



**HUMAN RIGHTS  
AND JUSTICE CENTRE**

# **Judicial Perspective on Cases of Conflict-Related Sexual Violence:**

A Study of the Case Laws of the  
Supreme Court of Nepal

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# Acronyms

CDO	Chief District Officer
CIEDP	Commission of Investigation on Enforced Disappeared Persons
CPA	Comprehensive Peace Accord
CRSV	Conflict Related Sexual Violence
CSO	Civil Society Organization
FIR	First Information Report
GoN	Government of Nepal
HRC	Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
LPC	Local Peace Committee
NKP	Nepal Kanoon Patrika (National Legal Journal)
OHCHR	Office of the High Commissioner of Human Rights
SC	Supreme Court
TRC Act	Enforced Disappearances Enquiry, Truth and Reconciliation Commission Act
TRC	Truth and Reconciliation Commission

## Executive Summary

### **A. Context: Conflict, transitional justice mechanisms, and the current situation**

The decade-long internal armed conflict in Nepal (1996-2006) between the governmental forces and the Communist Party of Nepal-Maoists, was marked by several gross human rights violations, including rape and other forms of sexual violence on a widespread and systematic scale. Women and girls were the most affected by sexual violence by both parties involved. Moreover, due to the armed conflict, women and girls had to go through various situations like widowhood, reversal of traditional gender roles, unwanted pregnancies resulting from sexual violence; and children born from rape; all of which led to their social exclusion by family members and the community.

In 2014, the Parliament passed “the Enforced Disappearances Enquiry, Truth and Reconciliation Commission Act”, 2014 (TRC Act) to address some of the crimes perpetrated during the conflict. Although the TRC Act prevents amnesty for perpetrators in cases of rape and sexual violence, it allows “mediation” between victims and perpetrators in cases of gross human rights violations, including rape. The current amendment bill on the TRC Act too allows mediation in the crimes of “sexual violence”, a term not well defined in the Nepalese legislation. The two Commissions (the Commission of Investigation of Enforced Disappeared Persons (CIEDP) and the Truth and Reconciliation Commission (TRC) established pursuant to this Act, received an initial mandate of two years. They commenced their work in 2015 and the mandate was repeatedly extended without any tangible outcome of the process. More importantly, the Commissions continue to operate based on flawed legislation, which includes provisions that are against international standards as declared also in the decisions of the Supreme Court of Nepal and as assessed by international human rights mechanisms.

Although a recent study estimates that the number of conflict-related sexual violence survivors (CRSV) ranges between 1500 to 2000, there are no official concrete data on the subject. Irregularities and lack of disaggregated data on the exact number of CRSV victims/survivors lead to a lack of understanding of the adverse impacts on these survivors and the acknowledgment of their suffering. The United Nations (UN) Special Rapporteur on Violence against Women, its Causes and Consequences expressed her serious concerns about how CRSV victims were not able to register their cases and still suffer without having access to any Government interim relief packages for the victims of the conflict. The decisions from the UN Human Rights Committee in the cases *Fulmati Nyaya, Devi Maya Nepal* find Nepal internationally responsible for not having fulfilled its obligations to provide the victims with effective remedies including in terms of effective investigation, prosecution, punishment, compensation, appropriate measures of satisfaction including arranging an official apology in a private ceremony, psychological rehabilitation, medical

treatment, criminalize torture and adapt the definition of rape and other forms of sexual violence in accordance with international standards.

## **B. Legislation on CRSV in Nepal**

The existing legislation is inadequate to deal with CRSV. Although the TRC Act recognizes rape and sexual violence as gross violations of human rights, it does not define what constitutes sexual violence, nor does it differentiate between rape and other forms of sexual violence. The “National Code 1963” and “Compensation Relating to Torture Act 1996” which were applicable during the conflict period set a 35-day statutory limitation to lodge complaints concerning rape and torture respectively. Such a tight statute of limitation is not commensurate with the gravity of the crimes concerned and is at odds with international standards. Although the legislation that is currently applicable, i.e. the National Penal Code 2018, set a 2-year statute of limitation to lodge a complaint on cases of rape, this remains not commensurate to the gravity of the crime concerned. Further, the Code still has flaws, such as an inadequate definition of sexual violence and a limited understanding of the notion of “victims” in terms of gender, among others.

## **C. Methodology**

The report is based on a desk review that analyzes verdicts on writ petitions adjudicated by the Supreme Court of Nepal (SC) which were accessible through the latter’s website; the monthly compilation of the case law ‘Nepal Kanoon Patrika’ (Nepal Law Journal), available online and in the form of books. The report includes case law specific to cases of CRSV, as well as transitional justice and sexual violence that did not happen in the context of the armed conflict. The desk review also includes reports on the issue of CRSV published by various governmental institutions, national and international non-governmental organizations, and local newspapers.

## **D. Jurisprudence on CRSV in Nepal**

The SC has issued a number of verdicts on cases relating to CRSV, as well as other issues related to the transitional justice process. In cases like *Madhav Basnet v Nepal Government*, the SC acknowledged the circumstances of the armed conflict, and the right to reparation for victims and their families and considered some of the provisions of the TRC Act not in line with international standards and the Interim Constitution of Nepal. Similarly, in the case of *Suman Adhikari v Nepal Government*, the SC rejected the provision of the TRC Act that prescribes the reconciliation between the victims and perpetrators without the victims’ consent and overruled the provision that promotes amnesty. The SC has provided directives to the Government to adopt the necessary laws and policies to guarantee victims’ rights to reparation, truth-seeking, rehabilitation, prompt crime investigation, and accountability of perpetrators.

In other instances, such as the case of *Bhagiram Chaudhary v Nepal Government*, the SC has considered the TRC Act to be adequate to address the issues of CRSV. The SC quoted the provisions of the TRC Act that refer to victims of sexual violence, but it did not assess the existence of loopholes in the legislation that do not allow CRSV victims make special arrangements to overcome the challenges to find documents, medical examination reports, and other corroboratory evidence to ensure access to justice and redress. This is in contrast with many earlier verdicts of the SC that affirmed the prominence of the criminal justice system over transitional justice mechanisms. This kind of discrepancies creates uncertainty, raises confusion, demotivates the victims and derails the purpose of justice.

Furthermore, in some of the writ applications, there was no discussion on the nuances and gravity of CRSV, whilst the focus remained on procedural details related to the statute of limitation. For instance, in *AC v Nepal Government 2019*, the SC considered AC to be negligent to make attempts of filing the case in 2013 AD while she had been released from police custody in 2002 AD and referred to the existence of TRC mechanisms to investigate the crimes perpetrated during the conflict. Similarly, in *SC v Nepal Government 2019*, the SC rejected and quashed the writ petition referring to the applicable statute of limitation and considered that the incident was reported too late. In both instances, the SC failed to assess the context and complexity related to CRSV in Nepal. In another case, *Meera Dhungana v Nepal Government 2015* wherein the petitioners raised concerns over the

#### **Some conflicting decisions of the Supreme Court**

... to decide if any act is criminal or not requires a neutral and legal evaluation of evidence, which cannot be determined by a quasi-judicial body like the Commission. (*Suman Adhikari vs. The Office of Prime Minister and Council of Ministers and Others*, NKP 2071, Decision No. 9303, Writ No. 070-WS-0050, 26 February 2015, para. 59)

... a limited statute of limitation for gross human rights violations as stipulated in general criminal law would deteriorate a victim's right to justice...therefore the provision of 35 days of limitation to begin prosecution, once the Attorney General decides to take up the cases is against the common standard. (*Madhav Kumar Basnet vs. Nepal Government*, Writ no. 069-WS-0057, NKP 2070, Decision no. 9051, 1 February 2018; also cited in *Meera Dhungana vs. The Office of Prime Minister and Council of Ministers and Others*, NKP 2073, Decision No. 9551, Writ No. 070-WS-0052, 16 April 2015, p. 36)

The TRC Act, in its Section 2 (e) (h) (j) and Section 23 includes victims of sexual violence and its family and Section 3 has provision on Commission's power to recommend Nepal Government on compensation. Hence, there should not be a separate directive to address the demand of the petitioner [redefining victims by identifying and including the victims of CRSV, ..., provide short term and long term relief support including employment facility, provide loan facilities, compensation, ...] (*Bhagiram Chaudhary vs. The Office of Prime Minister and Council of Ministers and Others*, 070-WO-0452, decided on 31 August 2016)

inadequacy of 35-day statute of limitation concerning CRSV, the SC did not consider the need to define CRSV and eliminate the statute of limitation for the corresponding criminal proceedings.

## **E. CRSV and Access to Justice**

The research conducted showed that survivors of CRSV do not enjoy their right to access to justice and redress, mostly due to the subsequent reasons:

**Right to privacy:** The SC has set various precedents protecting victims' right to privacy and there exist Procedural Guidelines for Protecting the privacy of the parties in the proceedings of special types of cases 2007. However, in many instances, it was found that the anonymity of the victims was not duly maintained during the legal process, thus frustrating the guarantees foreseen for the victims and their representatives.

**Timely Adjudication:** There are no precise data to establish the number of years a case requires to reach the final settlement through a competent body. With reference to some of the cases analyzed in the report, it took four to five years on average to get the final decision from the apex court in Nepal from the date of the submission of the complaint. The delays sometimes also play a role in building distrust of victims towards the judicial institutions.

**Measures of Reparation:** Survivors of CRSV were excluded as victims from the directives of the Nepal Government to provide financial interim relief. Even the decisions of the UN Human Rights Committee requesting Nepal to adopt measures of reparation have not been implemented. In general, the SC has ensured victims' right to compensation in several rape cases, requesting the support of the Victim Relief Fund. It also stressed the importance of reparation in cases related to conflict. Regrettably, victims of CRSV have not received adequate reparation so far.

## **F. Conclusions and Recommendations**

### **F.1. Conclusions**

1. The SC has received few petitions on the issue of CRSV and, thus, the jurisprudence on this issue is currently rather limited.
2. Even with the limited number of petitions received, when the SC had the opportunity to discuss CRSV and the existing statute of limitation applicable to criminal proceedings for CRSV, it failed to do so, without providing sound reasons.
3. The SC has been unable to interpret and elaborate on the impact of the ongoing transitional justice process on the victims of CRSV, and to identify and assess their unique needs.
4. There are many issues related to CRSV which remain under-explored by both the judiciary and the representatives of CRSV victims, such as i) the issue of privacy of



- victims, ii) the lack of inclusion of CRSV victims in the interim relief packages, and iii) the need for a different provision on statute of limitation for criminal proceedings on CRSV.
5. The very few petitions on CRSV that have reached the SC do not reflect the unique circumstances of CRSV victims, despite recognizing the special circumstances of the armed conflict in other precedents.
  6. Victims of CRSV are left with no effective domestic remedy. In several decisions, the SC does not assess which is responsible body to address issues related to CRSV, including whether the victims of CRSV should access courts through regular general criminal proceedings or seek justice in the context of transitional justice mechanisms.
  7. The application of the 35-days statute of limitation to cases of CRSV remains a major – usually insurmountable – obstacle for victims and their representatives. In other cases related to the conflict era where there are no statutory limitations, such as in the case of rape followed by murder, the SC has adjudicated on the merits of the case, delivering innovative verdicts.
  8. The SC maintains the rule of 35 days of the statute of limitation for criminal proceedings in cases of CRSV, despite various decisions in non-conflict-related rape cases that accept that a 35-days limitation is not enough time for the victim to lodge a complaint. The jurisprudence of the SC, therefore, seems to set a double standard, whereby a 35-day statute of limitation would not be acceptable for cases of sexual violence that occurred after the conflict, but would be fair in cases of CRSV. This contradictory case law is not grounded on sound legal arguments and shows a lack of understanding of the complexity of the war and the obstacles faced by CRSV victims in lodging complaints or reporting violations in an environment where, oftentimes, the offenders worked precisely in the security forces or the police.
  9. Similarly, the SC seems to disregard the impact of CRSV on victims/survivors. The position of the SC materially left CRSV victims without any effective remedy and they had to turn to international mechanisms – such as the UN Human Rights Committee – to seek justice and redress. In fact, the UN Human Rights Committee held that the application of the 35-day statute of limitation is at odds with Nepal's international undertakings and therefore the jurisprudence of the SC is triggering the State's international responsibility for an unlawful act.
  10. The right to privacy guaranteed to the victims of sexual violence is not ensured when CRSV victims file writ petitions before the SC. Their names, address and sensitive information concerning the incident are made public like in the proceedings concerning any other case.
  11. There are no specific relief schemes for victims of CRSV and those existing do not incorporate CRSV victims among beneficiaries.
  12. Although the SC has ensured rape victims' right to reparation in many precedents, there have been no petitions yet explicitly seeking all forms of reparation for CRSV, and so there are no precedents on this. The judgments of the SC ordering the

Government of Nepal to provide reparation to all the victims of war have not yet been implemented.

13. Based on these findings, the Human Rights and Justice Centre (HRJC) issue the following recommendations, respectively directed at the Government of Nepal, the SC and civil society organisations.

## **F.2. Recommendations**

### **a. Recommendations to the Government of Nepal**

It is recommended that the Government of Nepal:

- ⇒ assesses the effectiveness of the TRC and seeks solutions to the existing problems of the transitional justice process, bringing the corresponding legislation in line with Nepal's international obligations.
- ⇒ adopts legislation/policies specific to CRSV. The legislation must include, and not be limited to, providing a definition of CRSV, setting clear procedural routes to seek justice and redress, and discarding the provision of the statute of limitation for criminal proceedings and compensation claims concerning CRSV.
- ⇒ adopts schemes/policies to ensure CRSV victims' right to adequate reparation, including compensation, restitution, rehabilitation, satisfaction, and guarantees of non-recurrence.
- ⇒ complies with the directive orders issued by the SC in its verdicts regarding the transitional justice process.
- ⇒ acknowledges and works effectively to implement without delay the measures of reparation indicated by the UN Human Rights Committee in its decisions on the three cases *Fulmati Nyaya vs. Nepal*, *Devi Maya vs. Nepal* and *Purna Maya vs. Nepal*.
- ⇒ researches and publicizes the data on the number of CRSV victims and the legal processes they have resorted to, till date.

### **b. Recommendations to the Supreme Court**

It is recommended that, when adjudicating cases of CRSV, the SC:

- ⇒ recognises the agonizing circumstances of CRSV victims and develops a jurisprudence that disregards any statute of limitation. In this sense, the SC shall take into account the relevant decisions by the UN Human Rights Committee on complaints against Nepal.
- ⇒ upholds the highest standards to ensure the respect of the victims/survivors right to privacy and their security, including in-camera hearings and restrictions in disclosing sensitive data.
- ⇒ acknowledges the victims' right to adequate reparation, including compensation, restitution, rehabilitation, satisfaction and guarantees of non-recurrence. Also in this case, the SC shall take into account the relevant findings of the UN Human Rights Committee in the decisions issued on cases of CRSV in Nepal.

- ⇒ assigns priority '*agradhikar*' to the cases concerning CRSV as per its regulations.

**c. Recommendations to Civil Society Organizations**

It is recommended that civil society organisations:

- ⇒ research and publish comprehensive and disaggregated data regarding CRSV victims to emphasize the scope, gravity and impact of this crime.
- ⇒ identify uncharted issues of CRSV and strategically litigate cases to demand that domestic courts develop jurisprudence on such issues. The subjects can include i) the issue of privacy of victims, ii) the lack of inclusion of CRSV victims in the interim relief packages, iii) the need of a different provision on statutes of limitation for CRSV.
- ⇒ recognize the survivors of sexual violence that occurred during the conflict
- ⇒ uphold the highest standards to ensure the respect of the victims/survivors right to privacy and their security in disclosing sensitive data while filing and litigating the cases of CRSV.
- ⇒ develop campaigns and reinstate strategic litigation to assess and reform the transitional justice mechanisms.
- ⇒ strategically lobby and pressurize the government to implement the recommendations provided by HRC in its decisions on cases of CRSV and the judgments of SC on writ petitions, especially on transitional justice-related issues.
- ⇒ since the SC cannot by itself decide on these issues without any applications, civil society organisations in particular, as well as victims of CRSV and their representatives, should consider the opportunity of lodging more applications on these issues, calling on the SC to pronounce itself on the mentioned matters and clarifying its competence to adjudicate cases of CRSV.

