

FEBRUARY 2021  
SRI LANKA: BRIEFING NOTE 1

## FRAMING THE PROBLEM IN THE CONTEXT OF SYSTEM CRIMES AND FAILED INSTITUTIONS

*"Sri Lanka remains in a state of denial about the past, with truth-seeking efforts aborted and the highest State officials refusing to make any acknowledgement of past crimes."*

*Michelle Bachelet, 2021*

### WAR CRIMES AND CRIMES AGAINST HUMANITY

The 2015 OHCHR Investigation into Sri Lanka (OISL) mandated by the Human Rights Council finds reasonable grounds to allege that the Sri Lankan Army indiscriminately – and in some cases deliberately – repeatedly attacked civilians and civilian objects during the final phase of the civil war in 2009, causing massive loss of life. The report details mass enforced disappearances and several summary executions at the war end and then systematic, widespread and particularly brutal torture and sexual violence of men and women in detention that continued well after the war and which it says was part of a "deliberate policy" on the part of the State. The Sri Lankan Government chose not to cooperate with this investigation but, despite having no access to the country, countless governments, international agencies, victims and eyewitnesses provided the UN with prima facie evidence of mass atrocities. In the 5 years since this UN investigation, hundreds more witnesses have fled the country with additional critical information. The urgent need for justice has been bravely spearheaded by the Families of the Disappeared in Sri Lanka, a country which the UN says has the second highest number of disappeared in the world. In 2015, the Sri Lankan Government also identified several killings of journalists and massacres of Tamils as emblematic cases to investigate [see Emblematic Cases, Briefing Note 5]. In 2021, OHCHR observed that not one emblematic case had been concluded successfully.<sup>1</sup>

### WHAT IS THE EVIDENCE?

The OISL report comes from only one of many UN bodies making the case that war crimes and crimes against humanity occurred in Sri Lanka.

In 2011 a Panel of Experts appointed by the UN Secretary General reported on the killing of civilians through widespread shelling, the targeting of hospitals and humanitarian objects, the denial of humanitarian assistance and human rights violations outside the conflict zone, including against the media and critics of the Government. The Panel concluded that the conduct of the war posed a grave assault on the entire regime of international humanitarian law. Both these UN reports found that there were reasonable grounds to believe that many of the gross

violations of human rights and serious violations of international humanitarian law committed during the war, and shortly after, amounted to international crimes such as crimes against humanity or war crimes. Under international law, states have an obligation duly to investigate and prosecute international crimes. Any call for a general amnesty, or unwillingness to investigate and prosecute perpetrators, violates victims' right to justice and effective remedy.

An internal review of the UN's own grave failures in Sri Lanka by Charles Petrie sparked the 'Rights Up Front' initiative. In addition, there is an array of reports by UN special mandate holders looking at conflict-related violations such as torture, sexual violence, enforced disappearance, summary executions and arbitrary detention during and after the war end. This is aside from a vast number of human rights organisation reports on Sri Lanka, both international and domestic. Overall, there are hundreds of credible reports that have emerged over decades detailing egregious human rights violations by the Sri Lankan State which have never been addressed, including three phases of mass atrocities (targeting first Sinhalese and then Tamils) in each of which tens of thousands were killed or disappeared.

### STRUCTURAL FAULT LINES AND THE NEED FOR INSTITUTIONAL REFORM

*"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>2</sup>*

*UN High Commissioner for Human Rights, Zeid Ra'ad Al Hussein, 2015*

Put simply, Sri Lanka is not just dealing 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.<sup>3</sup> This eroded system makes it impossible for decent and well-meaning individuals to fix the problems from within and it is naïve to expect capacity building and training to redress deep rooted structural issues such as impunity, corruption including nepotism, political interference, ethnic discrimination and ethno-majoritarianism. Despite winning the war against the Liberation Tigers of Tamil Eelam (LTTE), successive regimes in Sri Lanka have failed to address historical injustices and accountability for serious international crimes, instead playing to long-standing fears and resentments among their own constituents. In this context, prevention, accountability and redress are of particular importance, as is recognizing the suffering of victims and addressing the underlying structural root causes of conflict in Sri Lanka. The holistic comprehensive transitional justice policy under UN Resolution 30/1 was intended to guarantee the rights to truth, justice, reparation and non-recurrence of violations, contributing significantly to the recognition of victims and restoring their dignity and rights as citizens. This transitional

justice policy could have assisted in dismantling the oppressive and corrupted institutions and mechanisms, establishing minimum conditions of trust, especially in State institutions, and strengthened the rule of law, social cohesion and reconciliation. Although the gravity of the crimes perpetrated in Sri Lanka justifiably prioritises the need for criminal accountability, the Coalition Government unfortunately failed to set up either the Hybrid Court or the Truth Commission.

