



International Covenant on Civil and Political Rights

Distr.: Restricted*
22 November 2012

Original: English

Human Rights Committee

Communication No. 2000/2010

Decision adopted by the Committee at its 106th session (15 October – 2 November 2012)

<i>Submitted by:</i>	Yuba Kumari Katwal (represented by counsel, TRIAL – Track Impunity Always)
<i>Alleged victim:</i>	Chakra Bahadur Katwal (her husband) and the author herself
<i>State party:</i>	Nepal
<i>Date of communication:</i>	27 October 2010 (initial submission)
<i>Document references:</i>	Special Rapporteur's rule 97 decision, transmitted to the State party on 8 November 2010 (not issued in document form)
<i>Date of adoption of Views:</i>	10 October 2012
<i>Subject matter:</i>	Enforced disappearance
<i>Substantive issues:</i>	Right to life, prohibition of torture and cruel and inhuman treatment, right to liberty and security of person, respect for the inherent dignity of the human person, recognition as a person before the law and right to an effective remedy
<i>Procedural issues:</i>	Exhaustion of domestic remedies
<i>Articles of the Covenant:</i>	2, paragraph 3; 6, paragraph 1; 7; 9, paragraphs 1 to 4; 10, paragraph 1; and 16
<i>Article of the Optional Protocol:</i>	5, paragraph 2 (b)

* All persons handling this document are requested to respect and observe its confidential nature.

Annex

Decision of the Human Rights Committee under the Optional Protocol to the International Covenant on Civil and Political Rights (106th session)

concerning

Communication No. 2000/2010

Submitted by: Yuba Kumari Katwal (represented by counsel, TRIAL – Track Impunity Always)

Alleged victim: Chakra Bahadur Katwal (her husband) and the author herself

State party: Nepal

Date of communication: 27 October 2010 (initial submission)

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

Meeting on 10 October 2012,

Having concluded its consideration of communication No. 2000/2010, submitted to the Human Rights Committee by Yuba Kumari Katwal 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:

Decision on admissibility

1.1 The author of the communication is Mrs. Yuba Kumari Katwal, a Nepalese national born on 20 March 1961. She claims that Nepal has violated the rights of her missing husband, Chakra Bahadur Katwal, under articles 6, paragraph 1; 7; 9, paragraphs 1 to 4; 10 and 16; alone and read together with article 2, paragraph 3, of the International Covenant on Civil and Political Rights. She also claims that Nepal has violated her rights under article 7, alone and read together with article 2, paragraph 3, of the International Covenant on Civil and Political Rights. She is represented by counsel TRIAL (Track Impunity Always)¹.

1.2 On 2 February 2011, upon the State party's request, the Committee, acting through its Special Rapporteur on New communications and Interim measures decided that the admissibility of the communication should be considered separately from the merits.

¹ The Optional Protocol entered into force for Nepal on 14 August 1991.

The facts as submitted by the author

2.1 The author's husband, Mr. Chakra Bahadur Katwal, was the headmaster of Shree Kuibhir Secondary School in Kuibhitar, Okhaldunga District, where he also taught science. On 9 December 2001, he received a letter from the Okhaldunga District Education Office brought by Mr. A., an assistant teacher working in the school with him. The letter, signed by an officer of the District Education Office requested him to present himself to the said office, without specifying the purpose of the request. In the morning of 12 December 2001, Mr. Katwal left his village, in the company of Mr. A, to go to the District Education Office. It was Mr. A, who described to the author and her daughter the events that took place after that.

2.2 Once Mr. Katwal and Mr. A arrived at the District Education Office in the morning of 13 December 2001, they were directed to the District Administration Office. There, Mr. Katwal, still in the presence of Mr. A, was told by the Chief District officer to go to the army barracks. Mr. Katwal went there, but this time unaccompanied. Mr. A. only saw him the following morning on 14 December 2001, when soldiers were carrying him by his legs and arms from the army barracks to the District Police Office. He was severely injured, his clothes were covered with bloodstains, his eyes were closed and he appeared to be unconscious. This was the last time Mr. A saw the author's husband².

2.3 The author tried on numerous occasions to establish the whereabouts of her husband and to gather information on his fate. These attempts were curtailed, rather than facilitated, by the authorities.

