



# 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. 2556/2015\*,\*\*,\*\*\*

<i>Submitted by:</i>	Fulmati Nyaya (represented by TRIAL International)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Nepal
<i>Date of communication:</i>	20 June 2014
<i>Document references:</i>	Decision taken pursuant to rule 97 of the Committee's rules of procedure, transmitted to the State party on 27 January 2015 (not issued in document form)
<i>Date of adoption of Views:</i>	18 March 2019
<i>Subject matter:</i>	Arbitrary arrest, torture and forced labour of suspected Maoist child supporter by army and police officers
<i>Procedural issues:</i>	Exhaustion of domestic remedies
<i>Substantive issues:</i>	Prohibition of torture and cruel, inhuman and degrading treatment; prohibition of forced labour; right to liberty and security of a person; respect for the inherent dignity of the human person; non-discrimination; recognition as a person before the law; right not to be subjected to arbitrary or unlawful interferences with one's privacy and family life; right to special protection as a child; and right to an effective remedy

\* Adopted by the Committee at its 125th session (4-29 March 2019).

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

\*\*\* An individual opinion (partly concurring) by Committee member José Manuel Santos Pais is annexed to the present Views.



*Articles of the Covenant:* 2, 3, 7, 8 (3) (a), 9, 10 (1), 17, 23 (1), 24 (1) and 26  
*Articles of the Optional Protocol:* 5 (2) (b)

1.1 The author of the communication is Fulmati Nyaya,<sup>1</sup> a national of Nepal, born in 1987 and a member of the indigenous Tharu community. She claims that the State party has violated her rights under articles 2, 3, 7, 8 (3) (a), 9, 10 (1), 17, 23 (1), 24 (1) and 26 of the Covenant. The Optional Protocol entered into force for the State on 14 May 1991.

1.2 On 27 January 2015, the Committee, acting through its Special Rapporteur on new communications and interim measures, decided to examine the admissibility of the communication together with the merits, in accordance with rule 97 of the Committee's rules of procedure.

### **The facts as presented by the author**

2.1 The author notes that the facts of the present communication must be read in the context of the decade-long armed conflict in Nepal (1996-2006).

2.2 The author was born in the Kailali District in far-western Nepal. On 2 April 2002, when the author was 14 years old,<sup>2</sup> 300 members of the Royal Nepalese Army (RNA) and the Armed Police Force (APF)<sup>3</sup> entered her village allegedly looking for Maoists. Soldiers mistook the author for her elder sister -Ms. Kantimati,<sup>4</sup> who had joined the Maoist party the previous year- and arrested her. She was dragged in a truck, where she was blindfolded, handcuffed and taken to APF's Bakimalika Battalion in Banbehda, Kailali. In the truck, the author was sexually assaulted by a group of six to seven soldiers, who touched various parts of her body, including her breast, thighs and bottom. On the same day, the security forces also arrested her friend, Ms. Junkiri.<sup>5</sup>

2.3 Later that day, the author and other detainees were taken to the Army barracks in Teghari. The author was detained *incommunicado*. During the first nine days of her detention, she lived in a big hall with 80 to 90 other detainees, both men and women in very poor hygienic conditions. She hardly had anything to eat. The Major asked the soldiers to bring the detainees to his office one by one for interviews. For four days, she was regularly taken from the hall for such interviews. The interrogations took place twice or three times a day, generally in the evenings and she was most of the time blindfolded.

2.4 During her detention, she was raped and subjected to other forms of sexual violence, including forced nudity, insertion of objects in her vagina and other sexual assaults. She was also subjected to beatings, kicking, punching, prolonged blindfolding and handcuffing, threats, insulting and denigrating language and coerced extraction of confessions. Following the rape, she was not able to urinate and was bleeding profusely. The bleeding lasted for a week and she did not receive any medical assistance or treatment. The Major who raped her threatened to kill her if she told anybody about what had happened.

2.5 The author was detained at the Army barracks in Teghari from 2 to 11 April 2002. Then, she was transferred back to the Bakimalika Battalion of the APF in Banbehda together with her friend Ms Junkiri. They were detained in a very small dark room without windows, mattresses, blankets or beds. During that period, she was again raped and subjected to other forms of sexual violence. The Superintendent of the Police (SP) always called her for interrogation during the day and after meeting him for three to four days, he asked for the removal of her blindfold. Moreover, the female detainees, including the author, were verbally abused and forced to do work in the barracks, such as carrying bricks and sand, making cement for the construction of a temple and watering the garden.

2.6 Over a month and a half after her detention, the author's father, Mr. [REDACTED] went to the APF's barracks and finally found her after having searched for her in many places of detention. He had to deposit NPR 50,000.00 (approximately 500 Euros) to secure her release. On 13 or 14 June 2002, the author and her friend Ms. Junkiri were released but were requested to report back on certain dates about Maoists activities. They reported periodically for about nine months, until March 2003. Sometimes, police officers recording their reports

<sup>1</sup> The author is using a pseudonym for the present communication.

