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REFERENCE: G/SO 215/51 NPL (2)  
CE/MEF/sn 1761/2008

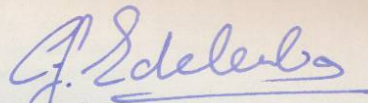
12 April 2011

Dear Ms. Sharma,

I have the honour to transmit to you herewith, the text of the Views, adopted by the Human Rights Committee on 24 March 2011, concerning communication No. 1761/2008, which you submitted to the Committee for consideration under the Optional Protocol to the International Covenant on Civil and Political Rights, on behalf of Mr. Yubraj Giri et al.

In accordance with established practice, the text of the Views will be made public.

Yours sincerely,

*PP*   
Ibrahim Salama  
Director  
Human Rights Treaties Division

Ms. Mandira Sharma  
Advocacy Forum  
16 Pabitrpyara Margh, Baluwatar  
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United Nations

**International Covenant on  
Civil and Political Rights**

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**Human Rights Committee**  
Hundredth and first session  
14 March- 1 April 2011

**Views**


**Communication No. 1761/2008**

<u>Submitted by:</u>	Yubraj Giri (represented by the Advocacy Forum)
<u>Alleged victim:</u>	The author, his wife (Dhanamaya Giri) and their two children (Yashoda and Yogesh Giri)
<u>State party:</u>	Nepal
<u>Date of communication:</u>	14 January 2008 (initial submission)
<u>Document references:</u>	Special Rapporteur's rule 97 decision, transmitted to the State party on 29 February 2008 (not issued in document form)
<u>Date of adoption of Views:</u>	24 March 2011

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

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<i>Subject matter:</i>	Arbitrary arrest and detention, and acts of torture against a farmer, on suspicion of membership in the Communist Party (Maoist)
<i>Substantive issue:</i>	Arbitrary arrest and detention; Torture and ill-treatment; <i>Incommunicado</i> detention; Enforced disappearance; Conditions of detention; Right to an effective remedy; State of Emergency.
<i>Procedural issue:</i>	Non-exhaustion of domestic remedies
<i>Articles of the Covenant:</i>	2, paragraph 3; 7; 9; and 10, paragraph 1
<i>Article of the Optional Protocol:</i>	5 (2) (b)

On 24 March 2011, 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. 1761/2008.

[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 (one hundredth and first session)**

concerning

**Communication No. 1761/2008\*\***

Submitted by: Yubraj Giri (represented by the Advocacy Forum)

Alleged victim: The author, his wife (Dhanamaya Giri) and their two children (Yashoda and Yogesh Giri)

State party: Nepal

Date of communication: 14 January 2008 (initial submission)

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

Meeting on 24 March 2011,

Having concluded its consideration of communication No. 1761/2008, submitted to the Human Rights Committee on behalf of Mr. Yubraj Giri, his wife and two children 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 Mr. Yubraj Giri, a Nepalese national, born on 1 February 1983. He claims to be a victim by Nepal of violations under article 7; article 9 and article 10, read in conjunction with article 2, paragraph 3, of the Covenant. He is represented by the Advocacy Forum. The Optional Protocol entered into force for the State Party on 4 March 1996.

**The facts as presented by the author**

2.1 The author is a farmer and lives in Rajagadawa Bankhet, Banke District, in the Bheri Zone, in Nepal. He is married to Dhanmaya Giri, and they have two children, Yashoda,

\*\* The following members of the Committee participated in the examination of the present communication: Mr. Lazhari Bouzid, Ms. Christine Chanet, Mr. Ahmad Amin Fathalla, Mr. Cornelis Flinterman, Mr. Yuji Iwasawa, Ms. Helen Keller, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Gerald L. Neuman, Mr. Michael O'Flaherty, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabian Omar Salvioli, Mr. Krister Thelin and Ms. Margo Waterval.

aged 7 and Yogesh, aged 5<sup>1</sup>. On 29 April 2004, he was visiting the village of Laknawar, and playing a board game with villagers on the roadside in the afternoon. He had been playing for 10 minutes when a member of the Communist Party of Nepal (Maoist) ("CPN-M") joined the game. After about 5 minutes, the author heard a man shouting to another person to "look at the Maoist activist". The author turned and saw two men dressed in civilian dress and armed with pistols, riding on bicycles. The Maoist activist began running away and the two men got off their bicycles, opened fire and gave chase to him.

2.2 After about 20 minutes, the two men in civilian dress returned to the village, got back on their bicycles and rode away. Most of the people who had been playing had dispersed, but the author was still by the roadside as he was buying tobacco from a shopkeeper. After finishing his purchase, he went to the home of an acquaintance, and saw an army truck, in which were 20-25 men wearing army uniforms and carrying guns and bags, driving through the village. After some 20 minutes, the author left his acquaintance's place and began cycling home. Just as he was leaving Laknawar, he encountered a dozen men in army uniforms, whom he believed were RNA soldiers. One RNA soldier asked the author where he was from, and where he was going. While he was answering, the two men in civilian dress who had earlier chased the Maoist activist came over. One of them told the soldiers that he had seen the author with the Maoist activist who had escaped. This man kicked the author three times in the chest and stomach with his boots. While kicking the author, he also pointed his pistol at the author and told him he was a Maoist. After the third kick, the author fell on the ground. The man kicked the author a fourth time in the chest, and the latter lost consciousness.

