

## Representation under ILO Constitution, Article 24

Submitted by: Nepal Telecom Karmachari Union

Registered under: Government of Nepal, Ministry of Labour and Transport Management

Department of Labour and Employment promotion

Registration NO. 1766

1. This is a representation, submitted in accordance with Article 24 of the ILO Constitution, against the Federal Democratic Republic of Nepal. The representation relates to the non-compliance by Nepal with its obligations under ILO Convention No. 169 (the “**Convention**”), which was ratified by Nepal on 14 September 2007. This representation is filed by Nepal Telecom Karmachari Union.
2. This representation relates to a road-widening project (the “**Project**”) currently being undertaken by the Nepali government in 83 localities covering 996 km<sup>1</sup> within the Kathmandu Valley, which (as currently planned and implemented in some areas) involves the demolition of houses and significant Newar cultural heritage sites and forced displacement of an estimated 140,000 people, the majority of whom (on best estimates) appear to be Newar. Demolition and displacement connected with the Project is already underway despite a Supreme Court interim injunction prohibiting demolition while a domestic legal challenge is being heard.

### Background facts

#### *The history of the Newar indigenous peoples in the Kathmandu Valley*

3. The Kathmandu Valley is the ancestral land of the Newar people (*Adivasi janajati*). The Newar self-identify as an indigenous people in Nepal, and are officially recognised as an indigenous nationality in Nepal in the National Foundation for the Development of Indigenous Nationalities Act 2002 (NFDIN).
4. Traditional Newari culture is primarily urban in nature, based around the former three kingdoms of the Kathmandu Valley (Kathmandu, Lalitpur and Bhaktapur), and encompassing smaller towns and rural areas in the vicinity of these three urban centres (and particularly in the southern part of the Kathmandu Valley).<sup>2</sup> Road sections in the Kathmandu valley affected by the project, which affect a number of smaller Newari towns and villages, include Chahabil-Sankhu, Kalanki-Nagdhunga, Balaju-Baisdara (now completely demolished), Chobhar-Dakshinkali, Jorpati-Sundarijal, Samakhushi-Tokha-Jhor, Golkopakha-Gongabu, Gwarko-Imadhol-Lubhu, Dolahiti-Sunakothi-Chapagaun, Tripureshwor-Kalanki, Lagankhel-Satdobato, Imadol-Siddiphur-Godwari, Karmanasa-Harisiddhi-Godavari, Nakku-Bhaisepati-Bungmati, Bishnumati Corridor, Ketshowor Pepsi Cola-Sallaghari Tinkune Bhaktapur, Sitapaila-Ramkot-Bhimdunga. Although people of Newari descent live in many areas of

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<sup>1</sup>Notice of KVDC Published on *Kantipur National Daily*, 20 March 2016, p 16.

<sup>2</sup>Gellner, D. N. 'Language, caste, religion and territory: Newar identity ancient and modern', (1986) 27(1) *European Journal of Sociology* 102, 108-110.

Nepal, Newari culture and language remains strongly linked to this traditional area in the Kathmandu Valley (and indeed Newar cultural continuity declines as the distance from these centres increases).

5. Migration and population increase has put strain on the maintenance of Newari culture.<sup>3</sup> During the 20<sup>th</sup> century, in-migration to the Kathmandu valley has significantly increased the population of Kathmandu and Lalitpur as urban centres. The Population Monograph of Nepal (published in 2014, and based on the 2011 census), notes that “Although Newar populations have increased between the 2001 and 2011 censuses, the Newar group no longer maintains numerically the highest position in Kathmandu district in the 2011 census. It is simply because a large number of Hill Brahman populations, and other groups have migrated into the Kathmandu Valley because of the Maoist insurgency in Nepal from 1996 to 2006 for reasons of security and employment. In addition, every year a lot of people migrate to the Kathmandu valley searching for jobs, etc, and eventually settle in the Kathmandu district.”<sup>4</sup> Implications of this include a loss of Newar collective lands (as noted below); increased pressure on the Newari language (as Nepali becomes increasingly the *lingua franca* in the city); and increasing geographical diffusion or dilution of Newari communities within Kathmandu.
6. Traditional Newari culture, which incorporates both Hindu and Buddhist religious traditions, is distinct from both the mainstream *Parbatiya* culture of Nepal as well as from other indigenous peoples in Nepal. Newars have been described as a “microcosmic society within the multinational state of Nepal, with ethno-specific types of organization and economy, their own individual, highly developed culture, and a caste system which is regarded by other Nepalis as being extremely orthodox”.<sup>5</sup> Newari communities may contain one or many caste groups; where there is more than one group, sub-groups are often geographically concentrated together.<sup>6</sup>
7. One unique element of Newari culture is the tradition of *guthi*.<sup>7</sup> Guthi refers to “traditional, cooperative organizations, the aims, activities and members of which can vary greatly”.<sup>8</sup> Traditionally, Newari *guthis* would often manage collectively-held lands (held on the basis of religious or public interest purposes) for the benefit of the entire community.<sup>9</sup> In more recent times, almost all *guthi* lands have been appropriated and allocated for other purposes by the government. However, central *guthi* institutions, often associated with a temple or other cultural centre, have remained in place (now usually stripped of their previous land management function) and continue to form the cultural centre of Newari communities within

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<sup>3</sup> See e.g. B. G. Shrestha, “The Newars: The indigenous population of the Kathmandu Valley in the modern State of Nepal” (1999) 26(1) *Contributions to Nepalese Studies* 83.