2.4 On 26 January 2005, the author's daughter was arrested and interrogated by the 18th Brigade of the Royal Nepalese Army. She was ill-treated during the six weeks of her detention. From the first day of interrogation, she was told that she would be tortured until she died. The author's daughter was already very weak due to her health problem and her subsequent stay in hospital. She was beaten with a stick until she fell unconscious. During the first day, no one brought her medicine or food. She was only given a glass of water. The following 7 days she was given rice twice. Her left arm was broken and painful. On 21 February 2005, the Chief District Officer issued an arrest letter mentioning that the author's daughter had been arrested pursuant to the Terrorist and Disruptive Activities (Control and Punishment) Ordinance. Finally, at the end of March 2005, after days of ill-treatment, interrogations and transfers from one detention place to the other, she was released in exchange for 40,000 Nepali Rupees that the author had to pay.

2.5 In December 2005, the author accompanied her daughter to Kathmandu's teaching hospital for medical treatment. On 4 January 2006, on her way back, the author was arrested by a group of soldiers near Jhapre, which is located at a two-day walk from her village. One of them, a Captain in the Army, insulted her saying that her husband had been killed four years before and he wondered why she was still looking for him. He kicked her on her breasts, pulled her hair and threw her on the floor. He took all her money, stole her jewellery and her ID documents. The soldiers continued to beat her. At some point one of them put a gun in her mouth, threatening to kill her. During the following 13 days, the author was repeatedly beaten, insulted and interrogated by army personnel about her and her daughter's possible connection with the Maoists. She was forced to sleep on the floor in a cold room³ and was barely able to eat because of her painful lips and teeth. During the following six days, she was forced to walk long distances with the group of soldiers. At some point, she was brought near a pond where soldiers threatened to drown her. One of

² In 2007, two teachers from the victim's school provided similar testimonies.

³ The author does not provide further details on the location of the room and type of detention place in which she stayed (official or unofficial).

them put a stick in her mouth and told her not to talk about her 13 days in detention to anyone. He also ordered her not to say ever again that her husband had been ill-treated by the army because they had nothing to do with his death. On 16 January 2005, they brought her to the District Police Office, then to the District Administration Office and finally released her after her identity was checked. Following this event, she was admitted at the hospital for two weeks and continues to suffer pain ever since. She had to undergo a medical treatment for her back and leg injuries.

2.6 In July 2005, the author's daughter contacted a lawyer in Kathmandu who took on her father's case and prepared a habeas corpus writ, which was filed in a joint case on disappearances to the Supreme Court of Nepal. On 20 August 2006, the Supreme Court ordered the establishment of a Prisoner Investigation Team, charged with investigating the status of a number of petitioners and identifying the persons and offices/authorities involved in the arrest. The case of Mr. Katwal was included in the mandate of the Prisoner Investigation Team. While the methodology of the Prisoner Investigation Team is unclear, its report contains details of torture and ill-treatment Mr. Katwal was subjected to in custody. It establishes that officials tried to cover up the circumstances of his death and identifies the persons allegedly responsible.

2.7 The report of the Prisoner Investigation Team mentions that the body of the victim was buried in a pit near the Local Chandale Stream Khola and a group of soldiers was supposed to burn the remains a few days after his death, to destroy all evidence. However, the Prisoner Investigation Team states that the soldiers did not find the body, and that therefore it was not burned. On this point, the Verification Committee of the Ministry of Home Affairs differs with the Prisoner Investigation Team by finding that the body was in fact exhumed from its original grave 8 to 10 days after the death and burned on the same spot. No statement was made whether the Prisoner Investigation Team itself tried to locate the body. The body of the victim was never returned to the author's family.

2.8 Based on the conclusions reached by the Prisoner Investigation Team, the Supreme Court of Nepal made the following finding on 1 June 2007: "The investigation undertaken [...] reveals that Mr. Chakra Bahadur Katwal of writ No. 632 had appeared at the office of the Chief District Officer in person on 13 December 2001, and was put in illegal detention by the order of the Chief District Officer at the District Police Office; he was then transferred to the army barracks. He was killed on 16 December 2001 due to cruel torture inflicted upon him by army officers".

2.9 The Supreme Court ordered the investigation and subsequent prosecution of those responsible for the victim's disappearance and death, as identified in the report of the Prisoner Investigation Team. In addition to finding that Mr. Katwal was dead and ordering the prosecution of those responsible, the ruling of the Supreme Court of 1 June 2007 instructed the payment of immediate relief to the next of kin of the victim.