2.3 When he regained consciousness, the author was in a moving truck, lying face down. He was not blindfolded or handcuffed. As he had difficulty breathing, he asked if he could sit, and was allowed to do so. The RNA soldiers did not inform him of the reasons for his arrest, nor of his rights at the time of his arrest. He noticed men in uniforms around him, but the men in civilian dress were not in the truck. When the truck reached the highway, the author was blindfolded. Some RNA soldiers called him names and pulled his beard. About 30 minutes later, the truck stopped and the author was ordered to get down from the truck. His blindfold was moved, and the author could see that he was in an army barrack, and later heard soldiers refer to it as the Immamnagar Barrack. The soldiers then replaced his blindfold again and cuffed his hands behind his back.

2.4 The author was forced to walk for about 10 to 15 minutes to a building, and locked in a room called the "medical detention room". It was about 3 meters by 4 meters, devoid of light, had a filthy smell and lots of mosquitoes. There were two steel beds but no bedding. There was a toilet attached to the room, but no water. There was a small window, but it was covered with plastic and jute sacks. The author's hands were cuffed behind his back for the first three to four days of his detention, and were cuffed in front of him after that. The author was sharing his cell with at least one co-detainee, sometimes more, leading to overcrowding. He was not provided with adequate water, food, bedding, natural light or recreational facilities. For the first three months of his detention, both detainees were allowed to remove their blindfold and undo their handcuffs during mealtimes. Food and water would be passed by the sentry through the cell window. After the first three months of his detention, the sentries stopped undoing the author's handcuffs at mealtime. He was told that the sentries had lost the keys for his handcuffs and could no longer undo them. He was therefore blindfolded and handcuffed throughout the remainder of his detention at the Army Barracks, which led to considerable difficulties for him to eat and use the toilet. He adds that he was only allowed to shower on two occasions during his detention, and had to

<sup>1</sup> Age of the children at the time of the initial communication.

ask the sentry for drinking water, which was rationed. He was never provided with a change of clothes.

2.5 The author was detained at the Immamnagar Army Barrack *incommunicado* from 29 April 2004 to 12 May 2005, i.e. for almost 13 months. At no point during his detention was he allowed to contact his family or a lawyer. RNA soldiers tortured him and subjected him to cruel, inhumane and degrading treatment. He was tortured daily for one week, usually during the day. After one week, the torture stopped for three or four days, was resumed for a few days, and then stopped again for a few days. This pattern continued for about three months, after which the frequency of the torture decreased, but it nevertheless continued for around seven months. Torture occurred during interrogations, and would include beatings on the shoulders, the back and legs with a plastic pipe and a hard wooden stick. The author was also slapped in the face, punched on the head and ears with the fist, kicked in the back with army boots, including on parts that had been beaten the previous day. The interrogator would ask the author about his involvement with the Maoists. During the torture sessions, the author would be blindfolded and handcuffed. He once recognized the voice of one of the torturers as sounding like the voice of one of the men dressed in civilian, who had beaten him upon arrest. When the author denied any involvement, the torture would be intensified. The first day of his detention, after the interrogation and beating session, the author was told to rest because he would be killed the next day by being taken up in a helicopter and thrown out of it. During his detention, he was alternatively told by some sentries that he would be freed, while others would tell him that he would be killed. Other acts of torture included rubbing his body against ice blocks, and piercing with needles of his back, his chest near his nipples and underneath his toenails. The author was moved at least twice from the medical detention room to other areas in the barracks. RNA soldiers told him that he was being moved to hide him from the International Committee of the Red Cross (ICRC) or the National Human Rights Commission (NHRC).

2.6 After the seventh month of his detention, the author was forced to write a confession, stating that he was a Maoist activist, that the RNA had seized documents related to the CPN-M from him, and that he now wanted to "surrender". The author was forced to put his thumbprint on the document. Later, he was also forced to write and sign similar statements. After the eighth month of his detention, he was tortured on one occasion only. However, RNA soldiers would continue to verbally abuse him, some telling him he would be killed, while others would tell him he would be released. The author estimates that in total, he was tortured about 100 times. He was afraid to ask for medical assistance while in detention, and was only seen once by a doctor. As a result of the torture, he continues to suffer from constant headaches and dizziness, pain in his jaw, head, shoulders, back, hips and legs and was diagnosed with spinal osteoarthritis. He also experiences post traumatic symptoms such as depression, difficulty concentrating, episodes of anger, fear and anxiety, including fear of uniforms, and has flashbacks.

