



International Covenant on Civil and Political Rights

Advance unedited version

Distr.: General
5 April 2017

Original: English

Human Rights Committee

Views adopted by the Committee under article 5(4) of the Optional Protocol, concerning communication No. 2185/2012^{*, **}

<i>Communication submitted by:</i>	Bimala Dhakal, Manjima Dhakal and Rabindra Dhakal (represented by counsel, Philip Grant, of Track Impunity Always - TRIAL)
<i>Alleged victim:</i>	The authors and Rajendra Dhakal (husband, father and brother of the authors, respectively)
<i>State party:</i>	Nepal
<i>Date of communication:</i>	31 January 2012 (initial submission)
<i>Document references:</i>	Decision taken pursuant to rule 97 of the Committee's rules of procedure, transmitted to the State party on 2 August 2012 (not issued in document form)
<i>Date of adoption of Views:</i>	17 March 2017
<i>Subject matter:</i>	Enforced disappearance
<i>Procedural issues:</i>	Exhaustion of domestic remedies
<i>Substantive issues:</i>	Right to life; prohibition of torture and cruel and inhuman treatment; right to liberty and security of person; respect for the inherent dignity of the human person; recognition as a person before the law; right of the child to measures of protection; and right to an effective remedy
<i>Articles of the Covenant:</i>	2(3), 6, 7, 9, 10, 16 and 24(1)
<i>Articles of the Optional Protocol:</i>	5(2)(b)

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

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

1. The communication is submitted by Ms Bimala Dhakal (wife), Mr Rabindra Dhakal (brother) and Ms Manjima Dhakal (daughter) on their behalf and on that of Mr Rajendra Dhakal. They are Nepal nationals, born on 27 August 1970, 25 September 1971, 29 September 1990, and 13 November 1968, respectively. The authors claim that the State party has violated Mr Rajendra Dhakal's rights under articles 6, 7, 9, 10, and 16, separately and in conjunction with article 2(3), of the International Covenant on Civil and Political Rights (the Covenant) by Nepal; Ms Bimala Dhakal's and Mr Rabindra Dhakal's rights under article 7, alone and in conjunction with article 2(3); and Ms Manjima Dhakal's rights under article 7, read in conjunction with 2(3) and 24(1), of the Covenant. The authors are represented by counsel. The Covenant and its Optional Protocol entered into force for the State party on 14 August 1991.

The facts as submitted by the authors

2.1 As a result of the armed conflict that started in 1996 in the State party between the government and the Communist Party of Nepal – Maoist (CPN-M), there was a marked deterioration of the human rights situation in the country. All parties to the conflict, including the police and the Royal Nepalese Army, committed atrocities, and enforced disappearances became a widespread phenomenon.¹ Reliable sources indicate that during 2003-2004 Nepal was recognized as having a large number of cases of enforced disappearances.² Victims of enforced disappearance were mainly Maoist sympathisers or supporters. Many of these victims were students, businessmen, farmers, journalists and human rights defenders, among others.³

2.2 Rajendra Dhakal (Mr Dhakal) and the first author (Bimala Dhakal) have three children. Mr Dhakal was a human rights defender and member of the Nepal Bar Association. He worked in a law firm called "Progressive Legal Services Centre" and was Chairman of the Gorkha district branch of the Forum for the Protection of Human Rights-FOPHUR. He was also district secretary of the United People's Front (UPF), an organization gathering various Communist groups, until 1995. He resigned from this post when the CPN-M started the armed conflict in February 1996. Between March and June 1996, he was illegally detained by the Nepalese police and released by order of a district court in June 1996. During his detention he was ill-treated, tortured and kept almost without any contact with the outside world. In June 1998, in the framework of a homicide and robbery case in Tanahun District Court, he was charged of attacking police personnel, carrying explosives, opening fire indiscriminately, and killing a police sub-inspector. A warrant and summons were issued against him. At that time Mr Dhakal was actively working as a lawyer in cases of torture and harassment by State agents. After the issuance of the arrest warrant against him, he began receiving death threats from security forces. As a result, in August 1998 he quit his legal career and went into hiding.

2.3 On 8 January 1999, Mr Dhakal was attending a closed-door political awareness programme at Jamdi village, Khairenitar, in Tanahun District. When he was going to the Jamdi's stream, he was approached and arrested by the police. Two other persons, Mr. P.B.T and Mr N.D.A., primary school teachers, were also arrested and brought to the Bel

¹ The authors refer to the report of the Working Group on Enforced or Involuntary Disappearances on its visit to Nepal (E/CN.4/2005/65/Add.1); 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).

