



**Report to the Committee on the Elimination of
Discrimination against Women**

Submission on the 6th Periodic Report submitted by Nepal

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

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

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

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

I. Introduction

1. With this report, TRIAL International and the HRJC wish to present to the Committee on the Elimination of Discrimination against Women (“the Committee”) information relating to the 6th Periodic Report submitted by Nepal.
2. In light of the mandate and expertise of the organizations, the submission will focus on the discrimination against women within the framework of the transitional justice process, with a particular focus on conflict-related sexual violence (“CRSV”).¹ The report will analyze the flawed domestic criminal legislation vis-à-vis sexual offences; the persisting obstacles faced by victims of sexual violence crimes committed during the armed conflict (1996-2006); and the space given to them in the context of the transitional justice process. A brief analysis of the presumption of death in enforced disappearance cases and its consequences on women victims of the conflict will also be provided.

II. The shortcomings of the legislative framework

3. Chapter 18 of the Country Penal (Code) Act 2074 (“Penal Code (2017)”), which came into force on 17 August 2018,² defines and prohibits a number of sexual offences, while also providing for penalties for the perpetrator.³ This provision does not meet Nepal’s international obligations to adequately criminalize rape and other forms of sexual violence.

A. The definition of rape and other forms of sexual violence in the Penal Code (2017)

¹For a detailed overview of the commission of sexual violence during the Nepalese armed conflict, see, among others: Human Rights Watch, *Silenced and Forgotten, Survivors of Nepal’s Conflict-Era Sexual Violence*, September 2014 (“HWR, Silenced and Forgotten, 2014”); Office of the High Commissioner for Human Rights (OHCHR), *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*, November 2012 (“OHCHR, Nepal Conflict Report, 2012”); and TRIAL (Track Impunity Always), *Written Information for the Follow-up to the Concluding Observations of the Committee on the Elimination of Discrimination against Women with regard to Nepal’s Combined Fourth and Fifth Periodic Reports*, August 2013 (“TRIAL, Written Information for the Follow-up, 2013”).

² The Country Penal (Code) Act, 2074 (2017) (“Penal Code (2017)”) was enacted on 16 October 2017 and replaces the Muluki Ain (National Code), 2020 (1963).

³ Penal Code (2017), Chapter 18. Chapter 18 prohibits rape (Section 219); incest (Section 220); sexual intercourse with a detainee (Section 221); sexual intercourse with a person 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 addresses the provision of compensation, while Section 229 specifies the statutory limitation.

4. The Rome Statute⁴ provides a list of conducts that are considered crimes of sexual violence,⁵ and that may constitute war crimes or crimes against humanity. It includes, rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, and other forms of sexual violence of a comparable gravity.⁶ Although the Nepalese Penal Code (2017), addresses a number of sexual offences⁷ (such as incest, sexual intercourse with a detainee, and child abuse), rape and forced abortion are the only forms of sexual violence as prohibited under international law that are explicitly codified under the domestic legal framework.⁸
5. Furthermore, Nepalese law does not codify war crimes and crimes against humanity. As a consequence, rape and forced abortion can only be prosecuted as ordinary offences, disregarding the specificities of the commission of these crimes in the context of an armed conflict.
6. As a result of such a restricted criminal legal framework, all other forms of sexual violence as prohibited under international law may remain unpunished.
7. Section 221 of the Penal Code (2017) provides for *government employees'* prohibition of having, or facilitating or creating the circumstances for, sexual intercourse with a detainee. Whenever such sexual intercourse amounts to rape, the penalty for the crime of rape may be increased in a maximum of three years. While this provision reflects

⁴ Rome Statute of the International Criminal Court (1998) ("the Rome Statute"). Although Nepal is not a party to the Rome Statute, this text provides internationally recognized definitions of international crimes. On 24 July 2006, a resolution from the Parliament of Nepal directed the government to accede the Rome Statute.

⁵ The Elements of Crimes of the Rome Statute (2011) provide that perpetrators of crimes of sexual violence are those who have committed "an act of a sexual nature against one or more persons or caused such person or persons to engage in an act of a sexual nature by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment or such person's or persons' incapacity to give genuine consent." (Article 8(2)(b)(xxii)-6 in relation to war crimes during international armed conflicts, and Article 8(2)(e)(vi)-6 in relation to war crimes during non-international armed conflicts. Likewise, Article 7(1)(g)-6 refers to sexual violence as a crime against humanity). In contrast, Nepalese legislation does not specifically define the meaning of sexual violence.

