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# Accountability and Reparations for Victims of Conflict Related Sexual Violence in Sri Lanka

DISCUSSION PAPER  
CENTRE FOR POLICY ALTERNATIVES

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The Centre for Policy Alternatives (CPA) is an independent, non-partisan organisation that focuses primarily on issues of governance and conflict resolution. Formed in 1996 in the firm belief that the vital contribution of civil society to the public policy debate is in need of strengthening, CPA is committed to programmes of research and advocacy through which public policy is critiqued, alternatives identified and disseminated.

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## Introduction

Countless reports have highlighted the extensive sexual violence that occurred during and after the three-decade long war between the Sri Lankan military and the Liberation Tigers of Tamil Eelam (LTTE). Evidence suggests that conflict-related sexual violence was widespread during the last phase and immediate aftermath of the war in 2009, and reports indicate that sexual violence and harassment related to the conflict continues.<sup>1</sup> Sexual violence both related and unrelated to the conflict remains an extensive problem. An “increasing number of cases of sexual abuse of children and women are reported particularly from the former conflict zones of North and East, although increasing trends are being observed across the country.”<sup>2</sup> Particularly concerning is the increase in cases of sexual violence against children.<sup>3</sup> Though some of the change could be due to increased reporting, experts believe that abuse is on the rise, and still mostly unreported.<sup>4</sup> Limited accountability has been achieved for victims who were abused during and after the war, and survivors continue to be emotionally, physically, and economically impacted.<sup>5</sup>

Despite promises of change with the election of the Sirisena administration in January 2015, the government has done little to end impunity for the military and police personnel who committed acts of rape and sexual violence. Many victims in Sri Lanka stay silent due to fear of retaliation, extreme stigma, and mistrust of the legal system, which fails to adequately address sexual violence. Increasing numbers of victims of conflict-related violence have escaped abroad where they have shared their stories with researchers who have corroborated the evidence with medical and psychological evaluations and documented the cases.<sup>6</sup> Reports indicate that in several instances violence is perpetrated by military and

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<sup>1</sup> International Truth and Justice Project Sri Lanka, “Silenced”-Survivors of Sexual Violence and Torture in 2015 (January 2016); UN Human Rights Council, Report of the Office of the United Nations High Commissioner for Human Rights on Promoting Reconciliation, Accountability and Human Rights in Sri Lanka, 16 September 2015, A/HRC/30/61, available at: <http://www.refworld.org/docid/55ffb1854.html> [last accessed on 25 January 2016]; International Truth and Justice Project Sri Lanka, “A Still Unfinished War: Sri Lanka’s Survivors of Torture And Sexual Violence 2009-2015” (July 2015); Human Rights Watch, “We will teach you a lesson” - Sexual violence against Tamils by Sri Lankan security forces (February 2013)

<sup>2</sup> Dinouk Colombage, *Rapes Surge in Sri Lanka Amid Weak Martial laws*, Aljazeera, (17 August 2014), <http://www.aljazeera.com/indepth/features/2014/08/rapes-surge-sri-lanka-amid-weak-marital-laws-201481772359790802.html> (nation-wide sexual violence increased 20% between 2012 and 2014)

<sup>3</sup> Feizal Samath, *Child Rape on the Rise in Sri Lanka*, Colombo Telegraph, (23 July 2012), <https://www.colombotelegraph.com/index.php/child-rape-on-the-rise-in-sri-lanka/>; Human Rights Council, Report of the OHCHR Investigation on Sri Lanka (OISL), A/HRC/30/CRP.2 (1 December 2015) at ¶621; International Truth and Justice Project, “A Still Unfinished War: Sri Lanka’s Survivors of Torture And Sexual Violence 2009-2015” *supra* note 1, p 19

<sup>4</sup> Interview with health official, Jaffna, 28 January 2016; *Violence Against Women on the Rise*, Irin News, (27 November 2008), <http://www.irinnews.org/report/81693/sri-lanka-violence-against-women-on-the-rise>

<sup>5</sup> Human Rights Watch, *supra* note 1

<sup>6</sup> Human Rights Watch, “We will teach you a lesson”, *supra* note 1 (68 victims and many other witnesses); International Truth and Justice Project Sri Lanka, “Silenced”, *supra* note 1 (20 cases in 2015); International Truth and Justice Project Sri Lanka, “A Still Unfinished War”, *supra* note 1 (“180 statements from witnesses, virtually

police officials against both Tamil civilians and former LTTE members.<sup>7</sup> Such conflict-related violence generally takes the form of rape or other horrific sexual abuse such as burning or spraying chili powder on genital areas.<sup>8</sup> The sexual violence is often combined with other methods of torture and interrogation. It is conducted in detention centers, in internally displaced persons (IDP) camps, in police stations, and occasionally in victim's homes.<sup>9</sup> Evidence including the similarity between unrelated victim experiences, implies that the brutal abuse in part of a systematic program.<sup>10</sup> Researchers have suggested that much of the sexual violence along with other torture, is used to control the Tamil population through degradation and fear, intimidate victims and their families into silence, and exact large ransoms.<sup>11</sup>

These systematically perpetrated acts of sexual violence amount to human rights abuses and are violations of international law.<sup>12</sup> Victims have a right to truth, justice, and reparations.<sup>13</sup> Following multiple UN reports calling for investigations, the United Nations Human Rights Council (UNHRC) Resolution, "Promoting Reconciliation, Accountability and Human Rights in Sri Lanka", adopted at the 30th Session of the United Nations Human Rights Council, urges the government to investigate and take action on rape and sexual violence and provide reparations for victims.<sup>14</sup> The government of Sri Lanka has committed to establishing several mechanisms including an office on missing persons, an office of reparations, a judicial mechanism and a truth and reconciliation commission. However, where widespread rape and sexual violence have occurred in other conflicts, they have often been ignored in

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all of whom were subjected to periods of detention and repeated torture and sexual violence inside Sri Lanka"); <http://www.sangam.org/ANALYSIS/Lancet.htm> (38 men)

<sup>7</sup> International Truth and Justice Project Sri Lanka, "Silenced", *supra* note 1; Human Rights Watch, "We will teach you a lesson", *supra* note 1; UN Human Rights Council, A/HRC/30/61, *supra* note 1 at 116

<sup>8</sup> UN Human Rights Council, A/HRC/30/61, *supra* note 1 at 116

<sup>9</sup> International Truth and Justice Project Sri Lanka, "Silenced", *supra* note 1; Human Rights Watch, "We will teach you a lesson", *supra* note 1; UN Human Rights Council, A/HRC/30/61, *supra* note 1 at 116 [https://www.hrw.org/sites/default/files/reports/srilanka0213webwcover\\_0.pdf](https://www.hrw.org/sites/default/files/reports/srilanka0213webwcover_0.pdf)

<sup>10</sup> International Truth and Justice Project Sri Lanka, "A Still Unfinished War", *supra* note 1

<sup>11</sup> International Truth and Justice Project Sri Lanka, "Silenced", *supra* note 1,

<sup>12</sup> UN General Assembly, Rome Statute of the International Criminal Court (last amended 2010), 17 July 1998, ISBN No. 92-9227-227-6, available at: <http://www.refworld.org/docid/3ae6b3a84.html> [accessed 26 January 2016]; UN General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85, available at: <http://www.refworld.org/docid/3ae6b3a94.html> [accessed 26 January 2016]; *Prosecutor v. Anto Furundzija (Trial Judgement)*, IT-95-17/1-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 10 December 1998, available at: <http://www.refworld.org/docid/40276a8a4.html>

<sup>13</sup> UN General Assembly, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law : resolution / adopted by the General Assembly*, 21 March 2006, A/RES/60/147

<sup>14</sup> UN Human Rights Council, Promoting reconciliation, accountability and human rights in Sri Lanka: resolution / adopted by the Human Rights Council, 1 October 2015, A/HRC/30/L.29, available at: [http://ap.ohchr.org/documents/dpage\\_e.aspx?si=A/HRC/30/L.29](http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/30/L.29) [last accessed on 18 January 2016] ¶ 11,13,15; UN Human Rights Council, A/HRC/30/61, *supra* note 1 at 126 United Nations Security Council, Conflict-related sexual violence Report of the Secretary-General, S/2014/181

reconciliation.<sup>15</sup> In fulfilling its commitments, Sri Lanka must ensure that victims of sexual violence are part of the transitional justice process including having access to accountability and provided with reparations. Redress must include not only judicial reparations and accountability, but a broad spectrum of individual and collective administrative reparations, designed and implemented in conjunction with a credible truth seeking process. In the transitional justice context, reparations are measures taken by the state to “recognize and address the harms suffered by victims of systematic human rights violations”.<sup>16</sup> A comprehensive reparations program would include restitution to restore the victim to his or her pre-violation situation, compensation for the harm caused by the violation, rehabilitation in the form of medical, psychological or other assistance, measures of satisfaction such as truth-seeking and public apologies, and guarantees of non-recurrence including institutional reform and monitoring measures. These are discussed in greater detail below.

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<sup>15</sup> Ruth Rubio-Marín, *Reparations for Conflict-Related Sexual and Reproductive Violence: A Decalogue*, 19 Wm. & Mary J. Women & L. 69, 72 (2012), <http://scholarship.law.wm.edu/wmjowl/vol19/iss1/5>; Human Rights Watch, *Silenced and Forgotten Survivors of Nepal’s Conflict-Era Sexual Violence* (2014), available at [https://www.hrw.org/sites/default/files/reports/nepal0914\\_ForUpload\\_0.pdf](https://www.hrw.org/sites/default/files/reports/nepal0914_ForUpload_0.pdf) (describing how victims of sexual violence during the civil war in Nepal have been left out of the interim reparations programs)

<sup>16</sup> International Center for Transitional Justice, *Reparations*, (2014), available at <https://www.ictj.org/our-work/transitional-justice-issues/reparations>

## I. Judicial Reparations and Accountability

The right to remedy and reparations for human rights violations is established under international law.<sup>17</sup> Courts are capable of providing accountability by convicting perpetrators, and awarding reparations to individual victims as redress for the harm suffered.<sup>18</sup> Some special courts will award collective and moral reparations as requested with respect to a single conviction.<sup>19</sup>

There are numerous obstacles to judicial accountability and the award of judicial reparations in Sri Lanka. Victims of sexual violence have been unable to access justice due to a range of issues including widespread impunity, delays with court proceedings, poor investigation, and lack of victim and witness protection.<sup>20</sup> Although the war ended in 2009, and the government has adopted a zero-tolerance policy on sexual violence<sup>21</sup>, reports indicate that sexual violence has increased during the post-war period and was continuing in 2015.<sup>22</sup> Very little investigation or judicial action has been taken in this regard.

