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Human Rights Committee

Communication No. 2111/2011

Views adopted by the Committee at its 112th session (7–31 October 2014)

Submitted by:	Sharmila Tripathi (represented by counsel, Track Impunity Always-TRIAL)
Alleged victim:	The author, Gyanendra Tripathi (her husband) and C.T. (their minor daughter)
State party:	Nepal
Date of communication:	28 September 2011 (initial submission)
Document references:	Special Rapporteur's rule 97 decision, transmitted to the State party on 21 October 2011 (not issued in document form)
Date of adoption of views:	29 October 2014
Subject matter:	Enforced disappearance
Substantive issues:	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; freedom of association; right of the child to measures of protection; and right to an effective remedy
Procedural issues:	Exhaustion of domestic remedies
Articles of the Covenant:	6, para. 1; 7; 9, paras. 1–4; 10, para. 1; 16; 22; and 24, para. 1, alone and read in conjunction with article 2, para. 3
Articles of the Optional Protocol:	3 and 5, para. 2 (b)

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Annex

Views of the Human Rights Committee under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political rights (112th session)

concerning

Communication No. 2111/2011*

Submitted by:	Sharmila Tripathi (represented by counsel, Track Impunity Always-TRIAL)
Alleged victim:	The author, Gyanendra Tripathi (her husband) and C.T. (their minor daughter)
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Date of communication:	28 September 2011 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 29 October 2014,

Having concluded its consideration of communication No. 2111/2011, submitted to the Human Rights Committee by Sharmila Tripathi under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication is Sharmila Tripathi, who submits the communication on her own behalf and that of her husband Gyanendra Tripathi and their minor daughter C.T. They are Nepalese nationals, born on 1 January 1969, 8 June 1969 and 21 January 2002, respectively. The author claims that the State party has violated Mr. Tripathi's rights under articles 6; 7; 9, paragraphs 1–4; 10, paragraph 1; 16 and 22, alone and read in conjunction with article 2, paragraph 3, of the International Covenant on Civil and Political Rights; the author's rights under article 7, read in conjunction with article 2, paragraph 3, of the Covenant; and her minor daughter's rights under article 7, read in conjunction with articles 2, paragraph 3, and 24, paragraph 1, of the Covenant. The author is represented by counsel.

* The following members of the Committee participated in the examination of the present communication: Yadh Ben Achour, Lazhari Bouzid, Christine Chanet, Ahmed Amin Fathalla, Cornelis Flinterman, Yuji Iwasawa, Walter Kälin, Zonke Zanele Majodina, Gerald Neuman, Sir Nigel Rodley, Victor Manuel Rodríguez-Rescia, Fabián Omar Salvioli, Anja Seibert-Fohr, Yuval Shany, Konstantine Vardzelashvili, Margo Waterval, and Andrei Paul Zlătescu.

The facts as submitted by the author

2.1 As a result of the armed conflict prevailing in the country, the State party authorities declared a state of emergency in November 2001. The Terrorist and Disruptive Activities Ordinance (2001) allowed State agents to arrest individuals on the basis of mere suspicion of involvement in terrorist activities and various constitutionally granted human rights and freedoms were suspended. Against this background, both parties to the conflict, including the police and the Royal Nepalese Army, committed atrocities and enforced disappearances became a widespread phenomenon.[1] Moreover, in August 2003, the Army arbitrarily detained several members of the All Nepal National Independent Students' Union (Revolutionary) (ANNISU-R), the student wing of the Communist Party of Nepal-Maoist (CPN-M). During that period, the Maharajgunj army barracks in Kathmandu, which hosted the Bhairabnath and the Yudha Bhairab battalions, became notorious as a place in which persons suspected of being Maoists were detained, ill-treated, tortured, disappeared and killed.[2]

2.2 Mr. Tripathi was a member of the ANNISU-R Central Committee and head of the division of education in Kathmandu. On or about 2 August 2003, he was arrested by army personnel. He was detained in an unknown location in the Kathmandu Valley for 17 days and kept incommunicado for the first 3 days following his arrest. He was severely ill-treated. On or about 19 August 2003, he was handed over to the police and kept in the District Police Office in Hanumandhoka, Kathmandu, until his release on 5 September 2003. He then stayed at a friend's house, in Shantinagar, Banseshwor Municipality, Kathmandu district. He and the author had daily phone contact until 26 September 2003. After that date she was not able reach him again.