## कार्यकारी सारांश

### क. सन्दर्भ: द्वन्द्व, संक्रमणकालीन न्यायका संयन्त्र, र वर्तमान अवस्था

नेपाल सरकार र नेपाल कम्युनिस्ट पार्टी - माओवादी बीचमा एक दशक चलेको आन्तरिक सशस्त्र द्वन्द्व (२०५२-२०६३) को समयमा व्यापक र व्यवस्थित रूपमा बलात्कार र अन्य यौन हिंसाका साथै गम्भीर मानवअधिकार उल्लङ्घनहरू भएका थिए । दुवै पक्षबाट भएको यौन हिंसामा, महिला र बालिकाहरू सबैभन्दा बढी प्रभावित भएका छन् । त्यसका साथै, सशस्त्र द्वन्द्वको कारण महिला र बालिकाहरू एकल भएको, परम्परागत लैङ्गिक भूमिकामा परिवर्तन आउने, यौन हिंसाको परिणामस्वरूप अनावश्यक गर्भावस्था रहने, बलात्कारको परिणामस्वरूप बच्चा जन्मिने जस्ता विभिन्न अवस्थाबाट गुज्रनु पर्ने र यी सबका कारणले उनीहरू परिवार र समुदायबाट बहिष्कृत हुने स्थिति समेतको सृजना भयो ।

विक्रम सम्बत २०७१ वैशाख ८, मा संसदले द्वन्द्वका समयमा घटेका अपराधहरू सम्बोधन गर्नको लागि “बेपत्ता पारिएका व्यक्तिको छानबिन तथा सत्य निरूपण तथा मेलमिलाप आयोग ऐन” (“सत्य निरूपण तथा मेलमिलाप आयोग ऐन”) पारित गरेको थियो । सत्य निरूपण तथा मेलमिलाप आयोग ऐनले बलात्कार र यौन हिंसाको अपराधको लागि क्षमादान प्रतिबन्धित गरेतापनि बलात्कार लगायत अन्य गम्भीर मानव अधिकार उल्लङ्घनको अपराधमा मेलमिलाप गर्न स्वीकारेको देखिन्छ । सो ऐन अनुसार स्थापना भएका “बेपत्ता पारिएका व्यक्तिको छानबिन आयोग” र “सत्य निरूपण तथा मेलमिलाप आयोग” दुई वर्षको प्राथमिक कार्यकाल प्राप्त गर्यो । सो आयोगहरूले २०७२ मा कार्य सम्पादन सुरु गर्यो र कुनै मूर्त परिणाम बिना आयोगहरूको पटक-पटक कार्यकाल थप गरियो । थप महत्वपूर्ण कुरा, यी आयोगहरू हालसम्म त्रुटिपूर्ण कानूनहरूमा आधारित छन् जुन नेपालको सर्वोच्च अदालतको फैसलाहरू र अन्तर्राष्ट्रिय सिद्धान्त विपरित छन् ।

हालै गरिएको अध्ययनले नेपालमा द्वन्द्वसँग सम्बन्धित यौन हिंसाका पीडितहरूको संख्या १५०० देखि २००० रहेको अनुमान गरे पनि सोसँग सम्बन्धित यकिन औपचारिक तथ्यांक छैन । द्वन्द्वसँग सम्बन्धित यौन हिंसाको तथ्यांकमा अनियमितता र विभाजित तथ्यांकमा कमीका कारण पीडितहरूले बहन गर्नु परेको प्रतिकूल अवस्थाको बुझाई र उनीहरूको पिडाको सम्बोधनमा कमी भएको छ । संयुक्त राष्ट्र संघका “महिला विरुद्ध हिंसा, यसका कारण र परिणामको विशेष प्रतिवेदक”ले द्वन्द्वसँग सम्बन्धित यौन हिंसा पीडितहरूले आफ्नो मुद्दा दर्ता गर्न नपाएको र अहिले सम्म पनि कुनै सरकारी अन्तरिम राहत प्राप्त नगरेको अवस्थाबारे गम्भीर चिन्ता व्यक्त गर्नु भएको थियो । संयुक्त राष्ट्र संघको मानव अधिकार समितिले *फूलमती न्याय, देवी माया* नेपालका मुद्दाहरूमा पीडितलाई प्रभावकारी अनुसन्धान गरी अभियोजन गर्ने, दोषीलाई सजाय दिन, पीडितलाई परिपुरण, सन्तुष्टिका लागि उचित उपायहरू प्रदान गर्ने, मनोवैज्ञानिक पुनःस्थापना प्रदान गर्ने, चिकित्सा उपचार प्रदान गर्ने, यातनालाई अपराधीकरण गर्ने, र यौन हिंसाका परिभाषालाई अन्तर्राष्ट्रिय मापदण्ड अनुरूप अनुकूल बनाउने जस्ता प्रभावकारी उपचार प्रदान गर्ने दायित्व नेपालले पुरा नगरेको भनी अन्तर्राष्ट्रिय रूपमा जिम्मेवार मानी निर्णय गरेको छ ।

### ख. नेपालमा द्वन्द्वसँग सम्बन्धित यौन हिंसाका पीडितसँग सम्बन्धित कानून

हाल प्रचलनमा रहेको कानूनहरू द्वन्द्वसँग सम्बन्धित यौन हिंसाका पीडितलाई सम्बोधन गर्न अपर्याप्त छन् । सत्य निरूपण तथा मेलमिलाप आयोग ऐनले बलात्कार र यौन हिंसालाई मानव अधिकारको

गम्भीर उल्लङ्घन भनी पहिचान गरे पनि सो ऐनले कुन कार्यलाई यौन हिंसा मान्ने भनी व्याख्या गरेको छैन र सो ऐनले बलात्कार र यौन हिंसाका अन्य कार्यहरू बीच फरक गर्दैन । द्वन्द्वको समयमा प्रचलनमा रहेको मुलुकी ऐन २०२० र यातना सम्बन्धी क्षतिपूर्ति ऐन २०५३ मा बलात्कार र यातनाको उजुरी गर्न ३५ दिन हदम्याद रहेको थियो । यति थोरै समयको हदम्याद सो अपराधको गम्भीरताको अनुपातमा छैन र अन्तर्राष्ट्रिय सिद्धान्तको प्रतिकूल छ । हाल प्रचलनमा रहेको कानून ( मुलुकी अपराध संहिता ऐन, २०७४ ) अनुसार बलात्कार को मुद्दामा उजुरी दिन २ वर्षको हदम्याद राखे पनि सो अझै सम्बन्धित अपराधको गम्भीरताको अनुपातमा रहेको छैन । अझ, प्रचलित कानूनमा यौन हिंसाको अपर्याप्त व्याख्या र लिङ्गका आधारमा “पीडित” को संकुचित बुझाई लगायतका त्रुटि यथावत छन् ।

### ग. पद्धति

यो प्रतिवेदन नेपालको सर्वोच्च अदालतका निर्णयहरूको डेस्क अध्ययनमा आधारित छ । प्रतिवेदनमा अदालतले गरेका रिट निवेदनका निर्णयहरूको नेपाल कानून पत्रिकामा प्रकाशित मासिक संकलन र अनलाईन वेबसाइटमा प्रकाशित नजिरहरूको विश्लेषण गरेको छ । यस प्रतिवेदनमा द्वन्द्वसँग सम्बन्धित यौन हिंसा, संक्रमण न्याय लगायत द्वन्द्व बाहेकको समयमा भएको यौन हिंसासँग सम्बन्धित नजिरहरू समेत समावेश गरिएका छन् । द्वन्द्वसँग सम्बन्धित यौन हिंसाका पीडितहरूको विषयमा विभिन्न सरकारी निकाय, राष्ट्रिय तथा अन्तर्राष्ट्रिय संस्था र स्थानीय पत्रपत्रिकामा प्रकाशित रिपोर्ट पनि यस अध्ययनमा समावेश गरिएको छ ।

### घ. नेपालमा द्वन्द्वसँग सम्बन्धित यौन हिंसासँग सम्बन्धित विधिशास्त्र

सर्वोच्च अदालतले द्वन्द्वसँग सम्बन्धित यौन हिंसाका लगायत संक्रमणकालिन न्यायसँग सम्बन्धित विभिन्न फैसला गरेको छ । *माधव बस्नेत समेत विरुद्ध नेपाल सरकार* जस्ता मुद्दामा सर्वोच्च अदालतले द्वन्द्वको परिस्थिति, र पीडित तथा उनीहरूको परिवारको परिपुरणको अधिकारलाई सम्बोधन गरी सत्य निरूपण तथा मेलमिलाप आयोग ऐनको केही प्रावधान अन्तर्राष्ट्रिय सिद्धान्त तथा नेपालको अन्तरिम संविधान अनुरूप नरहेको उल्लेख गरेको थियो । यसै गरी, *सुमन अधिकारी समेत विरुद्ध नेपाल सरकार*को मुद्दामा, सत्य निरूपण तथा मेलमिलाप आयोग ऐनमा भएको पीडितको सहमतिबिना पीडित र पीडक बीचमा हुने मेलमिलापका प्रावधानहरू खारेज गरी आममाफीका प्रावधानहरू समेत खारेज गरेको थियो । सर्वोच्च अदालतले पीडितको परिपुरणको अधिकार, सत्य खोजी, पुर्नस्थापना, शीघ्र अपराध अनुसन्धान र अपराधीको जवाफदेहिता स्थापना गर्न आवश्यक कानून र नीति बनाउन सरकारलाई आदेश समेत गरेको छ ।

अन्य नजिर, जस्तै, *भागी राम चौधरी विरुद्ध नेपाल सरकार*मा भने सर्वोच्च अदालतले द्वन्द्वसँग सम्बन्धित यौन हिंसाको मुद्दा सम्बोधन गर्न सत्य निरूपण तथा मेलमिलाप आयोग ऐन पर्याप्त रहेको टिप्पणी गरेको छ । अदालतले सत्य निरूपण तथा मेलमिलाप आयोग ऐनमा रहेका यौन हिंसाका पीडितसँग सम्बन्धित प्रावधानहरू उद्धरण गरेको तर न्याय र उपचारको सुनिश्चितताका लागि आवश्यक पर्ने दस्तावेज, चिकित्सक परीक्षण रिपोर्ट र अन्य परिस्थितिजन्य प्रमाण संकलन गर्न हुने चुनौती हटाउन विशेष प्रावधान बन्न बाधक रहेको कानुनी त्रुटिहरूको समीक्षा गरिएको छैन । यस फैसला फौजदारी न्याय प्रणालीको संक्रमणकालिन न्याय उपर प्रमुखता रहने भनी सर्वोच्च अदालतको पहिलेका फैसलाहरूको विपरीत रहेको छ । यस्ता भिन्नताले अन्योलता, भ्रम सृजना, र पीडितलाई निरुत्साहित गरी न्यायको उद्देश्य परास्त गर्दछ ।

यसका साथै, केही अन्य रिट नवेदनहरूमा हदम्याद सम्बन्धी कार्यविधिगत विवरणमा केन्द्रित रही द्वन्द्वसँग सम्बन्धित यौन हिंसाको सूक्ष्मता र गम्भीरता छलफल गरिएको छैन। जस्तै, *एसी विरुद्ध नेपाल सरकार* २०७६ मा, अदालतले, एसी २०५९ सालमा रिहा भएको र २०७० मा मुद्दा दर्ता गर्ने प्रयास गरेकाले एसीले हेलचेकर्याई गरेको भन्दै सत्य तथा निरुपणका संयन्त्रले द्वन्द्वमा घटेका अपराधमा अनुसन्धान गर्ने इंगित गरेको थियो। साथै *एससी विरुद्ध नेपाल सरकार* २०७६ मा, सर्वोच्च अदालतले हदम्यादलाई उद्हरण गर्दै रिट प्रतिवेदन खारेज गरेको र घटना निकै ढिला उजुरी गरेको ठम्याएको थियो। दुवै उदाहरणहरूमा, द्वन्द्वसँग सम्बन्धित यौन हिंसाका सम्बन्धित सन्दर्भ र जटिलताको समीक्षा गर्न बाट सर्वोच्च अदालत चुकेको छ। द्वन्द्वसँग सम्बन्धित यौन हिंसामा ३५ दिन हदम्याद को अपर्याप्तता भएकोमा निवेदकहरूले प्रश्न गरेको *मीरा हुंगाना विरुद्ध नेपाल सरकार* २०७२ मुद्दामा, सर्वोच्च अदालतले द्वन्द्वसँग सम्बन्धित यौन हिंसाको व्याख्या गर्न र सम्बन्धित मुद्दामा हदम्याद हटाउन आवश्यक नरहेको मानेको छ।

### सर्वोच्च अदालतका केही विरोधाभास निर्णयहरू

..... कुनै पनि कार्य अपराध हो वा होइन भनि निर्णय गर्न प्रमाणको निष्पक्ष र कानुनी मुल्यांकन गर्न आवश्यक हुन्छ, र सो कार्य आयोग जस्ता अर्ध न्यायिक निकायले गर्न सक्दैन। (*सुमन अधिकारी विरुद्ध प्रधानमन्त्रीको कार्यालय र मन्त्री परिषद र अन्य*, ने.का.प २०७१, निर्णय नं ९३०३, रिट नं ०७०-*ws-००५०*, १४ फागुन २०७४, परिच्छेद ५९)

.....साधारण फौजदारी कानूनमा प्रावधान गरिएको घोर मानव अधिकार उल्लङ्घनको मुद्दामा सीमित हदम्याद हुनाले पीडितको न्यायको अधिकार हनन हुने हुन्छ, .... तसर्थ महान्यायाधिवक्ताको कार्यालयले उजुरी लीन निर्णय गरे पश्चात् अभियोजन सुरु गर्न ३५ दिनको प्रावधान सामान्य सिद्धान्तको विरुद्ध छ। (माधव कुमार बस्नेत विरुद्ध नेपाल सरकार, रिट नं ०६९-*ws-००५७*, ने.का.प २०७०, निर्णय नं ९०५१, १ फेब्रुअरी २०१८; *मीरा हुंगाना विरुद्ध प्रधानमन्त्रीको कार्यालय र मन्त्री परिषद र अन्य*, ने.का.प २०७३, निर्णय नं ९५५१, रिट नं ०७०-*ws-००५२*, ३ वैशाख २०७२, परिच्छेद ३६)

सत्य निरुपण तथा मेलमिलाप आयोग ऐनको दफा २ (ड) (ज) (ञ) र दफा २३ मा यौन हिंसाका पीडित र उनीहरूको परिवार समावेश गरिएको छ, र दफा २३ मा नेपाल सरकारलाई क्षतिपूर्तिको लागि सिफारिस गर्न आयोगलाई अधिकार रहने प्रावधान गरिएको छ। तसर्थ, निवेदकको माग सम्बोधन गर्न छुट्टै निर्देशन जारी हुनु हुँदैन [द्वन्द्वसँग सम्बन्धित यौन हिंसाका पीडितहरूलाई पहिचान र समावेश गरि पीडितलाई पुन व्याख्या गरिएको, ..... , रोजगारीको सुविधा, ऋणको सुविधा, क्षतिपूर्ति लगायतका अल्प कालिन र दीर्घ कालिन राहत प्रदान गर्ने, ...] (*भागी राम चौधरी विरुद्ध प्रधानमन्त्रीको कार्यालय र मन्त्री परिषद र अन्य*, ०७०-*ws-०४५२*, १५ भदौ अगस्त २०७३ मा फैसला भएको)

### ड. द्वन्द्वसँग सम्बन्धित यौन हिंसा र न्यायमा पहुँच

द्वन्द्वसँग सम्बन्धित यौन हिंसाका पीडितहरूले मुख्यतः निम्न कारणहरूले न्यायमा पहुँच नपाएको यस अध्ययनले देखाउँछ:

**गोपनीयताको हक:** पीडितहरूको गोपनीयताको हक संरक्षण गर्न सर्वोच्च अदालतले विभिन्न नजिर प्रतिपादन गरेको र विशेष प्रकृतिका मुद्दामा पक्षको गोपनीयता संरक्षण गर्न कार्यविधिगत निर्देशिका २००७ भएतापनि धेरै घटनाहरूमा, कानुनी प्रक्रियाको क्रममा पीडितको गोपनीयता कायम नरहेको पाइएको छ, तसर्थ, पीडित र उनीहरूको प्रतिनिधिहरूलाई प्रत्याभूत गरिएको अधिकार निरर्थक भएका छन्।

**समय सापेक्ष फैसला:** कुनै मुद्दाको अन्तिम किनारा लाग्न कति समय लाग्छ भनी कुनै यकिन तथ्यांक छैन । यस अध्ययनमा समीक्षा गरिएका केही मुद्दाहरूको सन्दर्भ हेर्दा घटना उजुर गरे देखी सर्वोच्च अदालतबाट फैसला हुन चार देखि पाँच वर्ष लागेको देखिन्छ । यस्ता ढिलाइले पीडितमा न्यायिक निकाय प्रति अविश्वास सृजना गर्ने भूमिका हुने हुन्छ ।

**परिपुरणका उपायहरू:** आर्थिक अन्तरिम राहत प्रदान गर्ने नेपाल सरकारको निर्देशनहरूमा द्वन्द्वसँग सम्बन्धित यौन हिंसाका पीडितहरूलाई समावेश गरिएको छैन । नेपाललाई परिपुरणको उपायहरू अनुसरण गर्न संयुक्त राष्ट्रिय संघको मानव अधिकार समितिको सिफारिसहरू पनि कार्यान्वयन गरिएको छैन । साधारणतया, सर्वोच्च अदालतले विभिन्न बलात्कारका मुद्दाहरूमा पीडितको क्षतिपूर्तिको हक स्थापना गराई पीडित राहत कोषको सहयोग अनुरोध गरेको छ । सर्वोच्च अदालतले द्वन्द्वसँग सम्बन्धित मुद्दामा पनि परिपुरणको महत्व उल्लेख गरेको छ । तर, द्वन्द्वसँग सम्बन्धित यौन हिंसाका पीडितहरूले पर्याप्त परिपुरण प्राप्त गरेका छैनन् ।

