



**International Covenant on  
Civil and Political Rights**

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**Human Rights Committee**

**Communication No. 1863/2009**

**Views adopted by the Committee at its 105th session (9–27 July 2012)**

<i>Submitted by:</i>	Dev Bahadur Maharjan (represented by counsel, Mandira Sharma, Advocacy Forum - Nepal)
<i>Alleged victims:</i>	The author, his wife and parents
<i>State party:</i>	Nepal
<i>Date of communication:</i>	31 December 2008 (initial submission)
<i>Document references:</i>	Special Rapporteur's rule 97 decision, transmitted to the State party on 19 February 2009 (not issued in document form)
<i>Date of adoption of Views:</i>	19 July 2012
<i>Subject matter:</i>	Arbitrary arrest and incommunicado detention, and acts of torture against a former teacher, on suspicion of membership in the Communist Party (Maoist).
<i>Substantive issues:</i>	Arbitrary arrest and detention; Torture and ill-treatment; incommunicado detention; enforced disappearance; conditions of detention; right to an effective remedy
<i>Procedural issues:</i>	Non-exhaustion of domestic remedies
<i>Articles of the Covenant:</i>	2, para. 3, alone and in conjunction with 7, 9, 10
<i>Articles of the Optional Protocol:</i>	5, para. 2 (b)



## Annex

### **Views of the Human Rights Committee under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights (105th session)**

concerning

#### **Communication No. 1863/2009\***

*Submitted by:* Dev Bahadur Maharjan (represented by counsel, Mandira Sharma, Advocacy Forum - Nepal)

*Alleged victims:* The author, his wife and his parents

*State party:* Nepal

*Date of communication:* 31 December 2008 (initial submission)

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

*Meeting on 19 July 2012,*

*Having concluded* its consideration of communication No. 1863/2009, submitted to the Human Rights Committee by Dev Bahadur Maharjan under the Optional Protocol to the International Covenant on Civil and Political Rights,

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

*Adopts* the following:

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

1. The author of the communication, dated 31 December 2008, is Dev Bahadur Maharjan, a national of Nepal, born on 22 March 1972. He alleges violations by Nepal of his rights under article 2, paragraph 3, read alone and in conjunction with articles 7, 9 and 10 of the Covenant. He also claims that the State party violated his family's rights under article 7 of the Covenant. The State party acceded to the Covenant and its Optional Protocol on 14 May 1991. The author is represented by counsel, Mandira Sharma (Advocacy Forum - Nepal).

#### **The facts as presented by the author**

2.1 On 15 November 2003, while the author, his wife and his parents were sleeping, soldiers of the Royal Nepalese Army (RNA) broke their door to gain entry into his house in

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\* The following members of the Committee participated in the examination of the present communication: Mr. Yadh Ben Achour, Mr. Lazhari Bouzid, Ms. Christine Chanet, Mr. Cornelis Flinterman, Mr. Yuji Iwasawa, Mr. Walter Kälin, Mr. Gerald L. Neuman, Mr. Michael O'Flaherty, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabián Omar Salvioli, Mr. Marat Sarsembayev, Mr. Krister Thelin and Ms. Margo Waterval.

Kathmandu. They questioned the author about his brother who was associated with the Communist party (Maoists). The soldiers searched the house and requested the author to sign a document confirming that they did not harm him, his family or property. The author was also requested to call one of the army officers within a week to reveal his brother's whereabouts, which the author did, without however having any information on his brother's location. After four or five days, the Armed Police Force<sup>1</sup> carried out a search at the author's house and questioned him about his brother. Around four or five days after that, plain clothes men with revolvers searched his house. The author was not presented with a warrant for any of the searches.

2.2 On 26 November 2003, the author was arrested at his home by members of RNA, some of them in plain clothes and some of them in uniform. He was asked to take them to his sister's house, where they suspected that his younger brother would be. He was then detained at the Chhauni military barracks in Kathmandu, where he was kept in the same room as his brother-in-law, R.M., who had also just been arrested. He was not presented with an arrest warrant, nor given any reason for his arrest. Eight months after his arrest, on 29 July 2004, he was given a preventive detention order for 90 days under the Terrorist and Disruptive Activities (Control and Punishment) Act.<sup>2</sup> This order expired on 26 October 2004. On 1 November 2004, the Chief District Officer of Kathmandu District signed a preventive detention order authorizing the author's detention under the Public Security Act.<sup>3</sup>

2.3 He was detained at the Chhauhni military barracks from 26 November 2003 to 17 September 2004, when he was transferred to an official detention facility, Sundarijal detention centre. For the majority of the 10 months that the author was held at the Chhauni Barracks, he was kept in overcrowded rooms infested with lice, he had to sleep on a blanket on the floor, he had limited access to sanitary facilities and he was allowed to wash only three times during his entire detention there. For his entire detention at the military barracks, the author was blindfolded or made to wear a hood which allowed him to look downwards only. Moreover, he was not able to contact his family and friends, or consult with a lawyer during this time. During visits by delegates of the International Committee of the Red Cross (ICRC), the author was hidden in a different room and was therefore not able to speak to them. However, on 17 August 2004, together with other detainees, the author wrote a letter to ICRC alerting them of the torture and conditions of detention. In addition, his detention at the military barracks was not officially acknowledged by the State party.

2.4 While he was detained in the military barracks, he was subjected to torture and ill-treatment. Sixteen days after the author's arrest, he was questioned for four consecutive nights about Maoist activity and a list of people, some of whom he knew. When the author answered that he was not a Maoist, he was beaten on his back, his legs, the soles of his feet, and shins, kicked in his chest and face, he was partially asphyxiated and cold water was spilled over him. On the last day of his questioning, the author was requested to direct the soldiers to the house of M.M., a social worker whom the author had met through his work as a teacher. The author directed them to the house. On their way back to the military

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<sup>1</sup> According to the author, the Armed Police Force is a paramilitary force founded in 2001.

