithful implementation of these rights serves all populations in Nepal and affirms a fundamental principle of all the treaties to which Nepal is a State Party: that all human beings share the same basic worth and are entitled to a life with dignity. Meeting these obligations will also greatly increase Nepal's ability to achieve a sustainable peace and ensure its effective political, economic, and social development. As demonstrated throughout this report, a constitution that affirms Nepal's international human rights obligations can and must serve as the foundation for this crucial endeavor.

<sup>1</sup> At the time of writing, the Interim Constitution had been subject to three separate sets of amendments. This report's analysis of the Interim Constitution is based on the English translation of the Interim Constitution prepared by the United Nations Development Programme [UNDP] as of January 2008: *The Interim Constitution of Nepal, 2063 (2007)*, as amended by the first, second and third amendments, Jan. 2008, *available at*

[http://www.undp.org.np/constitutionbuilding/constitutionnepal/contitutionfile/Interim\\_Constitution\\_bilingu al.pdf](http://www.undp.org.np/constitutionbuilding/constitutionnepal/contitutionfile/Interim_Constitution_bilingu al.pdf) [hereinafter NEPAL IC].

<sup>2</sup> See NEPAL IC, *supra* note 1, at 6 (UNDP introductory remarks). Between 1996 and 2006, Nepal experienced a civil war known as, the "People's War." See U.S. Department of State, Background Note: Nepal, <http://www.state.gov/r/pa/ei/bgn/5283.htm> (last visited Apr. 12, 2008); Center for Human Rights and Global Justice (CHRGJ), *The Missing Piece of the Puzzle: Caste Discrimination and the Conflict in Nepal* 3 (2005) [hereinafter, CHRGJ], *Missing Piece of the Puzzle*. The conflict began as a popular, armed movement amongst CPN-Maoist rebels in the country's western region. *Id.* at 3. The Maoists' initial goals were to move Nepal away from a Hindu kingdom and towards a more secular republic that committed itself to the principles of gender and caste equality and to addressing centuries-old exploitation of Dalits. *Id.*

<sup>3</sup> CONST. OF THE KINGDOM OF NEPAL 2047 (1990) [hereinafter NEPAL 1990 CONST.].

<sup>4</sup> See NEPAL IC, *supra* note 1, at 6 (UNDP introductory remarks).

<sup>5</sup> *Id.* See also CHAITANYA MISHRA, LOCATING THE CAUSES OF THE MAOIST STRUGGLES: ESSAYS ON THE SOCIOLOGY OF NEPAL 116 (2007) (noting that the 1990 Constitution "largely remained benign to the structures of patriarchy and discrimination," failed to "counteract the...caste-based...broad and sharp political, economic, and cultural oppression of the Dalits," and, "from the point of view of almost all Dalits...the post-1990 state has been undemocratic and oppressive.").

<sup>6</sup> MISHRA, *supra* note 5, at 113 (noting also that the process had "denied people and their representatives the authority to prepare and promulgate the Constitution."). See also International Crisis Group (ICG), *Nepal's Constitutional Process* 2, Asia Report No. 128, Feb. 26, 2007 ("It was King Birendra who promulgated the [1990] Constitution . . . . Apart from the Maoists, activists representing smaller parties and ethnic or regional movements complained it was a private deal made by powerful parties and the palace. . . . The [Constitutional Recommendation Commission – an unelected, advisory body subject to 'strong palace pressure'] received submissions from the public, the 'vast majority' concerning ethnic, linguistic and religious issues, but it neither publicly acknowledged nor incorporated them."). See also Joerg Luther & Domenico Francavilla, *Nepal's Constitutional Transition* 2, Department of Public Policy and Public Choice – POLIS, Working Paper No. 93, July 2007, *available at* <http://polis.unipmn.it/pubbl/RePEc/uca/ucapdv/luther93.pdf> (noting "[t]he Constitution of 1990 has been criticized, inter alia, because it 'a) was not made [by] a constituent assembly but by a nine-member commission with two royal representatives, b) was considered not completely devoted to democracy, c) did not declare Nepal a secular state and did not protect minority languages, d) granted no freedom to life, admitted suspension of the right to constitutional remedies and lacked of fundamental duties, d) realized an imperfect balance of powers within the form of government.").

<sup>7</sup> NEPAL IC, *supra* note 1, Preamble.

<sup>8</sup> *Id.*, Preamble and art. 1. See also MISHRA, *supra* note 5, at 2 (noting that the Interim Constitution "provides the legal basis for the conduct of state affairs during [Nepal's] transitional period"). The Constituent Assembly elections took place on April 10, 2008. See, e.g., Matthew Rosenberg, *Nepal Votes in Historic Election*, The Associated Press, Apr. 10, 2008, *available at*

<http://ap.google.com/article/ALeqM5i7r1pF1wwyRn2PaqU6DsZFzTzODAD8VV5LFG0>

<sup>9</sup> See KRISHNA BHATTACHAN, TEJ SUNAR & YASSO KANTI BHATTACHAN, CASTE-BASED DISCRIMINATION IN NEPAL, REGIONAL RESEARCH ON CASTE-BASED DISCRIMINATION IN SOUTH ASIA, INDIAN INSTITUTE OF DALIT STUDIES 33 (2008) [hereinafter CASTE-BASED DISCRIMINATION IN NEPAL] (explaining that the Constituent Assembly is expected to take roughly three years to draft the new constitution).

<sup>10</sup> See NEPAL IC, *supra* note 1, at 12 (UNDP introductory remarks stating: "When the Constituent Assembly prepares a new Constitution it does not have to use any of the rules in the Interim Constitution. But it may decide that some of those rules are still useful.").

<sup>11</sup> MISHRA, *supra* note 5, at 138 ("The dismantling of the 1990 [Constitution] . . . –particularly during the last three eventful, militarized, violent and constitutionally-vacant years—demands the framing of new, popularly legitimate, democratic and progressive rules, which can govern the state and society within the short run and open up the constitutional process for peaceful transitions in the future.").

<sup>12</sup> See CHRJ & Human Rights Watch (HRW), *Hidden Apartheid: Caste Discrimination against India's 'Untouchables'* (2007) [hereinafter CHRJ & HRW, *Hidden Apartheid*]; CHRJ, *Missing Piece of the Puzzle*, *supra* note 2; CHRJ, *Center for Human Rights and Global Justice Statement Before the Committee Against Torture* (Nov. 2005) [hereinafter, CHRJ, *Statement before the CAT*]. See also Smita Narula, *Untouchables: The Plight of Dalit Women*, Testimony before the United States Congressional Human Rights Caucus (May 1, 2007), available at <http://www.law.nyu.edu/newscalendar/faculty/documents/narula20may200720testimony.pdf>.

<sup>13</sup> See Lawyers National Campaign Against Untouchability (LANCAU), STATUS OF DISTRIBUTION OF DRINKING WATER & NUTRITIOUS FOOD, STATUS OF TEXT BOOKS & IMPLEMENTATION OF LEGAL PROVISIONS FOR ELIMINATING THE CRIME OF UNTOUCHABILITY 9 (2006) [hereinafter LANCAU, STATUS OF DISTRIBUTION] (“One of the core reasons [for] the present conflict is [the] inhuman...social life pattern where even the 21<sup>st</sup> century untouchability and other forms of inhuman atrocities are alive.”). See also CHRJ, *Missing Piece of the Puzzle*, *supra* note 2, at 2.

<sup>14</sup> The United Nations Office of the High Commissioner on Human Rights (OHCHR) issued the following caution with regard to the current transitional period in Nepal: “The issue of social inclusion and equality is a central consideration of many people’s support for political transition. Unless these concerns are seriously addressed, there is a danger of deepening social divisions and further violence. Real and sustained change, including the recognition and enjoyment of rights by traditionally marginalized groups, will be an important factor in building a stable and sustained democracy during the transition.” U.N. High Commissioner for Human Rights, *Report of the United Nations High Commissioner for Human Rights on the human rights situation and the activities of her Office, including technical cooperation, in Nepal*, ¶ 77, U.N. Doc. A/61/374 (Sept. 22, 2006) [hereinafter *Report of the High Commissioner for Human Rights Sept. 2006*].

<sup>15</sup> For example, South Africa’s creation of a constitution that is embedded in human rights arguably helped consolidate peace and stability during its transition. See Eric C. Christiansen, *Adjudicating Non-justiciable Rights: Socio-economic Rights and the South African Constitutional Court*, 38 COLUM. HUM. RTS. L. REV. 321, 325 (2007) (noting that the South African Constitution “...ultimately achieved a goal considered impossible for decades: a relatively non-violent transition from ‘racial autocracy to a non-racial democracy, by means of a negotiated transition, the progressive implementation of democracy, and respect for fundamental human rights.’”). See also U.N. High Commissioner for Human Rights, *Report of the United Nations High Commissioner for Human Rights on the human rights situation and the activities of her Office, including technical cooperation, in Nepal*, ¶ 10, U.N. Doc. A/HRC/4/97 (Jan. 17, 2007) [hereinafter, *Report of the High Commissioner for Human Rights Jan. 2007*] (“OHCHR has repeatedly stated that human rights must be central to the [Nepalese] peace process.”). Conversely, critics of Iraq’s constitutional reform process have warned that the country’s failure to “...use international norms to craft a rights regime...to address the rights and fears of minorities and vulnerable groups” will hinder the country’s reconstruction. Makau Mutua, *The Iraq Paradox: Minority & Group Rights in a Viable Constitution*, 54 BUFF. L. REV. 927, 931 (2006). A new constitution grounded in human rights will also demonstrate Nepal’s commitment to valuing the inherent dignity of each person. Barbara Bennett Woodhouse, *The Constitutionalization of Children’s Rights: Incorporating Emerging Human Rights into Constitutional Doctrine*, 2 U. Pa. J. Const. L. 1, 44 (Dec. 1999) (“[Recognizing] a right to dignity is an acknowledgement of the intrinsic worth of human beings: human beings are entitled to be treated as worthy of respect and concern.”).

<sup>16</sup> Committee on the Elimination of Racial Discrimination (CERD Committee), *16th Periodic Reports of States Parties due in 2002, Addendum, Nepal*, ¶ 75, U.N. Doc. CERD/C/452/Add.2 (July 30, 2003) [hereinafter, *Nepal Report to the CERD Committee 2003*] (stating that “[t]he Dalits of Nepal are the most marginalized and deprived group of Nepal, which has been subjected to caste-based discrimination from ancient times,” and that “[d]espite the legal abolition of the caste system in 1963, and the legal prohibitions of caste-based discrimination, they continue to suffer from attitudinal discrimination in society.”).

<sup>17</sup> According to LANCAU, “[n]o ruling party or the opposing party [has] ever raised the concern of [the lack of] implementation of these global [human rights] requirements.” LANCAU, STATUS OF DISTRIBUTION, *supra* note 13, at 17.

<sup>18</sup> NEPAL 1990 CONST., *supra* note 3, at art. 11(2)–(4).

<sup>19</sup> For example, the 1990 Constitution explicitly permitted discrimination against Dalits in religious contexts. See all CHRJ, *Missing Piece of the Puzzle*, *supra* note 2, at 7 (noting that Article 19 of the 1990 Constitution provided that “Every person shall have the freedom to profess and practise his own religion as handed down to him from ancient times having due regard to traditional practices.”); NEPAL 1990 CONST., *supra* note 3, at art. 19(1).

<sup>20</sup> See *infra* Section III.H.



<sup>21</sup> As understood from Article 38 of the Statute of the International Court of Justice, Nepal's international obligations towards Dalits arise from a variety of sources, including, international treaties, customary international law, *jus cogens* norms, general principles of law, and, as subsidiary sources, judicial decisions, and the teachings of highly qualified publicists. Statute of the International Court of Justice art. 38, June 26, 1945, 59 Stat. 1060. While recognizing the importance of all these sources of law, our analysis will focus primarily on Nepal's obligations arising from the international human rights treaties it has ratified.

<sup>22</sup> International Labour Office (ILO), *Dalits and Labour in Nepal: Discrimination and Forced Labour* 7 (2005) [hereinafter 2005 ILO Report]. In a 2001 study, 205 practices of caste-based discrimination were identified in a survey of eight sample sites. CASTE-BASED DISCRIMINATION IN NEPAL, *supra* note 9, at 23. Nepal's caste system is a complicated social construct with various intricacies and technicalities. See, e.g., CONTESTED HIERARCHIES: A COLLABORATIVE ETHNOGRAPHY OF CASTE AMONG THE NEWARS OF THE KATHMANDU VALLEY, NEPAL (David N. Gellner & Declan Quigley eds., 1999). This report does not seek to generalize or trivialize those complexities, but rather to provide a distilled description of common conditions most Dalits face.

<sup>23</sup> As noted by the Government in its periodic report to the CERD Committee, “[f]or an overwhelming majority of people, the caste system continues to be an extremely salient feature of personal identity and social relationships and, to some extent, determines access to social opportunities.” CERD Committee, *14th Reports of States Parties due in 1998, Addendum, Nepal*, ¶ 22, U.N. Doc. CERD/C/337/Add.4 (May 12, 1999) [hereinafter *Nepal Report to the CERD Committee*, 1999].

<sup>24</sup> See LANCAU, STATUS OF DISTRIBUTION, *supra* note 13, at 9 (“Nepalese culture is rooted in discrimination based on religion, which [has] perpetuated both practices of untouchability and exploitation of women.”). See also 2005 ILO Report, *supra* note 22, at 7 (“One of the central elements of the Hindu ideology is the inherent superiority of some groups and inferiority of others based upon the descent-based ‘purity’ principle.”).

<sup>25</sup> In 1910, the National Civil Code institutionalized the “centuries old caste-superiority tradition,” by dividing society in four castes: *Tagadbari* (“sacred thread wearing high castes”), *Matwali* (“liquor consuming meso-castes and ethnic communities”), *Pani nachaln, chhoichhito halnu naparne* (“water unacceptable, sprinkling holy water not required”), and *Pan nachalne, chhoi chhito halnu parne* (“water unacceptable, sprinkling of holy water required”). LANCAU, *Status of Tarai Dalits* 1 (2006).

<sup>26</sup> See *infra* Section III.A.

<sup>27</sup> See CHRJ, *Missing Piece of the Puzzle*, *supra* note 2, at 8 (“Caste discrimination has denied Dalits land ownership and usage. While a great number of Nepal's agricultural laborers are Dalit, very few of them can claim ownership of land. Together, Dalits own just one percent of Nepal's arable land, while only three percent of Dalits own more than a hectare of land. As a result, squatter colony inhabitants and landless bonded laborers are overwhelmingly Dalit.”). See also, CASTE-BASED DISCRIMINATION IN NEPAL, *supra* note 9, at 28 (finding that “Dalits belonging to 13 Dalit castes are ‘prohibited’ to migrate near non-Dalits’ settlement areas.”).

<sup>28</sup> CASTE-BASED DISCRIMINATION IN NEPAL, *supra* note 9, at 87-104. See also CHRJ, *Missing Piece of the Puzzle*, *supra* note 2, at 10-11 (“In rural areas, Dalits are often made to sit in the back of the classroom and are treated as ‘untouchable’ even by their teachers. While the average literacy rate for Nepal's general population is estimated to be approximately fifty percent, only 24.2 percent of all Dalits were literate as of 2001.”).

<sup>29</sup> CHRJ, *Missing Piece of the Puzzle*, *supra* note 2, at 6 (“Because one's caste can be determinative of one's occupation, caste discrimination is also referred to as discrimination on the basis of ‘work and descent.’ Dalits are typically restricted to tasks and occupations that are deemed too ‘filthy’ or ‘polluting’ for ‘upper-caste communities.’”); *id.* at 8 (“The practice of ‘untouchability’ relegates Dalits into work considered to be ‘ritually impure,’ such as manual scavenging or leather work...Dalits are also denied adequate compensation for this work, resulting in severe and disproportionate economic vulnerability.”).

<sup>30</sup> CHRJ, *Missing Piece of the Puzzle*, *supra* note 2, at 7. (“Strict prohibition on inter-caste marriage, particularly between Dalits and non-Dalits, also helps preserve caste hierarchies.”). See also CASTE-BASED DISCRIMINATION IN NEPAL, *supra* note 9, at 29.

<sup>31</sup> Dalits are routinely denied entry into “upper-caste” temples. See CHRJ, *Missing Piece of the Puzzle*, *supra* note 2, at 7 (“[F]or example, in 2004, Dalits were beaten by police officer with *lathis* (batons) for entering the “upper-caste” Laxmi Banketesh Temple in Bharatpur.”). See also CASTE-BASED DISCRIMINATION IN NEPAL, *supra* note 9, at 24.

<sup>32</sup> Caste divisions are preserved and reinforced through the practice and threat of social ostracism or physical violence. See CHRJ, *Missing Piece of the Puzzle*, *supra* note 2, at 7. According to LANCAU:

Dalits are attacked by both State authorities – principally the police, secondarily the army – and by non-Dalit members of the public. The forms that physical attacks take include: shooting, public lynching, burning alive, beating with hands, boots, sticks, and guns, stabbing with knives and swords, force-feeding human feces and urine, rape and gang-rape, parading naked in public, enforced disappearances, eviction from houses, burning houses and property, verbal abuse.

See LANCAU, STATUS OF DISTRIBUTION, *supra* note 13, at 52.

<sup>33</sup> See CHRJ, *Missing Piece of the Puzzle*, *supra* note 2, at 12 (“Dalits in Nepal are disproportionately malnourished as compared to the rest of the population. As a consequence of being denied water and land, they are unable to produce sufficient or nutritious food . . . The health of Dalits is also consistently compromised by a lack of access to healthcare and by the relegation of Dalits into professions that involve handling of human excrement and animal flesh, resulting in greater exposure to disease-causing agents. In addition to occupational hazards, sexual violence against Dalit women and punitive social rituals seeking to ‘pollute’ Dalits also have detrimental consequences on Dalits’ mental and physical health. In some villages, Dalits have been forced to eat human excrement as a form of punishment and humiliation.”). See also Committee on Economic, Social, and Cultural Rights (ESCR Committee), *Concluding observations of the Committee on Economic, Social and Cultural Rights: Nepal*, ¶ 24, U.N. Doc. E/C.12/NPL/CO/2 (Jan. 16, 2008) [hereinafter ESCR Committee, *Nepal Concluding Observations 2008*]. (“The Committee is concerned by the denial of access of persons belonging to the lower castes to public wells, thereby directly threatening their right to an adequate standard of living and their right to the highest attainable standard of health.”). See also CASTE-BASED DISCRIMINATION IN NEPAL, *supra* note 9, at 26.

<sup>34</sup> CHRJ, *Missing Piece of the Puzzle*, *supra* note 2, at 12 (“Dalit women bear the brunt of exploitation and violence in [Nepal] and are largely perceived as being ‘sexually available’ to ‘upper-caste’ men.”); *id.* at 13 (“Dalit women are often forced into sex work with truckers, policemen, members of the army, and the general public. As a result, they are particularly vulnerable to contracting HIV/AIDS and other sexually transmitted diseases.”). Many women in the [Dalit] Badi caste, in particular, are perceived to be sex workers. *Id.* at 13.

<sup>35</sup> CASTE-BASED DISCRIMINATION IN NEPAL, *supra* note 9, at 9 (“During fieldwork, Dalit respondents mentioned that tradition, custom of marriages within caste, older generation, social, economic and political supremacy of Bahun-Chetris (upper-castes), traditional values, illiteracy, caste based marriage system, weak economy, landlessness, poverty, occupation, Dalit insensitive government plans, policies and programs, and conservative attitude of the individuals are the main sources of caste based discrimination, including untouchability, in Nepal.”). See also 2005 ILO Report, *supra* note 22, at 8 (“The pervasiveness of caste discrimination is the most important contributory factor for the various dimensions of exclusion of Dalits.”).

<sup>36</sup> CHRJ, *Missing Piece of the Puzzle*, *supra* note 2, at 6.

<sup>37</sup> Note that the actual number of Dalits in Nepal has been a contested issue as there is some controversy over whether to include particular groups within the Dalit category. See LANCAU, STATUS OF DISTRIBUTION, *supra* note 13, at 11 (noting differences in Dalit population reports, and also that “definitions of Dalits differ.”). The Government census of 2001 has estimated the Dalit population at 15 percent of Nepal’s 22.3 million population. CASTE-BASED DISCRIMINATION IN NEPAL, *supra* note 9, at 1. In contrast, Dalit NGOs believe that number is underestimated, and have claimed that the Dalits comprise between 20 percent to 25 percent of Nepal’s population. CHRJ, *Missing Piece of the Puzzle*, *supra* note 2 at 7; CASTE-BASED DISCRIMINATION IN NEPAL, *supra* note 9, at xiii (“The leaders of the Dalit movements and experts on Dalit issues estimates that Dalits comprise one fourth of the total population of Nepal.”); LANCAU, STATUS OF DISTRIBUTION, *supra* note 13, at 11. It is believed that the census number is inaccurate for a number of reasons, including that some Dalits may have hidden their identity out of fear of reprisal, some Dalits may simply be unaware of their identity, as well as the failure by census officials to recognize certain groups as Dalits. CASTE-BASED DISCRIMINATION IN NEPAL, *supra* note 9, at 17. Regarding the last point, the census only recognized 17 of the 22 Dalit “castes” identified by the National Dalit Commission. *Id.* at 17.

<sup>38</sup> This fact, and the remaining facts cited in this paragraph, are taken from CHRJ, *Missing Piece of the Puzzle*, *supra* note 2 at 6-8.

<sup>39</sup> See CHRJ, *Missing Piece of the Puzzle*, *supra* note 2 at 3.

<sup>40</sup> *Id.* at 3.

<sup>41</sup> Laya Prasad Uprety, Indra Rai, Him Prasad Sedhain, *Rights Based Advocacy Campaign Against Caste-Based Discrimination in Nepal: A Case Study of the Grassroots Anti-Carcass Throwing Campaign of Saraswati Community Development Forum 20*, Action Aid Working Paper 5 (Nov. 2005), available at

<http://www.actionaid.org/assets/docs/five.pdf> (highlighting the hierarchy existing between two Dalit castes – the “higher” *Mushars*, who work as landless agricultural workers, and the *Chamars*, who dispose of animal carcasses and work as leather workers and drummers); CASTE-BASED DISCRIMINATION IN NEPAL, *supra* note 9, at 9 (identifying sixteen Nepalese Dalit castes).

<sup>42</sup> Indeed, one of the challenges in forming a consolidated anti-caste discrimination movement in Nepal has been the difficulty in uniting Dalit sub-castes to work with one another because of this rigid hierarchal structure. See Uprety, Rai, Sedhain, *supra* note 41.

<sup>43</sup> CHRJ, *Missing Piece of the Puzzle*, *supra* note 2 at 12.

