

Mandates of the Special Rapporteur in the field of cultural rights; the Special Rapporteur on the rights of indigenous peoples and the Special Rapporteur on the human rights of internally displaced persons.

REFERENCE:
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Excellency,

We have the honour to address you in our capacity as Special Rapporteur in the field of cultural rights, the Special Rapporteur on the rights of indigenous peoples and the Special Rapporteur on the human rights of internally displaced persons, pursuant to Human Rights Council resolutions 19/6, 33/12 and 32/11.

In this connection, we would like to bring to the attention of your Excellency's Government information we have received concerning **the alleged forced eviction, internal displacement, destruction of cultural property, and lack of consultation and free, prior informed consent of the Newar peoples due to the ongoing Kathmandu Valley Road Improvement Project.**

According to the information received:

The indigenous Newar peoples comprises a sizeable part of the Nepali population. Their traditions play an important role in the country's cultural heritage, especially in the Kathmandu Valley, which is a traditional homeland and ancestral domain of the Newars. The Newar peoples are legally listed as *Adivasi Janajati* (indigenous nationalities) in the National Foundation for Development of Indigenous Nationalities Act (2002), and thus are officially recognised in Nepal.

Numerous large development projects have sprung up after the peace agreement was signed in 2006, including road construction, hydropower plants, and high-power transmission lines. Such projects have allegedly been planned and implemented without properly informing and undertaking consultations with the people affected by them, and have frequently affected *Adivasi Janajati* indigenous peoples.

The Ministry of Physical Infrastructure and Transport, the Road Department, the Ministry of Urban Development and the *Kathmandu Upatyaka Vikash Pradhikaran* (Kathmandu Valley Development Authority) have been carrying out a major road expansion project that has allegedly had an adverse impact on the Newar indigenous communities in Kathmandu. This road project reportedly has financial support from China and the Asian Development Bank (ADB).

The Kathmandu Valley Road Expansion Project has led to mass and forced eviction of the Newars, which have intensified in the last months. Some 15'000 houses have already been demolished and a further 15'000 houses are at risk of demolition. The project is reportedly being carried out without consultation with the affected peoples in order to seek their free, prior and informed consent for the development and execution of these road expansion plans. The aforementioned authorities have allegedly put marks on houses and other infrastructure, signaling the intent of their demolition for road expansion purposes, without prior notice.

The information received furthermore suggests that this project has been initiated without any social, cultural or environmental impact assessments, and that no alternative or precautionary measures, compensation or rehabilitation plans were in place for the people facing forced expulsion. The people affected have asked for full disclosure about the road expansion project on the above-mentioned issues. Although required by the Land Acquisition Act and the Right to Information Act, there has allegedly been no information and response given in this regard until the time of writing this communication.

According to the information received, approximately one hundred and forty thousand people, including women, children and older persons, will be affected by the road construction project in the Kathmandu Valley, both directly and indirectly. A 2017 household survey indicates that the majority of affected persons are from the indigenous Newar community.

The Nepalese National Human Rights Commission (NHRC) has stated that 'indigenous peoples in Nepal continue to face serious threat to their lives and properties in development activities such [...as] road expansion and constructions and proper management of graveyard sites [...] and urbanizations. They often face intimidation, tortures, displacement, force eviction that result negative consequences toward their identity, life and security'.¹

In December 2015, the Supreme Court called on the government not to put marks on private houses and pull them down in a unilateral manner while carrying out the road expansion works in the course of implementing development and road expansion programmes in the urban areas without fulfilling the due process requirements and providing compensation as specified by the law.

¹ NHRC Statement at EMRIP on 11 July 2017; www.nhrcnepal.org/nhrc_new/doc/newsletter/933038606NHRC_Hon_Commissioner_Mohna_An_sari_HRC_10th_Session_on_%20EMRIP_Geneva_11_July_2017.pdf.