## च. निष्कर्ष र सिफारिस

### १. निष्कर्ष:

१. सर्वोच्च अदालतले द्वन्द्वसँग सम्बन्धित यौन हिंसाका निवेदन र मुद्दाहरू कम संख्यामा प्राप्त गरेको र यस कारण यस विषयमा विधिशास्त्र सीमित रहेको छ ।
२. थोरै संख्यामा प्राप्त भएको निवेदनहरूमा पनि, सर्वोच्च अदालतलाई द्वन्द्वसँग सम्बन्धित यौन हिंसाको र प्रचलित फौजदारी कार्यवाहीमा लागू हुने हदम्यादको बारेमा छलफल गर्ने अवसर प्राप्त हुँदा, ठोस कारणका साथ सोलाई प्रस्तुत सर्वोच्च अदालत असफल रहेको छ ।
३. द्वन्द्वसँग सम्बन्धित यौन हिंसाका पीडितहरूमा हालको संक्रमणकालीन प्रक्रियाले पारेको प्रभावबारे व्याख्या र विश्लेषण गर्न सर्वोच्च अदालत असफल रहेको छ ।
४. पीडितको गोपनीयता; द्वन्द्वमा भएका यौन हिंसाका पीडितको अन्तरिम राहतमा समावेशिताको कमी; द्वन्द्वमा भएका यौन हिंसाका फौजदारी कार्यवाहीमा भिन्न हदम्यादको आवश्यकता जस्ता थुप्रै विषयहरूमा न्यायालय र यस्ता हिंसाका पीडितका प्रतिनिधिहरूद्वारा घनीभूत छलफल गर्न बाँकी छन् ।
५. अन्य मुद्दाहरूमा सशस्त्र द्वन्द्वको विशेष परिस्थिति पहिचान भएतापनि, द्वन्द्वमा भएका यौन हिंसा सम्बन्धित सर्वोच्च अदालत पुगेका थोरै मुद्दाहरूमा द्वन्द्वमा परेका यौन हिंसा पीडितको विशेष परिस्थिति प्रतिबिम्ब भएका छैन ।
६. द्वन्द्वमा भएका यौन हिंसाका पीडितहरूले प्रभावकारी घरेलु उपचारको अवसर प्राप्त गरेका छैनन् । धेरै फैसलाहरूमा, द्वन्द्वसँग सम्बन्धित यौन हिंसाका पीडितहरूले नियमित सामान्य फौजदारी कार्यवाही अनुरूप अदालत जानु पर्ने हो वा संक्रमणकालीन न्यायका पद्धतिद्वारा न्याय खोज्नु पर्ने हो लगायत द्वन्द्वसँग सम्बन्धित यौन हिंसाको विश्लेषण गरेको छैन ।
७. पीडित र उनका प्रतिनिधिका लागि द्वन्द्वमा भएका यौन हिंसाका मुद्दामा ३५ दिन को हदम्याद लागू हुनु प्रमुख -र प्राय निकै चुनौतीपूर्ण बाधा रही आएको छ । हदम्याद लागू नहुने द्वन्द्वसँग सम्बन्धित अन्य मुद्दा जस्तै बलात्कार पछिको हत्यामा सर्वोच्च अदालतले मुद्दाको तथ्य र प्रमाणको आधारमा अभिनव फैसलाहरू गरेको छ ।
८. द्वन्द्वसँग सम्बन्धित नरहेका बलात्कारका मुद्दाहरूमा उजुरी दिन ३५ दिनको हदम्याद पीडितलाई पर्याप्त नहुने भनी स्वीकार गरे पनि द्वन्द्वसँग सम्बन्धित यौन हिंसाको मुद्दामा फौजदारी कार्यवाहीको लागि ३५ दिन हदम्याद लागू हुने भनी सर्वोच्च अदालतले सो कायम गर्दै आएको छ । तसर्थ, द्वन्द्व काल पछि यौन हिंसा को मुद्दामा ३५ दिनको हदम्याद स्वीकार्य नहुने तर द्वन्द्वसँग सम्बन्धित यौन

हिंसाको मुद्दामा सो हदम्याद स्वीकार्य हुने जस्तो दोहोरो मापदण्ड सर्वोच्च अदालतको विधिशास्त्रमा देखिन्छ । यी विरोधाभास नजिरहरू ठोस कानुनी तर्कमा आधारित छैनन् र द्वन्द्वसँग सम्बन्धित यौन हिंसाका पीडितहरूले उजुरी दिन सामना गर्नु पर्ने परिस्थिति, जहाँ धेरै पटक पीडक आफैँ सुरक्षा बल वा प्रहरीमा कार्यरत हुन्छन्, सोको बुझाईको अभाव देखिन्छ ।

९. यसैगरी, द्वन्द्वमा भएका यौन हिंसाका पीडितहरूमाथि परेको असरलाई सर्वोच्च अदालतले बेवास्ता गरेको देखिन्छ । द्वन्द्वसँग सम्बन्धित यौन हिंसाका पीडितहरूलाई सर्वोच्च अदालतले न्याय सम्पादन गर्न नसक्दा प्रभावकारी उपचार विहीन भई पीडितहरूले न्याय र परिपुरणका लागि संयुक्त राष्ट्रिय संघको मानव अधिकार समिति जस्ता अन्तर्राष्ट्रिय संयन्त्र अवलम्बन गर्नु पर्ने अवस्थाको सृजना गरेको छ । संयुक्त राष्ट्रिय संघको मानव अधिकार समितिले ३५ दिन को हदम्याद नेपालको अन्तर्राष्ट्रिय दायित्वको विरुद्धमा रहेको भनी फैसला गरेको र तसर्थ सर्वोच्च अदालतको विधिशास्त्रले राज्यको अन्तर्राष्ट्रिय दायित्व सृजना गरेको छ ।
१०. द्वन्द्वसँग सम्बन्धित यौन हिंसाका पीडितले सर्वोच्च अदालतमा रिट निवेदन दर्ता गर्दा यौन हिंसाका पीडितहरूलाई सुनिश्चित गरिएको गोपनीयताको हक सुनिश्चित नभएको पाइन्छ । उनीहरूको नाम, ठेगाना र घटनासँग सम्बन्धित संवेदनशील जानकारी अन्य मुद्दा सरह नै सार्वजनिक गरिन्छ ।
११. द्वन्द्वसँग सम्बन्धित यौन हिंसाका पीडितहरूलाई कुनै निश्चित राहतको योजना उपलब्ध छैन र उपलब्ध भएका योजनाहरूले द्वन्द्वका परेका यौन हिंसाका पीडितहरूलाई लाभार्थीको रूपमा समावेश गर्दैन ।
१२. सर्वोच्च अदालतले विभिन्न नजिरहरूमा बलात्कार पीडितहरूको परिपुरण पाउने हक सुनिश्चित गरेतापनि, द्वन्द्वसँग सम्बन्धित यौन हिंसा पीडितको लागि सबै प्रकारका परिपुरणको व्यवस्थाको माग गरी विशिष्ट निवेदन दर्ता नभएकाले यस विषयमा कुनै विशिष्ट नजिर प्रतिपादन भएको छैन । सर्वोच्च अदालतले नेपाल सरकारलाई सबै द्वन्द्व पीडितलाई परिपुरण प्रदान गर्नु भनी गरेको आदेश कार्यान्वयन भएको छैन ।
१३. यी निष्कर्षको आधारमा ह्युमन राईट्स एण्ड जस्टिस सेन्टरले नेपाल सरकार, सर्वोच्च अदालत र नागरिक समाजलाई निम्न सिफारिस गर्दछ ।

## २. सिफारिसहरू

### नेपाल सरकारलाई गरिएका सिफारिसहरू

नेपाल सरकारलाई निम्न सिफारिस गरिएको छ:

- ⇒ सत्य निरूपण तथा मेलमिलाप आयोगको प्रभावकारिताको मुल्यांकन गर्ने र हाल संक्रमणकालीन न्यायको प्रक्रियामा अवस्थित समस्याहरूको समाधान खोजी नेपालको अन्तर्राष्ट्रिय दायित्वको पालना हुने गरी सम्बन्धित कानून लागू गर्ने ।
- ⇒ द्वन्द्वसँग सम्बन्धित यौन हिंसा सम्बोधन गर्ने विशिष्ट कानून तथा नीति जारी गर्ने । सो कानूनले यी विषयमा मात्र सीमित नभई समेट्ने विषयहरू: यौन हिंसाको व्याख्या गर्ने, न्याय र क्षतिपूर्तिको लागि प्रस्ट कार्यविधि तोक्ने, र द्वन्द्वसँग सम्बन्धित यौन हिंसाको फौजदारी कारवाही र क्षतिपूर्तिमा हदम्यादको प्रावधान लागू नगर्ने जस्ता प्रावधान समावेश गर्ने ।
- ⇒ क्षतिपूर्ति, पुनरुधार, पुनस्थापना, सन्तुष्टि र पुन नदोहोरिने सुनिश्चितता लगायत पिडितको पर्याप्त परिपूरणको अधिकार सुनिश्चित गरी नीति निर्माण गर्ने, योजना अपनाउने ।
- ⇒ संक्रमणकालीन न्यायसँग सम्बन्धित सर्वोच्च अदालतको निर्देशन आदेशको पालना गर्ने ।



- ⇒ फूलमती न्याय विरुद्ध नेपाल, देवी माया विरुद्ध नेपाल र पूर्ण माया विरुद्ध नेपाल मा संयुक्त राष्ट्रिय संघको मानव अधिकार समितिले गरेको फैसला सम्बोधन गरी सो फैसलाको तुरुन्त प्रभावकारी कार्यान्वयन गर्ने ।
- ⇒ द्वन्द्वसँग सम्बन्धित यौन हिंसाका पीडितको संख्या र हाल सम्म उनीहरूले अवलम्बन गरेका न्यायिक प्रक्रिया बारे अनुसन्धान गरि सो को तथ्य प्रकाशन गर्ने ।

### सर्वोच्च अदालतलाई सिफारिसहरू

द्वन्द्वसँग सम्बन्धित यौन हिंसाको मुद्दा निरूपण गर्दा सर्वोच्च अदालतलाई निम्न सिफारिस गरिन्छ:

- ⇒ द्वन्द्वसँग सम्बन्धित यौन हिंसाका पीडितहरूले सामना गर्नु पर्ने पिडादायी परिस्थितिको पहिचान गर्ने र हदम्यादलाई हटाई विधिशास्त्रको विकास गर्ने । यस अर्थमा, संयुक्त राष्ट्रसंघको मानव अधिकार समितिले नेपाल विरुद्धको उजुरीमा गरेको निर्णयलाई ध्यानमा राख्ने ।
- ⇒ बन्द इजलास र संवेदनशील जानकारी सार्वजनिक गर्न प्रतिबन्ध समेतको पीडितको गोपनीयता र सुरक्षाको हकलाई उच्च मापदण्डको आधारमा कायम गर्ने ।
- ⇒ क्षतिपूर्ती, पुनरुधार, पुनस्थापना, सन्तुष्टि र पुन नदोहोरिने सुनिश्चितता लगायत पीडितको पर्याप्त परिपूरणको अधिकार सम्बोधन गर्ने । यस सम्बन्धमा, संयुक्त राष्ट्रिय संघको मानव अधिकार समितिले नेपाल विरुद्धको द्वन्द्वसँग सम्बन्धित यौन हिंसाको उजुरीमा गरेको निर्णयलाई ध्यानमा राख्ने ।
- ⇒ द्वन्द्वसँग सम्बन्धित यौन हिंसाको मुद्दालाई आफ्नो नियमावलीमा प्राथमिकता राख्ने र अग्राधिकार तोक्ने ।

### नागरिक समाज संस्थालाई सिफारिसहरू

नागरिक समाज संस्थालाई निम्न सिफारिस गरिएको छ:

- ⇒ द्वन्द्वसँग सम्बन्धित यौन हिंसाको दायरा, गम्भीर्यता, र प्रभावलाई केन्द्रित गर्न द्वन्द्वसँग सम्बन्धित यौन हिंसाको अनुसन्धान गरी व्यापक र विभाजित तथ्य प्रकाशन गर्ने ।
- ⇒ द्वन्द्वसँग सम्बन्धित यौन हिंसाको अज्ञात विषयहरू पहिचान गर्ने र योजनाबद्ध रूपमा यी मुद्दाहरूमा छलफल गरी स्थानीय अदालतद्वारा यस विषयमा विधिशास्त्र विकास गर्न माग गर्ने । निम्न विषयहरू समावेश गर्न सकिन्छ: (क) पीडितहरूको गोपनीयताको विषय (ख) अन्तरिम राहतमा द्वन्द्वसँग सम्बन्धित यौन हिंसाका पीडित समावेश नभएको (ग) द्वन्द्वसँग सम्बन्धित यौन हिंसाको लागि भिन्न हदम्यादको प्रावधानको आवश्यकता ।
- ⇒ द्वन्द्वको समयमा यौन हिंसाका पीडितहरूलाई मान्यता दिने ।
- ⇒ द्वन्द्वसँग सम्बन्धित यौन हिंसाको मुद्दामा पैरवी गर्दा संवेदनशील जानकारी सार्वजनिक गर्न प्रतिबन्ध लगायत पीडितको गोपनीयता र सुरक्षाको हकलाई उच्च मापदण्डको आधारमा कायम गर्ने ।
- ⇒ संक्रमणकालीन न्यायका पद्धतिको मुल्यांकन र परिमार्जन गर्न योजनाबद्ध छलफल र अभियानको विकास गर्ने ।

- ⇒ संयुक्त राष्ट्रसंघको मानव अधिकार समितिको फैसलामा गरिएको सिफारिस र संक्रमणकालीन न्याय सम्बन्धित मुद्दामा सर्वोच्च अदालतले गरेको फैसलाको कार्यान्वयन गर्न योजनाबद्ध रूपमा सरकारलाई दबाव दिने ।
- ⇒ सर्वोच्च अदालतले कुनै निवेदन बिना आफै निर्णय गर्न नसक्ने हुनाले, खास गरी नागरिक समाज र द्वन्द्वसँग सम्बन्धित यौन हिंसाका पीडित र उनीहरूका प्रतिनिधिहरूले सर्वोच्च अदालतलाई यी विषयहरूमा विचार प्रकट गर्न र आफ्नो कार्यकुशलता देखाउने मौका दिन थप निवेदन दर्ता गर्नेबारे विचार गर्ने ।

# I. Introduction

## Overview of the report

1. This report aims to research, identify and analyse the case law of the Supreme Court of Nepal (hereinafter 'SC') on the issue of conflict-related sexual violence (hereinafter 'CRSV').
2. Section I briefly discusses the contextual background of the armed conflict, the ongoing transitional justice process, and the current situation concerning CRSV in Nepal. Section II illustrates the methodology used in conducting the research and writing this report and the limitations of this report. Section III briefly illustrates the national legal framework applicable to the victims of CRSV and explains why and when victims of CRSV resorted to the SC. Section IV analyses the jurisprudence of the SC on the subject of CRSV. The analysis is divided into sub-topics, the SC's jurisdiction to adjudicate cases relating to CRSV, the recognition of victims of CRSV by the SC, SC's judgments on cases concerning transitional justice and their nexus with CRSV and CRSV victims' access to justice. The report ends with Section V, which offers conclusions and specific recommendations to the concerned stakeholders, including the SC, the Nepal Government, and Civil Society Organizations (hereinafter 'CSOs').

## A. Contextual background of the 10-year armed conflict of Nepal

3. The internal armed conflict was launched by the Communist Party of Nepal (Maoist) (hereinafter 'CPN-Maoist') in 1996, with the aim of overthrowing the constitutional monarchy and establishing a socialist republic.<sup>1</sup> The signing of the Comprehensive Peace Agreement (hereinafter 'CPA') between the Government of Nepal (hereinafter 'GoN') and the Communist Party of Nepal (Maoist) in November 2006 marked the official end of the 10-year-long armed conflict.
4. The report of the Office of the High Commissioner of Human Rights (hereinafter 'OHCHR') estimates over 13,000 deaths and 1300 forcibly disappeared persons during the decade long conflict.<sup>2</sup> Several gross human rights violations, such as unlawful killings, enforced disappearances, torture and other inhumane and degrading treatment or punishments, arbitrary arrest and sexual violence<sup>3</sup> took place during the conflict. More specifically, women and girls were overwhelmingly caught in between the conflict between two parties and suffered from increasing insecurity, fear, and

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<sup>1</sup> International Crisis Group Working to Prevent Conflict Worldwide, *Nepal's Maoists: Their Aims, Structure and Strategy*, Asia Report N°104, 27 October 2005, p. 4.

<sup>2</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. 14.

<sup>3</sup> *Ibid.*

poverty.<sup>4</sup> As a consequence of the armed conflict, women and girls had to go through various situations like widowhood,<sup>5</sup> reversal of traditional gender roles,<sup>6</sup> unwanted pregnancies resulting from sexual violence; and children born as a consequence of rape; all of which led to their social exclusion by family members and the community.<sup>7</sup>

5. During the conflict, sexual violence, including rape, has been found to be committed by both parties to the conflict.<sup>8</sup> However, the majority of such cases were reported to be committed by the security forces. It was a 'common practice' for the security forces to use rape and sexual violence as a way to punish women for their alleged connection with the 'other side' (then rebels- the Maoists).<sup>9</sup> Studies indicate that sexual violence was committed by the security forces during operations, in custody, and at checkpoints.<sup>10</sup>
6. The data available indicate that, during the armed conflict, more than one-third of the victims of sexual violence were children, with many under 15 years of age.<sup>11</sup> Women, including pregnant women, were raped in front of their husbands and children.<sup>12</sup> The security forces also committed other forms of sexual harassment, including, but not limited to, asking for sex, touching women and girls inappropriately, using filthy words, and harassing women and girls during the conflict.<sup>13</sup>

## **B. Transitional Justice Mechanisms**

7. The Comprehensive Peace Accord (CPA) of 22 November 2006 had provisioned to set up a 'High-level Truth and Reconciliation Commission to investigate the truth about people seriously violating human rights and involved in crimes against humanity'.<sup>14</sup> In March 2013, an ordinance was issued by then-President Ram Baran Yadav to establish the said commission.<sup>15</sup> The ordinance had a provision for granting amnesty to perpetrators of crimes under international law and foresaw the possibility of

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<sup>4</sup> 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, available at [https://www.academia.edu/34076129/Sexual\\_Violence\\_in\\_the\\_Peoples\\_War\\_The\\_Impact\\_of\\_Armed\\_Conflict\\_on\\_Women\\_and\\_Girls\\_in\\_Nepal\\_2006](https://www.academia.edu/34076129/Sexual_Violence_in_the_Peoples_War_The_Impact_of_Armed_Conflict_on_Women_and_Girls_in_Nepal_2006), p. 10.