Victims report that perpetrators frequently act in groups, often without hiding their identities, and in an organized manner.<sup>23</sup> This suggests that they do not fear prosecution.<sup>24</sup> In the rare situations where cases are reported and investigations lead to indictments, it is still difficult to convict. Furthermore, CPA was also informed of instances where victims are reluctant to seek medical care or make a complaint with the police, due to fear and stigma.<sup>25</sup> There are also cases where victims have indicated unwillingness to pursue accountability due to stigma from society towards victim and in some instances the families.<sup>26</sup> It is also reported that where care is sought, medical professionals may not conduct appropriate

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<sup>17</sup> Universal Declaration of Human Rights (Article 8); International Convention on the Elimination of All Forms of Racial Discrimination (Article 6); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (article 14); International Convention for the Protection of All Persons from Enforced Disappearances (Article 24); The Rome Statute of the International Criminal Court (article 68)

<sup>18</sup> Rubio-Marín, *supra* note 15 at 78

<sup>19</sup> Civil Party Lead Co-Lawyers' Section-ECCC, Guidebook on Judicial Reparations in Case 002/2 before the ECCC (November 2014), available at [http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/2015-07-17%2017:01/E352.3\\_EN.PDF](http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/2015-07-17%2017:01/E352.3_EN.PDF) (collective reparations might include rehabilitation, documentation, and education)

<sup>20</sup> UN Human Rights Council, A/HRC/30/61, *supra* note 1

<sup>21</sup> Right of Reply of Sri Lanka, 26th Session of the Human Rights Council, Agenda Item 4, 23 June 2014, available at <http://www.news.lk/news/sri-lanka/item/1325-sri-lanka-rejects-inference-that-the-presence-of-the-military-contributes-to-the-insecurity-of-women-and-girls-in-the-former-conflict-affected-areas>

<sup>22</sup> UN Security Council, *Conflict-related sexual violence : report of the Secretary-General*, 23 March 2015, S/2015/203, available at: <http://www.refworld.org/docid/5536100a4.html> [accessed 26 January 2016]; International Truth and Justice Project Sri Lanka, "Silenced", *supra* note 1 at 13

<sup>23</sup> Interviews in the North and East of Sri Lanka, January and February 2016. Also see- International Truth and Justice Project Sri Lanka, "Silenced", *supra* note 1 at 10

<sup>24</sup> *Id.*; Human Rights Watch, "We will teach you a lesson", *supra* note

<sup>25</sup> Interviews with victim groups and civil society, January 2016.

<sup>26</sup> Interview with victim groups and civil society, North and East of Sri Lanka, January and February 2016



medico-legal investigations, in part due to a fear of having to testify<sup>27</sup> or fear of threats and attacks by alleged perpetrators.<sup>28</sup> One illustrative example of the failure of proper medical investigation is that of Vijayakala Nanthakumar and Sivamani Weerakoon who reported that they had been raped by members of the Mannar Police's Counter-Subversive Unit.<sup>29</sup> The initial report of the District Medical Officer stated that there was no evidence of rape.<sup>30</sup> After a public outcry and statements by the victims that they had been threatened by the police not to consent to a medical examination and had not received any examination, a subsequent medical investigation was conducted.<sup>31</sup> The second examination showed numerous injuries consistent with sexual assault and torture.<sup>32</sup> As a result of such obstacles, most cases of sexual violence are poorly investigated and victims and witnesses are often unwilling to testify due to a lack of protection and fear of retaliation.<sup>33</sup> Cases that make it into the court system enter a backlog and are delayed years or even decades.<sup>34</sup> Impunity and other impediments to the provision of justice must be addressed in order to make judicial reparations an effective remedy.

### **The Current Domestic Legal Framework**

Under the current legal framework in Sri Lanka, acts of sexual violence can be prosecuted in domestic courts as rape, custodial rape, gang rape, or grave sexual abuse. Rape includes intercourse where the woman is in detention or where 'consent is obtained through intimidation, threat, or force'.<sup>35</sup> Custodial rape is defined as acts committed by public officers or persons in positions of authority against women in official custody or against women who have been wrongly restrained.<sup>36</sup> These provisions are of particular importance since several accounts of documented sexual violence occurred in detention centers, displacement camps, and in police custody.<sup>37</sup> Article 365(B) of the Penal Code covers grave sexual abuse not amounting to rape, and would be applicable to the many other forms of sexual violence practiced in relation to the conflict. The punishment for the listed offences includes payment

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<sup>27</sup> International Truth and Justice Project Sri Lanka, "Silenced", *supra* note 1 at 12 (In one 2015 case where the victim needed stitches he experienced considerable difficulty finding any doctor who would treat him, such was the level of fear among the medical profession in Sri Lanka regarding treating a torture survivor)

<sup>28</sup> Interviews in the North and East of Sri Lanka, January & February 2016

<sup>29</sup> Kishali Pinto Jayawardena, "Women's demands for justice in Sri Lanka", Sunday Times (23 December 2007), available at <http://www.sundaytimes.lk/071223/Columns/focus.html>

<sup>30</sup> *Ibid.*

<sup>31</sup> *Ibid.*

<sup>32</sup> *Ibid.*

<sup>33</sup> International Truth and Justice Project Sri Lanka, "Silenced", *supra* note 1 at 9

<sup>34</sup> Waruni Karunaratne, Women Under Siege, The Sunday Leader, (20 September 2015), available at <http://www.thesundayleader.lk/2015/09/20/women-under-siege/>

<sup>35</sup> Sri Lanka Penal Code Section 363

<sup>36</sup> Sri Lanka Penal Code Section 364

<sup>37</sup> Human Rights Watch, "We will teach you a lesson", *supra* note 1 at 30-31; Refugee Documentation Center, Reports on existence in forest area etc of female only detention / torture camps during Tamil - Sri Lankan conflict (where internees were routinely tortured, raped etc in "torture camps" by EPDP / Sri Lankan military) 2 (13 January 2012), available at [http://www.ecoi.net/file\\_upload/1930\\_1326790349\\_q14854-sri-lanka.pdf](http://www.ecoi.net/file_upload/1930_1326790349_q14854-sri-lanka.pdf)

of compensation to the victims. However, judges have discretion in awarding compensation and in sentencing. Furthermore, the domestic legal framework has so far been incapable of adequately addressing offences of sexual violence due to practical issues such as being ill-equipped to mete out effective criminal justice in respect of the magnitude of crimes, the lack of a reliable victim and witness protection program, and evidentiary and procedural barriers perpetuated by the stigma and sensitivity surrounding acts of a sexual nature, gender biases and patriarchal attitudes of authorities responsible for investigation and prosecution, which make it difficult to prosecute perpetrators under the domestic legal system. There has also been a recent trend in Sri Lanka of suspending sentences for perpetrators of sexual violence following a decision finding mandatory minimum sentences in rape cases to be unconstitutional.<sup>38</sup>

Cases can also be brought as violations of fundamental rights under the constitution. Such a case was brought by Yogalingam Vijitha, who was tortured and raped by police officers in detention.<sup>39</sup> Despite the court having ordered compensation to be paid by both the perpetrators and the state, the police officers were not prosecuted.<sup>40</sup> In its opinion, the Supreme Court urged the Attorney General to take action under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment Or Punishment Act No. 22 of 1994 (Convention Against Torture Act).<sup>41</sup> The Convention Against Torture Act is another domestic mechanism that can be used to prosecute sexual violence, however Sri Lanka has generally failed to implement the Act and there have been limited investigations or prosecutions.<sup>42</sup> As with prosecutions of sexual violence more generally, a lack of witness and victim protection, proper investigations, and medical examinations have contributed to the poor implementation of the Act.<sup>43</sup> Reports indicate instances where the police when prompted, fail to investigate and may sabotage evidence or investigations.<sup>44</sup> The Act was intended to implement the Convention Against Torture and Other Degrading Treatment

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<sup>38</sup> Sri Lanka Shadow Report to the Committee on the Elimination of All Forms of Discrimination Against Women (July 2010) 36, available at [http://www2.ohchr.org/english/bodies/cedaw/docs/ngo/WMD\\_SriLanka48.pdf](http://www2.ohchr.org/english/bodies/cedaw/docs/ngo/WMD_SriLanka48.pdf); Rashantha N. de Alwis-Seneviratne, "Rape: A Human Issue", Colombo Telegraph, (3 June 2015), available at <https://www.colombotelegraph.com/index.php/rape-a-human-issue/>

<sup>39</sup> Human Rights Watch, "We will teach you a lesson", *supra* note 1 at 18,19; Yogalingam Vijitha v. Wijesekara, Reserve Sub.Inspector of Police, S.C. (FR) No. 186/2001, SCM 23.8.2002.

<sup>40</sup> Human Rights Watch, "We will teach you a lesson", *supra* note 1 at 18,19; Yogalingam Vijitha v. Wijesekara, Reserve Sub.Inspector of Police, S.C. (FR) No. 186/2001, SCM 23.8.2002.

<sup>41</sup> Yogalingam Vijitha v. Wijesekara, Reserve Sub.Inspector of Police, S.C. (FR) No. 186/2001, SCM 23.8.2002.

<sup>42</sup> Submission from Lawyers' Rights Watch Canada to the Committee Against Torture, Sri Lanka: 3rd and 4th Periodic Report on the Implementation of the Convention Against Torture, (October 2011), available at [http://tbinternet.ohchr.org/Treaties/CAT/Shared%20Documents/LKA/INT\\_CAT\\_NGO\\_LKA\\_47\\_9518\\_E.pdf](http://tbinternet.ohchr.org/Treaties/CAT/Shared%20Documents/LKA/INT_CAT_NGO_LKA_47_9518_E.pdf)

<sup>43</sup> Janasansadaya and Asian Human Rights Commission, Review of Medico-legal Examination & Documentation of Torture in Sri Lanka (December 2008)

<sup>44</sup> Asian Center for Human Rights, Torture and Lawless Law Enforcement in Sri Lanka

A shadow report to the UN Committee Against Torture, 3 (November 2005), available at <http://www.achrweb.org/reports/srilanka/SLK-CAT0305.pdf>

(CAT) after ratification by Sri Lanka, but falls short in this regard. For instance, in contrast with CAT, the Act fails to prohibit inhumane and degrading treatment.<sup>45</sup>

### **Recommended Amendments to the Legal Framework**

Although the penal code provides a mechanism to prosecute individual cases of sexual violence<sup>46</sup>, it is preferable that sexual violence be prosecuted as war crimes and crimes against humanity, which, unlike the domestic legal system, recognizes the gravity and scale of the offence and the powerlessness of victims in the context of armed conflict, while also providing for the rights of the defendant. Sri Lanka should adopt the language of international instruments including the Geneva Conventions and Additional Protocols II, ratify the Rome Statute and have enabling domestic legislation, in order to domestically prosecute conflict-related sexual violence as war crimes and crimes against humanity. This is due to the failure of the domestic legal system to recognize the gravity of the offence and its international nature, and to duly acknowledge the harm caused to the victims. Further, these crimes are such that the current domestic legal framework lacks the capacity to address them in order to bring effective remedy to their victims, undermines accountability as it does not recognize command responsibility and remains open to interference and influence by powerful political, security and military actors. Although Sri Lanka enacted the Geneva Conventions Act in 2006, it does not properly implement the Geneva Conventions and requires reform. The domestication of international law must also be made retroactive so that crimes during the conflict can be prosecuted under it.<sup>47</sup> This domestication of international law will require legal reform.

