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Human Rights Committee

Views adopted by the Committee under article 5(4) of the Optional Protocol, concerning communication No. 2164/2012*, **

<i>Communication submitted by:</i>	Sabita Basnet (represented by counsel, Philip Grant, of Track Impunity Always-TRIAL)
<i>Alleged victim:</i>	The author and Milan Nepali (her husband)
<i>State party:</i>	Nepal
<i>Date of communication:</i>	21 May 2012 (initial submission)
<i>Document references:</i>	Decision taken pursuant to rule 97 of the Committee's rules of procedure, transmitted to the State party on 18 June 2012 (not issued in document form)
<i>Date of adoption of Views:</i>	12 July 2016
<i>Subject matter:</i>	Enforced disappearance
<i>Procedural issues:</i>	Failure to sufficiently substantiate allegations; incompatibility <i>ratione materiae</i>
<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>Articles of the Covenant:</i>	2(3), 6, 7, 9, 10, and 16
<i>Articles of the Optional Protocol:</i>	2; 5(2)(b)

1. The author of the communication is Ms Sabita Basnet, who submits the communication on her behalf and on that of her husband, Mr Milan Nepali. They are Nepalese nationals, born on 8 August 1970 and 22 May 1968, respectively. The author claims that the State party has violated Mr Milan Nepali's rights under articles 6; 7; 9 (1-4);

* Adopted by the Committee at its 117th session (20 June-15 July 2016).

** The following members of the Committee participated in the examination of the present communication: Yadh Ben Achour, Lazhari Bouzid, Sarah Cleveland, Ahmed Amin Fathalla, Olivier De Frouville, Yuji Iwasawa, Ivana Jelic, Photini Pazartzis, Mauro Politi, Sir Nigel Rodley, Victor Manuel Rodríguez-Rescia, Fabián Omar Salvioli, Dheerujall Seetulsingh, Anja Seibert-Fohr, Yuval Shany, Konstantine Vardzelashvili and Margo Waterval.

10 (1); and 16, alone and read in conjunction with article 2 (3); and her rights under article 7, in conjunction with article 2 (3), of the Covenant. The Optional Protocol entered into force for the State party on 14 August 1991. The author is represented by counsel.

The facts as submitted by the author

2.1 As a result of the armed conflict started in 1996 in the State party, there was a marked deterioration of the human rights situation in the country. The number of arbitrary arrests and detentions, tortures, and enforced disappearances increased significantly. Although the Communist Party of Nepal-Maoist (CPN-M) was not declared an illegal “terrorist organization” by the State party until 2001, persons suspected of involvement with the CPN-M were detained, held incommunicado and disappeared by the Nepal Police under the Public Security Act (1989). According to the UN Working Group on Enforced or Involuntary Disappearances (WGEID) the majority of the outstanding cases of disappearance reported to it occurred between 1998 and 2004 in the context of counter-insurgency operations launched by security forces against members and supporters of the CPN-M.¹

2.2 The author and her husband lived in Kathmandu Municipality, Dhapasi VDC, Wead No. 3, at the time of the events. They had two minor children, born in 1994 and 1995. The author claims that her husband worked as journalist for a left-wing (Maoist) daily newspaper *Janadesh* since 1992. She worked as an administrative assistant for a private firm. Both were active members of the CPN-M and frequently participated in its activities. The author’s husband had been arrested and detained by the Nepal Police as a suspected Maoist on two previous occasions: in July 1995, together with the author, and in March 1997. He was released after 17 days and one month, respectively.

2.3 On 21 May 1999, the author and her husband went together to the main shopping district in central Kathmandu. When they were in Sundhara, 6 or 7 unarmed policemen, some of them wearing uniform, approached them, arrested the author’s husband, and informed him that he had to come with them for questioning. The author claims that at the time of his arrest, he was not accused of any offence. He was put in a micro-van and driven away to an unknown destination. She further claims that she did not say anything to the policemen as he had been arrested and released on two previous occasions. She also did not want to be identified as his wife to avoid being arrested. On the next days, she went several times to every police station and sub-station in Kathmandu in search of her husband, without success. On an unspecified date, the District Police Office (DPO)-Hannumandhoka, Kathmandu told her that her husband was not allowed to receive visits, including from his family, as per order of the Police and the Home Ministry.

2.4 On 26 May 1999, a friend of the author’s husband, Mr A.M., filed writ of habeas corpus before the Supreme Court in favour of Mr Nepali. It was claimed that Mr Nepali had been illegally arrested and taken in a van by policemen on 21 May 1999; and that despite requests to the police, no person -including his relatives- had been able to meet him.

2.5 The author claims that on 4 June 1999, the author received an anonymous phone call from a man who told her that her husband was being held in the Police Headquarters in Naxal, Kathmandu. On the next day she went there and asked to see her husband. The police refused her request, but allowed her to hand over some clean clothes for her husband. The author claims that although she was denied access to her husband, the manner in which the on-duty policeman took the clothes to pass on to him indicated an implicit acknowledgement that he was indeed being held inside the police premises. After this date,

¹ The author refers to the UN Working Group on Enforced or Involuntary Disappearances (WGEID) Report on the Visit to Nepal, 28 January 2005, para. 7-9, and 27; and Amnesty International (AI), Urgent Appeal (February 2000), AI Index: ASA 31/03/2000, p. 2.

she went to the Police headquarters almost every day but her requests to see her husband were always refused.

