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International Covenant on Civil and Political Rights

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Human Rights Committee

Communication No. 1865/2009

Views adopted by the Committee at its 108th session (8–26 July 2013)

Submitted by:	Shanta Sedhai (represented by counsel, Advocacy Forum–Nepal)
Alleged victim:	Mukunda Sedhai (author's husband) and family
State party:	Nepal
Date of communication:	3 October 2008 (initial submission)
Document references:	Special Rapporteur's rule 97 decision, transmitted to the State party on 19 February 2009 (not issued in document form)
Date of adoption of Views:	19 July 2013
Subject matter:	Enforced disappearance
Substantive issues:	Right to life, prohibition of torture and cruel and inhuman treatment, right to liberty and security of person, respect for the inherent dignity of the human person, recognition as a person before the law and right to an effective remedy
Procedural issue:	Exhaustion of domestic remedies
Articles of the Covenant:	Article 2 (para. 3); article 6 (para. 1); article 7; article 9; article 10 (para. 1) alone, and in conjunction with article 2 (para. (3))
Articles of the Optional Protocol:	Article 5 (para. 2 (b))

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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 (108th session)

concerning

Communication No. 1865/2009*

Submitted by:	Shanta Sedhai (represented by counsel, Advocacy Forum–Nepal)
Alleged victim:	Mukunda Sedhai (author's husband) and family
State party:	Nepal
Date of communication:	3 October 2008 (initial submission)

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

Meeting on 19 July 2013,

Having concluded its consideration of communication No. 1865/2009, submitted to the Human Rights Committee by Shanta Sedhai 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 is Shanta Sedhai, the wife of Mukunda Sedhai, a Nepalese national born in December 1970 who disappeared on 19 December 2003. She claims that Nepal has violated the rights of her missing husband and the rights of herself and her family under articles 6, 7, 9, and 10 (para. 1) read in conjunction with article 2 (para. 3) of the International Covenant on Civil and Political Rights.[1] She is represented by Advocacy Forum–Nepal.

* 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. Ahmad Amin Fathalla, Mr. Cornelis Flinterman, Mr. Yuji Iwasawa, Mr. Walter Kälin, Ms. Zonke Zanele Majodina, Mr. Kheshoe Parsad Matadeen, Ms. Iulia Antoanella Motoc, Mr. Gerald L. Neuman, Sir Nigel Rodley, Mr. Victor Manuel Rodríguez-Rescia, Mr. Fabián Omar Salvioli, Ms. Anja Seibert-Fohr, Mr. Yuval Shany, Mr. Konstantine Vardzelashvili and Ms. Margo Waterval.
The text of an individual opinion by Committee members Mr. Salvioli and Mr. Rodríguez-Rescia is appended to the present Views.

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

The facts as submitted by the author

2.1 The author married Mr. Sedhai on 7 March 1991 and they resided together at Jeevanpur Village Development Committee, Ward No. 6, Dhading District. They have two children: a son, Anil Shedhai, born on 25 March 1993, and a daughter, Anita Shedhai, born on 22 September 1999. Mr. Sedhai was a businessman and frequently visited Kathmandu where he rented a room near Swayambu.

2.2 On 18 December 2003, Mr. Sedhai was in Kathmandu to conduct business and sell sugar-cane. The author had visited him in Kathmandu on 17 December. She left him on 18 December to take care of their two children, who were in the village. Mr. Sedhai spent the night of 18 December in his rented room in Swayambu. On the afternoon of 19 December 2003, he went to a tea shop in Bhimsensthan, Ward No. 20, in the centre of Kathmandu. The tea shop was managed by Raju Khakurel, who is a second cousin of Mr. Sedhai, and comes from Dhading, the same district as Mr. Sedhai. The shop was regularly used as a meeting place for those from Dhading District who stayed in Kathmandu, and Mr. Sedhai was known to others there.

2.3 Four or five men in plain clothes arrived at the tea shop and went down the corridor to the back room. Mr. Raju Khakurel and Mr. Narayan Silwal, who were in the shop and witnessed the detention of Mr. Sedhai, provided statements to Advocacy Forum–Nepal respectively on 6 and 8 August 2008. They both recall that some of the men were armed and remember that they themselves were asked to stand up and were searched. They were then asked if they had anything to confess. After they had all answered in the negative, one of the men in plain clothes called out Mr. Sedhai's name.

2.4 Mr. Sedhai stood up and presented himself to the men. He was then led out of the room by the men in plain clothes, who locked the door of the back room from the outside and told the other men that they would return in 15 minutes. When Mr. Sedhai was taken past Mr. Khakurel, the men in plain clothes ordered Mr. Kharkurel not to open the door to the room and said that they would return in 15 minutes. Mr. Sedhai was taken southwards away from the tea shop and Mr. Silwal, one of the witnesses who knew him from his home village reported that other customers who were present told him that they saw Mr. Sedhai being taken away in a white and green army van that had been parked down the hill.

