



International Covenant on Civil and Political Rights

Distr.: General
16 August 2019

Original: English

Human Rights Committee

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

<i>Communication submitted by:</i>	Tikanath and Ramhari Kandel (represented by counsel, TRIAL International)
<i>Alleged victims:</i>	The authors and Amrit Kandel (the authors son and brother, respectively)
<i>State party:</i>	Nepal
<i>Date of communication:</i>	11 April 2014 (initial submission)
<i>Document references:</i>	Decision taken pursuant to rule 97 of the Committee's rules of procedure (now rule 92), transmitted to the State party on 2 February 2015 (not issued in document form)
<i>Date of adoption of Views:</i>	15 July 2019
<i>Subject matter:</i>	Arbitrary arrest, torture and enforced disappearance; absence of prompt and impartial investigation; lack of access to an effective remedy
<i>Procedural issue:</i>	Admissibility – exhaustion of domestic remedies
<i>Substantive issues:</i>	Right to life; prohibition of torture and cruel and inhuman treatment or punishment; right to liberty and security of person; respect for the inherent dignity of the human person; recognition as a person before the law; right to an effective remedy
<i>Articles of the Covenant:</i>	2 (3), 6, 7, 9, 10 and 16
<i>Articles of the Optional Protocol:</i>	2 and 5 (2) (b)

1.1 The authors of the communication are Tikanath Kandel, born on 14 April 1950, and his son Ramhari Kandel, born on 28 August 1978. The communication is brought on their

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

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



behalf and on behalf of Amrit Kandel, born on 29 May 1981, also a son of Tikanath Kandel and a younger brother of Ramhari Kandel. The authors are nationals of Nepal. They claim that Nepal has violated Amrit Kandel's rights under articles 2 (3), 6, 7, 9, 10 and 16 of the Covenant, and Tikanath Kandel's and Ramhari Kandel's rights under article 7, read alone and in conjunction with article 2 (3) of the Covenant. The Optional Protocol entered into force for the State party on 14 August 1991. The authors are represented by counsel.

The facts as submitted by the authors

2.1 At the time of the facts described in the communication, Amrit Kandel was residing in an area of Kathmandu called Chabahil and was studying for his Bachelor of Arts at Saraswati Multiple Campus. He was affiliated to the All Nepal National Independent Student Union-Revolutionary, the students' wing of the then Communist Party of Nepal (Maoist). In 2003, his father, Tikanath Kandel, was a farmer (he is now retired) and his brother Ramhari Kandel was a shopkeeper selling windowpanes.

2.2 On 10 October 2003, Amrit Kandel was walking in the alleyways of the Gangahiti neighbourhood of Chabahil with a friend, Dhruva Subedi. At approximately 3 p.m., 11–12 armed men in plain clothes got out of a van belonging to the Royal Nepalese Army, attacked Amrit Kandel, forced him into the van at gunpoint and took him away. While Amrit Kandel was being captured, his friend ran away.

2.3 Ramhari Kandel had also been taken away, on 12 September 2003, while he was visiting his sister at her apartment in Patan, Lalitpur District, near Kathmandu. On that occasion, a group of 5–7 Royal Nepalese Army personnel entered the apartment, arrested Ramhari Kandel, forced him into a van and brought him to Maharajgunj prison, where he was detained incommunicado and subjected to interrogations and beatings, for around three months.

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

2.5 According to Ramhari Kandel, the conditions of detention at Maharajgunj amounted to cruel, inhuman and degrading treatment. Detainees were often forced to sleep in the open air, on gravel. They were constantly held in handcuffs. Most of the time, they were blindfolded. Water and food were scarce and provided irregularly, depending on the guards' mood. Moreover, detainees were interrogated while under duress, both during the day and at night time. Ramhari Kandel was frequently threatened with death; he was also beaten, dragged on the ground and forced to kneel on pebbles for hours. He has indicated that many of the detainees were repeatedly subjected to electric shocks and submerged in water.

