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Human Rights Committee

Communication No. 2111/2011

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

Submitted by:	Sharmila Tripathi (represented by counsel, Track Impunity Always-TRIAL)
Alleged victim:	The author, Gyanendra Tripathi (her husband) and C.T. (their minor daughter)
State party:	Nepal
Date of communication:	28 September 2011 (initial submission)
Document references:	Special Rapporteur's rule 97 decision, transmitted to the State party on 21 October 2011 (not issued in document form)
Date of adoption of Views:	29 October 2014
Subject matter:	Enforced disappearance
Substantive issues:	Right to life, Prohibition of torture and cruel and inhuman treatment, right to liberty and security of person, respect for the inherent dignity of the human person, recognition as a person before the law, freedom of association, right of the child to measures of protection and right to an effective remedy
Procedural issue:	Exhaustion of domestic remedies
Articles of the Covenant:	6, paragraph 1; 7; 9, paragraphs 1-4; 10, paragraph 1; 16; 22; 24, paragraph 1, alone, and in conjunction with article 2(3)
Article of the Optional Protocol:	Articles 3; 5, paragraph 2 (b)

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Annex

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

concerning

Communication No. 2111/2011*

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

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

Meeting on 29 October 2014,

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

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

Adopts the following:

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

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

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

The facts as submitted by the author

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.[1] Moreover, in August 2003, the RNA arbitrarily detained several members of the All Nepal National Independent Student Union-(Revolutionary) (ANNISU-R), the student wing of the Communist Party of Nepal-Maoist (CPN-M). During this period, the RNA's Maharajgunj barracks in Kathmandu, which hosted the Bhairabnath and the Yudha Bhairab Battalions, became notorious as a place in which persons suspected of being Maoists were detained, ill-treated, tortured, disappeared and killed.[2]

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

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

2.4 On 28 September 2008, the author tried to report her husband's arbitrary arrest to the District Police Office (DPO) in Hanumandhoka, Kathmandu. But, she was informed that such 'incidents' were not responsibility of the police. On the same day, she visited several RNA's barracks within the Kathmandu Valley to ascertain his whereabouts, without success. She continued visiting the barracks regularly until the ceasefire agreement was signed between the CPN-M and the Seven Party Alliance (SPA) in May 2006. Although she was never harassed nor threatened, each time she visited the barracks she met with complete indifference from the RNA's officers.

2.5 On 29 September and 1 October 2003, Mr S.P., an advocate acting on his own initiative, and the author, respectively, lodged writs of habeas corpus before the Supreme Court in favour of Mr Tripathi. The author argued that her husband was illegally detained by the security forces and requested the Court to order his release.

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[1] The author refers 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.

[2] The author refers to the OHCHR *Report of investigation into arbitrary detention, torture and disappearance at Maharajgunj RNA barracks, Kathmandu, in 2003-2004*, (May 2006), available at: http://nepalconflictreport.ohchr.org/files/docs/2006-05-26_report_ohchr_ eng.pdf ; and the National Human Rights Commission's Investigation of disappearances in Maharajgunj Barracks as ordered by the Supreme Court. Submitted to the Supreme Court on 7 September 2009.

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

2.7 On 13 November 2003, the Ministry of Defence informed the Supreme Court, that 'from the information done, it [had] been found that Gyanendra Tripathi [was] not under RNA's custody', without providing any detail or explanation.

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

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

2.10 On 4 July 2006, the NHRC found that Mr Tripathi was arrested, kept in the Maharajgunj barracks and disappeared by the Bhairabnath battalion, recommending the government to bring him under the protection of the law and to prosecute those responsible for these crimes. Nevertheless, no action has been taken by the authorities in this regard.

2.11 On 1 June 2007, the Supreme Court issued a decision concerning another writ of habeas corpus filed by Mr R.D. who, acting on his own initiative, additionally included as petitioners Mr Tripathi and other persons who had been arbitrary detained by State agents between January 1999 and February 2004. The Court stated that they had been illegally arrested and enforced disappeared by security personnel, and ordered the government to take immediate measures to ensure accountability by *inter alia* establishing a commission of inquiry, criminalising enforced disappearance, investigating and prosecuting those responsible for disappearances; and providing adequate compensation and relief to the victims and their families.