<sup>2</sup> By that time, the author was attending school 8th grade.

<sup>3</sup> APF was a paramilitary police force established by the Government by way of Ordinance, under the operational control of the RNA.

<sup>4</sup> Pseudonym.

<sup>5</sup> Pseudonym.

ill-treated them, touching their bodies and using vulgar language. At some point, the beating stopped but they were sometimes asked to water the garden. The police threatened to kill them if they missed any reporting day. Afterwards, the reporting dates happened every 7 days, then every 15 days and, at an unspecified date, they were no longer requested to report.

2.7 In June 2002, the author returned to her village and found out that she had become a social outcast. Aware of the behaviour of security forces towards female detainees, the villagers assumed that she had been raped and thus bore “impurities”. Her friends in the village avoided her. She was not able to come out of her house for about a month due to the shame and humiliation and she stopped going to school. Therefore, her formal education was interrupted for two years. She went back to school in 2004, where she was often ridiculed as an “impure girl.”

2.8 In February 2009, the author got married. A week after her marriage, her husband heard about the rumour of her rape. When he asked her about the rape, she told him the truth. As a result, her husband and in-laws rejected her. The author was deeply humiliated and had to go back to her maternal home. She stayed there for two years before her husband finally reconciled with her.

2.9 The trauma provoked by the sexual violence and torture endured and the subsequent stigmatization and rejection, left the author with severe psychological sequelae. She suffers from post-traumatic stress disorder and has ongoing anxiety, nightmares and suicidal thoughts. She also suffers from various grave physical ailments including pains in her chest and problems with her backbone and ribs. She was examined by a physician in Kathmandu in March 2013 and the doctor advised her to undertake therapy and be on long term medication to avoid further damage to her backbone, as she is at risk of paralysis.<sup>6</sup> The forensic doctor who examined the author on 24 March 2014 found scars over her body and a nail deformity that are considered to be “consistent with the history provided by the examinee.”<sup>7</sup>

2.10 Although many years passed since the author was subjected to rape, torture and forced labour, she never complained about these crimes to any authority, doctor or even her own family. Given the social stigma attached to sexual violence in the Nepalese society, including within the indigenous community she belonged to, it was impossible for her to seek support in the community as it would have led to further victimization rather than to a remedy. Moreover, the author was only a 14-year-old girl and she did not understand the avenues of justice or how to follow them. She would have needed to be represented by her parents in legal proceedings, but she was too ashamed to ask for their support.

2.11 In 2011, the author learnt about the possibility of applying for interim relief as a victim of the conflict before the District Administration Office (DAO). In January 2011, she complained about her arbitrary detention and ill-treatment before the Chief District Officer (CDO), but she has not received any “interim relief” to date. In fact, the “interim relief” excludes from its scope victims of rape or other forms of sexual violence.<sup>8</sup>

2.12 On 17 February 2014, a lawyer filed a complaint (First Information Report, ‘FIR’) on behalf of the author. The Deputy SP of the Kailali District Police Office refused to register the author’s FIR, as it allegedly did not comply with the 35-day statute of limitation for reporting the crime of rape established pursuant to Section 11 of the Nepalese Criminal Code. The lawyer also tried to file a claim for compensation before the Kailali District Court, pursuant to the Torture Compensation Act 1996 (‘TCA’), but the Court refused to register the claim.

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<sup>6</sup> The author provides a medical certificate and medicine prescription from the Sahid Memorial Hospital, with no specified date.

<sup>7</sup> The author provides copies of a medical certificate dated 25 March 2014 attesting the grave physical and psychological harm suffered by her and of a certificate dated 24 March 2014 issued by the Department of Forensic Medicine of the Tribhuvan University attesting the author suffers from post-traumatic stress disorder and that her physical injuries match her allegations of physical and sexual assault.

<sup>8</sup> The author refers to the Advocacy Forum report, “Discrimination and Irregularities: The Painful Tale of Interim Relief in Nepal,” 2010, p. 12, 14 and 28 and to the Concluding Observations of Nepal, CCPR/C/NPL/CO/2, para. 5 b.

2.13 The author notes that Section 3 (5) of the State Cases Act (1992) allows complainants to further lodge their FIR with the CDO or the Police Officer superior to the police office that initially refused to file the FIR. Accordingly, on 29 March 2014, the author requested the Assistant CDO in Dhangadhi, District Headquarter of Kailali, to register a FIR but he refused to do so alleging that it was not possible for conflict-related cases to be registered and that the author should wait for the establishment of transitional justice mechanisms.

