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April 23, 2024

## Re: Submission SRT Thematic Report on Crimes of Sexual Torture

### **Challenges to and Recommended Strategies for the Effective Investigation and Prosecution of Wartime Sexual Torture and Ill-Treatment: Lessons Learned from Sri Lanka's Sexual Torture and Ill-Treatment of Tamils**

People for Equality and Relief in Lanka (PEARL) is a Tamil volunteer-driven, women-led civil society organization that was formed in 2005. We work to achieve human rights, justice, and self-determination for the Tamil people in the northern and eastern parts (the “North-East”) of Sri Lanka.

PEARL is submitting information to the Special Rapporteur, Dr. Alice Jill Edwards, on key domestic and international challenges to investigating and prosecuting sexual torture and related ill-treatment of Tamils in Sri Lanka and our recommended strategies to address such obstacles in Sri Lanka and similar conflict-affected situations.

#### I. Context

The 26-year-long war in Sri Lanka ended on May 18, 2009, when Sri Lankan forces defeated the Liberation Tigers of Tamil Eelam (LTTE). The LTTE had launched an armed liberation struggle to establish a separate state in the northern and eastern parts (North-East) of the island.

During the final five months of the war alone, the number of Tamils unaccounted for and presumed dead ranged from 40,000 to 169,796.<sup>1</sup> Notably, most civilian casualties were caused by government shelling.<sup>2</sup>

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<sup>1</sup> *Report of the Secretary-General's Panel of Experts on Accountability in Sri Lanka*, ¶ 137 (Mar. 31, 2011), <https://reliefweb.int/report/sri-lanka/report-secretary-generals-panel-experts-accountability-sri-lanka> (“40,000 civilian deaths”) [hereinafter *POE Report*]; *Submission by the Catholic Diocese of Mannar to the Lessons Learnt and Reconciliation Commission*, 4 (Jan. 8, 2011), [https://www.tamilnet.com/img/publish/2011/01/LLRCsubmission\\_by\\_MannaarDiocese.pdf](https://www.tamilnet.com/img/publish/2011/01/LLRCsubmission_by_MannaarDiocese.pdf) (“146,679 people seem to be unaccounted for”); International Truth and Justice Project (ITJP), *Death Toll in Sri Lanka's 2009 War* (Feb. 2021), [https://itjpsl.com/assets/ITJP\\_death\\_toll\\_A4\\_v6.pdf](https://itjpsl.com/assets/ITJP_death_toll_A4_v6.pdf) (estimating 169,796 people unaccounted for based on World Bank household data).

<sup>2</sup> *POE Report*, ii.

Both parties to the conflict allegedly committed war crimes and crimes against humanity.<sup>3</sup> However, only the Sri Lankan security forces committed rape and other forms of sexual violence, including sexual torture, as a weapon of war.<sup>4</sup>

No alleged Sri Lankan government perpetrators have been held responsible for torture or other international crimes.

### **Ethnoreligious Nationalism as a Root Cause of Conflict**

Sinhala-Buddhist nationalism, which fueled successive governments' Sinhalese governments' anti-Tamil structural and physical violence, has been a primary driver of conflict in Sri Lanka. The Sri Lankan government and security forces' impunity for such violence, including sexual torture, is a related, ongoing key grievance for Tamils.

The precolonial history of the island, before 1505, featured periods of war and peace between the Tamil and Sinhalese kingdoms.<sup>5</sup> Following the island's independence in 1948, Sinhalese governments promulgated discriminatory policies, laws, and even constitutions to promote Sinhala-Buddhist nationalism.<sup>6</sup> Such laws include the Prevention of Terrorism Act (PTA).<sup>7</sup>

### **Wartime Ethnic-based Physical and Sexual Torture of Detainees**

Even before the start of the armed conflict in 1983, the Sri Lankan security forces had an "almost universal practice" of torturing and ill-treating Tamil detainees.<sup>8</sup>

Since 1979, the government has used the PTA to arbitrarily arrest and detain, disappear, and torture individuals, mostly Tamils.<sup>9</sup> Tamils with real, imputed, or simply suspected ties to the

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<sup>3</sup> U.N. Human Rights Council, *Report of the OHCHR Investigation on Sri Lanka*, U.N. Doc. A/HRC/30/CP.2, ¶¶ 1-2 (Sept. 16, 2015), <https://www.refworld.org/docid/55ffb1d04.html> [hereinafter *OISL Report*].

