

TÉLÉCOPIE • FACSIMILE TRANSMISSION

DATE: 27 October 2020

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OBJET/SUBJECT: Letter from the Special Rapporteur against women its causes and consequences.

# Please find attached a letter from the Special Rapporteur on violence agaisnt women, its causes and consequences, Ms Dubravka Simonovic.



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**Mandate of the Special Rapporteur on Violence against Women, its Causes and Consequences**

# 27 October 2020

Dear Ms. Singer,

I have the honour to address you in my capacity as Special Rapporteur on violence against women, its causes and consequences, pursuant to Human Rights Commission resolution 1994/45 (1994), and subsequent Human Rights Council resolutions 16/7; 23/25; 32/19 and 41/17.

In my upcoming report to the General Assembly, I intend to review the incorporation of the international standards on rape as a human rights violation and a crime gender-based violence against women (GBVAW) into legislation and practice at the national level. I also seek to provide recommendations to States and other stakeholders in order to harmonize them with such standards, focusing on access to justice and support for victims of rape; and on prosecution of perpetrators, in an effort to break the cycle of impunity.

With this objective in mind, I have asked for States and other stakeholders to provide answers to the questionnaire attached to this letter, which will be used to inform my report, covering the issue of rape during both peace and conflict situations.

I would appreciate receiving inputs from your office and its relevant sections on the criminalisation and prosecution of rape in conflict contexts, based in the attached questionnaire, by **31 December 2020**. The inputs received will be made public in my mandate’s webpage.

I remain at your disposal for any queries through the team supporting my mandate at the Office of the UN High Commissioner for Human Rights, Ms. Renata Preturlan (rpreturlan@ohchr.org/ +41 22 9289254); Ms. Orlagh McCann

(omccann@ohchr.org/+41 22 917 99 02); or at vaw@ohchr.org.

Please accept, Excellency, the assurances of my highest consideration.



Dubravka Šimonovic

Special Rapporteur on Violence against Women, its Causes and Consequences

Ms. Hanaa Singer

UN Resident Coordinator in Sri Lanka

## Annex – Questionnaire on criminalization and prosecution of rape

**Definition and scope of criminal law provisions**

1. Please provide information on criminal law provision/s on rape (or analogous forms of serious sexual violence for those jurisdictions that do not have a rape classification) by providing full translated transcripts of the relevant articles of the Criminal code and the Criminal procedure code.

Amendment No. 22 of 1995 amended section 363 and 364 of the definition of rape of the Penal Code, which now reads as follows.

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| **363.** A man is said to commit " rape " who enactment has sexual intercourse with, a woman under circumstances falling under any of the following descriptions:- |
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|  | (a) without her consent even where such woman is his wife and she is judicially separated from the man |
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|  | (b) with her consent when her consent has been obtained, by use of force or threats or intimidation or by putting her to. fear of death or hurt, or while she was in unlawful detention. |
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|  | (c)with her consent when her consent has been obtained at a time when she was of unsound mind or was in a state of intoxication Induced by alcohol or drugs, administered to her by the man or by some other person |
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|  | (d) with her consent when the man knows that he is not her husband, and that her consent is given because the believes that he is another man to whom she is, or believed herself to be, lawfully married; |
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|  | (e) with or without her consent when she is under sixteen years of age, unless the woman Is his wife who is over twelve years of age and is not judicially separated from the man.‘Explanation- (i)Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape; (ii)Evidence of resistance such as physical injuries to the body os not essential to prove that sexual intercourse took place without consent**364**

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|  | (1) Whoever commits rape shall, except, in the cases provided for in subsections (2) and (3), be punished with rigorous Imprisonment for a term not leas than seven years and not exceeding twenty years and with fine, and shall in addition be ordered to pay compensation of an amount determined by court, to the person in respect of whom the offence was committed for the injuries caused to each person. |
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|  | (2) Whoever- |
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|  | (a) being a public officer or person in a position of authority, takes advantage of his official position, and commits rape on a woman in his official custody or wrongfully restrains and commits rape on a woman; |

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|  | (b) being on the management, or on the staff of a remand home or other place of custody, established by or under law, or of a women's or children's institution, takes advantage of his position and commits rape on any woman in mate of such remand home, place of custody or institution ; |

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|  | (c) being on the management or staff of a hospital, takes advantage of his position and commits rape on a woman in that hospital; |

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|  | (d) commits rape on a woman knowing her to be pregnant; |

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|  | (e) commits rape on a woman under eighteen years of age ; |

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|  | (f) commits rape on a woman who is mentally or physically disabled ; |

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|  | (g) commits gang rape, |