The Supreme Court has issued several interim orders to halt further activities relating to the road expansion, stating that it would cause irreparable harm. In April 2016, such orders were issued following a writ petition filed to the Supreme Court on 23 February 2016. The petition raised the concern over 47 houses due to be demolished as a result of the ongoing road expansion project, and demanded the immediate halt. According to the information received, the houses were subsequently demolished, and the owners were taken into custody, being charged with breaking the law and disrupting public order. It is alleged that individuals were beaten, arrested and detained in the Thankot Police Check Post.

In June 2016, the NHRC raised concerns over violations of the right to property by the State, undertaken against the spirit of the Supreme Court stay order and interim order related to the road expansion in Kathmandu valley. The NHRC urged the Government of Nepal to act or cause to act in accordance with the values and spirit of the Supreme Court and ensure that individual's dignity of life and the right to shelter be respected.²

In August 2016, the Supreme Court issued a further Interim Order to halt activities relating to the road expansion.

In November 2016, the Commissioner of Kathmandu Valley Development Authority, Dr. Bhai Kaji Tiwari, reportedly stated that 'We must expand the road stretch at any cost. If the locals obstruct the expansion move again, we will have no choice but to use force.'³ In November and December 2016, the Kathmandu Valley Development Authority reportedly used force against locals who continued to obstruct expansion work along Teku-Soltimode and Jorpati-Sankhu stretches of the project.

Since January 2017, indigenous peoples have staged peaceful demonstrations in several parts of the Kathmandu Valley. The protests were against the displacement of hundreds of people who received no compensation from the Government and against the State's violation of interim orders set out by the Supreme Court to suspend the expansion of roads.

Numerous cultural heritage sites considered an integral part of the life and identity of the peoples, are reportedly at risk of destruction due to the execution of the road expansion project. These include temples, monasteries and sacred sites such as Guthi Ghar (Trust Houses) *Chaityas*. Although the Government of Nepal

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www.nhrcnepal.org/nhrc_new/doc/newsletter/Nepal_NHRC_Press_Release_Kalimati_Local_People_Building_Eng_9_June_2016.pdf.

³ <https://thehimalayantimes.com/kathmandu/kathmandu-valley-development-authority-use-force-expand-road/>.

promised to avoid the destruction of these heritage sites, the information received indicates little transparency about the road expansion plans.⁴ In the town of Badegaon the widening of the roads may affect 30 heritage sites.

In March 2017, a group led by the Kathmandu Valley Road Expansion Victim Struggle Committee staged demonstrations against the road expansions in various areas of Kathmandu Valley. They requested the halt of additional activities and demanded proper compensation for the houses that have been demolished.

While the road construction project was due to be completed in July 2017, information received indicates that only approximately 25% of the road expansion project has been completed. The project is expected to consist of some 916 km of roadworks and an anticipated acceleration of road expansion activities in the Kathmandu Valley is likely to further undermine and violate the human rights of the indigenous Newar peoples, notably by infringing on their rights to land, housing and cultural rights.

While we do not wish to prejudge the accuracy of these allegations, we are concerned that forced evictions, displacements and violations of the human rights of the Newar peoples continue to take place, despite repeated efforts to bring these violations to the attention of the Government of Nepal. We are particularly disturbed by the accounts of the eviction of the Newar from their ancestral land, the use of force on protestors, the lack of prior information and consent, and the significant and irreversible damage these ongoing road construction projects may pose to indigenous peoples.

We would like to echo the concerns previously raised by the Committee on Economic, Social and Cultural Rights' Concluding Observations on Nepal (2014), noting that indigenous people are '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 recommended that the State 'seek their free, prior and informed consent before launching any development projects', 'continuously monitor the projects being developed so as to take corrective measures, if necessary', and 'provide displaced families and groups with fair and adequate compensation'.⁵

Forced evictions coupled with the lack of information and consent of indigenous peoples for development projects has been an enduring concern for the mandate on the rights of indigenous peoples and these issues were addressed by the previous Special Rapporteur, James Anaya, in his 2009 country mission report.⁶ We would like to reiterate

⁴ <http://nepalitimes.com/article/Nepali-Times-Buzz/bulldozing-cultural-heritage,3525>

⁵ E/C.12/NPL/CO/3

⁶ A/HRC/12/34/Add.3

the recommendation made by the previous Special Rapporteur on the rights of indigenous peoples to adopt ‘appropriate measures to ensure that Adivasi Janajati communities are consulted, through their own representative institutions, in the planning and undertaking of any development project, either private or public, that affects their traditional land use patterns or access to natural resources’ and that a ‘mechanism should be developed to provide redress to these communities for their loss of land or access to natural resources incurred without their free, prior and informed consent, including when that loss has occurred by the establishment of development projects’.

