



## International Covenant on Civil and Political Rights

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### Human Rights Committee

#### Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2615/2015<sup>\*,\*\*</sup>

<i>Communication submitted by:</i>	Devi Maya Nepal(pseudonym) (represented by counsel, TRIAL (Track Impunity Always))
<i>Alleged victim:</i>	The author
<i>State party:</i>	Nepal
<i>Date of communication:</i>	24 March 2015 (initial submission)
<i>Document reference:</i>	Decision taken pursuant to former rule 97 of the Committee's rules of procedure, transmitted to the State party on 3 June 2015 (not issued in document form)
<i>Date of adoption of Views:</i>	15 July 2021
<i>Subject matter:</i>	Gang rape of indigenous woman by members of armed forces
<i>Procedural issues:</i>	Admissibility – exhaustion of domestic remedies; admissibility – <i>ratione materiae</i>
<i>Substantive issues:</i>	Cruel, inhuman and degrading treatment or punishment; discrimination; discrimination against women; effective remedy; family life; privacy; torture; unlawful attacks on honour or reputation
<i>Articles of the Covenant:</i>	7, read alone and in conjunction with 2 (1)-(3), 3, and 26; and 17 and 23 (1), each read alone and in conjunction with 2 (1), 2 (3), 3 and 26.
<i>Articles of the Optional Protocol:</i>	3 and 5 (2) (b)

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\* Adopted by the Committee at its 132<sup>nd</sup> session (28 June—23 July 2021).

\*\* The following members of the Committee participated in the examination of the communication: Yadh Ben Achour, Tania María Abdo Rocholl, Arif Bulkan, Wafaa Ashraf Moharram Bassim, Mahjoub El Haiba, Shuichi Furuya, Kobauyah Tchamdja Kpatcha, Carlos Gómez Martínez, Duncan Laki Muhumuza, Hernán Quezada Cabrera, Vasilka Sancin, José Manuel Santos Pais, Hélène Tigroudja, Imeru Tamerat Yigezu, and Gentian Zyberri.

1. The author of the communication is Devi Maya Nepal (pseudonym), a national of Nepal born in 1973. She claims that the State party has violated her rights under article 7, read alone and in conjunction with articles 2 (1)-(3), 3 and 26 of the Covenant. She also claims that the State party has violated her rights under articles 17 and 23, each read alone and in conjunction with articles 2 (1), 2 (3), 3 and 26 of the Covenant. The Optional Protocol entered into force for the State party on 14 August 1991. The author is represented by TRIAL (Track Impunity Always).

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

2.1 The author maintains that the present communication must be read in the context of the decade-long armed conflict (1996-2006) between the Government and the Communist Party of Nepal. Systematic gross human rights violations, including torture and sexual violence, took place during the conflict. Because of widespread impunity, victims of those violations have not received adequate redress for the harm that they suffered. Sexual violence during the conflict was seriously underreported because victims experienced stigma, shame, fear of retaliation, and fear of further victimization. Furthermore, it was futile to report acts of sexual violence because the State party's authorities, including the police, did not act in response to allegations against members of the Armed Forces.<sup>1</sup> Members of marginalized castes and ethnic communities were disproportionately affected by the conflict, as they were targeted for recruitment by the Communist Party of Nepal. Women belonging to the most marginalized communities were more vulnerable to sexual violence.<sup>2</sup> In a report issued in 2012, the Office of the United Nations High Commissioner for Human Rights made the following findings: systematic torture, including rape and other forms of sexual violence, took place during the conflict in Nepal; security forces appeared to have perpetrated the majority of cases of sexual violence during their searches for Maoists; women suspected of supporting Maoists faced particularly severe violence; a culture of impunity for opportunistic sexual violence existed; a suspicion of Maoist affiliation was used as an excuse to avoid scrutiny or accountability; action was rarely taken in response to allegations of sexual violence by members of the security forces; victims of sexual violence feared retaliation or further victimization were they to report such acts; and stigma was attached to victims of sexual violence both during war and in peacetime.<sup>3</sup>

2.2 The author belongs to the indigenous community of the Tharu, a group living mainly in the southern region of the Terai, which borders India. When the events at issue in the communication took place, the author was working as a labourer and a housewife. She was married and had a three-year-old daughter. The family lived in extremely poor economic conditions.

2.3 On 20 August 2002, approximately 200 members of the Royal Nepalese Army and the Armed Police Force of Nepal raided the village where the author lived. At the time, the author and her daughter were at home. A group of six uniformed soldiers entered the author's house and stated that they were searching for Maoist insurgents. The soldiers repeatedly asked the author whether she was hiding or feeding insurgents. The soldiers then started touching the author's genitals and hitting her with boots and the butts of their guns. They dragged her to a nearby bed where the author's daughter was sleeping. Each time the author screamed, they hit her on the head with a gun. The author then fell on the bed and the soldiers tied her legs and hands and undressed her. They shouted sexual insults at her, squeezed her breasts and subjected her to vaginal rape. The soldiers threatened to kill her if she reported the incident. She was beaten more each time that she tried to resist, until she fell unconscious. When she regained consciousness, the soldiers had left and she was surrounded by her

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<sup>1</sup> The author cites, for example, Committee against Torture, Report on Nepal adopted under article 20 of the Convention, U.N. Doc. A/67/44, Annex XIII (2011), para. 108; and Human Rights Watch, "Silenced and Forgotten: Survivors of Nepal's Conflict-era Sexual Violence" (2014), p. 20 and 31; and Institute of Human Rights Communication, Nepal (IHRICON), "Sexual Violence in the 'People's War': The Impact of Armed Conflict on Women and Girl in Nepal" (2007).

