



**International covenant  
on civil and  
political rights**

Distr.  
RESTRICTED\*

CCPR/C/94/D/1469/2006  
6 November 2008

Original: ENGLISH

HUMAN RIGHTS COMMITTEE  
Ninety-fourth session  
13 – 31 October 2008

**VIEWS**

**Communication No. 1469/2006**

<u>Submitted by:</u>	Yasoda Sharma (represented by Advocacy Forum-Nepal)
<u>Alleged victim:</u>	The author and her husband Surya Prasad Sharma
<u>State Party:</u>	Nepal
<u>Date of communication:</u>	26 April 2006 (initial submission)
<u>Document references:</u>	Special Rapporteur's rule 91 decision, transmitted to the State party on 9 May 2006 (not issued in document form)
<u>Date of adoption of Views:</u>	28 October 2008

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\* Made public by decision of the Human Rights Committee.

*Subject matter:* Disappearance, detention incommunicado

*Procedural issues:* Non-exhaustion of domestic remedies

*Substantive issues:* Right to life; prohibition of torture and cruel, inhuman or degrading treatment or punishment; right to liberty and security of the person; respect for the inherent dignity of the human person

*Articles of the Covenant:* 2(3) in connection with articles 6, 7, 9 and 10

*Articles of the Optional Protocol:* 5(2)(b)

On 28 October 2008, the Human Rights Committee adopted the annexed text as the Committee's Views, under article 5, paragraph 4, of the Optional Protocol in respect of communication No. 1469/2006.

[ANNEX]

**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

Ninety-fourth session

concerning

**Communication No. 1469/2006\***

<u>Submitted by:</u>	Yasoda Sharma (represented by Advocacy Forum-Nepal)
<u>Alleged victim:</u>	The author and her husband Surya Prasad Sharma
<u>State Party:</u>	Nepal
<u>Date of communication:</u>	26 April 2006 (initial submission)

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

Meeting on 28 October 2008,

Having concluded its consideration of communication No. 1469/2006, submitted to the Human Rights Committee by Yasoda Sharma 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**

1.1 The author of the communication submitted on 26 April 2006 is Mrs. Yasoda Sharma, a Nepalese national born on 3 May 1967, on behalf of herself and her missing husband, Surya Prasad Sharma, born on 27 September 1963. She claims that Nepal has violated article 2(3) in connection with articles 6, 7, 9 and 10, by not conducting a thorough investigation of her husband's disappearance. She is represented by counsel, Advocacy Forum - Nepal. Nepal has been a State party to the Covenant and its Optional Protocol since 14 May 1991.

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\* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Yuji Iwasawa, Ms. Helen Keller, Ms. Iulia Antoanella Motoc, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Mr. Rafael Rivas Posada, Sir Nigel Rodley and Mr. Ivan Shearer.

1.2 On 12 February 2008, the State party requested that the admissibility of the communication be examined separately from the merits of the communication. On 29 February 2008, the Special Rapporteur on New Communications, on behalf of the Committee, determined that the admissibility and the merits of this case should be considered together.

### **Facts as presented by the author**

2.1 On 12 January 2002, the author's husband returned home after living in hiding for five years as a supporter of the Communist Party of Nepal (Maoist). An application was prepared with the support of some mainstream political leaders for him to surrender, and it was suggested that he submit this application to the Office of the Chief District Officer in Baglung on 14 January 2002. On that day at 5 a.m., a group of 10-15 uniformed army personnel came to the author's residence in Srinigar Tole, Baglung district. They woke up the author and her husband. The captain in charge (whose name is unknown) and another soldier entered the house and removed the author's husband from his bed. He was then taken into custody and informed that he would be taken to the army barracks to be interrogated. The soldiers then searched the house for ammunition and Maoist-related documents. They found nothing. When the soldiers left with the author's husband, the author followed them to the Kalidal Gulm army barracks, where she saw her husband being led inside. She was not permitted to enter the barracks, but was informed that her husband would be released after the interrogation.