2.12 On 7 September 2009, the NHRC issued a report concerning the Maharajgunj barracks, which stated that the author's husband was kept in these barracks and later disappeared. The NHRC also noted that 43 persons kept in custody at the Maharajgunj

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

barracks were taken to the Shivapuri national reserve, in Kathmandu, and killed between December 2003 and January 2004.[4]

2.13 The author claims that she tried to exhaust all domestic remedies. Her writ of habeas corpus was quashed by the Supreme Court, the highest domestic tribunal, and there is no other domestic remedy to exhaust.[5] The NHRC cannot be considered an effective remedy. As regards the First Investigative Report (FIR), it is limited to the crimes listed in Schedule 1 of the State Cases Act of 1992 which does not include enforced disappearance and torture. Furthermore, the filing of FIRs in disappearance cases does not constitute an appropriate remedy as the authorities usually argue that the person's death cannot be proved in the absence of the body. Although torture is forbidden pursuant to article 14(4) of the Interim Constitution and section 3(1) of the Compensation Relating to Torture Act (CRTA), it has not been criminalized by national law. CRTA does not provide for criminal accountability but only for compensation of a maximum of 100,000. Rupees and a claim must be filed within 35 days of the torture or release from detention. Despite the Supreme Court's order in 2007 to criminalize enforced disappearance, no action has been taken in this respect.

The complaint

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

3.2 The author claims that although there are no eye-witnesses of the precise moment of her husband's arrest, there are strong reasons and elements to believe that he was arbitrary arrested on 26 September 2003, kept in the Maharajgunj barracks and enforced disappeared by State agents. Moreover, in view of testimonies and other concurrent evidence, from different reliable sources, it is reasonable to presume that he was killed by members of the RNA. His arbitrary deprivation of liberty took place within a context of massive arrests, enforced disappearances and torture of persons suspected of being Maoist. Against this background, the burden of proof rests on the State party to provide a satisfactory and convincing explanation, establishing and disclosing with certainty her husband's fate and whereabouts. Therefore, in light of the State party's failure to demonstrate the contrary, the author submits that her husband's enforced disappearance as such and subsequent killing constitute a violation by the State party of his right under article 6.

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

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[4] The author refers to the NHRC's Investigation of disappearances in Maharajgunj Barracks as ordered by the Supreme Court, supra note 2, p. 1-2. She also notes that in November 2008, at the request of the OHCHR-Nepal, two forensic experts from the Department of Forensic Medicine at the University of Turku conducted a preliminary investigation of a possible mass burial or cremation site at Shivapuri forest. The experts concluded that the remains found were human. In addition, her husband's name was included in the International Committee of the Red Cross's publication *Missing Persons in Nepal: The right to know – updated listed 2009 (August 2009)*.

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

3.4 Mr Tripathi's conditions of detention at the Maharajgunj barracks also constituted a violation of his rights under articles 7 and 10, paragraph 1. Testimonies of former detainees as well as the NHRC's and OHCHR-Nepal's reports indicate that detainees were permanently handcuffed and blindfolded. They were held in overcrowded cells, with limited access to food of very poor quality, non-clean water, and toilets. Those who suffered diseases and inflections did not receive medical treatment.

3.5 The author's husband was also victim of violations his rights under article 9, paragraphs 1-4. The fact that her husband was last seen alive in the hands of the RNA at the Maharajgunj barracks, in the context of massive arrests of persons suspected of being Maoists, allows for a presumption that he was arrested on 26 September 2003 by State agents, without providing any legal grounds. His detention was not entered in any official record or register and his relatives have never seen him again. He was never charged with a crime, nor was he brought before a judge or any other official authorized by law to exercise judicial power. He was unable to take proceedings before a court to challenge the lawfulness of his detention.

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

3.7 The author claims that her husband's arbitrary detention, enforced disappearance and alleged arbitrary deprivation of life, were directly related to his membership to the ANNISU-R; and, therefore, constitute a violation of his right under article 22, paragraph 1.

3.8 Although the author reported promptly the arbitrary deprivation of liberty and enforced disappearance of her husband, no *ex officio*, prompt, impartial, thorough and independent investigation has been carried out and his fate and whereabouts remain unknown to date. Moreover, as of today, no one has been summoned or convicted for his arbitrary deprivation of liberty, enforced disappearance, torture, most likely arbitrary execution and the subsequent concealment of his mortal remains. Accordingly, the State party has violated and is continuingly violating his rights under articles 6, paragraph 1; 7; 9, paragraphs 1-4; 10, paragraph 1; 16, and 22, in conjunction with article 2, paragraph 3, of the Covenant.

3.9 The author claims that the State party violated her rights under article 7, read in conjunction with article 2, paragraph 3, as she was subjected to deep anguish and distress due to the arbitrary arrest and subsequent enforced disappearance of her husband, as well as to the acts and omission of the authorities in dealing with the issues. As a result of her husband's disappearance, she had to bring her daughter up alone. In this regard, she argues that wives and families of disappeared persons are often stigmatised in Nepal.