<sup>2</sup> The author cites, for example, International Centre for Transitional Justice and Advocacy Forum, "Across the Lines: The Impact of Nepal's Conflict on Women," p. 45 and 46.

<sup>3</sup> The author cites Office of the United Nations High Commissioner for Human Rights, "The Nepal Conflict Report" (2012).

neighbours. Her clothes were torn and she was bleeding profusely from her vagina. The neighbours bathed her and helped her change her clothes.<sup>4</sup> The neighbours informed her that the soldiers had been in the house for about one hour while members of the Armed Police Force waited outside by the door.

2.4 After the attack, the author was in a state of shock and was physically very weak. The following day, on 21 August 2002, her husband and some of her neighbours took her to a medical centre in the nearby town of Jhalari, where she received treatment.<sup>5</sup> For almost one month after the attack, the author stayed in bed and was unable to stand up.<sup>6</sup> She suffered from insomnia, migraines and recurrent nightmares and episodes of crying. She experienced physical pain all over her body and in particular in her breasts.

2.5 The author gave birth to a girl in June 2003. Both the author and her husband were convinced that the pregnancy had resulted from the rape.

2.6 The author still suffers from severe physical and psychological consequences of the rape, including pain in her lower abdomen, back and legs. She continues to suffer from insomnia and recurrent nightmares, and has been diagnosed with post-traumatic stress disorder. Since the events, she feels scared of everything and needs to be accompanied all the time. The rape also disrupted her personal and family life, as her husband has changed his attitude towards her. Since the events, he often insults her by calling her “the wife of a soldier” and her younger daughter “the daughter of a soldier.” He has also said on various occasions that the author and her younger daughter should both leave the house. The author feels deeply humiliated by these repeated insults, and fears for the future of her younger daughter. The inhabitants of the village where the author lives are aware of what happened to her. While some neighbours are sympathetic and supportive, others have marginalised her and her younger daughter, and have openly stigmatised them for being a victim of rape and a “product of rape,” respectively.

2.7 For numerous reasons, the author did not file a complaint for years following the attack. The very nature of rape made it impossible for her to report the crime to anyone, since doing so would have resulted in potential retaliation and more defamation towards her. Because of the patriarchal social structure in Nepal, it is unthinkable for victims of sexual violence to seek support from the community, since that would inevitably lead to further victimization rather than remedy. Hence, the author felt that her only option was to remain silent and try to forget what had happened, especially since she is a member of an indigenous community where sexual violence is highly stigmatized. Furthermore, during the conflict in Nepal, no one dared to complain about the police or the army, since doing so would result in reprisals. In addition, the author was not aware that it was possible to file a complaint, also known as a first information report. Most of the inhabitants of the village where she lived were illiterate, and no one there could help her to seek justice through legal procedures. The author was also

<sup>4</sup> The author provides statements from two individuals who lived in the vicinity of the author and who corroborates the author’s overall allegations concerning the events of 20 August 2002.

<sup>5</sup> The author specifies that the medical centre was located in a rural district of Nepal and was not a proper hospital. Accordingly, the author was not subjected to a thorough examination nor did she receive any written certificate attesting to the harm that she had endured. The author provides a certificate relating to a forensic medical examination that was conducted by a medical doctor, apparently in 2012. According to the certificate, the author recounted the events of the attack and displayed no genital or anal injuries at the time of examination. However, she appeared to be suffering from post-traumatic stress disorder and depression. The examiner referred the author to a psychiatrist for evaluation. The examiner also stated that there was no reason not to believe the author’s account of the attack and its consequences.

<sup>6</sup> The author provides a statement from her husband dated 17 December 2014, in which the following is stated. On 20 August 2002, while at work at a construction site, the author’s husband learned that members of the security forces, the Armed Police Force, and the police had arrived in the village. When he returned home for a lunch break at around 11 a.m., the author told him what had happened to her. The author’s husband felt bad and helpless, and neighbours helped to take the author to hospital. The author’s husband is not the father of the author’s younger daughter. The author’s husband does not know much about the incident but knows that the individuals in question did wrong to his wife.

initially focused on coping with her health problems and on overcoming the stigma and fear that she faced on a daily basis as a result of the attack.

2.8 After the author learned that she could file a criminal complaint to report the harm that she had endured, a lawyer went to the Kanchanpur District police office on 19 December 2014 to file a first information report on the author's behalf. The District police office refused to register the report on the ground that it did not comply with the 35-day statutory period for reporting rape under section 11 of the Criminal Code of Nepal. The author maintains that the refusal to register first information reports for sex crimes is a common practice in Nepal. On 19 December 2014, the author also filed a complaint before the District Administration Office in Kanchanpur. The Chief District Officer also refused to register the complaint on the ground that it was time-barred.