² The authors refer to Human Rights Watch and Advocacy Forum, *Waiting for Justice*, September 2008, p. 11.

³ UN Working Group on Enforced an Involuntary Disappearances, *Report of the Working Group – Addendum – Mission to Nepal* (6-14 December 2004), in UN doc. E/CN.4/2005/65/Add.1, 28 January 2005.

Chautara Area Police Office. However, they were separated from Mr Dhakal, who was put in solitary confinement. That was the last time he was seen. After two days the teachers were released.

2.4 In the following days, the first author, who had last seen her husband one month earlier in Chitwan, heard rumours about Mr Dhakal's arrest. Upon her request, the second author (Rabindra Dhakal) started searching for his brother. Between 12 and 19 January 1999, the second author visited the District Police Office (DPO) in Tanahun, the DPO in Nawalparasi, the DPO in Kaski, Pokhara, and the Armed Police Battalion, Pokhara. In all these places, the officers in charge informed him that his brother had been transferred to another police post. At the Armed Police Battalion, Pokhara, he was informed that Mr Dhakal had been transferred to the DPO in Gorkha. Lastly he visited the Gorkha office, where he was informed that Mr Dhakal was indeed there but he was not allowed to visit him. A few weeks after the second author met the two teachers who had been arrested along with his brother. They told him that Mr Dhakal was arrested on 8 January 1999 and transferred to the Tanahun DPO. The whereabouts of Mr Dhakal remain unknown since. The second author kept the first author and her family regularly informed on his steps to search for her husband.

2.5 On 21 January 1999, the second author lodged a writ of habeas corpus on behalf of his brother, Mr Dhakal, before the Nepalese Supreme Court. The Court issued a Show Cause Order to inter alia the Home Ministry, the Police Headquarters, Naxal, Kathmandu, DPOs in Gorkha, Nawalparasi, Kaski and Tanahun, Armed Police Battalion, Pokhara, Kaski, and Bel Chautara Area Police Office. These authorities responded by denying the detention. They also denied the second author's allegations that police officers informed him that his brother had been moved from one police facilities to another consecutively (see 2.4 above).

2.6 On 23 March 1999, the Supreme Court ordered the Police Headquarters to search for Mr Dhakal in all places of detention and to produce him before the Court. On 19 April 1999, the Police denied any knowledge about the case and stated that charges of homicide were pending against Mr Dhakal at the Tanahun District Court since 1998 in connection with the murder of a police sub-inspector, and that the police was searching for him.

2.7 In December 1999, the affidavits of the two teachers arrested together with Mr Dhakal were presented to the Supreme Court. They confirmed that on 8 January 1999 Mr Dhakal was arrested by policemen led by Inspector K.B.R. and transferred to the Tanahun District Police Office. Afterwards, the Home Ministry informed the Court that Mr Dhakal had not been found in custody.

2.8 On 9 August 2000, the UN Special Rapporteur on extrajudicial, summary or arbitrary executions issued a report on her mission to Nepal, in which she noted that she had been briefed about Mr Dhakal's case.⁴ In 2001 Amnesty International submitted his case to the UN Working Group on Enforced and Involuntary Disappearances (WGEID).⁵ His name was also included in the list of disappeared persons of the National Human Rights Commission of Nepal (NHRC)⁶ and in the International Committee of the Red Cross (ICRC) missing persons database.⁷

2.9 The authors claim that the first author had long been mildly involved in political activities with the CPN-M; that after Mr Dhakal's disappearance, she became very much engaged, along with the second author, in a group called the "State Enforced Disappearance Family Society"; and that in early 2001, she was arrested for having connections with the Maoist party. Policemen told her that her husband had already been killed by the security forces and threatened that she would have the same fate if she continued being involved in Maoist activities. She was held in detention for 10 days and was repeatedly ill-treated during interrogation. She was blindfolded and constantly beaten in the head with a stick. After 10 days she was released but obliged to report to the police post in Thantipokhari, Palungtar VDC, Gorkha district every Saturday.

2.10 Due to the situation of violence in Nepal, the judicial system was adversely affected and no additional steps were taken concerning Mr Dhakal's case until the end of the armed conflict in 2006. On 28 August 2006, in order to follow-through with pending habeas corpus petitions concerning enforced disappearances, the Supreme Court decided to establish a Detainee Investigation Task Force (DITF), led by a judge of the Appellate Court, to inquire into four cases of disappearance, including Mr Dhakal's. The investigation concluded that he was arrested by a police team comprised of 10-12 policemen of the Police Office in Bel Chautara, Tanahun, under the command of Police Inspector K.B.R, brought to the Area Police Office, Bel Chautara, and made to disappear. It also recommended that criminal charges be brought against the perpetrators and that relief be granted to the affected families.