2.2 On 15 January 2002, the author went to the army barracks with food and warm clothes for her husband. She was not permitted to visit him. Army personnel also informed her that her husband was safe. On 20 January 2002, she was again prevented from visiting her husband at the barracks. On the same day, a soldier visited her at home, stating that her husband had sent him to collect tobacco for him. The soldier did not disclose his identity. However, he was able to ask for Mr Sharma's preferred tobacco by its exact name. He told her that her husband had been beaten and that she should not tell anyone that he had come to visit her on her husband's behalf. On 22 January 2002, the author heard rumours that her husband had been severely tortured in the barracks.

2.3 On 23 January 2002, the author and her mother-in-law asked again to visit her husband. The soldier at the gate went inside the barrack, came back and told them that Mr. Sharma had escaped on 21 January 2002 while being taken to Amalachour village to reveal the whereabouts of a Maoist hide-out. He repeated what Major Chandra Bahadur Pun had told him, i.e. that Mr. Sharma had drowned in the Kaligandaki River during his escape.

2.4 On 2 February 2002, the author came to the barracks to meet with Major Chandra Bahadur Pun. She enquired about the charge under which her husband was held and his state of health. The Major reiterated that Mr. Sharma had patrolled with troops in order to identify other Maoist 'terrorists' during which time he escaped. The author enquired about his body, in the eventuality that he had been killed by the armed forces. The Major denied that any murder had occurred, refused to disclose any further information and asked her to leave.

2.5 On 3 February 2002, the author contacted the Chief District Officer (CDO) and asked under which law her husband was detained. The CDO claimed that, because of the state of emergency, he could not provide detailed information about her husband's situation. On 4 February 2002, the author approached the District Police Office of Baglung for information on

her husband, but was told that they had no time to hear her case. She persistently tried to collect news from the relevant authorities.

2.6 On 12 February 2002, Amnesty International released an Urgent Action appeal for Mr Sharma. On 9 September 2002, the author appealed to the National Human Rights Commission (NHRC). On 20 January 2006, the Commission informed the author that it had communicated with the relevant authorities, but failed to obtain any further information about Mr. Sharma. The author also contacted several other human rights organisations at various dates, but none were able to assist her.

2.7 On 4 February 2003, the author filed in the Supreme Court a writ of habeas corpus against the Home Ministry, the Defence Ministry, the Police Headquarters, the Army Headquarters, the District Administration Office (CDO) of Baglung, the District Police Office of Baglung and the Khadgadal Barracks of Baglung. On 5 February 2003, the Supreme Court ordered the respondents to show cause and provide reasons for the alleged victim's detention. It received responses from all the respondents between February and April 2003. All, with the notable exception of the CDO, denied the arrest and detention of Mr. Sharma. They stated that they had not made any order for his arrest, had not arrested him and were not illegally detaining him. Furthermore, they demanded that the writ of habeas corpus be quashed. As for the CDO, it responded that its records showed that Mr. Sharma had been arrested by the security forces, had escaped while patrolling and jumped into the river from which he did not emerge. The Supreme Court asked for further details from the CDO. In its reply dated 2 April 2003, the CDO stated that on 21 January 2002, troops from the Kalidal barracks were patrolling with Mr. Sharma around 4 p.m. along Dovan Way when they were ambushed by Maoists. At this point, Mr. Sharma tried to escape, jumped into the river and did not reappear. He was assumed drowned. The CDO stated that this incident was verbally reported to the author.

2.8 The Supreme Court asked for further details to be provided by the Office of the Attorney General which upheld the CDO's description of events regarding Mr. Sharma. It also reported that "the Kalidal Gulm barrack had moved to some other place and the Khadgadal Gulm barrack had come to Baglung. Thus, the latter had neither arrested, nor received any information on Surya's case by the prior barracks." On 12 November 2003, the Supreme Court ordered again the CDO to provide some clarification on the law under which the arrest of Mr. Sharma took place. The CDO replied that he had been arrested by the security forces, in particular those stationed at Kalidal Gulm barrack, under no order or act by the CDO, but for the purposes of their own investigation. The CDO stated that a person could be arrested for interrogation and kept in detention and that Mr. Sharma had died during that time.

