



### CHALLENGES TO REDRESS VICTIMS OF SGBV IN NEPAL

#### 1. OVERVIEW OF ISSUE

The 10-year internal armed conflict in Nepal between 1996 and 2006 deeply affected the country, and women and girls continue to suffer in its aftermath. Many women experienced violence, including sexual violence, during the conflict. Those who have survived are still suffering both physically and mentally, and they also face the stigma that society places on victims of sexual violence.

Despite the widespread sexual violence which occurred during the conflict, individual cases are rarely documented nor acknowledged by the state. Indeed, in the post-conflict years, there has been a systemic failure to document and provide compensation and legal redress to women victims.<sup>1</sup> Women persistently face barriers to justice, which prevent the full-realisation of their rights, such as social stigma, pervasive impunity, lack of witness protection, insufficient evidence and ineffective judicial mechanisms dealing with these cases.

The failure so far to ensure accountability for these crimes has allowed sexual violence to persist in the post-conflict period. The acquiescence of successive governments allowing continued impunity for sexual violence has legitimized and encouraged the further perpetration of sexual violence in peace time.<sup>2</sup> Failures to respond to sexual violence are not limited to crimes committed during the conflict. In fact, it

<sup>1</sup> See United Nations Office of the High Commissioner for Human Rights (UNOHCHR) 'Nepal Conflict Report An analysis of conflict-related violations of international human rights law and international humanitarian law between February 1996 and 21 November 2006', October 2012.

<sup>2</sup> WOREC and WILPF, *The Prosecution of Sexual Violence in Nepal*, Report to CEDAW, April 2011, available at: <[http://www2.ohchr.org/english/bodies/cedaw/docs/ngos/WOREC\\_Nepal\\_WILPF\\_for\\_the\\_session\\_Nepal\\_CEDAW49.pdf](http://www2.ohchr.org/english/bodies/cedaw/docs/ngos/WOREC_Nepal_WILPF_for_the_session_Nepal_CEDAW49.pdf)>

has been reported that “post conflict Nepal has been characterized by an increase in the perpetration of sexual violence since the CPA [Comprehensive Peace Agreement of November 2006] was signed”.<sup>3</sup>

#### 2. ISSUES WITH REPORTING

In all cases of sexual violence, both throughout the conflict-era and otherwise, women are at risk of being ‘doubly-victimized’ if they report sexual violence.<sup>4</sup> Not only do they have to suffer through the sexual violence initially, but subsequently through the shame and stigmatization of having lost their honour. It is therefore not surprising that the Women’s Rehabilitation Centre (WOREC) estimates that only 25 percent of women victims of violence seek medical care and fewer (about 20 percent) seek legal remedies.<sup>5</sup> Taboos surrounding sexual violence in Nepali society and the general culture of silence are the biggest challenge to data collection.<sup>6</sup> These taboos make it difficult to document sexual violence without risk of

<sup>3</sup> Ibid.

<sup>4</sup> See UNOHCHR, ‘Nepal Conflict Report An analysis of conflict-related violations of international human rights law and international humanitarian law between February 1996 and 21 November 2006’, October 2012.

<sup>5</sup> Facts on Violence Against Women in Nepal,” WOREC Nepal, 2012, available at: <<http://www.worecnepal.org/sites/default/files/VAW-Fact-Sheet-t2012-WOREC.pdf>>, see also Margot Dankner, Teresa Taylor and Monica Youssef, Georgetown University Law Center, *Confidentiality and the Legal Process: Leveraging Legislation and Policy to Protect Nepal’s Most Vulnerable Victims* (Fall 2011). “The United Nations estimates that, worldwide, one in five women will become a victim of rape or attempted rape in her lifetime...In contrast, according to the Nepali Women’s Police Cell (a special unit within Nepal’s police force that handles crimes against women) 376 cases of rape and 101 cases of attempted rape were filed in the court in fiscal year 2009-2010,” United Nations Sec’y General, United to End Violence Against Women: Fact Sheet, at 1 (2007), available at: <<http://www.un.org/en/women/endviolence/pdf/VAW.pdf>>. U.S. Embassy in Nepal, 2010 Annual Human Rights Report – Nepal (2011), available at: <<http://nepal.usembassy.gov/2010ahr.html>>

<sup>6</sup> UNCT-Nepal, “Joint UNCT Input on Nepal” para 4.

causing harm to the victims, which is a fundamental principle in human rights monitoring.

Due to the chronic failure to comprehensively document all instances of sexual violence which occurred during the conflict period, much of the information currently collected only provides a qualitative insight into the patterns of sexual violence. It is impossible to document with precision the quantitative extent of sexual violence, largely due to the social stigma surrounding rape, and a general reluctance on behalf of victims to report the violence.<sup>7</sup> A victim of sexual violence often fails to report the crime due to threats against her and her family to withdraw the accusations, rallying from the community physically stop her from testifying in court against the accused, failure of the police to register the First Information Report, fear of retaliation and further victimization.<sup>8</sup> WOREC found that women at community level were particularly afraid to register complaints in cases of violence allegedly by security forces.<sup>9</sup> Even if they do, it often turns out to be useless to lodge a complaint because state institutions, particularly the police, would not investigate or intervene in allegations about sexual violence, especially not if they are against the army.<sup>10</sup> Though there is an increasing trend in reporting of cases of rape to the police, it is still very much a challenge in conflict related cases of sexual violence.