2.6 On 10 June 1999, the author and a friend, Ms K.B., visited the Police Headquarter again and handed over some more clean clothes for her husband. The on-duty policeman gave her some dirty clothes belonging to her husband for washing. Afterwards, the author and her friend walked to a nearby hill from which they could have a view of the inner compound of the headquarters. The author argues that from this place, they saw her husband for approximately 2 minutes as he was taken to and from the toilet by a single policeman. He was handcuffed, but looked in fairly good physical condition. The author shouted out to get her husband's attention, but she was too far away and he did not hear her. The author submits that this was the only time she saw him following his arrest. On 20 June 1999, Mr Nepali's relatives submitted a written appeal to the Parliament requesting that his whereabouts be made public and their immediate released from police custody.

2.7 On 12 July 1999, the Supreme Court quashed the writ of habeas corpus submitted by Mr A.M. because it had not been established that Mr Nepali was in fact in detention, as Mr A.M. had failed to provide information to the Court concerning the location where he was being held. The Court pointed out that the Home Ministry, the Nepal Police Headquarters-Naxal, Kathmandu, and the District Administration Office-Kathmandu, stated that they had not arrested Mr Nepali and that he was not in their custody.

2.8 The author claims that on 6 August 1999 the Prime Minister met members of the Families of Victims of State Disappearance Association (FVSDA), co-founded by her; and that in reply to a request for information, the Prime Minister said that their disappeared relatives, including Mr Nepali, had already been killed. The author requested the assistance of Amnesty International (AI), which on 13 August 1999, issued an urgent action appeal calling the Nepalese authorities for information on the whereabouts of 8 individuals arrested between November 1998 and May 1999, including her husband.

2.9 On 17 August 1999, the author lodged a writ of habeas corpus before the Supreme Court in favour of her husband. The Secretary of the Home Ministry, the Chief District Officer, and the Nepal Police Headquarters informed to the Court that that they had not detained Mr Nepali. The Sub-Inspector of the DPO, Hannumandhoka, Kathmandu, stated that the author's allegations as to the detention of her husband on 21 May 1999 by the police were false; that no police personnel were sent to arrest him; and that he had not been illegally detained, tortured or disappeared by the police.

2.10 On 31 August 1999, a national daily newspaper *Mahanagar Daily*, published an article, which stated that Mr Nepali and other 5 persons arrested as suspected Maoists had been kept under high security at the Riot Control Police Force, in Pokhara, Kaski District; and that although the Prime Minister stated that they had already been killed, certain sources indicated that they were still alive and had been tortured by the police.² The author upholds that she could not verify this information, and that she was unable to go to Pokhara to search for her husband as she had to take care for her two young children. She further claims that this was the last time that she received any news concerning her husband's fate and whereabouts.

2.11 On 6 September 1999, the author informed the Supreme Court that according to the *Mahanahar Daily*, Mr Nepali had been moved from the Nepal Police Headquarters, Kathmandu, to the Riot Control Police Force, Pokhara.

² The author provides a copy of the original article of the *Mahanagar Daily* and a translation into English language.

2.12 On 10 and 20 September 1999, members of the FVSDA requested the Prime Minister to make public the information concerning their relatives' fates, including Mr Nepali's one, and to bring those responsible of the disappearances to court.

2.13 Upon the author's request, on 1 October 1999, the Supreme Court issued an order for a search warrant to the Western Regional Riot Control Armed Police battalion, Pokhara. On 24 January 2000, the Deputy Inspector of the Western Regional Riot Control Armed Police battalion, Pokhara, denied that Mr Nepali had been held by them. On 11 February 2000, the Supreme Court ordered the Inspector General of the Police (IGP) to provide a written response concerning Mr. Nepali's whereabouts within 15 days. In absence of response, on 20 March 2000, the Court reiterated his order to the IGP. On 9 June 2000, the Police Headquarters stated before the Court that it had been unable to locate Mr Nepali and that he was not under police detention. On 5 July 2000, the Supreme Court decided on the writ of habeas corpus submitted by the author and stated "[a]fter exhausting all possible means to find the applicant it could not be held Milan Nepali is in Police detention, and this court cannot issue an order without strong evidence and based merely on hunch and guesswork".

2.14 The author points out that the National Human Rights Commission (NHRC) was established in 2000, and that she registered a complaint with it concerning his husband's disappearance. His name was included in the list of conflict-related disappearances;³ however an investigation was never carried out. The United Nations High Commissioner for Human Rights' (OHCHR) and the International Committee of the Red Cross' (ICRC) offices in Nepal were set up in Nepal several years after Mr Nepali's disappearance. His name is also listed in the ICRC Missing Person database.⁴

2.15 In addition, the author claims that approximately a year after her husband's disappearance, the case received a lot of publicity; that as a result her employer fired her alleging that she was a Maoist; that since the job was not a permanent one, she was unable to take any legal action against the employer; and that it became very difficult to provide for her and her children. Moreover, she became fully occupied by the public campaign to locate her husband and did not undertake salaried work until 2007.