<sup>5</sup> International Centre for Transitional Justice (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. 28.

<sup>6</sup> *Ibid.*, p. 32.

<sup>7</sup> *Ibid.*, p. 34.

<sup>8</sup> OHCHR, *Nepal Conflict Report*, op. cit., p. 168.

<sup>9</sup> *Ibid.*; International Centre for Transitional Justice (ICTJ) and Advocacy Forum, *Across the Lines, The Impact of Nepal's Conflict on Women*, 2010, p. 11.

<sup>10</sup> IHRICON, *Sexual Violence in the "People's War": The Impact of Armed Conflict on Women and Girls in Nepal*, op. cit., p. 18.

<sup>11</sup> OHCHR, *Nepal Conflict Report*, op. cit., p. 23.

<sup>12</sup> ICTJ and Advocacy Forum, *Across the Lines, The Impact of Nepal's Conflict on Women*, op. cit., p. 50.

<sup>13</sup> *Ibid.*, p. 53.

<sup>14</sup> CPA, *Comprehensive Peace Accord signed between Nepal Government and the Communist Party of Nepal (Maoist)*, op. cit., Section 5.2.5.

<sup>15</sup> International Justice Resource Center (IJRC), *Truth and Reconciliation Commission For Nepal Continues To Face Criticism*, 9 April 2013, available at <https://ijrcenter.org/2013/04/09/flawed-truth-and-reconciliation-commission-for-nepal/>

reconciliation without consent from the parties, which received huge criticism.<sup>16</sup> Later, in January 2014, in *Madhav Kumar Basnet vs Nepal Government*,<sup>17</sup> the SC declared a number of provisions of the ordinance, including the provision for granting amnesty, as unconstitutional.<sup>18</sup> It issued a directive order to the GoN to revise the text of the ordinance to ensure its compliance with international law and the then Interim Constitution 2007.<sup>19</sup>

8. Later, on 25 April 2014,<sup>20</sup> the Parliament passed the Enforced Disappearances Enquiry, Truth and Reconciliation Commission Act, 2014 A.D. (2071 B.S.) (hereinafter 'TRC Act').<sup>21</sup> The text of the TRC Act essentially reproduced that of the ordinance of March 2013. Pursuant to the TRC Act, two transitional justice mechanisms were set up, namely, the Commission of Investigation of Enforced Disappeared Persons (hereinafter 'CIEDP')<sup>22</sup> and the Truth and Reconciliation Commission (hereinafter 'TRC').<sup>23</sup> The Commissions received an initial mandate of two years,<sup>24</sup> which has been extended several times.<sup>25</sup> Despite the repeated extensions of their mandate, the Commissions still operate on the basis of a flawed legislation. On 26 February 2015, the SC declared certain provisions of the TRC Act to be against international standards.<sup>26</sup>
9. Victims' groups and CSOs demanded the amendment of the law to bring it in line with the order of the SC and to meet international standards. Lately, on 19 March 2023, the Government presented to the Parliament yet another draft bill for the amendment of the TRC Act (hereinafter "amendment bill"). This amendment bill is essentially a replica of a previous bill registered before the Parliament on 15 July 2022, which had been subjected to strong objections from civil society and victims' organisations.<sup>27</sup> The bill has

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<sup>16</sup> OHCHR, *An OHCHR Analysis of the Nepal Ordinance on Investigation of Disappeared People, Truth and Reconciliation Commission*, December 2012, p. 1, available at

[https://www.ohchr.org/Documents/Press/Nepal\\_OHCHR\\_Analysis\\_TJ\\_Ordinance\\_Dec\\_2012.pdf](https://www.ohchr.org/Documents/Press/Nepal_OHCHR_Analysis_TJ_Ordinance_Dec_2012.pdf).

<sup>17</sup> *Ibid.*

<sup>18</sup> Supreme Court, *Madhav Kumar Basnet vs. Nepal Government*, Writ no. 069-WS-0057, NKP 2070, Decision No. 9051, 1 February 2018 (2070-10-18), para. 35.

<sup>19</sup> *Ibid.*

<sup>20</sup> OHCHR, *OHCHR Technical Note The Nepal Act on the Commission on Investigation of Disappeared Persons, Truth and Reconciliation, 2071 (2014)* – as Gazetted 21 May 2014, para. 1, available at

[https://www.ohchr.org/Documents/Countries/NP/OHCHRTechnical\\_Note\\_Nepal\\_CIDP\\_TRC\\_Act2014.pdf](https://www.ohchr.org/Documents/Countries/NP/OHCHRTechnical_Note_Nepal_CIDP_TRC_Act2014.pdf).

<sup>21</sup> The Enforced Disappearances Enquiry, Truth and Reconciliation Commission Act, 2014 A.D. (2071 B.S.) (TRC Act).

<sup>22</sup> Commission of Investigation of Enforced Disappeared Persons of Nepal, available at <https://ciedp.gov.np>.

<sup>23</sup> Truth and Reconciliation Commission of Nepal, available at <https://trc.gov.np>.

<sup>24</sup> TRC Act, op. cit., Section 38.

<sup>25</sup> In 2016, the two commissions' tenure was extended to another one year until 2017. Again, in 2017 February, it was extended for a year, amidst vast criticism. As its tenure came to an end in February 2018, on 5 January 2018, it was extended further for a period of one year. On 6 February 2019, the tenure of the commissions was extended for another one year. On January 2020, the mandate of the commissions was extended for another one year until February 2021. In July 2021, the commissions received a mandate for another one year until July 2022, which was further extended until 17 October 2022. On 14 October 2022, the term was extended until 17 July 2023. See TRIAL International and Human Rights and Justice Center, *Alternative Report on Nepal in the view of the adoption of the LIST OF ISSUES PRIOR TO REPORTING by the Human Rights Committee*, December 2020, paras. 17, 21, 23.

<sup>26</sup> Supreme Court, *Suman Adhikari et al v Government of Nepal*, 26 February 2015, 069-WS-0057, pp. 80-85.

<sup>27</sup> The Kathmandu Post, 'Victims object to proposed changes in laws that aim to absolve perpetrators', 21 July 2022, available at <https://kathmandupost.com/national/2022/07/21/victims-object-to-proposed-changes-in-laws-that-aim-to->

some positive provisions concerning reparation. In particular, the bill recognizes reparation as a right of the victim, regardless of various circumstances, such as (i) non-identification of the perpetrator; (ii) reconciliation between the victim and the perpetrator, and (iii) recommendation for prosecution or amnesty.<sup>28</sup> However, amendment the bill incorporates several provisions that do not align with international standards and decisions of the national courts. For instance, Section 2 (4) of the registered amendment bill differentiates between 'human rights violations' and 'gross human rights violations.' The former includes 'murder', 'sexual violence', 'physical or mental torture', 'abduction and hostage taking, 'illegal detention', 'beating, maiming and causing physical disability', 'looting, capture, destruction or arson of private and public property', 'forced eviction from one's residence or displacement by any other means', or 'any inhuman act that are against international human rights and humanitarian law' The amendment bill empowers the Commissions to provide amnesty for these violations.<sup>29</sup> The list of gross human rights violations includes 'cruel and inhuman murder', 'rape', 'cruel and inhuman torture' and 'enforced disappearances', for which amnesty is prohibited. However, such segregation does not seem to be justified and showcases an erroneous understanding of the elements of crimes, including torture and sexual violence.

10. Furthermore, the mandate of the commissioners of both Commissions expired in mid-April 2019. On 25 March 2019, the GoN formed a recommendation committee to appoint new commissioners. After nine months of vacuum, the committee recommended the commissioners only on 18 January 2020. The appointment was politically influenced.<sup>30</sup> It discarded victims' sentiments, the opinions of other national stakeholders, and the concerns expressed by the international community,<sup>31</sup> including the joint communication made by the United Nations Special Procedures on 12 April 2019 to the GoN.<sup>32</sup> As already mentioned, despite the lack of any concrete achievement

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[absolve-perpetrators](https://www.icj.org/nepal-amendment-bill-to-transitional-justice-act-needs-revision/); International Commission of Jurists (ICJ), Nepal: Amendment bill to Transitional Justice Act needs revision, 29 July 2022, available at <https://www.icj.org/nepal-amendment-bill-to-transitional-justice-act-needs-revision/>.

<sup>28</sup> Amendment bill to TRC Act, March 2023, Section 10 (2).

<sup>29</sup> *Ibid*, Section 15.

<sup>30</sup> The Kathmandu Post, *Ganesh Datta Bhatta to lead truth commission, Yubaraj Subedi picked as disappearance commission chair*, published on 18 January 2020, available at <https://kathmandupost.com/national/2020/01/18/ganesh-datta-bhatta-to-lead-truth-commission-yubraj-subedi-picked-as-disappearance-commission-chair>.

<sup>31</sup> Republica, *Recent govt steps undermine transitional justice in Nepal, say int'l human rights watchdogs*, published on 25 January 2020, available at: [https://myrepublica.nagariknetwork.com/amp/recent-govt-steps-undermine-transitional-justice-in-nepal-say-int-l-human-rights-watchdogs/?fbclid=IwAR0KTW0UOo8qsBAL72kIpNOQxNLwQTWKoh8YBEZMQMEa1n\\_NikwNHOPool8](https://myrepublica.nagariknetwork.com/amp/recent-govt-steps-undermine-transitional-justice-in-nepal-say-int-l-human-rights-watchdogs/?fbclid=IwAR0KTW0UOo8qsBAL72kIpNOQxNLwQTWKoh8YBEZMQMEa1n_NikwNHOPool8).

<sup>32</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).

so far, the mandate of the Commissions was extended multiple times, the latest being on 14 October 2022, which expanded the term until 17 July 2023.

11. The two transitional justice mechanisms have not been and cannot be effective until they continue to operate on the basis of severely flawed legislation, which determines that there is no chance that they will adequately address with sensitivity and seriousness, among others, the issue of CRSV.

### C. Current Situation of CRSV

12. The data on the number of CRSV victims/survivors; the exact magnitude of this crime; and the precise figure of children born as a consequence of rape during the conflict era are unavailable.<sup>33</sup> In 2012, the OHCHR Nepal Conflict Report indicated that the documentation of sexual violence during the conflict 'remains scarce'.<sup>34</sup> Ten years later, the situation has not changed. Although a recent study<sup>35</sup> estimates between 1500 to 2000 CRSV survivors, there is no official concrete data on the subject. Irregularities and lack of disaggregated data on the exact number of CRSV victims/survivors lead to a lack of understanding of the adverse impacts on these survivors and the acknowledgment of their suffering. A report issued by UN Women in 2017 asserts that the GoN is 'yet to acknowledge research findings and identified number of CRSV victims/survivor' through researches carried out by various CSOs, 'due to diversity in research methodologies'.<sup>36</sup> This has led to a lack of concrete data to analyse the situation of CRSV victims.
13. The Human Rights Committee (hereinafter, 'HRC'), the United Nations Treaty Body mandated to monitor the implementation of the International Covenant on Civil and Political Rights (hereafter, 'ICCPR')<sup>37</sup>, has rendered decisions on three individual complaints, which are emblematic of the situation of CRSV survivors in Nepal. The decisions (also called 'views'), delivered respectively in 2017, 2019 and 2021, concern the cases *Purna Maya vs. Nepal*,<sup>38</sup> *Fulmati Nyaya vs. Nepal*<sup>39</sup> and *Devi Maya Nepal vs. Nepal*.<sup>40</sup> In *Purna Maya vs. Nepal*, the HRC held that gang rape and other acts of torture inflicted on the victim were violations of 'rights under article 7,<sup>41</sup> read alone and in

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<sup>33</sup> Pinky Singh Rana and UN Women, *Nepal: Needs of Sexual Violence Survivors and Children Born out of Rape*, 2017, p. 8.

<sup>34</sup> OHCHR, *Nepal Conflict Report*, op. cit., p. 22.

<sup>35</sup> ICTJ, Global Survivors Fund and others, *Nepal Study On Opportunities For Reparations For Victims And Survivors Of Conflict-Related Sexual Violence*, 2022, p. 32.

<sup>36</sup> *Ibid.*, p. 7.

<sup>37</sup> International Covenant on Civil and Political Rights (ICCPR), adopted 16 December 1966, entered into force 23 March 1976, UNTS, Vol. 999, p. 171. Nepal ratified ICCPR and its First Optional Protocol on 14 May 1991.

<sup>38</sup> HRC, Case *Fulmati Nyaya vs. Nepal*, Views of 18 March 2019.

<sup>39</sup> HRC, Case *Purna Maya vs. Nepal*, Views of 17 March 2017.

<sup>40</sup> HRC, Case *Devi Maya Nepal vs. Nepal*, Views of 15 July 2021.

<sup>41</sup> ICCPR, Article 7 "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation."

conjunction with article 2 (3)<sup>42</sup> of the ICCPR'.<sup>43</sup> The HRC reiterated the States' obligation 'to provide the author with an effective remedy,<sup>44</sup> including in terms of effective investigation, prosecution, punishment, compensation, appropriate measures of satisfaction, psychological rehabilitation, and medical treatment.<sup>45</sup> Highlighting the State's obligations under article 2 (2) of the ICCPR,<sup>46</sup> the HRC recommended Nepal to 'abolish then existing 35-day' statute of limitation for filing cases of rape, ensure confidentiality and protection of victims, remove legal provisions allowing impunity, 'facilitate a national dialogue on sexual violence against women to increase the visibility of the issue and the status of victims in Nepalese society', etc.<sup>47</sup> However, at the date of writing this report, *Purna Maya's* case has not been investigated, she has not received any compensation for the harm suffered, and still urgently requires psycho-social and physical support.<sup>48</sup> Albeit the statute of limitations for criminal proceedings has been amended, as it will emphasised below, it remains at odds with international law. Moreover, Nepal is yet to take any measures to adequately protect CRSV survivors or ensure their confidentiality and impunity is still rampant in cases of sexual violence committed during the internal conflict.<sup>49</sup>

14. In its decision on the case *Fulmati Nyaya vs. Nepal*, the HRC also found several violations by the State party.<sup>50</sup> In addition to recommending measures similar to those indicated in the case *Purna Maya vs. Nepal*, the HRC also recommended adapting 'the definition of rape and other forms of sexual violence in accordance with international standards', prompt, impartial and effective investigation in cases of rape and other forms of sexual violence, an apology from the State in a private ceremony, the removal of obstacles that hinder the filing of complaints and effective access to justice and compensation in cases of CRSV, among others.<sup>51</sup> However, at the date of writing this report, *Fulmati Nyaya's* case has not been investigated nor she has received any compensation or a private apology.<sup>52</sup> All in all, any HRC's recommendations are yet to be implemented, which depicts the gruelling condition of CRSV victims in Nepal.

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<sup>42</sup> *Ibid.*, Article 2(3) "Each State Party to the present Covenant undertakes: (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity; (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy; (c) To ensure that the competent authorities shall enforce such remedies when granted.

<sup>43</sup> HRC, Case *Purna Maya*, op. cit., para. 13.

<sup>44</sup> *Ibid.*, para. 14.

<sup>45</sup> *Ibid.*

<sup>46</sup> ICCPR, Article 2 (2).

<sup>47</sup> HRC, Case *Purna Maya*, op. cit., para. 15.

<sup>48</sup> REDRESS, *Purna Maya vs. Nepal*, available at <https://redress.org/casework/purna-maya/>.

<sup>49</sup> *Ibid.*

<sup>50</sup> ICCPR, articles 7 and 24 (1); articles 2 (1) and 3, read alone in conjunction with articles 7, 24 (1) and 26; article 8 (3), read alone and in conjunction with articles 7 and 24 (1); article 9; read alone and in conjunction with articles 2 (3) and 24 (1); articles 17 and 23 (1); and article 2 (3), read alone and in conjunction with articles 3, 7, 9, 24 and 26.

<sup>51</sup> HRC, Case *Fulmati Nyaya vs. Nepal*, op. cit., para. 9.

<sup>52</sup> Real Rights Now, *FULMATI NYAYA*, available at <https://realrightsnow.org/en/fulmati-nyaya/>.



15. In its decision on the case of *Devi Maya vs. Nepal*, the HRC also found several violations of the ICCPR by the State party.<sup>53</sup> The HRC considered that the sexual violence and rape suffered by *Devi Maya* amounted to 'serious disruption of author's family life and marriage'<sup>54</sup> and had 'particularly serious discriminatory consequences'<sup>55</sup> for her, and that the State had failed to provide measures of special protection as she was entitled as a member of a particularly vulnerable indigenous group.<sup>56</sup> Similar to those recommendations indicated in the cases *Purna Maya vs. Nepal* and *Fulmati Nyaya vs. Nepal*, the HRC recommended 'significantly increasing the statute of limitations commensurate with the gravity of such crimes'.<sup>57</sup>
16. On 23 September 2022, the Government endorsed the second National Action Plan on United Nations Resolutions 1325 and 1820 (NAP II) after a slow process of consultation. NAP II recognises four priority pillars: participation, protection and prevention, relief and recovery and capacity building, resource management, and monitoring and evaluation. Indeed, NAP II seems an improvement compared to the previous one, as it envisages direct and meaningful participation of conflict-affected women in the formulation and implementation of relief, recovery, and rehabilitation programs; and aims at identifying and addressing in an holistic way the needs of women and girls victims and survivors of CRSV and ensuring proportional and meaningful participation of women at all levels. However, NAP II does not contain any provision concerning the promotion of accountability for CRSV in the form of investigation, prosecution and sanction of perpetrators.

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<sup>53</sup> ICCPR, article 7, read alone and in conjunction with articles 2 (1), 2 (3), 3 and 26 of the Covenant; and under articles 17 and 23, each read alone and in conjunction with articles 2 (1), 2 (3), 3 and 26 of the Covenant.

