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Promotion reconciliation, accountability and human rights in Sri Lanka

Report of the Office of the High Commissioner for Human Rights

Summary

The present report is submitted pursuant to Human Rights Council Resolution 40/1 which requested the Office of the United Nations High Commissioner for Human Rights (OHCHR) to continue to assess progress in the implementation of its recommendations and other relevant processes relating to reconciliation, accountability and human rights in Sri Lanka

While fully acknowledging the challenges posed by the COVID-19 pandemic, the High Commissioner is deeply concerned by the trends emerging over the past year, which may represent early warning signs of a deteriorating human rights situation. The report highlights that developments over the past year have fundamentally changed the environment for advancing reconciliation, accountability and human rights in Sri Lanka, eroded democratic checks and balances and civic space, and reprised a dangerous exclusionary and majoritarian discourse. These trends threaten to reverse the limited but important gains made in recent years and risk the recurrence of the policies and practices that gave rise to the grave violations of the past. The social and economic impact of COVID 19 has been deep. The High Commissioner believes that these early warning signals be give urgent attention by the Human Rights Council and that it should sustain its close monitoring of and engagement on developments in Sri Lanka. She also urges Member States to pursue alternative international options for ensuring justice and reparations and support a dedicated capacity to advance these efforts.

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I. Introduction

1. This report is presented pursuant to Human Rights Council resolution 40/1 on promoting reconciliation, accountability and human rights in Sri Lanka, adopted by consensus with the co-sponsorship at that time of Sri Lanka. Resolution 40/1 requested the Office of the United Nations High Commissioner for Human Rights (OHCHR) to "continue to assess progress in the implementation of its recommendations and other relevant processes relating to reconciliation, accountability and human rights in Sri Lanka", and to present a comprehensive report at its forty-sixth session.[1]

2. In February 2020, the Government of Sri Lanka informed the Human Rights Council of its decision to withdraw co-sponsorship of resolution 40/1 and related resolutions 34/1 and 30/1, expressing its intention to pursue an "*inclusive, domestically designed and executed reconciliation and accountability process*".[2] While fully acknowledging the challenges posed by the COVID-19 pandemic, the High Commissioner is deeply concerned by the trends emerging over the past year, which have fundamentally changed the environment for advancing reconciliation, accountability and human rights in Sri Lanka, eroded democratic checks and balances and civic space, and reprised a dangerous exclusionary and majoritarian discourse. These trends threaten to reverse the limited but important gains made in recent years and risk the recurrence of the policies and practices that gave rise to the grave violations of the past.

3. In preparation for the report, OHCHR sent a detailed list of questions to the Government of Sri Lanka on 23 November 2020 and received written inputs on 28 December 2020.[3] OHCHR also held a constructive and substantive meeting with Government representatives in virtual format on 7 January 2021. The Government provided comments on the report.

4. During the reporting period, OHCHR continued to provide technical assistance to the Human Rights Commission of Sri Lanka (HRCSL) and the Office on Missing Persons (OMP), and worked closely with the Resident Coordinator and United Nations country team in developing programmatic activities under the United Nations Peacebuilding Fund and the Joint Programme for Peace. The High Commissioner regrets that the Government did not issue a visa for deployment of an additional international human rights officer as endorsed by the General Assembly pursuant to resolution 40/1.

5. Since Sri Lanka issued a standing invitation to all Special Procedures in December 2015, 10 special procedures[4] undertook official country visits between 2015 and 2019. The Special Rapporteur on truth, justice, reparations and guarantees of non-recurrence undertook four additional academic visits during the period. No Special Procedure mandates have visited the country since August 2019, but the Government is seeking to reschedule visits by the Special Rapporteur on the right to education and Special Rapporteur on contemporary forms of slavery, including its causes and consequences in 2021.[5] Since January 2020, Special Procedures have issued eight communications on Sri Lanka. The Government has responded to two.[6]

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[1] This report should be read in conjunction with the reports and updates of OHCHR on Sri Lanka of 26 February 2020 (A/HRC/43/19), 8 February 2019 (A/HRC/40/23), 25 January 2018 (A/HRC/37/23), 10 February 2017 (A/HRC/34/19), 29 June 2016 (A/HRC/32/CRP.4), the comprehensive report of OHCHR on Sri Lanka of 28 September 2015 (A/HRC/30/61), and the detailed findings of the OHCHR investigation of 2015, referred to unofficially as the "OISL report" (A/HRC/30/CRP.2).