<sup>2</sup> According to section 9 of the Terrorist and Disruptive Activities (Control and Punishment) Act, an individual can be preventively detained for up to a full year in cases where there exist appropriate grounds for believing that a person has to be stopped from doing anything that may cause a terrorist or destructive act.

<sup>3</sup> Section 3 (1) of the Public Security Act 1989 states that in cases where there exist adequate and appropriate grounds to prevent any person from doing anything which may immediately undermine the sovereignty, integrity or public tranquillity and order of the Kingdom of Nepal, the local authority may issue an order to detain such person in any specified place for a specified period.

barracks, the soldiers killed a random person who was standing at the perimeter fence of the barracks. They threatened the author not to tell anybody about this shooting or they would kill him. After this event, the author feared even more for his life. On the fourth day of his questioning, the author was in severe pain; he had fever and could not move his body on his own. His brother-in-law, who was detained in the same room, witnessed the author's injuries and stated that, during four consecutive nights, he heard the author scream in the neighbouring room. During his whole detention at the military barracks, the author did not receive any medical treatment.

2.5 After the author's disappearance, his family and friends tried to search for him. They visited the Chhauni barracks, as well as other army barracks and police stations. They visited Government offices, including the Army Headquarters and District Administration Offices. They also approached ICRC, local human rights organizations, the Human Rights Committee of the Nepal Bar Association and the National Human Rights Commission (NHRC). The author's father staged a sit-in to try to put pressure on the Government to release the author or at least reveal his whereabouts to the family. Despite repeated efforts, no official confirmation of the author's detention and whereabouts could be obtained. It was only upon his transfer to the Sundarijal detention centre on 17 September 2004 when his detention was acknowledged and he was able to receive visitors.

2.6 The author was released from detention on 7 January 2005, after his sister filed a successful writ of habeas corpus with the Supreme Court. The Supreme Court held that the author had been detained without sufficient ground and reason and without complying with appropriate legal procedure. He was never charged with any offence. Despite the passage of almost three years since his release, there has been no investigation by the State party into his enforced disappearance and torture and he has not been given any compensation.

2.7 On the day of the author's release, attempts were made by the security forces to re-arrest him and the author had to switch vehicles on two occasions. The car in which the author was originally travelling was pulled over and the occupants were interrogated by the police.<sup>4</sup> The author went into hiding for about two weeks after his release fearing for his life and freedom. Approximately three to four weeks after his release, the author went to the Centre for Victims of Torture (CVICT); however, when they referred him to the hospital, he noticed that their vehicle was being followed by army personnel. Due to fear of re-arrest or reprisals by the army, the author did not go to the hospital and did not return to CVICT. For about seven months after the author's release, he had difficulties walking any substantial distance, had trouble eating, suffered from fever and continues suffering from respiratory problems, in particular during winter. He also has long and short-term memory problems and, as a consequence, had to quit his teaching job. According to a medical certificate of 23 May 2008, the author suffers from depression and post-traumatic stress disorder. He did not suffer of any of those conditions before his detention.

2.8 The author's enforced disappearance placed substantial financial and psychological stress on his family. The author was the only breadwinner of the family. The author's wife and father experienced health problems due to their constant worry and the author's wife, who was eight months pregnant when the author was arrested, had complications during the birth of their daughter.

2.9 With regard to the exhaustion of domestic remedies, the author cites the Committee's jurisprudence, according to which the exhaustion of domestic remedies rule

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<sup>4</sup> See International Commission of Jurists, "Attacks on Justice – Nepal" (11 July 2005), stating that the remedy of habeas corpus was not effective to combat arbitrary detention, because – among other reasons – police and military authorities simply re-arrested detainees immediately following their release from custody.

does not require resort to actions that objectively have no prospect of success,<sup>5</sup> nor does it require that victims pursue remedies that are either inapplicable de jure or de facto and do not constitute an effective remedy within the meaning of article 2, paragraph 3 of the Covenant,<sup>6</sup> and claims this should apply to his case. He maintains that the domestic remedies are ineffective and insufficient and that the level of fear the author felt at the time of his release prevented him from exhausting them. First of all, the author explains that the crimes of torture,<sup>7</sup> ill-treatment, enforced disappearance and incommunicado detention are not criminalized in domestic criminal law. Torture, inhuman treatment and enforced disappearance are addressed in the Constitution; however, there is no implementing legislation criminalizing them. Therefore, the author cannot make a complaint to the police, nor the police investigate ex officio, as the crimes are not contained in legislation. The author could have filed a complaint to the police or to the District Court for private prosecution of a lesser crime, such as assault or inhuman detention; however, the author claims that filing such complaints would have not provided him with any redress, as they fail to take into account the gravity of the harm suffered and they are unlikely to result in an independent investigation, as the police was placed under the RNA command structure in November 2003. Moreover, the author argues that the Army Act of 1959 and the new Army Act of 2006 grant immunity for army personnel for any actions taken in good faith “while discharging their duties”, including torture and enforced disappearances. The same applies for actions under the Terrorist and Disruptive Activities (Control and Punishment) Ordinance, 2004, under which the author was detained from 29 July to 26 October 2004.

2.10 The author further claims that the habeas corpus writ to the Supreme Court only became available once the authorities officially recognized his detention, as it was common practice by the Supreme Court to dismiss the complaint if the authorities denied the arrest. In addition thereto, during his detention at the military barracks, the author was not able to take any steps to challenge his detention, as he was prevented from coming into contact with any organization that could help him and not brought before a judge or allowed to see a doctor.