<sup>44</sup> *Id.* See also Durga Sob, Feminist Dalit Organization (FEDO), *Dalit Women in Nepal: Issues and Challenges* 3, Working Paper Presented at International Consultation on Caste based Discrimination, Nov. 29-Dec. 1, 2004 available at [http://www.idsn.org/Documents/caste/pdf/c\\_Sob.pdf](http://www.idsn.org/Documents/caste/pdf/c_Sob.pdf) (“Dalit women’s disproportionate and extreme poverty stems from illiteracy, untouchability, physical violence and lack of empowerment. The social scenario has confined them to the lowest paid jobs. Since Dalit women have no economic power in the family, they end up working as labourers but barely earn enough to feed themselves or their families.”). See further Program for the Study of International Organizations (PSIO), *The Maoist Insurgency in Nepal: A Monograph, Causes, Impact and Avenues of Redress* 37-38 (Mar. 2006) (“Political, economic and cultural structures are also highly “gendered” and oppressive and discriminatory against women. Patriarchy is a key organizing principle within the domestic as well as public spheres. Rules and practices of ownership and inheritance of productive and other assets have historically and sharply discriminatory against women. Rules and practices governing marriage, dissolution of marriage, sexuality, physical mobility, and widowhood also largely favor men. Such rules and practices have historically suppressed the level of public and political engagement of women.”); World Bank (WB) & Department of International Development (DFID), *Unequal Citizens, Gender, Caste and Ethnic Exclusion in Nepal* 89, 108 (2006) [hereinafter WB/DFID, *Unequal Citizens*] (Finding that women in all caste and ethnic groups “score lower on both empowerment and inclusion [measures] than men in their own groups.”).

<sup>45</sup> 2005 ILO Report, *supra* note 22, at 46-47.

<sup>46</sup> See e.g. Theodor Meron, *The 1994 US Action in Haiti: Extraterritoriality of Human Rights Treaties* 89 AM. J. INT’L L. 78 n. 19 (1995); PETER ROWE, THE IMPACT OF HUMAN RIGHTS LAW ON THE ARMED FORCES 122 (2006) (stating that the “reach of the relevant human rights treaties is based upon ‘jurisdiction’”).

<sup>47</sup> See e.g. J. HERMAN BURGERS & HANS DANIELIUS, THE UNITED NATIONS CONVENTION AGAINST TORTURE: A HANDBOOK ON THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN, OR DEGRADING TREATMENT OR PUNISHMENT 59, 131 (1988) (noting in relation to the drafting Article 5 of CAT that there was “general agreement that territoriality should be a ground for jurisdiction” and that the phrase “territory under its jurisdiction” that is used in CAT was intended to extend jurisdiction to “territories under military occupation, to colonial territories and to any other territories over which a State has factual control”).

<sup>48</sup> See Section IV.A.

<sup>49</sup> CERD Committee, *General Recommendation No. 30: Discrimination against Non-citizens*, ¶ 3, 64th Sess., U.N. Doc. CERD/C/64/Misc.11/rev.3 (Dec. 1, 2004) [hereinafter CERD Committee, *General Recommendation No. 30*] (noting that “human rights are, in principle, to be enjoyed by all persons,” and that “States parties are under an obligation to guarantee equality between citizens and non-citizens in the enjoyment of these rights to the extent recognized under international law.”). U.N. Human Rights Comm., Sub-Comm. on the Promotion & Protection of Human Rights, *Final Report of the Special Rapporteur, Prevention of Discrimination: The Rights of Non-Citizens*, ¶ 6, U.N. Doc. E/CN.4/Sub.2/2003/23 (May 26, 2003) [hereinafter Sub-Comm. on the Promotion & Protection of Human Rights, *The Rights of Non-Citizens*] (citing the Universal Declaration of Human Rights’ recognition of this principle in Article 2(1): “[e]veryone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”) (emphasis added).

<sup>50</sup> CERD Committee *General Recommendation No. 30* makes clear that even though ICERD permits States to differentiate between citizens and non-citizens, they must still “avoid undermining the basic prohibition on discrimination.” CERD Committee, *General Recommendation, No. 30*, *supra* note 49, ¶¶ 1-3. In other words, States should not detract in any way from the rights and freedoms recognized in particular in the Universal Declaration of Human Rights (10 Dec. 1948), U.N.G.A. Res. 217 A (III) (1948) [hereinafter UDHR], the International Covenant on Economic, Social, and Cultural Rights (New York, 16 Dec. 1966) 993 U.N.T.S. 3, entered into force 3 Jan. 1976 hereinafter ICESCR], and the International Covenant on Civil and Political Rights (New York, 16 Dec. 1966) 999 U.N.T.S. 171 and 1057 U.N.T.S. 407, entered into force 23 Mar. 1976 [hereinafter ICCPR]. *Id.* at ¶ 2.

<sup>51</sup> Human Rights Committee (HRC), *General Comment No. 18: Discrimination Against Non-Citizens*, ¶ 13, 37th Sess., 1989, U.N. HRI/GEN/1/Rev.6 [hereinafter HRC, *General Comment No. 18*]; CERD Committee, *General Recommendation No. 30*, *supra* note 49, at ¶ 4.

<sup>52</sup> HRC, *General Comment No. 15: The Position of Aliens Under the Covenant*, ¶¶ 7, 18, U.N. Doc. HRI/GEN/1/Rev.1 (Nov. 4, 1986) [hereinafter HRC, *General Comment No. 15*].

<sup>53</sup> *Id.* at ¶ 7.

<sup>54</sup> *Id.* (Also providing *inter alia*, that “[a]liens shall not be subjected to retrospective penal legislation, and are entitled to recognition before the law. They may not be subjected to arbitrary or unlawful interference with their privacy, family, home or correspondence. They have the right to freedom of thought, conscience and religion, and the right to hold opinions and to express them. Aliens receive the benefit of the right of peaceful assembly and of freedom of association. They may marry when at marriageable age. Their children are entitled to those measures of protection required by their status as minors. In those cases where aliens constitute a minority within the meaning of article 27, they shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practise their own religion and to use their own language.”). *See also* Sub-Comm. on the Promotion & Protection of Human Rights, *The Rights of Non-Citizens*, *supra* note 55, at ¶ 7.

<sup>55</sup> Sub-Comm. on the Promotion & Protection of Human Rights, *The Rights of Non-Citizens*, *supra* note 49, at ¶ 19.

<sup>56</sup> Although the rights provided for in the ICESCR are defined as being rights for “everyone,” Article 2(3) of the ICESCR states that “developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals.” Nevertheless, “as an exception to the general rule of equality, it should be noted that Article 2(3) must be narrowly construed, may be relied upon only by developing countries, and only with respect to economic rights. Sub-Comm. on the Promotion & Protection of Human Rights, *The Rights of Non-Citizens*, *supra* note 49, at ¶ 19. Additionally, as explained by the ESCR Committee, “even where the available resources are demonstrably inadequate, the obligation remains for a State party to strive to ensure the widest possible enjoyment of relevant rights under the prevailing circumstances. Moreover, the obligations to monitor the extent of the realization, or more especially of the non-realization of economic, social and cultural rights, and to devise strategies and programmes for their promotion, are not in any way eliminated as a result of resource constraints.” ESCR Committee, *General Comment No. 3: The Nature of States Parties Obligations*, ¶ 11, 5th Sess., U.N. Doc. E/1991/23 (Dec. 14, 1990) [hereinafter ESCR Committee, *General Comment No. 3*]. *See also*, Sub-Comm. on the Promotion & Protection of Human Rights, *The Rights of Non-Citizens*, *supra* note 49, at ¶ 7.

<sup>57</sup> CERD Committee, *General Recommendation No. 30*, *supra* note 49, at ¶ 29.

<sup>58</sup> *Id.* at ¶ 36.

<sup>59</sup> International Covenant on the Elimination of Racial Discrimination (New York, 7 Mar. 1966) 660 U.N.T.S. 195, 5 I.L.M. 352 (1966), *entered into force* 4 Jan. 1969 [hereinafter ICERD]. Nepal acceded to ICERD on Jan. 30, 1971. Office of the High Commissioner of Human Rights, International Convention on the Elimination of All Forms of Racial Discrimination, <http://www2.ohchr.org/english/bodies/ratification/2.htm> (last visited Apr. 12, 2008).

<sup>60</sup> Convention on the Elimination of All Forms of Discrimination against Women (New York, 18 Dec. 1979) 1249 U.N.T.S. 513, 19 I.L.M. 33 (1980) *entered into force* 3 Sept. 1981 [hereinafter CEDAW]. Nepal ratified CEDAW on April 22, 1991. Division for the Advancement of Women, <http://www.un.org/womenwatch/daw/cedaw/states.htm> (last visited Apr. 12, 2008).

<sup>61</sup> ICCPR, *supra* note 50. Nepal acceded to ICCPR on May 14, 1991. Office of the High Commissioner of Human Rights, International Covenant on Civil and Political Rights, <http://www2.ohchr.org/english/bodies/ratification/4.htm> (last visited Apr. 12, 2008).

<sup>62</sup> ICESCR, *supra* note 50. Nepal acceded to ICESCR on May 14, 1991. Office of the High Commissioner of Human Rights, International Covenant on Economic and Social Rights, <http://www2.ohchr.org/english/bodies/ratification/3.htm> (last visited Apr. 12, 2008).

<sup>63</sup> Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (New York, 10 Dec. 1984) *as modified by* 3 Apr. 1988, 24 I.L.M. 535 (1985) *entered into force* 26 June 1987 [hereinafter CAT] Nepal acceded to CAT on May 14, 1991. Office of the High Commissioner of Human Rights, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, <http://www2.ohchr.org/english/bodies/ratification/9.htm> (last visited Apr. 12, 2008).

<sup>64</sup> Convention on the Rights of the Child (New York, 20 Nov. 1989) 1577 U.N.T.S. 3 (1989) *entered into force* 2 Sept. 1990. Nepal acceded to CRC on Sept. 14, 1990. Office of the High Commissioner of Human Rights,

Convention of the Rights of the Child, <http://www2.ohchr.org/english/bodies/ratification/11.htm> (last visited Apr. 12, 2008).

<sup>65</sup> According to the Vienna Convention on the Law of Treaties, “[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith.” Vienna Convention on the Law of Treaties art. 26, May 23, 1969, 1155 U.N.T.S. 331, 339.

<sup>66</sup> Nepal Treaty Act of 1990 art. 9(1), available at <http://www.unhcr.org/home/RSDLEGAL/3ae6b51724.html> (last visited Apr. 12, 2008). There is, however, disagreement as to whether Nepal is *monist* (a legal system in which national and international legal systems form a unity, such that the act of ratifying an international law instrument immediately incorporates the law into national law) or *dualist* (a legal system in which international law must be adopted as national law before it can be enforced nationally). Many interpret Nepal’s Treaty Act of 1990 as showing that Nepal has a monist legal system because Article 9(1) establishes the supremacy of international law and the treaty does not require treaties to be enacted as national legislation before they can have effect. See Center for Women’s Research, *CEDAW – A Manual 3* (2006) (“Some countries in the South Asia Region such as Nepal have a Treaty Act (1990) that adopts a monist approach to international law.”). Nevertheless, others find that Nepal’s constitutional history and legislative practice suggest a dualist legal system. FIAN International and Rights and Democracy, *Parallel Information, The Right to Adequate Food in Nepal* 17 (2007), [http://www2.ohchr.org/english/bodies/cescr/docs/info-ngos/rd\\_fian\\_nepal.pdf](http://www2.ohchr.org/english/bodies/cescr/docs/info-ngos/rd_fian_nepal.pdf) [hereinafter FIAN, *Parallel Information*] (“The International Covenant on ESCR and other international treaties have an unclear status in Nepal’s legal order. Nepal’s constitutional history and legislative practice suggest a dualist legal system while the Treaty Act of 1991 sees that international legal instruments prevail over the Constitution and laws.”); Bing Bing Jia, *Review and Bibliography*, 5 CHINESE J. INT’L L. 249, 250 (2006) (“Rudra Sharma examines the relationship between Nepalese domestic law and Nepal’s international obligations through the case of Nepal’s ratification of the WTO accession protocol. The writing shows that international law is not supreme in the land, and that Nepal adheres to a dualist system in this regard. The difference between the provisions of the Constitution and the Treaty Act of 1990 seems to bear this out. However, the issues arising from such are not clearly set forth,” citing ASIAN YEARBOOK OF INTERNATIONAL LAW (B.S. Chimni, Miyoshi Masahiro and S. Subedi, eds.) Vol. 10 (2001-2002)). Members of the judiciary have also recognized the importance of incorporating international human rights standards into their decisions. See Kalyan Shrestha, *Nepali Judiciary: Achievements and Challenges*, NJA LAW JOURNAL, Vol. 1, No. 1, 2007-12-04, 14 (“The protection of human rights by applying the international standards at the domestic level is a commendable judicial exercise.”). The Government of Nepal website openly states its commitment to “the promotion and protection of human rights as contained in the Universal Declaration of Human Rights and other international human rights instruments to which Nepal is a party.” Government of Nepal, Ministry of Foreign Affairs, Nepal and the UN <http://www.mofa.gov.np/nepalun/statement6.php> (last visited, Feb. 11, 2008).

<sup>67</sup> See CERD Committee, *General Recommendation No. 29: Discrimination Based on Descent*, ¶ 111, 61st Sess., U.N. Doc. A/57/18 (2002) [hereinafter CERD Committee, *General Recommendation No. 29*] (explaining that “discrimination based on ‘descent’ includes discrimination against members of communities based on forms of social stratification such as caste and analogous systems of inherited status which nullify or impair their equal enjoyment of human rights”). See also CERD Committee, *Concluding Observations of the Committee on the Elimination of Racial Discrimination: Nepal*, ¶¶ 12, 16, 64th Sess., 299, U.N. Doc. CERD/C/64/CO/5 (2004) [hereinafter CERD Committee, *Nepal Concluding Observations 2004*]; CERD Committee, *Review of Nepal’s Periodic Report, Report of the Committee on the Elimination of Racial Discrimination*, ¶ 519, U.N. GAOR, 42d Sess., Supp. No. 18, U.N. Doc. A/42/18 (1987); CERD Committee, *Concluding Observations of the Committee on the Elimination of Racial Discrimination: Nepal*, ¶¶ 6, 11, 57th Sess., U.N. Doc. CERD/C/304/Add.108 (2001); CERD Committee, *Concluding Observations of the Committee on the Elimination of Racial Discrimination: Nepal*, ¶¶ 10, 13, 14, 53d Sess., U.N. Doc. CERD/C/304/Add.61 (1999) [hereinafter CERD Committee, *Nepal Concluding Observations 1999*]; CHRJ & HRW, *Hidden Apartheid*, *supra* note 12 at 3.

<sup>68</sup> In its General Recommendation 29, the CERD Committee recommended, for example, that State Parties: establish mechanisms to promote respect for equal rights; take measures against the dissemination of ideas of caste inferiority; ensure equal access to justice; take measures to eradicate poverty among descent-based communities and combat their marginalization; and, take measures to eliminate debt bondage and degrading conditions associated with caste discrimination. CERD Committee, *General Recommendation No. 29: Discrimination Based on Descent*, ¶6(bb), 61st Sess., U.N. Doc. A/57/18 (2002).

<sup>69</sup> CEDAW, *supra* note 60, at art. 2(a).

<sup>70</sup> *Id.* at arts. 3, 10-14.

<sup>71</sup> *Id.* at arts. 3, 7-9, 15-16.

<sup>72</sup> CRC, *supra* note 64, at art. 16.

<sup>73</sup> *Id.* at art. 34.

<sup>74</sup> *Id.* at art. 32.

<sup>75</sup> ICCPR, *supra* note 50, at art. 2(1).

<sup>76</sup> *Id.* at art. 6.

<sup>77</sup> *Id.* at art. 7.

<sup>78</sup> *Id.* at art. 8.

<sup>79</sup> *Id.* at art. 9.

<sup>80</sup> *Id.* at art.17.

<sup>81</sup> *Id.* at art. 17.

<sup>82</sup> *Id.* at art. 19.

<sup>83</sup> *Id.* at art. 21.

<sup>84</sup> *Id.* at art. 22.

<sup>85</sup> *Id.* at art. 23.

<sup>86</sup> *Id.* at art. 25.

<sup>87</sup> *Id.* at art. 25.

<sup>88</sup> *Id.* at art. 27.

<sup>89</sup> *Id.* at art. 26.

<sup>90</sup> ICESCR, *supra* note 50, at art. 6.

<sup>91</sup> *Id.* at art. 7.

<sup>92</sup> *Id.* at art. 8.

<sup>93</sup> *Id.* at art. 9.

<sup>94</sup> *Id.* at art. 11.

<sup>95</sup> *Id.* at art. 12.

<sup>96</sup> *Id.* at art. 13.

<sup>97</sup> *Id.* at art. 15.

<sup>98</sup> *Id.* at art. 2.

<sup>99</sup> *Id.* at art. 2.

<sup>100</sup> *Id.* at art. 16(1).

<sup>101</sup> *Id.* at art 14.

<sup>102</sup> See CERD Committee, *Nepal Concluding Observations 2004*, *supra* note 67; CERD Committee, *Nepal Concluding Observations 2001*, *supra* note 67; CERD Committee, *Nepal Concluding Observations 1999*, *supra* note 67.

<sup>103</sup> The CEDAW Committee has expressed concerns over gender discrimination in Nepal against women of “lower castes,” including, the existence of discriminatory laws, cultural practices and stereotypes, the literacy gap between men and women, the practices of forced prostitution and trafficking, and maternal mortality. CEDAW Committee, *Concluding comments of the Committee*, U.N. Doc. A/59/38 Part I (Mar. 18, 2004) [hereinafter CEDAW Committee, *Nepal Concluding Comments 2004*].

<sup>104</sup> The Committee on the Rights of the Child has noted several areas of concern regarding discrimination against Dalit children. See CRC Committee, *Concluding Observations: Nepal*, U.N. Doc. CRC/C/15/Add.261 (Sept. 21, 2005) [hereinafter CRC Committee, *Nepal Concluding Observations 2005*]; CRC Committee, *Concluding Observations of the Committee on the Rights of the Child: Nepal*, U.N. Doc. CRC/C/15/Add.57 (June 7, 1996) [hereinafter CRC Committee, *Nepal Concluding Observations 1996*].

<sup>105</sup> The Human Rights Committee (HRC)—established by Article 28 of the ICCPR in order to monitor implementation of that Covenant—has noted serious concerns with Nepal’s failure to bring an end to discrimination on the basis of caste. HRC, *Concluding Observations of the Human Rights Committee: Nepal*, ¶ 7, CCPR/C/79/Add.42 (Nov. 10, 1994) [hereinafter HRC, *Nepal Concluding Observations 1994*].

<sup>106</sup> The ESCR Committee has expressed serious concerns about Nepal’s failure to implement several provisions of the Covenant. ESCR Committee, *Nepal Concluding Observations 2008*, *supra* note 33, at ¶ 24.

<sup>107</sup> Committee Against Torture—established by Article 17 of CAT—has expressed concern that the Dalit population remains susceptible to discrimination, abuse and torture. CAT Committee, *Conclusions and Recommendations of the Committee Against Torture: Nepal*, ¶¶ 13, 26, U.N. Doc. CAT/C/NPL/CO/2 (Apr. 13, 2007) [hereinafter CAT Committee, *Nepal Conclusions and Recommendations 2007*]. It has expressed grave concerns over discrimination against Dalits and the “large number of consistent and reliable reports concerning the widespread use of torture and ill-treatment by law enforcement personnel. *Id.* at ¶ 13.

<sup>108</sup> The issue of federalism presently underscores most discussions regarding Nepal’s transition to democracy. On December 28, 2007, Article 159 of the Interim Constitution was amended to read, “Nepal will be a federal

democratic republic.” *3rd amendment clears deck for republic*, KANTIPUR ONLINE (Dec. 28, 2007), <http://www.kantipuronline.com/kolnews.php?nid=132640>. While an analysis of federalism falls outside the scope of this report, it should be noted that design of the federal system, as with any other aspects of Nepal’s governmental structure, should be properly discussed, such as to ensure implementation of Nepal’s international human rights obligations. For example, the ICG has called for the creation of a “technical research commission that could develop a knowledge base for future discussions” regarding federalism. *Nepal’s Troubled Tarai Region*, Asia Report No. 136, July 9, 2007, *available at* <http://www.crisisgroup.org/home/index.cfm?id=4941>. The ICG has called for the Government of Nepal to initiate “discussion on options for federalism, their implications and how to implement them.” *Id.* at ii. The Dalit Charter—a document created by 300 Dalit representatives from over 75 districts in Nepal—does not envisage a federal system in which Dalits are physically constrained to one state. Dalit Rights Kathmandu Charter 2007, ¶ 8, National Dalit Conference, Kathmandu, Nepal (Dec. 2007) [hereinafter 2007 Dalit Charter]. Specifically, it reads: “Since . . . Dalits do not need a separate state in a federal setup, the national constitution should have a provision of a package policy to resolve the economic, political, administrative, social and cultural problems of the Dalits in the federal state system along with the provision of proportional representation for them.” *Id.*

<sup>109</sup> NEPAL IC, *supra* note 1, at Preamble and art. 1(1). *See also* MISHRA, *supra* note 5, at 2 (noting that the Interim Constitution “provides the legal basis for the conduct of state affairs during [Nepal’s] transitional period”).

<sup>110</sup> *See* ICCPR, *supra* note 61, at art. 25(a) (providing the right and opportunity for every citizen to “take part in the conduct of public affairs”); ICERD, *supra* note 59, at art. 5(c); CEDAW, *supra* note 60, at art. 7. *See also* HRC, *General Recommendation No. 25: The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service*, ¶¶ 2, 6, 57th Sess., U.N. Doc. A/51/40 vol. I (1996) [hereinafter, HRC, *General Recommendation No. 25*] (“[P]eoples have the right to freely determine their political status and to enjoy the right to choose the form of their constitution or government.”).

<sup>111</sup> *See e.g.* ESCR Committee, *General Comment No. 16: The equal right of men and women to the enjoyment of all economic, social and cultural rights*, ¶ 7, 34th Sess., U.N. Doc. E/C.12/2005/4 (Aug. 11, 2005) [hereinafter, ESCR Committee, *General Comment No. 16*] (“Guarantees of non-discrimination and equality in international human rights treaties mandate both de facto and de jure equality. *De jure* (or formal) equality and *de facto* (or substantive) equality are different but interconnected concepts. Formal equality assumes that equality is achieved if a law or policy treats men and women in a neutral manner. Substantive equality is concerned, in addition, with the effects of laws, policies and practices and with ensuring that they do not maintain, but rather alleviate, the inherent disadvantage that particular groups experience.”). *See also* CEDAW Committee, *General Recommendation No. 23: Political and Public Life*, ¶ 15, 16th Sess., U.N. Doc. A/52/38/Rev.1 Part II (1997) [hereinafter, CEDAW Committee, *General Comment No. 28*].

<sup>112</sup> *See e.g.*, CEDAW Committee, *General Recommendation No. 23*, *supra* note 111, at ¶¶ 15, 17; HRC, *General Comment No. 28: Equality of Rights Between Men and Women*, ¶¶ 3, 29-30 U.N. Doc. CCPR/C/21/Rev.1/Add.10 (Mar. 29, 2000); CERD Committee, *General Recommendation No. 29*, *supra* note 67, at ¶ 6(bb) (recommending State Parties to “[t]ake special and concrete measures to guarantee to members of descent-based communities the right...have due representation in Government and legislative bodies.”).