[2] Human Rights Council, forty-third session, High Level Segment statement by Hon. Dinesh Gunawardena, Minister of Foreign Relations of Sri Lanka, 26 February 2020, https://www.lankamission.org/images/PDF_-_2020/26-02-2020%20-%20Media%20Release%20-%20Statement%20full%20version.pdf.

[3] Note Verbale to OHCHR from the Permanent Mission of Sri Lanka in Geneva, 28 December 2020.

[4] See A/HRC/33/51/Add.2; A/HRC/34/54/Add.2; A/HRC/35/31/Add.1; A/HRC/34/53/Add.3; A/HRC/40/52/Add.3; A/HRC/45/45/Add.1; A/HRC/39/45/Add.2; A/HRC/40/57/Add.2; A/HRC/44/50/Add.1 A/HRC/43/48/Add.2.

[5] Note Verbale to OHCHR from the Permanent Mission of Sri Lanka in Geneva, 28 December 2020.

[6] LKA 5/2020; LKA 9/2020.

II. Context and significance of resolution 30/1

6. At this key juncture for the Human Rights Council's engagement with Sri Lanka, it is important to recall the history and context that gave rise to resolution 30/1 and why the commitments made by Sri Lanka to the Human Rights Council and to all Sri Lankans remain critical.

7. Sri Lanka's armed conflict emerged against the backdrop of deepening discrimination and marginalisation of the country's minorities, particularly the Tamils. The 30-year war between the Government and the Liberation Tigers of Tamil Eelam (LTTE), as well as earlier insurgencies in the south, were marked by persistent and grave human rights violations and abuses by both parties, including extrajudicial killing, widespread enforced disappearances, arbitrary detention, torture and sexual violence that affected Sri Lankans from all communities. Thousands of children were systematically recruited and used as fighters and in other roles by LTTE and other armed groups, Muslim and Sinhala communities were forcibly expelled from the North, and civilians were indiscriminately killed in terrorist attacks on public places and transport by the LTTE. Successive High Commissioners have consistently condemned these acts.

8. Despite these serious violations, impunity prevailed. Cases that reached the courts were the subject of interminable delays, interference, harassment of victims and witnesses and only exceptionally achieved convictions. Numerous commissions of inquiry appointed by successive governments failed to credibly establish truth and ensure accountability. This has led to a glaring confidence gap.[7]

9. During the final stage of the conflict with the LTTE in 2009, there were credible allegations of indiscriminate shelling by Government forces, including in the densely populated 'No Fire Zones', and of attacks on protected objects, resulting in massive civilian deaths and casualties.[8] The LTTE prevented civilians from leaving the conflict area. Strict controls over humanitarian supplies by the Government caused additional deaths and suffering. LTTE cadres and their dependents are believed to have been extra-judicially executed after handing themselves over to Sri Lankan armed forces.[9] More than 250,000 people were detained for months in military-run closed camps for internally displaced persons.[10]

10. As the fighting ended, on 23 May 2009 the United Nations Secretary-General and then President Mahinda Rajapaksa issued a joint statement in which the Secretary-General "underlined the importance of an accountability process to address allegations of violations of international humanitarian and human rights law" and the Government committed "to take measures to address these grievances."[11] On 26 May 2009, the Human Rights Council convened a special session on the situation in Sri Lanka and adopted resolution 11/1, endorsing the joint statement and the understandings contained therein.[12]

11. In June 2010, the Secretary-General appointed a Panel of Experts to advise him on accountability issues in Sri Lanka. In 2011, the Panel concluded that there were credible allegations that, in the months leading up to May 2009, a wide range of serious violations of international humanitarian law (IHL) and international human rights law had been committed both by the Government of Sri Lanka and LTTE, some of which could amount to war crimes

[7] OISL report, A/HRC/30/CRP.2, paras 468-524. See also A/HRC/45/45/Add.1, para. 36.

[8] Report of the UN Secretary General's Panel of Experts on Accountability in Sri Lanka, 31 March 2011. Available at: http://www.un.org/News/dh/infocus/Sri_Lanka/POE_Report_Full.pdf. See also OISL report.

[9] Report of the Panel of Experts, paras 149-170.