2.11 On 27 November 2003, the author’s brother submitted an application to a local non-governmental organization, the Human Rights Organization of Nepal, who wrote on 1 December 2003 to the National Human Rights Commission (NHRC).<sup>8</sup> However, the author is not aware of any actions that NHRC took as a result of this. On 7 March 2008, the author decided to contact NHRC again requesting compensation. However, in November 2008, he was unofficially informed that no steps had been taken to investigate his complaint. The author explains that even if NHRC had investigated his complaint, the remedy would not bring effective relief, as NHRC can only make recommendations to the authorities and cannot enforce its decisions.<sup>9</sup>

<sup>5</sup> See communication No. 210/1986, *Pratt and Morgan v. Jamaica*, Views adopted on 6 April 1989, para. 12.3.

<sup>6</sup> See communication No. 84/1981, *Dermitt Barbato v. Uruguay*, Views adopted on 21 October 1982, para. 9.4.

<sup>7</sup> See report by the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak: Mission to Nepal, E/CN.4/2006/6/Add.5, para. 14.

<sup>8</sup> The National Human Rights Commission is Nepal’s national human rights institution, accredited with A Status, complying with the principles relating to the status of national institutions for the promotion and protection of human rights (Paris Principles) of the International Coordinating Committee on National Human Rights Institutions.

<sup>9</sup> See Jyoti Sanghera, Deputy Representative of the Office of the United Nations High Commissioner for Human Rights in Nepal, welcome remarks at the International Day in Support of the Victims of Torture, 3 July 2008.

2.12 The author adds that the Public Security Act under which he was detained from 1 November 2004 to 7 January 2005 contains a remedy that is inadequate, as it only provides for departmental action or compensation as redress if the detention was an act of bad faith. In addition thereto, it is subject to a short statutory limitation of 35 days. The author claims that the same is true for the Terrorist and Disruptive Activities (Control and Punishment) Act. Both acts allow for preventive detention up to a year and the author would have only been able to petition for compensation and not for release and only, moreover, if he could establish that the authorities acted in bad faith.

2.13 The author claims that the Compensation relating to Torture Act does not provide for criminal accountability but only compensation of a maximum of approximately US\$ 1,266 (100,000 Nepali rupees). A claim must be filed within 35 days of the torture or release from detention and the applicant may be fined if it is decided that the claim was ill-intended or groundless. The author claims that due to his justified fears of reprisals and re-arrest and to the insufficient nature of the remedy itself, he should not be required to exhaust it.

### **The complaint**

3.1 The author claims to be a victim of an enforced disappearance<sup>10</sup> and recalls that the key element defining such disappearance is the act of placing the detainee outside of the protection of the law.<sup>11</sup> He claims to be a victim of a violation of article 7 in conjunction with article 2, paragraph 1,<sup>12</sup> by being detained unacknowledged and incommunicado at the Chhauni military barracks from 26 November 2003 to 17 September 2004.<sup>13</sup> The author notes that he was actively prevented from coming into contact with outside organizations, as he was being hidden from ICRC delegates visiting the barracks and his detention was not officially acknowledged until his transfer to the Sundarijal detention centre.

3.2 He also submits that, during four consecutive nights, the RNA soldiers subjected him to both physical and mental torture to obtain information on Maoist activities, as a result of which he fell unconscious on one occasion, suffered from a severe fever, was in pain and unable to walk for a period of time and continues to experience difficulties walking long distances. In addition to that, during his detention at the military barracks, the author was randomly hit and kicked, threatened with death, subjected to verbal abuse and in constant fear of being killed. The author claims that this constitutes torture or at least cruel, inhuman or degrading treatment contrary to article 7. He further claims that the denial of

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<sup>10</sup> See article 2 of the International Convention for the Protection of All Persons from Enforced Disappearance.

<sup>11</sup> Working Group on Enforced or Involuntary Disappearances, general comment on the definition of enforced disappearance.

<sup>12</sup> See communication No. 540/1993, *Celis Laureano v. Peru*, Views adopted on 25 March 1996, para. 8.5.

<sup>13</sup> See communications No. 1469/2006, *Sharma v. Nepal*, Views adopted on 28 October 2008, para. 7.2; No. 107/1981, *Quinteros Almeida v. Uruguay*, Views adopted on 21 July 1983, para. 13; No. 440/1990, *El-Megreisi v. Libyan Arab Jamahiriya*, Views adopted on 23 March 1994, para. 5.4; No. 458/1991, *Mukong v. Cameroon*, Views adopted on 21 July 1994, para. 9.4; No. 428/1990, *Bozize v. Central African Republic*, Views adopted on 7 April 1994, para. 5.2; No. 950/2000, *Sarma v. Sri Lanka*, Views adopted on 16 July 2003, para. 9.5; No. 540/1993 paras. 8.3–8.5; No. 542/1993, *Tshishimbi v. Zaire*, Views adopted on 25 March 1996, para. 5.5.

medical treatment during his detention constitutes a breach of articles 7 and 10, paragraph 1.<sup>14</sup>

3.3 The author claims that being kept in an overcrowded room infested by lice, blindfolded/hooded during the entire detention, being given inadequate food during the first two months of his detention and being allowed to wash only three times during his entire detention at the military barracks amounts to ill-treatment in contravention of articles 7<sup>15</sup> and 10.<sup>16</sup> He further refers to the Committee's general comment No. 21 (1992) on humane treatment of persons deprived of their liberty<sup>17</sup> and claims that his detention conditions were debasing and humiliating and failed to abide by the Standard Minimum Rules for the Treatment of Prisoners. He claims that the State party therefore breached article 10.

3.4 The author further claims that the State party failed in its duty to investigate the author's allegations and prosecute those responsible, despite having been informed of them on various occasions.<sup>18</sup> He claims that the State party thus violated its duty under article 7 read in conjunction with article 2, paragraph 3.