2.6 Tikanath Kandel was informed of the arrest of Ramhari Kandel on 13 September 2003 by his daughter. He read about Amrit Kandel's arrest in the newspaper, as a representative of the All Nepal National Independent Student Union-Revolutionary mentioned it in an interview with the daily *Hamara Mahanagar*. On 15 October 2003, Tikanath Kandel lodged a complaint with the National Human Rights Commission regarding the arrests of both his sons and their incommunicado detention. He also reported their cases to the International Committee of the Red Cross. On 17 October 2003, he attempted to file a complaint with the human rights cell¹ of the Royal Nepalese Army but officials there denied any involvement by the Army and refused to register the complaint. On 19 October 2003, a former Army soldier who was from the same district as Tikanath Kandel and who had recently retired told his wife that he had personally seen Amrit Kandel

¹ The human rights cell is a human rights monitoring mechanism established in 2002 within the Royal Nepalese Army, the Armed Police Force and the national police in order to conduct internal investigations into human rights abuses by security personnel.

at Maharajgunj prison and that he was still alive. On 21 October 2003, Tikanath Kandel enquired about his sons' whereabouts with Thakur Prasad Kandel, a distant relative who was then the Minister for Land Reform and Management, who told him that both sons were still alive and would be released soon. In November 2003, Tikanath Kandel sent a letter of appeal to the office of the Prime Minister and to the Ministry of Home Affairs requesting protection for his two sons, but he never received a reply.

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

2.8 Tikanath Kandel joined a society of families of the disappeared in 2004, with a view to participate in advocacy and in protests aimed at pressuring the Government into disclosing the fate and whereabouts of several victims of enforced disappearance.

2.9 On 30 November 2004, Tikanath Kandel lodged an application for habeas corpus with the Supreme Court of Nepal with the assistance of the Nepal Bar Association. The application mentioned, as respondents, the Ministry of Home Affairs, the Ministry of Defence, the District Police Office of Kathmandu, the District Administration Office of Kathmandu, the Headquarters of the Royal Nepalese Army and the Bhairabanath Battalion of the Army in Maharajgunj. In December 2004, these entities all denied involvement in the arrest and detention of Amrit Kandel. On 20 December 2004, Ramhari Kandel submitted his testimony to the Supreme Court. On 16 March 2005, the Court ordered the newly established Commission of Investigation on Enforced Disappeared Persons to provide information on whether Amrit Kandel's name was on its list of disappeared individuals. On 30 March 2005, the Court also ordered the National Human Rights Commission to provide information on the measures it had taken with regard to the authors' complaint. However, before being provided with the requested information, the Court decided, on 13 July 2005, to dismiss the application for procedural reasons since the counsel in the case had not come to one of the hearings. Tikanath Kandel only learned about this development in January 2006.

2.10 On 13 February 2006, Amrit Kandel's case was included in a habeas corpus writ filed with the Supreme Court on behalf of 34 disappeared persons. On 1 June 2007, the Supreme Court issued a judgment ordering the Government to establish a high-level investigative commission charged with making public information on the status of the disappeared persons, criminalizing enforced disappearance, initiating legal action against the persons responsible and providing reparation to affected families. However, the Supreme Court judgment was never implemented by the Nepalese authorities.

2.11 The authors last heard of Amrit Kandel being alive in April 2006, when another retired Royal Nepalese Army soldier from their district indicated that he was being detained in the Army barracks in Baireni and that he had personally seen him there. Tikanath Kandel immediately went to Baireni but was denied entry to the barracks. He informed the National Human Rights Commission, which sent a team there on 24 May 2006; its members too were denied access. On 26 May 2006, the team was finally allowed into the barracks, but Amrit Kandel was not there.

2.12 In November 2008, in his capacity as coordinator of the society of families of the disappeared, Tikanath Kandel wrote letters to the Prime Minister and the Minister for Home Affairs requesting them to disclose information on the fate and whereabouts of several disappeared persons, including his son. He also met with the Minister for Defence. He never received any information. To date, the database on missing persons of the International Committee of the Red Cross shows that Amrit Kandel's fate and whereabouts remain unknown.

