



**Supplement to the
International Protocol on
the Documentation and
Investigation of Sexual
Violence in Conflict:**

Sri Lanka

**SRI LANKA-SPECIFIC GUIDANCE FOR PRACTITIONERS
MARCH 2018**

 Institute for International
Criminal Investigations

REDRESS
Ending Torture, Seeking Justice for Survivors



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REDRESS is an international human rights non-governmental organisation based in the United Kingdom and The Netherlands with a mandate to assist survivors of torture and related international crimes to seek justice and other forms of reparation, hold accountable the governments and individuals who perpetrate torture, and develop the means of ensuring compliance with international standards and securing remedies for victims. More information on REDRESS can be found at www.redress.org.



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ACRONYMS

| | |
|-----------------|--|
| AGO | Attorney General's Office |
| COI | Commission of Inquiry |
| CARSV | Conflict and Atrocity-Related Sexual Violence |
| CAT | Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment |
| CEDAW | Convention on the Elimination of All Forms of Discrimination against Women |
| CED | Convention on the Protection of All Persons from Enforced Disappearance |
| CFA | Ceasefire Agreement |
| CCP | Code of Criminal Procedure Act 1979 |
| CRC | Convention on the Rights of the Child |
| CID | Criminal Investigation Division |
| CTA | Draft Counter Terrorism Act |
| HRCSL | Human Rights Commission of Sri Lanka |
| HRW | Human Rights Watch |
| ICC | International Criminal Court |
| ICCPR | International Covenant on Civil and Political Rights |
| IP2 | International Protocol on the Documentation and Investigation of Sexual Violence in Conflict (2nd ed.) |
| ITJP | International Truth and Justice Project |
| JVP | Janatha Vimukthi Peramuna |
| LLRC | Lessons Learned and Reconciliation Commission |
| LTTE | Liberation Tigers of Tamil Eelam |
| NCPA | National Child Protection Authority |
| OHCHR | UN Office of the High Commissioner for Human Rights |
| OISL | UN Office of the High Commissioner on Human Rights investigation on Sri Lanka |
| PTSD | Post-Traumatic Stress Disorder |
| PTA | Prevention of Terrorism (Temporary Provisions) Act 1979 |
| PVCW Act | Protection of Victims of Crime and Witnesses Act, No. 4 of 2015 |
| PSO | Public Security Ordinance, No. 25 of 1947 |
| SLA | Sri Lankan Army |
| TID | Terrorist Investigation Department |
| WAN | Women's Action Network |
| UN | United Nations |
| UPR | Universal Periodic Review |
| UNHRC | United Nations Human Rights Council |



PART I /

USING THE INTERNATIONAL PROTOCOL IN SRI LANKA

CHAPTER 1 / INTRODUCTION

The International Protocol on the Documentation and Investigation of Sexual Violence in Conflict, now in its second edition (hereafter referred to as “IP2”) is a “set of guidelines setting out best practice on how to document, or investigate, sexual violence as a war crime, crime against humanity, act of genocide or other serious violation of international criminal, human rights or humanitarian law”.¹ It is a tremendous resource for practitioners, covering theoretical, legal and very practical aspects of documentation.

As IP2 makes clear, documentation is highly context-specific, and each conflict situation and country will have individual legal and practical aspects that must be considered as part of and alongside the best practice guidelines. This Supplement is intended as a country-specific companion to IP2, providing information relevant to documenters of Conflict and Atrocity-Related Sexual Violence (“CARSV”)² in Sri Lanka. It does not generally repeat the content of IP2 and cannot be used as a stand-alone document. Instead, it addresses the context for and characteristics of CARSV most apparent in Sri Lanka, legal avenues for justice within Sri Lanka and specific to Sri Lanka at the international level, specific evidential and procedural requirements and practical issues that may arise when documenting CARSV in and in relation to the country.

Users of this Supplement should note that laws can be changed and all legislative provisions set out here should be checked against up-to-date law in Sri Lanka. As explained further in the Supplement, there are ongoing discussions about how to promote accountability for such crimes. It is very possible that new mechanisms and laws, including new definitions of crimes and new rules of evidence and procedure, may be created.

The Supplement is aimed at both local practitioners and those from outside the country. It is relevant to documentation from within Sri Lanka and from outside, although Part IV (Documentation in Practice: Preparation) focuses on issues concerning documentation from within Sri Lanka.

This Supplement, along with Sinhala and Tamil translations, is available online at the websites of REDRESS (www.redress.org) and IICI (www.iici.global). The FCO may also in due course post the Supplement in all three languages on its website.

Note that chapter and section numbering largely mirror those in IP2 for easy cross-referencing, though not all IP2 chapters are included for further country-specific elaboration.



PART II /

WHAT IS SEXUAL VIOLENCE? CHAPTER 2 / UNDERSTANDING SEXUAL VIOLENCE IN SRI LANKA

Sexual violence in Sri Lanka, as elsewhere, is a “complex and pervasive problem”.³ It is perpetrated “against women and girls in every community and often emanates from within their own communities”,⁴ set in a culture of deeply entrenched impunity and victim-shaming.⁵ This has been reflected in horrific fashion through widespread sexual violence against both women and men committed by state actors, including during periods of conflict.⁶

From the 1980s until 2009, Sri Lanka experienced several decades of almost uninterrupted armed conflict, predominantly between the Sri Lankan armed forces and the Liberation Tigers of Tamil Eelam (“LTTE”).⁷ The LTTE was a Tamil militant group fighting for the independence of the predominantly Tamil Eastern and Northern parts of the country. Throughout the armed conflict, the LTTE controlled parts of the claimed territory and operated as a quasi-state over this territory. Allegations of war crimes and crimes against humanity were levelled against both parties throughout the conflict, and these allegations increased during the last stages of the war when hostilities intensified.⁸

Box 1. Categorising the conflict against the LTTE

The Sri Lankan armed conflict against the LTTE is widely recognised as a non-international armed conflict giving rise to the application of international humanitarian law, in addition to international criminal law. The beginning of the armed conflict is generally situated in the 1980s when the intensity of the hostilities increased beyond mere internal disturbances and the LTTE secured control over parts of Northern and Eastern Sri Lanka.⁹

The Sri Lankan government and the LTTE entered into a ceasefire agreement (“CFA”) in February 2002. However by mid-2006 the CFA had broken down significantly, with hostilities resuming between the two parties.¹⁰ On 19 May 2009 the Sri Lankan government declared an end to the war and armed hostilities came to an end.¹¹

Widespread sexual violence committed by the Sri Lankan security forces throughout the conflict is well-documented, including by United Nations (“UN”) investigations.¹² The Office of the High Commissioner for Human Rights (“OHCHR”) Investigation on Sri Lanka concluded that there were “reasonable grounds to believe that rape and sexual violence by security forces personnel was widespread against both male and female detainees, particularly in the aftermath of the war. The patterns of sexual violence appear to have been a deliberate means of torture to extract information and to humiliate and punish persons who were presumed to have some link to the LTTE”.¹³

In contrast, although the LTTE also committed numerous violations of international humanitarian law,¹⁴ it is generally accepted that the LTTE did not resort to sexual violence as part of its modus operandi.¹⁵ Researchers report a zero-tolerance policy by the LTTE that provided protection against sexual violence to both women and children who joined the ranks of the militant groups – either voluntarily or forcibly – and to some extent to those within LTTE-controlled and administered territory.¹⁶ The LTTE did, however, recruit child soldiers (often forcibly), which exposed the children to greater risk of sexual violence from Sri Lankan security forces, particularly while detained in “Protective Accommodation and Rehabilitation Camps” (“rehabilitation camps”) after the conflict.¹⁷

CARSV in Sri Lanka has not, however, been limited to violence in the context of the war against the LTTE. In 1971, a revolt by the majority Sinhalese Janatha Vimukthi Peramuna (“JVP”) against the Sri Lankan state saw the imposition of a state of emergency and a crackdown by state security forces that “went far beyond legitimate counter-terror action”,¹⁸ leading to the killing of an estimated 10,000–20,000 JVP members.¹⁹ According to Jayawardena and Anantharajah: “[s]exual violence formed a distinct part of that response. Indeed, the first shocking illustration of wartime rape which stamped itself on the country’s conscience was the public sexual degradation and murder of a young (Sinhalese) wom-

an, Premawathie Manamperi, who was ‘punished’ by (Sinhalese) soldiers for being ‘associated’ with JVP revolutionaries during this period”.²⁰

During the 1980s, the JVP – by then largely a Sinhalese nationalist organisation – led a second insurrection targeting both state forces and predominantly Sinhalese civilians. Occurring from 1987-1990, this was a low-intensity conflict (nevertheless with casualty figures estimated between 30,000 – 60,000 people) characterised by subversion, assassinations, raids, and attacks on military and civilian targets.²¹ More than 23,000 people were forcibly disappeared by state security forces,²² and a number of cases of sexual violence against Sinhalese women by state security forces were reported.²³ A government-appointed inquiry into the widespread enforced disappearances in the Western, Southern and Sabaragamuwa Provinces during the period January 1988 to December 1994 found that rapes and killings of women had occurred, and noted that “violence against women was used as a tool of control of a community (family, village, peers)”.²⁴

Various forms of sexual violence that were perpetrated by the security forces during the conflicts with the JVP and LTTE continued after the end of the war against the LTTE in May 2009, including in detention and in highly militarised contexts,²⁵ and some continued to be documented in 2017.²⁶

Although the post-May 2009 crimes were committed outside the theatre of hostilities, the connection with the armed conflict arguably is three-fold. First, the armed conflict has exacerbated the physical and socio-economic vulnerability of many women in the conflict-affected regions, including to sexual violence. Second, despite the cessation of hostilities, for many years, conflict-affected regions have continued to be heavily militarised. Militarisation is deeply embedded in many facets of daily life.²⁷ In this context, civilians in those areas have been at a heightened risk of harassment, intimidation and violence, including sexual violence by members of the armed forces, the majority of which are of a different ethnic background.

Third, emergency and extraordinary legal frameworks also remained in place for several years after the end of the armed conflict and some continue to date.²⁸ These have and continue to allow for an extraordinary system of detention for alleged terrorism suspects, who do not benefit from the same judicial safeguards available for other detainees. This has contributed to a context in which sexual violence in detention and as a form of torture against both men and wom-

en has continued to be perpetrated long after the end of the hostilities and until the present.

This Supplement focuses on the documentation of CARSV, as defined in IP2: “sexual violence as a war crime, crime against humanity, act of genocide or other serious violation of international criminal, human rights or humanitarian law”.²⁹ Given the above context, consideration is given both to crimes committed during the civil war (by state and non-state actors), and sexual violence crimes committed by state actors in conflict-affected zones after the end of the armed conflict. This is because the latter category may be seen as part of a continuum of violence and may potentially constitute international crimes or grave human rights violations. Some have argued, for example, that post-war violations committed against Tamil civilians in the Northern Province meet all the elements to amount to crimes against humanity.³⁰

International law requires no context of or link to armed conflict for crimes against humanity, genocide or, except for war crimes, other serious violations of international criminal or human rights law (although crimes and violations such as crimes against humanity, genocide, torture, rape and other human rights violations can and usually are also committed in the context of conflict). In documenting both conflict and post-conflict cases, practitioners should carefully consider the legal elements of crimes against humanity and other serious international crimes and human rights violations and consider whether the elements may potentially be fulfilled.

A. Contextualising sexual violence in Sri Lanka

Understanding why sexual violence in conflict occurs is critical for effective documentation, reporting, and ultimately achieving accountability for these violations and justice for victims. It enables documenters to understand patterns of abuses, their root causes and the impacts of sexual violence in conflict that are relevant to preventing these crimes. It further guides documenters’ interaction with various stakeholders including judicial actors, health care personnel and other service providers.

In general, rape and other forms of sexual violence are crimes that are motivated by domination, control and exerting power. CARSV in Sri Lanka follows this pattern.

In Sri Lanka, rape and sexual violence as a form of torture of persons in detention has a long history, set against a deeply entrenched culture of impunity.³¹ Victims of sexual violence in custody have included men and women from across different communities. For example, outside the context of conflict, a

human rights organisation published documentation in 2011 of “over a thousand cases of torture of Sinhalese men and women in police custody” in the first decade of the 2000s, “many of which involved sexual violence and rape”.³²

In conflict settings, people across all ethnicities have also been targeted.³³ However, the minority Tamil community (men and women alike) have been particularly targeted by and vulnerable to sexual violence due to the intensity of the conflict in Tamil majority areas and a history of discrimination and power imbalances in society that perpetrators could abuse.³⁴ That history, combined with male dominated economic and political spheres and unequal power relationships have been a catalyst of widespread and systemic sexual abuse during and after the armed conflict, both within and outside detention.

The armed conflict also exacerbated women’s vulnerabilities in conflict-affected areas. Women in the North and East of the country were particularly vulnerable to exploitation and abuse due to societal inequalities, discrimination and gender stereotypes that confined them to the home and demoted their positions of power in the community.³⁵ During the conflict, some women joined the ranks of the LTTE as a form of empowerment. Their status as fighters challenged patriarchal norms. Some were high ranking within the movement. However, after the conflict, these former fighters suffered from discrimination from both their own community and in terms of heightened scrutiny from state institutions due to this status.³⁶

B. Forms of conflict-related sexual violence in Sri Lanka

1. Sexual violence in detention as a form of torture

During the armed conflict against the LTTE and in the post-armed conflict period, allegations of widespread sexual violence by members of the security forces have been reported.³⁷ Sexual violence has predominantly targeted men and women of Tamil ethnicity in detention or during their forced interaction with the police or the armed forces,³⁸ as well as some Sinhalese and Tamil-speaking Muslim men and women with perceived connections to the LTTE.³⁹ In particular, the OISL reports allegations of sexual violence by security forces in detention, at the very end of the armed conflict when thousands of civilians and fighters crossed into government controlled territory, in internment and displacement camps where thousands of civilians were subsequently confined, and in other places of detention including rehabilitation camps.⁴⁰ Other sources document reports of women held in military camps for the purposes

of sexual slavery for long periods, sometimes as long as a number of years.⁴¹

In 2013, Human Rights Watch (HRW) reported allegations of sexual violence committed against 75 former LTTE detainees who now live abroad.⁴² Conducting research in Sri Lanka was inhibited by government access restrictions and as a result HRW obtained information from only a small fraction of detainees. However, from the large proportion of sexual violence allegations among the sample group, HRW concluded that the information strongly suggests that “abuses were widespread and systematic during the final years of the conflict and in the years since”.⁴³

According to HRW: “[s]exual violence **frequently began with sexual humiliation and forced nakedness or semi-nakedness**, either during the interrogation sessions or outside of them. Forced stripping was accompanied with **verbal sexual threats and mocking**, which added to the humiliation and degradation of being tortured. This psychological sexual abuse was frequently followed by **physical torture and ill-treatment, including rape and various forms of sexual violence**”.⁴⁴ The International Truth and Justice Project (“ITJP”) reported in 2017 that in the recent cases it has documented, “[m]ost of the rape takes place in the holding cells at night rather than the larger interrogation rooms. This means there is no sense of respite for the torture victims even when they are alone recovering from beatings and burnings”.⁴⁵

According to cases documented within and outside Sri Lanka, widespread forms of sexual violence in detention include **burning of detainees’ genitals or breasts with cigarettes, twisting of detainees’ penises and testicles, scratching or biting of breasts and buttocks, forcible masturbation, being forced to perform oral sex, spraying chili powder on detainees’ genitals, crushing detainees’ genitals by slamming drawers, oral, vaginal and anal rape**, including with barbed wires, and **gang rape**.⁴⁶

Arbitrary detention of critics of the government and those suspected of links to the LTTE has regularly followed a notorious pattern: the abduction of individuals into “white vans” leading to their disappearance and torture.⁴⁷ These abductions are reported to generally have been carried out by the Criminal Investigation Division (“CID”) and Terrorist Investigation Department (“TID”), but also by the military.⁴⁸

Documenters have also recorded a link between bribery and extortion and ongoing detention and torture: in a significant

number of cases families of detained victims have been able to secure their release by the payment of bribes.⁴⁹

2. Conflict-related sexual violence outside of detention

The OISL report found that men were equally as likely to be victims of conflict-related sexual violence as women.⁵⁰ However while both men and women have been subject to sexual violence in detention, women have generally been at a higher risk of being subjected to sexual violence by members of the security forces in their homes or while outside seeking livelihood opportunities or searching for their detained or missing relatives.⁵¹

Rape of Tamil women in their homes and at checkpoints by soldiers and police, **often followed by extrajudicial execution**, was a feature of the conflict reported by Sri Lankan NGOs and UN agencies from the 1990s.⁵²

Separately, the OISL found significant video evidence of the widespread and “outrageous” **desecration of the bodies of dead female combatants** in the latter stage of the war, “all having breasts and genitalia exposed. In some cases the legs had been spread wide”.⁵³ The report concluded that “[i]f established, these acts could amount to the war crime of outrages to personal dignity”.⁵⁴ Other sources have reported evidence of rape, including gang rape, of these female combatants before execution and desecration of their bodies.⁵⁵

In addition, there have been reports of **widespread sexual violence against civilian women fleeing the conflict areas** during the peak of the fighting, which violence forced women to return to the scene of fighting.⁵⁶ Screening processes carried out as tens of thousands of internally displaced persons (“IDPs”) crossed into government-held territory in the latter stages of the war also involved forcing IDPs to strip naked in front of soldiers, and often in front of other detainees. Some women were checked by male soldiers and some were assaulted, for example on their breasts with rifles.⁵⁷

In the post-conflict period, former conflict-affected areas, particularly the Northern part of the country, have been heavily militarised. The presence of the military in former LTTE-controlled areas has heightened Tamil women’s sense of insecurity and their vulnerability to sexual violence. Estimated numbers of women-headed households range between 40,000 and 60,000 in the former conflict zones.⁵⁸ These women are particularly vulnerable to violence when they leave their home for daily activities,⁵⁹ search for their missing relatives in police stations and army camps or are visited by security forces at their home.⁶⁰ In addition, the socio-economic difficulties and

lack of access to land taken by the military has made them vulnerable to sexual exploitation, often referred to in Sri Lanka as “sexual bribery”. Women have reported being compelled to provide sexual acts to access resources, jobs and assistance, including from government officials.⁶¹

C. Conflict and Atrocity-Related Sexual Violence

1. Motivations

CARSV in Sri Lanka has been considered to serve several purposes. It has been used to instill terror, as a form of torture or punishment of an individual or the wider community, to discourage broader Tamil involvement with the LTTE, as a means of interrogation to obtain evidence, to humiliate and break victims psychologically and to disrupt social cohesion.⁶²

The words used by perpetrators when committing sexual violence often underline these motivations. ITJP reports that while “ethnically derogatory language is quite usual throughout the torture and in the holding cells, it is particularly prevalent during the sexual violations”.⁶³ A characteristic account came from one post-conflict victim of sexual violence in detention who reported: “[t]hey said things like ‘you Tamil dogs, are you trying to fuck with the Sinhalese, you will always be our slaves’”.⁶⁴ Another man reported how a soldier raped him and that: “I felt that this was his way of humiliating the community. It was very painful. He then turned me over and pulled my penis and testicles very hard in anger. ‘We will make sure that you will not create a future Tamil with this.’ I fainted as it was extremely torturous and painful”.⁶⁵

2. Under-reporting of sexual violence

According to Pinto-Jayawardena and Guthrie, “[a] culture of silence exists with regard to sex in Sri Lanka – violent or otherwise. It mirrors and compounds another culture of silence – that exercised by communities when human rights are violated (which may have been most profound among Tamils during the conflict, but is evident wherever people feel powerless). It is the result of years of violence, abuse of power by those in control, and impunity that has often left Sri Lankan citizens feeling unprotected and subject to reprisals if they dare to speak out about abuse”.⁶⁶

Researchers have suggested that although the prevalence of sexual violence was often high within the sample group investigated, CARSV appears to be under-reported in Sri Lanka. Difficulties in obtaining evidence are explained by cultural taboos regarding the issue, the stigma, shame and trauma ex-

perienced by victims,⁶⁷ community pressure not to report for fear of branding all ex-fighters as rape victims, a lack of trust in authorities, a lack of unsafe reporting spaces, the inaccessibility of information being withheld by government forces, the non-recognition of male rape as a criminal offence in Sri Lankan law,⁶⁸ the government's refusal to allow any independent investigation,⁶⁹ a lack of effective witness protection measures,⁷⁰ and victims' fears of reprisal by government forces if allegations are made.⁷¹ These challenges explain why CARSV is likely to be under reported and the number of cases is likely to be higher than current evidence suggests.⁷²

3. Victims

The majority of conflict-related sexual violence victims in Sri Lanka are of Tamil ethnicity, although not exclusively. The victims' age group ranges from children to the elderly. For example, allegations of sexual abuse were obtained by HRW from men and women between the ages of 16-50 who came from both Tamil areas of the North and East, and from Colombo districts.⁷³ Researchers report that men were just as likely as women to be victims of sexual abuse, especially in detention and rehabilitation centres. In the majority of documented cases, victims were accused of connections with the LTTE.⁷⁴

Information about the incidence of sexual abuse of children is limited, however allegations have been made that child soldiers were also victims of conflict-related sexual abuse by security forces.⁷⁵ A number of cases have been documented of men who were forcibly recruited to the LTTE as child soldiers and who were later tortured by security forces in rehabilitation camps.⁷⁶

4. Perpetrators

Alleged perpetrators of CARSV extend to a broad range of Sri Lankan security forces.⁷⁷ According to the OISL report, those responsible for sexual violence in the war against the LTTE belonged to the police (CID and TID), National Intelligence Bureau, Military Intelligence, Sri Lankan Army ("SLA") and Navy.⁷⁸ The report also identifies detention centres where violence occurred, for example Joseph Camp in Vavuniya, TID and CID facilities in Colombo and Veppankulam, Boosa Detention Centre, Omanthai Central College, Poonthoddaam Camp, Pulinerwa Camp and Welikanda Rehab Centre.⁷⁹

D. Impact of conflict-related sexual violence in Sri Lanka

Sexual violence has far-reaching negative consequences for victims, families and communities. Survivors suffer physical, psy-

chological, and socio-economic harms as described in IP2. In some instances, rape and sexual violence were perpetrated in front of—or in close proximity to—the victims' children, further aggravating inter-generational trauma.⁸⁰ The social stigmatisation associated with sexual violence (see further Chapter 7: Do No Harm) may curtail victims' opportunities and deprive them of their support structure within the family and the community. In addition, both men and women may be reluctant to seek medical assistance due the stigma attached to sexual violence.