2.9 On 12 September 2004, the Malego Commission on the investigation of missing persons (set up in 2004 to publicly declare the location of missing persons) published a list of missing persons which included Mr. Sharma's name and quoted the CDO's response. In a letter dated 2 February 2005, the Home Ministry supported the CDO's response and reaffirmed that Mr. Sharma was not in army custody or placed under their control.

2.10 On 16 February 2005, the Supreme Court quashed the writ of habeas corpus. The author waited for seven months for the grounds under which the writ was quashed to be revealed. On 23 September 2005, she was provided with the decision which stated that since Mr. Sharma had

drowned in the river, he was not in the custody or control of the state and that there was thus no need to issue the writ. The Supreme Court took no action to compel the respondents to produce Mr. Sharma's body, regardless of the cause of death, as is required by a writ of habeas corpus.

### **The complaint**

3.1 The author claims that she was not given an effective remedy in violation of article 2(3). There was no thorough investigation into the disappearance of her husband. While her husband was arrested during a declared state of emergency, the author recalls that article 4 does not permit derogations to articles 6, 7, 8, 11, 15, 16 and 18 of the Covenant, and that in any case, her husband's enforced disappearance was not required by the emergency situation. She argues that the failure to maintain current and accurate records of detainees increases the likelihood of detainees being subjected to torture and other abuses. The Supreme Court did not order an investigation, nor did it bring the perpetrators to justice. The author also argues that the 1996 Torture Compensation Act is of limited assistance since details of the torture inflicted on the victim must be provided and such information is not usually available. She recalls that the Committee has previously held that the failure to provide effective remedies was in itself a violation of the Covenant.<sup>1</sup>

3.2 The author claims that the State's failure to investigate her husband's disappearance breaches its obligation under article 6. She recalls that States have a responsibility under article 6 to take measures to prevent disappearances and to effectively investigate them.<sup>2</sup> By taking the author's husband on patrol in a Maoist-controlled area, the army was directly putting at risk his personal safety. It also took no reasonable steps to protect him during the alleged drowning. As of today, there is no independent report as to what has happened to the author's husband while he was in the custody of the army. The author notes that two contradictory responses were given to the Supreme Court. Most authorities claimed that the husband was never arrested or detained by them, while the CDO held that he drowned in a river while trying to escape.

3.3 The author claims that the enforced disappearance of her husband and the ill-treatment he was subjected to constitute violations of article 7. Her husband was never detained in officially recognised places of detention. The family never knew his exact whereabouts. His name, place(s) of detention and the names of the persons responsible for his detention were never recorded in registers readily available and accessible to his relatives.<sup>3</sup> While the CDO maintains that he was held for a short period of time, without charge, for the purposes of an interrogation, he should have been traceable at all times. The author argues that her husband's arrest and

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<sup>1</sup> See Communication No. 90/1981, *Luyeye Magana ex-Philibert v. Zaire*, Views adopted on 21 July 1983, para.8.

<sup>2</sup> See Communication No. 449/1991, *Rafael Mojica v. Dominican Republic*, Views adopted on 15 July 1994, para.5.5; and Communication No. 540/1993, *Celis Laureano v. Peru*, Views adopted on 16 April 1996, para.8.3.

<sup>3</sup> See Human Rights Committee, General Comment No.20, para.11.

incommunicado detention constitutes a breach of article 7.<sup>4</sup> Moreover, she argues that the anguish caused to herself by her husband's disappearance is also a violation of article 7.<sup>5</sup>

3.4 The author claims that her husband's rights under article 9 were violated because he was arrested without a warrant and not informed of the grounds of arrest. He was never charged. Moreover, he was held incommunicado between 14 January 2002 and 21 January 2002 when he allegedly died. He did not have the opportunity to consult a lawyer and could not challenge the lawfulness of his detention.