2.13 Following the establishment of the Interim Relief Programme by the Ministry of Peace and Reconstruction, the authors applied to obtain monetary compensation. In November 2009, they were awarded 100,000 Nepalese rupees (approximately 1,000 United

States dollars) for Amrit Kandel's enforced disappearance. Amrit Kandel's family received an additional 200,000 rupees on 13 November 2011.

The complaint

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

3.2 The authors further claim a violation of article 7, read alone and in conjunction with article 2 (3) of the Covenant, in respect of Tikanath Kandel and Ramhari Kandel due to the mental distress and severe anguish that they both have endured over the past 11 years and that they continue to suffer as a result of Amrit Kandel's enforced disappearance and of the absence of information establishing his fate and whereabouts from the authorities. They submit that such suffering amounts to inhumane treatment by the State party.

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

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

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

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

State party's observations on admissibility and the merits

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

4.2 The State party first recalls the main facts described in the communication. On 10 October 2003, Amrit Kandel was arrested by personnel of the then Royal Nepalese Army and detained in Bhairabanath Battalion barracks at Maharajgunj. Ramhari Kandel, the elder brother of Amrit Kandel, was also arrested and brought to the same barracks. Ramhari Kandel found that Amrit Kandel had been blindfolded and tortured. On 30 November 2004, Tikanath Kandel filed a writ of habeas corpus to the Supreme Court of Nepal in order to

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

4.3 The State party submits that the authors must exhaust domestic remedies before submitting a written communication to the Committee for consideration. It argues that the authors should have invoked domestic legislation in order to seek a remedy and reparation. Since transitional justice mechanisms have been established pursuant to the Enforced Disappearances Enquiry, Truth and Reconciliation Commission Act, 2071 (2014), to provide justice to victims in conflict-related cases, the State party argues that the authors could still file a complaint with the Commission of Investigation on Enforced Disappeared Persons.

4.4 The State party argues that the Commission is mandated to hear conflict-related cases involving enforced disappearances, to provide information on the fate of disappeared persons, to make recommendations to the Government of Nepal in prosecuting alleged offenders and to provide reparation to the victims.

4.5 While admitting that dealing with violations of international human rights and humanitarian law during an armed conflict is not an easy task, the State argues that the Commission can find answers to questions about how individuals and communities confront past atrocities, reconcile and rebuild after conflict. Its objective is restorative, in that it aims to alleviate victims' pain, and retributive, in that it aims to punish perpetrators. The ordinary criminal justice system cannot be used effectively for seeking the truth, prosecuting perpetrators, providing reparation or rehabilitation to victims, shaping the collective memory to facilitate the reconciliation process and reforming institutions so that they can deal with violations of human rights during the armed conflict. Truth-seeking is at the centre of the work of this transitional justice mechanism, which is tasked with identifying perpetrators and victims and documenting patterns of abuse for institutional reform.

4.6 In line with the provisions of the Interim Constitution, the Comprehensive Peace Accord and the verdict of the Supreme Court in the case *Rabindra Prasad Dhakal on behalf of Rajendra Prasad Dhakal (Advocate) v. Nepal*, including writ No. 3575 dated 1 June 2007, Parliament enacted the Enforced Disappearances Enquiry, Truth and Reconciliation Commission Act, 2071 (2014). The Act aims at achieving greater national unity and reconciliation, as envisaged in the Accord, by observing the principles of human rights more effectively. Furthermore, the objectives of the Act are to ensure truth, justice, reparations and public acknowledgement of victims, prevent future abuse and combat impunity.

4.7 Section 26 of the Act expressly prohibits the recommendation of amnesty for perpetrators of offences of a grave nature. Pursuant to the Act, the Government has established the Truth and Reconciliation Commission and the Commission of Investigation on Enforced Disappeared Persons, the latter of which is tasked with carrying out investigations into cases of enforced disappearance during the conflict. Both Commissions were established in February 2015 with a mandate to achieve their objectives within two years. The State party believes that the establishment of the Commissions is a significant step forward for its transitional justice process.

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

defenders and other stakeholders, the Commission of Investigation on Enforced Disappeared Persons has drafted its regulations and has been developing its terms of reference.