2.16 In 2008, the author was awarded Rs. 100,000⁵ as an interim relief provided to relatives of a victim of enforced disappearance. This interim relief cannot be considered an adequate compensation or a substitute for an integral reparation.

2.17 The author claims that she has exhausted all domestic remedies. Her and Mr A.M.'s writs of habeas corpus were quashed by the Supreme Court, the highest domestic tribunal, and there is no other domestic remedy to exhaust.⁶ Furthermore, no remedies were available in practice to obtain prosecution for those responsible of enforced disappearance and torture. The NHRC cannot be considered an effective remedy. As regards complaint before the police, the First Investigative Report (FIR), it is limited to the crimes listed in Schedule 1 of the State Cases Act of 1992 which does not include enforced disappearance and torture. Furthermore, the filing of FIRs in disappearance cases does not constitute an appropriate remedy, as the authorities usually argue that the person's death cannot be proved in the absence of the body. Although torture is forbidden pursuant to article 14(4) of the Interim Constitution and section 3(1) of the Compensation Relating to Torture Act

³ The author provides a copy of the list that includes her husband's name.

⁴ The author provides a copy of a document issued by the ICRC on 14 February 2012, "Nepal-Missing: The right to know. Information on the person", that indicates that Mr Nepali is in the list of missing persons, having as a date and place of last news: 21 May 1999, Kathmandu, Sundhara.

⁵ According to the author, it was approximately USD \$ 1,200.00 at the moment the communication was submitted to the Committee.

⁶ The author refers to the Committee's jurisprudence concerning communication No. 1469/2006, Sharma v Nepal, Views adopted on 28 October 2008, para 6.3.

(CRTA), it has not been criminalized by national law. CRTA does not provide for criminal accountability but only for compensation of a maximum of Rs. 100,000 and a claim must be filed within 35 days of the torture or release from detention. Despite the Supreme Court's order in 2007 to criminalize enforced disappearance, no action has been taken in this respect.

The complaint

3.1 The author argues that her husband is a victim of enforced disappearance and that the State party violated his rights under articles 6; 7; 9 (1-4); 10 (1); and 16, read alone and in conjunction with article 2 (3); as well as her rights under article 7, in conjunction with article 2 (3), of the Covenant.

3.2 The author's husband was arbitrarily deprived of his liberty by the security forces on 21 May 1999 and taken to the Police headquarters in Naxal, Kathmandu, where he was last seen by the author and her friend Ms K.B. On 31 August 1999, the *Mahanagar Daily* published an article that reported that although the Prime Minister had announced that Mr Nepali had been killed, he and other individuals detained by the security forces were still alive and being held at the Riot Control Police Force, in Pokhara. Despite the fact that Mr Nepali was last seen alive in life-threatening circumstances in the hands of agents of the State party and that his deprivation of liberty was promptly denounced by his wife, the authorities have systematically denied having arrested and detained him. His arbitrary deprivation of liberty took place within a context of massive arrests, enforced disappearances and torture of persons suspected of being Maoist. Against this background, the burden of proof rests on the State party to provide a satisfactory and convincing explanation, establishing and disclosing with certainty her husband's fate and whereabouts. Therefore, in light of the State party's failure to demonstrate the contrary, the author submits that her husband's enforced disappearance as such and subsequent most likely killing constitute a violation by the State party of his right under article 6.

3.3 The incommunicado detention and enforced disappearance of the author's husband *per se* amount to a treatment contrary to article 7. By keeping him in detention, without contact with the outside world since 21 May 1999, the authorities placed him at mercy of his captors, that resulted in a constant state of mental anguish. Further, according to the article published by *Mahanagar Daily*, he was a victim of torture while in detention at the Riot Control Police Force, in Pokhara.

3.4 The author points out that prolonged isolation and deprivation of communication with the outside world 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 being.⁷ The author therefore considers that in spite of scant evidence regarding Mr Nepali's conditions while in detention, the fact that he was kept incommunicado with no access to legal recourse or family members, constitutes a violation of article 10 (1) of the Covenant.

3.5 The author's husband was also a victim of violation of his rights under article 9 (1-4). The fact that he was last seen alive at the Police Headquarters in Naxal, Kathmandu, in the context of increasing numbers of arrests of persons suspected of involvement in CPN-M activities, allows for a presumption that he was deprived of his liberty by agents of the State on 21 May 1999. No legal grounds were provided for his deprivation of liberty. His detention was not entered in any official record or register. He was never charged with a crime, nor was he brought before a judge or any other official authorized by law to exercise judicial

⁷ The author refers to the jurisprudence of the Inter-American Court of Human Rights in its judgment of 29 July 1988, *Velásquez Rodríguez v. Honduras*, para. 156.

power. He was unable to take proceedings before a court to challenge the lawfulness of his detention.