[10] OISL report, para 1268.

[11] Joint Statement by United Nations Secretary-General, Government of Sri Lanka; https://www.un.org/press/en/2009/sg2151.doc.htm.

[12] A/HRC/RES/S-11/1.

and crimes against humanity, and recommended an international investigation.[13] The Government rejected the Panel of Experts report.[14]

12. Meanwhile, in May 2010, the Government had appointed another domestic inquiry – the Lessons Learnt and Reconciliation Commission (LLRC) – to examine the period between the failure of the ceasefire in February 2002 and the end of the armed conflict.[15] Following the publication by LLRC of its final report, the Human Rights Council adopted resolution 19/2 in April 2012, noting "that the report does not adequately address serious allegations of violations of international law," but calling on the Government to implement "constructive recommendations" made by LLRC.[16] In August 2013, the then President of Sri Lanka appointed a further Commission to investigate complaints regarding missing persons (the "Paranagama Commission"),[17] which also failed to credibly establish the truth, ensure accountability and provide redress to victims. The Government meanwhile pursued a strategy of resettlement, rehabilitation, reintegration, reconstruction and reconciliation, focussed on infrastructure and development and including the rehabilitation of former LTTE cadres and child soldiers.

13. Throughout this period, OHCHR consistently reported to the Human Rights Council that progress on accountability and reconciliation remained extremely limited, and that disturbing patterns of extrajudicial killings, abductions, enforced disappearances and torture by the security forces and paramilitary groups continued.[18]

14. Given the failure of domestic mechanisms to conduct credible investigations, in March 2014, the Human Rights Council requested OHCHR in resolution 25/1 to undertake a comprehensive investigation. The report of the OHCHR investigation on Sri Lanka (OISL), released in September 2015, found credible evidence that both Sri Lankan security forces and LTTE were responsible for war crimes and crimes against humanity.[19] It documented the "total failure of domestic mechanisms", including past presidential commissions of inquiry, to ensure accountability and examined the deeply-entrenched barriers to justice in the domestic criminal justice system, particularly for international crimes.[20]

15. It was at this juncture that a national unity Government, formed in January 2015, made important commitments to confront the past, strengthen democratic and independent institutions, and end impunity. These were embodied in its co-sponsoring of Human Rights Council resolution 30/1, which provided a comprehensive roadmap of measures to ensure justice, provide redress to victims, achieve reconciliation and undertake important legal and institutional reforms to prevent the recurrence of violations.[21] The measures were further fleshed out through a civil society-led national consultation process that engaged Sri Lankans from all communities across the island and stakeholders such as religious leaders and the military.[22]

16. In its reports on the implementation of resolution 30/1 to the Human Rights Council, OHCHR highlighted that while the former Government made some progress on human rights issues, developments related to transitional justice were inconsistent and subject to

[13] The Secretary-General transmitted the report to the President of the Human Rights Council on 12 September 2011.

[14] Note Verbale from Permanent Mission of Sri Lanka to the President of the Human Rights Council, 14 September 2011.

[15] http://www.priu.gov.lk/news_update/Current_Affairs/ca201112/FINAL%20LLRC%20REPORT.pdf. paras 515-527.

[16] Human Rights Council resolution 19/2. In 2011, the Panel of Experts concluded that LLRC "was deeply flawed, does not meet international standards for effective accountability mechanism and therefore, does not satisfy the joint commitment of the President of Sri Lanka and the Secretary-General to an accountability process."

[17] https://parliament.lk/uploads/documents/paperspresented/report-of-paranagama.pdf.

[18] A/HRC/22/38.

[19] A/HRC/30/CRP.2.

[20] OISL report, para. 1261.

[21] A/RES/S-30/1.

[22] Final Report of the Consultation Task Force on Reconciliation Mechanisms, http://war-victims-map.org/wp-content/uploads/2017/02/CTF-Final-Report-Volume-I-Nov-16.pdf.

considerable delays.[23] Nevertheless, Sri Lanka seemed to be on a new path towards advancing reconciliation, accountability and human rights. The developments since November 2019, however, have reversed that direction and, instead, threaten a return to patterns of discrimination and widespread violations of human rights experienced in past decades.

