

**International Covenant on
Civil and Political Rights**

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Human Rights Committee**Views adopted by the Committee under article 5 (4) of the
Optional Protocol, concerning communication No.
2560/2015***.**

<i>Communication submitted by:</i>	Tikanath and Ramhari Kandel
<i>Alleged victim:</i>	The authors and Mr. Amrit Kandel (the authors' son and brother)
<i>State party:</i>	Nepal
<i>Date of communication:</i>	11 April 2014 (initial submission)
<i>Document references:</i>	Decision taken pursuant to rule 92 of the Committee's rules of procedure, transmitted to the State party on 2 February 2015 (not issued in document form)
<i>Date of adoption of Views:</i>	15 July 2019
<i>Subject matter:</i>	Arbitrary arrest, torture and enforced disappearance; absence of prompt and impartial investigation; lack of access to an effective remedy
<i>Procedural issues:</i>	Admissibility - exhaustion of domestic remedies
<i>Substantive issues:</i>	Right to life; prohibition of torture and cruel and inhuman treatment or punishment; right to liberty and security of person; respect for the inherent dignity of the human person; recognition as a person before the law; and right to an effective remedy.
<i>Articles of the Covenant:</i>	2(3), 6, 7, 9, 10 and 16

* Adopted by the Committee at its 126th session (1 – 26 July 2019).

** The following members of the Committee participated in the examination of the present communication: Tania María Abdo Rocholl, Yadh Ben Achour, Ilze Brands Kehris, Arif Bulkan, Ahmed Amin Fathalla, Shuichi Furuya, Christof Heyns, Bamariam Koita, Duncan Laki Muhumuza, Photini Pazartzis, Hernán Quezada, Vasilka Sancin, José Manuel Santos Pais, Yuval Shany, Hélène Tigroudja, Andreas Zimmermann and Gentian Zyberi.



Articles of the Optional Protocol: 2 and 5 (2)(b)

1. The authors of the communication, dated 11 April 2014 and received on 16 April 2014, are Mr. Tikanath Kandel, born on 14 April 1950, and his son Ramhari Kandel, born 28 August 1978. The communication is brought on their behalf and on behalf of Amrit Kandel, born on 29 May 1981 respectively, the son of Mr. Tikanath Kandel and a younger brother of Ramhari Kandel. The authors are Nepali nationals. They claim violations by Nepal of Mr. Amrit Kandel's rights under articles 2(3), 6, 7, 9, 10 and 16, and of Mr. Tikanath's and Ramhari's rights under article 7 alone, and in conjunction with article 2 (3) of the International Covenant on Civil and Political Rights ("the Covenant"). Nepal ratified the Optional Protocol on 14 May 1991. The authors are represented by TRIAL (Track Impunity Always).

The facts as presented by the authors

2.1 At the time of the facts of the communication, Mr. Amrit Kandel was residing in Chabahil, Kathmandu, and was a Bachelor of Arts student at Sarswati Multiple College in Kathmandu. He was affiliated to the All Nepal National Independent Student Union-Revolutionary (ANNISU-R), the students' wing of the then Communist Party of Nepal-Maoist (hereinafter CPN-M). In 2003, Mr. Tikanath Kandel, his father, was a farmer (now retired) and Mr. Ramhari Kandel, his brother, was a windowpane shopkeeper.

2.2 On 10 October 2003, Mr. Amrit Kandel was walking in the alleyways of Gangahiti neighborhood in Chabahil, in Kathmandu, together with one of his friends, Mr. Dhruba Subedi. At approximately 3 p.m., around 11 or 12 armed men in plain clothes got out of a van belonging to the Royal Nepal Army (RNA), attacked Mr. Amrit Kandel and took him under their control. He was forced inside the van at gunpoint and taken away. While Mr. Amrit Kandel was being captured, his friend ran away.

2.3 Mr. Ramhari Kandel, his brother, had also been taken away about a month before, on 12 September 2003, whilst he was visiting his sister at her apartment in Patan, Lalitpur District, in Kathmandu. A group of five to seven RNA personnel had entered the apartment, arrested him, forced him into a van and brought him to Maharajgunj prison, where he was detained *incommunicado*, amidst interrogations and beatings, for around three months.

2.4 On 10 October 2003, Mr. Ramhari Kandel heard someone crying in a tent close to his and recognized his brother's voice. Five days later, he walked past his brother while going to the toilet and recognized him, although they were both blindfolded, as Mr. Ramhari Kandel managed to peep out several times. They managed to communicate for a few minutes while in the toilet and Ramhari saw that his brother's body was swollen and covered with bruises. During the following days and weeks, they did not have an occasion to communicate again.

2.5 The conditions of detention at Maharajgunj were cruel, inhuman and degrading according to Mr. Ramhari Kandel. Detainees were often forced to sleep in the open-air on gravel, were constantly handcuffed and most of the time kept blindfolded. Water and food were scarce and provided irregularly, depending on the guards' mood. Moreover, detainees were interrogated under duress both at day and night-time. Mr. Ramhari Kandel was frequently threatened with death, beaten, dragged on the ground and forced to kneel on pebbles for hours. He also indicated that many of the detainees were repeatedly subjected to electroshocks and submerged in water.