2.3 As the author knew that her husband had an appointment to meet a friend at the Shantinagar Gate, on 27 September 2003 she went to the gate. However, a petrol-pump attendant told her that he saw a man, who fitted the description of her husband, being arrested and taken away by a group of persons in plain clothes. She assumed that he had been taken by the Army, as had happened to many others Maoist supporters.

2.4 On 28 September 2003, the author tried to report her husband's arbitrary arrest to the District Police Office in Hanumandhoka, Kathmandu. However, she was informed that such "incidents" were not the responsibility of the police. On the same day, she visited several army barracks within the Kathmandu Valley to ascertain his whereabouts, without success. She continued visiting the barracks regularly until the ceasefire agreement was signed between the CPN-M and the Seven Party Alliance in May 2006. Although she was never harassed or threatened, each time she visited the barracks she met with complete indifference from army officers.

2.5 On 29 September and 1 October 2003 respectively,, Mr. S.P., an advocate acting on his own initiative, and the author lodged writs of habeas corpus before the Supreme Court

[1] The author refers to the report of the Working Group on Enforced or Involuntary Disappearances on its visit to Nepal (E/CN.4/2005/65/Add.1), para. 25; and the report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment on his visit to Nepal (E/CN.4/2006/6/Add.5), para. 17.

[2] The author refers to the report of the Office of the United Nations High Commissioner for Human Rights (OHCHR) of an investigation into arbitrary detention, torture and disappearance at the Maharajgunj RNA barracks, Kathmandu, in 2003 and 2004 (May 2006), available at: http://nepalconflictreport.ohchr.org/files/docs/2006-05-26_report_ohchr_eng.pdf; and the report of an investigation by the National Human Rights Commission into disappearances at the Maharajgunj barracks, which was ordered by the Supreme Court and submitted to it on 7 September 2009.

in favour of Mr. Tripathi. The author argued that her husband had been illegally detained by the security forces and requested the Court to order his release.

2.6 On 30 September and 1 October 2003, the Police, the Army and the Ministry of Home Affairs, among other authorities, informed the Supreme Court that Mr. Tripathi had not been arrested or detained by them. In the following weeks, other authorities also stated that they had not detained him. In October 2003, the author also reported her husband's arbitrary detention to the National Human Rights Commission and requested its help in securing his release.

2.7 On 13 November 2003, the Ministry of Defence, without providing any detail or explanation, informed the Supreme Court that, from the information available, it found that Gyanendra Tripathi was not in the custody of the Army.

2.8 On 26 January 2004, the Supreme Court quashed the writs of habeas corpus submitted by the author and Mr. S.P. It stated that they had failed to show that Mr. Tripathi was detained or in whose custody he was; that for a search warrant to be issued, the applicants must help the Court by identifying the place or agency to be searched; and that only after the location of the detainee had been identified, could the application for habeas corpus be reissued. The Court concluded that it was not necessary to carry out further investigations.

2.9 In May 2006, the Office of the United Nations High Commissioner for Human Rights in Nepal issued a report of an investigation into arbitrary detention, torture and disappearance at the Maharajgunj barracks, Kathmandu, in 2003 and 2004. The report included Mr. Tripathi's name in a list of disappeared persons and stated that agents of the Bhairabnath battalion had detained several members of UNNISU-R; that they were held incommunicado; and that the Army had denied to their families or other authorities that they had been detained. The report also stated that Mr. Tripathi was alive and under the control of the battalion at least until 20 December 2003.[3]

2.10 On 4 July 2006, the National Human Rights Commission found that Mr. Tripathi had been arrested, kept in the Maharajgunj barracks and disappeared by the Bhairabnath battalion. It recommended that the Government bring him under the protection of the law and that those responsible for such crimes be prosecuted. However, no action has been taken by the authorities in that regard.