3.5 The author claims that her husband's rights under article 10 were violated because he was a victim of an enforced disappearance.

3.6 With regard to the issue of exhaustion of domestic remedies, the author notes that she has attempted to obtain redress through a habeas corpus writ in order to find out the reasons for her husband's detention and his whereabouts. This was unsuccessful. Under the Judicial Administration Act of 1991, the Supreme Court may review a case decided by itself on two grounds, namely where a new fact arises after the decision and this fact is of vital importance to decide the case, or where the decision is inconsistent with the Supreme Court's previous jurisprudence. However, in the present case, the author cannot seek review on either ground since no new fact has arisen and there are many previous decisions quashing writs of habeas corpus where the respondents deny arrest and detention. The author has also approached the National Human Rights Commission and the Malego Commission, but without success. She considers that she has exhausted all domestic remedies.

3.7 The author requests that the Committee recommend to the State party that it must ensure that her husband's disappearance be thoroughly investigated by an impartial body in order to determine his situation and that this information be communicated to the family. On the basis of that information, the author should be released. If it is established that he has been killed, those responsible for his death should be identified, prosecuted and punished for obstructing the course of justice and causing the death of the author's husband. The State party should ensure that the family receives full and adequate reparation.

#### **State party's observations on admissibility**

4.1 By note verbale of 12 February 2008, the State party recalls that the author's husband was arrested by the security forces for an interrogation on his involvement in terrorist activities. While he was accompanying security forces to identify and show the hideouts of the rebels in the Amalachour area in Baglung district on 21 January 2002, they were ambushed and attacked by the rebels. Taking advantage of the situation, the author's husband jumped into the Kaligandaki river and drowned on his escape. He did not emerge from the river and was assumed drowned.

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<sup>4</sup> See Communication No. 950/2000, *Sarma v. Sri Lanka*, Views adopted on 16 July 2003, para.9.5; and See Communication No. 440/1990, *El-Megreisi v. Libyan Arab Jamahiriya*, Views adopted on 23 March 1994, para.5.4.

<sup>5</sup> See Communication No. 107/1981, *Quinteros Almeida v. Uruguay*, Views adopted on 21 July 1983, para.14.

4.2 The State party challenges the admissibility of the communication on two grounds. Firstly, the State party argues that the author has not exhausted domestic remedies. It contends that there are established civil as well as criminal procedures available to the author. The author did not initiate criminal proceedings through the filing of a First Information Report (FIR), which is the starting-point for any legal action. This would have triggered an investigation of the case under the supervision of the Office of the District Attorney. The author could then have gone to the District Court, and then to the Appellate Court. Decisions by the Appellate Court can be appealed to the Supreme Court.

4.3 The State party notes that instead of following the ordinary course of action, the author filed in the Supreme Court a writ of habeas corpus. The State party argues that this is not the normal legal course of justice, but a complement to it. Writ jurisdiction is invoked only when facts and merits are established beyond doubt, but no other legal remedies are available. The author has created a false impression that she has exhausted domestic remedies because she resorted directly to the Supreme Court through her habeas corpus writ petition. In any case, the author failed to seek judicial review by the Supreme Court which has the power to review its own decisions. She passed her own subjective pre-conceived judgment that it was unlikely that the judges would change the decisions made in her case. The State party emphasizes that the exercise of writ jurisdiction by the Supreme Court does not bar in any way the right of an individual to seek a remedy under the ordinary legal procedures. Legal remedies are available and effective.

4.4 While acknowledging that at the time of the arrest of the author's husband, the country was under a declared state of emergency, the State party argues that this situation did not deprive persons from seeking normal legal remedies. It further notes that the Comprehensive Peace Accord signed on 21 November 2006 provides for the establishment of a Truth and Reconciliation Commission whose mandate will be to look into all cases of disappeared persons.

4.5 Finally, the State party argues that counsel does not appear to be authorized to represent the author before the Committee.