3.5 The author also claims that by subjecting his family to mental distress and anguish caused by the uncertainty concerning his fate and whereabouts violated article 7 in their respect.<sup>19</sup>

3.6 The author submits that the State party breached article 9, paragraph 1, because he was detained from 26 November 2003 to 29 July 2004 and from 26 October 2004 to 1 November 2004 without any authorization,<sup>20</sup> contrary to the procedures established under domestic law.<sup>21</sup> The author further submits that, in failing to inform him of the legal grounds of his arrest or of any charge against him until he was given a detention order under the Terrorist and Disruptive Activities (Control and Punishment) Act on 29 July 2004, the State party breached article 9, paragraph 2. The author submits that the State party's failure to promptly bring him before an independent judicial authority and thus preventing him from challenging his detention<sup>22</sup> breached article 9, paragraphs 3 and 4. The author claims that in keeping him in unacknowledged and incommunicado detention and in failing to provide him with an effective remedy, including compensation violated his rights under article 9, paragraph 5 read in conjunction with article 2, paragraph 3.

3.7 Finally, the author claims that article 2, paragraph 3, has been violated in itself,<sup>23</sup> as there is no law criminalizing enforced disappearances, ill-treatment or torture, the State

<sup>14</sup> See general comment No. 20 (1992) on the prohibition of torture or cruel, inhuman or degrading treatment or punishment, *Official Records of the General Assembly, Forty-seventh Session, Supplement No. 40 (A/47/40)*, annex VI, sect. A, para. 11.

<sup>15</sup> See communication No. 265/1987, *Vuolanne v. Finland*, Views adopted on 7 April 1989, para. 9.2.

<sup>16</sup> See communication No. 458/1991, para. 9.3.

<sup>17</sup> See *Official Records of the General Assembly, Forty-seventh Session, Supplement No. 40 (A/47/40)*, annex VI, sect. B, para. 3.

<sup>18</sup> See general comment No. 20, para. 14.

<sup>19</sup> See communications No. 107/1981, para. 14; No. 1469/2006, para. 7.9; No. 950/2000, para. 9.5.

<sup>20</sup> The author was detained under the Terrorist and Disruptive Activities (Control and Punishment) Act from 29 July 2004 to 26 October 2004 (90 days) and under the Public Security Act from 1 November 2004 until his release on 7 January 2005.

<sup>21</sup> See communication No. 950/2000, para. 9.4.

<sup>22</sup> See general comment No. 8 (1982) on the right to liberty and security of persons, *Official Records of the General Assembly, Thirty-seventh Session, Supplement No. 40 (A/37/40)*, annex V, para. 4.

<sup>23</sup> See communications No. 1469/2006, para. 9; No. 992/2001, *Saker v. Algeria*, Views adopted on 30 March 2006, para. 9.12; No. 90/1981, *Luyeye Magana ex-Philibert v. Zaire*, Views adopted on 21 July 1983, para. 8; general comment No. 31 (2004) on the nature of the general legal obligation

party was unwilling or unable to investigate the author's allegations and there were no proper and accurate records of detainees, which diminished the possibility of filing a habeas corpus petition.

#### **The State party's observations on the admissibility and the merits**

4.1 On 27 April 2010, the State party submits that the author was arrested on 29 July 2004 and was handed over to the Sundarijal detention centre on 17 September 2004. It argues that there was no evidence that the author had been tortured and the letter of handover submitted to the detention centre did not contain any remarks about the alleged torture. It notes that the then prevailing 1990 Constitution and the currently prevailing Torture Compensation Act provided for a constitutional remedy and compensation in cases of torture. The State party assures the Committee that the authorities would respect and cooperate with the proper domestic legal procedure, if such a case were lodged. It notes that if the court decided that torture had been inflicted, it could award compensation to the victim and make a recommendation about the necessary actions against the perpetrators. The State party notes that the author has failed to exhaust domestic remedies, as the Army has not received any communication from any competent office or court of law.

4.2 On 16 July 2010, the State party submits additional observations and reiterates that the author was arrested on 29 July 2004 and detained for the purpose of interrogation on the ground that some of his activities were considered a threat to public peace and security. On 17 September 2004, upon the order of the District Administration Office, he was transferred to the detention centre at Sundarijal where he was preventively detained. On 5 January 2005, as per verdict of the Supreme Court, the author was released.

4.3 The State party submits that the author's allegation of torture is groundless, as there was no record about it in the relevant documents. The State party also maintains that any relative or legal counsel may appeal to the district court to request the examination of the physical and mental condition of the supposed victim of torture within three days. However, in relation to the author, the State party did not find any record of such an appeal. It also notes that the author's sister's writ of habeas corpus did not contain any mention of torture. It submits that the author or his relatives did not file any complaint for compensation. The State party therefore maintains that the author's claim is not based on truth. It argues that the author was immediately released upon order by the Supreme Court and has found to be living a free life afterwards and has not sought any kind of redress for the alleged mistreatment or torture.

4.4 The State party reiterates that both the then prevailing 1990 Constitution and the Compensation relating to Torture Act 1996 offer a legal remedy in cases of torture. Article 14, sub-article 4, of the Constitution 1990 stipulated that "no person who is detained during investigation, for trial or for any other reason shall be subjected to physical or mental torture, nor shall be subjected to any cruel, inhuman or degrading treatment. Any person so treated shall be compensated in a manner as determined by law". Pursuant to the Compensation relating to Torture Act, an individual who has been tortured during detention can file a complaint to the district court claiming compensation within 35 days of being tortured or of release. If the victim is dead or unable to file a complaint on his own, a member of his family or legal counsel can file such a complaint on his behalf. If the court finds that the allegation is true, it may award compensation up to 100,000 Nepalese rupees and may order departmental action against the Government employee responsible for such act. The State party notes that it has been established both nationally and internationally

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imposed on States parties to the Covenant, *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 40*, vol. I (A/59/40 (Vol. I)), annex III, para. 15.



that the State party's judiciary have fulfilled its responsibility in a free and impartial manner even during the difficult days of armed conflict and political adversity. The present communication attests that the author has been released after the order of the competent court. The author however has not made any effort to seek legal remedy before the courts; the State party therefore holds that his allegation of torture cannot be established and should therefore be dismissed.

