



## International Covenant on Civil and Political Rights

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### Human Rights Committee

#### Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2184/2012\*, \*\*

<i>Communication submitted by:</i>	Ram Maya Nakarmi (represented by counsel, Philip Grant, of Track Impunity Always — TRIAL)
<i>Alleged victim:</i>	The author, Padam Narayan Nakarmi (her husband) and Luman Nakarmi (their minor daughter)
<i>State party:</i>	Nepal
<i>Date of communication:</i>	31 January 2012 (initial submission)
<i>Document references:</i>	Decision taken pursuant to rule 97 of the Committee's rules of procedure, transmitted to the State party on 2 August 2012 (not issued in document form)
<i>Date of adoption of Views:</i>	10 March 2017
<i>Subject matter:</i>	Enforced disappearance
<i>Procedural issues:</i>	Exhaustion of domestic remedies; failure to sufficiently substantiate allegations
<i>Substantive issues:</i>	Right to life; prohibition of torture and cruel and inhuman treatment; right to liberty and security of person; respect for the inherent dignity of the human person; recognition as a person before the law; right of the child to measures of protection; right to an effective remedy
<i>Articles of the Covenant:</i>	2 (3), 6, 7, 9, 10, 16 and 24 (1)
<i>Articles of the Optional Protocol:</i>	2 and 5 (2) (b)

\* Adopted by the Committee at its 119th session (6 March-29 March 2017).

\*\* The following members of the Committee participated in the examination of the communication:  
Tania María Abdo Rocholl, Yadh Ben Achour, Ilze Brands Kehris, Ahmed Amin Fathalla, Olivier de Frouville, Christof Heyns, Yuji Iwasawa, Bamariam Koita, Marcia V.J. Kran, Duncan Laki Muhumuza, Photini Pazartzis, Mauro Politi, José Manuel Santos Pais, Anja Seibert-Fohr, Yuval Shany and Margo Waterval.



1. The author of the communication is Ram Maya Nakarmi, who submits the communication on her own behalf and on that of her husband, Padam Narayan Nakarmi, and her minor daughter, L.N. They are all Nepalese nationals, born on 11 January 1977, 17 April 1976 and 22 October 1999, respectively. The author claims that the State party has violated her husband's rights under articles 6, 7, 9, 10 and 16, separately and in conjunction with article 2 (3), of the Covenant; her rights under article 7, alone and in conjunction with article 2 (3); and her minor daughter's rights under article 7, read in conjunction with 2 (3) and 24 (1) of the Covenant. The author is represented by counsel. The Covenant and its Optional Protocol entered into force for the State party on 14 August 1991.

#### **The facts as submitted by the author**

2.1 From 1996 to 2006, an internal armed conflict took place in Nepal between the Government and the Communist Party of Nepal – Maoist. Broad powers were given to the law enforcement officers by the Terrorist and Disruptive Activities Ordinance. For long periods, the State party declared a state of emergency and several rights were suspended. Both parties to the conflict, including the police and the Royal Nepalese Army, committed atrocities, and enforced disappearances became a widespread phenomenon.<sup>1</sup> During that period, and especially after 2003, the Bhairab Nath Barracks of the Royal Nepalese Army in Maharajgunj, Kathmandu (also known as the Maharajgunj barracks) became notorious as a place in which persons suspected of being Maoists were detained, ill-treated, tortured, disappeared and killed.<sup>2</sup>

2.2 Mr. Nakarmi used to live in Bungmati, Lalitpur, Nepal, where he worked as an ironmonger in a small business making iron grills. His was the only source of income for his family. The author claims that, on 23 September 2003, Mr. Nakarmi was arrested and taken from his home by approximately six plain-clothed security personnel who identified themselves by way of their official identity cards as members of the Royal Nepalese Army deployed from the Bhairab Nath Barracks. Several people, including the author and Mr. Nakarmi's mother and brother, witnessed his arrest.

2.3 Following her husband's arrest, the author visited the Bhairab Nath Barracks and the Lagankhel Barracks, in Lalitpur, on a regular basis for two years. Personnel of both barracks always denied that Mr. Nakarmi was held there. She also regularly visited the Nepal Police Headquarters in Naxal, Kathmandu, and the District Police Office in Hanuman Dhoka, Kathmandu, but they always informed her that her husband was not in police custody. However, shortly after her husband's arrest, a former detainee of the Bhairab Nath Barracks told the author that her husband was in the barracks.

2.4 In October 2003, the author tried to register a first information report with the District Police Office in Patan. The author submits that the police refused to register the report on the grounds that it could only be submitted for crimes listed in schedule 1 of the State Cases Act of 1992 and that enforced disappearance was not on the list.

2.5 The author claims that, at some point between 2005 and 2006, two other former detainees of the Bhairab Nath Barracks, K.K.C. and H.S., who were released in 2005, told her that they had seen her husband in the Barracks.

