

9 February, 2015

Ms. Victoria Tauli Corpuz
Special Rapporteur on the rights of indigenous peoples

Ms. Farida Shaheed
Special Rapporteur in the field of cultural rights

Palais des Nations
CH-1211 Geneva 10
Switzerland

Re: Urgent Communication concerning violations of the rights of indigenous Newars in Kathmandu, Nepal

Esteemed Special Rapporteurs:

This communication¹ is respectfully submitted for consideration under your mandates regarding the violation of the rights of indigenous Newar people, inter alia to their lands and resources and culture, in the tourist district of Thamel in Nepal's capital city Kathmandu.

A Nepali private company has unlawfully acquired the communal trust lands – traditionally holding a holy pond and its embankments – of the indigenous Pradhan Newar community of Thamel to construct Chhaya Center, “the biggest business complex in Nepal's history”. As a result, the religious and cultural customs and traditions of Pradhan Newars based on the land and resources have been destroyed, thus seriously infringing their human rights and fundamental freedoms. We request that you jointly examine this communication and correspond with the Government of Nepal about the need to take immediate action to defend, protect and promote the rights of the indigenous Pradhan Newars to their land, resources, sacred places and culture.

Respectfully,



Prabindra Shakya

On behalf of
Lawyers' Association for Human Rights of Nepalese Indigenous Peoples (LAHURNIP) and
National Coalition Against Racial Discrimination (NCARD)

¹ This communication is jointly submitted by Lawyers' Association for Human Rights of Nepalese Indigenous Peoples (LAHURNIP) www.lahurnip.org and National Coalition Against Racial Discrimination (NCARD) www.ncard.org.np

Urgent communication concerning violations of rights of indigenous Newars to their lands and resources and cultures in Kathmandu, Nepal due to construction of a business complex in their communal trust land

Submitted to the United Nations Special Rapporteurs on the rights of indigenous peoples and in the field of cultural rights

The planned business complex Chhaya Center² is currently under construction in the tourist district of Thamel in Ward No. 9 of Kathmandu Metropolitan City. Chhaya Devi Complex Private Limited – the developer of the Center claims it to be the biggest such complex in Nepal being built in a total area of 76,000 sq. ft. According to the indigenous Pradhan³ Newars, who have been living in the area adjoining the complex construction site for generations, the land on which the complex is being built is their communal trust land called Guthi⁴ land in Nepal that the company has wrongfully acquired through corruption and abuse of authority.

Background

The ancient name of Thamel (originally Thanbahil) is Kalpanagar. At the beginning of the Malla era (10th – 18th century), the feudal king⁵ of the area Sinhasartha Baaha, who is considered to be the ancestor of Pradhans of Thamel and referred to as ‘god’ for his devout faith in Buddhism, established a large Bikramasheel Bihar (a Newar monastery) north of Kathmandu. The monastery is known as Than Bihar (Than meaning north and Bihar meaning monastery), which was later adapted to give the area its name: Thamel.

East of the monastery lies an open space with a platform, which has been used for religious fairs, festivals and dances since ancient times. A beautiful pond was set up further east to

² See <http://www.chhayacenter.com/page.php?play=4&id=33>

³ Pradhan is a social group with indigenous Newar community/nation.

<http://en.wikipedia.org/wiki/Pradhan>. Newar is one of the 59 officially listed indigenous groups of Nepal – native to Kathmandu valley and surrounding areas.

⁴ Guthi is a socio-economic organization in Newar community set up for maintaining order in society. It is a kind of common trust consisting mainly of cultivated land as assets. See *Guthi Sansthan in Newar Community* at <http://bossnepal.com/guthi-sansthan-in-newar-community/> or <http://en.wikipedia.org/wiki/Guthi>. Other communities have also adopted or appropriated similar Guthi practices for various socio-cultural purposes. Guthi land, in Nepal’s laws, is a land endowment made for a religious or philanthropic purpose. See Guthi Corporation Act 1976 available at

http://www.lawcommission.gov.np/index.php?option=com_remository&Itemid=2&func=fileinfo&id=690&lang=en. Also, see Liz Alden Wily *et al*, *Land Reform in Nepal: Where is it coming from and where is it going?* November 2008,

http://www.landcoalition.org/sites/default/files/legacy/uploads1/nepal_law_book.pdf?q=wp-content/uploads/nepal_law_book.pdf

⁵ Ancestors of Pradhans are believed to have ruled the area since ancient times as feudal kings till the early Malla era. They built number of temples, courtyards, ponds, stone taps, rest houses, etc. of historical, archaeological, religious and socio-cultural significance. Number of festivals and fairs and religious ceremonies were initiated. Numerous Guthis were set up for those socio-cultural and religious purposes with adequate land endowed to those Guthis.

the open space; the Pradhan community historically used the pond for their daily rituals, death rites, festivals as well as other religious and cultural purposes.

