



# International Covenant on Civil and Political Rights

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## Human Rights Committee

### Communication No. 2051/2011

Views adopted by the Committee at its 112<sup>th</sup> session  
(7-31 October 2014)

<i>Submitted by:</i>	Jit Man Basnet and Top Bahadur Basnet (represented by counsel, Track Impunity Always-TRIAL)
<i>Alleged victim:</i>	The authors
<i>State party:</i>	Nepal
<i>Date of communication:</i>	8 February 2011 (initial submission)
<i>Document references:</i>	Special Rapporteur's rule 97 decision, transmitted to the State party on 21 April 2011 (not issued in document form)
<i>Date of adoption of Views:</i>	29 October 2014
<i>Subject matter:</i>	Enforced disappearance
<i>Substantive issues:</i>	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 and right to an effective remedy
<i>Procedural issue:</i>	Exhaustion of domestic remedies, Level of substantiation of claims
<i>Articles of the Covenant:</i>	7; 9; 10 and 16 alone, and in conjunction with article 2(3)
<i>Article of the Optional Protocol:</i>	2; and 5, paragraph 2 (b)



## 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. 2051/2011\***

*Submitted by:* Jit Man Basnet and Top Bahadur Basnet  
(represented by counsel, Track Impunity  
Always-TRIAL)

*Alleged victim:* The authors

*State party:* Nepal

*Date of communication:* 8 February 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. 2051/2011, submitted to the Human Rights Committee by Jit Man Basnet and Top Bahadur Basnet 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 authors of the communication and the State party,

*Adopts* the following:

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

1. The authors of the communication are Mr Jit Man Basnet, and Mr Top Bahadur Basnet, Nepalese nationals, born on 17 December 1975 and 27 October 1981, respectively. They claim that the State party has violated Mr Jit Man Basnet's rights under articles 7, 9, 10 and 16, alone and in conjunction with article 2, paragraph 3; as well as Mr Top Bahadur Basnet's rights under article 7, in conjunction with article 2, paragraph 3, of the Covenant. The authors are represented by counsel.

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\* The following members of the Committee participated in the examination of the present communication: Yadh Ben Achour, Lazhari Bouzid, Christine Chanet, Cornelis Flinterman, Yuji Iwasawa, Walter Kälin, Zonke Zanele Majodina, Gerald Neuman, Nigel Rodley, Victor Manuel Rodríguez-Rescia, Fabián Omar Salvioli, Anja Seibert-Fohr, Dheerujlall Seetulsingh, Yuval Shany, Konstantine Vardzelashvili, Margo Waterval, and Andrei Paul Zlatescu. The text of an individual opinion by Committee member Mr. Yuval Shany (partly concurring partly dissenting) is appended to the present Views.



### The facts as submitted by the authors

2.1 As a result of the armed conflict prevailing in the country, the State party's authorities declared a state of emergency in November 2001. The Terrorist and Disruptive Activities (Prevention and Control) Ordinance (TADO Act) 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 (RNA), committed atrocities and enforced disappearances became a widespread phenomenon.<sup>1</sup> In 2003, the RNA's Bhairabnath Battalion barracks in Kathmandu, also known as Maharajgunj barracks (the barracks), became notorious as a place in which persons suspected of being Maoists were detained, severely ill-treated, tortured, disappeared and killed<sup>2</sup>.

2.2 Jit Man Basnet was a journalist and the founder of the newspaper Sagarmatha Times. He also worked as a human rights lawyer in a law firm in Kathmandu. Top Bahadur Basnet is his cousin. They grew up living in the same house as one family. On 4 February 2004, Jit Man Basnet was approached by three persons wearing the Army's uniform in front of his house. They started insulting him whilst people gathered to watch his arrest. He was blindfolded and forced to get into an army vehicle. He was taken to the Bhairabnath Battalion barracks. He was not informed about the grounds for his arrest.

2.3 In his first night at the barracks, Jit Man Basnet was questioned about Maoist activities and locations by the Army's personnel. As he denied any knowledge about this, they kicked and hit him with bamboo sticks and polythene pipes; pushed his head into a drum full of dirty smelling water; and threatened to kill him. He was intermittently unconscious. During the first night, he received a phone call from a co-worker, Mr G.L., and managed to tell this person that he was in a 'tense situation' before the guards switched off the phone. On 5 February 2004, Mr G.L. informed the Basnet family about the arrest. Since the family did not have more information about his arrest, they presumed that he had been arrested by the Army. Top Bahadur Basnet visited several organisations and authorities to find out his cousin's whereabouts, without success.

