

Mandates of the Working Group on the issue of human rights and transnational corporations and other business enterprises; the Special Rapporteur on the right to development; the Special Rapporteur on the situation of human rights defenders and the Special Rapporteur on the rights of indigenous peoples

Ref.: AL OTH 36/2022
(Please use this reference in your reply)

24 May 2022

Mr. Ghising,

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 the right to development; 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, 42/23, 43/16 and 42/20.

In this connection, we would like to bring to your information we have received concerning **allegations of threats and intimidation by Government and police officials against indigenous community members of the FPIC and Rights Forum who have raised concerns regarding the environmental and human rights impacts of the Marsyangdi Corridor transmission line project that is being developed by the State-owned company Nepal Electricity Authority, with funding from the European Investment Bank (EIB).**

The FPIC and Rights Forum is a grassroots network, formed by indigenous community representatives from several districts affected by the proposed transmission line project. The FPIC and Rights Forum was formed to coordinate and mobilise community efforts to ensure free, prior, and informed consent of the affected peoples, in the context of the project.

According to the information received:

Background

The European Investment Bank (EIB) is financing the Marshayandi Corridor Transmission Line project in Lamjung District, Nepal. The project is implemented by the state-owned company, the Nepal Electricity Authority (NEA). The project has raised social and environmental concerns among Indigenous Peoples, living along the proposed transmission line route. The FPIC and Rights Forum have expressed their concerns about this project for the past four years. The key demand of the community is to reroute the transmission line that is passing through their villages, including Bajhaket village. Bajhaket is a mixed community with Indigenous Peoples (Ghale, Gurung, Tamang, Bhujel).

The FPIC and Rights Forum have submitted petitions to local district authorities and national authorities on behalf of indigenous communities. In 2018, community representatives submitted a formal complaint to the EIB. This complaint triggered a compliance review process of the financing of the

project. On 7 December 2021, indigenous community members and members of the FPIC and Rights Forum reportedly experienced threats and intimidation by State officials, including police officers.

Timeline of Events leading up to 7 December 2021

On 13 March 2021, various community organizations of Bajhakhet and other adjoining settlements, including a community forest conservation group, a youth group, and a women and mothers' group, submitted a joint letter to the Besishahar Municipality. The application requested that the local government relocate the transmission towers to protect the village, land, and natural environment.

In April 2021, the EIB released a report of its findings pursuant to the aforementioned 2018 formal complaint. The findings included non-compliance in several areas, including inadequate public consultations and lack of a process to obtain free, prior, and informed consent from the affected Indigenous Peoples. After the release of this report, EIB suspended funding while compliance issues are addressed.

On 8 August 2021, the indigenous communities submitted an application to the Ministry of Home Affairs through the District Administration Office in Lamung, requesting a process for free, prior, and informed consent be undertaken. They demanded not to install the transmission towers in their village and to find alternative solutions to avoid the multi-dimensional impacts of the transmission line.

On 4 October 2021, the indigenous communities of Raut Thok Village (an adjoining village of Bajhakhet village) submitted an application to the NEA office in Besishahar Municipality, Lamjung District, urging the NEA not to construct the transmission line in their village as they remain concerned about the adverse impacts to the land, health, natural environment, and livelihoods of the people. The application urged the NEA office to relocate the project to other sites.

On 28 October 2021, the EIB participated in an online dialogue with indigenous community representatives to discuss progress on the project and implementation of its report.

Events of 7 December 2021

On 7 December 2021, a delegation of Government officials and police visited Bajhakhet village, one of the indigenous communities affected by the transmission line project, to reportedly pressure the community to accept the project. The Chief District Officer of Lamjung district participated in the visit with approximately a dozen police carrying firearms from the Lamjung District Police Office and NEA officials. A meeting took place between these officials and community members in a field.

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project. The Chief District Officer of Lamjung district participated in the visit with approximately a dozen police carrying firearms from the Lamjung District Police Office and NEA officials. A meeting took place between these officials and community members in a field.

Reportedly, approximately 25-30 affected indigenous community members including women and Indigenous Peoples, were subject to intimidation by these officials, in the presence of armed police officers, with the aim of forcing them to stop protesting and accept the transmission line project. Officials warned community members that they must accept the project as it is a symbol of national pride. They also threatened to push the project forward even if community members did not agree, and issued a warning that police forces would otherwise be mobilized to accomplish this.

Indigenous community members reiterated their position that the transmission line should be re-routed, and that community members affected by the project must be adequately compensated. Six of the community members who were reportedly subject to intimidation on 7 December were also in attendance at the online dialogue with EIB on 28 October 2021.

On 8 December 2021, 14 indigenous community members from Bajhakheth Village filed a complaint to the National Human Rights Commission of Nepal regarding the intimidation by Government officials and police that took place the day before and requested an investigation into the incident.

On 26 April 2022, a total of five transmission towers located on lands were acquired by NEA, in Dordi Rural Municipality-2, Archalbot. The owners of the lands where the towers were built, felt pressured to accept a complete compensation offered, fearing that NEA would not provide it later on.