While a great deal of emphasis has been placed on the Government of Sri Lanka's rejection of the Hybrid Court, not enough has been said about the failure to establish the Truth Commission. A Truth Commission has the potential to deal with the structural underpinnings of decades of conflict, including the denial by successive Governments of their own complicity in continuing the conflict. Truth-telling contributes to atrocity prevention through the public accounting of the magnitude of the crimes committed, which is often unknown to those not directly affected, and it exposes the underlying motives, means and structures used in committing those crimes. On the basis of this accounting, recommendations for prevention can be formulated, in particular measures for promoting reconciliation and transforming discriminatory structures.<sup>4</sup> Thus, the failure to set up the Truth Commission robbed different ethnic communities of the opportunity to hear the violations committed and to be forced to confront their own denial. In short, truth-seeking could have helped change entrenched mindsets and might have strengthened the desire for reform and ultimately reconciliation. Indeed, one of the outcomes could have been a better understanding of the structural nature of the violations, rather than the assumption that regime change would fix the problem. The notion of just a few 'rotten apples' in the military and security forces would have been profoundly properly challenged by the first hand testimony of victims.

Institutional reform and the guarantee of non-recurrence are indelibly linked to prevention, and require security sector reform. This involves removing tainted officials, establishing robust oversight mechanisms, and strengthening the capacities of national structures, including legislative bodies, the judiciary and national human rights institutions in order to uphold good governance, human rights and the rule of law and be able to resolve future conflicts. A legitimate transitional justice process acknowledges past grievances and ensures accountability for serious international crimes. This involves managing ethnic and religious diversity, promoting tolerance and respect for plurality, promoting a robust and diverse civil society, fostering an independent and pluralistic media sector, and strengthening its capacity to counteract hate speech.

Unless the underlying structural grievances and systems crimes are addressed, replacing leaders will not change the underlying problems of Sri Lanka or achieve accountability for the past.

#### **DECADES OF IMPUNITY ENTRENCHED BY THE FAILURE TO IMPLEMENT THE OISL REPORT AND JOINT RESOLUTION 30/1 CONSTITUTE STRUCTURAL FAULT LINES IN SRI LANKA**

While it is true that the first Rajapaksa regime under Mahinda Rajapaksa was dead-set against any form of accountability, particularly around their 'war heroes', the 2015-19 Coalition Government also started to retreat from the commitments they had made under Joint Resolution 30/1 quite soon after it was passed, and failed to use the time they were in government to

ensure implementation of the commitments made, leading to the disappointment and endangering of many victims. Resolution 30/1 promised vetting and screening of public and security officials, which never happened and only required political will - it is worth recalling that it was under the 'good governance' Government that an alleged war criminal was repeatedly promoted, including to Army Commander, that a retired policeman who ran the country's most notorious torture site was brought out of retirement and sent as a Government representative to the UN Committee Against Torture meeting in Geneva, and several questionable military diplomatic appointments made. During this period, a UN special investigation found credible allegations that abduction, torture and sexual violence by security forces continued. The fact that the transitional justice initiative was managed by the Foreign Ministry indicates its primary audience was the international community, and not the people of Sri Lanka.

#### **GOVERNMENT DENIAL: TARGETING AND KILLING OF CIVILIANS IN THE NAME OF FIGHTING TERRORISM**

Denial in Sri Lanka has manifested itself in multiple forms, some of them quite nuanced and sophisticated. Currently senior military officers like the Defence Secretary have resorted to repeating phrases like "our hands are clean"<sup>5</sup> and asserting that there were no war crimes.

The Sri Lankan Government, which is now led by ex-military officers who were instrumental in the 2009 war, has frequently invoked the defence that this was a just war against an internationally proscribed terrorist group. At various stages it has also claimed the war was a 'zero civilian casualty war', 'a humanitarian rescue operation' and asserted that Government soldiers went into war carrying the Human Rights Charter in one hand and a gun in the other. None of this rhetoric is a defence in international law for indiscriminate and disproportionate attacks on civilians, let alone targeted strikes on hospitals and displacement camps or the deliberate starvation of civilians including the denial of medicine and objects indispensable to their survival. Nor does it absolve Sri Lanka of its legal obligations once combatants are hors de combat and prisoners of war. Put simply, it is not acceptable to lure your enemy and his family to surrender, only to rape, torture and/or summarily execute hundreds of them as suspected 'terrorists' - this constitutes perfidious conduct.