<sup>4</sup> Central Bureau of Statistics (2014). *Population Monograph of Nepal: Volume 2, Social Demography*. National Planning Commission Secretariat (Government of Nepal). Available at: <http://cbs.gov.np/image/data/Population/Population%20Monograph%20of%20Nepal%202014/Population%20Monograph%20V02.pdf>, at page 13.

<sup>5</sup> U Müller-Böker, “Spatial Organization of a Caste Society: the Example of the Newar in the Kathmandu Valley, Nepal” (1988) 8(1) *Mountain Research and Development* 23, 24.

<sup>6</sup> *Ibid.*

<sup>7</sup> While the word *Guthi* may be used by some other groups to refer to a land-holding organisation, the tradition among Newars is considered distinct: see M C Regmi, *Land ownership in Nepal*, 1976, University of California Press, 48.

<sup>8</sup> Müller-Böker, *op. cit.*, 27.

<sup>9</sup> Regmi, *op. cit.*, 48.

the Kathmandu Valley. Guthi are critical to the maintenance and renewal of Newar cultural traditions.<sup>10</sup>

### ***Current road-widening works throughout the Kathmandu Valley***

8. In approximately 2011-12, the Government of Nepal (through the Kathmandu Valley Development Authority, **KVDA**, the Ministry of Physical Infrastructure and Transport, **MPIT**, the Roads Department, **RD**, and the Ministry of Urban Affairs, **MUA**) announced the launch of a road-widening programme for the Kathmandu Valley, covering approximately 916 km of roads. Physical work began in relation to the road-widening in late 2014, and has continued progressively (although halted in some cases by protests and legal challenges among other things) since that time. It is believed this work is being financed by foreign governments, but information on its financing is not public available.
9. The complainant does not have complete documents in relation to the exact location of the road-widening programme from the KVDA (in part because, despite requests from several affected individuals, the KVDA has not provided complete information on the project.<sup>11</sup> However, on the basis of newspaper reports, together with information about the physical works already underway, it is believed the roadworks included in the project include the following sections of road (note this list may not be exhaustive):
  - Chahabil-Sankhu(13 km)
  - Kalanki-Nagdhunga (9 km according to documents of Kathmandu Valley Road Widening Project 2071/8/14 B.S./30 November 2014)
  - Balaju-Baisdara (2 km) (Demolitions already completed)
  - Chobhar-Dakshinkali (13.7 km)
  - Jorpati-Sundarijal (19.6 km)
  - Samakhushi-Tokha-Jhor (11 km)
  - Golkopakha-Gongabu (3 km)
  - Gwarko-Imadhol-Lubhu(11 km)
  - Dolahiti-Sunakothi-Chapagaun\* (13 km)
  - Tripureshwor-Kalanki\* (3 km)
  - Lagankhel-Satdobato\* (1.5 km)
  - Imadol-Siddhipur-Godavari\*
  - Karmanasa-Harisiddhi-Godavari\* (8.7 km)
  - Nakku-Bhaisepati-Bungmati\*
  - Bishnumati Corridor
  - Ketshowor Pepsi Cola-SallaghariTinkuneBhaktapur (10 km)
  - Sitapaila-Ramkot-Bhimdhunga (4.5 km)
10. Of the above list, all have been affected by demolitions (either commenced or completed) except the Nakku-Bhaisepati-Bungmati section, the Bishnumati corridor and the

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<sup>10</sup> For further information on some distinctive elements of Newari cultural traditions, see: Minority Rights Group (2016). *State of the World's Minorities and Indigenous Peoples 2016: Events of 2015*, at 136-7. Available at: <http://minorityrights.org/wp-content/uploads/2016/07/MRG-SWM-2016.pdf> and "Newar", webpage on *Indigenous Voice*, available at <http://www.indigenousevoice.com/en/indigenous-peoples/14/newar.html>.

<sup>11</sup> The submitting organisation is aware of (unsuccessful) requests made by affected individuals residing in Ranibari and Samakhushi for disclosure of the details of the road-widening project.

KoteshworPepsi Cola-SallaghariTinkuneBhaktapursection. KVDA announced in 2016 that work will (re)commence on the six road sections marked with an asterisk in July 2016.<sup>12</sup>

11. As noted above, the first work on road-widening activities, which related to an approximately 5 km stretch of road from Kalanki to Nagdhunga, commenced in approximately December 2014, and demolitions in this area commenced in 2015.<sup>13</sup>In February 2016, 47 local residents from the Kalanki-Nagdhunga road area filed a case with the Supreme Court of Nepal seeking a halt to the expansion to this work,<sup>14</sup> and in August 2016 the Court issued an interim order to cease the expansion of the road in this area.<sup>15</sup> Similar cases were brought by residents affected by the Bajalu-Baisdhara road-widening<sup>16</sup> and the Chobar-Dashinkali road widening.<sup>17</sup> In December 2016 and January 2017, local residents held protests in Jorpati and Maitighar in relation to the road-widening in those areas.<sup>18</sup>On 14 June 2013, 27 June 2013 and 30 July 2013 residents of SamakhusiTokhaalso filed a similar Writ Petition in the Supreme Court. In spite of (and in violation of) these Court orders, the KVDA has continued and/or announced it will continue work in several areas that remain the subject of interim injunctions.<sup>19</sup>The Supreme Court cases remain underway. On 18 September 2017, the Supreme Court gave a summary oral judgment indicating that it was upholding the complainants petition, however the petition included a number of different arguments and the elements which have been upheld are not yet clear (in the meantime, there are no further orders and the interim injunction on further demolitions remains in place). A written decision from the Court is expected to be issued in the next weeks or months which will clarify the nature of the decision and the particular arguments which have been accepted (and notably, whether those based on ILO Convention 169 have been accepted).
12. The road widening project requires demolition of a significant number of houses (and corresponding eviction of a significant number of families) in order to permit expansion of the roads. The exact number of houses to be demolished is unknown, in part because the GoN has not (contrary to legal requirements under Nepali law) undertaken an environmental and social impact assessment of the road-widening proposal (nor conducted any other public consultation on the proposal, the routes and/or any alternatives). The numbers of people affected, however, appear to be significant. Newspaper reports indicated that 871 houses would need to be demolished on the Jorpati-Sundarijal road section alone;<sup>20</sup>moreover, in an interview with media, the head of KVDA indicated that up to 30,000 houses were likely to be affected (15,000 of which had already been demolished at the time of the interview in February 2017).<sup>21</sup> Given the average household occupancy rate of 4.1 people per household in

