

Mandates of the Working Group on the issue of human rights and transnational corporations and other business enterprises; the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context; the Special Rapporteur on the situation of human rights defenders and the Special Rapporteur on the rights of indigenous peoples

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Excellency,

We have the honour to address you in our capacities as Working Group on the issue of human rights and transnational corporations and other business enterprises; Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context; Special Rapporteur on the situation of human rights defenders; and Special Rapporteur on the rights of indigenous peoples, pursuant to Human Rights Council resolutions 44/15, 43/14, 43/16 and 42/20.

In this connection, we would like to bring to the attention of your Excellency's Government, information we have received regarding **alleged violations of the rights of indigenous Newar peoples over their lands, resources and over the loss of religious and cultural sites. The Newars are facing threats of forced evictions and displacement due to the construction of the Terai/Madhesh FastTrack Expressway and the construction of the Chhaya Center business complex in the tourism district of Thamel in Kathmandu. According to information received, the complex includes an Aloft Marriott hotel, company whose headquarters are domiciled in the USA. Delays in administrative and judicial proceedings to formally recognize the land rights of the Newars pose further threats of irreparable harm to their way of life. Constructions have occurred in the absence of consultation with the affected indigenous peoples who have experienced threats and violence for engaging in peaceful protests against the projects.**

According to the information received:

The Terai/Madhesh Fast Track (Expressway) Project

Newar communities in Khokana and Bungamati reportedly face threats of displacement and forced eviction from their lands due to the construction of the Terai/Madhesh Fast Track Expressway project.¹

According to reports, most fertile farmland around the village of Khokana will be lost to the road construction, making it nearly impossible for indigenous farmers to sustain a livelihood. Concerns have also been raised that important religious and cultural sites would be lost. UNESCO has listed the village of Khokana as a tentative World Heritage site.²

¹ <https://www.nepalarmy.mil.np/fasttrack/home>

² UNESCO has tentatively listed Khokana as a World Heritage Site
<https://whc.unesco.org/en/tentativelists/844/>

The Fast Track Expressway project began in 2006 with funding from the Asian Development Bank (ADB). An Environmental Impact Assessment (EIA) was submitted to the Government in March 2015. The EIA indicated “significant objection” to the expropriation of productive agricultural land from the local community for the construction of the highway. However, the Newars reportedly never received an official copy of the EIA report despite repeated requests. Proposals were made for an alternative route along the western bank of the Bagmati River but the current plans were ultimately approved by the Government.

Concerns have been raised that construction of the Fast Track Expressway project is occurring despite the absence of meaningful consultation or consent from the Newars.

Land acquisition notices by the Government have been published twice, in 2016 listing 1,200 land plots and in 2019 listing a further 400 plots of farmlands of the local Newar residents that will be acquired for the purpose of the highway. At least 1600 families will be affected by these acquisitions. In the longer-term, the project may indirectly impact over 18,000 local residents, the majority of whom are indigenous Newar farmers. Construction would also encroach upon important religious and cultural sites including the Sikali Temple, ritual places, funeral areas, and a holy pond.

According to the information received, the Nepali Army took over project construction in 2017, causing fear and insecurity among locals opposing the project. The army has since set up camps along the highway without the agreement of the indigenous Newar farmers. Lands have been wire-fenced and local residents have been barred from accessing and cultivating their lands. In addition, certain lands have been taken by the Nepali Army to set up “project offices”.

The Newars have participated in a series of negotiations with the Nepali Army and submitted complaints against the land acquisition to local authorities and the National Human Rights Commission. Despite their efforts, the Newars’ concerns remain unaddressed and the majority of those displaced have not received compensation.

Reports indicate that in February 2020, Newar representatives filed a writ petition with the Supreme Court of Nepal alleging violation of the right to information, property, religion, language, culture, housing and “life with dignity” as guaranteed in Nepal’s Constitution (2015) and other laws. The Court repeatedly postponed hearings on the petition while construction of the Fast Track Project and threats of displacement have continued.

Concerns have been raised that peaceful protests against the Fast Track Expressway project are being countered by police violence. During demonstrations held on March 2018 and July 2020, at least a dozen land defenders were reportedly injured when police fired tear gas and water cannons.

In September 2020, there were new confrontations between the community members and the police when the project began constructing a bridge in the nighttime during prohibitory orders for the general public to stay indoors due to the COVID-19 pandemic.

The Chhaya Center Complex

The Chhaya Center Complex,³ was built by Chhaya Devi Complex Pvt. Ltd, a private Nepali company in 2018 on lands of cultural and religious significance to the indigenous Newar community. The complex, the largest of its kind in Nepal (86,000 sq ft and 15 stories tall), includes a shopping mall, movie theater, Aloft Marriott hotel, casino, concert venue, conference hall and banquet center.