2.6 In May 2006, the Office of the High Commissioner for Human Rights in Nepal (OHCHR-Nepal) issued a report on investigation into arbitrary detention, torture and disappearances at the Bhairab Nath Barracks in 2003-2004.<sup>3</sup> The name of the author's husband was mentioned among those of detainees whose whereabouts were still not clarified and who were reported to have been very ill when last seen by former co-detainees in 2004 and in early 2005. According to that report, detainees' testimonies indicated that, by late December 2003, Mr. Nakarmi was suffering from severe swelling of the body and

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<sup>1</sup> See reports of the Working Group on Enforced or Involuntary Disappearances, E/CN.4/2004/58, para. 227, and A/HRC/13/31, annex IV (graph relating to Nepal), and Office of the United Nations High Commissioner for Human Rights (OHCHR), "Conflict-related disappearances in Bardiya District" (December 2008), pp. 5 and 27 (available from <http://nepal.ohchr.org>).

<sup>2</sup> The author refers to OHCHR, "Report of investigation into arbitrary detention, torture and disappearance at the Maharajgunj RNA barracks, Kathmandu, in 2003 and 2004" (May 2006).

<sup>3</sup> Ibid.

overall weakness and it was believed that he had died in 2004.<sup>4</sup> The report also noted that detainees were kept in cruel, inhuman or degrading conditions.<sup>5</sup>

2.7 The author claims that, on 19 June 2006, she reported her husband's disappearance and made a second attempt to file a first information report before the District Police Office in Hanuman Dhoka, Kathmandu, which was registered on 19 June 2006. In the report, she identified five members of the Royal Nepalese Army who had allegedly participated in the disappearance, torture and probable murder of her husband and requested their immediate arrest and prosecution. She stated that they were responsible for what had happened to her husband based on eyewitness testimonies and the information contained in the OHCHR-Nepal report. Despite her efforts, no investigation was carried out. On 25 December 2006, the District Police Office in Kathmandu told her not to return as they were unable to call the army's officers to the Office or, therefore, to conduct an investigation.

2.8 Following the refusal of the police to take any action against the alleged perpetrators, on 4 January 2007 the author filed a writ of mandamus before the Supreme Court of Nepal against different governmental authorities and members of the Royal Nepalese Army that had allegedly participated in the extrajudicial killing of her husband. Within the proceedings, the District Police Office of Hanuman Dhoka, Kathmandu, stated that the author had not filed a first information report before it. Other authorities, such as the Ministry of Defence, the Chief of the Human Rights Cell of the Army Headquarters, a Lieutenant Colonel at Bhairab Nath Barracks, the Minister for Home Affairs, the Chief of the Army and two senior police officers at the Kathmandu District Police Office, did not provide any relevant information to the Supreme Court and stated that they had not arrested or seen the author's husband.

2.9 On 1 June 2007, the Supreme Court ruled on the habeas corpus petitions of 83 disappeared persons. While a habeas corpus petition was never filed on behalf of Mr. Nakarmi, the Supreme Court noted that, according to one of the writs the author's husband had died as a result of torture in the Bhairab Nath Barracks. It also noted that a former detainee of those Barracks testified before the Court of Appeal in Patan that the persons mentioned in the petitions had been kept there in detention.

2.10 In June 2009, the author received interim relief of Nr 100,000 under the Interim Relief Plan set up by the Government.

2.11 On 18 August 2009, the Supreme Court sent a letter to the National Human Rights Commission asking whether the Commission had any information pertaining the disappearances allegedly committed in the Bhairab Nath Barracks. In reply, on 7 September 2009, the Commission submitted a report that described various methods of torture used within the Barracks, including being submerged by water, electrocution and beatings with different objects. It also stated that detainees in the Barracks were kept under poor conditions and forced to watch and listen to torture being inflicted on others. The author points out that the report mentioned her husband's name and stated that he had been kept in custody, that he had fallen ill as a result of torture inflicted on him, and that other inmates believed that in the second week of February 2004 he had been taken to the Shree Birendra Army Hospital in Chhauni, Kathmandu.<sup>6</sup> The author underlines that Mr. Nakarmi is also mentioned in the missing persons database of the Nepalese Red Cross<sup>7</sup> and in the National Human Rights Commission's list of missing persons.<sup>8</sup>

2.12 On 26 August 2010, the Supreme Court quashed the author's writ of mandamus on the ground that there was no evidence that indicated that her husband had been arrested and murdered by State's agents. It stated that the author had relied upon statements made by inmates who had been in custody for criminal proceedings and the report presented by the National Human Rights Commission, and that her allegations were mere assumptions. The

<sup>4</sup> Ibid., p. 65.

<sup>5</sup> Ibid., p. 60.

<sup>6</sup> The author refers to the report of an investigation by the National Human Rights Commission into disappearances at the Bhairab Nath Barracks, which was ordered by the Supreme Court and submitted to it on 7 September 2009.

<sup>7</sup> The author refers to the International Committee of the Red Cross, "Missing persons in Nepal: the right to know", August 2008, in which the name of the author's husband is listed.

