



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. 2245/2013*, **

<i>Submitted by:</i>	Purna Maya (represented by Advocacy Forum, Nepal and REDRESS)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Nepal
<i>Date of communication:</i>	19 December 2012
<i>Document references:</i>	Decision taken pursuant to rule 97 of the Committee's rules of procedure, transmitted to the State party on 23 May 2013 (not issued in document form)
<i>Date of adoption of Views:</i>	17 March 2017
<i>Subject matter:</i>	Sexual abuse of suspected Maoist supporter by army officers
<i>Procedural issues:</i>	Exhaustion of domestic remedies
<i>Substantive issues:</i>	Cruel, inhuman and degrading treatment; arbitrary arrest and detention; discrimination on the grounds of sex; effective remedies
<i>Articles of the Covenant:</i>	2 (1) and (3), 3, 7, 9, 10 (1) and 26
<i>Articles of the Optional Protocol:</i>	5 (2) (b)

1.1 The author of the communication is Purna Maya,¹ a national of Nepal born in 1969. She claims to be victim of a violation of articles 2 (1) and (3), 3, 7, 9, 10 (1) and 26 of the Covenant. The Optional Protocol entered into force for the State on 14 May 1991. The author is represented by counsel.

* Adopted by the Committee at its 119th session (6-29 March 2017).

** The following members of the Committee participated in the examination of the communication: Tania María Abdo Rocholl, Yadh Ben Achour, Ilze Brands Kehris, Sarah Cleveland, Ahmed Amin Fathalla, Olivier de Frouville, Christof Heyns, Yuji Iwasawa, Bamariam Koita, Marcia V.J. Kran, Duncan Laki Muhumuza, Photini Pazartzis, Mauro Politi, José Manuel Santos Pais, Anja Seibert-Fohr, Yuval Shany and Margo Waterval.

The text of an individual opinion by Committee member Anja Seibert-Fohr (concurring) is annexed to the present Views.

¹ The author is using a pseudonym for the present communication.



1.2 On 2 October 2013, pursuant to rule 92 of its rules of procedure, the Committee, acting through its Special Rapporteur on new communications and interim measures, decided to reject the State party's request to examine the admissibility of the case separately from the merits.

The facts as presented by the author

2.1 The author was born in Dailekh district in mid-west Nepal. After getting married and having a daughter, the family moved to nearby Jumla district. Two years into her marriage, her husband married a second wife and the author returned to Dailekh district with her daughter.

2.2 When the internal armed conflict began in Nepal in 1996 between the Communist Party of Nepal (Maoist) and the Government of Nepal, supported by the Royal Nepalese Army,² the author was living with her daughter in Dailekh in a small shack, which also served as a tea shop. The Maoists used to set off bombs in the forest near the author's village and members of the Royal Nepalese Army frequently visited her tea shop and asked whether any Maoists stopped by her shop. They used to scold her and accuse her of being a "spy for the Maoists".

2.3 In September 2004, J.T., a lieutenant in the Royal Nepalese Army, came to the author's house and inquired about her husband and his alleged ties with the Maoists. The author responded that her husband was working in Jumla district and living with his second wife. The author was told to call her husband and tell him come to Dailekh within one month or "she would suffer the consequences". The author called her husband but was unsuccessful in getting him to come to Dailekh. The Royal Nepalese Army inquired about her husband's whereabouts and made threats three more times. On those occasions, J.T. would be accompanied by 40 to 60 soldiers. Each time, the author was unsuccessful in getting her husband to come to Dailekh.

2.4 On 23 November 2004, at around 3 p.m., J.T. entered the author's house, dragged her from her room, accused her of being a Maoist and took her to the Bhawani Bakash army barracks for further interrogation. Upon arrival at the barracks, she was blindfolded and taken to a room. She was interrogated for about an hour by an army official about her husband's alleged connections with the Maoists, to which she declared that she did not know anything. She was then interrogated by J.T. for another hour, after which, J.T. got agitated and started to insult her. When she tried to lift the blindfold, he struck her with an unknown object that left her bleeding from the middle finger of the right hand and from the left eyebrow. He kicked her with his boots on and repeatedly punched her in the stomach, back, legs and thighs. Then he ripped off her sari. The author asked for a glass of water, hoping that it might give her an opportunity to escape; J.T. told her to urinate and drink that. He forcefully grabbed her and attempted to rape her, but she kicked him. He then dragged her across the room and bashed her head into the door, which caused her forehead to bleed profusely. Then, J.T. pulled off her petticoat, pushed her face to the floor and raped her twice. J.T. also bit the author on her nose, cheek and shoulders, which has left permanent scars. After J.T. left the room, at least three other soldiers entered and raped the author one after the other until she lost consciousness. The author regained consciousness while she was still lying on the floor and heard the door open. With the assistance of a soldier, she managed to walk out of the barracks and was left outside a neighbour's shop at around 8 p.m., crying in pain and unable to walk. She remained there until the shop owner came and called an ambulance to take her to Dailekh district hospital.