As highlighted above, Sri Lanka must also incorporate command responsibility into its law, allowing officers and other public officials to be held responsible for acts they oversaw. Civil society organizations have continually made this recommendation, and it is included in paragraph 7 of the UNHRC Resolution which references “the trial and punishment of those most responsible”.<sup>48</sup> Article 28 of the Rome Statute provides a definition of command responsibility, which the legislature in Sri Lanka may use as a model for domestic legislation.<sup>49</sup> Under Article 28 of the Rome Statute, a military commander is criminally

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

<sup>46</sup> It should be noted that the penal code still does not address marital rape. The legislature should amend the law to criminalize rape in the marital context. This is a necessary reform, particularly given the increase in domestic violence, but is beyond the scope of this paper.

<sup>47</sup> UN Human Rights Council, Promoting reconciliation, accountability and human rights in Sri Lanka: resolution / adopted by the Human Rights Council, A/HRC/30/L.29 *supra* note 14 at ¶ 7 (encouraging “the trial and punishment of those most responsible for the full range of crimes under the general principles of law recognised by the community of nations relevant to violations and abuses of human rights and violations of international humanitarian law, including during the period covered by the LLRC”)

<sup>48</sup> UN Human Rights Council, Sri Lanka Applicable International Law, available at [http://www.geneva-academy.ch/RULAC/applicable\\_international\\_law.php?id\\_state=206](http://www.geneva-academy.ch/RULAC/applicable_international_law.php?id_state=206)

<sup>49</sup> UN General Assembly, *Rome Statute of the International Criminal Court (last amended 2010)*, 17 July 1998, ISBN No. 92-9227-227-6, available at: <http://www.refworld.org/docid/3ae6b3a84.html> [accessed 26 January 2016]

responsible for crimes committed under his command where he knew or should have known that the forces were committing or about to commit such crimes and failed to take the necessary and reasonable measures to prevent their commission or report the matter to the authorities.<sup>50</sup> Additionally under Article 28, superiors who are not military commanders are also criminally responsible for the crimes of their subordinates where the superior “either knew, or consciously disregarded information which clearly indicated” that subordinates were committing or about to commit crimes concerning activities within the responsibility and control of the superior, and the superior failed to take necessary and reasonable measures to prevent their commission or report them to the authorities.<sup>51</sup> Command responsibility is highly applicable in the Sri Lankan context where reports indicate that sexual violence was perpetrated by the military and police systematically and on a widespread scale.<sup>52</sup> Command responsibility is helpful to prosecution because many victims of sexual violence by military and police personnel may not be able to identify the perpetrators. However, the victim may very well be able to identify the perpetrators’ specific military or police affiliation by their uniforms or the location they where they were attacked. Many of those charged with international crimes involving rape or sexual violence in the International Criminal Tribunal for the former Yugoslavia (ICTY), International Criminal Tribunal for Rwanda (ICTR), and Special Court for Sierra Leone (SCSL) were charged on the basis of command responsibility.<sup>53</sup> Any future accountability mechanism and those involved in this work in Sri Lanka should take note of violence that occurred and is possibly occurring in certain locations and under certain commanders.

The definition of rape within the Penal Code must also be amended to include male victims. Reports indicate that both men and women were subject to sexual abuse as a result of the war and ongoing conflict.<sup>54</sup> Male victims are reluctant to report sexual abuse due to homophobia and stigmatization.<sup>55</sup> Other actions must be taken to encourage reporting and provide gender-tailored rehabilitative support for victims. But creating a judicial mechanism for male victims to pursue justice is an imperative step. Many people in Sri Lanka believe that rape and sexual abuse of men is not possible and that a man who has been raped must be weak or homosexual.<sup>56</sup> Failure to include the rape of men in the Penal Code reinforces the misconception that it is not possible for men to be raped and that sexual violence perpetrated

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<sup>50</sup> *Ibid.*

<sup>51</sup> *Ibid.*

<sup>52</sup> International Truth and Justice Project Sri Lanka, “Silenced”, *supra* note 1; Human Rights Watch, “We will teach you a lesson”, *supra* note 1

<sup>53</sup> United Nations Department of Peacekeeping Operations, “Review of the Sexual Violence Elements of the Judgements of the International Criminal Tribunal for the Former Yugoslavia, The International Criminal Tribunal for Rwanda, And the Special Court for Sierra Leone in the Light of Security Council Resolution 1820”, available at [http://www.icty.org/x/file/Outreach/sv\\_files/DPKO\\_report\\_sexual\\_violence.pdf](http://www.icty.org/x/file/Outreach/sv_files/DPKO_report_sexual_violence.pdf) at 28

<sup>54</sup> UN Human Rights Council, A/HRC/30/61, *supra* note 1 at 116

<sup>55</sup> United Nations, Guidance Note of the Secretary General-Reparations for Conflict Related Sexual Violence (June 2014)

<sup>56</sup> Sandesh Sivakumaran, Sexual Violence Against Men in Armed Conflict The European Journal of International Law Vol. 18 no. 2, 253, 256 (2007), available at <http://ejil.org/pdfs/18/2/224.pdf>

against men does not constitute a crime. This in turn further stigmatizes male victims and prevents them from accessing needed services or pursuing judicial accountability.

## International Law

The acts of sexual violence that have been endemic to the conflict and post-conflict periods are clear violations of international law, regardless of whether prosecutions occur in a purely domestic court after incorporation of international law into the domestic framework, in a special or hybrid court under a specific statute, or in an international court. Rape and other sexual violence could be prosecuted as war crimes (serious violations of international humanitarian law), crimes against humanity, and torture under international law. These are discussed in detail below. It is important to note that in determining whether the elements of the following crimes are met, it is irrelevant whether the perpetrator acted for sexual gratification. The elements of these crimes differ somewhat between various international instruments, but are generally satisfied in the Sri Lankan context. For clarity on the elements of international crimes, it is helpful to consult the footnoted sources, the Rome Statute and the statutes of the ICTY and ICTR.<sup>57</sup>

**War Crimes:** Sexual violence is a war crime under Common Article 3 to the 1949 Geneva Conventions and of Additional Protocol II, which applies to non-international armed conflict, and prohibits “outrages upon personal dignity, in particular humiliating and degrading treatment” in the context of conflict. Customary international law has long confirmed that rape and sexual violence qualify as a war crime.<sup>58</sup> For example, the Pre-Trial Chamber of the Extraordinary Chambers in the Courts of Cambodia found rape and sexual assault to be a war crime, citing prohibitions on rape in instruments such as the Lieber Code of 1863, The Hague Conventions, and the Geneva Conventions.<sup>59</sup> Additionally, sexual violence has been established as a war crime in both the ICTY and ICTR. The case of Anto Furundžija was the first case brought solely on charges of sexual violence. Though he did not personally perpetrate the acts of rape and sexual violence, he was found guilty as an aider and abettor of outrages upon personal dignity (violations of the laws or customs of war).<sup>60</sup> Similarly, in

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<sup>57</sup> Elements of Crimes, available at <https://www.icc-cpi.int/NR/rdonlyres/336923D8-A6AD-40EC-AD7B-45BF9DE73D56/0/ElementsOfCrimesEng.pdf> (clarifies the elements of war crimes and crimes against humanity under the Rome Statute); Updated Statute for the Criminal Tribunal for the Former Yugoslavia, available at [http://www.icty.org/x/file/Legal%20Library/Statute/statute\\_sept09\\_en.pdf](http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf); Statute of the International Tribunal for Rwanda, available at [http://www.icls.de/dokumente/ict\\_r\\_statute.pdf](http://www.icls.de/dokumente/ict_r_statute.pdf)

<sup>58</sup> Amicus Curiae Brief of The Human Rights Center at the University of California, Berkeley, School of Law, Rape and Other Forms of Sexual Violence as Crimes Against Humanity, War Crimes, and Torture Under Customary International Law, Filing Before the Extraordinary African Chambers, 13-15 (8 December 2015)

<sup>59</sup> Case No. 002, Case File No. 002/19-09-2007-ECCC/OCIJ (PTC 145 & 146), Pre-Trial Chamber, Decision on Appeals by Nuon Chea and Ieng Thirith Against the Closing Order, 15 February 2011, para. 151.

<sup>60</sup> *Prosecutor v. Anto Furundžija (Trial Judgement)*, IT-95-17/1-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 10 December 1998; see also Akayesu, ICTR 96-4-T, Judgment at ¶ 686 (noting that sexual violence is “within the scope” of “outrages upon the personal dignity” of the war crime provisions of the Statute.

the case of *Prosecutor vs Akayesu*, a local government leader, did not commit the acts of sexual violence but knew they were happening and aided and abetted in their commission. Much of the evidence consisted of witness statements that Akayesu had watched women dragged off to be raped, at one point ordering a woman to be taken away and stating “you should first of all make sure that you sleep with this girl.”<sup>61</sup> Support for the conviction also came from the fact that much of the rape and sexual violence occurring in the town happened in public.<sup>62</sup> Widespread public sexual violence is absent in the Sri Lankan context. But there is evidence of Internally Displaced Persons (IDPs) and detainees witnessing others being dragged into the jungle and hearing “pleading not to be attacked” and screams.<sup>63</sup> Such evidence could be one of several data to show widespread perpetration of sexual violence in particular locations and pursue accountability for officials responsible for those locations.

