

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

REFERENCE:
AL USA 16/2021

30 March 2021

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 in Nepal over their lands, resources and over the loss of religious and cultural sites in relation to 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 your territory. Delays in administrative and judicial proceedings to formally recognise 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 for engaging in peaceful protests against the project.**

According to the information received:

The Chhaya Center Complex,¹ 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

¹ www.chhayacenter.com ; www.spotlightnepal.com/2019/07/24/marriott-international-announces-opening-aloft-kathmandu/

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 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 the Newars' loss of their traditional lands and territories, the lack of good faith consultations, the failure to obtain their free prior and informed consent, and over the significant and irreversible damage that the Chhaya Center poses to the Newars lands, resources, culture, religion, and livelihoods. Furthermore, the threats 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 any additional information and any comments that you may have on the above-mentioned allegations.
2. Please highlight the steps that your Excellency's Government has taken, or is considering to take, to protect against human rights abuse by business enterprises domiciled in the United States and its territories, and/or within its jurisdiction, such as Marriot International. Please provide information on what measures your Excellency's Government has taken to ensure that such 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 operations (including abroad), as set forth in the United Nations Guiding Principles on Business and Human Rights.
3. Please describe any guidance that your Excellency's Government has provided to U.S.-domiciled business enterprises on respecting human rights throughout their operations in line with the United Nations Guiding Principles, including by setting out the Government's expectations as to how human rights due diligence should be conducted, how to consult meaningfully potentially affected stakeholders, and how to remedy any negative human rights impacts. Please also indicate whether any guidance was provided with respect to the duty to obtain free, prior and informed consent of indigenous peoples prior to the approval of business activities affecting their land use, as per the UN Declaration on the Rights of Indigenous Peoples.
4. Please provide information on any measures that your Excellency's Government has taken, or considering to take, to ensure that those affected by business activities of Marriot International in the tourism district of Thamel, in Kathmandu, have access to effective remedies, in accordance with the UN Guiding Principles.

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 this subject matter has been sent to the Government of Nepal, as well as to the 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. The United States of America has ratified international treaties relevant to the rights of indigenous peoples including the International Covenant on Civil and Political Rights (ICCPR), and the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD).

We wish to draw the attention of your Excellency's Government to article 25.1 of the Universal Declaration of Human Rights, which enshrines the right to an adequate standard of living, including food and housing, among others.

We furthermore wish to refer to the Declaration on the Rights of Indigenous Peoples (UNDRIP), adopted by the General Assembly in 2007 and endorsed by your Excellency's Government in 2010. 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

- c. applicable laws and to respect human rights;
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.

The obligation to protect, respect, and fulfill human rights, recognized under treaty and customary law entails a duty on the part of the State not only to refrain from violating human rights, but to exercise due diligence to prevent and protect individuals from abuse committed by non-State actors (see for example Human Rights Committee, General Comment no. 31 para. 8).

It is a recognized principle that States must protect against human rights abuse by business enterprises within their territory. As part of their duty to protect against business-related human rights abuse, States are required to take appropriate steps to “prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication” (Guiding Principle 1). This requires States to “state clearly that all companies domiciled within their territory and/or jurisdiction are expected to respect human rights in all their activities” (Guiding Principle 2). In addition, States should “enforce laws that are aimed at, or have the effect of, requiring business enterprises to respect human rights...” (Guiding Principle 3). The Guiding Principles also require States to ensure that victims have access to effective remedy in instances where adverse human rights impacts linked to business activities occur.

Moreover, Principle 26 stipulates that “States should take appropriate steps to ensure the effectiveness of domestic judicial mechanisms when addressing business-related human rights abuses, including considering ways to reduce legal, practical and other relevant barriers that could lead to a denial of access to remedy.”

States may be considered to have breached their international human law obligations where they fail to take appropriate steps to prevent, investigate and redress human rights violations committed by private actors. While States generally have discretion in deciding upon these steps, they should consider the full range of permissible preventative and remedial measures.

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 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.