2.11 On 1 June 2007, the Supreme Court issued a decision concerning another writ of habeas corpus filed by Mr. R.D. who, acting on his own initiative, additionally included as petitioners Mr. Tripathi and other persons who had been arbitrarily detained by agents of the State between January 1999 and February 2004. The Court stated that they had been illegally arrested and forcibly disappeared by security personnel, and ordered the Government to take immediate measures to ensure accountability by, inter alia, establishing a commission of inquiry, criminalizing enforced disappearance, investigating and

[3] OHCHR report (note 2 above), pp. 48–49. The author also points out that, according to copies of documentation enclosed with her communication, Krishna K.C., who was also kept in those barracks, declared before the Patan Appellate Court that he saw her husband in the Maharajgunj barracks in or around December 2003; that on 20 December 2003, a group of detainees, including Mr. Tripathi, were taken by the Army to an unknown place to be killed; and that those detainees were never seen again. In a written testimony given to OHCHR-Nepal in February 2007, he also mentioned that he had heard rumours that Mr. Tripathi had been killed in the Shivapuri barracks. Likewise, Jit Man Basnet, another previous inmate of the barracks, published a book entitled *258 Dark Days*, in which he described in detail the manner in which the author's husband was tortured by the authorities and noted that soldiers had told him that he had died while he was immersed in a drum full of water, as part of the torture inflicted on him.

prosecuting those responsible for disappearances and providing adequate compensation and relief to the victims and their families.

2.12 On 7 September 2009, the National Human Rights Commission issued a report concerning the Maharajgunj barracks, in which it stated that the author's husband had been kept in the barracks and had later disappeared. The Commission also noted that 43 persons kept in custody at the Maharajgunj barracks had been taken to the Shivapuri National Park in the Kathmandu Valley and killed between December 2003 and January 2004.[4]

2.13 The author claims that she tried to exhaust all domestic remedies. Her writ of habeas corpus was quashed by the Supreme Court, the highest domestic tribunal, and there is no other domestic remedy to exhaust.[5] The National Human Rights Commission cannot be considered an effective remedy. As regards the first information report, it is limited to the crimes listed in schedule 1 of the State Cases Act of 1992, which does not include enforced disappearance and torture. Furthermore, the filing of first information reports in disappearance cases does not constitute an appropriate remedy, as the authorities usually argue that the person's death cannot be proved in the absence of a body. Although torture is forbidden, pursuant to the Interim Constitution and section 3 (1) of the Compensation Relating to Torture Act, 2053 (1996), it has not been criminalized by national law. The Act does not provide for criminal accountability, but only for compensation of a maximum of Nr. 100,000 and a claim must be filed within 35 days of the torture or release from detention. Despite the order of the Supreme Court in 2007 to criminalize enforced disappearance, no action has been taken in that respect.

The complaint

3.1 The author argues that her husband was the victim of enforced disappearance and that the State party violated his rights under articles 6; 7; 9, paragraphs 1–4; 10, paragraph 1; 16; and 22, alone and read in conjunction with article 2, paragraph 3, of the Covenant; her rights under article 7, read in conjunction with article 2, paragraph 3, of the Covenant; and her minor daughter's rights under article 7, read in conjunction with articles 2, paragraph 3, and 24, paragraph 1, of the Covenant.

3.2 The author claims that, although there are no eye-witnesses to the precise moment of her husband's arrest, there are strong reasons to believe that he was arbitrarily arrested on 26 September 2003, kept in the Maharajgunj barracks and forcibly disappeared by State agents. Moreover, in view of testimonies and other concurrent evidence from different reliable sources, it is reasonable to presume that he was killed by members of the Army. His arbitrary deprivation of liberty took place within the context of massive arrests, enforced disappearances and torture of persons suspected of being Maoists. Against that background, 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,

[4] The author refers to the report of the investigation undertaken by the National Human Rights Comission into disappearances at the Maharajgunj barracks, which was ordered by the Supreme Court, pp. 1–2. She also notes that, in November 2008, at the request of OHCHR-Nepal, two experts from the Department of Forensic Medicine at the University of Turku, Finland, conducted a preliminary investigation of a possible mass burial or cremation site in Shivapuri forest. The experts concluded that the remains they had found were human. In addition, the name of the author's husband was included in a report by the the International Committee of the Red Cross entitled "Missing persons in Nepal: the right to know – updated listed 2009" (August 2009).

[5] The author refers to the Committee's jurisprudence in communication No. 1469/2006, *Sharma* v. *Nepal*, Views adopted on 28 October 2008, para. 6.3.

the author submits that her husband's enforced disappearance as such, and subsequent killing, constitute a violation by the State party of his rights under article 6 of the Covenant.

3.3 The incommunicado detention and enforced disappearance of the author's husband per se amount to a treatment contrary to article 7 of the Covenant. By keeping him in detention without contact with the outside world since September 2003, the authorities placed him at the mercy of the officers of the Maharajgunj barracks. Further, according to eye-witnesses who saw him in the barracks, he was in poor physical condition and with visible signs of torture. It has been well documented that torture was a common practice at Maharajgunj barracks.