2.4 In the next 2 days, Jit Man Basnet was again interrogated and subjected to torture and severe ill-treatment for several hours. On one occasion, Colonel R.B. threatened him with being tortured to death, as happened with another journalist. During the full duration of his detention that lasted 258 days, he was kept under inhuman conditions of detention and suffered more torture. He had to spend days and nights lying on a thin mattress on the floor, with his hands handcuffed behind his back and blindfolded. In winter, with temperature below zero, he was kept in a tent with holes in the roof and provided with only a thin blanket to sleep in. Food was of very poor quality and served in small quantities. There was only one toilet for more than 100 detainees. Further, he was prevented to have any contact with the outside world, including his family and legal representatives. Detainees were not allowed to talk among themselves and they were moved and hidden in different areas of the barracks each time the International Committee of the Red Cross (ICRC) visited the barracks.

2.5 Since Jit Man Basnet's detention was well publicised, on 1 March 2004, advocate Mr B.L., on his own initiative, filed a writ of habeas corpus to the Supreme Court of Nepal

<sup>1</sup> The authors refer to the UN Working Group on Enforced or Involuntary Disappearances (WGEID) Report on the Visit to Nepal, 28 January 2005, para. 25, and the 2006 UN Special Rapporteur on Torture, Report on the Visit to Nepal, para. 17.

<sup>2</sup> The authors refer to the OHCHR's Report of investigation into arbitrary detention, torture and disappearance at Maharajgunj RNA barracks, Kathmandu, in 2003-2004, published in May 2006.



and requested the authorities to disclose his place of detention and release him. The writ pointed out that Mr Basnet's relatives did not know the place of his detention and the reasons for his arrest.

2.6 On 8 March 2004, Top Bahadur Basnet submitted a request for investigation into his cousin's disappearance to the National Human Rights Commission (NHRC).

2.7 On 11 March 2004, the RNA informed the Supreme Court that Jit Man Basnet was not held in military detention. On the same day, he was forced to sign a fake confession stating that he was a Maoist, and had been involved in violent activities and killings. The statement also indicated that he had not been tortured.

2.8 Despite their efforts, the Basnet family received contradicting information concerning Jit Man Basnet's whereabouts and could not ascertain whether he was alive and held in the Bhairabnath barracks. Top Bahadur Basnet met the Commander of the Bhairabnath barracks, the Senior Superintendent of the armed police force and representatives of the RNA's Human Rights Cell. However, they threatened him and refused to provide him with information about the whereabouts and fate of his cousin.

2.9 On 4 June 2004, within the habeas corpus proceedings, the Supreme Court ordered the NHRC to make an inquiry with the RNA and police as to the alleged arrest and illegal detention of Jit Man Basnet and submit a report to the Court. In July 2004, Top Bahadur Basnet informed the NHRC that he had met former detainees held at the Bhairabnath barracks, two of whom told him that Jit Man Basnet was in these barracks; that he had chest number 97; and that these persons refused to corroborate this information before the authorities as they were afraid of reprisals.

2.10 On the first week of October 2004, Top Bahadur Basnet managed to get into the Bhairabnath barracks and meet Jit Man Basnet, with the help of a friend, Mr. R.C., who was an Army officer. On 18 October 2004, Jit Man Basnet was released. An army officer told him that he had been under investigation, but was found innocent. He was also threatened; asked not to reveal information about the barracks; forced to sign a document indicating that he had been in detention for 90 days; and ordered to report to the Army in Kathmandu every 15 days.

2.11 As a result of the conditions of detention, Jit Man Basnet had eyesight problems and fragile health conditions. He indicates that he stopped reporting to the Army after the third time, fearing re-arrest. On 25 November 2004, he filed a petition to the NHRC requesting compensation for his illegal detention.

2.12 On 24 December 2004, Jit Man Basnet provided the NHRC with a detailed statement of his detention conditions at the Bhairabnath barracks and a list of names of detainees, on the condition that his name remained confidential. Nevertheless, in a report issued by the NHRC in January 2005, his name was disclosed as the source of information in a case of a disappeared person that had been announced in the media. Subsequently, he received death threats several times.

