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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. 2835/2016*, **, ***

Communication submitted by:	Eugénie Chakupewa et al. (represented by counsel from TRIAL International)
Alleged victims:	The authors
State party:	Democratic Republic of the Congo
Date of communication:	26 July 2016 (initial submission)
Document references:	Decision taken pursuant to rule 92 of the Committee's rules of procedure, transmitted to the State party on 25 October 2016 (not issued in document form)
Date of adoption of Views:	25 March 2021
Subject matter:	Torture and non-payment of court-ordered compensation
Procedural issues:	Lack of cooperation by the State party
Substantive issues:	Right to an effective remedy; cruel, inhuman or degrading treatment or punishment; fair trial; discrimination on the ground of sex
Articles of the Covenant:	2 (1) and (3), 3, 7, 14 (1) and 26
Articles of the Optional Protocol:	2, 3 and 5 (2)

1. The authors of the communication are Eugénie Chakupewa, born in 1975, Tahusi Nambushwa Mawazo, born in 1975, Furaha Namahinga, born in 1987, Christine Chekanabo Nambuswa, born in 1980,[1] Fatuma Sungunepa, born in 1980, Sada Mapendo, born in 1984, and Katarina Victorina, born in 1977, all nationals of the Democratic Republic of the Congo. They claim that the State party has violated their rights under articles 7 and 14 (1), read alone

* Adopted by the Committee at its 131st session (1–26 March 2021).

** The following members of the Committee participated in the examination of the communication: Tania María Abdo Rocholl, Wafaa Ashraf Moharram Bassim, Yadh Ben Achour, Arif Bulkan, Mahjoub El Haiba, Furuya Shuichi, Carlos Gómez Martínez, Marcia V.J. Kran, Photini Pazartzis, Hernán Quezada Cabrera, Vasilka Sancin, José Manuel Santos Pais, Soh Changrok, Kobauyah Tchamdja Kpatcha, Hélène Tigroudja, Imeru Tamerat Yigezu and Gentian Zyberi.

*** A joint (concurring) opinion by Arif Bulkan and Hélène Tigroudja, a joint (partially dissenting) opinion by Furuya Shuichi, Photini Pazartzis, and Vasilka Sancin, and a joint (dissenting) opinion by Marcia V.J. Kran and Imeru Tamerat Yigezu are annexed to the present Views.

[1] It was this author's father, Jean Marie Pangusi, who signed a power of attorney for TRIAL International in view of the precarious security situation in the region (increasing crime, presence of armed groups, etc.), which makes travel impossible, and the author's having no means to send a power of attorney electronically.

and in conjunction with article 2 (3), and articles 2 (1), 3 and 26 of the Covenant. The Democratic Republic of the Congo acceded to the Optional Protocol to the Covenant on 1 November 1976. The authors are represented by counsel from the non-governmental organization (NGO) TRIAL International.

Facts as submitted by the authors

2.1 The Forces démocratiques de libération du Rwanda (FDLR) is an armed group composed of Hutu rebels who took refuge in the Democratic Republic of the Congo after the genocide in Rwanda in 1994. Ever since, this armed group has been a major cause of insecurity in the eastern provinces of the country because its members regularly carry out military raids and commit numerous acts of violence against the civilian population. In the summer of 2009, the Congolese Government launched the military operation "Kimia II" in the Province of South Kivu in order to track down elements of the FDLR present in the region. The Eighty-third Battalion of the Eighth Infantry Brigade of Sange was deployed to the village of Mulenge. On 14 August 2009, at around 6 a.m., violent clashes erupted between the FDLR and the Armed Forces of the Democratic Republic of the Congo (FARDC), forcing local residents to flee to the nearby village of Mugaja.

2.2 A few days later, once their meagre provisions had been exhausted, a large number of displaced families got together and decided to organize an expedition to Mulenge to gather produce from their fields and recover food from the reserves in their houses. The authors were part of the group that left for Mulenge on the morning of 18 August 2009 to gather provisions. When the group arrived in the centre of Mulenge, it split into smaller subgroups and each subgroup went in a different direction. Each of the seven authors then set off towards their home or else towards the fields they tended around the village. Small groups of FARDC soldiers ambushed them at various locations, threatened them with the weapons they were carrying, overpowered them, stripped them naked and raped them. Most of the authors were gang raped by various soldiers.

2.3 Some of the authors were found injured, abandoned and unconscious at the scene of the crime by their families, while others managed to get back on the road and return to the village on their own. In the days that followed, accompanied by their relatives and representatives of a local human rights NGO, the authors travelled to the health-care centre in Ndegu, where they received appropriate care for several days. However, the pain felt by the authors has not subsided and they suffer from numerous physical and psychological after-effects of the violence inflicted on them. They feel vulnerable and rejected as a result of the discrimination and social exclusion that they have experienced since the attacks. Their social and economic situation is extremely precarious. Because of the stigmatization suffered by victims of sexual violence in the Democratic Republic of the Congo, some of the authors have changed their names. One of the authors fell pregnant as a result of having been raped and was consequently abandoned by her husband.