<sup>4</sup> *OISL Report*, ¶ 571. See generally Elisabeth Jean Wood, *Armed Groups and Sexual Violence: When is Wartime Rape Rare?*, 37 *POLITICS SOCIETY* 131, 146-152 (2009), <https://www.usip.org/sites/default/files/missing-peace/wood-when-is-wartime-rape-rare2009-published-version.pdf>.

<sup>5</sup> PEARL, *State-Sponsored Sinhalization of the North-East*, 10 (Mar. 2022), <https://pearlaction.org/wp-content/uploads/2022/03/State-Sponsored-Sinhalization-of-the-North-East-March-2022.pdf>; Neil DeVotta, *Sinhalese Buddhist Nationalist Ideology: Implications for Politics and Conflict Resolution in Sri Lanka*, 13, 77 (Jan. 1, 2007), <https://www.eastwestcenter.org/publications/sinhalese-buddhist-nationalist-ideology-implications-politics-and-conflict-resolution-s>.

<sup>6</sup> PEARL, *State-Sponsored Sinhalization of the North-East*, 10-11.

<sup>7</sup> PEARL, *No Trials, Only Tribulations for Tamil Victims of Sri Lanka's Conflict-related Sexual Violence*, 11 (Aug. 2022), <https://pearlaction.org/wp-content/uploads/2022/08/No-Trials-Only-Tribulations-for-Tamil-Victims-of-Sri-Lankas-CRSV-August-2022.pdf>.

<sup>8</sup> The International Commission of Jurists documented enforced disappearances of Tamils and custodial torture, ill-treatment, and deaths from July 1979 through June 1983, and Amnesty International documented torture in 1981 and January through February 1982. Tamil Nation, *Torture - 'Almost Universal Practise' of Sri Lankan Authorities*, <https://tamilnation.org/indictment/indict026.htm> (quoting reports by the International Commission of Jurists and Amnesty International).

<sup>9</sup> OHCHR, *Sri Lanka: UN Experts Call for Swift Suspension of Prevention of Terrorism Act and Reform of Counter-Terrorism Law* (Mar. 2, 2022), <https://www.ohchr.org/en/press-releases/2022/03/sri-lanka-un-experts-call-swift>

LTTE<sup>10</sup> have been detained for years without charge or the possibility of judicial review or release.<sup>11</sup> Notably, detentions and trials under the Act were rare in Tamil majority areas, where proceedings took place in Tamil and judges were more impartial and independent in handling PTA cases.<sup>12</sup>

The PTA has contributed to Sri Lanka's "backlog" of 60,000 to 100,000 enforced disappearances since the 1980s, of whom tens of thousands were Tamils disappeared in the context of the armed conflict.<sup>13</sup> Enforced disappearance places the victim at high risk of torture and ill-treatment, including rape and other forms of sexual violence, by keeping the victim completely outside the protection of the law.<sup>14</sup>

During the war, security forces' torture of both male and female detainees was "endemic," and many were sexually tortured, including with rapes.<sup>15</sup>

In the final five months of the war, "countless" Tamil men and women detained by security forces in 2009 were subjected to sexual violence.<sup>16</sup>

Human Rights Watch found that the government used torture broadly as a war strategy "intended to ... instill terror in individuals and the broader Tamil population," with sexual violence being a key element of that strategy.<sup>17</sup> It believed that "patterns across perpetrators, places of detention, and interrogation practices ... strongly suggest that rape and other sexual violence was a systematic practice that was known or should have been known at the highest levels of

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[suspension-prevention-terrorism-act-and](#); Ben Emmerson, *Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, Visit to Sri Lanka*, U.N. Doc. A/HRC/40/52/Add.3, ¶¶ 8, 47 (Dec. 14, 2018), <https://www.ohchr.org/en/documents/country-reports/ahrc4052add3-visit-sri-lanka-report-special-rapporteur-promotion-and> [hereinafter *Special Rapporteur on Countering Terrorism's Report*].

<sup>10</sup> The authorities have historically targeted Tamils under the PTA, but since the 2019 Easter Sunday bombings, Tamil-speaking Muslims have also been vulnerable. Human Rights Watch, *"In a Legal Black Hole": Sri Lanka's Failure to Reform the Prevention of Terrorism Act* (Feb. 7, 2022), <https://www.hrw.org/report/2022/02/07/legal-black-hole/sri-lankas-failure-reform-prevention-terrorism-act>.