2.13 On 19 January 2005, the NHRC concluded that Jit Man Basnet was illegally detained by the RNA at the Bhairabnath barracks and subjected to torture. It stated that despite the Police's and the Ministry of Home Affairs' refusal to acknowledge the arrest, Jit Man Basnet's statement, as well as photographs and a medical report of the Institute of Medicine of Tribhuvan University,<sup>3</sup> submitted to the NHRC after his release, supported the

<sup>3</sup> According to the English translation of the medical examination report issued by the Tribhuvan University's Institute of Medicine-Maharaj Campus of 19 December 2004, provided by the authors, Mr Jit Man Basnet had multiple hyperpigmented tramline contusion marks and scars on his body. The



conclusion. The NHRC recommended that the authorities, inter alia, carry out an investigation to identify and sanction those responsible, and provide him with 50,000 Rupees as compensation. However, at the time the communication was submitted, none of the recommendations had been implemented and the compensation had not been paid.

2.14 On 18 September 2006, Jit Man Basnet submitted a contempt of court writ petition to the Supreme Court against the commander in chief of the RNA, the chief of army staff, the brigadier general of the law division of RNA, the RNA's spokespersons, the battalion commander and the major of the Bhairabnath Battalion. He claimed that they had caused contempt of court within the habeas corpus proceedings instituted by advocate Mr B.L., as they misled the Court by denying that he had been detained in the Bhairabnath barracks and subjected to torture. Accordingly, the author requested the Court to impose them the maximum possible punishment as provided for in Section 7(1) of the Supreme Court Act, 2048 (1991). On 19 September 2006, the Joint Registrar of the Supreme Court denied the registration of the author's petition as it was addressed against defenders not all of whom were included in the original writ of habeas corpus, and failed to identify which acts constituted contempt of court. On 22 September 2006, the author requested the Supreme Court to overturn the Joint Registrar's decision. On 14 December 2006, the author's request was rejected by the Supreme Court.

2.15 In parallel, on 29 October 2006, Jit Man Basnet filed a writ of mandamus to the Supreme Court, claiming that he had been illegally detained and subjected to ill-treatment and torture. He requested that the Court order the government to establish a high-level independent judicial commission to investigate the disappearance of persons held in the Bhairabnath barracks. On 22 December 2006, Lieutenant Colonel R.J.K., on behalf of the Bhairabnath Battalion, informed the Supreme Court that the author was arrested by the security forces on the grounds of his involvement in terrorist activities and held in detention by 'virtue of the order of the competent authority under the law'. He also stated that Mr Basnet was not subjected to torture or ill-treatment. On 2 January 2007, the Army Legal Department reiterated this information before the Supreme Court. On 3 March 2009, the Supreme Court dismissed the mandamus writ due to the absence of Mr Basnet's lawyer in one hearing. The authors, however, claim that the lawyer missed only one out of 15 hearings.

2.16 On 6 March 2010, Jit Man Basnet filed a request for compensation before the Ministry of Peace and Reconciliation in connection with his illegal arrest and detention by the RNA. At the time the communication was submitted, he had received no compensation.

2.17 The authors claim that they have exhausted all domestic remedies. Despite their efforts, no investigation has been carried out by the State party and no one has been sanctioned for Jit Man Basnet's arbitrary detention, enforced disappearance and torture. Moreover, NHRC cannot be considered an effective remedy. The authors argue that they did not try to file a First Information Report (FIR) to the police as this procedure is limited to the crimes listed in Schedule 1 of the State Cases Act of 1992 which does not include enforced disappearance and torture. The Supreme Court ordered the government in 2007 to criminalize enforced disappearance, but no action has been taken in this respect. As a result of the loopholes in the existing legislation concerning enforced disappearance and torture, perpetrators of these crimes can hardly be prosecuted and sanctioned.

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report also stated that 'the injuries [were] produced by the repeated impact of elongated objects with blunt force. Age of the injury marks [was] consistent with alleged time of infliction'.



### The complaint

3.1 The authors argue that Jit Man Basnet was victim of enforced disappearance and that the State party violated his rights under articles 7, 9, 10 and 16, alone and in conjunction with article 2, paragraph 3. As for Top Bahadur Basnet, his rights under article 7, read in conjunction with article 2, paragraph 3, of the Covenant were violated.