<sup>113</sup> This means for example that women should not only have been guaranteed at least 50 percent of the seats reserved for Dalits in the Constituent Assembly, reflecting their percentage of Nepal’s Dalit population, but also 50 percent of the total seats in electoral processes, reflecting their percentage of the overall population. According to the 2001 Census, Dalit women comprised 1,393,493 of the Dalit population as compared to 1,356,634 Dalit men. CASTE-BASED DISCRIMINATION IN NEPAL, *supra* note 9, at 18 (also stating that the male and female composition of population of the country are 11,359,378 and 11,377,556 respectively).

<sup>114</sup> Reserved seats for Dalits should not in practice be reserved only for certain Dalit castes at the exclusion of others. Instead, those from “lower” Dalit castes should have the opportunity for equal participation. The World Bank has used the term “elite capture” to describe the phenomenon of the unequal receipt of benefits by a particular sub-group within a larger, disadvantaged group. WB/DFID, *Unequal Citizens*, *supra* note 44, at 89, 108 (citing Census 2001, CBS, HMG/N). Note that Dalit NGOs and activists in Nepal have emphasized the importance of keeping Dalit community members informed of the Constituent Assembly’s work. Dalit Issues of Nepal for New Constitution, ¶ 13 (on file with author) (this document was received from the Dalit NGO Federation and enumerates 73 individual demands from the Dalit community regarding the new constitution) (“The State should guarantee that the Dalit community is fully informed about the policies, laws, and processes that will be adopted by the Constituent Assembly to make a new constitution of Nepal with the hope that Dalits and all other marginalized backward communities would be able to use the sovereign right to

express their aspirations, thoughts, feelings and issues independently and without any fear during the process of writing of the new constitution.”).

<sup>115</sup> In 2002, the CERD Committee identified the particular political subjugation arising from descent-based discrimination. CERD Committee, *General Recommendation No. 29 supra* note 67. It stressed that “fresh efforts need to be made...to eliminate the scourge of descent based discrimination and empower communities affected by it,” and “strongly encourage[d] those affected States that have yet to recognize and address [descent-based discrimination] to take steps to do so.” *Id.* at ¶ 111. Within that spirit of seeking new approaches, the CERD Committee recommended that State Parties:

1(f) *Adopt special measures* in favour of descent-based groups and communities in order to ensure their enjoyment of human rights and fundamental freedoms, in particular *concerning access to public functions, employment and education.*”;

6(aa) *Ensure that authorities at all levels in the country concerned involve members of descent-based communities* in decisions which affect them”;

6(bb) Take special and concrete measures to guarantee to members of descent-based communities the right to participate in elections, to vote and stand for election on the basis of equal and universal suffrage, and to have due representation in Government and legislative bodies.

*See also* HRC, *General Recommendation No. 25, supra* note 110, at ¶¶ 6, 23 (“Where a mode of direct participation by citizens is established, no distinction should be made between citizens as regards their participation on . . . grounds [such as race, colour, sex, language, religion, political or opinion, national or social origin, property or other status] and no unreasonable restrictions should be imposed.”).

<sup>116</sup> MISHRA, *supra* note 5, at 113. *See also* ICG, *Nepal's Constitutional Process, supra* note 6, at 2.

<sup>117</sup> *See also* NEPAL IC, *supra* note 1, at 8 (UNDP introductory remarks stating that the original ICDC was comprised of “7 prominent lawyers, including former presidents of the Nepal Bar Association,” 5 of which were Brahmin). *But see* CASTE-BASED DISCRIMINATION IN NEPAL, *supra* note 9, at 32-33 (stating that the original ICDC was comprised of six non-Dalit males, “all from the Hills, male Bahuns and Chhetris, including a Madhesi.”)

<sup>118</sup> *Id.* at 32.

<sup>119</sup> *Id.* at 33 (“One Dalit out of sixteen members was indeed insignificant, except to raise a faint voice.”).

<sup>120</sup> CERD Committee, *General Recommendation No. 30, supra* note 49, at ¶¶ 4 and 18.

<sup>121</sup> ICERD *supra* note 59, at arts. 1(1) and 5(e); CERD Committee, *General Recommendation No. 30, supra* note 49, at ¶ 13.

<sup>122</sup> CEDAW Committee, *Nepal Concluding Comments 2004, supra* note 103, at ¶ 199.

<sup>123</sup> CRC Committee, *Nepal Concluding Observations 2005, supra* note 104, at ¶ 42.

<sup>124</sup> An individual can only obtain a citizenship certificate after submitting any of the following documentation: Nepalese Citizenship certificates for descendants of relatives within three generations; recommendations from the relevant Village Development Committees certifying birth in Nepal and permanent residence in Nepal; or a Land Title Deed Ownership Certificate. Nepal Citizenship Act, 2063 (2006), § 8 *available at*

<http://www.britishcitizen.info/NCA2006.pdf>.

<sup>125</sup> *Id.*

<sup>126</sup> Nepal Citizenship Act, *supra* note 124, § 8.

<sup>127</sup> Dalit communities are routinely denied citizenship because many of them do not own land. CHRGI, *Missing Piece of the Puzzle, supra* note 2, at 9 (citing Tek Tamrakar, *Existing Pro-Dalit Policies in Nepal*, WEEKLY TELEGRAPH, Nov. 17, 2004, *available at*

<http://www.nepalnews.com.np/contents/englishweekly/telegraph/2004/nov/nov17/national.htm>).

<sup>128</sup> Nepal Citizenship Act, *supra* note 124, § 8(iv).

<sup>129</sup> Jagaran Media Center, *70 percent Dalits in Saptari have no citizenship certificates*, E-bulletin: Issue No. 13, Mar. 6, 2006, <http://www.jagaranmedia.org.np/e-bulletin.php?id=246#3>.

<sup>130</sup> One Dalit, Sukhari Ram, said that all four generations of his family were not considered citizens. *Id.* According to LANCAU, lack of citizenship has long been one of the most pressing issues for individuals within the Badi community and has prevented community members from voting and accessing jobs and other opportunities. LANCAU, INTRA-DALIT DISCRIMINATION: A FACT FINDING REPORT 35 (2005) [hereinafter LANCAU, INTRA-DALIT DISCRIMINATION].



<sup>131</sup> On November 26, 2006, a new Citizenship Act came into force. The law, for the first time in Nepal, enables a Nepalese woman to pass on citizenship to her child by descent. Nepal Citizenship Act, *supra* note 124, § 3(i) and 8.

<sup>132</sup> NEPAL 1990 CONST., *supra* note 3, at art 9(4).

<sup>133</sup> NEPAL IC, *supra* note 1, at art. 11.

<sup>134</sup> See *supra* note 124.

<sup>135</sup> Press Release, UN OHCHR-Nepal, Concerns about discrimination and the Citizenship Bill (Nov. 24, 2006) [hereinafter UN OHCHR-Nepal Press Release 2006] [http://nepal.ohchr.org/en/resources/Documents/English/pressreleases/NOV2006/2006\\_11\\_24\\_HCR\\_PressRelease\\_E.pdf](http://nepal.ohchr.org/en/resources/Documents/English/pressreleases/NOV2006/2006_11_24_HCR_PressRelease_E.pdf).

<sup>136</sup> Unlike the children of a Nepalese man and a foreign spouse, the children of a Nepalese woman and a foreign spouse must be born in Nepal, must reside permanently in Nepal, and must not have acquired citizenship of the foreign country in order to acquire Nepalese citizenship. NEPAL IC, *supra* note 1, at art. 8(7).

<sup>137</sup> See further *Nepali women face citizenship discrimination*, Sept. 29, 2007, UNI, <http://news.oneindia.in/2007/09/29/nepali-women-face-citizenship-discrimination-1191051160.html> (noting that despite intense debate on maintaining gender neutrality, the Citizenship Act failed to treat Nepalese women as equal citizens).

<sup>138</sup> UN OHCHR-Nepal Press Release 2006, *supra* note 135.

<sup>139</sup> Alternatively spelled Tarai Dalits. There are significant geographical and historical distinctions among Dalits in Nepal. WB/DFID, *Unequal Citizens*, *supra* note 44, at 5. The Terai Dalits, typically of Madhesi ethnicity, live in the plains region located in the southern part of Nepal, bordering India. *Id.* and UNESCO, FORMS AND PATTERNS OF SOCIAL DISCRIMINATION IN NEPAL 9 (2006). The Hill Dalits, generally of Parbatiya ethnicity, live in the region that ranges in altitude from 610 to 4876 meters above sea level WB/DFID, *Unequal Citizens*, *supra* note 44, at 5 and UNESCO, *supra* note 139, at 8. The Hill Dalits comprise approximately 61 percent of Dalits in Nepal and generally have a higher socio-economic status than Terai Dalits. CASTE-BASED DISCRIMINATION IN NEPAL, *supra* note 9, at xiv and WB/DFID, *Unequal Citizens*, *supra* note 44, at xxi.

<sup>140</sup> *Citizenship Acquiring Process Eased*, KANTIPUR ONLINE, Sept. 6, 2006,

<http://www.kantipuronline.com/kolnews.php?&nid=85249>. See *supra* note 124 for discussion on citizenship requirements.

<sup>141</sup> *Citizenship paper distribution on*, THE HIMALAYAN TIMES, Jan. 23, 2007.

<sup>142</sup> *Dalits Still Deprived of Citizenship Papers*, THE HIMALAYAN TIMES, Apr. 24, 2007; Tek Tamrakar, Human Rights Consultant, Feminist Dalit Organization, *Sub-Commission on the Promotion And Protection of Human Rights Working Group on Minorities, 12th Session, August 2006, Geneva, Switzerland*, ¶ 3, [http://www2.ohchr.org/english/issues/minorities/docs/12/Feminist\\_dalit\\_organization\\_fedo.doc](http://www2.ohchr.org/english/issues/minorities/docs/12/Feminist_dalit_organization_fedo.doc).

<sup>143</sup> ICERD, *supra* note 59, at art. 1; ICESCR, *supra* note 50, at art. 2.2.; ICCPR, *supra* note 61, at art. 26.

<sup>144</sup> ICERD, *supra* note 59, at art. 1.

<sup>145</sup> CERD Committee, *General Recommendation No. 29*, *supra* note 67, at ¶ 111 (explaining that “discrimination based on ‘descent’ includes discrimination against members of communities based on forms of social stratification such as caste and analogous systems of inherited status which nullify or impair their equal enjoyment of human rights”). See also CHR[G], *Hidden Apartheid*, *supra* note 12, at 3.

<sup>146</sup> See CERD Committee, *General Recommendation No. 14: Definition of racial discrimination*, ¶ 2, U.N. Doc A/48/18 at 114 (Mar. 22, 1993) [hereinafter *CERD Committee General Rec. No. 14*]. HRC, *General Comment No. 18: Non-Discrimination*, ¶ 7, U.N. Doc. HRI\GEN\1\Rev.1 (Nov. 10, 1989) [hereinafter HRC, *General Comment No. 18*]. See further CHR[G], *Irreversible Consequences: Racial Profiling and Lethal Force in the “War on Terror”* 21 (2006).

<sup>147</sup> *Id.*

<sup>148</sup> NEPAL 1990 CONST., *supra* note 3, at art. 11. Specifically, Article 11(1) stated that “[a]ll citizens shall be equal before the law,” and “[n]o person shall be denied the equal protection of the laws.” Further, Article 11(2) provided that “[n]o discrimination shall be made against any citizen in the application of general laws on the grounds of . . . caste,” and Article 11(3) stated that “[t]he state shall not discriminate among citizens on grounds of . . . caste.” Finally, Article 11(4) read that “[n]o person shall, on the basis of caste, be discriminated against as untouchable, be denied access to any public place, or be deprived of the use of public utilities,” and that, “[a]ny contravention of this provision shall be punishable by law.”

<sup>149</sup> A study conducted in 2000 by the Forum for Women, Law and Development (a Kathmandu-based NGO), for example, identified a total of 118 provisions in Nepalese laws, regulations, and its constitution that discriminated against women in the areas of social, economic, political, and family life, including citizenship,

inheritance, marriage, adoption, and domestic and foreign employment. CHRGI, *Missing Piece of the Puzzle*, *supra* note 2, at 14-15.

<sup>150</sup> Nepal Civil Code, Chapter 19 of Adal (1963) (“If any one treats any person discriminatorily as an untouchable on the basis of a caste...such person *may* be imprisoned up to one year or fined up to three thousand rupees or both.”) (emphasis added). Excerpted in LANCAU, STATUS OF DISTRIBUTION, *supra* note 13, at 15. According to a study conducted by LANCAU, not a single person in 2006 was taken into custody for the crime of untouchability. LANCAU, STATUS OF DISTRIBUTION, *supra* note 13, at 34.

<sup>151</sup> See LANCAU, STATUS OF DISTRIBUTION, *supra* note 13, at 31. The Nepalese Government has acknowledged that post-1990 legislative acts “[have] not been effective as expected.” *Nepal Report to the CERD Committee 2003*, *supra* note 16, at ¶ 61.

<sup>152</sup> For example, despite recognizing that a particular law violated the 1990 Constitution’s non-discrimination provisions because of its unequal impact on women, the Supreme Court refused to declare the law unconstitutional, explaining:

Before declaring [the law] unconstitutional . . . the negative sides of [such a decision] should also be taken into account. This exerts a great impact on the structure of the patriarchal society like ours, handed down from ancient times. . . Making sudden changes in traditional social practices and in matters of social norms pursued by the society since a long time ago, may create problems in connection with adjustment in the society.

*Dhungana v. His Majesty's Government Ministry of Law*, Supreme Court of Nepal, Special Bench (August 3, 1995).

<sup>153</sup> *Supra* n. 105.

<sup>154</sup> HRC, *Nepal Concluding Observations 1994*, *supra* note 105, at ¶ 7.

<sup>155</sup> CERD Committee, *Nepal Concluding Observations 2004*, *supra* note 67, at ¶12. In drafting its Concluding Observations, the CERD considered Nepal’s fifteenth and sixteenth periodic reports submitted to it under Article 9 of ICERD.

<sup>156</sup> *Id.*

<sup>157</sup> *Id.* (stressing that prompt and impartial investigations are paramount in counteracting discriminatory attitudes and practices).

<sup>158</sup> *Id.* at ¶ 16.

<sup>159</sup> CEDAW Committee, *Nepal Concluding Comments 2004* *supra* note 103. In drafting its Concluding Observations, the CEDAW Committee considered Nepal’s combined second and third period report submitted to it under Article 18 of CEDAW.

<sup>160</sup> *Id.* at ¶ 18.

<sup>161</sup> *Id.* at ¶ 26.

<sup>162</sup> See WB/DFID, *Unequal Citizens*, *supra* note 44, at 5, 25, 27 (citing Census 2001, CBS, HMG/N).

<sup>163</sup> *Nepal Concluding Comments 2004* *supra* note 103, at ¶ 30.

<sup>164</sup> CRC Committee, *Nepal Concluding Observations 2005* *supra* note 104, at ¶ 35. In drafting its Concluding Observations, the CERD Committee considered Nepal’s second periodic report submitted to it under Article 44 of the CRC.

<sup>165</sup> *Id.* at ¶ 36.

<sup>166</sup> *Id.* at ¶ 61.

<sup>167</sup> *Id.* at ¶ 75.

<sup>168</sup> *Id.* at ¶ 92.

<sup>169</sup> See Tshepo L. Mosikatsana, *Children's Rights and Family Autonomy in the South African Context: A Comment on Children's Rights under the Final Constitution*, 3 MICH. J. RACE & L. 341 (1998).

<sup>170</sup> NEPAL IC, *supra* note 1, at Preamble.

<sup>171</sup> Preambles serve as “a key to open the mind of the makers, as to the mischiefs which are to be remedied and the objects which are to be accomplished by the provisions of the statute.” JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 459 (5th ed. 1891) (1833) “[The] importance of examining the preamble, for the purpose of expounding the language . . . has been long felt, and universally conceded.”

<sup>172</sup> In particular, Article 26 of the ICCPR includes the following non-exhaustive list of grounds on which discrimination is prohibited: “race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.” ICCPR, *supra* note 50

<sup>173</sup> ICERD, *supra* note 59, at art. 1.

<sup>174</sup> ICERD, *supra* note 59, at art. 1; ICCPR, *supra* note 50, at art. 26; ICESCR, *supra* note 50, at art. 2.2;

<sup>175</sup> For example, the ICCPR utilizes non-exhaustive lists in its provisions that guarantee the rights contained therein and prohibit discrimination. ICCPR, *supra* note 50, at art. 26 (“All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”) (emphasis added).

<sup>176</sup> See e.g., *Dalit Advocates Fight Prejudice and Superstition in Villages of Nepal*, The Advocacy Project, Oct. 27, 2005, available at <http://advocacynet.org/resource/573> (describing a Jagaran Media Center investigation which found that Dalits in the town of Nepalgunj who worked for upper castes received rice as compensation instead of money; one Dalit man received US\$40 in rice for a year’s work that would typically pay US\$570).

<sup>177</sup> *Nepal Report to the CERD Committee 2003*, *supra* note 16 at ¶ 99 (“The Government stands firm in its commitment to the principle of equal pay for work of equal value without any discrimination as to sex, race, caste, religion, ethnicity or creed.”)

<sup>178</sup> CEDAW, *supra* note 60, at art. 3 (“States Parties shall take in all fields, in particular in the political, social, economic and cultural fields, all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.”); ICERD, *supra* note 59, at art. 1(4) (“Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups . . . shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.”). See also ESCR Committee, *General Comment No. 16*, *supra* note 111, at ¶ 15 (“Temporary special measures may sometimes be needed in order to bring disadvantaged or marginalized persons or groups of persons to the same substantive level as others.”); CERD Committee, *General Recommendation No. 29*, *supra* note 67, at ¶¶ 1(e), 2(l), 6(bb) (“[T]he principle of equality sometimes requires States parties to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the Covenant.”); HRC, *General Comment No. 4: Equality Between the Sexes*, ¶ 2, U.N. Doc. A/36/40 (1981) [hereinafter HRC, *General Comment No. 4*]. Under CEDAW, states must account for the three types of measures provided in the treaty: general measures to improve women’s rights; temporary special measures to enable the achievement of substantive equality between women and men (Article 4(1)); and permanent gender-specific special measures required by biological difference (Article 4(2)). See Diane Elson, *Budgeting for Women’s Rights: Monitoring Government Budgets for Compliance with CEDAW* 50 (2006).

<sup>179</sup> The 1990 Constitution did not devote a separate article to the prohibition of caste discrimination and untouchability.

<sup>180</sup> As discussed *supra* Section IV.B.1, the CERD Committee defines racial discrimination to include discrimination based on “colour, descent, or national or ethnic origin.”

<sup>181</sup> Except obviously on the ground of “occupation.”

<sup>182</sup> See Uprety, *supra* note 41.

<sup>183</sup> CHR[G], *Missing Piece of the Puzzle*, *supra* note 2, at 7-8.

<sup>184</sup> See ICERD, *supra* note 59, at art. 2(1)(b) & (d). See also CERD Committee, *General Recommendation No. 20: Non-discriminatory implementation of rights and freedoms*, ¶ 5, 48th Sess., U.N. Doc. A/51/18 (1996) (“[T]o the extent that private institutions influence the exercise of rights or the availability of opportunities, the State Party must ensure that the result has neither the purpose nor the effect of creating or perpetuating racial discrimination.”).

<sup>185</sup> ICCPR, *supra* note 50, at art. 2(1). See also HRC, *General Comment No. 15*, *supra* note 52, at ¶ 2.

<sup>186</sup> ICCPR, *supra* note 50, at art. 6. See also HRC, *General Comment No. 6: The Right to Life*, ¶¶ 2-4, 16th mtg, U.N. Doc. A/37/40 (1982) [hereinafter HRC, *General Comment No. 6*].

<sup>187</sup> ICCPR, *supra* note 50, at art. 7. See also HRC, *General Comment No. 20: Article 7: Replaces General Comment 7 Concerning Prohibition of Torture and Cruel Treatment or Punishment*, ¶¶ 1-15, 44th mtg, U.N. Doc. A/47/40 (1992) [hereinafter HRC, *General Comment No. 20*].

<sup>188</sup> ICCPR, *supra* note 50, at art. 8. See also HRC, *General Comment No. 28*, *supra* note 112, at ¶ 12.

<sup>189</sup> ICCPR, *supra* note 50, at art. 9. See also HRC, *General Comment No. 8, Right to Liberty and Security of Persons*, ¶¶ 1-4, 16th mtg, U.N. Doc. A/37/40 (1982) [hereinafter HRC, *General Comment No. 8*].

<sup>190</sup> ICCPR, *supra* note 50, at art. 17. See also HRC, *General Comment No. 16, The Right to Respect of Privacy, Family, Home, and Correspondence, and Protection of Honor Reputation*, ¶¶ 1-1, 32th mtg, U.N. Doc. A/43/40 (1988) [hereinafter HRC, *General Comment No. 16*].

