



**Guaranteeing the Rights of Survivors of Conflict-related  
Sexual Violence in Nepal, with special reference to the  
Human Rights Committee's Decision on the Case *Fulmati  
Nyaya v. Nepal***

**February 2021**

**Submission from the Human Rights and Justice Centre**

**to**

**National Human Rights Commission**

**National Women Commission**

**Indigenous Nationalities Commission**

With the support of TRIAL International



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## Acronyms

APF	Armed Police Force
CEDAW	Convention on the Elimination of All forms of Discrimination against Women
CIEDP	Commission on the Investigations of Enforced Disappeared Persons
CPA	Comprehensive Peace Accord
CPN-M	Communist Party of Nepal - Maoists
CRSV	Conflict-related Sexual Violence
FIR	First Information Report
GBV	Gender Based Violence
GoN	Government of Nepal
HRC	Human Rights Committee
HRJC	Human Rights and Justice Centre
HRW	Human Rights Watch
ICCPR	International Covenant on Civil and Political Rights
ICTJ	International Centre for Transitional Justice
INC	Indigenous Nationalities Commission
IRP	Interim Relief Package
MOHA	Ministry of Home Affairs
NAP	National Action Plan
NGO	Non-Governmental Organization
NHRC	National Human Rights Commission
NWC	National Women Commission
OHCHR	Office of the United Nations High Commissioner for Human Rights
RNA	Royal Nepal Army
SRVAW	Special Rapporteur on Violence against Women, its Causes and Consequences
CRTA	Compensation relating to Torture Act
TRC	Truth and Reconciliation Commission

## **Organization submitting the report**

The **Human Rights and Justice Centre (HRJC)** improves access to justice for victims of human rights violations in Nepal such as genocide, torture, enforced disappearances, extrajudicial executions and sexual violence.

The HRJC provides free legal support to victims regardless of their background, religious or political affiliation. Through a network of trusted Nepalese human rights lawyers, it litigates cases domestically and internationally to end impunity and enforce the rule of law.

This report is submitted with the support of TRIAL International.

**TRIAL International** is a non-governmental organization fighting impunity for international crimes and supporting victims in their quest for justice.

TRIAL International takes an innovative approach to the law, paving the way to justice for survivors of unspeakable sufferings. The organization provides legal assistance, litigates cases, develops local capacity and pushes the human rights agenda forward.

The report was written with the support of Ms. Jesselina Rana, in the context of a coaching programme on “International Human Rights Litigation for Lawyers” conducted from July to December 2020.

## A. Introduction

1. The Human Rights and Justice Centre (HRJC) wishes to bring to the attention of the national institutions, specifically, National Human Rights Commission (NHRC), National Women's Commission (NWC) and National Indigenous Commission (NIC), several issues related to the obstacles faced by conflict related sexual violence (CRSV) survivors in Nepal.

2. Pursuant to international law, sexual violence committed during a conflict (international or non-international), under certain circumstances, can be considered as genocide, or a crime against humanity or a war crime. However, the existing Nepalese legislation do not codify conflict related sexual violence (CRSV) as such crimes, thus leaving a significant loophole, which favours impunity. Even worse, the Government of Nepal (GoN) has not recognized survivors of CRSV among the victims of the internal conflict (1996 to 2006). The present report sheds light on various obstacles faced by the survivors to CRSV in access to justice, taking as a reference the decision rendered by the Human Rights Committee (HRC) on an illustrative individual complaint against Nepal (i.e. Case *Fulmati Nyaya v. Nepal*).<sup>1</sup> Furthermore, the report contains several recommendations concerning the rights of CRSV survivors directed at the NHRC, the NWC, and the NIC.

3. Section A briefly summarises the impact of the internal conflict on Nepali women; Section B specifically deals with the case study concerning Ms. Fulmati Nyaya<sup>2</sup>, adjudicated in 2019 by the HRC. In the section, the report illustrates the facts of the case and the decision rendered by the HRC. Section C is dedicated to an analysis of the existing national laws and mechanisms to address CRSV and the corresponding loopholes and the ensuing procedural obstacles. Section D illustrates the flawed mandate of the existing transitional justice mechanisms with regard to

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<sup>1</sup> The Human Rights Committee (HRC) is a United Nations Treaty Body, mandated to monitor the implementation of the International Covenant on Civil and Political Rights (ICCPR), to which Nepal is a State party since 14 May 1991. The decision on the case of Ms. *Fulmati Nyaya v Nepal* is also attached along with this report for the submission.

<sup>2</sup> Ms. Fulmati Nyaya is a pseudonym used for security and privacy reasons. If the institutions to which this report is submitted wish to learn the real identity of the person concerned, the HRJC will facilitate this, provided that the necessary guarantees are undertaken.

CRSV. Section E recalls the respective mandates of the NHRC, the NWC and the INC and identifies what each of them could and should do to improve the situation of women survivors of CRSV in general and to ensure the implementation of the HRC decision on the case of Ms. Fulmati Nyaya in particular. In this regard, Section F contains recommendations directed at each of these national institutions.

### **A.1. Brief background on the conflict in Nepal**

4. A decade long armed conflict, from 1996 to 2006, between the Communist Maoist party (CPN-M) and the GoN left long lasting adverse consequences for the country and its people. Until the 2006 Comprehensive Peace Accord (CPA), both governmental security forces and the Maoists were responsible for serious breaches of international humanitarian law and gross human rights violations, including unlawful killings, torture, enforced disappearances and sexual violence.<sup>3</sup>

### **A.2. Impact of the conflict on women in Nepal - systematic use of torture, including rape and other forms of sexual violence**

5. Gross human rights violations, including torture, rape and other forms of sexual violence, were committed on a widespread and systematic scale during the conflict by all the parties involved.<sup>4</sup> In particular, women faced sexual violence by security forces on the pretext of belonging to the warring sides or for having provided food and shelter to Maoist combatants. Women and girls were raped and sexually abused while in custody<sup>5</sup> and detention<sup>6</sup> and during joint operations by the army and the police;<sup>7</sup> if

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<sup>3</sup> Human Rights Watch (HRW), *Silenced and Forgotten: Survivors of Nepal's Conflict-era Sexual Violence*, 2014, available at [http://www.hrw.org/sites/default/files/reports/nepal0914\\_ForUpload\\_0.pdf](http://www.hrw.org/sites/default/files/reports/nepal0914_ForUpload_0.pdf), p. 23.

<sup>4</sup> Committee against Torture (CAT), *Concluding Observations on Nepal*, UN Doc. CAT/C/NPL/CO/2, 13 April 2007, para. 27; International Centre for Transitional Justice (ICTJ) and Centre for Research on Environment Health and Population Activities (CREPAH), *To Walk Freely with a Wide Heart*, 2014, available at <https://www.ictj.org/sites/default/files/ICTJ-Report-Nepal-Reparations-2014.pdf>, p. 7; ICTJ and Advocacy Forum, *Across the Lines, The Impact of Nepal's Conflict on Women*, 2010, available at <https://www.ictj.org/sites/default/files/ICTJ-Nepal-Across-Lines-2010-English.pdf>, p. 51; and Institute of Human Rights Communication, Nepal (IHRICON), *Sexual Violence in the "People's War": The Impact of Armed Conflict on Women and Girls in Nepal*, Kathmandu, 2007, p. 10.

<sup>5</sup> CAT, *Concluding Observations on Nepal*, op. cit., para. 27; and ICTJ and Advocacy Forum, *Across the Lines, The Impact of Nepal's Conflict on Women*, op. cit., p. 56.

<sup>6</sup> Office of the United Nations High Commissioner for Human Rights (OHCHR), *Nepal Conflict Report*, 2012, available at [https://www.ohchr.org/Documents/Countries/NP/OHCHR\\_Nepal\\_Conflict\\_Report2012.pdf](https://www.ohchr.org/Documents/Countries/NP/OHCHR_Nepal_Conflict_Report2012.pdf), p. 173.