Land Registration Office records dated 1965 BS (circa 1909 AD) for the Guthi's property includes the land covering the open space with the platform as well as the pond and its embankment. The area was registered as a public pond at the Office in 2033 BS (circa 1977 AD). Even the field book at Guthi Corporation⁶, the governmental body set up to manage, conduct and coordinate Guthis throughout the country – shows Sinhasartha Garud Bhagwan Guthi as owner of the Raj Guthi⁷ land with an area of more than 12 *ropanies* (more than 72,000 sq. ft.)⁸. This indicates that the land had been endowed for religious purposes of the Guthi, thus belonging to the community as a whole, under the control of the Guthi Corporation. However, today massive construction is on going on the land where the pond and its embankment were.

During the dictatorial Rana oligarchy, then Prime Minister Keshar Shumsher Rana forcefully annexed the pond in the compound of Keshar Mahal palace he built in the area while the Pradhan Newars were given limited access to the pond. A small royalty was paid to the Guthi of the monastery for the acquisition of the pond and embankment land. Keshar Shumsher Rana, abusing his ruling authority, unlawfully got the Guthi land registered with himself as its tenant though existing laws do not provide for individual beneficiary for Guthi lands. Idols and structures of various gods and deities in the embankment of the pond were moved. The tradition of using water and lotus flower from the pond for daily worship at the monastery was discontinued and a stone nearby was used as the site for death rites.

Following death of Keshar Shumsher Rana, his son, Keyur Shumsher, inherited the land. When he began to fill up the pond, Guthi members filed a case at Nepal's Supreme Court against such action claiming violation of the right to religion.⁹ In 2033 BS (circa 1977 AD), the Court resolved the case through a settlement to retain the pond and its embankment while Keyur Shumsher was maintained as its tenant and allowed to use the land. Nonetheless, that did not stop Keyur Shumsher from filling in the pond and fragmenting and registering the pieces as Raitani Guthi¹⁰ land, whereby the religious endowments are owned by the cultivator-tenants, by abusing his ties to the royal authority and conniving with the officials of the Guthi and Guthi Corporation. The fragmented pieces were transferred to Sudha Paudyal and Bina Paudyal. A large part of land was still retained under Shumsher's tenancy.

⁶ See www.guthisansthan.org.np

⁷ Raj Guthi are religious endowments under the control of the Guthi Corporation. See Liz Alden Wily *et al*, *Supra* note 4

⁸ The total land area is 12 ropani, 13 aana, 2 paisa, 3 daam = $(12 \times 5476 + 13 \times 542.25 + 2 \times 85.56 + 3 \times 21.39)$ sq. ft. = $(65,712 + 7,049.25 + 171.12 + 64.17)$ sq. ft. = 72,996.54 sq. ft. approx.

<http://www.housingnepal.com/articles/display/units-of-area-calculation-in-nepal>

⁹ Pushpa Man Pradhan et al vs. Keyur Shumsher, Supreme Court of Nepal

¹⁰ Raitani Guthi are religious endowments owned by the cultivator-tenants. See Liz Alden Wily *et al*, *Supra* note 4

After Keyur Shumsher's demise, Ambika Rana inherited the larger part of land while the smaller pieces were transferred to Shankar Prasad Shah in 2044 BS (circa 1988 AD) as Raitani Guthi land. Three years later, Guthi Corporation decided to freeze the land pieces indicating faulty procedure in registration of the land as Raitani Guthi land. The duo – Rana and Shah – challenged against this at Kathmandu District Court to which the Court gave the verdict in favor of the duo in 2053 BS (circa 1997 AD). When Guthi officials appealed against the verdict in the Appellate Court, Ambika Rana in 2062 BS (circa 2006 AD) paid a sum of 15,000,000 NPR (around 150,000 USD) to the Guthi members to drop the case and settled the dispute unlawfully without the knowledge of the court.

In 2063 BS (2007 AD), Ambika Rana sold a fragment of the larger piece to Sureshaya Housing while in 2064 BS (2008 AD) Shankar Prasad Shah transferred the other pieces of land to Pratima Pandey. The following year, Chhayadevi Complex purchased all the pieces of land and acquired approval for construction of the business complex from Kathmandu Metropolitan City office in 2069 BS (2013 AD).

