



SUBMISSION

for the

**THEMATIC REPORT OF THE SPECIAL RAPPOREUR ON VIOLENCE AGAINST WOMEN ON
RAPE AS A GRAVE AND SYSTEMATIC HUMAN RIGHTS VIOLATION AND GENDER-BASED
VIOLENCE AGAINST WOMEN**

MAY 2020

Submitted by

Human Rights and Justice Centre

TRIAL International

I. Introduction

The United Nations Special Rapporteur on Violence against Women, its Causes and Consequences (hereinafter, “the Special Rapporteur”) announced that, in September 2020, she will present a thematic report to the General Assembly on States’ responsibility to criminalise and prosecute rape as a grave and systematic human rights violation and gender based violence against women, in line with international human rights standards.

To that end, the Special Rapporteur invited different stakeholders from all countries, including civil society actors, to send responses to a questionnaire. Based on their expertise, the Human Rights and Justice Centre and TRIAL International are submitting their answers to the questionnaire below with regard to the applicable legislation and relevant jurisprudence in **Nepal**. Most of the information submitted refers to conflict-related rape and other forms of sexual violence. Notwithstanding, reference will be made also to domestic legislation applicable to rape and sexual violence in peacetime.

In November 2018, the Special Rapporteur visited Nepal and, in her report, she analysed the applicable legislation concerning rape and other forms of sexual violence¹ and issued the corresponding recommendations. Unfortunately, at the time of writing most of those recommendations have not been implemented. Accordingly, the answers to the questionnaire below reproduce some information already known to the Special Rapporteur, where appropriate complementing it and illustrating the relevant developments (or lack thereof).

II. Background

In her report on the visit to Nepal, the Special Rapporteur confirmed the existence of deeply rooted **gender stereotypes**, which create a favourable environment for the commission of violence against women and the ensuing impunity. In her words, “violence against women in Nepal is pervasive, occurring in both the private and the public spheres throughout the country, and is further compounded by the persistence of entrenched patriarchal attitudes, gender stereotypes and harmful practices”.² Along the same lines, the Human Rights

¹ Special Rapporteur on Violence against Women, its Causes and Consequences, *Report on Country Visit to Nepal*, UN Doc. A/HRC/41/42/Add.2 of 19 June 2019, para. 35. Hereinafter, “Report of the Special Rapporteur on her Country-Visit to Nepal”.

² *Ibid.*, para. 27.

Committee observed “the persistence of patriarchal attitudes and deep-rooted stereotypes that perpetrate discrimination against women in all spheres of life”.³

Although over the past years progress – especially at the legislative level – must be registered with regard to the eradication of gender stereotypes, in practice, the relevant norms often remain unimplemented.

The described situation must be taken into account when analysing the scope and consequences of conflict-related sexual violence. In this regard, the report of the Office of the High Commissioner for Human Rights (hereinafter, “OHCHR”) concerning the abuses committed during the armed conflict, clarified that “an unequal gender relation that is pervasive in the Nepali society has been a key in legitimizing violence against women”.⁴

Nepal underwent a decade-long armed conflict (1996-2006), characterised by systematic gross human rights violations, including torture, enforced disappearance, extra-judiciary executions, arbitrary arrests, and sexual violence. On 21 November 2006, a Comprehensive Peace Agreement was signed and it included a commitment to establish two transitional justice mechanisms, aimed at delivering justice and redress to victims and their families. Pursuant to the Act on Commission on Investigation of Disappeared Persons, Truth and Reconciliation, 2014 (hereinafter, “the TRC Act”), in February 2015, two transitional justice bodies were eventually established, namely the Truth and Reconciliation Commission (hereinafter, “TRC”) and the Commission on Investigation of Enforced Disappearance of Persons (hereinafter, “CIEDP”). Each commission was entrusted with a two-year mandate, which has been extended already multiple times.

In February 2015, the Supreme Court of Nepal issued a decision whereby it declared several provisions of the TRC Act unconstitutional and at odds with Nepal’s international obligations. The Supreme Court directed the government to amend such provisions and make them consistent with its international undertakings. In subsequent rulings, the Supreme Court reaffirmed the existence of serious loopholes in the legislative framework on transitional justice. Among others, the provisions that would allow amnesties for crimes under international law and gross human rights violations were the source of special concern,

³ Human Rights Committee (HRC), *Concluding Observations on Nepal*, UN Doc. CCPR/C/NPL/CO/2 of 28 March 2014, para. 8 (emphasis added).

⁴ Office of the High Commissioner for Human Rights (OHCHR), *Nepal Conflict Report*, 2012, available at: http://www.ohchr.org/Documents/Countries/NP/OHCHR_Nepal_Conflict_Report2012.pdf, p. 164 (emphasis added).

together with the lack of adequate guarantees of the independence and impartiality of the two commissions.

Notwithstanding the Supreme Court's clear orders, **the legislative framework regulating the functioning of the two commissions has not been amended and they carried out a significant part of their work based on such flawed mandate.**

The TRC registered more than 60,000 complaints of gross human rights violations and the CIEDP received more than 3,000 complaints of enforced disappearance. The registration of complaints was conducted in the absence of an adequate witness protection programme and lacking technical knowledge and expertise. The commissions only launched some preliminary investigations, but their mandate expired before they could come up with any meaningful findings, publish a report, formulate any recommendation, or grant redress to victims.

In her report on the visit to Nepal, the Special Rapporteur expressed her concern because the transitional justice mechanisms have not been fully functioning and have faced considerable challenges.⁵ She also noted that many victims and survivors of rape or other forms of sexual violence did not register complaints, mostly due to fear of repercussions and that, in general, the existing legal framework did not allow them to have access to compensation and other forms of reparation.⁶ Accordingly, the **Special Rapporteur formulated a number of recommendations concerning the transitional justice process,⁷ none of which has been implemented so far.**

In February 2019, the mandate of the two commissions was extended a third time (i.e. until February 2020). However, throughout the entire year 2019, Nepal failed to amend the underlying legislative framework and to appoint new commissioners, *de facto* paralysing the transitional justice process.

After a whole year of inactivity, in the proximity of a further expiry of the mandate, in January 2020, the government announced its intention to appoint new commissioners at the end of a rushed and secretive process, thus causing outrage among victims' groups, who consider that the provincial consultations convened for such purpose on 13 January 2020 and lasted only 3 hours are a mockery in the face of their suffering.