Abortion is illegal in Sri Lanka and for this reason, women survivors often resort to unhealthy and dangerous ways of aborting a fetus resulting from rape. In the event that they are unsuccessful or do not wish to resort to abortion, they may carry out their pregnancy in secret and subsequently give up the baby for adoption. Some women have gone on to have children born as a result of the rape and must then deal with both the psychological and economic stresses this provides for both mother and child, and the social stigma within the community of being a single mother.

CARSV has also been seen in a number of contexts to normalise sexual and gender based violence in the wider community, even after the conflict has ended.⁸¹ This is another reported impact in conflict-affected regions of Sri Lanka, with increased intra-community violence against women, in the form of intimate partner violence and demand for violent sexual acts.⁸² The impact of CARSV may also be felt outside the conflict-affected regions. For example, it has been documented that soldiers traumatised by their combat experience in Sri Lanka are more likely to perpetrate violence against their own family.⁸³



PART III /

ACCOUNTABILITY AVENUES AND REMEDIES CHAPTER 3 / OVERVIEW OF ACCOUNTABILITY AVENUES AND REMEDIES RELATING TO SRI LANKA

This chapter provides a brief overview of the accountability avenues that may be available at the national and international level for victims of CARSV in Sri Lanka.

A. Barriers to justice within Sri Lanka

When considering domestic avenues of accountability and remedy it is important to recognise that significant barriers to justice exist in Sri Lanka for victims of sexual violence, and victims of CARSV in particular.

Some of these barriers are explored more fully in other sections of this Supplement, but they include in particular:

- a high risk of reprisals and intimidation and the risk of political or military interference in cases, and the lack of effective witness protection processes (see further Chapter 8: Safety and Security)
- weakened independence of the judiciary⁸⁴
- a “lack of political will throughout the system to bring alleged state perpetrators of human rights violations to justice, including the police department’s willingness to conduct thorough and impartial investigations, the Attorney General’s Office’s (“AGO’s”) willingness to pursue prosecutions involving state security forces and other state actors, and the willingness of judges adjudicating such cases to ensure fair and timely trials”⁸⁵ (see further this Chapter)
- a lack of capacity within the police force to investigate complex crimes⁸⁶
- inadequate laws to deal with CARSV specifically (see further Chapter 4: Individual Criminal Responsibility)
- difficulty accessing criminal proceedings because of language barriers and insensitive procedures⁸⁷ (see further Chapter 4: Individual Criminal Responsibility)

- the significant risk of re-traumatisation through court proceedings (see further Chapter 4: Individual Criminal Responsibility)
- backlogs in cases leading to long delays (see further in this Chapter). On average, “it takes between 10 to 15 years to conclude a case from the point of initiation of action to the delivery of judgment, without appeal”
- the high cost and complex nature of civil litigation (see further in this Chapter)
- a lack of independence of key quasi-judicial bodies (see further in this Chapter).

As a result of these barriers, to date there is almost complete impunity for crimes, including CARSV.

C. Overview of accountability avenues and remedies for victims

1. Domestic avenues (in Sri Lanka)

The following are potential legal avenues for accountability and remedy for CARSV in Sri Lanka, subject to the significant limitations of domestic remedies briefly outlined above.

a. Judicial

i. Criminal

» A **criminal complaint** can be submitted to the police by any person with information about an offence and investigated by police before being sent for trial (see further Chapter 4: Individual Criminal Responsibility). Note that many sexual offences committed by serving army personnel, including rape, may also be tried by court martial under the Army Act 1949, however this does not exclude the person from being tried and punished by civilian (criminal) courts for civilian offences.⁹⁰

ii. Civil

» The **Protection of Victims of Crime and Witnesses Act, No. 4 of 2015** (“PVCW Act”) provides that a victim of crime has the right to “receive prompt, appropriate and fair redress, including reparation and restitution, for and in consideration of any harm, damage or loss suffered as a result of being a victim of crime”.⁹¹ Under that Act every High Court and Magistrate’s Court may order a convicted perpetrator to pay compensation to the victim of crime or witness, up to a maximum of SRs. 1,000,000 (approximately USD8550). It specifies that when assessing the amount, the court shall consider all relevant information, including a statement from the Government Medical Officer to determine the nature and extent of the “damage, loss or harm that the victim of crime may have suffered”.⁹² The court shall also consider submissions from the victim on the impact of the crime on them, as well as any compensation that has already been paid.⁹³ Receiving criminal compensation under the PVCW Act through the criminal process does not preclude the victim from pursuing a civil claim for damages.⁹⁴

» Sexual violence could also give rise to a civil **claim founded on delict** for a wrong committed by the defendant towards the plaintiff, such as an *aquilian* action which entitles a plaintiff to claim damages for wrongful damage caused to the plaintiff or action *injuriarum* for wrongs inflicted on the plaintiff’s reputation, dignity and status.⁹⁵ Where the alleged perpetrator is a state official the state will also be vicariously liable and can be sued. Damages are awarded at the discretion of the court and may include compensation for physical harm and pain of the mind, including trauma, and humiliation caused.⁹⁶ Where there are long-lasting injuries to the plaintiff which affect the daily routine of the plaintiff, loss of profits may be claimed from the defendant.

iii. Constitutional

» A person who alleges the violation of a **fundamental right** guaranteed by the Constitution may file an application to the Supreme Court seeking remedy within one month of the alleged violation. For cases of sexual violence an applicant could rely on Article 11 (Torture and

Box 2. Fundamental Rights Applications

Victims of human rights violations may file an application to the Supreme Court, which has sole and exclusive jurisdiction to hear and determine questions relating to the infringement or imminent infringement of fundamental rights by executive or administrative action. The fundamental rights application must be filed within one month of the date of infringement of such right. Although this is a significant barrier in most cases of sexual violence, case law has given a broad interpretation to the one month rule. If a person is detained for an extended period of time, the person is not guilty of delay by not filing while imprisoned. In addition, the one month rule has no application if an inquiry into a complaint regarding violation of a fundamental right is pending before the Human Rights Commission.

Once a petition is filed the court must grant leave before it can proceed. If the court is of the view that there is a prima facie case, leave to proceed may be granted. The proceedings require written submissions from both parties and an oral hearing.

Regarding sexual offences, the fundamental right to be invoked is Article 11, which provides that no person shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. The rights protected under Article 11 cannot be restricted. Article 11 of the Constitution has been interpreted to include sexual violence. Alternatively, in cases of sexual harassment/sexual “bribery” not amounting to torture, Article 12(1) has been held to have been violated.

The question of the burden of proof relating to fundamental rights applications is the balance of probability, which is used in civil cases. Accordingly, the court must look for a high degree of probability to establish the facts that have been alleged by the Petitioner.

Relief sought in fundamental rights applications may vary depending on the facts of each case. The Supreme Court has the power to grant relief or make directions that it deems just and equitable. A degree of discretion may be exercised in this respect. Similarly, the amount of compensation awarded to petitioners is also decided by the court. In most cases alleging violation of Article 11, compensation has been ordered to be paid by the individual respondents as well as the state. There is currently a large backlog of cases so there are long delays in cases being heard. In addition, the application has strict time limits and involves “costly, complex litigation”, so this avenue is not available in practice to all applicants.

Box 3. Application of international law by Sri Lankan courts

Sri Lanka is a dualist country. As such, treaties that are ratified by Sri Lanka, and other international law, only apply in domestic law when enacted in domestic legislation.⁹⁹ This notwithstanding, principles of international law have at times been used by the Sri Lankan courts in interpretation of Sri Lankan law.¹⁰⁰

For example, the Supreme Court has made reference to the United Nations Convention Against Torture (“CAT”) when determining a fundamental rights application.¹⁰¹ Jurisprudence of international courts,¹⁰² other jurisdictions and the UN Human Rights Committee have also been referred to.¹⁰³

other cruel, inhuman or degrading treatment or punishment), and/or Article 12(1) (Equality before the law). See further Box 2.

» Courts down to the level of the High Court also have the power to issue **common law writs**, including the writ of *habeas corpus* (which allows review of detention and release if unlawful).⁹⁷ Where proceedings for such writs in the Court of Appeal disclose prima facie evidence of an infringement or imminent infringement of fundamental rights by a party, the Court of Appeal must refer that matter to the Supreme Court for determination.⁹⁸ This could provide another avenue for review of alleged sexual violence. Note however that lawyers have anecdotally stated that clients on whose behalf they are applying for habeas corpus will often ask them **not** to reveal details of torture, including sexual violence, in such proceedings in the belief that such information may in fact harm their case and/or lead to reprisals.

b. Quasi-judicial and non-judicial

» The **Human Rights Commission of Sri Lanka** (“HRCSL”) has (among others) the power to investigate complaints regarding infringements or imminent infringements of fundamental rights, the power to make directions for the payment of compensation¹⁰⁴ and the power to refer a matter to a court.¹⁰⁵ Until 2006 the HRCSL operated relatively independently, but that independence was seriously compromised by appointments outside the Constitutional Council procedure in that year and years following.¹⁰⁶ Although reforms were made to reintroduce independence of appointment in 2015, the HRCSL remains at ‘B’ accreditation status concerning its compliance with the Paris Principles.¹⁰⁷ In the view of the Special Rapporteur on Torture, following his visit to Sri Lanka on 2016, “[t]he National Human Rights Commission was resurrected with a credible composition of members in

2015, but needs to be further strengthened and funded. Proceedings before the Commission hold some promise for the victims, but it does not seem capable of remedying impunity for past and present serious human rights violations, which require effective prosecution”.¹⁰⁸

» The Constitution also provides for a **Parliamentary Commissioner for Administration (Ombudsman)**, who is appointed by the President to investigate and report on “complaints or allegations of the infringement of fundamental rights and other injustices by public officers and officers of public corporations, local authorities and other like institutions”.¹⁰⁹ However, a complainant can only access the Ombudsman through his or her Member of Parliament, and it does not appear that the Ombudsman has played a significant role in the protection of human rights.¹¹⁰

» Throughout the history of the conflict, the Sri Lankan government has established numerous **Commissions of Inquiry** (“COIs”) to investigate particular alleged violations.¹¹¹ Some of these “have been used by governments to expose the abuses of a previous political regime for partisan reasons [while others] have been appointed to inquire into abuses committed during that same administration, to escape accountability”.¹¹² Even where they have functioned relatively independently, their recommendations have resulted in very few prosecutions.¹¹³ The role of the AGO in the operation of COIs and implementation of their recommendations is seen as highly problematic.¹¹⁴

» In future, a quasi-judicial **Office on Reparations and a Truth Commission** may be established (see further Box 4).

» In future, the victim of a domestic crime or a fundamental rights violation (or their family member¹¹⁵) may also be able to apply for a payment from the **Victims of Crime and Witness Assistance and Protection Fund** established under the PVWC Act. This would allow them to claim

Box 4. Transitional justice mechanisms

In connection with Resolution 30/1 of the UN Human Rights Council (“UNHRC”) on Promoting Reconciliation, Accountability and Human Rights in Sri Lanka,¹¹⁶ Sri Lanka committed to an official truth-seeking process for allegations of violations of human rights and humanitarian law committed during the armed conflict. In particular, it committed to establishing an **Office on Missing Persons** to investigate and ascertain the fate and whereabouts of those who went missing in connection with the armed conflict, with political unrest or civil disturbances or as a result of an enforced disappearance. It has also committed to establishing a **Hybrid Court** to try international crimes, a **Truth Commission** and an **Office on Reparations**.

Each of these mechanisms could contribute to establishing responsibility and providing remedy for conflict-related crimes including sexual violence. However, while the Office on Missing Persons Act was finally signed into operation on 15 September 2017,¹¹⁷ the government is yet to publicly unveil its plans for the establishment of a Truth Commission, Office on Reparations or Hybrid Court. This is despite repeated commitments that the Truth Commission legislation would be presented in the first half of 2017¹¹⁸ after consultations were conducted countrywide for the design of the four proposed transitional justice mechanisms.¹¹⁹

compensation for any physical or mental harm or loss or damage to property suffered as a result of the crime or violation.¹²⁰ However, there are serious concerns about the constitution of the Board of the Victim and Witness Protection Authority, which is to administer the Fund, and these concerns are heightened for victims of CARSV (see further Chapter 7: Do No Harm). To date it appears that – three years after the enactment of the law – the Fund has not yet been established.

2. Regional and international human rights mechanisms

Asia does not have a functioning regional human rights oversight mechanism and there are no regional avenues for accountability available.

Sri Lanka is, however, party to nearly all of the core UN human rights treaties and their protocols, including the International Covenant on Civil and Political Rights (“ICCPR”), the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“CAT”), the Con-

vention on the Elimination of All Forms of Discrimination against Women (“CEDAW”), the Convention on the Protection of All Persons from Enforced Disappearance (“CED”) and the Convention on the Rights of the Child (“CRC”).

a. Judicial

» No judicial human rights courts exist at the supra-regional level.

b. Quasi-judicial

» Sri Lanka has accepted the competence of the Human Rights Committee¹²¹ and the Committee on the Elimination of Discrimination Against Women¹²² to hear **individual communications**. In August 2016 the Sri Lankan government also accepted the competence of the Committee Against Torture to hear individual complaints under the CAT.¹²³ However, the impact of a decision from these bodies has been limited by a decision of the Supreme Court in the case of *Singarasa v Attorney General* (see Box 6 below).

Box 5. The importance of documenting harm

As explained in Chapter 6, Section D (Elements to document harm) of IP2, harms caused by CARSV should be comprehensively documented, both to prove certain elements of crimes and in order to facilitate reparations. These include the physical, mental, economic and social harm. As detailed in IP2, physical harm includes immediate and long-term injuries and diseases, including reproductive health problems. It is also important to specify whether the victim has been incapacitated as this would enable dependants, family members or next of kin to obtain compensation directly from the Victim and Witness Protection Authority. Mental harm, on the other hand, includes trauma, depression and mental illnesses. Within Sri Lanka, these may be relevant to claims for criminal compensation or payments from the Fund under the PWVC Act, for civil or fundamental rights claims, or for claims to the proposed Office on Reparations.

Box 6. Singarasa v Attorney General and UN Treaty Body Individual Communications

In 2006 the Sri Lankan Supreme Court ruled that it did not have the power to enforce decisions of the UN Human Rights Committee directly in Sri Lanka.¹²⁴ The Supreme Court held that while the acceptance of the ICCPR and its complaints procedure was valid and bound Sri Lanka to international law, in a dualist country such as Sri Lanka Parliament had to enact legislation to import those obligations into domestic law. Without specific legislation, individuals who had received positive decisions from the treaty bodies did not have a justiciable claim for enforcement before the courts of Sri Lanka.

This means that it is currently not possible to ask the courts of Sri Lanka to directly enforce the decisions of a UN Committee. Nevertheless, Sri Lanka is still bound under international law to uphold its obligations under UN treaties and their complaints procedures in good faith. However, the government's record on voluntary implementation of the Committees' decisions is weak.¹²⁵

Regardless, victims may find other reasons to turn to Committees, including for a sense of vindication, for creation of a lasting record of events, and to use the decisions for international advocacy.

Such human rights proceedings at the international level seek to establish the responsibility of the state, rather than individuals. For further information on these procedures see OHCHR (2013), 'Individual Complaint Procedures under the United Nations Human Rights Treaties', Fact Sheet No. 7, Rev. 2, available at: <http://www.ohchr.org/Documents/Publications/FactSheet7Rev.2.pdf>.

» One of the UNHRC's special procedures, the **UN Working Group on Arbitrary Detention**, also has a quasi-judicial procedure that may be accessed by or on behalf of victims of CARSV who are held in arbitrary detention.¹²⁶

c. Non-judicial

» Sri Lanka has accepted the **inquiry procedures** under the CAT and the CEDAW.¹²⁷ This allows the relevant Committee to initiate a confidential inquiry on receipt of reliable information on serious, grave or systematic violations by a state party of rights in those treaties.

» Sri Lanka must also present **periodic reports** to the Committees monitoring implementation of the UN human rights treaties to which it is party. This provides an opportunity for non-government sources to submit information to the Committee, on which the Committee may question the state during its dialogue on human rights issues.

» Individual "urgent appeals" and "allegation letters" can be submitted to any of the **Special Rapporteurs and Working Group** processes (for further information on these procedures see IP2, page 35).

» The **UN Human Rights Council** has provided other forums for scrutiny of the actions of the Sri Lankan government, for example through its universal periodic review ("UPR") process and convening of a special session on Sri Lanka in 2009.¹²⁸ The UNHRC also has a confidential complaints procedure to address "consistent patterns of gross and reliably attested violations of all human rights and all fundamental freedoms". Complaints can be submitted by "individuals, groups, or non-governmental organizations that claim to be victims of human rights violations or that have direct, reliable knowledge of such violations".¹²⁹

3. Investigative and fact-finding bodies

» The UN has established a number of investigative and fact-finding bodies in relation to the conflict in Sri Lanka (including the Secretary-General's Panel of Experts on Accountability in Sri Lanka (2011) and the OHCHR Investigation on Sri Lanka (2015)). There is the possibility that a further body might be created in the future, however at present this seems very unlikely.