2.7 On 12 May 2005, the author was transferred by the RNA to the Banke District Police ("DPO") in Nepalgunj. He was forced, at gunpoint, to write and sign a similar statement to the ones previously signed. On 12 May 2005, the Lieutenant of Kalidal Battalion, Immamnagar Barracks, wrote a letter to the DPO regarding the author, and recommending that he be preventively detained pursuant to section 9 of the *Terrorist and Destructive Activities (Control and Punishment) Ordinance (2004)*<sup>2</sup>. In the letter, the

<sup>2</sup> Section 9 reads: "In case where there exists appropriate grounds for believing that a person had to be stopped from doing anything that may cause a terrorist and destructive act, the Security officer may issue an order to keep him under preventive detention up to six months in "any humane place". If there are reasonable grounds to believe that any person has to be prevented from committing any

Lieutenant stated that the author was involved in Maoist terrorist activities and that he had assisted the Maoists in transporting goods and carrying out abductions.

2.8 On 12 May 2005, District Police Office Police Instructor B.D.K. wrote a note to which he attached a statement written by the police inspector, and signed by the author, in which the latter confessed to the crimes referred to by the Lieutenant in his letter of 12 May 2005, and having spied on behalf of the Maoists. The author maintains that he was forced, at gunpoint, to write and sign such a confession.

2.9 On 13 May 2005, the Superintendent of Police, S.L., wrote a letter to the District Administrative Office, advising that the author had been transferred to police custody by the RNA on 12 May 2005. The Superintendent specified that the author had been found to have been involved in "Maoist terrorist activities", and requested that the author be preventively detained under section 9 of the *Terrorist and Destructive Activities Ordinance* ("TADO").

2.10 On 13 May 2005, the author was accordingly taken to the District Administrative Office, where a preventive detention order was issued under the TADO, on the basis of the correspondence received from both the Nepalese Army and the Banke District Police. The author was transferred to the Banke District Jail on the same day, and provided with a letter confirming that he was being preventively detained under section 9 of the TADO 2004.

2.11 On 29 June 2005, the author filed a writ petition of *habeas corpus* in the Appellate Court in Nepalgunj, Banke District, in which he referred to his arbitrary arrest, his illegal and *incommunicado* detention, and the physical and mental torture to which he was subjected while detained by the RNA. The writ named as respondents the District Police Office, the District Administrative Office, the Chief District Administrative Officer and the District Jail. In the writ, the author denied being a Maoist activist, and challenged his continued detention under the TADO 2004. On 1 July 2005, the Appellate Court requested written replies from the respondents within three days. Replies from the District Police Office, the District Administrative Office and the District Jail denied that the author was detained illegally, referring to valid requests in this regard, including Royal Nepalese Army's. On 14 September 2005, the Appellate Court in Nepalgunj ordered that the author be brought before the District Court and released. It concluded that the Chief District Administrative Officer did not have the power to issue preventive detention orders under the TADO 2004. It ordered the release of the author on this procedural ground. The author was released on 15 September 2005, after 126 days of detention in the District Jail.

2.12 Regarding the requirement of exhaustion of domestic remedies, the author stresses that upon the filing by the author of his *habeas corpus* petition of 29 June 2005, the authorities were aware of his allegations of torture. Under the Appellate Court Regulations No 29 and 30, the Court has the discretion to create an investigative committee if it has any evidence of torture. The Court did not exercise such discretionary powers in this case. Similarly, despite being cognisant of the allegations of torture brought by the author, the police failed to initiate a criminal investigation to identify and prosecute perpetrators. The author contends that the lack of any investigation, more than two years after the filing of the writ of *habeas corpus* constitutes an undue delay, and demonstrates that any further complaint would be futile and lack any prospect of success.

2.13 The author also mentions that he tried to file a complaint at the District Police Office of Banke. However, the police refused to accept it, stating that this was not the appropriate agency. The author refers, generally, to various attempts by victims, relatives of victims and

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terrorist activities for longer than that, on the approval of His Majesty the Government's Home Ministry, the Security Officer can issue additional six months of preventive detention".

non governmental organizations, who sought to file complaints for past and ongoing human rights violations by security forces, which were rejected by the police. He affirms that there are no further available and effective remedies for the breach of his human rights, which would result in the identification and punishment of those responsible.

2.14 The author stresses that under Nepalese law, there are no provisions which set out the individual criminal liability for arbitrary detention, torture or ill treatment, except a very vague and ineffective provision of the *Police Act*<sup>3</sup>. He also mentions that the *Police Act* introduces immunity for the District Administrative Officers and any police personnel “for action taken (...) in good faith while discharging (...) duties<sup>4</sup>”. A similar provision was enacted in the *Army Act (2006)*<sup>5</sup>, and perpetrators are *de facto* placed outside the ambit of any punishment, since investigations of cases of torture and disappearances are dealt with by a Special Committee, while prosecution takes place before a Special Court Martial. Also, provisions of the former *Army Act (1959)*, which regulate the conduct, and establish the responsibility of the Royal Nepalese Army, do not apply to arrests carried under the TADO 2004.