2.5 After his arrest, Mr. Sedhai was detained in Chhauni Barracks. In 2005, the National Human Rights Commission conducted an investigation and concluded that Mr. Sedhai had been arrested and subsequently detained. A witness, Mr. Dev Bahadur Maharjan, who gave a statement on 6 August 2008 to Advocacy Forum–Nepal, clearly recollects spending time with him and discussing how he had been arrested and was treated in the Barracks. Mr. Sedhai told him that he had been beaten and tortured so badly during his first few weeks in detention that he could not stand up and had to be taken to hospital. After these discussions, Mr. Maharjan realized that the man he had heard a few weeks earlier being beaten and kicked for one and a half hours by army men was Mr. Sedhai. He had heard him state that he was Mukunda from Jeevanpur Village Development Committee, Dhading District. Mr. Maharjan also remembers that Mr. Sedhai had a wound on his face, which he told Mr. Maharjan was from being kicked.

2.6 Two witness statements delivered in August 2008 to Advocacy Forum–Nepal by Mr. Maharjan and Mr. Om Parkash Timilsena describe the inhuman conditions, torture and inhuman and degrading treatment they suffered at Chhauni Barracks. According to these statements, detainees at the Barracks were kept blindfolded throughout their stay, were denied access to medicines and hygiene facilities, were denied food and water, and were able to wash and bathe only rarely. Severe torture and beatings, including electric shocks and severe beatings with bamboo sticks, were commonplace in the Barracks. Mr. Maharjan

also testified that, in the room where he was kept, a man had died as a result of the injuries inflicted on him through torture.

2.7 On 25 January 2004, the day before the Festival of Education (*Saraswati Puja*) in Nepal, Mr. Sedhai was, according to Mr. Maharjan's testimony, taken out of the detention room with five other people. The whereabouts of all these people remains unknown. In his statement to Advocacy Forum–Nepal, Mr. Timilsena remembers that during the first week of February 2004, about nine people, including Mr. Sedhai, were transferred into the room in Chhauni Barracks where he was detained, and where interrogators used to keep photographs of Maoists and Maoist student leaders on the wall. Mr. Sedhai remained in this room for 15 to 20 days. He then told Mr. Timilsena that he was going to be released. The following day, he was taken with four or five other people from this room. There has been no reported sighting of him since then and the author has been unable to discover any further evidence as to his whereabouts.

2.8 A week after Mr. Sedhai's arrest, the author was visited by a man in plain clothes who stated that he was from the District Police Office in Hanumandhoka, Kathmandu, and said that the author's husband would be released if she paid bail. That same day, the Chief District Officer of Kathmandu District "disavowed" this person and said he would investigate whether Mr. Sedhai had been arrested by the police.

2.9 In the first six weeks after Mr. Sedhai's arrest, the author received two notes from him, brought to her by sympathetic guards from Chhauni Barracks. The first of these notes came about 10 to 15 days after his arrest, and the person who delivered it identified himself as a member of the army from Chhauni Barracks. The author lost this first letter but remembers that it said that Mr. Sedhai was fine and asked her to give the army guard "a nice jacket". On 16 January 2004, another member of the army delivered a second letter from Mr. Sedhai. As requested, she gave the army guard a jacket worth 350 rupees. This was the last letter the author received from her husband. After Mr. Sedhai was arrested on 19 December 2003, his family suffered from extreme economic hardship and personal anguish. The family's mental suffering and economic hardship continues to this day, as they are still anxious to know about his fate.

2.10 On 14 December 2004, the author filed a writ of habeas corpus with the Supreme Court of Nepal against the Ministry of Home Affairs, the Ministry of Defence, Chhauni Barracks, Police Headquarters, Kathmandu District Administration Office, Kathmandu District Police Office and Army Headquarters. Starting on 17 December 2004, these offices filed responses denying any knowledge of Mr. Sedhai's whereabouts. The writ was put on hold on 25 May 2005 after the author did not appear for a hearing before the court on 11 April 2005, because of a transport strike in her area that lasted several days. The author filed a second writ of habeas corpus on 15 September 2005. The officials responded by saying that they did not know the whereabouts of the alleged victim and demanding that the writ be dismissed. The Supreme Court put this second writ together with those of several others who had disappeared during the armed conflict.

2.11 In June 2007, the Supreme Court issued a decision concerning many people who had disappeared during the conflict, including Mr. Sedhai. In this seminal decision, the Supreme Court directed the legislature to criminalize enforced disappearance and investigate the numerous allegations of disappearances, including that of Mr. Sedhai. To date, the Government has taken no effective steps to implement this decision, and because the Supreme Court is the highest judicial body in Nepal, there is no other effective judicial process by which to attempt to appeal or enforce this decision.