2.6 Mr. Tikanath Kandel was informed of the arrest of Ramhari on 13 September 2003 by his daughter. He found out about his other son's arrest in the newspaper, as an ANNISU-R representative mentioned it in an interview with the Mahanagar Daily. On 15 October 2003, Mr. Tikanath Kandel lodged a complaint with the National Human Rights Commission (NHRC) with regard to both his sons' arrest and *incommunicado* detention. He also reported their cases to the International Committee of the Red Cross. On 17 October 2003, he attempted to file a complaint to the Human Rights Cell¹ of the RNA but the officials there

¹ The RNA "human rights cell" is one of the human rights monitoring mechanisms established in 2002 within the RNA, the APF and the NP in order to conduct internal investigations into human rights abuses by security personnel.

denied any involvement by the RNA and refused to register his complaint. On 19 October 2003, a former RNA soldier, who belongs to the same district as Mr. Tikanath Kandel and had recently retired, told his wife that he had personally seen Amrit Kandel at Maharajgunj barracks and that he was still alive. On 21 October 2003, Mr. Tikanath Kandel enquired about his sons' whereabouts to one of his distant relatives who was then the Minister for Land Reforms, Mr. Thakur Prasad Kandel, who told him that they were both alive and would be released soon. In November 2003, Mr. Tikanath Kandel sent a letter of appeal to the office of the Prime Minister and Ministry of Home Affairs requesting protection for the lives of his two sons, but he never received a reply.

2.7 On 10 December 2003, Mr. Ramhari Kandel was released. He was threatened by soldiers who told him that he would be rearrested or killed if he initiated any legal action regarding his or his brother's detention. Mr. Ramhari Kandel did not dare to do so and went back to his village in Dhading district. Following his release, neither Mr. Ramhari Kandel nor any other member of his family have ever seen Mr. Amrit Kandel again, and his fate and whereabouts remain unknown.

2.8 Mr. Tikanath Kandel joined the Society of the Families of Disappeared in 2004, in order to participate in activities of advocacy and protests with a view to pressure the government into disclosing the fate and whereabouts of several victims of enforced disappearances.

2.9 On 30 November 2004, Mr. Tikanath Kandel lodged a petition for *habeas corpus* with the Supreme Court of Nepal with the assistance of the Nepal Bar Association. The respondents mentioned in the application were the Ministry of Home Affairs, the Ministry of Defence, the District Police Office, Kathmandu, the District Administration Office of Kathmandu, the RNA Headquarters and the Bhairabnath Battalion of the RNA in Maharajgunj. However, in December 2004, the latter entities all denied their involvement in the arrest and detention of Mr. Amrit Kandel. On 20 December 2004, Ramhari Kandel submitted his testimony to the Supreme Court. On 16 March 2005, the Court ordered the newly established Committee on the Investigation of Persons Disappeared by the State to provide information as to whether Mr. Amrit Kandel's name was mentioned on their list of disappeared individuals. On 30 March 2005, the Court also ordered the National Human Rights Commission (NHRC) to provide information on measures it had taken with regard to the authors' complaint before it. However, before being provided with the requested information, the Court decided, on 13 July 2005, to strike out the application for procedural reasons since the counsel in the case had missed the date of one of the hearings. Mr. Tikanath Kandel only learned about this development in January 2006.

2.10 On 13 February 2006, Mr. Amrit Kandel's case was included in a habeas corpus petition filed before the Supreme Court on behalf of 34 disappeared persons. On 1 June 2007, the Supreme Court issued a judgement, ordering the government to establish a high level investigative commission, to make public the status of the disappeared persons, to criminalize enforced disappearance, to initiate legal action against the persons responsible and provide reparation to the families. However, the Supreme Court judgement was never implemented by the Nepalese authorities.

2.11 The authors last heard of Mr. Amrit Kandel being alive in April 2006, when another retired RNA soldier from their district indicated that he was detained in the RNA barracks in Baireni and that he had personally seen him there. Mr. Tikanath Kandel immediately went there, but was denied entry. He informed the NHRC. The NHRC sent a team there on 24 May 2006, but they were also denied access. On 26 May 2006, the NHRC team was finally allowed in the barracks, but Mr. Amrit Kandel was not there anymore.

2.12 In November 2008, in his capacity of coordinator of the Society of the Families of Disappeared, Mr. Tikanath Kandel wrote letters to the Prime Minister and the Home Minister to request them to disclose the fate and whereabouts of several disappeared persons, including his son. He also met with the Defence minister. He never received any information. To date, the ICRC's database on missing persons reports that Mr. Amrit Kandel's fate and whereabouts remain unknown.

2.13 Following the establishment of an Interim Relief Program by the Ministry of Peace and Reconstruction, the authors applied to obtain monetary compensation. In November

2009, they were awarded 100,000 Nepalese Rupees (approximately 1000 USD) for Mr. Amrit Kandel's enforced disappearance. Mr. Amrit Kandel's family received further 200,000 NPR (approximately 2000 USD) on 13 November 2011.

The complaint

3.1 The authors of the communication submit that Nepal has violated articles 6, 7, 9, 10 and 16 of the Covenant, read alone and in conjunction with article 2 (3) of the Covenant, with regard to the arbitrary arrest, torture and enforced disappearance of Mr. Amrit Kandel, as well as the ongoing failure of the Nepalese authorities to carry out an ex officio, prompt, effective, independent, impartial and thorough investigation into his disappearance and to judge and sanction those responsible.

3.2 The authors further claim a violation of article 7, read alone and in conjunction with article 2 (3) of the Covenant, in respect of Mr. Tikanath Kandel and Mr. Ramhari Kandel due to the mental distress and severe anguish that they both have endured over the last eleven years and that they continue to suffer as a result of Mr. Amrit Kandel's enforced disappearance and of the absence of information establishing his fate and whereabouts by the authorities. They submit that such suffering amounts to inhumane treatment by the State party.