2.9 On 18 December 2014, the author filed a claim for compensation before the Kanchanpur District Court. The Court refused to register the claim because it had not been filed within the 35-day statutory period. In any case, the Kanchanpur District Court may only provide compensation of approximately 1,266 USD but does not have the authority to establish criminal liability. The author did not even obtain compensation from the District Court.

2.10 On 22 January 2015, the author filed a writ of mandamus before the Supreme Court of Nepal. The writ of mandamus procedure is used to seek an order from the Supreme Court requesting relevant authorities to provide remedies for legal violations. In the writ, the author claimed that her right to reparation had been violated because the police and the District Court had refused to register her complaint, and because no alternative judicial remedy was available. The author requested that the Supreme Court nullify the decisions of the authorities and order those authorities to promptly investigate the alleged offences. The author's chances of success were very small, given that the Supreme Court had never admitted requests concerning the non-application of the 35-day statutory period for filing criminal complaints for rape. In 2008, the Supreme Court did rule that there was a need to remove time limitations provisions from domestic legislation because they constituted a barrier to effective remedies and reparations for victims. The Supreme Court ordered the Government to amend relevant legislation and remove the 35-day statutory limitation in question. However, that ruling has not been implemented.

2.11 The sub-registrar of the Supreme Court initially refused to register the author's writ of mandamus, on the ground that the claim should have been filed before an appellate court to challenge the decision of the District Court. The author argued that such an appeal would have been impossible, because the District Court had not issued a decision but had simply refused to register her claim. Eventually, the writ before the Supreme Court was registered on 29 January 2015. On the same date, the Court held an initial hearing. On 2 February 2015, the Supreme Court issued a "show cause" notice in which it requested the District Administration Office and the police of Kanchanpur to provide a reply within 15 days. The 15-day deadline has long since expired, and the authorities in question have not provided a reply.

2.12 No effective remedies are available to the author. Her attempts to file a criminal complaint and obtain compensation did not succeed. Under article 5 (2) (b) of the Optional Protocol and the Committee's jurisprudence, domestic remedies may only be required insofar as domestic remedies appear to be effective and are *de facto* available to the author. Domestic remedies need not be exhausted when the author has objectively no prospect of success. Filing a complaint within 35 days from the date on which the author was subjected to sexual violence and torture was impossible because of the fear and physical impairment that the author suffered as a result of the rape. No victim of rape during the conflict has any prospect of redress under existing legislation. In its Views on *Maharajan v. Nepal*, the Committee considered that the 35-day statutory limitation period for filing complaints about torture is inconsistent with the gravity of the crime.<sup>7</sup>

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<sup>7</sup> *Maharajan v. Nepal* (CCPR/C/105/D/1863/2009), para. 7.6.

## The complaint

3.1 The author claims that the State party has violated her rights under article 7, read alone and in conjunction with articles 2 (1)-(3), 3 and 26 of the Covenant. She also claims that the State party has violated her rights under articles 17 and 23, each read alone and in conjunction with articles 2 (1), 2 (3), 3 and 26 of the Covenant. With respect to the author's rights under article 7 of the Covenant, read alone, the author was raped and subjected to other forms of violence, including beatings, threats, insults and other denigrating language and acts. Under international jurisprudence, rape constitutes torture when it is inflicted by or at the instigation of, or with the consent or acquiescence of, a public official or another person acting in an official capacity.<sup>8</sup> General recommendation No. 19 of the Committee on the Elimination of Discrimination against Women<sup>9</sup> characterizes violence against women as a form of discrimination that seriously inhibits women's ability to enjoy rights and freedoms on an equal basis with men. The Committee against Torture has considered in its jurisprudence that sexual abuse by police officers constitutes torture even if it occurs outside of formal detention facilities.<sup>10</sup> According to the jurisprudence of the Human Rights Committee, rape constitutes a form of extreme gender-based violence and amounts to a violation of article 7 of the Covenant.<sup>11</sup>

3.2 In violation of the author's rights under article 7, read in conjunction with article 2 (2) of the Covenant, the State party has failed to adopt such laws and other measures as may be necessary to give effect to the author's rights under the Covenant with regard to rape and other forms of sexual violence.<sup>12</sup> The State party's legislation does not: a) recognize rape or other forms of sexual violence as a war crime or a crime against humanity; b) criminalize acts such as forced nudity, forced pregnancy, sexual assault and other forms of sexual violence not involving penetration; c) permit the filing of criminal complaints for rape, or reparations for rape, more than 35 days after the rape; d) include within the definition of rape any acts other than penile penetration of the vagina with a woman or a minor without her consent;<sup>13</sup> e) include victims of rape or other forms of sexual violence within the scope of what is known as interim relief (policies under which the State party made *ex gratia* payments for gross human rights violations during the conflict); or f) provide a proportionate penalty for rape, which is punishable by imprisonment of 5-15 years, depending on the age of the victim.