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|  | (3) Whoever commits rape on a woman under sixteen years of age and the woman stands towards the man in any of the degrees of relationships enumerated in lection 364A shall on conviction be punished with rigorous imprisonment, for a term not less than fifteen years and not exceeding twenty years and with fine. |
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|  | (4) Where any person fails to pay the compensation he is ordered to pay under subsection (1) or subsection (2), he shall, In addition to the imprisonment imposed on him under subsection (1) or subsection (2) be punished with a further term of imprisonment of either description for a term which may extend up to two yearsAmendment 16 of 2006, provided an explanation that “injuries” includes psychological or mental trauma |

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**365B**

(1) Grave sexual abuse is committed any person who, for sexual gratification, does any act, by the use of his genitals or any other part of the human body or any Instrument on any orifice or part of the body of any other person, being an act which does not amount to rape under section 363, in circumstances falling under any of the following descriptions, that is to say- (a) without the consent of the other person ; (b) with the consent of the other person where the consent has been obtained by use of force, threat, or intimidation or putting such other person in feat of death or of hurt or while such l other person was in unlawful detention; (c) with the consent of the other person where such consent has been obtained at a time the other person was of unsound mind or was in a state of intoxication induced by alcohol Of drugs. (2) Whoever- (a) commits grave sexual abuse shall be punished with rigorous imprisonment for a. term not less than seven years and not exceeding twenty years and with fine and shall also be ordered to pay compensation of an amount determined by court to the person In respect of whom the offence was committed for the injuries caused to such person ; (b) commits grave sexual abuse on. any person under eighteen years of age shall be punished with rigorous imprisonment for a term not less than ten years and not exceeding twenty years and with fine and shall also be ordered to pay compensation of an amount determined by court to the person. in respect of whom the offence was committed for the injuries caused to such person.".

1. Based on the wording of those provisions, is the provided definition of rape:
	1. Gender specific, covering women only: **YES, it is very limiting and does not extend to men as victims. Unclear to what degree extends to transgender people as victims.**
	2. Gender neutral, covering all persons: **NO, the definition of rape necessitates the offence to be committed by a male perpetrator on a female victim.**
	3. Based on the lack of consent of victim **NOT ONLY – the provisions give exceptions when consent has been given, where the offence of rape is still applicable (minor, consent viced by intoxication, unsound mind or mistaken identity) and seems to provide exception for lack of consent in marital context when there isn’t a judicial separation.**
	4. Based on the use of force or threat **NOT ONLY – Age, state of mind, intoxication and mistaken identity are contemplated as rape without use of force**
	5. Some combination of the above. **YES** If yes, please specify.

**The definitions give many provisos that the offence could be defined by, for instance when consent has been given, under duress, under unsound state of mind, or when consent is not valid due to age**.

* 1. Does it cover only vaginal rape? YES /NO – **Unclear**. **Though the section does not specify that the penetration has to be vaginal this seems to be inferred by the reference to the act of sexual intercourse between man and woman – and the accompanying explanations refers to penetration being sufficient- as well as the existence of another article (365) that penalizes (with or without consent) “*carnal intercourse against the order of nature with any man, woman, or animal*”. Article 365, which de facto criminalizes consensual same sex relations would also seem to be applicable to non-consensual anal rape (including rape of transgender women that have not undergo reassignment surgery)**
	2. Does it cover all forms of penetration? YES/NO. If yes, please specify. **This is unclear, as it confines the act to be between a man and a woman, with the man as the perpetrator. Read together with the provisions on Grave Sexual Abuse (365B), the common perception is that in order to constitute the offence of rape the criteria of penal – vaginal would be necessary, or else the offence could be termed as Grave Sexual Abuse.** “***365B: Grave sexual abuse is committed any person who, for sexual gratification, does any act, by the use of his genitals or any other part of the human body or any Instrument on any orifice or part of the body of any other person, being an act which does not amount to rape under section 363”***
	3. Is marital rape in this provision explicitly included? YES / NO

**NOT FULLY. Though Section 363 recognizes that rape could be committed in marriage, where there was coerced or non-consensual sex, it is only extended to one category of cases – where “she (the victim) is judicially separated from the man.”] Judicial or legal separation in the Marriage law of Sri Lanka is a legal remedy available only after court proceedings. Marital rape is therefore not an offence if a woman is not legally separated by court order, and she is living with her spouse, or is in a situation of *de facto* separation**

* 1. Is the law silent on marital rape? YES/NO

**See above. The law is silent when a woman is not legally separated by court order, and she is living with her spouse, or is in a situation of de facto separation.**