3.3 The authors claim that they have exhausted available domestic remedies and that no further judicial remedies are available in Nepal as the only legal avenue under Nepalese law regarding enforced disappearances is the habeas corpus procedure. They also argue that no effective remedies exist to enable criminal prosecution, as torture and enforced disappearances have not been criminalized in the Nepalese legislation. They further submit that the transitional justice mechanisms cannot be considered as effective remedies since they have not been established at that point.

3.4 The authors also argue that their submission should not be considered as an abuse of submission. After obtaining a favorable judgement from the Supreme Court, the authors expected it to be enforced by the authorities. They also remained active and continued to attempt to obtain information on the fate and whereabouts of Mr. Amrit Kandel. They explain that they only brought the communication to the Committee when they realized that there were no prospects of obtaining any remedies or information through domestic procedures.

3.5 The authors have requested measures of reparation, including compensation, restitution, rehabilitation, satisfaction and guarantees of non-repetition.

3.6 As a form of restitution, in the event of Mr. Amrit Kandel's death, the State party should take all the necessary measures to locate his mortal remains and deliver them to his family. In order to repair the harm caused to the authors and to avoid the repetition of facts similar to those of this case, the State party should acknowledge its international responsibility, on the occasion of a public ceremony. The State party should also pay a tribute to Mr. Amrit Kandel in order to restore his dignity, and provide the authors, as a form of rehabilitation, with medical and psychological care, and grant them access to free legal aid, in order to provide them with remedies. As a guarantee of non-repetition, the State party should take the necessary measures to ensure that enforced disappearance and torture constitute autonomous offences under its criminal law, punishable by appropriate penalties, and establish appropriate educational programmes for law enforcement officers. As a form of satisfaction, the State party should translate the views of the Committee into Nepalese and publish them accordingly.

State party's observations on admissibility and the merits

4.1 On 4 September 2015, the State party submitted that the authors' communication is inadmissible due to non-exhaustion of available domestic remedies, or alternatively without merit.

4.2 The State party first recalls the main facts of the communication. On 10 October 2003, Mr. Amrit Kandel was arrested by the personnel of the then RNA and detained in Bhairabanath Battalion, Maharajgunj. Mr. Ramhari Kandel, elder brother of Mr. Amrit Kandel was also arrested and brought to the same Battalion. Mr. Ramhari Kandel found that

Mr. Amrit Kandel was blindfolded and tortured. On 30 November 2004, Mr. Tikanath Kandel filed a writ of habeas corpus to the Supreme Court of Nepal in order to obtain the release of his son Mr. Amrit Kandel from illegal detention. On 13 July 2005, the Supreme Court suspended the case stating that the lawyer of the petitioner missed the hearing date of 26 May 2005, and since he did not request an extension or alternate date either, nothing else is further required in regard to the case, according to the State party. On 13 February 2006, a separate writ of habeas corpus was filed to the Supreme Court on behalf of 34 disappeared persons, including Mr. Amrit Kandel. On 1 June 2007, the Supreme Court ordered the Government to form a high-level investigative commission on enforced disappearance to establish and make public the status of those disappeared; to criminalize enforced disappearance; to initiate legal actions against perpetrators; and to provide relief and reparation to the relatives of victims. The State party has admitted that the fate and whereabouts of Mr. Amrit Kandel remain unknown to date.

4.3 The State party submits that the authors must exhaust local remedies before submitting a written communication to the Committee for consideration. It argues that the authors should have invoked domestic legislation in order to seek a remedy and reparation. Since transitional justice mechanisms have been established pursuant to the Act on the Commission on Investigation of Enforced Disappearance, Truth and Reconciliation (the TRC Act of 2014) to provide justice to victims in conflict related cases, “the authors can still file complaint to the Commission on Investigation of Enforced Disappearance”.

4.4 The State party argues that the Commission is mandated to hear conflict related cases of enforced disappearances, to declare the fate of the disappeared persons, to recommend to the Government of Nepal prosecuting the alleged offenders, and to provide reparation to the victims.

4.5 Although admitting that dealing with the violation of international human rights and humanitarian law during an armed conflict is not an easy task, the transitional justice mechanism can find answers as to how individuals and communities confront past atrocities, reconcile and rebuild after conflict. Its objective is restorative, aimed at alleviating victims’ pain, and retributive, aimed at punishing perpetrators. The ordinary criminal justice system cannot be used effectively for seeking the truth, prosecuting perpetrators, providing reparation or rehabilitation to victims, shaping collective memory to facilitate the reconciliation process, and reforming the institutions to deal with the violation of human rights during the armed conflict. Truth seeking is at the centre of transitional justice mechanism and informs each by identifying perpetrators and victims, and by documenting patterns of abuses for institutional reform.

4.6 In line with the provisions of the Interim Constitution, the Comprehensive Peace Accord (CPA) and the Supreme Court’s verdict in the case of *Rabindra Prasad Dhakal v. the Government of Nepal*,² including the writ No. 3575 dated 1 June 2007, the Parliament has enacted the TRC Act. The Act aims at greater national unity and reconciliation, as envisaged in the CPA, by observing the principles of human rights more effectively. Furthermore, the objectives of the TRC Act are to ensure truth, justice, reparations and public acknowledgement of victims, preventing future abuse and combating impunity.

