

# Challenges to Accountability for Human Rights Violations in Sri Lanka

A Discussion Paper

March 2017

Composed of 60 eminent judges and lawyers from all regions of the world, the International Commission of Jurists promotes and protects human rights through the Rule of Law, by using its unique legal expertise to develop and strengthen national and international justice systems. Established in 1952 and active on the five continents, the ICJ aims to ensure the progressive development and effective implementation of international human rights and international humanitarian law; secure the realization of civil, cultural, economic, political and social rights; safeguard the separation of powers; and guarantee the independence of the judiciary and legal profession.

® Challenges to Accountability for Human Rights Violations in Sri Lanka

© Copyright International Commission of Jurists, March 2017

The International Commission of Jurists (ICJ) permits free reproduction of extracts from any of its publications provided that due acknowledgment is given and a copy of the publication carrying the extract is sent to its headquarters at the following address:

International Commission of Jurists  
P.O. Box 91  
Rue des Bains 33  
Geneva  
Switzerland

# **Challenges to Accountability for Human Rights Violations in Sri Lanka**

A Synopsis of Findings from a Meeting with Lawyers and Human Rights Defenders in Colombo, November 2016

Discussion Paper

March 2017

## Table of Contents

<b>Introduction</b> .....	<b>1</b>
<b>Background &amp; Political Context</b> .....	<b>2</b>
<i>Prevention of Terrorism Act, 1979</i> .....	3
<b>Observations of the Workshop</b> .....	<b>4</b>
<i>Public Lack of Faith in the Criminal Justice System</i> .....	5
Lack of political will and ability to investigate, prosecute and adjudicate human rights violations .....	5
Vacuum in legal framework to address serious human rights crimes .....	6
Lack of independence in the judicial system .....	7
Undue delays in pending court cases .....	7
<i>Lack of independence and impartiality of Attorney General’s Office</i> .....	7
Conflict of interest at the AGO .....	7
AGO vetting Bills .....	8
Alleged judicial partiality towards the AGO .....	8
Access to counsel .....	9
Language .....	9
<i>Challenges in Addressing Crimes under international law through the Domestic     Legal Framework</i> .....	10
<i>Legal Reform</i> .....	12
Witness and victim protection .....	13
Counter-terrorism.....	13
Criminal Procedure Code .....	14
<b>Identifying strategies to address the challenges</b> .....	<b>14</b>
<i>Reforming the Attorney General’s Office</i> .....	14
<i>Increasing the Independence &amp; Impartiality of the Judiciary</i> .....	15
<i>Functional Independence of the Police</i> .....	15
<i>Making Crimes under International Law Specific Offences in Sri Lankan Law</i> .	15
<i>Strengthening Independent Commissions</i> .....	16
<i>Bar Association</i> .....	16
<i>Public Awareness-Raising</i> .....	17
<b>Conclusion</b> .....	<b>17</b>
<b>Annex 1</b> .....	<b>18</b>
<b>Annex 2</b> .....	<b>20</b>

## Introduction

Sri Lanka has an obligation to provide justice, including effective redress, and ensure accountability to victims of human rights abuses. The criminal justice system as it stands today has not served victims seeking to assert this right, whose efforts to seek justice are frustrated by investigative, prosecutorial and judicial lack of independence, impartiality and capacity, all of which continue to contribute to a pervasive culture of impunity within the system.

The International Commission of Jurists (ICJ) has previously published several reports assessing the Sri Lankan judiciary and criminal justice system as a whole<sup>1</sup>. '*Post-war Justice in Sri Lanka: Rule of Law, the Criminal Justice System and Commissions of Inquiry*',<sup>2</sup> published in 2010, documents the history of impunity for human rights violations in Sri Lanka. '*Authority without Accountability: The Crisis of Impunity in Sri Lanka*',<sup>3</sup> published in 2012, documents how and why it has become nearly impossible for people who have suffered human rights violations and abuses, including those amounting to serious crimes, to receive justice in Sri Lanka. Five years hence, most of the concerns documented in these two reports still remain relevant due to failure by the government in undertaking the reforms necessary to strengthen the system.

In November 2016, the ICJ convened a workshop in Colombo, Sri Lanka, which included Sri Lankan lawyers and other human rights defenders to discuss the challenges they face in promoting greater accountability for human rights violations and abuses, particularly when working within the Sri Lankan criminal justice system. The issues raised by participants mirrored those identified in the ICJ's prior reports, reflecting the ongoing and unaddressed systemic challenges that practitioners continue to face.

Participants shared experiences, particularly frustrations, and challenges they face when engaging with the Sri Lankan criminal justice system. It was noted by a number of participants that many of the problems stemmed from the current institutional structure of the investigative, prosecutorial and adjudicating State bodies, which were lacking in adequate safeguards to ensure professional independence and perceived to be biased in favour of the State as opposed to victims and other non-state individuals. In this regard, participants raised a number of suggestions for legal and administrative reform, including reform of the Attorney General's department and steps to increase the independence, impartiality and competency of the judiciary and the police. Participants also highlighted the need for legislative measures, specifically to introduce crimes under international law into the domestic legal framework and to repeal and replace the Prevention of Terrorism Act currently in force. Additionally, day-to-day administrative frustrations such as language barriers were also noted by the practitioners as a significant shortcoming in the criminal justice system that frustrated efforts at accountability for human rights abuse.

---

<sup>1</sup> See ICJ Briefing Note, *Beyond Lawful Constraints: Sri Lanka's Mass Detention of LTTE Suspects*, available at [http://reliefweb.int/sites/reliefweb.int/files/resources/28738E40D73D48AB492577AF000B5BD6-Full\\_Report.pdf](http://reliefweb.int/sites/reliefweb.int/files/resources/28738E40D73D48AB492577AF000B5BD6-Full_Report.pdf).

<sup>2</sup> <https://www.icj.org/sri-lanka-icj-releases-report-documenting-the-history-of-impunity-for-human-rights-violations-in-sri-lanka/>.

<sup>3</sup> <https://www.icj.org/sri-lanka-new-icj-report-documents-crisis-of-impunity/>.

The workshop was one of two workshops as part of a justice and accountability project initiated by the ICJ with the support of the UK Foreign and Commonwealth Office (FCO). The purpose of the project is to identify, assess and help address the challenges faced by the judiciary, legal professionals and human rights defenders in promoting greater accountability for human rights violations, particularly torture and other ill-treatment, and sexual and gender-based violence. In carrying out this work, the ICJ is building upon the ICJ's longstanding experience of engagement in Sri Lanka spanning many decades.

A similar colloquium among judges of the Sri Lankan judiciary, with the support of the Judges Institute of Sri Lanka, was conducted in January 2017. The outcome of the judges' colloquium, together with the observations reflected in this discussion paper, will serve as a reference point to frame the issues and challenges for accountability for human rights abuses in the criminal justice system in Sri Lanka, aimed at identifying points for strategic interventions by way of advocacy and capacity building towards strengthening institutions and reforming laws.

The participants, all legal practitioners, were selected on the basis of their active involvement in the criminal justice system as advocates working on behalf of victims of human rights abuse, advocacy around the challenges in the system and legal reform as well as their ability to represent and identify challenges faced by the grassroots throughout the country. The ICJ worked to ensure balanced regional, ethnic and gender representation among participants when organizing the event. The full agenda for the event is annexed.

## **Background & Political Context**

In 2009 the 30-year long armed conflict between the Sri Lankan government and the separatist movement, the Liberation Tigers of Tamil Eelam (LTTE) came to an end with the defeat of the LTTE. The conflict period, as well as the two insurrection periods in the 1970s and 1980s, witnessed a large number of human rights violations and abuses by both the government forces and rebel groups.<sup>4</sup> There has been limited movement by successive governments towards holding to account perpetrators responsible for these abuses on both sides, which has in turn eroded faith in the country's criminal justice system.