### 3. ANALYSIS OF PATTERNS AND VICTIMS OF SGBV

Despite some issues with reporting based on information collected by numerous NGOs,<sup>11</sup> clear patterns of sexual violence are identifiable. Research findings reveal that women and girls were particularly targeted for rape and other sexual violence in certain contexts. In general, the majority of women and girls who reported incidents of sexual violence lived in areas perceived to be CPN-M strongholds or close to army barracks. Findings also indicate that the reduced presence of men in households during the conflict was taken advantage of by the security forces, CPN-M cadres and private individuals because it was easier to target women and girls. The Transitional Justice Reference Archive (hereafter TJRA) identifies numerous cases where the victims were raped at their home during search operations or forcibly taken from their home and then raped at a nearby location. It is frequently reported that Security Forces personnel would visit the victim's home and accuse either the victim or the victim's family members of being Maoists, and proceed to rape the victim.<sup>12</sup> It was also commonly told that these instances of sexual violence would occur in the presence of the victim's family and children.

It was often reported that women and girls were often subjected to sexual violence while undertaking daily activities outside the home such as collecting firewood or thatch, fetching water, going to the market, or when at home alone performing domestic work.<sup>13</sup> Additionally research findings indicate that especially in detention conditions, the RNA and NP tortured and harassed women. Forms of such torture included inserting foreign objects, such as guns or sticks, into the vagina, walking on the body of the women wearing heavy boots, punching and kicking on sensitive areas such as breasts and genitals, applying electric shocks to genitals or breasts, raping detainees while they were blindfolded with their hands and feet bound,

<sup>7</sup> See below, 'Difficulties faced by Women'. This is supported by research conducted by WOREC, which estimates that only 25 percent of women victims of violence seek medical care and fewer (about 20 percent) seek legal remedies; Facts on Violence Against Women in Nepal," WOREC Nepal, 2012.

<sup>8</sup> See Margot Dankner, Teresa Taylor and Monica Youssef, Georgetown University Law Center, *Confidentiality and the Legal Process: Leveraging Legislation and Policy to Protect Nepal's Most Vulnerable Victims* (Fall 2011) at 10. See also UNOHCHR, Nepal Conflict Report An analysis of conflict-related violations of international human rights law and international humanitarian law between February 1996 and 21 November 2006, October 2012.

<sup>9</sup> UNOHCHR, Nepal Conflict Report An analysis of conflict-related violations of international human rights law and international humanitarian law between February 1996 and 21 November 2006, October 2012, WOREC, *Violence against Women in Nepal*, p.2

<sup>10</sup> Ibid.

<sup>11</sup> Such as Advocacy Forum, ICTJ, WOREC, Blue Diamond Society, Transitional Justice Reference Archive (TJRA), (a database of 300,000 documents collected by the UN High Commissioner for Human Rights in Nepal).

<sup>12</sup> Advocacy Forum and International Centre for Transitional Justice, *Across The Lines: The Impacts of Nepal's Conflict on Women* (2010), pg53

<sup>13</sup> Ibid, pg 34.

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forced nudity, use of vulgar language and threats of sexual abuse.<sup>14</sup>

It is a matter of serious concern that among the victims who have come forward to AF. Of the 128 women and girls, 2% were ten years or younger, and another 11% were 16 or younger. (Under Nepali law, a victim is a minor if she is under 16). In addition, a number of young girls reported that security forces personnel subjected them to inappropriate and unnecessary “security checks” on the way to school. These often involved touching their bodies, such as their breasts and hips, and there have also been reports of verbal assaults.

### 4. ANALYSIS OF HEALTH AND MEDICAL RELATED ISSUES OF VICTIMS

It is difficult to obtain any data on the issue of pregnancy as a result of sexual violence because of the lack of the data on sexual violence in general. Hardly any institutions have invested in systematic data collection on the subject. However, UNFPA and UNICEF coordinated a project to provide comprehensive services for the victims of gender based violence, through integrated health camps. This project also supported Advocacy Forum’s ongoing efforts of documentation of the cases of sexual violence.

A joint research conducted by Advocacy Forum and ICTJ highlights some issues related to this problem. Research indicates that during the conflict many women suffered from unwanted pregnancies, gynecological problems and psychosocial problems. There was a shortage of health care and medicine in village health posts.<sup>15</sup> Further, there were often no health professionals in district health posts because they feared they could be targeted by the security forces possibly for treating Maoists. Women also found it difficult to travel to seek care because of a lack of transportation. Research indicates that a large number of victims still suffer from gynecological problems following rape, which has led to severe pain and suffering, with many being unable to enjoy a

fulfilling sex life or conceive. For some, the continued lack of security and threats from the perpetrators to keep silent add to their mental trauma. Some victims of rape have committed suicide or expressed suicidal tendencies.