3.2 Jit Man Basnet was subjected to enforced disappearance, as he was arbitrarily deprived of his liberty by State party's officials, held incommunicado at the Bhairabnath barracks between 4 February and 18 October 2004, and hence, placed outside the protection of the law. His enforced disappearance and incommunicado detention amount per se to a treatment contrary to article 7. In addition, while in detention, he was also subjected to torture and other forms of physical and psychological ill-treatment. The authors request the Committee to consider these violations within the general context of systematic human rights violations existing in the State party against those suspected of being Maoists,<sup>4</sup> in particular in the Bhairabnath barracks.<sup>5</sup>

3.3 The authorities arrested Jit Man Basnet, without providing the legal grounds. His detention was not entered in any official record or registered and his relatives and defence counsel were not allowed to see him. He was 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. These facts amount to violations of article 9.

3.4 Jit Man Basnet's incommunicado detention and enforced disappearance as well as the conditions he was subjected to constitute by themselves violations of article 10 of the Covenant.

3.5 Jit Man Basnet's incommunicado detention for over 9 months placed him outside the protection of the law. In this regard, the authors point out that each time NHRC's representatives or ICRC's delegates visited the Bahirabneth barracks, he was moved and hidden in different areas of the barracks in order to prevent him from obtaining any form of protection or access to a possible remedy. Consequently, the State party is responsible for a violation of his rights under article 16.

3.6 The State party failed to carry out an ex officio, prompt, impartial, thorough and independent investigation concerning Mr Jit Man Basnet's arbitrary detention, enforced disappearance, torture and severe ill-treatment, and those responsible have not been sanctioned. The existing legal framework is not effective and it materially leaves victims and their relatives without remedy, further fostering impunity. The use of habeas corpus is in practice illusory in cases of enforced disappearance. Habeas corpus decisions issued by the courts against the security forces are said not to be complied with. In addition, the success of this procedure is dependent upon the admission of the security forces that the person sought is in their custody. Only then can the military authorities even be asked to explain why a person should remain in detention. A central difficulty in these cases is that government officials are not considered to be 'witnesses' and are not constrained by any legal provision to tell the truth.<sup>6</sup>

<sup>4</sup> The authors refer to the Special Rapporteur on Torture, Report on the Visit to Nepal, doc. E/CN.4/2006/6/Add.5 of 9 January 2006, paras. 26 and 3; and CAT, Concluding Observations on Nepal, doc. CAT/C/NPL/CO/2 of 13 April 2007, para. 13 and 24.

<sup>5</sup> The authors refer to the OHCHR's Report of investigation into arbitrary detention, torture and disappearance at Maharajgunj RNA barracks. See footnote 2, para 27-44.

<sup>6</sup> WGEID, Report on the Visit to Nepal, supra footnote 1, paras. 40-42.



3.7 With regard to Top Bahadur Basnet's rights, he was subjected to deep anguish and distress due to the arbitrary arrest and subsequent enforced disappearance of his cousin, as well as the lack of investigation. Furthermore, while looking for his cousin, he was repeatedly subjected to episodes of intimidation and harassment. The State party failed to adequately prevent these incidents and to investigate them when they occurred. Furthermore, in the absence of his cousin, Top Bahadur Basnet had to take over the responsibility as a head of the Basnet family and to provide for his cousin's four sisters and father. As a result, his life was completely affected as he had to renounce to his commercial activities and borrow large amounts of money. He still suffers the psychological consequences of the severe distress endured. However, he has not received any compensation for the material and moral harm suffered, nor any measure of rehabilitation. Accordingly, he claims that these facts constitute a violation of article 7, in conjunction with article 2, paragraph 3 of the Covenant.

3.8 The authors request the Committee to recommend the State party to: i) bring the perpetrators of Jit Man Basnet's arbitrary deprivation of liberty, torture and enforced disappearance before the competent civilian authorities for prosecution, judgment and sanction, and disseminate publicly the results of this measure; ii) provisionally separate from service, all army officials against whom there is *prima facie* evidence that they were involved in the crimes against Jit Man Basnet, pending the outcome of investigation; iii) ensure that persons suspected of having committed these 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; iv) ensure that the authors obtain integral reparation and prompt, fair and adequate compensation; and v) ensure that the measures of reparation cover material and moral damages, and measures of restitution, rehabilitation, satisfaction and guarantees of non-repetition are issued. In particular, they request that the State party acknowledge its international responsibility, on the occasion of a public ceremony, in the presence of the authorities and of the authors to whom official apologies shall be issued; and that the State party name a street or build a monument or a commemorative plate in Kathmandu to preserve the memory of all the victims of enforced disappearance during the internal armed conflict, including a specific reference to the case of Jit Man Basnet whereby his reputation is fully restored. The State party should also provide the authors with medical and psychological care immediately and free of charge, through its specialised institutions, and grant them access to free legal aid where necessary, in order to ensure to them 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. 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 By Note verbale of 24 June 2011, the State party challenged the admissibility of the communication on the grounds of failure to exhaust domestic remedies.