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

3.7 Although the author reported promptly the arbitrary deprivation of liberty and enforced disappearance of her husband, no *ex officio*, prompt, impartial, thorough and independent investigation was carried out. As of today, no one has been summoned or convicted for his arbitrary deprivation of liberty, enforced disappearance, and torture. Likewise, in the event of his death, his mortal remains have not been located, identified and returned to his loved ones. Accordingly, the State party has violated and continues to violate his rights under articles 6; 7; 9 (1-4); 10 (1); and 16, read in conjunction with article 2 (3), of the Covenant.

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

3.9 The author requests the Committee to recommend the State party to *inter alia*: i) order an independent investigation as a matter of urgency concerning the fate and whereabouts of her husband and, in the event of his death, to locate, exhume, identify and respect his mortal remains and return them to the family; ii) bring the perpetrators before the competent civilian authorities for prosecution, judgment and sanction, and disseminate publicly the results of these actions; and iii) ensure that the measures of reparation cover material and moral damages, and measures of restitution, rehabilitation, satisfaction and guarantees of non-repetition. In particular, she requests that the State party acknowledge its international responsibility on the occasion of a public ceremony to be held in the presence of the authorities and of Mr Nepali's relatives, to whom official apologies shall be issued; and that the State party name a street or build a monument or a commemorative plate in memory of all the victims of enforced disappearance and torture during the internal armed conflict, including a specific reference to the case of Mr Nepali whereby his reputation is fully restored. In order to reduce the psychological and mental suffering that these events have caused to the author and in general the material harm inflicted, the State party should also provide her without delay with medical and psychological care free of charge, through its specialised institutions, and grant her access to free legal aid where necessary. As a guarantee of non-repetition, the State party should take the necessary measures to ensure that enforced disappearance and torture, and the different forms of participation in these crimes, constitute autonomous offences under its criminal law, punishable by appropriate penalties which take into account their extreme seriousness.

State party's observations on admissibility

4.1 By note verbale of 22 August 2012, the State party submitted its observations, challenging the admissibility of the communication on the grounds of failure to exhaust domestic remedies and manifestly ill-founded.

4.2 The State party maintains that the author's allegations concerning the circumstances in which the alleged arrest and detention of her husband took place are not supported by any direct and circumstantial evidence. In this regard, the Supreme Court quashed the two writs of habeas corpus lodged in favour of the author's husband because the applicants were unable to show that he was in fact detained by the police. The fact that the fate and

whereabouts of Mr Nepali has not been established cannot prove the allegations of his arrest, detention and subsequent disappearance by the police or any other authority.

4.3 The State party has serious concerns as to the existence of human rights violations during the armed conflict. To address that situation, it has decided to establish a commission to investigate cases of disappearances and a truth and reconciliation commission, in compliance with the Interim Constitution of Nepal of 2007. To this end, bills on the truth and reconciliation commission and enforced disappearances have been submitted to Parliament. By the time the State party submitted its observations, the bills were pending approval. The two commissions to be formed after endorsement of those bills will investigate cases which occurred during the conflict and bring to the surface the truth about those cases. The State party holds that, against that background and in the light of its sincere effort to establish those transitional justice mechanisms, it could not be concluded that domestic remedies have been unreasonably prolonged. Accordingly, the author has not exhausted domestic remedies.

Author's comments on the State party observations on admissibility

5.1 On 19 October 2012, the author submitted her comments on the State party's observations. She argues that the State party's observations in fact focuses on the merits of the communication rather than on the admissibility. In this regard, she points out the existence of direct evidence of her husband's arrest, detention and subsequent enforced disappearance, as described in her initial communication, inter alia she herself witnessed his arrest, on 4 June 1999 she received an anonymous call that informed her about the location of her husband, on 10 June 1999, the policeman on-duty in the Police Headquarters handed her Mr Nepali's dirty clothes back in exchange for the clean ones she brought; on the same day she, together with her friend Ms K.B. saw him within the police facilities from a distance; and a newspaper later reported that he had been transferred to the Riot Control Police Force, Pokhara.

5.2 In cases of enforced disappearance where the clarification of the facts depends on information exclusively on the hands of the authorities, the State party is under the obligation to investigate these allegations *ex officio* in good faith, even in the absence of direct evidence. The habeas corpus writ concerning her husband's case was quashed by the Supreme Court on merely procedural grounds because she was unable to provide Mr Nepali's detention. The State party maintained that his detention must be proven in order for the habeas corpus to be issued. However, if that were the rationale of the remedy, its effectiveness would be rendered useless in cases of enforced disappearance. In the present case, neither the Supreme Court nor any authority carried out an effective investigation on the circumstances of her husband's arrest and subsequent disappearance.

5.3 At the time that the author submitted her comments, the establishment of the future truth and reconciliation commission and the commission on disappearance, as well as their powers to carry out prompt, independent and effective investigations and prosecutions, were uncertain. Further, they would not be judicial bodies and the draft bills included a general amnesty clause for perpetrators of serious violations of international human rights law and international humanitarian law, including enforced disappearance. Fact-finding processes by non-judicial bodies, although crucial for the establishment of the truth, could never replace access to justice and redress for victims of gross human rights violations and their relatives, as the criminal justice system is the more appropriate avenue for immediate investigation into and punishment of criminal acts. Accordingly, transitional justice mechanisms cannot be considered an effective remedy to be exhausted by the author.

