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**Annual report of the United Nations High Commissioner
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High Commissioner and the Secretary-General**

Report of the Office of the United Nations High Commissioner for Human Rights on Promoting Reconciliation, Accountability and Human Rights in Sri Lanka*

Summary

This report is submitted pursuant to Human Rights Council resolution 25/1, and includes the principal findings of OHCHR's comprehensive investigation into alleged serious violations and abuses of human rights and related crimes during the armed conflict in Sri Lanka. It also reviews human rights related developments in the country since March 2014, in particular the reforms and steps towards accountability and reconciliation by the new President elected in January 2015 and Government in August 2015. The report concludes with the High Commissioner's recommendations on the way forward, including the establishment of a hybrid special court to try war crimes and crimes against humanity allegedly committed by all parties to the armed conflict.

* Late submission.

Contents

	<i>Page</i>
I. Introduction	3
II. Engagement of OHCHR and Special Procedures.....	4
III. Human rights and related development	4
IV. Principal findings of OHCHR investigating on Sri Lanka (OISL).....	6
V. Steps towards accountability and reconciliation	11
VI. Looking ahead	14
VII. Conclusions and recommendations	15

I. Introduction

1. The present report is submitted pursuant to Human Rights Council resolution 25/1, which requested the Office of the United Nations High Commissioner for Human Rights (OHCHR) (a) to monitor the human rights situation in Sri Lanka and to continue to assess progress on relevant national processes; (b) to undertake a comprehensive investigation into alleged serious violations and abuses of human rights and related crimes by both parties in Sri Lanka during the period covered by the Lessons Learnt and Reconciliation Commission (LLRC), with assistance from relevant experts and special procedures mandate holders; and (c) to present a comprehensive report at the twenty-eighth session.

2. Following signals of engagement by the newly elected Government of Sri Lanka in January 2015, and the possibility that further information might become available for the investigation, the Human Rights Council accepted the High Commissioner's recommendation to defer consideration of the report until the 30th session.

3. This report includes the findings of the OHCHR investigation on Sri Lanka (OISL), a special team established by the former High Commissioner Navi Pillay to conduct the comprehensive investigation mandated in Human Rights Council resolution 25/1, which are detailed in the accompanying report A/HRC/30/CRP.2. The High Commissioner invited three distinguished experts¹ to play a supportive and advisory role, and Human Rights Council Special Procedures mandate holders also made input to the investigation.

4. It is important at the outset to stress that the OISL report represents a human rights investigation, not a criminal investigation. The timeframe covered by the investigation, the extent of the violations, the amount of available information, as well as the constraints to the investigation, including lack of access to Sri Lanka and witness protection concerns, posed enormous challenges. Nevertheless, the investigation report has attempted to identify the patterns of violations of international human rights and humanitarian law that occurred, not only during the last phases of the armed conflict, but during the whole period covered by OISL and prior to it.

5. These patterns of conduct consisted of multiple incidents that occurred over time. They usually required resources, coordination, planning and organisation, and were often executed by a number of perpetrators within a hierarchical command structure. Such systemic acts cannot be treated as ordinary crimes but, if established in a court of law, may constitute international crimes, which give rise to command as well as individual responsibility.

6. This report is being presented in a very different context to the one in which it was mandated. The election of a new President and Government on a platform centred on good governance, human rights and the rule of law provide a historic opportunity for Sri Lanka to address the grave human rights violations that have wracked its past; pursue accountability and institutional reform; ensure truth, justice and redress to many thousands of victims; and lay the basis for long-term reconciliation and peace. However, Sri Lanka has had such opportunities in the past, and the findings of the OHCHR investigation highlight the need for political courage and leadership to tackle comprehensively the deep-seated and institutionalized impunity which risks such violations being repeated.

¹ Mr. Martti Ahtisaari, former President of Finland; Dame Silvia Cartwright, former High Court judge of New Zealand; and Ms. Asma Jahangir, former President of the Human Rights Commission of Pakistan.

II. Engagement of OHCHR and Special Procedures

7. From the outset the Government of Sri Lanka “categorically and unreservedly rejected” resolution 25/1 and refused to engage “in any related process”. Former Government ministers and officials repeatedly criticised and vilified the OHCHR investigation in public and, more seriously, resorted to an unrelenting campaign of intimidation and harassment against victims, witnesses and civil society who might seek to provide information to the inquiry.

8. Since January 2015, the tenor of the Government’s engagement with OHCHR changed markedly. Although the new Government did not change its stance on cooperation with the investigation, nor admit the investigation team to the country, it engaged more constructively with the High Commissioner and OHCHR on possible options for an accountability and reconciliation process.

9. The Government also invited the Special Rapporteur on truth, justice, reparations and guarantees of non-recurrence, Mr Pablo de Greiff, to make a technical visit from 30 March to 3 April 2015. The Special Rapporteur stressed the importance of developing a comprehensive state policy on transitional justice through broad public consultation and participation, particularly of persons affected by violations.

10. The Working Group on enforced and involuntary disappearances (WGEID) was also invited to visit Sri Lanka from 2 to 12 August 2015, but was requested to postpone its visit when these dates fell close to the parliamentary elections. The WGEID has now proposed dates in November 2015 for its country visit.

III. Human rights and related developments

11. The Presidential election of 8 January 2015 marked a watershed in Sri Lanka’s political environment. The common opposition candidate, Mathiripala Sirisena, defeated the incumbent President Rajapaksa with the support of a broad coalition from all ethnic communities and across the ideological spectrum. A new Cabinet was formed with the former Opposition Leader, Ranil Wickremesinghe, as Prime Minister.