2.11 On 1 June 2007, the Supreme Court ruled on the habeas corpus petition of 83 disappeared persons. The Court took note of the findings of the DITF and concluded that Mr Dhakal was arrested and disappeared by members of the security forces; and that there was no information about his fate and whereabouts.⁸ The Court ordered the government inter alia to enact legislation in order to define and criminalize enforced disappearances, prosecute the perpetrators of these crimes, and provide compensation to the victims and their families.

2.12 On 3 August 2007, the first author received 150,000 NRs from the Chief District Office, Ghorka, as interim relief, in the framework of the Interim Relief Plan set up by the government. Later on 14 April 2008, she received 100,000 NRs from the Ministry of Peace and Reconstruction. However, the judgment's additional orders were not implemented by the government. The authors claim that they did not take further action since there was no

⁴ The authors refer to the report of UN Special Rapporteur on extrajudicial, summary or arbitrary executions. Mission to Nepal (E/CN.4/2001/9/Add.2), para. 41.

⁵ The authors point out that Mr Dhakal's case was included in the WGEID's reports in 2002, 2003, and 2004. See E/CN.4/2002/79, para. 231 E/CN.4/2003/70, para. 198; and E/CN.4/2004/58, para. 222; E/CN.4/2005/65, para. 240.

⁶ The communication provides a copy of NHRC-"An Appeal". Disappearance Name List (2057-2060 Mansir).

⁷ The communication provides a copy of ICRC's document, Nepal-The right to know (last updated 30.08.2011) which confirms that the name of Mr Dhakal is in the missing persons database.

⁸ The communication provides a copy of the decision of the Supreme Court of Nepal of 1 June 2007 and a translation into English language.

point in bringing the case before the police or judicial authorities given the impunity prevailing in the country, as showed by the decisions of the Supreme Court and their lack of implementation.

2.13 The authors affirm that they have taken possible steps to exhaust domestic remedies. Nevertheless, the remedies are ineffective and unreasonably prolonged. The proceedings after filing the habeas corpus writ lasted more than 7 years, and the Supreme Court's final decision of 1 June 2007 has not been implemented up to now, which constitutes an unreasonable delay, rendering the prospect of any further complaint futile. Despite this decision, the Nepalese authorities have failed to conduct an investigation on the circumstances of Mr Dhakal's disappearance and his fate and whereabouts remain unknown. The authors submit that they did not file a First Information Report (FIR) application before the police, because it would not have been an effective remedy because a criminal investigation can only start after registration of a FIR, but this can be lodged only when it is related to a crime enlisted in Schedule 1 of the 1992 State Cases Act. Since enforced disappearance is not codified in the State party's national legislation to date, it is impossible for relatives of victims of enforced disappearance to file a FIR for these acts. It is also questionable whether a FIR may be considered an effective remedy, as they have often been discretionarily refused by the police. Finally, a potential fact-finding process in the context of a transitional justice mechanism does not replace access to justice and redress for victims of gross human rights violations and their relatives and therefore cannot be deemed a remedy within the meaning of article 5, paragraph 2 (b) of the Optional Protocol.

The complaint

3.1 The authors claim that Mr Dhakal was a victim of enforced disappearance and that the State party has violated his rights under articles 6, 7, 9, 10, and 16, separately and in conjunction with article 2(3), of the Covenant by Nepal; the first and second authors' rights under article 7, alone and in conjunction with article 2(3); and the third author's (Manjima Dhakal) rights under article 7, read in conjunction with 2(3) and 24(1), of the Covenant.

3.2 Mr Dhakal was arbitrary deprived of his liberty by Nepalese police on 8 January 1999 and he was last seen alive in life-threatening circumstances in the hands of agents of the State. His arbitrary arrest, ill-treatment and subsequent enforced disappearance were perpetrated in a context of widespread and systematic practice. Although the Supreme Court's decision of 1 June 2007 endorsed the DITF's findings and concluded that Mr Dhakal was taken to the Bel Chautara Area Police Office and subsequently forcibly disappeared by the police, the Court's orders have never been implemented and no thorough and effective investigation has been carried out to establish his fate and whereabouts. Against that background, the burden of proof rests on the State party to show that it has complied with its obligation to guarantee the right to life of the person under its control. Therefore, in the light of the State party's failure to demonstrate the contrary, the authors submit that Mr Dhakal's enforced disappearance constitute a violation of his rights under article 6 of the Covenant.