2.5 Medical staff at Dailekh district hospital were unable to stop the author's uterus from bleeding, and she was transferred to Surkhet district hospital, where she stayed for a week. However, her uterus continued to bleed. She was referred to Lucknow hospital in

² The author notes that the internal conflict escalated in November 2001 when the King declared a national state of emergency. The Royal Nepalese Army was then deployed in an effort to gain control over Maoist strongholds in western Nepal. Security forces under the unified command of the Army reportedly committed numerous extrajudicial killings of civilians suspected of having connections or sympathies with the Maoists. At the same time, the Maoists abducted and killed civilians suspected of having ties with the Government.

India, but did not have the financial means to go there. It was not until September 2005, after selling a piece of land that she had inherited from her parents, that the author was able to travel to Lucknow hospital in India and undergo a hysterectomy. The operation left her with a serious infection, for which she was hospitalized in Surkhet district hospital for another 10 days upon her return from India.

2.6 When the author's husband heard the news about her being raped, he stopped sending food allowances for her and their daughter. Since the author was suffering flashbacks because she was near the place where she had been tortured, she moved with her daughter to Surkhet district, where they lived first in a rented room and later in a hut built by the author on her husband's land.³

2.7. In March 2006, the author went to the District Administration Office to file a claim for compensation as an internally displaced person. When she arrived at the Office, J.T. was also present. She pointed at him and publicly denounced the torture and rape. A staff member at the District Administration Office asked J.T. why he had tortured an innocent person. The Chief District Officer, who was also present, remarked that "he should have only tortured her after knowing her nature and personality", to which J.T. remained silent and looked down. The Chief District Officer then issued a letter recommending that the author receive "interim relief" as an internally displaced person. However, no action was taken regarding the torture allegations.

2.8. In November 2010, the author attended a rehabilitation programme run by Advocacy Forum for women affected by the conflict. Through this organization, she also received medical and psychological treatment.⁴ After six months of treatment, she started to gradually recover physically and psychologically and indicated her willingness to file a legal action, for which she started to receive legal assistance from Advocacy Forum.

2.9. On 30 September 2011, the author filed a First Information Report (FIR) — a police complaint to initiate criminal investigations — with the District Police Office in Dailekh for the crime of rape and other inhumane and degrading acts. In her complaint, the author stated that she had been unable to file a report until then owing to her lack of legal representation and the serious mental trauma and physical illness that she had endured as a result of torture. The Deputy Superintendent of the District Police Office refused to register her complaint, invoking section 11 of the chapter on rape of the *Muluki Ain* (National Code of Nepal of 1962), which provides for a 35-day statute of limitation for reporting the crime of rape. The author then went to the Dailekh District Administration Office to file an FIR under section 3 (5) of the State Cases Act (1992),⁵ but the Office upheld the refusal of the District Police Office to register her complaint. The author's representatives met the Chief District Officer, in person, at the District Administration Office and informed him about the case. The Chief District Officer orally confirmed the decisions of the District Police Office and the District Administration Office.

2.10 Since the District Administration Office refused to register the author's complaint, the only recourse available to the author was the Supreme Court of Nepal. On 21 December 2011, the author filed a writ petition with the Supreme Court seeking certiorari and mandamus orders under articles 32 and 107 (2) of the Interim Constitution of Nepal (2007), alleging that the police decisions refusing to register her FIR violated her constitutional rights to equality before the law, prohibition of discrimination, prohibition of arbitrary detention, prohibition of discrimination against women and violence against women, the right to be promptly brought before a judge, prohibition of torture and other cruel, inhuman or degrading treatment against persons deprived of their liberty and the right of torture victims to be compensated.⁶ The author requested the Supreme Court to nullify the district-

³ The author filed for a divorce, which was granted by the court in late 2009. She was awarded the right to half of her husband's property, although this still remains in dispute.

⁴ The author attaches to her complaint several medical and psychological reports from the Tribhuvan University Teaching Hospital in Kathmandu on the treatment she received during 2011.

⁵ According to section 3 (5) of the State Cases Act (1992), if the police refuse to register a FIR the complainant shall lodge such report with the Chief District Officer or the police office superior to the one that initially refused to register the complaint.

⁶ Article 107 (2) of the Interim Constitution of Nepal (2007) directs the Supreme Court to issue

level decisions refusing to register her complaint and to order them to start an investigation into the alleged offences. The registrar of the Supreme Court rejected the author's application on the basis that she had failed to seek an "alternative remedy" from the Chief District Officer as required under Section 3 (5) of the State Cases Act (1992). On 22 January 2012, Supreme Court Justice Prakash Wasti issued an order endorsing the registrar's refusal to file the author's complaint.