2.4 The authors reported the crimes to the chief of their village on 19 August 2009 – the day after the events took place – and an investigation was subsequently opened by the military prosecution authorities. The Commander of the Eighty-third Battalion put pressure on the leaders of the Third Company, which was responsible for the village of Mulenge at the time of the events, to bring the soldiers involved in the attacks to justice. From a group of just over a dozen soldiers, five were identified and ordered to appear before the investigating judge on 11 and 18 June 2010. Upon conclusion of the investigation, a trial was opened before the Military Tribunal of the Garrison of Uvira for crimes against humanity – specifically the mass rape committed on 18 August 2009 – punishable under articles 5, 6, 165 and 169 (7) of the Military Criminal Code and article 7 of the Rome Statute of the International Criminal Court. The trial hearings were held from 11 to 13 October 2010.

2.5 On 30 October 2010, the garrison military tribunal sentenced the five defendants to penal servitude (imprisonment) for life, with no mitigating circumstances, for the crime against humanity of mass rape under articles 165 and 169 (7) of the Military Criminal Code. The tribunal also admitted the authors as civil parties to the proceedings and ruled that the defendants were liable *in solidum* with the State party to pay each author US$ 50,000 in damages for the harm suffered.

2.6 Ruling on an appeal filed by the defendants, on 7 November 2011, the Military Court of South Kivu upheld the judgment of the tribunal and the decision to award damages to the civil parties. As the judgment of the Court was not appealed on points of law, it became *res judicata*.

2.7 Despite the final and irrevocable nature of the judgment, the monetary compensation ordered by the garrison military tribunal was not paid in the years that followed. In 2015, the authors therefore decided to initiate judgment enforcement proceedings in order to obtain their compensation.[2] The Congolese State was notified of the judgment of 7 November 2011 through the intermediary of the Governor of the Province of South Kivu and was ordered to pay the compensation due to each of the authors in accordance with the court decision.

2.8 In June 2015, the decisions were registered with the Ministry of Justice and Human Rights in Kinshasa. From that moment on, the authors' counsel followed up with the Ministry's Litigation Department on a monthly basis. In September 2015, the authors' counsel met with the Director of the Litigation Department in Kinshasa. At this meeting, the Director appeared to be unaware of the authors' case, even though, according to an acknowledgement of receipt, he had received the related correspondence and court decisions. After the meeting with the authors' counsel, the Director of the Litigation Department instructed the Chief of the Department to look over the correspondence and the decisions. The Chief then requested the resubmission of copies of the acknowledgement of receipt and the two court decisions, which had already been submitted on 29 June 2015, claiming that there must have been an oversight in the handling of the correspondence or a decision not to follow up on the case. Copies of the decisions and the acknowledgement of receipt were therefore resubmitted in September 2015. The authors' counsel subsequently met again with the Director and the Chief of the Litigation Department, who suggested that the payment of court-ordered compensation was at the discretion of the Minister of Justice. In order to ensure continuous and regular follow-up of the case, the authors' counsel visited the Ministry every two weeks to enquire about the progress of the procedure, to no great avail.

2.9 Before January 2016, representatives of the Ministry of Justice repeatedly asked the authors to await the approval of the 2016 State budget, after which, they claimed, payment of the compensation would be possible. Even after the budget was approved, however, the Ministry of Justice continued to refuse to authorize the use of budgeted funds to pay the compensation due. At this stage, it became clear that, despite the fact that every procedural requirement had been met, the success of the enforcement procedure essentially depended on political goodwill and remained at the discretion of the Government. Recognizing their powerlessness and the procedural impasse they had reached, the authors decided to report their situation, via letters dated 10 November 2015, to the National Human Rights Commission and the Special Advisor to the Head of State on combating sexual violence. Their letters have gone unanswered, however, and the procedure remains at a standstill.

Complaint

3.1 The authors claim a violation by the State party of articles 7 and 14 (1), read alone and in conjunction with article 2 (3), and of articles 2 (1), 3 and 26 of the Covenant. They demand appropriate reparation, including, first and foremost, the enforcement of the judgment of the Military Court of South Kivu of 7 November 2011 but also free medical care and psychological rehabilitation, and social and economic reintegration measures.

3.2 The authors were subjected to sexual assault of the utmost gravity, including rape by representatives of the State – that is, members of the FARDC – on the pretext that they were "femmes des FDLR" (FDLR women or wives). They argue that the Committee has recognized in its jurisprudence that rape and other forms of sexual violence constitute violations of article 7 of the Covenant.[3] In the present case, the authors consider that the State party is responsible for a continuing violation of article 7 of the Covenant since, despite the various steps taken by the Congolese judicial authorities to conduct an effective investigation

[2] Article 109 of the Code of Criminal Procedure provides that: "Enforcement is sought ... by the civil party in respect of sentences handed down in response to his or her petition."

[3] See e.g., *Mehalli et al. v. Algeria* (CCPR/C/110/D/1900/2009), para. 7.10.

and punish the perpetrators of the crimes, the victims have never obtained the compensation awarded to them. Since compensation is considered by the Committee to be a means of complying with the obligation to prevent torture, the authors argue that the State party has violated article 7 of the Covenant.