3.3 The incommunicado detention and enforced disappearance of Mr Dhakal amount to a treatment contrary to article 7 of the Covenant. By keeping him in detention without contact with the outside world since 8 January 1999, the authorities placed him at the mercy of the police. Further, it is likely that he suffered immensely from mental anguish as to his fate, owing to the circumstances surrounding his disappearance, including the past mistreatment in detention and the death threats received from the security forces after the issuance of the arrest warrant against him.

3.4 Over 12 years have passed since Mr Dhakal was arbitrary deprived of his liberty, taken to the Bel Chautara Area Police Office and subject to enforced disappearance by policemen. His long-lasting incommunicado detention constitutes per se a violation of

article 9 of the Covenant. Even admitting that his arrest was made pursuant to a valid arrest warrant, such as the one issued on 7 August 1998 by Tanahun District Court, none of the procedures required by Nepalese and international law have been met. His detention was not entered in any official record or registered 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.

3.5 The authors argue that Mr Dhakal's arbitrary arrest, incommunicado detention and enforced disappearance, as well as the conditions to which he was subjected by the police, constitute by themselves violations of article 10 of the Covenant.

3.6 Mr Dhakal's incommunicado detention, subsequent enforced disappearance and the failure by the authorities to conduct an effective investigation concerning his whereabouts and fate have maintained him outside the protection of the law since 8 January 1999, preventing him from enjoying his human rights and freedoms. Consequently, the State party is responsible for a continuing violation of article 16 of the Covenant.

3.7 Although the authors reported promptly the arbitrary deprivation of liberty and enforced disappearance of Mr Dhakal and the Supreme Court found that indeed he was forcibly disappeared by the police, 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, and possible death and the subsequent concealment of his mortal remains. Accordingly, the State party has violated and is continuing to violate his rights under articles 6, 7, 9, 10, and 16, read in conjunction with article 2(3), of the Covenant.

3.8 The State party has violated the first and second authors' rights under article 7, read in conjunction with article 2(3) of the Covenant, as they were subjected to deep anguish and distress owing to the arbitrary arrest and subsequent enforced disappearance of her relative, as well as to the acts and omissions of the authorities in dealing with those issues. Mr Dhakal's disappearance has grievous emotional and psychological consequences on the family. It clearly disrupted the first author's family life and adversely affected its financial sustainability. She faced difficulties to provide for her children and their education. She used to take medication in order to overcome anxiety and recurrent nervous breakdowns and is still deeply affected by her husband's disappearance. The second author was distressed by the utter lack of cooperation by the police authorities and feared being himself detained for his frequent visits and inquiries to police posts. Not feeling safe in Gorkha, he eventually decided to move to Japan but still keeping regular contacts with the first author and her family. Despite having moved abroad, he used to have recurrent nightmares picturing his brother being beaten up or himself travelling to find him. He consulted a doctor to try to recover from these tribulations and he undertook a treatment with anti-depressant and anxiolytic medication. To date the authors' right to know the truth about the circumstances of Mr Dhakal's enforced disappearance, his fate and whereabouts, the progress and result of the investigation, has been constantly violated by the State party.

3.9 The third author is victim of a violation of her rights under article 7, read in conjunction with articles 2(3) and 24(1) of the Covenant. She was 9 years old at the time of her father's disappearance. She suffered from anguish as she was growing up in dire financial conditions and seeing her mother having a very hard time taking care of the family. During the critical years of her youth, she had to withstand the emotional and social burden of living in a stigmatized family and to hear the stories about her father's death. Her plans of completing her studies in Kathmandu were curtailed by the economic hardships the family was experiencing and around 2001 she had to go back to Gorkha.

3.10 The authors request the Committee to recommend the State party inter alia to: (a) order thorough investigation, as a matter of urgency, concerning the fate and whereabouts of Mr Dhakal; (b) release him, should he be alive and, in the event of his death, to locate, exhume, identify and respect his mortal remains and return them to the family; and, in the event of his death, locate, identify and exhume his mortal remains and return them to the family; (c) bring the perpetrators before the competent civilian authorities for prosecution, judgment and sanction, and disseminate publicly the results of that measure; (c) ensure that the authors obtain integral reparation and prompt, fair and adequate compensation; and (d) ensure that the measures of reparation cover material and moral damages and measures of restitution, rehabilitation, satisfaction and guarantees of non-repetition. In particular, she requests that the State party acknowledge its international responsibility, on the occasion of a public ceremony, in the presence of the authorities and of Mr Dhakal's relatives, to whom official apologies shall be issued. The State party should also provide the authors with medical and psychological care immediately and free of charge, through its specialized institutions, and grant them access to free legal aid, where necessary, in order to ensure to their available, effective and sufficient remedies. As a guarantee of non-repetition, the State party should take the necessary measures to ensure that enforced disappearance and torture, and the different forms of participation in these crimes, constitute autonomous offences under its criminal law, punishable by appropriate penalties which take into account their extreme seriousness.

