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Human Rights Committee

Communication No. 2038/2011

Views adopted by the Committee at its 114th session (29 June-24 July 2015)

<i>Submitted by:</i>	Chhedulal Tharu and others (represented by counsel, Advocacy Forum-Nepal and REDRESS)
<i>Alleged victim:</i>	The authors and Dhaniram Tharu, Soniram Tharu, Radhulal Tharu, Prem Prakash Tharu, Kamala Tharu/Chaudhari, Mohan Tharu/Chaudhari, Lauti Tharu/Chaudhari and Chillu Tharu/Chaudhari (authors' close relatives)
<i>State party:</i>	Nepal
<i>Date of communication:</i>	24 January 2011 (initial submission)
<i>Document references:</i>	Special Rapporteur's rule 97 decision, transmitted to the State party on 8 April 2011 (not issued in document form)
<i>Date of adoption of Views:</i>	3 July 2015
<i>Subject matter:</i>	Enforced disappearance
<i>Procedural issues:</i>	Exhaustion of domestic remedies
<i>Substantive issues:</i>	Right to life, prohibition of torture and cruel and inhuman treatment, right to liberty and security of person, respect for the inherent dignity of the human person, recognition as a person before the law and right to an effective remedy <i>Articles of the Covenant:</i> 6, 7, 9, 10, 16, 17 (1), 23 and 24 (1), alone and in conjunction with article 2 (3)
<i>Articles of the Optional Protocol:</i>	5 (2) (a) and (2) (b)



Annex

Views of the Human Rights Committee under article 5 (4) of the Optional Protocol to the International Covenant on Civil and Political Rights (114th session)

concerning

Communication No. 2038/2011*

Submitted by: Chhedulal Tharu et al. (represented by counsel, Advocacy Forum-Nepal and REDRESS)

Alleged victim: The authors and Dhaniram Tharu, Soniram Tharu, Radhulal Tharu, Prem Prakash Tharu, Kamala Tharu/Chaudhari, Mohan Tharu/Chaudhari, Lauti Tharu/Chaudhari and Chillu Tharu/Chaudhari (authors' close relatives)

State party: Nepal

Date of communication: 24 January 2011 (initial submission)

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

Meeting on 3 July 2015,

Having concluded its consideration of communication No. 2038/2011, submitted to the Human Rights Committee by Chhedulal Tharu et al. 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 authors of the communication and the State party,

Adopts the following:

Views under article 5 (4) of the Optional Protocol

1.1 The authors of the communication are Chhedulal Tharu (father of Dhaniram and Soniram Tharu) and Sara/Sarita Tharu (wife of Dhaniram Tharu); Padam Tharu and Sanchariya Tharu (father and mother of Radhulal Tharu); Birbal Tharu, Thagani Tharu, and Bhagawati Tharu (father, mother and wife of Prem Prakash Tharu); Tulsiram Tharu and Phagani Tharu (father and mother of Kamala Tharu/Chaudhari); Mahango Tharu and

* The following members of the Committee participated in the consideration of the present communication: Yadh Ben Achour, Lazhari Bouzid, Sarah Cleveland, Olivier de Frouville, Yuji Iwasawa, Ivana Jelić, Duncan Laki Muhumuza, 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. The texts of individual opinions of Committee member Olivier de Frouville (concurring) and Anja Seibert-Fohr (concurring) are appended to the present Views.

Parmeshwari Tharu (father and mother of Mohan Tharu/Chaudhari); Jaggu Tharu and Lahiya Tharu (father and aunt of Lauti Tharu/Chaudhari); and Bechaniya Tharu and Manki Tharu (mother of Chillu Tharu/Chaudhari, and Bechaniya's husband, respectively), all Nepalese nationals. They claim that the State party has violated the rights of their eight relatives (hereinafter "the authors' relatives"), Nepalese nationals, under articles 6, 7, 9, 10, 16, 23 (1) and 24 (1), alone and in conjunction with article 2 (3), as well as their rights under articles 7, 17 (1) and 23, read alone and in conjunction with article 2 (3), of the Covenant. The authors are represented by counsel.

1.2 The authors submit that, at the moment of their disappearance, Dhaniram Tharu was 17 or 18 years old, married and working as a construction worker and subsistence farmer; Soniram Tharu was 16 or 17 years old and working as a *kamaiya*¹ for a landlord in the village of Parseni; Radhulal Tharu was 19 years old, married and working as a carpenter and subsistence farmer; Prem Prakash Tharu was 23 years old, married with an 18-month-old son and working as a farmer and tractor driver; Kamala Tharu was between 16 and 18 years old, a seventh grade student and living with her parents; Mohan Tharu was 18 years old, a construction worker and farmer, and married and with a son who was nine days old; Lauti Tharu was between 17 and 20 years old, working as a construction worker and as a farmer and with living her father and other relatives; and Chillu Tharu was 16 years old and living in his grandparents' house.²

The facts as submitted by the authors

2.1 Between 1996 and 2006, an internal armed conflict took place in the State party. Both parties to the conflict, including the police and the Royal Nepalese Army, committed atrocities, and enforced disappearances became a widespread phenomenon.³ Reliable reports indicate that a high number of enforced disappearances occurred in the Bardiya District and that members of the Tharu community were particularly targeted by the authorities.⁴

2.2 The authors and their eight relatives belong to the Tharu indigenous community, which constitutes 52 per cent of the population of the Bardiya District. They claim that historically this community has been discriminated against and marginalized in the State party, and that a significant number of members of the Communist Party of Nepal-Maoist in the Bardiya District came from their community.⁵

2.3 At the time of the events, the authors lived in Nauranga village, Ward No. 8, Manau Village Development Committee, Bardiya District. The authors claim that, on the night of 11 April 2002, between 60 and 70 Royal Nepalese Army soldiers arrived in the village and

¹ According to the authors, it refers to persons, including most of the Tharu people, who have a status of wage labourers. While the *kamaiya* system was formally abolished in 2000, the working conditions of former *kamaiya* families had not changed.