<sup>11</sup> *Special Rapporteur on Countering Terrorism's Report*, ¶ 15.

<sup>12</sup> *Special Rapporteur on Countering Terrorism's Report*, ¶ 47.

<sup>13</sup> Amnesty International, *Sri Lanka: Refusing to Disappear*, 3, 11 (Jan. 23, 2017), <https://www.amnesty.org/en/documents/asa37/5497/2017/en/>.

<sup>14</sup> *Enforced Disappearances*, AMNESTY INTERNATIONAL, <https://www.amnesty.org/en/what-we-do/enforced-disappearances/>.

<sup>15</sup> Wood, 145-146. In addition to physical torture, victims in the 1980s reported beatings on their genitals with sticks, batons, and sand-filled plastic pipes; the insertion of iron rods into their anus; and chili powder being put on their genitals. Amnesty International, *File on Sri Lanka's Torture*. According to an analysis of 184 Tamil men who had been detained in the 1990s, 21% were sexually tortured. M. Peel, A. Mahtani, G. Hinshelwood & D. Forrest, *The Sexual Abuse of Men in Detention in Sri Lanka*, 355 LANCET 2069, 2069 (June 10, 2000), <https://www.proquest.com/docview/199022845>.

<sup>16</sup> Human Rights Watch, *"We Will Teach You a Lesson": Sexual Violence against Tamils by Sri Lankan Security Forces*, 6, 29 (Feb. 2013), [https://www.hrw.org/sites/default/files/reports/srilanka0213webwcover\\_0.pdf](https://www.hrw.org/sites/default/files/reports/srilanka0213webwcover_0.pdf).

<sup>17</sup> Human Rights Watch, *"We Will Teach You a Lesson"*, 4-5, 29.

the state security apparatus.”<sup>18</sup> OISL similarly concluded that “incidents of sexual violence were not isolated acts but part of a deliberate policy to inflict torture” and “part of an institutional policy within the security forces.”<sup>19</sup>

Moreover, OISL recorded many cases of perpetrators calling victims “*Tamil dog*” or “*Tamil dogs*” with “the intent clearly being to break down that person emotionally and physically.”<sup>20</sup> “Dog” is used as a slur in both the Sinhala and Tamil languages; in Sinhala, “Tamil dog” and “Tamil dogs” are ethnic slurs, where the plural often refers to the Tamil people as a whole. This dehumanizing language is used not only in places of detention, but in the Sinhalese community in general.<sup>21</sup>

Tamils tortured by security forces had experienced “traumatic symptoms, including suicidal thoughts, sleeplessness, intrusive thoughts, inability to concentrate, depression and other symptoms of PTSD.”<sup>22</sup> One expert said sexual torture in particular produced “the most severe and persistent psychological damage,” which is “great and permeates everything” in their daily life; some died by suicide or attempted suicide.<sup>23</sup>

Importantly, since the end of the war, security forces have continued weaponizing physical and sexual torture against Tamil male and female detainees on an equal basis.<sup>24</sup>

## II. Domestic Challenges

The situation of Sri Lanka reveals the following domestic challenges: a lack of implementation of existing laws and policies, an inadequate legal framework, and a lack of political will.

### 1. Lack of Implementation and Inadequate Legal Framework

Sri Lanka is a State Party to the core UN human rights treaties that prohibit torture and ill-treatment: the International Covenant on Civil and Political Rights (ICCPR), acceded to in 1980, and the Convention against Torture, acceded to in 1994. Sri Lanka has also been a State Party to the Geneva Conventions, which prohibit cruel treatment and torture in non-international armed conflicts, since 1959.

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<sup>18</sup> Human Rights Watch, “*We Will Teach You a Lesson*”, 34.

<sup>19</sup> *OISL Report*, ¶¶ 590-91.

<sup>20</sup> *OISL Report*, ¶¶ 560, 587.

<sup>21</sup> PEARL email interviews with a political officer in a third-party state’s foreign affairs ministry with fluency in Tamil and Sinhala, including an understanding of ethnic slurs and their use in Sri Lanka (name and location withheld), Mar. 2024.