3.10 The author also contends that her daughter is victim a violation of her rights under article 7, read in conjunction with articles 2, paragraph 3 and 24, paragraph 1. She was 1 year and 8 months old at the time of her husband's disappearance. As a child, she has been particularly affected since she has had to grow up without being able to enjoy a family life and experiencing the ongoing anguish of not knowing where her father was and whether he would come back.

3.11 The author requests the Committee to recommend the State party to: i) order an independent investigation as a matter of urgency concerning the fate and whereabouts of her husband and, in the event of his death, to locate, exhume, identify and respect his mortal remains and return them to the family; ii) bring the perpetrators before the competent civilian authorities for prosecution, judgment and sanction, and disseminate publicly the results of this measure; iii) provisionally separate from service, all army officials against whom there is *prima facie* evidence that they were involved in the crimes

against her husband, pending the outcome of investigation; iv) 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; v) ensure that the author and her daughter obtain integral reparation and prompt, fair and adequate compensation; and vi) ensure that the measures of reparation cover material and moral damages, and measures of restitution, rehabilitation, satisfaction and guarantees of non-repetition. In particular, she requests that the State party acknowledge its international responsibility, on the occasion of a public ceremony, in the presence of the authorities and of Mr Tripathi's relatives to whom official apologies shall be issued; and that the State party name a street or build a monument or a commemorative plate in memory of all the victims of enforced disappearance and torture during the internal armed conflict, including a specific reference to the case of Mr Tripathi whereby his reputation is fully restored. The State party should also provide the author with medical and psychological care immediately and free of charge, through its specialised institutions, and grant her access to free legal aid where necessary, in order to ensure to her available, effective and sufficient remedies. Likewise, the author's daughter should be provided with a scholarship for the remainder of her education. As a guarantee of non-repetition, the State party should take the necessary measures to ensure that enforced disappearance and torture, and the different forms of participation in these crimes, constitute autonomous offences under its criminal law, punishable by appropriate penalties which take into account their extreme seriousness. Finally, the State party should establish as soon as possible educational programmes on international human rights law and international humanitarian law for all members of the army, the security forces and the judiciary.

State party's observations on admissibility and the merits

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

4.2 The legislation in force at the moment the State party's observations were submitted, allowed victims of torture to seek compensation. In addition, the State party informed that amendments to the Penal Code and other legislation in order to criminalize enforced disappearance, as well as two bills on the establishment of a Truth and Reconciliation Commission and a Disappearance Commission were pending for approval by the Parliament. The establishment of these commissions was agreed by the government and the CPN in the Comprehensive Peace Agreement of 21 November 2006 and is also provided by Article 33 (q) and (s) of the Interim Constitution of Nepal 2007. The commissions will be competent to carry out investigations concerning offences committed during the armed conflict, from 13 February 1996 to 21 November 2006.

4.3 As regards the merits of the communication, the State party maintains that the author's allegations are not based on reliable facts and proof, but on mere suspicion. The author argues that there are reasons to believe that her husband was arbitrarily executed by State agents at the Maharajgunj barracks. Nevertheless, her writ of habeas corpus filed

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

before the Supreme Court failed to indicate Mr Tripathi's whereabouts and to prove that in fact he was arrested and detained by State agents.

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

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

Author's comments on the State party's observations

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

5.2 The communication does not constitute an abuse of the right of submission. Since 2003, the author has addressed the authorities and requested them to establish her husband's fate and whereabouts. Her hopes of progress in the clarification of her husband's case were particularly encouraged after the Supreme Court's ruling of 1 June 2007. Afterwards, she has been reluctant to request its implementation, because she feared for her life and that of her daughter. Finally, the author points out that Rule 96 (c) of the Committee's Rule of procedure applies to communications submitted after January 2012.

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

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

5.4 By the time the author submitted her comments, the establishment of the future Truth and Reconciliation Commission and the Commission on Disappearance as well as their powers to carry out prompt, independent and effective investigations and prosecutions were uncertain. Further, they would not be judicial bodies and the draft bills included a general amnesty clause for perpetrators of serious violations of international human rights law and international humanitarian law, including enforced disappearance. Fact-finding processes by non-judicial bodies, though 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, being the criminal justice system the more appropriate avenue for immediate criminal investigation and punishment.

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

5.6 The amount of 300,000 Rupees received by the author as interim relief is a negligible amount to cover the material and moral harm suffered by her and her daughter and cannot be considered as an effective domestic remedy within the meaning of article 2, paragraph 3 of the Covenant. Furthermore, mere pecuniary compensation for human rights violations of 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.