2.10 Eight months after the ruling of the Supreme Court was delivered, Mr. Katwal's family was provided with 200,000 Nepali Rupees by the Home Ministry. On 29 June 2009, the author received 100,000 Nepali Rupees from the Peace Ministry. The author did not receive any other compensation as a relative of a disappeared person. She declares that she spent at least 720,000 Nepali Rupees in relation to her husband's disappearance, her daughter's and her own arrests and torture. The author does not receive her husband's pension and can do only a limited work because of the injuries received as a result of the beatings.

2.11 In addition to these proceedings, in February 2006, the author's daughter submitted a complaint about her own arrest to the National Human Rights Commission, which had already registered the author's complaint concerning the disappearance of her husband.

Furthermore, the International Committee of the Red Cross (ICRC) added Mr. Katwal's name to their database upon intervention by the author's daughter.

2.12 The author has exhausted all available and effective domestic remedies. The decision of the Supreme Court rendered on 1 June 2007 is final and binding. The Court itself stated that no further investigation with regard to the author's husband needed to be done since it considered the investigation of the Prisoner Investigation Team to be a "judicial one", whose "conclusion [...] [was] final regarding the condition" of Mr. Katwal. However, the ordered prosecution of those responsible has not taken place. No other remedy is available in Nepal to which the author could turn to in search of redress.

The complaint

3.1 The author submits that the State party violated article 6, paragraph 1; article 7; article 9, paragraphs 1 to 4; article 10 and article 16, alone and read together with article 2, paragraph 3, of the Covenant with regard to Mr. Katwal, due to his arrest, detention, torture and enforced disappearance, and in light of the State party's on-going failure to conduct ex officio prompt, impartial, independent and thorough investigation in order to establish his fate and whereabouts, as well as to identify, prosecute and punish those responsible for these crimes.

3.2 The particular gravity of the offence of enforced disappearance and the nature of the various human rights at stake determine that the prohibition of the enforced disappearance of persons and the corresponding obligation to investigate and punish those responsible has attained the status of jus cogens. It constitutes per se a violation of human rights and its prohibition is an absolute value from which nobody must deviate and all States are under an obligation to investigate, judge and sanction those responsible for the offence.

3.3 The State's obligation to protect the right to life includes the duty to prevent and punish arbitrary deprivation of life by criminal acts but also by their own law enforcement personnel. Therefore, the law must strictly control and limit the circumstances in which a person may be deprived of his life by such authorities⁴. The victim was last seen in the hands of the authorities. In the absence of other information, the circumstances allow strong presumption that State agents deprived him of his life, an element which was later acknowledged by the Supreme Court. The author therefore considers that article 6, paragraph 1 was violated. Moreover, the victim was last seen in December 2001 and no investigation about his disappearance was conducted until 2007. Only after the Supreme Court's order based on the habeas corpus filed by the author's daughter, was an investigation carried out into the fate of Mr. Katwal. Therefore, the State party did not conduct an ex officio and prompt investigation. In addition, the investigation ordered by the Supreme Court was a judicial investigation. No criminal investigation by the police or the prosecutor was initiated. The Court limited itself to stating that the victim had died without providing the family with information on the fate of the victim's remains. As for the criminal responsibility of alleged perpetrators, the investigation was confined to the enumeration of the persons responsible, but no criminal investigation and prosecution were initiated. The author therefore also considers that article 6, read in conjunction with article 2, paragraph 3 of the Covenant has been violated.

3.4 The author further contends that the State party has violated the prohibition of torture in respect of Mr. Katwal and in her own respect. With regard to Mr. Katwal, the link between secret detention and the elevated risk of torture was confirmed by the Committee

⁴ The author refers to the Committee's General Comment No. 6 (1982) on the right to life, para. 3; and the Committee's jurisprudence in communication No. 154/1983, Baboeram et al v. Suriname, Views adopted on 4 April 1985, para. 14.3.

in its own jurisprudence⁵. The author also refers to article 17 of the International Convention for the Protection of All Persons from Enforced Disappearance. In the present case, all elements, including the Supreme Court's ruling point to the fact that Mr. Katwal was tortured. The author therefore requests the Committee to identify the acts committed against her husband as torture and not a mere violation of article 7 of the Covenant.