4.5 The State party submits that the author was not arrested because he was a teacher but because of then prohibited activities he was involved in. The State party notes that the security services have separate human rights units and that training has been regularly carried out, including by the Office of the United Nations High Commissioner for Human Rights in Nepal. It notes that the security institutions are bearing the extra pressure of ensuring peace and security to the general public and that it is counterproductive to impeach the security agencies for unfounded allegations of human rights violations. It notes its full commitment to human rights and assures that all people in the country are provided with equal protection of the law and the opportunity to redress through judicial and administrative procedures established by law. It further reiterates its commitment to constructively engage with the Human Rights Committee. It requests that the present communication be dismissed for the aforementioned ground.

#### **Author's comments on the State party's observations**

5.1 On 19 July 2010, the author submits his comments on the State party's observations of 27 April 2009 and notes that, contrary to the State party's observations, he was already arrested on 26 November 2003. The date of the 29 July 2004 is not the date of his arrest but the date on which he was given a detention order under the Terrorist and Disruptive Activities (Control and Punishment) Act.

5.2 With regard to the exhaustion of domestic remedies, the author recalls the Committee's jurisprudence<sup>24</sup>, according to which the domestic remedies must be capable of remedying the alleged violations, that they must be available and effective both in law and practice and have objectively prospect of success. They also must not be too dangerous for the complainant.<sup>25</sup>

5.3 The author reiterates that the writ of habeas corpus remedy was not available to him or his family while he was detained incommunicado at the Chhauni barracks, as he was prevented from any contact with the outside world and as at the time, the Supreme Court had a practice to reject writs of habeas corpus in which the place of detention was not mentioned. Once the author's detention was officially recognized, his sister filed a writ of habeas corpus; however, not knowing about the author's torture and ill-treatment, she did not mention it in her petition. At the court hearing, the marks of torture were hidden under the author's clothes, the judge did not ask the author about the treatment at the place of detention and the author was too scared to volunteer this information, in particular as he did not have any medical evidence. In addition to that, on release, attempts were made to re-arrest the author as he was leaving the court. He notes that this was common practice at the

<sup>24</sup> See communication No. 594/1992, *Phillip v. Trinidad and Tobago*, Views adopted on 20 October 1998, para. 6.4; communication No. 210/1986, para. 12.3.

<sup>25</sup> See communication No. 594/1992, para. 6.4; see also African Commission on Human and Peoples' Rights, *Alhassan Abubakar v. Ghana*, communication No. 103/93, para. 6; African Commission on Human and Peoples' Rights, *Sir Dawda K. Jawara v. The Gambia*, communications No. 147/95 and 149/96, para. 35.

time.<sup>26</sup> In addition to that, the author notes that, three or four weeks after his release, he consulted the Centre for Victims of Torture, Nepal (CVICT) and, upon their referral to a hospital, was followed by army personnel and was therefore not able to reach the hospital. Due to these threats and his fear of reprisals and re-arrest, the author did not make a complaint to the police, the army or under the Compensation relating to Torture Act.

5.4 The author reiterates that a complaint was registered on his behalf with NHRC on 3 December 2003 (see para. 2.11). On 8 July 2010, the author received a letter confirming that a complaint had been registered. It mentioned that the author had been disappeared by the security forces during the time of the armed conflict on 1 December 2003.<sup>27</sup> The author maintains that an application to NHRC is not an effective remedy, as NHRC, a non-judicial body,<sup>28</sup> can only issue recommendations. Nevertheless, NHRC was the only body to which the author could turn without fear of reprisals. NHRC took his statement while he was in detention at the Sundarijal detention centre and advised him not to file a claim under the Compensation relating to Torture Act. The author also notes that the State party has not investigated his allegations after the present communication was transmitted to it and that this fact therefore constitutes a separate violation of article 7.<sup>29</sup>

5.5 The author further reiterates that beyond his legitimate fear for his own safety, the remedies under the Constitution and the Compensation relating to Torture Act do not present available and effective remedies for the purposes of the exhaustion rule. The 1990 Constitution did not define torture as a crime. The 2007 Interim Constitution established torture and enforced disappearance as a criminal offence; however, no bill providing the criminal penalties has been passed by the legislature. Incommunicado detention is not mentioned in either constitutions and is not criminalized. In addition, the author maintains that a complaint under the Compensation relating to Torture Act is not an effective remedy, as the Act does not provide criminal accountability for those responsible,<sup>30</sup> and due to the author's fears of reprisal and his physical and mental state after his release, he would not have been able to submit a complaint within 35 days as provided for by the Act. The author further argues that the statutory limitation is not in compliance with article 7.<sup>31</sup> Moreover, due to the absence of any medical exam during his detention and fear of re-arrest and reprisals upon release, the author was also unable to obtain medical evidence to substantiate a claim under the Compensation relating to Torture Act. In addition to that, the author argues that he was not able to file a criminal complaint under domestic legislation, as the alleged crimes were not illegal and an investigation into the crimes would have been carried out by the army itself or the police under unified command of the army and would therefore not have been independent.

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<sup>26</sup> See Committee against Torture, conclusions and recommendations of the Committee against Torture: Nepal, CAT/C/NPL/CO/2, para. 28; Amnesty International urgent actions No. 83/05, 12 April 2005; No. 275/04, 18 October 2004; No. 12/06, 12 January 2006; No. 358/03, 11 January 2005.

<sup>27</sup> The letter by NHRC does not provide any further details on the circumstances or length of his disappearance.