⁵ Report of the Special Rapporteur on her Country-Visit to Nepal, para. 57.

⁶ *Ibid.*, para. 58.

⁷ *Ibid.*, para. 83.

Despite the flawed process, on 27 January 2020, the Cabinet of Ministers decided to extend the mandate of the two commissions for one more year (i.e. until February 2021). Notwithstanding the formal renewal of the mandate, this is unlikely to produce any meaningful results, until the legislative framework regulating their mandate remains at odds with international law; the process of selection and appointment of the commissioners is not transparent and consultative; and the commissions are provided with adequate technical expertise and resources.

On 27 April 2020, the Supreme Court of Nepal rejected a petition previously lodged by the government of Nepal, seeking the review of its 2015 ruling against amnesties for grave conflict-era crimes, including rape or other forms of sexual violence.⁸ The rejection of the government's petition is certainly a positive signal from the Nepalese judiciary, but until the relevant legislation is not amended, the State party will continue breaching its international obligations.

All in all, despite some progress – especially with regard to the legislative framework – much remains to be done to ensure that Nepal complies with international law with regard to the criminalisation of rape and other forms of sexual violence.

III. Questionnaire on Criminalisation and Prosecution of Rape

III.A) Definition and scope of criminal law provisions

- 1. Please provide information on criminal law provision/s on rape (or analogous forms of serious sexual violence for those jurisdictions that do not have a rape classification) by providing full translated transcripts of the relevant articles of the Criminal code and the Criminal procedure code.**

On 9 August 2017, the Nepalese Parliament endorsed a new Penal Code (*Muluki Foujdaari Samhita, 2074 BS* (The National Penal Code Act, 2017) and *Muluki Faujdaari Samhita Ain, 2074* (The National Criminal Procedure Code, 2017), which were approved by the President on 16 October 2017, and entered into force on 17 August 2018. The National Penal Code contains substantive provisions on the crimes, while the National Criminal Procedure Code sets forth the applicable procedures to be followed in dealing with such crimes.

Pursuant to Chapter 18 (Annex I to this submission) of the National Penal Code, the following conducts are criminalised and sanctioned: rape (Section 219); incest (Section 220); sexual intercourse with a detainee (Section 221); sexual intercourse with a person

⁸ OHCHR, *Press Briefing Note on Nepal*, 1 May 2020, available at: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25855&LangID=E>.

under one's protection (Section 222); sexual intercourse with a person in office or receiving professional services (Section 223); sexual harassment (Section 224); child sexual abuse (Section 225); unnatural sexual intercourse (Section 226); bestiality (Section 227). Additionally, Section 228 of the new National Penal Code addresses the provision of compensation, while Section 229 specifies the statutory limitation.

For the integral text (in English) of the above-mentioned provisions, please refer to Annex I.

The relevant procedures in relation to rape, as provided in the National Criminal Procedure Code, are presented below:

Section 57: According to this Code, once the complaint is registered, the court within this paragraph and as per necessity should issue an arrest warrant to bring the accused of offences under Schedule-1 and Schedule-2 before the court who was/were not presented along with the complaint.

Rape is listed as a crime under Schedule-1. The provision above makes it compulsory for the court to issue the arrest warrant against the offender/s who has/have not been apprehended.

Section 67: For the accused of the following crimes, the court will detain the accused during trial if the evidence presented provides reasonable grounds to believe that the accused perpetrated the crime.

- a) Crimes with punishment of life imprisonment;
- b) Crimes under Schedule-1 and Schedule-2 that has imprisonment for more than 3 years; and
- c) Attempt, Instigation or criminal conspiracy or accomplice in the crimes under section (a) and (b) above.

Rape is one of the crimes listed in Schedule-1 and imprisonment for more than 3 years is the punishment foreseen. The provision here does not allow the accused of rape to be released on bail and requires him or her to remain in custody.

Section 89 (2): Notwithstanding subsection (1) above, in the following situations, the accused cannot appoint another person on his behalf: cases relating to the offences under Schedule-1 and Schedule-2.

The provision above does not allow the accused of rape to appoint another person on his or her behalf to be presented before the court for trial related activities like submitting a complaint; a memorandum of appeal or a statement of defence; presenting evidence; collecting compensation or similar matters, as per the decision of the court or conduct any other important activities.⁹ Otherwise, pursuant to Nepali legislation, in certain crimes, the accused is allowed to appoint a representative to appear before the court to perform the above mentioned activities.

Section 116: The case cannot be withdrawn once registered before the Court for the offences under Schedule-1 and Schedule-2.

The provision secures hearing of the cases of rape once it has been registered. However, in many cases of rape, victims may retract their initial statements and are often subjected to fear, threat and coercion to drop the charge or change their statements in court.¹⁰

Furthermore, Section 37 of the Criminal Offense (Sentence Determination and Implementation) Act 2017 (*Faujdaari Kasur (Sajaya Nirdharan tatha Karyawayan Ain) 2074*) provides a list of offenders for whom the sentencing term cannot be reduced even if the offender improves his/her behaviour and has completed three-fourth of the sentencing term. Such list includes the crime of rape.

2. Based on the wording of those provisions, is the provided definition of rape:
a. Gender specific, covering women only YES

Section 219 of the National Penal Code defines rape as “*a man has sexual intercourse with a woman without her consent or with a girl child below the age of eighteen years with her consent.*” This definition is insufficient as it does not provide for other victims of rape, such as a man, a male child, or a transgender person. It also eliminates the possibility of a woman being the perpetrator of the crime of rape.

b. Gender neutral, covering all persons NO
c. Based on the lack of consent of victim YES

According to Section 219 of the National Penal Code, “*consent obtained by way of coercion, undue influence, intimidation, threat, misrepresentation, or abduction or hostage-taking*” as well as “*consent obtained at the time of being of unsoundness of mind [sic.] shall not be*

⁹ In other crimes of less severity, a person can be appointed to represent the accused to be presented before the Court for trial related activities.

¹⁰ Preventing Sexual Violence In Nepal Through Harmonizing Relevant Laws With International Human Rights Standards', Kathmandu School of Law, 2015, available at <http://ksl.edu.np/files/large/8bb7d6bf39679d3>.

considered to be consent.” Regarding age-related incapacity, this is also provided for under Section 225 under prohibition of child sexual abuse.