3.3 The authors also argue that, whenever allegations of serious violations are made, States parties have an obligation to provide an effective remedy to any person whose Covenant rights have been violated, and that this entails the enforcement of decisions granting such remedies and, in particular, an obligation to provide appropriate compensation.[4] They argue that the Committee has confirmed that States which fail to fulfil their obligation to provide reparation in the form of compensation to victims of serious human rights violations are in breach of their obligation to provide an effective remedy.[5] The authors consider that the obligation to provide an effective remedy under article 2 (3) of the Covenant entails an obligation for the State to ensure that the victim obtains effective reparation. Consequently, the State party's failure to comply with this obligation in respect of the crimes of torture committed against the authors constitutes a violation of article 2 (3), read in conjunction with article 7, of the Covenant.

3.4 Furthermore, the authors argue that the State party violated their right to a fair trial by failing to implement the decision on monetary compensation issued by the Military Court of South Kivu, in violation of article 14 (1), read alone and in conjunction with the positive obligations under article 2 (3) of the Covenant.[6] The authors explain that the panel mandated by the United Nations High Commissioner for Human Rights to study the use of remedies and reparations for victims of sexual violence in the Democratic Republic of the Congo concluded that "for those victims of sexual violence who are able to overcome the many challenges of bringing a case to court and getting a judgment that condemns the perpetrators and awards them reparations in the form of damages and interest … indemnity awards are not paid, even in those cases where the State has been held liable *in solidum*".[7] Moreover, in July 2013, the Committee on the Elimination of Discrimination against Women expressed its concern about the limited enforcement of court decisions and non-payment of compensation for acts of sexual violence by State agents in conflict-affected areas.[8]

3.5 Lastly, the authors invoke their right not to be subjected to discrimination, in accordance with articles 2 (1), 3 and 26 of the Covenant. The Committee recalls that the obligation to ensure to all individuals the rights recognized in the Covenant requires the removal of obstacles to the equal enjoyment of such rights.[9] The application of the principle of equality sometimes requires States parties to take affirmative action in respect of vulnerable or disadvantaged groups.[10] Several United Nations experts have noted the particularly alarming situation with regard to the systematization of violence against women, the stigmatization of victims of sexual violence in Congolese culture[11] and the denial of the right to compensation of victims of sexual violence.[12] The authors therefore allege that the failure to pay compensation awarded to victims of sexual violence exacerbates their stigmatization. They maintain that the State party has participated in and contributed to their stigmatization by failing to fulfil its obligation to pay the damages awarded to them by the

[4] Human Rights Committee, general comment No. 31 (2004), para. 16.

[5] *Horvath v. Australia* (CCPR/C/110/D/1885/2009), paras. 8.4–8.6.

[6] *Pimentel et al. v. Philippines* (CCPR/C/89/D/1320/2004), para. 9.2.

[7] Office of the United Nations High Commissioner for Human Rights, *Report of the Panel on Remedies and Reparations for Victims of Sexual Violence in the Democratic Republic of Congo to the High Commissioner for Human Rights* (March 2011), p. 49, para. 6 of the findings.

[8] CEDAW/C/COD/CO/6-7, para. 9 (e).

[9] Human Rights Committee, general comment No. 28 (2000), para. 3.

[10] Human Rights Committee, general comment No. 18 (1989), para. 10.

[11] See, e.g., A/HRC/13/63, para. 26.

[12] United Nations Organization Stabilization Mission in the Democratic Republic of the Congo and the Office of the High Commissioner for Human Rights, *Progress and Obstacles in the Fight against Impunity for Sexual Violence in the Democratic Republic of the Congo* (April 2014), para. 57; and Office of the High Commissioner for Human Rights, *Report of the Panel on Remedies and Reparations for Victims of Sexual Violence in the Democratic Republic of Congo to the High Commissioner for Human Rights* (March 2011), paras. 152–153.

Military Court of South Kivu on 7 November 2011 and has thus violated their right not to be subjected to discrimination, in breach of articles 2 (1), 3 and 26 of the Covenant.

Lack of cooperation by the State party

4. On 25 October 2016, 25 May 2018 and 8 October 2019, the Committee requested the State party to submit its observations on the admissibility and merits of the communication. The Committee regrets the State party's failure to provide any information with regard to the admissibility or the substance of the authors' allegations. It recalls that article 4 (2) of the Optional Protocol obliges States parties to examine in good faith all allegations brought against them and to make available to the Committee all the information at their disposal. In the absence of a reply from the State party, due weight must be given to the authors' allegations, to the extent that they are substantiated.

Issues and proceedings before the Committee

Consideration of admissibility

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

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

5.3 The Committee takes note of the authors' claim that all available and effective domestic remedies have been exhausted. In the absence of any objection by the State party in this connection, the Committee considers that the requirements of article 5 (2) (b) of the Optional Protocol have been met.

5.4 The Committee notes that the authors have claimed a continuing violation of article 7 of the Covenant because the State party has failed to fulfil its obligation to pay the compensation awarded to them by the domestic courts, which recognized their status as victims of the crime against humanity of mass rape. In view of the final and irrevocable decision of the domestic courts to recognize the authors as victims of mass rape[13] – an act clearly prohibited by article 7 of the Covenant – the Committee notes that the guarantees established under article 7 include not only the obligation to conduct an effective investigation but also the obligation to provide adequate reparation.[14] Since, to date, the authors have not been paid the court-ordered compensation due to them, they retain their status as victims of a violation of article 7 of the Covenant.