4.6 On 11 March 2008 and 5 June 2008, the State party was requested to submit information on the merits of the communication. The Committee notes that this information has not been received. It regrets the State party's failure to provide any information with regard to the substance of the author's claims. It recalls that under the Optional Protocol, the State party concerned is required to submit to the Committee written explanations or statements clarifying the matter and the remedy, if any, that it may have taken. In the absence of a reply from the State party, due weight must be given to the author's allegations, to the extent that these have been properly substantiated.

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

5.1 On 10 June 2008, the author argues that contrary to the State party's claims, domestic remedies have been exhausted in this case. Firstly, she recalls that there is no specific crime of enforced disappearance and that there is thus no domestic remedy to exhaust. There is no specific prohibition on enforced disappearances under the Interim Constitution. An order by the Supreme Court in 2007 to criminalise enforced disappearances has yet to be acted upon by the government. Under the domestic legal system, it is necessary to file a FIR (First Information



Report) with the police for an investigation into an alleged crime to be investigated. Nonetheless, the State party had ample knowledge of the alleged crime through various official and unofficial sources and therefore had a duty to investigate. Indeed, the State party itself acknowledges that “it appears that the case does not seem to be one that can be remedied through a writ petition but might require detailed investigation.” The State party failed to mention that a FIR can only be submitted for one of the crimes listed in Schedule 1 of the State Cases Act of 1992. Enforced disappearance is not one of the crimes listed. It is therefore impossible for the author to submit a FIR for the disappearance of her husband. It is also impossible for the author to submit a FIR for the torture of her husband, as torture is not a crime listed in schedule 1 of the State Cases Act. Although the Torture Compensation Act of 1996 allows a family member to make a complaint on behalf of the victim in a “disappearance case”, it is impossible meet the burden of proof required by the Act, because a copy of a physical or mental check-up report must be made available to the concerned District Court. While the State party notes that there are civil procedures available to the author, it fails to list the specific remedies available. It is therefore impossible for the author under domestic law to seek redress for the disappearance of her husband as the existing legal system lacks the necessary mechanisms to allow her to submit a complaint to the competent authorities.

5.2 In some cases of disappearances, where it is known that the disappeared person died in custody, relatives have attempted to file FIRs under the State Cases Act for alleged homicide. However, in many cases, the fact that the person died cannot be proved in the absence of a body: filing a FIR for homicide or unlawful death is thus unlikely to lead to a successful investigation and prosecution. In any case, the filing of a FIR has led in some cases (not only disappearance cases) to threats to the plaintiffs and their families to force them to withdraw the FIR.<sup>6</sup> Moreover, FIRs have been refused by the police for various reasons. On occasion, the police have claimed that the case was a political issue on which it could not take action or that the complaint is against army personnel senior to the police officer and who is still working in the district. If the FIR is refused by the police, it is possible to appeal to CDO (Chief District Officer) and then appeal to the appellate court. However, these appeals are ineffective since there have been several cases where despite an order from the CDO to register the FIR, the DPO (district police office) has continued to refuse to take action.

5.3 While the State party claims that the domestic judicial system was functioning properly, the author recalls that even if she had been able to submit a FIR for the “disappearance” of her husband in January 2002, any progress in the police investigation would have stopped by November 2003 when the government established a unified command structure, whereby the police and the paramilitary Armed Police Force were brought under the command of the Royal Nepalese Army. This meant that submitting a FIR to the police about actions taken by the army would not have been investigated independently and impartially. Very few people dared to approach the police during that period and, if they did, the response was that the police had no power to investigate actions taken by the army. The author also recalls that there was a state of emergency between November 2001 and November 2002. It is therefore clear that the disappearance of her husband took place at a time when access to justice was limited both by restrictions on the legal system itself due to the state of emergency and fear for personal safety

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<sup>6</sup> See Report of the Working Group on Enforced and Involuntary Disappearances, E/CN.4/2005/65/Add.12, 8 January 2005, para.26.

due to the conflict situation. Just after the arrest of her husband, the author's telephone connection was cut off for a year as a punitive measure, leaving her with no means to contact people if she was in need of help or felt threatened.