---

<sup>4</sup> The UN Secretary General-appointed panel of experts found credible allegations, if proven, that indicated a wide range of serious violations of international humanitarian law and international human rights law was committed both by the Government of Sri Lanka and the LTTE. See UN Panel of Experts report, available at [http://www.un.org/News/dh/infocus/Sri\\_Lanka/POE\\_Report\\_Full.pdf](http://www.un.org/News/dh/infocus/Sri_Lanka/POE_Report_Full.pdf). The OHCHR Investigation on Sri Lanka (OISL) into alleged serious violations and abuses of human rights and related crimes during the period covered by the Lessons Learnt and Reconciliation Commission (LLRC) found similar allegations. The OISL report is available at <http://www.ohchr.org/EN/HRBodies/HRC/Pages/OISL.aspx>. The LLRC was a Commission of Inquiry appointed in 2010 by the former President Mahinda Rajapaksa largely as a response to international calls for an inquiry into events that transpired from 2002-2009. It set out a comprehensive set of recommendations, which the government stated would be implemented. A national action plan to implement the recommendations of the LLRC was formed, however little progress was made in this regard. The LLRC report is available at [http://www.priu.gov.lk/news\\_update/Current\\_Affairs/ca201112/FINAL%20LLRC%20REPORT.pdf](http://www.priu.gov.lk/news_update/Current_Affairs/ca201112/FINAL%20LLRC%20REPORT.pdf).

This near absolute practice of impunity for conflict era abuses continues to this day, even with a change of government in January 2015 marking the end of President Mahinda Rajapaksa's rule. The new coalition government headed by President Maithripala Sirisena along with Prime Minister Ranil Wickremesinghe brought together the two main political parties with a general promise of good governance. Sri Lanka, with a delegation led by the Minister for Foreign Affairs, in September 2015 adopted at the 30th Session of the UN Human Rights Council supported a consensus [resolution](#) recognizing that "accountability is essential to uphold the rule of law and to build confidence in the people of all communities of Sri Lanka in the justice system."<sup>5</sup> The resolution noted with appreciation that the Sri Lankan Government had proposed to establish "a judicial mechanism with a special counsel to investigate allegations of violations and abuses of human rights and violations of international humanitarian law."<sup>6</sup> Public consultations on the design of this mechanism, along with a number of others proposed by the government of Sri Lanka in its path towards transitional justice, were conducted in 2016 and the final report was published in January 2017.<sup>7</sup>

Despite stated commitments to progressive legislative and systematic reform by the new government, the ICJ and other stakeholders have raised concerns regarding the Government's willingness and capability to follow through on its promises. These include recent attempts by the Government to bring in a new counter-terrorism law which, at least in draft form, appeared more draconian than the predecessor Prevention of Terrorism Act of 1979 (PTA) which it was intended to replace.

#### *Prevention of Terrorism Act, 1979*

The Prevention of Terrorism Act of 1979 (PTA) provides law enforcement with broad powers of search, arrest and detention and guarantees immunity for officials responsible if they are deemed to be acting in good faith<sup>8</sup>. The PTA, however, does not further define the scope of what would constitute acts done in 'good faith'. Extended administrative detention permitted through the Act broadly denies detainee rights and shifts the evidentiary burden of proof to the detainee alleging torture or ill-treatment. The Act that was enacted in 1979 as a temporary measure, has effectively become permanent, even though some of its provisions contravene fundamental rights provisions of the Constitution of Sri Lanka.<sup>9</sup> The Act has been widely condemned for not complying with international law and standards and contemporary best practices and has been employed by successive governments to undermine freedom of expression by human rights

---

<sup>5</sup> See Annex 1 in this discussion paper for full text of the UN Human Rights Council Resolution 30/1, adopted 1 Oct 2015, UN Doc. A/HRC/Res/30/1, also available at [http://www.mfa.gov.lk/images/stories/pdfs/docs/FINAL\\_published\\_-\\_thirty\\_slash\\_one.pdf](http://www.mfa.gov.lk/images/stories/pdfs/docs/FINAL_published_-_thirty_slash_one.pdf). See also Report of the OHCHR Investigation in Sri Lanka (hereinafter "OISL Report"), 16 Sep 2015, UN Doc. A/HRC/30/CRP.2, available at <http://www.ohchr.org/EN/HRBodies/HRC/Pages/OISL.aspx>.

<sup>6</sup> UN Human Rights Council Resolution 30/1, adopted 1 Oct 2015, UN Doc. A/HRC/Res/30/1.

<sup>7</sup> <https://drive.google.com/drive/folders/0Bxbk4wYolphwSXBKSEIMYnhlYTg>.

<sup>8</sup> Section 26 of the PTA states: No suit, prosecution or other proceeding, civil or criminal, shall lie against any officer or person for any act or thing in good faith done or purported to be done in pursuance or supposed pursuance of any order made or direction given under this Act.

<sup>9</sup> Including the right to equality (Article 12 (1)) and the freedom from arbitrary arrest, detention and punishment (Articles 13 (1) and (2)).

defenders and journalists, even in a post-war context.<sup>10</sup> The report of the Human Right Commission of Sri Lanka to UN Committee Against Torture held that as at May 2016, 111 persons remained in remand custody under the PTA. 29 have not been indicted. The longest period a person has been on remand without indictment being filed is 15 years. The longest period a trial has been ongoing is since 2002, i.e. 14 years. 41 persons are appealing their sentences under the PTA with the longest period the person has been awaiting a decision being 14 years.<sup>11</sup> There are numerous calls to either to release the detainees or to charge them with a recognizable crime.

There were also attempts at passage of a weak witness and victim protection legislation and to amend the Criminal Procedure Code and bring in new legislation to tackle hate-speech. These have all faced considerable criticism and push-back from domestic and international civil society groups. Given this context, there is diminishing faith in the government's stated commitment to rule of law reform and accountability for human rights abuses, and in particular its commitment to follow through on promises made at the UN Human Rights Council in 2015.

The need to identify and address challenges faced in promoting and ensuring accountability for human rights in the existing criminal justice system and access to justice for victims – aside from promised ad-hoc mechanisms – is crucial both to ensuring justice for victims who have suffered human rights abuses and to strengthen the rule of law and human rights protections in the country more generally. Furthermore, addressing the human rights situation will also serve the aim of preventing future conflicts.

Decades of injustice for human rights violations and abuses have perpetuated a culture of impunity, where perpetrators are rarely held to account for their crimes. This historic deterioration of faith and credibility of the justice system does not bode well for the future of Sri Lanka, and remains a critical concern in the long-term. If left unaddressed, it has the potential to keep Sri Lanka in the spotlight for allowing human rights abuses to continue without any attempt to end the violence, address the roots of the conflict or offer any effective redress to victims. The reasons for such systemic breakdown of the judicial system, which has justified the need for ad-hoc transitional justice mechanisms as reflected in the UN HRC resolution 30/1, must therefore be identified and addressed within the new political context to ensure justice, to restore faith in the system, to promote reconciliation without sacrificing accountability, and to ensure non-repetition of past conflicts.

## **Observations of the Workshop**

---

<sup>10</sup> The PTA was used for example in 2014 to arrest human right defender Balendran Jeyakumari allegedly for aiding and abetting an ex-LTTE cadre. Two human rights defenders, Ruki Fernando and Fr. Praveen Mahesan, who were investigating her arrest were subsequently arrested for allegedly attempting to incite violence among communities.

<sup>11</sup> The report of the Human Right Commission of Sri Lanka to the UN Committee Against Torture, available at [https://docs.google.com/document/d/1Cc3ICXzqXNk00Ab\\_SPnqkCxb78DoCBWZu7XNA3BZQF4/edit](https://docs.google.com/document/d/1Cc3ICXzqXNk00Ab_SPnqkCxb78DoCBWZu7XNA3BZQF4/edit).



The observations recorded herein reflect the issues raised by the participants themselves during the discussion sessions, based on their own first-hand experiences and observations working in the field. Participants included human rights defenders and lawyers who are regularly involved in pursuing accountability for human rights abuses on behalf of victims, through litigation in the judicial system and other forms of advocacy for reform of the criminal justice system, and have regular and direct contact with victims, families and other stakeholders throughout all regions and demographic groups of the country.

As noted, the ICJ has previously documented in detail the breakdown of the rule of law and the crisis of impunity in the Sri Lankan judiciary and criminal justice system as a whole.<sup>12</sup> In its previous reports, the ICJ has called upon the Sri Lankan government to initiate several reforms to restore the rule of law, the independence and impartiality of the judiciary, and guarantee accountability for human rights violations and abuses. Five years since the ICJ's last assessment and recommendations, victims of human rights violations and abuses have yet to receive justice, as most of the concerns documented earlier still remain applicable. The issues raised by participants at the ICJ's workshop and memorialized herein echoed those identified in the ICJ's prior reports, pointing to the unaddressed systemic challenges that practitioners continue to face and that prevent justice for victims.