2.14 On 11 April 2014, the author filed a writ of mandamus before the Supreme Court of Nepal, which was registered on the same date, requesting the non-application of the 35-day statute of limitations. However, the author notes that the Supreme Court has never admitted requests concerning the non-application of the 35-day statute of limitation in individual cases so the chances of success of her petition are null. The author notes that the only exception was made regarding a specific non-conflict related case, in which the Supreme Court highlighted the need to remove provisions on prescription, noting that they were a barrier to effective remedy and reparations for victims and directed the government to amend the relevant legislation to remove the 35-day statutory limitation on rape. However, this remains unimplemented since 2008.<sup>9</sup>

2.15 On 17 April 2014, the Supreme Court issued a show cause order, asking the Ministry of Home Affairs, Nepal Police Headquarters in Naxal, the District Police Office in Kailali, and the District Administration Office in Kailali to provide a reply within 15 days (on 2 May 2014). None of the respondents respected this deadline and the Supreme Court fixed a second deadline for 2 June 2014.

2.16 The Police Headquarters and the Ministry of Home Affairs submitted rejoinders on 5 and 19 May 2014 respectively, challenging the admissibility of the claims on the basis of the 35-day statute of limitations, which precludes any investigations.<sup>10</sup> In June 2014, the District Police of Kailali and the District Administration Office of Kailali submitted similar replies. The case is still pending, while her overall health situation is critical and requires prompt intervention.

2.17 The author claims that she tried, unsuccessfully, to have a FIR registered and to submit a complaint for compensation pursuant to the 1996 Torture Compensation Act. She contends that she had no effective remedies available and cites the Committee's jurisprudence, according to which the exhaustion of local remedies can only be required insofar as such remedies appear to be effective in the given case and are *de facto* available to the author;<sup>11</sup> and that domestic remedies do not need to be exhausted where the author has objectively no prospect of success.<sup>12</sup>

2.18 The author further refers to a case against Nepal where the Committee held that "the filing of FIRs with the police rarely leads to any investigations" and thus declared the case admissible.<sup>13</sup> The author adds that in other cases the Committee expressly referred to the 35-day statute of limitations as excessively strict,<sup>14</sup> and flagrantly inconsistent with the gravity of the crime of torture.<sup>15</sup>

<sup>9</sup> The author refers to Supreme Court of Nepal, case Sapana Pardhan Malla v. the Government of Nepal Case No. 3393/2061, decision of 11 July 2008.

<sup>10</sup> The author provides copies of the rejoinders submitted to the Supreme Court by the Police and by the Ministry of Home Affairs, dated 5 May and 19 May 2014, respectively.

<sup>11</sup> The author refers to, inter alia, the views of the Committee in case Zdenek and Milada Ondracka v. Czech Republic, 14 December 2007, para. 6.3 and case Baboeram et al. v. Suriname, 4 April 1985, para. 9. 2.

<sup>12</sup> The author refers to the views of the Committee in case Ilmari Länsman et al. v. Finland, 26 October 1994, para. 6.2 and case Pratt and Morgan v. Jamaica, 6 April 1989, para. 12.3.

<sup>13</sup> The author refers to the views of the Committee in case Yasoda Sharma v. Nepal, views of 28 October 2008, para. 6.3.

<sup>14</sup> The author refers to the views of the Committee in case Giri v. Nepal, views of 24 March 2011, para. 6.3.

<sup>15</sup> The author refers to the views of the Committee in case Maharjan v. Nepal, 19 July 2012, para. 7.4; case Giri, see footnote 22. The author also refers to the Committee's Concluding Observations on Nepal of March 2014 and to the Committee's General Comments (Nos. 35, 31, 28, 20, 18, 17).

### The complaint

3.1 The author claims that the State party has violated articles 7, 8 (3) (a) and 10 (1), read alone and in conjunction with articles 2 (1, 2 and 3), 3, 24 (1) and 26 of the Covenant because of the rape, sexual abuse, torture, ill-treatment, inhumane conditions of detention and the forced labour that she was subjected to and the subsequent failure by the State party to provide an effective remedy and to carry out an *ex officio*, prompt, effective, independent, impartial and thorough investigation into her allegations, and to prosecute and sanction those responsible. The author submits that the violations are aggravated by the fact that, at the time of the events, she was a young indigenous girl and, as such, she was entitled to special protection from the State party. The author adds that the rape and sexual abuse that she endured were committed as part of a systematic practice existing during the conflict in Nepal. Moreover, the author claims that Nepal has failed to adopt effective legislative measures to give effect to the rights enshrined in the Covenant and has failed to remove obstacles in the existing legal framework that have disproportionately prejudicial effects on women. According to Nepalese law, no complaint can be entertained regarding rape unless filed within 35 days after the commission or occurrence thereof.<sup>16</sup> Filing a complaint would have been materially impossible for her as she was being held in arbitrary detention at the time. The author further claims that she was a victim of discrimination based on her gender and ethnicity because of the attitude shown by domestic authorities.<sup>17</sup>

3.2 The author further alleges to be victim of a violation of article 9 (1, 2 and 3), read alone and in conjunction with articles 2 (3) and 24 (1) of the Covenant because she was subjected to arbitrary arrest and detention; and she was not informed, at the time of arrest, of the reasons for her arrest, nor was she promptly informed of the charges against her. Nepalese authorities did not conduct any effective investigation into these violations, and they did not identify, prosecute and sanction those responsible, or provide her special protection as a child.