<sup>22</sup> *OISL Report*, ¶ 538.

<sup>23</sup> *OISL Report*, ¶¶ 578-579.

<sup>24</sup> *OISL Report*, ¶¶ 586-587, 590; Complaint from PEARL to Dr. Alice Jill Edwards, UN Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 4-6 (Sept. 16, 2023), <https://pearlaction.org/wp-content/uploads/2023/10/Letter-to-UNSR-on-Torture-FINAL.docx.pdf>.

Sri Lanka's Constitution prohibits torture and ill-treatment,<sup>25</sup> and its legislation implementing the Convention against Torture criminalizes torture.<sup>26</sup>

However, the Sri Lankan government has neither criminalized war crimes, crimes against humanity, or genocide nor ratified the Rome Statute of the International Criminal Court, which has jurisdiction over torture as an act of genocide, a war crime, and a crime against humanity.

### Recommended Strategies to Improve Implementation and Legal Frameworks

- States should enact legislation that criminalizes torture, enforced disappearances, war crimes, crimes against humanity, and genocide, without statutes of limitation, as well as various modes of liability, notably command and superior responsibility.
- States should ratify the Rome Statute of the International Criminal Court with retroactive effect to 2002.
- If alleged war crimes, crimes against humanity, and/or genocide, including sexual torture, occurred in a State, it should request the Office of the Prosecutor to carry out an investigation into the situation.
- States Parties to the Convention against Torture should hold the perpetrator State formally responsible for breaching its obligations under the Convention against Torture—including to prevent torture and ill-treatment, investigate and appropriately prosecute or extradite alleged perpetrators, and provide redress to victims—by taking action under Article 30.<sup>27</sup>
- UN actors—including the UN High Commissioner for Human Rights, your mandate, and UN investigations (for example, regarding Sri Lanka: the OHCHR Sri Lanka Accountability Project (SLAP))—should encourage States to implement the previous recommendations and strengthen their existing legal frameworks on torture.

## **2. Lack of Political Will**

Sri Lanka's so-called "reformist" government of then-President Maithripala Sirisena co-sponsored the unanimously adopted UN Human Rights Council Resolution 30/1 (2015), which pledged Sri Lanka to pursue transitional justice. In addition to envisioning a special judicial mechanism that would involve international experts, including foreign judges, lawyers, and investigators, it formalized Sri Lanka's commitments to address ongoing torture and sexual violence, vet and reform the security sector, and review and repeal harmful legislation, such as

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<sup>25</sup> Constitution of Democratic Socialist Republic of Sri Lanka, Chapter III, art. 11, <https://www.parliament.lk/files/pdf/constitution.pdf>.

<sup>26</sup> Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Act, No. 22 of 1994 (Sri Lanka).

<sup>27</sup> See discussion *infra* "Lack of States' Efforts to Seek Formal State Responsibility for Torture."

the PTA. However, in practice, Sirisena's government lacked the political will to make any progress on these, and other, commitments. Unfortunately, members of the international community remained lenient toward Sri Lanka's inaction, causing Tamil victims and survivors to lose faith in the international community.<sup>28</sup>

When Gotabaya Rajapaksa won the presidential elections in 2019, he swiftly withdrew from 30/1 and its follow-up resolutions.<sup>29</sup> The government of current President Ranil Wickremesinghe, who supported 30/1 as prime minister, also rejected 30/1's special judicial mechanism.<sup>30</sup>

Due to the lack of political will by Sri Lanka to ensure meaningful accountability and address the root causes of the conflict, including the government's Sinhala-Buddhist nationalism<sup>31</sup> and impunity, Tamils in the North-East, who were and remain the most conflict-affected and who are most at risk of ongoing human rights violations, have consistently rejected domestic justice mechanisms.

### Recommended Strategies to Influence Domestic Action

- States should make bilateral and multilateral engagements with the perpetrator State, especially military ones, contingent on the perpetrator State taking effective and consistent steps to investigate and appropriately prosecute or extradite alleged perpetrators.
- UN actors—including the UN High Commissioner for Human Rights, your mandate, and UN investigations (for example, regarding Sri Lanka: SLAP)—should encourage States to implement the previous recommendation.