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<sup>12</sup> “Delay in road expansion causing inconvenience to public”, *The Himalayan Times*, 9 April 2017; “Major road sections yet to be expanded in Valley”, *The Himalayan Times*, 13 February 2017.

<sup>13</sup> “Driven to despair”, *Kathmandu Post*, 5 April 2017.

<sup>14</sup> “Supreme Court stays Kalanki-Nagdhunga road expansion”, *The Himalayan Times*, 7 August 2016; “SC: halt Kalanki, Nagdhunga road expansion”, *Kathmandu Post*, 8 August 2016

<sup>15</sup> *Ibid.*

<sup>16</sup> “Balaju locals file writ against road expansion”, *Kathmandu Post*, 28 March 2016.

<sup>17</sup> “SC orders to halt to Chobhar-Dakshinkali road expansion for a week”, *Nepali Sajha*, 15 August 2016.

<sup>18</sup> “Demo in Jorpati against road project, 40 people including former joint secy under control”, *Online Khabar*, 25 December 2016; “People affected by road-widening drive stage demonstration at Maitighar”, *Annapurna Post*, 9 April 2017.

<sup>19</sup> “NHRC draws government’s attention over road expansion”, *Republica*, 21 July 2017. In addition, on 20 June 2016, the residents of Thankot (currently Chandragiri Municipality) filed a case (No. 072-MS-0031) against the KVDA for contempt of court for the breach of Interim Order. The case is sub judice.

<sup>20</sup> “Demo in Jorpati against road project, 40 people including former joint secy under control”, *Online Khabar*, 25 December 2016.

<sup>21</sup> *Annapurna Today*, 3 February, 2017, 28.

urban areas (according to the 2014-15 Annual Household Survey<sup>22</sup>), this suggests the total number to be affected may be around 120-130,000.

13. Again because of the lack of an environmental and social impact statement or other study, there is no official (public) information on the population groups who will be most affected by the road-widening. However, the Lawyers' Association for the Human Rights of Nepalese Indigenous Peoples (LAHURNIP) has conducted a small sample study of affected people in several areas of Kathmandu and Patan districts, namely: Balaju, BandaBhanjang, Baneshwor, Jorpati-Sankhu, Kalimati, Satungal, Sitapaila, Sundarijal, Thankot, Tinthana, Gurjudhara, Dakchhinkaliand Tokha(Kathmandu District); MadhyapurThimi, Dhapakhel, Bhandegau, Harishiddhi, Harishiddhi West (Patandistrict). The results of that study suggest that approximately 70% of people affected by the road-widening in the studied areas were indigenous peoples (of whom the vast majority were Newar).<sup>23</sup>
14. It is likely that this disproportionate effect on the Newar population is replicated throughout the road-widening project. The areas most affected by road-widening are generally the oldest parts of the Kathmandu Valley (including central urban areas, major Newar towns, and long-established roads connecting these areas), where Newar communities have been living for many generations, and where they continue to be resident in high populations.
15. Beyond the demolition of houses and appropriation of lands, the road-widening activities also involve destruction of a number of other public places, including some which have particular cultural significance for the Newar, including Newari *guthi*, which are a key element of cultural continuity within Newar communities in the Kathmandu Valley. A (non-exhaustive) sample list explaining a few of the culturally-significant places which have been or will be destroyed by the road-widening activities is included in Annex 1. There are other effects on Newar communities; notably, the forced evictions cause displacement of members of the community, usually to other areas, which destroys their long-term links with their local community. In addition, because of the complex caste structure (with differentiated roles and responsibilities) of Newar communities, the displacement of one particular Newari sub-group from the area (who may be displaced in their entirety by the road-widening) can disrupt the entire functioning of communal and cultural life.
16. There appear to be several contraventions of the legal procedure followed by the GoN and KVDA under national laws, including that:
  - a. No environmental and social impact statement was prepared as required by section 3 of the Environment Protection Act 1997, nor was any consultation taken on the plans, routes or alternatives to road-widening;
  - b. No official notice of the road expansion was published in the Gazette, as required by section 3 of the Public Roads Act 1971;
  - c. Notices of acquisition of land were not given to residents whose houses and/or lands were proposed to be included, as required by section 9 of the Land Acquisition Act 1977. Similarly, no study has carried out to confirm the appropriateness of the land

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<sup>22</sup> Central Bureau of Statistics (2016). *Annual Household Survey 2014/2015 (Major Findings)*. Government of Nepal, National Planning Commission Secretariat, at 61. Available at <http://cbs.gov.np/image/data/2016/Annual%20Household%20Survey%20Report%202014-15.pdf>, accessed 9 August 2017.