3.3 In violation of the author's rights under article 7, read in conjunction with article 2 (3) of the Covenant, the State party's authorities systematically fail to investigate allegations of torture, sexual violence and ill-treatment. Despite the author's attempts to file a complaint, domestic authorities – adhering to a common practice – refused to register her claim. Thus, the authorities failed to conduct a thorough, independent, impartial and prompt investigation into the author's allegations of torture and sexual violence.

3.4 In violation of the author's rights under article 7, read in conjunction with articles 2 (1), 3, and 26 of the Covenant, the State party failed to provide special measures of protection to which the author was entitled as a member of a particularly vulnerable group – the indigenous community of the Tharu – and instead subjected her to multiple forms of discrimination based on her status as a young indigenous woman. In its general comment No. 28, the Committee recognized that women are particularly vulnerable during internal or international armed conflicts, and States parties are obligated to take effective measures to protect women from rape, abduction and other forms of gender-based violence. In its general comment No. 18 on non-discrimination, the Committee stated that the "principle of equality sometimes requires States parties to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the

<sup>8</sup> The author cites, for example, International Criminal Tribunal for Rwanda, *Prosecutor v. Akayesu*, ICTR-96-4-T, Chamber 1, judgment of 2 September 1998, para. 597.

<sup>9</sup> U.N. Doc. A/47/38 at 1 (1993).

<sup>10</sup> The author cites Committee against Torture, *V.L. v. Switzerland* (CAT/C/37/D/262/2005), para. 8.10.

<sup>11</sup> The author cites *Mehalli v. Algeria* (CCPR/C/110/D/1900/2009), para. 7.10.

<sup>12</sup> The author cites, inter alia, *Djebbar et al. v. Algeria* (CCPR/C/103/D/1811/2008), individual concurring opinion by Fabian Salvioli, joined by Cornelis Flinterman, paras. 5, 6 and 7.

<sup>13</sup> Regarding the definition of rape under domestic legislation, the author cites section 14 of Muluki Ain.

Covenant. [...]. Such action may involve granting for a time to the part of the population concerned certain preferential treatment in specific matters as compared with the rest of the population. However, as long as such action is needed to correct discrimination in fact, it is a case of legitimate differentiation under the Covenant.”<sup>14</sup>

3.5 The author’s rights to privacy, safety from unlawful attacks on honour and reputation, and family life were also breached, in violation of articles 17 and 23 (1), read alone and in conjunction with articles 2 (1), 2 (3), 3 and 26 of the Covenant. International and regional human rights jurisprudence recognizes rape as a grave form of interference in the privacy and family life of victims.<sup>15</sup> Security forces entered the author’s house and raped her in front of her three-year-old daughter. This violated essential aspects and values of her private life, represented an intrusion in her sexual life, breached her right to freely decide with whom to have intimate relations, and caused her to lose total control over those most personal and intimate decisions. The fact that the author became pregnant as a consequence of rape stigmatized her and her younger daughter further and subjected her to a climate of shame and denigration within her family and community.

3.6 The author is entitled to an effective remedy, including compensation for the harm suffered, rehabilitation, satisfaction and guarantees of non-recurrence. In its Views on *Maharajan v. Nepal*,<sup>16</sup> the Committee requested the State party to amend its legislation establishing a 35-day statutory limitation on criminal complaints for rape, so as to bring the legislation into conformity with the Covenant. The Committee also requested the State party to criminalize torture and repeal all laws that grant impunity to alleged perpetrators of acts of torture. The State party has not implemented those recommendations. Under international and regional human rights jurisprudence, State parties must provide for appropriate compensation that is commensurate with the gravity of the violations; take effective measures to ensure that court proceedings involving rape allegations are pursued without undue delay; and ensure that all legal procedures in cases involving crimes of rape and other sexual offences are impartial and fair and are not affected by prejudice or stereotypical gender notions. The Committee on the Elimination of Discrimination against Women also requested that the State party review its legislative definition of rape, and provide training for judges, lawyers, law enforcement officers and medical personnel in understanding crimes of rape and other sexual offences in a gender-sensitive manner, so as to avoid revictimization of women having reported rape cases and to ensure that personal mores and values do not affect decision-making.<sup>17</sup>

3.7 With respect to reparation, the author requests that the Committee call on the State party to: a) promptly and effectively investigate the crimes alleged by the author and bring the perpetrators to justice; b) provide integral reparation and prompt, fair and adequate compensation to the author for the material and moral damage caused; c) provide to the author restitution, rehabilitation, satisfaction (including restoration of dignity and reputation), and guarantees of non-repetition; d) provide an official apology to the author on the occasion of a private ceremony, acknowledging the State’s international responsibility and consulting with the author in advance regarding the modalities of the ceremony, to ensure that she is not subjected to re-victimization or exposed to harmful consequences for her security and privacy; and e) provide to the author free-of-charge medical and psychological care. The author also requests the Committee to call upon the State party to implement the following general measures: a) define torture as an autonomous crime in its criminal legislation; b) adapt the definition of rape and other forms of sexual violence in its legislation in accordance with international standards, and codify rape as a war crime and a crime against humanity; c) amend the 35-day statute of limitations for the crime of rape and bring it into line with international human rights legal standards; d) ensure that investigations and forensic analyses, mainly with regard to rape and other forms of sexual violence, follow international standards,

<sup>14</sup> General comment No. 18 on non-discrimination, adopted on 10 November 1989 (U.N. Doc. HRI/GEN/1/Rev.6 at 146(2003).)