2.11 The author notes that she has exhausted all available domestic remedies. She tried to file an FIR and appealed the district-level decision not to register her report before the Supreme Court of Nepal. The registrar of the Supreme Court refused to register her appeal on the grounds that it had not been first presented to the Chief District Officer, although it was clearly stated in the writ that this had been done. In any case, where a crime should be investigated *ex officio*, the State party must pursue the investigation from the moment it receives credible information pointing to the commission of the crime. The author informed the District Administration Office about her arbitrary detention and torture in the presence of the Chief District Officer and J.T., who did not contest her report. Yet no action was taken to investigate her allegations. Furthermore, domestic remedies are ineffective and unavailable given that torture is not specifically criminalized in Nepal⁷ and the 35-day statute of limitation on rape bars access to justice, which is contrary to the Covenant⁸ and should not be taken into account in determining whether the author had made normal use of the remedy. In addition, the FIR remedy was ineffective and unavailable to her as she had the status of an internally displaced person with serious physical and mental injuries caused by the torture she had endured. Finally, the culture of impunity for conflict-era crimes in Nepal makes any theoretical remedies ineffective. During the conflict, the Army and the police were under a unified command structure, so reporting a crime committed by the Army to the police was difficult for victims.

2.12 The author notes that acts of sexual violence, including rape, against women and girls, committed by both the Army and the Maoists during the conflict have been under-reported owing to, *inter alia*, the prevailing climate of impunity for perpetrators, cultural stigmatization of victims, insecurity and fear of retaliation from perpetrators, all of which discourage victims from reporting.⁹ The author notes that the State party has failed to respond to any human rights violations committed during the conflict, in general, and sexual violence, in particular. The National Police consistently refused to register FIRs during the conflict, arguing that they were a political matter. Although some FIRs have been filed since the conflict and investigations have been opened for crimes of homicide committed during the conflict, only one person has been convicted to date. As to the crime of rape, no FIRs have been filed owing to the 35-day statute of limitation imposed by national law. Therefore, since no FIRs of rape were registered during the conflict, no victim of rape has any prospect of having the crime prosecuted under the current law. Although the Supreme Court of Nepal has twice ordered the revision of the statute of limitation for the crime of rape on the basis of its unreasonable and unrealistic nature, the provision

necessary and appropriate orders to enforce or provide remedies for constitutional or other legal violations. Article 32 guarantees the right to a constitutional remedy for constitutional violations in accordance with article 107 (2).

⁷ Although torture is recognized as a crime in the Interim Constitution of Nepal, there is no specific provision criminalizing this offence in domestic law. The author cites communication No. 1863/2009, *Maharjan v Nepal*, Views adopted on 19 July 2012, in which the Committee noted that torture was not criminalized in domestic law and that in the absence of legal provisions making torture a crime, the State could not provide the appropriate remedy of investigation and punishment. An effective remedy was therefore not available.

⁸ See *Maharjan v Nepal*, para. 7.6.

⁹ The author cites a number of reports, including Office of the United Nations High Commissioner for Human Rights (OHCHR), *Nepal Conflict Report* (October 2012), United Nations Population Fund and United Nations Children's Fund, Evaluation Report, "Ensuring recognition of sexual violence as a tool of conflict in the Nepal peace building process through documentation and provision of comprehensive services to women and girl survivors" (November 2012) and Amnesty International, "Nepal: human rights violations in the context of a Maoist 'peoples' war'" (March 1997), which documents incidents of sexual violence against women and girls during the conflict period as a tool of war.

remains unchanged. The author states that the prevalence of rape crimes continues to be justified by State acquiescence and tolerance of the crime, with most cases still being unreported, complaints often being rejected by the police, or victims forced to settle their cases with perpetrators.

2.13 The author notes that the Government has provided for ad hoc ex gratia payments to victims of human rights violations committed during the conflict. However, those policies excluded victims of rape and other forms of sexual violence.

The complaint

3.1 The author claims to be a victim of physical and psychological torture, in violation of article 7 of the Covenant, as a result of the acts she was subjected to on 23 November 2004, including blindfolding, beating, kicking, punching and gang rape, which were inflicted on her for a number of reasons, including to extract information, to punish her for something that her husband had allegedly done, to intimidate others in the community and to humiliate and degrade her. The rape in itself unequivocally amounted to torture. In her case, these events have had a major impact on her life, both physically and mentally. She still suffers from pain in her back and abdomen and from frequent vaginal discharge and has to go for medical check-ups twice a month. She has been diagnosed with both severe depressive disorder and post-traumatic stress disorder and has been forced to become an internally displaced person. She is also rejected by part of the society because she is a rape victim and faces financial constraints as her husband has stop providing the food allowances for her and their daughter as a result of the rape.

3.2 The author claims to be a victim of discrimination on the grounds of gender, contrary to article 2 (1), in conjunction with article 7, of the Covenant. She claims that the facts amounted to a breach of the obligation to ensure equal rights for men and women as guaranteed by article 3 of the Covenant. The rape had an underlying discriminatory purpose on the basis of gender. From the very beginning, the perpetrators addressed her in sexually demeaning terms (whore, prostitute, fatherfucker). The author notes that rape is a form of gender-specific violence, aimed, in its form or purpose, at, inter alia, asserting or perpetuating male domination over women.¹⁰ Gang rape is also a form of torture that was used predominantly against women and girls during the armed conflict, since the perpetrators knew that in the Nepalese social context, rape would have particularly serious consequences for a woman or girl because of her gender.