3.3 The author finally alleges a violation of articles 17 and 23 (1), read alone and in conjunction with articles 2 (1 and 3), 24 (1) and 26 of the Covenant, due to the arbitrary interference with her privacy and her sexual life as a woman,<sup>18</sup> the disruption of her family life, and the unlawful attacks on her honour and reputation. Moreover, Nepalese authorities failed to adopt measures of protection of the author's family, leaving the author to endure stigma and marginalization. The author claims she was a victim of a three-folded discrimination: as a child, a woman and an indigenous person.

3.4 With respect to reparation, the author requests that the Committee call on the State party to adopt the following specific measures: (a) undertake prompt and effective investigations of the crimes alleged by the author and bring the perpetrators to justice; (b) provide an official apology to the author on the occasion of a private ceremony, acknowledging its international responsibility; (c) provide a prompt, fair and adequate compensation to the author for the material and moral damage caused; and (d) provide free of charge medical and psychological care for the author. The author also requests that the Committee call upon the State party to implement the following general measures: (a) criminalize torture; (b) adapt the definition of rape and other forms of sexual violence in accordance with international standards and codify rape as a crime against humanity; (c) amend the 35-day statute of limitations for the crime of rape and make it in line with international human rights law; (d) amend Nepalese law making mandatory to provide an arrest warrant at the time of arrest, including the grounds for arrest; (e) ensure all fundamental legal safeguards for detainees are provided; (f) ensure that investigations and forensic analyses -mainly with regard to rape and other forms of sexual violence- follow international standards, in particular the Istanbul Protocol and the World Health Organization Guidelines for Medico-Legal Care for Victims of Sexual Violence; and (g) establish capacity building and educational programmes and trainings on diligent investigations of cases of sexual abuse of women, the Istanbul Protocol, international human rights law and international

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<sup>16</sup> The author refers to the Nepal Criminal Code (Muluki Ain), Chapter on Rape, Section 11.

<sup>17</sup> The author refers to the views of the Committee in case L.N.P v. Argentina, 18 July 2011, para. 13.3.

<sup>18</sup> The author refers to the General Comment No. 28 of the Committee, HRI/GEN/1/Rev.9 (Vol.I), 29 March 2000, paras. 11 and 20.

humanitarian law, for the judiciary, army, security forces and all persons that 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 argues that the author has failed to exhaust domestic remedies available both in the criminal justice system as well as the transitional justice mechanism, which is the appropriate avenue for truth-seeking for crimes committed during the armed conflict.

4.2 As to the ordinary criminal justice system, the State party notes that the author's writ of mandamus is still pending before the Supreme Court of Nepal and that, according to article 107 of the Interim Constitution of Nepal, the Supreme Court can issue an appropriate order to provide full justice to the writ petitioner. The State party adds that domestic legislation can provide specific statutes of limitation to file FIR depending on the nature of the case.

4.3 As to the transitional justice system, the State party notes that the author still has the possibility to file a complaint before the Truth and Reconciliation Commission, which is mandated to investigate conflict-related cases, recommend the government to prosecute alleged offenders and provide reparation to victims. The State party considers that the regular justice system cannot be enough for truth seeking, prosecution of perpetrators, reparations or rehabilitation to victims. The State party notes that truth seeking is at the center of transitional justice mechanisms. The State party claims, therefore, that the author should go to the Truth and Reconciliation Commission in order to record the violation of her rights and to be eligible for reparation, restitution and other eventual services and benefits.

4.4 The State party notes that sexual violence related offences, including rape, violence against women and torture, are criminalized under domestic law. The State party claims, therefore, that the government is committed to conducting prompt and impartial investigations and bringing sexual violence perpetrators to justice. The State party informs that, to enhance the access to justice for victims of rape, the concerned committees at the Legislature Parliament approved an amendment Bill to extend the 35-day statute of limitation on rape to six months. The State party also informs that a new Bill to fully criminalize all forms of torture and ill-treatment, pursuant to the Convention Against Torture, is under consideration by the Legislature Parliament.