<sup>7</sup> During 2001, the GoN decided to mobilise the Nepal Police and the Armed Police Force under the unified command of the Royal Nepal Army during joint operations. OHCHR, *Nepal Conflict Report*, op. cit., pp. 15 and 23; HRW, *Silenced and Forgotten: Survivors of Nepal's Conflict-era Sexual Violence*, op. cit., p. 11; and ICTJ and Advocacy Forum, *Across the Lines, The Impact of Nepal's Conflict on Women*, op. cit., p. 53.

suspected to be a Maoist or someone sympathetic towards the Maoists.<sup>8</sup> Maoist combatants have been reported to have raped women within their own cadres when women stood up to them or refused to support their party's activities.<sup>9</sup> However, institutional and systemic patriarchy along with weak implementation of the law were - and are - used as a tool to tolerate sexual violence against women during the armed conflict and afterwards in Nepal. Fourteen years after the adoption of the CPA, CRSV survivors continue to live without access to justice and redress for the harm suffered. Most of the victims were minors<sup>10</sup> when they were subjected to sexual violence and they are still suffering from long-term physical and mental consequences. They still wait for medical assistance,<sup>11</sup> access to free legal aid, and livelihood support,<sup>12</sup> among others.

## **B. Case study of Ms. Fulmati Nyaya**

6. This Section deals with the emblematic nature of the case of Ms. Fulmati Nyaya; provides a summary of the facts of the case and illustrates the findings of the HRC and the measures of reparation identified. The Section also refers to the status of the implementation (or lack thereof) of the decision of the HRC and the steps taken by Ms. Fulmati Nyaya to eventually obtain the enforcement of the decision on her case.

### **B.1. The emblematic nature of the case of Ms. Fulmati Nyaya**

7. The case of Ms. Fulmati Nyaya is illustrative of the widespread and systematic use of rape and other forms of sexual violence during the period of the armed conflict in Nepal. Several international human rights mechanisms and Non-governmental organizations (NGOs) have recognized the existence of a systematic practice of unlawful detention and arbitrary arrests<sup>13</sup> followed by torture and rape. In its last concluding observations on Nepal, the HRC noted with concern "the persistence of

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<sup>8</sup> HRW, *Silenced and Forgotten: Survivors of Nepal's Conflict-era Sexual Violence*, op. cit., p. 8.

<sup>9</sup> *Ibid.*

<sup>10</sup> Committee on the Rights of the Child (CRC), *Concluding Observations on Nepal*, UN Doc. CRC/C/NPL/CO/3-5 of 8 July 2016, para. 34 (d); and OHCHR, *Nepal Conflict Report*, 2012, op. cit., p. 23.

<sup>11</sup> HRW, *Silenced and Forgotten: Survivors of Nepal's Conflict-era Sexual Violence*, op. cit., p. 8.

<sup>12</sup> UN Security Council, Report of the Secretary-General on conflict-related sexual violence, 23 March 2018, UN Doc. S/2018/250, para. 108.

<sup>13</sup> HRC, *Concluding Observations on Nepal*, UN Doc. CCPR/C/NPL/CO/2 of 28 March 2014, available at: <https://www.un.org/sexualviolenceinconflict/wp-content/uploads/2019/04/report/s-2019-280/Annual-report-2018.pdf>, para. 11.

patriarchal attitudes and deep-rooted stereotypes that perpetrate discrimination against women in all spheres of life”.<sup>14</sup> Furthermore, Ms. Fulmati Nyaya pertains to the indigenous Tharu community, which was disproportionately affected during the conflict.<sup>15</sup> Several studies reveal that women pertaining to indigenous peoples or ethnic groups were highly affected and subjected to violations at the hands of governmental authorities on different occasions during the conflict.<sup>16</sup> This was also underlined by the Special Rapporteur on Violence against Women, its Causes and Consequences (SR on VAW), who noted that “[v]iolence against women disproportionately affects women and girls who face intersecting and multiple forms of discrimination, such as [...] Tharu women”.<sup>17</sup>

8. Many women were not able to communicate the sufferings generated by rape and other forms of sexual violence even to their family members,<sup>18</sup> let alone reporting the events to the authorities. Although many women experienced a deep sense of injustice,<sup>19</sup> they could not report the violence due to the lack of information on the available remedies and other legal obstacles, as well as to fear and stigma.<sup>20</sup> Furthermore, the SR on VAW expressed a particular concern on the impact on women and girls who were victims of sexual violence, rape and torture during the conflict. She also noted with alarm the underreporting of the cases of CRSV to the Truth and Reconciliation Commission (hereinafter, “TRC”),<sup>21</sup> a transitional justice mechanism set up in 2015 to investigate on the gross human rights violations that occurred during the conflict.

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<sup>14</sup> *Ibid.*, para. 8.

<sup>15</sup> Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples, *Report on the Situation of Indigenous Peoples in Nepal*, UN Doc. A/HRC/12/34/Add.3 of 20 July 2009, para. 8; ICTJ, *To Walk Freely with a Wide Heart*, op. cit., p. 7; and ICTJ and Advocacy Forum, *Across the Lines, The Impact of Nepal's Conflict on Women*, op. cit., p. 50.

<sup>16</sup> See Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples, *Report on the Situation of Indigenous Peoples in Nepal*, op. cit., para. 37. The military officials designated to patrol the Chitwan National Park's premises were reported to sexually abuse indigenous women.

<sup>17</sup> Special Rapporteur on Violence against Women, its Causes and Consequences (SR on VAW), *Report on country visit to Nepal*, UN Doc. A/HRC/41/42/Add.2 of 19 June 2019, available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G19/176/95/PDF/G1917695.pdf?OpenElement>, para. 65.

<sup>18</sup> HRW, *Silenced and Forgotten: Survivors of Nepal's Conflict-era Sexual Violence*, op. cit., p. 8.

<sup>19</sup> *Ibid.*, p. 13.

<sup>20</sup> ICTJ, *We Cannot Forget: Truth and Memory in Post Conflict Nepal*, 2017, available at <https://www.ictj.org/sites/default/files/We%20Cannot%20Forget%20Book.pdf>, p. 23.

<sup>21</sup> SR on VAW, *Report on country visit to Nepal*, op. cit., para. 58.

9. Despite the above-mentioned challenges, Ms. Fulmati Nyaya opted to bring forward her case and lodge an application before an international human rights mechanism (i.e. the HRC). Although the HRC issued a favourable decision in March 2019 and indicated the measures of reparation she is entitled to, as it will be further illustrated below, those measures have not been implemented as of today. The lack of willingness of the State to implement the decisions of the HRC shows the rampant impunity that continues to be tolerated by the State, notwithstanding the repeated calls and recommendations received from international human rights mechanisms and institutions. The case therefore truly illustrates the existing loopholes in the justice system and in the relevant domestic legislation, as well as the position of women and CRSV survivors in the present society in Nepal.

## **B.2. Summary of the facts of the case**

10. On 2 April 2002, Ms. Fulmati Nyaya, a 14-year-old girl belonging to the indigenous Tharu community of Nepal, was arbitrarily arrested from her home in Kailali District; within the backdrop of the decade long internal armed conflict. Around 300 members of the Armed Police Force (APF) and Royal Nepalese Army (RNA) entered her village and arrested her on the pretext of looking for Maoist rebels. Post-arrest, Ms. Fulmati was inappropriately touched and sexually assaulted by a group of soldiers. While detained, at the army barracks in Teghari, she was repeatedly raped and subjected to sexual, verbal and physical violence under the pretext of extracting her a confession. As a minor, not only was she raped and sexually abused, but also forced to perform labour within the barracks. Nine days after her arrest, she was transferred to the Bakimalika Battalion of the APF in Banbehda. Detention conditions at Teghari and Bakimalika were inhumane.