3.3 The author claims that the violations of article 7 that she endured while in detention also qualify as violations under article 10 (1) of the Covenant. Being blindfolded for two and a half hours, tortured and repeatedly raped by at least four different individuals is clearly outside the boundary of humane treatment of persons deprived of their liberty.

3.4 The author holds that the series of threats to which she was subjected by State agents over the months prior to her arrest amounted to a violation of her right to security of person under Article 9 (1) of the Covenant.¹¹ Also, her arrest and detention on 23 November 2004 was arbitrary and contrary to the provisions of article 9 (1), 2 and 3, given that she was arrested without warrant, she was not informed of any charges against her and she was released shortly afterwards. Moreover, bringing 40 to 60 armed soldiers to arrest her without specifying any crime constitutes elements of injustice and inappropriateness. The author alleges that the failure of the Government to provide her with compensation despite the numerous avenues that she pursued in that regard amount to a violation of article 9 (5) of the Covenant.

3.5 The author notes that, despite the State party's authorities being aware of the reported crime, no investigation has yet been initiated into her allegations of torture and she has been repeatedly denied a remedy before a competent judicial authority, in violation of article 2 (3) of the Covenant.

¹⁰ See A/HRC/7/3.

¹¹ See communications No. 542/1993, *Tshishimbi v. Zaire*, Views adopted on 25 March 1996; and No. 1250/2004, *Rajapakse v. Sri Lanka*, Views adopted on 14 July 2006.

3.6 The author argues that the 35-day statute of limitation for the crime of rape provided for in section 11 of the 1962 National Code violates the right to an effective remedy enshrined in article 2 (3) of the Covenant, read in conjunction with article 7. The period of limitation is unreasonably short considering the gravity and nature of the crime involved, the conflict setting and the vulnerable and disadvantaged position of victims of rape. In addition to the impossibility of filing an FIR during the conflict, there are invariably personal barriers, including feelings of shame and guilt, mistrust of the judicial system and the police, fear of retaliation and concerns for privacy or stigma, which prevent victims of rape from reporting the crime in general. Women in Nepal are faced with additional cultural barriers that are compounded by illiteracy and poverty, all of which make it extremely difficult to report rape, particularly within such a short period, as has been recognized by the Supreme Court of Nepal.¹² In the light of State obligations to combat impunity for serious crimes and their positive obligations to respond to gender-based violence and given the proven difficulties faced by rape victims in reporting the crime, the statute of limitations under Nepalese law is unduly short and must be considered a barrier that is contrary to the State's obligation to investigate and prosecute gender-based violence. In order to fulfil its obligations under the Covenant and redress the violations in this case, the State party should remove any statute of limitation for torture complaints, including rape, in the light of the recognized nature of torture as a violation of *jus cogens* norms.¹³

3.7 The author claims that the 35-day statute of limitation also violates articles 3 and 26 of the Covenant because it limits access to justice for a crime that is predominantly committed against women, and it therefore has a disproportionate impact on women. Such a limitation does not apply to other crimes such as murder (which has a 20-year statute of limitation period), adultery (one year), arson (one year), assault causing serious bodily harm (three months), looting (three months), kidnapping (six months) and the killing of a cow (six months). There is no objective or reasonable ground for treating such a serious crime differently. In addition, the State party has a positive obligation under articles 3 and 26 to respond to violence against women, including rape, which impairs the enjoyment by women of their human rights and fundamental freedoms.¹⁴

3.8 With respect to reparation, the author requests that the Committee call on the State party to adopt the following specific measures: (a) undertake full and effective investigations into the crimes alleged by the author and bring the perpetrators to justice; (b) undertake full and effective investigations into the failure of the District Administration Office to respond to the complaint made by the author; (c) provide adequate compensation to the author for the pecuniary and non-pecuniary losses that she has experienced as a result of the torture, including medical expenses to treat the injuries sustained from torture (Nr 450,000 or approximately \$5,300), and ongoing physical check-ups and psychotherapy for the damage suffered, which destroyed her chances of earning an adequate living for her and her daughter; (d) provide means of rehabilitation for the author; and (e) provide a public apology by the Government of Nepal for the violations inflicted on her. The author also requests that the Committee call upon the State party to implement the following general measures: (a) remove the statute of limitations for the crime of rape; (b) reform the FIR

¹² The author cites the order of mandamus of the Supreme Court of 11 July 2008 to the Government of Nepal, Ministry of Law, Justice and Parliamentary Affairs, Council of Ministers Secretariat, House of Representative, National Council, Writ No. 3393. The Supreme Court cited the lack of education and the exclusion of rape victims from society to explain the under-reporting of rape crimes. It further noted that an FIR exposed "victims in police station and court during the proceedings which require the victims to be present before the court and police for recording testimonies and examining of health and genitals. Victims are ignorant about the 35-day statute of limitations Because of this, many crimes of rape remain unreported and even in the cases which are reported, either the cases are annulled due to the delayed filing of the case after 35 days of the incident or the evidence is lost."