4.5 The State party finally adds that the Nepal Army, Armed Police Forces and Nepal Police had no record of the author's arrest or her subsequent release as claimed in the present communication.

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

5.1 In her comments of 16 November 2015, the author reiterates her allegations on admissibility and merits and the requested measures of reparation.

5.2 The author notes that, although her writ of mandamus is still pending before the Supreme Court: (a) it is unlikely to produce any meaningful result and she does not consider it to be an effective remedy in her case; and (b) the procedure before the Supreme Court has been slow and plagued by delays, cancellation of hearings and lack of answers from some respondents.<sup>19</sup>

5.3 The author interprets that, when the State party notes that domestic legislation can provide specific statutes of limitation to file a FIR, it claims that the author failed to comply with the 35-day statute of limitations to file her complaint. At the same time, the State party refers to an amendment to extend the 35-day statute of limitations to six months. The author claims, thus, that Nepal is aware of the overly restrictive nature of the 35-day statute of limitations as it is trying to modify it. She also notes that this amendment has not yet been signed into bill. Hence, is not yet applicable and, even if it becomes applicable law, it would not cover her case as she was raped in 2002.

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<sup>19</sup> The author refers to the admissibility decision of the Committee in case *Katwal v. Nepal*, 10 October 2012, para. 6.4 and to the views of the Committee, inter alia, in case *Maharjan v. Nepal*, 19 July 2012, para. 7.4.

5.4 The author further claims that the registration of her case before the Truth and Reconciliation Commission, a non-judicial body, cannot be considered as an effective remedy she should have exhausted before submitting a communication before the Committee.<sup>20</sup>

5.5 The author claims that the mere fact that Nepalese authorities failed to record her arbitrary deprivation of liberty (arrest and detention) amounts *per se* to a violation of article 9 of the Covenant. She notes that making a record of an arrest is one of the legal safeguards that must be provided to detainees according to article 9 of the Covenant.<sup>21</sup> The author adds that, as she was raped while in custody, the burden of the proof to rebut the author's allegations falls on the State party and it is not enough to allege that the deprivation of liberty has not been formally recorded.<sup>22</sup> The author claims, therefore, that the State party failed to provide any evidence to rebut the author's assertions concerning her arbitrary deprivation of liberty, rape, other forms of ill-treatment, sexual violence and subsequent forced labour.

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

#### *Consideration of admissibility*

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

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 domestic remedies have not been exhausted because, on the one hand, the author's writ of mandamus is still pending before the Supreme Court of Nepal and, on the other hand, she still has the possibility to file a complaint before the Truth and Reconciliation Commission.

6.4 The Committee notes, however, that the author: (a) filed two First Information Reports (FIR) concerning the crime of rape and other inhumane and degrading acts with the District Police Office, which were rejected based on the 35-day statute of limitations for the crime of rape; (b) filed a claim for compensation, pursuant to the Torture Compensation Act 1996 ('TCA'), which was also rejected and; (c) filed a writ of mandamus before the Supreme Court of Nepal requesting the non-application of the 35-day statute of limitations for conflict-related individual claims, that it is still pending. The Committee notes the author's uncontested allegations that she was unable to file a FIR within the legally established 35-day-period, given that, during that time, she was still arbitrarily detained with no access to legal assistance. The author has also argued that, even after her release, she was precluded from seeking support in her community and family due to the social stigma attached to victims of sexual violence. The Committee considers that the proceedings before the Supreme Court regarding the author's writ of mandamus filed in April 2014 are unduly prolonged, particularly considering the gravity of the crimes alleged. It further notes the author's statement that such proceedings are unlikely to bring relief given the longstanding jurisprudence of the Supreme Court on this issue. Therefore, in view of the legal and practical limitations on filing a complaint for rape in the State party, and the unduly prolonged and unlikely successful proceedings before the Supreme Court the Committee considers that the remedies in the criminal justice system were both ineffective and unavailable to the author.<sup>23</sup>

6.5 With regard to the transitional justice system, the Committee notes the author's argument that the registration of her case before the Truth and Reconciliation Commission is

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<sup>20</sup> The author refers to the views of the Committee in case *Katwal v. Nepal*, 10 October 2012, para. 6.3; case *Sedhai v. Nepal*, 19 July 2013, para. 7.5; case *Tripathi v. Nepal*, 28 October 2014, para. 6.3; and case *Basnet v. Nepal*, 29 October 2014, para. 7.4.

<sup>21</sup> The author refers to General Comment No. 28 of the Committee, *op. cit.*, para. 23 and to, *inter alia*, the views of the Committee in case *Kurbonov v. Tajikistan*, 6 November 2003, para. 6.5.

<sup>22</sup> The author refers to European Court of Human Rights (ECHR), case *Aydin v. Turkey*, judgement of 25 September 1997, para. 73.