2.12 The author also filed a complaint with the National Human Rights Commission on 26 March 2004. In its attempts to collect evidence regarding this complaint and determine the alleged victim's whereabouts, the Commission received no cooperation from

government and army officials, including the Ministry of Defence and the Human Rights Cell of the Nepal Army Headquarters, despite repeated attempts to ascertain information. After more than two years of investigation, the Commission issued a decision on 6 June 2006, stating that it was convinced that army personnel had arrested Mr. Sedhai on 19 December 2003. The decision recommended that the Government make Mr. Sedhai's whereabouts public, prosecute the army personnel responsible for his disappearance, and provide information to the Supreme Court and the Commission regarding the punishment of the officials responsible for his disappearance. The National Human Rights Commission has proven to have little power to enforce its decisions as they come in the form of recommendations rather than mandatory orders, unlike those of the Supreme Court.

2.13 According to the author, although there is a reference to enforced disappearance in the Interim Constitution, enforced disappearance is not defined as a crime in Nepal. This means that she cannot, on her own initiative, compel the police to investigate her husband's disappearance.

The complaint

3.1 The author claims a violation of article 6, as the State party failed to take specific and effective measures to prevent the disappearance of Mr. Sedhai. It has not acted with due diligence to investigate his whereabouts or bring those responsible to justice since his disappearance was reported to the authorities, despite recommendations by the National Human Rights Commission and directives from the Supreme Court to do so.

3.2 The author claims a violation of article 7 for:

(a) Keeping Mr. Sedhai in incommunicado detention at Chhauni Barracks in Kathmandu from the date of his arrest on 19 December 2003 to his subsequent disappearance;

(b) Exposing him to ill-treatment and torture in Chhauni Barracks;

(c) Subjecting him to severe beatings;

(d) Subjecting his family to mental distress and anguish caused by the uncertainty concerning his fate; and

(e) Providing no effective avenue by which his family can obtain compensation for the mental distress and anguish they suffered as a result of the uncertainty surrounding his fate and whereabouts.

3.3 In the alternative, it is argued that the above circumstances also amount to a breach of article 10 of the Covenant. In addition, the author claims a violation of article 10 for denying Mr. Sedhai visits from his family as well as for the poor detention conditions. Mr. Sedhai was kept blindfolded, only allowed to wash infrequently, denied medicine for wounds, denied food and water, and not supplied with hygiene facilities.

3.4 The author claims a violation of article 9 for:

(a) Making an arrest that was not in accordance with national requirements and procedures;

(b) Keeping Mr. Sedhai in incommunicado detention;

(c) Failing to allow him to challenge the legality of his detention; and

(d) Failing to provide compensation for his arbitrary arrest and detention.

3.5 The author also claims violations of articles 6, 7, 9 and 10 read in conjunction with article 2 (para. 3), and article 2 (para. 3) read alone, because of the inadequacy of the

measures taken to prevent, thoroughly investigate, and provide effective and enforceable remedies in the case of disappearances. In particular, it is submitted that:

(a) The powers of the Supreme Court of Nepal to determine the legality of detention and issue writs of habeas corpus are inadequate and thus the ability to challenge the legality of detention is ineffective;

(b) The failure of the State to maintain proper and accurate records of detainees prevented the author from obtaining sufficient information on the probable place of Mr. Sedhai's detention in order to effectively exercise the remedy of habeas corpus;

(c) The author's lack of access to an effective remedy has been compounded by defects in the law of perjury, as reported by the Working Group on Enforced or Involuntary Disappearances in December 2004;[2]

(d) The National Human Rights Commission can only make recommendations and has no power to enforce them. Despite the fact that it made a recommendation in this case and informed the Supreme Court and the Office of the Prime Minister and Council of Ministers, no investigation or prosecutions have taken place; and

(e) There is no law criminalizing enforced or involuntary disappearances or providing preventive measures, investigation mechanisms or compensation to alleged victims.

3.6 The author claims a violation of article 2 (para. 3) on its own, owing to the failure to provide an effective and enforceable remedy for the arbitrary arrest, torture and disappearance of her husband. Investigations into Mr. Sedhai's disappearance, with the exception of that conducted by the National Human Rights Commission, were not thorough, impartial or effective. The Commission mechanism was not effective and the legal remedy of habeas corpus was undermined by the State's delays, failure to keep proper detention records, and lack of political will to implement the relevant Supreme Court decision. On all these grounds, it is submitted that the State of Nepal has failed to provide an effective remedy to Mr. Sedhai and the author and has breached article 2 (para. 3) on its own and together with articles 6 (para. 1), 7, 9 and 10.

State party's observations on admissibility and on the merits

4.1 In a note verbale dated 9 August 2010, the State party submitted its observations. The State party recalls that the events described in the communication occurred during the armed conflict. To address this situation, the State party decided to establish a commission to investigate cases of disappearances, and a Truth and Reconciliation Commission, in compliance with article 33 (s) of the 2007 Interim Constitution of Nepal and clause 5.2.5 of the Comprehensive Peace Agreement of 21 November 2006. To this end, the Truth and Reconciliation Commission Bill and the Enforced Disappearance (Crime and Punishment) Bill, prepared in close consultation with all stakeholders, have been submitted to Parliament and are under active consideration by the relevant legislative committees. The two commissions to be formed after endorsement of these bills will investigate incidents that occurred during the conflict and bring to light the truth about cases of disappearance, including that of Mr. Sedhai. All individuals who have been affected by the conflict,

[2] Report of the Working Group on Enforced or Involuntary Disappearances: Mission to Nepal, 6–14 December 2004 (E/CN.4/2005/65/Add.1), para. 42.

including the author, will have an opportunity to present their cases and express their views before the commissions.