4.7 Section 26 of the TRC Act expressly prohibits amnesty to conflict related serious violations of human rights. Pursuant to the Act, the Government has established two Commissions: Truth and Reconciliation Commission, and Commission on Investigation of Enforced Disappearance, the latter of which is tasked with carrying out investigations into the cases of enforced disappearance during the conflict period. Both Commissions were established in February 2015 with a mandate to complete their objectives within two years. The State party believes that the establishment of the Commissions is a significant step forward for Nepal’s transitional justice process.

4.8 The State party adds that the Commissions are major components of the peace process, which seek to heal the pain and injustices suffered by victims of conflict, to restore their ruined lives and relations, and to rebuild their social trust. Following the discussion and consultation with conflict victims, civil society organizations, human rights defenders and

² The claim was submitted on behalf of *Rajendra Prasad Dhakal*.

other stakeholders, the Commission on Investigation of Enforced Disappearances has drafted its Regulations, and been developing its Terms of Reference.

4.9 The Commission will call upon all victims of conflict to bring their problems and file cases to it. The Commission is competent to ensure transparency while maintaining privacy of victims in the process of fact-finding and investigation.

4.10 The State party further asserts that the international community and the United Nations Human Rights Committee are legitimately expected to understand the transition and special situation of Nepal. Without the establishment of transitional justice mechanisms, the victims of armed conflict cannot get full justice. Nepal has observed international law while establishing its transitional justice mechanism, affirming that the cases of serious violations of human rights will be addressed in line with the international norms and instruments. The State party also submits that a Bill to criminalize torture, and a Bill on Penal Code to criminalize enforced disappearances, have been presented to the Parliament.

4.11 Per the official record provided by the Nepalese Army, the State party admits that Mr. Ramhari Kandel, one of the authors and brother of Mr. Amrit Kandel, was arrested and detained for investigation pursuant to applicable law of Nepal, and that he was not implicated in an act of enforced disappearance. He was freed on 10 December 2003, as confirmed by official records. However, no record of arrest and detention of Mr. Amrit Kandel was found.

4.12 The State party reiterates that it has fulfilled a number of important transitional commitments, including the establishment of a transitional justice mechanism, and that it has been seriously working to combat human rights violations. It affirms that its commitment to promote and protect human rights is total and unflinching.

4.13 In conclusion, the State party argues that the communication is not admissible as the authors have not exhausted available domestic remedies, since the matter can be addressed and remedies provided through the national transitional justice mechanism. Alternatively, the communication lacks merit. In the light of the above, the State party requests the Committee not to consider the present communication.

Author's comments on the State party's observations on admissibility and the merits

5.1 On 16 November 2015, the authors submitted that the State party has not refuted the facts described by the authors. The authors thus assume that the State party acknowledges the authenticity of the authors' claims, and the accuracy of the facts described in their initial communication.

5.2 As detailed in their original communication of 11 April 2014, the enforced disappearance of Mr. Amrit Kandel has been documented by several domestic and international human rights bodies. In this regard, a) in 2006, the Office of the High Commissioner for Human Rights, in its *Report of investigation into arbitrary detention, torture and disappearances at Maharajgunj RNA barracks, Kathmandu in 2003-2004*³ included Mr. Armit Kandel's name among "those who remain disappeared after being held in Maharajgunj barracks in 2003"; b) on 1 June 2007, in a verdict upon 28 different writ petitions concerning enforced disappearances perpetrated during the conflict by security forces, which included writ petition No. 372/062, filed on behalf of 34 disappeared persons, including Mr. Amrit Kandel, the Supreme Court of Nepal ordered the government, inter alia, to form a high level investigative commission on enforced disappearances, to make public the status of those disappeared, including Mr. Amrit Kandel; c) on 4 December 2007, the National Human Rights Commission (NHRC) published its *Ceasefire Report*, where it is said that "the Commission found that Mr. Amrit Kandel of Dhading district and Gyanendra Tripathi of Chitwan were being held in custody at the [Bahirabnath] Battalion";⁴ d) in 2009 and 2011, Mr. Amrit Kandel's family was awarded a total of 300,000 Nepalese Rupees (approximately, USD 3,000) for Mr. Amrit Kandel's enforced disappearance, as part of the Interim Relief Programme established by the Ministry of Peace and Reconstruction, fact that

³ OHCHR-Nepal, Report of investigation into arbitrary detention, torture and disappearances at Maharajgunj RNA barracks, Kathmandu in 2003-2004, May 2006, p. 68, Annex A.

⁴ NHRC, *Ceasefire Report*, 4 December 2007, section 2.5.

constitutes an indirect recognition by the government of Mr. Amrit Kandel as a victim of enforced disappearance; and e) the International Committee of the Red Cross (ICRC)'s database of missing persons still reports that Mr. Amrit Kandel's fate and whereabouts remain unknown.

5.3 In its jurisprudence, the Human Rights Committee has held that in cases of enforced disappearance the burden of proof "cannot rest alone on the author of the communication, especially considering that the author and the State party do not always have equal access to the evidence and frequently the State party alone has access to relevant information."⁵ In light of the evidence and detailed explanations provided by the authors of the communication and the failure of the State party to rebut those by providing any evidence to the contrary, the authors request the Committee, following its established practice,⁶ to give due weight to their factual allegations.