State party's observations on admissibility

4.1 On 10 October 2012, the State party submitted its observations on admissibility, and contended that the authors have failed to exhaust domestic remedies.

4.2 The State party maintains that the authors' allegations before the Committee were considered by the Supreme Court of Nepal within the habeas corpus proceeding lodged by the second author. During this proceeding, all the authorities stated that Mr Dhakal had not been arrested or detained by the security force. The Supreme Court issued a search warrant, but Mr Dhakal's whereabouts could not be established.

4.3 The authors have not filed a FIR to the police as required by the Government Cases Act of 1992. If they do, the police will investigate the case in accordance with the law. The authors have therefore failed to exhaust the available domestic remedies.

4.4 The State party notes that the allegedly human rights violations raised by the communication appear to be committed during the armed conflict. To address that situation, it has decided to establish a commission to investigate cases of disappearances and a truth and reconciliation commission, in compliance with the Interim Constitution of Nepal of 2007. To that end, bills on a truth and reconciliation commission and a commission on enforced disappearances have been submitted to the parliament. By the time the State party submitted its observations, the bills were pending approval. The two commissions to be formed after endorsement of the bills will investigate cases which occurred during the conflict and bring to the surface the truth about those cases. The State party holds that, against that background and in the light of its sincere efforts to establish those transitional justice mechanisms, it could not be concluded that domestic remedies have been unreasonably prolonged.

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

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

Authors' comments on the State party observations on admissibility

5.1 On 14 December 2012, the authors submitted their comments on the State party's observations and reiterate the allegations contained in their communication.

5.2 The authors allege that within the habeas corpus proceedings, the authorities replied to the Supreme Court's Show Cause Order by simply denying Mr Dhakal's arrest and detention, without providing any evidence that an investigation had been made into his whereabouts, before submitting their replies to the Court. Moreover, they did not refute the DITF's findings concerning his detention and disappearance by policemen, on which the Supreme Court based its decision. In this connection, they note that the WGEID stated that the success of the writs of habeas corpus in Nepal was entirely dependent upon the admission of the security forces; that the security forces personnel were not constrained by any legal provision to tell the truth; and that impunity remained.⁹

5.3 The authors submit that they have not received an interim relief of 300,000 NRs from the State party. It was only the first author, who received a relief as stated in its communication (see 2.12 above). However, the other authors and Mr Dhakal have not received any compensation. In any event, monetary compensation for violations of such grave nature does not amount to an effective remedy within the meaning of article 2, paragraph 3, of the Covenant.

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

5.5 As to the State party's contention that the authors have failed to file a FIR, the authors reiterate their previous allegations (see 2.13 above). Since neither enforced disappearance, nor torture or extrajudicial executions have been criminalised in the State party, no FIRs may be filed for these crimes and thus there are no remedies available in practice. On the other hand, they highlight that they made several inquiries before the police in 1999. The ineffectiveness of these inquiries led them to lodge a writ of habeas corpus on 21 January 1999. They further argue that the effectiveness of the FIR as a remedy is questionable since according to a Supreme Court's decision rendered in 2008, a FIR related to a case of homicide is to be rejected since it falls within the jurisdiction of the future Truth and Reconciliation Commission. With regard to the 1992 State Cases Act, they point out that it establishes procedures related to murder and kidnapping. However such procedures are inadequate in Mr Dhakal's case since he was not kidnapped, but illegally detained and subsequently forcibly disappeared.

⁹ The authors refer to the Working Group on Enforced or Involuntary Disappearances (WGEID), Report on the Mission to Nepal, 28 January 2005, paras. 41-42; and the WGEID, Mission to Nepal: Follow-up to the Recommendations made by the Working Group, 13 February 2012, pp. 100-101.

State party's observations on the merits

6.1 On 4 April 2013, the State party submitted its observations on the merits and reiterated that the authors have not exhausted domestic remedies and that steps have been taken to establish a transitional justice mechanism.

6.2 The State party informed the Committee that on 13 March 2013 an Executive Ordinance on the investigation of disappeared persons, truth and reconciliation commission was promulgated by the President, and that it intended to establish a high level Commission on Investigation of Disappeared Persons, Truth and Reconciliation. Against this background, it would not be appropriate for the Committee to consider cases pertaining to the conflict period of Nepal, given that the functioning of the transitional justice mechanism is about to begin.