<sup>23</sup> See communication No. 2245/2013, *Purna Maya v. Nepal*, Views adopted 23 June 2017, para. 11.5.

not an effective remedy considering the Commission's non-judicial nature. In this vein, 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>24</sup> and that transitional justice mechanisms cannot serve to dispense with the criminal prosecution of serious human rights violations.<sup>25</sup> The Committee therefore considers that resorting to the Truth and Reconciliation Commission would not constitute an effective remedy for the author.

6.6 In light of the foregoing, the Committee concludes that it is not precluded by article 5 (2) (b) of the Optional Protocol from examining the present communication.

6.7 As all other admissibility criteria have been met, the Committee declares the communication admissible and proceeds with its consideration of the merits.

#### *Consideration of the merits*

7.1 The Committee has considered the communication in the light of all the information made available to it by the parties, as required under article 5 (1) of the Optional Protocol.

7.2 The Committee notes the author's uncontested allegations that, since 2 April 2002 and, for a period of over a month and a half, she was subjected to rape and other forms of sexual violence and torture by members of the Royal Nepalese Army and of the Armed Police Force, in order to extract information about her alleged support to the Maoists. The Committee considers that the rape and other acts of sexual violence inflicted by the Nepalese Army and the Police upon the author, a 14-years-old indigenous girl at the time of the events, violated the author's rights under articles 7 and 24 (1) of the Covenant.

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 to had a discriminatory effect, as demonstrated by the fashion in which she was treated, as well as the generalized use of rape against girls and women during the conflict, owing to the particularly serious discriminatory consequences for girls and women victims of rape in the Nepalese society. The Committee recalls that women are particularly vulnerable in times of internal or international armed conflict and considers that this applies equally to girls. States must take all measures to protect girls and women from rape, abduction and other forms of gender-based violence.<sup>26</sup> In light of the context surrounding the rape and other forms of sexual violence to which the author was subjected to (see paras. 2.2 to 2.5),<sup>27</sup> as well as the State party's general failure to investigate and establish accountability for such crimes, the Committee considers that the State party has violated the author's right not to be subjected to gender discrimination under articles 2 (1) and 3, read alone in conjunction with articles 7, 24 (1) and 26 of the Covenant.

7.4 The Committee notes the author's allegations that, while in detention, Armed Police officers forced her to work in the barracks, carrying bricks and sand, making cement for the construction of a temple, and watering the garden, while also verbally abusing her. The State party has not contested these allegations. Therefore, considering the author's description and the fact that forced labour has been found as a factor in the cruel treatment of detainees during the internal conflict in Nepal,<sup>28</sup> due weight must be given to the author's allegations in this regard.

7.5 The Committee has considered that for labour not to be forced or compulsory, it must, "at a minimum, not be an exceptional measure; it must not possess a punitive purpose or effect; and it must be provided for by law in order to serve a legitimate purpose under the Covenant."<sup>29</sup> In light of these considerations, the Committee is of the view that forcing the author to work, exercising authority over her as a child in arbitrary detention, includes a degrading and discriminatory purpose in that specific context, falls within the scope of the

<sup>24</sup> See communication No. 2000/2010, *Katwal v. Nepal*, Views adopted on 1 April 2015, para. 6.3.

<sup>25</sup> See Concluding Observations on Nepal, CCPR/C/NPL/CO/2, 28 March 2014, para. 5 (b).

<sup>26</sup> See the Committee's General comment No. 28 (2000) on equality of rights between men and women, para. 8.

<sup>27</sup> See communications No. 1610/2007, *L.N.P. v. Argentina*, Views adopted on 18 July 2011, para. 13.3; and No. 2234/2013, *M.T. v. Uzbekistan*, Views adopted on 23 July 2015, para. 7.6 and communication No. 2245/2013, *Purna Maya v. Nepal*, Views adopted 23 June 2017, para. 12.4.

<sup>28</sup> See, *Nepal Conflict Report* (2012), p. 131.

<sup>29</sup> See, communication No. 1036/2001, *Bernadette Faure v. Australia*, Views of 23 November 2005, para. 7.5.

proscriptions set out in article 8 of the Covenant and, therefore, constitutes a violation of article 8 (3), read alone and in conjunction with articles 7 and 24 (1) of the Covenant.

7.6 In the light of the foregoing, the Committee decides not to examine separately the author's claims under article 10 (1) of the Covenant.