The research also revealed that those sexually abused in the Maoist party were also subjected to unsafe abortion. The study team received allegations from medical personnel and other sources that Maoist cadres sometimes forced pregnant female cadres to undergo abortions, and that these abortions were often carried out in an unsafe manner. In one case, a nurse reported that a Maoist cadre beat a girl cadre and her mother for refusing to terminate a pregnancy. In another incident, a woman reported that she witnessed a forced abortion in a Maoist camp in which a pregnant cadre was forced to run until she bled in an apparent attempt to provoke a miscarriage.<sup>16</sup>

The same research also reveals how the emotional, social and economic implications of unwanted pregnancies and children born of rape have been devastating for many women. In Nepal, non-marital pregnancy is highly stigmatized. Women who conceive out of wedlock face tremendous social, cultural and economic pressures, especially if they are from Hindu families. Many women were not able to register their children born of rape, leading to significant and interrelated further problems. One can argue these children are facing difficulties in obtaining citizenship cards subsequently. Although children can obtain citizenship on the basis of their mother’s citizenship,<sup>17</sup> women in rural parts of the country may not have citizenship themselves. Thus, if the father of the child is absent, the child will face difficulties registering for citizenship. During field research, many stories of how women have been ostracized by their own communities and families after having fallen pregnant as a result of rape or after sexual relationships with government security force personnel or Maoist cadres were documented.

<sup>14</sup> Ibid, page 52.

<sup>15</sup> See Section 7.3 below.

<sup>16</sup> Advocacy Forum and ICTJ, *Across the Lines*, p. 56, above note 11

<sup>17</sup> Nepal Citizenship Act (2006), Section 8.

## 5. ANALYSIS OF PERPETRATORS

When analyzing the data according to the alleged perpetrator, it is found that the majority (73%) of incidents of sexual violence were committed by State actors, including 57% committed by members of the Royal Nepal Army. In 42% of the cases, the victims allege they are able to identify the perpetrators. The largest number of the cases of rape occurred in or near the victim's home. Individual security forces personnel appear to have taken advantage of the climate of impunity that existed during and following the conflict, guaranteeing that they were rarely held accountable for criminal actions, including rape of women and girls. In many cases, superior officers or higher authorities knew about the rapes and did not take action against the perpetrators.<sup>18</sup> Rape committed in this more opportunistic way appears to have been more prevalent in areas where army barracks were located (temporarily and permanently).<sup>19</sup> Of 128 incidents of sexual violence documented by Advocacy Forum, more than half, 56%, were committed by multiple perpetrators. This is especially concerning because it indicates a systemic culture of impunity, in which committing sexual violence during conflict periods is considered 'acceptable', and perpetrators are not ashamed to act in groups.

## 6. POLICIES ISSUES/GAPS

### 6.1 DEFINING "VICTIM" AND COMPENSATION

A victim is defined as "person[s] who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are violations of criminal laws operative within member states, including those law prescribing criminal abuse of power."<sup>20</sup>

<sup>18</sup> Amnesty International, *A Deepening Human Rights Crisis: Time for Action*, December 2002, available at: <<http://www.amnesty.org/en/library/asset/ASA31/072/2002/en/ad246553-d772-11dd-b024-21932cd2170d/asa310722002en.pdf>>, Key Informant Interview (Human Rights Defender), Kathmandu at 3.2.3.

<sup>19</sup> This correlates with an IHRICON study which found: "in settlement areas surrounding the army barracks, army men were often found to be those who committed many negative acts and were often protected from punishment of their wrongdoings by their high ranking officers." IHRICON, "Sexual Violence in the "People's War," 2007, p. 3.

<sup>20</sup> Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power Adopted by General Assembly Resolution 40/34 of 29

The U.N. Basic Principle 20 states that "[c]ompensation should be provided for any economically assessable damage, as appropriate and proportional to the gravity of the violation and the circumstances of the case, resulting from gross violations of international human rights law and serious violations of international humanitarian law..."<sup>21</sup>

The Government of Nepal has put in place a number of policies to provide "interim relief" to "conflict victims". However, this has notably excluded victims of rape and other forms of sexual violence.<sup>22</sup> Recently, the government provided NRs 300,000 (USD 3,400) of "interim relief" to those killed or disappeared during the conflict. This includes an increase of NRs 200,000 to the families who had already received NRs 100,000 under the previous scheme.<sup>23</sup> Similarly, the previous government had announced an intention to provide "interim relief" for people who had been arrested and detained during the conflict.<sup>24</sup>

To date, victims of torture and sexual violence remain without reparation or even any "interim relief". Although no substitute for an effective remedy and reparation as required under international law, the fact that even this small measure of assistance has been denied to victims of sexual violence demonstrates their marginalization from the post-conflict process.

November 1985. This definition is also contained in the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law adopted and proclaimed by U.N. General Assembly Resolution 60/147 of 16 December 2005.

<sup>21</sup> U.N. Basic Principles, Principle 20. The examples of damage include a) physical and mental harm; b) lost opportunities, including employment, education and social benefits; c) material damages and loss of earnings, including loss of earning potential; d) moral damage; e) costs required for legal or expert assistance, medicine and medical services, and psychological and social services. Compensation is referred to in a range of international treaties, such as the ICCPR, CAT, and the Rome Statute of the ICC.