<sup>8</sup> National Human Rights Commission, "An appeal", disappearance name list (2057-2060), in which the name of the author's husband is included.

Court also maintained that the author's concerns about the disappearance of her husband had to be investigated by a truth and reconciliation commission to be created by the Government to address the problem of disappearances in Nepal. In that connection, it noted that the Government had enacted legislation for investigation of enforced disappearances and to provide relief to the families of the victims.

2.13 The author affirms that she has taken all possible steps to exhaust all domestic remedies. Nevertheless, those remedies are mostly inexistent and the few available are both ineffective and unreasonably prolonged. A criminal investigation can only start after registration of a first information report, but this can be lodged only when it is related to a crime enlisted in schedule 1 of the State Cases Act of 1992. Since enforced disappearance is not yet codified in the State party's national legislation, it is impossible for relatives of victims of enforced disappearance to file a first information report for these acts. The Supreme Court has recognized this serious gap in the legislation of the State party. In the case of the author's husband, it is only after the release of the 2006 OHCHR-Nepal report that the authorities accepted a first information report. However, this was ineffective as, only few months after the registration of the report, the District Police Office in Kathmandu requested the author not to return to the Police Office, as they were unable to call the respondent army officers to the District Police Office or, therefore, to conduct an investigation. The author's writ of mandamus was quashed by the Supreme Court on the premise that she should wait until the Government established a truth and reconciliation commission to address the problem of disappearance that occurred in Nepal during the non-international armed conflict. Nonetheless, the author contends that a potential fact-finding process in the context of a transitional justice mechanism does not replace access to justice and redress for victims of gross human rights violations and their relatives and therefore cannot be deemed a remedy within the meaning of article 5 (2) (b) of the Optional Protocol.

### **The complaint**

3.1 The author submits that her husband is a victim of enforced disappearance and that the State party violated his rights under articles 6, 7, 9, 10 and 16, separately and in conjunction with article 2 (3); her rights under article 7, read alone and in conjunction with article 2 (3); and her minor daughter's rights under article 7, read in conjunction with articles 2 (3) and 24 (1), of the Covenant.

3.2 The author's husband was arbitrary deprived of his liberty by members of the Royal Nepalese Army in the presence of eyewitnesses on 23 September 2003 and taken to the Bhairab Nath Barracks. He was last seen alive in a life-threatening condition. Moreover, in view of the testimonies of former detainees and other concurrent evidence from various reliable sources, such as the reports of OHCHR-Nepal and the National Human Rights Commission and the judgment of the Supreme Court of Nepal of 1 June 2007, it is reasonable to presume that he died while in custody as a result of ill-treatment and torture inflicted on him. The arbitrary arrest, ill-treatment and subsequent enforced disappearance of her husband was perpetrated in a context of a widespread and systematic practice. Despite the fact that his deprivation of liberty was promptly reported by the author, the authorities denied that it had occurred and no thorough and effective investigation has been carried out to clarify the fate and whereabouts of her husband. Moreover, his mortal remains have not been located, exhumed, identified or returned to his family. In that context, the burden of proof rests on the State party to provide a satisfactory and convincing explanation, establishing and disclosing with certainty her husband's fate and whereabouts. Therefore, in the light of the State party's failure to demonstrate the contrary, the author submits that her husband's enforced disappearance as such, and most likely subsequent killing, constitute a violation by the State party of his rights under article 6 of the Covenant.

3.3 The author claims that the enforced disappearance of her husband and the degree of suffering involved in being held without contact with the outside world amount to a violation of article 7 of the Covenant. Furthermore, there is concurrent evidence that indicates that he was tortured by the State party's authorities, such as the testimonies from former detainees mentioned in the reports of OHCHR-Nepal and the National Human Rights Commission (see paras. 2.6 and 2.9 above). The judgment of the Supreme Court of Nepal of June 2007 also noted that, according to one writ, her husband's name was listed among those who "succumbed to death as result of the torture [he] was subjected to whilst in custody".

3.4 Mr. Nakarmi's conditions of detention at the Bhairab Nath Barracks constituted a violation of his rights under articles 7 and 10 (1) of the Covenant. Testimonies of former detainees, as well as the reports of the OHCHR-Nepal and the National Human Rights Commission, indicate that detainees were permanently handcuffed and blindfolded and were held in overcrowded cells, with limited access to food of very poor quality, with dirty water and toilets. In winter, they were forced to sleep on cement floors and were not given proper clothing. Those detainees who suffered from diseases and infections did not receive medical treatment. Moreover, the report of OHCHR-Nepal indicated that, according to detainees' testimonies, her husband had related health problems that were allowed to worsen without the necessary medical treatment.