<sup>15</sup> The author cites, for example, European Court of Human Rights, *M.C. v. Bulgaria*, Application no. 39272/98, judgement of 4 December 2003, para. 153.

<sup>16</sup> *Maharajan v. Nepal* (CCPR/C/105/D/1863/2009), para. 9.

<sup>17</sup> Committee on the Elimination of Discrimination against Women, *Vertido v. Philippines* (CEDAW/C/46/D/18/2008), para. 8.9.

in particular the Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Istanbul Protocol) and the Guidelines for Medico-Legal Care for Victims of Sexual Violence issued by the World Health Organization; e) provide training and educational courses to members of the judiciary, police and the health sector on the diligent investigation of cases of sexual abuse of women, including a gender and ethnicity perspective; and f) offer educational programmes to the Istanbul Protocol, international human rights law and international humanitarian law for the judiciary, army, security forces and all persons who may be involved in dealing with persons deprived of their liberty.

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

4.1 In its observations dated 4 September 2015, the State party considers that the communication is inadmissible because the author has failed to exhaust domestic remedies that are available both through the criminal justice system and the transitional justice mechanism. The latter mechanism is the appropriate means for truth-seeking for crimes committed during the armed conflict.

4.2 With respect to the ordinary criminal justice system, the author's writ of mandamus is still pending before the Supreme Court of Nepal and, according to article 107 of the Interim Constitution of Nepal, the Supreme Court may issue an appropriate order to provide full justice to a writ petitioner. In addition, domestic legislation may provide specific statutes of limitations to file first information reports, depending on the nature of the case.

4.3 With respect to the transitional justice system, the author may file a complaint before the Truth and Reconciliation Commission, which was established pursuant to the Act on the Commission on Investigation of Enforced Disappearance, Truth and Reconciliation of 2014. The objectives of that Act are to ensure and provide truth, justice, reparations, and public acknowledgement of victims; prevent abuse; and combat impunity. Section 26 of the Act expressly prohibits amnesty to conflict related rapes and other serious violations of human rights. Established in 2015, the Truth and Reconciliation Commission is mandated to investigate human rights violations related to the conflict; recommend that the Government prosecute alleged offenders, and provide reparation and justice to victims.<sup>18</sup> The Commission has drafted its governing Regulation and is currently engaged with developing its Terms of Reference. In order to inform how the Commission will approach its mandate, its Commissioners have visited 20 districts and have held discussions with victims of the conflict, civil society members, rights defenders, government officials and other stakeholders.

4.4 The State party is committed to conducting prompt and impartial investigations and bringing perpetrators of sexual violence to justice. Offences related to sexual violence, including rape, violence against women and torture, are criminalized under domestic law. No one is immune to prosecution for crimes of sexual violence. Individuals convicted of rape may be imprisoned for up to 16 years. When an individual files a first information report with the relevant investigating authority regarding an offence related to sexual violence, that authority is legally required to conduct an investigation. To enhance access to justice for victims of rape, parliamentary legislative committees approved an amendment bill proposing to extend to six months the 35-day statute of limitations period for filing a complaint about rape. In addition, the legislative Parliament is currently considering a new bill proposing to fully criminalize all forms of torture and ill-treatment, pursuant to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

4.5 The ordinary justice system does not suffice for truth-seeking, prosecution of perpetrators, reparations or rehabilitation to victims. Truth-seeking is at the core of transitional justice mechanisms, which is used to identify perpetrators and victims, and to document patterns of abuses for institutional reform. It should be noted that truth-seeking takes place after the establishment of an officially-sanctioned truth commission or commission of inquiry that is authorized to investigate the past. Judicial proceeding against

<sup>18</sup> The State party also notes that in 2015, the Commission on Investigation of Enforced Disappearance was also created, and considers that the two Commissions represent a significant step forward for Nepal's transitional justice process.

the perpetrators of serious human rights violation may be initiated in court of law, upon the submission of the report by the truth commission.

4.6 Thus, the author should file a complaint before the Commission in order to record the violation of her rights and in order to be eligible for reparation, restitution and other possible services and benefits. The Commission is empowered to promptly and effectively investigate the effects, with the aim of identifying and trying those responsible for the violations committed against the author. After completion of the process, the author will be eligible for reparation, restitution and other services or benefits as provided for under the law.

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

5.1 In comments dated 6 October 2015, the author provided an update on the status of her writ of mandamus. The deadline for the State party's response to the writ, initially set for 17 February 2015, was repeatedly postponed, and to the author's knowledge, no response has been filed. A hearing before the Supreme Court was scheduled for 16 August 2015; however, the hearing did not take place, and no new hearing date has been scheduled. The writ is thus not likely to produce any meaningful result and is not an effective remedy. The Supreme Court has never declared inapplicable the 35-day statute of limitations period in an individual case. Even if she were to obtain a positive decision, it is unlikely that the decision would be implemented.