3.5 The author claims a violation of article 7, alone and read together with article 2, paragraph 3, of the Covenant with regard to herself, due to the anguish suffered by her and her family as a consequence of the enforced disappearance of her husband and the State party's failure to provide for adequate reparations. Threats and recourse to ill-treatment and torture have been made with regard to her and her daughter, and false explanations about the disappearance have been given during a prolonged period, thus aggravating the suffering endured by the author and her family. In addition, the author was not able to perform the ceremonial burial, as required by her religion.

3.6 The State party has violated Mr. Katwal's rights under article 9, paragraphs 1 to 4 of the Covenant in that from 13 December 2001 onwards, Mr. Katwal was subjected to arrest and detention at the hands of the security personnel both in the army barracks and the District Police Office. However, there is no evidence indicating the basis for depriving him of his liberty, under which procedure, whether the reasons for his arrest were disclosed to him and if, at any stage, his deprivation of liberty was the object of judicial scrutiny of any sort.

3.7 Prolonged isolation and deprivation of communication are in themselves cruel and inhuman treatment, harmful to the psychological and moral integrity of the person and a violation of the right of any detainee to respect for his inherent dignity as a human being⁶. The Committee itself has considered that enforced disappearance itself constituted a violation of article 10 of the Covenant and that the burden of proof in this respect was incumbent on the State party⁷. The author therefore considers that the enforced disappearance of her husband as well as the subsequent conditions he was subjected to following his arrest constitute a violation of article 10 of the Covenant. The lack of ex officio investigation into the matter further constitutes a violation of article 10 read in conjunction with article 2, paragraph 3 of the Covenant.

3.8 The victim was arrested, detained and last seen at the hands of the army and of the police of the State party. He was never presented to a judge or a judicial officer, his arrest and detention were never reviewed and he has never been seen since. Therefore, Mr. Katwal was placed outside the protection of the law, in violation of article 16 of the Covenant.

3.9 The ruling of the Supreme Court cannot be considered an adequate remedy since the investigation it ordered did not in itself live up to the standard required by article 2 of the Covenant. Even though the Supreme Court ordered proceedings to be initiated, the State party's government has continuously failed to implement the ruling. No criminal investigation, prosecution and punishment of those responsible for the disappearance of Mr. Katwal have taken place. Moreover, the author has not been adequately compensated. Only taking into account the material damage suffered, the author has spent an amount of 720,000 Nepali Rupees as a result of the disappearance. This amount does not even take

⁵ The author refers inter alia to communication No. 1327/2004, *Grioua v. Algeria*, Views adopted on 10 July 2007, para. 7.6.

⁶ The author refers to the jurisprudence of the Inter-American Court in its judgement of 29 July 1988, *Velásquez Rodríguez v. Honduras*, para. 156.

⁷ The author refers to the Committee's jurisprudence in communication No. 1469/2006, *Sharma v. Nepal*, Views adopted on November 2008, para. 7.7

into account the mental suffering caused to her and her family, the loss of her husband's salary and the loss of opportunities to work during the time she was engaged in searching for her husband. The author has only received 300,000 Nepal Rupees from the State party authorities. As claimed above, such compensation is not considered to be adequate.

3.10 The author concludes that in her view, the State party has violated articles 6, paragraph 1; 7; 9, paragraph 1 to 4; 10; and 16 alone and read in conjunction with article 2, paragraph 3 with regard to Mr. Katwal. It has also violated article 7, alone and read in conjunction with article 2, paragraph 3 in respect of the author. She therefore requests that pursuant to article 2, the State party should order an independent investigation as a matter of urgency with a view to locating Mr. Katwal and to exhume, identify and return his mortal remains to the author. She also requests the State party to bring the perpetrators of the deprivation of liberty, torture and enforced disappearance of Mr. Katwal before the competent civil authorities for prosecution, judgement and sanction, and to disseminate publicly the results of this measure. The author requests to ensure that she obtain integral reparation, including prompt, fair and adequate compensation. As a guarantee of non-repetition, the State party should amend its legislation in order to make effective the decisions of the judiciary with regard to the necessity to criminally investigate, prosecute and punish the perpetrators of torture and enforced disappearance.