<sup>28</sup> See pp. 9–10 of the State party's response in communication No. 1761/2008, *Giri v. Nepal*, Views adopted on 24 March 2011; communication No. 612/1995, *Vicente et al. v. Colombia*, Views adopted on 14 June 1994, para. 5.2.

<sup>29</sup> See general comment No. 31, para. 15.

<sup>30</sup> Section 7 of the Compensation relating to Torture Act provides that if it is held that torture has been committed in accordance with this Act, the district court shall order the concerned authority to take a departmental action according to existing law against the government employee who committed the act of torture.

<sup>31</sup> See article 29 of the Rome Statute of the International Criminal Court; also see general comment No. 31, para. 18.

5.6 With regard to the evidence, the author submits that he has provided credible and detailed evidence to support his allegations, such as a detailed personal testimony, a testimony by a fellow detainee, his brother-in-law detained at the same time, his wife and sister describing his physical injuries and change in personality, a letter from a local non-governmental organization to NHRC, a letter from a group of detainees, including the author, to ICRC, as well as medical and psychological reports. The author notes that the State party did not provide any evidence to refute his claims. Furthermore, the letter of transferral to the Sundarijal detention centre, to which the State party refers, has not been shown to the author and was not annexed to the State party's observations to the Committee. Additionally, regardless of the content of that letter, the author maintains that he has never received any medical treatment during his detention and that prior to his detention, the author was in good health and the State party has not provided any explanation to show that his injuries did not result from torture or other ill-treatment while in detention.

#### **Additional comments from the author**

6.1 On 28 September 2010, the author submits his comments on the State party's additional observations of 16 July 2010 and reiterates his comments of 19 July 2010. The author reiterates that he was not arrested on 29 July 2004, but on 26 November 2003 and that he was released on 7 January 2005 and not on 5 January 2005,<sup>32</sup> as indicated in the State party's observations. With regard to the reasons of detention stated by the State party, the author notes that he was not given any reasons on arrest and that the State party has never presented any evidence of his wrongdoing.

6.2 The author notes that he has never been taken before a judge and was not charged with any offence. He submits that under article 3 (3) of the Compensation relating to Torture Act, the detaining authorities have a duty to provide copies of medical reports to the district court and the fact that the State party is not invoking such reports confirms that no medical examinations have been carried out.

6.3 With regard to the State party's observations that "at the time when there is a need of enhancing morale of security institutions and making them more effective, it is counterproductive to impeach security agencies for unfounded allegations", the author contends that in instances in which an arguable case of arbitrary arrest, torture and other ill-treatment is made, the State party is under a duty to conduct a full, thorough and effective investigation into the allegations and is obliged to provide the victim with an effective remedy and adequate reparation. He notes that policy arguments or the profile of those responsible do not alter the State party's obligations.<sup>33</sup>

#### **Issues and proceedings before the Committee**

##### *Consideration of admissibility*

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

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

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<sup>32</sup> A letter from the Supreme Court to the Sundarijal detention centre requesting the author's release is stamped on 6 January 2005.

<sup>33</sup> See general comment No. 31, paras. 4, 14 and 18.

7.3 With respect to the exhaustion of domestic remedies, the Committee notes the State party's argument that the communication does not fulfil the requirements of article 5, paragraph 2 (b), of the Optional Protocol, because the author has not brought any claim to the domestic courts. It notes that the State party claims that the author could have made an application under the then prevailing 1990 Constitution, under the Compensation relating to Torture Act 1996 and to the district court to request the examination of his physical and mental condition within three days. It also notes the State party's argument that the habeas corpus writ did not contain any mention of the alleged torture. The Committee also notes the author's argument that domestic remedies are not effective, as: (a) the alleged violations are not criminalized; (b) complaints for lesser crimes would neither be investigated independently, the police having been placed under the Royal Nepalese Army (RNA) command structure, nor would they provide adequate redress; (c) his unacknowledged detention could not be challenged in the Supreme Court and once it was acknowledged, his sister did not know about his torture and ill-treatment; (d) a claim under the Public Security Act and the Terrorist and Disruptive Activities (Control and Punishment) Act, 2004, could not provide for release but only compensation if it was established that the authorities acted in bad faith and was not available due to the short statutory limitation; and (e) a claim under the Compensation relating to Torture Act would not provide for adequate redress and was not available due to the short statutory limitation. The Committee also notes the author's claim that his fear of reprisals and re-arrest prevented him from exhausting any remedies except for a claim lodged with NHRC.

7.4 In this regard, the Committee recalls that for the purposes of article 5, paragraph 2 (b), of the Optional Protocol, domestic remedies must both be effective and available, and must not be unduly prolonged.<sup>34</sup> With regard to the author's failure to raise claims of his enforced disappearance, torture, ill-treatment, arbitrary arrest and inhuman conditions of detention, the Committee observes that the State party has merely listed *in abstracto* the existence of remedies regarding the author's allegation of torture under the then prevailing 1990 Constitution, the Compensation relating to Torture Act and an application to the District Court, without however relating them to the circumstances of the author's case and without showing how they might have provided effective redress in the circumstances. The Committee recalls that the effectiveness of a remedy also depends on the nature of the alleged violation.<sup>35</sup>

7.5 The Committee observes that article 14, paragraph 4, of the Constitution stipulates a general principle prohibiting physical and mental torture, as well as cruel, inhuman or degrading treatment of detainees. However, this general prohibition does not appear to have been translated in the State party's laws through defining the relevant crimes and corresponding penalties. The Committee recalls its general comment No. 20, in which it holds that it is not sufficient for the implementation of article 7 to prohibit such treatment or punishment or to make it a crime. States parties should inform the Committee of the legislative, administrative, judicial and other measures they take to prevent and punish acts of torture and cruel, inhuman and degrading treatment in any territory under their jurisdiction.<sup>36</sup> In the light of the grave nature of the alleged violations and in the absence of any information on how an application under the Constitution may have provided effective relief to the author, including a prompt, effective and impartial investigation into his allegations and punishment of those responsible, the Committee considers that this

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<sup>34</sup> See communications No. 1560/2007, *Marcellana and Gumanoy v. The Philippines*, Views adopted on 30 October 2008, para. 6.2; No. 1469/2006, para. 6.3; No. 1761/2008, para. 6.3.