III. Emerging threats to reconciliation, accountability and human rights

17. From 2015, Sri Lanka took some important steps in strengthening democratic institutions and opening up democratic space, including for civil society and the media. Of fundamental significance was the adoption of the 19th Constitutional Amendment in April 2015, which strengthened the independence of key institutions and checks and balances on executive power. These gains were tested by the political events of 2018, and especially after the Easter Sunday terrorist attacks of April 2019, which killed 277 people and injured another 592.[24] In the aftermath, there was communal violence against the Muslim minority, and a state of emergency, emergency measures and extraordinary deployment of the military.[25]

18. Significant challenges and negative trends have emerged over the past year which have profoundly changed the environment for reconciliation, accountability and human rights, as well as achievement of the 2030 Agenda. Despite some of the successful Government efforts to contain the COVID-19 pandemic, its social and economic impact has been deep and exacerbated social disparities.

19. The following section highlights six of these broader trends: i) militarization of civilian government functions; ii) reversal of Constitutional safeguards; iii) political obstruction of accountability for crimes and human rights violations; iv) majoritarian and exclusionary rhetoric; v) surveillance and obstruction of civil society and shrinking democratic space; and vi) new and exacerbated human rights concerns. The High Commissioner is concerned these represent important early warning indicators that require the Human Rights Council's urgent attention.

A. Militarization of civilian governmental functions

20. Resolution 30/1 included commitments that would foster an enabling environment for transitional justice and reconciliation, such as ending military involvement in civilian activities, accountability for military personnel, and security sector reforms. Yet, the past year has seen a deepening and accelerating militarization of civilian government functions which the High Commissioner first reported to the Human Rights Council in February 2020.[26]

21. On 29 December 2019, the Government brought 31 entities under the oversight of the Ministry of Defence, including the Police, the Secretariat for Non-Governmental Organizations, the National Media Centre, the Telecommunications Regulatory Commission,[27] the Information and Communication Technology Agency,[28] the National Dangerous Drugs Control Board, the Disaster Management Centre and the Department of Emigration and Immigration.[29] On 20 November 2020, the President moved the Police Department under a new Ministry of Public Security and appointed a former Navy Admiral, elected to the Parliament in August 2020 as Minister.[30]

[23] A/HRC/32/CRP.4, A/HRC/34/19, A/HRC/37/23, A/HRC/40/23, A/HRC/43/19.
[24] Note Verbale, 27 January 2021.
[25] That has been regularly extended by Gazette by virtue of Section 12 of the Public Security Ordinance.
[26] A/HRC/43/19, para 33.
[27] This was reassigned to the Presidential Secretariat by Gazette (Extraordinary) no 2194/74 of 25.09.2020.
[28] Idem supra.
[29] Gazette (Extraordinary) no 2153/12 of 12.10.2019.
[30] Gazette (Extraordinary) No. 2202/25, 20 November 2020.

22. Since 2020, the President has appointed at least 28 serving or former military and intelligence personnel to key administrative posts and has formed several Presidential task forces with vague, overbroad or overlapping mandates with existing institutions.[31] Some task forces are composed almost entirely of military, intelligence and police personnel. The "Presidential Task Force to build a Secure Country, Disciplined, Virtuous and Lawful Society"[32] and the "Presidential Task Force for Archaeological Heritage Management in the Eastern Province"[33] are both headed by the Secretary to the Ministry of Defence, also a General.[34] The Army Commander has headed the COVID-19 response, the military has been tasked with administering quarantine centres and checkpoints, and 25 senior military officers have been appointed as Chief coordinating Officers for all districts to tackle COVID-19.

23. The High Commissioner is particularly troubled that these appointments include senior military officials who have been alleged in United Nations reports to be implicated in alleged war crimes and crimes against humanity during the final years of the conflict, including Lieutenant General Shavendra Silva, as Army Chief (in August 2019) and Major General (retired) Kamal Gunaratne, as Secretary to the Ministry of Defence (in November 2019).[35] They respectively commanded the 58th and 53rd Divisions, which were credibly alleged to have committed grave violations of international human rights and humanitarian law during the armed conflict[36]. On 28 December 2020, both officers were promoted to the rank of General.[37] In September 2019, the United Nations publicly announced a decision to suspend all Sri Lanka's Army peacekeeping deployments, except where they would expose United Nations operations to serious operational risk.[38]