4.2 Regarding Top Bahadur Basnet there are no records of violations of his rights by State's agents during the armed conflict. The communication does not explicitly mention which of his rights were violated, in which circumstances, and what steps were undertaken by him in this regard. The State party maintains that an abstract communication cannot be considered by the Committee and that therefore, the allegations concerning his rights should be declared inadmissible.



4.3 As for Jit Man Basnet, he was released unharmed from custody by the security forces on 18 October 2004. Further, his name appears in the records of the Ministry of Peace and Reconstruction as victim of enforced disappearance and, as per recommendation of the NHRC, he is entitled to receive a compensation of 50,000.00 Rupees. The State party sanctioned a sum of 120 million Rupees to provide compensation to victims of the armed conflict. Section 5 of the Procedures relating to Relief, Compensation and Financial Assistance, 2066(2009) provides that a person who has been kidnapped or disappeared, or his or her heir, may obtain a monetary relief of 25,000.00 Rupees through the concerned District Administration Office. If the author has not yet received the 50,000.00 Rupees as an interim compensation, he can still request it.

4.4 Article 33 (q) and (s) of the Interim Constitution of Nepal 2007 and Section 5.2.5 of the Comprehensive Peace Agreement provide for the establishment of transitional justice mechanisms, such as a high level truth and reconciliation commission, to investigate gross violations of human rights during the armed conflict and create an environment of reconciliation in the society. To this end, the government submitted to the Parliament the Truth and Reconciliation Commission Bill and the Enforced Disappearance (Offence and Punishment) Bill. The main aim of these Bills is to establish independent, impartial, and autonomous commissions to carry out thorough and credible investigations into all allegations of disappearances and serious human rights violations occurred from 13 February 1996 to 21 November 2006. At the moment the State party's observations were submitted, the Bills were pending for approval by the Legislative Committee of the Parliament. The State party holds that against this background and in light of its sincere effort to establish these transitional justice mechanisms, it could not be concluded that domestic remedies have been unreasonably prolonged. Accordingly, the authors have not exhausted domestic remedies.

5. On 11 January 2012, the State party informed the Committee that the two Bills were at the final stage of the Legislative Committee of the Parliament, and requested the Committee to refrain from considering the communication in light of its sincere commitment and steps taken to establish transitional justice mechanisms to bring the perpetrators to justice.

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

6.1 On 9 March 2012, the authors rejected the State party's observations. They uphold that their communication provides explicit allegations of violations of Top Bahadur Basnet's rights under article 7, read in conjunction with article 2, paragraph 3 of the Covenant. It gives a detailed account of his efforts before private institutions and the authorities in order to find out Jit Man Basnet's whereabouts and secure his release. In spite of the risk for his own personal safety, he took contact and met high-ranking members of the Army, including some who were involved in his cousin's enforced disappearance and torture, such as Colonel R.B., commander of the Bhairabnath barracks, and Mr S.K.B., the senior superintendent of the armed police force. The fact that the State party found no records about the human rights violations against Top Bahadur Basnet does not mean that his rights were not violated. He has duly substantiated his proximity with Jit Man Basnet; explained in detailed his efforts to search for his cousin and the indifference from the authorities to his requests for information on his fate and whereabouts; and the consequences on his mental health.

6.2 The State party did not provide relevant information to challenge the admissibility of the claims related to Jit Man Basnet's rights. The fact that he was released in no way absolves the State party from its responsibility for the violations of his rights.

6.3 The amount of 50,000.00 Rupees recommended by the NHRC as compensation for the violations suffered by Jit Man Basnet is a negligible amount to cover the material and



moral harm suffered by him 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 this nature is not a sufficient remedy. Reparations in cases of gross human rights violations shall include restitution, rehabilitation, satisfaction and guarantees of non-repetition.