Crimes against Humanity: Rape is also well established as a crime against humanity under international customary law.<sup>64</sup> Crimes against humanity are defined in the Rome Statute of the International Criminal Court to include various acts “committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack”, including “rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity”.<sup>65</sup> The statute and customary international law have provided for specific definitions for key elements such as the “widespread” and “systematic” nature of the attack, which needs to be established in order to prosecute under such crimes. It has been held that “widespread” constitutes “large-scale nature of the attack and the number of victims”<sup>66</sup> and “systematic” has been held as “the organized nature of the acts of violence and the improbability of random occurrence”<sup>67</sup>. Though Sri Lanka has not signed the Rome Statute, the systematic sexual violence committed in the country could still be prosecuted as a crime against humanity under customary international law. Rape was first declared to be a crime against humanity in the 1919 World War I Crimes Commission,<sup>68</sup> and since then courts and legislatures have continued to find rape to be a crime against humanity.<sup>69</sup> Article 5 of the ICTY statute which covers crimes

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(Note that courts in both *Furundzija* and *Akayesu* stated that rape may also qualify as genocide, where the appropriate elements are met)

<sup>61</sup> United Nations Department of Peacekeeping Operations, *supra* note 53

<sup>62</sup> *Ibid.*

<sup>63</sup> UN Human Rights Council, A/HRC/30/61, *supra* note 1 at 120

<sup>64</sup> Amicus Curiae Brief *supra* note 58 at 17-19

<sup>65</sup> [https://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome\\_statute\\_english.pdf](https://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf)

<sup>66</sup> *Prosecutor v Nahimana, Barayagwiza and Ngeze*

<sup>67</sup> *Naletilic and Martinovic*, (Trial Chamber), March 31, 2003, para. 236

<sup>68</sup> Report Presented to the Preliminary Peace Conference by the Commission on the Responsibilities of the Authors of the War and on Enforcement of Penalties (Carnegie Endowment for International Peace, Division of International Law Pamphlet No 3, 1919), reprinted in 14 American Journal of International Law 95 (1920), at 114, 127 (including rape on a list of violations of the laws of humanity)

<sup>69</sup> Kunarac et al. (IT-96-23 & 23/1) (this was the first case in the ICTY to convict for rape as a crime against humanity); Trial of Takashi Sakai, United Nations War Crimes Commission, Law Report of Trials of War

against humanity grants the ICTY the power to prosecute “persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population: (a) murder; [. . .] (f) torture; (g) rape; (h) persecutions on political, racial and religious grounds; (i) other inhumane acts.”<sup>70</sup> Article 3 of the ICTR statute is similar though it does not require armed conflict and states that the widespread or systematic attack on civilians must be perpetrated on “national, political, ethnic, racial or religious grounds”.<sup>71</sup> An illustrative case from the ICTY is *Kunarac et al.* in which all three defendants who participated in the creation of rape camps in Bosnia were convicted of rape as a crime against humanity. The court found that “in the context of widespread and systematic attack on civilians”<sup>72</sup>, rape allowed the Serbs to “assert their superiority and victory over the Muslims”. Reports available in the public domain indicate that the rape and sexual violence perpetrated in relation to the conflict in Sri Lanka has targeted civilians, and the systematic and widespread nature of these attacks is evidenced by the fact that there have been testimonies from survivors of sexual violence which indicates that incidents of sexual violence were not isolated acts but part of a deliberate policy to inflict torture, following similar patterns and using similar tools. Furthermore, given the disparate impact on Tamils and reports of the use of slurs such as “Tamil dogs” by perpetrators, was perpetrated on political, ethnic and religious grounds.<sup>73</sup> The elements of a rape as a crime against humanity under international law appear to be, at least on the basis of information available in the public domain, be satisfied.

**Torture:** Finally, rape and other sexual violence firmly qualify as the crime of torture. Sri Lanka has ratified the Convention Against Torture and Other Degrading Treatment (CAT) and has incorporated it into domestic law as the Convention Against Torture and other Cruel Inhuman or Degrading Treatment or Punishment Act, No. 22 of 1994.<sup>74</sup> The Act defines torture as “any act which causes severe pain, whether physical or mental” with the purpose of obtaining information or confession, punishing a person, intimidating or coercing a person, or done for any reason based on discrimination, and done with the initiation, consent or acquiescence of a person acting in official capacity.<sup>75</sup> Conflict-related sexual violence in Sri Lanka indisputably fits this definition. Torture can also be considered a crime against humanity, war crime, and an independent crime under customary international law.<sup>76</sup> Both

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Criminals Vol. XIV, Case No. 83, Chinese War Crimes Military Tribunal of the Ministry of National Defense, Nanking, 29th August, 1946 (1949), at 7

<sup>70</sup> United Nations Department of Peacekeeping Operations, *supra* note 53

<sup>71</sup> *Ibid.*

<sup>72</sup> United Nations International Criminal Tribunal for the Former Yugoslavia, “Landmark Cases”, available at <http://www.icty.org/en/in-focus/crimes-sexual-violence/landmark-cases>

<sup>73</sup> International Truth and Justice Project Sri Lanka, “Silenced”, *supra* note 1; Human Rights Watch, “We will teach you a lesson”, *supra* note 1; UN Human Rights Council, A/HRC/30/61, *supra* note 1 at 67

<sup>74</sup> Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment Or Punishment Act No. 22 of 1994

<sup>75</sup> *Ibid.*

<sup>76</sup> Amicus Curiae Brief, *supra* note 58 at 22

the ICTY and ICTR have prosecuted rape as a torture.<sup>77</sup> Much of the sexual violence perpetrated in connection with the conflict in Sri Lanka appears to be designed and intended as torture.<sup>78</sup> Victims consistently report sexualized forms of torture such as cigarette burns on the breasts or insertion of needles into the penis. And the violence often occurs in connection with degrading treatment such as forced nudity and slurs.<sup>79</sup> Such a focus on humiliation is particularly indicative of torture.<sup>80</sup>

## The Court

Ideally these crimes would be tried in a special court designed to hear cases involving sexual abuse or conflict-related human rights abuses. In the Report of the OHCHR Investigation on Sri Lanka, the UN recommended the creation of a hybrid court integrating international actors. The report cited an earlier resolution in finding that “Sri Lanka’s criminal justice system is not yet ready or fully equipped to promptly conduct the ‘independent and credible investigation’ into the allegations contained in this report, or ‘to hold accountable those responsible for such violations’, as requested by the Human Rights Council”.<sup>81</sup> A special hybrid court would facilitate the inclusion of judges, investigators, and lawyers who are better trained to handle human rights violations such as sexual violence, the use of special procedures, quicker judgments, and would hopefully put these controversial cases in the hands of independent and impartial court personnel.<sup>82</sup> A special court has been alluded to by the Minister of Foreign Affairs who spoke of a proposed “judicial mechanism with a special counsel” in September.<sup>83</sup> This language was adopted by paragraph 6 of the UNHRC

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<sup>77</sup> See e.g., *Prosecutor v. Zejnil Delalić et al.*, Case No. IT-96-21/T, Trial Chamber, Judgment, 16 November 1998, paras. 942-943; *Prosecutor v. Dragoljub Kunarac et al.* (Judgment), Case No. IT-96-23/I-A, Appeals Chamber, 12 June 2002, paras. 134-156, 185; *Prosecutor v. Laurent Semanza* (Judgment and Sentence), Case No. ICTR 97-20-T, Trial Chamber, 15 May 2003, para. 482

<sup>78</sup> Human Rights Watch, “We will teach you a lesson”, *supra* note 1; International Truth and Justice Project Sri Lanka, “Silenced”, *supra* note 1; UN Human Rights Council, A/HRC/30/61, *supra* note 1

<sup>79</sup> Human Rights Watch, “We will teach you a lesson”, *supra* note 1 at 4, 87

<sup>80</sup> *Prosecutor v. Anto Furundžija* (Trial Judgement), IT-95-17/1-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 10 December 1998

<sup>81</sup> Human Rights Council, Report of the OHCHR Investigation on Sri Lanka (OISL), A/HRC/30/CRP.2 (1 December 2015) at ¶1278 (citing A/HRC/RES/25/1, preamble)

<sup>82</sup> Bhavani Fonseka and Luwie Ganesathasan, Hybrid vs Domestic: myths, realities, and options for transitional justice in Sri Lanka (January 2016), available at <http://www.cpalanka.org/hybrid-vs-domestic-myths-realities-and-options-for-transitional-justice-in-sri-lanka/>; UC Berkeley Human Rights Center, The Long Road Accountability for Sexual Violence in Conflict and Post-Conflict Settings, 65 (2015); International Commission of Jurists, Sri Lanka: ICJ statement on UN accountability report (30 December 2015), available at <http://www.icj.org/sri-lanka-icj-statement-on-un-accountability-report>; Daily FT, An analysis of the UNHRC Resolution on Sri Lanka (6 October 2015), available at <http://www.ft.lk/article/479397/An-analysis-of-the-UNHRC-Resolution-on-Sri-Lanka>

<sup>83</sup> Colombo Telegraph, Sri Lanka’s Response To UNHRC: The Full Text Of Foreign Affairs Minister’s Speech Today, available at <https://www.colombotelegraph.com/index.php/sri-lankas-response-to-unhrc-the-full-text-of-foreign-affairs-ministers-speech-today/>



Resolution.<sup>84</sup> However President Sirisena stated in January that the government would not act “in haste” on the creation of such a court.<sup>85</sup> There has been some controversy over international participation in the creation of a special court. However, the language of the constitution and a long history of international participation in Sri Lanka show that such a court is constitutional, feasible and needed.<sup>86</sup>

The statute of the special court must clearly specify procedures and processes for the investigation and prosecution of sexual violence. It may be preferable to create a separate special court or chambers focused entirely on sexual violence. Liberia followed this approach with special court E.<sup>87</sup> A separate court would ensure that sexual violence is not overlooked amidst the push for prosecutions of other crimes, helps to relive the backlog of sexual violence cases, and allows court personnel to gain expertise more quickly.<sup>88</sup> It may also be easier to enact special procedures and standards, such as identity protection and security measures in a separate court, areas key in the Sri Lankan context. However, a separate court can be extremely costly, and may not result in better outcomes due to the increase of negative social impact, even with the adoption of special procedures such as confidentiality and security. In this context, it would be challenging to empower victims to seek redress. Thus, it is essential to examine broader issues related to sexual violence, ensuring that accountability is pursued and sequenced with larger reform processes including legal, policy and structural reforms.