¹³ See, inter alia, the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity; International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 decision in *Prosecutor v. Anto Furundzija*, judgment of 10 December 1998; CCPR/C/PAN/CO/3; CAT/C/CR/30/4; CAT/C/TUR/CO/3; and CAT/C/MNE/CO/1.

¹⁴ See Committee on the Elimination of Discrimination against Women, general recommendation No. 19 (1992) on violence against women, para. 7; and CEDAW/C/NPL/CO/4-5, para. 20.

filing process to ensure sufficient safeguards against difficulties in relation to initiating investigations into crimes; (c) criminalize torture and remove the legal provisions allowing for impunity for this crime; (d) facilitate a national dialogue on sexual violence to improve the visibility of the issue and the status of victims in Nepalese society; and (e) adopt measures to guarantee access to justice for victims of rape, including by ensuring the confidentiality and protection of victims during the filing of a complaint, investigation and proceedings, increasing the number of female police officers and prosecutors, establishing policies for the confidential storage of medical records of victims of sexual violence in hospitals, and providing interim relief to victims of sexual violence that occurred during the conflict.

State party's observations on admissibility

4.1 In its observations dated 15 August 2013, the State party argued that the author 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 Regarding the ordinary criminal justice system, the State party notes that it is common to provide for certain time limitations within which to file a case and that the author failed to file her case within the given time limitation and to follow the prescribed procedure for filing a report concerning the crime of rape. The Compensation Relating to Torture Act (1996) also provides for torture victims to make a claim for compensation within 35 days of the commission of the act of torture or their release and that the author failed to avail herself of this remedy before the District Court.

4.3 As to the transitional justice system, the Interim Constitution of Nepal (2007) obliges the State to establish a transitional justice mechanism to address the human rights violations committed during the armed conflict. On 14 March 2013, the Government promulgated the Ordinance on Investigation of Disappeared Persons, Truth and Reconciliation Commission 2069 (2013) (the TRC Ordinance) with the mandate to investigate serious conflict-related violations, including rape. The Commission may, *inter alia*, make recommendations to the Attorney General to file cases. Therefore, once the Commission is constituted, the author could avail herself of this transitional justice mechanism to obtain redress.

4.4 The State party adds that the author's allegations of her detention and torture are not supported by any evidence and that the case has not been recorded by any competent authority in Nepal.

Author's comments on the State party's observations on admissibility

5.1 In her comments of 28 August 2013, the author notes that the State party has provided two contradictory arguments to support the non-exhaustion of domestic remedies: it states that the author did not avail herself of remedies within the time limit provided by law, while at the same time it indicates that, as it is a conflict-related violation, it must be dealt with by the transitional justice mechanism rather than the ordinary criminal justice system.

5.2 The author notes that the criminal justice system is ineffective because torture is not criminalized under the criminal law of Nepal and the Torture Compensation Act (1996), which provides for the possibility of filing a compensation request for up to Nr 100,000 (approximately \$900) within 35 days of the torture or release from custody, is not an effective remedy for such violations.¹⁵ The author reiterates that the 35-day statute of limitation for filing complaints of rape is contrary to the Covenant because it is discriminatory, impossible for the victim to meet, has been found to be unconstitutional by the Supreme Court of Nepal and is flagrantly inconsistent with the gravity of the crime.

5.3 As to the transitional justice mechanism established by the TRC Ordinance, the author notes that this remedy is unreasonably prolonged, since the Commission has not yet

¹⁵ See *Maharjan v. Nepal*, para. 7.5.

been established and is not available to her because the Supreme Court issued an injunction against its implementation on 1 April 2013. In addition, this remedy is neither adequate nor effective as it is a non-judicial remedy without binding effect,¹⁶ its procedure is deeply flawed, it allows amnesties for serious human rights violations, it promotes reconciliation without the victims' consent, and it does not recognize the right to reparation.

State party's observations on the merits

6. On 27 November 2013, the State party noted that the Royal Nepalese Army had no record of the author's detention, that the accused lieutenant was not posted at the time and place mentioned in the communication, and that the facial and body description mentioned in the communication do not match the one stationed at the time.

Author's comments on the State party's observations on the merits

7. In her comments of 3 February 2014, the author notes that the State party denies her allegations in general terms, without any explanation as to what investigations carried out, which individuals questioned or which evidence of any records has been relied on. In contrast, she has submitted detailed witness statements, medical records and legal documents supporting her allegations. Her evidence and allegations are also consistent with the patterns of violations committed in Nepal during the conflict. Therefore, the Committee should give weight to her allegations in the absence of evidence to the contrary. In any event, the absence of a record of detention is meaningless since during the conflict, the Army reportedly routinely did not comply with legislative requirements for arrest and detention.¹⁷ Given that she was held in an informal place of detention (army barracks, where serious human rights violations were committed against her), it is not surprising that no record was kept of her detention. As to the State party's denial that the lieutenant was stationed in the area at the time of the events, the author notes that no evidence has been provided to substantiate this statement either. She has provided substantial and sworn evidence on her arrest and torture to both the police and the Committee. The information about which soldiers were stationed in the area at the time and which individuals were responsible for giving orders in those operations lies squarely within the State party's knowledge.¹⁸