4.9 The Commission of Investigation on Enforced Disappeared Persons will call upon all victims of the conflict to come forward with their problems and to file cases to it. The Commission is competent to ensure transparency while maintaining the privacy of victims in the process of fact-finding and investigation.

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

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

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

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

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

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

5.2 As detailed in the original communication of 11 April 2014, the enforced disappearance of Amrit Kandel has been documented by several domestic and international human rights bodies. In this regard: (a) in 2006, the Office of the United Nations High Commissioner for Human Rights issued a report in which it included Amrit Kandel's name among those who remain disappeared after being held in Maharajgunj barracks in 2003;² (b) on 1 June 2007, in a judgment based on the consideration of 28 different writs concerning enforced disappearances perpetrated during the conflict by security forces, which included a writ filed on behalf of 34 disappeared persons, including Amrit Kandel, the Supreme Court of Nepal ordered the Government, inter alia, to form a high-level investigative commission on enforced disappearances, to make public the status of those disappeared, including Amrit Kandel; (c) on 4 December 2007, the National Human Rights Commission published a report in which it wrote that Amrit Kandel was being held in custody by the Bhairabanath Battalion;³ (d) in 2009 and 2011, Amrit Kandel's family was awarded a total of 300,000 Nepalese rupees (approximately 3,000 United States dollars) for Amrit Kandel's enforced disappearance, as part of the Interim Relief Programme established by the

² See "Report of investigation into arbitrary detention, torture and disappearances at Maharajgunj RNA barracks, Kathmandu, in 2003–2004", May 2006, annex A.

³ See the Commission's "ceasefire report", sect. 2.5. Available from www.nhrcnepal.org/nhrc_new/doc/newsletter/Ceasefire%20report%20final.pdf.

Ministry of Peace and Reconstruction, fact that constitutes an indirect recognition by the Government that Amrit Kandel is indeed a victim of enforced disappearance; and (e) the International Committee of the Red Cross's database of missing persons still indicates that Amrit Kandel's fate and whereabouts remain unknown.

5.3 In its jurisprudence, the Human Rights Committee has held that in cases of enforced disappearance the burden of proof cannot rest alone on the author of the communication, especially considering that the author and the State party do not always have equal access to the evidence and frequently the State party alone has access to relevant information.⁴ In the light of the evidence and detailed explanations provided by the authors of the communication and the failure of the State party to rebut them by providing any evidence to the contrary, the authors request the Committee, following its established practice,⁵ to give due weight to their factual allegations.

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

5.5 Moreover, the Human Rights Committee has declared that article 9 of the Covenant requires compliance with important safeguards for detained persons, such as making a record of an arrest.⁶ Also with respect to article 9 of the Covenant, the Committee has stated that a centralized official register should be kept of the names and places of detention, and times of arrival and departure, as well as of the names of persons responsible for their detention, and made readily available and accessible to those concerned, including relatives.⁷ The absence of such data should be considered a violation of the Convention.

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

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

5.8 The authors of the communication are aware that transitional justice mechanisms were established in February 2015, after more than nine years of negotiations. At the time of the additional submission, those mechanisms were not yet fully operational. The authors are particularly concerned that more than eight months have elapsed since the establishment of the transitional justice mechanisms, without any substantial action having been taken so far, taking into account that, as the State party informs, the mechanisms have a mandate to complete their tasks within two years of formation. Moreover, on 21 May 2015, the

⁴ *Lewenhoff and Valiño de Bleier v. Uruguay* (CCPR/C/15/D/30/1978), paras. 12 and 13.3; and *Sharma and Sharma v. Nepal* (CCPR/C/94/D/1469/2006), para. 7.5.

⁵ *Madoui and Madoui v. Algeria* (CCPR/C/94/D/1495/2006), para. 7.6.

⁶ See the Committee's general comment No. 35 (2014) on liberty and security of person, para. 23; *Kurbonov v. Tajikistan* (CCPR/C/86/D/1208/2003), para. 6.5; and the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (General Assembly resolution 43/173, annex), principle 12.

⁷ See the Committee's general comment No. 35, para. 58.