4.2 The activities of the two commissions will in no way be a substitute for the application of the existing criminal law. The Enforced Disappearance Bill has been designed to establish enforced disappearance as a crime punishable by law; to allow for the establishment of the truth by investigating incidents that took place during the armed conflict; to end impunity by paving the way for taking appropriate action against the perpetrators; and to provide appropriate compensation and justice to victims. Likewise, the Truth and Reconciliation Commission Bill states that the individuals involved in enforced disappearances shall not be granted amnesty under any circumstances. Appropriate action is to be taken in conformity with the law against individuals who are found guilty after a comprehensive inquiry and investigation has been carried out by the two commissions that will be set up once the bills have been approved.

4.3 As stated in the author's communication, after due investigation, the National Human Rights Commission has recommended that the Government of Nepal make known the whereabouts of Mr. Sedhai. It has also recommended that the officials responsible for the alleged acts of extrajudicial detention and enforced disappearances be prosecuted once their involvement in those acts has been established. Likewise, the Supreme Court has issued a directive requiring the Government to formulate appropriate legislation and conduct the necessary inquiries and investigations into cases of disappearances through the commissions created on the basis of that legislation. The submission of the two bills to Parliament fully demonstrates the firm and sincere commitment of the Government of Nepal to fully honour the National Human Rights Commission recommendation and the Supreme Court directive in this process.

4.4 The family of Mr. Sedhai received 100,000 rupees,[3] provided under the Government policy and commitment to offer monetary assistance as interim relief to the families of persons who died or disappeared during the armed conflict. This amount is only an interim measure; it can in no way compensate for the pain and anguish suffered by the family and relatives of Mr. Sedhai. The Government is committed to providing additional relief on the basis of the recommendations made by the transitional justice mechanisms that will be established in the near future.

4.5 The State party further expresses concern about the authenticity of the communication presented by Ms. Mandira Sharma of Advocacy Forum–Nepal, said to be representing the author. The State party considers it troubling that Ms. Shedai's signature on the letter of authorization dated 4 August 2008 is different from the one she executed on the first writ of habeas corpus submitted to the Supreme Court. Moreover, Ms. Shedai merely made a thumbprint on her second writ of habeas corpus.

4.6 On the grounds that the State party is committed to conducting appropriate and comprehensive inquiries into all cases of enforced disappearances that took place during the 10-year armed conflict and that it has already taken steps to provide an appropriate domestic remedy in the spirit of the Interim Constitution, the Comprehensive Peace Agreement and Supreme Court directives, the State party is of the view that the communication submitted by the author should be dismissed.

Author's comments on the State party's submission

5.1 On 5 October 2010, the author rejected the State party's observations. The author contends that there is no certainty that the bills will be passed, when they will be passed or

[3] 100,000 Nepalese rupees are equivalent to about US$ 1,150 or €880 (24 April 2013).

how they will affect victims' rights. The author therefore rejects the State party's argument that the commission to investigate cases of disappearances and the Truth and Reconciliation Commission constitute "prompt, independent and effective investigation and prosecution", as required under international human rights law.[4]

5.2 The author highlights the fact that more than seven years have passed since Mr. Sedhai was arrested and disappeared and the State party has failed to conduct an impartial investigation. Additionally, the two commissions mentioned do not yet exist and the timeline for their establishment remains vague. The Government has therefore not provided a satisfactory commitment to "promptly" initiate an investigation. The author recalls that the commissions are not judicial bodies and it has not been established that they will have the power to impose appropriate punishments for human rights offenders.

5.3 The author indicates that the State party has still not implemented the decision issued by the National Human Rights Commission on 6 June 2006, recommending that the Government of Nepal make public the whereabouts of Mr. Sedhai, prosecute the army personnel responsible for his disappearance, and provide information to the Supreme Court and the Commission on the punishment handed down to the officials responsible.

5.4 The author further considers that the commission to investigate cases of disappearances and the Truth and Reconciliation Commission are not judicial bodies and that the bills providing for their establishment would not give them the power to impose appropriate punishment for the perpetrators of Mr. Sedhai's enforced disappearance.

5.5 The author also considers that the State party's argument that transitional justice mechanisms are more appropriate for a comprehensive inquiry and investigation does not provide her with a guarantee of prompt prosecution of the perpetrators. Even if the Nepalese criminal justice system does not criminalize torture, enforced disappearance, incommunicado detention and ill-treatment, it remains the more appropriate avenue for immediate criminal investigation and punishment. The claim presented by the author cannot be dismissed on the basis of transitional justice bodies that have yet to be established.

5.6 As for the other grounds invoked in the State party's observations, the author considers that the sum of 100,000 rupees provided by the State party as interim relief following the Supreme Court decision of June 2007 does not constitute adequate compensation for her and her family.