5.2 The author reiterates that the District Officer refused to register the first information report that she attempted to file in December 2014. Any legislative amendment that may be enacted to extend the 35-day statute of limitations period for reporting rape would not apply to the author, because she was subjected to rape in 2002. Furthermore, a six-month reporting period would still be inadequate.

5.3 Transitional justice mechanisms, including the Truth and Reconciliation Commission, are not yet fully operational. The State party has also sought from the Supreme Court review of the Act pursuant to which the Commission was created. Because that decision is pending, it is not clear which powers the Commission will have. The author is considering requesting registration of her case once the Commission becomes operational and once its powers and methods of work become clear. However, the Commission, which is not a judicial body, is currently not an effective remedy. It is not mandated with the power to provide guarantees of non-repetition, such as legislative reform or measures of satisfaction.

5.4 The State party's position regarding recourse to the Commission is incorrect. In a decision issued on 26 February 2015, the Supreme Court stated that cases that are pending before judicial courts, including the Supreme Court, may not be transferred to the Commission. Under this principle, the author is barred from seeking relief from the Commission, since her writ of mandamus is pending before the Supreme Court.

5.5 On 3 May 2021, the author informed the Committee that on 29 May 2019, the Supreme Court had dismissed her writ of mandamus, on the ground that the refusal of the police to register her first information report was justified because of the 35-day filing statute.

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

##### *Consideration of admissibility*

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

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

6.3 The Committee notes the State party's claim that the author has not exhausted domestic remedies, as required by article 5 (2) (b) of the Optional Protocol, because her writ of mandamus is still pending before the Supreme Court of Nepal, and because she has not filed a complaint before the Truth and Reconciliation Commission.



6.4 However, the Committee notes that the author: a) filed two first information reports in December 2014 before the District Police Office and the District Administration Office in Kanchanpur, respectively, and that her requests to register the reports were both denied on the basis of the 35-day statute of limitations for filing a criminal report about rape; b) filed a claim for compensation in December 2014 before the Kanchanpur District Court, which also refused to register the claim because it was time-barred; and c) filed a writ of mandamus on 22 January 2015 before the Supreme Court of Nepal, in which she requested the non-application of the 35-day statute of limitations for conflict-related individual claims. The Committee notes that according to the author, on 29 May 2019, the Supreme Court dismissed the writ of mandamus, on the ground that the refusal of the police to register the first information report was justified in light of the author's failure to file it within the 35-day statute of limitations period. The Committee notes the author's uncontested allegations that she was unable to file a first information report within the legally established 35-day period, given that during that time, she was in a state of shock and physically very weak, was living in a rural area, where most of the inhabitants were illiterate, with no access to legal assistance and no knowledge of the possibility to file a first information report; was unwell and was trying to cope in the aftermath of the attack; and was precluded from seeking support in her indigenous community on account of the strong social stigma attached to victims of sexual violence and the fear she felt, namely of reprisals. Referring to its prior relevant jurisprudence,<sup>19</sup> the Committee considers that the remedies in the criminal justice system were both ineffective and unavailable to the author, in view of the legal and practical limitations on filing a complaint for rape in the State party.

6.5 With regard to the transitional justice system, the Committee notes the author's argument that not only transitional justice mechanisms are not fully operational, but the registration of her case before the Truth and Reconciliation Commission would not be an effective remedy, (including) because of the Commission's non-judicial nature, and because of the ruling of the Supreme Court stating that complaints that are pending before the judicial courts may not be referred to the Commission. The Committee recalls its jurisprudence that it is not necessary to exhaust avenues before non-judicial bodies to fulfil the requirements of article 5 (2) (b) of the Optional Protocol,<sup>20</sup> and that transitional justice mechanisms cannot serve to dispense with the obligation to prosecute the perpetrators of serious human rights violations.<sup>21</sup> The Committee therefore considers that resorting to the Truth and Reconciliation Commission would not constitute an effective remedy for the author.

6.6 With respect to the author's claim under article 7, read in conjunction with article 2 (2) of the Covenant, the Committee recalls that according to its jurisprudence, the provisions of article 2 of the Covenant lay down a general obligation for States parties and do not give rise, when invoked separately, to a claim in a communication under the Optional Protocol.<sup>22</sup> Furthermore, article 2 of the Covenant may not be invoked in a claim in a communication under the Optional Protocol in conjunction with other provisions of the Covenant, except when the failure by the State party to observe its obligations under article 2 is the proximate cause of a distinct violation of the Covenant directly affecting the individual claiming to be a victim.<sup>23</sup> In the present case, the Committee observes that the author's claim under article 7, read in conjunction with article 2 (2) of the Covenant lies in the alleged failure of the State party's legislation to give effect to her rights in relation to acts of sexual violence. The Committee notes, however, that the author has already alleged a violation of her rights under article 7, resulting from the interpretation and application of the existing laws of the State party. The Committee considers that an examination of whether the State party violated its general obligations under article 2 (2) of the Covenant, read in conjunction with article 7,

<sup>19</sup> See, for example, *Nyaya v. Nepal* (CCPR/C/125/D/2556/2015), para. 6.4.