### **III. International Challenges**

Other States' and the UN's responses, or lack thereof, to the situation in Sri Lanka reveals as challenges: diplomatic or head-of-state immunity of alleged perpetrators, which bars universal jurisdiction cases from proceeding; States' lack of political will to exercise universal jurisdiction; lack of States' efforts to seek formal state responsibility for torture; and failure to analyze and address victims and survivors' allegations of genocide.

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<sup>28</sup> See generally PEARL, *Delayed or Denied? Sri Lanka's Failing Transitional Justice Process* (May 2018), <https://pearlaction.org/wp-content/uploads/2018/05/pearl-tj-report-final-portrait.pdf> (analyzing Sri Lanka's lack of progress on its commitments under 30/1, members of the international community's permissiveness or even supportiveness of Sri Lanka, and the effect on Tamil victims).

<sup>29</sup> Amnesty International, *Sri Lanka: Withdrawal from UN Commitments Requires Robust Response by Human Rights Council* (Feb. 27, 2020), <https://www.amnesty.org/en/latest/news/2020/02/sri-lanka-withdrawal-from-un-commitments-requires-robust-response-by-human-rights-council/>.

<sup>30</sup> Krishan Francis, *Sri Lanka Refuses International Human Rights Investigation*, ASSOCIATED PRESS (Sept. 5, 2022), <https://apnews.com/article/united-nations-constitutions-sri-lanka-ranil-wickremesinghe-government-and-politics-7d6f2866e3970ddad980e60ed008e57e>.

<sup>31</sup> See generally PEARL, *State-Sponsored Sinhalization of the North-East*.



## 1. Diplomatic or Head-of-State Immunity of Alleged Perpetrators

Since 2011, criminal cases have been filed against Sri Lankan political and military leaders with direct and/or command responsibility for torture. However, defendants typically enjoyed diplomatic or head-of-state immunity at the time of filing:

- **Mahinda Rajapaksa had command responsibility over the security forces as President (November 2005 to January 2015).** On October 24, 2011, then-President Rajapaksa visited Australia. A Tamil private citizen filed an indictment. Australia's Attorney-General did not give consent to prosecute.<sup>32</sup>
- **Jagath Jayasuriya had command responsibility over the military operations in the Vanni (the northern part of the island except the peninsula) and over Joseph Camp (a detention center rife with the sexual torture, including with rapes, of Tamil detainees) as Vanni Security Forces Commander (August 2007 through July 2009).** In June 2015, Jayasuriya was appointed Ambassador to Argentina, Brazil, Chile, Colombia, Peru, and Suriname. In 2017, ITJP filed criminal complaints in Brazil, Chile, Colombia, and Suriname, with plans to file in Argentina and Peru soon after. Although Suriname refused to accept the suit, Brazil confirmed its jurisdiction and Chile assigned a prosecutor to investigate. Jayasuriya returned to Sri Lanka the day before the cases were filed, likely because he had been tipped off.<sup>33</sup>
- **Jagath Dias had command responsibility over the 57 Division of the SLA (February 2007 through September 2009), which tortured, including sexually, and extrajudicially killed surrendered or captured LTTE leaders, and also directly committed torture.**<sup>34</sup> In September 2009, Dias was appointed Deputy Ambassador to Switzerland, Germany, and the Holy See. In January 2011, the European Center for Constitutional and Human Rights (ECCHR) sent a dossier to Germany and Switzerland requesting they revoke his diplomatic visa and consider investigating the 57 Division's war crimes. In September 2011, his diplomatic status was revoked, and the Swiss Attorney General decided to launch a criminal investigation if Dias returns to Switzerland.<sup>35</sup>

### Recommended Strategies Regarding Immunity

- States should ensure individuals responsible for human rights violations, including sexual torture, do not receive or retain diplomatic roles and diplomatic immunity.

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<sup>32</sup> See generally PEARL, *No Trials, Only Tribulations*, 63 (detailing the allegations and procedural history).

<sup>33</sup> See generally PEARL, *No Trials, Only Tribulations*, 65-66 (detailing the allegations and procedural history).

<sup>34</sup> See generally European Center for Constitutional and Human Rights, *ECCHR Dossier: Major General Jagath Dias*, 20-22 (Jan. 2011), <https://www.legal-tools.org/doc/cac228/pdf> (detailing the allegations).

<sup>35</sup> See generally PEARL, *No Trials, Only Tribulations*, 63-64 (detailing the allegations and procedural history).