- d. Based on the use of force or threat YES**
- e. Some combination of the above. YES**
- f. Does it cover only vaginal rape? NO**
- g. Does it cover all forms of penetration? NO**

Section 219 of the National Penal Code defines rape by referring to *“the penetration of [the] penis, to any extent, into the anus, mouth or vagina, [and] [the] insertion of any object other than the penis into the vagina”*. The provision thus excludes the insertion of any object or parts of the body other than the penis into the anus as well as other scenarios not encompassed by this limited definition.

The National Penal Code considers penetration an essential element of the crime of rape and non-physical forms of sexual violence are considered under sexual harassment. Under Section 224(2), which regulates the prohibition of sexual harassment, the National Penal Code defines the latter in the following terms: *“if the person holds or touches or attempts to touch any sensitive organ of, or opens or attempts to open undergarments of, or obstructs or hinders in any way the wearing or removing of undergarments of, or takes to any lonely place in an unusual manner, or gets his or her sexual organ to be touched or held by, or uses vulgar or similar other words, spoken or written or by gesture or by way of electronic medium, or shows any pornography to, or teases or annoys with sexual motive, or behaves in an unusual, undesirable or indecent manner with, a person who is not his wife or her husband, without her or his consent, with the motive of having sexual intercourse with her or him”*.

However, the Supreme Court of Nepal has repeatedly held that penetration cannot be the precondition of rape.¹¹ Similarly, in the case *Government of Nepal v. Mubarak Mir Musalman* the Supreme Court affirmed that, although there was no penetration, the physical, mental, and psychological along with social consequences, were sufficient to demonstrate the occurrence of rape.¹²

h. Is marital rape in this provision explicitly included? YES

¹¹ Supreme Court of Nepal, *Government of Nepal v. Tasi B.K. et.al*, Nepal Kanoon Patrika 2073 (BS), Issue 1, decision No. 9159, Decision date 10 January 2014.

¹² Supreme Court of Nepal, *Government of Nepal v. Mubarak Mir Musalman*, Nepal Kanoon Patrika 2067 (BS), Issue 9, decision No. 8466.

Under Section 219(4) of the National Penal Code, there is criminal responsibility for rape committed in a marital relationship, although the sentencing differs. Once again, the language used by the National Penal Code is not gender-neutral and does not provide for criminal responsibility of a wife committing rape to her husband.

For the purposes of Section 224 (2) of the National Penal Code, if someone attempts to touch any sensitive organ or attempts to open the undergarments of a person who is their wife or husband without their consent, with the motive to have sexual intercourse, they will be considered to have committed sexual harassment and not rape.

Notwithstanding, if someone attempts to touch any sensitive organ or attempts to open the undergarments of their wife or husband without their consent it is not punishable as sexual harassment.

- i. **Is the law silent on marital rape?** NO
 - j. **Is marital rape covered in the general provisions or by legal precedent even if it is not explicitly included?** YES, it is included in the general provisions.
 - k. **Is marital rape excluded in the provisions, or is marital rape not considered as a crime?** NO
- 3. Are there any provisions excluding criminalization of the perpetrator if the victim and alleged perpetrator live together in a sexual relationship/have a sexual relationship/had a sexual relationship? If so, please submit it.**

NO.

4. What is the legal age for sexual consent?

The legal age for sexual consent is 18. As per Section 219 (2) of the National Penal Code, a sexual relation “with a girl child below eighteen years of age even with her consent” is rape. In case of a child (male or female), consent given by a child for unnatural sexual intercourse is not considered as consent. This being so, it would not be wrong to assume that the National Penal Code is silent on what shall be the legal age of sexual consent for a male child given that the sexual intercourse is “natural”.

- 5. Are there provisions that differentiate for sexual activity between peers? If so, please provide them.**

NO.

- 6. Provide information on criminal sanctions prescribed and length/duration of such criminal sanctions for criminalized forms of rape.**

The National Penal Code establishes different sentences of imprisonment and fines relating to the sexual offenses under Chapter 18.

Rape: under Section 219 (3) of the National Penal Code, the individual shall be liable to the sentence of imprisonment as follows, having regard to the circumstances of such sexual intercourse and the age of the woman: a) Imprisonment for a term of 16-20 years, if the girl is below 10 years of age; b) Imprisonment for a term of 14-16 years, if the girl is 10 years or above 10 years of age but below 14 years of age; c) Imprisonment for a term of 12-14 years, if the girl is 14 or above 14 years of age but below 16 years of age; d) Imprisonment for a term of 10-12 years, if the woman is 16 or above 16 years of age but below 18 years of age; e) Imprisonment for a term of 7-10 years, if the woman is 18 or above 18 years of age.

Prohibition of incest under Section 220 of the National Penal Code: the individual shall be liable to the following sentences depending on the level of relationship by consanguinity or affinity: a) Imprisonment for life, in the case of sexual intercourse between the natural mother and her natural son or between the natural father and his natural daughter. b) Imprisonment for a term of 4-10 years and a fine of 40,000-100,000 Nepalese Rupees (approximately US\$ 350-900), in the case sexual intercourse is between the step-mother and her step-son, between the step father and his step daughter, between the full blood elder sister and brother, between full blood elder brother and sister, between father-in-law and daughter-in-law within the same branch, between grand-father and grand-daughter or great-grand-daughter within the same branch, between elder brother-in-law and sister-in-law within the same branch or between younger brother-in-law and sister-in-law within the same branch. c) Imprisonment for a term of 3-6 years and a fine of 30,000-60,000 Nepalese Rupees (approximately US\$ 270-530), in case of sexual intercourse between grand-mother and her grand-son or great-grand-son within the three generations of the same branch, between father's elder brother or uncle and niece within the same branch, between nephew and great mother (wife of own father's brother) or aunty within the same branch, between father-in-law and brother's daughter-in law within the same branch, between uterine maternal uncle and niece or nephew and maternal aunty, between mother's elder sister or younger sister and nephew or between mother-in-law (one's wife side) and son-in-law. d) Imprisonment for a term of 1-3 years and a fine of 10,000-30,000 Nepalese Rupees (approximately US\$ 90-270) in the case of sexual intercourse between persons in other relationship within seven generations of one's own clan except that referred to in clause (a), (b) or (c).

Prohibition of sexual intercourse with a detainee under Section 221 (2) of the National Penal Code, the individual shall be liable to a sentence not exceeding 3 years.