5.4 The authors further assert that the lack of official records of Mr. Amrit Kandel's arbitrary arrest and subsequent detention and disappearance amount, per se, to a violation of Mr. Amrit Kandel's as well as Mr. Tikanath and Mr. Ramhari Kandel's rights, as set out in their initial communication.

5.5 Moreover, the Human Rights Committee has declared that article 9 of the Covenant requires compliance with important safeguards for detained persons, such as making a record of an arrest.⁷ According to the authors, the Committee has added that, to respect Article 9 of the Covenant "a centralized official register should be kept of the names and places of detention, and times of arrival and departure, as well as of the names of persons responsible for their detention, and made readily available and accessible to those concerned, including relatives".⁸ The absence of recording such data should be considered as a violation of the Convention.

5.6 Mr. Ramhari Kandel would like to refer to the initial communication and highlight that no claim was made that he was subjected to an act of enforced disappearance. Conversely, Mr. Ramhari Kandel claimed a violation of his rights under article 7, read alone and in conjunction with article 2 (3) of the Covenant, due to the mental distress and severe anguish he continues to suffer due to Mr. Amrit Kandel's ongoing enforced disappearance. Mr. Ramhari Kandel suffers from depression ever since his release from Maharajgunj and he cannot get over the fact that he could not do anything significant to secure the release of his brother due to a fear for his own life.

5.7 The authors reiterate their allegations that Mr. Amrit Kandel was subjected to violations of articles 6, 7, 9, 10 and 16, read alone and in conjunction with article 2 (3) of the Covenant, due to his arbitrary arrest, torture and enforced disappearance as well as to the ongoing failure by the Nepalese authorities to carry out an ex officio, prompt and effective, independent, impartial and thorough investigation into his disappearance and to prosecute and sanction those responsible. In addition, the authors further allege that the facts of the case disclose a violation of article 7, read alone and in conjunction with article 2 (3) of the Covenant, in respect of Mr. Tikanath Kandel and Mr. Ramhari Kandel, due to the mental distress and severe anguish they both continue to suffer due to Mr. Amrit Kandel's ongoing enforced disappearance.

5.8 The authors of the communication are aware that the transitional justice mechanisms have been established in February 2015, after more than nine years of negotiations. At the time of the additional submission, these mechanisms have not been fully operational yet. The authors are particularly concerned that more than eight months have elapsed since the

⁵ See *Bleier v. Uruguay* (communication No. R.7/30), para. 12 and 13.3; *Arhuaco v. Colombia* (CCPR/C/60/D/612/1995), para. 8.3; and *Sharma and Sharma v. Nepal* (CCPR/C/94/D/1469/2006), para. 7.5.

⁶ See *Zohra Madoui and Menouar Madoui v. Algeria* (CCPR/C/94/D/1495/2006), para. 7.6.

⁷ See General Comment No. 35 (CCPR/C/GC/35) of 15 December 2014, para. 23; *Bakhrudin and Dzhalloliddin Kurbonov v. Tajikistan* (CCPR/C/86/D/1208/2003), para. 6.5; and the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, (General Assembly resolution no. 43/173 of 9 December 1988), Principle 12.

⁸ General Comment No. 35, supra fn. 8, para. 58.

establishment of the transitional justice mechanisms, without any substantial action having been taken so far, taking into account that, as the State party informs, the mechanisms have a “mandate to complete their tasks within two years of formation”. Moreover, on 21 May 2015, the government of Nepal filed a petition before the Supreme Court seeking a review of the decision of 26 February 2015 on the TRC Act. The petition was registered on 21 May 2015 and is currently pending, thus making it impossible to determine with certainty which powers the Commission on Investigation of Enforced Disappearance (CIED) will eventually be entrusted with. As soon as the CIED becomes operative and its powers and methods of work become clear, the authors will consider attempting to have their case duly registered, even though, after meeting some of the commissioners during local consultations, the authors are not persuaded that the CIED will provide them with any concrete answer.

5.9 In any case, the registration of their case before the CIED cannot be considered as an effective remedy they should have exhausted before submitting their communication to the Human Rights Committee pursuant to article 5 of the Optional Protocol to the Covenant. The Committee has already made it clear, precisely referring to the CIED and other transitional justice mechanisms in Nepal, that “it is not necessary to exhaust avenues before non-judicial bodies to fulfil the requirements of article 5, paragraph 2 (b), of the Optional Protocol.”⁹ The CIED is a non-judicial body and Mr. Tikanath and Mr. Ramhari Kandel are therefore not required to wait until it will in fact commence gathering reports, registering and evaluating them and, eventually, assessing whether it deems it appropriate to refer them to domestic authorities for criminal investigation or not.

5.10 Regarding the State party’s contention that the “ordinary criminal justice system cannot be used effectively for truth seeking, prosecuting perpetrators, providing reparations or rehabilitation to victims, shaping collective memory to facilitate reconciliation process and reforming the institution to deal with the violation of human rights in the time of armed conflict”, the authors highlight that the Committee, in its 2014 Concluding Observations on Nepal, concluded that “transitional justice mechanisms cannot serve to dispense with the criminal prosecution of serious violations of human rights”.¹⁰ Moreover, the Committee clarified that the fact-finding and truth seeking objectives of the transitional justice mechanisms, though crucial for reconciliation purposes, cannot replace the criminal justice system in providing access to justice and redress to victims of gross human rights violations and their relatives.