5.5 With regard to the alleged violation of article 2 (1) of the Covenant in connection with the stigmatization of victims of sexual violence in Congolese culture, the Committee reiterates its jurisprudence establishing that the provisions of article 2 lay down general obligations for States parties and cannot in and of themselves constitute a separate claim under the Optional Protocol because they can only be invoked in conjunction with other substantive articles of the Covenant.[15] Accordingly, the Committee considers that the authors' claim in relation to article 2 (1) of the Covenant is inadmissible under article 3 of the Optional Protocol.

5.6 However, the Committee is of the view that the authors have sufficiently substantiated their other claims for the purposes of admissibility and proceeds to consider the merits of the

[13] Judgment of 7 November 2011 of the Military Court of South Kivu.

[14] See the Committee's general comment No. 20 (1992), para. 14, and the Committee's general comment No. 31 (2004), para. 16.

[15] See, e.g., *H.E.A.K. v. Denmark* (CCPR/C/114/D/2343/2014), para. 7.4; *Castañeda v. Mexico* (CCPR/C/108/D/2202/2012), para. 6.8; *Ch. H.O. v. Canada* (CCPR/C/118/D/2195/2012), para. 9.4; *Peirano Basso v. Uruguay* (CCPR/C/100/D/1887/2009), para. 9.4; and *A.P. v. Ukraine* (CCPR/C/105/D/1834/2008), para. 8.5.

claims under article 7, read alone and in conjunction with article 2 (3), article 14 (1), read in conjunction with article 2 (3), and articles 3 and 26 of the Covenant.

Consideration of the merits

6.1 The Committee has considered the present communication in the light of all the information made available to it by the parties, as provided for in article 5 (1) of the Optional Protocol.

6.2 The Committee notes the authors' allegations that the State party violated article 7 of the Covenant by failing to pay the compensation awarded to them by the domestic courts in 2011 after the courts had recognized their status as victims of mass rape. The Committee also notes that, in 2015, the authors initiated proceedings to obtain enforcement of the judgment awarding them compensation and notified the State party of the existence of an order to pay. However, after more than five years, no compensation has been paid to the authors. The Committee considers that the failure to provide compensation to persons expressly recognized as victims diminishes the effect of the punishment,[16] creates an appearance of impunity for persons accused of acts contrary to article 7 of the Covenant, and, moreover, undermines the deterrent effect of punishments handed down through the criminal justice system, which in turn erodes victims' confidence in the effectiveness of investigations.[17] In the absence of any rebuttal from the State party, the Committee gives due weight to the authors' allegations and considers that the facts before it disclose a violation of article 7, read alone and in conjunction with article 2 (3) of the Covenant.

6.3 The Committee also notes that, although the Military Court of South Kivu upheld the decision to award reparation to the authors, to date, they have not been able to secure the decision's enforcement. The State party has not explained why, more than nine years after the judicial decision of 7 November 2011, the authors have still not received the compensation awarded to them. Accordingly, given that the right of access to a court, in accordance with article 14 (1) of the Covenant, would remain illusory if a final and binding judicial decision remained ineffective to the detriment of a party,[18] and that action to ensure that the competent authorities enforce such remedies when granted, in accordance with article 2 (3) (c) of the Covenant, would also remain illusory, the Committee considers that the failure by the State party to enforce the above-mentioned decision constitutes a violation of the authors' rights under article 14 (1), read in conjunction with article 2 (3), of the Covenant.

6.4 Lastly, the Committee notes the authors' allegation that the failure by the domestic authorities to pay the compensation awarded to them as victims of mass rape only exacerbates the systematization of violence against women and the stigmatization of victims of sexual violence in Congolese culture, which is contrary to articles 3 and 26 of the Covenant. The Committee recalls that, by its nature, sexual violence affects women in particular,[19] that women are particularly vulnerable in times of internal or international armed conflict and that, in such situations, States must take all measures necessary to protect women from rape, abduction and all other forms of gender-based violence.[20] Among these measures, States must ensure that victims of sexual violence have effective access to justice, including adequate

[16] The Committee reiterates that, according to its general comment No. 31 (2004), article 2 (3) of the Covenant requires that States parties make reparation to individuals whose Covenant rights have been violated. Without reparation to individuals whose Covenant rights have been violated, the obligation to provide an effective remedy, which is central to the efficacy of article 2 (3), is not discharged.

[17] See, e.g., European Court of Human Rights, *Ramsahai and others v. Netherlands*, Application No. 52391/99, Judgment, 15 May 2007, para. 353.

[18] *Murodov v. Tajikistan* (CCPR/C/124/D/2826/2016 and CCPR/C/124/D/2826/2016/Corr.1), para. 7.2. See also European Court of Human Rights, *Hornsby v. Greece*, Application No. 18357/91, Judgment, 19 March 1997, para. 40; and European Court of Human Rights, *Paudicio v. Italy*, Application No. 77606/01, Judgment, 24 May 2007, para. 53.

[19] See Committee on the Elimination of Discrimination against Women, general recommendation No. 35 (2017).