4. International and Hybrid Courts and Tribunals

» Sri Lanka is not a state party to the Rome Statute of the **International Criminal Court** ("ICC"). In order to trigger ICC jurisdiction, Sri Lanka would need to ratify the Rome Statute (although that ratification would not enable the ICC to prosecute crimes committed prior to the date on which the Rome Statute enters into force for Sri Lanka, that is, ratification will not apply retrospectively), the UN Security Council would need to refer the situation to

the Office of the Prosecutor (which referral can have retroactive effect until 1 July 2002 when the Rome Statute entered into force), or Sri Lanka would have to make an Article 12(3) Rome Statute declaration accepting jurisdiction over crimes committed in Sri Lanka or over alleged Sri Lankan perpetrators (which declaration can have retroactive effect until 1 July 2002).

Another route to jurisdiction of the ICC may be if an alleged perpetrator is a national or dual national of a third country. If that third country is a state party or files an Article 12(3) declaration in relation to alleged crimes committed from 1 July 2002 by the alleged perpetrator in Sri Lanka, the ICC would have jurisdiction to investigate and prosecute that individual.

» The establishment of a **hybrid court** is however seriously considered in Sri Lanka. This was one of the four mechanisms that Sri Lanka committed to establish pursuant to UNHRC Resolution 30/1 (see above Box 4). The resolution referred to “a judicial mechanism with a special counsel to investigate allegations of violations and abuses of human rights and violations of international humanitarian law”, and affirmed “the importance of participation in a Sri Lankan judicial mechanism, including the special counsel’s office, of Commonwealth and other foreign judges, defence lawyers and authorised prosecutors and investigators”.¹³⁰ Proposals to establish such a hybrid court have been put forward by civil society.¹³¹ Various options have been studied by a working group constituted by the Prime Minister to devise the framework for the four promised transitional justice mechanisms. However, political opposition to the participation

of foreign judges in the process has thus far stalled any progress on the establishment of the court.¹³²

5. Avenues for interstate disputes

» It would be possible for a third state to bring a case against Sri Lanka before the **International Court of Justice**, for example based on a failure to fulfil obligations under the CAT to prosecute or extradite alleged perpetrators of torture.¹³³ This is not an individual remedy, although victims may in other ways benefit from such proceedings.

6. Proceedings in third countries – extra-territorial jurisdiction including universal jurisdiction¹³⁴

» Universal jurisdiction provisions in third countries may be used to bring alleged Sri Lankan perpetrators to trial, although most countries require the presence of the accused on their territory in order to begin a prosecution (or in some cases to open an investigation). Decisions on whether to proceed with the prosecution will also factor in the possibility of obtaining relevant evidence, including from Sri Lankan authorities. In this respect, it must be noted that the Sri Lankan government has made it clear that it will not cooperate with such prosecutions. See further Box 7, below.

» In addition, in some countries it is possible to bring a civil claim for damages against an individual or state for human rights violations committed in another country, although such claims are often barred by principles of state and official immunity.

Box 7. The use of universal jurisdiction for criminal accountability

In the absence of progress on accountability within Sri Lanka, calls for the use of universal jurisdiction provisions in third countries are increasing, including from the UN High Commissioner for Human Rights.¹³⁵ As IP2 explains, “[i]n its broadest form, the principle of universal jurisdiction allows the national authorities of any state to investigate and prosecute individuals suspected of certain crimes under international law such as war crimes, crimes against humanity, genocide and torture, regardless of where these crimes took place and regardless of the nationality or residency of the victims or suspects”.¹³⁶

This strategy was used, for example, by the International Truth and Justice Project (“ITJP”), which in August 2017 filed criminal complaints in Brazil and Colombia against **Jagath Jayasuriya**, a former Sri Lanka army general, for alleged war crimes and human rights violations. Jayasuriya, who was at the time Sri Lanka’s ambassador to South America, returned to Sri Lanka immediately after the filing of the charges.¹³⁷ However, the government of Sri Lanka has made it clear that it will do all in its power to defend the military from such actions. Of the Jayasuriya complaints, President Sirisena said: “I state very clearly that I will not allow anyone in the world to touch Jagath Jayasuriya or any other military chief or any war hero in this country”.¹³⁸

PART III /

ACCOUNTABILITY AVENUES AND REMEDIES

CHAPTER 3 / OVERVIEW OF ACCOUNTABILITY AVENUES AND REMEDIES RELATING TO SRI LANKA

D. Table of accountability avenues

| Domestic level | | |
|--|--|---|
| Individual Responsibility | State responsibility | Both |
| <p>Judicial</p> <p>Criminal prosecutions – in Sri Lanka or third country exercising extraterritorial jurisdiction</p> <p>Civil claim – in Sri Lanka or third country exercising extraterritorial jurisdiction</p> <p>Military court</p> | <p>Judicial</p> <p>Constitutional Writ</p> <p>Quasi-judicial</p> <p><i>Proposed Office for Reparations</i></p> | <p>Judicial</p> <p>Fundamental Rights Petition</p> <p>Quasi-judicial and non-judicial</p> <p>National Human Rights Commission</p> <p>Ombudsman</p> <p>National COI</p> <p>Office for Missing Persons</p> <p><i>Proposed Truth and Reconciliation Commission</i></p> <p><i>Victims of Crime and Witness Protection Compensation Fund</i></p> |
| International level | | |
| Individual Responsibility | State responsibility | Both |
| <p>Judicial</p> <p>International Criminal Court (UN Security Council referral, self-referral (though highly unlikely), or referral by another state for investigation in relation to one of its nationals or dual nationals)</p> | <p>Judicial</p> <p>International Court of Justice (inter-state case)</p> <p>Quasi-Judicial and non-judicial</p> <p>UN treaty bodies individual complaints mechanisms (HRC, CAT, CEDAW Committee)</p> <p>UN Working Group on Arbitrary Detention</p> <p>UN Special Procedures (special rapporteurs and working groups)¹³⁹</p> <p>UPR</p> <p>UN treaty body periodic reporting and inquiry procedures</p> <p>UNHRC complaints procedure</p> | <p>Non-judicial</p> <p>International COI and fact-finding missions</p> |
| Internationalised and hybrid courts and tribunals | | |
| Individual Responsibility | State responsibility | Both |
| <p>Judicial</p> <p><i>Proposed hybrid criminal court</i></p> | | |

CHAPTER 4 / INDIVIDUAL CRIMINAL RESPONSIBILITY

Despite the current significant barriers to achieving individual criminal accountability in Sri Lanka (see Chapter 3: Overview of Accountability Avenues and Remedies Relating to Sri Lanka, Part A, and this Chapter, Part B (Prosecution and punishment of CARSV crimes in practice)), CARSV cases may potentially be prosecuted under domestic law. The following section briefly details the relevant provisions under domestic criminal law and highlights a number of shortcomings in light of international standards. This section serves two purposes: (i) it outlines an agenda for legislative reform, and (ii) it identifies avenues for criminal accountability in the event circumstances change allowing for greater accountability domestically. Note that the legislative framework outlined in the following chapter may change. It is therefore important that documenters check whether the information contained is up to date.

A. Legal framework

While international law binds Sri Lanka, it has no direct effect on domestic law unless enacted into law by Parliament.¹⁴⁰ Thus, a criminal case pursued in Sri Lanka must be brought under domestic Sri Lankan criminal law. Despite commitments made by the government to the UNHRC,¹⁴¹ Sri Lankan domestic law does not specifically criminalise genocide, crimes against humanity, or war crimes committed in the context of a non-international armed conflict.¹⁴² Therefore, criminal charges for acts amounting to international crimes (apart from war crimes committed in international armed conflict) can only be initiated on the basis of domestic crimes and modes of responsibility.

Note that if Sri Lanka were to uphold its commitment to criminalise other international crimes both international law and Sri Lankan law would allow it to do so retrospectively.¹⁴³

B. Prosecution and punishment of CARSV crimes in practice

The criminal law has not provided a satisfactory avenue for justice for sexual violence victims in Sri Lanka, including victims of CARSV.

Although Sri Lanka's Penal Code criminalises a number of sexual offences, complaints to the police seldom lead to prosecution, let alone conviction, of alleged offenders. Police statistics indicate for example that in 2011, only 59 complaints were filed by the police of a total of 408 reported cases of rape or incest.¹⁴⁴

Furthermore, the number of convictions each year ranges between zero and seven. The vast majority of cases are pending investigation or pending in the Magistrate's Court, High Court or Attorney General's department.¹⁴⁵ Many cases of sexual violence are also dropped by victims, presumably due to inordinate delays, or because the criminal process could lead to re-traumatisation (see below Chapter 7: Do No Harm). In addition, even in cases where the accused is found guilty, judges often deliver suspended sentences.¹⁴⁶

These difficulties are exacerbated in relation to CARSV where alleged perpetrators often belong to powerful state institutions, in particular the military. The risks associated with making complaints against such officials are real, and genuine fears for their safety dissuade victims from pursuing complaints. In addition, state institutions have been almost universally unwilling to effectively prosecute such crimes.¹⁴⁷

Nevertheless, there have been some limited successes (albeit marred by intimidation and harassment of the victims and long delays).¹⁴⁸ For example, in October 2015 the Jaffna High Court found four soldiers guilty of the gang rape of one Tamil woman and sexual assault of another in 2010 and sentenced them to 25 years imprisonment (Vishvamadu case). It also directed them to pay compensation to the victims.¹⁴⁹ It is possible that in some cases pursuing criminal justice now might be considered realistic and appropriate. Circumstances in the future may also change, making domestic prosecutions a more viable option. It is therefore important that documenters are aware of the domestic legal landscape. This section sets out the potential options for seeking justice for such crimes as well as possible barriers and limitations to be aware of.

C. Sexual violence crimes under Sri Lankan Law

The sexual violence crimes captured in Sri Lankan law differ greatly from crimes recognised under international law. In particular, specific elements that justify the qualification of a crime as an international crime—i.e. the contextual elements for war crimes, crimes against humanity and genocide—are not reflected in domestic crimes. In addition, many of these domestic crimes are gender-specific and reflect social attitudes and values in relation to gender norms. As a result, many of the domestic crimes do not apply to both male and female victims

Box 8. Courts martial

Many sexual offences committed by serving army personnel, including rape, may also be tried by court martial under the Army Act 1949. However, under section 77 of the Army Act civilian courts have absolute concurrent jurisdiction to try and punish any person subject to military law for a civil offence (including those discussed in this chapter). However, if the person has already been punished for the same offence by court martial that punishment should be taken into account in sentencing.¹⁵⁰ The Army Act also imposes duties on commanding officers to cooperate with courts and police in the surrender and arrest of officers or soldiers under their command who are subject to civil criminal proceedings.¹⁵¹

Nevertheless, courts martial have been used in the past to avoid accountability for gross human rights violations. For example, “[i]n the Kokkadicholai incident, eighteen Sinhalese soldiers killed sixty-seven Tamil villagers. A Commission of Inquiry determined that the offences were punishable under the Penal Code, but should be tried before a Military Tribunal. A Military Court subsequently tried the offences and acquitted seventeen of the eighteen Sinhalese army men, finding the officer in charge guilty for failing to control his subordinates and improperly disposing of dead bodies. The officer-in-charge was subsequently dismissed”.¹⁵²

or perpetrators. This is also a significant difference compared to most international crimes relating to sexual violence.

1. Crimes relevant to CARSV under Sri Lankan law

The Penal Code of Sri Lanka, based on the colonial Indian penal code, forms the core of substantive criminal law in Sri Lanka. The following domestic crimes may be particularly relevant to CARSV.

- Sexual harassment (s. 345) – including verbal or physical harassment
- Rape (s. 363) – but covering only rape of a woman by a man
- Grave sexual abuse (s. 365B) – covering other forms of sexual violence, but requires defendant to have intended sexual gratification of themselves
- Trafficking of a person (s. 360C)
- Sexual exploitation of children (s. 360B)

Annex One reproduces relevant parts of these as well as other relevant provisions of the Penal Code, along with notes on important elements of these crimes and a comparison with underlying elements of international crimes where relevant.

In addition, the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment Or Punishment Act 1984 (“Convention Against Torture Act”) criminalises torture, defined largely in accordance with the CAT definition. The offence may be punished by imprisonment of up to ten years.¹⁵³ This definition would cover many forms of sexual violence including rape committed by state officials such as army personnel, military intelligence and police officers.¹⁵⁴

The High Court has jurisdiction over cases filed under the Convention against Torture Act.¹⁵⁵ However, it is notable that since 2012 only 17 cases have been filed under the Act and only two have resulted in convictions.¹⁵⁶ Complaints are sent to the Attorney-General, who instructs the Special Investigation Unit, under the supervision of the Inspector General of Police, to investigate the alleged use of torture. The Attorney-General has discretionary power and decides whether to indict. Negative decisions may be challenged by written application to the Appeals Court. As the Special Rapporteur on Torture noted in his report of his visit to Sri Lanka in 2016, “[t]his discretionary power represents a significant weakness of the system: while a number of indictments have been filed by the Attorney General under the Act, there have been few convictions”.¹⁵⁷

Box 9. Limitations of using “ordinary” crimes

Many of the sexual violence crimes recognised under Sri Lankan law would, if committed in the context of and linked to an armed conflict (in the case of war crimes), or if linked to and forming part of a widespread or systematic attack directed against a civilian population (in the case of crimes against humanity), constitute international crimes. However, as explained above, prosecution of these crimes in Sri Lanka is not possible unless they are specifically criminalised with retroactive effect under domestic law. This is problematic for a number of reasons.

First, the definition of sexual violence crimes under Sri Lankan law is in many cases gendered and not in accordance with international norms. For example, under Sri Lankan law, rape can only be committed if the perpetrator is a man and the victim a woman. It also extends only to vaginal penetration by the penis, and does not cover oral or anal rape.¹⁵⁸ This very restrictive definition departs from the definition of rape under international criminal law (see further IP2, page 44).¹⁵⁹ Therefore an act that would constitute rape, as an underlying element of a crime against humanity or a war crime, would not necessarily be characterised as rape under Sri Lankan law. The many allegations of forced penetration (either oral or anal) of men in custody in connection with the conflict would, for example, not be qualified as rape under Sri Lankan criminal law.

Second, ordinary sexual offences under Sri Lankan law do not recognise the specific context in which these crimes were committed, be it the context of an armed conflict or that of a widespread or systematic attack directed against a civilian population. This is problematic because international and ordinary crimes are not only different in nature, they also protect different values.¹⁶⁰ As such, the prosecution of CARSV as international crimes also “lies precisely in stigmatizing conduct which has infringed a value fundamental not merely to a given society, but to humanity as a whole [...]”.¹⁶¹ Prosecution of these crimes as ordinary crimes fails to recognise the gravity of the crimes and that they have been committed as part of a policy, fails to recognise the link between these crimes and other related international crimes, and may make it more difficult to link senior officials at the top of the chain of command to the crimes.¹⁶² This may also make it more difficult to prevent future crimes by missing opportunities for wider reform.¹⁶³

2. Modes of liability

Criminal law in Sri Lanka recognises two main modes by which liability for criminal offences may be attributed to a person. These are:

• Common intention

The Penal Code provides that where a criminal act is done by several persons in furtherance of a common intention of all such persons, each is liable as if they had committed the act alone.¹⁶⁴ Similarly, when a criminal act requires specific intention, persons joining in the act with the same knowledge and intention are considered to be liable for the act as if it was done by that person alone.¹⁶⁵

• Aiding and abetting

Abetment involves (i) instigating a person to do a criminal act, (ii) engaging in a conspiracy for doing such an act or (iii) inten-

tionally aiding a criminal act by actions or omissions.¹⁶⁶ Instigation includes where a person who is required to disclose a fact willfully misrepresents or conceals such fact in an attempt to cause the criminal act to be done.

In addition, the Penal Code includes the separate crime of **conspiracy**, where two or more persons agree to commit or abet an offence or act together with a common purpose to commit or abet an offence.¹⁶⁷ A conspiracy may arise with or without prior deliberation between the offenders. If two or more persons act in furtherance of a conspiracy, each of them is guilty of the offence of conspiracy to commit or abet the offence.¹⁶⁸ Proof of knowledge of the common plot is necessary; however, all conspirators need not have equal knowledge of the plot.¹⁶⁹

3. Possible defences and excuses

Defences under international law are narrowly defined (see, for example, Rome Statute article 31, but note that ICC law

Box 10. The need to reform modes of liability

UNHRC Resolution 30/1 recommends reforming Sri Lanka’s domestic laws to enable the prosecution of “those most responsible for the full range of crimes under the general principles of law recognized by the community of nations”.¹⁷⁰ This is particularly important because Sri Lanka’s Penal Code does not include other modes of responsibility recognised under international law. These modes of responsibility—including ordering, command responsibility and superior responsibility and indirect perpetration—are necessary to enable the prosecution of those most responsible for international crimes.¹⁷¹ The other modes of responsibility provided for by the Rome Statute of the ICC, including soliciting/ inducing, aiding and abetting, co-perpetration, and common purpose liability are adequately covered by modes of responsibility under Sri Lankan law.

Ordering is provided for by 25 (3) (b) of the Rome Statute. In several Sri Lankan cases, those who gave orders for the commission of a crime have been indicted and convicted¹⁷² for conspiracy, abetment and/or common intention. However, it is essential to specifically incorporate this mode of responsibility under Sri Lankan law to facilitate the prosecution of those who ordered the perpetration of a crime.¹⁷³

Command and superior responsibility are defined in articles 28 (a) and (b) of the Rome Statute. These modes of responsibility are not recognised under Sri Lankan law. However, in some cases, Sri Lankan courts have held an accused responsible on the basis of abetting for authorising or failing to prevent acts contravening criminal law despite being aware of them.¹⁷⁴ Nonetheless, this does not cover the full extent of command and superior responsibility under international law, which unlike Sri Lankan law, do not require actual knowledge.

Under ICC jurisprudence, indirect perpetration covers situations for which there exists an organised apparatus of power, within which the direct and indirect perpetrators operate, and which enables the indirect perpetrator to secure the commission of the crimes.¹⁷⁵ The *actus reus* is constituted by the control that the indirect perpetrator exercises over the direct perpetrator or over the structure to which the latter belongs. This is not covered by either common intention or conspiracy under Sri Lankan law.

may differ from general international law and the law of other international jurisdictions on aspects of this area of law).

Very few defences under Sri Lankan criminal law are relevant to sexual offences. The defence of **grave and sudden provocation** may apply to cases of assault or criminal force with the intent to dishonour a person, but not to other offences potentially involving a sexual element.¹⁷⁶

Other excuses that may potentially be relevant are **duress** (under threat causing apprehension of instant death),¹⁷⁷ **insanity**¹⁷⁸ and **intoxication**,¹⁷⁹ although this latter excuse is not available if a person voluntarily intoxicated themselves.

The **defence of mistake of fact in good faith**¹⁸⁰ might also be raised in relation to sexual violence crimes and other crimes related to them, such as murder. Interestingly, the first illustration contained in the section refers specifically to actions by the military: “A, a soldier, fires on a mob by the order of his superior officer in conformity with the commands of the law. A has committed no offence”. The Court of Criminal Appeal has, however, held that no soldier could obey an order of his superior and plead a good faith defence if the order is manifestly and obviously illegal (in that case an order to kill a person detained in custody in the context of civil war).¹⁸¹

4. Child offenders

No minimum age of criminal responsibility exists under international law, because countries differ as to what the minimum age should be.¹⁸² However, the ICRC considers that states should never set the age of criminal responsibility below 12 years old.¹⁸³

In Sri Lanka, general exceptions in the Penal Code provide that a child below the age of eight commits no offence.¹⁸⁴ Additionally, a child above the age of eight but below the age of twelve is not held criminally responsible if they did not have sufficient maturity to understand the nature and consequences of their conduct.¹⁸⁵

5. Prescription

Under Sri Lankan law, the period of prescription for all crimes apart from murder and treason is twenty years.¹⁸⁶ Therefore, although murder and treason have no statute of limitation, prosecution of any other crime is only possible up to twenty years from its commission.