5.4 As to the possibility of filing a FIR for unlawful death/killing, the author emphasises that the fact that her husband died during an attempt to escape the custody of the security forces has not been established. She is therefore not obliged to file a FIR for unlawful death. In any case, the State party had full knowledge of the disappearance and alleged death of her husband through both news articles documenting his disappearance at the time and the filing of the *habeas corpus* petition. Under Sections 7 and 9 of the State Cases Act and Rules 4 (5) and (6) of the State Cases Regulations, the DPO has the responsibility to initiate an investigation into all suspicious acts that come to its attention. The State party therefore had the responsibility to fully investigate the circumstances of the alleged death of the author's husband, even in the absence of a FIR.

5.5 The author recalls that although she filed a writ of habeas corpus in the Supreme Court, the investigation into the whereabouts of her husband ordered by the Supreme Court was biased and ineffective. She argues that she could not appeal to the Supreme Court as suggested by the State party, since there had been no court decision in this case for the reasons developed above. As there is no crime of "disappearance" in domestic law, she was unable to submit a complaint for the "disappearance" of her husband. She has not appealed against the Supreme Court's decision to dismiss the writ petition as there was no substantive reason to believe that the appeal would have been considered in a more independent manner. For a review of the Supreme Court's ruling to take place, the petitioner must show that there are new facts or evidence. This was not the case here. Furthermore, the ruling would have been reviewed by the same judge who dismissed the *habeas corpus* petition. This drastically restricts the chances that the case would have been reviewed effectively. These problems with the procedure are reflected in the fact that it is very rare in Nepal for petitioners to ask for review of dismissed *habeas corpus* decisions.

5.6 The author recalls that she has approached the National Human Rights Commission (NHRC). Her complaint was registered on 13 September 2002. On 15 May 2008, she was informed that the investigation is "in its last stages". In any case, the powers of the NHRC are limited. After the completion of an investigation, it can issue recommendations on compensation and further investigations to bring perpetrators to justice. However, it does not have the power to issue binding decisions. Many of its recommendations remain ignored. As for the Malego Committee, the author argues that the investigation by the Committee was less than satisfactory. The Committee simply quoted the response by the CDO, which states that the author's husband drowned while trying to escape from the armed forces. As to the State party's mention of the future Truth and Reconciliation Commission, the author finds this information irrelevant to the admissibility of the present case since this Commission still needs to be established and is not an existing remedy.

5.7 Finally, on the issue of authorization from the author to file to the complaint, the author points out that she signed the original copy of the communication submitted to the Committee.

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

### **Consideration of admissibility**

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

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

6.3 With respect to the requirement of exhaustion of domestic remedies, the Committee notes the State party's argument that the author has not filed a First Information Report with the police. Nevertheless, the Committee also notes the author's argument according to which the filing of FIRs with the police rarely leads to any investigation being made into the disappearance of the person concerned. It also notes that the author has made many enquiries, including with the Chief District Officer (CDO) and the District Police Office of Baglung (see para.2.5 above). On 4 February 2003, she also filed in the Supreme Court a writ of habeas corpus which was quashed two years later, even though the circumstances of the disappearance of the author's husband remained unclear. The Committee also notes that six years after the author's complaint was registered with the National Human Rights Commission, the investigation is still on-going. In the circumstances, the Committee considers that the author has met the requirements of article 5, paragraph 2 (b), of the Optional Protocol.

6.4 With regard to the issue of authorization, the Committee notes that the author signed the original complaint submitted by counsel to the Committee. It therefore concludes that counsel was duly authorized by the author to submit her complaint to the Committee.

6.5 In the circumstances, the Committee finds that it is not precluded from considering the communication under article 5, paragraph 2 (b), of the Optional Protocol. The Committee finds no other reason to consider the communication inadmissible and thus proceeds to its consideration on the merits, in as much as the claims under article 6; article 7; article 9; article 10; and article 2, paragraph 3, are concerned.