We would like to draw the attention of your Excellency’s Government to its obligations under binding international human rights instruments. Nepal is a party to the International Covenant on Economic, Social and Cultural Rights (ICESCR) since 14 May 1991, of which articles 2, 11 and 15 are of particular relevance for the situation described above; to the International Covenant on Civil and Political Rights (ICCPR) since 14 May 1991, of which articles 2, 6, 9, 14, 25, 26 and 27 should be particularly recalled; to the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) since 30 June 1971, and to the Convention on the Rights of the Child (CRC) since 14 September 1990, of which article 30 is of particular relevance.

We would also like to refer to the legally binding Indigenous and Tribal Peoples Convention (ILO Convention No. 169) that was ratified in 2007 by Nepal. In particular, we would like to refer to Article 16 (1) that affirms that indigenous peoples ‘shall not be removed 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 opportunity for effective representation of the peoples concerned.’ Article 16 (4) additionally adds that when returns are not possible, ‘as determined by agreement or, in the absence of such agreement, through appropriate procedures, these peoples shall be provided in all possible cases with lands of quality and legal status at least equal to that of the lands previously occupied by them, suitable to provide for their present needs and future development. Where the peoples concerned express a preference for compensation in money or in kind, they shall be so compensated under appropriate guarantees’.

Furthermore, the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), adopted by the General Assembly in 2007, elaborates upon existing binding rights in the specific cultural, historical, social and economic circumstances of indigenous peoples. These fundamental human rights include the right to life and security, equality and non-discrimination, all rights which are recognised in the human rights treaties ratified by Nepal.

Article 7 of UNDRIP provides that ‘indigenous individuals have the rights to life, physical and mental integrity, liberty and security of persons’. With respect to their rights to property in the form of land and natural resource rights, Article 26 of the Declaration states 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. 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’.

Furthermore, the Declaration’s 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’.

In addition, the Declaration stipulates in its Article 11 that indigenous peoples have the ‘right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites’. Article 31 states that indigenous peoples have the ‘right to maintain, control, protect and develop their cultural heritage’. It adds that ‘in conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of’ this right’. These provisions recall article 15 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), which urges States to take steps to ensure the realization of the right to cultural life for everyone, including steps necessary for the conservation of culture. In this connection, we refer to General Comment 21 (2009) of the Committee on Economic, Social and Cultural Rights, which recalls that States have the obligation to respect and protect cultural heritage in all its forms. Cultural heritage must be preserved, developed, enriched and transmitted to future generations as a record of human experience and aspirations. Such obligations include the care, preservation and restoration of historical sites, monuments, works of art and literary works, among others (E/C.12/GC/21, para.50).

In its resolution 33/20 on cultural rights and the protection of cultural heritage, the Human Rights Council noted that “the destruction of or damage to cultural heritage may have a detrimental and irreversible impact on the enjoyment of cultural rights.” Cultural heritage is also a critical resource for safeguarding, questioning and transmitting

historical knowledge and narratives of the past, and as such, are resources to ensure the right to education and training without any discrimination, as recognized in article 13 of the ICESCR. The Special Rapporteur in the field of cultural rights has underscored that States have a duty not to destroy, damage or alter cultural heritage, and to take measures to preserve and safeguard cultural heritage from destruction or damage by third parties (A/HRC/17/38, and A/HRC/31/59). The obligation to preserve and safeguard cultural heritage is also inscribed in the 2003 UNESCO Declaration concerning the Intentional Destruction of Cultural Heritage, stressing the responsibility of States not to intentionally destroy their own heritage.