² The authors claim that the ages given are indicative and that they are unable to provide an exact age of their relatives since they did not have citizenship cards or any other type of identity card. They further note that in rural areas of the State party the concept of time revolves around seasons and agricultural activities, and that the use of calendars is not common.

³ See reports of the Working Group on Enforced or Involuntary Disappearances (E/CN.4/2004/58, para. 227, and A/HRC/13/31, annex IV, graph relating to Nepal), as well as the report of the Office of the United Nations High Commissioner for Human Rights (OHCHR) entitled "Conflict-related disappearances in Bardiya District" (December 2008), pp. 5 and 27 (available from <http://nepal.ohchr.org>).

⁴ Ibid., p. 17.

⁵ See Human Rights Watch, "Clear culpability: 'disappearances' by security forces in Nepal" (28 February 2005), p. 26.

surrounded their houses. Most of the soldiers wore the army uniform, and some covered their faces with a scarf and carried weapons and torches. In groups of two to five soldiers, they broke into the authors' and other relatives' houses at the same time, around midnight. The soldiers appeared to be specifically targeting the authors' eight young relatives. In each case, their relatives were taken by force and against their will. During the operation, the soldiers threatened to kill the authors and other relatives. Some soldiers also beat or pointed their guns at certain authors. No reasons were given for taking the authors' relatives, but, in the cases of Radhulal, Kamala, Prem Prakash and Mohan, the soldiers assured the relatives that they would return to their homes soon after being interrogated. In general, the families were not given any information as to where the soldiers had taken their relatives. Nevertheless, Prem Prakash's wife was told that he would be taken to Rajapur, Kamala's parents were told that she would be taken to Gulariya, and Mohan's mother was told that he would be taken to Rajapur and then Gulariya. The authors have never seen their eight relatives again, and no relevant information has been given as to their fate and whereabouts.

2.4 The authors claim that, although their region is geographically isolated and lacks basic public services, including public transport, they made extensive efforts to locate their relatives. They further claim that they had no access to support, since few human rights non-governmental organizations (NGOs) worked in the area at the time and none provided legal assistance, and that they looked for advice within the community, approaching its leaders, such as the *badghar*⁶ of the village, the headmaster of the school and leaders of political parties.

2.5 In the following days, some of them also met with Mr. S.D., a former member of the parliament, who called the Area Police Office of Rajapur and the Thakurdwara army barracks. However, the authorities denied any knowledge of or involvement in the detention of their relatives. Mr. S.D. then called the Tikapur army barracks, and an officer confirmed to him that soldiers from the barracks had taken the eight young persons, but refused to give him further details. The authors also visited every police office and army barracks in Bardiya district and the neighbouring district of Kailali. In different groups, they went, inter alia, to the Area Police Office of Rajapur on two occasions, to the District Police Office in Gulariya on approximately 15 occasions, and to the army barracks and Area Police Office in Tikapur, Kailali District, on at least three occasions. They claimed that the second time they went to the District Police Office in Gulariya, they left a letter that had been written with the help of another person, describing how their relatives had been arrested and taken away by soldiers on 11 April 2002. Later, they also tried to leave a copy of this letter with the Area Police Office in Tikapur, without success. The authors submit that all the authorities denied that their relatives had been detained, and did not offer any assistance in looking for them or commit to undertaking an investigation into their disappearance.

2.6 In 2003, Padam Tharu reported the disappearance of his son, Radhulal, to the National Human Rights Commission office in Kathmandu. Later, he and his wife were summoned by the Rajapur army barracks. At the barracks, the Army officers informed them that they would start an investigation into the disappearance of their child, and that they would contact the family if they obtained any information. However, the parents have not heard from the Rajapur army barracks since then.

2.7 On 13 July, 23 September and 16 October 2003, the authors, with the assistance of Advocacy Forum-Nepal, filed eight writs of habeas corpus with the Supreme Court, on behalf of Dhaniram, Soniram, Lauti, Mohan, Prem Prakash, Chillu, Kamala and Radhulal, respectively. During the proceedings, the Ministry of Defence, the Ministry of Home

⁶ According to the authors, the *badghar* is the traditional chief in Tharu villages.

Affairs, the Bardiya District Administrative Office and the Bardiya District Police Office, among other authorities, informed the Supreme Court that the authors' relatives had not been arrested or detained by them.

2.8 On 24, 25, 26, and 27 August 2004, and 7 January, 11 February, and 29 March 2005, the Supreme Court quashed the writs of habeas corpus submitted by the authors. It stated that the authors had failed to identify where and by whom their relatives had been detained and that, in order to obtain a search warrant, the applicants must help the Court by identifying the place where the alleged victims were being kept. The authors claim that the Court did not proactively enquire about the fate and whereabouts of their relatives or about the measures undertaken by other authorities to search for their relatives or investigate their disappearance.

2.9 On 12 February 2006, Thagani Tharu (Prem Prakash's mother) reported the disappearance of Prem Prakash, Kamala, Lauti and Chillu to the National Human Rights Commission. Parmeshwari Tharu (Mohan's mother) also reported Mohan's disappearance to the Commission. The authors claim that officers from the Commission visited them twice and that the Commission transmitted their complaints to the Royal Nepalese Army's Human Rights Cell.

2.10 Their eight relatives were registered as missing persons in the International Committee of the Red Cross database.

2.11 On 25 May 2006, the Government established the Ministry of Home Affairs Disappearances Committee, composed of the Joint Secretary of the Ministry of Home Affairs (also known as the Neupane Committee), for the purpose of investigating the fate of allegedly disappeared persons, preparing a report establishing the truth of their status and recommending the necessary measures to be taken with respect to those whose status remains unknown. Subsequently, the National Human Rights Commission transmitted the cases of the authors' relatives to this Committee.