This differs from international law, where prescription does not apply to international crimes. Rome Statute article 29 is an example.

6. Immunities, other bars to the exercise of criminal jurisdiction and other grounds for excluding criminal liability

The Prevention of Terrorism (Temporary Provisions) Act 1979 (“PTA”), which gives broad search, arrest and detention powers (see further Chapter 7: Do No Harm), provides a broad immunity from criminal or civil proceedings to officials acting under it “in good faith”.¹⁸⁷ Although it is difficult to see how such a defence could be raised in proceedings for, e.g. rape, it could possibly be argued in other forms of sexual violence such as harassment, and in relation to other crimes connected to CARSV. The PTA does not define what amounts to “good faith”, leaving open the possibility of a broad interpretation.

The Code of Criminal Procedure (“CCP”) also provides state officials with immunity from criminal prosecution for actions taken in good faith in the discharge of their duties concerning dispersal of unlawful assemblies.¹⁸⁸ Other legislation that provides immunities to officials are the Indemnity Act No. 20 of 1982 (no longer in force) and Public Security Ordinance No. 25 of 1947 (“PSO”).¹⁸⁹

Immunities from criminal and civil suit are also available to the President of Sri Lanka while he or she holds office for any act done in his or her official or private capacity.¹⁹⁰ However, fundamental rights applications may still be brought against the Attorney-General in relation to acts done by the President during his or her time in office.¹⁹¹

Additionally, statements of a Member of Parliament given in Parliament or to a committee¹⁹² cannot be used to institute criminal proceedings against such member.¹⁹³

International law on other bars to the exercise of criminal jurisdiction, on other grounds for excluding criminal liability and on immunities generally is stricter than Sri Lankan law. For examples, see Rome Statute articles 27 (on irrelevance of official capacity) and 33 (on superior orders and prescription of law), but note that ICC law may differ from general international law and the law of other international jurisdictions on aspects of these areas of law.

D. Rules of procedure and evidence

1. Consent

As explained in IP2, jurisprudence of international criminal courts has developed “to protect victims from questions relating to consent: the emphasis has shifted away from having to prove an absence of consent towards instead proving the presence of coercive circumstances.”¹⁹⁴

These principles are not specifically recognised in domestic law, except in certain specific circumstances (such as rape in detention). In addition, no rules of evidence exist to protect victims from specific lines of questioning or introduction of specific evidence about consent.

Under Sri Lankan law consent is therefore primarily a substantive, rather than evidentiary issue, as it goes to the elements of the crime itself. Lack of consent need not be proved where sexual intercourse takes place with a minor or in lawful or unlawful detention.¹⁹⁵ In addition, apparent consent is irrelevant if sexual intercourse took place as a result of force, intimidation or threats of detention, harm or death.¹⁹⁶ These circumstances may be particularly relevant in cases of CARSV.

In other cases, questions of consent will be critical to a prosecution. Consent in cases of rape has been interpreted by courts to mean express and implied consent.¹⁹⁷ Consent of persons of unsound mind, intoxicated persons or those unable to un-

derstand the nature and consequences of such consent is not considered consent.¹⁹⁸

With respect to the age of consent, there is a distinction between the offences of rape and other sexual offences. Consent is irrelevant with regard to sexual intercourse with a girl less than 16 years; any such intercourse amounts to the crime of statutory rape.¹⁹⁹ However, other offences which contain a sexual element fix the age of consent at 18 years old.²⁰⁰

2. Corroboration

The IP2 explains how “[u]nder principles of international criminal procedure, no corroboration is required in cases of sexual violence”. In practice, this means that “provided it is credible and reliable—a victim’s own testimony can be sufficient evidence of the commission of a crime of sexual violence, in the absence of any other corroboration from witnesses, documents, medical reports, photos, or any other potentially corroborative evidence.”²⁰¹

Formally, Sri Lankan law adopts the same position: courts have held that the “refusal to act on the testimony of a victim of sexual assault in the absence of corroboration as a rule is adding insult to injury.”²⁰² Victims’ testimony in rape cases need not be corroborated by other evidence to be admissible.²⁰³ However, the burden of proof remains with the prosecution to prove the absence of consent of the victim. In this respect, contradicting oral evidence on essential facts may cause the victim’s testimony to be regarded as unworthy of credit.²⁰⁴

The Penal Code explicitly states that “[e]vidence of resistance such as physical injuries to the body is not essential to prove that sexual intercourse took place without consent”²⁰⁵ and the courts have recognised that rape can occur without causing any injury.²⁰⁶ However in practice, medical evidence has been considered crucial in some cases. For example, in one case the court found that acting on the basis of an uncorroborated testimony of a victim of rape would be dangerous, particularly when the medical evidence did not corroborate her testimony.²⁰⁷ Such an approach by judges can present a very significant barrier to jus-

Box 11. Prosecution of historic crimes on the basis of testimonial evidence

IP2 details how CARSV crimes have been successfully prosecuted decades after being committed.²⁰⁸ Examples include the prosecution of sexual violence crimes in Bosnia and Herzegovina more than 20 years after the events,²⁰⁹ and the conviction of individuals for crimes against humanity, including rape, in Argentina, more than 30 years after their commission.²¹⁰ As IP2 notes, often, due to the disappearance of forensic evidence over time, testimonial evidence is the only evidence tendered in such cases, although “the scene of a crime or violation should always be examined, if possible, at a very minimum to corroborate the witness’ description. In addition, forensic evidence has in some instances been found at scenes of alleged crimes many years after the event.”²¹¹

Box 12. Conflict of Interest of the AGO

According to the International Commission of Jurists (“ICJ”): “There is an inherent structural tension in the roles of the AGO in Sri Lanka, as with most AG’s offices in other countries, as it acts as both the chief legal advisor to and defender of the state in respect of all legal matters, while also acting as the chief prosecutor in all criminal cases. In practice, this tension has manifested in Sri Lanka in a lack of will to prosecute state actors in human rights cases, particularly those relating to the armed conflict”.²²²

tice, particularly in relation to cases of rape committed many years before investigation and trial.

3. Procedure

As is the case with any crime, offences involving sexual elements require a **complaint** to be made by a person with knowledge of an offence.²¹² The police reduce the complaint into writing and read it to the informant.²¹³ This may form a first hurdle for non-Sinhala speaking victims as there are not enough Tamil-speaking police officers and very few Tamil speaking female police officers.²¹⁴ These language barriers may also pose problems for the prosecution, for example where mistakes are made in the recording of witness statements.²¹⁵

The investigation may require **examination of a victim by a medical practitioner**. The consent of the victim must be obtained in such instances.²¹⁶ A Government Medical Officer may conduct the examination.²¹⁷ The report of such examination must be given to the police officer conducting the investigation.²¹⁸ A victim who does not consent to medical examination may be compelled by order of the Magistrate to submit to medical examination by the Government Medical Officer.²¹⁹ A Magistrate is required to assist in the investigation by issuing necessary orders.²²⁰

Prosecutions of criminal cases are led by the AGO on behalf of the state. This is a significant barrier to justice in conflict-related cases as the AGO has become increasingly politicised and unwilling to prosecute conflict-related cases.²²¹

The **Magistrate’s Court** exercises jurisdiction over criminal cases that involve fines up to Rs. 1500 or prison sentences of up to two years.²²³ Trials are conducted without a jury, and a Magistrate delivers the verdict and the sentence. The **High Court** exercises original jurisdiction for all matters involving a fine of over Rs. 1500 or imprisonment for a period longer than two years. The High Court therefore has original jurisdiction over all of the key crimes of sexual violence listed above.²²⁴

4. Protective measures

Once a criminal complaint is made, the police should commence an investigation.²²⁵ From this point onwards a victim is treated as a witness to the crime. The participation of a victim (or any other witness) in the criminal process includes engaging in the identification of the alleged offender at an identification parade.²²⁶ In cases involving sexual violence, the victim (witness) is permitted to make the identification from a concealed place.²²⁷ In cases involving child witnesses or victims, investigations may be carried out by a Special Investigation Police Unit. Police officers from this unit have been specially trained by the National Child Protection Authority (“NCPA”) to investigate and handle cases involving children. For example, these officers do not wear a uniform so as to avoid intimidating children.

Once a trial begins, victims may be called as witnesses. The witness is subject to examination in chief,²²⁸ cross examination²²⁹ and re-examination.²³⁰ Specific protection measures may be ordered to prevent re-traumatisation of the witness during court testimony. The adoption of such measures is discretionary and depends on the circumstances of each case.

Special protection measures are also in place for children to avoid re-traumatisation prior to and during trial. Considering the impact judicial processes have on children, most cases involving children are held *in camera*. Children are not usually brought to the witness box in open court and made to testify. Instead, they are heard in the judge’s chamber. In addition, for offenses relating to child abuse, a preliminary interview between an adult and the child that relates to any matter in issue in the proceedings may be admitted as direct evidence.²³¹ Therefore, the child need not testify in court or even in the judge’s chamber. Instead, the child is permitted to give evidence in an environment conducive to the child. Such an interview may be conducted by the NCPA.



PART IV /

DOCUMENTATION IN PRACTICE: PREPARATION

CHAPTER 7 / DO NO HARM

Chapter 7 of IP2 explains that the key ethical principle at the heart of documentation of CARSV is “Do No Harm”.²³² The human rights environment remains difficult in Sri Lanka and conflict-related sexual violence is a particularly sensitive topic. For this reason documentation of these crimes may expose victims and witnesses to a range of potential harm, which documenters have an ethical responsibility to avoid or prevent.

A. Potential harm

In Sri Lanka, the risk of harm to which victims or witnesses of sexual violence are exposed when deciding to document their experience varies greatly depending on their ethnicity and background, on the identity of the perpetrator or the institution that perpetrator belongs to as well as the purpose for which the victims’ case is being documented. Careful preparation of the documentation plan will assist in making an individualised risk assessment (see Section C below). Notwithstanding the need for an individualised risk assessment, the following describes the types of harm that are most likely to materialise due to the documentation of conflict-related sexual violence in Sri Lanka.

1. Stigma

In Sri Lanka women (and men) across all ethnic communities who are perceived to transgress cultural norms, including relating to sex (regardless of whether it is sex against their will or not), face higher risks of stigmatisation and violence. Abuse and harassment of such individuals are often excused and tolerated by the community and police.²³³ Being known as a survivor of sexual violence may have serious consequences for women and men in Sri Lanka. Like in many other countries and contexts, victims of sexual violence are often reluctant to report the crime for fear of being socially stigmatised by the community. In Sri Lanka, while both male and female victims fear social stigmatisation, men are even more reluctant than women to report sexual violence for fear of being regarded as unmanly, weak or homosexual.²³⁴ Women, on the other hand, may be reluctant to report sexual vio-

lence for fear of being labelled as promiscuous or prostitutes and compromising their own, their daughters’ or siblings’ chances of a “good” marriage.²³⁵

The fear of social stigma can be particularly high for single women and former female combatants who may already be stigmatised by the community on other accounts.²³⁶

2. Reprisals and intimidation

Intimidation and reprisals in sexual violence cases otherwise referred to as ‘silencing attacks’ are commonplace.²³⁷ These include direct threats to the victims and their relatives, as well as physical attacks.²³⁸

Therefore, victims of sexual violence in conflict are also afraid to report these crimes for fear of reprisals and intimidation from the perpetrator, the organisation he or she belongs to or other institutions.²³⁹ Many victims continue to live in highly militarised areas, where surveillance and interference by the army in all aspects of civilian life are commonplace, and where grave human rights violations including abductions, illegal detention, torture and sexual violence at the hands of state officials allegedly continue.²⁴⁰

3. Criminal charges

In addition to the stigma attached to sexual violence, the criminalisation of homosexual sex as an “unnatural offence” under the Penal Code also represents a risk for men who wish to report sexual violence perpetrated by other men.²⁴¹ The offence is committed regardless of consent between the parties and regardless of whether it is committed in public or private. The Penal Code further criminalises acts of ‘gross indecency’.²⁴² For further information see Annex One.

Unnatural offences are punished with imprisonment of up to ten years with a fine.²⁴³ If the offence is committed against a person below the age of sixteen by a person over eighteen the minimum period of imprisonment is ten years and up to twenty years²⁴⁴ Gross indecency is punished with

imprisonment of up to two years or with a fine or both.²⁴⁵ When gross indecency is between a person over eighteen and another below sixteen, a minimum sentence of ten years rigorous imprisonment is imposed.²⁴⁶

There is a dearth of case law pertaining to these offences. In fact, there have been very few convictions on the basis of these provisions for several decades. Recently, the Supreme Court held that where oral sex between two consenting adults is committed, a custodial sentence is not warranted.²⁴⁷ Taking cognizance of the facts of the case, the Supreme Court also held that the sentence imposed for the offence can be suspended. Nonetheless, these provisions are still perceived as a risk and discourage male survivors of sexual violence from reporting it.

4. Re-traumatisation

Re-traumatisation is also a major risk associated with the documentation of sexual violence and with the decision to seek redress for these crimes. In this respect, best practices outlined at pages 92-102 of IP2 can help mitigate the risk of re-traumatisation during and after the interview (see below, Section C). However, the risk of re-traumatisation is also present if victims approach state institutions in an attempt to seek redress for the crime.

The first step towards seeking redress for sexual violence in conflict is generally the filing of a complaint with the police. This is often traumatic for the victim as police officials are not always sensitive in their line of questioning and sometimes trivialise matters of violence against women.²⁴⁸ In addition, as noted above, there are very few Tamil-speaking police officers and even fewer female Tamil-speaking officers, so non-Sinhala speaking victims may not be able to communicate their complaint.²⁴⁹

The judicial process, and especially criminal trials may also be traumatic for victims of sexual violence. Cross-examination is often hostile and humiliating with lines of questioning seeking to tarnish the reputation of the victim. As a result participation in a court process is often traumatic and painful for the victim.²⁵⁰

Steps must be taken to anticipate and mitigate risks of re-traumatisation during the documentation process, and the risk of re-traumatisation by state institutions should be considered carefully, and addressed where possible, before taking steps to engage with such institutions.

B. Informed consent

As stressed in Chapter 7 of IP2 (Do No Harm), it is a crucial ethical obligation to obtain the informed consent of the victim or wit-

ness before commencing the documentation process (see pages 89-92). However, in the present context in Sri Lanka, obtaining fully informed consent from victims regarding the use of the information documented in the future may prove difficult. This is because many of the transitional justice institutions promised by the government to address conflict-related violence are yet to be designed. At this stage, victims are thus unable to make an informed decision regarding the participation in a process the contours of which are still undetermined.

In addition, the current security context is very fluid (see further Chapter 8: Safety and Security). This also limits victims' ability to consent to the future sharing and use of their information. It is crucial that documenters genuinely recognise these challenges and the limitations they pose regarding informed consent, and have in place measures to seek additional consent for use of the information in any future mechanisms.

Experience has shown that when victims are introduced to documenters by a trusted intermediary, they readily give consent without fully understanding the terms of their commitment. The relative lack of understanding regarding the various avenues for redress and associated risks must not be exploited at the expense of victims' safety and well-being.

Ultimately, "the decision to seek justice or to stay silent, to withhold all or part of the truth, or lay oneself open to judicial scrutiny, is a calculated one based on context: perceived power dynamics and the risks posed by disclosure. Some survivors and victims' families might seek public acknowledgement, apologies, restitution or compensation, while others may demand satisfaction and guarantees of non-repetition that include prosecution of perpetrators. They could seek a combination of any or all of these measures. They may be ready immediately, or may want to hold off disclosure for some time in the future when conditions might be more conducive to a positive outcome".²⁵¹ The wishes of the victim must be fully respected in this respect, while ensuring that they understand the possible consequences of those decisions, for example on potential future prosecutions.

C. Mitigating harm

External risks associated with the documentation of sexual violence crimes can be mitigated through careful planning of the investigation and interviews, ensuring the confidentiality of the information and referring the victims to appropriate institutions that may provide protection or support. However, when referral is sought, great care should be taken to ensure the safety of particular referral mechanisms.

1. Threat and risk assessment

In order to mitigate external risks to the documentation of conflict-related sexual violence, it is essential to defer to local knowledge. Documenters should seek the assistance of local activists and women networks to access victims and witnesses of sexual violence. It is not advisable to attempt to contact victims and witnesses directly as this may expose them to many of the risks described above. It is also essential to seek the expertise of local organisations to carry out individualised risk assessments and individualised mitigation plans for each interviewee.

2. Coordination

As noted in IP2, coordination of accountability-focused documentation and investigation efforts is critically important. Multiple efforts are often underway in areas where CARSV is believed to be prevalent.

Prior to engaging any survivor of CARSV (and other serious crimes and violations), anyone deciding to embark on accountability-focused documentation should take great care to find out who the mandated and non-mandated documentation and investigation and other relevant (such as medical and humanitarian) actors are (see definition of “mandated actor” in Box 13 below). They should also find out what work has already been done and whether (further) documentation is actually needed. At present the police, prosecutors and judges are the key mandated actors; however, additional mandated actors may exist in the future, especially if proposed transitional justice mechanisms outlined in Chapter 3 are established.

Especially if you are a non-mandated actor, please also take the time – before and during any accountability-focused documentation or investigation effort – to ask yourself why you wish to document and for what purpose. This assessment should include whether the documentation work will actually benefit victims/survivors and the prospects of justice. Apart from interviews with survivors, what are the alternative sources of information your work may need? Are there survivors and witnesses who have not yet had their experience documented? It should also map out the steps you can take to ensure any documentation you undertake will not actually or potentially undermine or duplicate existing justice efforts (approach, format, use). All too often well-meaning actors document or investigate CARSV without taking the time to work all of this out.

Please remember that it is not everyone’s role to document CARSV (or other crimes and violations). Sometimes the proper

Box 13. Mandated actors

For this Supplement, “mandated actor” means a person or body granted official government powers or mandate to act in a law enforcement, investigation, expert witness, prosecution and/or adjudicative function. This mandate can be given directly by, for example, a government, through national law, through an agreement with a government, through the UN Security Council acting under its Chapter VII powers, or through another body with the power to grant such official mandate.

role for lawyers, activists, first responders or those providing survivor support services is to inform survivors of the risks and benefits of documentation, different types of documenters including the mandated ones, and to ensure the survivor is able to make a fully informed decision about whether they want to document their case and with whom. These people also have a critical role to play in holding documenting actors – including journalists – whom they introduce to survivors to account for the standards and procedures followed in the documentation process.

In the event that you are a non-mandated actor, if the experience of a survivor (or witness) has not been documented before, properly consider whether referral to a mandated actor may have more benefits for the survivor and their objectives, in which circumstances you can support and guide them in the documentation by the mandated actor and getting the support they need without doing harm.

For both mandated and non-mandated actors, accountability-focused documentation and investigation efforts should truly prioritise the interests and rights of survivors. An ethical and responsible approach necessitates utmost care to avoid the potential – and more often than not, real – grave consequences of the lack of coordination, and especially of multiple interviews. Unless undertaken by highly experienced and well-resourced multi-disciplinary teams of practitioners, the consequences of uncoordinated documentation and repeated interviews almost unavoidably include causing further harm to survivors (such as re-traumatisation), and accounts of experiences that differ on important issues and end up being discredited and ignored by accountability mechanisms, something which also impacts on survivors.