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

⁷ See *supra* note 3. Certain provisions included under Chapter 18 of the Penal Code (2017), are problematic: for instance, Section 226 refers to "unnatural sexual intercourse" without explicitly defining which acts the provision would in practice encompass. As such, it is unclear whether Section 226 could be applied in cases of same-sex relationships.

⁸ Paragraph 2 of Section 188 of the Penal Code (2017) prohibits forced abortion by stipulating that "no person shall cause a pregnant woman to abort, by coercing, threatening, alluring or inducing her to so abort." In addition, Section 189 allows the termination of pregnancy up to 18 weeks in cases of rape (instead of 12 in situations where the pregnancy is not the result of a rape).

- State agents' greater obligation to protect, it fails to approach sexual violence when committed by State agents as a form of torture⁹ as recognized under international law.¹⁰
8. Moreover, the definition of "rape" as enshrined in Section 219 of the Penal Code (2017) is problematic. The latter is defined as the conduct where "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."¹¹ The provision specifies that "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 shall also be considered to be rape."¹² As such, it excludes the possibility of a man, male child, or transgender person being a victim of rape, as well as that of a woman being the perpetrator.
 9. Furthermore, the penetration of the anus of the victim by objects other than the penis is not acknowledged in the domestic legal framework. In contrast, the Elements of Crime of the Rome Statute state that any penetration, "however slight, of any part of the body of the victim with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body", may constitute rape.¹³
 10. With regard to the absence of consent in cases of rape, the Penal Code (2017) provides for situations in which consent cannot be inferred, and stipulates that "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 considered to be consent."¹⁴ As such, the Nepalese legal framework appears to be in line with international standards by allowing to infer non-consent from coercive circumstances.¹⁵
 11. Furthermore, international standards establish that sexual crimes do not necessarily involve physical contact – for example, forced nudity.¹⁶ As such, sexual violence refers

⁹ See European Court of Human Rights (ECHR), *Aydin v Turkey*, (57/1996/676/866), 25 September 1997, para. 83. See also International Criminal Tribunal for the former Yugoslavia (ICTY), *Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic*, (IT-96-23 & IT-96-23/1-A), 12 June 2002, para. 150, which provides that "sexual violence necessarily gives rise to severe pain or suffering, whether physical or mental, and in this way justifies its characterization as an act of torture".

¹⁰ Penal Code (2017), Section 167 regulates the crime of torture. Although the addition of torture as a criminal offence is welcomed, the definition is not in line with international standards and the penalties provided are not proportional to the gravity of the crime. The statute of limitations to report cases of torture is of six months, as per Section 170.

¹¹ Penal Code (2017), Section 219(2).

¹² Penal Code (2017), Section 219(2)(c).

¹³ Elements of Crime of the Rome Statute of the International Criminal Court (1998), Articles 7(1)(g)-1,8(2)(b)(xxii)-1 and 8(2)(vi)-1.

¹⁴ Penal Code (2017), Section 219(2)(a) and (b).

¹⁵ For a more detailed understanding of the notion of consent under international law, see Serge Brammertz and Michelle Jarvis, *Prosecuting Conflict-Related Sexual Violence*, Oxford University Press, 2016, paras.133-137.

¹⁶ See, for example, International Criminal Tribunal for the former Yugoslavia, *Prosecutor v. Brdjanin*, ICTY-99-36-T, Trial Judgment, 1 September 2004, para. 1013 referring to the case where a Bosnian Croat woman was forced

to physical and non-physical acts with a sexual component. However, in the Penal Code (2017), sexual harassment is the only offence that encompasses non-physical acts.¹⁷ The recently adopted Penal Code (2017), hence, does not follow pre-existing jurisprudence from the Supreme Court of Nepal, whereby penetration was not considered as an essential element of the crime of rape. Indeed, in *Government of Nepal v. Mubarak Mir Musalman*, the Court held that, although penetration did not occur, the physical, social, and psychological consequences on the victim were central in determining that the crime of rape had been committed.¹⁸