Prohibition of sexual intercourse with a person in one's own protection or security under Section 222 (2) of the National Penal Code, the individual shall be liable to a sentence not exceeding 3 years.

Prohibition of sexual intercourse with a person in office or receiving professional service under Section 223 (2) of the National Penal Code, the individual is liable to a sentence not exceeding 4 years and a fine not exceeding 40,000 Nepalese Rupees (approximately US\$ 350).

Prohibition of sexual harassment under Section 224 (2) of the National Penal Code, the individual shall be liable to a sentence not exceeding 3 years and a fine not exceeding 30,000 Nepalese Rupees (approximately US\$ 270).

Prohibition of child sexual abuse under Section 225 (2) of the National Penal Code, the individual shall be liable to a sentence not exceeding 3 years and a fine not exceeding 30,000 Nepalese Rupees (approximately US\$ 270).

Prohibition of unnatural sexual intercourse without consent under Section 226 (2) of the National Penal Code, the individual shall be liable to a sentence not exceeding 3 years and a fine not exceeding 30,000 Nepalese Rupees (approximately US\$ 270). If committed against a child, shall be liable to the sentence established in Section 219.

Prohibition of bestiality under Section 227 (2) of the National Penal Code, the individual shall be liable to a sentence not exceeding 2 years and a fine not exceeding 20,000 Nepalese Rupees (approximately US\$ 180) in relation to sexual intercourse with a cow and liable to a sentence not exceeding 1 year and a fine not exceeding 10,000 Nepalese Rupees (approximately US\$ 90) in relation to sexual intercourse with any other animal.

Prohibition of forced abortion under Section 188 (3) of the National Penal Code, the person shall be liable to the following sentences depending on how far along is the pregnancy: a) If the pregnancy is up to twelve weeks: a sentence of imprisonment for a term not exceeding 1 year and a fine not exceeding 10,000 Nepalese Rupees (approximately US\$ 90); b) If the pregnancy is more than twelve weeks and up to twenty-five weeks: a sentence of imprisonment for a term not exceeding 3 years and a fine not exceeding 30,000 Nepalese Rupees (approximately US\$ 270); c) If the pregnancy is more than twenty-five weeks: a

sentence of imprisonment not exceeding 5 years and a fine not exceeding 50,000 Nepalese Rupees (approximately US\$ 450).

Considering **the different sentencing regimes for the sexual offences listed above, it can be concluded that sexual crimes not classified as rape carry out lesser sentences, often not commensurate to the seriousness of these conducts.** The gaps in the definition of rape allow for equally grave acts to fall under the crime of sexual harassment and carry lesser sentences, such as rape committed by a female perpetrator and rape committed by the insertion of any object or parts of the body other than the penis into the anus.

7. What does the legislation in your country provide in terms of reparation to the victim of rape and/or sexual violence after conviction of the perpetrator?

Pursuant to Section 228 of the National Penal Code, a reasonable compensation shall be ordered to be paid to the victim of any offence referred to other than the offences under Sections 220 and 226. The offences under Sections 220 and 226 of the National Penal Code are prohibition of incest and prohibition of unnatural sexual intercourse without consent, respectively.

Although the National Penal Code refers to “reasonable compensation” for the victims of rape and other forms of sexual violence, there is no reference to a calculation method or specific criteria.

On 18 September 2018, the Crime Victim Protection Act, 2075 (2018) came into force for the protection of the rights and interest of the victims. In Section 31, the Act sets out the grounds to be considered when determining the amount of compensation. The court **may** (emphasis added) take into account any or all of the following:

- a) Reasonable expenses borne or to be borne by the victim for medical, psychological or psychiatric counselling;
- b) Expenses for medical treatment borne or to be borne by the victim;
- c) Unexpected travel expenses borne by the victim;
- d) Expenses for legal counsel borne by the victim;
- e) Damage caused to the personal capacity of the victim as a direct result of the offence;
- f) Financial loss borne or to be borne by the victim, provided that, where the victim has obtained or is to obtain compensation for such financial loss from the insurance pursuant to law, compensation shall not be provided pursuant to this clause;

- g) Expenses incurred or to be incurred in repairing or maintaining the damaged personal goods or purchasing new ones;
- h) The victim's income generation capacity lost or damaged as a direct result of the offence;
- i) Negative effects caused to the physical beauty of the victim;
- j) Damage caused to physical, intellectual, sexual or reproductive capacity of the victim;
- k) In the case of the offence of rape, negative effects caused from such offence to the social, cultural or family prestige or relationship of the victim;
- l) Where the victim becomes pregnant due to rape, expenses incurred due to abortion or to giving birth to and nurturing the baby;
- m) Medical treatment expenses in the case of abortion caused from the offence;
- n) Reasonable expenses spent by the victim in good faith to become safe from additional offence that is likely to be committed against him or her, where the special condition is attracted;
- o) Mental or emotional damage borne by the victim;
- p) Other appropriate grounds according to the nature and effects of the damage;
- q) In the case of a victim to whom a special condition is applicable to, reasonable expenses incurred by the victim in good faith to save the victim of first grade from additional offence;
- r) Guardian's patronage lost by the minor children.

As exhaustive as the list may seem, this provision comes with a loophole which leaves it to the discretion of the court rather than making it compulsory to take into due consideration the elements concerned when calculating the compensation to be provided to the victim.

Furthermore, a provision in the Act concerns interim relief. According to Section 29, “where it is required to have treatment of the victim or provide compensation or any kind of relief amount immediately, the court may make an order for getting such a person medically treated or providing compensation or relief amount in an interim manner”. The Act establishes that the amount concerned would be provided through the Victims’ Trust Fund.¹³ In case the accused is convicted of the offence upon judgment by the court, the latter shall order him or her to pay the amount of compensation or relief that had been provided from

¹³ The Crime Victim Protection Act, 2075 (2018), Section 29 (2). The Victims’ Trust Fund has been established under the competence of the Supreme Court of Nepal and the government of Nepal has allocated budget to ensure its functioning. However, in practice, although the application of the relevant provisions has already been invoked in court, this is very recent and the pertinent decisions rendered by District Courts are yet to reach the implementation phase.

the fund within 35 days from the date on which the judgment was adopted.¹⁴ If such amount cannot be paid by the offender, it will be recovered from any assets belonging to the offender, within 60 days from the date on which the judgment was issued.¹⁵

The Act establishes that the offender should bear the compensation to be paid to the victim.¹⁶ In case the court orders the offender to pay the compensation and the victim had obtained interim relief in the past, the amount for compensation would be deducted by the amount of interim relief.¹⁷ The provision does not adequately reflect the difference between the interim relief (meant to provide support vis-à-vis the victim's immediate needs) and compensation (meant to redress the harm suffered by the victim).