### *Public Lack of Faith in the Criminal Justice System*

As successive governments have failed to ensure accountability for serious human rights abuses in a timely and effective manner, due primarily to a lack of political will to prosecute those responsible especially where alleged perpetrators include state actors, victims have increasingly lost faith in the ability of the justice system to provide real redress.

Discussion participants spoke of a number of general challenges and perceptions, outlined below, that are encountered at every level of the judicial system by human rights defenders and independent lawyers representing victims and litigants when seeking accountability.

#### Lack of political will and ability to investigate, prosecute and adjudicate human rights violations

A major challenge is the lack of political will throughout the system to bring alleged state perpetrators of human rights violations to justice, including the police department's willingness to conduct thorough and impartial investigations, the Attorney General's Office's (AGO's) willingness to pursue prosecutions involving State security forces and other state actors, and the willingness of judges adjudicating such cases to ensure fair and timely trials.

The independence and impartiality of the police department, being the principal agency tasked with carrying out investigations of alleged abuses by state actors,

---

<sup>12</sup> See ICJ, *Post-war Justice in Sri Lanka: Rule of Law, the Criminal Justice System and Commissions of Inquiry*, 2010, available at <https://www.icj.org/sri-lanka-icj-releases-report-documenting-the-history-of-impunity-for-human-rights-violations-in-sri-lanka/>; *Authority without Accountability: The Crisis of Impunity in Sri Lanka*, 2012, available at <https://www.icj.org/sri-lanka-new-icj-report-documents-crisis-of-impunity/>.

sometimes against police officers themselves, is highly compromised. Police officers are often unwilling to investigate criminal allegations, especially where State actors are implicated.

It was noted that a more de-centralized police department that is less reliant and subject to influence by the central government, a possible outcome of the ongoing Constitutional reform process, could help address the problems with respect to the independence and impartiality of police.

Even when there is willingness within police precincts to investigate human rights matters, the lack of competency and resource capacity to carry out thorough investigations is a serious challenge in human rights cases.

The lack of functional independence and impartiality on substantive issues relating to the administration of justice is particularly acute in the AGO. Officers in the AGO are widely considered to perceive themselves as first and foremost agents of the State, as opposed to an independent and impartial law enforcement body mandated with upholding the rule of law and pursuing the fair administration of justice. In that connection, State prosecutors have been consistently unwilling to prosecute human rights cases that are seen by them as politically sensitive, particularly alleged conflict-era human rights abuses implicating State security forces.

The judiciary has also not been immune to undue political influence or bias when adjudicating human rights questions with an ethnic dimension and have typically ruled along ethnic lines.

#### Vacuum in legal framework to address serious human rights crimes

Most gross human rights violations and serious violations of international humanitarian law that amount to crimes under international law, such as enforced disappearances, extra-judicial killings, war crimes and crimes against humanity, are not criminalized as offenses under Sri Lankan domestic law. As such, it is difficult to prosecute offenses equating to these crimes in a manner that is appropriate to their serious nature. Where cases of extrajudicial killings and enforced disappearance have been brought into the judicial system, prosecutors rely on ordinary penal offenses such as murder and kidnapping to prosecute such offenses. Given the serious nature of these crimes, and the complexity of assigning responsibility in such cases, the ordinary penal code is wholly inadequate in serving the interests of justice and accountability.

This legal vacuum is compounded in the context of an armed conflict, where the Geneva Conventions<sup>13</sup> and other international humanitarian law instruments have not been incorporated into Sri Lanka law. Where crimes under international law such as war crimes and crimes against humanity are not so incorporated, establishing command responsibility, modes of liability, or other joint criminal enterprise is not an option for even willing prosecutors.

---

<sup>13</sup> Sri Lanka is party to the four Geneva Conventions. Sri Lanka however has not adopted the Additional Protocols.

### Lack of independence in the judicial system

The judiciary itself demonstrates lack of impartiality or unwillingness to adjudicate serious human rights cases. As the ICJ has previously documented, the independence and impartiality of the judiciary has been severely weakened through political pressure and overt interference, including arbitrary dismissals of the former Chief Justice and other senior judges, over the course of several decades.<sup>14</sup> The passage of the 19<sup>th</sup> amendment to the Constitution by the new government in 2015, establishing an independent Constitutional Council to make appointments to other key independent institutions and commissions such as the Judicial Service Commission, attempted to reverse this trend and restore the capacity of the judiciary. However, despite this welcome effort, the Sri Lankan judiciary remains fraught with concerns of its lack of independence, impartiality and capacity to properly adjudicate human rights cases involving State perpetrators, especially those with an ethnic dimension.

### Undue delays in pending court cases

Adding to the deterioration in public faith in the criminal justice system are the undue delays in resolving criminal matters before the courts. On average, it takes between 10 to 15 years to conclude a case from the point of initiation of action to the delivery of judgment, without appeal. As a case in point, detainees arrested under the PTA suffer particular harm in this regard, as reportedly over 100 PTA suspects remain in detention without possibility of bail.<sup>15</sup>

### *Lack of independence and impartiality of Attorney General's Office*

Since the periods of internal disturbances in the 1970s and 1980s, and increasingly through the armed conflict with the LTTE, the Attorney General's Office (AGO) in Sri Lanka has become deeply politicized. The AGO has demonstrated a pattern of bias in failing to pursue sensitive conflict-related cases against alleged State perpetrators and susceptibility to the structural conflicts of interest in being both the chief legal adviser to the government as well as the chief prosecutorial agency to uphold the rule of law throughout the country.<sup>16</sup>

### Conflict of interest at the AGO

There is an inherent structural tension in the roles of the AGO in Sri Lanka, as with most AG's offices in other countries, as it acts as both the chief legal advisor to and defender of the State in respect of all legal matters, while also acting as the chief prosecutor in all criminal cases. In practice, this tension has manifest in Sri Lanka in a lack of will to prosecute State actors in human rights

<sup>14</sup> See *supra*, note 10. See also ICJ, "ICJ condemns impeachment of Sri Lanka's Chief Justice", 1 Jan 2013, available at <https://www.icj.org/icj-condemns-impeachment-of-sri-lankas-chief-justice/>; ICJ, "Sri Lanka: Appointment of new Chief Justice undermines Rule of Law", 15 Jan 2013, available at <https://www.icj.org/sri-lanka-newly-appointed-chief-justices-long-record-of-blocking-justice/>.

<sup>15</sup> The report of the Human Right Commission of Sri Lanka to the UN Committee Against Torture, available at [https://docs.google.com/document/d/1Cc3ICXzqXNk00Ab\\_SPnqkCxb78DoCBWZu7XNA3BZQF4/edit](https://docs.google.com/document/d/1Cc3ICXzqXNk00Ab_SPnqkCxb78DoCBWZu7XNA3BZQF4/edit).

<sup>16</sup> See *ibid*.

cases, particularly those relating to the conflict. PTA cases, for instance, take an inordinately longer time to proceed through the criminal justice system than other criminal cases.

### AGO vetting Bills

Article 77 of the Constitution stipulates a duty on part of the Attorney General to examine draft Bills and to advise government if any of its provisions are inconsistent with the provisions of the Constitution and whether they have to be passed by a special majority prescribed by the Constitution. Furthermore, an officer acting on behalf of the Attorney General attends Parliament when Bills are debated and advises the Speaker on the constitutionality of any amendment that is proposed.

As noted in the AGO website:

As a matter of practice, the Legal Draftsman forwards to the Attorney-General a copy of every draft Bill. The Ministry concerned takes steps to have the Bill gazetted only after the Attorney-General certifies that its provisions are not inconsistent with the Constitution. This practice has made it possible to ensure in the early stages of drafting legislation that proposed laws do not contravene the provisions contained in the Constitution, especially those relating to fundamental rights.<sup>17</sup>

In practice, the process of getting this certification from the AGO involves negotiation until text is deemed Constitutional. Therefore the AGO, whose mandate includes appearing in court to represent and defend the State, is also effectively involved in the law-making process by negotiating provisions of any new law. However, it was considered that the AGO function in the legislative process should mainly be limited to advising as to constitutionality and conformity with international legal obligations of proposed legislation.