<sup>35</sup> See communication No. 612/1995, para. 5.2; communication No. 322/1988, *Rodríguez v. Uruguay*, Views adopted on 19 July 1994, para. 6.2; communication No. 540/1993, para. 7.2.

<sup>36</sup> See general comment No. 20, para. 8.

constitutional remedy did not need to be pursued for purposes of article 5, paragraph 2 (b), of the Optional Protocol.

7.6 With regard to the remedy under the Compensation relating to Torture Act 1996, the Committee observes that, according to article 5, paragraph 1, of the Act claims for compensation must be made within 35 days from the event of torture or after a detainee's release. It also notes that according to article 6, paragraph 2, of the Compensation relating to Torture Act, an applicant may be fined if it is proved that he acted in bad faith. It further notes that the Act provides for a maximum compensation of 100,000 Nepalese rupees (art. 6, para. 1, of the Act). Reiterating its previous jurisprudence, the Committee considers that to sue for damages for offences as serious as those alleged in the present case cannot be considered a substitute for the charges that should be brought by the authorities against the alleged perpetrators.<sup>37</sup> The Committee observes that, for purposes of admissibility, the author's fear of re-arrest or reprisals after his release from detention has been sufficiently substantiated, including by documentary evidence of similar cases. The Committee therefore considers that because of the 35-day statutory limit from the event of torture or the date of release for bringing claims under the Compensation relating to Torture Act, which is in itself flagrantly inconsistent with the gravity of the crime,<sup>38</sup> this remedy was not available to the author.

7.7 Concerning the State party's argument that the author or someone on his behalf could have filed an application to the district court to request the examination of his physical and mental condition within three days, the Committee observes that the author was detained incommunicado and his family did not have any knowledge of his whereabouts or treatment. It also notes that the State party has not provided any explanation how this remedy would have been available in the author's specific case and how it might have provided effective relief. The Committee therefore considers that, in the circumstances of the present case, this remedy was not available to the author or his family.

7.8 The Committee concludes that, in the circumstances of the case, it cannot be held against the author that he had not raised these allegations before the State party's courts. It also observes that both the author and his family have complained to the State party's authorities about the author's arbitrary arrest and incommunicado detention. Therefore, the Committee accepts the author's argument that, in the circumstances of his case, domestic remedies were neither effective and nor available and considers that it is not precluded by article 5, paragraph 2 (b), of the Optional Protocol from examining the communication.<sup>39</sup> The Committee sees no further obstacles to the consideration of the communication and therefore proceeds to its examination on the merits of the author's allegations under article 2, paragraph 3, read alone and in conjunction with articles 7, 9, and 10 of the Covenant.

#### *Consideration of the merits*

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

8.2 Regarding the author's alleged unacknowledged detention, the Committee recognizes the degree of suffering involved. It recalls its general comment No. 20 (1992) on

<sup>37</sup> See communication No. 1588/2007, *Benaziza v. Algeria*, Views adopted on 26 July 2010, para. 8.3.

<sup>38</sup> See general comment No. 31, para. 18.

<sup>39</sup> See communication No. 1633/2007, *Avadanov v. Azerbaijan*, Views adopted on 25 October 2010, para. 6.4.

the prohibition of torture or cruel, inhuman or degrading treatment or punishment.<sup>40</sup> It notes that, according to the information available to the Committee, he was detained incommunicado without an arrest warrant on 26 November 2003 and, on 29 July 2004, eight months after his arrest, he was presented with a preventive detention order under the Terrorist and Disruptive Activities (Control and Punishment) Act. It also notes that the State party, without further explanation, states that the author was arrested on 29 July 2004. During his incommunicado detention at the military barracks until his transfer to Sundarijal detention centre on 17 September 2004, he was prevented from any contact with his family or the outside world. He remained in preventive detention until 7 January 2005.

8.3 The Committee notes that the State party has not provided any response to the author's allegations regarding his enforced disappearance, nor has it substantively refuted his allegation that, on four consecutive nights, he was subjected to acts of torture and ill-treatment at the military barracks. The Committee also notes the author's claim that, during his detention at the military barracks, he was kept in overcrowded rooms infested by lice, had to sleep on a blanket on the floor, was blindfolded/hooded during the entire detention, was given inadequate food during the first two months, had limited access to sanitary facilities, was allowed to wash only three times during his entire detention and was randomly hit and kicked, as well as verbally abused and threatened by the guards. The Committee reaffirms that the burden of proof cannot rest on the author of the communication alone, especially since the author and the State party do not always have equal access to the evidence and it is frequently the case that the State party alone has the relevant information.<sup>41</sup> It is implicit in article 4, paragraph 2, of the Optional Protocol that the State party has the duty to investigate in good faith all allegations of violations of the Covenant made against it and its representatives and to furnish to the Committee the information available to it. In cases where the allegations are corroborated by credible evidence submitted by the author and where further clarification depends on information that is solely in the hands of the State party, the Committee may consider an author's allegations substantiated in the absence of satisfactory evidence or explanations to the contrary presented by the State party. In the absence of any convincing explanation from the State party in this respect, due weight must be given to the author's allegations.