Due consideration must be given to the non-pecuniary remedies provided in the National Penal Code in the context of a marital relationship. According to Section 219 (5) of the National Penal Code if the husband commits rape on his wife during the existence of marital relationship between them, upon petition of the victim, the court may order the perpetrator:

- a) To allow the wife to reside in the same house where she has resided, to provide her with food and clothes, not to hurt her and to behave her politely and decently;
- b) To get the wife to have required medical treatment or provide reasonable amount for her treatment;
- c) To arrange a separate residence for the husband if it is not appropriate for them to reside in the same place together and make necessary arrangement for the maintenance of the wife while so residing separately;
- d) To refrain from causing suffering or annoyance, in any manner, to the wife and do, or cause to be done, necessary and appropriate act for the interest and security of the wife.

With regard to conflict-related sexual violence, in her report the Special Rapporteur observed that only the relatives of individuals killed or forcibly disappeared and those injured or disabled as a result of the armed conflict were granted interim relief measures and monetary assistance while the victims of sexual violence were not entitled to claim any compensation or any other reparation or similar support services.¹⁸

III.B) Aggravating and mitigating circumstances

¹⁴ The Crime Victim Protection Act, 2075 (2018), Section 29 (3).

¹⁵ *Ibid.*, Section 29 (4).

¹⁶ *Ibid.*, Section 30 (1) The court may, while reaching a final settlement of the case, order that a reasonable amount be paid, as compensation, by the offender to the victim.

¹⁷ *Ibid.*, Section 30 (3) Where the court issues an order pursuant to sub-section (1) that compensation be paid by the offender to the victim who has already obtained interim compensation pursuant to Section 29, only the amount that remains after returning the amount of interim compensation obtained by the victim to the Fund shall be provided to the victim.

¹⁸ Report of the Special Rapporteur on her Country-Visit to Nepal, para. 60.

8. Does the law foresee aggravating circumstances when sentencing rape cases? If so, what are they?

YES. The National Penal Code establishes that a man who commits rape despite knowing that he has human immune deficiency virus (HIV positive) or a sexually transmissible disease shall be liable to the following additional sentence: (a) A sentence of imprisonment not exceeding 10 years and a fine not exceeding 100,000 Nepalese Rupees (approximately US\$ 900) as referred to in Section 105, which relates to the prohibition of transmitting human immuno-deficiency virus (HIV positive); (b) A sentence of imprisonment for a term not exceeding 3 years and a fine not exceeding 30,000 Nepalese Rupees (approximately US\$ 270) in the event of the commission of rape in spite of knowing that he has any other sexually transmitted disease.

Under Section 219 (7) of the National Penal Code there will be an additional sentence of imprisonment for a term not exceeding 5 years if the perpetrator commits rape with a gang on a woman; commits rape on a woman more than six-months pregnant; commits rape on a woman infirm or disabled or suffering from physical or mental illness; commits rape showing weapons.

The National Penal Code also stipulates that a man who commits rape on a woman when there is a prohibited relationship by consanguinity or affinity shall be liable to the sentence referred under Section 219, in addition to the sentence imposable for incest if he is liable to such sentence for incest.

In addition, Section 38 (u) of the National Penal Code also determines that if any offence committed was a crime against humanity it will be deemed an aggravating circumstance of that crime. However, the National Penal Code does not provide any further details and it is unclear if rape can be a considered a crime against humanity provided the international standards are fulfilled.

a. Is rape by more than one perpetrator an aggravating circumstance?

YES, Section 219 (7) of the National Penal Code there will be an additional sentence of imprisonment for a term not exceeding 5 years if a man commits rape with a gang on a woman.

b. Is rape of a particularly vulnerable individual an aggravating circumstance, or the imbalance of power between alleged perpetrator

and victims? (for example, doctor/patient; teacher/student; age difference)

YES, pursuant to Section 219 (7) of the National Penal Code there will be an additional sentence of imprisonment for a term not exceeding 5 years if a man commits rape on a woman more than six-months pregnant; or commits rape on a woman infirm or disabled or suffering from physical or mental illness.

c. Is rape by spouse or intimate partner an aggravating circumstance?

NO, it is actually the opposite. The National Penal Code states in the case of a husband raping his wife during the existence of marital relationship between them, he shall be liable to a sentence of imprisonment for a term not exceeding 5 years. For the purposes of this section, a marital relationship will not be considered if partition has been instituted upon making separation of board and bread; the wife has lived separately upon taking her partition share from the husband; divorce from the husband has been instituted.

Although the individual may be sentenced to **7-10 years for the crime of rape committed against a woman who is 18 or above 18 years of age, if there is a marital relationship this sentence is reduced to a term not exceeding 5 years.** The marital status of the perpetrator and victim of the crime should not attenuate the sentence.

9. Does the law foresee mitigating circumstances for the purposes of punishment? YES (see also the previous answer).

Pursuant to Section 39 of the National Penal Code, the following are mitigating circumstances:

- a. The offender is below 18 years or above 75 years of age;
- b. The offender had no intention to commit the offence;
- c. The person against whom the offence was committed had, immediately before the commission of the offence, provoked or threatened the offender;
- d. The offence was committed instantly as a retaliation against any grave offence committed against the offender or any of his or her close relatives;
- e. The offender voluntarily confessed the offence or expressed a remorse therefore;
- f. The offender surrendered himself or herself to the concerned authority;

- g. The offender, having confessed the offence committed by him or her, has already provided or agreed to pay compensation to the victim;
- h. The offender has diminished capacity because of physical, mental ability or disability;
- i. The extent of loss or harm caused to the victim and the society is insignificant;
- j. The offender rendered assistance in the judicial process by telling the truth to the court;
- k. The offender has confessed the guilt and committed not to perpetrate any criminal offence in the future;
- l. The offence was committed under others' instigation or pressure.

