

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 OTH 183/2021

30 March 2021

Mr. Maheshwor Prakash Shrestha,

We have the honour to address you in our capacities as the 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.

We are independent human rights experts appointed and mandated by the United Nations Human Rights Council to report and advise on human rights issues from a thematic or country-specific perspective. We are part of the special procedures system of the United Nations, which has 56 thematic and country mandates on a broad range of human rights issues. We are sending this letter under the communications procedure of the Special Procedures of the United Nations Human Rights Council to seek clarification on information we have received. Special Procedures mechanisms can intervene directly with Governments and other stakeholders (including companies) on allegations of abuses of human rights that come within their mandates by means of letters, which include urgent appeals, allegation letters, and other communications. The intervention may relate to a human rights violation that has already occurred, is ongoing, or which has a high risk of occurring. The process involves sending a letter to the concerned actors identifying facts of the allegation, applicable international human rights norms and standards, the concerns and questions of the mandate-holder(s), and a request for follow-up action. Communications may deal with individual cases, general patterns and trends of human rights violations, cases affecting a particular group or community, or the content of draft or existing legislation, policy or practice considered not to be fully compatible with international human rights standards.

In this connection, we would like to bring to the attention of your company, 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 in relation to the construction by your company of the Chhaya Center business complex in the tourism district of Thamel in Kathmandu. 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**

Chhaya Devi Complex Pvt. Ltd

indigenous peoples who have experienced threats and violence 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 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

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

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 information on the above-mentioned allegations regarding the construction of the Chhaya Center Complex, mentioned above and associated impacts on the Newars’ rights to lands, territories and resources, religious and cultural sites, traditional livelihoods and housing.
2. Please provide information about the human rights due diligence policies and processes put in place by your company to identify, prevent, mitigate and account for how you address adverse human rights impacts of your activities, in line with the United Nations Guiding Principles on Business and Human Rights (UN Guiding Principles).
3. Please provide information about specific due diligence or impact assessment measures taken by your company concerning the construction of the Chhaya Center Complex. In particular, please highlight how your company conducted meaningful consultation with affected stakeholders. Please indicate whether any steps were taken to avoid negative social, cultural and environmental impacts on the communities located in the area of the project, in particular to the indigenous Newar peoples, including by seeking their free, prior and informed consent for the project on their lands.
4. Please describe the measures that your company has taken, or is planning to take, to prevent recurrence of such situations in the future.
5. Please provide information on whether your company has established or participated in an effective operational-level grievance mechanism, in line with the UN Guiding Principles, to address adverse human rights impacts caused by your company throughout your operations. Please also provide any information on whether such grievance mechanisms

has been used to address any of the concerns or impacts identified by the stakeholders concerning the project, and any outcomes or remedy provided as a result.

6. Please provide information whether your company has provided, or is considering to provide, effective remedy, including adequate compensation, to local indigenous peoples affected by the construction of the Chhaya Center business complex

This communication and any response received from your company 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.

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 company to clarify the issue/s in question.

Please be informed that a letter on this subject matter has been also sent to the Governments of Nepal and the United States of America as well to other companies involved in the abovementioned allegations.

Please accept, Mr. Maheshwor Prakash Shrestha, 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 your attention to 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 or 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, all business enterprises have a responsibility to respect human rights, which requires them to avoid infringing on the human rights of others to address adverse human rights impacts with which they are involved. The responsibility to respect human rights is a global standard of expected conduct for all business enterprises wherever they operate. It exists independently of States’ abilities and/or willingness to fulfil their own human rights obligations, and does not diminish those obligations. Furthermore, it exists over and above compliance with national laws and regulations protecting human rights.

Principle 13 has identified two main components to the business responsibility to respect human rights, which require that “business enterprises: (a) Avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur; [and] (b) Seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts”.

Principles 17-21 lays down the four-step human rights due diligence process that all business enterprises should take to identify, prevent, mitigate and account for how they address their adverse human rights impacts. Principle 22 further provides that when “business enterprises identify that they have caused or contributed to adverse impacts, they should provide for or cooperate in their remediation through legitimate processes”.

We furthermore wish to refer to the Declaration on the Rights of Indigenous Peoples (UNDRIP), adopted by the General Assembly in 2007. 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.”

We wish to refer to article 25.1 of the Universal Declaration for Human Rights and to article 11.1 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), both of which enshrine the right to an adequate standard of living, including rights to adequate food and housing. In its General Comment No. 4, the UN Committee on Economic, Social and Cultural Rights clarified that the right to housing should be seen as the right to live in security, peace and dignity; and that the right to housing includes, among others, legal security of tenure guaranteeing legal protection against forced evictions, harassment and other threats. 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. In its General Comment No. 7, the Committee further defined forced evictions as a violation of human rights, which sometimes occurs in the name of development, in connection with development and infrastructure projects among others. We also wish to draw attention 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.