2.12 On 25 July 2006, the Disappearances Committee published its report, which concluded that it had resolved 174 out of 776 cases of disappearance. Among these cases, the report considered "clarified" the cases of Dhaniram, Chillu, Mohan, Kamala, Lauti, Soniram and Radhulal, as the Human Rights Cell of the Royal Nepalese Army had provided information that they had been killed on 11 April 2002 in crossfire with the security forces in the nursery area of Manau. The authors claim that the Committee did not undertake a thorough investigation, and gave full credence to the responses from the security agencies, without any consultation with the relatives, request for further clarification or examination of the information submitted. Moreover, they say the Human Rights Cell has never explained how it concluded that seven of their relatives had been killed in crossfire.

2.13 On 12 December 2006, the cases of Dhaniram, Radhulal (registered as "Raghulal"), Kamala, Chillu, Lauti (registered as "Lauti Chaudhari"), Mohan, Prem Prakash (registered as "Prem Tharu") and Soniram were reported to the Working Group on Enforced or Involuntary Disappearances.⁷

2.14 On 1 June 2007, the Supreme Court issued a judgement concerning 83 cases of enforced disappearance. Among other findings, the Court ordered the Government to provide all families of disappeared persons listed in the petition with 100,000 Nepalese rupees,⁸ to establish a commission of inquiry, to criminalize enforced disappearance and to

⁷ See A/HRC/4/41, annex IV.

⁸ According to the authors, this amount was the equivalent of \$1,420 at the time the communication was submitted.

prosecute those responsible. Following this ruling, the Council of Ministers decided to provide interim relief to various categories of victims of the armed conflict, including the relatives of disappeared persons. Between September 2008 and March 2009, the Manau Village Development Committee issued letters certifying that the authors' relatives were still disappeared.

2.15 In December 2008, the United Nations Human Rights Office in Nepal (OHCHR-Nepal) issued a report on enforced disappearances in Bardiya District.⁹ It noted that the Human Rights Cell of the Royal Nepalese Army had provided information about 35 cases, including the same information it had given to the Ministry of Home Affairs Disappearances Committee. The authors point out that the authorities transmitted the same information to additional institutions, such as the International Committee of the Red Cross.

2.16 In April 2009, the Ministry of Peace and Reconstruction provided the authors, as families of disappeared persons, with an interim relief of Nr 100,000. The authors maintain that this amount was intended only to provide temporary assistance to the victims or their families, and that it cannot be considered a measure of reparation.

2.17 The authors claim that their communication meets the admissibility requirement established in article 5 (2) (b) of the Optional Protocol and that they have exhausted all available judicial remedies. Despite their efforts, the fate and whereabouts of their relatives remain unknown, no effective investigation has taken place to clarify the circumstances of their disappearances and no one has been sanctioned. Moreover, neither the National Human Rights Commission nor the Ministry of Home Affairs Disappearances Committee can be considered an effective source of remedy. The authors argue that they did not try to file a first information report with the police, as this procedure is limited to the crimes listed in Schedule 1 of the State Cases Act of 1992, which does not include enforced disappearance.

2.18 As to the requirement established in article 5 (2) (a) of the Optional Protocol, the authors submit that the same matter is not being taken up under another procedure of international investigation or settlement. While it is an important special procedure within the United Nations system, the Working Group on Enforced or Involuntary Disappearances does not constitute a procedure analogous to the one established by the Optional Protocol, as it is of a strictly humanitarian nature.

The complaint

3.1 The authors argue that their eight relatives were victims of enforced disappearance and therefore of a violation of their rights under articles 6, 7, 9, 10, 16, 23 (1) and 24 (1), alone and in conjunction with article 2 (3), and that their rights under articles 7, 17 (1) and 23, read alone and in conjunction with article 2 (3) of the Covenant, were also violated by the State party.

3.2 The authors claim that members of the Royal Nepalese Army arbitrarily detained their eight relatives. Despite the authors' efforts and although their relatives' detention was promptly reported by them, the fate and whereabouts of their relatives remain unknown. All of the authorities initially denied that the authors' relatives had been deprived of liberty. Later, the Army alleged, without supporting evidence or investigation, that seven of the authors' relatives had been killed on 11 April 2002 in crossfire with the security forces in the nursery area of Manau. The authors maintain that it would be highly unlikely, if not impossible, for the Army to have referred to these seven persons by name if they had been killed in crossfire, since none of them, with the exception of Prem Prakash, had a

⁹ See footnote 3.

citizenship card or any other type of identity document. Moreover, the way in which the authors' eight relatives were taken from their homes was part of the general *modus operandi* of the Royal Nepalese Army's search operations in Bardiya District between December 2001 and January 2003.¹⁰ Against this background, the authors contend that their relatives' arbitrary detention and subsequent disappearance by the authorities placed them in a situation that posed a grave threat to life and constituted a violation of article 6 of the Covenant.

3.3 The authors further claim that the enforced disappearance of their relatives and the degree of suffering involved in being held without contact with the outside world amount to a violation of article 7.

3.4 The authors claim that the State party violated article 9 of the Covenant. Their relatives were taken by the Royal Nepalese Army, without an arrest warrant or a sufficient explanation of the reasons for their arrest. Later, the Army denied that they had been arrested or subsequently detained. Neither were the authors' relatives ever brought before a judge or any other official authorized by law to exercise judicial power, nor could they bring proceedings before a court to challenge the lawfulness of their detention.

3.5 The authors claim that the State party has violated and continues to violate the rights of their relatives under article 10 of the Covenant due to its inherent failure to treat their relatives, who remain subject to enforced disappearance, with humanity and to respect their dignity.

3.6 The authors maintain that the enforced disappearance of their relatives and the failure by the authorities to conduct an effective investigation concerning their whereabouts and fate places their relatives outside the protection of the law, preventing them from enjoying their human rights and freedoms in violation of article 16 of the Covenant.