### Alleged judicial partiality towards the AGO

Many judges in Sri Lanka are former prosecutors of the AGO. This has fed concerns, based on patterns of conduct, that the judiciary has an entrenched institutional loyalty in favor of the executive in human rights cases. Practitioners at the discussion workshop noted that State prosecutors receive undue special treatment from courts. It is common practice, for instance, for State prosecutors to be afforded an opportunity to meet the judge *ex parte* before the day's proceedings. These instances of preferential treatment provide the State party a distinct advantage in its ability to persuade the judge and typically violate basic principles of fair trial and equality of arms.

In practice, magistrates and judicial officers sometimes demonstrate a clear bias towards the AGO, often acting as an extension of the prosecutor's office, rather than a neutral arbiter. Especially in PTA cases, some magistrates are seen to assist the AGO's prosecutorial function from the bench.

---

<sup>17</sup> <http://www.attorneygeneral.gov.lk/index.php/about-us>.

It is often the case, as described by the participants, that magistrate judges ask the AGO prosecutor whether or not a suspect should be released on bail, even though it is the judiciary's role to grant bail. This is especially problematic when the magistrate judge asks the prosecutor how long of a pre-charge detention he or she wants, which is perceived as prejudicially assisting the State prosecution.

Furthermore, judges, especially those from lower courts outside of Colombo, rely on police officials for personal security and other personal favors. This calls into serious question the impartiality and independence of judges in adjudicating cases involving investigations conducted or alleged violations by the same State officials upon whom they rely for security and assistance.

### Access to counsel

The right to access to counsel at the time of arrest, though provided under police directives and required under international law, is not consistently respected in practice in Sri Lanka. In Sri Lanka, where torture and other ill-treatment is systematically and widely practiced, "confessions" are often obtained through torture or other ill-treatment and admitted as evidence.<sup>18</sup> Particularly in PTA cases, almost all cases are based on confessions.

At the time of the ICJ discussion workshop, the government of Sri Lanka had gazetted an amendment to the Criminal Procedure Code<sup>19</sup>, which it eventually shelved due to public criticism, that sought to restrict a detainee's access to counsel till after the first statement is recorded by the Police. At the time of writing a new amendment to the Criminal Procedure Code<sup>20</sup> seeks to issue caveats around a detainee's prompt access to legal counsel.

### Language

The rights of suspects and defendants to have proceedings communicated in their own language are not respected at every stage of the judicial process – during police complaint and investigation, provision of legal aid, and during trial.

Although there is legal right to make submissions in any of the three official languages, courts often fail to respect this right in practice. Objections raised on these grounds are sometimes not even recorded, and when they are recorded they risk postponing the case. There are instances where judges communicate with the Police in Sinhala, in even majority Tamil-speaking areas, making it impossible for the local Tamil lawyers to follow.

Limited Tamil-speaking police officers and limited language proficiency in practice often also results in witness statements being recorded incorrectly. Here again, cases get postponed as a result, when lawyers raise objections requesting

---

<sup>18</sup> The report of the Human Right Commission of Sri Lanka to the UN Committee Against Torture states, "The complaints received by the Commission illustrate that torture is routinely used in all parts of the country regardless of the nature of the suspected offence for which the person is arrested." See the report of the Human Right Commission of Sri Lanka to the UN Committee Against Torture, available at

[https://docs.google.com/document/d/1Cc3lCXzqXNk00Ab\\_SPnqkCxb78DoCBWZu7XNA3BZQF4/edit](https://docs.google.com/document/d/1Cc3lCXzqXNk00Ab_SPnqkCxb78DoCBWZu7XNA3BZQF4/edit).

<sup>19</sup> [http://www.documents.gov.lk/files/bill/2016/8/119-2016\\_E.pdf](http://www.documents.gov.lk/files/bill/2016/8/119-2016_E.pdf).

<sup>20</sup> [http://www.documents.gov.lk/files/bill/2017/3/165-2017\\_E.pdf](http://www.documents.gov.lk/files/bill/2017/3/165-2017_E.pdf).

to re-take the statement. This barrier is particularly pronounced for Tamil-speaking defendants.

*Challenges in Addressing Crimes under international law<sup>21</sup> through the Domestic Legal Framework*

Numerous violations of human rights and humanitarian law amounting to crimes under international law were alleged to have been committed during the armed conflict by both parties to the conflict – the members of the government and armed forces of Sri Lanka and members of the LTTE. However, many crimes under international law are not specific offenses under Sri Lanka law, including the following acts constituting such crimes:

- Starvation of a civilian population: A war crime under international humanitarian law (IHL), however not a specific crime under domestic law.
- The use of members of the civilian population as human shields: Although a war crime, it is not a specific domestic crime. At most it could be categorized as unlawful restraint or confinement.
- Intentionally directing an attack on civilian objects, including on a hospital: A war crime under international law, however not a specific crime under domestic law.

Command responsibility: Whereas evidence of a superior order is sufficient under international law to prosecute, under domestic law the nearest equivalent provision is to establish a conspiracy, which requires a different evidentiary standard and does not address the gravity of serious crimes under international law such as war crimes and crimes against humanity.

If established in a court of law, these acts would constitute crimes under international law and would give rise to additional modes of liability such as command or superior responsibility, in addition to individual responsibility, which must be investigated and prosecuted in the interests not only of justice for victims but also to ensure the rule of law and guarantee of non-recurrence.

Lack of adequate substantive law: As noted above, with the exception of torture, Sri Lankan domestic law has yet to make all gross human rights violations and crimes under international law specific crimes under domestic law. No corresponding specific crime of enforced disappearance, unlawful denials of the right to life by State agents, war crimes, or crimes against humanity exist under domestic legislation at present. National laws at present do not reflect the gravity of the crimes, or the context in which such crimes occurred in order to demonstrate patterns of systematic violations where applicable, as necessary to establish elements of the crimes. Unless international crimes are incorporated into domestic legislation, the gravity of such alleged acts cannot be captured through prosecuting them as ordinary criminal offences. When legislating such

---

<sup>21</sup> Crimes under international law include aggression, genocide, slavery, war crimes, crimes against humanity, torture and ill treatment, enforced disappearance, unlawful killings in violation of the right to life. The sources setting the framework for war crimes include the four Geneva Conventions of 1949, Additional Protocol I of 1977 and their grave breaches provisions; the Rome Statute for the ICC; and customary international law which indicates that the violations are applicable to non-international armed conflict (see ICRC study on customary IHL, available at <https://www.icrc.org/eng/resources/documents/publication/pcustom.htm>).

laws, the definition of such crimes must be consistent with existing accepted international definitions.

Lack of provisions to establish command responsibility or other modes of liability: Sri Lankan law does not sufficiently provide for modes of liability such as command responsibility, superior responsibility or joint criminal enterprise. As a result, it is impossible to pursue accountability for senior military officers or political leaders who, for example, may have directed or ordered, participated in, acquiesced to, or failed to exercise standard of care to prevent human rights violations, even if not actually committing the acts directly themselves.

While the Torture Act<sup>22</sup> states that an order of a superior officer or a public authority is not a defence for torture under the Act, as whole it does not make explicit reference to culpability of superiors for ordering the commission of torture. It does, however, provide that attempting to commit, aiding and abetting in the commission of the act and conspiring to commit torture are all offences under the Act.

The Bill to give effect to the International Convention for the Protection of All Persons from Enforced Disappearance (CED)<sup>23</sup> includes modes of liability. Article 6 of the CED states, in pertinent part:

1. Each State Party shall take the necessary measures to hold criminally responsible at least:
  - (a) Any person who commits, orders, solicits or induces the commission of, attempts to commit, is an accomplice to or participates in an enforced disappearance;
  - (b) A superior who:
    - (i) Knew, or consciously disregarded information which clearly indicated, that subordinates under his or her effective authority and control were committing or about to commit a crime of enforced disappearance;
    - (ii) Exercised effective responsibility for and control over activities which were concerned with the crime of enforced disappearance; and
    - (iii) Failed to take all necessary and reasonable measures within his or her power to prevent or repress the commission of an enforced disappearance or to submit the matter to the competent authorities for investigation and prosecution;
  - (c) Subparagraph (b) above is without prejudice to the higher standards of responsibility applicable under relevant international law to a military commander or to a person effectively acting as a

---

<sup>22</sup> Sri Lanka ratified the Convention Against Torture or Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention Against Torture) in 1994 and brought in domestic legislation giving effect to this law. Sri Lanka's Torture Act is available at [http://www.hrcsl.lk/PFF/LIbrary\\_Domestic\\_Laws/Legislations\\_related\\_to\\_Torture/Convention%20against%20Torture%201994%20of%202022.pdf](http://www.hrcsl.lk/PFF/LIbrary_Domestic_Laws/Legislations_related_to_Torture/Convention%20against%20Torture%201994%20of%202022.pdf); Convention Against Torture, adopted by General Assembly Resolution 39/46 on 10 December 1984, available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CAT.aspx>.