7.7 The Committee notes the author's claims under article 9 of the Covenant that she was arrested by a large military and police contingent without a warrant and without being informed of any charges against her and without being brought under judicial control, that she was detained in military and police barracks for more than one month and a half, and that she was never compensated for that detention despite the numerous avenues that she pursued in that regard. The State party refers to the lack of records of the author's detention, however, it has not provided any explanations to the contrary nor conducted the necessary investigations into the author's allegations. The Committee is of the view that the author has presented a credible case as to her detention and requiring victims of arbitrary and illegal arrest and detention to provide records thereof would amount to a *probatio diabolica*.<sup>30</sup> It considers that the burden of proof to rebut the author's evidence clearly lies with the State party. Therefore, the Committee considers that the author's arrest and detention by members of the Royal Nepalese Army and the Armed Police Force in the context of the internal conflict, constitutes a violation of her rights under article 9 of the Covenant.

7.8 Regarding the author's complaint related to 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 by forcing her to enter into sexual intercourse against her will as a girl; all the more so because due to her rape she endured stigma and marginalization, and the State party did not adopt measures to protect the author in any regard. The Committee considers, moreover, that the stigmatization, marginalization and shame endured by the author as a victim of sexual violence<sup>31</sup> from her community and family amounts to a disruption of her family life and marriage. In view of the above, the Committee finds a violation of articles 17 and 23 (1) of the Covenant.

7.9 The Committee notes the author's allegations concerning the lack of investigation of the violations sustained during her arrest and detention, despite the numerous avenues pursued. The Committee further notes that the grounds alleged by the Nepalese authorities for refusing to register the author's complaints were based on the 35-day statute of limitation applicable to the crime of rape under domestic legislation. The Committee recalls its jurisprudence according to which such an unreasonably short statutory period for bringing complaints for rape is flagrantly inconsistent with the gravity and nature of the crime and that it has a disproportionately negative effect on girls and women, who are predominantly the victims of rape.<sup>32</sup> In the present case, due to the trauma endured, the social shame and stigma towards victims of sexual violence in the author's community and her lack of access to information on possible available legal avenues, nine years passed before the author was able to attempt to seek justice for the violations she was subjected to.<sup>33</sup> The Committee takes note that the State party committed to enhance the access to justice for victims of rape (see para. 4.4) and takes also note that, in 2018, the State party amended its Criminal Code extending the statute of limitations for filing complaints for the crime of rape and other sexual offences from 35 days to one year.<sup>34</sup> The Committee notes, however, that even this new statute of limitation is not commensurate with the gravity of such crimes.

7.10 In light of the above, the Committee concludes that the statute of limitation for the crime of rape under Nepalese law in force at the time of the events prevented the author from

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<sup>30</sup> See, communication No. 2245/2013, *Purna Maya v. Nepal*, Views adopted 23 June 2017, para. 12.7.

<sup>31</sup> See, for instance, *Nepal Conflict Report* (2012), p. 165.

<sup>32</sup> See, *Concluding Observations on Nepal*, CCPR/C/NPL/CO/2, para. 13, in which the Committee expressed concern at the lack of progress in abolishing the 35-day limitation period for filing complaints of rape; and communications No. 1863/2009, *Maharjan v. Nepal*, para. 7.6 and No. 2245/2013, *Purna Maya v. Nepal*, Views adopted 23 June 2017, para. 12.5.

<sup>33</sup> See paras. 2.9 and 2.10.

<sup>34</sup> Chapter 18, Section 229 (2) of the new Nepalese Criminal Code, Act 2074 (2017), entered into force in August 2018.

accessing justice and violated her rights under article 2 (3), read alone and in conjunction with articles 3, 7, 9, 24 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 violations by the State party of articles 7 and 24 (1); articles 2 (1) and 3, read alone in conjunction with articles 7, 24 (1) and 26; article 8 (3), read alone and in conjunction with articles 7 and 24 (1); article 9; read alone and in conjunction with articles 2 (3) and 24 (1); articles 17 and 23 (1); and article 2 (3), read alone and in conjunction with articles 3, 7, 9, 24 and 26.

9. In accordance with article 2 (3) (a) of the Covenant, the State party is under an obligation to provide the authors with an effective remedy. This requires it to make full reparation to individuals whose Covenant rights have been violated. Accordingly, the State party is obligated, inter alia, to: (a) conduct a thorough and effective investigation into the facts surrounding the arrest, detention and rape of Ms. Nyaya and the treatment she suffered in detention; (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 effective reparation, 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 (i) criminalize torture and provide for appropriate sanctions and remedies commensurate with the gravity of the crime, (ii) adapt the definition of rape and other forms of sexual violence in accordance with international standards, (iii) guarantee that cases of rape, other forms of sexual violence and torture give rise to a prompt, impartial and effective investigation,<sup>35</sup> (iv) allow for criminal prosecution of those responsible for such crimes; and (v) remove 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 in the context of the Nepali armed conflict, as forms of torture, including a significant increase of the statute of limitations commensurate with the gravity of such crimes.<sup>36</sup>

10. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure for all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy when a violation has been established, the Committee wishes to receive from the State party, within 180 days, information 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.