5.11 Furthermore, at present, the transitional justice mechanisms would only have the power to recommend prosecution to the government of Nepal, which holds the final authority to undertake criminal prosecutions through the Office of the General Attorney. Hence, there is no reason to refer the authors to the transitional justice mechanisms, when the outcome of such mechanisms will be a simple recommendation for criminal prosecution to the General Attorney. The latter is already under an obligation to conduct an independent, impartial, thorough and effective investigation into the crimes committed against Mr. Amrit Kandel. This obligation must be carried out *ex officio*, without the need for further referral by transitional justice mechanisms.

5.12 Finally, the authors of the communication welcome the State party’s information that “a Bill to criminalize torture and a Bill on Penal Code to criminalize enforced disappearance has been presented to the Parliament”. However, it has not yet been signed into law and is therefore not applicable. Even if such amendments become law, such a development would not cover their case, as the enforced disappearance of Mr. Amrit Kandel occurred in 2003.

5.13 In conclusion, the authors stress that they do not have to resort to the transitional justice mechanisms to comply with the requirement of exhaustion of domestic remedies. Even if their case was dealt with by the transitional justice mechanisms, the provisions of the TRC Act referring to reparation are at odds with international standards, as no right to obtain reparation is guaranteed by the law, since the Act does not provide for guarantees of non-repetition, such as through legislative reforms, and measures of satisfaction. The authors

⁹ See e.g. *Katwal v. Nepal*, decision on admissibility of 10 October 2012 (CCPR/C/113/D/2000/2010) paras. 6.3 and 6.4; *Sedhai v. Nepal* (CCPR/C/108/D/1865/2009), para. 7.5; *Tripathi v. Nepal* (CCPR/C/112/D/2111/2011), para. 6.3; and *Basnet v. Nepal* (CCPR/C/112/D/2051/2011), para. 7.4.

¹⁰ Human Rights Committee, Concluding Observations on Nepal (CCPR/C/NPL/CO/72), para. 5 (b).

therefore hold that the remedies offered by the TRC in terms of reparations cannot be considered effective in their case. The authors highlight that, in case of gross human rights violations as the ones they and Mr. Amrit Kandel have been subjected to, they are entitled to integral redress for the harm suffered and this must be interpreted in accordance with the United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law. In particular, the authors call on the Committee to spell out in detail the measures of reparation to which they are entitled.

Issues and proceedings before the Committee

Consideration of admissibility

6.1 Before considering any claim contained in a communication, the Committee must decide, in accordance with rule 97 of its rules of procedure, whether the communication is admissible under the Optional Protocol to the Covenant.

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

6.3 With respect to the requirement of exhaustion of domestic remedies, the Committee notes the State party's arguments that the authors should have filed their case before the Commission on Investigation of Enforced Disappearance (CIED) as part of transitional justice mechanisms, to seek redress for violations during the armed conflict. The Committee notes the authors' arguments that the Supreme Court of Nepal on 1 June 2007 considered writ petition No. 372/062, filed on behalf of 34 disappeared persons, including Mr. Amrit Kandel, and ordered the government to investigate the status of those disappeared. The Committee also notes the authors' submission that Mr. Amrit Kandel's family was awarded monetary compensation in 2009 and 2011 in an indirect recognition of Mr. Amrit Kandel's enforced disappearance, that the transitional justice mechanisms have been established only in 2015 and the progress of their investigation has been slow, and that it has not been necessary to resort to CIED as a non-judicial body, given the Attorney General's obligation to carry out an effective investigation ex officio. Additionally, the State party has not taken any concrete action to investigate the whereabouts of Mr. Amrit Kandel or to bring those responsible to justice since his disappearance was reported to the authorities, despite the directives from the Supreme Court to do so. Instead, the State party admitted that the fate and whereabouts of Mr. Amrit Kandel remain unknown. The Committee considers that in the present circumstances, the authors have exhausted all available domestic remedies and that article 5 (2) (b) of the Optional Protocol does not preclude it from considering the communication, recalling that recourse to non-judicial bodies does not have to be exhausted to fulfil the requirements of this article, in particular when the transitional justice mechanisms, which are meant to reinforce regular justice system, have not been effective in cases of enforced disappearance, as evidenced in the present case.

6.4 As all other admissibility criteria have been met, the Committee therefore considers that the communication is admissible and proceeds to the examination of the authors' allegations under articles 6 (1), 7, 9, 10 and 16, read alone and in conjunction with article 2 (3) of the Covenant in respect of Mr. Amrit Kandel, and article 7, read alone and in conjunction with article 2 (3), in respect of Mr. Tikanath Kandel and Mr. Ramhari Kandel.

Consideration of the merits

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

7.2 The Committee takes note of the authors' allegation that Mr. Amrit Kandel has been arbitrarily arrested, detained and subjected to enforced disappearance since 10 October 2003, and that his fate and whereabouts have not been effectively investigated to date. It further notes that the State party did not challenge these allegations. The Committee observes that the OHCHR Report of investigation into arbitrary detention, torture and disappearances at

Maharajgunj RNA barracks, Kathmandu in 2003-2004, included Mr. Armit Kandel's name among those who remain disappeared after being held in Maharajgunj barracks in 2003.

7.3 The Committee takes note of the State party's argument that there is no record of Mr. Amrit Kandel's arrest or detention.