Government of Nepal filed a petition with the Supreme Court seeking a review of the decision of 26 February 2015 on the Enforced Disappearances Enquiry, Truth and Reconciliation Commission Act, 2071 (2014). The petition was registered on 21 May 2015 and is currently pending, thus making it impossible to determine with certainty which powers the Commission of Investigation on Enforced Disappeared Persons will eventually be entrusted with. As soon as the Commission becomes operative and its powers and methods of work become clear, the authors will consider attempting to have their case duly registered, even though, after meeting some of the commissioners during local consultations, the authors are not persuaded that the Commission will provide them with a concrete answer.

5.9 In any case, the registration of their case before the Commission of Investigation on Enforced Disappeared Persons cannot be considered an effective remedy that they should have exhausted before submitting their communication to the Human Rights Committee pursuant to article 5 of the Optional Protocol to the Covenant. The Committee has already made it clear, precisely referring to the Commission and other transitional justice mechanisms in Nepal, that it is not necessary to exhaust avenues before non-judicial bodies to fulfil the requirements of article 5 (2) (b) of the Optional Protocol.⁸ The Commission is a non-judicial body and Tikanath and Ramhari Kandel are therefore not required to wait until it starts gathering reports, registering and evaluating them and, eventually, assessing whether to refer them to domestic authorities for criminal investigation.

5.10 Regarding the State party's contention that the ordinary criminal justice system cannot be used effectively for truth-seeking, prosecuting perpetrators, providing reparations or rehabilitation to victims, shaping collective memory to facilitate the reconciliation process and reforming institutions so that they can deal with violations of human rights committed in times of armed conflict, the authors highlight that in 2014 the Human Rights Committee concluded that transitional justice mechanisms cannot serve to dispense with the criminal prosecution of serious violations of human rights (CCPR/C/NPL/CO/2, para. 5 (b)). Moreover, the Committee clarified that the fact-finding and truth-seeking objectives of the transitional justice mechanisms, though crucial for reconciliation purposes, cannot replace the criminal justice system in providing access to justice and redress to victims of gross human rights violations and their relatives.

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

5.12 Finally, the authors of the communication welcome the State party's affirmation that a bill to criminalize torture and a bill to criminalize enforced disappearance has been presented to Parliament. However, such bills have not yet been signed into law and are therefore not applicable. Even if such bills were to become law, they would not cover their case, as the enforced disappearance of Amrit Kandel occurred in 2003.

5.13 In conclusion, the authors stress that they do not have to resort to the transitional justice mechanisms to comply with the requirement of exhaustion of domestic remedies. Even if their case were dealt with by the transitional justice mechanisms, the provisions of the Enforced Disappearances Enquiry, Truth and Reconciliation Commission Act, 2071 (2014), referring to reparation are at odds with international standards, as no right to obtain reparation is guaranteed by the law, since the Act does not provide for guarantees of non-repetition, such as through legislative reforms, and measures of satisfaction. The authors

⁸ See, e.g., *Katwal v. Nepal* (CCPR/C/113/D/2000/2010), paras. 6.3 and 6.4; *Sedhai v. Nepal* (CCPR/C/108/D/1865/2009), para. 7.5; *Tripathi v. Nepal* (CCPR/C/112/D/2111/2011), para. 6.3; and *Basnet v. Nepal* (CCPR/C/112/D/2051/2011), para.7.4.