5.7 With regard to the authenticity of the complaint, the author indicates that the discrepancies between her signatures on documents related to the complaint can be explained by the fact that she is semi-literate. Additionally, at the time of the first writ of habeas corpus to the Supreme Court on 14 December 2004, under pressure of time and out of fear, and given that there was no ink with which to make a thumbprint, the author asked her niece to sign on her behalf. On 15 September 2005, when filing a second writ of habeas corpus, the author made a thumbprint. On 3 August 2008, when authorizing Advocacy Forum–Nepal to file a communication, she was feeling confident and was able to sign. The author further highlights that the thumbprint she made at the end of the writ of habeas corpus submitted in September 2005 matches the one on the statement attached to her submission to the Human Rights Committee dated 8 October 2010, and that the signature on her letter of 3 August 2008 to the Human Rights Committee is the same as the one in that submission.

[4] The author refers to the Committee's jurisprudence in communication No. 1469/2006, *Sharma v. Nepal*, Views adopted on 28 October 2008.

State party's additional observations

6.1 In a note verbale dated 3 February 2011 responding to the author's comments, the State party reiterated that the creation of the Truth and Reconciliation Commission and the commission on disappearances is mandated by the 2007 Interim Constitution of Nepal, as well as the 2006 Comprehensive Peace Agreement.[5] There is no reason to cast doubt on the constitutional provision aimed at addressing the issues of disappeared persons and human rights violations committed during the armed conflict. The provisions of chapter 8 of the Interim Constitution have to be observed in order for the bills to be approved by Parliament. The bills are under consideration and the commissions are going to be set up. There is no justification for questioning the mandates of the commissions that will be formed as they are clearly manifested in the relevant provisions of the Interim Constitution and the Comprehensive Peace Agreement.

6.2 The National Human Rights Commission was established as a constitutional body under article 132 of the Interim Constitution. It has the duty to ensure the respect, protection and promotion of human rights and their effective implementation. Its functions include receiving petitions or complaints of human rights violations, conducting independent inquiries and investigations and recommending action against perpetrators. The effective implementation of these recommendations is a constitutional obligation which the Government is committed to fulfilling. The author makes reference to an alleged failure by the Government to act on the recommendation of the National Human Rights Commission in the case of Mr. Sedhai. However, setting up a separate commission for a single incident would not be appropriate or practical. Additionally, as the facts in question occurred during the armed conflict, they must be addressed by the Truth and Reconciliation Commission, in conformity with international practice on establishing the truth in such cases, facilitating prosecution and reconciliation in society, and seeking a lasting peace. Once the bills become law, due action will be taken in accordance with the provisions contained therein.

6.3 The Government reiterates that the 100,000 rupees provided to the family of Mr. Sedhai is interim relief and that an additional relief package will be provided on the basis of the recommendations made by the transitional justice mechanisms to be set up in the near future.

6.4 As for the author's observation that the proposed commissions are not judicial bodies, the Government highlights the fact that they will be established under the constitutional mandate and the Comprehensive Peace Agreement. The commission on disappearances will also be created in accordance with the Supreme Court directive. These commissions should facilitate the smooth management of conflict, including by investigating grave human rights violations committed during the conflict and recommending the level of relief to be provided to the families of those who disappeared.

6.5 With regard to the comment that torture is not defined as a criminal offence, the 1990 Constitution states that no person in detention would be subjected to physical or mental torture or be given any cruel, inhuman or degrading treatment and any person so treated would be compensated in a manner determined by law. The 2007 Interim Constitution states that such acts are punishable by law and that victims will be compensated as determined by law. The 1996 Torture-related Compensation Act includes a

[5] On 14 March, 2013, Nepal's President Ram Baran Yadav passed an ordinance creating a Truth and Reconciliation Commission. On 1 April 2013, the Supreme Court suspended the application of the ordinance pending further review, mainly on the grounds that the mandate of the Commission included the possibility of amnesty for perpetrators of human rights violations.

legal remedy and an ongoing law reform aims "to make the legal provisions against torture more effective".

6.6 The author has mentioned that she asked her niece to sign on her behalf. The provisions of the *Muluki Ain* (General Code), 2020 *Bikram Samvat*, prohibit anyone from signing for another person, even with the consent of the other person, and punish this practice. It is not stated in the writ of habeas corpus that the signature was entered by the niece and the author did not mention that she had any specific difficulty that prevented her from signing. The State party also indicates that the claim that there was no ink is false.

6.7 The State party therefore considers that the case has no merit and that the claim made by the author should be dismissed.