[20] *Nyaya v. Nepal* (CCPR/C/125/D/2556/2015), para. 7.3; and Human Rights Committee, general comment No. 28 (2000), para. 8.

measures of reparation.[21] These measures are especially important in post-conflict situations,[22] as they prevent the revictimization of victims of mass rape, as in this case.[23] Given the context in which the mass rapes of which the authors were victims – characterized by the State party's domestic courts as crimes against humanity – took place, the complete failure to enforce the court decisions awarding the authors compensation and the lack of response from the State party, the Committee considers that the State party has exacerbated their situation of extreme vulnerability and the stigmatization and marginalization that they are suffering as victims of sexual violence.[24] In addition, the failure by a State to compensate women victims of violence may constitute tacit permission or encouragement not to do so, thereby exacerbating their vulnerability.[25] The Committee is therefore of the view that the State party has failed to comply with its obligation to protect the authors from gender-based discrimination under articles 3 and 26 of the Covenant.

7. 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), article 14, read in conjunction with article 2 (3), and articles 3 and 26 of the Covenant.

8. Pursuant to 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. The State party is therefore under an obligation to: (a) enforce in full the judicial decision handed down on 30 October 2010 and upheld on 7 November 2011; (b) take due account of all appropriate factors in order to update the decision on the date of its execution, including the harm suffered by the authors as a result of the undue delay in the payment of their compensation; (c) take appropriate measures of satisfaction in respect of the authors for the non-material damage caused by the violations suffered; and (d) ensure that the authors receive the necessary psychological rehabilitation and adequate medical treatment and benefit from social and economic reintegration measures. The State party is also under an obligation to take steps to prevent similar violations from occurring in the future.

9. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective 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 disseminated in the official languages of the State party.

[21] See Committee on the Elimination of Discrimination against Women, general recommendation No. 35 (2017).

[22] See Committee on the Elimination of Discrimination against Women, general recommendation No. 30 (2013).

[23] See, among others, A/HRC/13/63; United Nations Organization Stabilization Mission in the Democratic Republic of the Congo and the Office of the High Commissioner for Human Rights, *Progress and Obstacles in the Fight against Impunity for Sexual Violence in the Democratic Republic of the Congo*, April 2014; and Office of the High Commissioner for Human Rights, *Report of the Panel on Remedies and Reparations for Victims of Sexual Violence in the Democratic Republic of Congo to the High Commissioner for Human Rights* (March 2011).

[24] *Nyaya v. Nepal*, para. 7.3.

[25] *X. v. Timor-Leste* (CEDAW/C/69/D/88/2015), para. 6.7.

Annex I

[Original: English]

Joint opinion by Committee members Arif Bulkan and Hélène Tigroudja (concurring)

1. We concur with the majority opinion that the facts of this case disclose a violation by the State party of articles 7 and 14, read alone and in conjunction with article 2 (3), as well as articles 3 and 26, of the Covenant. The overarching theme of the communication under consideration and the element central to the Committee's findings on each of the rights involved is that of State accountability. By finding violations in each instance, the Committee's reasoning illustrates how the absence of enforcement contributes to impunity, which in turn leaves the substantive violation unaddressed. A victim's right is not fully vindicated unless the entire process of investigation, prosecution and punishment/reparation is completed; when the process is interrupted or aborted – even if only at the final stage – accountability for the violation is "illusory" (para. 6.3).[1]

2. We anticipate, however, that questions may be raised regarding the finding of a violation of article 26 by the Committee on these facts, based on an argument that the authors have not demonstrated that male victims have been compensated in domestic proceedings while female victims have not. Indeed, the traditional approach to claims under article 26 has been anchored in comparisons between persons who are similarly situated,[2] with a finding of discrimination possible only where any differential treatment is not based on "reasonable and objective" criteria.[3] Identifying a similarly situated comparator is an integral aspect of this analysis and, in determining whether this element exists, the Committee defers to the assessment of domestic courts.[4] We are of the view, however, that non-discrimination law has not remained stuck in this restrictive framework and our concurring opinion explores a broader notion of equality that would be manifestly applicable in this communication. We observe in passing that, as demonstrated by the Committee's burgeoning jurisprudence and its recent general comments,[5] the most meaningful approach to interpretation of the Covenant as a global human rights treaty is one that is dynamic, conscious of the evolving nature of this subject and attentive to the developments occurring in other international bodies.

3. International human rights law has been critiqued as androcentric because of its general orientation towards male interests,[6] an assessment thrown into sharp relief by formal approaches to sex discrimination that insist upon identifying a similarly situated male comparator who is treated more favourably. Plainly, such a requirement takes the male standard as the point of departure.[7] Where there is no comparable male equivalent, such insistence complicates the ability to recognize and address the unique prejudice suffered by a woman because of her gender.

4. The sterility of a purely formal analysis of discrimination, particularly in circumstances where there is no factual equivalence, is graphically illustrated by the argument of the State party in one case where it denied that the criminalization of abortion could amount to sex discrimination since any differentiation of treatment inevitably resulted

[1] Unless otherwise indicated, the paragraph numbers in parentheses refer to the Committee's Views to which the present joint opinion is annexed.