3.7 The authors submit that article 23 (1) of the Covenant requires the maintenance of personal relations and direct and regular contact between a child and his or her parents and that, therefore, the enforced disappearance of the authors' relatives constitutes a violation of this provision, since it resulted in a complete rupture of the relationship between parents and children.

3.8 The authors argue that Dhaniram (17-18 years old), Soniram, Kamala (16-18 years old), Lauti (17-20 years old) and Chillu were under the age of 18 and that the State party was therefore obliged to provide them special protection as minors. Accordingly, their arrest and subsequent disappearance also constituted a violation of article 24 (1) of the Covenant. The authors point out that, as established in article 37 (b) of the Convention on the Rights of the Child, the arrest, detention or imprisonment of a child should be in conformity with the law and be used only as a measure of last resort and for the shortest period of time.¹¹

3.9 Although the authors promptly reported the arbitrary deprivation of liberty and enforced disappearance of their relatives to the authorities and filed several complaints, including writs of habeas corpus before the Supreme Court, no *ex officio*, prompt, impartial, thorough and independent investigation has been carried out and the fate and the whereabouts of their eight relatives remain unknown to date. Should their relatives be dead, their remains have not been located, exhumed, identified and returned to the families. Moreover, no one has yet been convicted for their arbitrary deprivation of liberty and enforced disappearance. Accordingly, the State party has violated and is continuing to violate their relatives' rights

¹⁰ See "Conflict-related disappearances in Bardiya District", sects. VI.ii.i and VI.vii.ii.

¹¹ See Committee on the Rights of the Child, general comment No. 10 (2007) on children's rights in juvenile justice, paras. 59-61 and 82-84.

under articles 6 (1), 7, 9, 10 (1), 16, 23 (1) and 24 (1), all read in conjunction with article 2 (3) of the Covenant.

3.10 The authors argue that the State party has continued to violate their rights under article 7, read alone and in conjunction with article 2 (3) of the Covenant. They have suffered anguish and distress since 2002 due to the arbitrary deprivation of liberty, ill-treatment and enforced disappearance of their eight relatives, as well as to the failure of the authorities to carry out any effective investigation concerning the fate and whereabouts of their relatives.

3.11 The authors submit that the State party has also violated their rights under articles 17 (1) and 23, read alone and in conjunction with article 2 (3), by forcibly entering their homes and removing their relatives, which has resulted in an abrupt and complete separation from them.

3.12 The authors request the Committee to recommend that the State party (a) order prompt, impartial and thorough investigations concerning the fate and whereabouts of their eight relatives; (b) release their relatives, should they be alive and, in the event of their death, to locate, exhume, identify and respect their mortal remains and return them to the family; (c) provide information to the authors on the progress of the investigations; (d) bring the perpetrators before a court for prosecution, judgement and sanction; and (e) provide the authors and their relatives, should they be alive, with adequate compensation that covers material and moral damages, as well as other measures of reparation, including measures of rehabilitation¹² and satisfaction. In particular, the authors request that the State party publicly acknowledge its international responsibility. As a guarantee of non-repetition, the State party should ensure that enforced disappearance and torture constitute autonomous offences under its criminal law, amend its legislation so as to ensure that habeas corpus is an available and effective remedy in case of enforced disappearance, set up an independent commission to investigate enforced disappearances, ratify the International Convention for the Protection of All Persons from Enforced Disappearance and the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and fully implement the recommendations made by OHCHR in relation to the enforced disappearances in Bardiya district.

State party's observations on admissibility

4.1 By note verbale of 10 June 2011, the State party submitted its observations, challenging the admissibility of the communication on the grounds of failure to exhaust domestic remedies.

4.2 It notes that the 1990 Constitution explicitly prohibited torture and other cruel inhuman and degrading treatment and punishment, and that a person subjected to such treatment was entitled to adequate compensation in accordance with the 1997 Compensation relating to Torture Act. Therefore, the authors could have filed a petition under the Act, by which a decision by a court has to be made within 90 days. Likewise, they failed to submit a petition invoking the State Cases Act.

4.3 The National Human Rights Commission is an independent and impartial Commission established under the Human Rights Commission Act of 1997. It is vested with the statutory power to conduct enquiries into human rights violations, to require any person to appear before it, and to gather, receive, examine and assess information and

¹² See E/CN.4/1998/43, para. 75.

evidence. The Commission can recommend that the Government give compensation to a victim and punish perpetrators.

4.4 The State party informs the Committee that two investigative committees headed by Joint Secretaries at the Ministry of Home Affairs were established in order to ascertain the fate and whereabouts of the persons that were reported as disappeared during the armed conflict. It points out that the Army and the Police have also conducted departmental-level enquiries and held several personnel responsible. Further, to address the situation of disappeared persons, it decided to establish a commission to investigate cases of disappearances and a truth and reconciliation commission, in compliance with article 33 (s) of the 2007 Interim Constitution of Nepal and with 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 have been submitted to the parliament. By the time the State party submitted its observations, the bills were pending approval. The two commissions to be formed after endorsement of those bills will investigate cases that occurred during the armed conflict and bring to light the truth about these cases.

State party's observations on the merits

5.1 On 10 January 2012, the State party provided its observations on the merits of the communication. It reiterates its previous observations that the authors have not exhausted domestic remedies and that the communication should be declared inadmissible pursuant article 5 (2) (b) of the Optional Protocol.

5.2 The State party informs the Committee that the two bills for the establishment of a commission on disappearance and a truth and reconciliation commission were pending approval in a parliamentary committee. It points out that those bills were drafted with extensive interaction with stakeholders and members of the international community, and that their provisions are in accordance with international standards.

5.3 The State party remains committed to investigating, prosecuting and punishing the perpetrators and providing compensation to the victims of the human rights violations committed during the armed conflict between 1 February 1996 and 2006. It notes that the authors have already received interim relief.