<sup>54</sup> HRC, Case *Devi Maya Nepal vs. Nepal*, op. cit., para. 7.6.

<sup>55</sup> *Ibid.*, para. 7.3.

<sup>56</sup> *Ibid.*, para. 3.4.

<sup>57</sup> *Ibid.*, para. 9.

## II. Methodology

17. The report is based on desk review. The main subject of the study is to analyze verdicts on writ petitions adjudicated by the SC which were accessible through the website of the SC;<sup>58</sup> the monthly compilation of the case law '*Nepal Kanoon Patrika*' (Nepal Law Journal), (hereinafter 'NKP') available online<sup>59</sup> and in the form of books. For the purpose of analysis, NKPs were considered as these compilations are the only publicly available documentations of judgements pronounced by the SC. The report includes case law specific to cases of CRSV, as well as transitional justice and sexual violence that did not happen in the context of the armed conflict.
18. This report analyses a total of 9 decisions by the SC. Out of these, 6 deal with the subject of the transitional justice process in Nepal and its nexus with CRSV, and 3 deal with CRSV explicitly. All the cases analysed were adjudicated between 2009 A.D. and 2019 A.D. This report has additionally analysed 15 verdicts rendered by the SC on various cases of sexual violence including rape and sexual assault that did not happen in the context of armed conflict, for the purpose of drawing comparisons.
19. This report is limited to the analysis of cases decided by the SC and does not include interviews with the victims or their representatives. It does not include either any other decisions on CRSV by other courts in the country. It does not analyse cases that are currently pending in the SC. The verdicts that are considered in this report are illustrated at the end in *Annex I*.

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<sup>58</sup> Supreme Court of Nepal, available at <https://supremecourt.gov.np/web/>.

<sup>59</sup> Supreme Court of Nepal, Latest Digital Archive, available at <https://supremecourt.gov.np/web/nkpol>.

### III. Domestic Legal Framework and Mechanisms Applicable to Victims of Conflict-related Sexual Violence

20. This part of the report briefly illustrates the national legal framework applicable to the victims of CRSV. It explains why and when victims of CRSV resorted to the SC.

#### A. Transitional justice laws and mechanisms

21. Under the transitional justice process, the TRC is mandated ‘to investigate the facts about those involved in gross violations of human rights and crimes against humanity during the course of armed conflict’,<sup>60</sup> which is governed by the TRC Act. The procedures of receiving a complaint,<sup>61</sup> investigating,<sup>62</sup> providing rehabilitation, reparation or relief,<sup>63</sup> provisions on amnesty,<sup>64</sup> and reconciliation<sup>65</sup> are set forth in the TRC Act and its regulation. In the past years, the TRC has received 63,718 complaints, out of which only 3,787 complaints have undergone preliminary investigations.<sup>66</sup> However, there are no statistics depicting if the complaints that have undergone these investigations include cases of CRSV.

22. Moreover, the TRC Act includes ‘rape and sexual violence’ as gross violations of human rights,<sup>67</sup> but does not define what constitutes sexual violence nor differentiate between rape and other forms of sexual violence.

23. International human rights mechanisms have likewise criticized various provisions of the TRC Act. In particular, the provision concerning reconciliation in the TRC Act which stipulates that *when either of the parties apply with a request for reconciliation to the Commission - consent of the other party is not required for the Commission to bring ‘mutual reconciliation’*<sup>68</sup>- was regarded as ‘highly problematic and inappropriate’ by the OHCHR.<sup>69</sup> In 2018, the Committee on Elimination of Discrimination against Women

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<sup>60</sup> TRC Act, op. cit., Preamble.

<sup>61</sup> TRC Regulation, Chapter 2.

<sup>62</sup> *Ibid.*, Chapter 3.

<sup>63</sup> *Ibid.*, Chapter 5.

<sup>64</sup> *Ibid.*, Chapter 6.

<sup>65</sup> TRC Act, op. cit., Section 32.

<sup>66</sup> Human Rights Council, *Report of the Working Group on the Universal Periodic Review, Nepal*, A/HRC/47/10, 30 March 2021, para. 30; The Kathmandu Post, *Tenure of two transitional justice bodies to be extended but this is not enough, stakeholders say*, 4 February 2021, available at <https://kathmandupost.com/national/2021/02/04/government-decides-to-extend-tenure-of-two-transitional-justice-commissions-till-mid-july>.

<sup>67</sup> TRC Act, op. cit., Section 2(j)(6).

<sup>68</sup> TRC Act, op. cit., Section 22.

<sup>69</sup> OHCHR, *OHCHR Comments on the Nepal “Commission on Investigation of Disappeared Persons, Truth and Reconciliation Ordinance”*, 3 April 2013, available at [http://www.ohchr.org/Documents/Countries/NP/OHCHRComments\\_TRC\\_Ordinance.docx](http://www.ohchr.org/Documents/Countries/NP/OHCHRComments_TRC_Ordinance.docx), para. 6.

recommended Nepal to bring the TRC Act in line with its international obligations and take into account the SC's decision<sup>70</sup> and amend the amnesty provision of the TRC Act.<sup>71</sup> Several United Nations Special Procedures expressed their concern at the reported lack of effective consultation with victims concerning the amendment of the Act.<sup>72</sup> In three decisions rendered on the cases concerning CRSV in Nepal's armed conflict, the HRC held that the 'Truth and Reconciliation Commission would not constitute an effective remedy for the victim'.<sup>73</sup>

24. Although the government registered an amendment bill to the TRC Act, as explained above in paragraph 9, the amendment bill is flawed and does not meet the standards for international standards and decisions of the national courts. Further, as per Section 9 of the registered amendment bill, "except for the cases of grave human rights violations, the Commission may with independent consent of the victim conduct mutual mediation between the perpetrator and victim of human rights violation if the perpetrator or victim files an application for reconciliation before the Commission." This would allow crimes listed as 'human rights violations', such as sexual violence- in the amendment bill, which are equally grave, to be eligible for mediation against international law.<sup>74</sup>

25. Furthermore, the national legislation on rape and other forms of sexual violence is flawed and does not meet international law and standards on the matter.<sup>75</sup> The applicable law does not separately encompass provisions for access to justice concerning conflict-era crimes, as the NPC does not apply retroactively.<sup>76</sup> Thus, in the absence of any effective remedy, CRSV victims reach out to the SC as the last resort of available domestic measures, albeit knowing beforehand that, so far, it has not been effective.

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<sup>70</sup> *Ibid.*

<sup>71</sup> Committee on the Elimination of Discrimination against Women (CEDAW), *Concluding observations on the Sixth Periodic Report of Nepal*, CEDAW/C/NPL/CO/6, on 14 November 2018, para. 23 (a).

<sup>72</sup> Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, the 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 and the Special Rapporteur on violence against women, its causes and consequences, addressed to the Permanent Mission of Nepal to the United Nations Office and other international organizations in Geneva, p. 4, available at <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gld=25109>.

<sup>73</sup> HRC, Case *Fulmati Nyaya vs. Nepal*, op. cit., para. 6.5; HRC, Case *Purna Maya vs. Nepal*, op.cit., para. 11.4; HRC, Case *Devi Maya vs. Nepal*, op. cit., para. 6.5.

<sup>74</sup> Updated Set of principles for the protection and promotion of human rights through action to combat impunity (Principles on Impunity), E/CN.4/2005/102/Add.1 8 February 2005, principle 24(A).

<sup>75</sup> TRIAL International and Human Rights and Justice Center, *Alternative Report on Nepal in the view of adoption of the LIST OF ISSUES PRIOR TO REPORTING by the Human Rights Committee*, op. cit., paras. 26-37.

<sup>76</sup> Human Rights and Justice Centre (HRJC) with the support of TRIAL International, *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 vs. Nepal*, February 2021, para. 26.

26. Moreover, the SC has highlighted that the role of the TRC is complementary to the existing legal criminal proceedings.<sup>77</sup> A report published by the OHCHR Nepal calls on Nepal to establish accountability for conflict-related human rights violations through criminal justice procedures.<sup>78</sup>

## **B. Regular Criminal Justice Procedure**

27. During the armed conflict, the National Code, 1963 (*Muluki Ain* 2020 B.S.) (hereinafter 'National Code, 1963') was in force. The National Code, 1963 defined the crime of rape<sup>79</sup> with a statutory limitation of 35 days from the commission of the crime to file a complaint.<sup>80</sup> Where the victim was in captivity, the law provided for an additional 35 days to file a complaint after the victim's liberation.<sup>81</sup> The crimes of rape, murder, or sexual assault during the war period were governed by the provisions of the National Code, 1963 and must be prosecuted under the described framework.

28. Pursuant to the Government Cases Act, 1992 (2049), a complaint must be filed to initiate criminal proceedings for the crime of rape occurred during the armed conflict. This Act lists the crime of rape as a government criminal offence where the government was the plaintiff<sup>82</sup> under Schedule 1 of the Act.<sup>83</sup> The police is responsible to receive any written or verbal complaints of the crimes under Schedule 1 of the Act, called the First Information Report (hereinafter 'FIR').<sup>84</sup> If the police refuses to register the complaint, the applicant can go to the concerned Chief District Officer (hereinafter 'CDO') or higher authority of the designated police station to file a complaint and ask them to order the concerned police station to initiate necessary actions.<sup>85</sup> However, the police refused to register FIRs on CRSV, including rape, on an almost systematic basis,<sup>86</sup> as they were barred by the statute of limitations.<sup>87</sup>

29. When there is a refusal to register an FIR or the inactivity from the CDO or the higher police officials, no legal remedy remains available. In such circumstances, the victims of CRSV can resort to filing a writ petition under extra-ordinary jurisdiction of either the

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<sup>77</sup> Supreme Court, *Madhav Kumar Basnet vs. Nepal Government*, op. cit., para. 25.

<sup>78</sup> OHCHR Nepal, *The relationship between transitional justice mechanisms and the criminal justice system: Can conflict-related human rights and humanitarian law violations and abuses be deferred or suspended on the basis of commitments to establish a Truth and Reconciliation Commission*, March 2011, p. 10.

<sup>79</sup> The National Code, 1963 (*Muluki Ain* 2020), defined rape as '*sexual intercourse with a girl or woman an unmarried girl, a widow or someone's wife under sixteen years of age with or without her consent and with one above sixteen years of age without her consent by using force or showing threat or even under inappropriate influence*', Chapter on Rape, No. 1.

<sup>80</sup> The National Code, 1963 (*Muluki Ain* 2020), Chapter on Rape, No. 11.

<sup>81</sup> *Ibid.*, Chapter on Court Proceedings, No. 40.

<sup>82</sup> Government Cases Act, 1992, Section 23.

<sup>83</sup> *Ibid.*, Schedule 1, No. 4 '*Case punishable under the Chapter on Rape of the National Code.*'

<sup>84</sup> *Ibid.*, Section 3 (1).

<sup>85</sup> *Ibid.*, Section 3 (5).

<sup>86</sup> ICTJ and Advocacy Forum, *Across the Lines: The Impact of Nepal's Conflict on Women*, op. cit., p. 166.

<sup>87</sup> Human Rights Watch (HRW), *Nepal: Conflict-Era Rapes Go Unpunished*, 23 September 2014, available at <https://www.hrw.org/news/2014/09/23/nepal-conflict-era-rapes-go-unpunished>

SC<sup>88</sup> or the High Court.<sup>89</sup> For the purposes of this report, only the writ petitions filed to the SC are considered.

30. Likewise, the Compensation Related to Torture Act, 1996 A.D. (2053 B.S.) maintained a 35-day statute of limitation to apply for compensation in cases of torture.<sup>90</sup> The victims of CRSV were not able to access their right to compensation barred by this statute of limitation.<sup>91</sup> More importantly, national legislation fails to recognize sexual violence perpetrated during the civil war as a form of torture.<sup>92</sup>
31. On 9 August 2017, the Nepalese Parliament endorsed<sup>93</sup> a new Penal Code, the National Penal Code, 2017 (*Muluki Foujdaari Samhita, 2074 BS*) entered into force on 17 August 2018 (hereinafter, NPC). The NPC replaced the National Code, 1963.<sup>94</sup> Despite the NPC expands the statutory limitation for the crime of rape from 35 days to 1 year,<sup>95</sup> and for the cases of torture from 35 days to 6 months,<sup>96</sup> the SR on VAW expressed concern that it 'may still fail to provide victims with adequate time to come forward'.<sup>97</sup> These statutes do not reflect the difficulties faced by victims in reporting the incidents that occurred during the conflict.<sup>98</sup> Additionally, in its decision on the case *Fulmati Nyaya vs. Nepal*, the HRC held that the amended statute of limitation of 1 year for a filing a report on a rape case 'does not commensurate with the gravity of such crimes'.<sup>99</sup> In July 2022, the House of Representatives endorsed a proposal to increase the statute of limitation for criminal proceedings concerning sexual violence and set it at 2 years from the perpetration of the crime if the victim is an adult and 3 years if the victim is a minor.<sup>100</sup>

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<sup>88</sup> *Interim Constitution of Nepal*, 2007 A.D. (2063 B.S.) Article 107 (2); Constitution of Nepal, 2015 A.D. (2072 B.S.), Article 133(2): The Supreme Court shall, for the enforcement of the fundamental rights conferred by this Constitution or of any other legal right for which no other remedy has been provided or for which the remedy even though provided appears to be inadequate or ineffective or for the settlement of any constitutional or legal question involved in any dispute of public interest or concern, have the extraordinary power to issue necessary and appropriate orders, provide appropriate remedies, enforce such right or settle such dispute.

<sup>89</sup> *Interim Constitution of Nepal*, 2007 A.D. (2063 B.S.) Article 107 (2); Constitution of Nepal, 2015 A.D. (2072 B.S.), Article 144 (2).

<sup>90</sup> Compensation Related to Torture Act, 1996 A.D. (2053 B.S.), Section 5.

<sup>91</sup> TRIAL International 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), p. 19.

<sup>92</sup> TRIAL International and Human Rights and Justice Centre (HRJC), *Report to the Committee on the Elimination of Discrimination against Women Submission on the 6th Periodic Report submitted by Nepal*, September 2018, p. 7.

<sup>93</sup> The Kathmandu Post, *House passes long-awaited Criminal Code, 2074*, published on 9 August 2018, available at <https://kathmandupost.com/national/2017/08/09/house-passes-long-awaited-criminal-code-2074>.

<sup>94</sup> Republica, *New Muluki codes take effect from today*, published on 17 August 2018, available at <https://myrepublica.nagariknetwork.com/news/new-muluki-codes-take-effect-from-today/>.

<sup>95</sup> National Penal Code, 2017 A.D. (2074 B.S.), Section 229 (2).

<sup>96</sup> *Ibid.*, Section 170 (2).

<sup>97</sup> SR on VAW, *Report on country visit to Nepal*, op. cit., para. 59.

<sup>98</sup> *Ibid.*, para. 35.

<sup>99</sup> HRC, Case *Fulmati Nyaya vs. Nepal*, op. cit., para. 7.9.

<sup>100</sup> Nepal Gazette, Part 72, Issue 23, Kathmandu, Ministry of Communication and Information Technology, Department of Printing, Published on 15 July 2022. Available at: <http://rajpatra.dop.gov.np/welcome/book/?ref=25038>

Even with this amendment, the statute of limitation remains inadequate to grasp the gravity of the crime and is at odds with international standards.

### **C. Transitional justice vs regular criminal procedure**

32. Between 2015 to 2017, the TRC collected complaints through Local Peace Committees (hereafter, 'LPCs') formed at the local level.<sup>101</sup> One of the primary functions of the LPCs was to identify and register the complaints of conflict-affected persons. However, most of the victims of CRSV could not register their complaints. As narrated by the victims, some were told that the registration of a complaint on sexual violence required eyewitnesses; while others refrained from lodging a complaint due to the lack of victim protection mechanisms during the collection of the complaints. Overall, the stigmatization attached to cases of CRSV always prevented the victims from registering complaints. Not only have the Commissions failed in listening carefully to the stories of the CRSV victims; they have also failed in creating an amicable environment to collect information on the sexual violence that occurred during the conflict. Even the few victims who have registered their complaints on CRSV before the TRC have never heard back on the status of their complaint. More importantly, national and international mechanisms have challenged the competence of the TRC. While the SC highlighted that the role of TRC is complementary to the existing legal criminal proceedings;<sup>102</sup> the HRC held that the TRC would not constitute an effective remedy for the victim of gross human rights violations, such as CRSV.<sup>103</sup>

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<sup>101</sup> Local quasi-representative bodies of the Ministry of Peace and Reconstruction established at the district and municipality level.

<sup>102</sup> Supreme Court, *Madhav Kumar Basnet vs. Nepal Government*, op. cit., para. 25.

<sup>103</sup> HRC, Case *Fulmati Nyaya vs. Nepal*, op. cit, para. 6.5; HRC, Case *Purna Maya vs. Nepal*, op. cit., para. 11.4; HRC, Case *Devi Maya vs. Nepal*, op. cit., para. 6.5.

## IV. Research and Analysis of the Case Law of the Supreme Court on Conflict-Related Sexual Violence

33. This part of the report deals with the main analysis of the case law of the SC on CRSV. This section is further divided into 5 sub-sections which are substantiated below.