<sup>23</sup> The International Convention for the Protection of All Persons from Enforced Disappearance was ratified by Sri Lanka in 2016 and enabling legislation is gazetted at the time of writing, available at [http://documents.gov.lk/files/bill/2017/3/175-2017\\_E.pdf](http://documents.gov.lk/files/bill/2017/3/175-2017_E.pdf).



military commander.<sup>24</sup>

Retroactive applicability of crimes under international law: Violations of human rights and humanitarian law amounting to crimes under international law are criminal at the time the act was committed, regardless of whether they have yet been criminalized under a country's domestic criminal law. When legislating incorporation of such crimes, Sri Lanka must therefore expressly allow retrospective enforcement of the law for acts committed before the law came into effect. Otherwise, the law would only apply to future crimes and fail to address the numerous violations committed during the armed conflict.

Officials in the AGO, unfamiliar with concepts and applicability of international crimes, are resistant to their incorporation into domestic laws. This is mainly due to the lack of expertise and skill with regard to prosecuting these difficult issues of law, which for Sri Lanka is still uncharted territory.

Following Sri Lanka's ratification of the CED,<sup>25</sup> the government has promised that enforced disappearances will be incorporated into domestic legislation as a crime. As there were no reservations to the Convention, there is the expectation that the government will not only criminalize the act but also include modes of liability. If enacted, it will be the first such law to bring in modes of liability in Sri Lanka. It is important that any domestic law on enforced disappearance ensure that the CED is fully incorporated into domestic law the following:

- Criminalizing specific liability for acts of enforced disappearance,
- Including a definition of enforced disappearance that accords with that in the Convention
- Including an element making reference to the offense as a crime against humanity,
- Ensure that the continuing nature of the crime is recognized, ie, that until the fate and whereabouts of the "disappeared" person are clarified, the crime is ongoing. Therefore, acts of enforced disappearance that began before the ratification of the treaty, where the whereabouts and fate have not been clarified, are still subject to investigation and prosecution.
- Victims of enforced disappearance must include not just the disappeared person, but also their family members.<sup>26</sup>

The GOSL (Government of Sri Lanka) bill to give effect to the CED, as currently gazetted, fails to include provisions referencing the offense as a crime against humanity under aggravated circumstances, or as a continuing crime subject to retroactive application of the statute.

### *Legal Reform*

Participants discussed the urgent need for law reform aimed at strengthening

---

<sup>24</sup> Art. 6, International Convention for the Protection of All Persons from Enforced Disappearance (CED), available at <http://www.ohchr.org/Documents/ProfessionalInterest/disappearance-convention.pdf>.

<sup>25</sup> The CED was ratified by Sri Lanka in 2016 and enabling legislation in bill form is gazetted at the time of writing, available at [http://documents.gov.lk/files/bill/2017/3/175-2017\\_E.pdf](http://documents.gov.lk/files/bill/2017/3/175-2017_E.pdf). Section 3(3) of the bill establishes superior responsibility for the offense.

<sup>26</sup> The current bill does define "victims" as disappeared persons and any individuals who have suffered harm as the direct result of the enforced disappearance. See *ibid*.



the criminal justice system and, as importantly, greater public oversight of legislative initiatives attempted by the government. The legislative drafting process, particularly in case of reforms implicating the adjudication of human rights abuses, lacks adequate transparency and inclusive participation with civil society and other stakeholders. To date, the new government has enacted a witness and victim protection law, formulated a draft legal framework for a new counter-terrorism law to replace the PTA, and attempted to amend the Criminal Procedure Code. Each of these legislative initiatives falls short of adequately ensuring the protection of human rights.

#### Witness and victim protection

The *Assistance to and Protection of Victims of Crime and Witnesses Act*<sup>27</sup> was certified as law in March 2015. A number of human rights defenders, including practitioners, strongly criticized the Act, which was drafted by the previous government. Concerns centered around the composition and appointment process for the national authority called for under the Act that excluded the Constitutional Council. Furthermore, the division within the Police responsible for enforcement of the provisions of the Act is not sufficiently independent from the Police hierarchy, raising concerns regarding conflict of interest given the allegations of intimidation and abuse of victims and witnesses by members of the Police themselves.

#### Counter-terrorism

The GOSL prepared framework for a counter-terrorism bill intended to replace the deeply problematic PTA. The repeal of the draconian PTA is a key element of the HRC resolution 30/1 of September 2015 and a point that domestic and international human rights advocates have been calling for several years.

The PTA has been used since its inception to justify sweeping powers to arrest and detain persons in violation of Constitutional guarantees. Furthermore, its overbroad and vague provisions have also been utilized by governments in the past as a tool to suppress, and crackdown on activities in exercise of protected human rights, including freedom of expression. This has occurred particular in respect of political opposition and persons engaging in criticism of the government. Journalist J.S. Tissainayagam was convicted under such broad provisions (inciting communal disharmony). Given this historical context and experience of abuse, misuse and misapplication of the PTA, the current framework proposed by a government committed to progressive legislation is extremely troubling, especially drafted as a framework for counter-terrorism legislation during times of peace. As noted above, the PTA is highly problematic and has been criticized as a draconian law that has no place in post-war Sri Lanka. The government has in a number of international fora pledged to review and repeal the Prevention of Terrorism Act, and replace it with anti-terrorism legislation in accordance with contemporary international best practices.

However, the draft "Policy and legal framework of the proposed Counter Terrorism Act of Sri Lanka" prepared by the government as a replacement to the PTA is arguably more problematic from a rule of law and human rights

---

<sup>27</sup> [http://documents.gov.lk/files/act/2015/3/04-2015\\_E.pdf](http://documents.gov.lk/files/act/2015/3/04-2015_E.pdf).

perspective than the original PTA and inconsistent with international best practices, most notably in the even more expansive breadth of offences falling under its purview, the inclusion of a mandatory 72-hour period of detention prior to a detainee being produced before a magistrate, the denial of prompt access to legal counsel and the admissibility into evidence of “confessions” made to a Police Officer and other information that may have been unlawfully obtained. The government has since pulled this draft framework back and claimed that it is an “evolving document”. Nevertheless, the process highlights a flawed, opaque, non-inclusive legal drafting process that continues to defer heavily to the security and defense establishment and an approach overwhelmingly deferential to purported State security objectives favored by the drafters.

### Criminal Procedure Code

The Minister of Justice recently proposed amendments to the Criminal Procedure Code that would restrict a detainee’s access to a lawyer at the time of arrest. The Justice Minister’s proposal came under criticism from the Bar Association as well as the Human Rights Commission for increasing the risk of suspects being subject to torture and other ill treatment. In the face of this criticism, the government has pulled the amendment back for now. At the time of writing, as previously mentioned, a newly proposed amendment to the Criminal Procedure Code seeks to further deny detainees prompt access to counsel by introducing vague clauses.<sup>28</sup> However, the episode further highlights the dangers of the non-transparent legal drafting process in Sri Lanka and calls further into question the government’s genuine commitment to restoring the rule of law.

### **Identifying strategies to address the challenges<sup>29</sup>**

The workshop concluded with identifying and prioritizing key solutions or reform initiatives that could address the aforementioned challenges. Recognizing the challenge of implementing comprehensive systemic reform, the workshop focused on certain practical, effective and achievable measures that could be advocated for in the short to medium-term. Such measures would strengthen or reform critical institutions of the criminal justice system, and to could garner sufficient buy-in from national stakeholders in order to be realistically achievable.