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

Issues and proceedings before the Committee

Consideration of admissibility

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

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

6.3 With respect to the requirement of exhaustion of domestic remedies, the Committee notes the State party's argument that the authors should have filed their case before the Commission of Investigation on Enforced Disappeared Persons as part of the transitional justice process, to seek redress for violations committed during the armed conflict. The Committee also notes the authors' argument that the Supreme Court of Nepal, on 1 June 2007, issued a judgment based on its consideration of a writ filed on behalf of 34 disappeared persons, including Amrit Kandel, and ordered the Government to investigate the status of those disappeared. The Committee further notes the authors' submission that Amrit Kandel's family was awarded monetary compensation in 2009 and 2011 in an indirect recognition of Amrit Kandel's enforced disappearance, that the transitional justice mechanisms have been established only in 2015 and that they have made slow progress in the conduct of their investigations, and that it has not been necessary to resort to the Commission, as a non-judicial body, given the Attorney General's obligation to carry out an effective investigation *ex officio*. Additionally, the State party has not taken any concrete action to investigate the whereabouts of Amrit Kandel or to bring those responsible to justice since his disappearance was reported to the authorities, despite the directives from the Supreme Court to do so. Instead, the State party has admitted that the fate and whereabouts of Amrit Kandel remain unknown. The Committee considers that, in the present circumstances, the authors have exhausted all available domestic remedies and that article 5 (2) (b) of the Optional Protocol does not preclude it from considering the communication. In addition, it recalls that recourse to non-judicial bodies does not have to be exhausted to fulfil the requirements of the article, in particular when the transitional justice mechanisms, which are meant to reinforce the regular justice system, have not been effective in cases of enforced disappearance, as evidenced in the present case.

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

Consideration of the merits

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

7.2 The Committee takes note of the authors' allegation that Amrit Kandel has been arbitrarily arrested, detained and subjected to enforced disappearance since 10 October 2003, and that his fate and whereabouts have not been effectively investigated. It further notes that the State party has not challenged these allegations. The Committee observes that the Office of the United Nations High Commissioner for Human Rights has included Amrit

Kandel's name among those who remain disappeared after being held in Maharajgunj barracks in 2003.⁹

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

7.4 The Committee reiterates its position that the burden of proof cannot rest solely with the author of the communication, especially considering that the author and the State party do not always have equal access to evidence and that, frequently, the State party alone has access to the relevant information.¹⁰ It is implicit in article 4 (2) of the Optional Protocol that the State party has the duty to investigate, in good faith, all allegations of violations of the Covenant made against it and its representatives, and to provide the Committee with the information available to it. In cases in which the authors have submitted allegations to the State party that are corroborated by credible evidence and in which further clarification depends on information that is solely in the hands of the State party, the Committee may consider the authors' allegations substantiated, in the absence of satisfactory evidence or explanations to the contrary presented by the State party.

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

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

7.7 The Committee recalls that, while the Covenant does not explicitly use the term "enforced disappearance" in any of its articles, enforced disappearance constitutes a unique and integrated series of acts that represent continuing violations of various rights recognized in the treaty.¹¹

7.8 The Committee recalls that, in cases of enforced disappearance, deprivation of liberty followed by a refusal to acknowledge the deprivation of liberty, or by concealment of the fate of the disappeared person, removes the person from the protection of the law and places his or her life at serious and constant risk, for which the State is accountable.¹² In the present case, the State party has produced no evidence to show that it met its obligations to protect the life of Amrit Kandel while he was detained by the authorities. The Committee further recalls that States parties should take measures not only to prevent and punish deprivation of life by criminal acts, but also to prevent arbitrary killing by their own security forces.¹³ In these circumstances, the Committee considers that the State party has violated its obligations under article 6 (1) of the Covenant.

⁹ See "Report of investigation into arbitrary detention, torture and disappearances at Maharajgunj RNA barracks, Kathmandu, in 2003–2004", May 2006, annex A.

¹⁰ See *Sharma and Sharma v. Nepal*, para. 7.5; *Sharma et al. v. Nepal* (CCPR/C/122/D/2364/2014), para. 5.3; *Nakarmi and Nakarmi v. Nepal* (CCPR/C/119/D/2184/2012), para. 11.4; *Dhakal et al. v. Nepal* (CCPR/C/119/D/2185/2012), para. 11.4; *Maya v. Nepal* (CCPR/C/119/D/2245/2013), para. 12.2; *Maharjan et al. v. Nepal* (CCPR/C/105/D/1863/2009), para. 8.3; *Tripathi v. Nepal*, para. 7.2; and *Katwal v. Nepal*, para. 3.6.

¹¹ See *Neupane and Neupane v. Nepal* (CCPR/C/120/D/2170/2012), para. 10.5; *Katwal v. Nepal*, para. 11.3; *Serna et al. v. Colombia* (CCPR/C/114/D/2134/2012), para. 9.4; *Nakarmi and Nakarmi v. Nepal*, para. 11.5; and *Dhakal et al. v. Nepal*, para. 11.5. See also the Committee's general comment No. 36 (2018) on the right to life, para. 58.