12. The new Government’s manifesto included a 100-day programme of constitutional reform and other measures, which culminated in the passage of the 19th amendment to the Constitution which limits the powers of the executive Presidency, re-imposes Presidential term limits, and restores the Constitutional Council to recommend appointments to the judiciary and independent commissions. The Chief Justice, who had been controversially impeached in January 2013, was briefly reinstated, before the senior-most judge on the bench was appointed as her successor.

13. Parliamentary elections were subsequently held on 17 August 2015. The United Front for Good Governance (UNFGG), the coalition of parties that had governed since January 2015, won the largest number of seats, and a new Cabinet was formed on 4 September 2015.

14. Since January 2015, there has been a significant opening of space for freedom of expression, at least in Colombo, although reports of surveillance, interference and harassment of human rights defenders continued to be received from the district level. On 16 January 2015, the Government lifted restrictions on access by journalists to the northern region.

15. While President Sirisena appointed new civilian governors for both the Northern and Eastern Provinces, and the major security checkpoint leading to the North was removed in August 2015, the Government is still to embark on any comprehensive process of

demilitarization. Local civil society sources recorded 26 cases of harassment and intimidation by military and intelligence services in the North and East during the period January to August 2015. This highlights the reality that the structures and institutional cultures that created the repressive environment of the past remain in place and will require much more fundamental security sector reform.

16. Six years following the end of the war, many displaced populations have yet to achieve durable solutions, particularly with respect to livelihoods. A major problem continues to be the military occupation of private land, although the Government has proceeded with some land releases in Thellipallai and Kopai in the North and in Sampur in the East.

17. Land issues are further complicated by secondary occupation by civilians; loss, destruction and damage to land documents; competing claims; landlessness and un-regularized land claims. Care must also be taken to ensure land distribution does not exacerbate existing intra- and inter-community tensions, since land disputes have become increasingly politicized and ethnicized in return areas.

18. There are nearly 60,000 women-headed households in the Northern Province². Due to food insecurity, increasing inflation and lack of livelihood opportunities, women headed households are pushed further into debt, thereby increasing their vulnerability to exploitation. In the militarised context in the conflict-affected areas, women headed households are extremely vulnerable to sexual harassment, exploitation and violence.

19. The Government has been slow to clarify the number and identity of detainees still held under the Prevention of Terrorism Act (PTA) and emergency regulations. As of writing, the Government is believed to have acknowledged 258 remaining detainees: 60 of whom have not been charged; 54 who have been convicted in the past; the remaining cases pending. Reports have continued to emerge about the existence of secret and unacknowledged places of detention, which require urgent investigation.

20. The PTA, which has long provided a legal context for arbitrary detention, unfair trials and torture, remains in forces,³ Local civil society sources reported that, from January to August 2015, 19 persons were arrested under the PTA of whom 12 remain in detention. Although the Government has engaged in dialogue with Tamil diaspora groups, it has not yet taken steps to de-list the numerous Tamil diaspora organizations and individuals proscribed under the PTA in March 2013.

21. As documented in this investigation report, torture and sexual violence remain a critical concern, both in relation to the conflict and in the regular criminal justice system. A report by the NGO Freedom from Torture, which provides medical services to victims, highlighted six cases since the change of Government in 2015. Thirty-seven per-cent of the cases documented in the report concerned individuals who had returned to Sri Lanka after the conflict, a few of them rejected asylum seekers.⁴

22. During the period between March 2014 and August 2015 the NGO Secretariat for Muslims reported 112 incidents of hate speech, 22 since January 2015.⁵ During the same period Christian groups reported 126 incidents targeting Christians and religious sites, 57

² <http://www.statistics.gov.lk/HIES/HIES2012PreliminaryReport.pdf>

³ Human Rights Committee, Concluding observations on the fifth periodic report of Sri Lanka, CCPR/C/LKA/CO/5, 21 November 2014.

⁴ "Tainted Peace: Torture in Sri Lanka since May 2009". Freedom from Torture (Medical Foundation for the Care of Victims of Torture), August 2015.

⁵ <http://secretariatformuslims.org/>

since January 2015.⁶ In April 2015, the Government announced plans to revise the penal code to criminalize hate speech, but these amendments have yet to be presented.

23. As of August 2015, no prosecutions have taken place in relation to attacks by the Buddhist group Bodu Bala Sena on the Muslim community in Aluthgama in June 2014, where four persons were reportedly killed and 80 injured.

IV. Principal findings of OHCHR investigation on Sri Lanka (OISL)

24. The following section summarises the principal findings established by the OISL as a result of its investigation and on the basis of the information in its possession. The sheer number of allegations, their gravity, recurrence and the similarities in their modus operandi, as well as the consistent pattern of conduct they indicate, all point towards system crimes. While it has not always been possible to establish the identity of those responsible for these serious alleged violations, these findings demonstrate that there are reasonable grounds to believe that gross violations of international human rights law, serious violations of international humanitarian law and international crimes were committed by all parties during the period under investigation. Indeed, if established before a court of law, many of these allegations may amount, depending on the circumstances, to war crimes if a nexus is established with the armed conflict and/or crimes against humanity. If committed as part of a widespread or systematic attack against a civilian population. In some of these cases, the alleged acts were apparently committed on discriminatory grounds.