#### *Reforming the Attorney General’s Office<sup>30</sup>*

1. Clearly demarcate the role of the Attorney General in reviewing draft legislation to advise on constitutionality so as to ensure the functional independence and impartiality of the office.

---

<sup>28</sup> Clauses 6A (2) and 6A (6) of the proposed Amendment to the Code of Criminal Procedure (Special Provisions) Act, No. 2 of 2013, available at [http://www.documents.gov.lk/files/bill/2017/3/165-2017\\_E.pdf](http://www.documents.gov.lk/files/bill/2017/3/165-2017_E.pdf).

<sup>29</sup> These strategies are based on views expressed by participants of the workshop and do not necessarily reflect the views of the ICJ.

<sup>30</sup> For more information on international principles on the independence and accountability of judges, lawyers and prosecutors, see ICJ Practitioners’ Guide No. 1, available at <https://www.icj.org/new-icj-publication-international-principles-on-the-independence-and-accountability-of-judges-lawyers-and-prosecutors-a-practitioners-guide/>.

2. Address the potential conflict of interest in the AGO's multiple roles as prosecutor and legal adviser by establishing clear constitutional or statutory demarcations.
  - a. A number of options were put forward drawing on comparative experiences from other countries.<sup>31</sup>
  - b. Two proposals were posited: (1) Establishment of two completely independent departments, i.e., a legal officer's department that advises the government and a separate independent office of the prosecutor similar to the Director of Public Prosecutions that existed from 1972 to 1978; (2) Establishment of two separate offices within one umbrella agency, i.e., an AG and a Solicitor General, with separate functions to serve as legal adviser on one hand, and prosecutor's office on the other hand.
3. Divest the AGO of its quasi-judicial functions, such as holding unilateral authority to consent to bail in PTA cases.
4. Increase competence and capacity of the AGO through continuing legal education and training, especially in respect of crimes under international law and gross human rights violations.
5. Increase transparency, oversight and accountability of the AGO, including through mandatory periodic public reporting requirements.

#### *Increasing the Independence & Impartiality of the Judiciary*

1. Invest in continuing legal education and training judges in order to strengthen competency and capacity of career judges so as to avoid judges being drawn primarily from the AG's department.
2. Provide better language resources to all courts in order to provide quality translations.
3. Provide adequate support and resources for legal research.
4. Establish specialized courts for specialized areas so that judges sitting on those benches are specialized on those areas of law.
5. The Judicial Services Commission must ensure the independence and capacity of members it appoints to the judiciary.
6. Human rights defenders and practitioners must strategically intervene through public interest litigation, and judicial review to assist in ensuring justice and strengthening the role of the judiciary.

#### *Functional Independence of the Police*

1. Ensure effective law enforcement and investigation that are less biased or susceptible to political interference or undue influence in cases involving State security forces, through greater devolution of police powers.

#### *Making Crimes under International Law Specific Offences in Sri Lankan Law*

1. Enact laws that make war crimes, crimes against humanity, enforced disappearances and unlawful killing by State authorities specific offenses and establishes responsibility for officials higher in the chain of command.

---

<sup>31</sup> In the UK, for instance, where the AG is directly answerable to Parliament, the AG does not provide case-specific instructions to the main prosecuting body, the Crown Prosecution Service. In New Zealand, the advisory and litigation roles are split between the Attorney General's office and the Solicitor General's office.

2. Introduce retrospective application for the crime of enforced disappearance to reflect the continuous nature of the time.
3. Increase capacity of prosecutors in order to enable prosecutions through modes of liability and other elements of crimes under international law.
4. Create awareness among State and the public on the need for domestication of crimes under international law.
5. Though there was no opportunity during the limited timeframe of the workshop for specific discussion of the Rome Statute of the International Criminal Court (Rome Statute), the ICJ considers it crucial that Sri Lanka ratify the Rome Statute and that the international crimes of genocide, war crimes, crimes against humanity and aggression be incorporated into the Sri Lankan domestic criminal law in line with the Rome Statute.<sup>32</sup>

### *Strengthening Independent Commissions*<sup>33</sup>

1. Strengthen and resource (human and financial resources) independent institutions such as a Judicial Service Commission, the National Police Commission and the Human Rights Commission to be more effective and responsive to urgent human rights concerns, including violations.
2. Utilize all powers legislatively afforded to independent institutions such as the National Police Commission in a robust fashion in order to achieve their mandate.
3. Independent institutions must play a proactive role in advocacy by taking up public positions on serious institutional matters of legal reform with a view to enhancing the rule of law and the fair administration of justice, including in protection of human rights.
4. Require periodic public reporting by independent institutions to increase oversight, transparency and accountability, with a view to enhancing the rule of law and the fair administration of justice, including in protection of human rights.
5. Though there was no opportunity during the limited timeframe of the workshop for specific discussion on the Human Rights Commission of Sri Lanka (HRCSL), the ICJ considers it crucial that the HRCSL be provided with all necessary resources to ensure its ability to function effectively, independently and impartially, in line with the UN Principles relating to the status of National Institutions (The Paris Principles).<sup>34</sup>

### *Bar Association*

1. Support the Bar Association in taking a stronger advocacy role by taking up public positions on serious matters of legal reform.

---

<sup>32</sup> See Rome Statute of the International Criminal Court (Rome Statute), UN Doc. A/CONF.183/9, adopted 17 July 1998, available at [https://www.icc-cpi.int/nr/rdonlyres/ea9aef7-5752-4f84-be94-0a655eb30e16/0/rome\\_statute\\_english.pdf](https://www.icc-cpi.int/nr/rdonlyres/ea9aef7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf).

<sup>33</sup> The 19<sup>th</sup> amendment to the Constitution re-established the Constitutional Council which makes recommendations on appointees to a number of key independent commissions, namely, the National Police Commission, the National Human Rights Commission, the Election Commission, Public Service Commission, the Commission to Investigate allegations of Bribery or Corruption, the Finance Commission, the Delimitation Commission, the National Procurement Commission and the Audit Service Commission.

<sup>34</sup> See UN Principles relating to the status of National Institutions (The Paris Principles), adopted by General Assembly Resolution 48/134 on 20 December 1993, available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/StatusOfNationalInstitutions.aspx>.

*Public Awareness-Raising*

1. Place greater emphasis on public communication of reform initiatives to ensure a transparent and consultative process is required.

**Conclusion**

The purpose of this workshop and the subsequent judges' colloquium, the observations and recommendations of which are memorialized in this discussion paper and a similar paper to follow the judges' colloquium, is to serve as an assessment of current challenges faced in promoting greater accountability for human rights violations and abuses in Sri Lanka. The ICJ intends to build on the discussions in these workshops to strategically support Sri Lankan human rights advocates, lawyers and the judiciary to address and overcome these barriers. The observations and recommendations from both events can serve to further inform the ICJ's own positions and its ongoing advocacy and capacity-building initiatives focusing on longer-term criminal justice system reform, as well as in its domestic and international advocacy efforts towards promoting the rule of law, the fair administration of justice, and greater justice and accountability for conflict and post-conflict human rights violations and abuses.

## Annex 1

### AGENDA

**4<sup>th</sup> November 2016**

- 9.30am – 10am**      **Arrival, Registration, Tea & Coffee**
- 10am – 10.30am**      **Introduction Session**
- Welcome and introduction
  - Intro to project & purpose of workshop: Challenges faced by the human rights community in Sri Lanka when actively promoting greater accountability for human rights violations
  - Introductions of Participants
- 10.30am – 11.30am**      **Session 1: The Criminal Justice System: General Challenges and Experiences**
- General discussion about challenges and sharing experiences
- 11.30am – 11.45am**      **Tea Break**
- 11.45am – 1pm**      **Session 2: Challenges in Addressing International Crimes through Domestic Framework**
- Incorporating international law into domestic law
  - Considerations: criminalization of int'l crimes, e.g., enforced disappearances; command responsibility; retroactive application; application within criminal justice system versus proposed mechanisms
- 1pm – 2pm**      **Lunch**
- 2pm – 3pm**      **Session 3: Structural Obstacles & Specific Challenges**
- Specific obstacles as seen in emblematic cases: e.g., role of AG, threats, intimidation, influence and politicization of investigations, challenges specific to SGBV cases
  - Capacity / Independence & Impartiality of Criminal Justice System: investigators, judges, defence lawyers, prosecutors
- 3pm – 3.15pm**      **Tea Break**
- 3.15pm – 4.15pm**      **Structural Obstacles & Specific Challenges (cont.)**
- Specific obstacles as seen in emblematic cases: e.g., role of AG, threats, intimidation, influence and politicization of investigations, challenges specific to SGBV cases
  - Capacity / Independence & Impartiality of Criminal Justice System: investigators, judges, defence lawyers, prosecutors