The response of the Government of Sri Lanka to the ongoing grief of the Families of the Disappeared has been to insult and disbelieve them, and at times to abduct and torture them.<sup>6</sup> Hundreds of Tamil families who personally handed their loved ones over to the Army at the war end were told, when they had disappeared in State custody, that it was their fault that they did not obtain the names of the receiving soldiers and the number plates of the Army vehicles that drove them away.<sup>7</sup> A Sri Lankan diplomat now posted to the UN in New York misled a UN body by claiming a disappeared journalist had just run away to live abroad as a refugee.<sup>8</sup> Most recently the Defence Secretary of Sri Lanka, a general who commanded troops in the war, condemned the Office on Missing Persons as "absurd", saying it used totally wrong procedures and did not suit Sri Lanka's legal system.<sup>9</sup>

## GOVERNMENT ACCOUNTABILITY: COMMISSIONS TO LOOK INTO COMMISSIONS

*“However, this is an urgent problem and we therefore propose setting up a Royal Commission.”*

*Translation: This problem is a bloody nuisance, but we hope that by the time a Royal Commission reports, four years from now, everyone will have forgotten about it or we can find someone else to blame.”*

*Yes Minister*

In the past 12 years, the Rajapaksa Government's response to international calls for accountability has been to set up one domestic commission after the other<sup>10</sup>, to deflect blame and then never fully implement the recommendations. In some cases, the inquiry's report has never been published and we are told the military unsurprisingly exonerated itself of war crimes.<sup>11</sup> This is not unique to the Rajapaksas – it is a pattern dating back thirty years in Sri Lanka to inquiries into disappearances.<sup>12</sup>

Pablo de Greiff, the former Special Rapporteur on the Promotion of Truth, Justice, Reparations and the Guarantee of Non-Recurrence noted that, “Previous commissions have not contributed to closing the significant confidence gap among communities, restoring the rights of victims or making State institutions more trustworthy”.<sup>13</sup> He went on to say that these commissions have generally been criticized, to varying extents, for their lack of independence, manipulation of evidence, inadequate access or linguistic incompetence, and questionable guarantees given to participants, given the absence of a witness protection programme. He concluded that the cumulative effect of these commissions has been to increase mistrust in the Government's determination to genuinely redress violations.<sup>14</sup>

Just before the Geneva session in 2021, the President of Sri Lanka - in a move designed to deflect attention from the lack of accountability over decades for serious international crimes - has announced the establishment of yet another new commission to examine past commissions.<sup>15</sup> The terms of reference are to see if past inquiries “revealed any human rights violations”, identify their recommendations and examine how they've been implemented. This is an attempt to reset the clock to zero, and in all probability to nullify the findings of previous commissions and exonerate security officials who are alleged to have committed war crimes. The recent critique of the Office on Missing Persons by a senior Government official and the use of the Presidential Commission of Inquiry on Political Victimisation are examples of how far this Government is willing to go to protect 'heroes' and ultimately to argue about whether there is a need to address the past.

Meanwhile the police investigations into corruption and some emblematic cases during the 2015-19 Government have been steadily undone by the Presidential Commission on Political Victimisation. This commission's report has not been published, but leaks suggest it recommends the dropping of scores of cases against Government and security officials indicted by the last regime. This undermines the rule of law, the Attorney General's department and the police, and yet again indicates that Sri Lanka's criminal justice system lacks the credibility to investigate corruption and murder, let alone complex international crimes, as former UN High Commissioner Zeid observed in 2015.<sup>16</sup>

## MEANWHILE, ONGOING VIOLATIONS

Sri Lanka doesn't just need to deal with its past. In the present there is ongoing persecution of Tamils and Muslims. Hundreds of Muslims remain in detention after the Easter Sunday bombings, and there is increasing Islamophobia and hate speech, reinforced by the recent Government decision not to allow Muslims to bury those who have died of suspected Covid-19. Twelve years after the war end, Tamils are still not allowed to remember their dead, evidenced by the recent destruction of a monument at Jaffna University. Refugees from Sri Lanka continue to flee abroad, successfully claiming asylum in Europe and the UK, on the grounds of being tortured and proving future risk [see Briefing Note 2 on Ongoing Violations]. The increasing use of the judiciary and police to intimidate and deny the right to peaceful protest as in February 2021 when people were prevented from taking part in a five-day long march does not bode well for the protection of fundamental freedoms.<sup>17</sup>