Issues and proceedings before the Committee

Consideration of admissibility

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

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

7.3 With respect to the requirement of exhaustion of domestic remedies, the Committee notes that although the author filed a writ of habeas corpus with the Supreme Court in December 2004, and again in September 2005, which brought her allegations to the attention of the Ministry of Home Affairs, the Ministry of Defence, Chhauni Barracks, Police Headquarters, Kathmandu District Administration Office, Kathmandu District Police Office and Army Headquarters, no investigation of these allegations had been undertaken by the State party eight years after the violations were brought to its attention. The Committee notes that the reply received by the author after the second writ of habeas corpus reiterated that the government authorities did not know the whereabouts of the alleged victim and demanded the writ be dismissed, without providing any information on steps taken to investigate the case. The Committee also notes that the State party did not collaborate with the National Human Rights Commission, despite repeated attempts by the Commission to obtain information. Additionally, the State party has not taken any concrete action to investigate the whereabouts of Mr. Sedhai or to bring those responsible to justice since his disappearance was reported to the authorities, despite the recommendations of the Commission and directives from the Supreme Court to do so.

7.4 The Committee notes that the State party has provided no concrete information about ongoing criminal proceedings in the present case, and that, on the contrary, all the steps the author's family has taken to ascertain whether an investigation was being carried out point towards the absence of any such investigation or any significant progress in this regard. From the information available to it, the Committee can therefore not conclude that a criminal investigation is currently being carried out by the competent police or prosecution authorities.

7.5 The Committee further notes the State party's argument that the case of Mukhunda Sedhai will be addressed in the transitional justice framework which has still to be established in conformity with the 2007 Interim Constitution and with the 2006 Comprehensive Peace Agreement. It also notes the author's position that there is no

certainty that the relevant bills will pass into law and no clarity as to their consequences for victims.[6] The Committee considers that under the present circumstances, the author has exhausted all available domestic remedies and that article 5, paragraph 2 (b), of the Optional Protocol does not preclude it from considering the communication.

7.6 Regarding the argument of the State party that the variations in the author's signature in the documents she presented throughout the process cast doubt on the authenticity of the complaint, the Committee considers that, taking into account the author's explanations, such variations are not sufficient to doubt the authenticity of the communication submitted to the Committee.

7.7 The Committee therefore considers that the communication is admissible and proceeds to the examination of the author's allegations under articles 6 (para. 1), 7, 9 and 10 read alone and in conjunction with article 2 (para. 3) of the Covenant, and article 2 (para. 3) read alone.

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 The Committee notes that, according to the author, her husband, Mr. Mukunda Sedhai, was arrested on 19 December 2003 in a tea shop in Bhimsensthan, Kathmandu, by four or five men in plain clothes, some of whom were armed. The Committee takes note that Mr. Sedhai was known in the tea stall, where he regularly met other individuals from Dhading District who were staying in Kathmandu. The Committee also notes that the National Human Rights Commission conducted an investigation in 2005 and concluded that Mr. Sedhai had been arrested and subsequently detained in Chhauni Barracks; this information was subsequently confirmed by a witness, Mr. Dev Bahadur Maharjan. Although Mr. Sedhai's family still hopes to find him alive, the Committee understands the author's and her family's fear, in view of his prolonged disappearance, that he may be deceased. The Committee notes that the State party has produced no evidence refuting that possibility. The Committee recalls that, in cases of enforced disappearance, the deprivation of liberty followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate of the disappeared person places him or her outside the protection of the law and places his or her life at serious and constant risk, for which the State is accountable. In the case at hand, the Committee notes that the State party has produced no evidence to indicate that it has fulfilled its obligation to protect Mr. Sedhai's life. Therefore the Committee concludes that the State party has failed in its duty to protect Mr. Sedhai's life, in violation of article 6, paragraph 1, of the Covenant.[7]

8.3 The Committee recognizes the degree of suffering involved in being held indefinitely without contact with the outside world. It recalls its general comment No. 20 on article 7, which recommends that States parties should make provision to ban incommunicado detention.[8] The Committee notes that Mr. Sedhai was arrested on 19

[6] See footnote 5.

[7] See, inter alia, communication No. 1913/2009, *Abushaala v. Libya*, Views adopted on 18 March 2013, para. 6.2; communication No. 1753/2008, *Guezout and Rakik v. Algeria,* Views adopted on 19 July 2012, para. 8.4; communication No. 1779/2008, *Mezine v. Algeria*, Views adopted on 25 October 2012, para. 8.4; communication No. 1905/2009, *Ouaghlissi v. Algeria*, Views adopted on 26 March 2012, para. 7.4; and communication No. 1781/2008, *Djebrouni v. Algeria*, Views adopted on 31 October 2011, para. 8.4.

[8] See the Committee's general comment No. 20 (1992) on article 7, para. 11.