Issues and proceedings before the Committee

Consideration of admissibility

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

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

6.3 With respect to the requirement of exhaustion of domestic remedies, the Committee notes the State party's arguments that the author has not exhausted domestic remedies as she failed to register a FIR before the police; that she could request compensation under the Compensation Relating to Torture Act (CRTA); and that her husband's case shall be addressed within the transitional justice mechanisms which had to be established in conformity with the 2007 Interim Constitution and the 2006 Comprehensive Peace Agreement. The Committee also notes the author's allegations that 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 the CRTA does not provide for criminal accountability but only for compensation of maximum 100,000 Rupees. The Committee observes that the author's writ of habeas corpus was quashed by the Supreme Court on 26 January 2004. Despite the NHRC's recommendations of 4 July 2006 and the Supreme Court's ruling of 1 June 2007, the circumstances of the alleged disappearance of the author's husband remain unclear and no investigation has been concluded yet. The Committee further recalls its jurisprudence that in cases of serious violations a judicial remedy is required.[8] In this respect, the Committee observes that the transitional justice bodies to be established are not judicial organs. Accordingly, the

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

Committee considers that the investigation has been unreasonably prolonged and that there are no obstacles to the examination of the communication under article 5, paragraph 2 (b), of the Optional Protocol.

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

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

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

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[9] According to new rule of procedure 96 (c), the Committee shall ascertain that the communication does not constitute an abuse of the right of submission. An abuse of the right of submission is not, in principle, a basis of a decision of inadmissibility *ratione temporis* on grounds of delay in submission. However, a communication may constitute an abuse of the right of submission when it is submitted 5 years from the exhaustion of domestic remedies by the author of the communication, or, where applicable, after 3 years from the conclusion of another procedure of international investigation or settlement, unless there are reasons justifying the delay taking into account all the circumstances of the communication.

[10] See, for example, communications No. 1223/2003, *Tsarjov* v. *Estonia*, Views adopted on 26 October 2007, paragraph 6.3; No. 1434/2005, *Fillacier* v. France, decision of inadmissibility adopted on 28 April 2006, paragraph 4.3; and No. 787/1997, *Gobin* v. *Mauritius*, decision of inadmissibility adopted on 16 July 2001, paragraph 6.3.

[11] Ibid.

Consideration of the merits

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

7.2 The Committee takes note of the author's allegation that although there are no eye-witnesses of the precise moment of her husband's arrest, several reports and testimonies indicate that her husband was detained by the RNA on 26 September 2003, kept incommunicado at the Maharajgunj barracks and enforced disappeared by State agents. According to the author, the chances to find her husband alive are minimal, since concurring evidence suggests that he was killed by RNA's members on or about 20 December 2003. The Committee also notes the State party's argument that the author's allegations are based on mere suspicion; and that within the habeas corpus proceedings, she was unable to prove that her husband had been arrested and detained by State agents. The Committee reaffirms that the burden of proof cannot rest solely on the author of the communication, especially considering that the author and the State party do not always have equal access to evidence and that frequently the State party alone has access to the relevant information.[12] It is implicit in article 4, paragraph 2, of the Optional Protocol that the State party has the duty to investigate in good faith all allegations of violations of the Covenant made against it and its representatives and to provide the Committee with the information available to it. In cases where the author has submitted allegations to the State party that are corroborated by credible evidence and where further clarification depends on information that is solely in the hands of the State party, the Committee may consider the author's allegations substantiated in the absence of satisfactory evidence or explanations to the contrary presented by the State party.

7.3 In the present case, the Committee observes that promptly after losing contact with her husband in September 2003, the author approached several RNA's barracks in Kathmandu inquiring after his whereabouts and fate. However, the authorities denied his detention. It also observes that according to reports issued by OHCHR-Nepal and NHRC in 2006 and 2009, respectively, and testimonies from former detainees of Maharajgunj barracks, her husband was last seen in these barracks under RNA's custody, in December 2003. Further, on 4 July 2006 the NHRC found that Mr Tripathi had been arrested, kept in the Maharajgunj barracks and disappeared by members of the Bhairabnath battalion. In the light of the documentation submitted by the author, the Committee considers that the State party has not provided sufficient and concrete explanations that oppose the findings and conclusions of the NHRC and the OHCHR-Nepal, respectively. The Committee recalls its jurisprudence that, in cases of enforced disappearance, the deprivation of liberty followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate of the disappeared person, removes the person from the protection of the law, and places his or her life at a serious and constant risk for which the State is accountable.[13] In the instant case, the State party has produced no evidence to show that it met its obligations to protect the life of Mr Tripathi. Accordingly, the Committee concludes that the State party failed in its duty to protect Mr Tripathi's life, in violation of article 6, paragraph 1, of the Covenant.[14]