3.4 Mr. Tripathi's conditions of detention at the Maharajgunj barracks also constituted a violation of his rights under articles 7; and 10, paragraph 1, of the Covenant. Testimonies of former detainees, as well as the reports of the National Human Rights Commission and OHCHR-Nepal, 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. Those detainees who were suffering from diseases and infections did not receive medical treatment.

3.5 The author's husband was also a victim of violations of his rights under article 9, paragraphs 1–4, of the Covenant. The fact that her husband was last seen alive in the hands of the Army at the Maharajgunj barracks, in the context of massive arrests of persons suspected of being Maoists, allows for a presumption that he was arrested on 26 September 2003 by State agents, without any legal grounds. 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. Tripathi's 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 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 The author claims that her husband's arbitrary detention, enforced disappearance and alleged arbitrary deprivation of life, were directly related to his membership of ANNISU-R and, therefore, constitute a violation of his rights under article 22, paragraph 1, of the Covenant.

3.8 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 today, no one has been summoned or convicted for his arbitrary deprivation of liberty, enforced disappearance, torture, most likely arbitrary execution and the subsequent concealment of his mortal remains. Accordingly, the State party has violated and is continuing to violate his rights under articles 6, paragraph 1; 7; 9, paragraphs 1–4; 10, paragraph 1; 16 and 22, read in conjunction with article 2, paragraph 3, of the Covenant.

3.9 The author claims that the State party violated her rights under article 7, read in conjunction with article 2, paragraph 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 thosee issues. As a result of her husband's disappearance, she has had to bring up her daughter alone. In that regard, she argues that wives and families of disappeared persons are often stigmatized in Nepal.

3.10 The author also contends that her daughter is the victim of a violation of her rights under article 7, read in conjunction with articles 2, paragraph 3, and 24, paragraph 1, of the Covenant. She was one year and eight months 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.

3.11 The author requests the Committee to recommend the State party 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) provisionally separate from service all army officials against whom there is prima facie evidence that they were involved in the crimes against her husband, pending the outcome of the investigation; (d) ensure that persons suspected of having committed those crimes are not in a position to influence the progress of the investigation by means of pressure, or acts of intimidation or reprisal against the complainant, witnesses, their families or their defence counsels, or other persons participating in the investigation; (e) ensure that the author and her daughter obtain integral reparation and prompt, fair and adequate compensation; and (f) 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. Tripathi's relatives, to whom official apologies shall be issued; and that the State party name a street, build a monument or place a commemorative plaque in memory of all the victims of enforced disappearance and torture during the internal armed conflict, including a specific reference to the case of Mr. Tripathi, whereby his reputation is fully restored. 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. Likewise, the author's daughter should be provided with a scholarship for the remainder of her education. 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. Finally, the State party should establish, as soon as possible, educational programmes on international human rights law and international humanitarian law for all members of the Army, the security forces and the judiciary.

State party's observations on admissibility and the merits

4.1 On 10 May 2012, the State party submitted its observations on admissibility and the merits. It maintains that the communication is not in conformity with rules 96 (b), (c) and (f) of the Committee's rules of procedure.[6] It argues that the author has not exhausted all domestic remedies, as she failed to register a first information report with the police for the alleged human rights violations raised in her communication. On the other hand, habeas corpus proceedings, such as the one instituted by the author, are limited to reviewing the legality of a detention and an order of habeas corpus is issued by a court only when it is proven that a detention has taken place.

[6] The Committee observes that the State party has not substantiated its observations under rule 96 (c) of its rules of procedure (CCPR/C/3/Rev.10).

4.2 The legislation in force at the moment that the State party's observations were submitted, allowed victims of torture to seek compensation. In addition, the State party stated that amendments to the Penal Code and other legislation aimed at criminalizing enforced disappearance, as well as two bills on the establishment of a truth and reconciliation commission and a disappearance commission were awaiting approval by Parliament. The establishment of the commissions was agreed by the Government and the Communist Party of Nepal-Maoist in the Comprehensive Peace Agreement of 21 November 2006 and is also provided for in article 33 (q) and (s) of the Interim Constitution of Nepal of 2007. The commissions will be competent to carry out investigations concerning offences committed during the armed conflict, for the period from 13 February 1996 to 21 November 2006.