11. On 14 June 2002, she was released, while she was forced to regularly report to the barracks until March 2003 and to inform the police about what the Maoists were doing. As a consequence of the severe torture inflicted on her, Ms. Fulmati Nyaya suffers from grave physical and psychological ailments. Moreover, she became a social outcast and her formal education was hindered, as she had to stop going to school. When her husband accidentally learned about the sexual abuses she suffered

before meeting him, he repudiated her and sent her back to her place of origin, refusing to have contacts with her for about two years.

12. In January 2011, Ms. Fulmati complained about her arbitrary detention and ill-treatment before the Chief District Officer in Kailali district, after learning about the possibility to apply for interim relief but she has not received any such relief to date. As will be explained in the Sections below, the survivors of the CRSV, including Ms. Fulmati Nyaya, have not been recognized as the victims of the internal conflict in Nepal and been excluded from the support from the interim relief packages of the GoN. After knowing about the possibility to lodge a criminal complaint for the harm suffered, on 17 February 2014, Ms. Fulmati Nyaya went to the Kailali district Police Office to file a First Information Report (FIR). However, the FIR was not registered, in application of the 35-day statute of limitation for reporting the crime of rape established pursuant to Section 11 of the Criminal Code (Muluki Ain) in force at the time. On 17 February 2014, pursuant to the Compensation Relating to Torture Act (CRTA), Ms. Fulmati Nyaya, with the help of a legal representative also tried to file a claim for compensation before the Kailali District Court. The latter refused to register the claim as it allegedly did not comply with the 35-day statutory limitation established under domestic legislation. Indeed, Ms. Fulmati Nyaya did not submit her complaint immediately after her release, as she was struggling with her physical and psychological trauma and was paralyzed by stigma and fear. It must be further stressed that the CRTA does not provide for criminal accountability but only compensation of a maximum of approximately US\$ 1,266 (100,000 Nepali rupees). Nevertheless, Ms. Fulmati Nyaya did not obtain even this meagre compensation. On 11 April 2014, Ms. Fulmati filed a writ of mandamus before the Supreme Court of Nepal requesting the non-application of the 35-day statute of limitation. The Supreme Court issued a show cause order, asking the Ministry of Home Affairs, Nepal Police Headquarters in Naxal, the District Police Office in Kailali and the District Administration Office in Kailali to provide a reply within 15 days (i.e. by 2 May 2014). None of the respondents respected the deadline and the Supreme Court fixed a second deadline for 2 June 2014. The Police Headquarters and the Ministry of Home Affairs submitted rejoinders respectively on 5 and 19 May 2014 and contended the admissibility of the claims, alleging that the 35-day statute of

limitations must be applied and precludes the carrying out of investigations. The Supreme Court further extended the deadline for the reply from the District Police Office in Kailali, and the District Administration Office in Kailali to 3 July 2014.

13. Nepal having acceded to the International Covenant on Civil and Political Rights (ICCPR)<sup>22</sup> and its First Optional Protocol<sup>23</sup> on 14 May 1991, persons or groups of persons who consider that their rights pursuant to the ICCPR have been violated can lodge communications to the organ monitoring the ICCPR, that is the HRC.<sup>24</sup> On 20 June 2014, Ms. Fulmati Nyaya, with the support of TRIAL International, therefore lodged a communication to the HRC.

### **B.3. The Human Rights Committee's decision on the case *Fulmati Nyaya v. Nepal***

14. The HRC issued its decision on 18 March 2019, finding Nepal responsible for the violation of several of the rights enshrined in the ICCPR,<sup>25</sup> including the prohibition of torture,<sup>26</sup> cruel, inhuman or degrading treatment,<sup>27</sup> forced labor,<sup>28</sup> and the right to liberty and security.<sup>29</sup> In particular, the HRC found violations of Arts. 7 and 24 (1); Arts. 2 (1) and 3, read alone and in conjunction with Arts. 7, 24 (1) and 26; Art. 8 (3), read alone and in conjunction with Arts. 7 and 24 (1); Art. 9, read alone and in conjunction with Arts. 2 (3) and 24 (1); Arts. 17 and 23 (1); and Art. 2 (3), read alone and in conjunction with Arts. 3, 7, 9, 24 and 26, of the ICCPR.

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<sup>22</sup> ICCPR, adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entered into force on 23 March 1976, in accordance with Article 49.

<sup>23</sup> Optional Protocol to the ICCPR. Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entered into force on 23 March 1976, in accordance with Article 9.

<sup>24</sup> The HRC is the body of [independent experts](#) that monitors implementation of the [International Covenant on Civil and Political Rights](#) by its States parties.

<sup>25</sup> HRC, Case *Fulmati Nyaya v. Nepal*, Views of 18 March 2019, para. 9.

15. In accordance with Art. 2 (3) (a) of the ICCPR, the HRC declared that Nepal is under an obligation to provide Ms. Fulmati Nyaya with an effective remedy, including to:

- conduct a thorough and effective investigation into the facts surrounding the arrest, detention and rape of Ms. Nyaya and the treatment she suffered in detention;
- prosecute, try and punish those responsible for the violations committed;
- provide Ms. Nyaya with detailed information about the results of the investigation;
- ensure that any necessary and adequate psychological rehabilitation and medical treatment is provided to Ms. Nyaya free of charge; and
- provide effective reparation, adequate compensation and appropriate measures of satisfaction to Ms. Nyaya for the violations suffered, including arranging an official apology in a private ceremony.<sup>30</sup>

16. The HRC further recalled that the State party is also under an obligation to take steps to prevent the occurrence of similar violations in the future, by ensuring that its legislation:

- i. criminalizes torture and provides for appropriate sanctions and remedies commensurate with the gravity of the crime;
- ii. adapts the definition of rape and other forms of sexual violence in accordance with international standards;
- iii. guarantees that cases of rape, other forms of sexual violence and torture give rise to a prompt, impartial and effective investigation;
- iv. allows for criminal prosecution of those responsible for such crimes; and
- v. removes obstacles that hinder the filing of complaints and effective access to justice and compensation for victims of rape and other forms of sexual violence against women and girls in the context of the Nepali armed conflict, as forms of torture, including a significant increase of the statute of limitations commensurate with the gravity of such crimes.<sup>31</sup>

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

<sup>31</sup> *Ibid.*

17. Finally, the HRC held that it “wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee’s Views”<sup>32</sup> and it requested Nepal to “publish the present Views and disseminate them widely in the official languages of the State party”.<sup>33</sup>

18. In a separate press release, the Office of the High Commissioner for Human Rights (“OHCHR”) emphasised the importance of this decision and called on the GoN to implement the HRC Views without delay.<sup>34</sup>

19. The HRC requested Nepal to send, within 180 days from the notification of the decision (i.e. by 8 December 2019), information about the measures taken to give effect to the HRC Views and it also requested Nepal to “publish the present Views and disseminate them widely in the official languages of the State party”.<sup>35</sup> More than twenty months have passed since the adoption of the HRC decision, but not a single step has been taken by Nepalese authorities to ensure the implementation of the Views on the case of Ms. Fulmati Nyaya.

20. On the contrary, Ms. Fulmati Nyaya took several steps to obtain the implementation of the decision of the HRC on her complaint. On 2 March 2020, letters were submitted on her behalf by TRIAL International to numerous Nepali authorities, namely, the Office of the Prime Minister; the National Human Rights Commission (NHRC), the Ministry of Law, Justice and Parliamentary Affairs and the Ministry of Health. None of these authorities ever replied to Ms. Fulmati Nyaya’s letters.