- <sup>191</sup> ICCPR, *supra* note 50, at art. 17. *See also* HRC, *General Comment No. 16*, *supra* note 190, at ¶ 1.
- <sup>192</sup> ICCPR, *supra* note 50, at arts. 14 and 15. *See also* HRC, *General Comment No. 13: Equality Before the Courts and the Right to a Fair and Public Hearing by an Independent Court Established by Law*, ¶¶ 1-19, 21th mtg, U.N. Doc. A/39/40 (1984) [hereinafter HRC, *General Comment No. 13*].
- <sup>193</sup> ICCPR, *supra* note 50, at art. 19. *See also* HRC, *General Comment No. 10: Freedom of Expression*, ¶¶ 1-4, 19th mtg, U.N. Doc. A/38/40 (1983) [hereinafter HRC, *General Comment No. 10*].
- <sup>194</sup> ICCPR, *supra* note 50, at art. 21.
- <sup>195</sup> *Id.* at art. 22.
- <sup>196</sup> *Id.* at art. 23. *See also* HRC, *General Comment No. 28*, *supra* note 112, at ¶ 23 (“States are required to treat men and women equally in regard to marriage in accordance with article 23, which has been elaborated further by General Comment No. 19 (1990). Men and women have the right to enter into marriage only with their free and full consent, and States have an obligation to protect the enjoyment of this right on an equal basis. Many factors may prevent women from being able to make the decision to marry freely.”).
- <sup>197</sup> ICCPR, *supra* note 50, at art. 25. *See also* HRC, *General Comment No. 25*, *supra* note 110, at ¶¶ 1-27. *See infra* Section III.C.1.
- <sup>198</sup> ICCPR, *supra* note 50, at art. 25. *See also* HRC, *General Comment No. 25*, *supra* note 110, at ¶¶ 1-27.
- <sup>199</sup> ICCPR, *supra* note 50, at art. 27. *See also* HRC, *General Comment No. 23: The Rights of Minorities*, ¶¶ 1-9, 50th mtg, U.N. Doc. A/49/40 (1994) [hereinafter HRC, *General Comment No. 23*].
- <sup>200</sup> ICCPR, *supra* note 50, at art. 18(1).
- <sup>201</sup> HRC, *General Comment No. 22: The Right to Freedom of Thought, Conscience and Religion*, 48th Sess., ¶¶ 7, 8 U.N. Doc., A/48/40 vol. I (1993) (“In interpreting the scope of permissible limitation clauses [on the freedom of religion], States parties should proceed from the need to protect the rights guaranteed under the Covenant, including the right to equality and non-discrimination . . .”).
- <sup>202</sup> ICCPR, *supra* note 50, at art. 12. *See also* HRC, *General Comment No. 27: Freedom of Movement*, ¶¶ 1-21, 67th mtg, U.N. Doc. A/55/40 (1999) [hereinafter HRC, *General Comment No. 27*].
- <sup>203</sup> HRC, *General Comment No. 29: States of Emergency*, ¶ 3, 1950th mtg, U.N. Doc. CCPR/C/21/Rev.1/Add.11 (Aug. 31, 2001) [hereinafter HRC, *General Comment No. 29*].
- <sup>204</sup> “This requirement relates to the duration, geographical coverage and material scope of the state of emergency and any measures of derogation resorted to because of the emergency.” *Id.* at ¶¶ 4 and 5.
- <sup>205</sup> *Id.* at ¶ 4.
- <sup>206</sup> *Id.* at ¶ 8.
- <sup>207</sup> ICCPR, *supra* note 50, at art. 6.
- <sup>208</sup> *Id.* at art. 7.
- <sup>209</sup> *Id.* at art. 8(1).
- <sup>210</sup> *Id.* at art. 8(2).
- <sup>211</sup> *Id.* at art. 11.
- <sup>212</sup> *Id.* at art. 15.
- <sup>213</sup> *Id.* at art. 16.
- <sup>214</sup> *Id.* at art. 18.
- <sup>215</sup> *Report of the High Commissioner for Human Rights 2007*, *supra* note 15, at ¶ 62 (“Deep rooted discrimination in Nepal has profound implications in terms of civil and political as well as economic, social, and cultural rights. Discrimination on the basis of caste, ethnic, gender, geographic, and other considerations has marginalized and excluded millions of Nepali people from full participation in political processes and State institutions as well as equal access to housing, water, land and other such rights.”).
- <sup>216</sup> At the time of its dissolution in May 2002, not a single member of the House of Representatives was a Dalit. CHRGI, *Missing Piece of the Puzzle*, *supra* note 2, at 16. Conversely, while constituting only 16 percent of the population, “upper-caste” *Brahmins* represent 57 percent of parliament and 89 percent of the judiciary. *Id.* at 16. *See also* U.S. Department of State, *Country Reports on Human Rights Practices: Nepal*, (2006) <http://www.state.gov/g/drl/rls/hrrpt/2006/78873.htm> [hereinafter 2006 U.S. State Department Report] (“[T]radition [has] limited the roles of women and some castes in the political process.”).
- <sup>217</sup> *See* CASTE-BASED DISCRIMINATION IN NEPAL, *supra* note 9, at 37-38; CHRGI, *Missing Piece of the Puzzle*, *supra* note 2, at 16. As of 2006, only one Dalit was a member of Prime Minister Koirala’s 20-member cabinet. *See* 2006 U.S. State Department Report, *supra* note 216. In the current interim government, 2 out of 21 Ministers, 2 (9%) Ministers are Dalits. CASTE-BASED DISCRIMINATION IN NEPAL, *supra* note 9 at 73.

<sup>218</sup> CASTE-BASED DISCRIMINATION IN NEPAL, *supra* note 9, at 38. Additionally, women comprise only 17 percent of the Interim Legislature, despite being promised 33 percent of the seats (itself a low number) by the House of Representatives. *Id.*

<sup>219</sup> CHRJ, *Missing Piece of the Puzzle*, *supra* note 2, at 16. See CASTE-BASED DISCRIMINATION IN NEPAL, *supra* note 9, at 74. (“Dalits have zero representation in administrative leadership positions.”).

<sup>220</sup> See CASTE-BASED DISCRIMINATION IN NEPAL, *supra* note 9, at 75 (“Of the total 1,011 leadership positions in [the] judiciary, constitutional bodies and commissions, Council of Ministers, public administration, legislature-parliament, political parties, DDC presidents, municipality industry and trade, education, culture, science and technology, civil society sector, Dalits’ representation is [only 0.3%].”). Indeed, not only have non-Dalit legislators disregarded Dalit issues, they have actively enforced the discriminatory caste system. For example, on September 13, 2007, Member of Parliament Narendra Bam beat an 18-year-old Dalit woman for touching a public tap while bathing. Prakash Mohara, *Member of Parliament Beat a Dalit Woman*, Jagaran Media Center, (Sept. 14, 2007) <http://www.jagaranmedia.org.np/jagaran-media-nepal-dalit-news.php?id=56>. The local police department took no action. *Id.*

<sup>221</sup> CHRJ, *Missing Piece of the Puzzle*, *supra* note 2, at 16 (citing Jana Utthan Pratishan (JUP), Dalit in Nepal and Alternative Report for WCAR 1-2 27 (2001)).

<sup>222</sup> See CASTE-BASED DISCRIMINATION IN NEPAL, *supra* note 9, at 74-78. As of 2007, only one Dalit served on the Nepalese Congress Party’s 37-member Central Committee, only one Dalit served on the 59-member Nepal Communist Party-Unified Marxist Leninist Party Central Committee, one Dalit served on the 45-member Nepalese Congress-Democratic Central Committee, and only one Dalit served on the 35-member Communist Party of Nepal- Maoist Central Committee. *Id.*

<sup>223</sup> Reservations, or quotas, are used in the Indian Constitution as a permissible tool to reserve slots for the appointment or promotion of citizens from historically excluded groups to public positions. CONSTITUTION OF INDIA, art. 16(4) and 4(a).

<sup>224</sup> CHRJ, *Missing Piece of the Puzzle*, *supra* note 2, at 15-16. See also *supra* Section III.A.2 regarding Dalits’ exclusion from the ICDC.

<sup>225</sup> LANCAU, STATUS OF DISTRIBUTION, *supra* note 13, at 36.

<sup>226</sup> *Report of the High Commissioner for Human Rights Sept. 2006*, *supra* note 14. (“Representation of marginalized groups in the peace process continues to be an issue only partially addressed.”)

<sup>227</sup> *Nepal Report to the CERD Committee 2003*, *supra* note 16, at Executive Summary §(a) (“The representation of the underprivileged communities in decision-making bodies is not adequate.”).

<sup>228</sup> CERD Committee, *Nepal Concluding Observations 2004*, *supra* note 67, at ¶ 17.

<sup>229</sup> *Nepal Report to the CERD Committee 2003*, *supra* note 16, at ¶ 76.

<sup>230</sup> The Maoist insurgents built considerable support amongst Dalits and women, as their campaign included public humiliation and punishment schemes against those who practiced caste and gender discrimination. CHRJ, *Missing Piece of the Puzzle*, *supra* note 2, at 17. The Maoist insurgents’ formal agenda was articulated in a “Forty Point Plan,” which contained their core demands. Many of these demands focused on ending racial and caste discrimination, ensuring greater inheritance rights for women, and allowing for local autonomy where indigenous groups predominate. The Forty Point Demand of the United People’s Front (Feb. 1996), *reprinted in HIMALAYAN PEOPLE’S WAR: NEPAL’S MAOIST REBELLION* 285-87 (Michael Hutt ed., 2004).

<sup>231</sup> CHRJ, *Missing Piece of the Puzzle*, *supra* note 2, at 33. See also Ian Martin, Representative of the United Nations High Commissioner for Human Rights in Nepal, Address On the occasion of International Day for the Elimination of Racial Discrimination Event hosted by the National Dalit Commission and the Dalit NGO Federation Members, Kathmandu (Mar. 21, 2006) (“Members of Dalit communities across Nepal, already suffering a denial of fundamental rights under the centuries-old caste system, and members of indigenous nationalities, have suffered further denial of their rights in context of armed conflict.”). See also Dalit Issues of Nepal for New Constitution, *supra* note 114, at ¶ 62 (“[The] Dalit community suffered [the] most – both from the State and the rebels during the 10-year-long insurgency. The State should conduct [an] investigation to find out truths about the affected Dalit community during the war and make arrangements for their proper rehabilitation.”).

<sup>232</sup> See 2006 U.S. State Department Report, *supra* note 216 (“Before the popular uprising in April, security forces continued to commit arbitrary and unlawful killings. According to a local nongovernmental organization (NGO), Informal Sector Service Center (INSEC), security forces killed 247 people between January 1 and November 20. Additionally, Nepal Army (NA) soldiers killed numerous others before the cease-fire declaration on April 27, including those in custody who were tortured, according to NGO sources (see section 1.c.). The National Human Rights Commission (NHRC) reported that the government and Maoist insurgents

killed 43 persons between April 27 and December 31. During the year, the NA's human rights investigative cell conducted 102 new investigations involving 163 individuals. In most cases of arbitrary or unlawful killings, the security forces claimed that the victims were Maoist insurgents.”). See also CHRJ, *Missing Piece of the Puzzle*, *supra* note 2, at 22 (“According to the National Human Rights Commission of Nepal, government security forces have engineered roughly 2,000 extrajudicial killings [between 2001 and 2004.]”).

<sup>233</sup> See *infra* Section III.H. See also Asian Legal Resource Centre, *Alternative report to the 16th periodic report of State Party Nepal to the Committee on the Elimination of Racial Discrimination* 5 (2003) (“An important but often overlooked means of preventing Dalits from uplifting themselves is the systemic use of torture, such as . . . by the police in Nepal. Torture is used as a means to intimidate and silence minority populations, including Dalits. The types of torture include beating with hands and feet, guns and other objects, suffocation, rolling objects on the shins, and beating the soles of the feet with plastic pipes.”).

<sup>234</sup> See 2006 U.S. State Department Report, *supra* note 216 (“Before June 12 [2006], there were disappearances of persons while in the custody of security forces. In some cases, individuals disappeared, and their whereabouts remained unknown until much later when the government acknowledged that the individuals were detained under the Terrorist and Destructive Activities Ordinance (TADO) (see section 1.d.). On June 12, the government repealed TADO and released between 300 and 600 Maoist insurgents held under the act. Under TADO, suspects had to appear before a court within 60 days of their arrest, and the government could hold suspects in preventive detention for 360 days.”); *id.* (“INSEC data of unresolved disappearances lists the government as responsible for the disappearance of 1,305 persons from the beginning of the insurgency in 1996 through 2005. The Maoist insurgents, according to INSEC figures, were responsible for the abduction of 46,794 persons and the disappearance of 8,715 persons in 2005. By [the end of 2006] the government had not prosecuted government officials or Maoists for their involvement in disappearances.”). See also CHRJ, *Missing Piece of the Puzzle*, *supra* note 2, at 22, footnote 153 (“According to the United Nations, Nepal earned the dubious distinction of having the highest number of reported new “disappearances” in the world in both 2003 and 2004.”).

<sup>235</sup> CHRJ, *Missing Piece of the Puzzle*, *supra* note 2, at 33-34 (“Police and security forces regularly assume[d] that Dalit civilians unilaterally support[ed] the Maoists,” and “Dalit communities as a whole [were] collectively and summarily punished by State agents, even when there [was] no evidence of their involvement in the insurgency.”); *id.* at 24. (“In contrast to State forces that detain and abuse their victims in secret, Maoists commit[ed] summary executions and brutal forms of torture in full public view,” in order to “effectively ensure a community’s full cooperation while simultaneously eliminating active opponents who would otherwise challenge the movement.”). See also Tamrakar, *supra* note 142, at ¶ 3 (“In one hand, those suspected of being a Dalit by security officers are also suspected as being Maoist and arrested /detained without due process of law and on the other hand, since they have their own traditional skills to make guns/weapons, shoes and militia uniforms; they are abducted and forcibly appointed as the militia by the Maoist rebellion group.”)

<sup>236</sup> See 2006 U.S. State Department Report, *supra* note 216.

<sup>237</sup> *Id.* See also CHRJ, *Missing Piece of the Puzzle*, *supra* note 2, at 23.

<sup>238</sup> *Report of the United Nations High Commissioner for Human Rights on the situation of human rights and the activities of her Office, including technical cooperation, in Nepal*, ¶ 26, U.N. Doc. E/CN.4/2006/107 (Feb. 16 2006) (“Arbitrary arrest and detention of suspected members of or sympathizers of [the Maoist insurgents] continued to be a major source of complaints. . . . Detainees were often arrested by security officials in plainclothes, without being informed of the reasons, and held in detention without notification to their families or a lawyer. An analysis of cases where habeas corpus writ petitions were filed showed frequent denial of detention (giving rise to cases of disappearances), false or misleading information provided to the court by authorities or security forces, and rearrest after a court ordered release.”).

<sup>239</sup> See 2006 U.S. State Department Report, *supra* note 216.

<sup>240</sup> On November 26, 2001, a state of emergency was declared pursuant to Article 115 of the 1990 Constitution and basic rights and freedoms were accordingly suspended. CHRJ, *Missing Piece of the Puzzle*, *supra* note 2, at 4. On the same day, the TADO act, discussed *supra* Section III.H, was enacted, and a few months later, the Terrorist and Disruptive Activities (Control and Punishment) Act (TADA) came into force. *Id.* According to Human Rights Watch: “TADA grant[ed] sweeping discretionary powers to the security forces in dealing with anyone deemed to be a terrorist, and provid[ed] immunity from prosecution for ‘any act or work performed or attempted to be performed in good faith while undertaking their duties.’ Such a broad grant of immunity. . . fostered a climate of impunity among the Nepali security forces, in clear violation of Nepal’s international obligation to investigate and punish human rights violations.” HRW, *Between a Rock and a Hard Place: Civilians Struggle to Survive in Nepal’s Civil War* 11 (2004) [hereinafter HRW, *Between a Rock and a Hard Place*].

<sup>241</sup> On February 1, 2005, a state of emergency was declared as King Gyanendra vested all executive authority in the monarchy. *Nepal's King Declares Emergency*, BBC NEWS, Feb. 1, 2005, available at [http://news.bbc.co.uk/1/hi/world/south\\_asia/4224855.stm](http://news.bbc.co.uk/1/hi/world/south_asia/4224855.stm). King Gyanendra dismissed the country's government, effectively banned political party activity and arrested political leaders. CHR[G], *Missing Piece of the Puzzle*, *supra* note 2, at 25. During this state of emergency, the use of force was exercised against private citizens and students, media was severely restricted, journalists and human rights activists were detained, and a number of political activists and human rights defenders were “disappeared” by State security forces. *Id.*

<sup>242</sup> CHR[G], *Missing Piece of the Puzzle*, *supra* note 2, at 33 (“The militarization of the conflict...exacerbated [the] caste dynamics and the resulting abuses against Dalits in Nepal. Historically, the Nepalese army was built around caste lines. In 1768, Nepal's first monarch, King Prithvinarayan Shah, built an army whose senior ranks were composed almost entirely of “upper-caste” *Chetris* – the warrior caste. “Lower-caste” community members, including Dalits, were excluded. Building on these origins, caste structures persist[ed] in the modern army and serve[d] to reinforce discriminatory caste-based practices. The overwhelming majority of senior officers in the RNA continue[d] to hail from the “upper-caste” *Chetri* community. Only lower service units contain[ed] Dalits. According to one estimate, the “upper castes,” who form[ed] only thirty five percent of the general population, constitute[ed] 98 percent of all army officers. Within this context, Dalits [were] extremely vulnerable to human rights abuses. *Chetri* officers [might have been] more likely to trust information provided by villagers of their own caste and [might have been] inherently suspicious of and abusive toward Dalit villagers.”).

<sup>243</sup> See CASTE-BASED DISCRIMINATION IN NEPAL, *supra* note 9, at 19 (explaining that one of the main concerns of the Dalit movement over the past five decades has been the denial of Dalits' entry into Hindu temples). See also CHR[G], *Missing Piece of the Puzzle*, *supra* note 2, at 7.

<sup>244</sup> 2005 ILO Report, *supra* note 22, at 44-45.

<sup>245</sup> CHR[G], *Missing Piece of the Puzzle*, *supra* note 2, at 6.

<sup>246</sup> See Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, ¶ 47, U.N. Doc. E/CN.4/2001/9/Add.2 (Aug. 9, 2000) [hereinafter *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions 2000*] (“Although the 1990 Constitution largely reflects Nepal's international human rights commitments, it is clear that national legislation and the enforcement of domestic laws still need to be brought into line with these standards. The situation is particularly critical in the sphere of criminal justice and procedural law.”). See *infra* Section III.I.

<sup>247</sup> HRC, *Nepal Concluding Observations 1994*, *supra* note 104, at ¶10.

<sup>248</sup> CAT Committee, *Nepal Conclusions and Recommendations 2007*, *supra* note 107, at ¶14(b).

<sup>249</sup> *Report of the High Commissioner for Human Rights Jan. 2007*, *supra* note 15, at ¶ 8.

<sup>250</sup> For example, in her 2000 report to the United Nations Commission on Human Rights, Ms. Asma Jahangir, then-Special Rapporteur on extrajudicial killings and summary or arbitrary executions, concluded that Nepal's human rights record was “dismal,” citing instances of Nepalese security forces using excessive and indiscriminate force against unarmed civilians, carrying out extrajudicial killings, and the largely ineffective right of habeas corpus. *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions 2000*, *supra* note 246, at ¶¶10, 14, 18, 20.

<sup>251</sup> NEPAL IC, *supra* note 1, at art. 12.

<sup>252</sup> ICCPR, *supra* note 50, at art. 23. See *infra* Section III.F on women's rights.

<sup>253</sup> CHR[G], *Missing Piece of the Puzzle*, *supra* note 2, at 7.

<sup>254</sup> See Dalit Issues of Nepal for New Constitution, *supra* note 114, at ¶ 34 (“The Constitution should ensure that the fundamental and human rights of the Dalit community are not violated in the name of social norms and values.”).

<sup>255</sup> NEPAL IC, *supra* note 1, at art. 142

<sup>256</sup> *Id.* at art. 21.

<sup>257</sup> See *supra* III.C.2.

<sup>258</sup> The 2007 Dalit Charter called for Dalits' proportional representation in the government. See 2007 Dalit Charter, *supra* note 108, at ¶ 5 (stating that “[a] compulsory provision should be made for the proportional representation of [the] Dalit community . . . on the basis of their population in the representative, constitutional and all other bodies of the State.”). See also Dalit Issues of Nepal for New Constitution, *supra* note 114, at ¶ 7 (“Matters pertaining to Dalit rights should be clearly stated in the constitution for effective implementation of provisions regarding proportional representation of Dalit community in constitutional and all other bodies of the state including legislative, executive, and judiciary.”).

An analysis of the April 10, 2008 Constituent Assembly electoral process demonstrates the importance of a proportional representation system to Dalits' equal representation in Nepal. The 601 member Constituent Assembly was elected using a "mixed electoral system." NEPAL IC, *supra* note 1, at art. 63(3). Specifically, 335 members were elected through a proportional representation system and 240 members were elected through a "first-past-the-post" ("FPTP") system. *Id.* at art. 3(a)—(b). Dalits were constitutionally guaranteed seats in the proportional representation system; the Constituent Assembly Members Election Act of 2007 set the requirement at 13 percent (6.5 percent for Dalit women and 6.5 percent for Dalit men). *Id.* at art. 4; Nepal Election Portal, Election in Nepal <http://www.nepalelectionportal.org/EN/elections-in-nepal/electoral-system.php>. Regarding the FPTP seats, no such requirement existed, and only 4 percent of the candidates nominated were Dalits. The Advocacy Project, *Women, Dalit Seek Change From Historic Elections in Nepal* (Apr. 9, 2008) available at <http://www.advocacynet.org/resource/1146>. As a result of the mixed electoral system, Dalits comprised only 11 percent of the total Constituent Assembly candidates within Nepal's three major political parties. Tek Tamrakar, *Distribution of CA Candidates from 3 major political parties by selected characteristics*, 2008 (indicating that of the 1165 total Constituent Assembly candidates nominated by the CPN,UML, and Nepali Congress parties, only 129 are Dalits.) (on file with author). This percentage demonstrates two critical points regarding Dalit representation. First, proportional representation election systems are needed to ensure true representative equality, as Dalits were almost completely excluded through the FPTP system. Second, the proportional representation system must be based on accurate population numbers, as the 13 percent number was based on an underestimation of the Dalit population. *See supra* n. 37 regarding population figures.

<sup>259</sup> *Nepal Report to the CERD Committee 2003*, *supra* note 16, at ¶¶ 23, 61, 68 and 75.

<sup>260</sup> *See supra* Section II.A.1.

<sup>261</sup> *See supra*, n. 37.

<sup>262</sup> *Id.*

<sup>263</sup> *Id.*

<sup>264</sup> The following only contains those clauses of Article 143 that are relevant to the current analysis.

<sup>265</sup> The 2007 Dalit Charter calls for a "constitutional provision for the participation, representation and access of Dalit . . . communities at all levels and bodies of the political parties." 2007 Dalit Charter, *supra* note 108, at ¶4.

<sup>266</sup> *See* CASTE-BASED DISCRIMINATION IN NEPAL, *supra* note 9, at 75 ("Dalits are invisible in central committees of political parties as they comprise 1.35% of the total members.").

<sup>267</sup> "[F]or the . . . disadvantaged groups [other than women], there is no [legally mandated] system of nomination [within political parties]. It therefore depends entirely upon the conscience of the respective political parties to nominate such candidates in the elections. . . . The political parties have to give serious thought to nominating more candidates from these communities so that their voice may be heard at the national level and also to include them in the mainstream of national politics." *Nepal Report to the CERD Committee 2003*, *supra* note 16, at ¶ 93 (also noting as a "positive development" that two positions at the national level were filled by Dalits).

<sup>268</sup> Dalit NGOs and activists in Nepal have demanded that the new constitution require that the country's political parties include 20 percent Dalit participation. *See* Dalit Issues of Nepal for New Constitution, *supra* note 114, at ¶ 14 ("The Constitution should specify that each political party should have the participation of at least 20 percent Dalits.").

<sup>269</sup> Article 23 of the Interim Constitution, and its equivalent in the new constitution, should be interpreted in line with Article 18 of the ICCPR which protects "freedom of thought [and] conscience." As written, Article 23 of the Interim Constitution does not enumerate these freedoms. As the HRC has explained, "the freedom of thought and the freedom of conscience are protected equally with the freedom of religion and belief." HRC, *General Comment No. 22*, *supra* note 201, at ¶ 1. These rights are "far-reaching and profound" and encompass "freedom of thought on all matters, personal conviction and the commitment to religion or belief, whether manifested individually or in community with others." *Id.* Article 18 of the ICCPR "protects theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief," and is "not limited in its application to traditional religions or to religions and beliefs with institutional characteristics or practices analogous to those of traditional religions." *Id.* at ¶ 2.