Authors' comments on the State party's observations

6.1 On 18 April 2012, the authors submitted their comments on the State party's observations.

6.2 The authors reiterate that they have exhausted all domestic remedies. They argue that in general a writ of habeas corpus is the remedy best suited to redressing the violation concerned by producing the disappeared person and thereby ending the unacknowledged detention. It is therefore the most appropriate immediate remedy to protect the rights of a person taken by the authorities. However, the regulations concerning such writs and the manner in which the courts in the State party handle habeas corpus petitions make them ineffective. The authors further claim that it is the responsibility of the State party to carry out ex officio a full and thorough investigation into the allegations of torture and enforced disappearance at the earliest possible opportunity.

6.3 The ruling of the Supreme Court of 1 June 2007 has not yet been fully implemented. Although the State party granted the families of disappeared persons an interim relief of Nr 100,000, it has failed to implement the other directives, such as criminalizing enforced disappearance or prosecuting the perpetrators.

6.4 The authors reiterate that a first information report is not an effective remedy. As to the possibility of requesting compensation as a victim of torture under the Compensation relating to Torture Act, the authors point out that their relatives cannot materially pursue this procedure since they have been removed from the protection of the law by enforced disappearance, and that in general it is not an effective remedy with respect to the arbitrary detention and disappearance of their relatives. Likewise, it is not an effective remedy for the torture inflicted on them, since according to section 2 of the Act it applies only to torture committed in detention.

6.5 The potential future transitional justice mechanism is not relevant to the determination of the admissibility of the communication and, even if established, would not constitute an effective remedy. Fact-finding processes by non-judicial bodies can never replace access to justice and redress for victims of gross human rights violations and for their relatives, since it is the criminal justice system that is the more appropriate avenue for immediate criminal investigation and punishment.

6.6 The authors claim that, in the absence of concrete observations of the State party on the merits of the communication that refute their allegations, their claims should be considered substantiated. They point out that the State party refers to the investigations carried out by the Joint Secretaries at the Ministry of Home Affairs and by the Army; however, it failed to provide details as to how such investigations had been undertaken and why the Army concluded that seven of the authors' relatives had been killed in crossfire in April 2002.

Further submissions from the parties

7.1 On 4 July 2014 and 15 March 2015, the authors informed the Committee that on 25 April 2014 the State party's Parliament had adopted Act 2071 (2014) creating the Truth and Reconciliation Commission and the Commission on Investigation of Disappeared Persons. On 21 May 2014, the Act was published in the *Official Gazette*.

7.2 The authors point out that this Act is applicable to all cases of "serious violations of human rights" committed during the period of armed conflict, and argue that several provisions are incompatible with international human rights standards. Notably, it confers on the Commissions the power to recommend amnesties for gross violations of international human rights law or serious violations of international humanitarian law, such as the ones raised in the present communication; the Commissioners lack guarantees of independence and impartiality; and the Act fails to recognize the right of victims to full reparation.¹³ Should the Committee find that the Covenant has been violated in the present case, the Committee could recommend that the State party amend the Act, following appropriate consultation with victims, their families, civil society and the National Human Rights Commission.

7.3 On 26 February 2015, the Supreme Court found several provisions of Act 2071 (2014) contrary to the Interim Constitution and the State party's international obligations. Notably, it stated that the Act's amnesty provision was in violation of international law; that reconciliation could be granted only with the consent of the victims; that cases under consideration by the Court could continue to be dealt with by it, as they fell under its jurisdiction; and that the Attorney-General did not require the permission of the ministry to begin a prosecution. Nevertheless, the authors expressed their concern about the prospects

¹³ 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).

for implementation of the Supreme Court's decision, as the main political leaders had issued public statements rejecting the decision.

8. On 11 December 2014, the State party reiterated its commitment to establishing a transitional justice mechanism and informed the Committee about the adoption of the Act by its parliament, providing a brief description of the main provisions. It held that the Act was a landmark instrument to address the issue of past human rights violations committed by both the State party and non-State actors.

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 As required under article 5 (2) (a) of the Optional Protocol, the Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement. The Committee notes that the cases of Dhaniram, Radhulal, Kamala, Chillu, Lauti, Mohan, Prem Prakash and Soniram were reported to the Working Group on Enforced or Involuntary Disappearances. However, it recalls that extra-conventional procedures or mechanisms established by the Commission on Human Rights or the Human Rights Council, and whose mandates are to examine and report publicly on human rights situations in specific countries or territories, or cases of widespread human rights violations worldwide, do not generally constitute an international procedure of investigation or settlement within the meaning of article 5 (2) (a) of the Optional Protocol.¹⁴ Accordingly, the Committee considers that it is not precluded from examining the communication under this provision.

9.3 The Committee notes the State party's argument that the communication does not fulfil the requirements of article 5 (2) (b) of the Optional Protocol, owing to the fact that the authors have failed to lodge a complaint before a court under the Compensation relating to Torture Act and to invoke the State Cases Act, and that the cases of the authors' relatives should be addressed within the transitional justice mechanisms established by Act 2071 (2014), in conformity with the 2007 Interim Constitution and the 2006 Comprehensive Peace Agreement. The Committee also notes the authors' allegations that the Supreme Court quashed their writs of habeas corpus because they failed to identify where and by whom their relatives had been detained; the Compensation relating to Torture Act is not an adequate remedy for the violations suffered by their relatives; and 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, which does not include enforced disappearance. The Committee observes that, although the authors promptly reported their relatives' disappearance to the authorities, more than 13 years later the circumstances of their disappearance remain unclear and no investigation has yet been concluded. The Committee further recalls its jurisprudence that, in cases of serious violations, an effective judicial remedy is required. In this respect, the Committee observes that the transitional justice bodies established by Act 2071 (2014) are not judicial organs. 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.

¹⁴ See communication Nos. 1874/2009, *Mihoubi v. Algeria*, Views adopted on 18 October 2013, para. 6.2; and 1882/2009, *Al Daquel v. Libya*, Views adopted on 21 July 2014, para. 5.2.