<sup>22</sup> Advocacy Forum, *Discrimination and Irregularities. The Painful Tale of Interim Relief in Nepal*, 2010, available at: <[http://www.advocacyforum.org/downloads/pdf/publications/Discriminations\\_and\\_Irregularities\\_A\\_painful\\_tale\\_of\\_Interim\\_Relief\\_in\\_Nepal.pdf](http://www.advocacyforum.org/downloads/pdf/publications/Discriminations_and_Irregularities_A_painful_tale_of_Interim_Relief_in_Nepal.pdf)>

<sup>23</sup> Nepalnews, *Govt to provide Rs 300 thousand to each conflict victim's family*, September 30, 2011.

<sup>24</sup> Rising Nepal, Interview with Minister of Peace and Reconstruction, available at: <[http://www.gorkhapatra.org.np/rising.detail.php?article\\_id=52673&cat\\_id=29](http://www.gorkhapatra.org.np/rising.detail.php?article_id=52673&cat_id=29)> published in July 2011

### 6.2 TRUTH AND RECONCILIATION COMMISSION

There have been major setbacks in the process to establish the long-awaited transitional justice mechanisms provided for in the Comprehensive Peace Agreement (CPA), namely, the Truth and Reconciliation Commission (TRC) and the Commission on Disappearances (COID). The prospect of such mechanisms being set up, let alone of truth, justice and reparation for the victims and their family resulting from them remains very remote, especially after the dissolution of the Constituent Assembly in late May 2012. Bills for the establishment of a Truth and Reconciliation Commission and a Disappearances Commission, which were under consideration of the parliament were withdrawn just before the dissolution of the Constituent Assembly cum Legislative Parliament. In August 2012, the Government approved an ordinance to establish just one transitional justice mechanism, with wide powers to provide amnesty to perpetrators, including those who had committed gross human rights violations amounting to crimes under international law, including crimes of sexual violence.

The cabinet delivered the ordinance directly to the President without any consultation – either with the public or the NHRC. Raising concerns over the recent development OHCHR observed that ‘the legislation to enact the transitional justice mechanisms had been significantly delayed and remained in draft format. In addition, the Government has moved to empower the TRC to grant amnesties for international crimes and gross violations of international law committed during the conflict. OHCHR recalls that granting of amnesties for certain crimes, particularly genocide, crimes against humanity and war crimes, contravene principles under international law. For this reason, the United Nations (U.N.) has a policy that prevents it from supporting any national processes that run counter to its position on amnesties. Not only do amnesties contravene international human rights law by upholding impunity, they also weaken the foundation for a genuine and lasting peace.’<sup>25</sup>

<sup>25</sup> UNOHCHR, Nepal Conflict Report An analysis of conflict-related violations of international human rights law and international humanitarian law between February 1996 and 21 November 2006, October 2012.

Furthermore, OHCHR recommends that the ‘Transitional Justice Commissions should establish a process to discover and document the truth about sexual offences committed during the conflict. This should include the recruitment of appropriately skilled female staff with experience in working with victims of sexual violence and ensure systematic management of data that incorporates appropriate victim and witness protection measures. The report also recommends that integrated support mechanisms for victims and survivors of sexual and gender-based violence should be developed prior to the collection of information. They should include health care, psychosocial support, legal counselling and assistance, safe homes, emergency funds and state social services, such as reinforced community protection mechanisms.’<sup>26</sup>

The text of the ordinance has not been made public, but a copy has been obtained informally. It is found that the Commission will (i) be appointed on the basis of political consensus; (ii) not be mandated to recommend prosecutions for potential crimes committed; and (iii) will be mandated to recommend the granting of amnesties without any further qualification, which means that such amnesties could cover gross human rights violations and serious crimes under international law, including torture, rape, enforced disappearance and crimes against humanity.<sup>27</sup>

Additionally, the ordinance has problems in the following areas: reconciliation, reparation and recognizing the specific needs of women in the Truth and Reconciliation Process. In dealing with reconciliation under the ordinance, the Commission will be tasked with promoting reconciliation between victims and perpetrators, even where neither party has requested intervention from the Commission, in effect forcing victims to give up their rights to justice as part of the “reconciliation” process.<sup>28</sup> Moreover as the Truth and Reconciliation

<sup>26</sup> Nepal Conflict Report: An analysis of conflict-related violations of international human rights law and international humanitarian law between February 1996 and 21 November 2006, UNOHCHR, 2012, pg 203.

<sup>27</sup> Mandira Sharma, *Letting them off the hook*, Kathmandu Post, 18 September 2012, available at: <<http://www.ekantipur.com/the-kathmandu-post/2012/09/18/oped/letting-them-off-the-hook/239810.html>

<sup>28</sup> Section 22(1): ‘...if there is not filed such application [to the Commission for reconciliation] from victim or perpetrator, no restriction shall be deemed to restrict the Commission from promoting reconciliation.’ As cited in by International Commission of Jurists,

Commission has currently been proposed, it will be a politically constituted mechanism, and as a result, will unlikely be able to provide full reparation, especially with respect to satisfaction through judicial decisions.<sup>29</sup> Lastly as women suffered greatly from violence, including sexual violence, during the conflict, the ordinance must be altered to include provisions that will take into account their particular vulnerability.

On 30 August 2012, the U.N. expressed serious concern about the inclusion of amnesty provisions in the draft ordinance. The Resident and Humanitarian Coordinator stated, “The adoption of the proposed ordinance currently with the president could severely undermine access to justice for victims, and potentially further institutionalize impunity.”<sup>30</sup> As of the end of October 2012, amid wider political debates around the use of ordinances by the caretaker government of Prime Minister Baburam Bhattarai, the President has not approved the Ordinance, though the risk remains that he may do so, depending on how efforts to find a solution to many outstanding political issues progress.