### A. The Supreme Court's Jurisdiction to Adjudicate Cases of CRSV

34. The jurisdiction of the SC can be triggered in multiple ways.<sup>104</sup> The SC received the writ petitions on the issue of CRSV under the constitutional provision of extra-ordinary jurisdiction of the court.<sup>105</sup> The SC has rendered verdicts in several writ petitions concerning the jurisdiction of the court on the violations that occurred during the conflict. The verdicts however have been found to be conflicting. For instance, in a verdict rendered in 2019, the SC held that the TRC is an appropriate venue to complain about cases of CRSV.<sup>106</sup> However, in other verdicts, the SC had already prioritized the criminal justice system over the transitional process<sup>107</sup> for crimes committed during the armed conflict deliberating on the transitional process. In *Madhav Basnet vs. Government of Nepal*, the SC held that the national laws of criminal proceedings providing the jurisdiction to the courts- are the laws to be followed by the victims and that the jurisdiction of the TRC is meant to complement the existing criminal justice process and not to replace it.<sup>108</sup> Along the same line, in the case *Govinda Sharma 'Bandi' vs. Attorney General*, the SC held that the criminal justice system is competent even while a separate transitional justice mechanism is in place.<sup>109</sup> This was further supported in the case of *Suman Adhikari*,<sup>110</sup> where the SC clarified that the transitional justice process – and in particular the TRC – is meant to be temporary and a form of support – not a replacement – to the existing legal system.<sup>111</sup> As elaborated above, although many verdicts affirmed the prominence of criminal justice system over transitional justice mechanisms; in the case specific to the CRSV, the SC found otherwise. Such

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<sup>104</sup> See Constitution of Nepal 2015 A.D. (2072 B.S.), Article 133.

<sup>105</sup> Constitution of Nepal, 2015 A.D. (2072 B.S.), Article 133(2).

<sup>106</sup> Supreme Court, *AC vs. District Police Office and others*, Writ no. 70-WO- 0718, 18 September 2019 (2076.06.01), paras. 15 and 16.

<sup>107</sup> Supreme Court, *Govinda Prasad Sharma 'Bandi' vs. Attorney General Mukti Prasad Pradhan*, NKP 2070, Decision No. 9091, 2 April 2014 (2070.12.19), para. 33.

<sup>108</sup> Supreme Court, *Madhav Basnet vs. Nepal Government*, op. cit., para. 25.

<sup>109</sup> Supreme Court, *Govinda Prasad Sharma 'Bandi' vs. Attorney General Mukti Prasad Pradhan*, NKP 2070, Decision No. 9091, 2 April 2014 (2070.12.19), para. 33.

<sup>110</sup> Supreme Court, *Suman Adhikari vs. The Office of Prime Minister and Council of Ministers and Others*, op. cit., para. 58.

<sup>111</sup> *Ibid.*



discrepancies create uncertainty, raise confusion, demotivate the victims and derail the motive of justice.

35. The aforementioned decisions dealt with the adjudication of cases through criminal justice system. However, there are no specific decisions of the SC that define or clarify its jurisdiction for hearing cases of CRSV, maintaining the ambiguity.

## **B. The Supreme Court on the Recognition of Victims of CRSV**

36. As mentioned above, CRSV was perpetrated in a widespread manner during the armed conflict in Nepal. However, a few cases of CRSV have reached the SC. Out of 22 cases analysed for the purposes of this report, only 2 exclusively deal with the issue of CRSV and 1 with the nexus of transitional justice and CRSV.

37. In the case of *Bhagiram Chaudhary v Nepal Government*, the petitioner demanded redefining the victims of conflict by including the victims of CRSV as they were excluded from various government mechanisms and regulations, such as plans, policies, and directives; identify and list the victims of sexual violence and providing them with short term and long term economic and employment opportunities, economic support, loans, and other opportunities, identify the children born out of rape and ease the process to acquire citizenship certificate.<sup>112</sup> The SC, however, quashed the writ petition asserting that the GoN is equipped to provide compensation and other forms of support to the victims under the TRC Act, which encompasses victims of CRSV among victims of gross human rights violations.<sup>113</sup> For these reasons, the SC further held that CRSV does not need to be addressed through any separate regulation. The SC added that there is no problem for children without the identification of fathers to acquire citizenship.<sup>114</sup> The decision was unable to assess that the TRC Act and Regulation has largely failed to make special arrangements to overcome the challenges to find documents, medical examination reports and other corroboratory evidence in order to ensure justice to CRSV survivors.<sup>115</sup>

38. Even in the decisions concerning transitional justice-related issues,<sup>116</sup> it is interesting to note how, despite the CPA being systematically quoted, the SC has never cited the provision of 'providing *special protection* to the rights of women and children and to

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<sup>112</sup> Supreme Court, *Bhagiram Chaudhary vs. The Office of Prime Minister and Council of Ministers and Others*, 070-WO-0452, decided on 15 Bhadra 2073 (31 August 2016).

<sup>113</sup> *Ibid.*

<sup>114</sup> *Ibid.*

<sup>115</sup> ICJ, Nepal: Transitional Justice Mechanisms with Gender Perspective, A Briefing Paper, May 2021, p. 12.

<sup>116</sup> Supreme Court, *Madhav Basnet vs. Nepal Government*, op. cit., p. 1121; Supreme Court, *Suman Adhikari vs. The Office of Prime Minister and Council of Ministers and Others*, NKP 2071, Decision No. 9303, Writ No. 070-WS-0050, 26 February 2015 (2071.11.14), p. 2065.

immediately stop all types of violence against women and children, including sexual exploitation and abuse', from the CPA.<sup>117</sup>

39. In the judgements rendered by the SC on transitional justice-related issues, the reference to CRSV is limited to quoting Section 2 (j) (6) of the TRC Act, which includes rape and sexual violence in the list of acts considered gross human rights violations.<sup>118</sup>
40. In the writ petitions or applications on CRSV, there was no discussion on the nuances and the gravity of sexual violence during the armed conflict, whilst the focus remained solely on procedural details, such as the statute of limitation for criminal proceedings.<sup>119</sup> Due to this, the magnitude and gravity of CRSV have remained marginal in the verdicts of the SC. Moreover, the non-registration of the complaints prevented the exercise of the Court's central function to establish the facts and adjudicate the cases. This has casted shadow on the plights of the victims of CRSV.
41. CRSV victims have not yet been recognized as victims of the internal conflict.<sup>120</sup> The network of victims of CRSV has expressed concern over their lack of access to victims' identity cards, which is required as a proof to file a complaint.<sup>121</sup> In the case *Suman Adhikari vs. The Office of Prime Minister and Council of Ministers and Others*, the SC defined victims as 'anyone who has suffered physical, mental or financial harm caused by parties to conflict',<sup>122</sup> and halted the process of distributing victim identity cards stating that the Directive<sup>123</sup> issued by the government did not distinguish between victims and perpetrators of the conflict.<sup>124</sup> Yet, no steps have been taken to include CRSV survivors as victims of conflict. The CIEDP made efforts to distribute identity cards to the families of the disappeared,<sup>125</sup> but CRSV victims are yet to receive any such identification from the GoN and the TRC.

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<sup>117</sup> CPA, *Comprehensive Peace Accord signed between Nepal Government and the Communist Party of Nepal (Maoist)*, op. cit., Section. 7.6.

<sup>118</sup> TRC Act, op. cit., Section 2 (j)(6).

<sup>119</sup> Supreme Court, *AC vs. Nepal Government, Ministry of Home Affairs and others*, Writ no. 070-WO- 0718, 18 September 2019 (2076.06.01), paras. 15 and 16; Supreme Court, *SCY vs. District Police Office, Kanchanpur and others*, Writ no. 071-WO-0580, 15 May 2019 (2076.02.01), para.13.

<sup>120</sup> *Purna Maya*, one of the victims of CRSV states she is in dire need of health treatment and livelihood support but is not provided an identity card (recognized) as a victim of the conflict as reported in TRIAL International, REDRESS, Advocacy Forum, *NEPAL'S GRAND DEBT TO ITS VICTIMS OF SEXUAL VIOLENCE*, 19 June 2019, available at [https://trialinternational.org/wp-content/uploads/2019/06/PRESS-RELEASE\\_CRSV\\_20190619.pdf](https://trialinternational.org/wp-content/uploads/2019/06/PRESS-RELEASE_CRSV_20190619.pdf).

<sup>121</sup> Women Rehabilitation Centre (WOREC), Interaction Program to Address Issues of Female Survivors Of Conflict And Their Access To Justice, 28 February 2018, available at <https://www.worecnepal.org/content/193/2021-02-28>.

<sup>122</sup> *Suman Adhikari vs. The Office of Prime Minister and Council of Ministers and Others*, NKP 2073, Decision No. 9689, Writ No. 070-WS-0032, 26 August 2015 (2072.05.09), para. 5.

<sup>123</sup> Identification Card Directive, 2013; Advocacy Forum, *SC Stays Distribution of Conflict Victims' Identification Card*, 14 August 2013, available at <http://www.advocacyforum.org/news/2013/08/sc-stays-identification-card-of-conflict-victims.php>.

<sup>124</sup> *Ibid.*, para. 6.

<sup>125</sup> The Kathmandu Post, *Disappearance commission starts issuing ID cards*, published on 31 January 2021, available at <https://kathmandupost.com/national/2021/01/31/disappearance-commission-starts-issuing-id-cards>.

### C. The Supreme Court's Judgements on Cases concerning Transitional Justice and the Nexus with CRSV

42. One of the most prominent writ petitions concerning the issue of transitional justice and CRSV was lodged by Advocate Meera Dhungana in *Meera Dhungana vs. The Office of the Prime Minister and Council of Ministers and others*.<sup>126</sup> The first petition in this writ concerned the need for institutional reform of the TRC. The petitioner asked the SC to order the TRC to include more women employees so that the complaint mechanism becomes more accessible to women, who were the most affected by the war. The petition claimed that having more women in the TRC would help victims share their stories of sexual violence more comfortably.<sup>127</sup> The second petition concerned the need to eliminate the statute of limitation for the crimes of CRSV in the TRC Act.<sup>128</sup> The petition further emphasized the need to define sexual violence more elaborately in the Act.<sup>129</sup> The SC assessed the petitions and decided that the TRC Act does not need to stipulate a separate provision for adding more women employees as 'Section 3 of the TRC Act provides for at least one female member out of the 5 members of the Commission'.<sup>130</sup> The SC directed at the recommending committee to be formed under Section 3 of the TRC Act<sup>131</sup> and asserted that 'the committee's power to decide on the possibility of having all 5 - female members of the commission including the Chairperson cannot be denied without any reasons'<sup>132</sup> and thus rejected the first petition. When the petitioner asked about 'adding more female employees' under Section 11 of the TRC Act,<sup>133</sup> the SC referred to the committee in accordance with Section 3 of the TRC Act, thus unable to provide sound clarifications. The SC did not discuss at all the part of the petition concerning the need to eliminate the statute of limitation for criminal proceedings concerning CRSV, the Court did not discuss this matter- at all. Despite pointing out the lack of a proper definition of CRSV, the SC did not elaborate on this matter- at all. In this case, where the SC had the opportunity and the space to discuss CRSV and the existing statute of limitation, it the SC failed to do so, without providing sound reasons. "Section D" below discusses more on the statute of limitation in the cases of CRSV.

43. However, the SC has developed progressive jurisprudence on transitional justice-related matters, which is important to all the victims including those of CRSV. In the case *Madhav Basnet vs. Nepal Government*, the SC acknowledged the special and unique

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<sup>126</sup> Supreme Court, *Meera Dhungana vs. The Office of Prime Minister and Council of Ministers and Others*, op. cit., para. 4.

<sup>127</sup> *Ibid.*, para. 7.

<sup>128</sup> *Ibid.*

<sup>129</sup> *Ibid.*, para. 2.

<sup>130</sup> *Ibid.*, para. 21; TRC Act, op. cit., Section 3 (2): 'The Commission which shall include at least one women member shall consist of five members including the Chairperson'.

<sup>131</sup> TRC Act, op. cit., Section 3 (2).

<sup>132</sup> *Ibid.*, para. 21.

<sup>133</sup> TRC Act, op. cit., Section 11 on *Employees of the Commission*.

circumstances of the armed conflict.<sup>134</sup> In this verdict, the SC discussed on enforced disappearance<sup>135</sup> and the right to reparation for both victims and their families.<sup>136</sup> It declared some of the provisions of the then TRC Ordinance<sup>137</sup> as void<sup>138</sup> and issued a directive order to the GoN to amend the Ordinance as per international standards and the then Interim Constitution of Nepal.<sup>139</sup> Likewise, in the case *Suman Adhikari vs. The Office of Prime Minister and Council of Ministers and Others*, the SC rejected the provision of the TRC Act regarding reconciliation amongst the victims and perpetrators without their consent and overruled the provision of the TRC Act that promotes amnesty.<sup>140</sup> There are many precedents by the SC issuing multiple directives ordering the GoN to adopt the necessary laws and policies to protect conflict victims' rights to reparation,<sup>141</sup> truth-seeking,<sup>142</sup> rehabilitation,<sup>143</sup> prompt crime investigation,<sup>144</sup> and prosecution.<sup>145</sup>

44. In reality, recent research on the implementation of the SC judgments showed that major decisions of the SC on transitional justice have not been implemented.<sup>146</sup> Victims of conflict have criticized the government's failure to amend the TRC Act according to the decisions of SC.<sup>147</sup>

#### **D. The Supreme Court's View on the Statute of Limitation in Cases of Conflict-related Sexual Violence**

45. Criminal proceedings concerning CRSV were subjected to the 35-day statute of limitation, as provided in the National Code, 1963.<sup>148</sup> This provision has been the main hurdle for victims of CRSV to lodge a complaint. When there is no statute of limitation- i.e. when the victim is both raped and murdered, the SC is prompt in delivering

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<sup>134</sup> Supreme Court, *Madhav Basnet vs. Government of Nepal*, op. cit., para. 50.

<sup>135</sup> *Ibid.*, paras. 7, 8 and 9.

<sup>136</sup> *Ibid.*, para. 15.

<sup>137</sup> Ordinance on Investigation of Disappeared Persons, Truth and Reconciliation Commission, 2014, Section 23: provision on amnesty; Section 29: provision on filing cases.

<sup>138</sup> Supreme Court, *Madhav Basnet vs. Government of Nepal*, op. cit., para. 38.

<sup>139</sup> *Ibid.*, para. 56.

<sup>140</sup> TRC Act, op. cit., Section 26.

<sup>141</sup> Supreme Court, *Dipendra Jha vs. The Office of the Prime Minister and Council of Ministers and others*, Writ No. 067-WO-1198, 12 August 2012 (2069.04.28), para. 23; Supreme Court, *Madhav Basnet vs. Government of Nepal*, op. cit., paras. 30 and 52;

<sup>142</sup> Supreme Court, *Madhav Basnet vs. Government of Nepal*, op. cit., para. 52.

<sup>143</sup> *Ibid.*; Supreme Court, *Liladhar Bhandari vs. Nepal Government*, NKP 2065, Decision no. 8012, 7 January 2009 (2065.09.23), para 21; Supreme Court, *Madhav Basnet vs. Nepal Government*, op. cit., para. 15.

<sup>144</sup> Supreme Court, *Madhav Basnet vs. Government of Nepal*, op. cit., para. 44.

<sup>145</sup> *Ibid.*

<sup>146</sup> National Judicial Academy (NJA), *Study Report on the Execution Status of Supreme Court and Appellate Courts Orders/ Judgements relating to Transitional Justice*, 2016, p. 35.

<sup>147</sup> The Himalayan Times, *Conflict victims condemn govt for failing to amend act*, published on 4 November 2021, available at <https://thehimalayantimes.com/nepal/conflict-victims-condemn-govt-for-failing-to-amend-act>; The Kathmandu Post, *Where is peace without justice?*, published on 20 November 2021, available at <https://kathmandupost.com/columns/2021/11/20/no-peace-without-justice>.

<sup>148</sup> National Code, 1963, op. cit., Chapter on Rape, No. 1.

justice<sup>149</sup>- as homicide has no statute of limitation.<sup>150</sup> For example, in the case of *Maina Sunuwar*, where the victim was murdered after torture, the SC played an active role in ensuring justice.<sup>151</sup> Likewise, in its verdict on the case *KR*, where the victim was raped and murdered during the armed conflict, the SC ordered the concerned District Police Office to start the investigation immediately.<sup>152</sup> Comparatively, when survivors of CRSV reach out to the SC, their petitions are quashed on the grounds that they tried to file a complaint of sexual violence that occurred during the war going beyond the stipulated statute of limitation and therefore the claims were time-barred.<sup>153</sup> This trend highlights the need for removal of a statute of limitation for criminal proceedings on crimes committed during the war- including sexual violence.

46. Likewise, in cases where the victims have filed their petitions within the statute of limitation, the SC's judgments have been instrumental to amend the applicable legislation.<sup>154</sup> For instance, the SC ordered the GoN to criminalize marital rape<sup>155</sup> or to adjudicate non-penetrative sexual intercourse as rape.<sup>156</sup> It is important to note how, once the barrier of the statute of limitation is crossed, the SC has delivered progressive judgments. In its recent verdict on the case *Pradeep Bhattarai vs. Nepal Government*,<sup>157</sup> the SC distinguished among the three facets of sexual violence, i.e. rape, attempt to rape and sexual assault, and it held that attempt to rape includes all steps of rape except 'the finality'<sup>158</sup> and sexual assault is sexual violence, but far from reaching the steps of attempt to rape'.<sup>159</sup> In *Nepal Government vs. Gulab Miya*, the SC convicted the perpetrator of rape against a male,<sup>160</sup> despite the applicable law at the time<sup>161</sup>

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<sup>149</sup> *KR vs. District Police Office, Kavrepalanchowk*, Writ no. 064-WO-0339, Decision on 15 December 2011 (2066.08.29); Supreme Court, *Devi Sunar vs. District Police Office, Kavrepalanchowk*, NKP 2064, Decision No. 7857, 18 September 2007 (2064.06.01).