B. Reversal of Constitutional safeguards

24. On 22 October 2020, the new Parliament passed the 20th Amendment to the Constitution with a two-thirds majority. The amendment changes the balance of power between the different branches of the Government, vastly expanding the scope of presidential and executive powers and reversing many democratic gains introduced with the 19th Amendment in 2015. The High Commissioner is concerned that the amendment has fundamentally eroded the independence of key commissions and institutions, including the HRCSL, the Election Commission, the National Police Commission and the judiciary in terms of procedure for the selection, appointment and dismissal of senior judges and other high-ranking officials.[39] The amendment abolishes the Constitutional Council of eminent persons, which recommended appointments to the President and re-established the Parliamentary Council, which is composed exclusively of politicians and may only make observations. In December 2020, the President proceeded with the appointment of new members to the HRCSL, including a former Minister as chairperson. The High Commissioner is concerned that the new appointment process undermines the credibility and independence of the Commission.[40]

[31] https://menafn.com/1100162427/Sri-Lanka-Government-defends-appointment-of-military-officers-to-administrative-posts.

[32] Gazette Extraordinary no. 2178/18, 2 June 2020.

[33] *Ibid.*

[34] Gazette Extraordinary no. 2159/64, 25 January 2020; Gazette Extraordinary no. 2168/8, 26 March 2020; Gazette Extraordinary no. 2172/9, 22 April 2020; Gazette Extraordinary no. 2173/4, 27 April 2020 and, Gazette Extraordinary no. 2173/7, 28 April 2020.

[35] OHCHR, "Bachelet 'deeply troubled' by appointment of new Sri Lankan army chief", 19 August 2019; OHCHR, "Sri Lanka: UN experts say army chief appointment is 'affront to victims' of rights abuses", 27 August 2019.

[36] Report of the Sectary-General Panel of Experts on Accountability in Sri Lanka, para 62.

[37] https://www.army.lk/news/commander-chief-armed-forces-he-president-promotes-army-commander-four-star-rank-general-0; https://www.dailynews.lk/2020/12/28/local/237291/defence-secretary-army-commander-promoted.

[38] https://www.reuters.com/article/us-sri-lanka-un-peacekeepers-idUSKBN1WA2SL

[39] *Ibid*.

[40] The HRCSL had been upgraded to an A-status accreditation by the Global Alliance of National Human Rights Institutions in 2018, in terms of compliance with the Paris Principles.

25. In September 2020, the Government appointed an Expert Committee to draft a new Constitution and invited public inputs on several topics: the nature of the State, fundamental rights, language and decentralization. The High Commissioner notes the importance of an inclusive consultative process that takes into account the diversity of society and the full participation of civil society. In its past resolutions on Sri Lanka, the Human Rights Council has emphasized the "devolution of political authority, which is integral to reconciliation and the full enjoyment of human rights by all members of its population."[41] Various United Nations human rights mechanisms have also issued recommendations to Sri Lanka on addressing gaps in the Constitution's chapter of fundamental rights, and OHCHR stands ready to provide further technical assistance in this regard.

C. Political obstruction of accountability for crimes and human rights violations

26. While the criminal justice system in Sri Lanka has long been the subject of interference, the current Government has proactively obstructed or sought to stop ongoing investigations and criminal trials to prevent accountability for past crimes. On 9 January 2020, the Government appointed a Presidential Commission of Inquiry to investigate alleged "political victimisation" of public officials, members of the armed forces and police, and employees of State corporations by the previous Government.[42] With its broad mandate, the commission has intervened in police investigations and court proceedings and had the effect of undermining the police and judiciary in several high profile human rights and corruption-related cases.

27. Most notably, in January 2020, the Commission issued directives to the Attorney-General to halt the prosecution of former Navy Commander Admiral Wasantha Karannagoda and former Navy Spokesman Commodore D.K.P. Dassanayake in relation to disappearances of 11 persons in 2008-9. The Attorney-General did not comply with this order, asserting that the Commission had no statutory or legal authority to order him to refrain from performing his statutory functions.[43] Additionally, the Commission has intervened in favour of military intelligence officers in ongoing judicial proceedings, including in the murder of journalist Lasantha Wickrematunge in 2008, and enforced disappearance of cartoonist Prageeth Eknaligoda in 2010. The Commission has also interfered in other criminal trials, including by withholding documentary evidence, threatening prosecutors with legal action, and running parallel and contradictory examinations of individuals already appearing before trial courts.[44] The Commission submitted its final report to the President on 8 December 2020, but at time of writing this had not been published.