6.4 At the time the authors' comments were submitted, the establishment of the future Truth and Reconciliation Commission and the Commission on Disappearance was uncertain. Furthermore, the draft bills included a general amnesty clause for perpetrator of serious violations of international human rights law and international humanitarian law, including enforced disappearances. Fact-finding processes by non-judicial bodies, though crucial for the establishment of the truth, could never replace access to justice and redress for victims of gross human rights violations, being the criminal justice system the more appropriate avenue for immediate criminal investigation and punishment. In this regard, the authors point out that the Commissions would not be judicial bodies and would only have the power to make recommendation to relevant organs, including the Office of the Attorney General.

### **Issues and proceedings before the Committee**

#### *Consideration of admissibility*

7.1 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.

7.2 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.

7.3 The Committee takes note of the State party's argument that the claims of violations of Mr Top Bahadur Basnet's rights are formulated in an abstract fashion as they do not explicitly mention which of his rights were violated and in which circumstances. The Committee, however, observes that Mr Top Bahadur Basnet alleges violations of his rights under article 7, read in conjunction with article 2, paragraph 3, due to the events he had to go through in connection with the alleged illegal detention, enforced disappearance and torture of his cousin, Mr Jit Man Basnet. The Committee considers that Mr Top Bahadur Basnet has sufficiently substantiated his claims for purposes of admissibility.

7.4 With respect to the requirement of exhaustion of domestic remedies, the Committee notes the State party's argument that the authors have not exhausted domestic remedies; that Mr Jit Man Basnet's case should be addressed within the transitional justice mechanisms to be established in conformity with the 2007 Interim Constitution and the 2006 Comprehensive Peace Agreement; and that Mr Jit Man Basnet can request a compensation of 50,000.00 Rupees for his illegal detention and torture, as victim of the armed conflict in light of the NHRC's recommendations. The Committee also takes note of the authors' allegation that on 8 March 2002 Mr Top Bahadur Basnet filed a request for investigation into his cousin's disappearance to the NHRC; that Mr Jit Man Basnet himself filed requests for investigation into his alleged illegal detention, disappearance and torture after his release; and that although 10 years have elapsed since the alleged violations were committed, the investigation has not come to any conclusion yet. The Committee observes that the State party has contested the requirement of exhaustion of domestic remedies in a general fashion. However, it has not explained to the Committee which concrete remedies



could adequately and effectively satisfy the claims made by each of the authors. The Committee recalls its jurisprudence that in cases of serious violations a judicial remedy is required.<sup>7</sup> In this respect, the Committee observes that the transitional justice bodies to be established are not judicial organs and considers that the investigation in relation to Mr Jit Man Basnet's case has been unreasonably prolonged. Accordingly, the Committee concludes that there are no obstacles to the examination of the communication under article 5, paragraph 2 (b), of the Optional Protocol.

7.5 In view of the foregoing, and in the absence of other obstacles to admissibility, the Committee considers the communication admissible and proceeds to the examination of the claims in respect to Mr Jit Man Basnet under articles 7, 9, 10, and 16, read alone and in conjunction with article 2, paragraph 3; as well as to Mr Top Bahadur Basnet under article 7, read in conjunction with article 2, paragraph 3, of the Covenant.

#### *Consideration of the merits*

8.1 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.

8.2 The Committee takes note of the authors' unrefuted allegations that Mr Jit Man Basnet was arrested by persons wearing the Army's uniform on 4 February 2004 and taken to the Bhairabnath Battalion barracks, where he was held incommunicado, with no access to family, lawyer or anyone else from the outside world until the first week of October 2004; and that during this time the authorities refused to inform his family that he was kept at Bhairabnath barracks or elsewhere. Further, the authorities did not collaborate with the investigation carried out by the NHRC to find out Mr Basnet's fate and whereabouts. The Committee therefore considers that Mr Basnet's deprivation of liberty, followed by the authorities' refusal to acknowledge it and by concealment of his fate, constituted an enforced disappearance.