<sup>20</sup> See, for example, *Katwal v. Nepal* (CCPR/C/113/D/2000/2010), para. 6.3.

<sup>21</sup> See, for example, *Nyaya v. Nepal* (CCPR/C/125/D/2556/2015), para. 6.5.

<sup>22</sup> See, for example, *Griffiths v. Australia* (CCPR/C/112/D/1973/2010), para. 6.4.

<sup>23</sup> See *Timoshenko et al. v. Belarus* (CCPR/C/129/D/2461/2014), para. 6.4; *Lumbala Tshidika v. Democratic Republic of the Congo* (CCPR/C/115/D/2214/2012), para. 5.5; *Alger v. Australia* (CCPR/C/120/D/2237/2013), para. 6.8; *Poliakov v. Belarus* (CCPR/C/111/D/2030/2011), para. 7.4; *Formonov v. Uzbekistan* (CCPR/C/122/D/2577/2015), para. 8.5; compare with *Poplavny v. Belarus* (CCPR/C/115/D/2019/2010), para. 7.4.

would not be distinct from the examination of the violation of the author's rights under article 7 of the Covenant. The Committee therefore considers that the author's claim under article 7, read in conjunction with article 2 (2) of the Covenant is inadmissible *ratione materiae* under article 3 of the Optional Protocol.

6.7 The Committee considers that the author has sufficiently substantiated her claims under article 7, read alone and in conjunction with articles 2 (1), 2 (3), 3 and 26 of the Covenant; and under articles 17 and 23, each read alone and in conjunction with articles 2 (1), 2 (3), 3 and 26 of the Covenant. Accordingly, the Committee declares the communication admissible and proceeds to examine it on the merits.

#### *Consideration of the merits*

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

7.2 The Committee notes the author's allegations that on 20 August 2002, she was subjected to rape, other forms of sexual violence and ill-treatment by members of the Royal Nepalese Army and the Armed Police Force. The Committee notes that the State party has not provided any specific comments to refute these allegations. The Committee observes that the author has provided a detailed and consistent description of the gang rape and other acts of sexual violence that she endured, and documentation to support those allegations, including statements from two individuals and the author's husband, and a forensic medical examination certificate confirming the author was suffering from post-traumatic stress disorder and depression and that there was no reason not to believe the author's account of the attack and its consequences. The Committee takes note of the author's allegation that she experienced severe physical pain and mental suffering during and after the attack up to the present. The Committee also observes that according to the author's allegations, the security forces intentionally subjected the author to rape and other acts of violence in order to extract a confession regarding her imputed support for Maoist insurgents. The Committee also notes the author's reference to various non-governmental reports that indicate a general pattern of violations committed by the State party's security forces during the internal conflict; those violations include sexual violence inflicted during interrogations of women suspected of being Maoists or Maoist supporters.<sup>24</sup> In the light of the above, and in the absence of any explanation from the State party with respect to the factual claims raised, due weight must be given to the author's allegations. Recalling its prior relevant jurisprudence, the Committee considers that the rape and other acts of sexual violence inflicted by the Royal Nepalese Army and the Armed Police Force upon the author, who is a member of the indigenous community of the Tharu, violated the author's rights under article 7 of the Covenant.<sup>25</sup>

7.3 The Committee also notes the author's uncontested argument that the rape and other acts of sexual violence to which she was subjected had a discriminatory effect, as demonstrated by the generalized use of rape against women during the conflict, owing to the particularly serious discriminatory consequences, shame and stigma for women victims of rape in society in Nepal, and, in particular, in the indigenous community to which the author belongs. The Committee recalls that women are particularly vulnerable in times of internal or international armed conflict.<sup>26</sup> States parties must therefore take all measures to protect women and girls from rape, abduction and other forms of gender-based violence, particularly those women and girls belonging to more vulnerable groups, as indigenous communities like the one the author belonged to.<sup>27</sup> In light of the context surrounding the rape and other forms of sexual violence to which the author, as a woman, was subjected,<sup>28</sup> the Committee considers

<sup>24</sup> See, inter alia, Office of the United Nations High Commissioner for Human Rights, *Nepal Conflict Report* (2012), p. 158.

<sup>25</sup> See, for example, *Nyaya v. Nepal* (CCPR/C/125/D/2556/2015), para. 7.2; *Mehalli v. Algeria* (CCPR/C/110/D/1900/2009), para. 7.10. See also Committee against Torture, *A v. Bosnia and Herzegovina* (CAT/C/67/D/854/2017), paras. 7.2-7.4.

<sup>26</sup> See *Maya v. Nepal* (CCPR/C/119/D/2245/2013), para. 12.4.

<sup>27</sup> See general comment No. 28 on Equality of rights between men and women (article 3) (CCPR/C/21/Rev.1/Add.10 (2000)), para. 8; *Nyaya v. Nepal* (CCPR/C/125/D/2556/2015), para. 7.3.

<sup>28</sup> See *Maya v. Nepal* (CCPR/C/119/D/2245/2013), para. 12.4; *Nyaya v. Nepal* (CCPR/C/125/D/2556/2015), para. 7.3.

that the State party has violated the author's right not to be subjected to torture under article 7, read in conjunction with articles 2 (1), 3 and 26 of the Covenant.