8.4 On the basis of the information at its disposal, the Committee concludes that keeping the author in captivity without allowing any contact with his family and the outside world, subjecting him to acts of torture and ill-treatment on four consecutive nights and his conditions of detention amount to a violation of article 7 of the Covenant with respect to each one of the author's claims.<sup>42</sup>

8.5 The Committee notes the anguish and distress caused to the author's family by his disappearance, from the time of his arrest until 17 September 2004, when his detention was acknowledged and he was able to receive visitors. It notes that the author was arrested when his wife was eight months pregnant and that he was the sole breadwinner of the family, which placed a considerable financial burden on them. The Committee is therefore

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<sup>40</sup> *Official Records of the General Assembly, Forty-seventh Session, Supplement No. 40 (A/47/40)*, annex VI, sect. A, para. 11.

<sup>41</sup> See communication No. 1782/2008, *Aboufaied v. Libya*, Views adopted on 21 March 2012, para. 7.4; communication No. 1422/2005, *El Hassy v. Libyan Arab Jamahiriya*, Views adopted on 24 October 2007, para. 6.7; and communication No. 1297/2004, *Medjnoune v. Algeria*, Views adopted on 14 July 2006, para. 8.3.

<sup>42</sup> See communications No. 1761/2008, para. 7.6; No. 1422/2005, *El Hassy v. Libyan Arab Jamahiriya*, Views adopted on 24 October 2007, para. 6.2; No. 540/1993, para. 8.5; No. 458/1991, para. 9.4; and No. 440/1990, para. 5.4.

of the opinion that the facts before it reveal a violation of article 7 of the Covenant, read in conjunction with article 2, paragraph 3, with regard to the author's wife and his parents.<sup>43</sup>

8.6 With regard to the alleged violation of article 9, the Committee notes that, according to the author, on 26 November 2003, he was arrested without a warrant by soldiers of the Royal Nepalese Army and detained at the Chhauni military barracks incommunicado without being informed of the reasons for his arrest or the charges against him. The Committee recalls that the author was never brought before a judge during his detention, and could not challenge the legality of his detention until it was officially acknowledged and his sister filed a writ of habeas corpus in the Supreme Court. The Committee took note of the State party's contention that the author was arrested on 29 July 2004 under the Terrorist and Disruptive Activities (Control and Punishment) Act of 2004, adopted in the context of the state of emergency declared by the State party, and allowing the arrest and detention of suspects for a period of up to one year. However, in the absence of any pertinent explanations from the State party on the author's arrest and detention from 26 November 2003 to 29 July 2004 and from 26 October 2004 to 1 November 2004, charges against him and a determination by a court on the legality of his arrest and detention, the Committee finds a violation of article 9.<sup>44</sup>

8.7 With respect to article 10, the Committee reiterates that persons deprived of their liberty may not be subjected to any hardship or constraint other than that resulting from the deprivation of liberty, and that they must be treated with humanity and respect for their dignity. In the absence of information from the State party concerning the treatment of the author in detention, the Committee gives due weight to the author's allegations that his conditions of detention at the military barracks amount to ill-treatment and concludes that his rights under article 10, paragraph 1, were violated.<sup>45</sup>

8.8 The author also invokes article 2, paragraph 3, of the Covenant, under which States parties are required to ensure that individuals have accessible, effective and enforceable remedies for asserting the rights recognized in the Covenant. The Committee reiterates the importance which it attaches to States parties' establishment of appropriate judicial and administrative mechanisms for addressing alleged violations of rights, even during a state of emergency.<sup>46</sup> The Committee further recalls that the failure by a State party to investigate allegations of violations could in and of itself give rise to a separate breach of the Covenant.<sup>47</sup> In the present case, the information before the Committee indicates that the author did not have access to an effective remedy, and the Committee therefore concludes that the facts before it reveal a violation of article 2, paragraph 3, read in conjunction with articles 7, 9, and 10, paragraph 1.

8.9 The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation of articles 7; 9 and 10, paragraph 1, read alone and in

<sup>43</sup> See communication No 1640/2007, *El Abani v. Libyan Arab Jamahiriya*, Views adopted on 26 July 2010, para. 7.5; No. 1295/2004, *El Awani v. Libyan Arab Jamahiriya*, Views adopted on 11 July 2007, para. 4; No. 107/1981, para. 14; and No. 950/2000, para. 9.5.

<sup>44</sup> See communications No. 1782/2008, para. 7.6; No. 1761/2008, para. 7.8; No. 1297/2004, *Medjnoune v. Algeria*, Views adopted on 14 July 2006, para. 8.5; and No.1469/2006, para. 7.3.

<sup>45</sup> See the Committee's general comment No. 21, para. 3; communications No. 1134/2002, *Gorji-Dinka v. Cameroon*, Views adopted on 17 March 2005, para. 5.2; No 1640/2007, para. 7.7; and No. 1422/2005, para. 6.4.

<sup>46</sup> General comment No. 29 (2001) on derogation during a state of emergency, *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 40*, vol. I (A/56/40 (Vol. I)), annex VI, para. 14.

<sup>47</sup> General comment No. 31, para. 15.

conjunction with article 2, paragraph 3 of the Covenant as regards the author. The Committee is also of the view that article 7, read in conjunction with article 2, paragraph 3 of the Covenant was breached with regard to the author's wife and his parents.

9. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author and his family with an effective remedy, by (a) ensuring a thorough and diligent investigation into the torture and ill-treatment suffered by the author; (b) the prosecution and punishment of those responsible; (c) providing the author and his family with adequate compensation for all the violations suffered; and (d) amending its legislation so as to bring it into conformity with the Covenant, including the amendment and extension of the 35-day statutory limitation from the event of torture or the date of release for bringing claims under the Compensation relating to Torture Act; the enactment of legislation defining and criminalizing torture; and the repealing of all laws granting impunity to alleged perpetrators of acts of torture and enforced disappearance. In doing so, the State party shall ensure that the author and his family are protected from acts of reprisals or intimidation. The State party is also under an obligation to prevent similar violations in the future.

10. In becoming a State party to the Optional Protocol, the State party recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not. Pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case 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 to have them widely disseminated in the official languages of the State party.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

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