<sup>35</sup> See, *Neupane and others v. Nepal* (CCPR/C/120/D/2170/2012), para 11.

<sup>36</sup> See, *Concluding Observations on Nepal*, CCPR/C/NPL/CO/2, para. 13. See also *Prosecutor v. Furundzija*, Judgment, International Criminal Tribunal for the former Yugoslavia ICTY-95-17/1 (10 December 1998).

## Annex

### Individual opinion of Committee Member Mr. José Santos Pais (partly concurring)

1. I fully concur with the Committee that the State party violated several articles of the Covenant in the present communication, although not with the conclusion that Nepal is responsible for a disruption of the author's family life and marriage (para 8).

2. The author was born in the Kailali District in far-western Nepal. On 2 April 2002, when the author was 14 years old, members of the Royal Nepalese Army (RNA) and the Armed Police Force (APF) entered her village and arrested her. She was dragged in a truck and was sexually assaulted by a group of soldiers, who touched various parts of her body, including her breast, thighs and bottom (para 2.2). Later that day, the author was taken to the Army barracks in Teghari (para 2.3).

3. During her detention, she was raped and subjected to other forms of sexual violence. Following the rape, she was not able to urinate and was bleeding profusely. However, she did not receive any medical assistance or treatment (para 2.4).

4. In June 2002, the author returned to her village and found out that she had become a social outcast. Aware of the behaviour of security forces towards female detainees, villagers assumed that she had been raped and thus bore "impurities". Her friends in the village avoided her. She was not able to come out of her house for about a month due to the shame and humiliation and she stopped going to school (para 2.7).

5. In February 2009, the author got married. A week after her marriage, her husband heard about the rumour of her rape. When he asked her about the rape, she told him the truth. As a result, her husband and in-laws rejected her. The author was deeply humiliated and had to go back to her maternal home. She stayed there for two years before her husband finally reconciled with her (para 2.8).

6. The trauma provoked by the sexual violence endured and the subsequent stigmatization and rejection, left the author with severe psychological sequelae. She suffers from post-traumatic stress disorder and has ongoing anxiety, nightmares and suicidal thoughts (para 2.9).

7. Notwithstanding, for several years after the author was subjected to rape, she did not complain about it to any authority, doctor or even her own family. Given the social stigma attached to sexual violence in the Nepalese society, including within the indigenous community she belonged to, she found it impossible for her to seek support in the community as it would have led to further victimization rather than to a remedy and she was also too ashamed to ask for her parents' support (para 2.10).

8. The author alleges a violation of articles 17 and 23 (1) of the Covenant, due to the arbitrary interference with her privacy and her sexual life as a woman, the disruption of her family life, and the unlawful attacks on her honour and reputation (para 3.3).

9. In this regard, due account should be given to the author's uncontested allegations that, since 2 April 2002 and, for a period of over a month and a half, she was subjected to rape and other forms of sexual violence by members of the Royal Nepalese Army and of the Armed Police Force. I therefore concur with the Committee, that these crimes, inflicted upon the author, a 14-years-old indigenous girl at the time of the events, violated the author's rights under articles 7 and 24 (1) of the Covenant (para 7.2).

10. Regarding the author's complaint under article 17 of the Covenant, I also concur with the Committee, that the rape of the author constitutes an arbitrary interference with her



privacy and her sexual autonomy by forcing her to enter into sexual intercourse against her will as a girl; all the more so because due to her rape she endured stigma, shame and marginalization from her community (para 7.8).

11. However, unlike the Committee, I fail to see how the State party is to be held accountable for the alleged disruption of the author's family life or of her future marriage.

12. Regarding family life, the author herself acknowledges she did not complain about her rape to her own family and that she felt too ashamed to ask for her parents' support (supra 7 and para 2.10). Moreover, her family has received her after the events, cared for her and gave her shelter and understanding. Therefore, the author did not face a situation of family disruption.

13. As for the author's marriage, it was celebrated 7 years after the events and the causal link between the sexual crimes endured and the initial disruption of the marriage intermingle with several other factors (husband's and in-laws' perception of the author as a victim of sexual violence, perceptions of the community on the same issue, social prejudices and bias and many others). I therefore fail to see how the State party is to be held responsible for the author's disrupted marriage, particularly since the spouses later reconciled with each other.

14. By concluding with a violation of the author's rights under articles 17 and 23 (1) of the Covenant for these reasons, the Committee opens up an avenue for State's responsibility that will hardly have any boundaries, both in terms of the number of years to take into account after the events and as to the extent of such responsibility.

15. I would therefore have concluded that Nepal is not responsible, in the present case, for a disruption of the author's family life and marriage and therefore has not violated, on these grounds, articles 17 and 23 (1) of the Covenant.

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