Additional information from the parties

8. On 4 July 2014, the author informed the Committee that the Parliament had passed the Act on the Commission on Investigation of Disappeared Persons, Truth and Reconciliation 2071 (2014) (the TRC Act) on 25 April 2014. The Act applies to cases of serious conflict-related human rights violations. Yet, according to two analyses of the Act conducted by OHCHR¹⁹ and by a non-governmental organization group comprised of Advocacy Forum, REDRESS and TRIAL,²⁰ the Act is incompatible with the Covenant because, inter alia, it: (a) provides for amnesties for gross human rights violations; (b) gives discretion to authorities as to whether to undertake a criminal investigation into violations; (c) does not recognize victims' right to reparation; (d) does not provide sufficient guarantees of independence and impartiality for the Commission. Although the crime of rape is excluded from the amnesty provision, reconciliation between victims and perpetrators for the crime of rape may be carried out without the victim's consent and prosecution will then be barred. The other violations alleged by the author, including arbitrary detention and torture, are subject to amnesties.

¹⁶ See OHCHR Comments on the Nepal Commission on Investigation of Disappeared Persons, Truth and Reconciliation Ordinance — 2069 (2013) of 3 April 2013; and communication No. 2018/2010, *Chaulagain v. Nepal*, Views adopted on 28 October 2014, para. 6.3.

¹⁷ See OHCHR, *Nepal Conflict Report* (2012), p.155.

¹⁸ See communication No. 11/1977, *Motta v. Uruguay*, Views adopted on 29 July 1990, para. 14.

¹⁹ See OHCHR Technical Note: The Nepal Act on the *Commission on Investigation of Disappeared Persons, Truth and Reconciliation, 2071 (2014)* — as Gazetted 21 May 2014.

²⁰ See Advocacy Forum — Nepal, TRIAL (Track Impunity Always) and REDRESS, "Paying lip service to justice: the newly adopted TRC Act breaches international law and flouts the decision of the Supreme Court of Nepal" (June 2014).

9. On 7 July 2014 and 11 December 2014, the State party noted that it was in the process of establishing a transitional justice mechanism and that it was fully committed to carrying out a full investigation into the present case through such mechanism. The State party informed the Committee about a number of policies and programmes established to provide relief, rehabilitation and reintegration for conflict victims. The TRC Act was currently being examined by the Supreme Court of Nepal. The Act does not provide for blanket amnesties but rather establishes clear conditions for amnesties and the obligation of the Commission to hold close consultation with the victim before granting it. The Commissions established by the Act enjoy full structural and functional independence and autonomy and they cannot execute reconciliation without the victims' consent.

10.1 On 17 March 2015, the author noted that, on 26 February 2015, the Supreme Court ruled that the TRC Act was contrary to the Interim Constitution and to international law. The court struck down section 26 on amnesties and clarified that reconciliation could only be granted with the consent of the victims.

10.2 The author notes that provision of relief through policies and programmes cannot be considered to amount to an effective remedy for serious human rights violations.²¹

Issues and proceedings before the Committee

Consideration of admissibility

11.1 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.

11.2 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.

11.3 The Committee notes the State party's claim that domestic remedies have not been exhausted because, on the one hand, the author failed to use the transitional justice mechanism established by the TRC Act and passed on 25 April 2014, and, on the other hand, she failed to file a criminal complaint for rape or a compensation claim for torture within the established legal time limit.

11.4 With regard to the transitional justice system mechanism, the Committee notes the author's argument that such mechanism is not available, since the Truth and Reconciliation Commission has not been established to date, nor is the mechanism an effective remedy in light of its non-binding nature and the numerous flaws identified by reports and by the Supreme Court itself, which ruled that the TRC Act was unconstitutional and contrary to international law.²² The Committee also 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.²³ The Committee considers that the Commission established under the TRC Act would not constitute an effective remedy for the author.

11.5 As to remedies available within the Nepalese criminal justice system, the Committee notes that the author tried to file a First Information Report (FIR) concerning the crime of rape and other inhumane and degrading acts with the District Police Office, which was rejected based on the 35-day statute of limitations for the crime of rape, and that she appealed this decision all the way to the Supreme Court of Nepal. The Committee notes that the author explained both in her written FIR as well as in her communication before the Committee that she was unable to file a claim within the legally established time frame given the severe physical and psychological injuries sustained as a result of torture, and given the lack of legal assistance. In view of the legal and practical limitations on filing a

²¹ See communication No. 2018/2010, *Chaulagain v. Nepal*, Views adopted on 28 October 2014, paras. 6.3 and 11.6; and Committee against Torture, general comment No. 3 (2012) on implementation of article 14 by States parties, para. 37.

²² Ibid.

²³ See communications No. 2000/2010, *Katwal v. Nepal*, Views adopted on 1 April 2015, para. 6.3; and No. 1761/2008, *Giri v. Nepal*, Views adopted 24 March 2011 and corrigendum, para. 6.3.

complaint for rape in the State party and taking into consideration the efforts made by the author to file such a complaint, the Committee considers that this remedy was both ineffective and unavailable to the author.