An earlier commitment that neither amnesty nor pardon will be granted for crimes of rape has been removed from the draft. U.N. WOMEN together with number of other women’s rights organizations had part of the review of the previous bills presented before the parliaments and submitted its review and recommendations for the consideration of the parliament. CEDAW Committee had urged Nepal to prioritize the consideration of the TRC laws that would ensure that the Commission is gender sensitive, independent and authoritative and that the TRC deals with sexual violence and pay particular attention to the social and security dimension of public testimony for victims of sexual violence.<sup>31</sup>

*Comprising Justice: Nepal’s Proposed Ordinance on Commission on Disappeared Persons, Truth and Reconciliation* (October 2012), available at: <<http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2012/10/TJ-Ordinance-Briefing-Paper-FINAL-VERSION.pdf>>

<sup>29</sup> International Commission of Jurists, *Comprising Justice: Nepal’s Proposed Ordinance on Commission on Disappeared Persons, Truth and Reconciliation* (October 2012), available at: <<http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2012/10/TJ-Ordinance-Briefing-Paper-FINAL-VERSION.pdf>>

<sup>30</sup> Republica, *UN against blanket amnesty for HR violators*, 30 August 2012, available at: <[http://www.myrepublica.com/portal/index.php?action=news\\_details&news\\_id=40785](http://www.myrepublica.com/portal/index.php?action=news_details&news_id=40785)>

<sup>31</sup> No. 36 of Concluding Observations on Fourth and Fifth (Combined) Periodic Report of Nepal on CEDAW Convention, 2011.

### 6.3 UNITED NATIONS SECURITY COUNCIL RESOLUTIONS 1325 AND 1820

In October 2000, the U.N. Security Council unanimously approved Resolution 1325, which calls upon “all parties to armed conflict to respect fully international law applicable to the rights and protection of women and girls” and “to take special measures to protect women and girls from gender-based violence, particularly rape and other forms of sexual abuse.”<sup>32</sup> The resolution specifically addresses the responsibility of all States to end impunity towards sexual violence, and prosecute individuals for the violations.

Further, in Resolution 1820 (2008) of 19 June 2008, the Security Council demanded that “all parties to armed conflict immediately take appropriate measures to protect civilians, including women and girls, from all forms of sexual violence.”<sup>33</sup> The resolution also stressed the need to exclude sexual violence crimes from amnesty provisions in conflict resolution, and called on Member States “to comply with their obligations for prosecuting persons responsible for such acts, to ensure that all victims of sexual violence, particularly women and girls, have equal protection under the law and equal access to justice.”<sup>34</sup>

In response to these Security Council resolutions, the government of Nepal adopted a National Action Plan (NAP) on Women, Peace and Security in February 2011. The primary focus of the National Action Plan is to increase the active involvement of women in the reconstruction of the Nepal government and peace-building program. In July 2012, the Office of the Prime Minister also committed to review and amend legislation which is discriminatory towards women, and also to strengthen the law and policies to provide effective legal assistance to the victims of conflict.<sup>35</sup>

Despite these positive steps towards advancing the role of women in post-conflict society, any real progress towards ending impunity for conflict-era sexual violence has so far not extended beyond rhetoric.

<sup>32</sup> UN Security Council Resolution 1325 (S/RES/1325) (2000), paras 9 and 10.

<sup>33</sup> UN Security Council Resolution 1820 (S/RES/1820) (2008) para 3.

<sup>34</sup> *Ibid*, para 4.

<sup>35</sup> Office of the Prime Minister, *National Strategy and Plan of Action to End Gender Violence and to Empower Gender Equality*, July 2012.

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Furthermore, it is unlikely that true reconciliation can be achieved while such rampant impunity for sexual violence remains. The fact that there has only been one conviction so far in relation to the thousands of crimes committed during the conflict shows that these commitments are not carried out in practice.<sup>36</sup> Furthermore, there have been recent developments in the transitional justice process which actually signify a step backwards in terms of the implementation of SCR 1325 and 1820. As noted below, the most recent government ordinance which established a transitional justice mechanism in August 2012 conferred wide powers to provide amnesties to perpetrators, including those who have committed gross human rights violations, including sexual violence. Such action is in direct contravention of SCR 1820, which emphasised the need to exclude crimes of sexual violence from any amnesty provisions.

### 7. BARRIERS TO JUSTICE

#### 7.1 PROBLEMATIC LEGAL DEFINITION OF RAPE

The current definition of rape in Nepali law is narrow in its scope and does not reflect international standards.<sup>37</sup> It is limited to penile-vaginal penetration and disregards the insertion of other bodily parts and objects. This definition must be changed and expanded so that rape is understood to be a violation of bodily integrity.

Additionally, the Muluki Ain refers to forced sexual intercourse (jabarjasti) instead of rape (balatkar).<sup>38</sup> The use of this type of language creates an understanding that there must be evidence of force and signs of a struggle to prove non-consent. As a result, rapes that have occurred as a result of someone abusing the vulnerable, regardless of physical strength, through abuse of power or threats are increasingly more difficult to prove. It must be recognized that sexual abuse constitutes a form of discrimination against women, and as a result, is prohibited under the international treaties to which Nepal is party. Specifically as part

of its treaty obligations, the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) establishes in Article 2 that: "State Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end [State parties should] adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women."<sup>39</sup> As a result, Nepal must alter its domestic legislation in order to end discrimination against women.