## DOES THE UN NAME ALLEGED PERPETRATORS?

The OISL report did not identify alleged perpetrators – Instead it focused on establishing details of the violations. However, the report does name some of those in command of relevant units. In the 5 years since the this report was published groups like the ITJP have collected and collated evidence (including through official Sri Lankan sources) on the command responsibility of individual commanders for international crimes including war crimes, crimes against humanity and a crime of torture. In the 2021 OHCHR report to the Human Rights Council, two Generals – currently the Army Commander and Secretary of Defence - are named by the UN for their role in alleged war crimes.

## SOME POSSIBLE NEXT STEPS

High Commissioner Bachelet has called, inter alia, for the referral of Sri Lanka to the International Criminal Court (ICC), for targeted sanctions, visa bans and for the filing of universal jurisdiction cases. Some of these measures have already happened in a limited way: in 2020 Sri Lanka's Army Commander, Shavendra Silva, was publicly designated in the United States over allegations of gross violations of human rights, which means he and his family are on a travel ban and denied visas. Logically under Leahy Law this should also impact US aid to the Sri Lankan Army. Universal Jurisdiction cases filed by the ITJP and its Latin American partners in 2017 for alleged war crimes against former Army Commander, Jagath Jayasuriya, were accepted by Brazil and Chile but could not be pursued after Jayasuriya fled home. Given the High Commissioner's call that states support universal jurisdiction, these cases could now be resumed with the support of the international community.<sup>18</sup> Before he became President and acquired immunity, two civil suits under the Torture Victims Protection Act were filed against Gotabaya Rajapaksa in 2020 on behalf of victims by a US law firm working with the ITJP and a US NGO.<sup>19</sup> The High Commissioner's 2021 report to the Human Rights Council is a clarion call to Member States to find the courage and political will to do the right thing by victims in Sri Lanka, who have waited so long for justice and accountability.

## ENDNOTES

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1 §49, A/HRC/46/20.

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2 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>

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3 [https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/LKA/INT\\_CCPR\\_CSS\\_LKA\\_18216\\_E.pdf](https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/LKA/INT_CCPR_CSS_LKA_18216_E.pdf)

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4 <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G18/170/58/PDF/G1817058.pdf?OpenElement>

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5 <http://www.dailynews.lk/2021/01/29/features/240100/'sri-Lankans-are-free-today-thanks-humanitarian-operation'>

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6 <https://itjpsl.com/assets/press/ENGLISH-ITJP-Press-release-Disappearance.pdf>

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7 <https://itjpsl.com/reports/disappear-site>

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8 <https://cpj.org/2011/11/sri-lankas-savage-smokescreen/>  
<https://mfa.gov.lk/foreign-minister-speaks-in-parliament-on-removal-of-mohan-peiris-from-cjs-office-2/>

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9 Kamal Gunaratne, *Ibid.*

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10 LLRC, Paranagama Commission.

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11 <https://www.army.lk/news/llrc-observations-cleared-army-commander-hands-over-court-inquiry-report-secretary-defence>

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12 Full reports of the Zonal and All Island Disappearance Commissions set up by Chandrika Kumaratunga's Government have still not been made public. It is widely believed they implicate several serving politicians and civil servants.

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13 Visit to Sri Lanka – Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence (A/HRC/45/45/Add.1)  
[https://reliefweb.int/sites/reliefweb.int/files/resources/A\\_HRC\\_45\\_45\\_Add.1\\_E.pdf](https://reliefweb.int/sites/reliefweb.int/files/resources/A_HRC_45_45_Add.1_E.pdf)

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14 *Ibid.*

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15 <https://itjpsl.com/assets/press/ENGLISH-23-January-2021-Sri-lanka-COI.pdf>  
Text at <https://colombogazette.com/2021/01/22/three-member-panel-appointed-to-probe-findings-of-former-war-commissions/>

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16 "Sri Lanka's criminal justice system is not currently equipped to conduct an independent and credible investigation into allegations of this breadth and magnitude", <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16539>

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17 <http://www.jdslanka.org/index.php/news-features/media/995-sri-lanka-tamil-journalist-harassed-by-police-twice-in-two-days-video>

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18 <https://itjpsl.com/reports/the-case-against-jagath-jayasuriya>

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19 <https://itjpsl.com/reports/gotabaya-rajapaksa-complaint>

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