

INTERNATIONAL  
TRUTH  
AND JUSTICE  
PROJECT

9 February 2021

**Subject: SRI LANKA**

(6 Briefing Notes attached)

**Submission regarding the 46<sup>th</sup> Session of the Human Rights Council in relation to the situation in Sri Lanka.**

**W** ITJPSL.COM  
**E** ITJPSL@GMAIL.COM

**EXECUTIVE DIRECTOR:**  
YASMIN SOOKA

The report of the High Commissioner for Human Rights to the Human Rights Council in January 2021, details the failure by the Government of Sri Lanka to honour the commitments it made not only to the victims of serious human rights violations and grave crimes committed in Sri Lanka but to the international community under the joint UN HRC Resolution 30/1<sup>1</sup>. The High Commissioner charts Sri Lanka's descent into authoritarianism, its failure to address historical injustices and accountability for serious international crimes and consequently the undermining of efforts to promote reconciliation. The High Commissioner's concerns are shared a group of Special Mandate holders who visited Sri Lanka and had first-hand experience of the human rights situation who note the reversal of important democratic gains achieved since 2015 as well as the roll back on the limited progress made particularly since the Government officially withdrew its support from Human Rights Council Resolution 30/1 in February 2020<sup>2</sup>. In particular, they raise i) threats to independent institutions and the rule of law; ii) increasing militarization; iii) restrictions on freedoms of peaceful assembly, association and expression; iv) discrimination against vulnerable groups, incitement to hatred and violence against minorities; v) legal safeguards, conditions of detention and prohibition of torture; vi) enforced disappearances; vii) impunity and viii) lack of progress

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<sup>1</sup> [https://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session43/Documents/A\\_HRC\\_43\\_19.docx](https://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session43/Documents/A_HRC_43_19.docx)

<sup>2</sup> <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26715&LangID=E>

in the transitional justice process, faultlines which reveal how entrenched impunity and denial are in Sri Lanka.

These faultlines are not recent developments that emerged only with the ascent of Gotabaya Rajapaksa to power in February 2020 but are the outcome of decades of structural impunity which have continued to see victims and their families clamouring for justice. Indeed, the former High Commissioner, Zeid Ra'ad Al Husein, noted in September 2015 that "The sheer number of allegations, their gravity and recurrence and the similarities in their modus operandi, as well as the consistent pattern of conduct they indicate, all point to system crimes... the State's security sector and justice system have been distorted and corrupted by decades of impunity".<sup>3</sup>

Democracy and the rule of law are at great risk in Sri Lanka; the increasing militarisation of the Government, coupled with the onslaught on fundamental freedoms and the increasing impunity afforded to the military and security forces is directly attributable to the failure to secure institutional reform in Sri Lanka. The High Commissioner's report and the tone and import of the response from the Government of Sri Lanka villifying her, underscore this concern.

### Key Issues to Consider

This narrative provides an overview of the six Briefing Notes attached to this submission:

- Framing the Problem in the Context of System Crimes and Failed Institutions
- Ongoing Violations – Torture, Arbitrary Arrests, Deaths in Custody
- Enforced Disappearance
- Institutional Reform, Vetting and Screening, and the Rule of Law
- Emblematic cases - update
- List of Emblematic Cases

### (1) Framing the Problem in the Context of System Crimes and Failed Institutions

United Nations investigations since 2009 present a prima facie case of mass atrocities perpetrated at the end of Sri Lanka's war with the LTTE, and the period following the war. Detail in these inquiries is supported by many other credible reports from non-governmental sources, including from the ITJP.

United Nations Human Rights Council (HRC) Resolution 30/1 was intended to provide Sri Lanka with a comprehensive and holistic transitional justice policy, to deal not only with the legacy of the 2009 war, but with decades of structural violence in which State institutions, including the criminal justice system, have been politicized and denuded of independence.