A. Unlawful killings

25. On the basis of the information obtained by OISL, there are reasonable grounds to believe the Sri Lankan security forces and paramilitary groups associated with them were implicated in unlawful killings carried out in a widespread manner against civilians and other protected persons. Tamil politicians, humanitarian workers and journalists were particularly targeted during certain periods, but ordinary civilians were also among the victims. There appears to have been discernible patterns of killings, for instance in the vicinity of security force checkpoints and military bases, and also of individuals while in custody of the security forces. If established before a court of law, these may amount, depending on the circumstances, to war crimes and/or crimes against humanity.

26. OISL also gathered information that gives reasonable grounds to believe that the LTTE also unlawfully killed Tamil, Muslim and Sinhalese civilians perceived to hold sympathies contrary to the LTTE. The LTTE targeted rival Tamil political parties, suspected informers and dissenting Tamils including political figures, public officials and academics, as well as members of rival paramilitary groups. Civilians were among the many killed or injured by LTTE indiscriminate suicide bombings and claymore mine attacks. Depending on the circumstances, if confirmed by a court of law, these may amount to war crimes and or crimes against humanity.

27. OISL also investigated allegations of extrajudicial executions of identified LTTE cadres and unidentified individuals on or around 18 May 2009, some of who were known to have surrendered to the Sri Lankan military. Although some facts remain to be established, based on witness testimony as well as photographic and video imagery, there appears to be sufficient information in several cases to indicate that they were killed after being taken

⁶ <http://nceasl.org/category/incident-reports/>

into custody. Depending on the circumstances, if confirmed by a court of law, many of the cases described in the report may amount to war crimes and/ or crimes against humanity.

B. Violations related to the deprivation of liberty

28. OISL documented long-standing patterns of arbitrary arrest and detention by Government security forces, as well as abductions by paramilitary organisations linked to them, which often reportedly led to enforced disappearances and extrajudicial killings.

29. The typical modus operandi involved the arbitrary arrest or abductions of individuals by security forces' personnel, sometimes with the assistance of paramilitary group members operating in unmarked "white vans" that were reportedly able to pass security checkpoints or enter security force bases.

30. These violations were and still are facilitated by the extensive powers of arrest and detention provided in the PTA still in force, as well as Emergency Regulations that were in force until 2011. Such unlawful and arbitrary arrest and detention are clearly in violation of Sri Lanka's obligations under international human rights law. Depending on the circumstances, if confirmed by a court of law, these violations may amount to war crimes and/ or crimes against humanity.

C. Enforced disappearances

31. During the course of its investigation, OISL reviewed reliable information on hundreds of cases of enforced disappearances that occurred within the period of its mandate in various parts of the country, with particular prevalence in the Northern and Eastern Provinces. Furthermore, the mass detention regime after the end of hostilities also led to enforced disappearances.

32. On the basis of the information available, OISL has reasonable grounds to believe that the Sri Lankan authorities have, in a widespread and systematic manner, deprived a considerable number of victims of their liberty, and then refused to acknowledge the deprivation of liberty or concealed the fate and whereabouts of the disappeared person. This, in effect, removed these persons from the protection of the law and placed them at serious risk. Family members of the disappeared persons were also subjected to reprisals and denied the right to an effective remedy, including the right to the truth.

33. There are reasonable grounds to believe that enforced disappearances may have been committed as part of a widespread and systematic attack against the civilian population, given the geographical scope and timeframe in which they were perpetrated, by the same security forces and targeting the same population. In particular, there are reasonable grounds to believe that those who disappeared after handing themselves over to the Army at the end of the conflict were deliberately targeted because they were or were perceived to be affiliated with LTTE forces.

D. Torture and other forms of cruel, inhuman or degrading treatment

34. OISL documented brutal use of torture by the Sri Lankan security forces, particularly in the immediate aftermath of the armed conflict when former LTTE members and civilians were detained en masse. This followed similar patterns by a range of security forces in multiple facilities, including army camps, police stations and "rehabilitation camps", as well as secret, unidentified locations.

35. On the basis of the information obtained by OISL, there are reasonable grounds to believe that acts of torture were committed on a widespread or systematic scale. This breaches the absolute prohibition of torture, and Sri Lanka's international treaty and customary obligations. If established before a court of law, these acts of torture may, depending on the circumstances, amount to crimes against humanity and/or war crimes.

E. Sexual and gender-based violence

36. The information gathered by OISL provides reasonable grounds to believe that rape and other forms of sexual violence by security forces personnel was widespread against both male and female detainees, particularly in the aftermath of the armed conflict. The patterns of sexual violence appear to have been a deliberate means of torture to extract information and to humiliate and punish persons who were presumed to have some link to the LTTE.

37. Due notably to the fear of reprisals, the stigma and trauma attached, and the other constraints its investigation faced, OISL was not able to fully assess the scale of the sexual violence used against those detained. Nevertheless, based on the information it has gathered, OISL considers there are reasonable grounds to believe that violations of international human rights law and international humanitarian law related to sexual violence have been committed by the Government security forces, and that some of these acts may amount to war crimes and crimes against humanity.

F. Abduction and forced recruitment

38. OISL gathered information indicating a pattern of abductions leading to forced recruitment of adults by the LTTE until 2009. The forced recruits were obliged to perform both military and support functions and were often denied contact with their families. Towards the end of the conflict, the abductions leading to forced recruitment became more prevalent. Victims and families who tried to resist were physically mistreated, harassed and threatened.

39. OISL observes that abductions leading to forced recruitment and forced labour were in contravention of Common Article 3 of the Geneva Conventions and of the LTTE's obligations under international humanitarian law to treat humanely persons taking no direct part in hostilities as well as those placed *hors de combat*. In cases in which the movement of those forcibly recruited was severely restricted, OISL considers this may amount to a deprivation of liberty. If established by a court of law, these violations may amount, depending on the circumstances, to war crimes and/or crimes against humanity.