#### 7.2 LACK OF CONFIDENTIALITY

"Confidentiality plays a vital role in the recovery process because it helps establish an environment in which victims feel more comfortable seeking assistance, making connections, and exercising their power within their right to choose what information to share, with whom, when, and how. Thus, confidentiality is a fundamental component of the relationship between a victim service center, a sexual assault victim advocate, and a victim," explains the U.S. Department of Justice.<sup>40</sup>

In Nepal, the lack of confidentiality, poor police practices and weak legislation compound the issue of sexual violence against women. For example in September 2009 police publically interrogated a 14-year-old rape victim outside the Sunsari Police Station in Dharan in front of a large crowd. One of the alleged rapists was a police officer who offered the family 30,000 rupees to withdraw the case against him. According to the district police, the case was dismissed.<sup>41</sup>

<sup>39</sup> Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180, 34 U.N. GAOR Supp. (No. 46) at 193, U.N. Doc. A/34/46, entered into force Sept 3, 1981, ratified by Nepal in 1991, Art. 2 and 2(b).

<sup>40</sup> See Margot Dankner, Teresa Taylor and Monica Youssef, Georgetown University Law Center, *Confidentiality and the Legal Process: Leveraging Legislation and Policy to Protect Nepal's Most Vulnerable Victims* (Fall 2011). "Consider this: In survey of victims in the United States, all victims surveyed said that it was "important" or "very important" that what they said or shared with a sexual assault crisis advocate be kept confidential." Joanna Zannoni, U.S. Dep't of Justice, *Strengthening Sexual Assault Victims' Right to Privacy* (2008), available at: <<http://www.ojp.usdoj.gov/ovc/publications/infores/VictimsRightToPrivacy/pfv.html>>

<sup>41</sup> See 2010 Human Rights Report: Nepal, U.S. DEP'T OF STATE (Apr. 8 2011).

<sup>36</sup> On this see Advocacy Forum and Redress (2011), *Held to Account: Making the Law Work to Fight Impunity in Nepal*, available at: <<http://www.redress.org/downloads/Nepal%20Impunity%20Report%20-%20English.pdf>>

<sup>37</sup> MulukiAin, Chapter 14.

<sup>38</sup> Ibid.

Legislation that protects the confidentiality of sexual assault victims is necessary due to the social stigmas and difficulties that victims face once their assault is revealed.<sup>42</sup> Privileges that shield communication between victims and their social workers, medical professionals, therapists or counselors from disclosure can increase victims' willingness to report a crime and receive treatment.<sup>43</sup> Without such guarantees of confidentiality, "sexual assault victims may not be willing to disclose personal information for fear that their innermost thoughts and feelings will later be scrutinized by defense counsel and used against them during a trial."<sup>44</sup>

Despite laws in place<sup>45</sup> and a comprehensive order<sup>46</sup> including a procedural guidelines by the SC<sup>47</sup> for ensuring in-camera proceeding in rape cases by the Supreme Court, Nepali trials are public and held in open court. Although there are certainly public policy reasons in favor this, such as ensuring a fair trial for the accused, this type of hearing does not protect the confidentiality of victims.<sup>48</sup> Allowing victims of SGBV to testify confidentially *in camera* would provide a level of protection to Nepali victims that is not presently available. Moreover, permitting a victim of sexual violence would minimize the chance of further trauma to the victim from direct confrontation with the accused.<sup>49</sup>

<sup>42</sup> Amnesty Int'l Annual Report 2011 – Nepal, AMNESTY INT'L (May 13, 2011), available at: <<http://www.unhcr.org/refworld/docid/4dce1550c.html>>

<sup>43</sup> See Margot Dankner, Teresa Taylor and Monica Youssef, Georgetown University Law Center, *Confidentiality and the Legal Process: Leveraging Legislation and Policy to Protect Nepal's Most Vulnerable Victims* (Fall 2011) at 19.

<sup>44</sup> Rape, Abuse, & Incest National Network, *Sexual Assault Issues: Confidentiality Laws* (2009), available at: <<http://www.rainn.org/public-policy/sexual-assault-issues/confidentiality-laws>>

<sup>45</sup> Rule 46(b) of the *District Court Rules, 2052* (1997), Rule 60(a) of the *Appellate Court Rules, 2048* (1991) and Rule 67(a) of the *Supreme Court Rules, 2049* (1992) provide for in-camera hearings of cases relating to minors, rape, trafficking in person, divorce and any other case that a court deems necessary.

<sup>46</sup> *Sapana Malla Pradhan v Government of Nepal*, Writ No. 3561, SC Judgment of Dec. 25, 2007.

<sup>47</sup> *Ibid.* (Procedural Guidelines for Protecting the Privacy of Parties in the Proceedings of Special Types of Cases (2007).

<sup>48</sup> Yuba Raj Subedi and Soorya Prasad Pokharel, *The Criminal Justice System of Nepal*, Attorney General of Nepal 12 (2010).