Whether or not prosecutions of sexual violence occur in a separate special court, all court actors including judges, lawyers, and investigators must be trained with respect to sexual violence. Improper questioning and humiliating treatment re-traumatize victims and contribute to the reluctance to seek justice. Efforts should be made to utilize gender-sensitive lawyers, judges, investigators, and court personnel. It has been shown that female victims generally are much more comfortable sharing their experiences with women.<sup>89</sup> Male and female victims are likely to have different preferences so ideally victims would be given a choice regarding the gender of court personnel when possible. Of course there may be times when victims will need to interact with personnel of a gender they are less comfortable with, so all personnel must be trained. Courtroom procedures must allow for anonymity and protect victims and witnesses who testify. For example, allowing out of court, video and behind screens testimony, voice distortion, and the use of coded language when testifying

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<sup>84</sup> UN Human Rights Council, Promoting reconciliation, accountability and human rights in Sri Lanka: resolution / adopted by the Human Rights Council, A/HRC/30/L.29 *supra* note 14 at ¶ 6

<sup>85</sup> News.lk, SL would not act ‘in haste’ on war crimes special court – President, available at <http://www.news.lk/news/politics/item/11607-sl-would-not-act-in-haste-on-war-crimes-special-court-president>

<sup>86</sup> Bhavani Fonseka and Luwie Ganeshathasan, Hybrid vs Domestic: myths, realities, and options for transitional justice in Sri Lanka (January 2016), available at <http://www.cpalanka.org/hybrid-vs-domestic-myths-realities-and-options-for-transitional-justice-in-sri-lanka/>

<sup>87</sup> Liberian Leader Dedicates Criminal Court ‘E’ (3 Dember 2008), available at [http://www.emansion.gov.lr/2press.php?news\\_id=972&related=7&pg=sp](http://www.emansion.gov.lr/2press.php?news_id=972&related=7&pg=sp)

<sup>88</sup> Combating Sexual and Gender Based Violence in Liberia, available at <http://stoprapenow.org/uploads/features/SGBVemail.pdf>

<sup>89</sup> Interview in the North, 23 January 2016

would be particularly helpful. Anonymity and other protection measures must extend beyond the courtroom and trial, and protect the safety and identify of victims traveling to and from court. Practical considerations such as the need for court personnel who speak both Tamil and Sinhala should be addressed.

Finally, standards of evidence must be designed for the prosecution of sexual violence and clearly defined. They should be victim and gender sensitive and recognize the limitations of war-time evidence collection. The defined rules of other courts such as the International Criminal Court rules of Evidence and Procedure or the ICTY Rules of Procedure and Evidence provide helpful guidance. For instance, both the ICTY and ICTR Rules of Procedure and Evidence included that “evidence of a consistent pattern of conduct relevant to serious violations of international humanitarian law under the Statute may be admissible in the interests of justice”.<sup>90</sup> A pattern is often established where numerous incidents display a pattern in “ (i) the profile of the perpetrators; (ii) the profile of the victims; (iii) the geographical and chronological distribution of the crime; and (iv), the modus operandi in the commission of the crime.”<sup>91</sup> Pattern evidence shown through “expert testimony to statistics and crime mapping” has been successfully used for many international crimes, but its use in the prosecution of sexual violence has been more limited.<sup>92</sup> However recommendations to apply pattern evidence to sexual violence have been proposed.<sup>93</sup> The rules of procedure and evidence for Sri Lanka’s special court should clearly allow for the use of pattern evidence with respect to sexual violence. Allowing for video-testimony will make it easier for the court to receive the necessary testimony from experts, victims and witnesses in a secure and cost-saving manner including those residing outside of Sri Lanka. Many victims have fled the country and are afraid to return for security reasons. The International Criminal Court has begun to allow video-link testimony in some circumstances, and could be consulted for guidance on establishing appropriate technology and procedures.<sup>94</sup>

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<sup>90</sup>ICTY Rules of Procedure and Evidence, available at [http://www.icty.org/x/file/Legal%20Library/Rules\\_procedure\\_evidence/IT032Rev50\\_en.pdf](http://www.icty.org/x/file/Legal%20Library/Rules_procedure_evidence/IT032Rev50_en.pdf); ICTR Rules of Procedure and Evidence, available at <http://www1.umn.edu/humanrts/africa/RWANDA1.htm>

<sup>91</sup> Xabier Agirre Aranburu, “Sexual Violence beyond Reasonable Doubt: Using Pattern Evidence and Analysis for International Cases, *Leiden Journal of International Law*”, 610 (2010), pp. 609–627 C Foundation of the Leiden Journal of International Law, available at <http://www.usip.org/sites/default/files/missing-peace/Xabier%20Aranburu.pdf>

<sup>92</sup> *Ibid.*

<sup>93</sup> *Ibid.*

<sup>94</sup> International Bar Association, *Witnesses before the International Criminal Court*, 18 (July 2013)

## II. Administrative Reparations

It is imperative that administrative reparations be provided in addition to court-ordered reparations and convictions. Out of court programs can reach many more victims than the judicial process, utilize procedures that are more victim-sensitive, and are significantly lower in cost.<sup>95</sup> It is also much easier to involve civil society organizations and victims in the design of administrative reparations, than it is in the judicial process.<sup>96</sup> Past commissions of inquiry have made numerous recommendations of reparations for victims of the conflict.<sup>97</sup> Although there is a commitment to establish an Office for Reparations, the present administration has not yet acknowledged the need for redress for victims of sexual violence.

The government of Sri Lanka has already committed to creating a Commission on Truth, Justice, Reconciliation, and Non Recurrence, and an Office for Reparations. These mechanisms provide a structure for a program of administrative reparations to be implemented.<sup>98</sup> The government must integrate the recommendations of the commission and others into a reparations policy, which specifically addresses conflict-related sexual violence, and provides a clear structure for the Office of Reparations and other involved agencies to implement the reparations. It is not enough to establish a commission to make recommendations. It has been demonstrated in other contexts that truth commissions have limited political power, and even recommendations labeled as binding may not be implemented.<sup>99</sup> Sri Lanka has its own history of ignoring the recommendations of its numerous past commissions.<sup>100</sup> Thus it is imperative that a carefully considered policy be written to guide the reparations process.

The reparations program should employ a combination of different forms of reparations to ensure that the many needs of a large population of victims are best met.<sup>101</sup> In developing a

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<sup>95</sup> United Nations, Guidance Note of the Secretary General-Reparations for Conflict Related Sexual Violence (June 2014); Rubio-Marín, *supra* note 15

<sup>96</sup> Rubio-Marín, *supra* note 15 at 103

<sup>97</sup> Bhavani Fonseka, The Need for a Comprehensive Reparations Policy, Center for Policy Alternatives (April 2015), available at <http://www.cpalanka.org/wp-content/uploads/2015/04/The-Need-for-a-Comprehensive-Reparations-Policy-and-Package2.pdf>

<sup>98</sup> UN Human Rights Council, Promoting reconciliation, accountability and human rights in Sri Lanka: resolution / adopted by the Human Rights Council, A/HRC/30/L.29 *supra* note 14 at ¶ 4

<sup>99</sup> Office of the United Nations High Commissioner For Human Rights, Rule-of-Law Tools for Post-Conflict Stations – Reparations Programs, HR/PUB/08/1, 11-12 (2008) (noting that the recommendations of the truth commissions in both El Salvador and Guatemala were ignored)

<sup>100</sup> International Crisis Group, Reconciliation in Sri Lanka: Harder than Ever, 3 (18 July 2011), available at [http://www.crisisgroup.org/~media/Files/asia/south-asia/sri lanka/209%20Reconciliation%20in%20Sri%20Lanka%20-%20Harder%20than%20Ever.pdf](http://www.crisisgroup.org/~media/Files/asia/south-asia/sri%20lanka/209%20Reconciliation%20in%20Sri%20Lanka%20-%20Harder%20than%20Ever.pdf) (Sri Lanka has a “long history of failed and ignored ad hoc inquiries”)

<sup>101</sup> United Nations, Guidance Note of the Secretary General-Reparations for Conflict Related Sexual Violence (June 2014); United Nations Department of Political Affairs, Addressing Conflict-Related Sexual Violence in Ceasefire and Peace Agreements, 50 (2012), available at page <http://www.un.org/wcm/webdav/site/undpa/shared/undpa/pdf/DPA%20Guidance%20for%20Mediators%20on%2>

reparations program, the government should engage victims<sup>102</sup> as well as civil society groups working on issues of sexual violence in order to ensure that the programs are effective and sensitive to those harmed.<sup>103</sup> Finally, reparations must be designed to ensure confidentiality to victims, who face stigma as survivors of sexual violence.

## Restitution and Compensation

Restitution and compensation may be awarded through the judicial process. But an additional administrative program of restitution and compensation is vital because many victims will not want or be able to pursue judicial action, will not be able to identify perpetrators, and even when the judicial system is strengthened and perpetrators are convicted, the awarded compensation may not be paid.<sup>104</sup> The proposed Office of Reparations and the Commission on Truth, Justice, Reconciliation are likely best suited to have responsibility for rewarding reparations to individual victims, though nothing is publicly indicated at the time of writing this paper.

Payment of restitution and compensation should be accompanied by judicial accountability and apologies. Otherwise victims and their communities are more likely to interpret compensation as payment for sexual services or buying the silence of victims. For example, In Guatemala, after compensation was distributed to victims, they were accused by community members of “willingly giving sex to the enemy for money”.<sup>105</sup> Confidentiality and sensitivity in the distribution of compensation and restitution are essential.

Restitution is intended to “restore the victim to the original situation before the gross violations of international human rights law or serious violations of international humanitarian law occurred.”<sup>106</sup> This is difficult with regard to sexual violence, where the impact on physical and mental health and social status may be impossible to reverse.<sup>107</sup> Reports indicate that victims living in militarized areas in the North of the country continue

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0Addressing%20Conflict-Related%20Sexual%20Violence%20in%20Ceasefire%20and%20Peace%20Agreements.pdf

<sup>102</sup> Cristián Correa, Julie Guillerot, Lisa Magarrell, Reparations and Victim Participation: A Look at the Truth Commission Experience, available at <https://www.ictj.org/sites/default/files/ICTJ-Global-Reparations-Participation-2009-English.pdf>

<sup>103</sup> United Nations, Guidance Note of the Secretary General-Reparations for Conflict Related Sexual Violence (June 2014); UN Human Rights Council, Promoting reconciliation, accountability and human rights in Sri Lanka: resolution / adopted by the Human Rights Council, A/HRC/30/L.29 *supra* note 14 at ¶ 3 (Supporting the governments “commitment to strengthen and safeguard the credibility of the processes of truth seeking, justice, reparations, and guarantees of non-recurrence by engaging in broad national consultations with the inclusion of victims and civil society, including non-governmental organizations, from all affected communities that will inform the design and implementation of these processes”)

<sup>104</sup> Fionnuala Ní Aoláin, Catherine O’Rourke, Aisling Swaine, Transforming Reparations for Conflict-Related Sexual Violence: Principles and Practice, Harvard Human Rights Journal / Vol. 28, at 135

<sup>105</sup> Rubio-Marín, *supra* note 15 at 94

<sup>106</sup> UN General Assembly, *Basic Principles and Guidelines*, *supra* note 13, at ¶ 19

<sup>107</sup> Fionnuala, *supra* note 104 at 119

to face sexual harassment by the military and live in fear of further detainment and abuse.<sup>108</sup> This fear leads many victims, particularly women, to take protective measures such as “limiting their daily activities” outside of the home, which worsen their economic condition.<sup>109</sup> Where abuse and resulting fear has economically marginalized victims, return of property and livelihoods, and restitution for discontinued education and lost employment can provide impactful redress.<sup>110</sup> In Sri Lanka, this means that reparations are intertwined with other needed action. For example, land that is owned by victims but still occupied by the military and others should be returned, and access to other resources such as fisheries should be ensured so that victims may regain their livelihoods.<sup>111</sup>

Compensation “should be provided for any economically assessable damage” resulting from violations which include physical or mental harm, lost opportunities and earnings, and moral damage.<sup>112</sup> In assessing economic damage for sexual violence, it is important to consider the gender of the victim and the unique impacts on victims within the culture. The stigma and marginalization within the community resulting from being identified as sexually abused, affect the victim’s earning and marriage potential.<sup>113</sup> These impacts should be recognized and quantified. Additionally, it is necessary to consider the manner in which compensation is awarded. Women victims in particular, who are given lump sum payments are likely to be pressured to give up the payments to relatives or to pay off family debts.<sup>114</sup> Researchers saw this effect after victims were paid one-time payments in South Africa, and interviews in the North and East suggest that the problem would likely arise in Sri Lanka. Monthly pension-type payments may better serve the purpose of compensating such victims.<sup>115</sup> Although larger payments may better help victims achieve independence<sup>116</sup>, given the risks with lump-sum payments, a combination of skills training and monthly pensions would best serve the purpose of ensuring that victims are compensated for their harm but also able to achieve self-sufficiency.