21. Moreover, despite the continuous follow-up efforts by the representatives of Ms. Nyaya, Nepalese authorities neither contacted Ms. Fulmati Nyaya, nor informed her about her rights pursuant to the decision of the HRC nor implemented any of the measures indicated by the HRC. Ms. Nyaya continues to suffer from the

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<sup>32</sup> *Ibid.*, para. 10.

<sup>33</sup> *Ibid.*

<sup>34</sup> UN experts: Nepal must change its laws to let victims of human rights violations access justice, available at <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24631&LangID=E>.

<sup>35</sup> HRC, *Case Fulmati Nyaya v. Nepal*, op. cit., para. 10.

consequences of the gross human rights violations that she has been subjected to and she has not been granted access to justice or redress.

22. On 13 March 2020, Ms. Fulmati Nyaya, with the support of TRIAL International, submitted a “follow-up to Views” report to the HRC, illustrating the lack of implementation of the measures indicated and describing the steps that she and her representatives have taken to urge Nepalese authorities to implement the decision.

23. As a State party to the ICCPR and its first Optional Protocol, Nepal has an obligation to act in accordance with the provisions of the ICCPR and implement the decisions issued by the HRC. It is noteworthy that, in the Views rendered on 17 March 2017 on the case *Purna Maya v. Nepal*, the HRC held that the gang rape to which Ms. Purna Maya was subjected had a discriminatory purpose.<sup>36</sup> To reach such conclusion, the HRC took into consideration the State party’s general failure to investigate on such crimes and prosecute and sanction those responsible, among others.<sup>37</sup> Indeed, also the measures indicated by the HRC in the case *Purna Maya* have not been implemented as of today.

24. The situation described reflects a troubling reality: on the one hand, hundreds of other Nepalese women, such as Ms. Fulmati Nyaya and Ms. Purna Maya, have been subjected to rape and other forms of sexual violence during the conflict and are equally confronted with the impossibility to obtain adequate redress for the violations suffered and to see those responsible held accountable. On the other hand, in cases such as those of Ms. Nyaya and Ms. Maya, which were brought as individual complaints before international human rights mechanisms, the decisions rendered by the latter remain unimplemented, in breach of Nepal’s international undertakings.

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<sup>36</sup> HRC, Case *Purna Maya v. Nepal*, Views of 17 March 2017, para. 12.4.

<sup>37</sup> *Ibid.*

## C. National laws and mechanisms to address conflict-related sexual violence

### C.1. Shortcomings in the domestic legal framework

25. When the crimes against Ms. Fulmati Nyaya were perpetrated, the applicable criminal legislation was Muluki Ain 2020 (National Criminal Code 1964) and it established a 35-day statute of limitation to lodge a criminal complaint on the crimes of sexual violence, including rape.<sup>38</sup> Similarly, the Compensation Relating to Torture Act maintained a 35-day statute of limitation to apply for compensation in cases of torture.<sup>39</sup> These provisions have been found in breach of international law.<sup>40</sup>

26. On 17 August 2018, National Penal Code entered into force and it sets a 1-year statute of limitations for criminal proceedings in cases of sexual violence<sup>41</sup> and six months in cases of torture.<sup>42</sup> These statutes are not commensurate to the gravity of the crimes concerned and do not reflect the difficulties faced by victims in reporting the incidents that occurred during the conflict.<sup>43</sup> The only exception to this statute of limitations is for the offence of incest where there is no limitation in filing the complaint.<sup>44</sup> In any case, the applicable law does not separately encompass provisions for access to justice concerning conflict-era crimes, as the National Penal Code does not apply retroactively.

27. Pursuant to the Rome Statute of the International Criminal Court, under certain circumstances rape and other forms of sexual violence (including rape, sexual slavery, enforced prostitution, forced pregnancy, forced sterilization, and other forms of sexual

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<sup>38</sup> *Muluki Ain 2020* (National Crime Code 1963), Chapter on Rape, No. 11.

<sup>39</sup> *Compensation Relating to Torture Act*, 2053 (1996), Sec 5 (1). On the incompatibility between the Compensation relating to Torture Act and international law, see, among others, HRC, Case *Bagale v. Nepal*, Views of 2 November 2020, para. 6.5.

<sup>40</sup> For the cases of torture: HRC, Case *Maharjan v. Nepal*, Views of 19 July 2012, para. 7.6; and Case *Giri v. Nepal*, Views of 24 March 2011, para. 6.3; Case *Sherpa v. Nepal*, Views of 4 January 2016, para. 10. See also HRC, *General Comment No. 31 on the Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, of 26 May 2004, para. 18; for the cases of sexual violence, HRC, *Purna Maya v. Nepal*, op. cit., para. 12.5.

<sup>41</sup> National Penal Code 2017, Section 229(2).

<sup>42</sup> *Ibid.*, Section 170 (2).

<sup>43</sup> SR on VAW, *Report on country visit to Nepal*, op. cit., para. 35.

<sup>44</sup> *Muluki Aparadh Samhita 2074* (National Penal Code 2017), Sec 229 (1).

violence of a comparable gravity)<sup>45</sup> may amount to genocide, crimes against humanity or war crimes.<sup>46</sup> Although the National Penal Code (2017), addresses a number of sexual offences (such as incest, sexual intercourse with a detainee, and child abuse), rape and forced abortion are the only forms of sexual violence as prohibited under international law that are explicitly codified under the domestic legal framework.<sup>47</sup> Furthermore, Section 38 (u) of the National Penal Code also determines that if any offence committed was a crime against humanity it will be deemed an aggravating circumstance of that crime. However, the National Penal Code does not provide any further details and it is unclear if rape can be considered a crime against humanity provided the international standards are fulfilled. In addition, non-ratification of the Rome Statute of the International Criminal Court and the lack of criminalization of rape as genocide, war crime or crime against humanity by the National Penal Code of Nepal has enabled the culture of impunity and obstructs access to justice for survivors.

28. As illustrated above, with the impossibility of initiating formal criminal procedures against CRSV due to lack of criminalization of sexual violence as genocide, war crimes and crimes against humanity, the perpetrators are not held accountable and are enjoying impunity. Pursuant to international law, crimes against humanity, war crimes and genocide are imprescriptible. Notably, all cases of CRSV, despite the circumstance it was committed, must be criminalized and duly prosecuted. Furthermore, under international law, gross human rights violations should not be

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<sup>45</sup> Rome Statute of the International Criminal Court, Article 7(1)(g) provides that rape, sexual slavery, enforced prostitution, forced pregnancy, forced sterilization, or any “other form of sexual violence of comparable gravity” can amount to crimes against humanity “when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack”. Rape, sexual slavery, forced prostitution, forced pregnancy, forced sterilization, or any “other form of sexual violence also constituting a grave breach of the Geneva Conventions” would be acts amounting to war crimes when committed in the context of and associated with an international armed conflict (Article 8 (2)(b)(xxii)) or a non-international armed conflict ((Article 8 (2)(e)(vi)-6)).

<sup>46</sup> The Elements of Crimes of the Rome Statute of the International Criminal Court provide that perpetrators of crimes of sexual violence are those who have committed “an act of a sexual nature against one or more persons or caused such person or persons to engage in an act of a sexual nature by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment or such person’s or persons’ incapacity to give genuine consent.” (Article 8(2)(b)(xxii)-6 in relation to war crimes during international armed conflicts, and Article 8(2)(e)(vi)-6 in relation to war crimes during non-international armed conflicts. Likewise, Article 7(1)(g)-6 refers to sexual violence as a crime against humanity). In contrast, Nepalese legislation does not specifically define the meaning of sexual violence.