[2] William A. Schabas, *UN International Covenant on Civil and Political Rights: Nowak's CCPR Commentary* (N.P. Engel, 2019), 3rd ed.

[3] General comment No. 18 (1989), para. 13.

[4] *Castell-Ruiz et al. v. Spain* (CCPR/C/86/D/1164/2003), para. 7.2.

[5] See general comments No. 36 (2018) and No. 37 (2020).

[6] Alice Edwards, "Violence against women as sex discrimination: judging the jurisprudence of the United Nations human rights treaty bodies", in *Equality and Non-Discrimination under International Law*, Stephanie Farrior, ed. (London, Routledge, 2017).

[7] Ibid.

from biological differences between men and women.[8] Likewise, the woman who complains of obstetric violence can never find a male comparator to demonstrate the inequality of treatment she may have received,[9] so the importance of adopting a broader approach to claims of gender discrimination is self-evident.

5. Recognizing the limitations of a formal model of equality, an influential body of scholarship highlights the need to focus on the impact of treatment, where social disadvantage and/or persistent societal oppression is acknowledged. The "intensely individualistic" nature of formal notions of equality, whereby the disadvantage associated with the particular status or group is not factored in the analysis, has been noted.[10] The problem with merely seeking equivalence between men and women is that doing so ignores the structural differences that account for inequality in the first place and perpetuates the disadvantage associated with the group.[11] For this reason, the alternative model is one that proceeds upon a substantive notion of equality that seeks a more transformative outcome, in other words the elimination of social disadvantage.

6. The respective differences between formal and substantive equality as outlined above are aptly illustrated in the facts of this communication. A formal analysis that would merely compare the treatment of male victims and that would end there if no difference were proved, flagrantly overlooks the uniquely gendered nature of the problem of violence against women, which has been described as "a global phenomenon that is a shared experience of women and girls across historical periods, countries, and cultures".[12] Women and girls are subjected to violence precisely because they are women and girls, a longstanding disadvantage that is buttressed by societal attitudes and systematically tolerated by institutional structures.[13] The risk of violence is heightened in times of war and conflict, when women are deliberately targeted both to reinforce male dominance and to humiliate the wider community.[14] Yet, as demonstrated by the present communication, the reality is that women are at risk not only from hostile forces, but also from those who are meant to protect them.[15] For these reasons, international human rights law treats violence against women as an issue of gender discrimination.[16]

7. There are two aspects of the jurisprudence on equality in relation to violence against women that are particularly relevant in these circumstances, both forming elements of the principle of due diligence. The first, which has been highlighted by the Committee on the Elimination of Discrimination against Women, articulates the responsibilities of States to act with due diligence "to investigate and punish acts of violence, and for providing compensation" to victims, including for private acts.[17] As discussed in *Jessica Lenahan (Gonzales) et al. v. United States of America*, the emblematic case of the Inter-American Commission on Human Rights on due diligence, international law emphasizes "the link between the duty to act with due diligence and the obligation of States to guarantee access to adequate and effective judicial remedies for victims and their family members when they suffer acts of violence". The Committee on the Elimination of Discrimination against Women, in enforcing standards against sex discrimination, has shown that State authorities may reinforce harmful stereotypes depending on how they handle cases of gender-based violence,

[8] *Mellet v. Ireland*, (CCPR/C/116/D/2324/2013), para 4.13. Note the incisive response to this argument by Committee member Sarah Cleveland in her individual opinion on that case (CCPR/C/116/D/2324/2013, annex II, para. 6).

[9] *S.F.M. v. Spain* (CEDAW/C/75/D/138/2018).

[10] Sandra Fredman, *Discrimination Law*, 2nd ed. (Oxford, Oxford University Press, 2011).

[11] Ibid.

[12] Alice Edwards, "Violence against women as sex discrimination".

[13] Ibid.

[14] Christine Chinkin, "Rape and sexual abuse of women in international law", *European Journal of International Law*, vol. 5, No. 3 (1994), pp. 326–341.

[15] Catharine MacKinnon, "Rape, genocide and women's human rights", in *Genocide and Human Rights*, Tom Campbell and Mark Lattimer, eds. (London, Routledge, 2007).

[16] Committee on the Elimination of Discrimination against Women, general recommendation No. 19 (1992), para. 7.

[17] Ibid., para. 9.

which can in turn further revictimize victims.[18] In similar circumstances, the Inter-American Court of Human Rights qualifies State authorities' passivity as a form of "institutional violence". For the Court, the State becomes a "second aggressor".[19]

8. In this case, the State party admittedly recognized the rapes as crimes against humanity and some of the perpetrators were convicted and imprisoned. Nonetheless, according to the undisputed facts, more than half of the soldiers involved were not identified and the compensation ordered was never paid to the authors. These failures meant there was only partial accountability; in the context of what were grave crimes, the obdurate refusal of the national authorities to pay the compensation ordered is indicative of the social disadvantage and oppression the authors face as women. As already explained, the climate of impunity that inevitably results from failing to enforce judgments in cases of violence in turn encourages or at least facilitates repetition of the conduct. This has been precisely the view of the majority in this case, which found a violation of articles 3 and 26 of the Covenant, by reasoning that the non-payment of compensation aggravated the problem of violence against women and stigmatized them in the Democratic Republic of the Congo.