2.15 The author also refers to the four transitional mechanisms established pursuant to the Comprehensive Peace Agreement signed in 2006, but states that none of these mechanisms is likely to lead to any investigation and criminal prosecution. Regarding civil remedies, the author points to the ineffectiveness of the Compensation relating to Torture Act (CRT)<sup>6</sup>, as well as to fear of intimidation and reprisals on part of victims. The other possibility offered under this Act would be an administrative remedy by way of an appeal to the police authorities, which would lead to disciplinary sanctions. Regarding complaints lodged with the National Human Rights Commission (533 in total in 2007), and the Commission’s recommendation that the State party should pay compensation to the victims and take legal action with respect to 14 complaints, only two of the victims received the recommended compensation.

2.16 Regarding his family, the author states that after four or five months searching for him, they informally received information that the author was alive in the army barrack. However, as they heard no subsequent news, they lost hope that he would return home, and became convinced that the author was dead. As his children were very young, his wife only told them their father had gone to India. She was depressed and had frequent headaches. When he was in the District Jail, the author wrote a letter to his family to let them know that he was still alive. The family did not believe that the letter was from the author and sent his grandfather to the jail to verify that he was really alive. The author also refers to the economic impact of his arrest, detention and torture for his family, as he has been physically unable to work since his release.

#### The complaint

3.1 The author claims that the State Party violated article 7; article 9; and article 10, all read in conjunction with article 2, paragraph 3 of the Covenant<sup>7</sup>.

<sup>3</sup> Section 34 (n), which provides liability for up to five years imprisonment, or suspension of salary for up to one year if “he unjustly harasses any person through arrogance or intimidation or causes loss or damage to the property of any person.”

<sup>4</sup> Section 37.

<sup>5</sup> Section 22.

<sup>6</sup> The author refers to the report of the Special Rapporteur on torture and other cruel, inhumane or degrading treatment or punishment, Mission to Nepal, 9 January 2006, E/CN.4/2006/6/Add.5, para 3.

<sup>7</sup> The author refers to the Committee’s General Comment No 20 on article 7 A/47/40 (1992), para. 14



3.2 The author alleges that the State party breached article 7 of the Covenant in his regard through: (i) Exposing him to severe and systematic beatings and other acts of torture and ill-treatment during his detention at the Immamnagar Army Barracks, for a period of seven months, including for the purpose of extracting confessions<sup>8</sup>; (ii) Keeping him in *incommunicado* detention for 13 months (from 29 April 2004 to 12 May 2005)<sup>9</sup>; (iii) Denying him the right to contact his family; (iv) Exposing him to inhumane and degrading detention conditions at Immamnagar Army Barracks<sup>10</sup>; (v) Failing to investigate his allegations of torture and ill-treatment at the Immamnagar Army Barracks; (vi) Subjecting his family<sup>11</sup> to mental distress and anguish caused by the continuing uncertainty concerning his fate and whereabouts from the date of his arrest on 29 April 2004 until 13 May 2005, the day he was moved to the District Jail and could write to let them know that he was still alive and detained in jail. The author's effective disappearance for 13 months facilitated gross breaches of his rights under article 7.

3.3 The author further claims a violation of article 10 by the State party, in light of the ill-treatment he was exposed to during detention, the material conditions of his detention, and his *incommunicado* detention.

3.4 The author considers that he is also the victim of a violation of article 9, paragraph 1<sup>12</sup>, paragraph 2 and paragraph 3 of the Covenant, with respect to his arbitrary arrest and detention. On 29 April 2004, he was beaten, arrested and taken away by RNA soldiers, without being informed of the reasons for his arrest, nor being charged of a crime or otherwise brought before a judicial instance, and his *incommunicado* detention lasted for 13 months (from 29 April 2004 to 12 May 2005). The author alleges a further breach of article 9, paragraph 1, through the disproportionate and excessive use of force by RNA soldiers upon his arrest which breached his right to the security of his person. With regard to article 9, paragraph 4, the author contends that his *incommunicado* detention precluded him from challenging the legality of his detention<sup>13</sup>.

3.5 With respect to remedies, the author invites the Committee to request the State party initiate an impartial investigation by an autonomous and independent body, and prosecute State actors found responsible for his arbitrary arrest, *incommunicado* detention and torture. He further asks the Committee to direct the State party, in conducting its investigation, to protect the author and other complainants and witnesses from intimidation and reprisals, and to inform them on the progress and result of the investigation. It also invites the Committee to request the State party to remove any impediments to investigation and prosecution, such as immunities, and to suspend the army Chief of Staff from office pending the outcome of investigations against him. He also asks that the State party pays

<sup>8</sup> The author refers to Communication No 973/2001, *Khalilova v. Tajikistan*, Views adopted on 30 March 2005.