11.6 With regard to the remedy under the Torture Compensation Act (1996), the Committee recalls that compensation for offences as serious as those alleged in the present communication does not substitute for the obligation of State authorities to investigate and bring charges against alleged perpetrators.²⁴ The Committee notes that such claims for compensation are limited to a maximum compensation of Nr 100,000 and are subject to a 35-day statute of limitations. The Committee recalls its previous jurisprudence in which it stated that the 35-day statutory limit for bringing claims under the Torture Compensation Act is in itself flagrantly inconsistent with the gravity of the crime.²⁵ The Committee therefore considers that this remedy was also ineffective and unavailable to the author. Accordingly, the Committee concludes that it is not precluded by article 5 (2) (b) of the Optional Protocol from examining the present communication.

11.7 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

12.1 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.

12.2 The Committee notes the author's allegations that, on 23 November 2004, while she was held in military barracks, she was subjected to gang rape and other forms of torture by members of the Royal Nepalese Army, in order to extract information about her husband's alleged support to the Maoists, to punish and intimidate her and others in the community, and to humiliate and degrade her. The State party has not contested these allegations, but merely stated that they are not supported by any evidence. The Committee recalls that the burden of proof cannot rest on the author of the communication alone, especially since the author and the State party do not always have equal access to the evidence and it is frequently the case that the State party alone has the relevant information.²⁶ It is implicit in article 4 (2) of the Optional Protocol that the State party has the duty to investigate in good faith all allegations of violations of the Covenant made against it and its representatives and to provide the Committee with the information available to it. In cases where the allegations are corroborated by credible evidence submitted by the author and where further clarification depends on information that is solely in the hands of the State party, the Committee may consider the author's allegations as substantiated in the absence of satisfactory evidence or explanations to the contrary by the State party. In the light of the author's detailed and consistent description of the gang rape and other acts of torture endured, which are corroborated by medical and psychological reports provided by her and coinciding with the general pattern of violations committed by Nepalese security forces during the internal conflict as documented in various intergovernmental and non-governmental reports — including, in particular, sexual violence against women suspected of being Maoists or Maoist supporters, in the context of interrogations²⁷ — and in the absence of any explanation from the State party in this respect, due weight must be given to the author's allegations. The Committee also notes the State party's failure to initiate any investigations into the author's allegations of torture, despite the numerous avenues she pursued.

12.3 The Committee considers that gang rape and other acts of torture inflicted by the Army upon the author while in detention and the subsequent lack of investigation of her allegations, prosecution of those responsible and reparation to the victim violated the

²⁴ See for example, *Mahrajan v. Nepal*, para. 7.6; and communication No. 1588/2007, *Benaziza v. Algeria*, Views adopted on 26 July 2010, para. 8.3.

²⁵ See *Mahrajan v. Nepal*, para. 7.6.

²⁶ See, inter alia, communications No. 1422/2005, *El Hassy v. Libyan Arab Jamahiriya*, Views adopted on 24 October 2007, para. 6.7; and No. 1297/2004, *Medjnoune v. Algeria*, Views adopted on 14 July 2006, para. 8.3.

²⁷ See, inter alia, OHCHR, *Nepal Conflict Report* (2012), p. 158.

author's rights under article 7, read alone and in conjunction with article 2 (3) of the Covenant.

12.4 The Committee also notes the author's uncontested argument that the gang rape to which she was subjected had a discriminatory purpose, as demonstrated by the terms in which she was addressed and the fashion in which she was treated, as well as the generalized use of gang rape against women during the conflict, owing to the particularly serious discriminatory consequences for female rape victims in Nepalese society (see paras. 2.12-2.13 and 3.2 above). The Committee recalls that women are particularly vulnerable in times of internal or international armed conflict and that, during such situations, States must take all measures to protect women from rape, abduction and other forms of gender-based violence.²⁸ In the light of the context surrounding the gang rape to which the author was subjected (see para. 2.4),²⁹ 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 in conjunction with article 7, and article 26 of the Covenant.

12.5 The Committee further notes that the grounds alleged by the Nepalese authorities for refusing to register the author's complaint are based on the 35-day statute of limitation applicable to the crime of rape under domestic legislation. The Committee considers that 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 women, who are predominantly the victims of rape.³⁰ Accordingly, the Committee concludes that the 35-day statute of limitation for the crime of rape under Nepalese law prevented the author from accessing justice and constitutes a violation of article 2 (3), read in conjunction with articles 7 and 26, of the Covenant.

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

12.7 The Committee notes the author's claims under article 9 (1), (2), (3) and (5), that she was continuously threatened and harassed by members of the Royal Nepalese Army and detained by a large military contingent without a warrant and without being informed of any charges against her, that she was detained in the military barracks for several hours and later released, and that she was never compensated for that detention despite the numerous avenues that she pursued in that regard. The State party has signalled the lack of records of the author's detention but 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 detention to provide records thereof would amount to a *probatio diabolica*. 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 detention by members of the Royal Nepalese Army in the context of the internal conflict and the State party's failure to provide her with compensation constitutes a violation of her rights under article 9 of the Covenant.