B. The statute of limitations under Nepalese legislation

12. The Committee had recommended Nepal to “take immediate measures to abolish the statute of limitations on the registration of sexual violence cases, to ensure women’s effective access to courts for the crime of rape and other sexual offences.”¹⁹ Nepal did not take heed of such recommendation. Far from being abolished, the statute of limitations concerning the filing of complaints for cases of rape was merely brought from 35 days to six months in 2015, before being once again extended to one year through the new Penal Code (2017).²⁰ Paradoxically, no statute of limitation is established for cases of incest.
13. While these time extensions can be acknowledged as an attempt on the part of Nepalese authorities to progressively comply with international standards, in practice those changes are insufficient as they do not improve victims’ ability to file a complaint. Fear, trauma, social stigma, and severe health consequences, are only a few of the obstacles that prevent most rape victims from coming forward within such a short period of time. In the context of Nepal, many women remain unaware of their legal rights and often tend to prioritize medical assistance or psychosocial support.²¹
14. Furthermore, Section 229(2) confusingly stipulates that “[p]rovided that where the offence is committed against a person held in detention, taken into control, abducted

to undress herself in front of Bosnian Serb policemen and soldiers. See also International Criminal Court, Office of the Prosecutor, *Policy Paper on Sexual and Gender-Based Crimes*, June 2014.

¹⁷ Penal Code (2017), Section 224(2). The section refers for example to the use of “vulgar or similar other words” or the showing of “any pornography.”

¹⁸ Supreme Court of Nepal, *Government of Nepal v. Mubarak Mir Musalman*, Nepal Kanoon Patrika 2067(BS), Issue 9, decision no.8466.

¹⁹ Committee on the Elimination of Discrimination against Women (CEDAW), *Concluding Observations on Nepal*, UN doc. CEDAW/C/NPL/4-5 of 29 July 2011, para. 20(c).

²⁰ Penal Code (2017), Section 229(2).

²¹ Human Rights Watch, *Silenced and Forgotten, Survivors of Nepal’s Conflict-Era Sexual Violence*, September 2014, pages 59-73.

or taken hostage, no complaint shall lie after the expiry of three months from the date of release from such detention, control, abduction, or hostage-taking.”²² However, it remains unclear how this provision operates in relation to the general 1-year statute of limitations rule.

15. In a situation where the perpetrator of an act of rape is a State official, as regulated pursuant Section 221, a victim will often face particularly severe difficulties in filing a complaint – granted he or she can file a complaint at all. The fear of potential risks to his or her physical security is indeed magnified under such circumstances.
16. Due to the lack of criminalization of war crimes and crimes against humanity, the only applicable statute of limitations is that mentioned above – including for cases when sexual violence constitutes torture. Nepal thus remains in contravention with international standards, which provide that a “statute of limitations shall not apply to gross violations of human rights”,²³ as well as Supreme Court’s jurisprudence.²⁴
17. As a consequence, the domestic legislative framework has fostered, and continues to, impunity for the commission of sexual violence as a war crime, a crime against humanity, or as an act of torture.

III. Persisting obstacles for CRSV victims: the filing of First Information Reports

18. In addition to the flawed legislative framework above described, victims of sexual violence face a combination of other obstacles when attempting to file complaints. Prior to the opening of a criminal investigation, a victim is required to submit a First Information Report (“FIR”) in the police office located nearest to the incident.²⁵
19. Such a requirement becomes particularly problematic when the perpetrator is a State agent, in particular if he or she is either still in place within the local office, or well-known from those working at the local office. Fear of facing their assailant, of finding themselves at risk of re-victimization, or of being confronted with the stigma associated with sexual violence constitutes a strong deterrent for victims.²⁶
20. With specific regard to rape and other forms of sexual violence, it has been reported that the police regularly refuse to register complaints. The reasons given for such

²² Penal Code (2017), Section 229.

²³ UN Basic Principles and Guidelines on the Rights to a Remedy and Reparation, Principle 6.

²⁴ Supreme Court of Nepal, *Madhav Kumar Basnet v. Nepal Government*, 2 January 2014 (069-WS-0057). In this case, the Supreme Court found that the application of a statutory limitation on gross human rights violations constitute a violation of international standards and directed the government to formulate appropriate legislation.

²⁵ Penal Code (2017), Section 8. See also Supreme Court of Nepal, *Purnimaya Lama v. District Administration Office, Kavrepalanchowk and Others*, Writ No. 1231, 10 March 2008, para. 9.