9. We note that impunity in this context is an acute and well-known problem in the State party. A former Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo, is among those who have noted the "alarming levels" of gender-based violence in the Democratic Republic of the Congo, despite many legislative and other interventions.[20] As one United Nations peacekeeping officer has acknowledged, in the Democratic Republic of the Congo it is more dangerous to be a woman than a soldier in armed conflict.[21] Successive studies of the situation have revealed that the violence experienced by women in the State party is particularly brutal (involving gang rape, rape with objects such as bayonets and intentional sexual injuries such as the cutting off of breasts) and that it is inflicted by State and non-State military forces, foreign militias and even United Nations peacekeeping forces. In 2009, the Secretary-General reported that over 200,000 cases of sexual violence had occurred in the Democratic Republic of the Congo since 1996, estimating the actual figure to be much higher given the fact of underreporting.[22] Against this known context of sexual violence against women in the Democratic Republic of the Congo, and given the principles we have discussed in the present opinion, the omissions by the State party in relation to the authors are unquestionably failures of due diligence, which qualify as discrimination on the basis of gender.

10. The second dimension of equality in relation to violence against women is a State's responsibility, as an offshoot of the principle of due diligence, to prevent violence in the first place.[23] As the Committee on the Elimination of Discrimination against Women has argued, building upon both its general recommendation No. 19 (1992) and article 1 of the Convention on the Elimination of All Forms of Discrimination against Women, it is not enough to punish perpetrators; all aspects of the criminal justice system must function to prevent violence against women.[24] According to the Committee:

> The failure of a State party to take all appropriate measures to prevent acts of gender-based violence against women in cases in which its authorities are aware or should be aware of the risk of such violence, or the failure to investigate, prosecute and punish perpetrators and provide reparations to victims/survivors of such acts, provides tacit

[18] *X. and Y. v. Russian Federation* (CEDAW/C73/D100/2016); and *S.L. v. Bulgaria* (CEDAW/C/73/99/2016).

[19] Inter-American Court of Human Rights, *V.R.P., V.P.C. et al. v. Nicaragua*, Judgment of 8 March 2018, paras. 142 and 297.

[20] Rashida Manjoo and Calleigh McRaith, "Gender-based violence and justice in conflict and post-conflict areas", *Cornell International Law Journal*, vol. 44, No. 1 (2011), pp. 11–31.

[21] Ibid.

[22] S/2009/362, para. 12.

[23] Inter-American Court of Human Rights, *Jessica Lenahan (Gonzales) et al. v. United States of America*, para. 126.

[24] See also *Yildirim v. Austria* (CEDAW/C/39/D/6/2005), para. 12.1.2; and *Goekce v. Austria* (CEDAW/C/39/D/5/2005).

permission or encouragement to perpetrate acts of gender-based violence against women.[25]

The facts of this case reveal a failure by the State party to meet this standard and protect the authors, despite the known and heightened vulnerabilities to which they were subject. That amounts to a failure to act with due diligence and thus constitutes a violation the State party's obligation not to discriminate against the authors, in contravention of articles 3 and 26 of the Covenant.

11. The authors, all rural women,[26] were at the material time merely trying to secure food from the villages they had been forced to abandon, in an environment of known danger created by the incursion of rebel soldiers of the Forces démocratiques de libération du Rwanda. Given the intersecting vulnerabilities experienced by the women, the State party owed them a heightened obligation of due diligence to protect them from violence, but instead they were brutalized by the very soldiers who were supposed to protect them. Both the violence and the subsequent indifference of the State party to their claims for compensation were products of the social disadvantage to which they were subject precisely because of their gender. It is for these manifestations of structural oppression that we find the authors to be victims of gender discrimination, irrespective of whatever compensation their male counterparts may or may not have received from the State party. The majority's finding of a violation of articles 3 and 26 in relation to these facts is thus, in our opinion, solidly based on the international human rights standards that have been developed in relation to equality.

[25] *X. v. Timor-Leste* (CEDAW/C/69/D/88/2015), para. 6.7.

[26] In its general recommendation No. 19 (1992), the Committee on the Elimination of Discrimination against Women highlights the particular risks faced by rural women and recommends that States take effective measures to overcome the violence these women face.

Annex II

[Original: English]

Joint opinion by Committee members Furuya Shuichi, Photini Pazartzis and Vasilka Sancin (partially dissenting)

1. We are writing separately because we find ourselves in disagreement with the Committee's approach to the issues of admissibility and of a violation of articles 3 and 26 of the Covenant (see paras. 5.6 and 6.4).[1]

2. In this case, the main issue centres on the non-payment of compensation ordered by the domestic jurisdictions for the complainants (seven women), who were deemed by the State party's courts to be victims of sexual violence and crimes against humanity, crimes that were documented by international bodies.[2] We agree with the grounds for the finding of a clear violation of article 7, read alone and in conjunction with paragraph 2 (3), of the Covenant (para. 6.2). In accordance with paragraphs 15 and 16 of general comment No. 31 (2004), States parties are required to make reparation to individuals whose Covenant rights have been violated. Without such reparation, the obligation to provide an effective remedy is not discharged. In the case at hand, it is obvious that the failure of the State to disburse the compensation awarded to the victims not only diminishes the effect of the sanction but also exacerbates a culture of impunity for such serious crimes.