7.4 The Committee reiterates its position that the burden of proof cannot rest solely with 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.¹¹ It is implicit in article 4 (2) of the Optional Protocol that the State party has the duty to investigate in good faith, all allegations of violations of the Covenant made against it and its representatives, and to provide the Committee with the information available to it. In cases in which the authors have submitted allegations to the State party that are corroborated by credible evidence and in which further clarification depends on information that is solely in the hands of the State party, the Committee may consider the authors' allegations substantiated, in the absence of satisfactory evidence or explanations to the contrary presented by the State party.

7.5 In the present case, the Committee observes that, despite the efforts made by the authors to locate Mr. Amrit Kandel, his fate and whereabouts remain unknown. The Committee observes that the authorities have denied their involvement in Mr. Amrit Kandel's deprivation of liberty, and have persistently refused to ascertain his fate or whereabouts.

7.6 In the light of the documentation submitted by the authors and corroboration by the witnesses (paras. 2.4 – 2.6 and 5.2), the Committee considers that the State party has not provided any sufficient or concrete explanation to refute the authors' allegations regarding Mr. Amrit Kandel's enforced disappearance. The Committee, therefore, considers that Mr. Amrit Kandel's deprivation of liberty, followed by the authorities' refusal to acknowledge it and establish his fate, constitutes an enforced disappearance.

7.7 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 violations of various rights recognized in the treaty.¹²

7.8 The Committee recalls that, in cases of enforced disappearance, deprivation of liberty followed by a refusal to acknowledge the deprivation of liberty, or by concealment of the fate of the disappeared person, removes the person from the protection of the law and places his or her life at serious and constant risk, for which the State is accountable.¹³ In the present case, the State party has produced no evidence to show that it met its obligations to protect the life of Mr. Amrit Kandel when he was in the authorities' detention. The Committee further recalls that States parties should take measures not only to prevent and punish deprivation of life by criminal acts, but also to prevent arbitrary killing by their own security forces.¹⁴ In these circumstances, the Committee considers that the State party violated its obligations under article 6 (1) of the Covenant.

¹¹ See *Sharma v. Nepal* (CCPR/C/94/D/1469/2006), para. 7.5; *Sharma et al. v. Nepal* (CCPR/C/122/D/2364/2014); *Chaulagain v. Nepal*; *Tharu et al. v. Nepal*; *Basnet v. Nepal*; *Nakarmi and Nakarmi v. Nepal*; *Dhakal et al. v. Nepal*; *Maya v. Nepal* (CCPR/C/119/D/2245/2013); *A.S. v. Nepal* (CCPR/C/115/D/2077/2011); *Sedhai et al. v. Nepal* (CCPR/C/108/D/1865/2009); *Maharjan et al. v. Nepal* (CCPR/C/105/D/1863/2009); *Tripathi and Tripathi v. Nepal* (CCPR/C/112/D/2111/2011); and *Katwal v. Nepal* (CCPR/C/113/D/2000/2010).

¹² See *Neupane and Neupane v. Nepal*, para. 10.5; *Katwal v. Nepal*, para. 11.3; *Serna et al. v. Colombia* (CCPR/C/114/D/2134/2012), para. 9.4; *Nakarmi and Nakarmi v. Nepal*, para. 11.5; and *Dhakal et al. v. Nepal*, para. 11.5. See also the Committee's general comment No. 36 (2018) on the right to life (CCPR/C/GC/36), para. 58.

¹³ See *Abushaala et al. v. Libya* (CCPR/C/107/D/1913/2009), para. 6.2; *Basnet v. Nepal*, para. 10.5; *Nakarmi and Nakarmi v. Nepal*, para. 11.6; and *Dhakal et al. v. Nepal*, para. 11.6. See also the Committee's general comment No. 36 (2018) on the right to life (CCPR/C/GC/36), para. 58.

¹⁴ See the Committee's general comment No. 36 (2018) on the right to life (CCPR/C/GC/36), paras. 7 and 13.

7.9 The Committee also recalls that, under article 2 (3) of the Covenant, States parties must ensure that all persons have accessible, effective and enforceable remedies in order to claim the rights enshrined in the Covenant. The Committee further recalls its general comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant, particularly the fact that, when investigations reveal violations of certain Covenant rights, States parties must ensure that those responsible are brought to justice. As with failure to investigate, failure to bring to justice perpetrators of such violations could in and of itself give rise to a separate breach of the Covenant. Those obligations arise notably in respect of violations recognized as criminal under either domestic or international law, such as torture and similar cruel, inhuman and degrading treatment, and summary and arbitrary killing (para. 18).

7.10 The Committee takes note of the writ petition No. 372/062 before the Supreme Court, filed on behalf of 34 disappeared persons, including Mr. Amrit Kandel, demanding to make public the status of those disappeared. The Committee also takes note a favourable judgment from the Supreme Court of 1 June 2007, ordering the Government to investigate the status of those disappeared, to hold the perpetrators accountable and to provide reparation to the relatives of the victims. However, the State party has not enforced the judgment, arguing that the authors should register the complaint regarding the disappearance of Mr. Amrit Kandel with the Commission on Investigation of Enforced Disappearance, and that the authorities would take legal action against those involved in the offence, in accordance with the recommendations of this Commission.

7.11 Despite the efforts made by Mr. Amrit Kandel's family, no investigation has been concluded by the State party in order to establish the circumstances surrounding the arrest, detention and enforced disappearance of Mr. Amrit Kandel and no perpetrator has been tried and punished. The State party has not clarified why the effective investigation has not taken place to date and what is the source of such delay.

7.12 Accordingly, the Committee considers that the State party has failed to conduct a prompt, thorough and effective investigation into the circumstances of the arrest, detention and enforced disappearance of Mr. Amrit Kandel, in violation of article 6, read in conjunction with article 2 (3) of the Covenant.