8.3 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 recommends that States parties make provision against *incommunicado* detention. It notes that in the present case Mr Jit Man Basnet was kept *incommunicado* between 4 February and the first week of October 2004, without contact with the outside world. It also takes note of the authors' allegation that he was tortured, in particular during the first days of his detention, while being interrogated. The Committee observes that the State party has limited its response to maintaining that on 18 October 2004 Mr Jit Man Basnet was released from custody of the security forces unharmed. However, the State party has not provided any response to the authors' allegation regarding the specific circumstances of his detention, nor has it refuted the allegations of torture and findings of the NHRC in this respect. Accordingly, the Committee concludes that keeping Mr Jit Man Basnet in captivity without allowing any contact with his family and the outside world, and subjecting him to acts of torture amount to a violation of his rights under article 7 of the Covenant.

8.4 The Committee notes the anguish and distress caused to Mr Top Bahadur Basnet by the disappearance of his cousin Mr Jit Man Basnet, from the time of his arrest until the first week of October 2004, when he managed to get access to the Bhairabnath barracks and confirm that his cousin was alive. The Committee observes that during this period Mr Top

<sup>7</sup> See communication No. 1761/2008, *Giri v. Nepal*, Views adopted on 24 March 2011, para.6.3.



Bahadur Basnet took over the responsibility as head of the Basnet family and provided for his cousin's four sisters and father, and that both authors have not only a formal family link, but a very close relationship since they grew up living in the same house as one family. It also observes that soon after Mr Jit Man Basnet disappeared, Mr Top Bahadur Basnet submitted a request for investigation to the NHRC and addressed several authorities and private institutions in order to find out his cousin's whereabouts; and that he received contradicting information as to his cousin's fate and whereabouts by the authorities, who officially denied the detention. In the particular circumstances of the present case, the Committee considers that the facts before it also disclose a violation of article 7 of the Covenant with regard to Mr Top Bahadur Basnet.<sup>8</sup>

8.5 With regard to the alleged violation of article 9, the Committee notes the authors' allegations that on 4 February 2004 Mr Jit Man Basnet was arrested without a warrant; held incommunicado at the RNA's Bhairabanth 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. The State party has not refuted these allegations. Accordingly, in the absence of any pertinent explanations from the State party, the Committee considers that Mr Jit Man Basnet's detention constitutes a violation of his rights under article 9 of the Covenant.

8.6 Regarding the complaint under article 10, paragraph 1, the Committee reiterates that persons deprived of their liberty may not be subjected to any hardship or constraint other than that resulting from the deprivation of liberty and that they must be treated with humanity and respect for their dignity.<sup>9</sup> In the instant case, the Committee notes the authors' claims that Mr Jit Man Basnet was handcuffed behind his back and blindfolded for long periods; that he was kept in a tent with holes which was inadequate for winter weather; that there was only one toilet for more than 100 detainees; and that food was of very poor quality and served in small quantities. In view of his incommunicado detention, the treatment inflicted on him, and the harsh conditions of detention, the Committee finds that the author's rights under article 10, paragraph 1, of the Covenant have been violated.

8.7 In respect of article 16, 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.<sup>10</sup> In the present case, the authorities subjected Mr Jit Man Basnet to *incommunicado* detention for about 8 months, and, despite his family's efforts, refused to provide them with information concerning his whereabouts and officially denied his

<sup>8</sup> See communication No 1640/2007, *El Abani v. Libyan Arab Jamahiriya*, Views adopted on 26 July 2010, para. 7.5; No. 1295/2004, *El Awani v. Libyan Arab Jamahiriya*, Views adopted on 11 July 2006, para. 4; 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.

<sup>9</sup> See general comment No. 21 (1992) on article 10, *Official Records of the General Assembly, Forty-seventh Session, Supplement No. 40 (A/47/40)*, annex VI, sect. B, para. 3; and communication No. 1779/2008, *Mezine v. Algeria*, para. 8.8; communication No. 1780/2008, *Zarzi v. Algeria*, Views adopted on 22 March 2011, para. 7.8; and communication No. 1134/2002, *Gorji-Dinka v. Cameroon*, Views adopted on 17 March 2005, para. 5.2.