<sup>9</sup> The author refers to Communication No 577/1994, *Polay v. Peru*, Views adopted on 6 November 1997, No 115/1982, *Wight v. Madagascar*, Views adopted on 1 April 1985, and No 449/1991, *Mojica v. Dominican Republic*, Views adopted on 15 July 1994.

<sup>10</sup> The author refers to Communication No 458/1991, *Mukong v. Cameroon*, Views adopted on 21 July 1994.

<sup>11</sup> The author refers to Communication No 107/1981, *Quinteros v. Uruguay*, Views adopted on 21 July 1983, No. 992/2001, *Bousroual v. Algeria*, 30 March 2006, para 9.8, and No 950/2000, *Sarma v. Sri Lanka*, Views adopted on 16 July 2003, para 9.5.

<sup>12</sup> The author refers, *inter alia*, to Communications No 305/1988, *Mukong v. Cameroon*, Views adopted on 21 July 1994, para. 9.8; No 950/2000, *Sarma v. Sri Lanka*, Views adopted on 16 July 2003, para 9.4; No 540/1993, *Celis Laureano v. Peru*, Views adopted on 25 March 1996, para 8.6; and No 563/1993, *Arrellana v. Colombia*, Views adopted on 27 October 1995, para 8.5.

<sup>13</sup> The author refers to Communication No 1128/2002, *Marques de Morais v. Angola*, Views adopted on 29 March 2005.

him and family adequate compensation and provide rehabilitation for their medical and psychological needs, as well as assistance with the author's education as restitution.

**State party's observations on admissibility and merits**

4.1 On 21 August 2009, the State party submitted its observations on the admissibility and merits of the communication. It first contends that the author did not exhaust the domestic remedies at his disposal. The *habeas corpus* recourse is limited to a decision on the legality of the detention, and did not, as such, require the State party to initiate an investigation as the author stated. The author failed to file a compensation claim with the District Court within 35 days from the date of the torture infliction, under the 1996 Compensation Relating to Torture Act (CRT), section 5. Such an application would have allowed the District Court to order a physical and mental examination of the author within three days, and any medical treatment needed would have been arranged by the Government. Such a decision would also have opened the possibility that compensation be granted to the author within 35 days. Upon a finding of infliction of torture, the District Court would also have ordered the concerned body to take departmental action against the government employee responsible. The author failed to use this prompt and effective domestic remedy.

4.2 The State party further contends that the author failed to file a petition with the National Human Rights Commission (NHRC), an independent Commission established under the Human Rights Commission Act (1997), which is vested with the statutory power to conduct inquiries into human rights violations, forward recommendations to national authorities, order appearances and production of evidence before the Commission, and may even order compensation to victims of human rights violations. The author failed to register a petition with the NHRC, and thus failed to exhaust domestic remedies at his disposal. The State party therefore requests the Committee to declare that the communication is inadmissible on this ground, and to establish that the author abused his right of submission by failing to use available and effective remedies.

4.3 On the merits, the State party rejects the author's allegations, stating that his arrest and detention must have been based on reliable intelligence information that he was actively involved in terrorist and destructive activities as accomplice. Security Officers of the RNA were empowered under the TADO 2004 to arrest and detain an individual for a maximum period of one year, subject to periodic review upon request of a Committee. The State party refers to the armed conflict prevailing in the country, and which prompted the declaration of the State of Emergency. Informing families of the arrest of individuals a long time after arrest was dictated by a state of necessity, to ensure the security of detainees and their families, as well as the security of places of detention.

4.4 With respect to the author's conditions of detention, the State party contends that such conditions, as described, were "fairly humane" in view of the general standards of living of the Nepalese people. It adds that conditions were similar to those provided to soldiers of the RNA. Regarding the author's specific allegations of torture, the State party affirms that when he was handed over to the police on 12 May 2005, the police officer did not record any mention of torture in the receipt of hand-over and take-over, which shows that there was no occurrence of torture. Also, medical prescriptions and certificates submitted by the author do not mention evidence of torture. The State party also observes that the author waited eight months after his release of 15 September 2005 to undergo a medical checkup. Such evidence cannot be used as a basis to prove torture during custody. Finally, the State party contends that contrary to the author's allegations, the TADO 2004 does not grant immunity to security forces. Section 19(4) provides that if the Act is applied with *malafide* motives, the aggrieved party shall be paid a reasonable compensation, and departmental action is engaged against the relevant official, who shall be punished. Also,

section 9 of the Evidence Act provides that confessions derived from torture are inadmissible.

**Author's comments on the State party's submission**

5.1 On 2 December 2009, the author rejects the arguments submitted by the State party. It reiterates that he was tortured about 100 times in total, during a period of approximately seven months. The author also recalls the conditions of his detention, and reaffirms that they amounted to cruel, inhuman or degrading treatment under article 7 of the Covenant.