### **Consideration of merits**

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

7.2 As to the alleged detention incommunicado of the author's husband, the Committee recognises 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 against detention incommunicado. It notes that the author claims that her husband was detained incommunicado from 12 January 2002 until the time of his alleged death on 21 January 2002. The Committee notes that the author saw her husband being taken to the army barracks. In these circumstances, and in the absence of any explanations from

the State party in this respect, due weight must be given to the author's allegations. The Committee concludes that to keep the author's husband in captivity and to prevent him from communicating with his family and the outside world constitutes a violation of article 7 of the Covenant.<sup>7</sup>

7.3 With regard to the alleged violation of article 9, the information before the Committee shows that the author's husband was arrested by uniformed army personnel without a warrant and held incommunicado without ever being informed of the reasons for his arrest or the charges against him. The Committee recalls that the author's husband was never brought before a judge and could not challenge the legality of his detention. In the absence of any pertinent explanations from the State party, the Committee finds a violation of article 9.<sup>8</sup>

7.4 As to the alleged disappearance of the author's husband, the Committee recalls the definition of enforced disappearance in article 7, paragraph 2(i), of the Rome Statute of the International Criminal Court: "Enforced disappearance of persons means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time." Any act leading to such disappearance constitutes a violation of many of the rights enshrined in the Covenant, including the right to liberty and security of person (art. 9), the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment (art. 7) and the right of all persons deprived of their liberty to be treated with humanity and with respect for the inherent dignity of the human person (art. 10). It also violates or constitutes a grave threat to the right to life (art. 6).<sup>9</sup> In the present case, in view of her husband's disappearance since 12 January 2002, the author invokes article 2, paragraph 3, article 6, article 7, article 9 and article 10.

7.5 The Committee notes that the State party has provided no response to the author's allegations regarding the forced disappearance of her husband. It reaffirms that the burden of proof cannot rest on the author of the communication alone, 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 the relevant information.<sup>10</sup> It is implicit in article 4, paragraph 2, of the Optional Protocol that the State party has the duty to investigate in good faith all allegations of violations of the Covenant made against it and its representatives and to furnish to the Committee the information available to it. In cases where the allegations are corroborated by credible evidence submitted by the author and where further clarification depends on information

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<sup>7</sup> See Communication No. 540/1993, *Laureano v. Peru*, Views adopted on 25 March 1996, para.8.5; and Communication No. 458/1991, *Mukong v. Cameroon*, Views adopted on 21 July 1994, para.9.4.

<sup>8</sup> See Communication No. 1297/2004, *Medjnoune v. Algeria*, Views adopted on 14 July 2006, para.8.5.

<sup>9</sup> See Communication No. 950/2000, *Sarma v. Sri Lanka*, Views adopted on 16 July 2003, para.9.3.

<sup>10</sup> See Communication No. 139/1983, *Conteris v. Uruguay*, Views adopted on 17 July 1985, para.7.2; and Communication No. 1297/2004, *Medjnoune v. Algeria*, Views adopted on 14 July 2006, para.8.3.

exclusively in the hands of the State party, the Committee may consider an author's allegations substantiated in the absence of satisfactory evidence or explanations to the contrary presented by the State party.

7.6 In the present case, the author has informed the Committee that her husband disappeared on 14 January 2002 at the Kalidal Gulm army barracks where he was last seen by the author herself. He may have been seen at the army barracks on 20 January 2002 by a soldier. While the author was told on 23 January 2002 that her husband drowned in a river while escaping and was presumed dead, she still does not know the exact circumstances of his death and what has happened to him in the period preceding it. In the absence of any comments by the State party on the author's husband's disappearance, the Committee considers that this disappearance constitutes a violation of article 7.