<sup>23</sup> LAHURNIP's study is only available in Nepali so is not annexed to this representation, but a copy is available on request.

acquisition s prescribed by section 6(2)(b). Neither due process nor consent has been obtained in accordance with section 26 of the Land Acquisition Act.

- d. No or inadequate compensation was provided to those whose lands were acquired, contrary to article 25(3) of the Constitution. There has similarly been non-compliance with article 37 of the Constitution that guarantees right to housing and right against illegal forced eviction. These are all fundamental rights guaranteed under the Constitution.

17. The KVDA has sought on a number of occasions to characterise residents who are opposing the demolitions as “illegal encroachers” on State land, namely the public roads. However, many residents (and this is particularly the case for Newar residents, many of whose families have lived in their existing dwellings for many generations) note that the buildings and settlements in which they live pre-date the national laws in relation to road setbacks (and thus rather, the public roads have sought to encroach upon their ancestral properties and settlements without formal acquisition or compensation).

18. Residents faced with eviction and/or loss of lands and properties have organised themselves in various ways to resist the road project (including, as noted above, filing Court cases in the Supreme Court). A number of affected communities have formed local “struggle committees”, and 27 of these have joined together to form the Kathmandu Valley Road Expansion Affected People Struggle Committee. Complaints raised by this umbrella organisation against the GoN include:

- The failure to consult on the road-widening plan and location, including considering alternative routes or measures which would minimise the need for demolitions and evictions;
- The failure to conduct any environmental and social impact assessment, and the related failure to take into account any impact on the cultural heritage of the Newar communities living in these areas;
- Failure to comply with legal procedures for expropriation and demolition of houses;
- Inappropriate tactics of intimidation in relation to demolitions, including (a) intimidation and arrest of local residents who oppose the works and (b) deliberately commencing demolition work on a Saturday (a non-working day in Nepal) to prevent recourse by local residents to the Courts for urgent interim orders; (c) a lack of notice before demolition takes place;
- Inadequate, delayed or no compensation for the loss of lands, houses, livelihoods and local amenities; and
- Failure to ensure that those whose houses are demolished have adequate (or any) alternative housing.

19. The KVDA has made statements to the media stating that “We must expand the road stretch at any cost” and that “If the locals obstruct the expansion move again, we will have no choice but to use force”.<sup>24</sup>

### **Contravention of ILO 169**

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<sup>24</sup> Statement by Bhai Khaji Tiwari, Development Commissioner at KVDA, quoted in “KVDA to use force to expand road”, *The Himalayan Times*, 24 November 2016.

20. On the basis of the background facts set out above, the submitting organisation believes that the Government of Nepal has acted and continues to act in contravention of its obligations under ILO Convention No. 169 in various respects. In particular, the submitting organisation believes that GoN (through the KVDA and other national actors) is in contravention of, inter alia, Articles 2, 4, 6, 7, 14, 16 and 33.
21. We note that the road-widening project is the subject of a number of national court cases which continue on foot in the Supreme Court of Nepal. However, consistent with the ILO Governing Body's previous rulings, we note that there is no requirement to exhaust domestic remedies before having recourse to the ILO's Article 24 representation mechanism.<sup>25</sup>
22. As explained above, the Newar peoples are recognised indigenous peoples within Nepal, whose traditional home is the Kathmandu Valley, incorporating its three main urban centres (Kathmandu, Lalitpur and Bhaktapur). The road-widening project affects the Newars disproportionately, in two senses: first, in simple numerical terms, because the evidence suggests Newars are the predominant group in the areas which are being affected by road-widening; and secondly, in a collective sense, because the destruction of homes and buildings caused by the road-widening has already caused (and its continuation threatens to cause) significant social and cultural disruption of traditional Newar communities who continue to inhabit the Kathmandu Valley. This disruption poses a significant risk to the cohesiveness of long-standing Newar communities, the continued use of the Newar language, and the maintenance of traditions, and ultimately to the cultural survival of the Newar.

#### *Violation of Article 6 of the Convention*

23. Under Article 6 of the Convention, the GoN is obliged to "consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly". As the Governing Body has previously noted, this obligation of consultation arises not only in relation to new projects or construction work, but also to maintenance and repair work,<sup>26</sup> and undoubtedly arises in relation to the road-widening work (with the very serious impacts it has on the local Newar population) in this case.
24. Given the very serious nature of the impacts caused (notably forced eviction of long-term residents from their homes and places of work, and the extensive damage to or destruction of longstanding traditional Newar communities), it is the view of the submitting organisation that the "appropriate procedures" for this project should have involved widespread, public and timely information about the project as well as alternatives under consideration, with a specific focus on consultations by the GoN with the Newar people (through their representative organisations). Such consultations should have provided an opportunity for genuine exchange (including sufficient time for such an exchange to take place), with the aim

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<sup>25</sup> See *Report of the Committee set up to examine the representation alleging non-observance by Mexico of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under article 24 of the ILO constitution by the Trade Union Delegation, D-III-57, section XI of the National Trade Union of Education Workers (SNTE), Radio Education*. Doc. GB 272/7/2 (1998); *Report of the Committee to set up to examine the representation alleging non-observance by Guatemala of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under article 24 of the ILO Constitution by the Federation of Country and City Workers (FTCC)*, 2007, Doc GB.299/6/1, para 55.