All of the conditions above apply to the offence of rape, except (b) and (l). In the crime is of strict liability like sexual relation with a minor, the criminal intention is not to be examined as per Section 29 of the Code.

Similarly, when rape is committed while the offender is under threat or upon others' instigation, it is still an offence as per Section 22 of the Code. In fact, the instigator is subjected to separate punishment,¹⁹ equal to that of the offender, pursuant to Section 35(3) (a).

In addition, Section 33 of the National Criminal Procedure Code establishes that, if the accused of any offence assists the investigative authority in the course of conducting investigation into such offence, the authority may, in consideration for such assistance, recommend to the government attorney for a reduction of the sentence.

10. Is reconciliation between the victim and the perpetrator allowed as part of a legal response? YES If so, at what stage and what are the consequences? Regardless of the law, is reconciliation permitted in practice? YES and what is the practice in this regard?

There is a practice of reconciliation between victims and perpetrators, despite the fact that there is no legal provision regulating such reconciliation. The latter is actually obtained by putting the victims under threat and duress. Pursuant to Section 114(5) of the National Criminal Procedure Code, the police must provide security to the victim if information is obtained that the victim is under undue coercion, threat or having adverse impact on the security of his/her body from the opponents. However, in practice, the police themselves are often part of arranging the reconciliation between the victim and the

¹⁹ National Penal (Code) Act, 2018, Section 35(2).

perpetrator at the very beginning of the case, denying the registration of a formal complaint (after rejecting the registration of a First Information Report).²⁰

Notwithstanding, Section 120 of the National Criminal Procedure Code establishes that, if the parties to any case related to any offence under Schedule-4²¹ so agree or the court considers it appropriate to refer such case for mediation, the court may order to refer such case for mediation at any time and stage, asking the parties to choose the mediator and directly appointing the mediator if the parties fail to do so.

11. Is there any provision in the criminal code that allows for the non-prosecution of perpetrator? NO.

a. if the perpetrator marries the victim of rape? NO

b. if the perpetrator loses his “socially dangerous” character or reconciles with the victim? NO

III.C) Prosecution

12. Is rape reported to the police prosecuted ex officio (public prosecution)? YES

In all the cases under the Schedule-1 of the National Criminal Procedure Code, the government of Nepal is the plaintiff.²² Schedule-1, among others, includes Sections 219 (rape), 221 (sexual intercourse with detainee), 222 (sexual intercourse with person in one's protection or security), 223 (sexual intercourse with person in office or receiving service), 225 (child sexual abuse) and sub-section (3) of Section 226 (unnatural sexual intercourse with a child) of Chapter-18 of the National Penal Code.

13. Is rape reported to the police prosecuted ex parte (private prosecution)?

NO

14. Are plea bargain or “friendly settlement” of a case allowed in cases of rape of women?

NO

15. Are plea bargain or “friendly settlement” of a case allowed in cases of rape of children?

NO

²⁰ *Ibid.*; The Himalayan Times, *Durbarmarg rape case: Probe Committee submits report, 3 police officers recommended for suspension*, 8 February 2018, available at <https://thehimalayantimes.com/kathmandu/durbarmarg-rape-case-probe-committee-submits-report-3-police-officers-recommended-for-suspension/>, accessed on 27 April 2020.

²¹ Section 220 (Prohibition of incest), section 224 (Prohibition of sexual harassment) and section 226 (Prohibition of unnatural sexual intercourse) of the National Penal (Code) Act comes under Schedule-4 of National Criminal Procedure (Code) Act.

²² National Criminal Procedure (Code) Act, 2017, Section 56.

16. Please provide information on the statute of limitations for prosecuting rape.

Section 229 (1) of the National Penal Code confirms that there is no statute of limitation for making a complaint in relation to the case of any offence under Section 220 relating to the prohibition of incest. Although the National Penal Code recognizes that there should be no statute of limitation on the registration of the crime of incest, it refrains from extending this to rape and other forms of sexual violence.

The National Penal Code under Section 229 (2) provides that no complaint shall lie after the expiry of **one year** from the date of commission of any of the offences under Sections 219 (prohibition of committing rape), 221 (prohibition of sexual intercourse with a detainee), 222 (prohibition of sexual intercourse with person in one's own protection or security), 223 (prohibition of sexual intercourse with person in office or receiving professional service), 224 (prohibition of sexual harassment), 225 (prohibition of child sexual abuse) and sub-section (3) of Section 226 (prohibition of unnatural sexual intercourse against a child).

Additionally, no complaint shall lie after the expiry of three months from the date of knowledge of commission of any of the other offences under this Chapter, which are under Sections 226 (prohibition of unnatural sexual intercourse without consent) and 227 (prohibition of bestiality).

Section 229 (2) states that where the offence is committed against a person held in detention, taken into control, kidnapped or taken hostage, no complaint shall lie after the expiry of three months from the date of release from such detention, control, kidnapping or hostage-taking. This means that the limitation period does not begin from the date of commission of the offence or date of knowledge of commission, but rather the date of release. This is a relevant advancement as the victim who is taken into control, kidnapped or taken hostage would in most cases be prevented from filing a complaint. However, three-month limitation period is a short time from the date of release of the victim and should be revised according to international law standards.

The National Penal Code increased the limitation period from six months to one year for someone to register any of the offences under Sections 219, 221, 222, 223, 224 and 225 and sub-section (2) of 226. Although this extension is noteworthy, it is still insufficient as most rape victims suffer fear, trauma, stigma, and other obstacles which prevent them from coming forward within a period short time.

Notably, the statute of limitation applicable to criminal proceedings concerning rape pursuant to the National Penal Code in force until 2018 was of 35 days. This was considered at odds with international standards. However, the Special Rapporteur, the CEDAW, and the Human Rights Committee already pointed out that **also one year is not in line with international law** and recommended a further amendment of the applicable legislation.²³ At the time of writing, these recommendations remain unimplemented.

17. Are there provisions allowing a child who was the victim of rape and to report it after reaching adulthood? YES

Section 74 of the Act Relating to Children (2075) 2018, allows a child who was a victim of rape to report it after reaching adulthood. However, this provision comes with its own limitations. As per this section, in relation to any offence against a child including child sexual abuse, a case has to be filed as per the statute of limitation specified by the law. However, in cases where no complaint has been registered as per the statute of limitation, notwithstanding anything contained in the prevailing law, the statute of limitation for filing the case with respect to the offence against the child shall continue to exist until one year after such a child has attained the age of 18 years.