Authors' comments on the State party's observations on the merits

7.1 On 24 June 2013, the authors submitted their comments on the State party's observations on the merits. They regret that the State party has failed to address the merits of the communication, as this denotes an indifference towards their suffering. It *inter alia* failed to provide any information about the fate and whereabouts of Mr Dhakal, leaving them to bear the brunt of the efforts to uncover any facts.

7.2 The authors reiterate their allegations regarding the FIR and submit that this is not a remedy that has to be exhausted for the purpose of admissibility under article 5 (2)(b) of the Optional Protocol. Moreover, although the Supreme Court's decision of 1 June 2007 found that Mr Dhakal was forcibly disappeared by the police and ordered an investigation, his fate and whereabouts remain unknown.

7.3 The authors also reiterated that the first author received an interim relief of 150,000 NRs and 100,000NRs, on 3 August 2007 and 14 April 2008, respectively, for Mr Dhakal's enforced disappearance. Monetary compensation for violations of such grave nature does not amount to an effective remedy within the meaning of article 2, paragraph 3, of the Covenant.

7.4 At the moment the authors' comments were submitted to the Committee, the prospect of establishing a Commission on Investigation into Disappeared Persons, Truth and Reconciliation did not yet exist. Notwithstanding the fact that the Executive Ordinance immediately came into force, its legal effects had been suspended by the Supreme Court of Nepal.

Further submissions from the parties

8.1 On 10 October 2013, the State party reiterated its observations about the transitional justice mechanism and maintained that the authors have not exhausted domestic remedies.

8.2 The State party submitted that it granted 300,000 NRs to Mr Dhakal's family, as interim relief. This amount is part of an initial package and is not a compensation for the violations suffered. Victims have the right to receive adequate reparation after the investigation of the cases.

8.3 The authors have not lodged a complaint with the concerned authorities in connection with the allegations of enforced disappearance of Mr Dhakal notwithstanding the fact that a Chapter on Kidnapping and Hostage is in force under the General Code (Muluki Ain).

9. On 6 November 2013 and 10 January 2014, the authors informed the Committee that on 2 January 2014, the Supreme Court of Nepal declared the Executive Ordinance of 14

March 2013, which established the Commission on Investigation into Disappeared Persons, Truth and Reconciliation, unconstitutional and inconsistent with international standards. The Supreme Court ordered authorities to establish a new commission, but no precise deadline was provided.

Issues and proceedings before the Committee

Consideration of admissibility

10.1 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 the case is admissible under the Optional Protocol to the Covenant.

10.2 As required under article 5 (2) (a) of the Optional Protocol, the Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement. The Committee notes that in 2011 Mr Dhakal's case was reported to the Working Group on Enforced or Involuntary Disappearances. However, it recalls that extra-conventional procedures or mechanisms established by the Commission on Human Rights or the Human Rights Council, and whose mandates are to examine and report publicly on human rights situations in specific countries or territories, or cases of widespread human rights violations worldwide, do not generally constitute an international procedure of investigation or settlement within the meaning of article 5 (2) (a) of the Optional Protocol.¹⁰ Accordingly, the Committee considers that it is not precluded from examining the communication under this provision.

10.3 With respect to the requirement of exhaustion of domestic remedies, the Committee notes the State party's arguments that the authors have not exhausted domestic remedies, as they failed to register a first information report with the police and to file a complaint under the Chapter on Kidnapping and Hostage of the General Code (Muluki Ain); and that Mr Dhakal's case will be addressed within the transitional justice mechanisms, established in conformity with the Interim Constitution of 2007. The Committee also notes the authors' allegations that they promptly reported Mr Dhakal's disappearance to the authorities on several occasions, including to the police; that a FIR 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 transitional justice mechanisms do not replace access to justice and cannot be considered an effective remedy to be exhausted. The Committee observes that the second author lodged a writ of habeas corpus to the Supreme Court of Nepal which was decided on 1 June 2007. In its decision, the Supreme Court found that Mr Dhakal's was forcibly disappeared by the police and ordered the authorities to carry out an investigation to establish his fate and whereabouts. Despite this decision and the authors' efforts, the specific circumstances of Mr Dhakal's detention and disappearance remain unclear more than 17 years later and no investigation has yet been concluded. The Committee further recalls its jurisprudence that in cases of serious violations a judicial remedy is required¹¹ and that the transitional justice bodies established by Act 2071 (2014) are not judicial organs.¹² Accordingly, the Committee considers that the remedies identified by the State party have been ineffective and that there are no obstacles to the examination of the communication under article 5 (2) (b) of the Optional Protocol.