<sup>26</sup> *Report of the Committee set up to examine the representation alleging non-observance by Mexico of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under article 24 of the ILO Constitution by the Union of Metal, Steel, Iron and Allied Workers (STIMAHCS)*, 2006, Doc GB.296/5/3, para 39.

of achieving agreement or consent.<sup>27</sup> Accordingly, the “consultation laid down in the Convention is therefore not merely a formal requirement but a genuine instrument for participation.”<sup>28</sup>

25. In contravention of this obligation, the GoN has undertaken no public consultation, and certainly no consultation with the Newars through their own institutions, over the road-widening project (which should have included e.g. the potential routes and destruction of property that may be involved, alternative routes with potentially lesser impacts and/or alternatives to the road-widening which may achieve any public purposes of the project, as well as measures for mitigating the effects on local communities). Instead, faced with the opposition of affected populations, it has failed to make information public and provide information when requested, failed to comply with existing national legal procedures, used underhand tactics to avoid legitimate restrictions on its work (such as undertaking demolition work on Saturdays to avoid Court oversight), aimed publicly to discredit opposing populations (describing them as interested only in protecting “private property”, and used intimidation tactics (such as arrest and threat of force) against affected populations.

#### *Violation of Article 7*

26. Article 7(3) of the Convention requires States parties to ensure that:

*... whenever appropriate, studies are carried out, in co-operation with the peoples concerned, to assess the social, spiritual, cultural and environmental impact on them of planned development activities. The results of these studies shall be considered as fundamental criteria for the implementation of these activities.*

27. The Governing Body has held that such studies must obligatorily precede any development activities, and involve the indigenous or tribal people affected by the project.<sup>29</sup> Moreover, because of the terms of Article 7(3) (which requires studies to take into account the social, spiritual, cultural and environmental impact), in many cases this may require a study which is more extensive in scope than that provided for under national law.<sup>30</sup>
28. In the present case, and despite legal requirements to the contrary under the laws of Nepal, the GoN has not carried out any type of prior impact assessment (and certainly not one which includes assessment of the social, spiritual, cultural and environmental impact of the road widening on the Newar people, or has involved the Newar people in any way. In the case of a project having such a far-reaching and irreversible impact on Newar communities, this omission is extremely serious. Moreover, as noted above, the Governing Body has previously observed that an impact assessment as required under national law may not be sufficient to satisfy the requirements of the Convention, given the broad scope of impact assessment required by Article 7(3). We suggest that the Governing Body may wish to consider adopting

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<sup>27</sup>Representation alleging non-observance by Mexico of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under article 24 of the ILO Constitution by nine workers' organizations, 2004, Doc GB.289/17/3, paras 89, 92, 94.

<sup>28</sup>Report of the Committee set up to examine the representation alleging non-observance by Brazil of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under article 24 of the ILO Constitution by the Union of Engineers of the Federal District (SENGE/DF), 2009, Doc GB.304/14/7, para 42

<sup>29</sup>Report of the Committee on Mexico (STIMAHCS), 2006, supra, para 40.

<sup>30</sup>Report of the Committee on Brazil (SENGE/DF), 2009, supra, para 57.



some or all of the Akwé:Kon guidelines<sup>31</sup>, developed by parties to the Convention on Biological Diversity (to which Nepal is a party) in order to provide guidance on the conduct of cultural, environmental and social impact assessments, in order to provide guidance to parties conducting assessments under Article 7(3).<sup>32</sup>

29. Pertinent to the present case, we note in particular the following provisions of the Akwe:Kon Guidelines:

- Under Article 11, notification of a development proposal and impact assessment, containing all details of the proposal, should be provided to organisations representing indigenous peoples in sufficient time to allow the affected indigenous community to prepare its response;
- Under Article 12, indigenous communities should be invited to participate in and are to be accorded full respect in all stages of the assessment and development process, including planning and implementation;
- Under Articles 28-34, development proposals should be assessed for possible impacts upon, inter alia, customary use of biological diversity, traditional knowledge, sacred sites and ritual or ceremonial activities; the need for cultural privacy, and the exercise of customary laws.
- Under Article 35, national ESIA legislation and processes should “respect existing inherent land and treaty rights as well as legally established rights of indigenous and local communities”.
- Under Article 39, an ESIA should take into account, inter alia, traditional systems and means of production;
- Under Article 51, an ESIA should take into account effects on social cohesion;
- Under Article 53, where prior informed consent is required by national law, the assessment process should consider whether such consent has been obtained.

#### *Violation of Article 14*

30. Under Article 14 of the Convention, the GoN is obliged to recognise the rights to ownership and possession of the peoples concerned over the lands which they traditionally occupy. As noted above, Newar communities in the Kathmandu Valley have, over the course of many decades, lost large tracts of lands to in-migration from other areas of Nepal. However, longstanding Newar communities (within urban conglomerations) and villages (outside of the main urban centres) continue to exist, and Newar members of these communities have long-standing property rights, both traditional and formalised, in these areas.

31. The existing road-widening project takes no account of such property rights (despite the KVDA acknowledging them in part, when it has observed disparagingly to the press that the

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<sup>31</sup>Akwé:Kon voluntary guidelines for the conduct of cultural, environmental and social impact assessments regarding development proposed to take place on, or which are likely to impact upon, sacred sites and on lands and waters traditionally occupied or used by indigenous or local communities. Available at: <https://www.cbd.int/doc/publications/akwe-brochure-en.pdf>.