3.5 The author claims that the State party violated article 9 of the Covenant. Her husband was taken by members of the Royal Nepalese Army and kept incommunicado in the Bhairab Nath Barracks, without an arrest warrant or an adequate explanation of the reasons for his arrest. Later, the Army denied that he had been arrested or subsequently detained. His detention was not entered in any official record or register and his relatives have never seen him again. He was never charged with a crime nor was he brought before a judge or any other official authorized by law to exercise judicial power. He was unable to take proceedings before a court to challenge the lawfulness of his detention.

3.6 Mr. Nakarmi's incommunicado detention, subsequent enforced disappearance and the failure by the authorities to conduct an effective investigation concerning his whereabouts and fate have maintained him outside the protection of the law since 23 September 2003, preventing him from enjoying his human rights and freedoms. Consequently, the State party is responsible for a continuing violation of article 16 of the Covenant.

3.7 Although the author reported promptly the arbitrary deprivation of liberty and enforced disappearance of her husband, no ex officio, prompt, impartial, thorough and independent investigation has been carried out and his fate and whereabouts remain unknown to date. Moreover, as of the submission of the complaint, no one had been summoned or convicted for his arbitrary deprivation of liberty, enforced disappearance, torture, most likely death and the subsequent concealment of his mortal remains. Accordingly, the State party has violated and is continuing to violate his rights under articles 6 (1), 7, 9, 10 (1) and 16, read in conjunction with article 2 (3), of the Covenant.

3.8 The author claims that the State party violated her rights under article 7, read in conjunction with article 2 (3), of the Covenant, as she was subjected to deep anguish and distress owing to the arbitrary arrest and subsequent enforced disappearance of her husband, as well as to the acts and omissions of the authorities in dealing with those issues. As a result of her husband's disappearance, she has had to bring up her daughter alone. To date, the author's right to know the truth about the circumstances of her husband's enforced disappearance, his fate and whereabouts, the progress and result of the investigation, has been constantly violated by the State party.

3.9 The author also contends that her daughter is victim of a violation of her rights under article 7, read in conjunction with articles 2 (3) and 24 (1), of the Covenant. She was 3 years old at the time of her father's disappearance. As a child, she has been particularly affected, since she has had to grow up without being able to enjoy a family life and experiencing the ongoing anguish of not knowing where her father is and whether he will come back. Her mother's deteriorating mental state had a negative impact on the quality of her upbringing.

3.10 The author requests the Committee to recommend the State party inter alia to: (a) order an independent investigation, as a matter of urgency, concerning the fate and whereabouts of her husband and, in the event of his death, locate, exhume, identify and respect his mortal remains and return them to the family; (b) bring the perpetrators before the competent civilian authorities for prosecution, judgment and sanction, and disseminate publicly the results of that measure; (c) ensure that the author obtains integral reparation and prompt, fair and adequate compensation; and (d) ensure that the measures of reparation cover material and moral damages and measures of restitution, rehabilitation, satisfaction and guarantees of non-repetition. In particular, she requests that the State party acknowledge its international responsibility, on the occasion of a public ceremony, in the presence of the authorities and of Mr. Nakarmi's relatives, to whom official apologies shall

be issued. The State party should also provide the author with medical and psychological care immediately and free of charge, through its specialized institutions, and grant her access to free legal aid, where necessary, in order to ensure to her available, effective and sufficient remedies. As a guarantee of non-repetition, the State party should take the necessary measures to ensure that enforced disappearance and torture, and the different forms of participation in these crimes, constitute autonomous offences under its criminal law, punishable by appropriate penalties which take into account their extreme seriousness.

#### **State party's observations on admissibility**

4.1 On 10 October 2012, the State party submitted its observations on admissibility and contended that the author has failed to exhaust domestic remedies and that her claims are manifestly ill-founded.

4.2 The State party maintains that the author's allegations concerning the circumstances in which the alleged arrest, detention, enforced disappearance, torture and arbitrary deprivation of life of her husband took place are not supported by any direct and circumstantial evidence. In this regard, on 26 August 2010, the Supreme Court quashed the author's writ of mandamus lodged in favour of her husband because she was unable to show that he had in fact been detained and murdered by members of the Royal Nepalese Army. Furthermore, these allegations cannot be confirmed from the reports of OHCHR-Nepal and the National Human Rights Commission or the judgment of the Supreme Court of 1 June 2007. In that context, the author's allegations of violations of the Covenant are therefore ill-founded.

4.3 The author has not filed a first information report with the police as required by the State Cases Act of 1992. If she had, the concerned authority would have conducted an investigation. The author has therefore failed to exhaust the available domestic remedies.

4.4 The State party submits that the Interim Constitution of Nepal of 2007 expressly stated that a truth and reconciliation commission was to be constituted to investigate the cases of individuals involved in serious violations of human rights during the course of armed conflict. Furthermore, human right violations in periods of armed conflicts need to be treated with specific investigations and remedies. Regular criminal justice cannot apply to such issues; a point which has also been accepted by the Supreme Court of Nepal. Once this Commission issues its report after conducting investigations, it will be up to the criminal justice system to prosecute the perpetrators. In this sense, transitional justice mechanisms are complementary and supplementary to the existing criminal justice systems. As it is making efforts to establish a transitional justice mechanism as soon as possible, the State party urges the Committee to understand its special situation.