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<sup>108</sup> Interviews in the North, 22 January 2016

<sup>109</sup> Nimmi Gowrinathan and Kate Cronin-Furman, *The Forever Victims? Tamil Women In Post-War Sri Lanka*, (28 August 2015)

<sup>110</sup> Fionnuala, *supra* note 104 at 120

<sup>111</sup> Bhavani Fonseka, *Legal and Policy Implications of Recent Land Acquisitions, Evictions and Related Issues in Sri Lanka*, CPA 2014; Bhavani Fonseka & Dharsha Jegatheeswaran, *Politics, Policy & Practices with Land Acquisitions and Related Issues in the North and East of Sri Lanka*, CPA, 2013; Bhavani Fonseka & Mirak Raheem, *Land in the Northern Province: Post War Politics, Policy and Practices* CPA, 2011

<sup>112</sup> UN General Assembly, *Basic Principles and Guidelines*, *supra* note 13, at ¶ 20

<sup>113</sup> Dinouk Colombage, *supra* note 2; Fionnuala, *supra* note 104 at 121; United Nations, *Guidance Note of the Secretary General-Reparations for Conflict Related Sexual Violence* (June 2014) at 17

<sup>114</sup> Interviews in the North, 23 January 2016

<sup>115</sup> Interviews with civil society in the North and East, January & February 2016; Rubio-Marín, *supra* note 15; Un Women, *Rape as a Tactic of War*, 93 available at [http://www.unwomen.org/~media/headquarters/media/publications/unifem/evawkit\\_06\\_factsheet\\_conflictandpos tconflict\\_en.pdf](http://www.unwomen.org/~media/headquarters/media/publications/unifem/evawkit_06_factsheet_conflictandpos tconflict_en.pdf)

<sup>116</sup> *Ibid.*

## Rehabilitation

Rehabilitation is essential to the success of all transitional justice mechanisms and the ability of communities to rebuild. Appropriate rehabilitation would include access to physical and mental health services, education and job-training, and housing.

The men, women and children who have faced sexual violence are unlikely to report the abuse, sometimes even to their families, both because they do not want to cause concern to their loved ones, and because they are likely to face stigmatization and ostracism even by those close to them.<sup>117</sup> As a result, they receive no psychological support and often suffer from depression, post-traumatic stress disorder, and other mental health issues.<sup>118</sup> Psychological services are necessary as part of rehabilitation. Children are the most vulnerable group in this respect and appropriate psychosocial measures should be taken to help them assimilate into society despite the trauma and stigma tied to their plight. Victims of violence may also be more likely to commit violence within their families and community, leading to further victimization within society.<sup>119</sup> An increase in domestic violence and marital rape within Tamil communities in Sri Lanka has already been reported, though the change could also be attributed to increased reporting and broader freedoms than were allowed under the LTTE, or the impacts of the conflict more generally.<sup>120</sup> Providing psychosocial support, treatment for alcoholism, other rehabilitative services is important to counter individual and community-wide effects.

The Office of Reparations proposed by the Government should ensure that appropriate rehabilitative services are provided, giving consideration to the advice of civil society, victims, and any truth commission. Reports indicate that the Office for National Unity and Reconciliation (ONUR) is already working on Conflict Transformation Programmes to resolve socio-economic issues.<sup>121</sup> The Office of Reparations should consult with ONUR to build on the work that's already been done and ensure sustainability. The Office of Reparations should also work with the Ministry of Health to provide physical and mental rehabilitative services. There does not seem to be any Ministry of Health program to provide public health services to conflict survivors<sup>122</sup>, but the Ministry may be in a good position to oversee such a program since the Ministry already has the network to enact such a program. Steps should be taken quickly so that services are provided as soon as possible. The help of

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<sup>117</sup> Interviews in the North and East of Sri Lanka, January & February 2016; International Truth and Justice Project Sri Lanka, "A Still Unfinished War", *supra* note 1 at 29, 87

<sup>118</sup> Interviews in the North and East of Sri Lanka, January & February 2016; International Truth and Justice Project Sri Lanka, "Silenced", *supra* note 1

<sup>119</sup> Nimmi Gowrinathan and Kate Cronin-Furman, *supra* note 109

<sup>120</sup> *Ibid.*

<sup>121</sup> <http://www.onur.gov.lk/index.php/en/programmes>

<sup>122</sup> <http://www.health.gov.lk/>

civil society in providing services or assistance such as counseling or skills training should be welcomed.

Attention should be paid to ensuring that the rehabilitative programs are available and appropriately tailored for both genders. Psychologists of both sexes and conversant in Tamil and Sinhala must be available and trained to recognize the unique impacts that sexual violence has on women and men. Education and job training should be practical and not reinforce gender-related economic disparities. For example, past NGO-run programs gave sewing machines to female victims despite limited demand for clothing and other textile products in the area.<sup>123</sup> As a result, the program did little to improve victim's livelihoods.

## **Satisfaction**

Satisfaction includes public apologies, memorialization, and truth seeking. Victims should be consulted when mechanisms of satisfaction are designed, to ensure that the actions do not cause additional stigma and harm. Public acknowledgement whether through court judgments, truth and reconciliation reports, or government statements, has been shown to be particularly important to victims. In Rwanda, women who were asked what they wanted from the ICTR tribunal spoke "mostly about wanting their experiences acknowledged and the violence against them condemned by the ICTR."<sup>124</sup> Victim groups and civil society in the North and East of Sri Lanka have indicated that public apologies and acknowledgement will likely be valuable to the rehabilitation and transitional processes.<sup>125</sup> Such an apology could be made by the government, similar to the Declaration of Peace on 4 February 2015. But it is important to recognize that an apology must be accompanied by other measures, including judicial accountability, security sector and institutional reform. Otherwise the meaning will be limited by the lack of trust in the transitional process.

In acknowledging the truth, attention should be paid to the stigmatization of both female and male victims. Sexual abuse of women as well as men should be recognized and done so in a manner that doesn't further ostracize victims. Efforts should be made to change community perceptions of male victims. Male victims of sexual violence often suffer depression, sexual dysfunction caused by depression and low self-esteem, impaired family relationships, and marginalization within the community.<sup>126</sup> They generally lack organized support and adequately tailored services.<sup>127</sup> Any act of satisfaction must acknowledge male victims in a

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<sup>123</sup> Nimmi Gowrinathan and Kate Cronin-Furman, *supra* note 109

<sup>124</sup> Binaifer Nowrojee, "Your Justice is Too Slow" Will the ICTR Fail Rwanda's Rape Victims?, (November 2005) at 6

<sup>125</sup> Interviews in the North and East of Sri Lanka, January & February 2016

<sup>126</sup> Chris Dolan, *Into the Mainstream: Addressing Sexual Violence Against Men and Boys* (3-4) (2014), available at [http://www.refugeelawproject.org/files/briefing\\_papers/Into\\_The\\_Mainstream-Addressing\\_Sexual\\_Violence\\_against\\_Men\\_and\\_Boys\\_in\\_Conflict.pdf](http://www.refugeelawproject.org/files/briefing_papers/Into_The_Mainstream-Addressing_Sexual_Violence_against_Men_and_Boys_in_Conflict.pdf)

<sup>127</sup> *Ibid.* at 4; Fionnuala, *supra* note 104 at 109

collective and confidential manner, and use language that does not de-masculinize or otherwise stigmatize them.

### **Guarantees of Non-Recurrence**

Guarantees of non-recurrence can be an important symbolic measure of redress for victims, and a powerful means to facilitate post-conflict transition. To effectively create trust, guarantees must be supported by institutional reform, a credible judicial system, and a successful truth-seeking process.<sup>128</sup> A policy to prevent future sexual violence and ensure continuing accountability must be implemented.<sup>129</sup> The Sri Lankan government has repeatedly stated that it has a “well-established, zero tolerance policy” on sexual violence and “continues to take strong action against reported cases.”<sup>130</sup> It should adhere to these statements through education and accountability for military, police personnel and others. Such “institutional remedies are a powerful mechanism to strengthen guarantees of non-repetition.”<sup>131</sup> Recommendations for institutional reform are included in paragraph 8 of the UNHRC Resolution which “[e]ncourages the Government of Sri Lanka to introduce effective security sector reforms as part of its transitional justice process.”<sup>132</sup> Security sector reform may include an administrative process to prevent inclusion of human rights violators in the current security forces and training and incentives to promote human rights, as suggested by the Resolution.<sup>133</sup> However victims and civil society should participate in designing impactful reforms. Changes such as ensuring that women take positions within security forces and the judicial system, which would improve the conditions for female victims who want to pursue justice, may better ensure accountability and non-recurrence. An example of successful security sector reform is the creation of Family Support Units in Sierra Leone, staffed by officers trained to work with sexual violence, domestic violence, and trafficking.<sup>134</sup> The Family Support Units gained community trust and their creation led to an increase in reported cases and a decrease in stigma.<sup>135</sup> Legislative reform like the inclusion of international law within the domestic legal framework, along with accountability in the courts is needed to send a message of ending the culture of impunity. And a truth-telling

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<sup>128</sup> United Nations, Guidance Note of the Secretary General-Reparations for Conflict Related Sexual Violence (June 2014) at 19-20

<sup>129</sup> *Ibid.* At 20

<sup>130</sup> Colombo Telegraph, Sri Lanka Rejects Canada’s Claim ‘Ongoing Use Of Rape Against Opponents By Security Forces,’ (23 June 2014), available at <https://www.colombotelegraph.com/index.php/sri-lanka-rejects-canadas-claim-ongoing-use-of-rape-against-opponents-by-security-forces/>

<sup>131</sup> Fionnuala, *supra* note 108 at 116-17 (citing *A.S. v. Hungary* where the court awarded a victim of forced sterilization damages, and also asked for institutional change in writing that the state should act to ensure that informed consent is obtained by health officials in the future)

<sup>132</sup> UN Human Rights Council, Promoting reconciliation, accountability and human rights in Sri Lanka: resolution / adopted by the Human Rights Council, A/HRC/30/L.29 *supra* note 14 at ¶ 8

<sup>133</sup> *Ibid.*

<sup>134</sup> Megan Bastick and Daniel de Torres, Implementing the Women, Peace and Security Resolutions in Security Sector Reform, available at <http://www.osce.org/odihr/75269?download=true>

<sup>135</sup> *Ibid.* at 13



process that identifies sources of conflict and solutions will further bolster trust in guarantees of non-recurrence.