4.3 As regards the merits of the communication, the State party maintains that the author's allegations are not based on reliable facts and proof, but on mere suspicion. The author argues that there are reasons to believe that her husband was arbitrarily executed by State agents at the Maharajgunj barracks. Nevertheless, her writ of habeas corpus filed before the Supreme Court failed to indicate Mr. Tripathi's whereabouts and to prove that in fact he had been arrested and detained by State agents.

4.4 The State party states that in May 2005, a committee was set up to inquire into the status of disappeared persons. At the moment that the State party's observations were submitted, the committee had carried out investigations into the status of 174 disappeared persons. Against that background, and in the light of its sincere efforts to establish transitional justice mechanisms, the State party requests the Committee not to examine the author's communication. It points out that the alleged arbitrary detention and enforced disappearance of Mr. Tripathi have not yet been proven and that only an independent investigation can establish his fate and whereabouts, and sanction those responsible for violations of his rights.

4.5 The Supreme Court issued an order to provide Nr. 100,000 to close relatives of a disappeared person whose status had not been clarified. In that framework, the author was granted Nr. 300,000 as interim compensation.

Author's comments on the State party's observations

5.1 On 23 June 2012, the author rejected the State party's observations. She argues that her claims are sufficiently substantiated and reiterates that substantial and concurring evidence, from different reliable sources, indicates that her husband was arbitrarily detained and subsequently subjected to enforced disappearance. In light of that evidence and in the context of systematic repression of Maoist sympathizers, it is reasonable to conclude that he was placed in a grave situation of suffering irreparable damage to his integrity and life. In that regard, the author emphasizes that her husband was not only a member of ANNISU-R, but head of its education division and a member of the Central Committee in Kathmandu. Therefore, her husband was arbitrarily deprived of his liberty, subsequently forcibly disappeared, and presumably killed by members of the Army.[7]

5.2 The communication does not constitute an abuse of the right of submission. Since 2003, the author has addressed the authorities and requested them to establish her husband's fate and whereabouts. Her hopes of progress in the clarification of her husband's case were particularly encouraged after the ruling by the Supreme Court of 1 June 2007. Afterwards, she was reluctant to request its implementation, because she feared for her life

[7] The author refers to communication No. 44971991, *Mojica* v. *Dominican Republic*, Views adopted on 15 July 1994, para. 5.7.

and that of her daughter. Finally, the author points out that rule 96 (c) of the Committee's rules of procedure applies to communications submitted after January 2012.

5.3 As to the requirement of exhaustion of domestic remedies, the author holds that a habeas corpus proceeding is not limited to examining the legality of a detention, but may also obtain the freedom of the person concerned, should the detention be found to be arbitrary. In her husband's case, the State party claimed that his detention must be proven in order for the habeas corpus to be issued. However, if that were the rationale of the remedy, its effectiveness would be rendered useless in cases of enforced disappearance. In light of all the evidence that indicated that her husband was the victim of enforced disappearance, it was for the State party's authorities to investigate the circumstances of his detention and establish his fate and whereabouts. She reiterates that the first information report is not an effective remedy and that even in those cases where such reports may be filed, the police generally refuse to register submissions when members of the police or the Army are involved. As to the State party's argument that victims of torture can request compensation, the author points out that the Coimpensation Relating to Torture Act is a civil act, which only provides for compensation and, potentially, disciplinary action with regard to the perpetrators of such actions.

5.4 At the time that the author submitted her comments, the establishment of the future truth and reconciliation commission and the commission on disappearance, as well as their powers to carry out prompt, independent and effective investigations and prosecutions, were uncertain. Further, they would not be judicial bodies and the draft bills included a general amnesty clause for perpetrators of serious violations of international human rights law and international humanitarian law, including enforced disappearance. 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.

5.5 The State party's commitment to human rights, expressed in its observations, is neither supported by the evidence, nor of relevance to the case of the author's husband. In that regard, it is emphasized that the State party has failed to implement the ruling by the Supreme Court of 1 June 2007.

5.6 The amount of Nr. 300,000 received by the author as interim relief is a negligible amount to cover the material and moral harm suffered by her and her daughter, and cannot be considered as an effective domestic remedy within the meaning of article 2, paragraph 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.

Issues and proceedings before the Committee

Consideration of admissibility

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not the case is admissible under the Optional Protocol to the Covenant.