The coalition Government's failure to establish the promised Hybrid Court and Truth Commission, undermined efforts to secure criminal

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<sup>3</sup> Statement by UN High Commissioner for Human Rights Zeid Ra'ad Al Hussein via videolink to the Human Rights Council 30 September 2015. <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16539>

accountability and to excavate and expose the systemic nature and structural underpinnings of the violations, both in terms of acts of omission as well as commission. The government's approach to these allegations is one of denial and avoidance. Sri Lankan governments have a history of appointing commissions of inquiry into these matters that have failed to establish responsibility, build confidence amongst affected communities and avert recurrence. Commission reports are often suppressed, recommendations not implemented while the Government maintains a posture of rebuttal, couched in a narrative of sovereignty and security. Ironically, numerous perpetrators implicated in war crimes, have been promoted and appointed to positions of power, in complete violation of the commitment to vetting and screening out of perpetrators in terms of HRC resolution 30/1 and is indicative of the Government's total disdain for the international community.

## **(2) Ongoing Violations – Torture, Arbitrary Arrests, Deaths in Custody**

The ITJP and others have recorded hundreds of gross violations of human rights perpetrated since the war ended with no accountability - the experience of victims and survivors demonstrates the limitations of domestic options as the criminal justice system is severely compromised and is unable to deliver robust investigations and successful prosecutions.

Numerous reports by OHCHR, UNCAT, WGEID and a number of Special Mandate Holders as well as the ITJP have noted the continuum of violations and the absence of accountability for them - the pattern of abductions, torture, sexual torture, arbitrary arrest and deaths in custody are fairly systematic.

Arrests have continued under the guise of 'security'. The failure to repeal and continued use of the controversial Prevention of Terrorism Act is now compounded by the use of the International Covenant on Civil and Political Rights, stifling freedoms by targeting opponents and critics.

## **(3) Enforced Disappearances**

By 2015, Sri Lanka had the second largest case-load of disappearances in the world after Iraq, from different periods of conflict going back to the JVP massacres. The most recent are from the final phase of the war, including the disappearance of hundreds who surrendered to government forces between the 16 and 19 May 2009 in one place.

The only transitional justice mechanisms established as a result of HRC Resolution 30/1 have been the Office on Missing Persons (OMP) and the Office for Reparation. The OMP was envisaged as a discrete mechanism for receiving complaints and investigating the tens of thousands of unresolved cases of missing persons - in framing the mandate of the OMP, the government created a false dichotomy between a humanitarian and criminal approach, presenting victims with an absolutely artificial and unfair choice between truth and justice. While the OMP published lists in November 2020 of 'missing' persons, the blurring of the distinction between the 'missing' and 'disappeared' has prejudiced the inalienable rights of families to the truth about the fate and whereabouts of loved ones and their rights to justice and accountability. The Office of Reparations, established in 2018, also in terms of HRC Resolution 30/1,

barely functions, has no financial independence and it is neither transparent nor accountable in terms of the benefits processes or outcomes, resulting in civil society organisations and families calling for an independent audit of their work.

#### **(4) Institutional Reform, Vetting and Screening, and the Rule of Law**

HRC Resolution 30/1 emphasised the importance of institutional reforms in Sri Lanka to strengthen the rule of law – referencing inter alia constitutional reforms, security sector reform, including the need to strengthen the independence of the judiciary, and the domestic Human Rights Commission.

The coalition Government reneged on commitments to vet public and security officials, and made several questionable appointments, including appointing Shavendra Silva as Army Commander in 2019, despite the OISL allegations of war crimes. There has been no concerted effort to disentangle networks of power, corruption, nepotism and cronyism. The situation has worsened significantly under the current Government, which now actively seeks to divert processes of accountability under a resurrected narrative cloaked in patriotic nationalism of fighting extremism, sovereignty and security. The recent raft of appointments of (largely retired) military officials is justified on grounds of efficiency, but prima facie culpabilities for gross violations of human rights amongst some appointees is denied and /or avoided.