²⁶ HWR, *Silenced and Forgotten*, 2014, pages 59-73.

decision vary. For instance, the police may request a medical report in order to register the complaint, even though physicians do not accept to prepare a report collecting the conclusions of the forensic examination without the prior filing of a FIR.²⁷

21. While the victim can challenge this decision, the concerned police officers do not risk any penalty for refusing to register a complaint: as a result, it has become widespread practice for the police to exercise a discretionary authority and decide which FIR to register and which to ignore. FIRs directed against members of the police forces or the military have thus been particularly difficult for victims to register.²⁸
22. When the police refuse to register the FIR, the victim can file a complaint before the Government attorney, the Chief District Officer (higher authority within the Police) and the Ministry of Home Affairs, subsequently.²⁹ These authorities may instruct the concerned police office to register the FIR.³⁰ Often, however, the police officers disregard these decisions and the FIR remains unregistered. In this case, the victim has the possibility of filing a *mandamus order* before the competent High Court.³¹ In addition to the fact that the victim is faced with the obligation of hiring a lawyer so as to obtain that the police be ordered to register her or his complaint, the Court's decision are often left unimplemented.³²
23. This practice remains widespread and strongly contributes to fostering high levels of impunity and dramatically hinders victims' trust in the judicial system.

²⁷ OHCHR, *Nepal Conflict Report*, 2012, para. 194. In addition, TRIAL International has faced such obstacles when providing support to victims of conflict-related sexual violence and when attempting to obtain a forensic examination report.

²⁸ For additional information concerning the difficulties of victims to register FIRs related to conflict-related human rights violations, see OHCHR, *Nepal Conflict Report*, 2012, paras. 181-185, 197; TRIAL (Track Impunity Always), *Written Information for the Follow-up*, 2013, paras. 15-16; International Commission of Jurists. *Achieving Justice for Gross Human Rights Violations in Nepal, Baseline Study*, October 2017 (ICJ, *Baseline Study*, 2017), page 21.

²⁹ Code of Criminal Procedure (2074), Section 5.

³⁰ Penal Code (2017), section 5.

³¹ Constitution of Nepal, 2015, Article 144.

³² ICJ, *Baseline Study*, 2017, page 21.

TRIAL International and the HRJC respectfully ask the Committee to recommend to the government of Nepal to:

- Define and criminalize war crimes and crimes against humanity,
- Define rape and other forms of sexual violence and codify these offences as war crimes, crimes against humanity, torture or genocide.
- Modify the definition of rape so that it is not limited to acts committed by a male perpetrator against a female victim.
- Define and criminalize other forms of sexual violence, including sexual slavery, enforced pregnancy, forced prostitution, forced sterilization and forced nudity.
- Abolish the statute of limitations on the registration of complaints for rape and other forms of sexual violence as a war crime, crime against humanity, or act of torture.
- Implement all appropriate measures to eliminate the discretionary authority of the police to register FIRs.

IV. CRSV in the transitional justice process: the amendment of the TRC Act

24. The Committee had requested Nepal to “state the measures that have been taken: (a) to address impunity for crimes of rape and other sexual violence committed during the armed conflict and provide data thereon (...)” as well as to provide information about the measures taken “to comply with the Supreme Court decision of 2015 to amend the amnesty provisions of the [TRC Act] and to reinstate criminal proceedings for conflict-related sexual violence that had been withdrawn.”³³

25. The Enforced Disappearances Enquiry, Truth and Reconciliation Commission (TRC Act), passed by the Parliament of Nepal on 25 April 2014, created two Commissions: the Truth and Reconciliation Commission and the Commission on Investigation of Disappeared Persons (“the Commissions”). The TRC Act was heavily criticized by the local and international human rights community for its lack of compliance with Nepal’s obligations under international law.³⁴

26. The 2014 TRC Act lists rape and other forms of sexual violence as “gross violations of human rights”. However, the TRC Act does not provide any definition as to what exactly

³³CEDAW, *List of issues and questions in relation to the sixth periodic report of Nepal* (“List of Issues”), UN doc. CEDAW/C/NPL/Q/6 of 19 March 2018.

³⁴ See for example: OHCHR, *Technical note, The Nepal Act on the Commission on Investigation of Disappeared Persons, Truth and Reconciliation, 2071 (2014) – as Gazetted 21 May 2014*, June 2014; TRIAL, Terai Human Rights Defenders Alliance, Victims’ Common Platform on Transitional Justice, *Follow-up Report on the Implementation of the Recommendations Issued by the Human Rights Committee* (CCPR/NPL/CO/2), March 2015.

constitutes rape and other forms of sexual violence – nor does it provide any rule to overcome the applicable statutes of limitations.