<sup>270</sup> *See* CASTE-BASED DISCRIMINATION IN NEPAL, *supra* n. 9, at 19 (explaining that caste discrimination occurs in both the Hindu and Christian communities).

<sup>271</sup> *See* ICCPR, *supra* note 50, at art. 18(3). *See also* HRC, *General Comment No. 22*, *supra* note 201, at ¶¶ 7-8. Dalit NGOs and activists in Nepal have called for the prohibition of the use of religion and social norms and values as a continued justification for caste-based discrimination. *See* Dalit Issues of Nepal for New Constitution,



*supra* note 114, at ¶ 3 (“The system of local governance should not give any concession to any religion and cultural heritage that allows caste discrimination and untouchability towards Dalits at home and place of residence.”); *id.* at ¶ 34 (“[T]he Constitution should ensure that the fundamental and human rights of the Dalit community are not violated in the name of social norms and values.”).

<sup>272</sup> See ICCPR, *supra* note 50, at art. 4(1).

<sup>273</sup> *Id.* at art. 11.

<sup>274</sup> *Id.* at art. 16.

<sup>275</sup> The Interim Constitution does not include any provisions equivalent to either Article 11 or Article 16 of the ICCPR.

<sup>276</sup> See HRC, *General Comment No. 29*, *supra* note 203, at ¶4.

<sup>277</sup> *Nepal Report to the CERD Committee 2003*, *supra* note 16, at ¶ 41.

<sup>278</sup> Nahakul Subedi, *Economic and Social Rights: Constitutional Aspiration and their Enforceability*, National Judicial Academy Nepal, NJA LAW JOURNAL, Vol. 1, No. 1, 2007, 113 (adding that “one of the major reasons behind the issuance of Interim Constitution is the progressive restructuring of the state to resolve existing problems based on class, caste, religion gender, etc”). See also, Bishwa Nath Tiwari, *An Assessment of the Causes of Conflict in Nepal*, Second Annual Himalayan Policy Research Conference, at 12, Nepal Study Centre, Madison (Oct. 2007), [https://repository.unm.edu/dspace/bitstream/1928/3294/1/BishwaNathTiwari\\_Nepal\\_CausesofConflict\\_pdf.pdf](https://repository.unm.edu/dspace/bitstream/1928/3294/1/BishwaNathTiwari_Nepal_CausesofConflict_pdf.pdf) (discussing studies that assert that “economic factors such as inequality, landlessness, and a general lack of opportunity reinforced by complex systems of caste and related discriminatory patterns” have motivated and supported the Maoist cause.”).

<sup>279</sup> Nepal is required to take steps to fulfill its obligations under the ICESCR “with a view to achieving progressively the full realization of the rights recognized” in the Covenant. ICESCR, *supra* note 50, at art. 2(1). See also ESCR Committee, *General Comment No. 3*, *supra* note 56, at ¶ 2; ESCR Committee, *General Comment No. 12: The Right to Adequate Food*, 20th Sess., ¶ 43, U.N. Doc. E/C.12/1999/5 (May 12, 1999) [hereinafter, ESCR Committee, *General Comment No. 12*]; ESCR Committee, *General Comment No. 14: The Right to the Highest Attainable Standard of Health*, ¶ 31, 21st Sess., U.N. Doc. E/C.12/2000/4 (Aug. 11, 2000) [hereinafter ESCR Committee, *General Comment No. 14*]; ESCR Committee, *General Comment No. 15: The Right to Water*, ¶ 17, 29th Sess., U.N. Doc. E/C.12/2002/11 (Jan. 20, 2003) [hereinafter ESCR Committee, *General Comment No. 15*]. As the ESCR Committee explained, the concept of progressive realization “constitutes a recognition of the fact that full realization of all economic, social and cultural rights will generally not be able to be achieved in a short period of time.” ESCR Committee, *General Comment No. 3*, *supra* note 56, at ¶ 9. Nevertheless, the ICESCR “imposes an obligation to move as expeditiously and effectively as possible towards the full realization of the rights in question.” *Id.* Further, steps towards full realization of rights should be “deliberate, concrete and targeted as clearly as possible.” *Id.* at ¶ 2; ESCR Committee, *General Comment No. 12* *supra* note 279, at ¶ 14; ESCR Committee, *General Comment No. 14*, *supra* note 279, at ¶ 30; ESCR Committee, *General Comment No. 15*, *supra* note 279, at ¶ 17. The ICESCR also cautions State parties not to take deliberately retrogressive measures with regards to the fulfillment of these rights. ESCR Committee, *General Comment No. 3*, *supra* note 56, at ¶ 9.

<sup>280</sup> ESCR Committee, *General Comment No. 3*, *supra* note 56, at ¶ 2; ESCR Committee, *General Comment No. 12* *supra* note 279, at ¶ 43; ESCR Committee, *General Comment No. 13: The Right to Education*, ¶ 31, 21st Sess., U.N. Doc. E/C.12/1999/10 (Dec. 8, 1999) [hereinafter, ESCR Committee, *General Comment No. 13*]; ESCR Committee, *General Comment No. 14*, *supra* note 279, at ¶ 31; ESCR Committee, *General Comment No. 15*, *supra* note 279, at ¶ 17. The progressive realization concept does not apply to Nepal’s obligation to ensure non-discrimination in the provision of economic, social, and cultural rights, as enshrined in Article 2(2) of the ICESCR. Similarly, this non-discrimination obligation is not contingent on the availability of resources. The obligation applies fully and immediately to all economic, social and cultural rights. ESCR Committee, *General Comment No. 3*, *supra* note 56, at ¶ 2; ESCR Committee, *General Comment No. 12*, *supra* note 279, at ¶ 43; ESCR Committee, *General Comment No. 14*, *supra* note 279, at ¶ 31; ESCR Committee, *General Comment No. 15*, *supra* note 279, at ¶ 17.

<sup>281</sup> See *supra* note 279.

<sup>282</sup> ESCR Committee, *General Comment No. 16*, *supra* note 111, at ¶¶ 6-9.

<sup>283</sup> The ESCR Committee has stated that the guarantee of non-discrimination in Article 2(2) and the guarantee of equal enjoyments of rights in Article (3) are “integrally related and mutually reinforcing.” *Id.* at ¶ 3.

Moreover, “the elimination of discrimination is fundamental to the enjoyment of economic, social and cultural rights on a basis of equality.” *Id.*

<sup>284</sup> *Id.* at ¶ 15.

<sup>285</sup> ICESCR, *supra* note 50, at art .6.

<sup>286</sup> *Id.* at art. 7.

<sup>287</sup> *Id.* at art. 10; CRC, *supra* note 64, at art. 32 (requiring State parties to “recognize the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child’s education, or to be harmful to the child’s health or physical, mental, spiritual, moral or social development.”).

<sup>288</sup> ICESCR, *supra* note 50, at art. 13. The right to education is one of the most detailed rights set out in the ICESCR. States have numerous obligations in fulfilling this right, including ensuring that primary education is free and compulsory for all, and that “[s]econdary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education.” *Id.* at art. 13(2).

<sup>289</sup> *Id.* at art. 11(1).

<sup>290</sup> *Id.* at art. 11(2).

<sup>291</sup> *Id.* at art. 9.

<sup>292</sup> CERD, *supra* note 16, at art. 2(2).

<sup>293</sup> *Id.* at art. 5(e). Particular importance is attached to non-discrimination in labor and employment rights, the right to housing, the right to health, the right to education, the right to social security, and the right of access to any place or service intended for use by the general public, such as transport, hotels, restaurants, cafes, theatres and parks. *Id.* at art. 5(e) and (f).

<sup>294</sup> 2005 ILO Report, *supra* note 22, at xiv.

<sup>295</sup> *Id.* at 41. Article 2(1) of the ILO Convention No. 29 defines forced labor as “all work or service which is extracted from any person under the menace of penalty and for which the said person has not offered himself voluntarily.”

<sup>296</sup> *Haliya* is a form of patron-client relationship in which “a landlord patron lets his Dalit client cultivate his land and gives him food or shelter, or both,” 2005 ILO Report, *supra* note 22, at 43. See more detailed discussion of the *Haliya* system *infra* Section III.D.2.

<sup>297</sup> 2005 ILO Report, *supra* note 22, at 44 (stating that police personnel and men from other castes often “barge into Badi houses at midnight and rape Badi women even in the presence of the members of their families,” and that the lack of other options also pushes some Badi women to engage in prostitution)

<sup>298</sup> *Id.* at 44 (stating that Chamars in the Terai and Sarkis in the hills have traditionally disposed of carcasses, but are increasingly unwilling to conduct this work unless adequately remunerated.); *Id.* at 41.

<sup>299</sup> *Id.* at 44.

<sup>300</sup> 71 percent of Dalits surveyed had been threatened with denial of access to labor. *Id.* at 44. About 60 percent of Dalits were threatened with exclusion from social and religious gatherings; 41 percent were threatened with denial of access to public water; 40 percent faced exclusion from community decision-making processes; 35 percent faced verbal harassment; and 21 percent faced physical harassment. Other threats for resisting forced labor include ex-communication, imposition of monetary penalties, denial of access to temples, exclusion from the village, denial of access to public roads and trails, and denial of the ability to sell products and services. *Id.* at 44-45.

<sup>301</sup> *Id.*

<sup>302</sup> CHR[G], *Missing Piece of the Puzzle*, *supra* note 2, at 39, citing ILO, *Discrimination and Forced Labor of Occupational Castes in Nepal*, at 77 (2003) [hereinafter 2003 ILO Report], available at <http://www.idsn.org/tekst/developments.htm> (last visited Nov. 1, 2007).

<sup>303</sup> CHR[G], *Missing Piece of the Puzzle*, *supra* note 2, at 11 (citing 2003 ILO Report, *supra* note 302, at 55).

<sup>304</sup> 2005 ILO Report, *supra* note 22, at 23 (stating that as “...‘upper castes’ do not accept water and most food items from Dalit establishments, petty businesses involving the sale of these items are out of the question in most cases. In addition, as dealing with a Dalit is perceived as ritually defiling, other businesses entailing Dalit-‘upper caste’ transactions are also difficult propositions.”)

<sup>305</sup> *Id.* at 23. The Dalit respondents in an ILO survey stated that they still practiced their traditional occupations such as blacksmith work, tailoring, leatherwork, goldsmith work, copper/bronze work, earth-digging, sweeping and cleaning, ploughing, musical instrument playing, human waste disposal, and carcass disposal. These occupations were performed on an ad hoc basis and did not contribute much to the household’s livelihood. *Id.* at xiv.

<sup>306</sup> 2003 ILO Report, *supra* note 302, at 72 and 73.

<sup>307</sup> *Id.*

<sup>308</sup> Kamaiya Labour Prohibition Act, 2058 (B.S.).

<sup>309</sup> ESCR Committee, *Nepal Concluding Observations 2008*, *supra* note 33, at ¶ 11; CERD Committee, *Nepal Concluding Observations 2004*, *supra* note 68, at ¶ 18; CRC Committee, *Nepal Concluding Observations 2005*, *supra* note 105, at ¶ 92. *See also* FIAN, *Parallel Information*, *supra* note 66, at 26-27 (providing a detailed description of the difficulties faced by freed bonded laborers in Khanwada Tole in Dadeldhura district).

<sup>310</sup> ESCR Committee, *Nepal Concluding Observations 2008*, *supra* note 33, at ¶ 11; CERD Committee, *Nepal Concluding Observations 2004*, *supra* note 68, at ¶ 18; CRC Committee, *Nepal Concluding Observations 2005* *supra* note 105, at ¶ 92. *See also*, Jagannath Adhikari, *Farmers' Rights to Land: A Crucial Dimension on 'Livelihood Security'*, South Asia Partnership Canada (Nov. 22, 2004), [http://action.web.ca/home/sap/nepal\\_resources.shtml?x=69984&AA\\_EX\\_Session=ea89c0b3d850186bee48fb5e4dccb2a5](http://action.web.ca/home/sap/nepal_resources.shtml?x=69984&AA_EX_Session=ea89c0b3d850186bee48fb5e4dccb2a5) (discussing the *Haliya* system, and how “landlords were able to buy and sell laborers like any physical commodities.”).

<sup>311</sup> ESCR Committee, *Nepal Concluding Observations 2008*, *supra* note 33, at ¶ 15; CEDAW Committee, *Nepal Concluding Comments 2004*, *supra* note 103, at ¶ 208; CERD Committee, *Nepal Concluding Observations 2004*, *supra* note 68, at ¶ 16.

<sup>312</sup> 2005 ILO Report, *supra* note 22, at 45.

<sup>313</sup> *Id.* at 46.

<sup>314</sup> *Id.* at 46 and 47.

<sup>315</sup> *Id.* at 47.

<sup>316</sup> *Id.* at xvi.

<sup>317</sup> ESCR Committee, *Nepal Concluding Observations 2008*, *supra* note 33, at ¶ 11.

<sup>318</sup> CRC Committee, *Nepal Concluding Observations 2005*, *supra* note 105, at ¶ 35.

<sup>319</sup> ESCR Committee, *Nepal Concluding Observations 2008*, *supra* note 33, at ¶ 15; CEDAW Committee, *Nepal Concluding Comments 2004*, *supra* note 103, at ¶ 208; CERD Committee, *Nepal Concluding Observations 2004*, *supra* note 68, at ¶ 16.

<sup>320</sup> WB/DFID, *Unequal Citizens*, *supra* note 44, at 29 (citing Census 2001, CBS, HMG/N.) The Brahmin/Brahman (or Bahun), Chetri, and Newar are the three most economically, socially and politically, dominant ethnic and caste groups in Nepal. B.C. Upreti, *The Maoist Insurgency in Nepal: Nature, Growth and Impact*, 13 SOUTH ASIAN SURVEY 35, 41 and 43 (2006), *available at* <http://sas.sagepub.com/cgi/reprint/13/1/35.pdf>. According to the Nepal 2001 Census, the Chetri comprise 18% of Nepal's population, the Brahmin 13%, and the Newar 5.5%. Cited in David Gellner, *Caste, Ethnicity and Inequality in Nepal*, ECONOMIC & POLITICAL WEEKLY, at 1823, May 19, <http://www.epw.org.in/epw/uploads/articles/10625.pdf>.

<sup>321</sup> CASTE-BASED DISCRIMINATION IN NEPAL, *supra* note 9, at 89.

<sup>322</sup> CHRJ, *Missing Piece of the Puzzle*, *supra* note 2, at 11 (citing *Sushan Acharya, Democracy, Gender Equality and Women's Literacy: Experience from Nepal* 12, tbl.1, UNESCO Kathmandu Series of Monographs and Working Papers No. 1, 2004, *available at* <http://unesdoc.unesco.org/images/0013/001386/138638e.pdf>. *See also*, CASTE-BASED DISCRIMINATION IN NEPAL, *supra* note 9, at 88 (stating that although the literacy rate among Dalits almost doubled to 33.8 percent between 1991 and 2001, it was still significantly less than the national literacy of 53.7 percent).

<sup>323</sup> CASTE-BASED DISCRIMINATION IN NEPAL, *supra* note 9, at 89.

<sup>324</sup> *Id.*

<sup>325</sup> *Id.*

<sup>326</sup> *Id.*

<sup>327</sup> *Id.*

<sup>328</sup> *Id.*

<sup>329</sup> *Id.*

<sup>330</sup> CHRJ, *Missing Piece of the Puzzle*, *supra* note 2, at 10 (citing Center for Human Rights and Global Justice communication with Kathmandu-based expert on caste discrimination [name withheld] (July 2005)).

<sup>331</sup> WB/DFID, *Unequal Citizens*, *supra* note 44, at 93.

<sup>332</sup> CASTE-BASED DISCRIMINATION IN NEPAL, *supra* note 9, at 89. The founder of LANCAU estimates that there are roughly 10,000 people in Nepal who are licensed in law, and of those roughly 5,000 are in active legal practice. In comparison, there are only 35 Dalit lawyers in the country. Telephone Interview with Ratna Bagchand, President, LANCAU, in New York, N.Y. (Feb. 2, 2008).

<sup>333</sup> CASTE-BASED DISCRIMINATION IN NEPAL, *supra* note 9, at 103.

<sup>334</sup> ESCR Committee, *Nepal Concluding Observations 2008*, *supra* note 33, at ¶ 27; CRC Committee, *Nepal Concluding Observations 2005* *supra* note 105, at ¶ 75 (expressing concern that that “a large proportion of girls and

children from disadvantaged backgrounds such as *Dalit* children and children with disabilities remain deprived of educational opportunities.”).

<sup>335</sup> ESCR Committee, *Nepal Concluding Observations 2008*, *supra* note 33, at ¶ 27. The ESCR Committee also stressed “the value of education as a tool for national reconciliation, the eradication of harmful feudal practices, the promotion of respect for the dignity of all persons and groups, as well as the building of skills to enhance future employment prospects.” *Id.* at ¶ 27.

<sup>336</sup> See *supra* note 37, regarding official and unofficial estimates of the percentage of Dalits in Nepal’s population.

<sup>337</sup> CHRGI, *Missing Piece of the Puzzle*, *supra* note 2, at 8 (citing JANA UTTHAN PRATISTHAN (JUP), DALIT IN NEPAL AND ALTERNATIVE REPORT FOR WCAR 8 (2001)).

<sup>338</sup> WB/DFID, *Unequal Citizens*, *supra* note 44, at pxviii (citing THE NEPAL LIVING STANDARDS SURVEY, 2003/4.)

<sup>339</sup> CHRGI, *Missing Piece of the Puzzle*, *supra* note 2, at 8. See also, Uddhab P. Pyakurel, *Dalit Assertion and Democratic Transition*, Constitutionalism and Diversity in Nepal Seminar, Centre for Nepal and Asian Studies, TU in collaboration with MIDEA Project and ESP-Nepal 22-24, August 2007 Kathmandu, Nepal, <http://www.uni-bielefeld.de/midea/pdf/Uddav.pdf>.

<sup>340</sup> CHRGI communication with Kathmandu-based expert on caste discrimination [name withheld] (July 2005); CHRGI, *Missing Piece of the Puzzle*, *supra* note 2, at 12.

<sup>341</sup> Jagat Basnet, *Land Rights Movement in Nepal*, Community Self-Reliance Centre (2006), [http://www.landcoalition.org/pdf/06nl\\_art\\_cscc.pdf](http://www.landcoalition.org/pdf/06nl_art_cscc.pdf) (stating that land is the major cause of conflict); International Land Coalition (ILC), *Summary of the Country Reports*, ILC Asia Regional Meeting, Oct. 12 -14, 2006, Subic, Philippines, [http://www.landcoalition.org/cd\\_ILC/documenti/INSTITUTIONAL\\_DEVELOPMENT/Institutional\\_Events/Asia\\_Regional\\_Meeting/New\\_Summary\\_of\\_the\\_Country\\_Reports\\_data\\_table.pdf](http://www.landcoalition.org/cd_ILC/documenti/INSTITUTIONAL_DEVELOPMENT/Institutional_Events/Asia_Regional_Meeting/New_Summary_of_the_Country_Reports_data_table.pdf).

<sup>342</sup> Adhikari, *Farmers’ Rights to Land*, *supra* note 310.

<sup>343</sup> As a consequence of various movements initiated by farm laborers, tenants and other landless persons, the Nepalese Government has introduced numerous land reform laws and policies. Bishnu Raj Upreti & Jagannath Adhikari, *A Case Study on the “Marginalized Indigenous Communities” Access to Natural Resources in Nepal: National Laws, Policies and Practices* 25, International Conference on Agrarian Reform and Rural Development (ICARRD), Preliminary Draft presented at National Thematic Dialogue, Kathmandu, Nepal (Feb. 2006) [hereinafter Upreti & Adhikari, *A Case Study on the “Marginalized Indigenous Communities”*], [http://www.icarrd.org/en/icard\\_doc\\_down/case\\_Nepal.pdf](http://www.icarrd.org/en/icard_doc_down/case_Nepal.pdf) (providing detailed description of Nepal’s various land reform programs); Basnet, *Land Rights Movement in Nepal*, *supra* note 341. The Land Act of 1964, for example, sought to fix ceilings on land holdings, redistribute land, and define tenants’ rights to include protection against eviction, limits on rents, and entitlement to one-fourth of the rented land to legally registered tenants. Upreti & Adhikari, *A Case Study on the “Marginalized Indigenous Communities,” supra* note 343, at 21. The act and its subsequent amendments are, however, broadly seen as having failed to achieve meaningful land reform and to secure rights for Dalits and other marginalized populations. Basnet, *Land Rights Movement in Nepal*, *supra* note 343 (stating that the land reform program had “no positive impact, and most tenant and landless farmers in the country remained under control of powerful landlords through the following decades”); Adhikari, *Farmers’ Rights to Land*, *supra* note 310 (stating that the programs were “not successful”); Upreti & Adhikari, *A Case Study on the “Marginalized Indigenous Communities,” supra* note 343, at 25 (asserting that marginalized indigenous communities, Dalits, and poor farmers “did not get benefits from high sounding land reform.”). The Government was able to identify and redistribute only 1.5 percent of the total agricultural land (Upreti & Adhikari, *A Case Study on the “Marginalized Indigenous Communities,” supra* note 343, at 21) and only 5 percent of people resettled were genuinely landless. (ILC, *Summary of the Country Reports*, *supra* note 341). Further, the informal nature of tenancy meant that more than 450,000 tenants were not able to legally register their tenancy within the specified time limits and thus lost their tenancy rights. Upreti & Adhikari, *A Case Study on the “Marginalized Indigenous Communities,” supra* note 343, at 21. The following reasons have been offered to explain the failure of Nepal’s land reform: the predominance of feudalistic influence in the Nepalese Government (*Id.* at 25); illiteracy of tenants (Adhikari, *Farmers’ Rights to Land*, *supra* note 310); fear of eviction (Community Self-Reliance Centre (CRSC), *Land Rights in Nepal Present Realities and Strategies for Future*, Executive Summary, (July 2003) [hereinafter CRSC, *Land Rights in Nepal Present Realities*], [http://www.esp-nepal.org.np/document/reports/english/land\\_rights\\_summary.pdf](http://www.esp-nepal.org.np/document/reports/english/land_rights_summary.pdf)); procedural problems (Adhikari, *Farmers’ Rights to Land*, *supra* note 310); and the government’s lack of implementation of land reform laws and policies (CRSC, *Land Rights in Nepal Present Realities*, *supra* note 343; ILC, *Summary of the Country Reports*, *supra* note 341).

<sup>344</sup> This is evidenced by the fact that “72% of court cases involve land” and land has “fueled broader national conflict and armed movements. ILC, *Summary of the Country Reports*, *supra* note 341.

<sup>345</sup> As one scholar notes, if Nepal “is to embark on a serious poverty reduction work, solving the problem of landlessness and providing the rights of tenancy to tenant-cultivators should be the first priority. Adhikari, *Farmers’ Rights to Land*, *supra* note 310 (explaining how access to some land is essential for the food security of Nepalese families in rural Nepal).