4.5 The State party has provided Nr 300,000 to the family of each victim of the armed conflict whose whereabouts remain unknown, as interim relief. Victims may obtain further relief or reparation from the State after the establishment of a transitional justice system.

4.6 The State party contends that the existing criminal justice system is functioning well. Under the State Cases Act of 1992, Nepalese police has conducted investigations in relation to some offences committed during the period of armed conflict.

#### **Author's comments on the State party's observations on admissibility**

5.1 On 14 December 2012, the author submitted her comments on the State party's observations. She reiterates that her husband's detention by the Royal Nepalese Army was confirmed by the testimony of three different former detainees of the Bhairab Nath Barracks. Furthermore, the reports of OHCHR-Nepal and the National Human Rights Commission also confirmed Mr. Nakarmi's enforced disappearance. The Supreme Court of Nepal itself took note of the testimony rendered by one of these former detainees in its judgment of 1 June 2007, in which he indicated that her husband had been in the Barracks and had died as a result of acts of torture. This evidence also supports her claim that conditions of detention at the Bhairab Nath Barracks were inhumane and that inmates were generally subjected to torture.

5.2 In cases of enforced disappearance where the clarification of the facts depends on information exclusively in the hands of the authorities, the State party is under the obligation to investigate these allegations ex officio in good faith, even in the absence of

direct evidence. By quashing her writ of mandamus, the Supreme Court denied her an effective remedy and failed to comply with its obligation to conduct an ex officio, prompt, impartial, thorough and independent investigation into the enforced disappearance of Mr. Nakarmi. Neither the Supreme Court nor any other authority carried out an effective investigation of the circumstances of her husband's arrest and subsequent disappearance.

5.3 At the time when the author submitted her comments, the establishment of the future truth and reconciliation commission and the commission of inquiry into disappearances was uncertain. Fact-finding processes by non-judicial bodies, although crucial for the establishment of the truth, could never replace access to justice and redress for victims of gross human rights violations and their relatives, as the criminal justice system is the more appropriate avenue for immediate investigation into and punishment of criminal acts. Accordingly, transitional justice mechanisms cannot be considered an effective remedy to be exhausted by the author.

5.4 The author reiterates that she attempted to file a first information report twice. While the authorities initially refused to register it, she eventually succeeded on 19 June 2006. Since neither enforced disappearance nor torture or extrajudicial executions have been criminalized in the State party, no first information reports may be filed for these crimes and thus there are no remedies available in practice. Additionally, the author contends that the first information report is an ineffective remedy because the police generally refuse to register it when members of the police itself or of the armed forces are involved.<sup>9</sup>

5.5 The author highlights that she only received interim relief of Nr 100,000 from the Government. It is a negligible amount to cover the material and moral harm suffered by her and cannot be considered as an effective remedy within the meaning of article 2 (3) of the Covenant. Furthermore, mere pecuniary compensation for human rights violations of that nature is not a sufficient remedy. Reparations in cases of gross human rights violations shall include restitution, rehabilitation, satisfaction and guarantees of non-repetition.

#### **State party's observations on the merits**

6.1 On 5 April 2013, the State party submitted its observations on the merits and reiterated its observations about the admissibility of the communication.

6.2 The State party informed the Committee that, on 13 March 2013, an executive ordinance on a commission for the investigation into disappeared persons and truth and reconciliation had been promulgated by the President and that it intended to establish a high-level commission for that purpose. Against this background, it would not be appropriate for the Committee to consider the cases pertaining to the period of conflict in Nepal, given that the transitional justice mechanism is about to take up its functions.

#### **Author's comments on the State party's observations on the merits**

7.1 The author submitted her comments on the State party's observations on the merits on 24 June 2013 and 10 January 2014. She regrets that the State party had failed to address the merits of the communication, as this denotes an indifference towards her suffering. It inter alia failed to provide any information about the fate and whereabouts of her husband, leaving her to bear the brunt of the efforts to uncover any facts.

7.2 On 2 January 2014, the Supreme Court of Nepal declared the executive ordinance of 14 March 2013, which established the commission for investigation into disappeared persons and truth and reconciliation, unconstitutional and inconsistent with international standards. The Supreme Court ordered the authorities to establish a new commission, but no precise deadline was provided.

#### **Additional observations**

##### *State party's additional observations*

8.1 On 11 August and 11 December 2014, the State party informed the Committee that the Enforced Disappearances Enquiry, Truth and Reconciliation Commission Act had been

<sup>9</sup> The author refers to Human Rights Watch, "Indifference to duty: impunity for crimes committed in Nepal", 14 December 2010.

enacted by Parliament in April 2014, and that the Truth and Reconciliation Commission and the Enforced Disappearance Commission would be established soon. It also provided a brief description of the main provisions of the Act and held that it was a landmark instrument to address the issue of past human rights violations committed by both the State party and non-State actors. It also submitted that the bills to criminalize torture and enforced disappearance had been drafted and were in the process of resubmission to Parliament. The criminal justice system could not provide full remedy to the victims of the armed conflict without the transitional justice mechanisms. In this respect, the author's claims would be addressed fully after the establishment of the said mechanisms.