27. At the time of writing, a draft bill to amend the TRC Act has been circulated among stakeholders.³⁵ Pursuant to Section 2 (6) of the draft bill, ‘gross human rights violations’ include, among other torture, rape and other sexual violence.
28. The draft bill deletes references to crimes against humanity and war crimes from the original bill. These intended amendments demonstrate a weakening commitment to stand against such crimes.
29. Furthermore, the draft bill stipulates that ordinary criminal legislation shall not apply for offences committed during the conflict. It thus remains unclear which definitions should be taken as a reference for rape and other forms of sexual violence committed in the context of the armed conflict, and whether those would apply retroactively.
30. Another problematic aspect of the draft bill concerns the use of confessions in the prosecution of conflict-related sexual violence. Indeed, Section 13 (A) of the draft bill suggests that the function of truth seeking shall be kept separate from an inquiry with a view of prosecution. As such, admission of guilt by a perpetrator before the Commissions is not to be used as evidence in criminal trials.³⁶ However, in many cases of rape committed in the context of the armed conflict, confessions may constitute the only evidence available to issue a conviction.
31. The CEDAW has also asked Nepal to ensure that “the statute of limitations on filing complaints relating to rape and other forms of sexual offences during the conflict does not preclude women’s access to justice.” While the 2014 TRC Act does not tackle or mitigate the shortcomings of the national criminal legislative framework vis-à-vis statutory limitations, it should be noted that the draft bill abolishes the latter for war-era extra-judicial killings, enforced disappearance, torture, rape or other sexual violence. Indeed, pursuant to Section 29 of the draft bill, “there shall be no statutory limitation pursuant to this section for prosecuting persons involved in gross human rights violations.”³⁷
32. Furthermore, the draft bill fails to integrate a gender-sensitive approach to transitional justice. While a few mentions to “gender sensitivity” can be found,³⁸ the concept

³⁵ OHCHR, Technical Note, *Nepal bill for amending the 2014 Enforced Disappearance Enquiry, Truth and Reconciliation Commission Act*, July 2018(OHCHR, *Technical Note*, 2018). Similarly, TRIAL International, International Commission of Jurists and Amnesty International, *Legal Analysis of the Draft Bill to Amend the Act on Commission on Investigation of Disappeared Persons, Truth and Reconciliation 2014*, September 2018.

³⁶ OHCHR, *Technical Note*, 2018, para. 29

³⁷Draft Bill on Enforced Disappearances Enquiry, Truth and Reconciliation Commission (First Amendment) Act, 2075 (2018), Section 29(7).

³⁸For example, Section 23 (2).

remains vague and its intended application unclear. Specifically, the draft bill does not address the adoption of a gender lens in the collection of complaints, the investigative and prosecutorial process, or the provision of reparation. As a result, Nepal fails to comply with the international standards according to which women must be effectively included and represented in all legal, political, economic, and social post-conflict processes.³⁹

33. With specific regard to remedies for victims of conflict-related sexual violence, the CEDAW has urged Nepal to “ensure that victims of sexual crimes receive appropriate reparations, rehabilitation and counselling.”⁴⁰ As the United Nations Basic Principles on the Right to Remedy and Reparation stipulate, victims of gross violations of international human rights law and serious violations of international humanitarian law should be provided with reparations that are appropriate and proportional to the gravity of the harm suffered. In addition, reparations should be adequate, effective, as well as prompt, and include measures of restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition.⁴¹
34. Within the framework of the Interim Relief Program (“IRP”)⁴², only the relatives of individuals killed or forcibly disappeared, and those injured or disabled as a result of the armed conflict, were granted monetary assistance.⁴³ Thus, victims of torture, including rape and other forms of sexual violence, were not entitled to claim compensation. Sections 23 (A) and (B) of the draft bill recognize victims’ right to reparation and stipulate that interim relief shall be provided to those who did not receive support through this program initially.
35. Nonetheless, confusion between interim relief – temporary financial support that can be subject to certain conditions – and compensation – which are strictly dependent on the harm suffered by the victim – persist.