- UN actors—including the UN High Commissioner for Human Rights, your mandate, and UN investigations (for example, regarding Sri Lanka: SLAP)—should encourage States to implement the previous recommendation.

## 2. States' Lack of Political Will

Legal actions against Sri Lankan political and military leaders with direct and/or command responsibility for torture who were not protected by immunity also did not proceed. Singapore and Australia could have exercised jurisdiction over alleged Sri Lankan perpetrators who were present in their territory, but they lacked the political will to do so.

- **Gotabaya Rajapaksa had command responsibility over the security forces as Defense Secretary (2005 to 2015). He was President from November 2019 to July 2022, when he resigned due to mass protests about the country's economic situation, thus losing his head-of-state immunity.** He fled to the Maldives and then Singapore. ITJP submitted a criminal complaint to the Attorney General of Singapore requesting Rajapaksa's immediate arrest for war crimes. Singapore did not exercise jurisdiction over Rajapaksa, and on August 11, 2022, he flew to Thailand.<sup>36</sup> Previously, Rajapaksa frequently visited the United States, including from 2015 to 2019, a period when he lacked immunity, without facing any criminal charges.<sup>37</sup>
- **Jagath Jayasuriya lost his diplomatic immunity after returning to Sri Lanka in 2017.** In June 2019, three civil society organizations submitted a formal request to the Australian Federal Police to investigate Jayasuriya for allegations of torture, war crimes, and crimes against humanity. On multiple occasions in 2019 and 2020, Jayasuriya visited family and participated in public events in Australia. Unfortunately, the legal matter was never allocated to an investigations team due to an "administrative oversight." On January 31, 2022, relying on flawed reasons, the police decided not to start an investigation.<sup>38</sup>

### Recommended Strategies to Ensure Justice in Other States

- States should actively apply universal jurisdiction principles to investigate and appropriately prosecute alleged perpetrators of sexual torture—as torture, war crimes, crimes against humanity, and/or genocide—especially when the authorities know a suspect is or have reason to know the suspect will be present in their territory.

<sup>36</sup> See generally PEARL, *No Trials, Only Tribulations*, 67-78 (detailing the allegations and procedural history).

<sup>37</sup> Ike Sriskandarajah, "My Neighbor the Suspected War Criminal" (B. Myers & A. Donohue eds.), *The Center for Investigative Reporting* (Apr. 23, 2022), <https://revealnews.org/podcast/my-neighbor-the-suspected-war-criminal/>.

<sup>38</sup> Australian Centre for International Justice, *Letter from the Australian Federal Police* (Jan. 31, 2022), [https://acij.org.au/wp-content/uploads/2022/03/2022-01-31-Correspondence-from-AFP-to-ACIJ-ITJP\\_wb.pdf](https://acij.org.au/wp-content/uploads/2022/03/2022-01-31-Correspondence-from-AFP-to-ACIJ-ITJP_wb.pdf). See generally PEARL, *No Trials, Only Tribulations*, 66-67 (explaining why the Australian Federal Police's reasons were flawed; detailing the procedural history).



- UN actors—including the UN High Commissioner for Human Rights, your mandate, and UN investigations (for example, regarding Sri Lanka: SLAP)—should encourage States to implement the previous recommendation.

### 3. Lack of States' Efforts to Seek Formal State Responsibility for Torture

Any State Party to the Convention against Torture may invoke the responsibility of another State Party regarding an alleged failure to comply with its obligations *erga omnes partes*. Sri Lanka has not made any declarations or reservations regarding Article 30, which spells out the convention's dispute resolution process.

However, no State Party has tried to hold Sri Lanka formally responsible for breaching its obligations under the Convention against Torture—including to prevent torture and ill-treatment, investigate and appropriately prosecute or extradite alleged perpetrators, and provide redress to victims—by taking action against Sri Lanka under Article 30.

Canada and the Netherlands' action against Syria under Article 30<sup>39</sup> is an example of a good practice for addressing torture, including sexual torture, in situations of domestic impunity.