8.2 The State party maintains that the author has not lodged a complaint with the concerned authorities in connection with the allegations of enforced disappearance of her husband, notwithstanding the fact that a chapter on kidnapping and hostage-taking is in force under the General Code (Muluki Ain).

8.3 The State party submits that Mr Nakarmi's family was awarded Nr 300,000 as interim relief and reiterated its previous allegations with regard to the situation of transitional justice in Nepal.

*Additional observations from the author*

9. On 2 September 2014 and 12 January 2015, the author reiterated her allegations regarding the transitional justice mechanism, and argued that several provisions of the Act were incompatible with international human rights standards<sup>10</sup> and would not offer her an effective remedy.

**Issues and proceedings before the Committee**

*Consideration of admissibility*

10.1 Before considering any claim contained in a communication, the Committee must decide, in accordance with rule 93 of its rules of procedure, whether the case is admissible under the Optional Protocol.

10.2 The Committee has ascertained, as required under article 5 (2) (a) of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement.

10.3 With respect to the requirement of exhaustion of domestic remedies, the Committee notes the State party's arguments that the author has not exhausted domestic remedies, as she failed to register a first information report with the police and to file a complaint under the chapter on kidnapping and hostage-taking of the General Code (Muluki Ain); and that her husband's case will be addressed within the transitional justice mechanisms, established in conformity with the Interim Constitution of 2007. The Committee also notes the author's allegations that she tried to file a first information report twice with the District Police Office; that the second one was registered on 19 June 2006; and that it is not an appropriate remedy, as it is limited to the crimes listed in schedule 1 of the State Cases Act of 1992, which does not include enforced disappearance, torture and extrajudicial execution; that the Compensation relating to Torture Act does not provide for criminal accountability, but only for compensation of a maximum of Nr100,000; and that transitional justice mechanisms do not replace access to justice and cannot be considered an effective remedy to be exhausted. The Committee observes that the author's writ of mandamus was quashed by the Supreme Court on 26 August 2010. Although she promptly reported her husband's disappearance to the authorities, more than 13 years later the circumstances of his alleged disappearance remain unclear and no investigation has yet been concluded. The Committee further recalls its jurisprudence that in cases of serious violations a judicial remedy is required.<sup>11</sup> In this respect, the Committee observes that the transitional justice bodies established by the Enforced Disappearances Enquiry, Truth and Reconciliation Commission Act of 2014 are

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<sup>10</sup> The author refers to OHCHR, "The Nepal Act on the Commission on Investigation of Disappeared Persons, Truth and Reconciliation, 2071 (2014) – as gazetted 21 May 2014", OHCHR technical note; and OHCHR, "Nepal: truth-seeking legislation risks further entrenching impunity, alert United Nations rights experts", news release of 4 July 2014.

<sup>11</sup> See communication No. 1761/2008, *Giri v. Nepal*, Views adopted on 24 March 2011, para. 6.3.



not judicial organs capable of affording a judicial remedy.<sup>12</sup> Accordingly, the Committee considers that the remedies identified by the State party have been ineffective and that there are no obstacles to the examination of the communication under article 5 (2) (b) of the Optional Protocol.

10.4 The Committee takes note of the State party's observations that the author's allegations are manifestly ill-founded. The Committee observes, however, that for the purposes of admissibility, the author has sufficiently substantiated her allegations with plausible arguments in support thereof. As all admissibility requirements have been met, the Committee declares the communication admissible and proceeds to its examination of the merits.

#### *Consideration of the merits*

11.1 The Committee has considered the present communication in the light of all the information submitted to it by the parties, in accordance with article 5 (1) of the Optional Protocol.

11.2 The Committee takes note of the author's allegations that her husband was victim of enforced disappearance; that, on 23 September 2003, her husband was arrested and taken to the Bhairab Nath Barracks by plain-clothed security personnel who identified themselves as members of the Royal Nepalese Army; that although she reported promptly the arrest and disappearance to the authorities and filed two first information reports and a writ of mandamus, no prompt, impartial, thorough and independent investigation has been carried out by the authorities; and that testimonies indicated that her husband had been kept incommunicado at the Bhairab Nath Barracks and died while in custody as a result of the torture inflicted on him. However, his exact fate and whereabouts remain unknown to date and no one has been summoned or convicted for these acts.

11.3 The Committee also notes the State party's argument that the author's allegations concerning the circumstances in which the alleged arrest, detention, enforced disappearance, torture and arbitrary deprivation of life of her husband took place are not supported by any direct and circumstantial evidence and are only based on mere suspicion; and that for this reason the Supreme Court of Nepal quashed her writ to mandamus on 26 August 2010.