¹² See *Abushaala et al. v. Libya* (CCPR/C/107/D/1913/2009), para. 6.2; *Nakarmi and Nakarmi v. Nepal*, para. 11.6; and *Dhakal et al. v. Nepal*, para. 11.6. See also the Committee's general comment No. 36 (2018) on the right to life, para. 58.

¹³ See the Committee's general comment No. 36, paras. 7 and 13.

7.9 The Committee also recalls that, under article 2 (3) of the Covenant, States parties must ensure that all persons have accessible, effective and enforceable remedies in order to claim the rights enshrined in the Covenant. The Committee further recalls its general comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant, particularly the fact that, when investigations reveal violations of certain Covenant rights, States parties must ensure that those responsible are brought to justice. As with the failure to investigate, the failure to bring to justice perpetrators of such violations could in and of itself give rise to a separate breach of the Covenant. Those obligations arise notably in respect of violations recognized as criminal under either domestic or international law, such as torture and similar cruel, inhuman and degrading treatment, and summary and arbitrary killing.¹⁴

7.10 The Committee takes note of the writ submitted to the Supreme Court and filed on behalf of 34 disappeared persons, including Amrit Kandel, demanding that the status of those disappeared be made public. The Committee also takes note of the judgment of the Supreme Court of 1 June 2007 ordering the Government to investigate the status of those disappeared, to hold the perpetrators accountable and to provide reparation to the relatives of the victims. It further takes note that the State party has not enforced the judgment, arguing that the authors should register the complaint regarding the disappearance of Amrit Kandel with the Commission of Investigation on Enforced Disappeared Persons and that the authorities would take legal action against those involved in the offence upon the recommendation of the Commission.

7.11 Despite the efforts made by Amrit Kandel's family, no investigation has been concluded by the State party in order to establish the circumstances surrounding the arrest, detention and enforced disappearance of Amrit Kandel and no perpetrator has been tried and punished. The State party has not clarified why no such investigation has yet taken place or why there has been a delay in carrying out such an investigation.

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

7.13 The Committee notes the authors' argument that Amrit Kandel's arbitrary detention and his subsequent enforced disappearance amount, in and of itself, to treatment contrary to article 7. The Committee recognizes the degree of suffering involved in being held indefinitely without contact with the outside world. The Committee takes notes of the authors' allegations that the overall conditions of detention at Bhairabanath Battalion barracks, Maharajgunj (2003–2004), which included interrogations under duress and the use of electric shocks, amounted to cruel, inhuman and degrading treatment. Moreover, it notes that Ramhari Kandel saw that Amrit Kandel's body was swollen and covered with bruises from being beaten. As the State party denies the arrest and does not provide any evidence to clarify the facts regarding Amrit Kandel's treatment in detention, the Committee finds that his enforced disappearance and treatment while in detention constitute a violation of article 7 of the Covenant. Having reached that conclusion, the Committee will not examine the claims regarding the violation of article 10 (1) of the Covenant for the same facts.

7.14 The Committee notes the anguish and distress caused to the authors and their family by the disappearance of Amrit Kandel; the continuing and prolonged uncertainty surrounding the circumstances of his arrest and detention; that Amrit Kandel's release could not be secured by his relatives; and that the authors knew that no investigation was being carried out and that no one was being held accountable for Amrit Kandel's disappearance. The Committee considers that these facts reveal a violation of article 7 with respect to the authors of the present communication.

7.15 The Committee takes note of the authors' allegation of a violation of article 9 of the Covenant because Amrit Kandel was deprived of his liberty on 10 October 2003 and was not presented with a warrant at the time of his arrest. No legal grounds were provided for

¹⁴ See the Committee's general comment No. 31, para. 18.

his detention. He was never brought before a judge and could not challenge the legality of his detention. Moreover, Amrit Kandel's arrest and detention have not been recorded, in violation of international guidelines on safeguards for detained persons. In the absence of a response from the State party in this regard, the Committee considers that the detention of Amrit Kandel constitutes a violation of his rights under article 9 of the Covenant, including due to the absence of records of his arrest and detention.