<sup>346</sup> CHRJ, *Missing Piece of the Puzzle*, *supra* note 2, at 8 (citing HRW, CASTE DISCRIMINATION 18 (2001)).

<sup>347</sup> Adhikari, *Farmers’ Rights to Land*, *supra* note 310. See also, Dilli Raj Khanal, Pushpa Raj Rajkarnikar, Keshav Prasad Acharya & Dilli Ram Upreti, *Understanding reforms in Nepal* 142 (2005), <http://www.internationalbudget.org/resources/library/PubFinanceNepal.pdf> (citing the National Dalit Commission, *Condition of Dalit Community in Nepal* (Kathmandu, 2003) in stating that “[a]bout 48.7 percent of this community (Dalits) holds less than 5 ropani (ropani is a local land area unit and approximately equals 0.05 hectare) of land. Similarly, the number of the landless population in hudke, dum, gaïne, badi, and dhobi is 100, 88.2, 41.2, 39.1 and 33.3 percent, respectively.”).

<sup>348</sup> CHRJ, *Missing Piece of the Puzzle*, *supra* note 2, at 8 (citing HRW, CASTE DISCRIMINATION 18 (2001)).

<sup>349</sup> *Id.* (citing HRW, CASTE DISCRIMINATION 15 (2001)).

<sup>350</sup> Mahesh Banskota, *Structural Dimensions of Poverty in Nepal* 31, South Asia Centre for Policy Studies (SACEPS) Paper No. 8 (July, 2006), <http://saceps.org/paper8.htm>.

<sup>351</sup> *Nepal Report to the CERD Committee 2003*, *supra* note 16, ¶¶ 35, 37 (also stating that “disparity in landholding pattern among the different groups of Nepal, a product of the land tenure pattern of the past (particularly before 1950s), is recognized as one of the major causes of economic and social inequalities in Nepal”, and that “For an economy which is still heavily dependent on subsistence agriculture land is not only the most important means of production, it is also an important determinant of social status.”). See also CRSC, *Land Rights in Nepal Present Realities*, *supra* note 343 (stating that “[l]and ownership remains the main source of wealth and social status in Nepal and is the source of economic and political power); Adhikari, *Farmers’ Rights to Land*, *supra* note 310 (asserting that “land is not only the main source of wealth and livelihood, but also a source of social security, status and identity”); Upreti & Adhikari, *A Case Study on the “Marginalized Indigenous Communities,”* *supra* note 343, at 25 (stating that “[h]istorical examination reveals that most of the powerful, rich and successful people of today (in economy, education, politics and bureaucracy) are from the background of landlords. Hence, people acquiring more land are in higher social power structure and status”).

<sup>352</sup> See also Upreti & Adhikari, *A Case Study on the “Marginalized Indigenous Communities,”* *supra* note 343, at 25 (discussing how people who do not have land ownership cannot obtain citizenship certificates, yet they cannot get land without citizenship certificates; and explaining that this “vicious cycle is excluding poor ethnic groups from opportunities provided by the state”); ILC, *Summary of the Country Reports*, *supra* note 341 (stating that “[w]ithout land access, rural people are also denied access to basic services (water, electricity) and citizenship rights (e.g., schooling, birth certificates).”).

<sup>353</sup> The laborer and his/her family become bound to the landowner until they have paid off their debt, which is almost impossible since the laborers are typically unable to earn money from other sources. FIAN, *Parallel Information*, *supra* note 309, at 26.

<sup>354</sup> The Dom community of Hariharpur Village Development Committee, Ward No. 4 in the Terai region, for example, are denied access to any of the 17 public wells in their village and risk harassment and violence when they attempt to use the wells. Doms are considered among the “lowest of the low” caste groups in the Terai. They suffer extreme “untouchability” because their traditional occupations include disposing of dead animal carcasses. Consequently, they have to rely on “the mercy of upper caste people to pump drinking water for them” in return for cash or hand-made utensils. *Id.* at 23, 24.

<sup>355</sup> CHRJ, *Missing Piece of the Puzzle*, *supra* note 2, at 11 (citing Jana Utthan Pratisthan (JUP), Dalit in Nepal and Alternative Report for WCAR 24, 25 (2001)). See also The Dalit Initiation for New Nepal, Declaration Paper, Citizen Assembly June 16-17, 2007, ¶ 4, <http://advocacy.net.org/page/declpaper> (last visited Nov. 1, 2007).

<sup>356</sup> For example, in Dudhkade, Ward 1, twenty Dalit families shared one tap, while the two Brahmin families in the area had a tap to themselves. LANCAU, STATUS OF DISTRIBUTION, *supra* note 13, at 75. In Kanchanpur Municipality, the Executive Officer defended the Government’s practice by insisting that separate taps “minimize[d] social clashes between different castes.” and as a result could not be considered discriminatory. *Id.* at 74 and 76.

<sup>357</sup> CHRJ, *Missing Piece of the Puzzle*, *supra* note 2, at 12.

<sup>358</sup> LANCAU, INTRA-DALIT DISCRIMINATION, *supra* note 13, at 35.

<sup>359</sup> The Dalit Initiation for New Nepal, *Declaration Paper*, *supra* note 355.

<sup>360</sup> CHRGI, *Missing Piece of the Puzzle*, *supra* note 2, at 12 (citing Dalit Feminist Organization, *Story of Caste Discrimination: Forced to Eat Human Feces*, MANAV ASTITWA Vol. 1, No. 2, Oct. 23, 2003, <http://www.ahrchk.net/ma/mainfile.php/0102/36/> (relating a 2003 incident of a Dalit woman in Dhanghadi who was accused of being a witch by her “upper-caste” neighbor, and as a result was beaten and force fed a paste of human excrement and chili powder. With the assistance of a Dalit NGO, she was later taken to a local hospital, where she remained for ten days)).

<sup>361</sup> CASTE-BASED DISCRIMINATION IN NEPAL, *supra* note 9, at 26.

<sup>362</sup> WB/DFID, *Unequal Citizens*, *supra* note 44, at 26.

<sup>363</sup> ESCR Committee, *Nepal Concluding Observations 2008*, *supra* note 33, at ¶ 24.

<sup>364</sup> *Id.* at ¶ 42.

<sup>365</sup> CRC Committee, *Nepal Concluding Observations 2005* *supra* note 105, at ¶ 36.

<sup>366</sup> ESCR Committee, *Nepal Concluding Observations 2008*, *supra* note 33, at ¶ 4.

<sup>367</sup> NEPAL IC, *supra* note 1, at art. 32 (“Right to constitutional remedy”). See *supra* Section III.H.

<sup>368</sup> See, however, *supra* Section IV.A discussing the barriers Dalits face in accessing citizenship.

<sup>369</sup> 2007 Dalit Rights Kathmandu Charter requests that the right to health be a fundamental right and additionally calls on the state to ensure that the Dalit community has access to health services. 2007 Dalit Charter, *supra* note 108, at ¶ 19.

<sup>370</sup> ICESCR, *supra* note 50, at art. 12(1). The ESCR Committee explains that the right to health does not mean the right to be healthy. Instead, it includes both freedoms (such as the right to control one’s health and body and the right to be free from torture) as well as entitlements (such as the right to a system of health protection that provides equal access to health care). ESCR Committee, *General Comment No. 14*, *supra* note 279, at ¶ 8. Like all human rights, the right to health imposes three types or levels of obligations on State parties: the obligations to respect, protect and fulfill. The obligation to respect requires State parties to “refrain from interfering directly or indirectly with the enjoyment of the right to health.” The obligation to *protect* requires that State parties “take measures that prevent third parties from interfering with Article 12 guarantees.” The obligation to fulfill requires State parties to “adopt appropriate legislative, administrative, budgetary, judicial, promotional, and other measures towards the full realization of the right to health.” *Id.* at ¶ 33.

<sup>371</sup> *Id.* at ¶ 11.

<sup>372</sup> *Id.* at ¶ 3.

<sup>373</sup> *Id.* at ¶ 21.

<sup>374</sup> *Id.*

<sup>375</sup> CEDAW, *supra* note 60, at art. 12. See additional discussion on women’s rights *infra* Section III.E.

<sup>376</sup> A number of the rights closely related to the right to health and on which the realization of the right to health is dependent are currently already provided for in Nepal’s Interim Constitution. See e.g. NEPAL IC *supra* note 1, at art. 12 (regarding the “right to live with dignity”); *Id.* at art. 13 (“Right to equality”); *Id.* at art. 14 (“Rights against untouchability and racial discrimination”); *Id.* at art. 16(1) (regarding the right to live in a clean environment); *Id.* at art. 16(2) (regarding the right to free basic health services); *Id.* at art.17 (regarding the right to education); *Id.* at art. 18(1) (regarding the right to employment); *Id.* at art. 18(2) (regarding the right to social security); *Id.* at art. 18(3) (regarding the right to food sovereignty); *Id.* at art. 20(1) (prohibiting gender discrimination); *Id.* at art. 20(2) (regarding the right of women to reproductive health); *Id.* at art. 20(3) (prohibiting all forms of violence against women); *Id.* at art. 22(2) (regarding the right of children to be nurtured and to basic health); *Id.* at art. 26 (regarding the right against torture); *Id.* at art. 29 (prohibiting exploitation); *id.* at Article 30(1) (on the “right to proper work practices.”).

<sup>377</sup> ESCR Committee, *General Comment No. 14*, *supra* note 279, at ¶ 43. Even though the ICESCR provides for progressive realization and acknowledges available resource constraints, State parties have immediate obligations regarding to the right to health. These include the guarantee that the right to health will be exercised without discrimination of any kind, and the obligation to take steps toward the full realization of the right to health. *Id.* at ¶ 30. Even in times of severe resource constraints, State parties to the ICESCR are required to protect vulnerable members of society by “the adoption of relatively low-cost targeted programmes”. *Id.* at ¶ 18. See also *Id.* at ¶ 19 (stating that “States have a special obligation to provide those who do not have sufficient means with the necessary health insurance and health-care facilities, and to prevent any discrimination on internationally prohibited grounds in the provision of health care and health services.”).

<sup>378</sup> ICERD, *supra* note 59, at art. 5(e)(iv).

<sup>379</sup> CEDAW, *supra* note 60, at art. 12. See additional discussion on women’s rights *infra* in Section IV.E

<sup>380</sup> ICESCR, *supra* note 50, at art. 12(2)(b).

<sup>381</sup> See also Dalit Issues of Nepal for New Constitution, *supra* note 114, at ¶ 40 (“The practice of constructing separate water taps and spouts for Dalits and non-Dalits should be ended completely.”).

<sup>382</sup> ESCR Committee, *General Comment No. 14*, *supra* note 279, at ¶ 15.

<sup>383</sup> See NEPAL IC, *supra* note 1, at 14 (UNDP introductory remarks indicating that the Interim Constitution’s guarantee of free education includes secondary education).

<sup>384</sup> ICESCR, *supra* note 50, at art. 13(2)(a).

<sup>385</sup> *Id.* at arts. 13(2)(a), (b) and 14. Under the ICESCR, State parties are also required to ensure that higher education is equally accessible to all. *Id.* at art. 13(2)(c). State parties must also recognize every person’s right to education and agree that education “shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms.” ICESCR art. 13(1). See generally, ESCR Committee, *General Comment No. 13*, *supra* note 280.

<sup>386</sup> ESCR Committee, *General Comment No. 13*, *supra* note 280, at ¶¶ 22-24 (explaining that “fundamental education” corresponds to “basic learning needs” as set out in the UNESCO World Declaration on Education for All, adopted at the World Conference on Education for All: Meeting Basic Learning Needs, Thailand, Mar. 5-9, 1990. Article 1 of that Declaration defines “basic learning needs” as comprising “both essential learning tools (such as literacy, oral expression, numeracy, and problem solving) and the basic learning content (such as knowledge, skills, values, and attitudes) required by human beings to be able to survive, to develop their full capacities, to live and work in dignity, to participate fully in development, to improve the quality of their lives, to make informed decisions, and to continue learning.”).

<sup>387</sup> ESCR Committee, *General Comment No. 13*, *supra* note 280, at ¶ 6. See also Dalit Issues of Nepal for New Constitution, *supra* note at ¶ 45 (calling for “the removal of discriminatory terms, language and stories in the text books and syllabus – from primary to higher education...”).

<sup>388</sup> CEDAW, *supra* note 60, at art. 10.

<sup>389</sup> ESCR Committee, *General Comment No. 13*, *supra* note 280, at ¶ 32.

<sup>390</sup> The ESCR Committee has emphasized the importance of the right to education, describing it as the “primary vehicle by which economically and socially marginalized adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities.” ESCR Committee, *General Comment No. 13*, *supra* note 279, at ¶ 1. The Committee notes that education has a vital role in empowering women and safeguarding children from exploitative and hazardous labor and sexual exploitation. *Id.*

<sup>391</sup> Specifically, Article 13(2) states:

- ...
- (c) Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education;
  - (d) Fundamental education shall be encouraged or intensified as far as possible for those persons who have not received or completed the whole period of their primary education...

ICESCR, *supra* note 50, at art. 13(2)(c) and (d).

<sup>392</sup> See also, the 2007 Dalit Rights Kathmandu Charter, calling on the State to prohibit bonded labor and other labor exploitation, and to rehabilitate affected Dalits. 2007 Dalit Charter, *supra* note 108, at ¶ 14.

<sup>393</sup> While the ICESCR provides the most comprehensive elaboration of the right to work, various other international treaties binding on Nepal also recognize this right. See, ICCPR, *supra* note 50, at art. 8(3) (“No one shall be required to perform forced or compulsory labour”; *Id.* at art. 22(1) (“Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interest”); ICERD, *supra* note 59, at art. 5 (“States Parties undertake to prohibit and to eliminate racial discrimination... and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law...in the enjoyment of...the right to free choice of employment, to just and favourable conditions of work, to protection against unemployment, to equal pay for equal work, to just and favourable remuneration...”); CEDAW, *supra* note 60, at art. 11 (“States Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, in particular...the right to the same employment opportunities...”); CRC, *supra* note 64, at art. 32 (“States Parties recognize the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child’s education, or to be harmful to the child’s health or physical, mental, spiritual, moral or social development...States Parties shall in particular: (a) Provide for a minimum age or minimum ages for admission to employment; (b) Provide for appropriate regulation of the hours and conditions of employment; (c) Provide for appropriate penalties or other sanctions to ensure the effective enforcement of the present article.”).

<sup>394</sup> ICESCR, *supra* note 50, at art. 6(1).

<sup>395</sup> ESCR Committee, *General Comment No. 18: The Right to Work*, ¶ 6, 35th Sess., U.N. Doc. E/C.12/GC/18 (Feb. 6, 2006) [hereinafter ESCR Committee, *General Comment No. 18*]. The ICESCR also calls on State Parties to take various steps to achieve the full realization of the right to work, including through “technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment.” ICESCR, *supra* note 50, at art. 6(2).

<sup>396</sup> *Id.* at art. 7(1)(a).

<sup>397</sup> *Id.* at art. 7. As discussed earlier in this section the obligation to ensure the right to health under Article 12 of the ICESCR includes healthy work conditions and the obligation to, *inter alia*, implement “preventative measures in respect of occupational accidents and diseases”; ensure “an adequate supply of safe and potable water and basic sanitation”; prevent and reduce exposure to harmful substances such as harmful chemicals; and minimize, “so far as is reasonably practicable, the causes of health hazards inherent in the working environment.” ESCR Committee, *General Comment No. 14*, *supra* note 279, at ¶ 15.

<sup>398</sup> ICESCR, *supra* note 50, at arts. 7(1)(b), (c) and (d).

<sup>399</sup> The ESCR Committee has said that under the obligation to respect, State parties must, *inter alia*, prohibit forced or compulsory labor, refrain from denying or limiting access to decent work for all persons, especially marginalized individuals, and take measures to combat discrimination and to promote equal access and opportunities. ESCR Committee, *General Comment No. 18*, *supra* note 395, at ¶ 23. State Parties must also prohibit labor of children under the age of 16. *Id.* at ¶ 24. States’ obligations to protect the right to work include, *inter alia*, adopting legislation or taking other measures to ensure equal access to work and training and prohibiting forced or compulsory labor by non-State actors. *Id.* at ¶ 25. Finally, State parties’ obligations to fulfill the right to work under the ICESCR include, *inter alia*, recognizing the right to work in national legal systems, adopting national policies on the right to work, and implementing technical and vocational educational plans to facilitate access to employment. *Id.* at ¶¶ 26–28.

<sup>400</sup> ICESCR, *supra* note 50, at art. 9.

<sup>401</sup> ESCR Committee, *General Comment No. 19: The Right to Social Security*, ¶ 2, 39th Sess., U.N. Doc. E/C.12/GC/19 (Feb. 4, 2008) [hereinafter ESCR Committee, *General Comment No. 19*].

<sup>402</sup> *Id.* at ¶ 4. The ESCR Committee also notes the important role that social security plays in “preventing social exclusion and promoting social inclusion.” *Id.* at ¶ 3.

<sup>403</sup> The ESCR Committee emphasizes that even in times of severe resource constraints, the vulnerable members of society “can and indeed must be protected by the adoption of relatively low-cost targeted programmes.” ESCR Committee, *General Comment No. 3*, *supra* note 56, at ¶ 12. *See also* ESCR Committee, *General Comment No. 12*, *supra* note 279, at ¶ 28; ESCR Committee, *General Comment No. 14*, *supra* note 279, at ¶ 18.

<sup>404</sup> ESCR Committee, *General Comment No. 19*, *supra* note 401, at ¶ 59.

<sup>405</sup> ESCR, *General Comment No. 13*, *supra* note 280, at ¶ 12.

<sup>406</sup> NEPAL 1990 CONST., *supra* note 3, at arts. 20, 25(2) and 26(8).

<sup>407</sup> *See supra* Section III.C.

<sup>408</sup> ICERD, *supra* note 59, at art. 5(d)(v).

<sup>409</sup> Further, the Dalit Initiation for New Nepal Declaration asserts, “Dalits are currently unable to gain access to social, cultural and political sectors because they don’t have access to natural resources. Dalits should be provided with a justifiable mass of land.” The Dalit Initiation for New Nepal, *Declaration Paper*, *supra* note 355, at ¶ 4.

<sup>410</sup> ICESCR, *supra* note 50, at art. 7. *See also*, ESCR Committee, Concluding observations of the Committee on Economic, Social and Cultural Rights: Nepal, ¶ 22, U.N. Doc. E/C.12/1/Add.66 (Sept. 24, 2001) [hereinafter ESCR Committee, *Nepal Concluding Observations 2001*] (stating the ESCR Committee’s concern that former bonded laborers in Nepal continued to face problems accessing housing, land, work and education for their children).

<sup>411</sup> *See supra* Section IV.A. for a detailed discussion of citizenship and land in Nepal.

<sup>412</sup> ICESCR, *supra* note 50, at art. 11(1).

<sup>413</sup> *See also* ESCR Committee, *General Comment No. 16*, *supra* note 111, at ¶ 28 (stating that implementing the ICESCR Article 11 right to an adequate standard of living “requires that women have a right to own, use or otherwise control housing, land and property on an equal basis with men, and to access necessary resources to do so.”).



<sup>414</sup> ESCR Committee, *Nepal Concluding Observations 2001*, *supra* note 410, at ¶ 21. Similarly, the 2007 Dalit Rights Kathmandu Charter calls for land reform initiatives in order to increase Dalit land ownership. 2007 Dalit Charter, *supra* note 108, at ¶ 10.

<sup>415</sup> See Dalit Issues of Nepal for New Constitution, *supra* note 114, at ¶ 17 (“Land ownership for landless Dalit community should be ensured through radical land reform policy. Appropriate policies should be formulated and effectively implemented - especially to rehabilitate *Haliyas* (tillers)”).

<sup>416</sup> The drafters of the South African constitution recognized the centrality of land rights to previously marginalized persons and included provisions in its Article 25 that are advisable in the Nepalese context and may be replicated in relevant part as follows:

(5) The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.

(6) A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.

(7) A person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress.

CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, Act 108 of 1996 [hereinafter, SOUTH AFRICAN CONST.], art. 25.

<sup>417</sup> Nepal’s Interim Constitution grants the right to constitutional remedy for those rights defined in the Fundamental Rights part of the Interim Constitution. NEPAL IC, *supra* note 1, at art. 32.

<sup>418</sup> *Id.* at art. 36 (“(1) No question shall be raised in any court as to whether provisions contained in this Part are implemented or not. (2) The State shall mobilize or cause the mobilization of the required resources and necessary means for the implementation of the principles and policies contained in this Part.”).

<sup>419</sup> *Supra* n. 178. Dalit NGOs and activists have requested that Nepal “adopt a policy of employing Dalits in national level industries and businesses run by the private sector.” Dalit Issues of Nepal for New Constitution, *supra* note 114, at ¶ 25. See also *Id.* at ¶ 33 (“Fair representation of Dalits in Nepal Bar Association, Federation of Nepalese Chamber of Commerce and Industries, Federation of Nepalese Journalists and other professional organizations should be ensured.”).

<sup>420</sup> See also ESCR Committee, *General Comment No. 16*, *supra* note 111, at ¶ 15 (stating that “the application of the principle of equality will sometimes require that States parties take measures in favour of women in order to attenuate or suppress conditions that perpetuate discrimination”). See also, CEDAW Committee, *General Recommendation No. 25: Temporary Special Measures*, ¶ 8, 30th Sess., U.N. Doc. CEDAW/C/2004/I/WP.1/Rev.1 (Jan. 30, 2004) [hereinafter CEDAW Committee, *General Recommendation No. 25*] (stating that formal equality alone is insufficient for a State to meet its affirmative obligation to achieve substantive equality between men and women, and that the substantive equality embodied in CEDAW requires States to redistribute resources and power between men and women in order to achieve substantive equality).

<sup>421</sup> See *supra* Section III.B.3.b.

<sup>422</sup> See *supra* Section III.D.1.

<sup>423</sup> See *supra* Section II.A.1.

<sup>424</sup> CEDAW, *supra* note 60, at arts. 1-2.

<sup>425</sup> *Id.* at art. 3.

<sup>426</sup> *Supra* n. 111.

<sup>427</sup> CEDAW, *supra* note 60 art. 7.

<sup>428</sup> *Id.* at art. 8.

<sup>429</sup> *Id.* at art.10.

<sup>430</sup> *Id.* at art.11.

<sup>431</sup> *Id.* at art.12.

<sup>432</sup> *Id.* at art.13.

<sup>433</sup> *Id.* at art.15.

<sup>434</sup> *Id.* at art. 5.

<sup>435</sup> *Id.* at art. 14.

<sup>436</sup> See CHRJJ, *Missing Piece of the Puzzle*, *supra* note 2, at 16-18.

<sup>437</sup> *Supra* n. 103

<sup>438</sup> *Supra* Section III.A.3 and III.B.2.