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

Consideration of the merits

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

10.2 The Committee observes that the State party has not provided any concrete observation as to allegations raised by the communication. The Committee recalls that it is implicit in article 4 (2) of the Optional Protocol that the State party has the duty to investigate in good faith all allegations of violations of the Covenant made against it and its representatives and to provide the Committee with the information available to it. In cases in which the author has submitted allegations that are corroborated by credible evidence and in which further clarification depends on information that is solely in the hands of the State party, the Committee may consider the author's allegations substantiated in the absence of satisfactory evidence or explanations to the contrary presented by the State party.¹⁵

10.3 The Committee takes note of the authors' allegations that on 11 April 2002 members of the Royal Nepalese Army took their eight relatives and that they were never informed where their relatives were taken. The authors also claim that, although they reported promptly the arrest and disappearance of their relatives and filed several complaints and writs of habeas corpus, no ex officio, prompt, impartial, thorough and independent investigation has been carried out by the authorities; the fate and whereabouts of their relatives remain unknown to date; no one has been summoned or convicted for these acts; and that, in these circumstances, their relatives were victims of enforced disappearance.

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 represents a continuing violation of various rights recognized in that treaty.¹⁶

10.5 The Committee observes that in 2002, when the events occurred, the authors received contradictory information concerning their relatives' detention by different police offices and Army barracks and that, within the habeas corpus proceedings before the Supreme Court, the Ministry of Defence, the Ministry of Home Affairs, the Bardiya District Administrative Office and the Bardiya District Police Office, among other authorities, denied having arrested or detained their relatives. Later, on 25 July 2006, the Ministry of Home Affairs Royal Nepalese Army, concluded that Dhaniram, Chillu, Mohan, Kamala, Lauti, Soniram and Radhulal had been killed on 11 April 2002 in crossfire with the security forces in the nursery area of Manau. No information has been provided as to the fate and whereabouts of Prem Prakash. The State party has not, however, challenged the authors' allegation that the authorities did not undertake a thorough investigation and that it gave full credence to the information provided by the Human Rights Cell of the Army, which did not rely on any supporting evidence. The Committee also observes that the mortal remains of the authors' relatives' have not been returned to the families and no information has been provided by the authorities as to the location of the remains or the efforts that may have been undertaken to return them, thus keeping the authors in constant uncertainty. Against this background, the Committee considers that the State party has not explained the specific circumstances of the alleged death of the authors' relatives, nor has it produced evidence to

¹⁵ See communication No. 2111/2011, *Tripathi v. Nepal*, Views adopted on 29 October 2014, para. 7.2.

¹⁶ See communication No. 2000/2010, *Katwal v. Nepal*, Views adopted on 1 April 2015, para. 11.3.

indicate that it has fulfilled its obligation to protect their lives. Accordingly, the Committee concludes that the State party has failed in its duty to protect the lives of the authors' relatives, in violation of article 6 of the Covenant.

10.6 The Committee takes note of the authors' allegations that the detention and subsequent enforced disappearance of their relatives 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 authors' relatives constitutes a violation of article 7 of the Covenant.

10.7 The Committee also takes note of the anguish and stress caused to the authors by the disappearance of their relatives. In particular, the authors and their families have never received sufficient explanation concerning the circumstances surrounding their alleged deaths, nor have they received their 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 authors.

10.8 The Committee takes note of the authors' allegations under article 9 that their relatives were detained without an arrest warrant, that they were never brought before a judge or any other official authorized by law to exercise judicial power, and that they could not take proceedings before a court to challenge the lawfulness of their detention. In the absence of a State party's response in this regard, the Committee considers that the detention of the authors' relatives constitutes a violation of their rights under article 9 of the Covenant.

10.9 With regard to the alleged violation of article 16, the Committee considers that the intentional removal of a person from the protection of the law constitutes a denial of the right to recognition everywhere as a person before the law if the victim was in the hands of the State authorities when last seen and if the efforts of his or her relatives to obtain access to potentially effective remedies, including judicial remedies (see art. 2 (3) of the Covenant), have been systematically impeded. In the present case, the Committee notes that, shortly after the arrest of the authors' relatives, the authorities gave contradictory information about their arrest. Later, they failed to provide sufficient information concerning the fate or whereabouts of the authors' relatives, despite numerous requests. Accordingly, the Committee concludes that the enforced disappearance of the authors' relatives denied them the protection of the law and deprived them of their right to recognition as persons before the law, in violation of article 16 of the Covenant.

10.10 The authors invoke article 2 (3) of the Covenant, which imposes on States parties the obligation to ensure an effective remedy for all persons whose rights under the Covenant have been violated. The Committee attaches importance to the establishment by States parties of appropriate judicial and administrative mechanisms for addressing claims of rights violations. It refers to its general comment No. 31, which provides, *inter alia*, that a failure by a State party to investigate allegations of violations could, in and of itself, give rise to a separate breach of the Covenant. In the present case, the Committee observes that, shortly after the detention of the authors' relatives, the authors approached different police offices and Army barracks seeking information, and later filed writs of habeas corpus before the Supreme Court and complained to the National Human Rights Commission. Despite the authors' efforts, no thorough and effective investigation has been concluded by the State party to elucidate the circumstances surrounding their relatives' detention 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 by the Ministry of Home Affairs Disappearances Committee and

the concrete steps taken to clarify the circumstances of their detention or the cause of their alleged deaths. It has also failed to locate their mortal remains and return them to the authors' families. Therefore, the Committee considers that the State party has failed to conduct a thorough and effective investigation into the disappearance of the authors' relatives. Additionally, the Nr 100,000 received by the authors 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 the authors' relatives; and article 2 (3), read in conjunction with article 7 of the Covenant, with respect to the authors.

10.11 Having concluded that there was a violation of the above provisions, the Committee decides not to separately examine the authors' claims under articles 10, 17 (1), 23 and 24 (1) of the Covenant.