<sup>49</sup> See Margot Dankner, Teresa Taylor and Monica Youssef, Georgetown University Law Center, *Confidentiality and the Legal Process: Leveraging Legislation and Policy to Protect Nepal's Most Vulnerable Victims* (Fall 2011) at 31. Nepal's Interim Constitution contains several protections for the accused, but does not include a confrontation clause like the United States Constitution. See U.S. Const. Amend. VI. and Nepal's Interim Constitution (2007), §24.

Protections as described above help to provide a safe environment in which victims are able to receive assistance, while also being shielded from further stigmatization by the community.<sup>50</sup>

### 7.3 THIRTY-FIVE DAY STATUTE OF LIMITATIONS

A number of legal and policy issues impeded female rape victims' attempts to seek justice. Foremost among them is the 35 day statutory limitation for filing complaints of rape with the police.<sup>51</sup> Despite the scores of reported incidents of sexual violence during the conflict, the 35 day statutory limitation for the crime of rape created a significant obstacle for victims intending to commence legal action.<sup>52</sup> The police often invoke the statutory limitation as a reason for refusing to accept an initial FIR. International law prohibits a statute of limitation on the crime of rape because it is such a grave offense.<sup>53</sup>

In 2008, the Supreme Court of Nepal issued an order directing the government of Nepal to amend Section 11 of the rape chapter in the Muluki Ain.<sup>54</sup> Though the Supreme Court did not declare the 35 day statutory limitation null and void, it identified the provision as "unreasonable" and "unrealistic" and directed the Constituent Assembly to amend it as soon as possible. Noting that the 35 day statute of limitations is a major weakness of the Nepali criminal justice system, the Office of the Attorney General also recommended that the Government of Nepal extend the statute of limitations in accord with the directive order from the Supreme Court of Nepal.<sup>55</sup> To date, however, the statute of limitations for rape remains unchanged.<sup>56</sup>

<sup>50</sup> See Margot Dankner, Teresa Taylor and Monica Youssef, Georgetown University Law Center, *Confidentiality and the Legal Process: Leveraging Legislation and Policy to Protect Nepal's Most Vulnerable Victims* (Fall 2011) at 19.

<sup>51</sup> A "statute of limitations" refers to the period of time during which a legal action may be initiated following an offending incident. Each crime carries a different statute of limitations, generally based on the potential sentence attached to that crime.

<sup>52</sup> No. 11 of the rape chapter of Country Code provides for 35 days law of limitation in the cases of rape.

<sup>53</sup> International Committee of the Red Cross, "Practice Relating to Rule 160. Statutes of Limitation," available at: <[http://www.icrc.org/customary-ihl/eng/docs/v\\_cha\\_chapter44\\_rule160](http://www.icrc.org/customary-ihl/eng/docs/v_cha_chapter44_rule160)>

<sup>54</sup> *Sapana Pradhan Malla vs. Government of Nepal*, Nepal Law reporter 2065, volume 11, pgs 1358-1366.

<sup>55</sup> Annual Report, Office of Attorney General 2065/66, pg 67.

<sup>56</sup> The non-implementation of Supreme Court directives is a common occurrence in Nepal. There is no statute in Nepal criminalizing sexual

## Challenges to Redress Victims of SGBV in Nepal

The statute of limitations prescribed in domestic law protects the perpetrators instead of ensuring justice for victims of rape. Many victims of rape are women and girls belonging to disadvantaged and illiterate groups of society. Most are unaware of the statute of limitation for the crime of rape. In a country like Nepal where so many citizens are disadvantaged or illiterate, there should not be such a restrictive statute of limitations in rape cases. The international community supports this notion, as it considers rape as one of the most serious crimes. A perpetrator should not be allowed to escape prosecution based on an administrative pretext like the 35-day statute of limitations.<sup>57</sup>

Even if victims wanted to file complaints for redress for rapes committed by both sides during the 10-year conflict, the relevant authorities could simply deny their requests based on the extremely short statute of limitations.

### 7.4 NO UNIFIED SYSTEM FOR REPORTING SGBV

“[T]here is evidence that specialized units are more responsive and effective in dealing with violence against women. Experience has shown that the establishment of such units may facilitate the development of expertise in this area and may result in an increase in the number of cases investigated and a better quality and more efficient process for the complainant/survivor.”<sup>58</sup>

Currently, Nepal has Women’s Police Cells, which are police units that include women who are specially trained to handle women’s cases.<sup>59</sup> However, these

abuse in the work place. The Supreme Court, for instance, issued guidelines for the protection against sexual abuse in the work place for workers involved in night cabin restaurants, dance bars, and massage centers. The court said that the guideline was a temporary measure until a law can be properly enacted by the legislature. This demonstrates the Supreme Court’s willingness to step in when the government has been ineffective in protecting women’s rights.