5.2 Regarding exhaustion of domestic remedies, the author rejects the State party's allegation that he did not use all available remedies. He stresses that on 29 June 2005, he submitted a petition for a writ of *habeas corpus*. This was the earliest possible opportunity at which he could have made a complaint about his detention and treatment, as he was still detained in the Banke District Jail. In this petition, the author raised the baseless nature of his detention, his enforced disappearance in the military barracks, his *incommunicado* detention and the torture and other ill-treatment to which he was subjected. The Appellate Court of Nepalgunj only ordered his release, although it had the jurisdiction to initiate an investigation when torture or ill-treatment is alleged, by creating an investigative Committee, or by ordering the Executive to elect an officer to carry out the investigation. The Court did not elect any of these avenues, and failed to initiate an investigation.

5.3 The author stresses that the other body empowered under Nepalese law to investigate the actions of the police or the army is the police. In the present case, both the Chief District Officer and District Police were on notice of his allegations, as the author named them as respondents in his writ of *habeas corpus*. They however failed to act. On release, the author further sought to make a complaint to the police, but the latter refused to register his complaint. Four years after the violations were brought to its attention, the State party has yet to fulfill its duty to investigate the author's allegations. The author claims that this constitutes an unreasonably prolonged delay. He further contends that he should not be required to exhaust ineffective or futile local remedies such as the one under the Compensation relating to Torture Act (CRT). The author underlines the strict time limitation criteria for applications, which is 35 days from the date of infliction of torture. The author could not materially bring a complaint within this timeframe while held *incommunicado* at the Immamnagar Army Barracks or the Banke District Jail. He adds that while detained in the District Jail, he could not meet his lawyer in private and engage in conversations about his torture, which would have allowed him to prepare an application under the CRT. The CRT also requires the production of medical records, which the author was unable to secure while detained. In the 35 days following his release, the author did not feel confident enough to make a complaint under the CRT, because of the prevailing climate of fear, and his continuing fear of being re-arrested and tortured. The author also reiterates the ineffective nature of this recourse, which only led to four individuals being compensated, out of 200 cases filed. He also stresses that only two percent of cases filed under the CRT are complaints against the army. Regarding the National Human Rights Commission, the author stresses that it is not a judicial remedy, and only has recommendatory powers, and is hence not appropriate for serious allegations such as his. Further obstacles to the effectiveness of this recourse are the fact that the State party largely failed to implement the Commission's recommendations and its lack of independence at the time of the author's detention.

5.4 Responding to the State party's observations on the merits, and referring to article 4 of the Covenant, the author stresses that the political situation in the country cannot be used to justify the treatment inflicted on him, as the prohibition against enforced disappearance is absolute, and cannot be derogated from under any circumstance. The same can be said

about *incommunicado* detention, which falls within the ambit of article 7 of the Covenant, the protection of which is absolute and cannot be derogated from<sup>14</sup>.

5.5 Regarding the basis for the author's arrest, the author stresses that he was only arrested under the TADO 2004 on 13 May 2005, i.e. twelve and a half months after his initial arrest. The State party failed to provide any information on the basis for his detention prior to this date. The decision of the Appellate Court of Nepalgunj itself confirmed that his arrest and entire detention in the Immamnagar Barracks and Banke District Jail were arbitrary and unlawful. The author also stresses that the formal derogation on preventive detention under article 4 of the Covenant had ended when he was informed, on 13 May 2005, that he was subject to preventive detention. Under section 9 of the TADO, preventive detention is reviewed after a period of six months. As the author was detained for five months under the TADO, his detention was not subject to review.

5.6 The author reiterates that his treatment was contrary to article 7 in several respects, and recalls the absolute character of the prohibition<sup>15</sup>. The argument of the State party, that the Nepalese police would have mentioned any visible sign of torture upon its taking over from the RNA is inconclusive, considering the subordination of the police to the army. With respect to medical documentation, the author could not access an independent medical practitioner before his release. It adds that the medical examination of detainees, without fear of reprisals, is the State party's responsibility. While the CRT Act requires the examination of detainees at the time of arrest and release, and a copy of the report to be sent to the District Court, this was not done in the author's case, so as to avoid documenting the torture to which he was subjected. The State party also failed to order a medical examination after the author petitioned the Appellate Court in *habeas corpus*, in which he specifically referred to acts of torture. The reason why he waited almost eight months after his release to visit a doctor are mainly the fact that he could not afford a medical consultation, and his fear to go to Nepalganj (where the closest public hospital was) due to the heavy army and police presence there. It is only in May 2006 that he managed to secure some money, and visited a doctor. The author mentions that as a result of the prolonged blindfolding, his sight has decreased and he experiences unease when exposed to light.

#### 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 notes, as required by article 5, paragraph 2 (a), of the Optional Protocol, that the same matter is not being examined under any other international procedure of investigation or settlement.