State party's observations on admissibility

4.1 By Note verbale of 31 January 2011, the State party submitted its observations, challenging the admissibility of the communication on the grounds of non-exhaustion of domestic remedies. It states that the author's husband was arrested in the District Administration Office on 13 December 2001 and was made disappeared by security personnel⁸. The author's daughter filed a writ of habeas corpus before the Supreme Court against the Ministry of Home Affairs et al. The Supreme Court in its verdict stated that the Prisoner Investigation Team formed by the Court found that Mr. Katwal had died following his torture in detention. The Court ordered the Government to conduct criminal investigation and prosecute the officers and agencies involved in those acts in accordance with the applicable legislation.

4.2 Pursuant to the Court's ruling, a First Information Report (FIR) was lodged in the District Police Office in Okhaldhanga. The investigation is still on-going. The State party emphasizes that it is committed to take legal action against the responsible persons on the basis of facts and evidence derived from the investigation. In this regard, a FIR has been lodged for homicide and the investigation has not been finalized. Therefore domestic remedies have not been exhausted.

4.3 The events described in the communication occurred during the armed conflict. To address this special situation, the State party decided to establish a commission to investigate cases of disappearances and a Truth and Reconciliation Commission provided in article 33 (s) of the 2007 Interim Constitution of Nepal and in clause 5.2.5 of the Comprehensive Peace Agreement of 21 November 2006. To this end, the Truth and Reconciliation Commission Bill and the Enforced Disappearance (Offence and Punishment) Bill, prepared upon extensive consultations and participation of all stakeholders, have been submitted to Parliament and are under active consideration by the relevant legislative committees. The two commissions to be formed after endorsement of those bills shall investigate incidents which occurred during the conflict and bring to the surface the truth about cases of disappearance, including that of Mr. Katwal. All individuals

⁸ The State party does not provide further details on the security personnel referred to.

who have been affected by the conflict, including the author's husband, shall have an opportunity to present their case and express their views before those commissions.

4.4 The activities of the two commissions shall in no way substitute the application of the existing criminal law. The Disappearance Bill has been designed to establish enforced disappearance as a crime punishable by law; to allow for the establishment of the truth by investigating the incidents which happened during the armed conflict; to end impunity by paving the way for taking appropriate action against the perpetrators; and to provide appropriate compensation and justice to victims. Likewise, the Truth and Reconciliation Bill states that the individuals involved in enforced disappearances shall not be granted amnesty under any circumstances. Due action shall be taken in conformity with the law, against the individuals found guilty after the comprehensive inquiry and investigation are carried out by the two commissions to be formed once the Bills are approved. The commissions will be authorized to conduct investigations against any individual, even those who are no longer in their official position.

4.5 It cannot be argued that justice will not be met simply because these Bills are not yet in force. It is a recognized practice around the world to constitute Truth and Reconciliation Commissions in order to address cases emanating from the special situation of an armed conflict, to shed light on these cases and facilitate the prosecution of alleged perpetrators and at the same time favour reconciliation for sustainable peace.

4.6 The State party further argues that the facts as submitted by the author differ from the content of the writ of habeas corpus filed by the author's daughter before the Supreme Court. At that time, she stated that the author's husband was arrested by the Nepalese Army at the District Education Office whereas in her communication before the Committee, the author stated that Mr. Katwal went to the army barracks on his own as instructed by the District Education Officer. The State party therefore contends that the author is exaggerating the facts before the Committee. The State party further argues that the author's allegation that her daughter was arrested by the 18th Brigade of the Nepalese Army, was tortured and released upon paying Rs. 40,000 is baseless. The then Terrorist and Destructive Activities Ordinance (TADO) did not have any provision on monetary penalty and the author has not been able to submit any evidence to support her claim contradicting such assertion.

4.7 With regard to the alleged perpetrator of the act of torture against Mr. Katwal, the Prisoner Investigation Team formed by the Supreme Court stated in its report that the then Captain Dinesh Thapa was found to be responsible for inflicting torture on Mr. Katwal. Captain Thapa died while in service on 28 October 2002 during an offensive by the then insurgents at the Rumjatar Post of Okhaldhunga.

4.8 The author has acknowledged before the Committee that Mr. Katwal's family received Rs. 300,000 as interim relief. The State party understands that this sum is not sufficient and can in no way compensate the pain and anguish befallen on the family of Mr. Katwal. However, that amount is provisional and the State party is committed to providing additional relief on the basis of the recommendations made by the transitional justice mechanisms to be set up in a near future.