G. Recruitment of children and use in hostilities

40. OISL documented extensive recruitment and use of children in armed conflict by the LTTE over many years, which intensified during the last few months of the conflict, including increased reports involving children under 15. OISL also gathered information on child recruitment by the TMVP/Karuna group after its split from the LTTE in 2004. This was in violation of the Convention on the Rights of the Child (CRC) and its Optional Protocol on the involvement of children in armed conflict, and could also constitute war crimes if proven in a court of law.

41. Based on the information gathered by OISL, there are reasonable grounds to believe that Government security forces may have known that the Karuna Group recruited children in areas under their control. This indicates that the Government may also have violated the

CRC and its Optional Protocol to which it is a party, in particular to ensure the protection and care of children affected by armed conflict. OISL also notes the State's failure to date to prosecute those responsible, including individuals widely suspected of child recruitment, some of whom have since been appointed to public positions.

H. Impact of hostilities on civilians and civilian objects

42. On the basis of the information in OISL's possession, there are reasonable grounds to believe that many of the attacks reviewed in this report did not comply with the principles on the conduct of hostilities, notably the principle of distinction.

43. While it may have been permissible for the security forces to target any military objectives located in the No Fire Zones (NFZs) declared by the Government, these attacks were subject to the rules on conduct of hostilities, including taking all feasible precaution to avoid or minimize incidental loss of civilians lives or damage to civilian objects. The presence of large numbers of civilians, including many children, some of them living in flimsy shelters without access to bunkers, constituted an obvious risk that substantial loss of civilian lives and damage to civilian objects in the NFZs might occur as a result of an attack.

44. OISL recognises the complexities inherent in conducting military operations against legitimate military targets in or near densely populated areas. Nevertheless, the presence of LTTE cadres directly participating in hostilities from within the predominantly civilian population did not change the character of the population, nor did it affect the protection afforded to civilians under international humanitarian law. It is important to recall that the obligations of a party to an armed conflict under international humanitarian law are not conditioned on reciprocity. Violations attributable to one of the parties do not justify lack of compliance on the part of the other. While OISL's investigation is not conclusive on the proportionality assessment for each of the incidents reviewed in this report, it believes that this matter must be investigated.

45. OISL notes with grave concerns the repeated shelling of hospitals in the Vanni. Hospitals and other medical units and personnel enjoy special protection under IHL and cannot be made object of attack. Their protection does not cease unless these are used to commit hostile acts, outside their humanitarian function. The recurrence of such shelling despite the fact that the security forces were aware of the exact location of hospitals raises serious doubt that these attacks were accidental. Other civilian facilities in the NFZs were also impacted, notably humanitarian facilities and food distribution centres. The information available to OISL indicates that in none of the incidents reviewed were there any grounds that could have reasonably led the security forces to determine that these facilities were used for military purposes. These facilities therefore maintained their civilian character and could not be directly targeted. Directing attacks against civilian objects and/or against civilians not taking direct part in hostilities is a serious violation of international humanitarian law and, depending on the circumstances, may amount to a war crime.

46. Another concern is that security forces employed weapons that, when used in densely populated areas, are likely to have indiscriminate effects. This is reinforced by the fact that the security forces reportedly had the means to use more accurate weapons and munitions so as to better respect their legal obligations, notably the requirements of distinction and precaution. In addition, the security forces publicly declared that they had means at their disposal, such as real-time images from drones, that would have helped them accurately target military objectives.

47. Another precautionary measure, unless the circumstances do not permit, is to issue effective warnings when attacks are likely to affect civilians, leaving them adequate time to evacuate before military operations commence. OISL has obtained no information indicating that any specific warnings were issued to the civilian population inside the NFZs informing them that military operations were about to be conducted.

48. OISL's investigation did not find information suggesting that hospitals and other civilian facilities, including those of the UN, were used by the LTTE for military purposes. However, OISL's investigations indicate that the LTTE repeatedly constructed military fortifications (and positioned artillery and other weaponry in close proximity to and often adjacent to civilian areas, including humanitarian and medical facilities and the surrounding areas of IDP concentration in the NFZs. This conduct exposed the civilian population to the dangers of the military operations taking place around them, including by placing civilian lives at increased risk from SLA strikes. There are therefore reasonable grounds to believe that the LTTE's conduct violated its obligations to take all feasible measures to protect the civilian population and civilian objects against the effects of attacks under international humanitarian law.

I. Control of movement

49. OISL's findings indicate that there are reasonable grounds to believe that the LTTE had a clear high level policy of preventing civilians from leaving the Vanni, thereby unlawfully interfering with their liberty of movement. The information also shows that the policy hardened from January 2009, although the specific instructions as to how LTTE cadres should prevent anyone from leaving need to be clarified. Nevertheless, the information gathered indicates that a number of individuals, including several children, were shot dead, injured or beaten by LTTE cadres as they tried to leave, in contravention of their right to life and physical integrity. These acts may amount to direct attacks on civilians not taking direct part in hostilities, in violation of international humanitarian law. If established before a court of law, and depending on the circumstances, such conduct may amount to a war crime.

50. By compelling civilians to remain within the area of active hostilities, the LTTE also violated its obligation under international humanitarian law to take all feasible measures to protect the civilian population under its control against the effects of attacks from the security forces.