### **Collective Reparations**

Collective reparations should be utilized in order to protect the confidentiality of victims, and reach those who otherwise would not seek out services.<sup>136</sup> Due to the very real risk of stigmatization, most victims will not access rehabilitative or other reparations if it requires them to recount their stories or expose themselves as victims. To counter this issue, reparations such as counseling, health services, and educational services should be provided in a collective community-wide manner. Though care must be taken to ensure that workers are still trained with regard to sexual violence. Additionally, collective measures should supplement, not replace individualized redress, and should not be reallocated to simply rebuild infrastructure.<sup>137</sup> Symbolic measures such as public apologies, should always be collective and not identify individual victims.

### **Interim Reparations**

Developing a program of reparations requires significant planning, which often takes time. However, the effects of sexual violence are immediate and serious. Victims suffering urgent consequence such as health and psychological issues should be provided with interim reparations. In Sri Lanka, where violence and displacement has severely impacted the cultural norms of entire communities, the provision of psychosocial support is particularly pressing and should be addressed in the interim.<sup>138</sup> Certain victims, such as those who became pregnant as a result of rape have a particularly urgent need for psychological care.<sup>139</sup> These victims in particular suffer unique challenges in that in addition to the physical and psychological injuries, they are in some instances burdened by a sense of isolation and ostracism that leads to inadequate care for them. Appropriate psychosocial measures tailored to help their needs and to overcome the challenge of being excluded from society should be given consideration. Given the reluctance of victims to seek services, creative programs and guarantees of confidentiality are needed for interim psychosocial support. Health services should also be provided to any victims suffering from continuing physiological effects. Reports have indicated that some Sri Lankan victims need “medical treatment, including surgery as a result of their torture”, and other victims may need Sexually Transmitted Disease (STD) screening or gynecological care.<sup>140</sup> When perpetrators are ordered to pay compensation, it is seldom paid, or the payments are partial and

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<sup>136</sup> Rubio-Marín, *supra* note 15 at 97

<sup>137</sup> *Ibid.* At 104

<sup>138</sup> Zuzana Hrdlicková, The Impact of the Sri Lankan Conflict on the Social Status of Women, available at [http://www.academia.edu/11372215/The\\_Impact\\_of\\_the\\_Sri\\_Lankan\\_Conflict\\_on\\_the\\_Social\\_Status\\_of\\_Tamil\\_Women](http://www.academia.edu/11372215/The_Impact_of_the_Sri_Lankan_Conflict_on_the_Social_Status_of_Tamil_Women)

<sup>139</sup> Interview in the North, 23 January 2016

<sup>140</sup> International Truth and Justice Project Sri Lanka, “Silenced”, *supra* note 1 at 11

delayed.<sup>141</sup> The government should enforce awards of compensation, and pay awards directly to ensure that victims are compensated as soon as possible. Where reparations are delayed, the harmful impact of sexual violence is multiplied, and economic and social marginalization within the community worsens.<sup>142</sup> The government should include a section on interim reparations in the reparations policy or draft and implement a separate Interim Reparations Policy as soon as possible. This policy should clarify issues such as how victims will be identified as needing urgent reparation. South Africa's "Policy Framework for Urgent Interim Reparations Measures" provides a helpful model.<sup>143</sup> Civil society groups and relevant government agencies such as the Health Ministry should work to provide health and other needs services where possible. Providing interim reparations will help limit the long term negative impacts on victimized communities, but are not a substitute for continued work after the interim period.

## **Implementation**

A variety of factors are relevant to designing an effective reparations program that ensures that victims are able and willing to claim reparations, and that does not cause additional harm. In Sri Lanka, adequate witness and victim protection is essential to ensure security and confidentiality for those participating in reparations programs. Victims accessing reparations must have privacy and confidentiality so that they may seek redress without risking stigma by their communities. Standards of proof and evidence collection procedures should take account of the limitations on acquiring evidence and the psychological impacts of participation on the victims. Finally, the multitude of practical constraints on implementation must be carefully considered.

Confidentiality and security are needed to protect victims who seek reparations. Many of the survivors realistically fear retaliation against themselves and their families.<sup>144</sup> Amendments to and implementation of the Victim and Witness Protection Act are necessary. Though a National Authority for the Protection of Victims and Witnesses of Crime (National Authority), which is mandated to make non-binding recommendations to other departments and agencies on victim and witness protections, was finally established on January 8, 2016<sup>145</sup>, further steps must be taken to ensure that the protection functions adequately and that the appointed members of the authority are truly independent. Currently, the National Authority is made up of seven ex-ministry officials and five presidential appointees.<sup>146</sup> Under the Act, there is also a Division, responsible for designing and implementing the Victim and Witness

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<sup>141</sup> Interview in Colombo, 24 January 2016

<sup>142</sup> Fionnuala, *supra* note 104 at 119-120

<sup>143</sup> South Africa Policy Framework for Urgent Interim Reparation Measures 1995, available at, <http://www.justice.gov.za/trc/reparations/policy.htm>

<sup>144</sup> International Truth and Justice Project Sri Lanka, "Silenced", *supra* note 1

<sup>145</sup> Ceylon Today, NA for protecting victims and witnesses set up, (8 January 2016), available at, <http://www.ceylontoday.lk/51-114488-news-detail-na-for-protecting-victims-and-witnesses-set-up.html>

<sup>146</sup> *Ibid.*

Assistance Programme in accordance with the Authority guidelines and investigating threats or violations of the act.<sup>147</sup> However, this division is headed by the Senior Superintendent of Police.<sup>148</sup> This structure is ineffective since some officials and police officers are likely to be and should be, investigated. The legislature should amend the Act and the government should ensure that the National Authority is comprised of independent members not associated with the military or police, and the Division should be completely separated from the police department.<sup>149</sup> Each transitional justice mechanism should have its own independent body responsible for implementing victim and witness protections.

Confidentiality is also vital to protect victims from stigma and ostracism by their communities and families, and to facilitate their participation.<sup>150</sup> In Sri Lanka, chastity and purity is linked to the marriageability and social standing of women.<sup>151</sup> A woman who has lost her virginity, even without her consent, loses her access to marriage and thus economic stability.<sup>152</sup> For a married woman, identification as a victim is likely to humiliate and demasculinize her husband and stigmatize her children.<sup>153</sup> The entire family faces serious consequences and may abandon the victim. "The culture of shame in the Tamil community in Sri Lanka is so extreme that female witnesses describe even close childhood friends shunning them in their villages when they are released from detention. One female LTTE cadre feared to tell her relatives in London lest they throw her out of the house."<sup>154</sup> For men, identification as victims of sexual violence causes shame and disempowers their masculinity.<sup>155</sup> Male victims fear being viewed as weak, feminine, or homosexual.<sup>156</sup> Given the extensive stigma associated with victimization, survivors will understandably be "more willing to claim reparations if treated with confidentiality."<sup>157</sup> Confidentiality should be ensured by allowing victims "to give testimonies or provide evidence in private, at a distance, or through proxy."<sup>158</sup> Where confidentiality is unlikely or reparations are uncertain, this

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<sup>147</sup> *Ibid.*

<sup>148</sup> *Ibid.*

<sup>149</sup> *Ibid.*

<sup>150</sup> *Fionnuala*, *supra* note 104 at 99; Zuzana Hrdlicková *supra* note 138 at 84

<sup>151</sup> Zuzana Hrdlicková *supra* note 138; Dinouk Colombage, *supra* note 2 ("Cultural norms in Sri Lanka have contributed to the unwillingness of sexual-abuse victims to report these crimes," said Fernando, who teaches at the University of Colombo. "Very often, a woman will be shunned by her local community when they learn of such an act," she said. "If a woman is unmarried, it will be near impossible for her to find a husband if it becomes public knowledge.")

<sup>152</sup> Zuzana Hrdlicková *supra* note 138

<sup>153</sup> Interviews in the North and East of Sri Lanka, January & February 2016

<sup>154</sup> International Truth and Justice Project Sri Lanka, "Silenced", *supra* note 1 at 35 (Witness 177)

<sup>155</sup> The Lancet, The Lancet on Sexual Abuse of Tamil Prisoners in Sri Lanka, (10 June 2000), available at <http://www.sangam.org/ANALYSIS/Lancet.htm>

<sup>156</sup> Maite Vermeulen, Hidden Victims: The Story of Sexual Violence Against Men in Armed Conflict (4 September 2011), available at <http://www.e-ir.info/2011/09/04/hidden-victims-the-story-of-sexual-violence-against-men-in-armed-conflict/>

<sup>157</sup> United Nations, Guidance Note of the Secretary General-Reparations for Conflict Related Sexual Violence (June 2014)

<sup>158</sup> Rubio-Marín, *supra* note 15 at 80

must be disclosed to victims so that they may make informed choices about participating in a program.<sup>159</sup> The Office of Reparations and civil society groups should work to implement programs targeting stigma. Some educational and public awareness campaigns are already in place<sup>160</sup>, but much more must be done to combat stigma against both men and women. Novel and broad-reaching approaches should be considered. For example, in Cambodia, a radio program was created where sexual violence victims could call in and ask questions.<sup>161</sup> This gave victims a way to talk about their experiences and get information anonymously, and made the problem of sexual violence more visible, helping to address the stigma.