* 1. Is marital rape covered in the general provisions or by legal precedent even if it is not explicitly included? **Only in the event of having obtained a judicial separation.**
	2. Is marital rape excluded in the provisions, or is marital rape not considered as a crime? **YES - marital rape in the event of not having obtained a judicial separation is not considered a crime.**
1. Are there any provisions excluding criminalization of the perpetrator if the victim and alleged perpetrator live together in a sexual relationship/have a sexual relationship/had a sexual relationship? If so, please submit it with corresponding translations.
**No. The penal code does not exclude criminalization of a man who rapes a woman who has been cohabiting, and/ or has / had a sexual relationship. However, judicial precedent in a common law system and the attitude evident in case law means that in effect to ensure inquiry and prosecution in the circumstances mentioned especially in the cases of perpetrator living together and / or having a sexual relationship with the victim will be very difficult.**
2. What is the legal age for sexual consent? **Sixteen**

**Irrespective of consent , there is an exception in art363 related to marriage where it defines rape “*with or without her consent when she is under sixteen years of age, unless the woman is his wife who is over twelve years of age and is not judicially separated from the man”.* This is a reference to the fact that the Muslim Marriage and Divorce Act (applicable to the Muslim population) does not set a minimum age limit, allowing for earlier marriages than the common law required age of 18 years.**

1. Are there provisions that differentiate for sexual activity between peers? If so, please provide them. **In cases where the sexual activity between peers who are both miners where consent has been established the law imposes lesser punitive measures as specified by Section 364. As there is no minimum sentence provided for in these cases, they are likely not actively prosecuted though the police may file a “B report” (what the police file before Magistrates court regarding the status of investigations)**
2. Provide information on criminal sanctions prescribed and length/duration of such criminal sanctions for criminalized forms of rape.

**Generally the criminal sanctions prescribed as per the Penal Code are rigourous imprisonment for a terms not less than 07 years and not more than 20 years and with fine and shall in addition be ordered to pay compensation of an amount determined by court to the person in respect of whom the offence was committed for the injuries caused to such person. However, where the offence is committed in respect of a person under sixteen years of age, the court may, where the offender is a person under eighteen years of age and the intercourse has been with the consent of the person, impose a sentence of Imprisonment for a term less than ten years (no minimum sentence prescribed). The judiciary discretion provided in Section 364 has also reinforced the perception that the underage girl consented to the intercourse. This has led to arguments that the boy should not be considered as an offender and in many cases, suspended sentenced have been prescribed.**

**In aggravated circumstances set out under Section 364 the minimum sentence is specified as 10 years.**

1. What does the legislation in your country provide in terms of reparation to the victim of rape and/or sexual violence after conviction of the perpetrator? **Punishments as specified under Section 364 include financial compensation. In assessing the compensation, phycological harm and mental trauma too are considered.**

## Aggravating and mitigating circumstances

1. Does the law foresee aggravating circumstances when sentencing rape cases? If so, what are they?

(**a) being a public officer or person in a position of authority, takes advantage of his official position, and commits rape on. a woman in his official custody or wrongfully restrains and commits rape on a woman;**

**(b) being on the management, or on the staff of a remand home or other place of custody, established by or under law, or of a women's or children's institution, takes advantage of his position and commits rape on any woman in mate of such remand home, place of custody or institution ;**

**(c) being on the management or staff of a hospital, takes advantage of his position and commits rape on a woman in that hospital;**

**(d) commits rape on a woman knowing her to be pregnant;**

**(e) commits rape on a woman under eighteen years of age ;**

**(f) commits rape on a woman who is mentally or physically disabled ;**

**(g) commits gang rape,**

* 1. Is rape by more than one perpetrator an aggravating circumstance? **YES**
	2. Is rape of a particularly vulnerable individual an aggravating circumstance, or the imbalance of power between alleged perpetrator and victims? (for example, doctor/patient; teacher/student; age difference) **YES**
	3. Is rape by spouse or intimate partner an aggravating circumstance? **NO**
1. Does the law foresee mitigating circumstances for the purposes of punishment? YES/NO If yes, please specify. **YES in the event that the perpetrator was below the age of 18 years.**

 Is reconciliation between the victim and the perpetrator allowed as part of a legal response? YES/NO If so, at what stage and what are the consequences?

**No, however in cases where the evidence is solely reliant on the victim, it is unlikely that the case will reach fruition without the commitment of the victim to participate in the process**.