4.9 On the ground that the State party is committed to conduct appropriate and comprehensive inquiry into all the cases of enforced disappearances that took place during the 10-year armed conflict and that it has already acted in the direction of finding an appropriate domestic remedy in the spirit of the Interim Constitution, the Comprehensive Peace Agreement and directives of the Supreme Court, the State party is of the view that the communication submitted by the author should be dismissed.

4.10 The State party further states that it is always alert to the need that the activities undertaken by the Nepalese Army, Armed Police and other security agencies are in

conformity with human rights. In this respect efforts were deployed through training and orientations to promote and protect human rights, which have remarkably improved. Training of security forces have been carried out in cooperation with the country presence of the Office of the High Commissioner for Human Rights (OHCHR) in Nepal.

4.11 Protecting human rights, promoting democratic values and norms and end impunity are the utmost priorities of the State party. The State party has gone through democratic political transition and it is diligently working towards creating a favourable atmosphere for all to enjoy their rights and fundamental freedoms. The State party therefore requests the Committee to dismiss the communication on the basis of all the grounds mentioned in its observations.

Author's comments on the State party's observations

5.1 On 4 May 2011, the author rejects the State party's observations on admissibility. With regard to the exhaustion of domestic remedies, the author refers to the jurisprudence of the Committee where it has considered that those remedies must not only be available but also effective⁹. Such national remedies have to be exhausted to put the State in a position to redress its violation. The Committee has considered that whenever the highest domestic tribunal has decided the matter at issue, no other remedies must be exhausted¹⁰. The Committee has further considered that domestic remedies must not be unduly prolonged¹¹ and need not to be exhausted without reasonable prospect of success¹². With regard to violations of the right to life and of the prohibition of torture or cruel, inhuman or degrading treatment, an investigation is considered effective if it is prompt, thorough, independent and impartial¹³. Furthermore, the investigation must be carried out ex officio, without the victims or their relatives having to submit a complaint.

5.2 In the present case, the author contests the assertion made by the State party according to which the investigation is on-going and therefore domestic remedies have not been exhausted. In this regard, the author recalls that in a ruling dated 1 June 2007 regarding Mr. Katwal, the Supreme Court ordered an investigation and that those responsible for such violations should be prosecuted and punished. The State party gave no precise information about the First Information Report (FIR) allegedly lodged with the District Police Office of Okhaldhunga district. For instance, no date was given and no concrete evidence was provided proving that indeed a FIR was lodged.

5.3 Almost 10 years¹⁴ have elapsed since the disappearance and subsequent torture and death of the author's husband. Were any serious investigation underway, the State party would have been in a position to explain the steps taken and prospects of the investigation. The State party should have long ago framed charges against the perpetrators and brought them to justice, punished and jailed them. The author notes that the State party does not even allege that the culprits might soon be taken into custody, be charged with the crime and brought to trial. As enforced disappearance and torture are not codified in Nepali law,

⁹ The author refers to communication No. 220/1987, T.K. v. France, Views adopted on 8 November 1989, para. 8.2.

¹⁰ The author refers to communication No. 1023/2001, Lämsman et al v. Finland, Views adopted on 17 March 2005, para. 6.3.

¹¹ The author refers to communication No. 1619/2007, Pestaño v. The Philippines, Views adopted on 23 March 2010, para. 6.4.

¹² The author refers to communication No. 458/1991, Mukong v. Cameroon, Views adopted on 21 July 1994, para. 8.2.

¹³ The author refers inter alia to General Comment No. 31[80] on the Nature of the General Legal Obligation Imposed on States Parties to the Covenant, para. 15.

¹⁴ Almost 11 years at the time of consideration of the admissibility by the Committee.

the investigation certainly concerns other offenses. The State party is under an obligation to provide victims and their relatives with information about the state of the investigation. The State party has not done so before the Committee and, on the contrary, has remained vague as to the nature of the steps taken. In March 2010, OHCHR-Nepal contacted the police and prosecutor officials regarding the present case, who replied that they were unaware of progress in the investigation. The prosecutor's office reported that no recent update had been received from the police. The same observation could be made by OHCHR following their visit to Okhaldhunga district on 22-25 February 2011. The author was also informed that the report of the probe commission set up by the Supreme Court on which it largely based its ruling of 1 June 2007 was not even yet in the hands of the Okhaldhunga police. Officials from Okhaldhunga police refused to confirm it or transmit official information on the progress of the investigation in writing.