¹⁰ See communication Nos. 1874/2009, *Mihoubi v. Algeria*, Views adopted on 18 October 2013, para. 6.2; 1882/2009, *Al Daquel v. Libya*, Views adopted on 21 July 2014, para. 5.2; and 2038/2011, *Tharu et al. v. Nepal*, Views adopted on 3 July 2015, para. 9.2.

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

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

10.4 As all admissibility requirements have been met, the Committee declares the communication admissible and proceeds to its examination of the merits.

Consideration of merits

11.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as required under article 5 (1) of the Optional Protocol.

11.2 The Committee takes note of the authors' allegations that on 8 January 1999 Mr Dhakal was illegally detained by policemen in Jamdi village, taken to the Bel Chautara Area Police Office, kept incommunicado and subsequently forcibly disappeared; and that upon the first author's request, the second author reported promptly the arrest and disappearance to the authorities. As they did not carry out any investigation, he lodged a writ of habeas corpus to the Supreme Court of Nepal. Despite the authors' efforts, no prompt, impartial, thorough and independent investigation has been carried out by the authorities; the fate and whereabouts of Mr Dhakal remain unknown to date; and no one has been summoned or convicted for these acts.

11.3 The Committee also takes note of the State party's argument that the authors' allegations were considered by the Supreme Court of Nepal when dealing with the habeas corpus proceeding lodged by the second author; that within this proceeding, all the authorities stated that Mr Dhakal had not been arrested or detained by the security force; and that although the Supreme Court issued a search warrant, his whereabouts could not be established.

11.4 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.¹³ 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.

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

11.6 In the present case, the Committee observes that the authors reported promptly Mr Dhakal's disappearance to the authorities in January 1999; and that within the habeas corpus proceeding instituted by the second author before the Supreme Court; the Home Ministry, the Police Headquarters, Naxal, Kathmandu, DPOs in Gorkha, Nawalparasi, Kaski and Tanahun, Armed Police Battalion, Pokhara, Kaski, and Bel Chautara Area Police Office, among other authorities, denied having arrested or detained Mr Dhakal. Nevertheless, the DITF concluded that he was arrested by police team comprised of 10-12 policemen, brought to the Area Police Office, Bel Chautara, and disappeared. These

¹³ 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.

¹⁴ See communications No. 2000/2010, *Katwal v. Nepal*, Views adopted on 1 April 2015, para. 11.3; No. 2134/2012, *Molina Arias v. Colombia*, Views adopted on 9 July 2015, para. 9.4.

findings were subsequently confirmed by the Supreme Court's decision of 1 June 2007, which ordered the authorities to carry out an investigation to establish the circumstances of Mr Dhakal's disappearance. The Committee observes that the State party has produced no evidence refuting the Supreme Court's findings. Rather, it maintains that despite a Supreme Court's search warrant, Mr Dhakal's whereabouts could not be established. The State party has not provided the Committee with any information of the specific steps taken to carry out a thorough and effective investigation and their results. Mr Dhakal's whereabouts remain unknown to date, and in case of his death, his mortal remains have not been located and returned to his family. The Committee recalls that, in cases of enforced disappearance, the deprivation of liberty followed by a refusal to acknowledge the deprivation of liberty, or by concealment of the fate of the disappeared person, 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.¹⁵ In the instant case, the State party has produced no evidence to show that it met its obligations to protect the life of Mr Dhakal. Accordingly, the Committee concludes that the State party failed in its duty to protect Mr Dhakal's life, in violation of article 6 (1) of the Covenant.

11.7 The Committee takes note of the authors' allegations that the incommunicado detention since 8 January 1999 and subsequent enforced disappearance of Mr Dhakal amount per se to treatment contrary to article 7. 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 on article 7, which recommends that States parties should make provision to ban incommunicado detention. In the present case, in the absence of a satisfactory explanation from the State party, the Committee finds that the enforced disappearance of Mr Dhakal constitute a violation of article 7 of the Covenant. Having reached that conclusion the Committee will not examine the claims regarding the violation of article 10 of the Covenant for the same facts.

11.8 The Committee notes the anguish and distress caused to the three authors by the disappearance of Mr Dhakal in January 1999. Despite their efforts and the Supreme Court's decision of 1 June 2007, the authors have never received sufficient explanation concerning the circumstances surrounding his disappearance and, in case of his death, his remains have not been returned to his family. In the absence of a satisfactory explanation from the State party, the Committee considers that these facts reveal a violation of article 7 of the Covenant with respect to the authors. Having reached that conclusion the Committee will not examine the claims regarding the violation of third author's rights under article 24(1) of the Covenant.