28. On 31 July 2020, Shani Abeysekara, a former chief of the police criminal investigation division (CID), who led investigations into several high-profile crimes and "emblematic" human rights cases, was arrested on charges of fabricating evidence in a murder case. Another CID Inspector, Nishantha Silva, left Sri Lanka in 2019 fearing reprisals for his lead investigative role in respect of several emblematic cases and since then he has been charged with various offences.

D. Majoritarian and exclusionary rhetoric

29. The High Commissioner welcomes the Government's public commitments to the 2030 Agenda and appointment of a new Sustainable Development Council. She notes the Government's affirmation of the rights of all Sri Lankans and constitutional prohibitions against discrimination, but is deeply concerned about the increased use of ethno-nationalistic and majoritarian rhetoric and symbols by the President and other senior Government figures, which define public policies that appear to exclusively reflect the perceived interests of the

[41] A/HRC/RES/25/1.

[42] Gazette 2157/44 of 9 January 2020.

[43] http://www.dailynews.lk/2020/01/29/law-order/209856/pcoi-has-no-power-order-ag-refrain-performing-statutory-functions-ag.

[44] https://ceylontoday.lk/news/pcoi-probing-political-victimisation-ag-to-testify-today.

Sinhala Buddhist majority, and with minimal consideration for minority communities. Ethnic and religious minority communities are left behind and excluded in such official discourse, and often perceived and treated as posing a threat. Such an approach has serious negative implications for reconciliation, peace building and religious tolerance, and carries the seeds of future violence and conflict.

30. In his anniversary address on 18 November 2020, the President underlined that he had been elected by the Sinhala majority and invoked "legitimate fears that the Sinhala race, our religion, national resources and the heritage would be threatened with destruction in the face of various local and foreign forces and ideologies that support separatism, extremism and terrorism."[45] The President has set up an advisory council consisting of senior Buddhist monks to seek advice on governance.[46] In June 2020, a Presidential Task Force was established on the sensitive issue of Archaeological Heritage Management in the Eastern Province, consisting almost entirely of Sinhalese members, including two Buddhist priests, despite the diverse population and heritage of the region. The Government declined to include the national anthem in the Tamil language on national occasions, such as the Independence Day celebrations, on 4 February 2020, despite the preceding years' practice of singing it in two languages as a significant gesture towards reconciliation.

31. The COVID-19 pandemic has also impacted on religious freedom and exacerbated the prevailing marginalisation and discrimination suffered by the Muslim community. The High Commissioner is concerned that the Government's decision to mandate cremations for all those affected by COVID-19 has prevented Muslims from practicing their own burial religious rites, and has disproportionately affected religious minorities and exacerbated distress and tensions.[47] Although the Government asserted to OHCHR that this policy is driven by public health concerns and scientific advice, the High Commissioner notes that WHO guidance stresses that "cremation is a cultural choice".[48] Sri Lankan Muslims have also been stigmatized in popular discourse as carriers of COVID 19 – a concern raised by the High Commissioner in her global update to the Council in June 2020.[49]

E. Surveillance and intimidation of civil society and shrinking democratic space

32. A pattern of intensified surveillance and harassment of CSOs, human rights defenders and victims appears to have intensified over the past year, including of those who supported the implementation of resolution 30/1. As of December 2020, over 40 civil society organizations had approached OHCHR with reports of harassment, surveillance and repeated scrutiny by a range of security services - including Criminal Investigation Department, Terrorist Investigation Division and State Intelligence officials – who questioned them about administrative details and activities of the organization, lists of staff, including their personal contact details, donors and funding sources. Some were questioned about the whereabouts of their relatives abroad. The Secretary-General and Special Procedures have received similar allegations of surveillance and reprisals.[50] While the Government has stated its objective is to prevent violent extremism, the High Commissioner is concerned that this is creating a chilling effect on civic and democratic space and leading to self-censorship. While Sri Lanka was able to successfully hold parliamentary elections in August 2020 despite COVID-19, the

[45] President's address to the Nation, 18 November 2020, https://www.presidentsoffice.gov.lk/index.php/2020/11/18/presidents-address-to-the-nation-on-18-11-2020/.