7.13 The Committee notes the authors' argument that Mr. Amrit Kandel's arbitrary detention and his subsequent enforced disappearance 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. The Committee takes notes of the authors' allegations that the overall conditions of detention at Bhairabanath Battalion, Maharajgunj (2003-2004), including interrogation under duress and use of electroshocks, amounted to cruel, inhuman and degrading treatment. Moreover, Mr. Ramhari Kandel saw that Mr. Amrit Kandel's body was swollen and covered with bruises from being beaten. As the State party denies the arrest and does not provide any evidence to clarify the facts regarding Mr. Amrit Kandel's treatment in detention, the Committee finds that his enforced disappearance and treatment while in detention constitute a violation of article 7 of the Covenant. Having reached that conclusion, the Committee will not examine the claims regarding the violation of article 10 (1) of the Covenant for the same facts.

7.14 The Committee notes the anguish and distress caused to the authors and their family by the disappearance of Mr. Amrit Kandel; the continuing and prolonged uncertainty as to the circumstances of his arrest and detention; that his release could not be secured by his relatives; and their knowledge that no investigation was carried out or that no accountability resulted for his disappearance. . In this regard, the Committee considers that these facts reveal a violation of article 7 , with respect to the authors of the present communication.

7.15 The Committee takes note of the authors' allegation under article 9 of the Covenant that Mr. Amrit Kandel was deprived of his liberty on 10 October 2003, without an arrest warrant being presented at the time of his arrest. No legal grounds were provided for his detention. He was never brought before a judge, and could not challenge the legality of his detention. Moreover, Mr. Amrit Kandel's arrest and detention have not been recorded, in violation of safeguards for detained persons. In the absence of a response from the State party in this regard, the Committee considers that the detention of Mr. Amrit Kandel constitutes a

violation of his rights under article 9 of the Covenant, including due to the absence of records of his arrest and detention.

7.16 With regard to the alleged violation of article 16, the Committee notes the authors' allegation that, despite the fact that Mr. Amrit Kandel was arrested and detained incommunicado by security forces (Royal Nepal Army), the authorities denied their involvement in his enforced disappearance. The State party failed to provide relevant information concerning Mr. Amrit Kandel's fate. No effective investigation was carried out to ascertain his whereabouts, effectively placing him outside the protection of the law. 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.¹⁵ The Committee, therefore, finds that the enforced disappearance of Mr. Amrit Kandel deprived him of the protection of the law and of his right to recognition as a person before the law, in violation of article 16 of the Covenant.

7.17 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. In the present case, the Committee notes that the first author, Mr. Tikanath Kandel, lodged a complaint on 15 October 2003 with the National Human Rights Commission with regard to both his sons' arrest and incommunicado detention, unsuccessfully tried to register a complaint with the Nepal Royal Army on 17 October 2003, and enquired about his sons' whereabouts on 21 October 2003 with a distant relative who was then the Minister for Land Reforms. The authors also filed a writ of habeas corpus petition with the Supreme Court of Nepal on 30 November 2004. Despite these efforts, the State party has not undertaken an independent and thorough investigation to elucidate the circumstances surrounding Mr. Amrit Kandel's arrest, detention and disappearance. In this regard, the Committee considers that the State party has failed to conduct a prompt, thorough and effective investigation into the disappearance of Mr. Amrit Kandel. Additionally, the sums received by the authors as interim relief do not constitute an adequate remedy commensurate with the serious nature of the violations committed. Accordingly, the Committee concludes that the facts before it reveal a violation of article 2 (3), read in conjunction with articles 6, 7, 9 and 16 of the Covenant with regard to Mr. Amrit Kandel; and article 2 (3), read in conjunction with article 7, of the Covenant with respect to the authors.

8. The Committee, acting under article 5 (4) of the Optional Protocol, is of the view that the information before it discloses violations by the State party of articles 6, 7, 9 and 16, read alone and in conjunction with article 2 (3) of the Covenant with regard to Mr. Amrit Kandel, and a violation of article 7, read alone and in conjunction with article 2 (3), with respect to Tikanath and Ramhari Kandel.

9. 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 to, *inter alia*: (a) conduct a thorough and effective investigation into the facts surrounding the detention of Mr. Amrit Kandel and the treatment he suffered during detention and disappearance; (b) provide the authors with detailed information about the results of its investigation; (c) release Mr. Amrit Kandel, if he is still alive or in the event that Mr. Kandel is deceased, hand over his remains to his family; (d) prosecute and punish those found responsible for the violations committed and make the results of such measures public; (e) ensure that necessary and adequate psychological rehabilitation and medical treatment are made available to the authors; and (f) provide adequate compensation including appropriate measures of satisfaction, beyond the partial compensation already offered, to the authors for

¹⁵ See *Basnet v. Nepal*, para. 10.9; *Tharu et al. v. Nepal*, para. 10.9; and *Serna et al. v. Colombia*, para. 9.5; *Nakarmi and Nakarmi v. Nepal*, para. 11.10; and *Dhakal et al. v. Nepal*, para. 11.10.

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 its legislation (a) criminalize torture and enforced disappearance and provide for appropriate sanctions and remedies commensurate with the gravity of the crimes; (b) guarantee that such cases give rise to a prompt, impartial and effective investigation; and (c) allow for criminal prosecution of those responsible for such crimes.

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