<sup>439</sup> *Supra* Section III.D.2. See also CEDAW Committee, *Nepal Concluding Comments 2004*, *supra* note 103 at ¶204 (noting that “educational opportunities are fewer for women in rural areas,” and adding that it was “concerned at the status of women’s health, particularly rural women.”); CEDAW Committee, *Concluding comments of the Committee*, ¶ 137, U.N. Doc. A/54/38, ¶¶ 117-160 (June 25, 1999) (“The Committee considers that the widespread poverty in rural and remote areas and the gap between the situation of women in urban areas and those in rural and remote areas as a major obstacle to the full implementation of the Convention.”).

<sup>440</sup> *Supra* Section III.B.2.

<sup>441</sup> *Supra* Section IV.A.

<sup>442</sup> CEDAW, *supra* note 60, at arts. 1, 2. See also CEDAW Committee, *General Recommendation No. 25*, *supra* note 420, at ¶ 8 and n. 2 (citing 1999 World Survey on the Role of Women in Development, United Nations, New York, 1999, page ix.: “Gender is defined as the social meanings given to biological sex differences. It is an ideological and cultural construct, but is also reproduced within the realm of material practices; in turn it influences the outcomes of such practices. It affects the distribution of resources, wealth, work, decision-making and political power, and enjoyment of rights and entitlements within the family as well as public life. Despite variations across cultures and over time, gender relations throughout the world entail asymmetry of power between men and women as a pervasive trait. Thus, gender is a social stratifier, and in this sense it is similar to other stratifiers such as race, class, ethnicity, sexuality, and age. It helps us understand the social construction of gender identities and the unequal structure of power that underlies the relationship between the sexes.”).

<sup>443</sup> See CEDAW, *supra* note 60, at art. 5. See also CEDAW Committee, *General Recommendation No. 25*, *supra* note 420, at ¶ 8; HRC, *General Comment No. 4*, *supra* note 178, at ¶¶ 1-3.

<sup>444</sup> See, e.g., CERD Committee, *General Recommendation No. 25: Gender-Related Dimensions of Racial Discrimination*, ¶1 56<sup>th</sup> Sess. U.N. Doc. A/55/18 (2000) (“The Committee notes that racial discrimination does not always affect women and men equally or in the same way. There are circumstances in which racial discrimination only or primarily affects women, or affects women in a different way, or to a different degree than men. Such racial discrimination will often escape detection if there is no explicit recognition or acknowledgement of the different life experiences of women and men, in areas of both public and private life.”); CEDAW Committee, *General Recommendation No. 25*, *supra* note 420, at ¶12 (“Certain groups of women, in addition to suffering from discrimination directed against them as women, may also suffer from multiple forms of discrimination based on additional grounds such as race, ethnic or religious identity, disability, age, class, caste or other factors. Such discrimination may affect these groups of women primarily, or to a different degree or in different ways than men.”).

<sup>445</sup> See CEDAW, *supra* note 60, at arts. 9, 15 and 16; ICESCR, *supra* note 50, at art. 10. See generally CEDAW Committee, *General Recommendation No. 21: Equality in Marriage and Family Relations*, 13<sup>th</sup> Sess. U.N. Doc. A/49/38 (1994) [hereinafter CEDAW Committee, *General Recommendation No. 21*]. See also ESCR Committee, *General Comment No. 16*, *supra* note 111, at ¶ 27 (“Article 10, paragraph 1, of the Covenant requires that States parties recognize that the widest possible protection and assistance should be accorded to the family.”).

<sup>446</sup> See Dalit Issues of Nepal for New Constitution, *supra* note 114, at ¶ 59 (“Provisions should be made to ensure Dalit women’s equal access and control over financial assets of the family.”).

<sup>447</sup> See *supra* Section III.D.2.e. regarding access to health care in ESCR section.

<sup>448</sup> See CEDAW, *supra* note 60, at arts. 5(b), 10, 11, 14(2)(b) & (h), 16(1)(e), 16(2); ICESCR, *supra* note 50, at art. 12. See also CEDAW Committee, *General Recommendation No. 24: Women and Health*, 20<sup>th</sup> Sess., U.N. Doc. A/54/38 (1999); ESCR Committee, *General Comment No. 16*, *supra* note 111, at ¶29; ESCR Committee, *General Comment No. 14*, *supra* note 279, at ¶¶ 14, 21-22, 35-36, 44(a) and 52.

<sup>449</sup> See *supra* Section III.D.2.c.

<sup>450</sup> CRC, *supra* note 64, at art. 2(1).

<sup>451</sup> *Id.* at art. 3(1).

<sup>452</sup> *Id.* at art. 7(1).

<sup>453</sup> *Id.* at art. 6(2).

<sup>454</sup> *Id.* at art. 27(1).

<sup>455</sup> *Id.* at art. 24(1).

<sup>456</sup> *Id.* at art. 34. Additional rights of children are discussed *supra* in Section III.D.2. on the right to education.

<sup>457</sup> CRC, *supra* note 64, at art. 32(1). Similarly, State Parties to the ICESCR are required to ensure that children are protected from “economic and social exploitation,” and that their employment in work harmful to their morals or health or dangerous to life or likely to hamper their normal development” is punishable by law.

ICESCR, *supra* note 50, at art. 10(3). Further, as a party to the ILO Convention No. 182 concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labor, Nepal is required to “take immediate and effective measures to secure the prohibition and elimination of the worst forms of child labour as a matter of urgency.” ILO Convention No. 182 concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labor, art. 1, adopted June 17, 1999, 38 I.L.M. 1207, entered into force November 19, 2000. Similarly, as a party to the ILO Convention No. 138 concerning the Minimum Age for Admission to Employment, Nepal is required to “pursue a national policy designed to ensure the effective abolition of child labour and to raise progressively the minimum age for admission to employment or work to a level consistent with the fullest physical and mental development of young persons.” ILO Convention No. 138 concerning the Minimum Age for Admission to Employment, art. 1, adopted June 26, 1973, 1015 U.N.T.S. 297, entered into force June 19, 1976.

<sup>458</sup> CRC Committee, *Nepal Concluding Observations 2005*, *supra* note 104, at ¶ 6. The Committee recommended that Nepal “promote and facilitate respect for the views of children and ensure their participation in all matters affecting them in all spheres of society, particularly in the family, in school and in communities, in accordance with Article 12 of the Convention.” *Id.* at ¶ 19.

<sup>459</sup> CRC, *supra* note 64, at art. 32(1).

<sup>460</sup> CAT defines torture as “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.” CAT, *supra* note 63, at art. 1.

<sup>461</sup> A *jus cogens* norm is one that is “accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.” Vienna Convention, *supra* note 65, at art. 53. For the prohibition on torture as a *jus cogens* norm, see e.g., *Prosecutor v Furundzija* Case No. IT-95-17/1-T, Judgment (ICTY Trial Chamber December 10, 1998); *R. v. Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte (No. 3)*, [1999] 2 W.L.R. 827 (H.L.); Restatement (THIRD) OF THE FOREIGN RELATIONS LAW OF THE U.S., §1, Reporters Note 3 (1987). See also HRC, *General Comment 24: Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant*, ¶ 10, UN Doc. CCPR/C/21/Rev.1/Add.6 (1994). CAT emphasizes that “no exceptional circumstances whatsoever” may be invoked as justification of torture. CAT, *supra* note 63, at art. 2(2). The ICCPR also states that the prohibition against torture and other CID acts is non-derogable even in times of public emergencies. ICCPR, *supra* note 50, at art. 4(2). Since the obligations to prevent torture and other CID acts under Article 16 are interdependent, indivisible, and interrelated, and the definitional threshold between CID acts and torture are not clear, the CAT Committee considers the prohibition of CID acts to be likewise non-derogable under CAT. CAT Committee, *General Comment No. 2: Implementation of article 2 by States Parties*, ¶ 3, U.N. Doc. CAT/C/GC/2CRP.1/Rev. 5 (Nov. 23, 2007) [hereinafter CAT Committee, *General Comment No. 2*].

<sup>462</sup> CAT, *supra* note 63, at art. 1(1).

<sup>463</sup> CAT Committee, *General Comment 2*, *supra* note 461, at ¶ 22 (specifically noting that the contexts in which women are at risk include “deprivation of liberty, medical treatment, reproductive decisions and violence by private actors in communities and homes.”).

<sup>464</sup> CAT, *supra* note 63, at arts. 2(1) and 16(1). See also, HRC, *General Comment No. 20*, *supra* note 187, at ¶ 8 (calling on State parties to the ICCPR to prevent such conduct).

<sup>465</sup> CAT, *supra* note 63, at art. 4. See also, HRC, *General Comment No. 20*, *supra* note 187, at ¶ 13 (calling on State parties to the ICCPR to penalize all those responsible for encouraging, ordering, tolerating or perpetrating torture or other CID acts.)

<sup>466</sup> CAT, *supra* note 63, at art. 12. See also, HRC, *General Comment No. 20*, *supra* note 187, at ¶ 14 (stating that complaints of torture and other CID acts “must be investigated promptly and impartially by competent authorities so as to make the remedy effective.”)

<sup>467</sup> CAT, *supra* note 63, at art. 4(1). See also, HRC, *General Comment No. 20*, *supra* note 187, at ¶ 8 (calling on State parties to the ICCPR to punish torture and other CID acts).

<sup>468</sup> Under CAT, acts by individuals can constitute torture or CID conduct treatment or punishment when they are committed at “the instigation of” or “acquiescence of” a public official or other person acting in an official capacity.” CAT, *supra* note 63, at arts. 1 and 16. The Human Rights Committee has clarified that under

Article 7 of the ICCPR, State parties are also required to use legislative and other measures to provide protection against torture and other CID conduct treatment or punishment inflicted by private individuals. HRC, *General Comment No. 20*, *supra* note 187, at ¶ 2. (“The aim of the provisions of article 7 of the International Covenant on Civil and Political Rights is to protect both the dignity and the physical and mental integrity of the individual. It is the duty of the State Party to afford everyone protection through legislative and other measures as may be necessary against the acts prohibited by article 7, whether inflicted by people acting in their official capacity, outside their official capacity or in a private capacity.”). In the same vein, Article 2 also specifically calls on State parties to prevent acts of torture “in any territory under its jurisdiction, while and Article 4 requires State parties to ensure that “all acts of torture” are offences under its criminal law, which includes “acts by any person which constitutes complicity or participation in torture.”

<sup>469</sup> CAT Committee, *General Comment 2*, *supra* note 461, at ¶21.

<sup>470</sup> CAT, *supra* note 63, at art. 14(1). *See also*, HRC, *General Comment No. 20*, *supra* note 187, at ¶ 14 (stating that State parties to the ICCPR should ensure their legal systems effectively guarantees appropriate redress for victims of torture and other CID acts).

<sup>471</sup> CAT, *supra* note 63, at arts. 10 and 16. *See also*, HRC, *General Comment No. 20*, *supra* note 187, at ¶ 10 (instructing State parties to the ICCPR that “[e]nforcement personnel, medical personnel, police officers and any other persons involved in the custody or treatment of any individual subjected to any form of arrest, detention or imprisonment must receive appropriate instruction and training” regarding Article 7).

<sup>472</sup> CAT Committee, *Nepal Conclusions and Recommendations 2007*, *supra* note 107, at ¶ 13. Despite the ceasefire in April 2006, the Advocacy Forum filed over 1,300 new cases of torture in the year that followed. Haider Rizvi, *Torture Persists in Democratic Nepal, Say Advocates*, One World International Foundation (July 16, 2007), <http://us.oneworld.net/article/view/151330/1/> (last visited Apr. 12, 2008).

<sup>473</sup> The United Nations Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak, stated that out of all the countries he had visited on fact-finding missions in connection with his mandate, Nepal was the only one in which he concluded that “torture was conducted on a systematic basis.” Special Rapporteur Manfred Nowak had also traveled to Georgia, Mongolia and China. *Torture ‘conducted on systematic basis’ in Nepal: UN Rapporteur*, May 2, 2006, UN NEWS.

<sup>474</sup> This ordinance was first introduced in 2001, and has undergone several amendments. Lori Anderson, *Emergency and Public Safety Laws in Nepal*, States of Insecurity: A Symposium on Emergency Laws, Human Rights and Democracy, No. 512, Apr. 2002, <http://www.india-seminar.com/2002/512.htm>. The latest version is entitled Terrorist and Disruptive Activities (Control and Punishment) Ordinance, Ordinance no. 71 of the year 2005/2006 [hereinafter TADO], available at International Commission of Jurists, Nepal Gazette, Issue 55, Kathmandu, Mar. 27, 2006 (unofficial translation), [http://ejp.icj.org/IMG/TADO\\_2006.pdf](http://ejp.icj.org/IMG/TADO_2006.pdf).

<sup>475</sup> The ordinance empowers security officials to detain without trial for up to one year anyone suspected of planning a terrorist and disruptive act. Reasonable grounds for issuing this preventative detention include any information received from “any individual, institution or agency in respect of such person.” TADO, *supra* note 474, at art. 9. Further, cases instituted under the ordinance are not subject to any statute of limitations. TADO, *supra* note 474, at art. 22. TADO has been used to arrest, detain, and sometimes torture civilians, journalists, academics, human rights defenders, and any others who are perceived to be sympathetic to the Communist Party of Nepal-Maoist. Amnesty International, Press Release, *Nepal: Lack of rule of law only adds to instability*, AI Index: ASA 31/023/2002 (Mar. 19, 2002). *See also*, CAT Committee, *Nepal Conclusions and Recommendations 2007*, *supra* note 107, at ¶ 13 (expressing concern at the number of detainees in prolonged detention without trial under the Terrorist and Disruptive Activities (Control and Punishment) Ordinance of 2004).

<sup>476</sup> Rizvi, *supra* note 472; CHRJ, Press Release, *Dalits at High Risk of Torture*, (Nov. 2005). *See also, supra* Section D.2.a. discussing the CAT Committee’s other general criticisms of these laws. As Dalits have become increasingly politically active against discrimination. (Rizvi, *supra* note 472). Government forces have responded with torture and other mistreatment, taking full advantage of their ability to act with particular impunity against individuals considered “low-caste.” CHRJ, Release, *Dalits at High Risk of Torture* (Nov. 2005); CHRJ, Statement Before Committee Against Torture, 35<sup>th</sup> Session, NGO Briefing, Nov. 8, 2005 [hereinafter CHRJ], Statement Before CAT Committee], <http://www.chrgj.org/docs/CHRGJ%20Statement%20to%20Committee%20Against%20Torture%20on%20Nepal.pdf>. In March 2006, for example, Daya Ram Pariyar, a Dalit human rights activist, and Ram Chandra Yadav, a member of the Rastriya Prajatantra Party (RPP) were allegedly murdered by Nepalese security personnel. Telephone Interview with Ratna Bagchand, President, LANCAU, in New York, N.Y. (Feb. 2, 2008). On that occasion, international organizations released a statement condemning the death and noting

that “every day, Dalits, and other people are missing, tortured, and killed by security forces.” The ICDR and VODI Jointly Submit a Memorandum to the King of Nepal: The Murder of Rights Defender Daya Ram Pariyar Condemned, Nepal Dalit Info, <http://www.nepaldalitinfor.com/ICDR/icdr06.html>.

<sup>477</sup> CHRGI, Release, *Dalits at High Risk of Torture*, *supra* note 476; CHRGI Statement before CAT Committee, *supra* note 476 (citing similar reports by the OHCHR, the ICG, and the Asian Legal Resource Centre. *See also*, Lutheran World Federation, *Statement to 35<sup>th</sup> Session of United Nations Committee against Torture* (Nov. 2005) [hereinafter Lutheran World Federation, Statement before CAT Committee]

[http://www.lutheranworld.org/What\\_We\\_Do/OIAHR/UN\\_Bodies/LWF-Statement-Torture-Nepal.pdf](http://www.lutheranworld.org/What_We_Do/OIAHR/UN_Bodies/LWF-Statement-Torture-Nepal.pdf) (stating that “Dalits and people of low economic status are at greater risk of mistreatment by both sides in the conflict. Cases of “rape by the warring parties, illegal detentions, extortions, and kidnapping have been a normal way of life for many Dalit people” in Western Nepal.” It also notes that the Nepal Informal Sector Service Centre reported that Ramkishore Chamar, a Dalit of Kapilbistu district, was forcibly made to eat his own hand then later shot dead by the Maoist Retaliation Committee on March 26, 2005.) *See* HRW, *Between a Rock and a Hard Place*, *supra* note 240, at 54 (detailing gross human rights violations against Dalits by both Maoist insurgents and the Nepalese Government).

<sup>478</sup> Human Rights and Dignity of Dalit Women, *Report of the Conference in The Hague* 7, Nov. 20-25, 2006, available at <http://www.indianet.nl/pdf/humanrightsdalitwomen.pdf>.

<sup>479</sup> CAT Committee, *Nepal Conclusions and Recommendations* 2007, *supra* note 107, at ¶ 26.

<sup>480</sup> *Id.*

<sup>481</sup> *Id.* at ¶ 24

<sup>482</sup> CAT Committee, *Nepal Conclusions and Recommendations* 2007, *supra* note 107, at ¶ 12, stating that:

The State party should adopt domestic legislation which ensures that acts of torture, including the acts of attempt, complicity and participation, are criminal offences punishable in a manner proportionate to the gravity of the crimes committed, and consider steps to amend the Compensation Relating to Torture Act of 1996 to bring it into compliance with all the elements of the definition of torture provided in the Convention. The State party should provide information to the Committee on domestic jurisprudence referring to the definition of torture as per article 1 of the Convention.

<sup>483</sup> Advocacy Forum, *Torture Still Continues, A brief report on the practice of torture in Nepal* 3, 2006-2007, June 25, 2007 [hereinafter *Torture Still Continues*], [http://www.advocacyforum.org/pdfcoll/26\\_June\\_publication.pdf](http://www.advocacyforum.org/pdfcoll/26_June_publication.pdf) (last visited Nov. 1, 2007).

<sup>484</sup> Compensation Relating to Torture Act of 1996 art. 5(1).

<sup>485</sup> Mede European Consultancy, *Evaluation Report: torture Rehabilitation Centres*, Final Report 24 (2003).

<sup>486</sup> *Id.*

<sup>487</sup> CAT Committee, *Nepal Conclusions and Recommendations* 2007, *supra* note 107, at ¶ 28(b). *See also*, *Torture Still Continues*, *supra* note 483, at 3.

<sup>488</sup> *Torture Still Continues*, *supra* note 483, at 3.

<sup>489</sup> CAT Committee, *Nepal Conclusions and Recommendations* 2007, *supra* note 107, at ¶ 28(a).

<sup>490</sup> *Id.* at ¶ 39; *Torture Still Continues*, *supra* note 483, at 3; Rajendra Ghimire, *Legal measures for torture prevention in Nepal* 57, ARTICLE 2, Vol. 3, No. 6, Dec. 2004, <http://www.article2.org/mainfile.php/0306/172/>.

<sup>491</sup> CAT Committee, *Nepal Conclusions and Recommendations* 2007, *supra* note 107, at ¶ 29.

<sup>492</sup> The CAT Committee has criticized Nepal for its failure to make sufficient efforts to guarantee the independence of the judiciary and to ensure that security forces comply with court orders. CAT Committee, *Nepal Conclusions and Recommendations* 2007, *supra* note 107, at 16.

<sup>493</sup> CAT Committee, *Nepal Conclusions and Recommendations* 2007, *supra* note 107, at ¶ 26 (recommending that Nepal “ensure more diverse caste and ethnic representation in its police and security forces”).

<sup>494</sup> *Torture Still Continues*, *supra* note 483, at 3.

<sup>495</sup> CAT Committee, *Nepal Conclusions and Recommendations* 2007, *supra* note 107, at ¶ 16.

<sup>496</sup> Human Rights Commission Act, 2053 (1997) art. 9, available at <http://www.nhrcnepal.org/legislation.php>.

<sup>497</sup> *Torture Still Continues*, *supra* note 483, at 3.

<sup>498</sup> Dr. Bhogendra Sharma, *Torture and Deaths in Custody*, NEPALNEWS.COM, Dec. 10, 2004, [http://www.nepalnews.com.np/archive/2004/others/guestcolumn/dec\\_guest\\_columns.htm#3](http://www.nepalnews.com.np/archive/2004/others/guestcolumn/dec_guest_columns.htm#3) (last visited February 24, 2008). One Nepalese official reportedly told Manfred Nowak, Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, that “a little bit of torture helps.” *Torture*

'conducted on systematic basis' in Nepal: UN Rapporteur, May 2, 2006, UN NEWS, <http://www.un.org/apps/news/story.asp?NewsID=18325&Cr=Nepal&Cr1> (last visited Feb. 24, 2008).

<sup>499</sup> CAT Committee, *Nepal Conclusions and Recommendations* 2007, *supra* note 107, at ¶ 19.

<sup>500</sup> NEPAL 1990 CONST., *supra* note 3, at art. 14(4) provides: "No person who is detained during investigation or for trial or for any other reason shall be subjected to physical or mental torture, nor shall be given any cruel, inhuman or degrading treatment. Any person so treated shall be compensated in a manner as determined by law."

<sup>501</sup> CAT Committee, *General Comment 2*, *supra* note 461, at ¶15.

<sup>502</sup> *Id.* at ¶9.

<sup>503</sup> *Id.*

<sup>504</sup> *Id.* at ¶18. The Committee also finds that "the State's indifference or inaction provides a form of encouragement and/or *de facto* permission. *Id.*

<sup>505</sup> CAT, *supra* note 63, at art. 4(1).

<sup>506</sup> CAT, *supra* note 63, at art. 4(2).

<sup>507</sup> CAT, *supra* note 63, at art. 14(1).

<sup>508</sup> See e.g. ESCR Committee, *General Comment No. 16*, *supra* note 111, at ¶ 17 ("The equal right of men and women to the enjoyment of economic, social and cultural rights, *like all human rights*, imposes three levels of obligations on States parties—the obligation to respect, to protect and to fulfill. The obligation to fulfill further contains duties to provide, promote and facilitate.") (emphasis supplied). *Id.* at ¶21 ("The obligation to fulfill requires States parties to take steps to ensure that in practice, men and women enjoy their economic, social and cultural rights on a basis of equality. Such steps should include: [a]vailability and accessibility of appropriate remedies, such as compensation, reparation, restitution, rehabilitation, guarantees of non-repetition, declarations, public apologies, educational programmes and prevention programmes; [c]establishment by States parties of appropriate venues for redress such as courts and tribunals or administrative mechanisms that are accessible to all on the basis of equality, including the poorest and most disadvantaged and marginalized men and women; [d]development of monitoring mechanisms to ensure that the implementation of laws and policies aimed at promoting the equal enjoyment of economic, social and cultural rights by men and women do not have unintended adverse effects on disadvantaged or marginalized individuals or groups, particularly women and girls; [d]esign and implementation of policies and programmes to give long-term effect to the economic, social and cultural rights of both men and women on the basis of equality. These may include the adoption of temporary special measures to accelerate women's equal enjoyment of their rights, gender audits, and gender specific allocation of resources; [and] [h]uman rights education and training programmes for judges and public officials."). See also Office of the High Commissioner for Human Rights, International Human Rights Law, <http://www.ohchr.org/EN/ProfessionalInterest/Pages/InternationalLaw.aspx> ("International human rights law lays down obligations which States are bound to respect. By becoming parties to international treaties, States assume obligations and duties under international law to respect, to protect and to fulfil human rights. The obligation to respect means that States must refrain from interfering with or curtailing the enjoyment of human rights. The obligation to protect requires States to protect individuals and groups against human rights abuses. The obligation to fulfil means that States must take positive action to facilitate the enjoyment of basic human rights.")