<sup>47</sup> Paragraph 2 of Section 188 of the National Penal Code (2017) prohibits forced abortion by stipulating that “no person shall cause a pregnant woman to abort, by coercing, threatening, alluring or inducing her to so abort.” In addition, Section 189 allows the termination of pregnancy up to 18 weeks in cases of rape (instead of 12 in situations where the pregnancy is not the result of a rape).

subjected to the statute of limitation, or, where they are foreseen and applied, they should be long and commensurate to the extreme gravity of the crime. Nepal, in these sense, remains in contravention with international standards, which provides that a “statute of limitations shall not apply to gross violations of human rights”,<sup>48</sup> as well as with the Supreme Court’s jurisprudence, in the case of *Madhav Kumar Basnet v Nepal Government*, whereby the Court found that the application of a statutory limitation on gross human rights violations constitutes a violation of international standards and directed the GoN to amend the applicable legislation.<sup>49</sup>

29. When crimes under international law and gross human rights violations are concerned, international law requires a ‘comprehensive reparative concept that entails restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition [...] Reparation must be adequate, effective and comprehensive [...] monetary compensation alone is not be sufficient redress for a victim of torture and ill treatment’.<sup>50</sup> The same holds true in cases of sexual violence.<sup>51</sup> However, no victim of CRSV in Nepal has been able to obtain compensation or any other measure of reparation, as shown by the case of Ms. Fumati Nyaya.

30. In the case of *Fulmati Nyaya*, the HRC requested Nepal to “remove obstacles that hinder the filing of complaints and effective access to justice and compensation for victims of rape and other forms of sexual violence against women and girls in the context of the Nepali armed conflict... by significantly increasing the statute of limitations commensurate with the gravity of such crimes”.<sup>52</sup> However, as of the day of writing this report, no change in the provisions concerning the statute of limitations both for criminal proceedings and compensation has been made.

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<sup>48</sup> UN Basic Principles and Guidelines on the Rights to a Remedy and Reparation, General Assembly Resolution No. 60/147 of 16 December 2005, Principle 6.

<sup>49</sup> Supreme Court of Nepal, *Madhav Kumar Basnet v. Nepal Government*, 2 January 2014 (069-WS-0057).

<sup>50</sup> CAT, *General Comment No. 3*, UN Doc. CAT/C/GC/3 of 16 November 2012, paras. 2, 6 and 9.

<sup>51</sup> Committee on the Elimination of All Forms of Discrimination against Women (CEDAW), Case *Karen Vertido v. The Philippines*, decision of 16 July 2010, para. 8.9.

<sup>52</sup> HRC, Case *Fulmati Nyaya*, op. cit., para. 9.

31. Furthermore, the existing legislation is restrictive in addressing the notion of reparation for victims of rape and other forms of sexual violence. The law does not envisage other measures of reparation required under international law (including rehabilitation, satisfaction and guarantee of non-recurrence) besides compensation.<sup>53</sup> With regard to pecuniary compensation, the law<sup>54</sup> uses the overly vague term “reasonable compensation”, without determining what this actually means or establishing precise criteria to calculate the amount to be awarded to the victims.

## C.2. Procedural hurdles

32. During the conflict, the precarious security situation and the ongoing violence prevented victims of CRSV from seeking justice and redress.<sup>55</sup> Beyond the legal loopholes, survivors have also encountered multiple procedural hurdles, which concretely prevented their access to justice. Pursuant to the applicable rules, the registration of an FIR before the Nepal Police is required to trigger investigation and prosecution.<sup>56</sup> In several instances of rape or other forms of sexual violence, the Police refuses register the FIR because there is no medical report, while the doctor refuses to perform a forensic examination in the absence of a FIR.<sup>57</sup>

33. Furthermore, “complicated and expensive legal processes, where confidentiality is lacking, prevent women from seeking justice”<sup>58</sup>. The OHCHR also pointed out that “during the conflict, access to legal aid was limited or non-existent.”<sup>59</sup> Pursuant to the applicable legislation, survivors must register the FIR to begin the national legal actions. However, the registration of the FIR acts as a deterrent for many survivors to lodge their cases as many have been victimized by the APF and the RNA, as a result of which the Police would most likely refuse to register such complaints. In the past, CRSV survivors, including Ms. Fulmati, who have attempted to register an FIR, saw their requests systematically rejected. Sometimes this was justified with the alleged application of the above-mentioned statute of limitation; some others, they

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<sup>53</sup> *Muluki Aparadh Samhita 2074* (National Penal Code 2017), Sec 228.

<sup>54</sup> *Ibid.*

<sup>55</sup> HRC, *Case, Fulmati Nyaya*, op. cit., para. 7.9.

<sup>56</sup> This was previously set under Sec. 3, Government Cases Act, 2049 (1992). Currently it is established under Sec. 5, the Criminal Procedure Code (Act), 2017.

<sup>57</sup> ICTJ and Advocacy Forum, *Across the Lines: The Impact of Nepal's Conflict on Women*, op. cit., p. 166.

<sup>58</sup> OHCHR, *Nepal Conflict Report*, op. cit., p. 166

<sup>59</sup> *Ibid.*, p. 167.

were told that their cases would not be investigated by the police, but rather fell under the competence of the so-called “transitional justice mechanisms”; and in many other cases, no reason was given to justify the refusal to register the FIRs.

#### **D. Transitional justice mechanisms and conflict-related sexual violence**

34. Two transitional justice mechanisms, namely the TRC and the ‘Commission on the Investigation of the Enforced Disappeared Persons’ (CIEDP) were established in 2015, pursuant to the Truth and Reconciliation Commission Act (TRC Act), that came into force in 2014. On 26 February 2015, the Supreme Court declared some provisions of the TRC Act contrary to the Interim Constitution and Nepal’s international obligations.<sup>60</sup> Among others, the provision allowing amnesty for perpetrators of gross human rights violations was declared at odds with international law and the Constitution of the country. Accordingly, the Supreme Court ordered the amendment of the TRC Act. However, the GoN immediately lodged a petition to overturn the ruling. That petition was rejected by the Supreme Court on 26 April 2020. Despite this, at the time of writing, the TRC Act has not been amended. Hence, the applicable legislation remains severely flawed.

35. Furthermore, the acting Commissioners on these two Commissions were appointed through political influence; without appropriate consultations with the victims, discarding the opinions of national stakeholders and the concerns expressed by the international community, including the joint communication made to the GoN by several United Nations Special Procedures on 12 April 2019.<sup>61</sup>

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<sup>60</sup> Amnesty International, *Nepal: Supreme Court’s decision reaffirms the need to amend transitional justice law*, 1 May 2020, available at <https://www.amnesty.org/en/latest/news/2020/05/nepal-supreme-court-decision-reaffirms-need-to-amend-transitional-justice-law/>.

<sup>61</sup> See Joint Communication From Special Procedures (Working Group on Enforced or Involuntary Disappearances; the Special Rapporteur on extrajudicial, summary or arbitrary executions; the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment; the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence and the Special Rapporteur on violence against women, its causes and consequences), 12 April 2019, OL NPL 1/2019, available at [https://www.ohchr.org/Documents/Issues/Truth/OL\\_NPL\\_1\\_2019.pdf](https://www.ohchr.org/Documents/Issues/Truth/OL_NPL_1_2019.pdf).

36. Although the TRC Act lists ‘rape and sexual violence’ as gross human rights violations,<sup>62</sup> it does not provide any definition as to what exactly constitutes rape and other forms of sexual violence – nor does it provide any rule to overcome the applicable statute of limitations, thus determining that perpetrators of the crimes concerned enjoy impunity.