11.9 The Committee takes note of the authors' allegations under article 9 that Mr Dhakal was detained by the police without an arrest warrant. Even admitting that his arrest was made pursuant to a valid arrest warrant, such as the one issued on 7 August 1998 by Tanahun District Court, none of the procedures required by Nepalese and international law have been met. He was never brought before a judge or any other official authorized by law to exercise judicial power, and he could not 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 Supreme Court's decision of 1 June 2007. In the absence of a pertinent explanation from the State party, the Committee considers that the facts described constitute a violation of article 9 of the Covenant.

11.10 With regard to the alleged violation of article 16, the Committee notes the authors' allegations that Mr Dhakal was arrested by policemen; that despite their efforts, the State party has failed to provide them with sufficient information concerning his disappearance; and that despite the ruling by the Supreme Court of 1 June 2007, no effective investigation

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

has been carried out to ascertain his fate and whereabouts, maintaining him outside the protection of the law since 8 January 1999. The Committee is of the view that the intentional removal of a person from the protection of the law constitutes a refusal of the right to recognition as a person before the law, in particular if the efforts of his or her relatives to obtain access to effective remedies have been systematically impeded.¹⁶ The Committee, therefore, finds that the enforced disappearance of Mr Dhakal deprives him of the protection of the law and of his right to recognition as person before the law, in violation of article 16 of the Covenant.

11.11 The authors invoke article 2 (3) of the Covenant, which imposes on States parties the obligation to ensure an effective remedy for all persons whose rights under the Covenant have been violated. The Committee attaches importance to the establishment by States parties of appropriate judicial and administrative mechanisms for addressing claims of rights violations. It refers to its general comment No. 31, which provides, inter alia, 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.¹⁷ In the present case, the Committee observes that, shortly after the detention of Mr Dhakal, the second author approached different authorities seeking information, and later filed a writ of habeas corpus before the Supreme Court. On 1 June 2007, this court found that Mr Dhakal was forcibly disappeared by the police and ordered the authorities to carry out an investigation. Despite the authors' efforts and the Supreme Court's decision, more than 17 years after the disappearance of Mr Dhakal, no thorough and effective investigation has been conducted by the State party in order to elucidate the circumstances surrounding his detention and whereabouts and to bring the perpetrators to justice. The State party has failed to explain the effectiveness and adequacy of investigations carried out by the authorities and the concrete steps taken to clarify the circumstances surrounding Mr Dhakal's disappearance, as ordered by the Supreme Court of Nepal on 1 June 2007. In case of his death, the State party has also failed to search for his mortal remains and return them to his family. Therefore, the Committee considers that the State party has failed to conduct a prompt, thorough and effective investigation into the disappearance of Mr Dhakal. Additionally, the sums received by Mr Dhakal's family as interim relief does not constitute an adequate remedy commensurate to the serious violations inflicted. Accordingly, the Committee concludes that the facts before it reveal a violation of article 2 (3), in conjunction with articles 6 (1), 7, 9 and 16, with regard to Mr Dhakal; and article 2 (3), read in conjunction with article 7 of the Covenant, with respect to the authors.

12. The Human Rights Committee, acting under article 5 (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, 7, 9 and 16, of the Covenant; and of article 2(3), read in conjunction with articles 6, 7, 9 and 16 of the Covenant with regard to Mr Dhakal. The facts also disclose violations of article 7, and article 2(3), read in conjunction with article 7, with respect to the authors.

13. In accordance with article 2 (3) (a) of the Covenant, the State party is under an obligation to provide the authors with an effective remedy. This requires it to make full reparation to individuals whose Covenant rights have been violated. Accordingly, the State party is obligated, inter alia, to: (a) conduct a thorough and effective investigation into the disappearance of Mr Rajendra Dhakal and provide the authors with detailed information about the results of its investigation; (b) if Mr Rajendra Dhakal is dead, locate his remains and hand them over to his family; (c) prosecute, try and punish those responsible for the

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

¹⁷ General Comment N° 31, para. 15.

violations committed and make the results of such measures public; (d) ensure that any necessary and adequate psychological rehabilitation and medical treatment made available to the authors free of charge; and (e) provide adequate compensation and appropriate measures of satisfaction, to the authors and Mr Rajendra Dhakal, if he is alive, for the violations suffered. The State party is also under an obligation to take steps to prevent the occurrence of similar violations in the future. In particular, the State party should ensure that: i) its legislation allows for the criminal prosecution of those responsible for serious human rights violations such as torture, extrajudicial execution and enforced disappearance; and ii) any enforced disappearances give rise to a prompt, impartial and effective investigation.

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