5.4 The author contests the State party's argument that Truth and Reconciliation and Enforced Disappearance Commissions will better address the issue of accountability. The author notes that the State party is contradicting itself. While mentioning that a criminal investigation is on-going, without providing details on progress made, the State party considers that future transitional justice will provide for better solutions. The State party's position is that due action shall be taken after a comprehensive investigation is carried out by the two commissions to be formed once the Bills become law. This statement is a clear indication that there exists no reasonable prospect of success for a prompt and effective investigation and prosecution. The author contends that there is no certainty that the bills will be passed, when they will be passed and their consequences on victims. The author therefore rejects the State party's argument that such commissions constitute a prompt, independent and effective investigation and prosecution. The author recalls that those commissions are not judicial bodies and it has not been established that they will have the power to impose the appropriate punishment for human rights offenders.

5.5 Should the State party's argument be that transitional justice mechanisms are better suited to handle the author's right to a prompt, independent and effective investigation and prosecution of the culprits than ordinary criminal proceedings, it should be rejected by the Committee. The long delays already suffered and which continue to affect the holding of an adequate investigation must have had consequences on the collection of evidence and testimonies against alleged perpetrators.

5.6 The author therefore considers that the absence of an effective investigation into her husband's enforced disappearance, torture and subsequent death more than 10 years after the facts, on the mere justification that transitional justice yet to come will better address the issue, is an undue prolongation of the domestic remedies¹⁵.

5.7 As for the other grounds invoked in the State party's observations, the author considers that they are not related to admissibility but to the merits of the case. She specifically refers to the State party's contention that some facts of the case are contradictory, as well as the issue of interim relief or the death of the alleged perpetrator. These issues will therefore be addressed by the author on the merits should the Committee declare the communication admissible.

5.8 On 1 November 2011, the author further submits that the constant postponement of effective criminal investigations is a tool designed to perpetuate impunity and blatantly deny any form of accountability for past human rights violations. Already in October 2008, the Nepalese Government took a decision to withdraw 349 criminal cases against numerous

¹⁵ The author refers to the jurisprudence of the Committee in communication No. 1469/2006, *Sharma v. Nepal*, Views adopted on November 2008, para. 6.3; and communication No. 1250/2004, *Rajapakse v. Sri Lanka*, Views adopted on 14 July 2006, para. 6.2

political party cadres, including two senior members of the Cabinet itself. The withdrawal was said to be necessary to promote the peace process and fully implement the Comprehensive Peace Agreement (CPA) by enforcing a provision which called for the withdrawal of cases brought against individuals due to political reasons¹⁶. In reality, as opposed to political charges, the most frequent offences alleged in those cases were murder and attempted murder along with other serious crimes such as rape and mutilation.

5.9 Several orders from the Supreme Court have recently suspended district court decisions to issue arrest warrants over murder charges against high-ranking political members, endorsing the governmental position that these cases will be better dealt with by the future transitional justice mechanisms. The author considers these trends to be very worrying for democracy and the principle of separation of powers.

5.10 The author further submits that in August 2011, the Unified Communist Party of Nepal (UCPN-Maoist) struck a four-point political agreement with the United Democratic Madhesi Front (UDMF) in return for the latter's support to its prime ministerial candidate Dr. Baburam Bhattarai. Despite pledging, in its third point of the deal, to inter alia uphold fundamental rights, its second point states that "all the court cases against those involved in the Maoist insurgency, Madhes movement, Janjati movement, Tharuhat movement and Dalit and Pichadabarga movements will be dropped and they will be given general amnesty". This agreement was endorsed by Dr. Bhattarai when he was appointed as Prime Minister and was also endorsed by the Attorney-General appointed following the Prime Minister's nomination. This tendency reveals a willingness to protect politically-connected individuals from criminal liability. The results of these worrying decisions have been a de facto amnesty and impunity for the perpetrators of hundreds of crimes.

5.11 The author refers to the jurisprudence of the Inter-American Court where it has considered that the prohibition of the forced disappearance of persons and the related duty to investigate and punish those responsible has the nature of *jus cogens*. As such, the forced disappearance of persons cannot be considered a political crime or related to political crimes under any circumstance, to the effect of preventing the criminal prosecution of this type of crimes or suppressing the effects of a conviction¹⁷.