NEA officials went to Archalbot with approximately 28 police officers to build the rings for holding the transmission wire on the towers (Tower No. 33 B and 33 C). However, they could not put the rings on that day due to protests by the communities

On 27 April 2022, the same group of NEA officials, accompanied by approximately 30 armed police officers, visited the same village in Archalbot. The NEA officials and construction workers, with the support of armed police forces, managed to install the rings that hold the transmission wire in Tower No. 33 B and 33 E.

As of 1 May 2022, the situation on the ground continues to escalate. Several members of the community have reportedly suffered physical attacks by the police due to their protests, and some have also been arrested for obstructing the construction of the transmission line.

While we do not wish to prejudge the accuracy of these allegations, we are deeply concerned about the involvement of the State-owned company Nepal Electricity Authority in the negative human rights impacts on indigenous community members of the FPIC and Rights Forum, resulting in threats and acts of intimidation of indigenous peoples. We are equally concerned about the lack of adequate due diligence measures in place to mitigate and remedy adverse human rights impacts of

the activities of the Nepal Electricity Authority.

We are disturbed by the lack of good faith consultations with the affected indigenous communities, and failure to obtain free, prior, and informed consent of the affected Indigenous Peoples, and the significant and irreversible social and environmental damage that the project can incur to the culture and livelihoods of indigenous communities, as well as to lands, resources, and the natural environment.

We recall that while the Marshayandi Corridor Transmission Line project presents a financial interest, businesses, investors and financiers all have assumed international legal obligations on the rights of Indigenous Peoples and environmental protection. Indigenous Peoples and their knowledge are vital to the sustainable management of natural resources and biodiversity conservation, both of which are essential elements for combating climate change and fulfilling the Sustainable Development Goal (SDG) 13 on climate action as well as SDGs 14 and 15 on the conservation of biodiversity. The targeting of human rights defenders through intimidation, threats, and criminalization are of particular concern, as this appears to be in direct retaliation for their legitimate and peaceful activities promoting Indigenous Peoples' rights and the defence of their traditional lands, territories and resources. We are concerned that such allegations will not only denigrate the efforts of the above-mentioned indigenous human rights defenders to denounce human rights violations, but also the efforts of other human rights defenders and human rights organizations, contributing to a chilling effect on civil society and their ability to exercise the rights to freedom of expression, freedom of assembly, and association without fear of retaliation.

In connection with the above alleged facts and concerns, please refer to the **Annex on Reference to international human rights law** attached to this letter which cites international the 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/or comment(s) you may have on the above-mentioned allegations.
2. Please provide information about the human rights due diligence policies and processes put in place by your company to identify, prevent, mitigate, and remedy the adverse human rights impacts of your activities, in line with the UN Guiding Principles on Business and Human Rights.
3. Please provide information about specific due diligence or impact assessment measures taken by your company concerning the development of the Marsyangdi Corridor transmission line project. In particular, please highlight how your company conducted meaningful consultation with the affected stakeholders, specifically with the indigenous community members of the FPIC and Rights Forum before and after the commencement of the Marsyangdi Corridor transmission line project. Please also indicate whether any steps were taken to avoid

negative social, cultural and environmental impacts on the communities located in the area of the project, including by seeking their free, prior and informed consent for the project on their lands.

4. Please provide information on the circumstances of the meeting that took place on 7 December 2021 in Bajhakhhet village between Government officials, Nepal Electricity Authority representatives, police officers, and indigenous community members, during which reportedly 25-30 affected community members were subject to threats and intimidation by Government and NEA officials, in the presence of armed police, with the aim of pressuring them to cease their protests and accept the transmission line project.
5. Please describe the measures that your company has taken, or plans to take, to prevent the recurrence of such situations in the future.
6. Please provide information on the steps and measures that your company has taken or plans to take as a follow-up to the application submitted to the National Electricity Authority on 4 October 2021 by the indigenous communities of Raut Thok Village (an adjoining village of Bajhakhhet village), to your office in Besishahar Municipality, Lamjung District, urging your company not to construct the transmission line in the village on the grounds of adverse impact to the land, health, environment, and livelihoods of peoples, and to relocate the project to other sites.
7. Please provide information on steps taken by your company to establish operational-level grievance mechanisms, in line with the UN Guiding Principles, to address any adverse human rights impact that your company's operations, products and services may have contributed to and/or caused. Please also provide information on whether such grievance mechanisms have been used to address any of the concerns or impacts identified by the stakeholders in this communication, and any outcomes as a result.

We would appreciate receiving a response within 60 days. Past this delay, this communication and any response received from your company will be made public via the communications reporting website. They will also 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 would like to inform you that a communication concerning the above-mentioned allegation has also been sent to the European Investment Bank and the Nepal Electricity Authority.

We would like to inform you that a communication concerning the above-mentioned allegation has also been sent to the European Investment Bank and the Permanent Mission of Nepal.

Please accept, Mr. Ghising, the assurances of our highest consideration.