<sup>32</sup>The Akwé: Kon guidelines have already been referred to as one of the best practice standards by the Inter-American Court on Human Rights in its decision in *Saramaka v Suriname* IACtHR, Judgment of 28 November 2007, Ser C No. 172, para 215 (footnote).

opposition to the road-widening is only people trying to preserve their “private property”<sup>33</sup>). The GoN has not recognised any specific cultural or collective impact on the Newar from the road-widening project (contrary to its obligations under Article 5), and has sought to diminish or deny the property rights (even formal property rights) of those who have been or are to be evicted, as is evidenced inter alia by the lack of compensation paid for land lost to the project. In the absence of information from the GoN, the basis for such a position is unclear, but appears to be based on a general law that is over 40 years old which purported to define space around public roads, and appropriate such land, without compensation, for the government. Given the variations in the routing of the road which has occurred during the project (and which affected persons allege is because of political interests), it appears unlikely that this could in fact have appropriated all the land now being covered by demolitions. However, even if this law did purport to have such an effect, this in itself would have represented a violation of indigenous peoples’ property rights which, while it persisted, created a continuing violation of those rights and a corresponding right to restitution. Given that no action was taken by the GoN in fact to appropriate land and demolish houses prior to its ratification of the Convention, we submit that it cannot now rely upon any former law of this nature as a basis on which to evict the traditional Newar indigenous communities from lands, houses and businesses which they continue to own, occupy and use.

#### *Violation of Article 16*

32. Article 16 of the Convention specifically prohibits the removal of indigenous peoples from the lands which they occupy. Article 16(2) states that:

*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 effective representation of the people concerned.*

33. The road widening project involves destruction of homes and “forced evictions”,<sup>34</sup> and therefore involves acts by the GoN with very serious consequences for the affected peoples which can be justified under human rights law only in exceptional circumstances.<sup>35</sup> In this regard it may be instructive for the Governing Body also to consider the jurisprudence of UN human rights bodies who have considered this issue.<sup>36</sup> The Committee on Economic, Social

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<sup>33</sup> Statement by Bhai Khaji Tiwari, Development Commissioner at KVDA, quoted in “Delay in road expansion causing inconvenience to public”, *The Himalayan Times*, 9 April 2017, available at:

<https://thehimalayantimes.com/kathmandu/delay-road-expansion-causing-inconvenience-public/>.

<sup>34</sup> The term “forced evictions” has been defined by the Committee on Economic, Social and Cultural Rights to mean “the permanent or temporary removal against their will of individuals, families and/or communities from their homes and/or lands which they occupy, without the provision of, and access to, appropriate forms of legal and other protection”: Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 7: The right to adequate housing (Art 11.1): Forced evictions*, 20 May 1997, E/1998/22, para 3.

<sup>35</sup> CESCR, *General Comment No. 4: The right to adequate housing (Art 11(1) of the Covenant*, 13 December 1991, UN Doc No. E/1992/23, para 18; see also CESCR, *General Comment No. 7: The right to adequate housing (Art 11.1): Forced evictions*, 20 May 1997, E/1998/22, para 1.

<sup>36</sup> We note in this respect previous comments from the Governing Body indicating that the documentation from UN treaty bodies can be taken into account as indicative of the general framework in which ILO Conventions are interpreted: see *Representation on Mexico (nine workers’ organisations)*, 2004, supra, para 130.

and Cultural Rights (CESCR) has indicated that legislation against forced evictions is an essential basis on which to build a system of effective protection,<sup>37</sup> and that:

*States Parties shall ensure, prior to carrying out any evictions, and particularly those involving large groups, that all feasible alternatives are explored in consultation with the affected persons, with a view to avoiding, or at least minimizing, the need to use force. Legal remedies or procedures should be provided to those who are affected by eviction orders. States parties shall also see to it that all the individuals concerned have a right to adequate compensation for any property, both personal and real, which is affected.*<sup>38</sup>

34. The Committee noted that interference with a person's home should occur only in accordance with legal requirements.<sup>39</sup> Moreover, there are a number of minimum procedural protections which should be applied in any case where forced eviction may occur, including:

*(a) an opportunity for genuine consultation with those affected; (b) adequate and reasonable notice for all affected persons prior to the scheduled date of eviction; (c) information on proposed evictions, and, where applicable, on the alternative purpose for which the land or housing is to be used, to be made available in a reasonable time to those affected; (d) especially where groups of people are involved, government officials or their representatives to be present during an eviction; (e) all persons carrying out the eviction to be properly identified; (f) evictions not to take place in particularly bad weather or at night unless the affected persons consent otherwise; (g) provision of legal remedies; and (h) provision, where possible, of legal aid to persons who are in need of it to seek redress from the courts.*

35. As recognised by the Convention, forced evictions have particularly egregious effects for indigenous peoples, because they entail not only the loss of home and/or livelihood, but generally entail much broader losses of ancestral lands, sites and places of spiritual and cultural value, and involve the breakup of and disruption to vulnerable indigenous communities. Article 16 of the Convention is echoed (in stronger terms) in the United Nations Declaration on the Rights of Indigenous Peoples, Article 10 of which states:

*Indigenous peoples shall not be forcibly removed from their lands or territories. 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.*

36. In addition to the lack of consultation over the road-widening (required by Article 16(2) and separately by Article 6), a number of other requirements under both Article 16 of the Convention and general international law have not been respected, notably that (a) evictions may only be carried out in accordance with the law (b) affected persons should obtain adequate prior notice (c) affected persons should have access to remedies prior to eviction being carried out (in the present case, evictions have continued in defiance of Court orders, meaning that both the eviction is illegal and there is not an effective access to remedy); (d) affected persons should receive adequate compensation.