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

6.3 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; that she could request

compensation under the Compensation Relating to Torture Act; and that her husband's case will be addressed within the transitional justice mechanisms, which should be established in conformity with the Interim Constitution of 2007 and the Comprehensive Peace Agreement of 2006. The Committee also notes the author's allegations that a first information report 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 and torture; and that the Compensation Relating to Torture Act does not provide for criminal accountability, but only for compensation of a maximum of Nr. 100,000. The Committee observes that the author's writ of habeas corpus was quashed by the Supreme Court on 26 January 2004. Despite the recommendations of the National Human Rights Commission of 4 July 2006 and the ruling by the Supreme Court of 1 June 2007, the circumstances of the alleged disappearance of the author's husband 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.[8] In that respect, the Committee observes that the transitional justice bodies to be established are not judicial organs. Accordingly, the Committee considers that the investigation has been unreasonably prolonged and that there are no obstacles to the examination of the communication under article 5, paragraph 2 (b), of the Optional Protocol.

6.4 The Committee notes that the State party refers to rule 96 (c) of the Committee's rules of procedure, without providing observations in that regard. The Committee observes that the present communication was submitted to it on 28 September 2011 and that its new rule 96 (c) is applicable to communications received by the Committee after 1 January 2012.[9] The Committee further observes that the Optional Protocol does not establish time limits within which a communication should be submitted, and that the period of time elapsing before such a submission, other than in exceptional circumstances, does not in itself constitute an abuse of the right of submission of a communication.[10] It is clear that, in determining what constitutes excessive delay, each case must be decided on its own facts. In the meantime, the Committee applies its jurisprudence which allows for finding an abuse, where an exceptionally long period of time has elapsed before the presentation of the communication, without sufficient justification.[11] The Committee observes that no domestic legal action was taken by the author after the ruling by the Supreme Court of 26 January 2004; however she continued to make efforts to clarify her husband's whereabouts after that date, approaching different authorities. Moreover, on 1 July 2007, the Constitutional Court issued a ruling concerning the arbitrary detention and enforced disappearance of several detainees, including the author's husband. Therefore, in the circumstances of the instant case, the Committee considers that the delay does not constitute an abuse of the right of submission under article 3 of the Optional Protocol.

[8] See communication No. 1761/2008, *Giri v. Nepal*, Views adopted on 24 March 2011, para. 6.3.

[9] According to new rule of procedure 96 (c), the Committee shall ascertain that the communication does not constitute an abuse of the right of submission. An abuse of the right of submission is not, in principle, a basis of a decision of inadmissibility *ratione temporis* on grounds of delay in submission. However, a communication may constitute an abuse of the right of submission when it is submitted five years from the exhaustion of domestic remedies by the author of the communication, or, where applicable, three years from the conclusion of another procedure of international investigation or settlement, unless there are reasons justifying the delay, taking into account all the circumstances of the communication.

[10] See, for example, communications No. 1223/2003, *Tsarjov* v. *Estonia*, Views adopted on 26 October 2007, para. 6.3; No. 1434/2005, *Fillacier* v. France, decision of inadmissibility adopted on 27 March 2006, para. 4.3; and No. 787/1997, *Gobin* v. *Mauritius*, decision of inadmissibility adopted on 16 July 2001, para. 6.3.

[11] Ibid.

6.5 The Committee takes note of the author's claim under article 22 of the Covenant that her husband's alleged arbitrary detention, enforced disappearance and extrajudicial execution were directly related to his membership of ANNISU-R, where he held important positions. The Committee considers that this claim has not been sufficiently substantiated for purposes of admissibility and finds it inadmissible, pursuant to article 2 of the Optional Protocol.

6.6 The Committee considers that the remaining claims have been sufficiently substantiated for purposes of admissibility. It therefore considers that the communication is admissible and proceeds to the examination of the claims in respect Of Gyanendra Tripathi under articles 6; 7; 9; 10, paragraph 1, and 16, alone and read in conjunction with article 2, paragraph 3, of the Covenant; as well as in respect of the author under article 7, read in conjunction with article 2, paragraph 3, and of her minor daughter under article 7, read in conjunction with articles 2, paragraph 3, and 24, paragraph 1, of the Covenant.

Consideration of the merits

7.1 The Human Rights Committee has considered the communication in the light of all the information made available to it by the parties, as provided for under article 5, paragraph 1, of the Optional Protocol.