3. Confidentiality

It is essential to maintain the confidentiality of the exchange with victims or witnesses in all circumstances in order to mitigate the risks to their safety. While confidentiality should be maintained as a matter of principle, there may be situations where the investigator may be compelled by law or de facto to disclose the nature of the exchange with the interviewee, and the latter should be made aware of this possibility as part of the informed consent process. In Sri Lanka, this may be the case for example, if the investigator is stopped or arrested by the police and interrogated or if his or her documents are seized. Under the PTA, the police have wide powers to carry out searches and arrests. Any police officer of a rank equivalent or superior to Superintendent of police, or of a lower rank if duly authorised, may without a warrant arrest any person, enter or search any premises, stop and search any individual or vehicle, seize any document or thing reasonably suspected of being connected or concerned with an unlawful activity.²⁵² Obstructing or hindering the exercise of such investigative powers constitutes an offense punishable by up to seven years imprisonment.²⁵³

Despite the wide-ranging powers of investigation vested in police officers under the PTA, some communications are protected by privilege under Sri Lankan law and disclosure cannot be compelled. This is the case of some professional communications such as communications between an advocate, proctor or notary (an Attorney-at-Law) and his/

her client.²⁵⁴ Privilege in this instance extends to contents of documents exchanged between the client and his attorney.²⁵⁵ One cannot be compelled to disclose his/her confidential communication with his/her Attorney-at-Law.²⁵⁶ Similarly, the Attorney-at-Law cannot be compelled to disclose the content of his/her communication with his/her client unless the latter has expressly consented to disclosing such a communication.²⁵⁷

It is important to note however that communications to doctors and priests are not legally privileged. This means that priests and doctors may be compelled to reveal information obtained in their professional capacity during an investigation or a court proceeding. Understanding the contours of legal privileges in Sri Lanka is essential to make an informed decision regarding the actors that ought to be involved in the documentation process in order to ensure to the extent possible, the confidentiality of communications. In this respect, if the risk assessment indicates a likelihood of the documents being seized or the documenter being interrogated, it may be useful to consider involving a lawyer in the process.

It is also important to note that privilege also extends to Magistrates and police officers. They cannot be compelled to reveal the source of the information regarding the commission of an offence.²⁵⁸ This must also be clearly communicated to witnesses or victims in the event they wish to provide relevant information to the police but are afraid of reprisals by

Box 14. Repeal of the Prevention of Terrorism Act

The repeal of the PTA was at the core of demands formulated by activists, the UN and the international community for years. By co-sponsoring UNHRC Resolution 30/1, Sri Lanka promised inter alia to review and repeal the PTA, and replace it with anti-terrorism legislation which accords with contemporary international best practices.²⁵⁹

In April 2016, the government appointed a drafting committee comprising of bureaucrats, law enforcement/military heads, a representative from the AGO and two independent lawyers to propose a new counter terrorism framework: the Counter Terrorism Act (“CTA”).²⁶⁰ In October 2016, the final version of the Committee’s first draft was leaked to the media. The draft received sharp criticism by lawyers and human rights activists, many of whom were of the view that the new framework was in many respects worse than the PTA. Accordingly, many called for its complete withdrawal.²⁶¹ In light of this, the government decided to defer the legislative procedure and further revise the October draft.

In January 2017, the Prime Minister presented a revised version of the October draft to the Cabinet of Ministers. The draft addressed some of the key procedural weaknesses found in the previous draft.²⁶² However, it did not remedy other shortcomings including the overly broad definitions of ‘terrorism’ and ‘terrorist related offences’. The second revised draft was subsequently submitted to the Parliament’s Sectoral Oversight Committee on National Security for its ‘observations’. During this period, the second revised draft was further amended. Reportedly, influential members of the Cabinet and the security sector of Sri Lanka had weighed in heavily on this latest draft before it was suddenly approved by Cabinet on 25 April 2017.²⁶³

Calls for the review of the draft CTA framework have continued to be voiced since then. Of particular concern is the fact that many ordinary offenses under the Sri Lanka Penal Code are sought to be characterised as terrorism offenses if they are perpetrated with a vaguely defined purpose. This may for instance be “causing harm to the unity of Sri Lanka or any other sovereign State”.²⁶⁴ This ambiguous characterisation, coupled with the discretion given to executive functionaries to determine whether a person has committed a defined offence, could be abused by law enforcement personnel to normalise the arrest, detention and prosecution of individuals outside Sri Lanka’s ordinary criminal procedure. Procedural aspects also remain concerning. In particular, the draft CTA framework allows members of the armed forces to carry out arrests independently,²⁶⁵ a power that is not recognised under the PTA.

other actors. However, it is important to keep in mind that this legal provision is not a guarantee against leakage of information, particularly in the absence of an effective witness protection program (see further next section).

4. Referrals

Whenever additional assistance is necessary to ensure the support or protection of victims and witnesses, referral to other institutions may be appropriate. Depending on the cases, referral for medical assistance, physical rehabilitation or psycho-social support may also be necessary. These referrals may be done directly or through other institutions, including those described below.

Formal support structures and referral pathways are limited. In relation to psychological support for victims of sexual violence in the North and East, for example, it has been reported that “[f]earing that evidence of military crimes could be collected through psychosocial work, the Rajapaksa government withdrew such services, threatening professionals engaged in it, and barred projects involving it, thus denying assistance to most survivors”.²⁶⁶ Although this may be slowly changing,²⁶⁷ trusted local networks are still likely to be best placed to advise on appropriate referral options, including recommended medical and mental health professionals.

There are currently no known specific referral options for male victims of sexual violence.

i. NGOs and churches

In Sri Lanka, due to the failure of state institutions to ensure adequate protection and support to victims and witnesses of crimes, in particular those committed by security forces, non-governmental institutions as well as religious institutions including the Catholic Church have played a crucial role in assistance and protection. A well-organised and dedicated network of actors has provided –and continues to provide – protection, including options for safe housing, as well as a wide variety of

assistance measures to victims and witnesses at risk of reprisals or intimidation.²⁶⁸ Although these may not be able to provide the full range of services victims need, depending on the specifics of each case, this may remain the best option for efficient protection and support.

Women’s networks—such as Women in Need and Women’s Action Network—and support groups also offer peer support systems that have proven very efficient in assisting with the psychological trauma associated with gender-based and sexual violence against women. Women in Need also runs a 24 hour helpline for victims of violence against women and girls: 0114718585.²⁶⁹ In the East of the country, Suriya Women’s Development Centre provides legal advice and support and referrals to women survivors of sexual violence, among other crimes.

For men, networks of non-government torture and trauma rehabilitation centres (such as Family Rehabilitation Centres) or organisations supporting disabled people may provide referral options.

For legal support, the Center for Human Rights and Development (“CHRD”), with panels of lawyers in various districts, provides free legal advice to individuals detained under the PTA.

ii. Women’s Ministry helpline and referral pathways

The Ministry of Women and Child Affairs and the United Nations Development Program have developed a referral pathway for victims of sexual and gender-based violence.²⁷⁰ This may be initiated with the survivor’s consent through either a call to 24 hour helplines (Women’s Helpline 1938 / WIN 0114718585), or through hospital admission, and incorporates security, psycho-social, legal and medical referrals. However, as it largely involves referral to police and government agencies particular caution should be exercised when accessing these referral options for victims of state-inflicted violence.

iii. National Child Protection Authority (“NCPA”)

In cases involving sexual violence against children, a referral to the NCPA is also possible. The NCPA may refer the complaints it receives to relevant authorities.²⁷¹ It is also empowered to monitor the progress of all investigations and criminal proceedings relating to child abuse.²⁷² It may also provide legal advice and support for victims of child abuse.²⁷³

iv. Assistance under the Victim and Witness Protection Act

A referral to the institutions created under the Victim and Witness Protection Act is also theoretically possible. This may enable victims to access financial assistance. Victims of domestic crimes and violations of fundamental rights are entitled to receiving a sum of money from the Victim and Witness Protection Authority “in consideration of any expenses incurred as a result of the offence committed, including costs associated with participating in any proceedings”.²⁷⁴

The Act also specifies that, “where necessary resources are available with the State”, the victim of a crime shall be entitled to claim and obtain from the state medical treatment or services in respect of physical or mental harm suffered as a result of the crime as well as rehabilitation and counseling services.²⁷⁵

However, **referral for witness protection purposes is not advisable.** The legislation provides for the establishment of a National Authority for the Protection of Victims of Crime and Witnesses, as well as a board of management and a Victims of Crime and Witnesses Assistance and Protection Division of the Sri Lankan Police Department. Serious concerns have been raised about some of the appointments to the National Authority, including “an alleged perpetrator of torture named in a UN report, as well as the official in charge of “rehabilitation” camps post-war”.²⁷⁶

In addition, the Victim and Witness Protection Division, which is empowered to “investigate, by itself or with the assistance of any other police officer, complaints relating to threats, reprisals, harassment or a violation committed against victims and witnesses of crime”,²⁷⁷ is part of the police hierarchy. The Division is headed by a Senior Superintendent of Police nominated by the Inspector General of Police. This is particularly problematic in instances where the victim complains of a crime involving police officers, other members of security forces or powerful state officials.²⁷⁸

CHAPTER 8 / SAFETY AND SECURITY

Chapter 8 of IP2 explains how “[s]afety and security considerations are of paramount importance and both concepts are linked”.²⁷⁹ Practitioners need to be “aware of the safety and security aspects of their work and the risks which may arise for themselves as well as victims and witnesses and their families and communities”.²⁸⁰

Since 2015, the overall security conditions for human rights activism have improved in some parts of Sri Lanka, but remain extremely difficult in others.²⁸¹ In 2017, the Committee on the Elimination of Discrimination Against Women expressed its concern about “[s]erious allegations that the military and police perpetrated harassment, violence, including rape, abductions, torture, sexual bribery, sexual slavery, and unjustified surveillance, including home invasions, especially of women in the Northern and Eastern provinces, and specifically targeting Tamil women, women heads of households, and former combatants, war widows and women family members of the disappeared who search for truth, justice and accountability, as well as women human rights defenders”.²⁸²

In its 2016 review of Sri Lanka, the Committee Against Torture also emphasised that it remained “concerned about consistent reports of harassment and arbitrary detention of journalists and human rights defenders, which impede the effective reporting of torture and disappearance claims”.²⁸³

Similarly, the Special Rapporteur on Torture reported after his country mission in 2016: “[o]wing to the heavy militarization that still exists in the North and East of the country, surveillance continues to be used as a tool of control and intimidation. In addition to rehabilitated persons, many former detainees under the Prevention of Terrorism Act and their families, anyone deemed to have had any link to LTTE during the conflict and political and human rights activists remain subject to extensive surveillance and intimidation by the military, intelligence and police forces. While the extent and level of this practice have dropped compared to the early post-conflict period, systematic surveillance and intimidation continues, sometimes constituting ill-treatment”.²⁸⁴

Documentation of conflict-related violence, and sexual violence in particular, remains very sensitive and is likely to pose significant security challenges for victims and witnesses.

As explained above, the security challenges for both documenters and victims depend on the specifics of each case. They also vary greatly geographically. For example, the security conditions in the Vanni region where many conflict-affected families reside remains far more challenging than in the rest of the country. Surveillance is widespread and extremely pervasive. NGO meetings are systematically attended by intelligence officers. Surveillance is also carried out by members of the local population who report to intelligence services. As a result, the presence of outsiders is immediately noticed and recorded. Suspicion runs deep in the community and represents a great challenge for documentation activities. Similarly, in the rest of the country, sources, nature and intensity of the security risks depend on local factors. It is therefore important to plan the investigation together with local partners (see above Chapter 7: Do No Harm).

Practitioners should take careful note of the best practices outlined in Chapter 8 of IP2, including the adoption of a holistic security strategy and ways to manage risks to practitioners, information and victims and witnesses. As stated there: “Safety and security considerations are linked to the Do No Harm principle... and should underpin any decision or action taken by practitioners throughout the documentation process: from planning activities, choosing how to approach victims and witnesses and where to meet them, recording, transporting and storing information, to referrals”.²⁸⁵

A. Managing risks to practitioners

Of the examples of risks to practitioners outlined in IP2, the following are likely to be most relevant in the Sri Lankan context:

- Road traffic accidents
- Stress, fatigue, vicarious trauma and post-traumatic stress disorder (“PTSD”)
- Specific targeting from individuals or groups under investigation and their supporters
- Theft
- Office raids
- Judicial harassment, arbitrary arrest/detention, extrajudicial killing

- Deregistration (for national NGOs)
- Denied entry visas and other administrative obstacles (for foreigners).

Box 3 on pages 108-9 of IP2 outlines mitigation measures for many of these risks that should be carefully considered and implemented where appropriate.

B. Managing risks to information

All of the risks to information outlined in Chapter 8 of IP2 (Safety and Security) are potential risks for practitioners in Sri Lanka. Practitioners should ensure they use secure communication methods at all times when dealing with sensitive material, and be very careful with the information they post online and their use of social media.

Many small organisations may not have dedicated secure digital storage software. However, a carefully designed evidence handling and storage protocol can utilise a number of free services that allow for encrypted storage of files. For both digital and physical storage careful note should be taken of the information contained in Chapter 13 of IP2 (Storing and Handling Information).

C. Managing risks to victims and witnesses

As explained in more detail in Chapter 7 (Do No Harm), of the risks to victims and witnesses identified in Chapter 8 of IP2, the following are most likely to be present in Sri Lanka:

- Intimidation or retaliation by perpetrators including arrest and detention of either the victim or family members and the possibility of further torture and sexual violence
- Social stigma
- Divorce, family rejection, reduced chance of marriage
- Re-traumatisation due to a lack of gender-sensitivity by service providers, practitioners and/or the justice system, which may lead to self-harm or even suicide

Box 15. Addressing vicarious trauma

One issue that has reportedly received limited attention among national practitioners in Sri Lanka is the risk practitioners themselves face from vicarious trauma when documenting such serious crimes on an ongoing basis. Vicarious trauma “refers to the negative reactions that can occur when hearing about someone else’s traumatic experiences. ... Exposure to a traumatized person’s emotions, memories and images can create reactions in [practitioners] that resemble PTSD, including intrusive thoughts or images about things they have heard, hyperarousal and emotional reactivity. There may be other reactions affecting functioning in a broad range of areas”.²⁸⁶ Symptoms may include (among many others) anxiety, depression, a feeling of hopelessness, difficulty concentrating, nightmares, extreme anger and loss of empathy.²⁸⁷

Organisations must address the wellbeing of their staff, and individual self-care strategies are essential to prevent and address chronic stress, vicarious trauma and burn-out. For further information see OHCHR, ‘Manual on Human Rights Monitoring: Trauma and Self-Care’, (2011), <http://www.ohchr.org/Documents/Publications/Chapter12-MHRM.pdf>.

- (For men) imprisonment for ‘same sex acts’ due to homophobic laws, even when these acts were non-consensual

As stressed in IP2: “Victims and witnesses must be consulted about individual, local or community-specific risks during the documentation planning stage and prior to any decision to physically meet being made. However, practitioners should keep in mind that victims and witnesses may sometimes not recognise threats, minimise their risks as a coping mechanism or have unfounded fears as a result of misinformation or past traumatic experience”.²⁸⁸

Pages 116-117 of IP2 set out a number of steps that practitioners should take to protect victims and witnesses in light of these risks, which should be carefully followed.

CHAPTER 10 / **EVIDENCE OF SEXUAL** **VIOLENCE IN SRI LANKA**

Chapter 10 of IP2 outlines the different types of evidence that can be gathered during the documentation process to prove CARSV, including how to collect such evidence and associated risks. The following chapter provides brief details on specific Sri Lankan evidentiary and procedural requirements for the use of such evidence in Sri Lankan legal proceedings. For other considerations please refer to IP2.

A. Introduction

Rules regarding evidence are governed by the Evidence Ordinance. This Ordinance is applicable to all judicial proceedings before any court, other than courts martial.²⁸⁹ Admissibility and reliability of evidence is considered in Sri Lankan courts at the trial stage. In particular, to be admissible, evidence produced at trial must relate to relevant facts.²⁹⁰ A fact is considered proven if “after considering the matters before it, the court either believes it to exist or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists.”²⁹¹ A litigant bears the burden of proof of a fact on which his or her claim rests.²⁹²

B. Testimonial evidence

A fact other than the content of a document may be proven by oral evidence.²⁹³ However, if the oral evidence refers to the existence or condition of a material thing other than a document, the court may order the production of such a thing for inspection.²⁹⁴ Oral evidence must be direct.²⁹⁵ As such, hearsay evidence is not generally admissible (with certain exceptions).²⁹⁶ Expert testimony is also admissible as evidence of the expert’s opinion.

C. Documentary evidence

The content of a document may be proven by the production of the document itself. However, in some circumstances,²⁹⁷ secondary means may be resorted to in order to prove the content of a document. These include the production of a certified copy, a copy made through a mechanical process which ensures the accuracy of the copy or even the oral account of a person who has seen the document.²⁹⁸ The Evidence Ordinance also contains provisions regarding the proof of specific elements of a documentary piece of evidence including the proof of the sig-

nature or handwriting of a person alleged to be the author of a document.²⁹⁹ Provided that the specific rules regarding the production of evidence in the Evidence Ordinance are complied with, no additional proof of authenticity of documentary evidence, such as the chain of custody, is required.

D. Digital evidence

Specific rules of admissibility apply to audio-visual recordings as well as “statements produced by computers.”³⁰⁰ In particular, audio-visual recordings must be capable of being played, replayed, displayed or reproduced satisfactorily.³⁰¹ In addition, it must be proven that the machine that produced the audio-visual recordings or statements was operating properly at the time.³⁰² Additional proof that the audio-visual recordings were not altered or tampered with is also required. Alternatively, it may be proved that the recording was kept in a manner that prevented it from being altered or tampered with.³⁰³ In this respect the rigorous documentation of the chain of custody is essential. However, proof of these specific requirements is not needed if the opposing party is not contesting the authenticity of the evidence.³⁰⁴ The court may also presume that the audio-visual recordings or the statements produced by a computer are authentic.³⁰⁵

E. Medical evidence

The rules pertaining to admissibility of evidence apply to medical evidence. Medical evidence must be prepared by a Government Medical Officer³⁰⁶ whose independence is not in doubt.³⁰⁷ Medical evidence is usually presented in the form of documents, audio-visual recordings or statements produced by computers including medico-legal reports, X-rays, laboratory tests etc. DNA evidence is also accepted by court. For example, in *Attorney General v Potta Nauffer*,³⁰⁸ DNA evidence was used to prove beyond reasonable doubt that an accused person was at the scene of the crime.

Medical evidence involving the use of technology must fulfil the special rules of admissibility laid out in the Evidence (Special Provisions) Act No. 14 of 1995. For example, in *Mendis v The King*,³⁰⁹ X-ray evidence was deemed inadmissible because the Government Medical Officer was not present when the X-ray was taken.



PART V /

DOCUMENTATION IN PRACTICE: GATHERING INFORMATION CHAPTER 11 / INTERVIEWING IN SRI LANKA

Chapter 11 of IP2 provides guidance on how to carry out interviews in relation to CARSV. As it explains, knowledge of local context and attitudes is essential to carry out the interview process in a way that enables the interviewers to recognise indicators of sexual violence, minimise misunderstandings and mitigate risks of re-traumatisation.³¹⁰

A. Indicators of sexual violence

Victims of sexual violence are often reluctant to volunteer information about the crime. Often information about sexual violence is only disclosed after the witness is sufficiently comfortable with the interviewer. This may not happen in the course of the first interview. Given the taboos around sex in different Sri Lankan communities, victims and witnesses may be unwilling to disclose the information at all, or at least to use explicit language to explain what happened. In other circumstances the victim or witness may not know the language to describe what has happened.³¹¹

It is therefore essential for the interviewer to recognise indicators of sexual violence in order to pursue sensitive lines of ques-

tioning. Knowledge of the context in which conflict-related sexual violence occurred in Sri Lanka is useful in this respect (see Chapter 2: Understanding Sexual Violence in Sri Lanka, above). In addition, references to sexual violence that happened to others could be a cue that the witness him/herself is a survivor of sexual violence. Survivors of sexual violence often use euphemisms to describe sexual violence. For example, sexual intercourse may be referred to as ‘holding hands’. If not known or flagged by the translator, these euphemisms may go unnoticed. If translation is required it is therefore important to discuss these with the translator prior to the interview.