³⁹ See CEDAW, *General Recommendation No.30 on women in conflict prevention, conflict and post-conflict situations*, CEDAW/C/GC/30, 1 November 2013, paras. 38; 42-47; 70-81; UN Security Council Resolutions on Women, Peace and Security; 1325 (2000), 1820 (2009), 1888 (2009), 2889 (2010), 1960 (2011), 2106 (2013), 2122 (2013), 2242 (2015); Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-recurrence, *Report to the Human Rights Council on Participation of Victims in Transitional Justice*, UN Doc. A/HRC/34/62 of 27 December 2016, paras. 31-32; 34.

⁴⁰Committee on the Elimination of Discrimination against Women (CEDAW), *Concluding Observations on Nepal*, UN doc. CEDAW/C/NPL/4-5 of 29 July 2011, para. 36(f).

⁴¹ UN Basic Principles and Guidelines on the Right to a Remedy and Reparation, Principles 15 and 18; CEDAW, *General Recommendation No.30 on women in conflict prevention, conflict and post-conflict situations*, CEDAW/C/GC/30, 1 November 2013, para. 79.

⁴² In April 2007, the Ministry of Peace and Reconstruction was established and given the mandate to provide relief and rehabilitation to conflict-affected persons. As a result, between 2008 and 2009, an Interim Relief Program was set up to provide financial support to certain categories of victims. For more details about the IRP scheme, see ICTJ, *From Relief to Reparations: Listening to the Voices of the Victims*, 2011.

⁴³ It should be noted that widows who remarried lost their entitlement to compensation.

36. While the draft bill expands the definition of “reparations” so that to include “psychosocial counseling, interim relief, compensation, rehabilitation, facilities, subsidies or other provision”, concerns remain as to the effective application of this provision, the earmarked resources as well as to which extent a genuine gender approach will be followed by the Commissions when recommending reparations.

TRIAL International and the HRJC respectfully ask the Committee to recommend to the government of Nepal to:

- Retain the reference in the TRC Act to, and define, crimes against humanity;
- Amend the TRC Act so that it includes a definition of war crimes.
- Amend the TRC Act so that it includes definitions of rape and other forms of sexual violence that are in accordance with international law.
- Design reparation packages that guarantee that victims of rape and other forms of sexual violence are provided with comprehensive and adequate reparation.
- Develop a meaningful gender-sensitive approach to the transitional justice process, by ensuring that women take an active part in all legal, political, economic, and social post-conflict processes, and that the full range of their needs are effectively addressed.

V. The use of declaration of death in cases of enforced disappearance: the impact of the presumption of death on female relatives

37. An additional obstacle that women victims of the conflict – in this case, women whose relatives have been disappeared –relates to the use of declaration of death in cases of enforced disappearance.⁴⁴

38. Although the new Penal Code (2017), includes a definition of enforced disappearance, it remains inconsistent with international standards and does not apply to crimes committed between 1996 and 2006. Similarly, the existing Nepalese legal framework does not provide for a specific regulation of the status of victims⁴⁵ of this particular crime. Hence, relatives of disappeared persons face a number of legal and social consequences that only add to the severe anguish suffered as a result of the

⁴⁴ TRIAL International and the HRJC, submitted a report entitled *The Use of Declaration of Death in Cases of Enforced Disappearance: Regulating the Status of Disappeared Persons in Nepal*, to the Commission of Investigation on Enforced Disappeared Persons in March 2018.

⁴⁵ For the purposes of the present report, pursuant to international jurisprudence and law, “victim” means the disappeared person, as well as any individual who has suffered harm as the direct result of an enforced disappearance. See, among others, International Convention for the Protection of All Persons from Enforced Disappearance, Art. 24, para. 1.

impossibility to learn the truth on the fate and whereabouts of their loved ones. As the majority of victims of enforced disappearance in Nepal are men,⁴⁶ their female relatives – and more specifically their wives – are usually those who most suffer from such consequences.