<sup>150</sup> National Code, 1963, op. cit., Chapter on Homicide, No. 1.

<sup>151</sup> Supreme Court, *Devi Sunar vs. District Police Office, Kavrepalanchowk*, NKP 2064, Decision No. 7857, 18 September 2007 (2064.06.01), p. 668.

<sup>152</sup> *KR vs. District Police Office, Kavrepalanchowk*, Writ no. 064-WO-0339, Decision on 15 December 2011 (2066.08.29). p. 2356.

<sup>153</sup> Supreme Court, *AC Chaudhary vs. Nepal Government, Ministry of Home Affairs and others*, Writ no. 070-WO- 0718, 18 September 2019 (2076.06.01), paras. 15 and 16; Supreme Court, *SCY vs. District Police Office, Kanchanpur and others*, Writ no. 071-WO-0580, 15 May 2019 (2076.02.01), paras. 13.

<sup>154</sup> Supreme Court, *Raju Chapagain vs. Nepal Government*, Writ No. 070-WO-0711, 10 June 2015 (2072-2-27); Supreme Court, *Sapana Pradhan Malla vs. Nepal Government*, NKP 2065, Decision No. 8038, 11 July 2008 (2065.03.27); Supreme Court, *Indira Basnet vs. District Police Office Sindhupalchowk and others*, Writ No. 063-WO-0402, 9 February 2009 (2065-10-27).

<sup>155</sup> Supreme Court, *Jit Kumari Pangenji vs. Prime Minister and Office of Ministers*, NKP 2065, Decision No. 7973, 10 July 2008, (26.03.2065), para. 5.

<sup>156</sup> Supreme Court, *Nepal Government vs. Mubarak Mir Musalman*, NKP 2067, Decision no 8466, 23 February 2010 (2066.11.11); Supreme Court, *Ishwor Rishidev vs. Nepal Government*, NKP 2074, Decision no. 9826, 5 June 2016 (2073.02.23); Supreme Court, *Nepal Government vs. Ashok Shrestha*, NKP 2076, Decision no. 10165, 28 November 2017 (2074.08.12).

<sup>157</sup> Supreme Court, *Pradeep Bhattarai vs. Nepal Government*, NKP 2076, Decision no. 10280, 11 July 2019 (2076.03.26), para. 8.

<sup>158</sup> In this case, the court does not describe what includes finality of committing rape.

<sup>159</sup> *Ibid.*

<sup>160</sup> Supreme Court, *Nepal Government vs. Gulab Miya*, NKP 2076, Decision No. 10361, 12 July 2019 (2076.03.27), para. 3.

<sup>161</sup> The National Code, op. cit., No. 1.

recognizing only females as victims of rape.<sup>162</sup> Although the applicable law made the requirement of penetration compulsory,<sup>163</sup> in cases such as *Nepal Government vs. Mubarak Mir Musalman*,<sup>164</sup> *Ishwor Rishidev vs. Nepal Government*,<sup>165</sup> *Nepal Government vs. Ashok Shrestha*,<sup>166</sup> the SC found the crime to be rape even without penetration. Thus, the SC has played a crucial role in developing progressive jurisprudence. However, as explained, the application of the statute of limitation concerning CRSV prevented the SC from looking into the merits of several cases.

47. Additionally, the SC has issued various directive orders to amend the statute of limitation for the crime of rape since 2008 A.D. (2065 B.S.) concerning sexual violence in general, and not specifically linked with CRSV. In *Sapana Pradhan Malla vs. Nepal Government*, the SC issued a directive order to amend the 35-day statute of limitation.<sup>167</sup> It held that the 35-day statute of limitation was not enough time for the victims to file a complaint.<sup>168</sup> The SC ordered the GoN to establish a new statute of limitation for the crime of rape taking into consideration the victim's social and psychological condition as well as the need for prompt and effective investigation and prosecution.<sup>169</sup> In *Indira Basnet vs. District Police Office Sindhupalchowk and others*,<sup>170</sup> the SC considered the 35-day statute of limitation insufficient to file a case and ordered the GoN to conduct a proper investigation and abide by the directive orders of the SC<sup>171</sup> in its previous judgments of *Sapana Pradhan Malla vs. Nepal Government*. Likewise, in 2015 A.D. (2072 B.S.), in *Raju Chapagain vs. Nepal Government*, the SC held that it cannot designate a particular time frame as a statute of limitation for rape as it falls under the 'legislative wisdom' of the parliament.<sup>172</sup> However, the SC pointed out on the inactions and lingering of the GoN to implement the SC's previous directive orders to amend the statute of limitation.<sup>173</sup> In this case, the SC issued a directive order to the GoN to conduct thorough jurisprudential research on the laws on statute of limitation for rape around

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<sup>162</sup> The National Code defined rape as 'sexual intercourse with a girl or woman an unmarried girl, a widow or someone's wife under sixteen years of age with or without her consent and with one above sixteen years of age without her consent by using force or showing threat or even under inappropriate influence.'

<sup>163</sup> The National Code, op. cit., No. 1 (c): Minor penetration of the penis into the vagina shall be considered to be a sexual intercourse for the purposes of this Number.

<sup>164</sup> Supreme Court, *Nepal Government vs. Mubarak Mir Musalman*, NKP 2067, Decision no 8466, 23 February 2010 (2066.11.11), para. 4.

<sup>165</sup> Supreme Court, *Ishwor Rishidev vs. Nepal Government*, NKP 2074, Decision no. 9826, 5 June 2016 (2073.02.23), para. 8.

<sup>166</sup> Supreme Court, *Nepal Government vs. Ashok Shrestha*, NKP 2076, Decision no. 10165, 28 November 2017 (2074.08.12), para. 4.

<sup>167</sup> Supreme Court, *Sapana Pradhan Malla vs. Nepal Government*, NKP 2065, Decision No. 8038, 11 July 2008 (2065.03.27), para. 13.

<sup>168</sup> *Ibid.*, paras. 13 and 14.

<sup>169</sup> *Ibid.*

<sup>170</sup> Supreme Court, *Indira Basnet vs. District Police Office Sindhupalchowk and others*, Writ No. 063-WO-0402, 9 February 2009 (2065-10-27), p. 11.

<sup>171</sup> *Ibid.*

<sup>172</sup> Supreme Court, *Raju Chapagain vs. Nepal Government*, Writ No. 070-WO-0711, 10 June 2015 (2072.2.27), p. 3.

<sup>173</sup> *Ibid.*, p. 4.

the world and take Nepal's international and national obligations into consideration to amend the applicable legislation as soon as possible.<sup>174</sup>

48. Even while discussing the human rights violations during the conflict era, in the verdict on the *Madhav Basnet vs. Nepal Government*, the SC has acknowledged that proceedings concerning serious human rights violations cannot be subjected to a statute of limitation.<sup>175</sup> In this context, the SC issued a directive order to the GoN to amend the provision of the then Ordinance which stipulated a 35-day statute of limitation for the Attorney General's Office to process the case, if recommended by the TRC.<sup>176</sup> In the verdict on the case *Suman Adhikari vs. The Office of Prime Minister and Council of Ministers and Others*, the SC likewise accepted that this 35-day statute of limitation in the ordinance is 'impractical'.<sup>177</sup>
49. This report offers two case studies analyzing the issue of the statute of limitation for criminal proceedings as a major obstacle faced by the victims of CRSV to access justice.

#### Case Study One: AC vs. Nepal Government, Ministry of Home Affairs and others<sup>178</sup>

50. AC filed a writ petition under the extra-ordinary jurisdiction of the SC after her FIR was not registered by the District Police Office and the CDO for incidents of rape, torture and illegal detention perpetrated by security forces on 2 April 2002 A.D. (20 Chaitra 2058 B.S.).
51. In her petition to the SC, Ms. AC mentioned her inability to report the incident for a long period of time, because of her physical and mental suffering. She claimed that she could not timely lodge a complaint as her residing district was at constant risk due to the confrontations between the security forces and the Maoists. When she was able to file a complaint, the nearby police station rejected it as time-barred. As per the legal proceedings, she reached out to the District Administration Office asking the CDO to issue an order to the Police Station to take her FIR. This was also rejected by the CDO. The CDO rejected her application affirming that he did not have the authority to order the police to register complaints of cases that occurred during the conflict. Due to the unavailability of any other legal remedy, the applicant sought to file a writ petition

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<sup>174</sup> *Ibid.*, pp. 5-6.

<sup>175</sup> Supreme Court, *Madhav Basnet vs. Nepal Government*, op. cit., para. 48.

<sup>176</sup> *Ibid.*, para. 56(3). Ordinance on Investigation of Disappeared Persons, Truth and Reconciliation Commission, 2014, Section 29 (4): If the Attorney General of a Public Prosecutor designated by him decides to prosecute pursuant to Sub-section (1), Case can be filed within 35 days of such decision notwithstanding anything contained in any other existing law.

<sup>177</sup> Supreme Court, *Suman Adhikari vs. The Office of Prime Minister and Council of Ministers and Others*, op. cit., para. 22.

<sup>178</sup> Supreme Court, *AC Chaudhary vs. Nepal Government, Ministry of Home Affairs and others*, op. cit. All the details of this case study are taken from the verdict on this writ petition which is publicly available and can be accessed from [https://supremecourt.gov.np/cp/assets/downloads/supreme\\_129037.pdf](https://supremecourt.gov.np/cp/assets/downloads/supreme_129037.pdf).

under the extraordinary jurisdiction of the SC. The petitioner asked the SC to order the concerned authorities to register her FIR of the incident and initiate an effective investigation in the case.

52. The replies from the Police Headquarters, Home Ministry, CDO and District Police Office against the writ petition were as follows: i. The complaint is beyond the 35 days statute of limitation and ii. There are other mechanisms for complaining about the incidents occurred during the armed conflict like the TRC and so the complaints could not be registered and dealt with pursuant to the general criminal proceedings.
53. In its verdict, the SC referred to general provisions of the State Cases Act, 1992 A.D (2049 B.S.) which regulate the responsibilities of the Police and CDO to file a FIR.<sup>179</sup> The SC held that the applicant was negligent to complain for her rights and seek justice as she tried to file a complaint in 2013 A.D. (2070 B.S.) while she was released from the illegal custody in 2002 A.D. (2059 B.S.),<sup>180</sup> i.e. past the statute of limitation.<sup>181</sup> The SC then pointed out the existence of a special mechanism to investigate crimes during the conflict – citing the TRC.<sup>182</sup>
54. The SC rejected the petition of the applicant and quashed the writ because of the following reasons: i. inability to complain within the stipulated statute of limitation; ii. lack of clarity in the description of the incidents; iii. lack of respondents' jurisdiction to prosecute and investigate incidents occurred during the armed conflict and iv. the existence of legislation specific to crimes committed during the armed conflict.<sup>183</sup>

### Case Two: *SCY vs. District Police Office and others*<sup>184</sup>

55. SCY filed a writ petition under the extra-ordinary jurisdiction of the SC after her FIR was not registered by the District Police Office and District Administration Office for an incident of rape and other inhumane and degrading treatment during the armed conflict. The petition emphasised that the attempt to register the FIR was rejected firstly by the police station and then by the CDO citing the failure to fulfil the statute of limitation of 35 days.

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<sup>179</sup> Supreme Court, *AC vs. Nepal Government, Ministry of Home Affairs and others*, op. cit., para. 12.

<sup>180</sup> *Ibid.*, para. 13.

<sup>181</sup> *Ibid.*, para. 14.

<sup>182</sup> *Ibid.*, para. 15. *TRC Act*, Section 29 states about the steps to reach prosecution. Firstly, the Commission is to recommend to the Government of Nepal to prosecute the perpetrator found to be guilty of the offence of gross violation of human rights. Then the Ministry must write to the Attorney General to prosecute the perpetrator found to be guilty of the offence of the gross violation of human rights. The Attorney General or the Government Attorney designated by the Attorney General shall decide as to whether the perpetrator is to be prosecuted or not upon receipt of the correspondence for prosecution from the Ministry.

<sup>183</sup> *Ibid.*, para. 17.

<sup>184</sup> Supreme Court, *SCY vs. District Police Office, Kanchanpur and others*, Writ no. 071-WO-0580, 15 May 2019 (2076.02.01). All the details of this case study are taken from the verdict on this writ petition which is publicly available and can be accessed from [https://supremecourt.gov.np/cp/assets/downloads/supreme\\_138790.pdf](https://supremecourt.gov.np/cp/assets/downloads/supreme_138790.pdf).



56. The petition referred to the victim's rape, perpetrated by security forces on 20 August 2002 A.D. (04 Bhadra 2059 B.S.). The writ petition demanded the SC to order a mandamus to the concerned authorities to register the FIR and initiate investigations.
57. The replies from the CDO and District Police Office were as follows: i. there is no record of the said incident reported within the stipulated deadline pursuant to the law in any of the nearby police stations; ii. it is against the law to file a case after 12 years and 4 months from the incident, where the said incident happened on 20 August 2002 A.D. (04 Bhadra 2059 B.S.) and the petitioner tried to file a complaint on 21 December 2014 A.D. (06 Poush 2071 B.S.) and iii. lack of evidence to prove that the petitioner was raped, including any hospital's bills, news reports, human rights reports or any doctor's prescription.
58. The SC found that, despite the claims that the victim did try to file a report back then, there were no official records or evidence presented. The SC referred to the applicable statute of limitation for rape and its importance and held that a complaint after 12 years and 4 months from the said incident was late.<sup>185</sup> Thus, the SC rejected and quashed the writ petition.
59. These two decisions illustrate how the victims' access to justice is jeopardised due to the application of the 35-day statute of limitation. Although the SC has repeatedly referred to the impossibility of lodging a complaint within 35 days from the commission of the crime of rape,<sup>186</sup> it rejected these two CRSV cases precisely applying the said statute of limitation. These decisions by the SC was unable to assess if a victim of sexual violence or her family could have the ability to file a case in the same police station where the perpetrator is posted within the statutory limitation- especially in an ongoing conflict. Likewise, although in its case law the SC has asserted that the TRC is to support the existing criminal justice mechanisms,<sup>187</sup> the SC did not allow the victims to access the general proceedings under the ordinary criminal justice system in the two cases hereby analysed.

## **E. Conflict-related Sexual Violence Victims' Access to Justice**

### **i. Right to Privacy**

60. The SC has developed many precedents protecting victims' right to privacy such as in *Sapana Pradhan Malla vs. Nepal Government*,<sup>188</sup> where the SC developed the Procedural Guidelines for Protecting the Privacy of the Parties in the Proceedings of Special type of

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<sup>185</sup> Supreme Court, *SCY vs. District Police Office*, op. cit., para. 13.

<sup>186</sup> Supreme Court, *Raju Chapagain vs. Nepal Government*, op. cit., p. 3.

<sup>187</sup> Supreme Court, *Govinda Prasad Sharma 'Bandi' vs. Attorney General Mukti Prasad Pradhan*, op. cit., para. 33.

<sup>188</sup> Supreme Court, *Sapana Pradhan Malla vs. Nepal Government*, NKP 2064, Decision No. 7880, 25 December 2007 (10.09.2064), para. 15.

Cases, 2007 A.D. (2064 B.S.) which protects victims' identities, including of victims of sexual violence<sup>189</sup> and sealing the victim's personal information, such as name, address, family title.<sup>190</sup> The SC Rules guarantee closed camera hearings<sup>191</sup> for victims of sexual violence. The Crime Victim Protection Act, 2018 A.D. (2075 B.S.) bars anyone to disclose the victim's identity in case of rape, sexual harassment, among others in the course of the investigation, inquiry, prosecution and court proceedings.<sup>192</sup> However, in the writ petition on the issue of CRSV, the victims share their personal information that identifies the victim's name and address<sup>193</sup> as prescribed under the SC Regulations, 2017 A.D. (2074 B.S.).<sup>194</sup> For instance, in the case of *AC vs. Nepal Government, Ministry of Home Affairs and others*, the petitioner shared details of her suffering along with her name, her address, and the place where the incident took place.<sup>195</sup> The victim's right to protect her identity was here compromised despite the existing legal guarantees on the right to privacy. Although the law provided 'closed camera hearing', the hearing and adjudication of the writ petition of CRSV happened in an open hearing accessible to anyone present in the court. Despite the provision that the SC can order the protection of the victim's identity,<sup>196</sup> the SC was not able to deliver on this front. This is a lacuna on the SC's part, especially when there was a well-established jurisprudence in this regard.

61. Moreover, despite the existence of legal provisions on filing an application for the enforcement of the victims' right to privacy,<sup>197</sup> in the cases analyzed, the petitioners did not formally seek the guarantees concerned. Thus, it is important for the petitioners as well as their legal representatives to explicitly apply for protecting the victim's identity as well. The lack of enforcement of these guarantees can lead to an environment of hostility amongst victims of CRSV towards initiating legal proceedings before the SC.

## ii. Timely Adjudication

62. There is no data on the average time for the adjudication of writ petitions by the SC. The cases of CRSV<sup>198</sup> considered in this report indicate that the SC takes quite a long period

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<sup>189</sup> The Procedural Guidelines for Protecting the Privacy of the Parties in the Proceedings of Special type of Cases, 2064(2007), Section 2(1).

<sup>190</sup> *Ibid.*, Section 3.

<sup>191</sup> National Criminal Procedural Code Regulation, 2019 (2075), Rule 63; Supreme Court Regulation, 1992 (2049), Rule 67(a); Supreme Court Regulation, 2017 (2074), Rule 81(1). Closed camera hearing means case hearing in the court where only the concerned parties to the case are allowed in the room such as – respective legal representatives of each parties, victim, defendant, guardians (where applicable) and court officials and police provided with the permission of court to be at the hearing.