[46] Ibid.

[47] WHO Guidelines for disposal of COVID-19 victims considers burials an acceptable option. See AL LKA 2/2020.

[48] WHO Infection Prevention and Control for the safe management of a dead body in the context of COVID-19, dated 24 March 2020.

[49] https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26015&LangID=E.

[50] See LKA 1/2020, LKA 5/2020. See also A/HRC/45/36, PARA 110-111.

pandemic has also been used to justify excessive or arbitrary limits on legitimate freedom of expression and association.[51]

33. This has been reinforced by changed institutional arrangements for NGO oversight, and the use of laws on counter-terrorism or money-laundering to stifle legitimate activities. Significantly, the Government moved the NGO Secretariat, which supervises and monitors the registration and operations of NGOs, from a civilian Ministry under the purview of the Ministry of Defence and its intelligence arms.

34. Reports that the Voluntary Social Services Organisations (VSSO) Act that regulates operations of NGOs will be reviewed inter alia to control their access to foreign funds are also worrying. The High Commissioner stresses that any legislative reforms must comply with Sri Lanka's international legal obligations and constitutional provisions to respect and protect human rights, and should strengthen an enabling environment for civil society, rather than unreasonably restricting their activities and access to resources.[52] OHCHR stands ready to provide technical assistance and advice in this regard.

35. Other laws, such as the International Covenant on Civil and Political Rights (ICCPR) Act, which prohibits incitement to hatred, have also been misused in a discriminatory or arbitrary manner to arrest or detain people for peacefully expressing their opinion. The Special Rapporteur on freedom of religion and belief has observed that the ICCPR Act "has become a repressive tool used for curtailing freedom of thought or opinion, conscience, and religion or belief."[53] For example, Ramzy Razeek, an online activist was arrested on 9 April 2020 under this law and the Computer Crimes Act for using the expression "ideological jihad" in a post on his Facebook page criticizing anti-Muslim campaigns. A few days before, he had filed a complaint to the police about death threats that he received following his posting. He was released on bail on 17 September 2020 on account of his deteriorating health.

F. New and exacerbated human rights concerns

36. The High Commissioner is concerned that the Government has continued to use the Prevention of Terrorism Act (PTA), despite repeated calls over many years by United Nations human rights mechanisms to repeal it. For instance, on 14 April 2020, police officers arrested prominent lawyer Hejaaz Hizbullah at his house.[54] No detention order was given to him until 25 April 2020. His legal chambers were searched and materials seized. Hizbullah has been under renewable 90-day detention orders since then, under investigation for alleged involvement in the April 2019 terrorist attack in Colombo and for engaging in activities deemed "detrimental to the religious harmony among communities" and alleged indoctrination of children into extremism. Hizbullah's hearing before a Magistrate is postponed to February 2021, and a fundamental rights petition is pending in the Supreme Court. By then, he will have been in detention for 10 months without being charged.

37. The High Commissioner is also concerned by a recent series of deaths in police custody and in the context of police encounters with alleged criminal gangs. These incidents have occurred as the President and other senior Government figures have announced a tough, militarized approach to law and order and drug control. On 20 October 2020, Samarasinghe Arachchige Madush Lakshitha, the alleged leader of a drug trafficking group, was reportedly killed in a police crossfire while he was under the custody of the Colombo Crime Division (CCD). A few days earlier, his family and lawyers had expressed concern about his security. Four other deaths at the hands of the police of alleged members of organized crime gangs took place between June and August 2020. Recent deaths in custody also occurred in police stations, including allegedly as a result of torture, and in prisons during attempted escapes or riots and protests linked to fears of COVID-19. The most serious incident resulted in the death of 11 inmates and injuries to over one hundred during a protest in Mahara prison on 29

[51] https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26226; https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25920.

[52] See the Declaration on Human Rights Defenders adopted with A/RES/53/144. See also A/HRC/RES/22/6, https://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/RES/22/6.

[53] See A/HRC/43/48/Add.2, para 72.

[54] See LKA 4/2020.

November 2020. The Government appointed a Committee to investigate the incident and the interim report was submitted to the Minister of Justice on 7 December 2020.[55]

38. These incidents reflect the persistence of longstanding and endemic patterns of custodial deaths, use of torture and other ill-treatment, and extrajudicial killings by law enforcement officials with impunity. OHCHR has also continued to receive credible allegations through well-known human rights organizations of abductions, torture and sexual violence by Sri Lankan security forces since the adoption of resolution 30/1, including in the past year, which need to be credibly investigated.