11.4 The Committee reaffirms, however, its position that the burden of proof cannot rest solely on the author of the communication, especially considering that the author and the State party do not always have equal access to evidence, and that frequently the State party alone has access to the relevant information.<sup>13</sup> It is implicit in article 4 (2) of the Optional Protocol that the State party has the duty to investigate in good faith all allegations of violations of the Covenant made against it and its representatives, and to provide the Committee with the information available to it. In cases where the author has submitted allegations to the State party that are corroborated by credible evidence, and where further clarification depends on information that is solely in the hands of the State party, the Committee may consider the author's allegations substantiated, in the absence of satisfactory evidence or explanations to the contrary presented by the State party.

11.5 The Committee recalls that, while the Covenant does not explicitly use the term "enforced disappearance" in any of its articles, enforced disappearance constitutes a unique and integrated series of acts that represent continuing violation of various rights recognized in that treaty.<sup>14</sup>

11.6 In the present case, the Committee observes that the State party has not challenged the author's allegations that, in September 2003, the author approached the Bhairab Nath Barracks and the Lagankhel Barracks of the Royal Nepalese Army in Kathmandu inquiring as to her husband's whereabouts and fate, as well as the Nepal Police Headquarters in Naxal and the District Police Office in Hanuman Dhoka, Kathmandu. However, the

<sup>12</sup> See communication No. 2038/2011, *Tharu et al. v. Nepal*, Views adopted on 3 July 2015, para. 9.3.

<sup>13</sup> See communications No. 1422/2005, *El Hassy v. the Libyan Arab Jamahiriya*, Views adopted on 24 October 2007, para. 6.7; No. 1297/2004; *Medjnoune v. Algeria*, Views adopted on 14 July 2006, para. 8.3; and No. 1804/2008, *Il Khwildy v. Libya*, Views adopted on 1 November 2012, para. 7.2.

<sup>14</sup> See communications No. 2000/2010, *Katwal v. Nepal*, Views adopted on 1 April 2015, para. 11.3; and No. 2134/2012, *Sernas et al. v. Colombia*, Views adopted on 9 July 2015, para. 9.4.

authorities denied that he had been detained on several occasions. This position was maintained by the authorities before the Supreme Court within the writ of mandamus proceedings instituted by the author. On the other hand, the Committee also observes that, according to reports issued by OHCHR-Nepal and the National Human Rights Commission in 2006 and 2009, respectively, testimonies by former detainees at the Bhairab Nath Barracks indicate that the author's husband was last seen in those Barracks in the custody of the Army between December 2003 and February 2004, that he fell very ill, and that it is believed that he died as a result of torture inflicted on him. Further, a decision of the Supreme Court of Nepal of 1 June 2007, concerning the habeas corpus petitions of 83 disappeared persons also noted that, according to one of the writs, the author's husband had died as a result of torture inflicted in the Bhairab Nath Barracks. Mr. Nakarmi's name is also included on the National Human Rights Commission's list of conflict-related disappearances and the missing persons' database of the International Committee of the Red Cross. In the light of the documentation submitted by the author, the Committee considers that the State party has not provided sufficient and concrete explanations to refute the author's allegations regarding her husband's enforced disappearance. The Committee recalls that, in cases of enforced disappearance, the deprivation of liberty followed by a refusal to acknowledge the deprivation of liberty, or by concealment of the fate of the disappeared person, denies the person the protection of the law and places his or her life at serious and constant risk, for which the State is accountable.<sup>15</sup> In the instant case, the State party has produced no evidence to show that it met its obligations to protect the life of Mr. Nakarmi. Accordingly, the Committee concludes that the State party failed in its duty to protect Mr. Nakarmi's life, in violation of article 6 (1) of the Covenant.

11.7 The Committee takes note of the author's allegations that the incommunicado detention since September 2003 and subsequent enforced disappearance of her husband amount per se to treatment contrary to article 7; and that the reports of OHCHR-Nepal and the National Human Rights Commission also indicated that he was subjected to torture while in detention, which severely affected his health and presumably caused his death. The Committee recognizes the degree of suffering involved in being held indefinitely without contact with the outside world. It recalls its general comment No. 20 (1992) on the prohibition of torture or other cruel, inhuman or degrading treatment or punishment, which recommends that States parties should make provision to ban incommunicado detention. In the present case, in the absence of a satisfactory explanation from the State party, the Committee finds that the enforced disappearance of the author's husband and the treatment given to him while in detention constitute a violation of article 7 of the Covenant. Having reached that conclusion, the Committee will not examine the claims regarding the violation of article 10 (1) of the Covenant for the same facts.

11.8 The Committee notes the anguish and distress caused to the author and her minor daughter by the disappearance of Mr. Nakarmi and the lack of information on the circumstances surrounding it. No investigation has been carried out to ascertain his fate, and, in case of his death, to return his bodily remains to his family. The Committee considers that these facts reveal a violation of article 7 of the Covenant with respect to the author and her minor daughter. Having reached that conclusion, the Committee will not examine the claims regarding the violation of article 24 (1) of the Covenant concerning the author's minor daughter.