7.4 The Committee also notes the author's allegations under article 7, read in conjunction with article 2 (3) of the Covenant, regarding the State party's failure to investigate and establish accountability for the sexual violence against her. The Committee recalls that the Covenant does not provide a right for individuals to require that the State party criminally prosecute another person.<sup>29</sup> The Committee considers, nonetheless, that the State party has a duty to investigate promptly, impartially and thoroughly alleged violations of human rights, prosecute the suspects, punish those held responsible for such violations, and provide to victims other forms of reparation, including compensation.<sup>30</sup> While the author did not report the attack that occurred in 2002 until 2014 for the reasons mentioned above, the information made available to the Committee indicates that despite the author's attempts to file first information reports, a claim for compensation, and a writ of mandamus requesting remedies, the State party did not investigate the author's allegations of sexual violence for procedural reasons. The Committee recalls that expeditiousness and effectiveness are particularly important in the adjudication of cases involving claims of such gravity as rape.<sup>31</sup> The Committee considers that the State party's failure to promptly and effectively investigate the author's allegations of sexual violence amount to a violation of her rights under article 7, read in conjunction with article 2 (3) of the Covenant.

7.5 Regarding the author's claim under article 17 of the Covenant, the Committee considers that the rape of the author constitutes an arbitrary interference with her privacy and her sexual autonomy, since she was forced by State agents to enter into sexual intercourse against her will. The violation of the author's right to privacy is aggravated by the author's uncontested allegation that she was stigmatized and marginalized not only by her spouse but also by fellow community members on account of her status as a rape victim, and by the fact that the State party did not take measures to provide remedies to the author after the rape. The Committee therefore considers that the State party has violated the author's rights under article 17 of the Covenant.

7.6 With respect to article 23 (1) of the Covenant, the Committee notes the author's uncontested allegations that she was gang raped by armed State agents in front of her three-year-old daughter, gave birth to a child after being forcibly impregnated during the rape, was bedridden for nearly one month following the rape, suffered and continues to suffer serious psychological sequelae from the attack, and was stigmatized, marginalized and shamed by her husband and community because of her status as a victim of sexual violence and as the mother of a child born as a result of rape. The Committee considers that these circumstances amount to a serious disruption of the author's family life and marriage.<sup>32</sup> In view of the above, the Committee considers that sexual violence that the author endured at the hands of State agents violated her rights under article 23 (1) of the Covenant.

7.7 In light of its findings, the Committee does not deem it necessary to examine the remainder of the author's claims under article 17 of the Covenant; or her claims under articles 17 and 23 (1), each read in conjunction with articles 2 (1), 2 (3), 3 and 26 of the Covenant.

8. The Committee, acting under article 5 (4) of the Optional Protocol, is of the view that the facts before it disclose a violation by the State party of article 7, read alone and in conjunction with articles 2 (1), 2 (3), 3 and 26 of the Covenant; and of articles 17 and 23 of the Covenant.

9. Pursuant to article 2 (3) (a) of the Covenant, the State party is under an obligation to provide the author with an effective remedy. This requires it to make full reparation to individuals whose rights under the Covenant have been violated. Accordingly, the State party is obligated to, inter alia: a) conduct a thorough and effective investigation into the facts surrounding the rape of the author and other forms of sexual violence and ill-treatment to

<sup>29</sup> See *Chernev v. Russian Federation* (CCPR/C/125/D/2322/2013), para. 12.3; see also *Avadanov v. Azerbaijan* (CCPR/C/100/D/1633/2007), para. 9.5.

<sup>30</sup> *Ibid.*

<sup>31</sup> *X v. Sri Lanka* (CCPR/C/120/D/2256/2013), para. 7.4.

<sup>32</sup> See *Nyaya v. Nepal* (CCPR/C/125/D/2556/2015), para. 7.8.

which she was subjected on 20 August 2002; b) prosecute, try and punish those responsible for the violations committed; c) provide the author with detailed information about the results of the investigation; d) ensure that any necessary and adequate psychological rehabilitation and medical treatment is provided to the author free of charge; and e) provide adequate compensation and appropriate measures of satisfaction to the author for the violations suffered, including arranging an official apology in a private ceremony. The State party is also under an obligation to take steps to prevent the occurrence of similar violations in the future. In particular, the State party should ensure that its legislation: a) criminalizes torture and provides for appropriate sanctions and remedies commensurate with the gravity of the crime; b) adapts the definition of rape and other forms of sexual violence in accordance with international standards; c) guarantees that cases of rape, other forms of sexual violence and torture give rise to a prompt, impartial and effective investigation; d) allows for criminal prosecution of those responsible for such crimes; and e) removes obstacles that hinder the filing of complaints and effective access to justice and compensation for victims of rape and other forms of sexual violence against women and girls, namely in the context of the armed conflict in Nepal, as forms of torture, including by significantly increasing the statute of limitations commensurate with the gravity of such crimes.

10. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective remedy when it has been determined that a violation has occurred, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the present Views and disseminate them widely in the official languages of the State party.

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