Because of the difficulty in assessing evidence due to limited reporting, stigma, and fear, the standard of proof should be lowered for awarding reparations.<sup>162</sup> Evidence collection measures must be victim sensitive and designed to avoid re-traumatization. For example, victims should have the choice to be examined by someone of the same sex and to narrate their experiences in privacy. Victims should be able to use coded or community-specific lexicology to speak about their experiences to help avoid the taboo and trauma of speaking in detail about sexual violence.<sup>163</sup>

Attention should be paid to economic, geographical, literacy, and gender constraints. Internally displaced persons may be difficult to locate and may not have easy access to information or resources. Women have particular difficulty accessing reparation entitlements<sup>164</sup>, a problem that is exacerbated by the current trend in Tamil communities of women staying within the home for protection.<sup>165</sup> To address these limitations, programs should be set up in the conflict zones and transportation subsidies should be provided. Mobile service providers could also be used. Outreach should be tailored to the affected communities.<sup>166</sup> For example publicity campaigns could be placed in local Tamil language newspapers in the Northern and Eastern regions of the country. Finally, arrangements and

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<sup>159</sup> Fionnuala, *supra* note 104 at 139; Binaifer Nowrojee, “Your Justice is Too Slow” Will the ICTR Fail Rwanda’s Rape Victims?, (November 2005) at 22

<sup>160</sup> Interview in Colombo, 17 January 2016

<sup>161</sup> Australian Human Rights Centre and the Asian International Justice Initiative, Transformative Reparations for Sexual and Gender-Based Violence at the Extraordinary Chambers for the Courts of Cambodia 11 (28, November 2014), available at [http://www.eastwestcenter.org/sites/default/files/filemanager/Research\\_Program/Politics\\_Governance\\_and\\_Security/AIJI/Reparations%20Workshop%20Report.pdf](http://www.eastwestcenter.org/sites/default/files/filemanager/Research_Program/Politics_Governance_and_Security/AIJI/Reparations%20Workshop%20Report.pdf)

<sup>162</sup> United Nations, Guidance Note of the Secretary General-Reparations for Conflict Related Sexual Violence (June 2014) at 14

<sup>163</sup> United Nations Human Rights Council, Analytical study focusing on gender-based and sexual violence in relation to transitional justice, A/HRC/27/21, (30 June 2014) at 14

<sup>164</sup> Fionnuala, *supra* note 104 at 112

<sup>165</sup> Nimmi Gowrinathan and Kate Cronin-Furman, *supra* note 109

<sup>166</sup> Fionnuala, *supra* note 104 at 137 (citing a failed reparations program in Colombia where the publicity campaign to advertise reparations was placed in a single newspaper and did not reach the areas where needed)

funds for reparations must be planned and certain so that ordered reparations are actually implemented and victims are not harmed by unmet expectations.<sup>167</sup>

### **III. Integration with the truth-seeking process:**

Designing an effective reparations program requires integration with the truth-seeking process. A credible truth-seeking program is important to the success of reparations.<sup>168</sup> And for the majority of victims who will never testify before a court, their ability to tell their narrative to a truth commission is an important part of rehabilitation.<sup>169</sup>

#### **Victim and Witness Protections**

Strong witness and victim protection must be designed and implemented with all of the transitional justice mechanisms in mind, including truth-seeking, judicial accountability, and reparations programs. Victims of sexual violence in Sri Lanka and their family members have been harassed, detained, abused, and forced to flee.<sup>170</sup> Reports have indicated that one motivation for sexual violence has been to intimidate victims into silence.<sup>171</sup> Victims abroad are afraid to call relatives or give interviews. Medical personnel and community members are hesitant to serve as witnesses. These problems do not only limit judicial prosecution. Significant improvements to witness protections are necessary for a truth commission and reparations program to function.<sup>172</sup> Protections implemented by the National Authority must be designed to protect not just reformed perpetrators or those who participate in the judicial process, but also victims and witnesses who seek reparations and testify before a truth commission.

#### **Timing of Transitional Justice Mechanisms**

Reparations should not be delayed for the conclusion of the truth-seeking process. Many victims have urgent needs that will negatively impact the entire community if unmet. Time and rehabilitation are often needed before victims are able to share their experiences. “Without reparations, many victims will be unable to participate in parallel processes of accountability and truth recovery.”<sup>173</sup> However, the truth-seeking process should also be initiated quickly. An understanding of the conflict is important in designing effective

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<sup>167</sup>Australian Human Rights Centre and the Asian International Justice Initiative, *supra* note 161 at 13

<sup>168</sup> United Nations, Guidance Note of the Secretary General-Reparations for Conflict Related Sexual Violence (June 2014) at 9; Fionnuala, *supra* note 104 at 126

<sup>169</sup> Binaifer Nowrojee, Making the Invisible War Crime Visible: Post-Conflict Justice for Sierra Leone’s Rape Victims, 18 Harv. Hum Rts. J. 85 (2005) 103 (“Truth commissions offer a larger number of victims the opportunity to recount the wrongs committed against them in a more comfortable and supportive setting.”)

<sup>170</sup> Interviews in the North and East of Sri Lanka, January & February 2016

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

<sup>172</sup> *Ibid.* at 30

<sup>173</sup> Fionnuala, *supra* note 104 at 145

reparations programs and ensuring their legitimacy.<sup>174</sup> Although operating multiple mechanisms at one time can create challenges,<sup>175</sup> it is important that both reparations programs and a truth-seeking process be initiated without further delay. One solution is to allow a truth commission to award interim reparations where needed. For example, in East Timor “the Commission for Reception, Truth and Reconciliation (CAVR) put into place interim reparations for those most affected, which included victims of conflict-related sexual violence. Victims benefitted from \$200 grants and access to services, and participated in healing workshops.”<sup>176</sup> This type of program would provide reparations that are both tailored to the individual’s needs, and timely.

Involvement in the truth-seeking process should not preclude victims from accessing judicial remedies or administrative reparations. It is the combined and collective effect of transitional justice mechanisms that allows victims and societies to move forward. For many victims, the rehabilitative impacts of reparations or truth-seeking are a necessary first step to participation in the other processes.<sup>177</sup> Victims must have access to a range of mechanisms for redress, which are designed and implemented with survivors of sexual violence in mind.

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<sup>174</sup> United Nations, Guidance Note of the Secretary General-Reparations for Conflict Related Sexual Violence (June 2014) at 9

<sup>175</sup> Nowrojee (HRJ) pg 39 (challenges include a quick judicial process interfering with the TRC’s ability to uncover the truth, however effects of integration are “generally positive”)

<sup>176</sup> Rubio-Marín, *supra* note 15

<sup>177</sup> Human Rights Center UC Berkeley School of Law, The Victims’ Court, (2015), available at [https://www.law.berkeley.edu/wp-content/uploads/2015/04/VP\\_report\\_2015\\_final\\_full2.pdf](https://www.law.berkeley.edu/wp-content/uploads/2015/04/VP_report_2015_final_full2.pdf)

## IV Key Recommendations

### For Government and Parliament:

- Amend domestic law to incorporate international crimes, establish command responsibility, and to include male victims in the definition of rape.
- Revise the Victim and Witness Protection Act so that its administration is independent of the police and officials.

### For the Government:

- Establish without delay the different mechanisms provided in the UNHRC resolution.
- Ensure that the statute of the court covers crimes of sexual violence and that the rules of procedure and evidence facilitate the prosecution of sexual violence and are victim-sensitive. The rules of procedure and evidence should allow for the admission of pattern-based evidence for war crimes, crimes against humanity, and torture.
- Implement strong victim and witness protections for each transitional justice mechanism, independent of the National Authority, the police, the military, and government officials.
- Develop and implement a Reparations Policy incorporating the recommendations of the current and past truth commissions, civil society organizations, international actors, and victims.
- Incorporate different forms of reparations, including individual, symbolic, and collective redress into the reparations policy.
- Provide compensation and restitution for victims in accordance with the economic effects of sexual violence on victims from lost livelihoods, diminished marriage prospects, social ostracization, interrupted schooling, and psychological trauma. Ensure that compensation is paid by the government where convicted perpetrators fail to pay court-awarded compensation.
- Provide rehabilitation, including psycho-social support, health care, and education and job training.
- Publically acknowledge the perpetration of sexual violence and apologize to victims in a collective manner. Ensure that public acknowledgements and apologies are inclusive of male victims, protective of confidentiality, and sensitive to all victims.
- Provide guarantees of non-recurrence. This should include action to improve judicial accountability, legislative reform, and implement institutional and security sector reform to prevent non-recurrence.
- Provide some rehabilitative and symbolic reparations in a collective manner to reach the broader community of victims and protect confidentiality. For example, skills training or counseling services could be made available to all members of the community.
- Provide interim reparations to meet the urgent psychological, medical, and economic needs of victims. Facilitate the provision of urgent services by government agencies,

civil society organizations already working with victims, and other groups willing to assist.

- Ensure confidentiality and security for victims participating in reparations programs, court cases, and all other transitional justice processes. Provide full disclosure of the limitations on confidentiality and other risks of participation to all victims.
- Ensure that the standard of proof to participate in reparations programs and truth-telling are lower than court standards and allow for victim-sensitivity and confidentiality.
- Ensure adequate resources are available for translations into Sinhala, Tamil and English in all mechanisms and relevant programs.
- Develop a framework to allow for testimony from experts, victims, and witnesses abroad via video-link. Out of country-video testimony should be confidential and secure.
- Take steps to address the stigma surrounding sexual violence and torture including introducing awareness raising campaigns, training officials and service providers, initiating accountability and reparations programs.

### **For Civil Society**

- Collect and map evidence of sexual violence and maintain such evidence in a secure manner.
- Provide proposals to the government on transitional justice processes and mechanisms, providing suggestions to ensure credible and independent mechanisms are introduced and are victim centered.
- Provide rehabilitative and other services to victims where possible. Assist victims who desire to pursue judicial accountability and ensure that they are fully informed about the process and risks.
- Working with the government to address stigma around sexual violence and torture

### **For the International Community**

- Assist Sri Lanka in the present transitional justice process by supporting with technical expertise and resource for the different commitments made.
- Provide financial and other assistance to organizations working with or on behalf of victims in Sri Lanka.



## Conclusion

Widespread rape and sexual violence has been occurring for decades in Sri Lanka as a result of the conflict. Reports now indicate that sexual violence was perpetrated systematically. This violence severely impacts victims by causing psychological and physical harm, economic marginalization, and rejection by community and family members. The families of victims also suffer psychological, economic, and social harms. And communities as a whole are affected by the breakdown of family relationships, increased violence, and social problems that may result.

In order to give victims of rape and sexual violence in Sri Lanka the redress they need, carefully tailored judicial and administrative reparations must be provided. Victim sensitive and confidential procedures and processes should be instituted, and strong witness and victim protections must be implemented. A broad range of individual, collective, and symbolic, reparations is necessary.

The systematic perpetration of rape and sexual violence is now established internationally as war crimes, crimes against humanity, and torture. Sri Lanka must take the necessary steps to incorporate these standards into domestic law and to ensure accountability is pursued, and with it addressing the culture of impunity. Transitional justice includes truth, justice, reparations and guarantees of non-recurrence. The government of Sri Lanka has committed to instituting mechanisms and reforms to meet these needs and they must be followed through. There should be no further delays. It is time to reckon with the past and for Sri Lanka to take critical steps to ensure peace and reconciliation.