B. Culturally sensitive attitudes

While victims of sexual violence may be reluctant to disclose information to the interviewer, culturally sensitive attitudes may encourage them to open up more. While the documentation of sexual violence often requires very specific questions about the *actus reus* and *modus operandi*, this should be done in a very sensitive manner. In this respect, warning about the level of detail required and the reasons why these details are needed is essential.

Box 16. Possible code words for sexual violence

Experienced investigators have reported that Sri Lankan victims of sexual violence will often not refer explicitly to whether or what type of sexual violence occurred. As an illustration, examples of the type of language used by Tamil speakers that investigators suggest may indicate sexual violence or have alternative meanings include:

- “they slept with me” (may be meant as they raped me)
- they hit “it”/touched “it” (meant as genitals)
- they were forced to “hug each other” (may be closer than hugging – could indicate inappropriate touching or even rape)
- “I fainted” (may indicate rape – used to dissociate the victim from the act given the devastating social stigma attached)
- he “did it” (may indicate rape)
- references to it happened to “us”, “they” did it to “us” (may indicate something was done to the victim individually, even when the perpetrator is from the same community).

Specific terminology for sex, sexual violence and sexual organs is rarely if ever used in day to day life in many of the communities affected by conflict-related sexual violence in Sri Lanka. Depending on their own cultural background, interviewers may themselves be uncomfortable using specific terminology for sexual acts and sexual organs. However it is crucial that they overcome these sensitivities, by practicing use of the terms if required, so that they can ask appropriate follow-up questions where necessary. If it is clear that the interviewer is not shocked or disgusted by the use of specific terms this may help the victim to be more specific, with encouragement.

Box 17. The use of silence

Silence in interviews may have specifically understood cultural meanings, and in the context of some narratives may itself indicate that sexual violence occurred. Local documenters have reported that in their work recording statements of victims for storytelling purposes they will record the silence in the interview, and that silence will have an understood meaning. However, when documenting for accountability purposes information cannot be inferred from silence. Instead, interviewers should ask sensitive follow-up questions in an effort to obtain further detail in the witness' own words.

In addition, illustrated body diagrams (see for example those in the sample sexual assault medical certificate at Annex 4 of IP2) may be used as an aid to allow victims to point to specific parts of the body relevant to the evidence, rather than using the specific words. This must then be recorded carefully on the diagram and explained in writing. Alternatively, victims may be more willing to open up about the medical treatment they received for sexual violence, which may be another way to seek further clarification on the act itself.

Culturally sensitive attitudes may also help reduce risks of re-traumatisation. This may be done by ensuring empathetic listening and questioning. While documenters are sometimes advised to avoid displaying emotions in the course of the interview, in Sri Lanka, a neutral expression and a lack of emotional engagement may be misinterpreted as indifference or disbelief. It is also important to let the interviewee remain in control of the interview including by encouraging him/her to seek breaks whenever necessary, and ensuring that the sitting arrangements and the room disposition do not reflect a power disparity between the interviewer and the interviewee. It is also essential to ascertain whether the witness has a prefer-

ence as to male or female documenters, and to do the best possible to accommodate that preference.

C. Clarification and dealing with inconsistencies

Prior knowledge of the witness' background including knowledge of prior statements is also essential. This will enable documenters to be aware of any inconsistencies between statements and to understand these inconsistencies. As IP2 notes, “[i]nconsistencies and contradictions are not uncommon, and not necessarily indicative of a witness's lack of credibility, dishonesty or even reliability”.³¹² Apparent inconsistencies may arise, for example, from the trauma the witness has suffered, lapse of time since the event, cultural misunderstandings or embarrassment.³¹³

Documenters must systematically clarify the statement in order to dispel or explain inconsistencies. As explained in Chapter 11, Box 9 of IP2 (Dealing with Inconsistencies),³¹⁴ this must be done in a subtle and professional manner. Beyond inconsistencies, it is also essential to ask follow-up questions with respect to all aspects of the statement. This is particularly important concerning attribution of responsibility. For example, in Sri Lanka, law enforcement personnel are routinely referred to as CID when in fact they may not belong to such division. Clarifications must therefore be systematically sought in this respect.

PART VI /

CROSS-CUTTING ISSUES CHAPTER 17 / SEXUAL VIOLENCE AGAINST MEN AND BOYS

As described throughout preceding parts of this Supplement, conflict-related sexual violence against men and boys was and is apparently widespread in Sri Lanka, albeit vastly underreported.³¹⁵

Cases documented abroad and interviews with researchers suggest a very high prevalence of conflict-related sexual violence against men and boys. The OISL report found that men were equally likely to be victims of conflict-related sexual violence as women.³¹⁶ In particular, out of 30 victims of sexual violence interviewed by OISL, 18 were male victims.³¹⁷

As described further in Chapter 2 (Understanding Sexual Violence in Sri Lanka), acts of sexual violence against men and boys often took place as a form of torture in the context of interrogation.³¹⁸ Forcing men to masturbate other men or perform oral sex on other men, assaults to the genitals, and anal rape including with sharp objects are the most common forms of sexual violence reported.³¹⁹

Sexual violence against men by members of the police including the CID and TID has also been reported.³²⁰ Many survivors of sexual violence were held under the Prevention Terrorism Act which limits judicial oversight over detention for terrorism-related offenses.³²¹ Perpetrators were generally reported as men, and other allegations revealed incidence of gang rapes and repeated rapes.³²²

As explained in Chapter 17 of IP2, “[c]ultural norms of masculinity and deeply rooted gendered assumptions still prevail in many societies, making it difficult for many – from members of the general population to lawyers, investigators, prosecutors and judges – to contemplate men as victims of sexual violence...³²³ This is certainly the case in Sri Lanka, where, for example, male rape is not criminalised. One international investigator reported that a victim who described being raped said that he did not know male rape was possible until it happened to him.³²⁴

On the other hand, the cultural association between sexual violence against men and homosexuality (see IP2, pages

265-266) is strong. One researcher recently reported that “[d]uring our research, several interviewees conflated male sexual violence with homosexuality or laws proscribing homosexual acts, reflecting both a lack of awareness of the definition of rape and other forms of sexual abuse but also misconceptions about the nature and prevalence of sexual violence against men. One senior human rights activist said: “in order for a male officer to rape a male inmate, he would need to have homosexual tendencies, wouldn’t he?”³²⁵ As IP2 notes, “[f]or those who hold this belief, a heterosexual man sexually abusing another man is inconceivable, leading to the conclusion that the assault did not happen and the victim is lying”.³²⁶ This association also provides further barriers to reporting where victims fear “being labelled as homosexuals, with all the stigma and discrimination that his entails”,³²⁷ and where homosexual acts are criminalised under the Penal Code (as described further in Chapter Four (Individual Criminal Responsibility)).

Chapter 17 of IP2 provides detailed information about myths and assumptions surrounding sexual violence against males, prevalence, forms of sexual violence, experiences and impacts, red-flag indicators, the international legal position, and specific considerations throughout the documentation process. These should all be considered carefully in any documentation process concerning men and boys.



ANNEX ONE: CRIMES UNDER THE PENAL CODE RELEVANT TO CARSV

Sexual Violence

Section 363: Rape

363. A man is said to commit “rape” who has sexual intercourse with a woman under circumstances falling under any of the following descriptions :—

- (a) without her consent even where such woman is his wife and she is judicially separated from the man;
- (b) with her consent, while she was in lawful or unlawful detention or when her consent has been obtained, by use of force or intimidation, or by threat of detention or by putting her in fear of death or hurt;
- (c) with her consent when her consent has been obtained at a time when she was of unsound mind or was in a state of intoxication induced by alcohol or drugs, administered to her by the man or by some other person;
- (d) with her consent when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is, or believed herself to be, lawfully married;
- (e) with or without her consent when she is under sixteen years of age, unless the woman is his wife who is over twelve years of age and is not judicially separated from the man.³²⁸

Note: The law provides protection only for women and girls against rape, but not for men and does not contemplate female perpetrators. The courts have held that “the slightest penetration of the vulva such as the minimal passage of glans between the labia with or without the emission of semen or rupture of hymen constitutes rape”³²⁹ It therefore only covers vaginal penetration by the penis, and not other forms of rape such as oral or anal rape, which are covered under s. 365B (Grave Sexual Abuse). The Penal Code explicitly states that evidence of resistance such as physical injuries are not essential to prove the absence of consent.³³⁰

Rape is punishable with a minimum of seven years and a maximum of twenty years imprisonment, and compensation may be awarded to the victim for injuries (including psychological or mental trauma) to be paid by the offender.³³¹ Certain aggravating circumstances will raise the mandatory minimum punishment to ten years, including gang rape or where the rape was committed by a state official in custody.³³² Statutory rape is punishable with a minimum of fifteen years imprisonment.³³³

Section 365B: Grave Sexual Abuse

365B. (1) Grave sexual abuse is committed by any person who, for sexual gratification, does any act, by the use of his genitals or any other part of the human body or any instrument on any orifice or part of the body of any other person, being an act which does not amount to rape under section 363, in circumstances falling under any of the following descriptions, that is to say—

- (a) without the consent of the other person;
- (aa) with or without the consent of the other person when the other person is under sixteen years of age;
- (b) with the consent of the other person while on such other person was in lawful or unlawful detention or where that consent has been obtained, by use of force, or intimidation or threat of detention or by putting such other person in fear of death or hurt;
- (c) with the consent of the other person where such consent has been obtained at a time the other person was of unsound mind or was in a state of intoxication induced by alcohol or drugs.

Note: This section would cover rape of a man by a man and oral rape and anal rape of a woman. When committed against an adult it is punishable with imprisonment of between five and twenty years with a fine.³³⁴ If the victim is below eighteen years, the minimum sentence is imprisonment of seven years. In both circumstances, the offender is mandatorily required to pay compensation to the victim for injuries caused.

Section 345: **Sexual Harassment**

Whoever, by assault or use of criminal force, sexually harasses another person, or by the use of words or actions, causes sexual annoyance or harassment to such other person commits the offence of sexual harassment and shall on conviction be punished with imprisonment of either description for a term which may extend to five years or with fine or with both and may also be ordered to pay compensation of an amount determined by court to the person in respect of whom the offence was committed for the injuries caused to such person.

Explanation

1. Unwelcome sexual advance by words or action used by a person in authority, in a working place or any other place, shall constitute the offence of sexual harassment.
2. For the purposes of this section an assault may include any act that does not amount to rape under section 363.

Note: This section has been interpreted to apply to cases of what is commonly described as “sexual bribery”, where officials demand sexual acts for the carrying out of official administrative functions (see further above, Chapter Two: Understanding Sexual Violence in Sri Lanka, Part C”, at page 6).

Section 365: **Unnatural Offences**

365. Whoever voluntarily has carnal intercourse against the order of nature with any man, woman, or animal, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be punished with fine and where the offence is committed by a person over eighteen years of age in respect of any person under sixteen years of age shall be punished with rigorous imprisonment for a term not less than ten years and not exceeding twenty years and with fine and shall also be ordered to pay compensation of an amount determined by court to the person in respect of whom the offence was committed for injuries caused to such person.

Note: This provision criminalises consensual homosexual sex and is a significant barrier to men reporting rape by other men.

Section 365A: **Acts of gross indecency between persons**

365A. Any person who, in public or private, commits, or is a party to the commission of, or procures or attempts to procure the commission by any person of, any act of gross indecency with another person, shall be guilty of an offence, ...

Note: “Act of gross indecency” has not been defined but has generally been interpreted to mean sexual activity between men falling short of penetration. The section was amended in 1995 to include acts between women. Again, this may prove a barrier to men wishing to report sexual violence.

Section 357: **Kidnapping or abduction for forced marriage or illicit intercourse**

Whoever kidnaps or abducts any woman with intent that she may be compelled, or knowing it to be likely that she will be compelled, to marry any person against her will, or in order that she may be forced or seduced to illicit intercourse, or knowing it to be likely that she will be forced or seduced to illicit intercourse, shall be punished...

Section 360C: **Trafficking**

360c. (1) Whoever— [§ 8,22 of 1995.] (a) engages in the act of buying or selling or bartering of any person for money or for any other consideration; ... commits the offence of trafficking....

Sexual Violence Against Children

Statutory Rape – see Section 363 above: consent to sexual intercourse is irrelevant if girl is under sixteen years of age.

Note: Male victims are not covered by this provision.

Section 360B: **Sexual Exploitation of Children**

Whoever—

(a) knowingly permits any child to remain in any premises, for the purposes of causing such child to be sexually abused or to participate in any form or sexual activity or in any obscene or indecent exhibition or show;

(b) acts as a procurer of a child for the purposes of sexual intercourse or for any form of sexual abuse;

(c) induces a person to be a client of a child for sexual intercourse or for any form of sexual abuse, by means of print or other media, oral advertisements or other similar means ;

(d) takes advantage, of his influence over, or his relationship to, a child, to procure such child for sexual intercourse or any form of sexual abuse;

(e) threatens, or uses violence towards, a child to procure such child for sexual intercourse or any form of sexual abuse;

(d) gives monetary consideration, goods or other benefits to a child or his parents with intent to procure such child for sexual intercourse or any form of sexual abuse, commits the offence of sexual exploitation of children

(2) In this section “ child “ means a person under eighteen years of age

Other Relevant Crimes

Penal Code forms of Murder and Unlawful Killing

Section 293: Culpable Homicide

Section 294: Murder

Section 295: Culpable Homicide by causing death of person other than person whose death was intended

Section 305: Death caused by act done with intent to cause miscarriage.

Section 306: Act done with intent to prevent child being born alive or to cause it to die after death (see also below Forced abortion or miscarriage)

Section 307: Act causing death of quick unborn child by act amounting to culpable homicide (see also below Relating to Children)

Penal Code forms of Assault

Section 310: Hurt

Section 311: Grievous hurt

Section 312: Voluntarily causing hurt / Section 313: Voluntarily causing grievous hurt

Section 315: Voluntarily causing hurt by dangerous weapons or means / Section 317 (grievous hurt)

Section 318: Voluntarily causing hurt to extort property, or to constrain to an illegal act

Section 319: Causing hurt by means of poison etc., with intent to commit an offence

Section 320: Voluntarily causing grievous hurt to extort property, or to compel restoration of property

Section 321: Voluntarily causing hurt to extort confession, or to compel restoration of property / Section 322 (grievous hurt)

Section 323: Voluntarily causing hurt to deter public servant from his duty / Section 324 (grievous hurt)

Section 325: Voluntarily causing hurt on provocation / Section 326 (grievous hurt)

Section 336: Act endangering life or personal safety of others

Section 328: Causing hurt by act endangering life or personal safety of others / Section 329 (grievous hurt)

Section 343: Punishment of using criminal force other than on grave provocation

Section 344: Using criminal force to deter public servant from discharge of his duty

Section 346: Assault or criminal force with intent to dishonor person, otherwise than on grave provocation

Section 347: Assault or criminal force in attempt to commit theft of property

Section 348: Assaulting or criminal force in attempt wrongfully to confine a person

Section 349: Assaulting or using criminal force on grave and sudden provocation

Penal Code Provisions relating to Unlawful Detention

Section 323: Punishment for wrongful restraint

Section 333: Punishment for wrongful confinement (s. 334 for three or more days; s. 335 for ten or more days)

Section 336: Wrongful confinement of person for whose liberation writ has been issued

Section 337: Wrongful confinement in secret

Section 338: Wrongful confinement to extort property, or constrain to illegal act

Section 339: Wrongful confinement to extort confession, or compel restoration of property

Penal Code Provisions relating to Kidnapping, Abduction, Slavery

Section 352: Kidnapping from lawful guardianship (see below under “Relating to Children”)

Section 353: Abduction (“Whoever by force compels, or by any deceitful means, or by abuse of authority or any other means of compulsion, induces any person to go from any place, is said to “ abduct “ that person”).

Section 355: Kidnapping or abducting in order to murder

Section 356: Kidnapping or abducting with intent secretly and wrongfully to confine person

Section 357: Kidnapping, abducting or inducing woman to compel her marriage, etc (see above under Sexual Offences)

Section 358: Kidnapping or abducting in order to subject person to grievous hurt, slavery, etc.

Section 359: Wrongfully concealing or keeping in confinement kidnapped or abducted person

Relating to Children

Section 307: Act causing death of quick unborn child by act amounting to culpable homicide.

Section 352: Kidnapping from lawful guardianship (“Whoever takes or entices any minor under fourteen years of age if a male, or under sixteen years of age if a female, or any person of unsound mind, out of the keeping of the lawful guardian of such minor or person of unsound mind, without the consent of such guardian”).

Forced abortion or miscarriage

Section 304: Causing miscarriage without woman’s consent

Section 306: Act done with intent to prevent child being born alive or to cause it to die after death

Criminal intimidation

Section 483: Criminal Intimidation (“Whoever threatens another with any injury to his person, reputation, or property, or to the person or reputation of any one in whom that person is interested with intent to cause alarm to that person, or to cause that person to do any act which he is not legally bound to do, or to omit to do any act which that person is legally entitled to do, as the means of avoiding the execution of such threat, commits criminal intimidation”).



ENDNOTES

- ¹ Sara Ferro Ribeiro and Danaé van der Straten Ponthoz on behalf of the UK Foreign & Commonwealth Office (2017), 'International Protocol on the Documentation and Investigation of Sexual Violence in Conflict: Best Practice on the Documentation of Sexual Violence as a Crime or Violation of International Law', Second edition, p. 11, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/598335/International_Protocol_2017_2nd_Edition.pdf (hereinafter "IP2").
- ² For a definition of CARSV and use in this Supplement see further IP2, p. 11, and Chapter Two of this Supplement, p. 8.
- ³ Kishali Pinto-Jayawardena & Jeannine Guthrie (2016), 'Introduction', in *The Search for Justice: The Sri Lanka Papers*, (2016), Kumali Jayawardena & Kishali Pinto-Jayawardena (eds.), New Delhi: Zubaan, para. 5.
- ⁴ *Ibid.*
- ⁵ *Ibid.*, paras. 4-5.
- ⁶ See further Kishali Pinto-Jayawardena & Kirsty Anantharajah, 'A Crisis of Legal Indeterminacy' and State Impunity', in *The Search for Justice: The Sri Lanka Papers*, (2016), Kumali Jayawardena & Kishali Pinto-Jayawardena (eds.), New Delhi: Zubaan, p. 37ff.
- ⁷ David R. Stone (2012), 'Sri Lankan Civil War', *The Encyclopedia of War*, Blackwell Publishing, <http://onlinelibrary.wiley.com/doi/10.1002/9781444338232.wbeow598/full>
- ⁸ Office of the United Nations High Commissioner for Human Rights ("OHCHR"), 'Report of the OHCHR Investigation on Sri Lanka', (September 2015), A/HRC/30/CRP, p. 12, para. 49. [hereinafter "OISL Report"]. See also the Summary Report: OHCHR, 'Comprehensive report of the Office of the United Nations High Commissioner for Human Rights on Sri Lanka', (September 2015), A/HRC/30/61; OHCHR, 'Report of the Secretary General's Panel of Experts on Accountability in Sri Lanka', (March 2011), http://www.un.org/News/dh/infocus/Sri_Lanka/POE_Report_Full.pdf, [hereinafter "POE Report"].
- ⁹ *Ibid.*, para. 151.
- ¹⁰ *Ibid.*, para. 64.
- ¹¹ For the purposes of international humanitarian law, including war crimes law, whether an armed conflict exists is a factual question. The existence of a ceasefire agreement, peace agreement or declaration of victory may be relevant considerations, but are not determinative. Some hostilities appear to have continued for a number of days after the declaration of victory, so it is possible that international humanitarian law continued to apply to some events that happened in the days following 19 May 2009. See further Marko Milanovic (2014), 'The end of application of international humanitarian law', *International Review of the Red Cross*, pp. 96 (893), 163–188 at 171-172 and 180.
- ¹² See further Human Rights Watch ("HRW"), 'We Will Teach You a Lesson: Sexual Violence against Tamils by Sri Lankan Security Forces', (February 2013), pp. 17-22, <https://www.hrw.org/report/2013/02/26/we-will-teach-you-lesson/sexual-violence-against-tamils-sri-lankan-security-forces> [hereinafter "HWR Report"]. For a fuller list of relevant sources see OISL Report, footnote 533.
- ¹³ OISL Report, para. 1131.
- ¹⁴ See further POE Report, pp. iii-iv. The Panel of Experts found credible allegations that the LTTE had committed the following: "(i) using civilians as a human buffer; (ii) killing civilians attempting to flee LTTE control; (iii) using military equipment in the proximity of civilians; (iv) forced recruitment of children; (v) forced labour; and (vi) killing of civilians through suicide attacks" (at p. iii). See also OISL Report, paras. 1118, 1136, 1139, 1140, 1159, 1163 and 1167.