7.2 The Committee takes note of the author's allegation that, although there were no eye-witnesses to the precise moment of her husband's arrest, several reports and testimonies indicate that her husband was detained by the Army on 26 September 2003, kept incommunicado at the Maharajgunj barracks and forcibly disappeared by State agents. According to the author, the chances of finding her husband alive are minimal, since concurring evidence suggests that he was killed by members of the Army on or about 20 December 2003. The Committee also notes the State party's argument that the author's allegations are based on mere suspicion; and that within the habeas corpus proceedings, she was unable to prove that her husband had been arrested and detained by State agents. The Committee reaffirms 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.[12] It is implicit in article 4, paragraph 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.

7.3 In the present case, the Committee observes that promptly after losing contact with her husband in September 2003, the author approached several Army barracks in Kathmandu inquiring as to his whereabouts and fate. However, the authorities denied that he had been detained. The Committee also observes that, according to reports issued by OHCHR-Nepal and the National Human Rights Commission in 2006 and 2009, respectively, and testimonies from former detainees at theMaharajgunj barracks, her husband was last seen in those barracks in the custody of the Army, in December 2003. Further, on 4 July 2006, the National Human Rights Commission found that Mr. Tripathi

[12] 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.

had been arrested, kept in the Maharajgunj barracks and disappeared by members of the Bhairabnath battalion. In the light of the documentation submitted by the author, the Committee considers that the State party has not provided sufficient and concrete explanations that oppose the findings and conclusions of the National Human Rights Commission and OHCHR-Nepal. The Committee recalls its jurisprudence 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, removes the person from the protection of the law and places his or her life at serious and constant risk, for which the State is accountable.[13] In the instant case, the State party has produced no evidence to show that it met its obligations to protect the life of Mr. Tripathi. Accordingly, the Committee concludes that the State party failed in its duty to protect Mr. Tripathi's life, in violation of article 6, paragraph 1, of the Covenant.[14]

7.4 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 cruel, inhuman or degrading treatment or punishment, in which it recommended that States parties make provision against incommunicado detention. It notes the author's allegations that her husband was arrested in September 2003 and kept incommunicado at the Maharajgunj barracks, without contact with the outside world; and that when he was last seen in the barracks by other detainees, he was in poor physical condition and had visible signs of torture. In the absence of information from the State party that would contradict the aforementioned, the Committee concludes that the facts, as described, amount to 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 of the Covenant.

7.5 The Committee notes the anguish and distress caused to the author and her minor daughter, C.T., by the disappearance of Mr. Tripathi in September 2003. The author and her daughter have never received an adequate explanation of the circumstances surrounding Mr. Tripathi's disappearance. Moreover, although reliable evidence suggests that the chances of finding her husband alive are minimal, 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 the facts, as described, also disclose a violation of article 7 of the Covenant with regard to the author and her daughter.[15] Having reached that conclusion the Committee will not examine the claims regarding the violation of article 24, paragraph 1, of the Covenant concerning C.T.

7.6 Regarding the alleged violations of article 9 of the Covenant, the Committee notes the author's claims that the fact that her husband was last seen alive in the hands of the Army at the Maharajgunj barracks, together with the context of massive arrests of persons suspected of being Maoists, allows for a presumption that, on 26 September 2003, he was arrested without a warrant; held incommunicado at the Maharajgunj barracks; and never brought before a judge, or any other official authorized by law to exercise judicial power; nor could he take proceedings before a court to challenge the lawfulness of his detention. In that regard, the Committee observes that the State party has not refuted the findings of the National Human Rights Commission of 4 July 2006. In the absence of a pertinent

[13] See communication No. 1913/2009, *Abushaala* v. *Libya*, Views adopted on 18 March 2013, para. 6.2.

[14] See *Il Khwildy* v. *Libya*, para. 7.12.

[15] See communication No. 1640/2007, *El Abani* v. *Libyan Arab Jamahiriya*, Views adopted on 26 July 2010, para. 7.5; No. 1295/2004, *El Alwani* v. *Libyan Arab Jamahiriya*, Views adopted on 11 July 2007, para. 6.5; No. 107/1981, *Quinteros* v. *Uruguay*, Views adopted on 21 July 1983, para. 14; and No. 950/2000, *Sarma* v. *Sri Lanka*, Views adopted on 16 July 2003, para. 9.5.

explanation from the State party, the Committee considers that the facts described constitute a violation of article 9 of the Covenant.