<sup>10</sup> See communications No. 1640/2007, *El Abani v. Libyan Arab Jamahiriya* (supra note 18 above), para. 7.9; No. 1327/2004, *Grioua v. Algeria*, Views adopted on 10 July 2007, para. 7.8; and No. 1495/2006, *Madoui v. Algeria*, Views adopted on 28 October 2008, para. 7.7. Communication No. 1905/2009, *Khirani v. Algeria*, Views adopted on 26 March 2012, para. 7.8.



detention in a military facility. Furthermore, it is not refuted that the authorities moved and hid the detainees, including Mr Jit Man Basnet, in different areas of the barracks every time the NHRC and the ICRC visited them. The Committee, therefore, finds that the enforced disappearance of Mr Jit Man Basnet deprived him of the protection of the law during that period, in violation of article 16 of the Covenant.

8.8 The authors invoke 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, 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 Mr Jit Man Basnet did not have access to an effective remedy while in detention and after his release. During his detention, Mr Top Bahadur Basnet also approached several authorities looking for his cousin, including the authorities of the Bhairabnath barracks, who threatened him and refused to provide him with information about the whereabouts and fate of his cousin. Despite the authors' efforts and the NHRC's recommendations for investigation of 19 January 2005, almost after 10 years of Mr Jit Man Basnet's arrest no thorough and effective investigation has been conducted by the State party in order to elucidate the circumstances surrounding his detention and to bring the perpetrators to justice. Further, the Rs. 50,000.00 granted to Mr Jit Man Basnet by the NHRC as compensation 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, paragraph 3 in conjunction with articles 7; 9; 10, paragraph 1; and 16, with regard to Mr Jit Man Basnet; and of article 2, paragraph 3, in conjunction with article 7, with respect to Mr Top Bahadur Basnet.

9. 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 7; 9; 10, paragraph 1; and 16; and of article 2, paragraph 3, read in conjunction with articles 7; 9; 10, paragraph 1; and 16, of the Covenant with regard to Jit Man Basnet; and of article 7, and article 2, paragraph 3 in conjunction with article 7, with respect to Top Bahadur Basnet.

10. In accordance with article 2, paragraph 3, of the Covenant, the State party is under an obligation to provide the authors with an effective remedy, including by: (a) conducting a thorough and effective investigation into the facts surrounding the detention of Mr Jit Man Basnet and the treatment suffered at the Bhairabnath barracks; and prosecuting, trying and punishing those responsible for the violations committed; (b) providing the authors with detailed information about the results of this investigation; (c) providing adequate compensation to the authors for the violations suffered; (d) ensuring that the necessary and adequate psychological rehabilitation and medical treatment is provided to the authors; and (e) providing appropriate measures of satisfaction. The State party is also under an obligation to take steps to prevent similar violations in the future. In this connection, the State party should ensure that its legislation allows the criminal prosecution of the facts that constituted a violation of the Covenant.

11. 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 broadly in the official languages of the State party.



## Appendix

[Original: English]

### **Individual opinion of Committee member Mr. Yuval Shany (partly concurring partly dissenting)**

1. While I agree with all of the majority's conclusions concerning the first author - Jit Man Basnet - I am unable to join the conclusion that those parts of the complaint concerning the second author - Top Bahadur Basnet - are admissible. Under article 5, paragraph 2 of the First Optional Protocol, the Committee must ascertain that the individual has exhausted all available remedies. However, nothing in the case file indicates that the second author attempted to take any steps to obtain a domestic remedy or even alert the State party of the fact that he regards himself a victim of a human rights violation prior to the filing of the Communication. Indeed, the State party's claim that no such steps were taken has not been refuted by the second author.

2. The majority took the view that the State party "has not explained to the Committee which concrete remedies could adequately and effectively satisfy the claims made by each of the authors". This holding is consistent with the Committee's general approach that State parties claiming lack of exhaustion of local remedies must "specify the available and effective remedies that the author of the communication has failed to exhaust".<sup>1</sup> Still, I am of the view that an exception to this approach should be recognised where no steps whatsoever were taken by the author to claim remedies or even to bring his claim for a victim status to the attention of the State authorities. Under those circumstances, and in the absence of any explanation on the part of the author for his omission to take such steps, it is hard for me to accept that the State party has been afforded a reasonable opportunity for putting right the violation before the Communication has been brought to the Committee.<sup>2</sup> As a result, I believe that under the particular circumstances of the case at hand, the Committee is not in a position to ascertain that remedies were exhausted as far as the second author's complaint is concerned.

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<sup>1</sup> The Committee's general comment 33(2008), at para. 5.

<sup>2</sup> cf. *Selmouni v. France*, Judgment of the European Court of Human Rights of 28 July 1999, at para. 74