37. Between 2015 and 2017, both Commissions registered 63,000 complaints of violations from all over the country.<sup>63</sup> However, only 300 complaints concerned cases of sexual violence.<sup>64</sup> The registration of complaints was conducted in the absence of an adequate witness protection programme and lacking technical knowledge and expertise.<sup>65</sup>

38. The commissions only launched some preliminary investigations, but their mandate at that time expired before they could come up with any meaningful findings, publish a report, formulate any recommendation, or grant redress to victims. Despite the extension in their mandate, the Commissions have not taken any relevant step in this regard. In her report on the visit to Nepal, the SR on VAW expressed her concern because the transitional justice mechanisms have not been fully functioning and have faced considerable challenges.<sup>66</sup> She also noted that many victims and survivors of rape or other forms of sexual violence did not register complaints, mostly due to fear of repercussions and that, in general, the existing legal framework did not allow them to have access to compensation and other forms of reparation.<sup>67</sup> Furthermore, the victims could not register the complaints due to reprisals against and intimidation of persons reporting acts of torture and the lack of witness protection.<sup>68</sup>

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<sup>62</sup> The Enforced Disappearances Enquiry, Truth and Reconciliation Commission Act, 2071 (2014), Sec 2(j) (6).

<sup>63</sup> SR on VAW, *Report on the Visit to Nepal*, op. cit., para. 58.

<sup>64</sup> *Ibid.*

<sup>65</sup> See TRIAL 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*, available at: [https://trialinternational.org/wp-content/uploads/2016/05/TRC\\_Act\\_UN\\_Submission\\_AF\\_TRIAL\\_REDRESS\\_June2014\\_.pdf](https://trialinternational.org/wp-content/uploads/2016/05/TRC_Act_UN_Submission_AF_TRIAL_REDRESS_June2014_.pdf)

<sup>66</sup> *Ibid.*, para. 57.

<sup>67</sup> *Ibid.*

<sup>68</sup> Convention Against Torture (CAT), *Concluding Observations on Nepal*, doc. CAT/C/NPL/CO/2 of 22 April 2005, para 28 (a) and (b)

39. At the time of writing, CRSV survivors have not received any solace from the TRC. On the contrary, for many of them, even the attempt to engage with transitional justice mechanisms has been re-traumatizing. Moreover, the HRC in its jurisprudence on various cases from Nepal, including the decision on the case *Fulmati Nyaya* has stated that transitional justice mechanisms cannot serve to dispense with the criminal prosecution of serious human rights violations and hence would not be an effective remedy.<sup>69</sup> The HRC has further stated that the remedies offered must be both effective and available, and must not be unduly prolonged.<sup>70</sup>

40. Even prior to this unfortunate situation, CRSV survivors had been left out of the interim relief packages (IRP) designed for “conflict victims”. The IRP<sup>71</sup> was designed for “conflict victims” and not necessarily victims of gross violations of human rights or international humanitarian law. As a result, access to IRP has been limited to relatives of those who have been killed or to those injured as a consequence of the legitimate use of force while acting as a combatant as opposed to those who have been killed and injured as a result of human rights violations.<sup>72</sup> This interpretation has arbitrarily left out survivors of CRSV and torture from accessing State-sponsored IRP.<sup>73</sup>

41. The Nepalese National Action Plan (NAP) was developed, in the lead of Ministry of Peace and Reconstruction, in order to implement United Nations Security Council Resolutions 1325<sup>74</sup> and 1820<sup>75</sup> for the period of 2011 to 2016. The drafting

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<sup>69</sup> HRC, Case *Fulmati Nyaya v Nepal*, op.cit., para 6.5;

<sup>70</sup> HRC, Case *Yuba Kumari Katwal v. Nepal*, decision on admissibility of 10 October 2012, para. 6.4 (emphasis added). See also HRC, Case *Sobhraj v. Nepal*, views of 27 July 2010, para. 6.3; Case *Giri v. Nepal*, views of 24 March 2011, para. 6.3; and Case *Maharjan v. Nepal*, views of 19 July 2012, para. 7.4.

<sup>71</sup> In June 2007, the GoN decided to constitute a Special Task Force to collect the data of the persons, families and structures affected by conflict. On the basis of the findings of the Task Force, on 25 April 2008, the Council of Ministers adopted the Standards for Economic Assistance and Relief for Conflict Victims, 2008. See Advocacy Forum, *Discrimination and Irregularities. The Painful Tale of Interim Relief in Nepal*, 2010, available at: [http://www.advocacyforum.org/downloads/pdf/publications/Discriminations\\_and\\_Irregularities](http://www.advocacyforum.org/downloads/pdf/publications/Discriminations_and_Irregularities).

<sup>72</sup> ICTJ, *Relief, Reparations, and the Root Causes of Conflict in Nepal*, 2012, available at <https://www.ictj.org/publication/relief-reparations-and-root-causes-conflict-nepal>.

<sup>73</sup> SR on VAW, *Report on country visit to Nepal*, op. cit., para. 60 and 61.

<sup>74</sup> The Security Council adopted resolution (S/RES/1325) on women and peace and security on 31 October 2000. The resolution reaffirms the important role of women in the prevention and resolution of conflicts, peace negotiations, peace-building, peacekeeping, humanitarian response and in post-conflict reconstruction and stresses the importance of their equal participation and full involvement in all efforts for the maintenance and promotion of peace and security. Retrieved from <https://www.un.org/womenwatch/osagi/wps/>.

<sup>75</sup> This Security Council resolution recognized for the first time conflict-related sexual violence as a tactic of warfare and as a serious threat to international peace and security. The resolution calls for an end to

process of the NAP was led by the Ministry of Peace and Reconstruction, other governmental agencies, development partners, donor organizations, international NGOs, and civil society. The NAP focused on five pillars for action: women's participation in all decision-making levels, protection of women's rights, prevention of the violation of these rights, and promotion of gender equality among stakeholders, ensuring that relief, recovery and justice programmes meet women's needs, and resource mobilization and monitoring of the gender mainstreaming activities within all programs.<sup>76</sup> While the NAP progressed in achieving increased women's participation at certain levels,<sup>77</sup> it failed in the prevention of violence.<sup>78</sup> Similarly, it also failed in ensuring relief, recovery and justice programmes which could have benefitted the survivors of the CRSV, including Ms. Fulmati Nyaya. After the end of NAP I in 2016, until August 2019 there was a vacuum in the National Action Plans for the women who suffered the conflict.

42. Since August 2019, the United Nations Women (UN Women) is supporting the Ministry of Home Affairs to design the second phase of NAP Pursuant to this, the GoN also presented a draft of the National Action Plan II(NAP-II)<sup>79</sup> for the implementation of UN Security Council Resolutions 1325 and 1820. The draft NAP-II enshrines the strategic objective of women participation,<sup>80</sup> security and prevention,<sup>81</sup> and relief and recovery of the women,<sup>82</sup> including the victims of CRSV and other conflict-affected women. Despite this effort of the GoN, the draft NAP-II does not include an objective reflecting the responsibility of the State to put an end to impunity and to prosecute those responsible for crimes relating to sexual or other forms of violence against

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widespread conflict-related sexual violence, the accountability of all actors to counter impunity for such crimes and calls on the United Nations to develop appropriate mechanisms to provide protection from violence and respond to sexual violence and other forms of violence against civilians. Retrieved from <https://peacemaker.un.org/node/1919>.

<sup>76</sup> Submitted by 1325 Action Group, Desk Review Report of NAP Implementation on UNSCRs 1325 and 1820 related documents, Uploaded in October 2018, available at: [https://saathi.org.np/wp-content/uploads/2018/10/Desk-Review-Report\\_NAP.pdf](https://saathi.org.np/wp-content/uploads/2018/10/Desk-Review-Report_NAP.pdf), p. 8.

<sup>77</sup> The achievements of NAP are women's increased participation in the UN Peacekeeping Missions; development of Gender and Inclusion Policy by the Election Commission; development of the Gender Policy 2012 by the Nepal Police. See Punam Yadav, '1325 – is that a taxi number? Implementation of the National Action Plan on 1325 and 1820 in Nepal', 3 May 2017, available at <https://blogs.lse.ac.uk/wps/2017/05/03/1325-is-that-a-taxi-number-implementation-of-the-national-action-plan-on-1325-and-1820-in-nepal-punam-yadav-42017/>

<sup>78</sup> *Ibid.*

<sup>79</sup> Second National Action Plan (NAP-II), available at <https://moha.gov.np/en/post/second-national-action-plan-nap-ii-preliminary-draft> (Nepali version).