7.7 With regard to the alleged violation of article 10, the Committee notes the author's argument that her husband's rights under this provision were violated because he was a victim of an enforced disappearance. It recalls that all persons deprived of their liberty have the right to be treated with humanity and with respect for the inherent dignity of the human person. In the present case, the author's husband disappeared and possibly died while he was in the custody of the State party. In the absence of any comments by the State party on the author's husband's disappearance, the Committee considers that this disappearance constitutes a violation of article 10.

7.8 As to the possible violation of article 6 of the Covenant, the Committee notes that both the author and the State party seem to agree that the author's husband is dead. Nonetheless, while invoking article 6, the author also asks for the release of her husband, indicating that she has not abandoned hope for his reappearance. The Committee considers that, in such circumstances, it is not for it to appear to speculate on the circumstances of the death of the author's husband, particularly in the light of the fact that there has been no official inquiry into the event. Insofar as the State party's obligations under paragraph 9 below would be the same with or without such a finding, the Committee considers it inappropriate in the present case to make a finding in respect of article 6.

7.9 With regard to author herself, the Committee notes the anguish and stress that the disappearance of the author's husband since 12 January 2002 caused to the author. It therefore is of the opinion that the facts before it reveal a violation of article 7 of the Covenant with regard to the author herself.<sup>11</sup>

7.10 The author invokes article 2, paragraph 3, of the Covenant, which requires States parties to ensure that individuals have accessible, effective and enforceable remedies for asserting the rights enshrined in the Covenant. The Committee attaches importance to the States parties' establishment of appropriate judicial and administrative mechanisms for addressing alleged violations of rights under domestic law. It refers to its General Comment No. 31 which states that failure by a State party to investigate allegations of violations could in and of itself give rise

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<sup>11</sup> See Communication No. 107/1981, *Quinteros v. Uruguay*, Views adopted on 21 July 1983, para.14; and Communication No. 950/2000, *Sarma v. Sri Lanka*, Views adopted on 31 July 2003, para.9.5.

to a separate breach of the Covenant.<sup>12</sup> In the present case, the information before it indicates that the author did not have access to such effective remedies, and the Committee concludes that the facts before it reveal a violation of article 2, paragraph 3, read together with article 7 and article 9 and article 10 with regard to the author's husband; and a violation of article 2, paragraph 3, read together with article 7 with regard to the author herself.<sup>13</sup>

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it reveal violations by the State party of article 7, article 9, article 10 and article 2, paragraph 3, read together with article 7, article 9 and article 10 with regard to the author's husband; and of article 7, alone and read together with article 2, paragraph 3, with regard to the author's herself.

9. In accordance with article 2, paragraph 3, of the Covenant, the State party is under an obligation to provide the author with an effective remedy, including a thorough and effective investigation into the disappearance and fate of the author's husband, his immediate release if he is still alive, adequate information resulting from its investigation, and adequate compensation for the author and her family for the violations suffered by the author's husband and by themselves. While the Covenant does not give individuals the right to demand of a State the criminal prosecution of another person,<sup>14</sup> the Committee nevertheless considers the State party duty-bound not only to conduct thorough investigations into alleged violations of human rights, particularly enforced disappearances and acts of torture, but also to prosecute, try and punish those held responsible for such violations.<sup>15</sup> The State party is also under an obligation to take measures to prevent similar violations in the future.

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 or not and that, pursuant to article 2 of the Covenant, that State party has undertaken to ensure all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views.

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

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<sup>12</sup> See para.15.

<sup>13</sup> See Communication No. 1327/2004, *Grioua v. Algeria*, Views adopted on 10 July 2007, para.7.10.

<sup>14</sup> See Communication No. 213/1986, *H.C.M.A. v. The Netherlands*, Views adopted on 30 March 1989, para.11.6; and Communication No. 612/1995, *Vicente et al. v. Colombia*, Views adopted on 29 July 1997, para.8.8.

<sup>15</sup> See Communication No. 1196/2003, *Boucherf v. Algeria*, Views adopted on 30 March 2006, para.11; and Communication No. 1297/2004, *Medjnoune v. Algeria*, Views adopted on 14 July 2006, para.10.