According to the information received, the local Newars (Pradhan and Guthi) have traditionally owned and used over 72,000 sq feet of the land where the Chhaya Center was built. According to the information received, the Guthi operate a common trust of cultivated land under the Guthi Corporation Act of 1976 to preserve the socio-cultural and religious nature of these lands. Under Nepalese law, Guthi land is endowed for religious or philanthropic purposes for the benefit of the Newar community. Despite this protection, private investors have taken over control of the lands, through a process of gradual encroachment.

Reportedly, the name of the area “Thamel” has its origins in a Pradhan feudal king referred to as a God by the Newars. The kings of the Pradhans built temples, ponds, and houses in the area that have historical, religious and socio-cultural significance. Of particular concern is the ancient “Than Bahil” monastery, nearby wells and a sacred pond called “Kamal Pokhari,” traditionally used by the Pradhan Newars for daily rituals, death rites, festivals and other religious and cultural purposes.

According to the information received, land registration records from 1909 confirm Guthi ownership of the lands where the Chhaya Complex now stands. Since the early 1900s, communal lands were annexed through a series of private land registrations, allegedly in violation of Nepalese law. Access to the site was restricted, religious statues and structures were moved and the “Kamal Pokhari” pond was dredged and filled. The Guthi received legal protection from the courts in 1977, however parcels of land were later sold off as religious endowments to private cultivator-tenants. After further unsuccessful legal challenges and subsequent land transfers, the Chhaya Devi Complex Pvt. Ltd. purchased all the land parcels in 2008 and later obtained approval from the Kathmandu Metropolitan City office to build the mega-complex in 2013.

Reports indicate that in 2014, six Guthi filed a lawsuit in Kathmandu District Court demanding the repeal of all unlawful land transfers and registrations from 1977 on, including the recent approval of the construction permits for the business complex. Legal proceedings moved at a slow pace while construction

³ www.chhayacenter.com ; www.spotlightnepal.com/2019/07/24/marriott-international-announces-opening-aloft-kathmandu/

of the Chhaya complex accelerated. The District and Appellate Courts both ruled against the Guthi, who appealed to the Supreme Court in July 2014. The Guthi filed a public interest writ alleging violations of the right to religion (Art. 17.3), right to culture (Art. 23) and other rights guaranteed in the Interim Constitution of Nepal (2007) at the time. The writ asserts that public land and property cannot be destroyed, nor registered in the name of an individual under Nepalese law. The appellants sought an interim order to immediately halt the construction of the complex and freeze any land transactions, as well as a writ to retain and protect the pond and surrounding areas.

In 2017, the Supreme Court found that the transfer of Guthi lands to private ownership was against the provisions of the Guthi Corporation Act, 1976 and decided to re-examine the case. While the Newar community waits for the Court's decision, the customary practices of local Pradhans have been suspended with diminishing hope that the historical pond and the surrounding areas will be restored.

Information indicates that non-judicial remedies were also pursued. In April 2014, a complaint was registered with Nepal's National Human Rights Commission requesting an investigation into the human rights violations caused by the Chhaya Center construction and the facilitation of a dialogue between the indigenous community and the company. A complaint was also submitted to the Commission for the Investigation of Abuse of Authority in July 2014 calling for an investigation into alleged abuse of authority and corruption in relation to the Guthi land transactions. Neither complaint has produced a result to date.

Demonstrations against the illegal encroachment of Guthi lands have reportedly been organized over the past several years, however community members speaking out against the construction express fear of reprisals from powerful investors. In December 2020, employees of the Chhaya Center Complex threatened Mr. Bhagwat Pradhan, a heritage rights defender, at his home.

Concerns have been raised that the indigenous Newars are at risk of losing their traditional lands and resources and face irreparable harm to their culture. Traditional practices have been restricted including the use of pond water to clean the deities and idols of the monastery and the collection of lotus flowers for worship. Death rites now occur in an open space on the side of a busy street. Idols and structures moved from the pond area are no longer preserved but in a state of despair and the surrounding area has become an open parking space for street vendors. Concerns have been expressed that all of Nepali society will suffer the loss of cultural heritage.

While we do not wish to prejudge the accuracy of these allegations, we note with concern the alleged human rights violations of the Newar indigenous peoples. We are particularly disturbed by the reports indicating threats of evictions of Newars from their traditional lands and territories, the lack of good faith consultations, and the failure to obtain free prior and informed consent. We are gravely concerned about the significant and irreversible damage that the Fast Track Expressway and the Chhaya Center pose to the Newars lands, resources, culture, religion, and livelihoods.

Furthermore, the police response to the Newars defending their lands appears to restrict their peaceful and legitimate work in defending their human rights.