We would also like to remind your Excellency's Government of its obligations under various international human rights instruments, in particular the International Covenant on Economic, Social and Cultural and more specifically article 11.1 which recognizes the right of everyone to an adequate standard of living for themselves and their family, including food and housing, and to the continuous improvement of living conditions. This article must be read in conjunction with article 2.2 of the Covenant which provides for the exercise of any right under the Covenant without discrimination of any kind.

Furthermore, according to the Committee on Economic, Social and Cultural Rights' General Comment No. 7 on forced evictions, paragraphs 15 and 16, procedural protections are essential in relation to forced evictions, including, among others, genuine consultation, adequate and reasonable notice, alternative accommodation made available in a reasonable time, and provision of legal remedies and legal aid. In paragraph 17, the Committee further emphasizes that where those affected are unable to provide for themselves, the State party must take all appropriate measures, to the maximum of its available resources, to ensure that adequate alternative housing, resettlement or access to productive land, as the case may be, is available.

We draw your Government's attention to the provisions of the Guiding Principles on Internal Displacement. Guiding Principle 6 establishes that every human being shall have the right to be protected against being arbitrarily displaced from his or her home or place of habitual residence including in cases of large-scale development projects, which are not justified by compelling and overriding public interests. Guiding Principle 7 states that prior to any decision requiring the displacement of persons, the authorities concerned shall ensure that all feasible alternatives are explored in order to avoid displacement altogether. Where no alternatives exist, all measures shall be taken to minimize displacement and its adverse effects. If displacement occurs in situations other than during the emergency stages of armed conflicts and disasters, the following guarantees shall be complied with: (a) A specific decision shall be taken by a State authority empowered by law to order measures; (b) Adequate measures shall be taken to guarantee to those to be displaced full information on the reasons and procedures for their displacement and, where applicable, on compensation and relocation; (c) The free and

informed consent of those to be displaced shall be sought; (d) The authorities concerned shall endeavour to involve those affected, particularly women, in the planning and management of their relocation; (e) Law enforcement measures, where required, shall be carried out by competent legal authorities; and (f) The right to an effective remedy, including the review of such decisions by appropriate judicial authorities, shall be respected.

We also wish to call your attention to the Basic Principles and Guidelines on Development-based Evictions and Displacement, prepared by a former Special Rapporteur on adequate housing, which provides guidance on the States' obligations before, during and after development-based evictions.

The full texts of the human rights instruments and standards recalled above are available on www.ohchr.org or can be provided upon request.

In view of the urgency of the matter, we would appreciate a response on the initial steps taken by your Excellency's Government to safeguard the rights of the above-mentioned peoples in compliance with international instruments.

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

1. Please provide any additional information and any comment you may have on the above-mentioned allegations.
2. Please provide information on the measures that have been taken to protect the rights of the Newar in the context of the road construction project, including the obligation to consult and obtain the free and informed consent of indigenous peoples prior to the approval of any project affecting their lands or territories or resulting in their internal displacement.
3. Please provide information on the measures taken to comply with the relevant orders by the Supreme Court
4. Kindly provide further information on how the Government has sought to ensure that development projects are carried out in a manner that respects cultural heritage.

5. Please indicate whether social, cultural and environment impact assessments have been carried out for the Kathmandu Valley Road Improvement Project. If so, please kindly provide details of the results.
6. Please provide information on what measures have been taken to prevent internal displacement of the affected population including measures to inform and consult with them and, where displacement has occurred to provide required compensation and relocation.
7. Please provide information on whether investigations have been carried out in relation to the forced evictions and internal displacement of members of Newar community due to the Kathmandu Valley Road Improvement Project. In this regard, please provide details of the outcome to date of these investigations and whether any suspected perpetrators have been detained, charged and sanctioned. If no investigations have taken place, or if they have been inconclusive, please explain why.

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 for any person responsible of the alleged violations.

Your Excellency's Government's response will be made available in a report to be presented to the Human Rights Council for its consideration.

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

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