13. 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 article 2 (3); of articles 2 (1) and 3, read in conjunction with article 7; of article 26; of article 2 (3), read in conjunction with articles 7 and 26; and of article 9 of the Covenant.

14. In accordance with 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

²⁸ See the Committee's general comment No. 28 (2000) on equality of rights between men and women, para. 8.

²⁹ 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.

³⁰ See 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 *Maharjan v. Nepal*, para. 7.6.

reparation to individuals whose Covenant rights have been violated with an effective remedy and full reparation. Accordingly, the State party is obligated to, inter alia, to: (a) conduct a thorough and effective investigation into the facts submitted by the author Purna Maya, in particular the treatment to which she was subjected on 23 November 2004; (b) prosecute, try and punish with appropriate sanctions those responsible for her arbitrary detention, torture and harassment, and make the results of those measures public; (c) provide adequate compensation and appropriate measures of satisfaction to the author for the violations suffered, including reimbursement for medical expenses incurred to treat the injuries sustained as a result of torture; and (d) ensure that all necessary and adequate psychological rehabilitation and medical treatment is provided to the author. The State party is also under an obligation to take steps to prevent the occurrence of similar violations from occurring in the future.

15. In that connection and consistent with its obligations under article 2 (2) of the Covenant, the State party should: (a) abolish the 35-day statute of limitation for filing complaints of rape; (b) remove obstacles that hinder the filing of complaints and effective access to justice for victims of rape, including by ensuring the confidentiality and protection of victims during the filing of a complaint, the investigation and the proceedings, increasing the number of female police officers and prosecutors, establishing policies for the confidential storage of medical records of victims of sexual violence in hospitals, and providing interim relief to victims of sexual violence that occurred during the conflict; (c) criminalize torture and remove legal provisions allowing for impunity for this crime; (d) facilitate a national dialogue on sexual violence against women to increase the visibility of the issue and the status of victims in Nepalese society; and (e) provide training and conduct awareness-raising campaigns on violence against women and provide adequate protection to victims.³¹

16. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether or not there has been a violation of the Covenant and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy 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 present Views. The State party is also requested to publish the present Views and to have them widely distributed in the official language(s) of the State party.

³¹ See CCPR/C/NPL/CO/2, paras. 13-14.

Annex

Individual opinion of Committee member Anja Seibert-Fohr (concurring)

1. I concur with the Committee's conclusion that the State party violated the author's rights under articles 7, 9 and 26 of the Covenant. I am writing separately to explain the basis for finding the State party's refusal to investigate the gang rape to be in violation of the right to an effective remedy (see para 12.5 of the communication).

2. Pursuant to article 2 (3) (a) of the Covenant, each State party undertakes to ensure that any person whose rights or freedoms are violated shall have an effective remedy. In its general comment No. 20, the Committee has explained that complaints against ill-treatment prohibited by article 7 "must be investigated promptly and impartially by competent authorities so as to make the remedy effective". Accordingly, the Committee has recognized in *Maharjan v. Nepal* that the State party's 35-day statutory limit from the event of torture or the date of release for bringing claims under the Compensation relating to Torture Act is in itself flagrantly inconsistent with the gravity of the crime.¹

3. According to the author's uncontested submission, the State party provides for a 35-day statute of limitation also in section 11 of the chapter on rape in the *Muluki Ain* for reporting the crime of rape. This period is equally unreasonably short because of the gravity of the crime and the trauma suffered by victims as a result of the rape. It is therefore in violation of the right to an effective remedy for ill-treatment prohibited by article 7. Though it is doubtful whether the 35-day time limit, which applies to torture and rape alike and irrespective of gender, constitutes also in itself a gender-based discrimination, its application to the author is clearly in violation of her right to an effective remedy against the gang rape that she was subjected to and which the Committee found to be in violation of her rights under Article 26.

4. In other words, it is not in general the disproportionately negative effect of the statutory limitation (as pointed out in para. 12.5) which leads to a violation of the author's rights under article 2 (3), read in conjunction with article 26, but the refusal by the authorities to investigate the gender-based crimes that the author was subjected to (see para. 12.4). After all, the excessively short period also applied to serious crimes other than rape, thus challenging its qualification as gender-based.

5. The finding of a violation in the present case thus should not suggest that disproportionate effects of legislation as such are sufficient to find laws per se in violation of article 26, read alone or in conjunction with article 2 (3) of the Covenant. Such an assumption would not only be premature but also unnecessary given that the failure to investigate the author's allegations in the present case clearly reveals a violation of article 2 (3), read in conjunction with article 26, of the Covenant. For that reason, the Committee would be better advised to focus on each individual victim rather than on feeble general statements, which lack the necessary persuasiveness.

¹ See communication No. 1863/2009, *Maharjan v. Nepal*, Views adopted on 19 July 2012, para 7.6.