7.7 In respect of article 16 of the Covenant, the Committee reiterates its established jurisprudence, according to which intentionally removing a person from the protection of the law for a prolonged period of time may constitute a refusal of recognition as a person before the law if the victim was in the hands of the State authorities when last seen and, at the same time, if the efforts of his or her relatives to obtain access to potentially effective remedies, including judicial remedies (see art. 2, para. 3, of the Covenant), have been systematically impeded.[16] In the present case, the author claims that, despite the efforts of Mr. Tripathi's family, the State party has failed to provide them with relevant information concerning his fate and whereabouts and that despite the recommendations of the National Human Rights Commmission and the ruling by the Supreme Court of 1 June 2007, no effective investigation has been carried out to ascertain his whereabouts, maintaining him outside the protection of the law since September 2003. The Committee, therefore, finds that the enforced disappearance of Mr. Tripathi deprives him of the protection of the law and deprived him of his right to recognition as person before the law, in violation of article 16 of the Covenant.

7.8 The author invokes article 2, paragraph 3, of the Covenant, which requires States parties to ensure that individuals have accessible, effective and enforceable remedies for asserting the rights recognized in the Covenant. The Committee reiterates the importance it attaches to States parties establishing appropriate judicial and administrative mechanisms for addressing alleged violations of rights under domestic law. It refers to its general comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant, in which it states 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 losing contact with her husband, the author approached several barracks in Kathmandu, tried to report his disappearance to the Chief District Officer in Hanumandhoka and lodged a writ of habeas corpus with the Supreme Court. Despite the author's efforts, almost 12 years after the disappearance of her husband, no thorough and effective investigation has been concluded by the State party in order to elucidate the circumstances surrounding his detention, and no criminal investigation has even been started to bring the perpetrators to justice. Therefore, the Committee considers that the State party has failed to conduct a thorough and effective investigation into the disappearance of the author's husband. Additionally, the Nr. 300,000 received by the author as interim relief does not constitute an adequate remedy commensurate with the seriousness of the violations inflicted. Accordingly, the Committee concludes that the facts before it also reveal a violation of article 2, paragraph 3, read in conjunction with articles 6, paragraph 1; 7; 9 and 16 of the Covenant, with regard to Mr. Tripathi; and article 2, paragraph 3, read in conjunction with article 7 of the Covenant with respect to the author and C.T.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the information before it discloses violations by the State party of articles 6, paragraph 1; 7; 9 and 16 of the Covenant; and of article 2, paragraph 3, read in conjunction with articles 6, paragraph 1; 7; 9 and 16 of the Covenant with regard to Gyanendra Tripathi; and of

[16] See *El Abani* v. *Libyan Arab Jamahiriya*, para. 7.9; and communications No. 1327/2004, *Grioua v. Algeria*, Views adopted on 10 July 2007, para. 7.8; No. 1495/2006, *Madoui v. Algeria*, Views adopted on 28 October 2008, para. 7.7; and No. 1905/2009, *Khirani v. Algeria*, Views adopted on 26 March 2012, para. 7.8.

articles 7 and 2, paragraph 3, read in conjunction with article 7, with respect to the author and C.T.

9. In accordance with article 2, paragraph 3, of the Covenant, the State party is under an obligation to provide the author with an effective remedy, including by: (a) conducting a thorough and effective investigation into the facts surrounding the detention of Mr. Tripathi and the treatment he suffered at the Maharajgunj barracks, and providing the author with detailed information about the results of its investigation; (b) releasing him if he is still alive; (c) in the event that Mr. Tripathi is deceased, handing over his remains to his family; (d) prosecuting, trying and punishing those responsible for the violations committed; (e) providing adequate compensation for the violations suffered, to the author, her daughter and Mr. Tripathi, if he is still alive; (f) ensuring that necessary and adequate psychological rehabilitation and medical treatment are provided to the author and her daughter; and (g) providing appropriate measures of satisfaction. The State party is also under an obligation to take steps to prevent similar violations in the future. In that connection, the State party should ensure that its legislation allows the criminal prosecution of the facts that constituted a violation of the Covenant.

10. 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 or not there has been a 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 been established, the Committee wishes to receive from the State party, within 180 days, information concerning the measures taken to give effect to the Committee's Views. The State party is also requested to publish the present Views and disseminate them widely in the official languages of the State party.