18. Are there mandatory requirements for proof of rape, such a medical evidence or the need for witnesses? NO

If a police officer designated to collect proof and evidence pursuant to Section 8 of the National Criminal Procedure Code *thinks* (emphasis added) that, in view of the nature of the offence, evidence can be obtained if the examination of the blood, semen, hair or any other part of body of the concerned person or arms, thing or object, DNA or any other matter is conducted in order to find out the offender, he or she may request the examination of such blood, semen, hair or other part of body, arms, thing, object, DNA or any other physical evidence to be conducted by a government medical doctor or recognized laboratory.²⁴

In the case of *Suman Pahari v. Government of Nepal*,²⁵ the Supreme Court of Nepal stated that, in a case of rape, the victim is the primary link to the offence and the medical report follows thereafter. The Supreme Court affirmed that, in a case of rape, the statement of the victim is an important evidence as the victim herself or himself (as the witness to the

²³ Report of the Special Rapporteur on her Country-Visit to Nepal, para. 59; Committee on the Elimination of All Forms of Discrimination against Women, *Concluding Observations on Nepal*, UN Doc. CEDAW/C/NPL/CO/6 of 16 March 2018, paras. 22-23; and Human Rights Committee, *Case Fulmati Nyaya v. Nepal*, Views of 18 March 2019, para. 7.9.

²⁴ National Criminal Procedure Code, Section 21.

²⁵ Supreme Court of Nepal, *Suman Pahari v. Nepal Government*, NKP 2074 (BS), Decision No. 9801, 1 February 2017.

incident). The Supreme Court reiterated this stance in the case of *Surendra B.K. v. Government of Nepal*.²⁶ The Supreme Court held that the offence of rape is surreptitious and therefore a witness is generally not available in such offence. The victim is the primary evidence in the crime of rape and the claim of the victim should be established by medical examination. However, in other cases the Supreme Court acknowledged that the medical examination may not show that there has been an intercourse between the offender and the victim e.g. in case the medical examination performed much later than the incident.²⁷

19. Are there rape shield provisions aimed at preventing judges and defense lawyers from exposing a woman's sexual history during trial?

NO

20. Are there procedural criminal law provisions aimed to avoid re-victimizations during the prosecution and court hearings?

Section 6 of the Crime Victim Protection Act, 2075 (2018) guarantees the right to privacy of a victim of rape, incest and sexual harassment, among others, in the course of the investigation, inquiry, prosecution and court proceedings. This provision bars anyone from disclosing the identity of the victim in any manner. Further, in sub section (3), it states that where it is required to take statement or deposition of the victim, it can be done as follows:

1. By presenting the victim, without disclosing his or her identity;
2. By making victim change his or her actual voice;
3. By using the audio-visual dialogue technology in such a way that the accused cannot see and hear;
4. By making provision so that the accused cannot see or hear or can only hear.

Furthermore, Section 14 of the Act requires that a separate chamber is provided to the victim so that she or he can stay separate from the accused, from any person related to the accused or from witnesses presented by the accused. In case a separate chamber cannot be provided, the court must arrange for the safety and interest of the victim. Section 10 of the Act provides that the victims shall have the right to be safe from the attack, damage, fears. Intimidation or threats likely to be made or exerted by the suspect, accused, offender

²⁶ Supreme Court of Nepal, *Surendra B.K. v. Government of Nepal*, NKP 2075 (BS), Decision No. 10152, 21 May 2017.

²⁷ Supreme Court of Nepal, *Teen (Pseudonym) v. Government of Nepal*, NKP 2074 (BS), Decision No. 9811, 23 November 2016.

or person related to him or her or the witness of the accused against the victim or close relative of the victim and person dependent on the victim.

Similarly, Section 114 of the National Criminal Procedure Code provides for the security of the victim if information is obtained that such person is under undue coercion, threat or having adverse impact on the security of his or her body from the opponent as being the witness thereof. Section 16 (6) of the National Criminal Procedure Code also allows the examination of witness through video conferencing. Furthermore, Section 129 of the National Criminal Procedure Code has the provision of in camera trial proceedings for the offences of rape, incest, sexual violence, violence against women, etc.

III.D) War and/or conflict

21. Is rape criminalized as a war crime or crime against humanity?

NO

22. Is there a statute of limitations for prosecuting rape in war or in conflict contexts? YES

As explained above (see answer to question No. 16), the applicable statute of limitations to criminal proceedings concerning rape committed during the armed conflict was 35 days, thus being blatantly at odds with international law.

23. Is there explicit provisions excluding statutes of limitation for rape committed during war and armed conflict?

NO, see above the answers to questions No. 16 and 22.

24. Has the Rome Statute of the International Criminal Court (ICC) been ratified?

NO

III.E) Data

25. Please provide data on the number of cases of rape that were reported, prosecuted and sanctioned, for the past two to five years.

According to the Women's Rehabilitation Center, violence against women and incidents of rape increased from 68 in 2017 to 120 in 2018, while sexual abuse increased from 18 in 2017 to 37 in 2018.²⁸ According to the Nepal Police Data on Violence against Women, 2,230

²⁸ In a report published by the Women's Rehabilitation Centre (WOREC) in Nepali, covering the period from 17 July 2018 to 16 July 2019, there were 143 cases of rape and 18 cases of attempted rape. WOREC, Anweshi 2076 (2019), p. 14.

crimes of rape against women and children were registered in 2018 compared to 1,480 in 2017.²⁹ The rising statistics demonstrate the need to further consider the remedies and reparations provided for the victims of rape and other forms of sexual violence.

III.F) Other

26. Please explain any particular and additional barriers to the reporting and prosecution of rape and to the accountability of perpetrators in your legal and social context not covered by the above.

Additional existing barriers in the Nepali context are mentioned below:

a) Ineffective Investigation of Rape Cases

In the past, investigations by the Nepal Police has been questioned seriously. Dr. Harihar Wasti, a Nepalese forensic expert, stated that, when a crime is detected, the **medical officers of the nearest hospital, and not experts, perform the tasks concerned on the crime scene.** He added that different reports were produced by different hospitals on the same case of sexual offence.³⁰ Such discrepancies must be addressed as they hinder investigations on cases of rape.

b) Inadequate Victim Protection Mechanisms

The Ministry of Health and Population set up 18 hospitals based One Stop Crisis Management Centre with the aim of providing all care (treatment of injuries, help in rehabilitation, provide psychosocial counselling, provide legal advice and protection) under one roof. However, **these centres are not present in all districts of Nepal and many of the existing centres are understaffed and lack the necessary infrastructure.**³¹ Without adequate protection mechanisms and comprehensive support, victims have difficulties in accessing justice.