December 2003, and that his whereabouts have not been known since 16 January 2004, when a member of the army delivered the second and last letter written by Mr. Sedhai to his wife since his detention. The Committee further notes that witness statements indicate that Mr. Sedhai was seriously beaten and tortured while detained in the Chhauni Barracks and highlight that the detention conditions were inhuman and that torture and beatings were commonplace there (see paras. 2.5 and 2.6 above). The Committee recalls that it is implicit in article 4, paragraph 2, of the Optional Protocol that the State party has a 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 the absence of any convincing explanations from the State party, due weight must be given to the author's allegations.[9] On the basis of the information at its disposal, and recalling that article 7 allows no limitation, even in situations of public emergency,[10] the Committee finds that the acts of torture to which the author was exposed, his incommunicado detention and enforced disappearance, as well as his conditions of detention, reveal singular and cumulative violations of article 7 of the Covenant with respect to Mr. Sedhai.[11]

8.4 The Committee also takes note of the anguish and distress caused by Mr. Sedhai's disappearance to the author and their two children, Anil and Anita Shedhai. The family never obtained official confirmation of his detention. The Committee is therefore of the opinion that the facts before it also reveal a violation of article 7 of the Covenant, read alone and in conjunction with article 2, paragraph 3, with regard to the author's wife and their two children.[12]

8.5 With regard to the alleged violation of article 9, the Committee notes the author's statement (see paras. 2.1 to 2.3 above) that Mr. Sedhai was arrested on 19 December 2003 by four or five men in plain clothes, without a warrant and without being informed of the reasons for his arrest; that Mr. Sedhai was not informed of the criminal charges against him and was not brought before a judge or other judicial authority, which would have enabled him to challenge the legality of his detention; and that no official information was given to the author and her family regarding Mr. Sedhai's whereabouts or his fate. In the absence of satisfactory explanations from the State party, the Committee finds a violation of article 9 with respect to Mr. Sedhai.[13]

8.6 Regarding the complaint under article 10, paragraph 1, 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 view of Mr. Sedhai's incommunicado detention, the information provided by witnesses with regard to the detention conditions in Chhauni

[9] See communication No. 1295/2004, *El Alwani v. Libyan Arab Jamahiriya*, Views adopted on 11 July 2007, para. 6.5; communication No. 1422/2005, *El Hassy v. Libyan Arab Jamahiriya*, Views adopted on 24 October 2007, para. 6.2; and communication No. 458/1991, *Mukong v. Cameroon*, Views adopted on 21 July 1994, para. 5.1. .

[10] See article 4 of the Covenant.

[11] See communication No. 1761/2008, *Giri v. Nepal*, Views adopted on 24 March 2011, para. 7.4; *Ouaghlissi v. Algeria* (note 7 above), para. 7.5; *Djebrouni v. Algeria* (note 7 above), para. 8.5; *El Alwani v. Libyan Arab Jamahiriya* (note 9 above), para. 6.5.

[12] See *Abushaala v. Libya* (note 7 above), para. 6.4; *Mezine v. Algeria* (note 7 above), para. 8.6; communication No. 1640/2007, *El Abani v. Libyan Arab Jamahiriya*, Views adopted on 26 July 2010, para. 7.5.

[13] See *Mezine v. Algeria* (note 7 above), para. 8.7; *Ouaghlissi v. Algeria* (note 7 above), para. 7.7; and *Djebrouni v. Algeria* (note 7 above), para. 8.7.

Barracks, and in the absence of information provided by the State party in that regard, the Committee finds a violation of article 10, paragraph 1, of the Covenant.[14]

8.7 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 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 (2004), which indicates that the failure by a State party to investigate allegations of violations could in itself give rise to a separate breach of the Covenant (para. 15). In the current case, although Mr. Sedhai's family repeatedly contacted the competent authorities regarding his disappearance, including judicial authorities such as the Police Headquarters, the District Police and the Supreme Court of Nepal, all their efforts led to nothing, and the State party failed to conduct a thorough and effective investigation into Mr. Sedhai's disappearance. Furthermore, the reference by the State party to procedures that have still not been implemented (the Truth and Reconciliation Commission and the commission on disappearances as mandated by the 2007 Interim Constitution of Nepal and the 2006 Comprehensive Peace Agreement) is not sufficient to consider that the author has had access to an effective remedy. Additionally, the announcement by the State party that the 100,000 rupees received by the family of Mr. Sedhai as interim relief will be complemented by a relief package that should be determined on the basis of the recommendations made by the same transitional justice mechanisms that are still pending implementation does not guarantee the author an effective remedy either. The Committee therefore concludes that the facts before it reveal a violation of article 2, paragraph 3, read in conjunction with article 6, paragraph 1, article 7, article 9, and article 10, paragraph 1, with regard to Mr. Sedhai and article 2, paragraph 3, read in conjunction with article 7 of the Covenant with respect to the author and their two children, Anil and Anita Shedhai.

9. The 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 information before it discloses violations by the State party of article 6, paragraph 1; article 7; article 9; article 10, paragraph 1; and article 2, paragraph 3, read in conjunction with article 6, paragraph 1; article 7; article 9; article 10, paragraph 1, of the Covenant with regard to Mr. Sedhai, and of article 7, read alone and in conjunction with article 2, paragraph 3, with respect to the author and their two children.