State party's observations on the merits

6.1 On 12 August 2013, the State party submitted its observations on the merits. It reiterates that the author's allegations concerning the arrest of her husband on 21 May 1999

by the police in Sundhara, Kathmandu, and his subsequent disappearance are not supported for any direct and circumstantial evidence. According to the response of the Metropolitan Police Range, Kathmandu, there is no information or record about Mr Nepali's case. Within the habeas corpus proceedings lodged by the author, the Supreme Court issued an order for search warrant to the Western Regional Riot Control Armed Police battalion, Pokhara, and to the Inspector General of the Police (IGP), but it could not be established that Mr Nepali was in police detention.

6.2 The State party maintains that it is committed to carrying out thorough investigation, bringing perpetrators to justice, and providing reparations to the victims of human rights violation related to the armed conflict that occurred between 1996 and 2006. In this regard, the State party reiterates its observations about the transitional justice mechanisms and informs the Committee that an Executive Ordinance on the establishment of a Commission on investigation of disappeared persons, truth and reconciliation (the Commission) was promulgated.

6.3 The State party informed the Committee that it granted the author Rs. 275,000⁸ and that she would receive an additional amount of Rs. 50,000 under the interim relief scheme. She may also receive another amount as reparation, following the future recommendations of the Commission.

6.4 The author has failed to file a complaint or FIR, which would allow the police to initiate an investigation about her husband's case.

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

7.1 On 1 October 2013, the author submitted her comments on the State party's observations on the merits. She considers that it reiterated the observations already raised in its previous submission and do not bring any significant argument or matter for consideration. The State party's attitude denotes an indifference towards her suffering. It *inter alia* failed to provide any information about the fate and whereabouts of her husband, leaving her to bear the brunt of the efforts to uncover any facts.

7.2 The author reiterates her allegations about the FIR and submits that this is not a remedy that has to be exhausted for the purpose of admissibility under article 5 (2)(b) of the Optional Protocol. The FIRs rarely lead to any investigation being opened into the disappearance of the person concerned.⁹

7.3 The author contends that she was only awarded Rs. 100,000 in 2008 and that she has not received the amounts stated by the State party (see 6.3). It is a negligible amount to cover the material and moral harm suffered by her, and cannot be considered as an effective remedy within the meaning of article 2 (3) of the Covenant.

Further submissions from the parties

8.1 On 10 January 2014, the author informed the Committee that on 2 January 2014, the Supreme Court of Nepal declared the Executive Ordinance of 14 March 2013, which established a commission on investigation into disappeared persons, truth and reconciliation, unconstitutional. The Supreme Court ordered the Nepalese authorities to establish a new commission without delay.

8.2 By notes verbales of 11 August and 11 December 2014, the State party informed the Committee that the Truth and Reconciliation Commission Act (the Act) had been enacted by the Parliament in April 2014, and that the Truth and Reconciliation Commission and the

⁸ The Committee observes that the State party's observations do not provide any documentation or proof that this amount was granted to the author.

⁹ The author refers to communication No. 1469/2006, Views adopted on 28 October 2008, para. 6.3.

Enforced Disappearance Commission would be established soon. It also provided a brief description of the main provisions of the Act and held that it was a landmark instrument to address the issue of past human rights violations committed by both the State party and non-State actors. It also submitted that the bills to criminalize torture and enforced disappearance had been drafted and were in the process of resubmission to Parliament. The criminal justice system could not provide full remedy to the victims of the armed conflict without the transitional justice mechanisms. In this respect, the author's claims would be addressed fully after the establishment of the said mechanisms. It also reiterated that the author was awarded Rs 275,000 as interim relief.

8.3 On 2 September 2014 and 12 January 2015, the author reiterated her allegations concerning transitional justice mechanism; and argued that several provisions of the Act were incompatible with international human rights standards¹⁰ and would not offer her an effective remedy.

Issues and proceedings before the Committee

Consideration of admissibility

9.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether the case is admissible under the Optional Protocol to the Covenant.

9.2 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.

9.3 With respect to the requirement of exhaustion of domestic remedies, the Committee notes the State party's arguments that the author has not exhausted domestic remedies, as she failed to register a first information report with the police; and that her husband's case will be addressed within the transitional justice mechanisms, established in conformity with the Interim Constitution of 2007. The Committee also notes the author's allegations that a first information report is not an appropriate remedy, as it is limited to the crimes listed in schedule 1 of the State Cases Act of 1992, which does not include enforced disappearance and torture; that the Compensation Relating to Torture Act does not provide for criminal accountability, but only for compensation of a maximum of Rs. 100,000; and that transitional justice mechanisms do not replace access to justice and cannot be considered an effective remedy to be exhausted. The Committee observes that the author's writ of habeas corpus was quashed by the Supreme Court on 5 July 2000. Although she promptly reported her husband's disappearance to the authorities, more than 17 years later the circumstances of his alleged disappearance remain unclear and no investigation has yet been concluded. The Committee further recalls its jurisprudence that in cases of serious violations a judicial remedy is required.¹¹ In this respect, the Committee observes that the transitional justice bodies established by Act 2071 (2014) are not judicial organs.¹² Accordingly, the Committee considers that the investigation has been ineffective and unreasonably prolonged and that there are no obstacles to the examination of the communication under article 5 (2) (b) of the Optional Protocol.