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

Saad Alfarargi
Special Rapporteur on the right to development

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

We would like to highlight the UN Guiding Principles on Business and Human Rights (A/HRC/17/31), which were unanimously endorsed by the Human Rights Council in June 2011, are relevant to the impact of business activities on human rights. These Guiding Principles are grounded in the 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, States have a duty to protect against human rights abuses within their territory and/or jurisdiction by third parties, including business enterprises. 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.

Furthermore, we would like to note that as set forth in the United Nations Guiding Principles on Business and Human Rights, 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. Moreover, it exists over and above compliance with national laws and regulations protecting human rights.

Guiding Principles 11 to 24 and Principles 29 to 31 provide guidance to business enterprises on how to meet their responsibility to respect human rights and to provide for remedies when they have cause or contributed to adverse impacts. Moreover, the commentary of Principle 11 states that “business enterprises should not undermine States’ abilities to meet their own human rights obligations, including by actions that might weaken the integrity of judicial processes”. The commentary of Guiding Principle 13 notes that business enterprises may be involved with adverse human rights impacts either through their own activities or as a result of their business relationships with other parties. [...] Business enterprise’s “activities” are understood to include both actions and omissions; and its “business relationships” are understood to include relationships with business partners, entities in its value chain, and any other non-State or State entity directly linked to its business operations, products or services”.

The Guiding Principles have 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” (Guiding Principle 13).

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”.

Furthermore, business enterprises should remedy any actual adverse impact that they cause or to which they contribute. “Remedies can take a variety of forms and may include apologies, restitution, rehabilitation, financial or non-financial compensation and punitive sanctions (whether criminal or administrative, such as fines), as well as the prevention of harm through, for example, injunctions or guarantees of non-repetition. Procedures for the provision of remedy should be impartial, protected from corruption and free from political or other attempts to influence the outcome” (commentary to Guiding Principle 25).

The Guiding Principles also recognise the important and valuable role played by independent civil society organisations and human rights defenders. In particular, Principle 18 underlines the essential role of civil society and human rights defenders in helping to identify potential adverse business-related human rights impacts. The Commentary to Principle 26 underlines how States, in order to ensure access to remedy, should make sure that the legitimate activities of human rights defenders are not obstructed.

We would like to refer to the thematic report of the Working Group on the issue of human rights and transnational corporations and other business enterprises (ref. A/HRC/32/45) and recommendations contained therein elaborating on the duty of States to protect against human rights abuses involving those business enterprises that they own or control. This includes the following considerations:

88. All business enterprises, whether they are State-owned or fully private, have the responsibility to respect human rights. This responsibility is distinct but complementary to the State duty to protect against human rights abuses by business enterprises. This duty requires States to take additional steps to protect against abuses by the enterprises they own or control. This goes to the core of how the State should behave as an owner and the ways in which its ownership model is consistent with its international human rights obligations.

94. States, as primary duty bearers under international human rights law, should lead by example. To show leadership on business and human rights requires action and dedicated commitment on many fronts. It also includes using all the means at the disposal of States to ensure that the enterprises under their ownership or control fully respect human rights throughout their operations. There is untapped potential for State-owned enterprises to be champions of responsible business conduct, including respect of human rights. The Working Group calls on States and State-owned enterprises to demonstrate leadership in this field.

We would like to also refer you to the [Working Group's Guidance on ensuring respect for human rights defenders](#). The Report on human rights defenders and civic space – the business and human rights dimension (A/HRC/47/39/Add.2), highlights the need for addressing the adverse impact of business activities on human rights defenders. It unpacks for States and business the normative and practical implications of the Guiding Principles on Business and Human Rights in relation to protecting and respecting the vital work of human rights defenders.

In relation to the above-mentioned facts and concerns, we would like to draw the attention to international human rights instruments. 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.”

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 23 affirms the right of indigenous peoples “to determine and develop priorities and strategies for exercising their right to development.” Furthermore, Article 32 states that ‘States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources’. Furthermore, UNDRIP affirms that indigenous peoples have the right to practise and revitalize their cultural traditions and customs and have the right to the protection of the environment in their traditional lands, territories and resources, including from the dumping of hazardous waste.

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 further recall that the UN Declaration on the right to development (A/RES/41/128) defines the right to development an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development (article 1.1). The Declaration further states that the human person is the central subject of development and should be the active participant and beneficiary of the right to development

(article 2.1) and requires that States should encourage popular participation in all spheres as an important factor in development and in the full realization of all human rights (article 8.2). In this line, the ILO Convention 169 prescribes that indigenous peoples of the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well being and the lands their occupy.

We also refer to the Guidelines and recommendations on the practical implementation of the right to development , which urge states to design and implement development projects after holding meaningful consultations to identify the development priorities of the communities in a project area and benefits-sharing arrangements that would be suitable for those affected. The Guidelines further recommend (para 37) that States should respect the right of indigenous peoples to self-determination to fulfil the right to development. Indigenous peoples should be empowered to develop their own development priorities and provide their free, prior and informed consent as guaranteed by the United Nations Declaration on the Rights of Indigenous Peoples and the Indigenous and Tribal Peoples Convention, 1989 (No. 169), of the International Labour Organization.

Lastly, we would like to refer 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.