3. However, we fail to recognize why the Committee, after having concluded that articles 7 (and 14) were violated, also finds a violation of articles 3 and 26. While we acknowledge the seriousness of the crimes committed and the continuing effect of the stigmatization and revictimization caused by the non-payment of compensation to the victims, in our view the authors have failed to sufficiently explain, in the present case, where a difference of treatment resides – in regards to other victims of sexual violence and crimes against humanity – and to what extent such a difference was based on a ground impermissible under article 26.[3]

4. The authors of the communication claim a difference in treatment stressing the particular plight of women as victims of sexual abuse and the necessity to address the particular situation of women. However, the authors have not submitted any relevant information indicating that other victims (including men and children) have been duly compensated, while the authors have not.[4] In the absence of such information, we would have found this part of the communication inadmissible and are of the opinion that the finding of a separate violation of articles 3 and 26 in this particular context might send a wrong signal regarding the reparation due to all victims of serious human rights violations.

[1] Unless otherwise indicated, the paragraph numbers in parentheses refer to the Committee's Views to which the present joint opinion is annexed.

[2] OHCHR, *Report of the Panel on Remedies and Reparations for Victims of Sexual Violence in the Democratic Republic of Congo to the High Commissioner for Human Rights* (March 2011), cited in footnote 11 of the Views. Available from https://www.refworld.org/docid/4d708ae32.html.

[3] See general comment No. 18 (1989).

[4] OHCHR, *Report of the Panel on Remedies and Reparations*, para. 13:

> There are a number of male victims of sexual violence in the DRC, and it is difficult for them to come forward and speak about what happened to them. Like the women who have been raped, men who have been raped suffer from stigmatization, which can take a somewhat different form. The male victims interviewed by the panel talked of being raped as being treated "like a wife," and they are humiliated by others for identifying or being identified with a group of victims who are virtually all women.

Annex III

[Original: English]

Joint opinion by Committee members Marcia V.J. Kran and Imeru Tamerat Yigezu (dissenting)

1. We agree with the findings of the Committee that the failure to provide compensation to the authors as persons expressly recognized as victims of sexual violence diminishes the effect of the punishment, creates an appearance of impunity and renders the right of access to a court illusory. This is unacceptable, as crimes committed against women, including crimes of sexual violence, particularly in situations of armed conflict and post-conflict transition, constitute grave violations of human rights that must be urgently addressed and remedied. Therefore, we fully agree that the facts disclose a violation by the State party of articles 7 and 14, read alone and in conjunction with article 2 (3), of the Covenant. More generally, securing women's rights is key to successfully transitioning from a period of conflict and instability to one of lasting stability and governance through the rule of law, human rights and democracy.[1]

2. We do not, however, agree that the claims regarding the alleged violations of articles 3 and 26 of the Covenant are admissible.

3. The authors allege that the failure to pay compensation awarded to them as victims of sexual violence exacerbates their stigmatization. They maintain that the State party has participated in and contributed to their stigmatization by failing to fulfil its obligation to pay the damages awarded to them by the Military Court of South Kivu on 7 November 2011 and that it has thus violated their right not to be subjected to discrimination, in breach of articles 3 and 26 of the Covenant.

4. In paragraph 7 of its general comment No. 18 (1989), the Committee has clarified that "discrimination" as used in the Covenant should be understood to imply any distinction, exclusion, restriction or preference that is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and that has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms. In paragraph 10 of the same general comment, the Committee has pointed out that the principle of equality sometimes requires States parties to take affirmative action in order to diminish or eliminate conditions that cause or help to perpetuate discrimination prohibited by the Covenant. Moreover, in paragraph 30 of its general comment No. 28 (2000), the Committee has stated that States parties should address the ways in which any instances of discrimination affect women in a particular way.

5. Nonetheless, in order to be admissible under article 2 of the Optional Protocol, a communication must be adequately substantiated. The authors must establish a prima facie case that a Covenant right has been violated.[2]

6. In this case, the authors have not provided any information on how the failure by the State party to pay compensation has exacerbated their own stigmatization in their personal situations. Instead, they have argued that failure to pay compensation exacerbates the stigmatization of victims of sexual violence generally. Thus, there is insufficient information regarding how the stigmatization experienced by the authors has been made worse or has been perpetuated by the failure to pay compensation.

7. While the authors' situation is undoubtedly extremely difficult, in order to find that a claim has been sufficiently substantiated, the Committee requires specific facts about the

[1] Madeleine Rees and Christine Chinkin, "Exposing the gendered myth of the post-conflict transition: the transformative power of social and economic rights", *New York University International Law and Politics*, vol. 48, No. 4 (2016), pp. 1211–1226.

[2] A/39/40, A/39/40/Corr.1 and A/39/40/Corr.2, para. 588.

particular case before it. In the absence of such facts, as much as we recognize the overall grave situation of the authors, we must conclude that the claims under articles 3 and 26 have not been sufficiently substantiated and are therefore inadmissible under article 2 of the Optional Protocol.