¹⁰ See OHCHR, "The Nepal Act on the Commission on Investigation of Disappeared Persons, Truth and Reconciliation, 2071 (2014) – as Gazetted 21 May 2014", OHCHR technical note; and OHCHR, "Nepal: truth-seeking legislation risks further entrenching impunity, alert United Nations rights experts", news release (4 July 2014).

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

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

9.4 The Committee takes note of the State party's observations that the author's allegations are manifestly ill-founded. The Committee observes, however, that for the purposes of admissibility, the author has sufficiently substantiated her allegations with plausible arguments in support thereof. As all admissibility requirements have been met, the Committee declares the communication admissible and proceeds to its examination of the merits.

Consideration of merits

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

10.2 The Committee takes note of the author's allegations that on 21 May 1999 her husband was arrested by policemen in Sundhara, Kathmandu and taken to the Police Headquarters, in Naxal, Kathmandu; that although he was incommunicado, she managed to last see him from a distance within this police's premises on 10 June 1999; and that although she reported promptly the arrest and disappearance to the authorities and filed a writ of habeas corpus, no prompt, impartial, thorough and independent investigation has been carried out by the authorities. His fate and whereabouts remain unknown to date and no one has been summoned or convicted for these acts. In these circumstances, her husband is a victim of enforced disappearance.

10.3 The Committee also notes the State party's argument that the author's allegations are based on mere suspicion; and that within the habeas corpus proceedings, she was unable to prove that her husband had been arrested and detained by the police or other State agents. The Committee reaffirms that the burden of proof cannot rest solely on the author of the communication, especially considering that the author and the State party do not always have equal access to evidence, and that frequently the State party alone has access to the relevant information.¹³ It is implicit in article 4 (2), of the Optional Protocol that the State party has the duty to investigate in good faith all credible allegations of violations of the Covenant made against it and its representatives, and to provide the Committee with the information available to it. In cases where the author has submitted allegations to the State party that are corroborated by credible evidence, and where further clarification depends on information that is solely in the hands of the State party, the Committee may consider the author's allegations substantiated, in the absence of satisfactory evidence or explanations to the contrary presented by the State party.

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

10.5 In the present case, the Committee observes that promptly after losing contact with her husband in May 1999, the author approached several police stations in Kathmandu searching for him; that although the police at the Police Headquarters in Naxal, Kathmandu, denied her to have access to her husband, she was allowed to hand over some clean clothes for him and an on-duty police gave her some dirty clothes belonging to her husband; that after 10 June 1999 when she allegedly last saw him in the hands of the police in the Police Headquarters' premises from a distance, she continued inquiring as to his fate and

¹³ See communications No. 1422/2005, *El Hassy v. the Libyan Arab Jamahiriya*, Views adopted on 24 October 2007, para. 6.7; No. 1297/2004; *Medjnoune v. Algeria*, Views adopted on 14 July 2006, para. 8.3; No. 1804/2008, *Il Khwildy v. Libya*, Views adopted on 1 November 2012, para. 7.2; and No. 2111/2011, *Tripathi v. Nepal*, Views adopted on 29 October 2014, para. 7.2.

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

whereabouts, but she received contradicting information. In this regard, the Committee observes that an article published in the *Mahanagar Daily* on 31 August 1999, provided by the author, reported that although the then Prime Minister stated that Mr Nepali had been killed, he was in fact alive and being tortured and held by the Riot Control Police Force, in Pokhara; whereas within the habeas corpus proceedings before the Supreme Court the authorities denied that he had ever been detained by the police. No further information has been provided as to the fate and whereabouts of her husband. However, Mr Nepali's name is included in the National Human Rights Commission's list of conflict-related disappearances and the ICRC's missing person database. In the light of the documentation submitted by the author, the Committee considers that the State party has not provided sufficient and concrete explanations to refute the author's allegations regarding her husband's enforced disappearance. The Committee recalls that, in cases of enforced disappearance, the deprivation of liberty followed by a refusal to acknowledge the deprivation of liberty, or by concealment of the fate of the disappeared person, removes the person from the protection of the law and places his or her life at serious and constant risk, for which the State is accountable.¹⁵ In the instant case, the State party has produced no evidence to show that it met its obligations to protect the life of Mr. Nepali. Accordingly, the Committee concludes that the State party failed in its duty to protect Mr. Nepali's life, in violation of article 6 (1), of the Covenant.

10.6 The Committee takes note of the author's allegations that the detention and subsequent enforced disappearance of her husband amount per se to treatment contrary to article 7. The Committee recognizes the degree of suffering involved in being held indefinitely without contact with the outside world. It recalls its general comment No. 20 on article 7, which recommends that States parties should make provision to ban incommunicado detention. In the present case, in the absence of a satisfactory explanation from the State party, the Committee finds that the enforced disappearance of the author's husband constitutes 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.