J. Denial of humanitarian assistance

51. OISL found the Government of Sri Lanka placed considerable restrictions on freedom of movement of humanitarian personnel and on humanitarian activities in the Vanni. These restrictions impacted on the capacity of humanitarian organizations and personnel to effectively exercise their functions and ensure access to relief of civilians in need. Such restrictions may only be justified by imperative military necessity.⁷

52. There are reasonable grounds to believe that the LTTE also failed to respect its obligations to respect and protect humanitarian relief personnel and not to restrict their freedom of movement.

53. OISL has reasonable grounds to believe that the Government knew or had reasons to know the real humanitarian needs of the civilian populations in the concerned areas,

⁷ ICRC, *Database on customary international humanitarian law*, Rule 56.

including from its own Government agents on the ground, and yet imposed severe restrictions on the passage of relief and the freedom of movement of humanitarian personnel. This apparently resulted in depriving the civilian population in the Vanni of basic foodstuffs and medical supplies essential to survival. If established by a court of law, these acts and omissions point to violations of international humanitarian law, which, depending on the circumstances, may amount to the use of starvation of the civilian population as a method of warfare, which is prohibited under international humanitarian law.⁸ Such conduct, if proven in a court of law, and depending on the circumstances, may constitute a war crime.

K. Screening and deprivation of liberty of Internally Displaced Persons

54. OISL believes that the IDPs held in Manik Farm and other closed camps were deprived of their liberty for periods far beyond what would have been permissible under international law. Moreover, the material conditions in these closed IDP camps amounted to violations of the right to health and to an adequate standard of living, including food, water, housing and sanitation. Depending on the circumstances, such conditions may also amount to inhumane and degrading treatment as defined in international human rights law.

55. On the basis of the information in OISL's possession, there are reasonable grounds to believe that the IDPs were treated as suspects and detained because of their Tamil ethnicity and because they had come out of LTTE-controlled territory. This may amount to discrimination under international human rights law, and, if established by a court of law, may amount to the crime against humanity of persecution.

V. Steps towards accountability and reconciliation

56. As demonstrated in previous OHCHR reports to the Human Rights Council, the past years have seen a total failure of domestic mechanisms to credibly investigate, establish the truth, ensure accountability and provide redress to victims of the serious human rights violations and abuses described above.

57. In the course of its investigation, OHCHR obtained access to the unpublished reports of several domestic investigations, including the 2006 Udalagama Commission and the 2012 Army Court of Inquiry. These reports confirm OHCHR's concerns about their lack of independence and follow up to their recommendations highlighted in previous reports⁹.

58. Since January 2015, President Sirisena and other Government figures have struck a very different tone on reconciliation in public statements. On Independence Day, 4 February, the Government issued a special "declaration of peace" in three languages that expressed sympathy and regret for all the victims of the 30-year armed conflict and pledged to advance "national reconciliation, justice and equality for all citizens."

59. By a cabinet decision dated 25 March 2015 the Government established a new Office of National Unity and Reconciliation headed by former President Chandrika Bandaranaike Kumaratunga, with a mandate to drive progress on pending issues such as the release of detainees and civilian land occupied by the military. The Government also continued to place emphasis on implementation of the recommendations of the LLRC.

⁸ ICRC, *Database on customary international humanitarian law*, Rule 53.

⁹ See Report of the High Commissioner, March 2013, A/HRC/25/23.

A. Presidential Commission on Missing Persons

60. At time of writing there were indications that the Presidential Commission to Investigate into Complaints regarding Missing Persons appointed by the previous Government had received a further extension to complete its work,¹⁰ despite widespread concerns raised about its credibility and effectiveness. In June 2015, two additional Commissioners were appointed to expedite the hearing of cases. In July 2015, the Government also announced the appointment of a special investigation team to expedite investigation into some cases, although its status is not known¹¹.

61. As of 30 June, the Commission had received a total of 16,826 complaints of missing civilians and 5,000 complaints related to missing members of the security forces; 2,200 complainants were subsequently invited to give testimony at 47 public hearings in different districts.

62. Reports from independent observers as well as organizations working with families of the disappeared continued to criticise the lack of transparency and public information, the conduct of proceedings, and intimidation and harassment of family members by military and intelligence officials.¹² These concerns were raised with the Government by WGEID in February 2014, although they were largely rejected at the time.¹³

63. The Commission presented its first interim report to the President on 10 April 2015 and is reportedly ready to submit its second; neither report has been published. However, OHCHR has obtained access to a copy of the first interim report that sheds some light on the work of the Commission. The Commission's analysis of written complaints shows the security forces were responsible for 19 per cent, the LTTE for 17 per cent, and persons or groups unknown for more than 50 per cent; however a higher proportion of LTTE cases appear to have been invited for the public hearings, raising questions of selectivity. It also reports complaints received against paramilitary groups such as the TMVP/Karuna Group and EPDP.

64. In its interim report, the Commission recommends further investigation of a number of cases. Significantly, the Commission highlights 10 cases in which it has identified by name or rank members of the security forces responsible for abductions or disappearances, although the status of any further investigation is not known.

B. Emblematic cases

65. A Committee appointed by the new Government to re-investigate the deaths of 27 prisoners during a security operation to control a riot at Welikada Prison in November 2012¹⁴ found that a number of the killed and injured inmates had not been involved in the riot and recommended further criminal investigation and compensation.

66. In the case of the killing of protestors by army personnel at Weliwerya in August 2013¹⁵, an investigation by the Human Rights Commission of Sri Lanka (HRC-SL) concluded the deaths of three persons, injuries to 36, and destruction of property indicated

¹⁰ In 2014, the period covered by the Commission was extended from 1 June 1990 to 1 January 1983 - 19 May 2009.