In this context, we note that in 2018 the Committee on the Elimination of Racial Discrimination expressed concern over the absence of laws in Nepal guaranteeing the rights of indigenous peoples to own, use and develop their traditional lands and resources, and by allegations that those rights had been violated in the context of hydropower, road widening and other development activities that were often accompanied by involuntary displacement. The Committee recommended that Nepal find an adequate negotiated solution to resolve the dispute regarding the rights of indigenous peoples over their traditional lands and natural resources, including by revising legislation and taking into account the ILO Indigenous and Tribal Peoples Convention, 1989 (No. 169), obtain the free, prior and informed consent of indigenous peoples prior to the approval of any project affecting the use and development of their traditional lands and resources, and take measures to guarantee that evictions were carried out in accordance with international standards” (CERD/C/NPL/CO/17-23).

In connection with the above alleged facts and concerns, please refer to the **Annex on international human rights law** attached to this letter which cites international human rights instruments and standards relevant to these allegations.

As it is our responsibility, under the mandates provided to us by the Human Rights Council, to seek to clarify all cases brought to our attention, we would be grateful for your observations on the following matters:

1. Please provide information on the above-mentioned allegations regarding the construction of the Fast Track Expressway and the Chhaya Center Complex and associated impacts on the Newars’ rights to lands, territories and resources, religious and cultural sites, traditional livelihoods and housing.
2. Please provide information on any consultation processes undertaken with the Newar indigenous communities prior to the approval of the construction of the projects, and whether their free, prior and informed consent was sought, particularly concerning potential relocation and social, cultural and environmental impacts. Please indicate whether any measures are planned to include the participation of the Newar peoples in decision-making and to obtain their free, prior and informed consent to projects that may affect their lands and livelihoods.
3. Please provide information on the status of the above-mentioned litigation processes before the Supreme Court of Nepal.
4. Please provide information on efforts to ensure the right to peaceful assembly and freedom of expression for those engaged in peaceful demonstrations against the above mentioned projects. Please include information on the results of any investigation carried out in relation to allegations of coercion, threats or violence against indigenous rights defenders and indigenous Newars during peaceful assemblies.

5. Please indicate what additional steps have been taken by your Excellency's Government to protect against human rights abuses by Nepali Army, as the institution managing the construction of the Fast Track Expressway.
6. Please provide information on any steps that your Excellency's Government has undertaken, or is considering to take, including policies, legislation and regulations, to fulfill its obligation to protect against human rights abuses by business enterprises within its territories and/or jurisdiction, and to ensure that business enterprises conduct effective human rights due diligence to identify, prevent, mitigate and account for how they address their impacts on human rights throughout their operation, as set forth by the United Nations Guiding Principles on Business and Human Rights.
7. Please provide information on any steps taken by your Excellency's Government to ensure that the affected peoples and communities in your territory and/or jurisdiction have access to effective remedies for business related human rights abuses.
8. Please provide information on the status of Nepal Army camps and other structures installed in Khokana for the construction of the Fast Track Expressway and any proposed timelines for removal of the camps and associated structures.
9. Please provide information on remedies and compensation available for indigenous peoples forced to relocate due to the loss of lands, housing and access to their livelihoods caused by the construction of the Fast Track Expressway. Specifically, please provide information on any measures planned to prevent negative human rights impacts from evictions, including access to basic services, food and education.
10. Please provide information on measures taken to grant the Newars access to the Thamel Monastery, the "Kamal Pokhari" pond and the surrounding area in order for them to exercise their right to religious practice.

This communication and any response received from your Excellency's Government will be made public via the communications reporting [website](#) within 60 days. They will also subsequently be made available in the usual report to be presented to the Human Rights Council.

While awaiting a reply, we urge that all necessary interim measures be taken to halt the alleged violations and prevent their re-occurrence and in the event that the investigations support or suggest the allegations to be correct, to ensure the accountability of any person(s) responsible for the alleged violations.

We may publicly express our concerns in the near future as, in our view, the information upon which the press release will be based is sufficiently reliable to indicate a matter warranting immediate attention. We also believe that the wider public

should be alerted to the potential implications of the above-mentioned allegations. The press release will indicate that we have been in contact with your Excellency's Government's to clarify the issue/s in question.

Please be informed that a letter on the same subject has also been sent to the Government of the United States of America, as well as to companies involved in the abovementioned allegations.

Please accept, Excellency, the assurances of our highest consideration.

Dante Pesce
Chair-Rapporteur of the Working Group on the issue of human rights and
transnational corporations and other business enterprises

Balakrishnan Rajagopal
Special Rapporteur on adequate housing as a component of the right to an adequate
standard of living, and on the right to non-discrimination in this context

Mary Lawlor
Special Rapporteur on the situation of human rights defenders

José Francisco Cali Tzay
Special Rapporteur on the rights of indigenous peoples

Annex

Reference to international human rights law

In relation to the above-mentioned facts and concerns, we would like to draw the attention of your Excellency's Government to its obligations under binding international human rights instruments. Nepal has ratified numerous international treaties relevant to the rights of indigenous peoples including ILO Indigenous and Tribal Peoples Convention, 1989, No. 169 (ILO 169), the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD).