39. Officially determining the status of their loved ones is a step that most relatives must undertake in order to resolve a wide range of potential administrative issues arising from the enforced disappearance. Those may include regulating the status of marriage for the remaining spouse; implementing rights to inheritance; and dealing with management of property.
40. In the absence of a legal framework providing for situations of absence due to enforced disappearance, the sole provisions available are to be found in laws regulating the presumption and the recording of death, in particular, the Evidence Act of 2031 (1974) and the Birth, Death and Other Personal Event Registration Act of 2033 (1976). Pursuant these pieces of legislation, after 12 years during which a person has been not been heard of, the burden of proving that he person is alive shifts to whoever claims so.⁴⁷ In practice, Section 32 of the Evidence Act has been interpreted as establishing the presumption of death after 12 years of absence.
41. Relatives are however unable to prove whether those who have been disappeared are alive and are actually calling on authorities precisely to establish this: unveiling the truth on the circumstances of the enforced disappearance and the fate of the disappeared person, whether dead or alive.⁴⁸
42. “Absence due to enforced disappearance” is not included among the personal events that can be object of an official registration by relatives under the Birth, Death and Other Personal Event Registration Act. As a consequence, families of the disappeared have no choice but to request the provision of a death certificate upon the delivery of false information to the registrar concerning the supposed death of the disappeared.
43. The right to inheritance and the management of property are a few of the numerous issues that push families to request a death certificate of their disappeared relatives. However, many families have expressed the desire to be granted certificates of disappearance, instead of certificates of death, which would ensure the official

⁴⁶ ICRC, *Families of missing persons in Nepal: A study of their needs*, April 2009, p. 2. “90% of the missing are males...”

⁴⁷Section 32 of the Evidence Act, 2031 (1974), on the ‘Burden of proving that a person is alive’ after he or she goes missing, states that: “Provided that, when the question is whether a person is alive or dead, it is proved that such person has not been heard of for a period of twelve years by those who would naturally have heard of him/her if he/she had been alive, the burden of proving that he/she is alive is shifted to the person who claims it”.

⁴⁸The concealment of the fate and whereabouts of the disappeared is indeed one of the constitutive elements of this crime. See International Convention for the Protection of All Persons from Enforced Disappearance, Article 2.

recognition of the enforced disappearance of a relative, and would clarify the relationship between the disappeared individual and the certificate holder.⁴⁹

44. In the absence of such document, many wives of forcibly disappeared men have faced numerous problems in establishing the relationship with their husband. As the conflict allowed for a context in which marriages with members of the Maoists would occur without the knowledge of the spouses' relatives, the wives of those who were disappeared encountered economic hardship and social exclusion after the peace accord.⁵⁰ Faced with the impossibility to ascertain their relationship with the disappeared and register the marriage, many women have been denied access to the social benefits they should be entitled to, in particular within the framework of the Interim Relief Program.
45. Often blamed for the disappearance of their husbands, women are simultaneously questioned for their persistence in obtaining the truth about the fate and whereabouts of the disappeared, and accused of enjoying the company of other men.⁵¹ Furthermore, many are the wives of disappeared men who decline to take off the visible symbols of their status as married women, such as the bangles on their wrists and *sindhur*.⁵² Members of their community may criticize such choice, perceived as reluctance to be deprived from the higher status associated with marriage, and ostracize these women.⁵³ Such social stigma only adds to the anguish and psychological pain suffered as a result of the disappearance.
46. The draft bill to amend the TRC Act also fails to fully address the legal situation of disappeared persons and their relatives, and ignores the gendered dimension of this particular issue. Indeed, Section 40 (B) of the draft bill regulates the property transfer to relatives of disappeared persons. However, it fails to clarify the legal status attributed to such persons and seems to deal with enforced disappearance as a direct death, despite the uncertainty of the fate and whereabouts of the disappeared person, when mentioning "partition or property transfer after death".

⁴⁹ The International Committee of the Red Cross (ICRC), *Civil legal issues related to the families of the missing in Nepal*, July 2015, p.14.

⁵⁰ ICTJ, *Briefing: Beyond Relief- Addressing the Rights and Needs of Nepal's Wives of the Disappeared* , August 2013, p. 12.

⁵¹ ICTJ, *Briefing: Beyond Relief- Addressing the Rights and Needs of Nepal's Wives of the Disappeared*, August 2013, p. 13.

⁵² The International Center for Transitional Justice (ICTJ), *The Disappeared and Invisible. Revealing the Enduring Impact of Enforced Disappearance on Women*, March 2015, p.9.

⁵³ *Ibid.*

TRIAL International and the HRJC respectfully ask the Committee to recommend to the government of Nepal to:

- Promote legislative amendments to ensure, through a gender-sensitive approach, the legal status of disappeared persons and that of their relatives, in fields such as social welfare, financial matters, family law and property rights.
- Introduce into domestic legislation gender-sensitive provisions establishing and regulating certificates of absence due to enforced disappearance.