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ICJ Releases Report Documenting the History of Impunity for Human Rights Violations in Sri Lanka

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Bangkok, 18 January 2010: Today the International Commission of Jurists (ICJ) released a new report "Post-War Justice in Sri Lanka: Rule of Law, the Criminal Justice System, and Commissions of Inquiry" http://www.icj.org/IMG/Sri_Lanka_COI_18.01.09-2.pdf. The report addresses the systematic absence of remedies for gross human rights violations in Sri Lanka between 1977 and 2001 – a period of widespread disappearances and unlawful killings during waves of violent political unrest and internal armed conflict.

The objective of this report is to document and learn lessons from this history that will be important in today's post-war environment to finally come to grips with the systemic impunity that has long plagued Sri Lanka's democracy. While historical in nature, one need only acknowledge the lack of any significant institutional or legal reform since 2001 to realize the importance of these lessons today.

Gross violations of human rights give rise to a clear right of victims to know the truth about what happened to their loved ones, to access a judicial remedy, and to receive reparations. State responsibility for guaranteeing a remedy for such crimes transcends domestic jurisdictions as an obligation of all states (*erga omnes*).

In assessing Sri Lanka's fulfilment of these obligations, this report necessarily looks beyond the regular criminal justice system to an assessment of the many commissions of inquiry, appointed ostensibly to demonstrate various governments' commitment to independent inquiry where the nature of harms shocks the public confidence and necessitates extraordinary measures to ensure accountability.

The report demonstrates that neither the regular criminal justice system nor these commissions have been able to satisfy the state's obligations to its citizens. The failures are comprehensively evaluated and shown to owe a great deal to the politicization of the justice system through the strengthening of executive power at the expense of an independent and effective judiciary. Constitutionalism in Sri Lanka, meaning the higher-order commitments to principles of governance, including human rights and the rule of law, has been dramatically reshaped by successive captures of executive authority through constitutional amendments, particularly in 1972 and in 1978.

The three main findings of the report are as follows:

1. Absence of state accountability

The lack of state accountability for human rights violations in Sri Lanka crosses ethnic divides and all governments and parties. Civilians of predominantly Tamil ethnicity were caught up in the conflict in the North and East and suffered disproportionately from violations committed by the state, including, rape, torture, killings, and disappearances.

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At the same time, the most intense period of violations occurred in response to insurrectionist violence in other parts of the country during the 1980s and early '90s, when an estimated 40,000 Sinhalese youth were 'disappeared'. Only a few cases have been effectively investigated and prosecuted to a successful conclusion.

2. Limitations of the investigative and prosecutorial system

As this research highlights, Sri Lanka's investigative and prosecutorial system is seriously flawed. Lack of independent investigations and a hostile prosecutorial and overarching legal system has led to victims being penalized at all stages of the process, from the very first instance of lodging a first information in the police station to the protracted and intensely adversarial nature of legal proceedings, resulting in many victims and witnesses being coerced and compelled to change their testimony, again reinforcing the cycle of impunity that prevails. There is no dedicated team of police officers entrusted with an investigative function that could maintain its independence and effectiveness when investigating alleged human rights violations. The killing of victims and witnesses has been a persistent feature of the country's criminal justice system for many years.

The weakness of the prosecutorial system is compounded by lack of political will to prosecute grave human rights violations, as evidenced in the systematic patterns of non-indictments, acquittals/withdrawals, absence of appeals from acquittals and inadequate sentencing policy in respect of prosecutions of grave human rights violations.

3. Limitations of the law

At the level of the criminal law, due to the fact that involuntary or enforced disappearance does not constitute a crime in the Penal Code, the prosecution has had to rely on ordinary criminal offences such as abduction, abetment and conspiracy in order to file indictments. Proving these offences in situations of conflict has been immeasurably difficult. The non-incorporation of the doctrine of command responsibility in the criminal law has also been a serious fetter. The reform of the criminal law and prosecutions affirming the responsibilities of senior officers in situations of war, rather than the scattered trials of junior officers, is therefore imperative.

Failures in accountability for grave human rights violations have been abetted by emergency laws which have replaced the country's criminal procedure and evidence laws (based on the British legal codes) for most of the past three decades and which allow, *inter alia*, arbitrary arrests, incommunicado detention and the admittance of confessions made to police officers above a particular rank. The replacement of the normal law with emergency law is now taken for granted; emergency law was not lifted, even in part, after the military decimation of the LTTE in 2009.

The report concludes that learning the lessons from this history of impunity, in order both to avoid repeating past failures and to embark on a much-needed program of institutional reform, is an imperative in Sri Lanka today. The end of the long war in the North has opened an important window of opportunity in an otherwise dire situation for the rule of law. On the one hand, adherence by the state to the idea that in a democracy all stand equal before laws that protect fundamental rights stands at its lowest point in post-independence history. On the other hand, the door is now open as never before for reconciliation between Sri Lanka's ethnic communities based on addressing the institutional flaws in Sri Lanka's administration of justice, and restoring public faith in rule of law, human rights, and the constitutional process.

For further information please contact:

Kishali Pinto-Jayawardena, kisha@slt.lk, tel +94 11 2 824444