**AGENDA**  
**5<sup>th</sup> November 2016**

- 9.30am – 10am**      **Recap Day 1**
- 10am – 11am**      **Session 1: Proposed Legal Reform**
- Recent changes in law that will impact future cases
  - Counter Terrorism Act, proposed amendments to the Criminal Procedure Code, Emergency Regulations no more- potential re-introduction, impact?
  - Structural issues, gaps in witness protection
- 11am – 11.15am**      **Tea Break**
- 11.15 – 1pm**      **Session 2: Identifying Possible Solutions**
- Independent bodies
  - Other channels of redress for HR violations
- 1pm – 2pm**      **Lunch**
- 2pm – 3pm**      **Session 3: Roadmap for Interventions**
- Judicial independence & impartiality
  - Engagement with govt. by lawyers, civil society,
  - Engagement with international organisations
  - Engagement by international community with GOSL
  - Comparative Perspectives
- 3pm – 3.15pm**      **Evening Refreshments**
- 3.15pm – 4pm**      **Session 4: Roadmap for Interventions (cont.)**
- Judicial independence & impartiality
  - Engagement with govt. by lawyers, civil society,
  - Engagement with international organisations
  - Engagement by international community with GOSL
  - Comparative Perspectives
- 4pm – 4.15pm**      **Concluding Remarks & Vote of Thanks**



# General Assembly

Distr.: General  
14 October 2015

Original: English

## Human Rights Council

Thirtieth session

Agenda item 2

### Resolution adopted by the Human Rights Council on 1 October 2015

#### 30/1. Promoting reconciliation, accountability and human rights in Sri Lanka

*The Human Rights Council,*

*Reaffirming* the purposes and principles of the Charter of the United Nations,

*Guided* by the Universal Declaration of Human Rights, the International Covenants on Human Rights and other relevant instruments,

*Recalling* Human Rights Council resolutions 19/2 of 22 March 2012, 22/1 of 21 March 2013 and 25/1 of 27 March 2014 on promoting reconciliation and accountability in Sri Lanka,

*Reaffirming* its commitment to the sovereignty, independence, unity and territorial integrity of Sri Lanka,

*Reaffirming also* that it is the responsibility of each State to ensure the full enjoyment of all human rights and fundamental freedoms of its entire population,

*Welcoming* the historic free and fair democratic elections in January and August 2015 and the peaceful political transition in Sri Lanka,

*Noting with interest* the passage and operationalization of the nineteenth amendment to the Constitution of Sri Lanka and its contribution to the promotion of democratic governance and independent oversight of key institutions, including the provision on the promotion of national reconciliation and integration as among the constitutional duties of the President of Sri Lanka,

*Welcoming* the steps taken by the Government of Sri Lanka since January 2015 to advance respect for human rights and to strengthen good governance and democratic institutions,

*Welcoming also* the efforts of the Government of Sri Lanka to investigate allegations of bribery, corruption, fraud and abuse of power, and stressing the importance of such investigations and the prosecution of those responsible in ending impunity and promoting good governance,

GE.15-17355(E)



Please recycle





*Welcoming further* the steps taken to strengthen civilian administration in the former conflict-affected provinces of the North and the East, acknowledging the progress made by the Government of Sri Lanka in rebuilding infrastructure, demining and resettling internally displaced persons, and calling upon the international community, including the United Nations, to assist the Government of Sri Lanka in furthering these efforts, especially in expediting the process of delivering durable solutions for all internally displaced persons,

*Recognizing* the improved environment for members of civil society and human rights defenders in Sri Lanka while expressing concern at reports of ongoing violations and abuses of human rights, and recognizing the expressed commitment of the Government of Sri Lanka to address issues, including those involving sexual and gender-based violence and torture, abductions, as well as intimidation of and threats against human rights defenders and members of civil society,

*Reaffirming* that all Sri Lankans are entitled to the full enjoyment of their human rights regardless of religion, belief or ethnicity, in a peaceful and unified land,

*Reaffirming also* that States must ensure that any measure taken to combat terrorism complies with their obligations under international law, in particular international human rights law, international refugee law and international humanitarian law, as applicable,

*Welcoming* the Declaration of Peace of the Government of 4 February 2015 and its acknowledgement of the loss of life and victims of violence of all ethnicities and religions,

*Emphasizing* the importance of a comprehensive approach to dealing with the past, incorporating the full range of judicial and non-judicial measures, including, inter alia, individual prosecutions, reparations, truth-seeking, institutional reform, the vetting of public employees and officials, or an appropriately conceived combination thereof, in order to, inter alia, ensure accountability, serve justice, provide victims with remedies, promote healing and reconciliation, establish independent oversight of the security system, restore confidence in the institutions of the State and promote the rule of law in accordance with international human rights law with a view to preventing the recurrence of violations and abuses, and welcoming in this regard the expressed commitment of the Government to ensure dialogue and wide consultations with all stakeholders,

*Recognizing* that mechanisms to redress past abuses and violations work best when they are independent, impartial and transparent; are led by individuals known for displaying the highest degree of professionalism, integrity and impartiality; utilize consultative and participatory methods that include the views of all relevant stakeholders, including, but not limited to, victims, women, youth, representatives of various religions, ethnicities and geographic locations, as well as marginalized groups; and are designed and implemented on the basis of expert advice from those with relevant international and domestic experience,

*Recognizing also* that a credible accountability process for those most responsible for violations and abuses will safeguard the reputation of those, including within the military, who conducted themselves in an appropriate manner with honour and professionalism,

*Recalling* the responsibility of States to comply with their relevant obligations to prosecute those responsible for gross violations of human rights and serious violations of international humanitarian law constituting crimes under international law, with a view to ending impunity,

*Taking note* of the review of the high-security zones undertaken by the Government, and welcoming the initial steps taken to return land to its rightful civilian owners and to help local populations to resume livelihoods and to restore normality to civilian life,

*Welcoming* the commitments of the Government of Sri Lanka to the devolution of political authority,

*Requesting* the Government of Sri Lanka to implement effectively the constructive recommendations made in the report of the Lessons Learnt and Reconciliation Commission,

*Welcoming* the visit from 30 March to 3 April 2015 by and the observations of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, and the planned visit of the Working Group on Enforced or Involuntary Disappearances in November 2015,

*Recognizing* that the investigation into alleged serious violations and abuses of human rights and related crimes in Sri Lanka requested by the Human Rights Council in its resolution 25/1 was necessitated by the absence of a credible national process of accountability,

1. *Takes note with appreciation* of the oral update presented by the United Nations High Commissioner to the Human Rights Council at its twenty-seventh session, the report of the Office of the High Commissioner on promoting reconciliation and accountability in Sri Lanka<sup>1</sup> and its investigation on Sri Lanka requested by the Human Rights Council in its resolution 25/1,<sup>2</sup> including its findings and conclusions, and encourages the Government of Sri Lanka to implement the recommendations contained therein when implementing measures for truth-seeking, justice, reparations and guarantees of non-recurrence;

2. *Welcomes* the positive engagement between the Government of Sri Lanka and the High Commissioner and the Office of the High Commissioner since January 2015, and encourages the continuation of that engagement in the promotion and protection of human rights and in exploring appropriate forms of international support for and participation in Sri Lankan processes for seeking truth and justice;

3. *Supports* the commitment of the Government of Sri Lanka to strengthen and safeguard the credibility of the processes of truth-seeking, justice, reparations and guarantees of non-recurrence by engaging in broad national consultations with the inclusion of victims and civil society, including non-governmental organizations, from all affected communities, which will inform the design and implementation of these processes, drawing on international expertise, assistance and best practices;

4. *Welcomes* the commitment of the Government of Sri Lanka to undertake a comprehensive approach to dealing with the past, incorporating the full range of judicial and non-judicial measures; also welcomes in this regard the proposal by the Government to establish a commission for truth, justice, reconciliation and non-recurrence, an office of missing persons and an office for reparations; further welcomes the willingness of the Government to give each mechanism the freedom to obtain financial, material and technical assistance from international partners, including the Office of the High Commissioner; and affirms that these commitments, if implemented fully and credibly, will help to advance accountability for serious crimes by all sides and to achieve reconciliation;

5. *Recognizes* the need for a process of accountability and reconciliation for the violations and abuses committed by the Liberation Tigers of Tamil Eelam, as highlighted in the report of the Office of the High Commissioner on its investigation on Sri Lanka;

---

<sup>1</sup> A/HRC/30/61.