In 2007, Nepal ratified ILO Convention No. 169 which affirms the rights of indigenous peoples "to decide their own priorities for the process of development" and to "participate in the formulation, implementation and evaluation of plans and programmes for national and regional development which may affect them directly"(Art.7(1)). Article 14 (1) mandates recognition of indigenous peoples "rights of ownership and possession" over the lands they "traditionally occupy." This includes "lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities."

Further, Article 16 of ILO 169 affirms that indigenous peoples "shall not be removed from the lands which they occupy" and "where the relocation of these peoples is considered necessary as an exceptional measure, such relocation shall take place only with their free and informed consent. Where their consent cannot be obtained, such relocation shall take place only following appropriate procedures established by national laws and regulations, including public inquiries where appropriate, which provide the opportunity for effective representation of the peoples concerned." Article 16 (4) adds that when return is not possible, "as determined by agreement or, in the absence of such agreement, through appropriate procedures, these peoples shall be provided in all possible cases with lands of quality and legal status at least equal to that of the lands previously occupied by them, suitable to provide for their present needs and future development. Where the peoples concerned express a preference for compensation in money or in kind, they shall be so compensated under appropriate guarantees."

Under the ICESCR, Nepal is required to respect, protect, and fulfil the right to an adequate standard of living, including rights to adequate food and housing and "in no case may a people be deprived of its own means of subsistence." (ICESCR & ICCPR Art. 1) In its General Comment No. 4, the Committee on Economic, Social and Cultural Rights clarified that the right to housing (Art. 11(1)) should be seen as the right to live in security, peace and dignity. It indicates that the right to housing includes, among others, legal security of tenure guaranteeing legal protection against forced evictions, harassment and other threats. States should consequently take immediate measures aimed at conferring legal security of tenure upon those persons and households currently lacking such protection in genuine consultation with affected persons and groups. The Committee also declared that forced evictions are *prima facie* incompatible with the requirements of the Covenant and can only be justified in the most exceptional circumstances. The Committee further stated in its

General Comment No. 7 that indigenous peoples suffer disproportionately from the practice of forced eviction. In addition, we wish to draw the attention of your Excellency's Government to the Basic Principles and Guidelines on Development-Based Evictions and Displacement, published as an annex in the report (A/HRC/4/18) of the former Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, Miloon Kothari.

We furthermore wish to refer to the Declaration on the Rights of Indigenous Peoples (UNDRIP), adopted by the General Assembly in 2007 with a favourable vote by your Excellency's Government. Article 26 asserts the right of indigenous peoples to 'the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired' and for legal recognition of those rights 'with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.'

Article 10 affirms that indigenous peoples 'shall not be forcibly removed from their lands or territories' and that "no relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return." Article 11 of the UN Declaration protects indigenous cultural traditions, customs and practices including archaeological and historical sites, and artifacts and asks states to provide effective mechanisms for redress, in conjunction with indigenous peoples. Article 23 affirms the right of indigenous peoples "to determine and develop priorities and strategies for exercising their right to development."

Article 28(1) states that "indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent." Article 28(2) furthers this by affirming that "unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress."

Furthermore, we would like to highlight the United Nations Guiding Principles on Business and Human Rights (A/HRC/17/31), which were unanimously endorsed by the Human Rights Council in June 2011, and which are relevant to the impact of business activities on human rights. These Guiding Principles are grounded in recognition of:

- a. "States' existing obligations to respect, protect and fulfil human rights and fundamental freedoms;
- b. The role of business enterprises as specialized organs of society performing specialized functions, required to comply with all applicable laws and to respect human rights;
- c. The need for rights and obligations to be matched to appropriate and effective remedies when breached."

According to the Guiding Principles, States have a duty to protect against human rights abuses within their territory and/or jurisdiction by third parties, including business enterprises. In addition, businesses have an independent responsibility to respect all internationally recognised human rights, including by conducting human rights due diligence.

Lastly, we would like to refer your Excellency's Government to the United Nations Declaration on Human Rights Defenders, which states that everyone has the right to promote and to strive for the protection and realization of human rights and indicates State's prime responsibility and duty to protect, promote and implement all human rights and fundamental freedoms (articles 1 and 2). The Declaration details the State's obligation to ensure that no one is subject to violence, threats, or retaliation as a consequence of carrying out their legitimate work as human rights defenders (article 12). We would also like to refer to Human Rights Council Resolution 13/13, which urges States to put an end to and take concrete steps to prevent threats, harassment, violence and attacks by States and non-State actors against all those engaged in the promotion and protection of human rights and fundamental freedoms.