¹¹ <http://www.pcicmp.lk/images/NewsEvents/Press%20Release%2024.07.15.pdf>

¹² See Oral Update of the High Commissioner for Human Rights, September 2014, A/HRC/27/CRP.2

¹³ A/HRC/WGEID/103/1, para157; A/HRC/WGEID/102/1, paras 128-138.

¹⁴ See Report of the High Commissioner, February 2014, A/HRC/25/23, para 24.

¹⁵ Ibid.

the security forces had used excessive force. It also noted the presence of senior officers at the scene meant the shooting could not have taken place without orders.¹⁶

67. In a noteworthy development, on 25 June the Colombo High Court found a former Army staff sergeant guilty of the murder of eight Tamil civilians at Mirusuvil, Jaffna District in 2000; four other accused were acquitted. This is a rare case of a conflict-related violation being successfully prosecuted, and a reminder of the many other such cases that remain stalled or pending at various stages of proceedings. While welcome¹⁷, the case highlights the systemic problems of delay in the Sri Lankan judicial system.

68. In relation to the killing of five students at Trincomalee beachfront in January 2006, and of 17 humanitarian workers of *Action Contre La Faim* (ACF) in Muttur in August 2006, the Government reported intensifying investigations but highlighted difficulties in summoning or interviewing potential witnesses now living abroad¹⁸. These cases highlight the unfortunate lack of confidence witnesses have in Sri Lanka's domestic process and the absence of witness protection

69. During its first weeks in office, new Government ministers made public statements about reopening investigations into other prominent cases of human rights violations. In March 2015, three navy personnel and a former police officer were arrested and are in remand custody in relation to the killing of Tamil National Alliance MP Nadarajah Raviraj in November 2006, while a fourth suspect is being sought abroad.

70. In August 2015, just before the Parliamentary elections, police announced they had arrested several military personnel, including two Lieutenant Colonels, and two former LTTE cadres in relation to the disappearance of journalist and cartoonist Prageeth Ekmaligoda.¹⁹ According to State media, the investigation has so far revealed that Ekmaligoda was taken to an army camp in Girithale in North Central province following his abduction on 24 January 2010.²⁰

71. These developments are very welcome, but it is important that the momentum in these cases be sustained and broadened to the many other criminal cases languishing before the courts. The High Commissioner recalls that breakthroughs of this kind have been reported before other Human Rights Council sessions, only to stall later on.

C. Mass graves

72. In previous reports, OHCHR highlighted the pending investigations into various mass graves that have been discovered in different parts of the country. Developments this

¹⁶ HRC-SL inquiry report on intervention of the forces to disperse the demonstration at Weliveriya on right to drinking water in Rathupaswala area; <http://hrcls.lk/english/wp-content/uploads/2015/02/HRCSL-inquiry-report-on-intervention-of-the-forces-on-disperses-the-demonstration-at-Weliveriya-on-right-to-drinking-water-in-Rathupaswala-area..pdf>

¹⁷ The High Commissioner notes his opposition to the death penalty handed down in this case, and Sri Lanka's current status as a de facto abolitionist State.

¹⁸ According to the Government, in the ACF case, the Criminal Investigation Department (CID) has recorded statements of 18 military personnel since January 2015 and a further 22 are to be interviewed. CID wishes to interview two key witnesses believed to be living in France. In the Trincomalee case, the prosecution has presented the depositions of 25 witnesses and eight other witnesses are being sought from overseas; the next hearing in the case is scheduled for 7 December 2015.

¹⁹ <http://www.dailynews.lk/?q=police-legal/cid-arrests-four-army-officers>,
<http://www.dailynews.lk/?q=local/sgt-major-confesses-grilling-ekmaligoda>

²⁰ <http://www.dailynews.lk/?q=local/sgt-major-confesses-grilling-ekmaligoda>

year in the investigation into gravesites at Mannar and Matale have highlighted ongoing forensic challenges and possible manipulation of evidence.

73. In recent years, many other graves have been found in the former conflict zone, often of persons who died in shelling during the last phase of the conflict. This highlights the critical need for increased local capacity and international technical assistance in the forensic field, particularly forensic anthropology and archaeology. Ensuring the preservation and investigation of the sites will be critical to any future criminal investigations, as well as tracing of the missing for their families.

VII. Looking ahead

74. The new Government has pledged to deal with accountability issues “within the country’s legal framework.”²¹ Much of the debate has turned on what type of mechanisms might achieve this, and whether they should be domestic, international or a hybrid of the two. But as Human Rights Council resolution 25/1 stressed, what is needed is a “comprehensive approach to transitional justice incorporating the full range of judicial and non-judicial measures”, including individual prosecutions, reparations, truth-seeking, institutional reform and vetting of public employees and officials.²²

75. The commitment by the new Government to pursue accountability through a domestic process is commendable, particularly in a context where some political parties and sections of the military and society remain deeply opposed. But the unfortunate reality is that Sri Lanka’s criminal justice system is not yet ready or equipped to conduct the “independent and credible investigation” into the allegations contained in the OISL report, or “to hold accountable those responsible for such violations”, as requested by the Human Rights Council.²³

76. First and foremost is the absence of any reliable system for victim and witness protection, particularly in a context where the threat of reprisals is very high. In February 2015, the Government finally passed a long-pending Victim and Witness Protection law, although no concrete steps have been taken so far to make it operative. OHCHR has previously highlighted various shortcomings in the law that could compromise the independence and effectiveness of the new system²⁴. Much will depend on the integrity of appointments to the new Witness Protection Authority, the vetting of police assigned to this service, and the resources committed to this major undertaking.