#### Recommended Strategies to Hold Perpetrator States Formally Responsible for Torture

- Similar to how Canada and the Netherlands took action against Syria, States Parties to the Convention against Torture should hold a perpetrator State formally responsible for breaching its obligations under the Convention against Torture—including to prevent torture and ill-treatment, investigate and appropriately prosecute or extradite alleged perpetrators, and provide redress to victims—by taking action under Article 30:
  - Through formal negotiations;
  - If negotiations fail or become futile or deadlocked, through arbitration;
  - If the dispute is not resolved within six months, by bringing a claim to the International Court of Justice.
- UN actors—including the UN High Commissioner for Human Rights, your mandate, and UN investigations (for example, regarding Sri Lanka: SLAP)—should encourage States to implement the previous recommendation.

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<sup>39</sup> "The Netherlands Holds Syria Responsible for Gross Human Rights Violations," *Government of the Netherlands* (Sept. 18, 2020), <https://www.government.nl/latest/news/2020/09/18/the-netherlands-holds-syria-responsible-for-gross-human-rights-violations>; Minister of Foreign Affairs Takes Action on Syria's Human Rights Violations, *Global Affairs Canada* (March 4, 2021), <https://www.canada.ca/en/global-affairs/news/2021/03/minister-of-foreign-affairs-takes-action-on-syrias-human-rights-violations.html>; "Joint Statement by Canada and the Kingdom of the Netherlands on Instituting Proceedings at the International Court of Justice to Hold Syria to Account for Torture" (June 12, 2023), <https://www.government.nl/documents/diplomatic-statements/2023/06/12/joint-statement-by-canada-and-the-netherlands-on-instituting-proceedings-at-the-international-court-of-justice-to-hold-syria-to-account-for-torture>.

#### 4. Failure to Analyze and Address Victims and Survivors' Genocide Allegations

Under international criminal law, conduct causing serious bodily or mental harm (as an act of genocide) includes, among others, torture, inhuman or degrading treatment, rape, and other forms of sexual violence.<sup>40</sup> Genocidal intent can be inferred from circumstantial evidence, including the existence of consistent and methodical conduct.

It is reasonable to believe Sri Lankan forces committed genocide, including by causing serious bodily or mental harm through sexual torture. However, the OHCHR Investigation on Sri Lanka (OISL), using a “reasonable grounds to believe” standard, focused only on allegations of war crimes and crimes against humanity, deciding to leave allegations of genocide to be resolved through criminal investigations.<sup>41</sup>

More recent UN human rights investigations into other situations have, however, concluded genocide based on “reasonable grounds.”<sup>42</sup> Some even assessed state responsibility for genocide in situations where state organs committed genocidal acts but individual responsibility for genocide has not been determined.<sup>43</sup> To do so, UN human rights investigations have considered the presence of factors that, in international jurisprudence, allowed the inference that genocidal acts were committed with genocidal intent.<sup>44</sup>

The analysis and conclusion of state responsibility for genocide, based on “reasonable grounds,” by the Independent International Fact-Finding Mission on Myanmar<sup>45</sup> and the Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied Since 1967<sup>46</sup> are good examples of how UN actors have addressed genocide allegations against *de jure* state organs and the State itself even before individual responsibility has been determined.

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<sup>40</sup> Elements of Crimes of the Rome Statute of the International Criminal Court, 2187 U.N.T.S. 90, art. 6(b)(1) n.3. (Jul. 17, 1998), <https://www.icc-cpi.int/sites/default/files/Publications/Elements-of-Crimes.pdf>.

<sup>41</sup> Zeid Ra'ad Al-Hussein, “Sri Lanka: International Judges ‘Should Examine War Crimes’,” *Channel 4* (Sept. 16, 2015), <https://www.channel4.com/news/sri-lanka-international-judges-should-examine-war-crimes>.

<sup>42</sup> See, e.g., U.N. Human Rights Council, “*They Came to Destroy*”: *ISIS Crimes Against the Yazidis*, U.N. Doc. A/HRC/32/CRP.2 (June 15, 2016), ¶¶ 164-165, [https://www.ohchr.org/sites/default/files/Documents/HRBodies/HRCouncil/ColSyria/A\\_HRC\\_32\\_CRP.2\\_en.pdf](https://www.ohchr.org/sites/default/files/Documents/HRBodies/HRCouncil/ColSyria/A_HRC_32_CRP.2_en.pdf); U.N. Human Rights Council, *Report of the Detailed Findings of the Independent International Fact-Finding Mission on Myanmar*, U.N. Doc. A/HRC/39/CRP.2 (Sept. 17, 2018), ¶ 1441, [https://www.ohchr.org/sites/default/files/Documents/HRBodies/HRCouncil/FFM-Myanmar/A\\_HRC\\_39\\_CRP.2.pdf](https://www.ohchr.org/sites/default/files/Documents/HRBodies/HRCouncil/FFM-Myanmar/A_HRC_39_CRP.2.pdf).