11. The Human Rights Committee, acting under article 5 (4) of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the information before it indicates violations by the State party of articles 6 (1), 7, 9 and 16; article 2 (3), read in conjunction with articles 6 (1), 7, 9 and 16 of the Covenant with regard to authors' relatives; and of article 7, as well as article 2 (3), read in conjunction with article 7, with respect to the authors.

12. In accordance with article 2 (3) of the Covenant, the State party is under an obligation to provide the authors with an effective remedy, including by: (a) conducting a thorough and effective investigation into the disappearance of their relatives and providing the authors with detailed information about the results of its investigation; (b) if their relatives are dead, locating their remains and handing them over to their families; (c) prosecuting, trying and punishing those responsible for the violations committed and making the results of such measures public; (d) ensuring that any necessary and adequate rehabilitation and treatment are provided to the authors; and (e) providing effective reparation, including adequate compensation and appropriate measures of satisfaction, to the authors for the violations suffered. The State party is also under an obligation to take steps to prevent similar violations in the future. In particular, the State party should ensure that its legislation allows for the criminal prosecution of those responsible for serious human rights violations such as torture, extrajudicial execution and enforced disappearance.

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

Appendix I

Individual opinion of Committee member Olivier de Frouville (concurring)

1. In its Views, the Committee has decided to abandon the time requirement (a time requirement that had arisen from the use of the terms “removal of a person from the protection of the law for a prolonged period of time”) and found a violation of article 16 resulting from an enforced disappearance. These terms were used because, in a number of earlier Views, the Committee had used the definition of enforced disappearance given in article 7 (2) (i) of the Rome Statute establishing the International Criminal Court.^a

2. This time condition contained in the definition of the Rome Statute, however, had been sharply criticized, especially by the independent expert charged by the Commission on Human Rights with examining the shortcomings of international law in the matter^b and by the Working Group on Enforced or Involuntary Disappearances.^c The Committee had itself given up the reference to the Rome Statute, opting instead for a reference to the International Convention for the Protection of All Persons from Enforced Disappearance, which had been adopted in the meantime.^d However, it inexplicably maintained the time requirement, without justifying why the removal of the person from the protection of the law needed to be “prolonged” in order to find a violation of article 16.

3. In fact, the denial of the recognition of the individuals subjected to enforced disappearance as persons before the law begins right from the outset of their deprivation of liberty, as shown by the testimonies of those who returned from that hell. The victims of enforced disappearance are never detained in an official place of detention; they are locked up either in the headquarters of the intelligence service, in the cellar of a requisitioned building or in an old disused barracks, and the first thing that the guards do to them is to make them feel totally vulnerable and completely at their mercy. There is no appeal; no help can be expected from outside and the very notion of “law” vanishes. All that is left is the physical and mental restraint of the guards, who treat their victims as objects, inflicting torture and ill-treatment on them and thereby denying their human dignity.

4. It is true that the practice of enforced disappearance has evolved since the turn of the century. Nowadays, short-term disappearances have proliferated, especially in the context of counter-terrorism, as was noted by the Working Group on Enforced or Involuntary Disappearances in its reports.^e In the 1970s, 1980s and even 1990s, only a few people ever

^a In the first place, in communication Nos. 1328/2004, *Kimouche v. Algeria*, Views adopted on 10 July 2007, para. 7.2; and 1327/2004, *Grioua v. Algeria*, Views adopted on 10 July 2007, para. 7.2.

^b See E/CN.4/2002/71, para. 74.

^c See general comment on the definition of enforced disappearance (2007), in particular, paras. 5 and 9.

^d See, for example, communication Nos. 1588/2007, *Benaziza v. Algeria*, Views adopted on 26 July 2010, para. 9.3, in which the Committee still refers to the Statute in a footnote; and 1863/2009, *Maharjan v. Nepal*, Views adopted on 19 July 2012, para. 3.1, in which only the Convention is referenced.

^e See A/HRC/19/58/Rev.1, para. 50:

The Working Group notes that, regrettably, enforced disappearances continue to be used by some States as a tool to deal with situations of conflict or internal unrest. The Working Group

survived enforced disappearance. Most of the victims, once placed in secret detention, died under torture or were summarily executed. A few were lucky enough to come out of it alive, after a few days or a few weeks of detention, especially if their cases had been made public soon enough by non-governmental organizations or United Nations protection bodies like the Working Group. A few others, in some countries, would “reappear” years or even decades later, completely shattered by the experience of confinement and the total denial of their rights.

5. This type of enforced disappearance is still practised in some contexts, and the cases that the Committee has come across in *Tharu et al. v. Nepal* probably fit into that category. To this form of enforced disappearance, however, has been added the practice whereby a person is made to disappear for the space of a few days or for several weeks, during which time he or she is maintained in secret detention outside any legal framework and tortured, before being handed over to the police and then to the courts, often with a falsified arrest warrant in an attempt to hide the real date of arrest. The person is then charged and tried on the basis of “confessions” obtained in fact under torture during the period of disappearance. Have these practices been created in an effort to circumvent the time condition laid down in article 7 of the Rome Statute and the particularly degrading attribute of “crime against humanity”? There is no way of knowing. But that is not essentially what matters. What really matters here is the recognition that in some cases, as in the more classic cases, the person is denied the right to recognition as a person before the law from the outset of his or her deprivation of liberty. The act of causing the person to disappear and to be placed in secret detention outside any legal framework is a way of signifying to the person’s family and acquaintances that the disappeared person is no longer a person before the law, that he or she ceases to legally exist and is no longer entitled to the protection of his or her country’s laws or of international law — and that, in those conditions, the person’s torturers can dispose of him or her exactly as they please.