10. In accordance with article 2, paragraph 3, of the Covenant, the State party is under an obligation to provide the author and his family with an effective remedy, including by: (a) conducting a thorough and effective investigation into Mr. Sedhai's disappearance; (b) providing the author and her family with detailed information about the results of its investigation; (c) releasing him immediately if he is still being detained incommunicado; (d) in the event that Mr. Sedhai is deceased, handing over his remains to his family; (e) prosecuting, trying and punishing those responsible for the violations committed; and (f) providing adequate compensation to the author and her children for the violations suffered and to Mr. Sedhai, if he is still alive. The State party is also under an obligation to take steps to prevent similar violations in the future.

11. 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 or not there has

[14] See the Committee's general comment No. 21 (1992) on article 10, para. 3; *Mezine v. Algeria* (note 7 above), para. 8.8; communication No. 1780/2008, *Zarzi v. Algeria*, Views adopted on 22 March 2011, para. 7.8; and communication No. 1134/2002, *Gorji-Dinka v. Cameroon*, Views adopted on 17 March 2005, para. 5.2.

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

[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.]

Appendix

Individual opinion of Committee members Mr. Fabián Salvioli and Mr. Victor Rodríguez-Rescia

1. We agree with the decision of the Human Rights Committee in communication No. 1865/2009, which established the international responsibility of the State for the violation of articles 6 (para. 1), 7, 9 and 10 (para. 1), and article 2 (para. 3), read in conjunction with articles 6 (para. 1), 7, 9 and 10 (para. 1), of the Covenant, with respect to Mukunda Sedhai, and article 7, read separately and in conjunction with article 2 (para. 3), with respect to the author and her two children.

2. However, we deeply regret that the Committee did not find a violation of article 16 of the Covenant, departing from its established jurisprudence on enforced disappearances.

3. In the present case, the Committee did not find a violation of article 16 of the Covenant on the grounds that it had not been invoked by the author of the communication; the Committee thereby failed to apply the legal principle of *iura novit curia* and unjustifiably restricted its own competence in a way that is inappropriate for an international body that protects human rights.

4. The enforced disappearance of the victim was established in the file submitted to the Committee; the Committee has maintained a clear position since the adoption of its Views in the case of *Kimouche v. Algeria*,[1] whereby the enforced disappearance of persons implies the violation of the right to recognition as a person before the law. In this regard, it pointed out that "the Committee reiterates its settled jurisprudence, according to which the intentional removal of a person from the protection of the law for a prolonged period of time may constitute a refusal to recognize that person as a person before the law if the victim was in the hands of the State authorities when last seen and if the efforts of his or her relatives to obtain access to potentially effective remedies, including judicial remedies […], have been systematically impeded".[2]

5. It is difficult to understand why, in the light of similar established facts, the Committee draws different conclusions according to the legal arguments put forward by the parties. In adopting this course of action, the Committee addresses the issues before it as if the cases were governed by civil law rather than international human rights law. The reluctance of the majority of the Committee to apply the principle of *iura novit curia* leads to unreasonable results in the light of the established facts before it.

6. It should be noted that this alleged practice is not only based on a misconception but is also applied inconsistently: the Human Rights Committee has itself on occasion applied the principle of *iura novit curia*, although it has not mentioned it explicitly in its Views. In recent years, there have been various examples of the Committee's correct application of the provisions of the Covenant, on the basis of the evidence, departing from the legal arguments or the specific articles cited by the parties.[3]

[1] See communication No. 1328/2004, *Kimouche v. Algeria*, Views adopted on 10 July 2007, para. 7.9.

[2] See communication No. 1781/2008, *Berzig v. Algeria*, Views adopted on 31 October 2011, para. 8.9.

[3] See communication No. 1390/2005, *Koreba v. Belarus*, Views adopted on 25 October 2010; communication No. 1225/2003, *Eshonov v. Uzbekistan*, Views adopted on 22 July 2010, para. 8.3; communication No. 1206/2003, *R.M. and S.I. v. Uzbekistan*, Views adopted on 10 March 2010, paras. 6.3 and 9.2, with a finding of no violation; communication No. 1520/2006, *Mwamba v. Zambia*,

7. The Committee should set clear guidelines in the future for the assessment of the facts of the cases submitted to it, in order to apply the law; follow the best and most coherent international approach, without restricting its own competence; apply without hesitation the principle of *iura novit curia* when it is relevant; and avoid inconsistencies in its jurisprudence — all with a view to adequately fulfilling its mandate to monitor respect for and the guarantee of the rights set forth in the International Covenant on Civil and Political Rights for persons under the jurisdiction of a State party to the Optional Protocol, under the individual communications procedure.

[Done in English, French and Spanish, the Spanish 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.]

Views adopted on 10 March 2010; communication No. 1320/2004, *Pimental et al. v. Philippines*, Views adopted on 19 March 2007, paras. 3 and 8.3; communication No. 1177/2003, *Ilombe and Shandwe v. Democratic Republic of the Congo*, Views adopted on 17 March 2006, paras. 5.5, 6.5 and 9.1; communication No. 973/2001, *Khalilova v. Tajikistan*, Views adopted on 30 March 2005, para. 3.7; and communication No. 1044/2002, *Shukurova v. Tajikistan*, Views adopted on 17 March 2006, para. 3.