77. Second is the inadequacy of Sri Lanka’s domestic legal framework to deal with international crimes of this magnitude. Sri Lanka has not acceded to several key instruments, notably the Additional Protocols to the Geneva Conventions, in particular Additional Protocol II, the International Convention on the Protection of All Persons from Enforced Disappearance, and the Rome Statute of the International Criminal Court. It does not have laws criminalising enforced disappearances, war crimes, crimes against humanity or genocide. Its legal framework does not enable individuals to be charged with different forms of liability, notably command or superior responsibility.

78. In the past, when Sri Lanka has prosecuted conflict-related cases, it has relied on offences in the regular criminal law, such as murder. This fails to recognize the gravity of

²¹ See United Front for Good Governance election manifesto, <https://www.colombotelegraph.com/wp-content/uploads/2015/08/Election-held-LAA.xls-.pdf>

²² A/HRC/RES/25/1, preamble.

²³ Ibid.

²⁴ A/HRC/27/CRP.2, para 25.

the crimes, their international character, and duly acknowledge the harm caused to the victims. It also constrains and undermines prosecution strategies, as it does not follow the chain of responsibility and prosecute those who planned, organized or gave the orders for what may be system crimes.

79. Effective prosecution strategies for large-scale crimes, such as those described in the OISL report, focus on their systemic nature and their planners and organizers. The presumption behind such “system crimes” is that they are generally of such a scale that they require a degree of organization to perpetrate. Even sophisticated legal systems like Sri Lanka’s – that may be well suited to deal with ordinary crimes – may lack the capacity to effectively address system crimes and bring effective remedy to their victims. This challenge is even greater in an environment where the criminal justice system remains vulnerable to interference and influence by powerful political, security and military actors.

80. Judicial accountability should also be accompanied by broader transitional justice measures, including truth-seeking and reparations, to ensure that the right of victims to redress is realized. In this regard, it will be important that any accountability process in Sri Lanka examine the entire period of conflict and insurgencies dating back to at least the 1970s, not just the last years of the armed conflict covered in the OISL report. This will also avoid the temptation for accountability measures to be driven by political considerations.

81. The design of any truth-seeking and accountability mechanisms must be through a process of genuine, informed and participatory consultation, especially with victims and their families. Any new mechanisms should not be appointed under the Commissions of Inquiry Act, which has systematically failed to deliver results, but require new, purpose-specific legislation.

82. The third challenge is the degree to which Sri Lanka’s security sector and justice system have been distorted and corrupted by decades of emergency, conflict and impunity. For years, political interference by the Executive with the judiciary has become routine, as demonstrated in many of the cases investigated in this report. The independence and integrity of key institutions such as the Attorney General’s Office and Human Rights Commission remain compromised.

83. The security forces, police and intelligence services have enjoyed near total impunity and have not undergone any significant downsizing or reform since the armed conflict. The PTA and Public Security Ordinance Act remain in force. The military retains an oppressive presence in the war-affected areas of the north and east, still occupying extensive private land, expanding into commercial economic activities, and maintaining a culture of surveillance and harassment of the local population and civil society.

84. Without far-reaching institutional and legal reform, there can be no guarantee of non-recurrence. Sadly, Sri Lanka’s history includes moments where governments pledged to turn the page and end practices like enforced disappearances, but the failure to address impunity and root out the deep structures that had perpetrated such abuses meant the “white vans” could be reactivated when needed.

85. Against this backdrop, the High Commissioner believes that the Government will need to embark on fundamental reforms of the security sector and justice system, including a fully-fledged vetting process to remove from office security forces personnel and public officials suspected of involvement in human rights violations, before it can hope to achieve a credible domestic accountability process and hope to achieve reconciliation.

VIII. Conclusions and recommendations

86. The OHCHR investigation contained in this report was born out of the past failure of the Government of Sri Lanka to address accountability for the most serious human rights violations and crimes. Ending the impunity enjoyed by the security forces and associated paramilitary groups, as well as holding to account surviving members of the LTTE, will require political will and concerted efforts to ensure the non-recurrence of these violations and crimes.

87. The new Government's commitments in this respect are welcome, but it needs to convince a very skeptical audience – Sri Lankan and international – that it is determined to show results. Prosecuting a few emblematic cases will not be sufficient; Sri Lanka needs to address the patterns of serious human rights violations and other international crimes that have caused such suffering for all communities over decades if it is to prevent them haunting its future.

88. The High Commissioner remains convinced that for accountability to be achieved in Sri Lanka, it will require more than a domestic mechanism. Sri Lanka should draw on the lessons learnt and good practices of other countries that have succeeded with hybrid special courts, integrating international judges, prosecutors, lawyers and investigators. Such a mechanism will be essential to give confidence to all Sri Lankans, in particular the victims, in the independence and impartiality of the process, particularly given the politicization and highly polarized environment in Sri Lanka. OHCHR stands ready to continue providing its advice and technical assistance in the design of such a mechanism.

89. The High Commissioner also believes the Human Rights Council has – and should continue to play – a critically important role in encouraging progress on accountability and reconciliation in Sri Lanka. As the process now moves into a new stage, he urges Council members to sustain their monitoring of developments in Sri Lanka with a view to further actions that may be required at the international level should there not be concrete results.