¹⁵ OISL Report, para. 571; Elizabeth Jean Wood (2009), 'Armed Groups and Sexual Violence: When Is Wartime Rape Rare?' *Politics and Society* 37(1), pp. 131-161.

¹⁶ Nimmi Gowrinathan and Kate Cronin-Furman (2015), 'The Forever Victims? Tamil Women in Post-War Sri Lanka', Colin Powell Center for Civic and Global Leadership, City College New York, p. 14, <http://www.deviarchy.com/wp/wp-content/uploads/2015/09/The-Forever-Victims-Tamil-Women-in-Post-War-Sri-Lanka.pdf>, accessed 13 December 2017

¹⁷ See further HRW, 'Living in Fear: Child Soldiers and the Tamil Tigers in Sri Lanka', (November 2004), <https://www.hrw.org/reports/2004/srilanka1104/srilanka1104.pdf>; See further Sections B(1) (Sexual violence in detention as a form of torture.) and C(3) (Victims) of this Chapter.

¹⁸ Pinto-Jayawardena & Anantharajah (2016), 'A Crisis of Legal Indeterminacy' and State Impunity', p. 37.

¹⁹ The Asia Foundation, 'The State of Conflict and Violence in Asia', (2017), p. 162, https://asiafoundation.org/wp-content/uploads/2017/10/The_State_of_Conflict_and_Violence_in_Asia-12.29.17.pdf.

²⁰ Pinto-Jayawardena & Anantharajah (2016), 'A Crisis of 'Legal Indeterminacy' and State Impunity', p. 37.

²¹ The Asia Foundation (2017), 'The State of Conflict and Violence in Asia', p. 162.

²² Pinto-Jayawardena & Anantharajah (2016), 'A Crisis of 'Legal Indeterminacy' and State Impunity', p.37.

²³ Human Rights Watch ("HRW"), 'We Will Teach You a Lesson: Sexual Violence Against Tamils by Sri Lankan Security Forces' (February 2013), p. 21, <https://www.hrw.org/report/2013/02/26/we-will-teach-you-lesson/sexual-violence-against-tamils-sri-lankan-security-forces>.

²⁴ *Ibid.*, citing Government of Sri Lanka, "Final report of the Commission of Inquiry into Involuntary Removal or Disappearance of Persons in the Western, Southern and Sabaragamuwa Provinces, No. V," 1997, p. 132.

²⁵ See, e.g. International Truth and Justice Project ("ITJP"), 'Unstopped: State torture and sexual violence in 2016/17', (July 2017), http://www.itjpsl.com/assets/ITJP_unstopped_report_final.pdf.

²⁶ Information provided to REDRESS, January 2018. For cases from 2016 see *ibid.*

²⁷ See, e.g. Dharsha Jegatheeswaran (2017), 'Civil Security Department: The Deep Militarisation of the Vanni', Adalayam Policy Research Centre, pp. 1, 12, 22, <http://srilankabrief.org/wp-content/uploads/2017/09/ACPR-Report-Civil-Security-Department-The-Deep-Militarisation-of-the-Vanni-.pdf>.

²⁸ Former President of Sri Lanka His Excellency Mahinda Rajapakse, 'Parliamentary Debates (Hansard) of the Democratic Socialist Republic of Sri Lanka', (25 August 2011) 201(1), www.parliament.lk, accessed 13 December 2017; Prevention of Terrorism (Temporary Provisions) Act No. 48 of 1979 [hereinafter "PTA"].

²⁹ IP2, p. 11.

³⁰ See, e.g. Sri Lanka Campaign for Truth and Justice in Sri Lanka's Northern Province: A legal analysis of post-war human rights violations', (March 2014), <https://www.srilankacampaign.org/wp-content/uploads/2015/02/Crimes-Against-Humanity-Report-Sri-Lanka-Campaign-2014.pdf>.

³¹ HRW (2013), 'We Will Teach You a Lesson', pp. 17-18.

³² *Ibid.*

³³ See further pp. 3-5.

³⁴ See further OISL Report, paras. 47-48: “Following independence in 1948, a series of Government policies favouring the Sinhalese majority increasingly marginalised and alienated the Tamil minority. The Government presented these measures as a way to redress disadvantages Sinhalese had experienced under colonial rule, but they reflected an increasingly ethnic-based and majoritarian politics. From 1956 onwards, there were outbreaks of communal violence and growing radicalisation of some sections of the Tamil community. ... [B]y the mid-1970s, some increasingly militant groups began calling for a separate state, ‘Tamil Eelam’, in the North and East of the island.

The Tamil New Tigers was formed in 1972, and became the Liberation Tigers of Tamil Eelam (LTTE) in 1976. Over the following decade it engaged in struggles against rival Tamil parties and militant organisations. After an LTTE attack in Jaffna, in July 1983, in which 13 government soldiers were killed, communal violence erupted across the country in what became known as “Black July”. As many as 3,000 Tamils were killed, properties and businesses of Tamils were destroyed, and many fled Sinhalese-majority areas or subsequently left the country. A fully-fledged armed conflict developed between the Government and LTTE”.

³⁵ Raquel Saavedra and Shreen Saroor (2017), ‘A gendered approach to transitional justice in Sri Lanka’, South Asian Centre for Legal Studies, pp. 12-14 <http://sacls.org/resources/publications/reports/a-gendered-approach-to-transitional-justice-in-sri-lanka-women-s-perspectives-and-international-best-practices>

³⁶ Gowrinathan and Cronin-Furman (2015), ‘The Forever Victims?’, Section 4.

³⁷ HRW (2013), ‘We Will Teach You a Lesson’; Yasmin Sooka (2014), ‘An Unfinished War: Torture and Sexual Violence in Sri Lanka 2009-2014’, Bar Human Rights Committee of England and Wales, http://www.univie.ac.at/bimtor/dateien/violence_in_sri_lanka_2009_2014.pdf.

³⁸ OISL Report, para. 372. See also Sri Lanka Campaign for Peace and Justice, ‘Crimes Against Humanity in Sri Lanka’s Northern Province’, (2014), <http://cja.org/downloads/Crimes%20Against%20Humanity%20in%20Sri%20Lanka%20Northern%20Province.pdf>, [hereinafter “Crimes Against Humanity in Sri Lanka’s Northern Province”].

³⁹ HRW (2013), ‘We Will Teach You a Lesson’, p. 6.

⁴⁰ OISL Report, pp. 117-128. See also International Crimes Evidence Project (ICEP), ‘Island of Impunity’: Investigation into international crimes in the final stages of the Sri Lankan civil war’, (February 2014), pp. 150ff, https://www.piac.asn.au/wp-content/uploads/island_of_impunity.pdf.

⁴¹ See e.g. Special Rapporteur Mission Report (2016), A/HRC/34/54/Add.2, para. 43.

⁴² HRW (2013), ‘We Will Teach You a Lesson’, pp. 50-138.

⁴³ *Ibid.*, p. 2.

⁴⁴ *Ibid.*, p. 39.

⁴⁵ See further ITJP (2017) ‘Unstopped’, p. 41.

⁴⁶ Anne Woodworth & Bhavani Fonseka (July 2016), ‘Accountability and Reparations for Victims of Conflict Related Sexual Violence in Sri Lanka’, *Centre for Policy Alternatives Discussion Paper*, p. 5, <https://www.cpalanka.org/wp-content/uploads/2016/07/CSV-paper-June-2016.pdf>; OISL Report, paras. 116 and 597; Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, ‘Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment on his mission to Sri Lanka’ (December 2016), A/HRC/34/54, para. 26 (“Special Rapporteur Mission Report”); HRW (2013), ‘We Will Teach You a Lesson’, p. 40; ITJP (2017) ‘Unstopped’, pp. 41-47.

⁴⁷ Special Rapporteur Mission Report (2016), A/HRC/34/54, para.23. See further Sooka (2014), p. 21.

⁴⁸ Ibid.

⁴⁹ ITJP 'Joseph Camp', (2017), p. 38, http://www.itjpsl.com/assets/ITJP_Joseph_camp_report_FINAL.pdf.

⁵⁰ OISL Report, paras. 571 and 586.

⁵¹ Gowrinathan and Cronin-Furman (2015), 'The Forever Victims?', p. 5.

⁵² HRW (2013), 'We Will Teach You a Lesson', pp. 18-20.

⁵³ OISL Report, paras. 323-325.

⁵⁴ Ibid., para. 325.

⁵⁵ See e.g. ICEP (2014), 'Island of Impunity', paras. 11.30 and 11.34.

⁵⁶ HRW (2013), 'We Will Teach You a Lesson', p. 7.

⁵⁷ OISL Report, para. 1050.

⁵⁸ Dilrukshi Handunnetti, 'The man of the house is a woman', (14 June 2015), *Sunday Observer* <http://archives.sunday-observer.lk/2015/06/14/spe01.asp>; International Commission of Jurists ("ICJ") 'Submission to the Universal Periodic Review of Sri Lanka', (April 2012), p. 19, http://www.sangam.org/2012/08/ICJ_UPR.pdf, accessed 13 December 2017.

⁵⁹ Gowrinathan and Cronin-Furman (2015), 'The Forever Victims?', p. 5.

⁶⁰ International Crisis Group, 'Sri Lanka: Women's insecurity in the North and East', (December 2011), *Asia Report No. 217*, <https://www.crisisgroup.org/asia/south-asia/sri-lanka/sri-lanka-women-s-insecurity-north-and-east>.

⁶¹ Ibid., pp. 28-29.

⁶² OISL Report, para. 587, 591, 593, 594; HRW (2013), 'We Will Teach You a Lesson', p. 55.

⁶³ ITJP (2017), 'Unstopped', p. 39; OISL Report, para. 587.

⁶⁴ ITJP (2017), 'Unstopped', p. 39.

⁶⁵ Ibid., p. 40.

⁶⁶ Pinto-Jayawardena & Guthrie (2016), 'Introduction', *The Weight of Silence*, para. 2.

⁶⁷ Sooka (2014), p. 38.

⁶⁸ AA Edirisinghe and NKK Mudalige (2017), 'Male Victimization in Rape: Case of Sri Lanka', *Proceedings of APIIT Business, Law & Technology Conference, Asia Pacific Institute of Information Technology*, p. 121, <http://conference.apiit.lk/pdf2/Law/LBAT201714.pdf>

⁶⁹ ICJ (2012), 'Submission to the Universal Periodic Review of Sri Lanka', p. 6.

⁷⁰ See further Chapter 7 (Do No Harm).

⁷¹ ICJ (2012), 'Submission to the Universal Periodic Review of Sri Lanka', p. 3.

⁷² Chulani Kodikara, 'Justice and accountability for war related sexual violence in Sri Lanka', (August 2016), 50.50, *Inclusive Democracy*, <https://www.opendemocracy.net/5050/chulani-kodikara/justice-and-accountability-for-war-related-sexual-violence-in-sri-lanka>.

⁷³ HRW (2013), 'We Will Teach You a Lesson', p 30.

⁷⁴ Ibid., p. 75.

⁷⁵ Jason Hart (2001), 'Children & Armed Conflict in Sri Lanka; a Discussion Document Prepared for UNICEF Regional Office South Asia', Refugee Studies Centre, Oxford University, p. 40, <https://www.rsc.ox.ac.uk/files/files-1/dp-children-armed-conflict-sri-lanka.pdf>, accessed 13 December 2017.

⁷⁶ ITJP (2017), 'Unstopped', p. 15.

⁷⁷ Sooka (2014), p. 31.

⁷⁸ OISL Report, para. 588.

⁷⁹ Ibid., para. 589.

⁸⁰ HRW (2013), 'We Will Teach You a Lesson', pp. 67, 106.

⁸¹ UN Women (2017), 'Conflict-Related Sexual Violence in the Pacific: Putting Victims/Survivors First', p. 68, <http://www2.unwomen.org/-/media/field%20office%20eseasia/docs/publications/2017/05/wps-00-final-crsv-package.pdf?la=en&vs=318>.

⁸² International Crisis Group (2011), pp. 29-30; Pinto-Jayawardena & Guthrie (2016), 'Introduction', Sexual violence in the context of armed conflict and calls for justice, para. 6.

⁸³ Pinto-Jayawardena & Guthrie (2016), 'Introduction', Sexual violence in the context of armed conflict and calls for justice, para. 6.

⁸⁴ ICJ, 'Challenges to Accountability for Human Rights Violations in Sri Lanka: A Synopsis of Findings from a Meeting with Lawyers and Human Rights Defenders in Colombo, November 2016', (March 2017), p. 7, <https://www.icj.org/wp-content/uploads/2017/03/Sri-Lanka-FCO-Accountability-1-Advocacy-Analysis-brief-2017-ENG.pdf>.

⁸⁵ ICJ (2017), 'Challenges to Accountability for Human Rights Violations in Sri Lanka', p. 5.

⁸⁶ Ibid., p. 6.

⁸⁷ Ibid., pp. 9-10.

⁸⁸ Ibid., p. 7.

⁸⁹ Ibid., p. 3.

⁹⁰ Army Act 1949, s. 77.

⁹¹ Section 3(c).

⁹² PVCW Act, s. 28(2)(a).

⁹³ PVCW Act, ss. 28(2)(b)-(c).

⁹⁴ PVCW Act, s. 28(5).

⁹⁵ Note: The husband of a woman who has been raped may also file an action for damages against the defendant for the *injuria* caused to the husband by the rape of his wife: *Nadarajah v. Obeysekera* 76 NLR 268.

⁹⁶ *Nadarajah v. Obeysekera* 76 NLR 268.

⁹⁷ The Constitution, Arts. 126(3), 140, 141, 154P. The other writs are writs of *certiorari*, *prohibition*, *procedendo*, *mandamus* and *quo warranto*.

⁹⁸ The Constitution, Art. 126(3).

⁹⁹ *Ranasinghe v. Minister of Foreign Affairs and Others* (2010) 1 Sri L.R. 178 applied the Domestic Privileges Act No. 9 of 2009 which gave effect to the Vienna Convention on Diplomatic Relations, 1961 and Vienna Convention on Consular Relations, 1963.

¹⁰⁰ *Ranasinghe v. Minister of Foreign Affairs and Others* (2010) 1 Sri L.R. 178. See also *Queen v. Liyanage* 65 NLR 73; *G. G. Appuhamy v. J. A. Gregory* 55 N.L.R. 235 rules of international comity and diplomatic immunity were applied.

¹⁰¹ *Abasin Banda v. S. I. Gunaratne and Others* (1995) 1 Sri L.R. 244.

¹⁰² Including the European Court on Human Rights and Inter-American Court on Human Rights.

¹⁰³ *Leeda Violet and Others v. Vidhanapathirana OIC Police Station, Dickwella and Others* (1994) 3 Sri LR 377. See also *Channa Peris and Others v. Attorney General and Others* (1994) 1 Sri L.R. 1; *Velmuguru v. Attorney General and Another* (1981) 1 Sri L.R. 406.

¹⁰⁴ Human Rights Commission of Sri Lanka Act No.21 of 1996 [hereinafter “HRC Act”], s. 15(3)(c); s. 16(6).

¹⁰⁵ HRC Act, s. 11(a).

¹⁰⁶ OISL Report, para. 1203.

¹⁰⁷ Principles relating to the Status of National Institutions (“The Paris Principles”), adopted by General Assembly resolution 48/134 (20 December 1993). ‘B’ Status indicates “Partially compliant with the Paris Principles”, http://www.ohchr.org/Documents/Countries/NHRI/Chart_Status_NIs.pdf.

¹⁰⁸ Special Rapporteur Mission Report (2016), A/HRC/34/54, para. 90.

¹⁰⁹ The Constitution, Article 156(1). See further Parliamentary Commissioner for Administration Act No. 17 of 1982.

¹¹⁰ Linda C. Reif (2004), ‘The Ombudsman, Good Governance and the International Human Rights System’, *Volume 79, Martinus Nijhoff Publishers*, p. 245.

¹¹¹ For example, the UN Panel of Experts strongly criticised the operation of the Lessons Learned and Reconciliation Commission (“LLRC”) established to investigate alleged violations from 2002 to the end of the conflict, calling it “deeply flawed”. See further POE Report p. v; ICJ (2015), p. 115. For a detailed discussion of Commissions of Inquiry prior to 2010, see Kishali Pinto-Jayawardena (2010), ‘Post-War Justice in Sri Lanka: Rule of Law, the Criminal Justice System and Commissions of Inquiry’, International Commission of Jurists, https://reliefweb.int/sites/reliefweb.int/files/resources/04234216454178AFC12576B20038FF61-Full_Report.pdf.

¹¹² Pinto-Jayawardena (2010), ‘Post-War Justice in Sri Lanka’, p. 12.

¹¹³ *Ibid.*, p. 12.

¹¹⁴ See further ICJ (2015), ‘Authority and Accountability’, pp. 106-115.

¹¹⁵ PVCW Act, s. 29(4)(b).

¹¹⁶ UN Human Rights Council (2015), A/HRC/30/L.29.

¹¹⁷ Gazette of the Democratic Socialist Republic of Sri Lanka (Extraordinary), No.2036/21, Part I, (12 September 2017).

¹¹⁸ Sri Lankan Ministry of Foreign Affairs, ‘Statement by Foreign Minister Mangala Samaraweera at the High Level Segment of the 34th Session of the Human Rights Council’, (28 February 2017), www.mfa.gov.lk, accessed 13 December 2017.

¹¹⁹ Secretariat for Coordinating Reconciliation Mechanisms, ‘Final Report of the Consultation Task Force on Reconciliation Mechanisms’, (17 November 2016), www.scrm.gov.lk, accessed 13 December 2017.

¹²⁰ PVCW Act, ss. 29 – 30.

¹²¹ UN General Assembly, Optional Protocol to the International Covenant on Civil and Political Rights, (adopted 16 December 1966, entry into force 23 March 1976), United Nations, Treaty Series, vol. 999, [hereinafter “ICCPR”].

¹²² UN General Assembly, Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, (adopted 6 October 1999, entry into force 22 December 2000), United Nations, Treaty Series, vol. 2131. [hereinafter “CEDAW”].

¹²³ UN Committee Against Torture (2016), CAT/C/LKA/CO/5, para. 4.

¹²⁴ *Singarasa Nallaratnam v. Attorney General*, Application for Judicial Review SC/Spl/LA/ No.182/1999 SC Minutes 15.09.2006.