<sup>57</sup> For example, the U.S. State of New York recently eliminated its five year statute of limitations for rape in its criminal code, available at: <<http://www.gothamgazette.com/article/law/20060630/13/1897>>

<sup>58</sup> Handbook for Legislation on Violence Against Women, UNITED NATIONS, (2009) at 19, available at: <<http://www.un.org/womenwatch/daw/vaw/handbook/Handbook%20for%20legislation%20on%20violence%20against%20women.pdf>>

<sup>59</sup> *Women’s situation in Nepal*, ONE WOMEN, available at: <<http://www.onlinewomeninpolitics.org/womensit/nepl.pdf>>

Women’s Police Cells are only in five cities, including Kathmandu.<sup>60</sup> Despite their training, the Women’s Police Cells do not seem to have been established as the initial responders to sexual violence claims.<sup>61</sup> At this time, it is unclear what training the officers receive or what resources and funding is available to the Women’s Police Cells.<sup>62</sup> To encourage the reporting of SGBV, police units that include women who are specially trained to handle women’s cases, such as the Women’s Police Cells, should be created and properly trained.

### 7.5 LACK OF TRAINED MEDICAL PROFESSIONALS

Currently many medical professionals in Nepal have not been provided with adequate trainings in how to sensitively interact with sexual assault victims, and as a result, often refuse medical exams or treatment to victims who come without a police report.<sup>63</sup> Moreover, police often refuse to file a First Information Report without a medical report that corroborates that sexual violence occurred.<sup>64</sup> As a result, many cases of sexual assault are going unreported and many victims of sexual assault are not receiving proper treatment.

Medical and health professionals need standardized training on rape protocols, such as the ability to recognize and address the signs of SGBV, how to properly exam and document each incident of SGBV, how to provide appropriate medical treatment for injuries sustained, awareness concerning the health and emotional needs of survivors of sexual violence, and how to deliver health services while ensuring physical safety and confidentiality all while respecting the rights of the survivor.

<sup>60</sup> Ibid.

<sup>61</sup> Ibid.

<sup>62</sup> Ibid.

<sup>63</sup> See Margot Dankner, Teresa Taylor and Monica Youssef, Georgetown University Law Center, *Confidentiality and the Legal Process: Leveraging Legislation and Policy to Protect Nepal’s Most Vulnerable Victims* (Fall 2011); see also Irene Pietropaoli, *Sexual Violence Against Women in Nepal: Report of Rape Cases in 2007 2* (2008), at 3, available at: <[http://www.childtrafficking.com/Docs/insec\\_sexual\\_violence\\_0109.pdf](http://www.childtrafficking.com/Docs/insec_sexual_violence_0109.pdf)>; Human Rights Report: Nepal, U.S. DEPT OF STATE, available at: <<http://www.state.gov/g/drl/rls/hrrpt/2010/sca/154484.htm>>

<sup>64</sup> Ibid, see also Pietropaoli at 6.

## 8. CONCLUSIONS AND RECOMMENDATIONS

This briefing concludes that immediate strategies are needed to improve conditions for women affected by the conflict and to prepare the ground for justice and sustainable peace. In this regard, the following recommendations should be considered:

- *Legal Reform:* Legislative reform that criminalizes all sexual and gender-based violence, amends the rape law to remove the time-limit on filing complaints, establishes a victim and witness protection system, and ensures that legal aid is available and accessible.
- *Reforms of investigation and prosecutorial system:* Investigation and prosecution of crimes committed against women, including crimes of sexual violence, and ensuring that all actors cooperate in investigations. The establishment of gender-sensitive structures in the criminal justice system, including gender focal points in police stations, special units investigate cases of gender-based violence, training of police and prosecutors on how to address sexual violence cases and increasing effective recruitment of trained female personnel for service in the different sectors of criminal justice.
- *Ensure confidentiality:* Protections of confidentiality during investigations, trials or other legal proceedings and protection of confidentiality against public access through the media.
- *Allocation of resources:* A specific focus, including allocation of resources, on ensuring gender-sensitive policies and procedures are included in the substantive work as well as staffing and practice of all active commissions, as well as future commissions, such as the Truth and Reconciliation Commission and Disappearances Commission. Equal representation of women must be ensured in all echelons of state mechanisms.
- *Improving medical examination system:* Improving access to health care, particularly the community level, through free, or at least affordable services, specific to the needs of female conflict victims.
- *TRC:* The mandate of the truth commission must include a separate provision to carry out investigations into incidents of human rights violations against women. Wider consultations must be initiated with victims and relevant stakeholders and issues raised in such discussions must be incorporated before finalizing the legislation. Equal representation of women and men must be ensured while appointing commissioners and recruiting staff members. Adequate measures must be taken to ensure security and confidentiality of women victims and witnesses. *In camera* hearings must be conducted to record the personal experiences of women victims. The commission's final report must contain recommendations addressing the human rights violations suffered by women and girls and seeking to improve the place of women in society. It should be disseminated in a way that pays attention to the low rate of literacy among Nepali women. Moreover, all relevant actors should be trained in gender sensitive investigations, legal frameworks and standards on Gender based violence. Amnesty for gross violations like rape must be prohibited.
- *Interim Relief/ Reparation:* The current interim relief measures must include victims of rape, torture and other forms of sexual violence. Given the gravity of the crime, the relief amount should be proportional to other gross crimes like extrajudicial executions and disappearances.

The active participation of women must be ensured in the design of any reparations program. Reparations programs should include the types of human rights violations women have suffered (rape, displacement, greater household burdens in absence of male members of the family etc.) Monthly pension programs, educational stipends to children, assisting with medical services, particularly psychosocial counseling, and vocational trainings can be regarded as gender-friendly reparations.