10.7 The Committee also takes note of the anguish and stress caused to the author by the disappearance of her husband. In particular, the author has never received sufficient explanation concerning the circumstances surrounding Mr Nepali's disappearance or his alleged death, nor has she received his body remains. In the absence of a satisfactory explanation from the State party, the Committee considers that these facts reveal a violation of article 7 of the Covenant with respect to the author.

10.8 The Committee takes note of the author's allegations under article 9 (1-4) that her husband was detained without an arrest warrant, that he was never brought before a judge or any other official authorized by law to exercise judicial power, and that he could not take proceedings before a court to challenge the lawfulness of his detention. In the absence of a State party's response in this regard, the Committee considers that the detention of the author's husband constitutes a violation of his rights under article 9 of the Covenant.

10.9 With regard to the alleged violation of article 16, the Committee notes the author's allegations that her husband was arrested by policemen in her presence; that since then the State party has failed to provide her with relevant information concerning her husband's fate and whereabouts; and that no effective investigation has been carried out to ascertain his whereabouts, maintaining him outside the protection of the law since then. 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

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

systematically impeded.¹⁶ The Committee, therefore, finds that the enforced disappearance of Mr. Nepali deprives him of the protection of the law and of his right to recognition as person before the law, in violation of article 16 of the Covenant.

10.10 The author invokes article 2 (3) of the Covenant, which imposes on States parties the obligation to ensure an effective remedy for all persons whose rights under the Covenant have been violated. The Committee attaches importance to the establishment by States parties of appropriate judicial and administrative mechanisms for addressing claims of rights violations. It refers to its general comment No. 31, which provides, *inter alia*, that failure by a State party to investigate allegations of violations could in and of itself give rise to a separate breach of the Covenant.¹⁷ In the present case, the Committee observes that, shortly after the detention of the author's husband, she approached different police offices seeking information, and later filed a writ of habeas corpus before the Supreme Court and complained to the National Human Rights Commission. Despite the author's efforts, more than 17 years after the disappearance of her husband, no thorough and effective investigation has been concluded by the State party in order to elucidate the circumstances surrounding his detention, enforced disappearance and alleged deaths, and no criminal investigation has even been started to bring the perpetrators to justice. The State party has failed to explain the effectiveness and adequacy of investigations carried out the authorities and the concrete steps taken to clarify the circumstances surrounding Mr Nepali's disappearance and possible death. It has also failed to locate his mortal remains and return them to his family. Therefore, the Committee considers that the State party has failed to conduct a prompt, thorough and effective investigation into the disappearance of Mr Nepali. Additionally, the Rs. 100,000 received by the author as interim relief does not constitute an adequate remedy commensurate to the serious violations inflicted. Accordingly, the Committee concludes that the facts before it reveal a violation of article 2 (3), in conjunction with articles 6 (1), 7, 9 and 16, with regard to Mr Nepali; and article 2 (3), read in conjunction with article 7 of the Covenant, with respect to the author.

11. The Human Rights Committee, acting under article 5 (4), of the Optional, is of the view that the information before it discloses violations by the State party of articles 6, 7, 9 and 16, of the Covenant; and of article 2(3), read in conjunction with articles 6, 7, 9 and 16 of the Covenant with regard to Mr Milan Nepali. The facts also disclose violations of article 7, and article 2(3), read in conjunction with article 7, with respect to the author.

12. In accordance with article 2 (3) (a) of the Covenant, the State party is under an obligation to provide the author with an effective remedy. This requires it to make full reparation to individuals whose Covenant rights have been violated. Accordingly, the State party is obligated, *inter alia*, to: (a) conduct a thorough and effective investigation into the disappearance of Mr Nepali and provide the author with detailed information about the results of its investigation; (b) if her husband is dead, locate his remains and hand them over to his family; (c) prosecute, try and punish those responsible for the violations committed and make the results of such measures public; (d) ensure that any necessary and adequate psychological rehabilitation and medical treatment are provided to the author free of charge; and (e) provide effective reparation, including adequate compensation and appropriate measures of satisfaction, to the author and her husband, if he is alive, for the violations suffered. The State party is also under an obligation to take steps to prevent the occurrence of similar violations in the future. In particular, the State party should ensure that: i) its legislation allows for the criminal prosecution of those responsible for serious human rights violations such as torture, extrajudicial execution and enforced disappearance; and ii) any enforced disappearances give rise to a prompt, impartial and effective investigation.

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

¹⁷ General Comment N° 31, para. 15.

13. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure for all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy when a violation has been established, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the present Views and disseminate them widely in the official languages of the State party.