* 1. **Regardless of the law, is reconciliation permitted in practice? YES/NO and what is the practice in this regard?**

**A study conducted on Statutory Rape and Child Marriage in Sri Lanka[[1]](#footnote-1) revealed that in many cases of Statutory rape, authorities are reluctant to pursue action and look at the cases with leniency where the perpetrator commits to marriage, and cohabits.**

**There have been cases reported where the Police have played an active role in convincing a victim to accept a monetary settlement.** [[2]](#footnote-2)

1. Is there any provision in the criminal code that allows for the non-prosecution of perpetrator? NO If yes, please specify.
	1. if the perpetrator marries the victim of rape? /**NO – though in practice it may happen.**
	2. if the perpetrator loses his “socially dangerous” character or reconciles with the victim? **NO**

## Prosecution

1. Is rape reported to the police prosecuted ex officio (public prosecution)? YES/NO

**Sexual and Gender Based Violence continues to be severely under reported in Sri Lanka for reasons of social stigma and limited responses in terms of remedies and support mechanisms.**

1. Is rape reported to the police prosecuted ex parte (private prosecution)? YES/NO

**Criminal Cases can be prosecuted ex-parte, but the process for serving summons are cumbersome, and so they need to be exhausted in order to proceed with the case. Rape is usually a State prosecution. (Criminal Procedure Code – Sections 241, 242)**

1. Are plea bargain or “friendly settlement” of a case allowed in cases of rape of women? **There might be pressure that is placed on victims to settle cases, reportedly sometimes even by the Police, which may result in the case being withdrawn, but there is no provision for a plea bargain.**
2. Are plea bargain or “friendly settlement” of a case allowed in cases of rape of children? **There is no provision for a plea bargain.**
3. Please provide information on the statute of limitations for prosecuting rape. **General statute of limitations apply: This is determined by Section 456 of the Code of Criminal Procedure, which limits the time for prosecution for all offences other than murder and treason to a time limit of 20 years from the time the offence was committed.**
4. Which are the provisions allowing a child who was the victim of rape and to report it after reaching adulthood, if any? YES/**NO**
5. Are there mandatory requirements for proof of rape, such a medical evidence or the need for witnesses? YES/NO If yes, please specify.

**No, however though the Penal Code Section 363 does not require evidence of resistance, there is judicial precedent that states that evidence of struggle was necessary to prove lack of consent**. [[3]](#footnote-3)

1. Are there rape shield provisions aimed at preventing judges and defense lawyers from exposing a woman’s sexual history during trial? **NO**
2. Are there procedural criminal law provisions aimed to avoid re-victimizations during the prosecution and court hearings? **NO**. If yes, please specify.

## War and/or conflict

1. Is rape criminalized as a war crime or crime against humanity? **NO**
2. Is there a statute of limitations for prosecuting rape in war or in conflict contexts? YES/NO **No specific provisions for conflict-related rape or for war crimes**
3. Is there explicit provisions excluding statutes of limitation for rape committed during war and armed conflict? YES/**NO**
4. Has the Rome Statute of the International Criminal Court (ICC) been ratified? /**NO**

## Data

1. Please provide data on the number of cases of rape that were reported, prosecuted and sanctioned, for the past two to five years.

## See Annexure - 1

## Other

1. Please explain any particular and additional barriers to the reporting and prosecution of rape and to the accountability of perpetrators in your legal and social context not covered by the above.

**Widespread discrimination against homosexuals which is prescribed in law and the criminalization of consensual same sex acts which may also discourage male survivors from reporting or accessing services for fear that they may be accused of homosexual activity. Specifically, Sections 365 and 365A criminalize certain homosexual acts categorizing them as ‘unnatural offences’. These provisions have been used to persecute members of the LGBTIQ community and serve to reinforce discriminatory gender stereotypes.**.[[4]](#footnote-4)

Annexure 1

Grave Crimes Abstract – available at police.lk 

2019



2018



2017



2016



2015



1. Goonesekera and Amarasuriya Emerging Concerns and Case Studies of Child Marriages in Sri Lanka, 2011. Pg 22 – Official Response http://www.iccwtnispcanarc.org/upload/pdf/2501970655EMERGING%20CONCERNS%20AND%20CASE%20STUDIES%20ON%20CHILD%20MARRIAGE%20IN%20SRI%20ANKA%20%20.pdf [↑](#footnote-ref-1)
2. http://www.humanrights.asia/news/urgent-appeals/AHRC-UAC-040-2011/ [↑](#footnote-ref-2)
3. Kamal Addararachchi Case. See also - https://www.lawnet.gov.lk/wp-content/uploads/2016/11/032-SLLR-SLLR-2002-V-1-INOKA-GALLAGE-v.-KAMAL-ADDARARACHCHI-AND-ANOTHER.pdf [↑](#footnote-ref-3)
4. https://tbinternet.ohchr.org/Treaties/CESCR/Shared%20Documents/LKA/INT\_CESCR\_CSS\_LKA\_27228\_E.pdf [↑](#footnote-ref-4)