<sup>80</sup> *Ibid.*, Objective 1 of the NAP-II.

<sup>81</sup> *Ibid.*, Objective 2 of NAP-II.

<sup>82</sup> *Ibid.*, Objective 3 of NAP-II.

women and girls. Further to this, coupled with the described flaws of the legislation, NAP II fails to address the grave existing accountability gap. Therefore, NAP I failed in addressing the needs of the victims of rape or other forms of sexual violence of the conflict and NAP II, though still at the preparatory phase, excludes from its scope the prosecution of the perpetrators of CRSV. The NAPs hence cannot be considered as an effective remedy to Ms. Fulmati Nyaya and other victims of the CRSV.

43. In its Views on the case of *Fulmati Nyaya*, the HRC stressed that the failure to investigate and establish accountability for CRSV violates, among others, the right not to be subjected to gender discrimination.<sup>83</sup> Further, it should be noted that, since the national law addressing criminal responsibility on CRSV is flawed and the available criminal laws barred the survivors in the registration of the FIR as explained above; domestic courts subsequently failed to hold the perpetrators of CRSV accountable. No case of CRSV has been adjudicated by the Supreme Court of Nepal so far. The OHCHR report described that "...the extreme violence that women suffered during conflict does not arise solely out of the special conditions of war. Rather, such violence is directly related to the violence that is experienced by women during peace time".<sup>84</sup> The report referred to various studies to illustrate that Nepal had a strong patriarchal element deeply rooted in society that not only caused gender discrimination but also tolerated and legitimized sexual violence against women.<sup>85</sup> The country still has patriarchal elements that normalizes violence.<sup>86</sup>

#### **E. The role of constitutional bodies with regard to conflict-related sexual violence cases**

44. Each constitutional body has the power and mandate to fulfil its constitutional obligations, especially those concerning to social inclusion and justice. Constitutional commissions are autonomous bodies and therefore have the power to monitor Nepal's adherence to international law, analyse current injustices and make recommendations to the GoN accordingly. For the same reasons, each of these institutions can play a

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<sup>83</sup> HRC, Case *Fulmati Nyaya*, op. cit., para. 7.3.

<sup>84</sup> OHCHR, *Nepal Conflict Report*, op. cit., pp. 22-23.

<sup>85</sup> *Ibid.*, p. 23.

<sup>86</sup> SR on VAW, *Report on country visit to Nepal*, op. cit., para. 8.

pivotal role in calling for the State's international responsibility for the gross human rights violations committed in the country and the ensuing impunity and lack of adequate and comprehensive redress.

### **E.1. National Human Rights Commission**

45. The NHRC is a constitutional body established by Art. 248 of the Constitution of Nepal, 2015. The Constitution establishes the powers and functions of the NHRC.<sup>87</sup> Among many others, the NHRC has the power to investigate complaints of violations of human rights of an individual or group and make recommendations for action against the perpetrators, make recommendations to file a case pertaining to human rights violations in the court in accordance with law; to carry out periodic reviews of the relevant laws relating to human rights and make recommendations to the GoN for necessary amendments as well as monitor Nepal's compliance with international treaties to which it is a party; and make recommendations for effective compliance and investigation.

46. Despite the fact that Ms. Fulmati Nyaya obtained a favourable decision from the HRC, there continues to exist a lack of response from the GoN and the failure to implement the measures of reparation there indicated. The NHRC's constitutional mandate and autonomous status allows the review of Nepal's international obligations in order to make recommendations to the GoN for the effective and speedy implementation of the decision of the HRC. On 2 June 2020, the NHRC has recommended the GoN to compensate Ms. Nyaya with 300'000 Nepalese Rupees (appx. USD 2560) and identify and prosecute the perpetrators responsible for the crimes committed against Ms. Fulmati Nyaya.<sup>88</sup>

47. Reference to her case (under case number 1159) was also made by the NHRC on 15 October 2020, in a report detailing the account of 20 years of human rights violations. The report stated that the NHRC's investigation on the complaint submitted to it by Ms. Fulmati Nyaya proved that she had been arbitrarily arrested and detained

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<sup>87</sup> The Constitution of Nepal 2072 (2015), Art. 248.

<sup>88</sup> Letter from the Central Office of the NHRC, dated 2 June 2020, letter reference number 1697.

and was subjected to physical and psychological torture as well as sexual violence at Teghari Barracks and Armed Police Battalion in Banbehda.<sup>89</sup>

48. As per the NHRC report, on 2 June 2020 (2077/02/20) the NHRC's recommendation letter was sent to the Office of the Prime Minister and the Council of Ministers (OPMCM). On 14 June 2020 (2077/02/32), the NHRC received a letter from the OPMCM informing that the recommendation letter was forwarded to the Ministry of Home Affairs (MOHA), Ministry of Defence and Ministry of Finance for the implementation. The Ministry of Home Affairs forwarded a letter to the Nepal Police Headquarters directing for the implementation of the NHRC's recommendations.<sup>90</sup> On the same day, the MOHA also sent a letter to the Department of Relief and Data Management, under its authority, to implement the recommendations from the NHRC. However, to date, Ms. Fulmati Nyaya has not been contacted by any governmental authority on the issues at stake.

49. Ms. Fulmati Nyaya received a letter from the local government about the existence of the decision of the NHRC only on 8 October 2020, while the decision was adopted by the NHRC on 15 March 2020 as per the complaint registered by Ms. Nyaya on 4 March 2002. To the knowledge of the HRJC and TRIAL International, on 14 June 2020, the NHRC received a letter from the OPMCM that informed her that latter had written a letter to the MOHA and the Ministry of Defence to implement the decision. (Letter N. 721/6565). Similarly, on 9 June 2020, the NHRC received a copy of the letter that the MOHA had written to the Nepal Police Headquarters to implement the recommendation (Letter No. 276), and a copy of the letter the MOHA had written to the Relief and data department to implement the recommendation (Letter No. 278). Despite all these exchanges, Ms. Fulmati Nyaya is still struggling to obtain the pecuniary compensation she is entitled to. She is making attempts at the local and national levels to obtain the compensation she has been awarded. While Ms. Fulmati Nyaya is planning to inquire with the competent institutions on the status of the implementation, she recalls that compensation is only one of the measures of

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<sup>89</sup> NHRC, *Twenty years of the Commission: the Status of Recommendations of the Commission and its implementation*, October 2020, (Nepali version), pp. 693- 694.

<sup>90</sup> On 9 June 2020 (2077/02/27), the NHRC also received a copy of the letter dispatched by the Ministry. See NHRC, *Twenty years of the Commission: the Status of Recommendations of the Commission and its implementation*, op. cit., p. 694.

reparation indicated by the HRC in its decision on her case and more remains to be done to ensure that the Views are fully implemented.

## **E.2. National Women Commission**

50. The NWC is established by Art. 252 of the Constitution of Nepal. The Constitution also provides for the NWC's powers, functions and mandate.<sup>91</sup> Amongst other things, the Constitution establishes the duties to monitor and carry out periodic review of laws concerning the rights and interests of women and obligations under the international treaties to which Nepal is a party and make recommendations to the GoN on the measures for their effective compliance and implementation and to also make recommendations to the concerned bodies to file cases concerning violence against women in court.