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[12] Communications No. 1422/2005, *El Hassy v. Libya*, 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 vs. Libya*, Views adopted on 1 November 2012, para 7.2;

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

[14] Communication No. 1804/2008, *cit.* para. 7.12

7.4 The Committee recognizes the degree of suffering involved in being held indefinitely without contact with the outside world. It recalls its general comment No. 20 (1992) on the prohibition of torture or cruel, inhuman or degrading treatment or punishment, in which it recommends that States parties make provision against *incommunicado* detention. It notes the author's allegations that her husband was arrested in September 2003 and kept *incommunicado* at the Maharajgunj barracks, without contact with the outside world; and that when he last seen in the barracks by other detainees, he was in poor physical condition and had visible signs of torture. In absence of information from the State party that would contradict the aforementioned, the Committee concludes that the facts as described amount to a violation of article 7 of the Covenant. Having reached this conclusion the Committee will not examine the claims regarding the violation of article 10 of the Covenant.

7.5 The Committee notes the anguish and distress caused to the author and her minor daughter, Ms C.T., by the disappearance of Mr Tripathi since September 2003. The author and her daughter have never received sufficient explanations concerning the circumstances surrounding Mr Tripathi's disappearance. Moreover, although reliable evidence suggests that the chances to find her husband alive are minimal, no investigation has been carried out to ascertain his fate, and, in case of his death to return his bodily remains to his family. The Committee considers that the facts as described also disclose a violation of article 7 of the Covenant with regard to the author and her daughter.[15] Having reached this conclusion the Committee will not examine the claims regarding the violation of article 24, paragraph 1 of the Covenant concerning Ms C.T.

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

7.7 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.[16] In the present case, the author claims that despite the efforts of Mr Tripathi's family the State party has failed to provide them with relevant information concerning his fate and whereabouts and that despite the NHRC's recommendations and the Supreme Court's ruling of 1 June 2007, no effective investigation has been carried out to ascertain

[15] See communication No 1640/2007, *El Abani* v. *Libyan Arab Jamahiriya*, Views adopted on 26 July 2010, para. 7.5; No. 1295/2004, *El 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.

[16] See communications No. 1640/2007, *El Abani v. Libyan Arab Jamahiriya*, Views adopted on 26 July 2010, 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.

his whereabouts, maintaining him outside the protection of the law since September 2003. The Committee, therefore, finds that the enforced disappearance of Mr Tripathi deprives him of the protection of the law and deprived him to his right to recognition as person before the law, in violation of article 16 of the Covenant.

7.8 The author invokes article 2, paragraph 3, of the Covenant, which requires States parties to ensure that individuals have accessible, effective and enforceable remedies for asserting the rights recognized in the Covenant. The Committee reiterates the importance it attaches to States parties establishing appropriate judicial and administrative mechanisms for addressing alleged violations of rights under domestic law. It refers to its general comment No. 31, in which it states that failure by a State party to investigate allegations of violations could in and of itself give rise to a separate breach of the Covenant. In the present case, the Committee observes that shortly after losing contact with her husband the author approached several barracks in Kathmandu, tried to report his disappearance to the CDO in Hanumandhoka, and lodged a writ of habeas corpus to the Supreme Court. Despite the author's efforts, almost 12 years after the disappearance of her husband no thorough and effective investigation has been concluded by the State party in order to elucidate the circumstances surrounding his detention and no criminal investigation has even been started to bring the perpetrators to justice. Therefore, the Committee considers that the State party has failed to conduct a thorough and effective investigation into the disappearance of the author's husband. Additionally, the Rs. 300.000 received by the author as interim relief does not constitute an adequate remedy commensurate to the seriousness of the violations inflicted. Accordingly, the Committee concludes that the facts before it also reveal a violation of article 2, paragraph 3 in conjunction with article 6, paragraph 1; 7; 9; and 16, with regard to Mr Tripathi; and article 2, paragraph 3, read in conjunction with article 7 of the Covenant with respect to the author and Ms C.T.

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

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

10. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether or not there has been a violation of the Covenant and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure for all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy when a violation has been established, the Committee wishes to receive

from the State party, within 180 days, information concerning the measures taken to give effect to the Committee's Views. The State party is also requested to publish the present Views and disseminate them broadly in the official languages of the State party.