¹²⁵ See Human Rights Committee, ‘Follow-up progress report on individual communications’, (May 2017), CCPR/C/119/3, pp. 60-61, <http://www.ohchr.org/Documents/HRBodies/TB/AnnualMeeting/29Meeting/FollowupConcludingObservations.docx>.

¹²⁶ See further OHCHR information: <http://www.ohchr.org/EN/Issues/Detention/Pages/Complaints.aspx>.

¹²⁷ Article 20, United Nations Committee Against Torture, and Article 8, Optional Protocol to CEDAW.

¹²⁸ 11th special session of the Human Rights Council, ‘The human rights situation in Sri Lanka’ (27 May 2009), A/HRC/S-11/2, http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/S-11/2.

¹²⁹ See further OHCHR, ‘Human Rights Council Complaint Procedure’, <http://www.ohchr.org/EN/HRBodies/HRC/ComplaintProcedure/Pages/HRCComplaintProcedureIndex.aspx>.

¹³⁰ Human Rights Council, ‘Promoting Reconciliation, Accountability and Human Rights in Sri Lanka’, (September 2015), A/HRC/30/L.29, para. 6.

¹³¹ Rhadeena de Alwis and Niran Anketel (2015), ‘A Hybrid Court: Ideas for Sri Lanka’, *South Asia Centre for Legal Studies*, <http://sacls.org/resources/publications/reports/a-hybrid-court-ideas-for-sri-lanka>, accessed 13 December 2017.

¹³² See further Sri Lanka Monitoring and Accountability Panel (“MAP”) ‘An Alternative Roadmap to Victims’ Justice’, (2017), p. 3, <http://war-victims-map.org/wp-content/uploads/2017/11/MAP-Thematic-Report-9-Nov-2017.pdf>, accessed 6 January 2018 (“MAP Report”).

¹³³ See, e.g. International Court of Justice, ‘Questions relating to the obligation to prosecute or extradite: Belgium v Senegal’, ICJ GL No 144, ICGJ 437 (20 July 2012), 20, <http://www.icj-cij.org/en/case/144>.

¹³⁴ See IP2, p. 33, Box 2: ‘Universal Jurisdiction as a Tool to Fight Impunity’.

¹³⁵ In September 2017, the UN High Commissioner for Human Rights said: “The absence of credible action in Sri Lanka to ensure accountability for alleged violations of international human rights law and international humanitarian law makes the exercise of universal jurisdiction even more necessary”: Human Rights Council, ‘Opening Statement by Zeid Ra’ad Al Hussein, United Nations High Commissioner for Human Rights’, (11 September 2017). See further MAP (2017), ‘An Alternative Roadmap to Victims’ Justice’, pp. 11-12.

¹³⁶ See further IP2, p. 33.

¹³⁷ See further <http://www.itjpsl.com/reports/the-case-against-jagath-jayasuriya>; MAP (2017), 'An Alternative Roadmap to Victims' Justice', pp. 8-10.

¹³⁸ Bharatha Mallawarachi, 'Sri Lankan leader will protect general accused of war crimes', (3 September 2017), Associated Press, <https://www.washingtontimes.com/news/2017/sep/3/sri-lankan-leader-will-protect-general-accused-of-/>.

¹³⁹ Although the UN Working Group on Arbitrary Detention is a UN Special Procedure it is considered a quasi-judicial mechanism.

¹⁴⁰ Sri Lanka is a dualist country. As such, national and international law constitute separate and distinct legal systems that exist alongside each other. As a consequence, international treaties signed by the Government do not automatically become part of domestic law: *Singarasa Nallaratnam v. Attorney General*, Application for Judicial Review SC/Spl/LA/No.182/1999 SC Minutes 15.09.2006.

¹⁴¹ UN Human Rights Council (2015), A/HRC/30/L.29, para. 7

¹⁴² The Geneva Conventions Act (No. 4 of 2006) only applies to international armed conflicts. Note that it does not apply retrospectively to acts committed before it came into force.

¹⁴³ ICCPR, United Nations Treaty Series 999; Article 15(2) and Article 13(6) of the Constitution.

¹⁴⁴ Leader of the Opposition's Commission on Prevention of Violence Against Women and the Girl Child, 'Rape and Sexual Violence', (December 2014), p. 23, [hereafter Commission on Prevention of Violence Against Women and the Girl Child].

¹⁴⁵ Commission on Prevention of Violence Against Women and the Girl Child (2014), p. 23.

¹⁴⁶ Savitri Goonesekere and Camena Gunaratne (1998), 'Women, Sexual Violence and the Legal Process in Sri Lanka: A Study on Rape', *Centre for Women's Research*. See also generally Commission on Prevention of Violence Against Women and the Girl Child (2014); Priya Thangarajah (2016), 'Rape and the Evidentiary Process in Sri Lanka', *The Search for Justice: The Sri Lanka Papers*, Kumari Jayawardena and Kishali Pinto Jayawardena (eds), New Delhi: Zubaan; Shyamala and Mario Gomez (1999), 'Gender Violence in Sri Lanka: From Rights and Shame to Remedies and Change', *Canadian International Development Agency's Shakti Gender Equity Project*.

¹⁴⁷ Chulani Kodikara & Sarala Emmanuel (2016), 'Global Discourses and Local Realities', in *The Search for Justice: The Sri Lanka Papers*, (2016), Kumali Jayawardena & Kishali Pinto-Jayawardena (eds.), New Delhi: Zubaan, pp.6-11.

¹⁴⁸ Pinto-Jayawardena & Anantharajah (2016), 'A Crisis of Legal Indeterminacy' and State Impunity', in *The Search for Justice: The Sri Lanka Papers*, (2016), Kumali Jayawardena & Kishali Pinto-Jayawardena (eds.), Zubaan, p. 48; Women's Action Network (WAN), 'WAN Statement on the Vishvamadu Rape Case', (7 October 2015), <http://www.tamilguardian.com/files/File/Womens%20Action%20Network/WAN%20statement%20on%20Vishvamadhu%20rape%20case%2007Oct2015.pdf>.

¹⁴⁹ See further International Crisis Group, 'Sri Lanka's Conflict-Affected Women: Dealing with the Legacy of War', (2017), p. 11, <https://www.crisisgroup.org/asia/south-asia/sri-lanka/289-sri-lankas-conflict-affected-women-dealing-legacy-war>.

¹⁵⁰ Army Act 1949, s. 77(2).

¹⁵¹ Army Act 1949, s. 78.

¹⁵² ICJ (2015), 'Authority Without Accountability', p. 62.

¹⁵³ Following a decision of the Supreme Court in 2008 the statutory minimum of 7 years imprisonment for torture is no longer applicable: *In the matter of a Reference in terms of Article 125(1) of the Constitution of the Democratic Socialist Republic of Sri Lanka* (No. 03/08), Judgment.

¹⁵⁴ See further International Criminal Tribunal for Rwanda, *The Prosecutor v. Akayesu* (Trial Judgement), ICTR-96-4-T, 2 Sept. 1998, para. 687; IP2 p. 72.

¹⁵⁵ Convention Against Torture Act 1984 ss. 2(4) and 4.

¹⁵⁶ UN Committee Against Torture (2016), CAT/C/LKA/CO/5, para. 19.

¹⁵⁷ Special Rapporteur Mission Report (2016), A/HRC/34/54, para. 88.

¹⁵⁸ See further Annex One.

¹⁵⁹ International Criminal Court, Elements of Crimes, 2011 Article 7(1)(g)(1).

¹⁶⁰ See generally, Isabelle Lassée and Eleanor Vermunt (2016), 'Fitting the Bill: Incorporating International Crimes Into Sri Lankan Law', South Asian Centre for Legal Studies, <http://sacls.org/resources/publications/reports/fitting-the-bill-incorporating-international-crimes-into-sri-lankan-law>.

¹⁶¹ *Prosecutor v. Erdemovic* (IT-96-22), Trial Chamber, 29 November 1996, paras. 64-65.

¹⁶² Although this is a substantive matter of modes of liability, in a practical sense it is also a matter of how crimes are conceived and evidence is collected.

¹⁶³ See Priya Gopalan (2016), 'Time to Act: Accountability for conflict-related sexual violence in Sri Lanka', Prosecuting Conflict Related Sexual Violence, [http://www.iap-association.org/PSV/News/Accountability-for-Conflict-Related-Sexual-Vio-\(2\)](http://www.iap-association.org/PSV/News/Accountability-for-Conflict-Related-Sexual-Vio-(2)).

¹⁶⁴ Penal Code, s. 32.

¹⁶⁵ Penal Code, s. 33.

¹⁶⁶ Penal Code, s. 100.

¹⁶⁷ Penal Code, s. 113A.

¹⁶⁸ Penal Code, s. 113A.

¹⁶⁹ Penal Code, s. 113A.

¹⁷⁰ UN Human Rights Council (2015), A/HRC/30/L.29, para. 7.

¹⁷¹ Lassée and Vermunt (2016), 'Fitting the Bill', p. 21.

¹⁷² *Wijesuriya and Another v. The State* 77 NLR 25.

¹⁷³ See generally, Lassée and Vermunt (2016), 'Fitting the Bill'

¹⁷⁴ *Weeresoriya v. Marianu Baas* [1906] 10 N.L.R. 127. See also *Ellis v. Stephens* [1901] 51 N.L.R. 52.

¹⁷⁵ *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui* (ICC-01/04-01/07-717), Pre-Trial Chamber I, 30 September 2008, para. 515-518.

¹⁷⁶ Penal Code, s. 346. Grave and sudden provocation is established when there is graveness and suddenness in the provocation offered which deprives the defendant of all self-control: *King v. Kirigoris* 48 N.L.R. 407.

¹⁷⁷ Penal Code, s. 87. This provision does not provide an excuse to murder.

¹⁷⁸ Penal Code, s. 77. A person who pleads insanity must establish that he was insane at the time of committing the offence (not before or after). Such a defendant must not know the nature of the act or that what he is doing is contrary to law.

¹⁷⁹ Penal Code, s. 78.

¹⁸⁰ Penal Code, s. 69.

¹⁸¹ *Wijesuriya v. The State* (1973) 77 NLR 25 (Court of Criminal Appeal), cited in ICJ (2017), 'Challenges to Accountability', pp. 60-61.

¹⁸² ICRC, 'Children and Detention', (November 2014), p. 7, <https://www.icrc.org/eng/assets/files/publications/icrc-002-4201.pdf>.

¹⁸³ Ibid.

¹⁸⁴ Penal Code, s. 75.

¹⁸⁵ Penal Code, s. 76.

¹⁸⁶ Code of Criminal Procedure Act No. 15 of 1979 [hereinafter "CCP"], s. 456.

¹⁸⁷ The Prevention of Terrorism (Temporary Provisions) Act 1979, s.26.

¹⁸⁸ CCP, s. 97.

¹⁸⁹ See further ICJ (2015), 'Authority Without Accountability', p. 56.

¹⁹⁰ The Constitution, Article 35. See further ICJ (2015), 'Authority without Accountability', pp. 49 -55.

¹⁹¹ The Constitution, Article 35.

¹⁹² Parliament (Powers and Privileges) Act No. 21 of 1953, s. 2. A committee is defined as a standing committee, select committee or other committee of Parliament.

¹⁹³ Parliament (Powers and Privileges) Act No. 21 of 1953, s. 16(1). However, s. 16(3) permits action to be instituted or to proceed against a Member of Parliament if he gives false evidence or fabricates evidence in accordance with s. 190 of the Penal Code.

¹⁹⁴ IP2, p. 59.

¹⁹⁵ Penal Code, s. 363(b).

¹⁹⁶ Penal Code, s. 363(b).

¹⁹⁷ *Inoka Gallage v. Kamal Addararachchi and Another* (2002) 1 Sri L.R. 307.

¹⁹⁸ Penal Code, s. 83

¹⁹⁹ Penal Code, s. 363(e). See *Attorney General v. Priyantha* (2001) 2 Sri L.R. 96.

²⁰⁰ Penal Code, s. 360A, 360B, 360C.

²⁰¹ IP2, p. 61.

²⁰² Per Sisira de Abrew J. *Ajith v. Attorney General* (2009) 1 Sri L.R. 23.

²⁰³ *Sunil and Another v. The Attorney General* (1986) 1 Sri L.R. 230.

²⁰⁴ *Regina v. Dharmasena* 58 N.L.R. 15. See *Sunil and Another v The Attorney General* (1986) 1 Sri L.R. 230.

²⁰⁵ Penal Code, s. 363 (explanation (ii)).

²⁰⁶ *Perera v. AG* (2012) 1 Sri L.R. 69.

²⁰⁷ *Sunil and Another v The Attorney General* (1986) 1 Sri L.R. 230.

²⁰⁸ IP2, p. 148.

²⁰⁹ Ibid.

²¹⁰ TeleSur, 'Argentina Sentences 6 to Life in Prison for Crimes Against Humanity During US-Backed Dirty War', (16 September 2017), <https://www.telesurtv.net/english/news/Argentina-Sentences-6-to-Life-in-Prison-for-Crimes-Against-Humanity-During-US-Backed-Dirty-War-20170916-0016.html>.

²¹¹ IP2, p. 148.

²¹² CCP s. 109.

²¹³ CCP s. 109.

²¹⁴ Women's Action Network ("WAN"), 'Women's Access to Justice in the North and East of Sri Lanka: CEDAW Shadow Report submitted by Women's Action Network', (August 2016), p. 4, http://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/LKA/INT_CEDAW_NGO_LKA_25964_E.pdf, accessed 4 January 2018. See further The Economist, 'Linguistic slights spur ethnic division in Sri Lanka', (2 March 2017), <https://www.economist.com/news/asia/21717987-monoglot-officials-are-impeding-post-war-reconciliation-linguistic-slights-spur-ethnic-division>; Sarah E Davies, 'Whither Justice? The Language Barrier in Accessing The Criminal Justice System', (2016), Fokus Women, <http://www.fokuswomen.lk/reports/language-barrier-accessing-criminal-justice-system/>.

²¹⁵ ICJ (2017), 'Challenges to Accountability', pp. 9-10.

²¹⁶ CCP s. 122(1).

²¹⁷ CCP s. 122(1).

²¹⁸ CCP s. 122(1).

²¹⁹ CCP s. 122(1).

²²⁰ CCP s. 124 as amended by the Code of Criminal Procedure (Amendment) Act No. 11 of 1988.

²²¹ ICJ (2017), 'Challenges for Accountability', pp. 7-8.

²²² Ibid.

²²³ CCP s. 14.

²²⁴ The Accused may elect to be tried before a jury where he/she stands charged of certain serious crimes, such as crimes against the State, murder, culpable homicide, attempted murder and rape: Judicature Act No 2 of 1978 (as amended) s. 11. Where the Chief Justice decides that the interests of justice require it a Trial at Bar may be held in place of a trial by jury, before three judges of the High Court: §450 CCP.

²²⁵ CCP s. 109-115.

²²⁶ Code of Criminal Procedure (Amendment) Act No. 11 of 1988, s. 124.

²²⁷ Code of Criminal Procedure (Amendment) Act No. 11 of 1988, s. 124.

²²⁸ Evidence Ordinance No.14 of 1895 [hereinafter "Evidence Ordinance"], s. 137(1).

²²⁹ Evidence Ordinance, s. 137(2).

²³⁰ Evidence Ordinance, s. 137(3).

²³¹ Evidence Ordinance, s. 163A.

²³² IP2, p. 85.

²³³ See further Pinto-Jayawardena & Guthrie (2016), 'Introduction'.

²³⁴ OISL Report, para. 116; Woodworth and Fonseka (2016), p. 11; Sandesh Sivakumara (2007), 'Sexual Violence Against Men in Armed Conflict', *European Journal of International Law* 18(2), p.253, 256, <http://ejil.org>, accessed 13 December 2017.

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²³⁶ Shyamala Gomez, 'Sexual Violence in Conflict: Women Survivors and Stigma: The 'Social Scar'', (2 December 2017), *Daily Mirror*, <http://www.dailymirror.lk/article/Sexual-Violence-in-Conflict-Women-Survivors-and-Stigma-The-Social-Scar--141504.html>, accessed 13 December 2017 (on single women); IRIN, 'Fewer "I do's" for former female rebels', (2011), <http://www.irinnews.org/report/92017/sri-lanka-fewer-i-dos-former-female-rebels>, accessed 3 January 2018 (on former female combatants).

²³⁷ Medhaka Fernando (2017), 'Mending Walls: Avenues to Restore Trust in Victim and Witness Protection Part 1', *South Asian Centre for Legal Studies*, p. 6, www.sacls.org, accessed 13 December 2017.

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²³⁹ Kodikara (2016), 'Justice and accountability for war related sexual violence in Sri Lanka'.

²⁴⁰ See further ITJP (2017) 'Unstopped'; UN Committee Against Torture (2016), CAT/C/LKA/CO/5, para. 4.

²⁴¹ Penal Code (Amendment) Act No. 22 of 1995 s. 365A.

²⁴² Penal Code s. 365A.

²⁴³ Penal Code (Amendment) Act No.22 of 1995 s. 365.

²⁴⁴ Penal Code (Amendment) Act No.22 of 1995 s. 365.

²⁴⁵ Penal Code (Amendment) Act No.22 of 1995 s. 365A.

²⁴⁶ Penal Code (Amendment) Act No.22 of 1995 s. 365A.

²⁴⁷ *Sergeant N.W.A. Nihal and Another v. M.G.O.P. Panditharathne and Ten Others*, SC Appeal No.32/2011, S.C. Minutes 30.11.2016.

²⁴⁸ Commission on Prevention of Violence Against Women and the Girl Child (2014), p. 30.

²⁴⁹ WAN (2016), 'Women's Access to Justice in the North and East of Sri Lanka', p. 4. See further, The Economist, 'Linguistic slights spur ethnic division in Sri Lanka' (2 March 2017), <https://www.economist.com/news/asia/21717987-monoglot-officials-are-impeding-post-war-reconciliation-linguistic-slights-spur-ethnic-division>; Davies (2016), 'Whither Justice?'

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²⁵¹ Pinto-Jayawardena & Guthrie (2016), 'Introduction', Sexual violence in the context of armed conflict and calls for justice, para. 17.

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²⁵³ PTA s. 6(2).

²⁵⁴ Evidence Ordinance s. 126(1).

²⁵⁵ Evidence Ordinance s. 126(1).

²⁵⁶ Evidence Ordinance s. 129.

²⁵⁷ Evidence Ordinance s. 126.

²⁵⁸ Evidence Ordinance s. 125.

²⁵⁹ UN Human Rights Council (2015), A/HRC/30/L.29, para. 12.

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- ³²³ IP2, p. 265.
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³²⁷ Ibid., p. 267.

³²⁸ The legal age for marriage in Sri Lanka is eighteen years. However, this legal framework does not apply to Muslim women. Accordingly, a Muslim woman may be married at the age of twelve. If a girl is below the age of twelve, the Quazi Judge may, after an inquiry, authorise the registration of marriage. Therefore, the law of statutory rape does not apply if the woman is over twelve years of age and is married and is not judicially separated.

³²⁹ *Perera v. Attorney General* (2012) 1 Sri L.R. 69.

³³⁰ *Perera v. Attorney General* (2012) 1 Sri L.R. 69.

³³¹ Penal Code (Amendment) Act No.22 of 1995 s. 364.

³³² Penal Code (Amendment) Act No.22 of 1995 s. 364(2) Custodial rape refers to rape by a person holding a position of authority, in charge of a remand home or other place of custody, a hospital, rape of a pregnant woman, rape of a woman below eighteen years of age, gang rape and rape of a woman who is mentally or physically disabled.

³³³ Penal Code (Amendment) Act No.22 of 1995 s. 364(3).

³³⁴ Penal Code (Amendment) Act No. 16 of 2006 s. 365B(2)(a).

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