51. Recently, the NWC published a factsheet with data on gender-based violence (GBV) and the support to the victims of GBV was extended by the NWC.<sup>92</sup> However, in the absence of office bearers at the NWC from 2017 to February 2021, the work of the institution has been limited mostly to administrative tasks.<sup>93</sup> With the vacant position of the office bearers, the NWC was not been able to investigate on cases of CRSV against women.<sup>94</sup> With the appointment of new office bearers on 3 February 2021, the NWC must engage in addressing the needs and issues, as well as guaranteeing the rights of CRSV survivors. Regardless of the current situation of the NWC<sup>95</sup>, the recommendations provided in Section F.1 and F.1.2 below should be considered without delay upon the prospective appointments.

## **E.3. Indigenous Nationalities Commission**

52. The INC is established by Art. 261 of the Constitution of Nepal and its powers and functions are to conduct study and research work to protect the rights of

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<sup>91</sup> The Constitution of Nepal 2072 (2015), Art. 252.

<sup>92</sup> National Women Commission, [file:///C:/Users/user/Downloads/5fbf3ae460475\\_NWC\\_factsheet\\_October\\_2020.pdf](file:///C:/Users/user/Downloads/5fbf3ae460475_NWC_factsheet_October_2020.pdf).

<sup>93</sup> The Kathmandu Post, *National Women Commission remains defunct as the cases of violence against women continues*, published on 1 December 2020, available at: <https://kathmandupost.com/national/2020/12/01/national-women-commission-remains-defunct-as-the-cases-of-violence-against-women-continues>.

<sup>94</sup> *Ibid.*

<sup>95</sup> The Speaker of the House of Representatives has filed a writ petition at Supreme Court against the appointment of officials in constitutional bodies without parliamentary hearings.

indigenous nationalities. As per the INC Act, 2074 (2017), the INC has the power to make recommendations for the investigation and filing of cases against those who have committed rights violation against individuals from indigenous communities.<sup>96</sup>

53. The position of the office bearers of the INC was vacant for a long time. With this gap, the specific issues related to the indigenous communities of Nepal still lie in the backburner. The newly appointed officers must commence their work in addressing the rights of people belonging to indigenous communities. Regardless of the current situation of the INC, the recommendations provided in Section F.1 and F.1.3 below should be considered without delay.

## **F. Conclusions and Recommendations**

54. Constitutional bodies have an important role to play, especially in cases of gross human rights violations. The lack of response and apathy from the GoN vis-à-vis the recommendations received from international bodies creates greater space for impunity. It is now more than ever that constitutional bodies must come together to put adequate pressure on the GoN to ensure that cases like that of Ms. Fulmati Nyaya are taken into consideration and duly addressed, including through the opening of judicial proceedings and the adoption of adequate measures of reparation.

55. Further, demanding for relief and reparations for CRSV survivors is crucial to maintain their mental and physical well-being and ensure effective rehabilitation. The amendment of existing laws that impede women's access to justice in cases of CRSV, with a view at bringing them in line with international standards, will play a crucial role in combatting impunity and preventing similar violations in the future.

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<sup>96</sup> Indigenous Nationalities Commission Act, 2074 (2017), Section 7.

## **F.1. Recommendations to the National Human Rights Commission, National Women Commission and the Indigenous Nationalities Commission**

56. The HRJC respectfully calls on all three national institutions (NHRC, NWC and INC) to:

- a. Schedule a meeting between their representatives, the HRJC and, where appropriate, other NGOs, at the earliest convenience, to discuss Ms. Fulmati Nyaya's case and the situation of the CRSV survivors in general;
- b. Discuss among the three institutions and determine the tasks to be assumed by each of them with regard to the implementation of the decision on Ms. Nyaya's case in particular, and of CRSV survivors in general. The outcome of this discussion, along with a timetable concerning the actions foreseen and the deadline for the execution of the tasks concerned, should be made public and, in particular the part concerning the measures identified by the HRC in its decision, notified to Mr. Nyaya and her representatives;
- c. Jointly facilitate meetings with Ms. Fulmati Nyaya and her representatives to identify the specific needs of Ms. Fulmati Nyaya in accordance to the decision of the HRC and to maintain her updated on the progress made in the implementation of the measures there identified;
- d. Jointly identify and reach out to the competent GoN authorities to follow-up on the implementation of the recommendations made by the NHRC and the HRC in the case of Ms. Fulmati Nyaya;
- e. Jointly identify and reach out to the competent GoN authorities to address the needs of CRSV survivors in general;
- f. Jointly recommend the MOHA to amend the NAP-II to include identification and prosecution of the perpetrators of CRSV;
- g. Create a team with their respective representatives and review the existing legislation and identify the obstacles it may pose to CRSV survivors, bearing in mind international law and standards and recommend the necessary amendments in a consolidated manner to the Ministry of Law, Justice and Parliamentary Affairs. In particular, they should recommend the Ministry of Law, Justice and Parliamentary Affairs that 'war crimes', 'crimes against humanity' and 'genocide' are criminalized in accordance with international law and, where appropriate, cases of CRSV are dealt with pursuant to these categories and

considered imprescriptible; and that the provisions concerning statute of limitations on criminal proceedings and for compensation claims concerning rape and torture cases are amended; recommend the Ministry of Women, Children and Social Welfare and Ministry of Law and Parliamentary Affairs to ensure the implementation of the decision in the case of Ms. *Fulmati Nyaya v. Nepal*, among other decisions of the international human rights mechanisms; review the existing policies related to CRSV survivors in general and recommend the Ministry of Women, Children and Social Welfare and Ministry of Law and Parliamentary Affairs to address the issues in the policies concerned;

- h. Call upon the GoN to accede without further delay to the Rome Statute of the International Criminal Court.

#### **F.1.1. Recommendations to the National Human Rights Commission**

57. In addition to the recommendations above, the HRJC respectfully calls on the NHRC to:

- a. Be in constant touch with the victim(s) of CRSV who submit complaints before the NHRC and conduct a thorough assessment of their status and needs before (and even after) submitting recommendations to the GoN;
- b. Adopt a standard for calculating the compensation to be recommended for victims of gross human rights violations, including survivors of CRSV;
- c. While issuing recommendations to the GoN on gross human rights violations, after consulting the victims, include other measures of reparation (and not only pecuniary compensation);
- d. Launch a call for applications to invite authors to submit articles concerning the legal and practical challenges in accessing justice for conflict related gross human rights violations, and in particular CRSV, in the Annual Journal of the NHRC 'Sambahak';
- e. Coordinate and conduct regular meetings with relevant constitutional bodies like the NWC and the INC on the issues related to victims of CRSV;

- f. Coordinate with the HRJC and other r organizations to be updated on the individual communications submitted to various United Nations human rights mechanisms (Special Procedures and Treaty Bodies) and their status;
- g. Conduct regular meetings with government representatives and victims and their representatives, including Ms. Fulmati Nyaya, to ensure the prompt and full implementation of the decisions issued by international mechanisms, such as the HRC;
- h. Conduct regular meetings with regional offices of the NHRC to ensure the prompt implementation of its recommendations as well as those rendered by international mechanisms (Treaty Bodies and Special Procedures) at the provincial and local levels;
- i. Conduct regular meetings with the GoN on the recommendations made by NHRC on the cases of human rights violations in the previous years, until they are fully implemented.

#### **F.1.2. Recommendations to the National Women Commission**

58. In addition to the recommendations above, the HRJC respectfully calls on the NWC to:

- a. Undertake a thorough need-based research and make the necessary recommendations to the GoN to ensure that CRSV survivors, including Ms. Fulmati Nyaya, obtain psychological and physical treatment free of charge.

#### **F.1.3. Recommendations to the Indigenous Nationalities Commission**

59. In addition to the recommendations above, the HRJC respectfully calls on the INC to:

- a. Undertake a thorough need-based research and make the necessary recommendations to the GoN on securing the rights of indigenous peoples so as to guarantee the non-recurrence of human rights violations perpetrated against indigenous peoples.