90. A comprehensive set of recommendations is included in the accompanying OISL report (A/HRC/30/CRP.2). In particular, the High Commissioner wishes to highlight the following recommendations:

To the Government of Sri Lanka

General

(a) Set up a high-level executive group to develop a coordinated, time-bound plan and oversee progress in implementing the recommendations contained in this report and previous reports by the High Commissioner to the Human Rights Council, as well as relevant outstanding recommendations of the LLRC and past commissions of inquiry;

(b) Invite OHCHR to establish a full-fledged country presence to monitor the human rights situation, advise on implementation of the High Commissioner's recommendations and of all HRC resolutions, and provide technical assistance;

(c) Initiate genuine consultations on transitional justice, in particular truth-seeking and accountability mechanisms, reparations and memorialization, with the public, victims and witness groups, civil society and other stakeholders; These should be accompanied by public education programmes that ensure informed participation in the process;

(d) Invite the Special Rapporteur on truth, justice, reparations and guarantees of non-recurrence to continue his engagement so that he accompanies and advises in this process; Invite other relevant Special Representatives of the Secretary-General and Special Procedures mandate holders, notably the Special Rapporteurs on extrajudicial killings and torture, to make early country visits, particularly those highlighted in the OISL report.

Institutional reforms

(e) Through the Constitutional Council, appoint qualified new members to the Human Rights Commission of Sri Lanka of the utmost independence and integrity, and review legislation to strengthen the Commission's independence and its capacity to refer cases to the courts;

(f) Issue clear, public and unequivocal instructions to all branches of the military and security forces that torture, rape, sexual violence and other human rights violations are prohibited and that those responsible, both directly or as commander or superior, will be investigated and punished; Order an end to all surveillance, harassment and reprisals against human rights defenders;

(g) Develop a fully-fledged vetting process respecting due process to remove from office military and security force personnel and any other public official where there are reasonable grounds to believe that they were involved in human rights violations;

(h) Prioritize the return of private land that has been occupied by the military and end military involvement in civilian activities;

(i) Take immediate steps to identify and disarm groups affiliated with political parties and sever their linkages with security forces, intelligence services and other Government authorities;

(j) Initiate a high-level review of the Prevention of Terrorism Act (PTA) and its regulations and the Public Security Ordinance Act with a view to their repeal and the formulation of a new national security framework fully complying with international law;

Justice

(k) Review the Victim and Witness Protection Act with a view to incorporating better safeguards for the independence and effectiveness of the witness protection programme in line with international standards; Ensure the independence and integrity of those appointed to the Witness Protection Authority and that the police personnel assigned to this program are fully vetted; Ensure adequate resources for the witness protection system;

(l) Accede to the International Convention on the Protection of All Persons from Enforced Disappearances, the Additional Protocols to the Geneva Convention, and the Rome Statute of the International Criminal Court;

(m) Enact legislation to criminalize war crimes, crimes against humanity, genocide and enforced disappearances without statute of limitation; Enact various modes of criminal liability, notably command or superior responsibility;

(n) Adopt a specific legislation establishing an ad hoc hybrid special court, integrating international judges, prosecutors, lawyers and investigators, mandated to try war crimes and crimes against humanity, with its own independent investigative

and prosecuting organ, defense office and witness and victims protection program, and resource it so that it can promptly and effectively try those responsible;

(o) Carry out a comprehensive mapping of all criminal investigations, habeas corpus and fundamental rights petitions related to serious human rights violations, as well as the findings of all Commissions of Inquiries where they have identified specific cases, and refer these cases to the special court upon its establishment;

(p) Reinforce the forensic capacity of the judiciary and ensure that it is adequately resourced, including for DNA testing, forensic anthropology and archaeology;

(q) Review all cases of detainees held under the PTA and either release them or immediately bring them to trial; Review the cases of those convicted under the PTA and serving long sentences, particularly where convictions were based on confessions extracted under torture;

Truth/right to know

(r) Dispense with the current Presidential Commission on Missing Persons and transfer its cases to a credible and independent institution developed in consultation with families of the disappeared;

(s) Develop a central database of all detainees, with independent verification, where relatives can obtain information of the whereabouts of family members detained, and publish a list of all detention centres;

(t) Publish all unpublished reports of the many human rights-related commissions of inquiry, the Presidential Commission on the Missing, and the Army Court of Inquiry into civilian casualties;

(u) Develop a comprehensive plan/mechanism for preserving all existing records and documentation relating to human rights violations, whether held by public or private institutions;

Reparations

(v) Develop a national reparations policy, considering the specific needs of women and children, and make adequate provision from the State budget;

(w) Strengthen programmes of psychosocial support for victims;

To the United Nations system and Member States

(a) Provide technical and financial support for the development of transitional justice mechanisms provided that they meet international standards; Set up a coordination mechanism among donors in Sri Lanka to ensure focussed and concerted efforts to support the transitional justice process;

(b) Apply stringent vetting procedures to Sri Lankan police and military personnel identified for peacekeeping, military exchanges and training programmes;

(c) Wherever possible, notably under universal jurisdiction, investigate and prosecute those responsible for violations such as torture, war crimes or crimes against humanity;

(d) Ensure a policy of non-refoulement of Tamils who have suffered torture and other human rights violations until guarantees of non-recurrence are sufficient to ensure that they will not be subject to further abuse, in particular torture and sexual violence;

(e) Continue to monitor human rights developments and progress towards accountability and reconciliation through the Human Rights Council; Should there be insufficient progress, the Human Rights Council should consider further international action to ensure accountability for international crimes.