5.12 The author concludes that the lateness of the transitional justice mechanism, the inadequacy of the current proceeding involving Mr. Katwal's disappearance and the arbitrariness of the latest decisions on criminal case-withdrawals and review, are signs of a lack of appropriate remedial procedures in Nepal.

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 argument that the communication does not fulfil the requirements of

¹⁶ Clause 5.2.7 of the Comprehensive Peace Agreement dated 21 November 2006.

¹⁷ The author refers to IACtHR, *Tiu Tojin v. Guatemala*, Judgment of 26 November 2008, para. 91.

article 5, paragraph 2(b) of the Optional Protocol, because pursuant to the Supreme Court's ruling of 2007, a First Information Report (FIR) has been lodged and the investigation is still on-going. The Committee also notes the State party's contention that the case of Mr. Katwal shall be addressed in the transitional justice framework which has still to be established in conformity with the law. The Committee notes the author's counter-arguments, according to which the State party gave no precise information about the First Information Report (FIR) allegedly lodged with the District Police Office of Okhaldhunga district, such as the date of submission and the current stage of the investigation. The Committee notes the author's contention that more than a decade has elapsed since the disappearance of Mr. Katwal and no charges against the alleged perpetrators have yet been framed and his remains have not been located. As for the State party's argument in relation to transitional justice, the Committee notes the author's contention that there is no certainty that the bills on this matter will be passed as laws and if yes, when they will be passed as laws and the consequences for victims.

6.4 The Committee recalls that for the purposes of article 5, paragraph 2(b), of the Optional Protocol, domestic remedies must both be effective and available, and must not be unduly prolonged. As to whether there exists any on-going criminal proceedings in the present case, the Committee notes that the State party has provided no concrete information on the First Information Report it affirms having lodged and that, on the contrary, all the steps taken by the author's family in search for confirmation that an investigation was being carried out were pointing towards the absence of such investigation or significant progress in this regard. From the information available to it, the Committee can therefore not conclude that a criminal investigation is currently being carried out by the competent police or prosecution authorities.

6.5 With regard to such potential future transitional justice mechanisms, as the Truth and Reconciliation Commission and the Enforced Disappearance Commission, the Committee recalls 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.

6.6 As to whether the application of a remedy has been unreasonably prolonged, the Committee has to consider all of the circumstances, including the complexity of the case and the conduct of the author and the State party's authorities. In the present case, the Committee notes that the author's daughter submitted a writ of *habeas corpus* to the Supreme Court in July 2005. Despite those attempts and the Supreme Court's ruling of 2007, almost 11 years after Mr. Katwal's arrest, the investigation is still on-going, with the very first concrete steps taken by the judiciary only in 2007. The Committee notes that the State party has not demonstrated that the continuing investigation is effective, in light of the serious and grave nature of the alleged violations. It concludes, therefore, that this constitutes an unreasonably prolonged delay.¹⁸ In the circumstances, the Committee finds that it is not precluded from considering the communication under article 5, paragraph 2 (b), of the Optional Protocol.

7. Accordingly, the Human Rights Committee decides:

(a) That the communication is admissible insofar as it raises issues with respect to articles 6, paragraph 1, 7, 9, 10 and 16; alone and read in conjunction with article 2, paragraph 3 (in relation to the author's husband); as well as with respect to article 7, read in conjunction with article 2, paragraph 3, of the Covenant (in respect of the author);

(b) That, in accordance with article 4, paragraph 2, of the Optional Protocol, the State party is requested to submit to the Committee, within six months of the date of

¹⁸ See communication No. 1761/2008, *Giri v. Nepal*, Views adopted on 24 March 2011, para., 6.3

transmittal to it of this decision, written explanations or statements clarifying the matter, and indicating the measures, if any, that may have been taken by the State;

(c) That any explanations or statements received from the State party shall be communicated to the author under rule 99, paragraph 3, of the Committee's rules of procedure, with the request that any comments he may wish to make thereon should reach the Human Rights Committee, in care of the Office of the United Nations High Commissioner for Human Rights, within six weeks of the date of transmittal; and

(d) That this decision shall be communicated to the State party and to the author.

[Adopted in English, French and Spanish, the English text being the original version.]