6.3 Regarding exhaustion of domestic remedies, the Committee recalls that for the purposes of article 5, paragraph 2(b), of the Optional Protocol, domestic remedies must both be effective and available, and must not be unduly prolonged.<sup>16</sup> The Committee took note of the State party's argument, that the author failed to avail himself of the relief

<sup>14</sup> The author refers to communication No 950/2000, *Sarma v. Sri Lanka*, *supra*, note 19, para 9.5.

<sup>15</sup> The author refers to the Committee's General Comment No 20 on article 7 (A/47/40) (10 March 1992) at para 3.

<sup>16</sup> Communications No. 1560/2007, *Marcellana and Gumanoy v. The Philippines*, Views adopted on 30 October 2008, para. 6.2; and No. 1469/2006, *Sharma v. Nepal*, Views adopted on 28 October 2008, para. 6.3.

offered by the Compensation Relating to Torture Act (CRT). The Committee observes, however, the strict limitation period provided in the Act, whereby a complaint must be filed within 35 days from the date of the infliction of torture. The Committee observes that it would have been materially impossible for the author to avail himself of this mechanism, as he was still being detained *incommunicado* at the Immamagar Army Barracks and at the Banke District Jail within this time. The Committee further notes that despite the filing, by the author, of a writ in *habeas corpus* with the Appellate Court of Nepalgunj, in which both the Chief District Officer and District Police were on notice of his allegations, no investigation of these allegations was undertaken by the State party four years after the violations were brought to its attention. The Committee concludes that this constitutes an unreasonably prolonged delay. It finally recalls that national human rights institutions such as the National Human Rights Commission in Nepal, are not considered a judicial remedy within the meaning of article 5, paragraph 2 (b) of the Optional Protocol. The authors therefore needed not to file a petition with that body to fulfill the requirement set forth in article 5, paragraph 2 (b), of the Optional Protocol.

6.4 The Committee sees no further obstacles to the consideration of the communication and therefore proceeds to the examination on the merits of the author's allegations under articles 7, 9, and 10, read in conjunction with article 2, paragraph 3 of the Covenant.

*Consideration of the merits*

7.1 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.

7.2 With respect to the alleged detention *incommunicado* of the author, 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 the author's allegation, that he was detained *incommunicado* from 29 April 2004 to 12 May 2005, i.e for a duration of 13 months, while being prevented from communicating with his family and the outside world. The State party did not provide contrary information in this respect.

7.3 The Committee further took note of the author's claim that his conditions of detention amounted to cruel, inhumane or degrading treatment. The author was detained in a dark and filthy cell of 3 by 4 meters, drinking water was rationed, there was no water for the toilets, and he could only bathe twice during his detention. He was handcuffed and blindfolded for 10 months out of his 13 month-detention. The author also provided detailed information about the torture and ill-treatment to which he was exposed, estimating that he was tortured for 100 times in the 13 months of his *incommunicado* detention in the Immamagar Army Barracks.

7.4 The Committee recalls 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 cases where the allegations are corroborated by credible evidence submitted by the author and where further clarification depends on information that is solely in the hands of the State party, the Committee may consider an author's allegations to be substantiated in the absence of satisfactory evidence or explanations to the contrary presented by the State party. In the absence of any

convincing explanations from the State party, due weight must be given to the author's allegations<sup>17</sup>.

7.5 The Committee recalls its General Comment No. 20, in which it indicated that it did not "consider it necessary to draw up a list of prohibited acts or to establish sharp distinctions between the different kinds of punishment or treatment; the distinctions depend on the nature, purpose and severity of the treatment applied"<sup>18</sup>. Nevertheless, the Committee considers it appropriate to identify treatment as torture if the facts so warrant. In so doing, it is guided by the definition of torture found in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which states in its article 1, paragraph 1 that "torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind ...". The Committee is mindful that this definition differs from that in the prior Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which described torture as "an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment". Accordingly, its general approach is to consider that the critical distinction between torture on the one hand, and other cruel, inhuman or degrading treatment or punishment, on the other, will be the presence or otherwise of a relevant purposive element.

7.6 On the basis of the information at its disposal, and recalling that article 7 allows no limitation, even in situations of public emergency<sup>19</sup>, the Committee finds that the torture and ill-treatment to which the author was exposed, his *incommunicado* detention and his conditions of detention, reveal singular and cumulative violations of article 7 of the Covenant.

7.7 The Committee notes the anguish and distress caused to the author's family by his disappearance, from the time of his arrest in April 2004 until May 2005, when he was transferred to the District Jail, and was able to write them a letter informing them that he was still alive and imprisoned. The family never obtained an official confirmation of his detention. The Committee is therefore of the opinion that the facts before it reveal a violation of article 7 of the Covenant, read in conjunction with article 2, paragraph 3, with regard to the author's wife and his two children<sup>20</sup>.