11.9 The Committee takes note of the author's allegations under article 9 that her husband was detained by members of the Royal Nepalese Army without an arrest warrant, that he was never brought before a judge or any other official authorized by law to exercise judicial power and that he could not take proceedings before a court to challenge the lawfulness of his detention. In the absence of a response from the State party in that regard, the Committee considers that the detention of the author's husband constitutes a violation of his rights under article 9 of the Covenant.

11.10 With regard to the alleged violation of article 16, the Committee notes the author's allegations that her husband was arrested by members of the Royal Nepalese Army in the presence of several witnesses, including the author and Mr. Nakarmi's mother and brother; that since then the State party has failed to provide the author with relevant information concerning her husband's fate and whereabouts; and that no effective investigation has

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<sup>15</sup> See communication No. 1913/2009, *Abushaala v. Libya*, Views adopted on 18 March 2013, para. 6.2.

been carried out to ascertain his whereabouts, thereby maintaining him outside the protection of the law since then. The Committee is of the view that the intentional removal of a person from the protection of the law constitutes a refusal of the right to recognition as a person before the law, in particular if the efforts of his or her relatives to obtain access to effective remedies have been systematically impeded.<sup>16</sup> The Committee, therefore, finds that the enforced disappearance of Mr. Nakarmi deprives him of the protection of the law and of his right to recognition as a person before the law, in violation of article 16 of the Covenant.

11.11 The author invokes article 2 (3) of the Covenant, which imposes on States parties the obligation to ensure an effective remedy for all persons whose rights under the Covenant have been violated. The Committee attaches importance to the establishment by States parties of appropriate judicial and administrative mechanisms for addressing claims of rights violations. It refers to its general comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant, which provides, inter alia, in paragraph 15, that failure by a State party to investigate allegations of violations could in and of itself give rise to a separate breach of the Covenant. In the present case, the Committee observes that, shortly after the detention of the author's husband, she approached different barracks of the Royal Nepalese Army and police facilities seeking information and later filed a writ of mandamus before the Supreme Court. Despite the author's efforts, more than 13 years after the disappearance of her husband, no thorough and effective investigation has been conducted by the State party in order to elucidate the circumstances surrounding his detention and whereabouts and to bring the perpetrators to justice. Therefore, the Committee considers that the State party has failed to conduct a prompt, thorough and effective investigation into the disappearance of Mr. Nakarmi. Additionally, the sum received by the author as interim relief does not constitute an adequate remedy commensurate to the serious violations inflicted. Accordingly, the Committee concludes that the facts before it reveal a violation of article 2 (3), in conjunction with articles 6 (1), 7, 9 and 16, with regard to Mr. Nakarmi; and article 2 (3), read in conjunction with article 7, of the Covenant with respect to the author and her minor daughter.

12. The Committee, acting under article 5 (4) of the Optional Protocol, is of the view that the information before it discloses violations by the State party of articles 6, 7, 9 and 16 of the Covenant; and of article 2 (3), read in conjunction with articles 6, 7, 9 and 16, of the Covenant with regard to Mr. Nakarmi. The facts also disclose violations of article 7 and article 2 (3), read in conjunction with article 7, with respect to the author and her minor daughter.

13. In accordance with article 2 (3) (a) of the Covenant, the State party is under an obligation to provide the author with an effective remedy. This requires it to make full reparation to individuals whose rights under the Covenant have been violated. Accordingly, the State party is obligated to, inter alia: (a) conduct a thorough and effective investigation into the disappearance of Mr. Nakarmi and provide the author with detailed information about the results of its investigation; (b) if her husband is dead, locate his remains and hand them over to his family; (c) prosecute, try and punish those responsible for the violations committed and make the results of such measures public; (d) ensure that any necessary and adequate psychological rehabilitation and medical treatment are made available to the author and her minor daughter; and (e) provide adequate compensation and appropriate measures of satisfaction, to the author, her minor daughter and her husband, if he is alive, for the violations suffered. The State party is also under an obligation to take steps to prevent the occurrence of similar violations in the future. In particular, the State party should ensure that: (a) its legislation allows for the criminal prosecution of those responsible for serious human rights violations, such as torture, extrajudicial execution and enforced disappearance; and (b) any enforced disappearance gives rise to a prompt, impartial and effective investigation.

14. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a

<sup>16</sup> See communications No. 2164/2012, *Basnet v. Nepal*, Views adopted on 12 July 2016, para. 10.9; No. 2038/2011, *Tharu et al. v. Nepal*, Views adopted on 3 July 2015, para. 10.9; and No. 2134/2012, *Serna et al. v. Colombia*, para. 9.5.

violation of the Covenant and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure for all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy when a violation has occurred, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the present Views and to have them widely disseminated in the official languages of the State party.

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