<sup>192</sup> Crime Victim Protection Act, 2018 A.D. (2075 B.S.), Section 6. f

<sup>193</sup> Supreme Court, *AC vs. Nepal Government, Ministry of Home Affairs and others*, op. cit., paras. 1 and 2.

<sup>194</sup> Supreme Court Regulations, 2017 A.D. (2074 B.S.), Section 13 (3) lay down that document filed in the Supreme Court must include name, phone number and other credentials to identify the applicant and the defendant.

<sup>195</sup> Supreme Court, *AC vs. Nepal Government, Ministry of Home Affairs and others*, op. cit., paras. 1 and 2.

<sup>196</sup> Procedural Guidelines for Protecting the Privacy of the Parties in the Proceedings of Special type of Cases, 2064 (2007), Section 5.

<sup>197</sup> Crime Victim Protection Act, 2018 A.D. (2075 B.S.), Section 23.

<sup>198</sup> *Ibid.*

of time to deliver its decisions. For instance, in the case *AC vs. Nepal Government, Ministry of Home Affairs and others*, the petition was filed on 11 April 2014 (28 Chaitra 2070) and the SC rejected it on 18 September 2019 (2 Ashwin 2076). It took 5 years and 6 months for the SC to reach a decision, even when the writ was not about the merits of the case, but to request the SC to order the concerned authorities to register an FIR. Likewise, in the case of *SC vs. District Police*, the petition was filed on 25 January 2015 (11 Magh 2071) and the SC rejected it on 15 May 2019 (1 Jestha 2076). It took 4 years and 4 months for the SC to reach a decision, even when the writ petition was not about the merits of the case but about a procedural obstacle like in the case of AC. Because of this delay, victims can lose trust in the justice dispensing process of the SC.

63. The SC has provisions of giving priority '*agradhikar*' to cases of public importance.<sup>199</sup> But the writ petitions here considered were not granted any priority '*agradhikar*' by the SC. These writ petitions on CRSV must be granted priority when requested by the petitioner.

### iii. Measures of Reparation

64. In the directives promulgated by the GoN for providing financial relief to the victims, those of CRSV are not enlisted as beneficiaries.<sup>200</sup> There are separate directives to guarantee the right to reparation for families of those murdered,<sup>201</sup> displaced persons,<sup>202</sup> disappeared persons and their families,<sup>203</sup> people, family or organizations whose property has been hampered by a party to the conflict,<sup>204</sup> but there are no specific directives for the victims of CRSV. The interim relief package<sup>205</sup> includes victims' right to scholarship,<sup>206</sup> medical help to the wounded,<sup>207</sup> but victims of CRSV were not included in the interim relief schemes.<sup>208</sup>

65. In the context of the UPR conducted in 2021, Nepal asserted to have provided 'interim relief to the victims of conflict'.<sup>209</sup> However, in the report submitted by the State, it is

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<sup>199</sup> Supreme Court Regulation, 2017 (2074), Rule 73: Any cases of public importance or by the nature of cases which need speedy justice, the respective benches or the Chief justice can give priority to such cases.

<sup>200</sup> Procedure for Citizen Relief, Compensation and Financial Relief, 2010 (2066), para 1; Transitional Justice Resource Centre, *Conflict Victim Relief Manual*, December 2012, p. 10.

<sup>201</sup> Directive to provide financial assistance to families of murdered, 2009 (2065).

<sup>202</sup> Directive to provide relief to individuals and families displaced by the armed conflict, 2007 (2063); National Policy Regarding Internally Displaced Persons, 2007 (2063).

<sup>203</sup> Directive to Provide Relief to the Families of the Disappeared, 2009 (2065).

<sup>204</sup> Procedure for Citizen Relief, Compensation and Financial Relief, 2010 (2066), para 1; Transitional Justice Resource Centre, *Conflict Victim Relief Manual*, December 2012, p. 10.

<sup>205</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.

<sup>206</sup> Standards for Economic Assistance and Relief for Conflict Victims, 2008 (2064), para 3.

<sup>207</sup> *Ibid.*

<sup>208</sup> Advocacy Forum, *The Painful Tale of Interim Relief in Nepal*, 2010, p. 12; TRIAL International, REDRESS, Advocacy Forum, *NEPAL'S GRAND DEBT TO ITS VICTIMS OF SEXUAL VIOLENCE*, op. cit.

<sup>209</sup> Human Rights Council, *National Report Submitted in accordance with paragraph 5 of the annex to Human Rights Council Resolution 16/21*, op. cit., p. 5.

pointed out that interim relief has been delivered to the relatives of the deceased and of the disappeared, orphaned children, to relatives of the abducted and displaced people,<sup>210</sup> but there is no mention to victims of sexual violence. Alternative reports submitted by other stakeholders highlighted that the experience of women survivors of CRSV is rarely acknowledged while discussing the issue of armed conflict and sexual violence.<sup>211</sup> The stakeholders recommended the amendment of the TRC Act to include measures to investigate cases of sexual violence and CRSV survivors in the victims' relief schemes.<sup>212</sup>

66. Even when the victims of CRSV were provided with measures of reparation<sup>213</sup> from an international human rights mechanism like the UN HRC, those measures have not been implemented as of today.<sup>214</sup>
67. The SC has ensured victims' right to compensation in many rape cases.<sup>215</sup> In *Nepal Government vs. Gulab Miya*, the SC held that, despite the financial incapacity of the perpetrator to pay compensation to the victim, the State is responsible and ordered the GoN to pay compensation from the Victim Relief Fund.<sup>216</sup> Likewise, the SC has frequently stressed the need and importance of compensation and reparation in precedents related to transitional justice.<sup>217</sup> However, at the time of writing, these judgements have not been implemented.<sup>218</sup> Moreover, there are no pending writ petitions before the SC seeking the inclusion of CRSV victims in relief packages provided by the GoN. This could be a meaningful area for litigation and advocacy for CSOs as well as for representatives of the victims.

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<sup>210</sup> *Ibid.*, p. 21.

<sup>211</sup> Human Rights Council, *Summary of Stakeholder's Submission on Nepal*, A/HRC/WG.6/37/NPL/3, 18-19 January 2021, p. 4.

<sup>212</sup> *Ibid.*

<sup>213</sup> HRC, Case *Fulmati Nyaya vs. Nepal*, op. cit., para. 9; HRC, Case *Purna Maya vs. Nepal*, op. cit., para. 14.

<sup>214</sup> Human Rights and Justice Centre (HRJC) with the support of TRIAL International, *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 vs. Nepal*, op. cit., para. 46; The Kathmandu Post, *Nepal yet to take steps to ensure justice for women who suffered sexual violence during conflict*, published on 21 June 2019, available at <https://kathmandupost.com/national/2019/06/20/nepal-yet-to-take-steps-to-ensure-justice-for-women-who-suffered-sexual-violence-during-conflict>

<sup>215</sup> Supreme Court, *Nepal Government vs. Dipak B.K.*, NKP 2076, Decision No. 10292, 19 November 2018 (03.08.2075), para. 10; Supreme Court, *Adv. Punya Shila Dawadi Ghimire vs. Nepal Government*, NKP 2074, Decision No. 9741, 4 February 2016 (21.10.2072), para. 4.

<sup>216</sup> Supreme Court, *Nepal Government vs. Gulab Miya*, op. cit., para. 8.

<sup>217</sup> Supreme Court, *Liladhar Bhandari vs. Nepal Government*, NKP 2065, Decision no. 8012, 7 January 2009 (2065.09.23), para 21; Supreme Court, *Madhav Basnet vs. Nepal Government*, op. cit., para. 15.

<sup>218</sup> OHCHR, *Press briefing notes on Nepal*, 23 November 2021, available at <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=27847&LangID=E>.

# V. Conclusions and recommendations

## Conclusions

1. The SC has received few petitions on the issue of CRSV and, thus, the jurisprudence on this issue is currently rather limited.
2. Even with the limited number of petitions received, when the SC had the opportunity to discuss CRSV and the existing statute of limitation applicable to criminal proceedings for CRSV, it failed to do so, without providing sound reasons.
3. The SC has been unable to interpret and elaborate on the impact of the ongoing transitional justice process on the victims of CRSV, and to identify and assess their unique needs.
4. There are many issues related to CRSV which remain under-explored by both the judiciary and the representatives of CRSV victims, such as i) the issue of privacy of victims, ii) the lack of inclusion of CRSV victims in the interim relief packages, and iii) the need for a different provision on statute of limitation for criminal proceedings on CRSV.
5. The very few petitions on CRSV that have reached the SC do not reflect the unique circumstances of CRSV victims, despite recognizing the special circumstances of the armed conflict in other precedents.
6. Victims of CRSV are left with no effective domestic remedy. In several decisions, the SC does not assess which is responsible body to address issues related to CRSV, including whether the victims of CRSV should access courts through regular general criminal proceedings or seek justice in the context of transitional justice mechanisms.
7. The application of the 35-days statute of limitation to cases of CRSV remains a major – usually insurmountable – obstacle for victims and their representatives. In other cases related to the conflict era where there are no statutory limitations, such as in the case of rape followed by murder, the SC has adjudicated on the merits of the case, delivering innovative verdicts.
8. The SC maintains the rule of 35 days of the statute of limitation for criminal proceedings in cases of CRSV, despite various decisions in non-conflict-related rape cases that accept that a 35-days limitation is not enough time for the victim to lodge a complaint. The jurisprudence of the SC, therefore, seems to set a double standard, whereby a 35-day statute of limitation would not be acceptable for cases of sexual violence that occurred after the conflict, but would be fair in cases of CRSV. This contradictory case law is not grounded on sound legal arguments and shows a lack of understanding of the complexity of the war and the obstacles faced by CRSV victims in lodging complaints or reporting violations in an environment where, oftentimes, the offenders worked precisely in the security forces or the police.
9. Similarly, the SC seems to disregard the impact of CRSV on victims/survivors. The position of the SC materially left CRSV victims without any effective remedy and they

had to turn to international mechanisms – such as the UN Human Rights Committee – to seek justice and redress. In fact, the UN Human Rights Committee held that the application of the 35-day statute of limitation is at odds with Nepal’s international undertakings and therefore the jurisprudence of the SC is triggering the State’s international responsibility for an unlawful act.

10. The right to privacy guaranteed to the victims of sexual violence is not ensured when CRSV victims file writ petitions before the SC. Their names, address and sensitive information concerning the incident are made public like in the proceedings concerning any other case.
11. There are no specific relief schemes for victims of CRSV and those existing do not incorporate CRSV victims among beneficiaries.
12. Although the SC has ensured rape victims’ right to reparation in many precedents, there have been no petitions yet explicitly seeking all forms of reparation for CRSV, and so there are no precedents on this. The judgments of the SC ordering the Government of Nepal to provide reparation to all the victims of war have not yet been implemented.
13. Based on these findings, the Human Rights and Justice Centre (HRJC) issue the following recommendations, respectively directed at the Government of Nepal, the SC and civil society organisations.

## **Recommendations**

### ***a. Recommendations to the Government of Nepal***

It is recommended that the Government of Nepal:

- ⇒ assesses the effectiveness of the TRC and seeks solutions to the existing problems of the transitional justice process, bringing the corresponding legislation in line with Nepal’s international obligations.
- ⇒ adopts legislation/policies specific to CRSV. The legislation must include, and not be limited to, providing a definition of CRSV, setting clear procedural routes to seek justice and redress, and discarding the provision of the statute of limitation for criminal proceedings and compensation claims concerning CRSV.
- ⇒ adopts schemes/policies to ensure CRSV victims’ right to adequate reparation, including compensation, restitution, rehabilitation, satisfaction, and guarantees of non-recurrence.
- ⇒ complies with the directive orders issued by the SC in its verdicts regarding the transitional justice process.
- ⇒ acknowledges and works effectively to implement without delay the measures of reparation indicated by the UN Human Rights Committee in its decisions on the three cases *Fulmati Nyaya vs. Nepal*, *Devi Maya vs. Nepal* and *Purna Maya vs. Nepal*.
- ⇒ researches and publicizes the data on the number of CRSV victims and the legal processes they have resorted to, till date.

### **b. Recommendations to the Supreme Court**

It is recommended that, when adjudicating cases of CRSV, the SC:

- ⇒ recognises the agonizing circumstances of CRSV victims and develops a jurisprudence that disregards any statute of limitation. In this sense, the SC shall take into account the relevant decisions by the UN Human Rights Committee on complaints against Nepal.
- ⇒ upholds the highest standards to ensure the respect of the victims/survivors right to privacy and their security, including in-camera hearings and restrictions in disclosing sensitive data.
- ⇒ acknowledges the victims' right to adequate reparation, including compensation, restitution, rehabilitation, satisfaction and guarantees of non-recurrence. Also in this case, the SC shall take into account the relevant findings of the UN Human Rights Committee in the decisions issued on cases of CRSV in Nepal.
- ⇒ assigns priority '*agradhikar*' to the cases concerning CRSV as per its regulations.

### **c. Recommendations to Civil Society Organizations**

It is recommended that civil society organisations:

- ⇒ research and publish comprehensive and disaggregated data regarding CRSV victims to emphasize the scope, gravity and impact of this crime.
- ⇒ identify uncharted issues of CRSV and strategically litigate cases to demand that domestic courts develop jurisprudence on such issues. The subjects can include i) the issue of privacy of victims, ii) the lack of inclusion of CRSV victims in the interim relief packages, iii) the need of a different provision on statutes of limitation for CRSV.
- ⇒ recognize the survivors of sexual violence that occurred during the conflict
- ⇒ uphold the highest standards to ensure the respect of the victims/survivors right to privacy and their security in disclosing sensitive data while filing and litigating the cases of CRSV.
- ⇒ develop campaigns and reinstate strategic litigation to assess and reform the transitional justice mechanisms.
- ⇒ strategically lobby and pressurize the government to implement the recommendations provided by HRC in its decisions on cases of CRSV and the judgments of SC on writ petitions, especially on transitional justice-related issues.
- ⇒ since the SC cannot by itself decide on these issues without any applications, civil society organisations in particular, as well as victims of CRSV and their representatives, should consider the opportunity of lodging more applications on these issues, calling on the SC to pronounce itself on the mentioned matters and clarifying its competence to adjudicate cases of CRSV.

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# Annex I: List of cases

## **Writ petitions on/related to CRSV**

1. *AC vs. District Police Office and others*, Writ no. 070-WO- 0718, 18 September 2019 (2076.06.01)
2. *SC vs. District Police Office, Kanchanpur and others*, Writ no. 071-WO-0580, 15 May 2019 (2076.02.01)
3. *Bhagiram Chaudhary vs. The Office of Prime Minister and Council of Ministers and Others*, 070-WO-0452, decided on 15 Bhadra 2073 (31 August 2016)

## **Writ petitions on transitional justice process**

4. *Madhav Kumar Basnet vs. Nepal Government*, Writ no. 069-WS-0057, NKP 2070, Decision no. 9051, 1 February 2018 (2070.10.18)
5. *Suman Adhikari vs. The Office of Prime Minister and Council of Ministers and Others*, NKP 2071, Decision no. 9303, Writ no. 070-WS-0050, 26 February 2015 (2071.11.14)
6. *Govinda Prasad Sharma 'Bandi' vs. Attorney General Mukti Prasad Pradhan*, NKP 2070, Decision No. 9091, 2 April 2014 (2070.12.19)
7. *Dipendra Jha vs. The Office of the Prime Minister and Council of Ministers and others*, Writ No. 067-WO-1198, 12 August 2012 (2069.04.28)
8. *Liladhar Bhandari vs. Nepal Government*, NKP 2065, Decision no. 8012, 7 January 2009 (2065.09.23)

## **Other cases and writ petitions related to cases of sexual violence**

9. *Devi Sunar vs. District Police Office, Kavrepalanchowk*, NKP 2064, Decision No. 7857, 18 September 2007 (2064.06.01)
10. *Sapana Pradhan Malla vs. Nepal Government*, NKP 2065, Decision No. 8038, 11 July 2008 (2065.03.27)- Statute of Limitation
11. *Jit Kumari Pageni v. Prime Minister and Office of Ministers*, NKP 2065, Decision No. 7973, 10 July 2008, (26.03.2065)
12. *Indira Basnet vs. District Police Office Sindhupalchowk and others*, Writ No. 063-WO-0402, 9 February 2009 (2065.10.27) Statute of Limitation
13. *Nepal Government vs. Mubarak Mir Musalman*, NKP 2067, Decision no 8466, 23 February 2010 (2066.11.11)
14. *KR vs. District Police Office, Kavrepalanchowk*, Writ no. 064-WO-0339, Decision on 15 December 2011 (2066.08.29)
15. *Raju Chapagain vs. Nepal Government*, Writ No. 070-WO-0711, 10 June 2015 (2072.2.27) Statute of Limitation
16. *Ishwor Rishidev vs. Nepal Government*, NKP 2074, Decision no. 9826, 5 June 2016 (2073.02.23)
17. *Nepal Government vs. Ashok Shrestha*, NKP 2076, Decision no. 10165, 28 November 2017 (2074.08.12).

18. *Pradeep Bhattarai vs. Nepal Government*, NKP 2076, Decision no. 10280, 11 July 2019 (2076.03.26)
19. *Nepal Government vs. Gulab Miya*, NKP 2076, Decision No. 10361, 12 July 2019 (2076.03.27)
20. *Sapana Pradhan Malla vs. Nepal Government*, NKP 2064, Decision No. 7880, 25 December 2007 (10.09.2064)- Right to privacy
21. *Nepal Government vs. Dipak B.K.*, NKP 2076, Decision No. 10292, 19 November 2018 (03.08.2075)
22. *Adv. Punya Shila Dawadi Ghimire vs. Nepal Government*, NKP 2074, Decision No. 9741, 4 February 2016 (21.10.2072)

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