National remedies sought

Judicial remedies

Representatives of the indigenous Pradhan community claim that the entire process relating to the Guthi land has been unlawful. They claim that some Guthi members were bought off during the settlement of 2062 BS, which has resulted in division in the community in favor of and against the construction of business complex. They say many community members also feared reprisals against them if they openly speak against the construction of the complex due to strong influence of the investors in political circles, as well as their connections to land mafia.

Nonetheless, six of the Guthi members in 2014 filed a case at Kathmandu District Court demanding repeal of all the actions beginning from bestowing tenancy on the Guthi land in the settlement of 2033 BS and ensuing fragmentation and transfer of pieces of land, registration of the land pieces as Raitani Guthi and following settlement made by Ambika Rana with Guthi officials and all the succeeding transfers of the ownership of the land pieces to the recent approval for construction of the business complex. The plaintiffs have claimed that these actions have eventually led to extinction of the religion of the community.¹¹ While the Court process has been sluggish with hearings postponed repeatedly, construction of the complex has been moving ahead at a rapid pace.

District Courts in Nepal cannot make an interventionist order for which only Nepal's Supreme Court has necessary jurisdiction. This includes the extraordinary power to issue necessary and appropriate order, specifically injunctions, to enforce fundamental constitutional rights or settle constitutional or legal disputes of public interest.¹² Thus, a representative of the Pradhan community along with rights advocates has also filed a

¹¹ See http://nepalindigenoussissues.blogspot.com/2014/03/blog-post_23.html [in Nepali]

¹² Art. 107 (2), Interim Constitution of Nepal, 2007

public interest litigation writ petition in Nepal's Supreme Court in July 2014 against the company, Guthi officials and concerned government authorities and ministries¹³.

The writ petition has claimed violations of right to religion (Art. 17.3) and cultural rights (Art. 23) in the case, among other rights guaranteed in Interim Constitution of Nepal, 2007. Further, the writ petition states that there are clear legal provisions in Nepal that public lands and properties cannot be destroyed and registered in the name of an individual under Land (Survey and Measurement) Act 2019 (1963), Land Revenue Act 2034 (1978), Local Self-Governance Act 2055 (1999) and Local Administration Act 2028 (1971). Ancient Monument Preservation Act 2013 (1956) guarantees preservation of ancient monuments and provides for penalty against those who obstruct preservation of such monuments. Civil Code also states that public lands cannot be destroyed.

In the writ, they have demanded an Interim Order to immediately halt the construction of the complex and freeze any transaction of the land as well as a mandamus order to retain the pond and its embankment as public property and to undertake initiatives for protection of such public properties, including formation of a high level committee if necessary and formulation of required laws. While the Supreme Court did not issue an interim order to halt construction of the complex, it has issued a show cause order to the defendants.

However, the proceedings at the Supreme Court have also been very slow. There have been extreme delays in setting court hearings and repeated postponements thereof often blamed on understaffing of the judiciary and complex technical procedures. Those are general problems that plague Nepal's justice system, which have raised serious concerns of justice being delayed or completely denied in this case as well. Thus, an immediate intervention is urgently required.

Non-judicial Remedies

A complaint regarding the issue was also registered at Nepal's National Human Rights Commission (NHRC) in April 2014 recommending investigation into the violation of human rights in the case and asking for facilitation of dialogue between the indigenous community and rights violators. Responding to the complaint, an official at NHRC recommended the complainant over the phone to file a writ petition at the Supreme Court for immediate intervention, which was later undertaken as described above.

A complaint was also submitted on the issue to the Commission for the Investigation of Abuse of Authority (CIAA) in July 2014 calling for investigation of abuse of authority and corruption in the transactions of the Guthi land. So far this complaint has not produced any result. The constitutional bodies have differing mandate over cases sub judice at the court

¹³ Defendants include Government of Nepal, Office of the Prime Minister and Cabinet of Ministers; Ministry of Federal Affairs and Local Development; Ministry of Culture, Tourism and Civil Aviation; Ministry of Urban Development; Ministry of Science, Technology and Environment; Kathmandu District Administration Office; Department of Archaeology; Kathmandu Metropolitan City; Kathmandu Land Registration Office; Guthi Corporation; Kathmandu Valley Development Authority; Chhaya Devi Complex Pvt. Ltd.; Ambika Rana as well as Guthi officials.

of law. While NHRC can conduct investigations with the permission of the court concerned¹⁴, CIAA cannot any action in matters relating to any judicial action of a court of law¹⁵. There is no knowledge if the bodies have undertaken any significant investigation on the complaints submitted on the case.