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<sup>37</sup>General Comment No. 7, para 9.

<sup>38</sup> Ibid, Para 13.

<sup>39</sup>Ibid, para 14.

37. In respect of the latter, we note that Article 16(4) of the Convention requires that peoples removed from their lands “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”. Article 16(5) requires that “persons thus relocated shall be fully compensated for any resulting loss or injury”.
38. In the present case, the GoN and the KVDA appear to have made no effort to relocate Newar people (or any people) evicted by the project or provide them with alternative land. Monetary compensation, where offered, has been delayed (or has not arrived) and where it has arrived, it has been inadequate. Numerous people among those evicted have complained that they have not been provided with compensation for the land which they have lost to the road-widening (only for the value of their demolished house). It is not clear that national laws in relation to compensation are consistent with international law requirements for adequate compensation (specifically in relation to land value), and additionally bearing in mind that many residences are not only homes but also business premises.

*Systematic failure to take into account indigenous peoples in decision-making*

39. The submitting organisation believes that the above violations arise in part because of broader, systematic violations related to the participation of indigenous peoples within decision-making structures within Nepal, including violations of the GoN’s obligations under inter alia, Article 2, Article 4 and Article 33. In this respect, it is submitted that the GoN continues to have a dismissive view of indigenous peoples and systematically fails to ensure their effective participation in decision-making,<sup>40</sup> and has sought to undermine the cohesion of indigenous groups (including the Newars) for political purposes. The failure of the GoN to engage effectively with Newars and other groups in the face of opposition to the road-widening project is evidence of this continued disregard.
40. Discrimination against indigenous peoples in Nepal is pervasive and all-encompassing, and this discrimination has recently been entrenched in the 2015 Constitution, rewritten (after a long process) following the peace accords in 2006. LAHURNIP criticised the new Constitution in relation to a number of discriminatory provisions including that:

*... it characterises Nepal as a mono-cultural nation-state (Articles 3 and 4); its definition of secularism provides special status to Hinduism (Article 4); the Khas Nepali language is the only official language of Nepal, allowing for a few mother tongues to be official state languages only (Articles 6 and 7); the cow and other Hindu symbols continue to be national symbols (Article 9.3); the right to live with dignity has been limited to being a part of the state policies, which are unenforceable (Articles 16K Para. 8, and 55). Participation in state bodies on the basis of inclusive principles (Article 42) has no meaning if it is not proportional with caste, ethnicity, region and gender identifiers.<sup>41</sup>*

<sup>40</sup>IWGIA (2017). “Nepal”. In *The Indigenous World 2017*, IWGIA, 405 at 408-9.

<sup>41</sup>IWGIA (2016). “Nepal”. In *The Indigenous World 2016*, IWGIA, 321 at 324.

41. Specifically in relation to land, the GoN has failed to enact any legislation that protects or recognises customary land ownership of indigenous peoples (estimated to comprise between a third and half of the total population of Nepal<sup>42</sup>), and indeed has statutorily abolished a number of customary tenure systems.<sup>43</sup>In 2015, the CEACR noted that the levels of land ownership by indigenous peoples in Nepal, according to a study submitted by the GoN itself, were low, and requested specific information from the GoN on progress made in identifying customarily owned lands.<sup>44</sup>A number of treaty bodies have similarly expressed concerns for the lack of protection of indigenous peoples' rights, including:

- The Committee on the Rights of the Child, which noted concerns in 2017 regarding the “low enrolment rate and high dropout rate of indigenous children”; reports of discrimination against indigenous children in the aftermath of the 2015 earthquake, and denial of free, prior and informed consent in resettlement and reconstruction decisions; the disproportionately high mortality rate of indigenous children; the lack of learning materials in indigenous languages; reports of bullying (including by teachers) of indigenous children in schools;<sup>45</sup>
- The Committee on Economic, Social and Cultural Rights, which noted concerns in 2016 about “information that indigenous peoples have been deprived of their traditionally owned lands, territories and resources due to development projects carried out by the State party without seeking their free, prior and informed consent. The Committee is further concerned that, although the State party has ratified International Labour Organization (ILO) Convention No. 169 (1989) concerning indigenous and tribal peoples in independent countries, there is no legal provision that recognizes community ownership of lands by indigenous peoples (art. 1).”<sup>46</sup>
- The Committee on the Elimination of Racial Discrimination, which noted concerns in 2004 about the “general paucity of information” regarding the implementation of the Convention for Nepal’s indigenous peoples, and over the “allegations of forced relocation and violations of the right of indigenous peoples to own, develop, control and use their traditional homelands and resources, in the name of wildlife preservation”.<sup>47</sup>

42. As the Governing Body has previously noted, “... Articles 2 and 33 of the Convention provide for coordinated and systematic action by governments, with the participation of the peoples concerned, to protect the rights of these peoples and to guarantee respect for their integrity, and for participation, from the conception to the evaluation stage, of the measures provided for in this Convention.”<sup>48</sup>In Nepal, however, there is a complete absence of coordinated and systematic action to protect indigenous peoples, and similarly a total closure

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<sup>42</sup> See IWGIA, *op. cit.*, at 405. The official census figure of 36% is disputed by indigenous peoples who claim the true figure is over 50%.

<sup>43</sup> D R Joshi et al (2017). “Indigenous peoples and Land tenure practices: contemporary debates and issues in Nepal”. *Evidence for Policy: Policy brief*, COLARP, January 2017.