²⁹ The Fiscal Year 074/075 was between 16 July 2017 to 16 July 2018 and the Fiscal year 075/076 was between 17 July 2018 to 16 July 2019. See <https://cid.nepalpolice.gov.np/index.php/cid-wings/women-children-service-directorate>.

³⁰ My Republica, Thira L Bhusal & Mahabir Paudyal, Published 4 October 2018, *Many rape victims in Nepal are deprived of justice due to flawed investigation process*, accessed from <https://myrepublica.nagariknetwork.com/news/many-rape-victims-in-nepal-are-deprived-of-justice-due-to-flawed-investigation-process/>.

³¹ INHURED International, Promoting Gender Equality And Social Inclusion: Nepal's Commitments And Obligations, October 2018, p. 18&87, available at https://think-asia.org/handle/11540/8981?fbclid=IwAR3eqYjrENdO_asc0SU1kS1k7K1Y23i3HgrGAGerMc3gksKplkiiKEw9Jss; The Kathmandu Post, Lumbini Provincial Hospital's One-stop Crisis Management Centre is crippled by lack of infrastructure and staff, published 2 May 2020, available at <https://kathmandupost.com/province-no-5/2020/02/16/lumbini-provincial-hospital-s-one-stop-crisis-management-centre-is-crippled-by-lack-of-infrastructure-and-staff>.

IV. Conclusions

In the light of the information provided above, **Nepal must amend without any further delay the legislation concerning rape and other forms of sexual violence, both during the conflict and in peacetime, as well as the relevant framework on transitional justice.** In particular, Nepal shall ensure that:

- the definition of rape in the National Penal Code is amended so that it becomes gender-neutral, covers all forms of penetration, and carries sanctions that are commensurate to the gravity of the crime.
- the sanctions foreseen for sexual offences other than rape are adequate and proportionate to the extreme seriousness of the crimes at stake.
- the marital status of the perpetrator of rape does not attenuate the sentence.
- victims of rape and other forms of sexual violence obtain integral reparation for the harm suffered, including adequate compensation, as well as restitution, rehabilitation, satisfaction and guarantees of non-repetition. In this regard, it is crucial to guarantee that when compensation is awarded at the end of criminal proceedings, if the perpetrator is unable to pay for it, based on subsidiary liability, the State will cover the payment of the amount due.
- the Victims Trust Fund obtains adequate financial, human and technical resources.
- victims of rape and other forms of sexual violence during the conflict obtain without delay reparation for the harm suffered, which cannot be limited to interim relief. In this regard, civil claims for non-pecuniary damage related to crimes under international law and, in particular, torture and conflict-related sexual violence, are not subjected to any statute of limitations.
- criminal proceedings concerning rape and other forms of sexual violence are not subjected to any statute of limitations.
- law enforcement personnel, public officials and the judiciary refrain from practices aimed at automatically favouring reconciliation between victims and perpetrators of rape and other forms of sexual violence. Provisions that guarantee that victims are not subjected to threats or harassment in this regard must be adopted, as well as concrete measures to avoid any such instance and to prosecute and sanction those responsible.

- amend the applicable legislation so as to introduce shield provisions aimed at preventing judges and defence lawyers from exposing a woman's sexual history during trial.
- codify war crimes and crimes against humanity, including rape, pursuant to the applicable international standards, guaranteeing that none of these is subjected to any statute of limitations.
- ensure that crime scene investigation is performed by experts adequately trained to carry out the task in accordance with international standards.
- ensure that centres to provide comprehensive support and care (including treatment of injuries, help in rehabilitation, provide psychosocial counselling, provide legal advice and protection) to victims of rape or other forms of sexual violence are established across the country and receive adequate financial, human and technical resources.
- the amendment of the TRC Act pursuant to the rulings of the Supreme Court of Nepal, ensuring its consistency with international standards. The amendment must reflect the demands of the victims and their representative organisations. In particular, it must guarantee that: a) neither of the commissions has the power to recommend amnesties or similar measures that might have the effect of exempting from any criminal proceedings or sanctions persons accused of crimes under international law and gross human rights violations, including rape and other forms of sexual violence; b) governmental authorities have no margin of discretion to decide criminal prosecution of those accused of crimes under international law and gross human rights violations; c) if a process of reconciliation between the perpetrator and victims is undertaken, this is done only with the free, genuine and informed consent of the victim; d) a comprehensive programme of witness protection is set up and adequate resources are allocated for such purpose; and e) the TRC Act adequately distinguishes between interim relief and reparation and the latter encompasses compensation, restitution, rehabilitation, satisfaction, and guarantees of non-repetition.
- the amended transitional justice legislation specifies the composition and precise competence of the Special Court, as well as its relationship with other domestic courts and the Office of the Attorney General. Cases already *sub-judice* shall not be attracted by the Special Court.
- the selection and appointment process of the commissioners is fully transparent and consultative. Independence and impartiality of the commissioners must be ensured. Commissions must be guaranteed enough financial, technical, and human resources to

carry out their respective mandate in the long term and must be enabled to self-regulate their resources, without being made dependent on the decisions of political actors.

It is essential that the legislative reforms and the policies adopted are accompanied by **awareness raising** and **programmes aimed at eradicating gender-stereotypes and promoting regular capacity-building and trainings for judges, lawyers, law enforcement officers and medical personnel in understanding crimes of rape and other sexual offences in a gender-sensitive manner.**

About the Subscribing Organisations

The **Human Rights and Justice Centre** is an NGO established in 2017, based in Kathmandu. It aims at improving access to justice for victims of human rights violations in Nepal such as torture, enforced disappearances, extrajudicial executions and sexual violence.

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TRIAL International is a Geneva-based NGO established in 2002 and with consultative statute to the UN Economic and Social Council (ECOSOC). Its aim is fighting impunity for international crimes and supporting victims in their quest for justice. The organization provides legal assistance, litigates cases, develops local capacity and pushes the human rights agenda forward.

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