<sup>43</sup> U.N. Human Rights Council, *Detailed Findings of the Independent International Fact-Finding Mission on Myanmar*, U.N. Doc. A/HRC/42/CRP.5 (Sept. 16, 2019), ¶ 222 & n.490, [https://www.ohchr.org/sites/default/files/Documents/HRBodies/HRCouncil/FFM-Myanmar/20190916/A\\_HRC\\_42\\_CRP.5.pdf](https://www.ohchr.org/sites/default/files/Documents/HRBodies/HRCouncil/FFM-Myanmar/20190916/A_HRC_42_CRP.5.pdf).

<sup>44</sup> *Report of the Detailed Findings of the Independent International Fact-Finding Mission on Myanmar* (2018), ¶¶ 1418, 1441.

<sup>45</sup> *Detailed Findings of the Independent International Fact-Finding Mission on Myanmar* (2019), ¶ 223.

<sup>46</sup> See generally Francesca Albanese, Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied Since 1967, *Anatomy of a Genocide*, U.N. Doc. A/HRC/55/73 (Mar. 25, 2024), <https://www.ohchr.org/sites/default/files/documents/hrbodies/hrcouncil/sessions-regular/session55/advance-versions/a-hrc-55-73-auv.pdf>.

The thoughtful handling of genocide allegations in the analysis of evidence by UN investigations acknowledges the specific crime of genocide and what conduct, including sexual torture, may amount to genocide. This is important for victims and survivors given the role that genocide denial by perpetrator States plays in intergenerational trauma and injustice.<sup>47</sup> Furthermore, States Parties to the Genocide Convention have certain legal obligations and expectations, including to punish genocide, which may create an additional pathway to justice for victims and survivors of genocidal sexual torture.

### Recommended Strategies to Analyze and Address Genocide Allegations

Where there are reasonable grounds to believe genocidal acts were committed and that factors allowing the inference of genocidal intent were present, as is the situation in Sri Lanka:

- States should carry out genocide determinations, using “reasonable grounds to believe” as the standard of proof.
- Any State making a finding of genocide should publicly acknowledge the perpetrator State’s responsibility for genocide (for example, regarding Sri Lanka: this would entail publicly acknowledging that Sri Lanka is responsible for genocide against the Tamil people in 2009) and take steps to punish genocide, including by:
  - applying universal jurisdiction, as relevant;
  - supporting criminal and UN investigations (for example, regarding Sri Lanka: SLAP) and urging them to consider allegations of genocide in its analyses of evidence;
  - where international justice mechanisms lack jurisdiction or are unavailable, supporting the establishment of an international criminal justice mechanism to investigate alleged perpetrators of international crimes, including genocide, and prosecute those most responsible.
- UN actors—including the UN High Commissioner for Human Rights, your mandate, and UN investigations (for example, regarding Sri Lanka: SLAP)—should explicitly analyze genocide allegations in their statements and reports and appropriately conclude genocide.
- The aforementioned UN actors, among others, should encourage States to implement the previous recommendations.

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<sup>47</sup> Michelle E. Ringrose, *The Politicization of the Genocide Label: Genocide Rhetoric in the UN Security Council*, 14 *Genocide Studies & Prevention* 124, 127 (2020), <https://digitalcommons.usf.edu/cgi/viewcontent.cgi?article=1603&context=gsp>; Melanie Altanian, *Genocide Denialism as an Intergenerational Injustice*, in *Intergenerational Equity: Environmental and Cultural Concerns* 159 (Thomas Cottier, Shaheez Lalani, & Clarence Siziba eds., 2019). See Todd F. Buchwald & Adam Keith, *By Any Other Name: How, When, and Why the US Government Has Made Genocide Determinations*, 23 (Mar. 18, 2019), [https://www.ushmm.org/m/pdfs/Todd\\_Buchwald\\_Report\\_031819.pdf](https://www.ushmm.org/m/pdfs/Todd_Buchwald_Report_031819.pdf).