<sup>44</sup>CEACR (2015). *Direct Request: Nepal*. Published 115<sup>th</sup> ILC session, available at:

[http://www.ilo.org/dyn/normlex/en/?p=1000:13100:0::NO:13100:P13100\\_COMMENT\\_ID:3244381:NO](http://www.ilo.org/dyn/normlex/en/?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:3244381:NO).

<sup>45</sup>Committee on the Rights of the Child (2016). *Concluding observations on the combined third to fifth periodic reports of Nepal*. 8 July 2016. UN Doc No. CRC/C/NPL/CO/3-5, at paras 58, 64 and 66.

<sup>46</sup>Committee on Economic, Social and Cultural Rights (2016). *Concluding observations on the third periodic report of Nepal*. 12 December 2014. UN Doc No. E/C.12/NPL/CO/3, para 9. See also the Committee’s previous concluding observations (CESCR (2008). *Concluding observations of the Committee on Economic, Social and Cultural Rights: Nepal*. 16 January 2008. UN Doc No. E/C.12/NPL/CO/2.

<sup>47</sup>Committee on the Elimination of Racial Discrimination (2004). *Concluding observations of the Committee on the Elimination of Racial Discrimination: Nepal*. 28 April 2004. UN Doc No. CERD/C/64/CO/5, para 13.

<sup>48</sup>*Report of the Committee on Brazil (SENGE/DF)*, 2009, *supra*, para 43.

to participation by indigenous peoples in these decisions. Far from adopting special measures to safeguard the persons, institutions, property, labour, culture and environment of the peoples concerned as required under Article 4, the GoN continues in practice to pursue assimilationist policies which fail to recognise and respect the varied and unique cultures of indigenous peoples in Nepal.

### *Conclusion*

43. For the above reasons, the submitting organisation believes the GoN is in violation of its obligations under the Convention, and requests the consideration and intervention of the Governing Body in order to uphold the Convention. The submitting organisation would in particular seek from the GoN, and hopes the Governing Body will consider recommending:

- An immediate halt to all road-widening works which are taking place contrary to the interim orders of the Supreme Court;
- A general halt to all further demolition or construction work pending:
  - the completion of a full impact assessment, which takes into account the cultural, social, spiritual and environmental impacts on the Newar people and other groups, and is undertaken in consultation with them;
  - consultation with all affected groups (and in particular the Newar people) over the proposed road-widening routes and alternatives, and in particular alternatives which have a less destructive impact on Newar communities;
  - review of the owners and occupiers affected by road-widening (as determined following consultations), and budgeting of full compensation for any further evictions or demolitions required;
- Review of the compensation paid (or not paid) to Newars (and others) already evicted from their houses, and a payment of additional compensation to those who have not been compensated adequately (including payment in kind or in monetary compensation for land and houses destroyed (at the election of those evicted), as well as compensation in relation to loss of subsistence and livelihood caused by loss of lands or business premises and/or local business goodwill, where this arises).
- Rehabilitation of lands and/or houses that have already been destroyed or affected by the works carried out in contravention of the Convention.

**[DATE]**

**Nepal Telecom Karmachari Union**

**Address: [address]**

**Contact person(s): [name]**

**Email address(es): [email address]**

**Annex 1–Non-exhaustive, indicative list of some culturally significant areas affected by the Road Widening Project**

	<b>Temple/Mo nastery</b>	<b>Location</b>	<b>Cultural Value</b>
1	Narayan Pokhari (pond)	Tokha Municipality (Tokha Road Expansion)	Newar people celebrate <i>Jatra</i> on Baisakh 3 (April 15/16/17) according to the Nepali Calendar every year in this pond. They perform rituals to dip the gods Chanderswori Mai, Sapana Tirtha Mai, Saraswoti and Ganesh in this pond. It is very important to collective identity and social integrity.
2	Budhawa Mandir	Bade gaun, Godabari Municipality (Sat dobat to Bandegau road expansion)	This is a 1700 year old temple. Budhawa means Budhabar (Wednesday) and day of Buddha. The Newar worship here during a month-long period during Shrawan (July-August) as a <i>Gulan Parba</i> . The Matya (one type of ritual group) have to compulsory visit this temple on the day of Panchadaan. Newars from across Kathmandu valley (Yen, Yela, Kwapa, Kipu) visit and worship collectively here.
3	Sattal	Badegaun Godabari Municipality	This is a Buddhist site in which Newar people sing religious song about lord Buddha every day.
4	Bhairab Mandir	Badegaun, Godabari Municipality	Bhairab Jatra is celebrated on Yanya Punhi (Indra Jatra) in this temple every year. The statue of the god Bhairab is brought from Tika Bhairam on this day.
5	Krishna Mandir	Badegaun (old Buspark), Godabari Municipality	The Newar people worship at this Krishna Mandir every day. They specially celebrate birth day of God Krishna on Krishna janmastami. They take the god on a cart and travel all over the town.
6	Kumari Mandir	Chandragiri Municipality, Khariko Rukh (Kalanki to Nagdhunga Road expansion)	This temple holds historical and cultural value. Newar people visit this temple to perform all rituals from birth to death.
7	Saraswati Mandir	Chandragiri Municipality, Thankot	Newar People Worship Specially on Sakimana Punhi and Shree Panchami on the name of god Saraswoti.
8	Gupti Ganesh	Gokarna	This shrine /sacred site of Newar is ancient and nobody knows when and who built it. Newar perform <i>Jatra</i> (Carnival) here two times a year, first on 25 April and second on 31 May.