6. This was why the Working Group recognized, in its general comment on the right to recognition as a person before the law in the context of enforced disappearances, that enforced disappearance represented “a paradigmatic violation” of the right to be recognized as a person before the law.^f Any enforced disappearance, however long it lasts, constitutes a violation of that right. It is fortunate that the Committee has amended its jurisprudence in that sense — even in a case that did not involve that type of short-term disappearance — as it can only add greater accuracy and relevance to the legal definition of the violation.

has also witnessed the use of “short term disappearances”, where victims are placed in secret detention or unknown locations, outside the protection of the law, before being released weeks or months later, sometimes after having been tortured and without having been brought in front of a judge or other civil authority. This very worrisome practice, whether it is used to counter terrorism, to fight organized crime or suppress legitimate civil strife demanding democracy, freedom of expression or religion, should be considered as an enforced disappearance and as such adequately investigated, prosecuted and punished.

See also, more recently, A/HRC/27/49, para. 117:

During the reporting period, the Working Group observed a pattern of short-term enforced disappearances being used in a number of countries, including Bahrain and the United Arab Emirates. The Working Group expresses its deep concern at the phenomenon. It stresses that there is no time limit, no matter how short, for an enforced disappearance to occur and that accurate information on the detention of any person deprived of liberty and their place of detention shall be made promptly available to their family members.

^f See A/HRC/19/58/Rev.1, para. 42.

Appendix II

Individual opinion of Committee member Anja Seibert-Fohr (concurring)

1. I concur with the Committee's conclusion on this communication. However, I am not in a position to support the broad legal reading of article 16 suggested in the first sentence of paragraph 10.9. Instead I would have retained the temporal element which has long been established in the Committee's jurisprudence.

2. Article 16 of the Covenant protects the right of everyone to recognition everywhere as a person before the law. The capacity to bear rights and duties is a necessary prerequisite to all other individual rights.^a The absolute and non-derogable nature of this right explicitly recognized in article 4 (2) of the Covenant demands a particularly careful determination of its scope. Accordingly, the Committee held in *Grioua v. Algeria* that "intentionally removing a person from the protection of the law *for a prolonged period of time* may constitute a refusal to recognize that person before the law if the victim was in the hands of the State authorities when last seen and, at the same time, if the efforts of his or her relatives to obtain access to potentially effective remedies, including judicial remedies (Covenant, art. 2, para. 3) have been systematically impeded [emphasis added]". It explained that, in such cases, victims "are in practice deprived of their capacity to exercise entitlements under the law, including all their other rights under the Covenant, and of access to any possible remedy as a direct consequence of the actions of the State".^b Since 2007, it has been the Committee's established case law that article 16 is violated when victims are systematically *and* for a prolonged period of time deprived of any possibility of exercising their rights and denied access to a remedy.^c

3. Under these circumstances, which include the temporal element and the systematic character of the deprivation, a de facto denial of the right to be treated as a bearer of rights is taking place.^a The temporal element is evidence of the refusal per se to recognize an individual as a person before the law. I am aware that the International Convention for the Protection of All Persons from Enforced Disappearance and the Inter-American Convention on Forced Disappearance of Persons do not contain a temporal element for the definition of enforced disappearance. However, the issue before us is not a determination of whether an atrocity qualifies as an enforced disappearance but whether it is in violation of article 16 of the Covenant. While recognizing the very serious nature of enforced disappearance as one of the most heinous human rights violations, and the immediate need for the effective protection for victims of enforced disappearance and their families, the fact that an atrocity inflicted upon a victim constitutes an enforced disappearance which is in violation of articles 6, 7 and 9 of the Covenant and thus requires immediate protection does not

^a See *Aboufaied v. Libya*, Communication No. 1782/2008, Views adopted on 21 March 2012, appendix, individual opinion of Committee member Walter Kälin.

^b See communication No. 1327/2004, *Grioua v. Algeria*, Views adopted on 10 July 2007, para. 7.8.

^c See, for example, communication Nos. 1640/2007, *El Abani v. Libyan Arab Jamahiriya*, Views adopted on 26 July 2010, para 7.9; 1751/2008, *Aboussedra v. Libyan Arab Jamahiriya*, para. 7.9; and 1495/2006, *Madoui v. Algeria*, Views adopted on 28 October 2008, para. 7.7.

automatically predetermine the legal analysis under article 16.^d Moreover, not every case of a denial of justice or access to a remedy in case of a violation of a right is in violation of article 16.^a

4. This line of reasoning is by no means intended to change or weaken the concept of enforced disappearance enshrined in the above-named conventions. Neither does it lead to a fragmented standard for a notion which is not included in the Covenant. It is the role of the Committee to examine communications on the basis of each of the Covenant provisions and to determine whether the factual circumstances are appropriate for finding a violation of the Covenant^e rather than generalizing or reinterpreting its guarantees by applying legal notions that are not enshrined therein.^f For the reasons outlined above, I do not recognize the rationale for renouncing the temporal element under article 16. It would be erroneous to find a violation thereof whenever there is a denial of justice for whatever short period of time. Apart from the fact that the modification was unnecessary for the outcome of the present very serious case, in which the victims had been removed from the protection of the law since 2002,^g I fear that lowering the threshold of article 16 for reasons which lie outside the Covenant risks undermining the fundamental value of this human rights guarantee in the long run.

^d See communication No. 2022/2011, *Hamulić v. Bosnia and Herzegovina*, Views adopted on 30 March 2015, appendix I, individual opinion by Committee member Anja Seibert-Fohr, para. 5.

^e Article 16 of the Covenant is an autonomous human right guarantee. The notion “recognition as a person before the law” differs from the wording in the International Convention for the Protection of All Persons from Enforced Disappearance. Accordingly, its interpretation is informed neither by this Convention nor by article 7 (2) (i) of the Rome Statute of the International Criminal Court.

^f See *Hamulić v. Bosnia and Herzegovina*, individual opinion by Committee member Anja Seibert-Fohr, para. 7.

^g The Committee found a violation of article 16 under its established jurisprudence, e.g. in Views of the Committee on communication No. 2000/2010, *Katwal v. Nepal*, adopted on 1 April 2015, para. 11.9.