7.16 With regard to article 16 of the Covenant, the Committee notes the authors' allegation that, despite the fact that Amrit Kandel was arrested and detained incommunicado by security forces (the Royal Nepalese Army), the authorities denied their involvement in his enforced disappearance. The State party failed to provide relevant information concerning Amrit Kandel's fate. No effective investigation was carried out to ascertain his whereabouts, effectively placing him outside the protection of the law. The Committee is of the view that the intentional removal of a person from the protection of the law constitutes a refusal of the right to recognition as a person before the law, in particular if the efforts of his or her relatives to obtain access to effective remedies have been systematically impeded.¹⁵ The Committee, therefore, finds that the enforced disappearance of Amrit Kandel deprived him of the protection of the law and of his right to recognition as a person before the law, in violation of article 16 of the Covenant.

7.17 The authors invoke article 2 (3) of the Covenant, which imposes on States parties the obligation to ensure an effective remedy for all persons whose rights under the Covenant have been violated. The Committee attaches importance to the establishment by States parties of appropriate judicial and administrative mechanisms for addressing claims of rights violations. It refers to its general comment No. 31, which provides, inter alia, that failure by a State party to investigate allegations of violations could in and of itself give rise to a separate breach of the Covenant. In the present case, the Committee notes that Tikanath Kandel lodged a complaint on 15 October 2003 with the National Human Rights Commission with regard to both his sons' arrest and incommunicado detention, unsuccessfully tried to register a complaint with the Royal Nepalese Army on 17 October 2003 and enquired about his sons' whereabouts on 21 October 2003 with a distant relative who was then the Minister for Land Reform and Management. The authors also filed a writ of habeas corpus with the Supreme Court of Nepal on 30 November 2004. Despite these efforts, the State party has not undertaken an independent and thorough investigation to elucidate the circumstances surrounding Amrit Kandel's arrest, detention and disappearance. In this regard, the Committee considers that the State party has failed to conduct a prompt, thorough and effective investigation into the disappearance of Amrit Kandel. Additionally, the sums received by the authors as interim relief do not constitute an adequate remedy commensurate with the serious nature of the violations committed. Accordingly, the Committee concludes that the facts before it reveal a violation of article 2 (3), read in conjunction with articles 6, 7, 9 and 16 of the Covenant, with regard to Amrit Kandel and of article 2 (3), read in conjunction with article 7 of the Covenant, with respect to the authors.

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

9. Pursuant to article 2 (3) (a) of the Covenant, the State party is under an obligation to provide the authors with an effective remedy. This requires it to make full reparation to individuals whose Covenant rights have been violated. Accordingly, the State party is obligated, inter alia: (a) to conduct a thorough and effective investigation into the facts surrounding the detention of Amrit Kandel and the treatment he suffered during detention and disappearance; (b) to provide the authors with detailed information about the results of its investigation; (c) to release Amrit Kandel if he is still alive or, should he be deceased, to hand over his remains to his family; (d) to prosecute and punish those found responsible for

¹⁵ See *Tharu et al. v. Nepal* (CCPR/C/114/D/2038/2011), para. 10.9; and *Serna et al. v. Colombia*, para. 9.5; *Nakarmi and Nakarmi v. Nepal*, para. 11.10; and *Dhakal et al. v. Nepal*, para. 11.10.

the violations committed and make the results of such measures public; (e) to ensure that necessary and adequate psychological rehabilitation and medical treatment are made available to the authors; and (f) to provide adequate compensation, including appropriate measures of satisfaction, beyond the partial compensation already offered, to the authors for the violations suffered. The State party is also under an obligation to take steps to prevent the occurrence of similar violations in the future. In particular, the State party should ensure that its legislation criminalizes torture and enforced disappearance and provides for appropriate sanctions and remedies commensurate with the gravity of the crimes. Moreover, it should guarantee that such cases give rise to a prompt, impartial and effective investigation and it should allow for the criminal prosecution of those responsible for such crimes.

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