UN Peacekeeping has a huge role to play in ensuring that Sri Lankan participation in peacekeeping is conditioned on ensuring that military officials implicated in war crimes and serious human rights violations are held accountable and vetted out. The UN's decision to vet peacekeeper deployments from Sri Lanka initially resulted in some progress when Geneva was directly involved; a process that the domestic Human Rights Commission was unable to deliver on and is even less so given the Commission has now lost its independence under the current administration. The appointment of Shavendra Silva as Commander of the Army occurred in August 2019 under the coalition Government. This prompted the UN to announce a suspension of peacekeeping deployments from Sri Lanka, "except in instances where suspension would expose U.N. operations to serious operational risk". No such suspension has been implemented.

#### **(5 & 6) Emblematic cases**

Since 2015, a number of "emblematic" cases focused on particularly egregious incidents of gross violations of human rights, including enforced disappearances and assassinations. However police investigations have been under-resourced, witnesses and plaintiffs have been endangered, suspects have absconded or been protected. An analysis of the emblematic cases reflect patterns of violations, institutional responsibility and a failure to connect perpetrators. Unfortunately, investigations, have in the main failed to focus on the systemic nature of these crimes and the link with political violence. In two instances, convictions were secured, although one was subsequently overturned on appeal, and the perpetrator in the other matter was pardoned. Impunity in Sri Lanka has been exacerbated by the findings and recommendations of the Presidential Commission of Inquiry into cases of alleged political

victimisation, which ultimately undo accountability for the President and his allies.

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## Conclusion

Decades of impunity in Sri Lanka coupled with denial have emboldened the current Government's stance to vilify those who confront their narrative of victimhood, believing that they will escape international and domestic accountability. The hard hitting reports of the High Commissioner and Special Mandate holders dispel this myth and show that successive governments have failed to capitalize domestically on international goodwill that they would live up to its commitments on justice, accountability and national reconciliation in order to restore the rule of law and ultimately prevention.

## Recommendations:

- Member states should reject the notion that the Government of Sri Lanka be allowed to establish yet another domestic commission of inquiry, whose leadership is compromised, and where evidence will be tainted, inevitably compromising future criminal accountability for serious crimes;
- Noting the High Commissioner's concerns, ensure that UN Peacekeeping Operations complies with its own human rights policies and suspends the future deployment of any Sri Lankan peacekeepers until (a) such time as an appropriate vetting and screening process is in place and (b) military officials implicated in the Haiti sexual exploitation and abuse scandal are held accountable and (c) those implicated in war crimes such as Shavendra Silva and Kamal Gunaratne are held criminally accountable. After all peacekeeping is a privilege and not a right;
- Promote accountability for serious international crimes through supporting international investigations into alleged war criminals from Sri Lanka, and indictments promoting universal jurisdiction;
- Utilise sanctions regimes in own countries such as the Global Magnitsky laws or equivalent, sanctioning human rights violators, including asset and travel bans, and making it impossible for them and family members to travel abroad;
- Promote linkages between Geneva and New York on human rights issues and democratic failure in Sri Lanka, enabling open dialogue within the Security Council to support initiatives which foster the management of ethnic and religious diversity in Sri Lanka, accountability for grave crimes and ensure that the risk of future atrocities is prevented;
- Establish benchmarks with a clear timeline for implementing a transitional justice programme which includes establishing a Hybrid Court, the Truth Commission, a security sector reform program inclusive of vetting and screening of public officials and the security forces, and institution reform of the criminal justice system including the judiciary and the Office of Attorney General;
- Above all ensure that technical capacity and training does not obscure human rights monitoring and that OHCHR is given a lead role in monitoring the human rights situation on the ground;

- Promote multiple initiatives to strengthen the collection and preservation of evidence;
- Identify and investigate citizens with dual nationality, particularly from countries that have ratified the Rome Statute and refer them to the ICC;
- Promote the referral of Sri Lanka to the International Criminal Court for alleged war crimes and crimes against humanity, including persecution.

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Yasmin Sooka  
Johannesburg

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