<sup>509</sup> ESCR Committee, *General Comment No. 16*, *supra* note 111 at ¶ 21.

<sup>510</sup> See e.g. HRC, *General Recommendation No. 31: Nature of the General Legal Obligation on State Parties to the Covenant*, 80<sup>th</sup> Sess., ¶ 8, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004) [hereinafter HRC, *General Recommendation 31*] ("There may be circumstances in which a failure to ensure [ICCPR] rights as required by article 2 [of the ICCPR] would give rise to violations by States Parties of those rights, as a result of States Parties' permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities. States are reminded of the interrelationship between the positive obligations imposed under article 2 and the need to provide effective remedies in the event of breach under article 2, paragraph 3 [of the ICCPR]."); *Id.* at ¶15 ("[The ICCPR] requires that in addition to effective protection of Covenant rights States Parties must ensure that individuals also have accessible and effective remedies to vindicate those rights. Such remedies should be appropriately adapted so as to take account of the special vulnerability of certain categories of person, including in particular children. The Committee attaches importance to States Parties' establishing appropriate judicial and administrative mechanisms for addressing claims of rights violations under domestic law."). See also, ESCR Committee, *General Comment No. 9: The Domestic Application of the Covenant*, ¶ 4 19<sup>th</sup> Sess., U.N. Doc., E/1999/22 (1998) [hereinafter ESCR Committee, *General Comment No. 9*] ("legally binding international human rights standards

should operate directly and immediately within the domestic legal system of each State party, thereby enabling individuals to seek enforcement of their rights before national courts and tribunals.”).

<sup>511</sup> UDHR, *supra* note 50, at ¶ 8.

<sup>512</sup> ICCPR, *supra* note 50, at art. 2(3)(a).

<sup>513</sup> *Id.* at 2(3)(b).

<sup>514</sup> *Id.* at art. 2(3)(c). See e.g. HRC, *General Recommendation 31*, *supra* note 510, at ¶¶ 8, 15.

<sup>515</sup> ICERD, *supra* note 59, at art. 6.

<sup>516</sup> See also ESCR Committee, *General Comment No. 9*, *supra* note 510, at ¶¶ 2, 4.

<sup>517</sup> ICESCR, *supra* note 50, at art. 2(1). See also *supra* Section III.D.1. on Nepal’s international obligations in the realization of economic and social and cultural rights.

<sup>518</sup> CEDAW, *supra* note 60, at art. 24.

<sup>519</sup> CAT, *supra* note 63, at arts. 12, 13 and 16. See *supra* Section III.H.1.

<sup>520</sup> CAT, *supra* note 63, at art. 14.

<sup>521</sup> See e.g. ICCPR, *supra* note 50, at art. 2(3)(a) (establishing the right to remedy for “any person”); ICERD, *supra* note 59, at art. 6 (establishing the right to remedy to everyone in the State Party’s jurisdiction). See also CERD Committee, *General Recommendation No. 30*, *supra* note 49, at ¶¶ 7, 18; HRC, *General Recommendation 31*, *supra* note 510, at ¶ 10.

<sup>522</sup> ICCPR, *supra* note 50, at art. 2(3); CAT, *supra* note 63, at arts. 13-14; ICERD, *supra* note 59, at art. 6.

<sup>523</sup> ICG, *Nepal’s Constitutional Process*, *supra* note 6, at 2.

<sup>524</sup> Michael Hutt, *Drafting the Nepal Constitution, 1990*, ASIAN SURVEY, Vol. 31, No. 11. (Nov., 1991) at 1020.

<sup>525</sup> NEPAL 1990 CONST., *supra* note 3, at arts. 11, 12, 14, and 20.

<sup>526</sup> *Id.* at art. 88(2). See also Shrestha, *supra* note 66, at 65 (discussing the constitutional recognition of public interest litigation in the 1990 Constitution).

<sup>527</sup> See Tamrakar, *supra* note 142, at ¶ 3 (“[A]lthough caste-based discrimination is illegal under the Constitution, the chances of Dalits getting restitution for injustices committed against them are remote. Despite the governmental recognition of ‘untouchability’ related castes, atrocities based on caste are not decreasing. The police administration and concerned authorities are not accountable. The government often fails to prosecute those who engage in discrimination against Dalit[s]. Very often the victims do not even lodge complaints. Dalits have no faith towards the administrative and justice system. Impunity seems to prevail with regard to violations against Dalits.”). See also LANCAU, STATUS OF DISTRIBUTION, *supra* note 13, at 8. (“The implementation of the [1990 Constitution’s nondiscrimination provisions] has been overshadowed by lack of interest of the state in elimination of caste discrimination and untouchability”). For other criticisms of the 1990 Constitution, see *supra* note 6, citing Joerg Luther & Domenico Francavilla, *Nepal’s constitutional transition*, POLIS Working Paper n. 93, July 2007, at 2.

<sup>528</sup> See ESCR Committee, *Nepal Concluding Observations 2008*, *supra* note 33, at ¶ 13.

<sup>529</sup> As Justice Kalyan Shrestha of the Nepal Supreme Court has stated, “the whole idea of the written constitutional government with provisions such as the right to justice, the right against torture, etc. will be futile if the justice system is not made robust.” Shrestha, *supra* note 66, at 5. Justice Shrestha also criticized the Interim Constitution for insufficiently ensuring the independence of the judiciary, adding that an independent and impartial judiciary is a constitutional right and a prerequisite to the enforcement of the rights and laws envisioned by the constitution. *Id.* See also NEPAL IC., *supra* note 1, at art. 100(2). The 2007 Dalit Rights Kathmandu Charter goes further by calling for a “Dalit Bench in all judicial and quasi judicial bodies and a special court ... to look into cases of racial discrimination.” 2007 Dalit Charter, *supra* note 108, at ¶ 18. There are currently no Dalit judges in Nepal. Telephone Interview with Ratna Bagchand, President, LANCAU, in New York, N.Y. (Feb. 2, 2008).

<sup>530</sup> Public interest litigation, as provided in Article 88(2) of the 1990 Constitution, was intended as the central means of making human rights meaningful and bringing “justice within the reach of every man and woman and at the doorstep of every needy person.” Hari Bansh Tripathi, *Public Interest Litigation in Comparative Perspective*, National Judicial Academy Nepal, NJA Law Journal, Vol. 1, No. 1, 2007, at 50, 71. As a result of public interest litigation, the Supreme Court has been able to rule on important cases related to Dalit rights. In *Vishwarkarma v. HMG*, for example, the Supreme Court declared void and unconstitutional legislation that would have allowed Dalits to be denied access to temples and other religious sites. *Man Bahadur Vishwarkarma v. HMG*, Writ No. 2505 of the year 2049. B.S., English translation available in SOME LANDMARK DECISIONS OF THE SUPREME COURT OF NEPAL 223-240 (Ram Krishna ed., 2003). Yet the vast majority of public interest litigation cases are not registered with the Supreme Court. In 2006, the Dalit NGO Federation (DNF) dealt with 209 public interest litigation cases, while additional complaints were lodged by LANCAU, Nepal National

Dalit Social Welfare Organization (NNSW), and other Dalit organizations. See CASTE-BASED DISCRIMINATION IN NEPAL, *supra* note 9, at 41. According to representatives of these organizations, local administrators and legal personnel of the courts who are responsible for administering these cases did not take them seriously and preferred pre-trial mediation to registering the cases with the Supreme Court. See *Id.* at 41. Consequently, only two untouchability cases were registered in FY 2003/4 and FY 2004/5 each, and not a single one was registered in FY 2005/6. CASTE-BASED DISCRIMINATION IN NEPAL, *supra* note 9, at 41. Once a case is actually registered with the Supreme Court, the Court is obligated to hear the case. Interview with Nepal Supreme Court Registrar, Ram Krishna Timsena, Nov. 12, 2007.

<sup>531</sup> LANCAU, *Workshop on the Role of Government Attorneys to Establish Social Justice*, Awareness Against Untouchability Newsletter, Issue 8, 2007 [hereinafter LANCAU, *Workshop on Government Attorneys*] (stating that where judges in lower courts have the opportunity to hear untouchability cases brought under the Civil Code of 1963, they generally ask those found guilty of caste-based discrimination to pay only a minimal fine). While the civil code allows punishment by imprisonment for up to one year, it appears that no perpetrator has ever been jailed for practicing untouchability or other caste-based discrimination to date. *Id.* LANCAU and the National Judicial Academy (an autonomous statutory body brought into existence under the National Judicial Academy Ordinance in 2004 that seeks to serve the training and research needs of judges, government attorneys, government legal officers, judicial officers, private law practitioners) are currently trying to address this problem by sensitizing judges to the gravity of caste-based discrimination and the significance of their decisions. Interview with Agni Prasad Thapaliya, National Judicial Academy Registrar, Kathmandu, Nepal, Nov. 12, 2007; Interview with LANCAU, Kathmandu, Nepal (Nov. 12, 2007).

<sup>532</sup> Even where public interest litigation cases do reach the Supreme Court, the Court has been criticized for relying too heavily on issuing directives to the Government to consider enacting new legislation, instead of clearly pronouncing that a law or practice is unconstitutional. Hari Bansh Tripathi, *Public Interest Litigation in Comparative Perspective*, National Judicial Academy Nepal, NJA LAW JOURNAL, Vol. 1, No. 1, 2007, at 69 (discussing *Meera Dhungana v. HMG & Others*; *Chanda Bajracharya v. HMG* (Writ no. 2826 of the year 2051 BS)).

<sup>533</sup> The Government's non-compliance with judicial decisions ultimately affects the judges' willingness to rule against the Government and thereby risk controversy and attacks on their judicial power. Shrestha, *supra* note 66, at 20 (stating that "the danger of the courts' inability to compel compliance is that it may discourage judges from making hard and often unpopular decisions."). A study by the Nepal National Judicial Academy of the 67 public interest litigation cases decided by the Supreme Court from 1994 to 2006 revealed that only 13 of them had been "fully implemented." Another six had been "partially implemented"; 22 were "in implementation stage"; 11 were "not implemented"; and there was no information provided on an additional 11 cases. Shreekrishna Mulmi, *Research and National Judicial Academy: A short note*, National Judicial Academy Nepal, NJA LAW JOURNAL, Vol. 1, No. 1, 2007, at 243 and 244. In one case, LANCAU filed a petition with the Supreme Court requesting that the Supreme Court ask the Government to pursue legal action against police officers who had tortured and killed two Dalit activists. *Ratna Bahadur Bagchand vs. HMG*, 2006. Telephone Interview with Ratna Bagchand, President, LANCAU, in New York, N.Y. (Feb. 2, 2008). Ruling against the Government in June 2006, the Supreme Court issued the requested mandamus. At this writing, the Government had yet to respond. Telephone Interview with Ratna Bagchand, President, LANCAU, in New York, N.Y. (Feb. 2, 2008). Even where a national agency seeks to implement a decision, enforcement may break down at the local level. For example, in March 1999, the Home Ministry issued a notice intended to reduce caste-based discrimination in the citizenship process, but children within the Badi community among other Dalits continue to be discriminated against in certain District Administration offices and continue to be denied the intended protection. LANCAU, STATUS OF DISTRIBUTION, *supra* note 13, at 35 and 36.

<sup>534</sup> *Ratna Bahadur Bagchand vs. HMG*, Writ No. 46, 2004, decided April 21, 2005. The directive order called on "the Ministry of Law, Justice and Parliamentary Affairs, to take necessary action; having discussion and counseling with concerned national level untouchability elimination organizations for the fulfillment of the objectives of article 11(d) of the constitution, and International Convention on Elimination of all forms of Racial Discrimination, 1965." English translation by Ratna Bagchand, President, LANCAU, Email Communication (Mar. 20, 2008). The failure of the government to comply is made even more inexplicable by the fact that at the time of these discussions, LANCAU had distributed about 1,000 copies of a comprehensive law on untouchability which it then distributed to members of parliament and party officials. Telephone Interview with Ratna Bagchand, in New York, N.Y. (Feb. 2, 2008).

<sup>535</sup> LANCAU, STATUS OF DISTRIBUTION, *supra* note 13, at 57-58.

<sup>536</sup> Nepal IC, *supra* note 1, at art. 162(3) (stating: "Necessary legal arrangements shall be made on the basis of democratic norms and values to bring about gradual reforms in the judicial sector to make it independent,



clean, impartial and competent.”).

<sup>537</sup> LANCAU, STATUS OF DISTRIBUTION, *supra* note 13, at 34. The Nepalese Government has acknowledged that its legislative acts “have not been effective as expected [and that], [r]ealizing this weakness and concerned about the demands of the Dalit communities to be treated with full dignity in the society, the Government is committed to taking strong political, social, legal and administrative measures to end existing practices of untouchability in Nepal.” *Nepal Report to the CERD Committee 2003*, *supra* note 16, at 61.

<sup>538</sup> Nepal Civil Code, Chapter 19 of Adal (1963), *supra* note 149.

<sup>539</sup> LANCAU, *Workshop on Government Attorneys*, *supra* note 531.

<sup>540</sup> *Id.* Public interest lawyers are therefore calling for, *inter alia*, increased coordination between Government agencies, additional funding to ensure implementation, and effective monitoring of Government compliance with judicial decisions. *Id.*; Sapana Pradhan Malla, *Failure of Child Marriage Law and Recent Interventions of the Supreme Court*, National Judicial Academy Nepal, NJA LAW JOURNAL, Vol. 1, No. 1, 2007, at 209, 210; Shrestha, *supra* note 66, at 20; CASTE-BASED DISCRIMINATION IN NEPAL, *supra* note 9, at 41-42. Some suggest that the Government’s present resource management and budgetary system requires an overhaul to enable it to better implement pro-poor policies. Dilli Raj Khanal, Pushpa Raj Rajkarnikar, Keshav Prasad Acharya & Dilli Ram Upreti, *Understanding reforms in Nepal* 143 (2005)

<http://www.internationalbudget.org/resources/library/PubFinanceNepal.pdf> (further discussing problems with Nepal’s existing budgetary system for pro-poor programs. Some key problems include the lack of efficiency of expenditure; the widening gap between the budgeted and actual expenditure; and the absence of involvement of beneficiary groups.); Dalit Issues of Nepal for New Constitution, *supra* note 114, at ¶ 17 (“The fiscal policy has neither linked the works of Dalits with fiscal policy of the country nor formulated plans/policies and launched programmes to maintain, promote and modernize their profession. Prevailing social, economic and other obstacles in the fiscal plan have constrained Dalit participation in economic activities.”).

<sup>541</sup> LANCAU, *Workshop on Government Attorneys*, *supra* note 531.

<sup>542</sup> CASTE-BASED DISCRIMINATION IN NEPAL, *supra* note 9, at 41 (citing Tek Tamrakar, *Dalit Samudaya Biruddha Bhedbhaypurna ra Samsodhaniya Kanooni Prabadbaharuko Adhyan Pratibedan* (Study report on Discriminatory and amendable legal provision against Dalits), National Dalit Commission, Kathmandu, Nepal).

<sup>543</sup> LANCAU, STATUS OF DISTRIBUTION, *supra* note 13, at 51-52.

<sup>544</sup> The National Dalit Commission (NDC) was established under the Ministry of Local Development in March 2002. Its goals include recommending timely amendments to existing legal provisions and policies that will enable Dalits to enjoy their rights, and formulating activities to eliminate untouchability and entertain discrimination complaints by Dalits in coordination with the National Human Rights Commission (NHRC). CASTE-BASED DISCRIMINATION IN NEPAL, *supra* note 9, at 45-46.

<sup>545</sup> LANCAU, STATUS OF DISTRIBUTION, *supra* note 13, at 17. The NDC lacks both the capacity and authority to carry out its mandated activities. CASTE-BASED DISCRIMINATION IN NEPAL, *supra* note 9, at 46.

<sup>546</sup> CASTE-BASED DISCRIMINATION IN NEPAL, *supra* note 9, at 48. The NHRC is not perceived as being responsive to Dalit needs and concerns. LANCAU, Status of Distribution, *supra* note 13, at 52. The National NHRC has a mandate to work with the NDC in the protection of Dalit rights, but according to a recent academic study the NHRC’s handling of caste-based discrimination cases has been largely ineffective. CASTE-BASED DISCRIMINATION IN NEPAL, *supra* note 9, at 48.

<sup>546</sup> LANCAU, STATUS OF DISTRIBUTION, *supra* note 13, at 17. The NDC lacks both the capacity and authority to carry out its mandated activities. CASTE-BASED DISCRIMINATION IN NEPAL, *supra* note 9, at 46.

<sup>547</sup> ESCR Committee, *Nepal Concluding Observations 2008*, *supra* note 33, at ¶ 12 (recommending that Nepal provide the NHRC with commissioners and ensure that the new constitution provides for its financial autonomy).

<sup>548</sup> The Nepal Excluded, Oppressed and Dalit Class Development Committee was formed in 1997 with the responsibility of implementing Dalit-specific government-funded activities such as education scholarships, income-generation grants, and public awareness programs. CASTE-BASED DISCRIMINATION IN NEPAL, *supra* note 9, at 45.

<sup>549</sup> CASTE-BASED DISCRIMINATION IN NEPAL, *supra* note 9, at 45.

<sup>550</sup> *Id.* at 45.

<sup>551</sup> The Committee has been accused of reportedly giving non-Dalits education scholarships intended for Dalits. LANCAU, STATUS OF DISTRIBUTION, *supra* note 13, at 18 (stating that “only 47% of actual beneficiaries were reported to hold the scholarships.”).

<sup>552</sup> CASTE-BASED DISCRIMINATION IN NEPAL, *supra* note 9, at 41-42; LANCAU Nepal, *Workshop on the Role of Police to Establish Social Justice*, Awareness Against Untouchability Newsletter, Issue 12, 2007. In 2005, the Dalit Human Rights Organization (DHRO) conducted a survey of the attitudes of Dalits toward the police's handling of untouchability offenses in 2005. CASTE-BASED DISCRIMINATION IN NEPAL, *supra* note 9, at 41-42. The report revealed that about 46 percent of the respondents were not aware of legal prohibitions on caste-based discrimination; 48 percent believed that prejudice prevented law enforcement officials from seriously addressing offenses against Dalits; 74 percent had no knowledge of which procedures to follow to report an offense to the police; and only 4.3 percent of the respondents said that they go to the police with their complaints. CASTE-BASED DISCRIMINATION IN NEPAL, *supra* note 9, at 41-42. A LANCAU workshop with members of the police force on the role of the police in caste-related social justice issues concluded that the police must go further in facilitating victims' ability to obtain justice for caste-based discrimination. It found that the police also had a duty to inform people about crimes related to untouchability; register complaints according to existing laws; behave respectfully toward victims; investigate the abuses; and communicate with government lawyers and other relevant offices. LANCAU Nepal, *Workshop on the Role of Police to Establish Social Justice*, *supra* note 552.

<sup>553</sup> LANCAU, STATUS OF DISTRIBUTION, *supra* note 13, at 57-58.

<sup>554</sup> CAT Committee, *Nepal Conclusions and Recommendations 2007*, *supra* note 107, at ¶ 13.

<sup>555</sup> *Id.* at ¶ 27.

<sup>556</sup> *See, e.g.*, Chapter 2, Section 7 of the South African Constitution, which provides in pertinent part: "This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom." SOUTH AFRICAN CONST. *supra* note 416.

<sup>557</sup> *Id.*

<sup>558</sup> NEPAL IC, *supra* note 1, at 24 (UNDP introductory remarks).

<sup>559</sup> *Supra* Section III.H.1. Note that Dalit NGOs and activists have requested the creation of structures within Nepal's judicial and quasi-judicial bodies to specifically focused on Dalits and caste discrimination issues. Dalit Issues of Nepal for New Constitution, *supra* note 114, at ¶ 31 ("There should be a provision for a Dalit Bench at each of the Judicial and Quasi-judicial bodies, and a special court at the Centre to look into cases relating to caste discrimination.")

<sup>560</sup> NEPAL IC, *supra* note 1, at 24 (UNDP introductory remarks indicating that the body previously existed but was constitutionally established for the first time through the Interim Constitution).

<sup>561</sup> ESCR Committee, *Nepal Concluding Observations 2008*, *supra* note 33, at ¶ 12.

<sup>562</sup> The 2007 Dalit Rights Kathmandu Charter calls for the setting up of the NDC as a constitutional body in order to increase its authority and capacity. 2007 Dalit Charter, *supra* note 108, at ¶ 7. *See also* Dalit Issues of Nepal for New Constitution, *supra* note 114, at ¶ 30 ("[The] National Dalit Commission should be made constitutional, all powerful, and proportionally inclusive."). *See also Id.* at ¶ 4 ("With regard to ensuring meaningful Dalit participation in the process of state restructure from the preliminary stage, the participation of Dalit community should be ensured in the National planning Commission, Election Commission, National Human Right Commission, Truth Reconciliation Commission, State Restructuring Commission, and other committees that will be formed for the new structuring of state.").

## RECASTING JUSTICE: Securing Dalit Rights in Nepal's New Constitution

Nepal is in a process of democratic transition following a prolonged civil war. The central feature of this transition is the country's new constitution, which will be drafted by elected members of the Constituent Assembly. In creating this fundamental document, the Constituent Assembly has the opportunity to crystallize the country's peace and advance Nepal's political, economic, and social development. It also has the opportunity to demonstrate Nepal's commitment to the inherent dignity of all individuals. Recognizing and ensuring the human rights of all Nepalese people is vital to fulfilling these paramount goals. In particular, the rights of Nepal's Dalit (so-called untouchable) population—a group that continues to face systematic discrimination and exclusion on the basis of caste—must finally be realized.

*Recasting Justice* analyzes Nepal's Interim Constitution to help inform the ways in which the new constitution may be drafted in accordance with the country's international human rights obligations to secure Dalit rights. The report was produced in close cooperation with Dalit advocates and members of the legal community in Nepal and draws on the expertise of Nepalese academics and international constitutional scholars. Its recommendations are based on a detailed analysis of Nepal's obligations under international human rights law. The report includes detailed factual information on human rights abuses against Dalits in Nepal and builds on both CHR&GJ's expertise on caste discrimination and its 2005 report, *The Missing Piece of the Puzzle: Caste Discrimination and the Conflict in Nepal*.

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**Left:** Dalit villagers gather in the district of Rolpa in western Nepal. Caste-based discrimination and the practice of “untouchability” have ensured the complete subordination of Dalits (or so-called untouchables) in Nepal. In the country's democratic transition, Dalits are demanding their meaningful participation in Nepal's governance and constitutional affirmation of their fundamental human rights.

**Right:** Dalits work on the road from Rolpa to Thabang in western Nepal.

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