Current situation

As a result of the above-mentioned events, many of the customary practices of local Pradhan Newars based on the pond and its embankments have been shattered. As stated above, the traditions of using the pond water to clean the deities and idols of the monastery and lotus flower from the pond to worship them have been entirely discontinued while death rites have been dishonorably modified to be performed on a stone in the open space which now lay by the side a busy street. The idols and structures moved from the embankments of the pond to the open space have been in the state of utter despair in lack of adequate preservation while the open space itself has more or less turned into parking area and/or spot for street vendors.

The Sinhasartha Garud Bhagwan Guthi has long stopped receiving any additional revenue or benefit from the land, except for a small financial support from the Guthi Corporation. Such revenue was to be used for the communal rituals and observing festivals and fairs, including a locally renowned 12-year fair of an idol from the monastery. While the construction of the complex proceeds unabated on the land in question within high concrete walls and tin fences, it is only natural that there are growing concerns of further challenges to the existing practices.

The situation has directly affected hundreds of families of local Pradhan Newars as well as entire Newar community/nation in terms of loss of cultures and traditional lands and resources. At the same time, this only reflects the devastation of indigenous cultures and lands, territories and resources that has marked the formation of modern 'Nepali' State and culture. Thus, the entire Nepali society is eventually at loss due to loss of such cultures and cultural heritage.

Violations of rights

In above context, it is evident that the rights of indigenous Pradhan Newars to lands and resources, as well as their cultural rights, as provided in Nepal's national laws and international human rights obligations, have been violated.

Article 17.3 of Nepal's interim constitution guarantees that each community residing in Nepal has the right to preserve and promote its culture, cultural civilization and heritage. Article 23 of the constitution provides that every person shall have the right to profess, practise and preserve his or her own religion as handed down to him or her from ancient times, paying due regard to social and cultural traditions and, further, that every religious

¹⁴ Art. 4 (b), National Human Rights Commission Act, 2068 (2012)

¹⁵ Art. 4 (b), Commission for the Investigation of Abuse of Authority Act, 2048 (1991)

denomination shall have the right to maintain its independent existence. For this purpose, the law mandates that religious places and trusts should be managed and protected by the State. Besides infringement of these constitutional rights, various national laws have also been defied on in the case, as claimed in the writ petition filed in Nepal's Supreme Court.

In addition, the aforementioned events indicate violations of rights of indigenous Pradhan Newars to freely participate in the cultural life of the community as provided in Universal Declaration of Human Rights (Art. 27) and International Covenant on Economic, Social and Cultural Rights (Art. 15) as well as right to freedom of religion as guaranteed in International Covenant on Civil and Political Rights.

Furthermore, UN Declaration on the Rights of Indigenous Peoples 2007, which Nepal voted in favor of, specifically provides that indigenous peoples and individuals have the right not to be subjected to destruction of their culture and states shall provide effective mechanisms for prevention of, and redress for any action which has the aim or effect of depriving them of their cultural values (Art. 8).

Article 11 of the Declaration also provides 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, among others and states shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural and religious property taken without their free, prior and informed consent or in violation of their laws, traditions and customs. Further, article 31 guarantees indigenous peoples the right to control, protect and develop their cultural heritage and their intellectual property over such cultural heritage.

Conclusion and Requests to Special Rapporteurs

On behalf of indigenous Pradhan Newar community and greater indigenous peoples of Nepal, the Special Rapporteurs are respectfully requested to take the information provided under their consideration. This is only a representative case in which communal/trust lands of indigenous peoples have been unlawfully acquired and abused. This has very often occurred in the name of development and urbanization at the hands of the State or other parties with support of the State, which has resulted in great destruction of their indigenous cultures and identities¹⁶. As national remedies have been ineffective or slow in protecting the rights of the indigenous Pradhan Newars, it is necessary that international human rights experts come together to condemn such continued violations of rights of indigenous peoples and consider ways to intervene to ensure that the Government of Nepal protects and promotes human rights as it is obligated to do.

¹⁶ See, for example, an earlier communication submitted regarding violation of rights of indigenous Newar people due to road expansion drive in Kathmandu valley
<http://nepalindigenousissues.blogspot.com/2015/02/un-rights-expert-informed-of-violation.html>