7.8 With regard to the alleged violation of article 9, the Committee notes that on 29 April 2004, the author was violently arrested without a warrant by soldiers of the Royal Nepalese Army. He was detained in the Mid-Western Divisional headquarters (Immamnagar Barracks), and held *incommunicado* without being informed of the reasons for his arrest or the charges against him. The Committee recalls that the author was never brought before a judge during his *incommunicado* detention, and could not challenge the

<sup>17</sup> See communications No. 1295/2004, *El Awani v. Libyan Arab Jamahiriya*, *supra*, note 33, para. 6.5; No. 1422/2005, *El Hassy v. Libyan Arab Jamahiriya*, Views adopted on 24 October 2007, para. 6.2; No. 540/1993, *Celis Laureano v. Peru*, *supra*, note 22, para. 8.5; and No. 458/1991, *Mukong v. Cameroon*, Views adopted on 21 July 1994, para. 9.4.

<sup>18</sup> General comment No. 20: Article 7 (Prohibition of torture or other cruel, inhuman or degrading treatment or punishment), paragraph 4.

<sup>19</sup> General Comment No. 20, *supra*, para. 3.

<sup>20</sup> See communication No 1640/2007, *El Abani v. Libyan Arab Jamahiriya*, Views adopted on 26 July 2010, para. 7.5; No. 1295/2004, *El Awani v. Libyan Arab Jamahiriya*, *supra* note 33, para. 4; No. 107/1981, *Quinteros v. Uruguay*, Views adopted on 21 July 1983, para. 14; and No 950/2000, *Sarma v. Sri Lanka*, *supra* note 33, para. 9.5.

legality of his detention until he filed a writ in *habeas corpus* with the District Appellate Court of Nepalgunj on 29 June 2005. The Committee took note of the State party's contention that the author was arrested under the TADO Act of 2004, adopted in the context of the state of emergency declared by the State party, and allowing the arrest and detention of suspects for a period of up to one year. It transpires from the file, however, that the author was only arrested on this basis on 13 May 2005, after he was handed-over to the police. In the absence of any pertinent explanations from the State party on the author's arrest and detention from 29 April 2004 to 13 May 2005, the Committee finds a violation of article 9<sup>21</sup>.

7.9 With respect to article 10, and while taking note of the State party's argument, that conditions of detention should be assessed in light of the overall standards of living in Nepal, the Committee recalls that treating persons deprived of their liberty with humanity and with respect for their dignity is a fundamental and universally applicable rule. Consequently, the application of this rule, as a minimum, cannot be dependent on the material resources available in the State party<sup>22</sup>. The Committee further recalls its view, that while it is not separately mentioned in the list of non-derogable rights in article 4, paragraph 2, this norm of general international law is not subject to derogation<sup>23</sup>. In light of the information at its disposal, and reiterating its findings under article 7, which are closely related, the Committee finds a violation of article 10, paragraph 1.

7.10 The author also invokes article 2, paragraph 3, of the Covenant, under which States parties are required to ensure that individuals have accessible, effective and enforceable remedies for asserting the rights recognized in the Covenant. The Committee reiterates the importance which it attaches to States parties' establishment of appropriate judicial and administrative mechanisms for addressing alleged violations of rights, even during a state of emergency<sup>24</sup>. The Committee further recalls that failure by a State party to investigate allegations of violations could in and of itself give rise to a separate breach of the Covenant<sup>25</sup>. In the present case, the information before the Committee indicates that the author did not have access to an effective remedy, and the Committee therefore concludes that the facts before it reveal a violation of article 2, paragraph 3, read in conjunction with article 7, article 9, and article 10, paragraph 1.

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 disclose a violation of articles 7; 9 and 10, paragraph 1, read in conjunction with article 2, paragraph 3 of the Covenant vis a vis the author. The Committee is also of the view that article 7, read in conjunction with article 2, paragraph 3 of the Covenant was breached with regard to the author's wife, Ms. Dhanmaya Giri, and their two children, Yashoda and Yogesh Giri.

9. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author and his family with an effective remedy, by ensuring a thorough and diligent investigation into the torture and ill-treatment suffered by the author, the prosecution and punishment of those responsible, and providing the author and his family with adequate compensation for the violations suffered. In doing so, the State party shall ensure that the author and his family are protected from acts of reprisals or

<sup>21</sup> See communications No. 1297/2004, *Medjnoune v. Algeria*, Views adopted on 14 July 2006, para.8.5; and No.1469/2006, *Sharma v. Nepal*, *supra* note 33, para. 7.3.

<sup>22</sup> General Comment No. 21 on article 10 (10 April 1992), para. 4.

<sup>23</sup> General Comment No. 29 on article 4, A/56/40 (Vol. I), Annex VI, para. 3.

<sup>24</sup> *Ibid.*, para. 14.

<sup>25</sup> General comment No. 31 on article 2, A/59/40 (Vol. I), Annex III (p. 175-179), para 15.

intimidation. The State party is also under an obligation to prevent similar violations in the future.

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