<sup>2</sup> See A/HRC/30/CRP.2.

6. *Welcomes* the recognition by the Government of Sri Lanka that accountability is essential to uphold the rule of law and to build confidence in the people of all communities of Sri Lanka in the justice system, notes with appreciation the proposal of the Government of Sri Lanka to establish a judicial mechanism with a special counsel to investigate allegations of violations and abuses of human rights and violations of international humanitarian law, as applicable; affirms that a credible justice process should include independent judicial and prosecutorial institutions led by individuals known for their integrity and impartiality; and also affirms in this regard the importance of participation in a Sri Lankan judicial mechanism, including the special counsel's office, of Commonwealth and other foreign judges, defence lawyers and authorized prosecutors and investigators;

7. *Encourages* the Government of Sri Lanka to reform its domestic law to ensure that it can implement effectively its own commitments, the recommendations made in the report of the Lessons Learnt and Reconciliation Commission, as well as the recommendations of the report of the Office of the High Commissioner,<sup>1</sup> including by allowing for, in a manner consistent with its international obligations, the trial and punishment of those most responsible for the full range of crimes under the general principles of law recognized by the community of nations relevant to violations and abuses of human rights and violations of international humanitarian law, including during the period covered by the Lessons Learnt and Reconciliation Commission;

8. *Also encourages* the Government of Sri Lanka to introduce effective security sector reforms as part of its transitional justice process, which will help to enhance the reputation and professionalism of the military and include ensuring that no scope exists for retention in or recruitment into the security forces of anyone credibly implicated through a fair administrative process in serious crimes involving human rights violations or abuses or violations of international humanitarian law, including members of the security and intelligence units; and also to increase training and incentives focused on the promotion and protection of human rights of all Sri Lankans;

9. *Welcomes* the recent passage by the Government of Sri Lanka of an updated witness and victim protection law and its commitment to review the law, and encourages the Government to strengthen these essential protections by making specific accommodations to protect effectively witnesses and victims, investigators, prosecutors and judges;

10. *Also welcomes* the initial steps taken to return land, and encourages the Government of Sri Lanka to accelerate the return of land to its rightful civilian owners, and to undertake further efforts to tackle the considerable work that lies ahead in the areas of land use and ownership, in particular the ending of military involvement in civilian activities, the resumption of livelihoods and the restoration of normality to civilian life, and stresses the importance of the full participation of local populations, including representatives of civil society and minorities, in these efforts;

11. *Encourages* the Government of Sri Lanka to investigate all alleged attacks by individuals and groups on journalists, human rights defenders, members of religious minority groups and other members of civil society, as well as places of worship, and to hold perpetrators of such attacks to account and to take steps to prevent such attacks in the future;

12. *Welcomes* the commitment of the Government of Sri Lanka to review the Public Security Ordinance Act and to review and repeal the Prevention of Terrorism Act, and to replace it with anti-terrorism legislation in accordance with contemporary international best practices;

13. *Also welcomes* the commitment of the Government of Sri Lanka to sign and ratify the International Convention for the Protection of All Persons from Enforced Disappearance without delay, to criminalize enforced disappearances and to begin to issue certificates of absence to the families of missing persons as a temporary measure of relief;

14. *Further welcomes* the commitment of the Government of Sri Lanka to release publicly previous presidential commission reports;

15. *Encourages* the Government of Sri Lanka to develop a comprehensive plan and mechanism for preserving all existing records and documentation relating to human rights violations and abuses and violations of international humanitarian law, whether held by public or private institutions;

16. *Welcomes* the commitment of the Government of Sri Lanka to a political settlement by taking the necessary constitutional measures, encourages the Government's efforts to fulfil its commitments on the devolution of political authority, which is integral to reconciliation and the full enjoyment of human rights by all members of its population; and also encourages the Government to ensure that all Provincial Councils are able to operate effectively, in accordance with the thirteenth amendment to the Constitution of Sri Lanka;

17. *Also welcomes* the commitment of the Government of Sri Lanka to issue instructions clearly to all branches of the security forces that violations of international human rights law and international humanitarian law, including those involving torture, rape and sexual violence, are prohibited and that those responsible will be investigated and punished, and encourages the Government to address all reports of sexual and gender-based violence and torture;

18. *Requests* the Office of the High Commissioner to continue to assess progress on the implementation of its recommendations and other relevant processes related to reconciliation, accountability and human rights, and to present an oral update to the Human Rights Council at its thirty-second session, and a comprehensive report followed by discussion on the implementation of the present resolution at its thirty-fourth session;

19. *Encourages* the Government of Sri Lanka to continue to cooperate with special procedure mandate holders, including by responding formally to outstanding requests;

20. *Encourages* the Office of the High Commissioner and relevant special procedure mandate holders to provide, in consultation with and with the concurrence of the Government of Sri Lanka, advice and technical assistance on implementing the above-mentioned steps.

*40th meeting  
1 October 2015*

[Adopted without a vote.]

## Commission Members

March 2017 (for an updated list, please visit [www.icj.org/commission](http://www.icj.org/commission))

### Acting President:

Prof. Robert Goldman, United States

### Vice-President:

Justice Michèle Rivet, Canada

### Executive Committee:

Prof. Carlos Ayala, Venezuela

Justice Azhar Cachalia, South Africa

Prof. Andrew Clapham, UK

Ms Imrana Jalal, Fiji

Ms Hina Jilani, Pakistan

Justice Radmila Dragicevic-Dicic, Serbia

Mr Belisário dos Santos Júnior, Brazil

### Other Commission Members:

Professor Kyong-Wahn Ahn, Republic of Korea

Justice Adolfo Azcuna, Philippines

Mr Muhannad Al-Hasani, Syria

Mr Abdelaziz Benzakour, Morocco

Justice Ian Binnie, Canada

Sir Nicolas Bratza, UK

Mr Reed Brody, United States

Prof. Miguel Carbonell, Mexico

Justice Moses Chinhengo, Zimbabwe

Ms Roberta Clarke, Barbados-Canada

Justice Elisabeth Evatt, Australia

Mr Roberto Garretón, Chile

Prof. Jenny E. Goldschmidt, Netherlands

Prof. Michelo Hansungule, Zambia

Ms Gulnora Ishankanova, Uzbekistan

Mr. Shawan Jabarin, Palestine

Justice Kalthoum Kennou, Tunisia

Prof. David Kretzmer, Israel

Prof. César Landa, Peru

Justice Ketil Lund, Norway

Justice Qinisile Mabuza, Swaziland

Justice José Antonio Martín Pallín, Spain

Prof. Juan Méndez, Argentina

Justice Charles Mkandawire, Malawi

Mr Kathurima M'Inoti, Kenya

Justice Yvonne Mokgoro, South Africa

Justice Sanji Monageng, Botswana

Justice Tamara Morschakova, Russia

Justice Egbert Myjer, Netherlands

Justice John Lawrence O'Meally, Australia

Justice Fatsah Ouguergouz, Algeria

Dr Jarna Petman, Finland

Prof. Mónica Pinto, Argentina

Prof. Víctor Rodríguez Rescia, Costa Rica

Mr Alejandro Salinas Rivera, Chile

Prof. Marco Sassoli, Italy-Switzerland

Justice Ajit Prakash Shah, India

Justice Kalyan Shrestha, Nepal

Mr Raji Sourani, Palestine

Justice Philippe Texier, France

Justice Stefan Trechsel, Switzerland

Prof. Rodrigo Uprimny Yepes, Colombia



**International  
Commission  
of Jurists**

P.O. Box 91  
Rue des Bains 33  
CH 1211 Geneva 8  
Switzerland

**t** +41 22 979 38 00

**f** +41 22 979 38 01

[www.icj.org](http://www.icj.org)