Annex I

[Original: Spanish]

Individual opinion (concurring) of Committee member Fabián Salvioli

1. In communications involving cases of enforced disappearance, the Committee has in recent years taken the correct legal approach, looking at this atypical human rights violation as a whole in its consideration of the merits and finding direct violations of articles 6, 7, 9 and 16 of the Covenant, as well as of article 2 (3) read in conjunction with the aforementioned articles. It also correctly identifies as victims of enforced disappearance persons who have been deprived of their liberty, whether legally or illegally, and whose deprivation of liberty is then denied as having occurred or whose fate or whereabouts are concealed. These two are the only elements to be used in determining whether a case constitutes enforced disappearance, and it would be a grave mistake to introduce additional criteria, such as a time dimension; the removal from legal protection is a consequence and not at all a requirement of enforced disappearance.

2. The Committee considered the present communication No. 2164/2012 in accordance with the most relevant jurisprudence in the matter of enforced disappearance. Unfortunately, in cases where the authors do not explicitly raise the relevant articles, the Committee remains reluctant to apply them. As a result, the Committee has come to different legal conclusions in cases with identical proven facts. Fortunately, the Committee is beginning to see the disadvantage and legal confusion caused by not applying the principle of *iura novit curia*, as do all the international courts, from the former Permanent Court of International Justice to the International Court of Justice, and many regional and international human rights bodies, including other treaty bodies.

3. In addition, the Committee has not moved sufficiently forward on the matter of reparations, although some progress has been made in recent years. In the case in hand, reparations should have been considered and decided more comprehensively, and in that respect I endorse the reasoning of the individual opinion submitted by my colleague Víctor Rodríguez Rescia. Reparations must be — logically — the legal consequence determined by the Committee of the violations it has found, accompanied by a range of possible measures. The Committee still has a long way to go with respect to rehabilitation, satisfaction and especially measures of non-recurrence. Being more precise and detailed would doubtlessly help victims and their families, the State — which would have a clear ideas of the steps it should take to satisfy the Views issued — and the Committee itself for the purpose of the follow-up stage. The Committee is on the right path and I have no doubt that in future it will achieve the progress needed to more fully discharge its function of interpreting and applying the International Covenant on Civil and Political Rights and that States will take the necessary steps to achieve the purposes of the Covenant.

Annex II

[Original: Spanish]

Concurring opinion of Víctor Rodríguez Rescia

1. The present opinion concurs fully with the decision of the Human Rights Committee concerning communication No. 2164/2012 on the merits and the rights under the Covenant that were found to have been violated by the State party. However, with regard to the paragraph on reparations (para. 12), I believe that, as indicated in paragraph 10.5 of the communication, the disappearance of Mr. Nepali occurred in the context of enforced disappearances during the armed conflict (Mr. Nepali's name is included in the list of conflict-related disappearances kept by the National Human Rights Commission and the missing persons database maintained by the International Committee of the Red Cross). These circumstances provide a complex context that makes it impossible to consider Mr. Nepali's disappearance as an isolated case of enforced disappearance. Therefore, even though I agree with the obligation established in paragraph 12 for the State party to "conduct a thorough and effective investigation into the disappearance of Mr Nepali and provide the author with detailed information about the results of its investigation", I believe that as part of the concept of integral reparation, the Committee should have included an obligation for the State party regarding the "right to truth".

2. Although the Covenant does not refer to the right to truth, it is clearly established within the framework of transitional justice that the right to truth constitutes a type of reparation, among the corollaries peace, justice, reparation and non-repetition. Knowledge of the truth involves not only investigating the specific case of enforced disappearance of Mr. Nepali; it also requires understanding the reasons for the disappearance along with many others in a context of total impunity during the conflict. The right to truth derives from the right to access to justice and to an effective remedy as established in article 2.3 of the Covenant, read in conjunction with the right of petition referred to in article 14 of the Covenant. Therefore, I am of the opinion that the Committee should have granted the author's request in relation to guarantees of non-repetition. Such guarantees would oblige the State to admit publicly its wrongdoings concerning past crimes, specifically those related with enforced disappearance and routine subjection to torture, and not only the specific investigation of Mr. Nepali's case. As a consequence, and consistent with integral reparation standards in transitional justice that are already recognized by other regional human rights courts, such as the Inter-American Court of Human Rights, it could be beneficial for victims if the Committee decided to extend the scope of its reparations to include other measures, such as (1) the recognition of international responsibility for serious past human rights violations; (2) the setting up of memorials, for instance a public monument or commemorative plate, that restores the honour of victims, including the name of Mr. Nepali, but even more importantly that conveys a clear message of historical truth so that similar events do not occur in the future; and (3) a formal public apology.

3. Requesting that the State make a formal apology has already been established as a measure of reparation by this Committee. Such was its conclusion in a case of racial discrimination in which it rendered a decision unfavourable for Spain (*Williams Lecraft v. Spain*; communication No. 1493/2006, adoption of Views on 27 July 2009, para. 9). Why not follow this precedent in a progressive manner in cases such as the present one, in which the enforced disappearance of the author occurred in a general context of violence and impunity? This was an exemplary case and a good opportunity to do adopt such an approach. I hope that in similar cases, when the authors request it — even though I

subscribe to the principle of *iura novit curiae* and I do not consider such a request to be a requirement — the Committee will follow such a course and develop a more comprehensive standard approach to reparations in the case of serious past human rights violations.