39. The High Commissioner welcomes some of the positive measures to mitigate the spread of COVID-19 in prisons, such as the Attorney-General issuing instructions to facilitate bail for certain offences and the release of thousands of prisoners during 2020. OHCHR stands ready to assist with more systemic reforms to address the root causes of an overloaded prison system with long-standing problems,[56] such as overcrowding, long pre-trial detention and complex bail regimes that have been raised by different special procedures.[57]

IV. Assessment of the implementation of resolution 30/1

A. Transitional justice and confidence-building measures

40. In resolution 30/1, the Government committed to establish four crucial transitional justice mechanisms: a commission on truth, justice, reconciliation and non-recurrence; an office on missing persons (OMP); an office on reparations; and a judicial mechanism with a special counsel to investigate allegations of violations of human rights and of international humanitarian law.[58]

41. Neither the previous nor current Government have established the truth and reconciliation commission (TRC) or the special judicial mechanism. A concept framework for the TRC was reportedly submitted to Cabinet in 2019, but was not taken forward. As for the judicial mechanism, the debate over the participation of foreign judges became highly politicized with contested claims of incompatibility with the Constitution.[59] On 21 January 2021, President Rajapakasa appointed a three-member Commission of Inquiry to assess the findings and recommendations of preceding COIs and Committees and to assess the implementation their recommendations as well as what steps need to be taken to implement those recommendations in line with the present Government policy.[60] In February 2020 the High Commissioner noted that she was "not convinced the appointment of yet another Commission of Inquiry will advance this agenda"[61]. The High Commissioner notes that the new Commission's membership lacks diversity and independence, and its terms of reference do not inspire confidence it will produce any meaningful result.

42. The Government has stated that the OMP (established in 2016 and operational since 2018), and the Office for Reparations (established in 2018) will continue with "appropriate adaptation in line with the Government policy framework."[62] Despite limited capacity and resources, the OMP has helped to amplify the voices of the families and their situation. It has assisted families to secure Certificates of Absence for families, particularly through the provision of "Interim Reports" on each case. It has played an observer role in magisterial

[55] Note Verbale, 27 January 2021.

[56] See Prison study by the Human Rights Commission of Sri Lanka, http:www.hrcsl.lk/documentation/reports.

[57] A/HRC/34/54/Add.2; A/HRC/40/52/Add.3.

[58] A/HRC/RES/30/1.

[59] https://mfa.gov.lk/statement-by-hon-tilak-marapana-p-c-minister-of-foreign-affairs-of-sri-lanka-and-leader-of-the-sri-lanka-delegation-to-the-40th-session-of-the-human-rights-council-on-agenda/

[60] http://documents.gov.lk/files/egz/2021/1/2211-55_E.pdf

[61] https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25624&LangID=E

[62] Statement by Hon. Dinesh Gunawardena, Minister of Foreign Relations of Sri Lanka, 27 February 2020, https://www.lankamission.org/images/PDF_-_2020/Full%20Statement%20under%20Item%202%20-%202%20PM%2027%20February.pdf.

court cases on investigation of human remains and exhumation of mass graves. The OMP was also able to access the records of past commissions of inquiry to devise a centralized database of cases, and in November 2020, it published lists of complaints of missing and disappeared persons whom it has registered.[63]

43. Building and maintaining the trust of victims and their relatives will be essential to the success of these institutions. The High Commissioner is concerned therefore that harassment, surveillance and scrutiny by security agencies of families, lawyers and others working on disappearances have undermined the work of OMP. She recognizes the courage, commitment and determination of families and victims from all communities, who, despite many challenges, have continued to voice their demands for justice and answers about the fate of their missing loved ones.

44. The High Commissioner is deeply troubled therefore by the appointment in December 2020 of a new Chairperson of the OMP, who has just completed his role as Chair of the Presidential Commission of Inquiry on alleged political victimisation. As noted above, that Commission has obstructed and intervened in judicial proceedings on several "emblematic" human rights cases, including disappearances. His appointment will seriously undermine the independence and credibility of the OMP, eroding the trust of the victims' families and thereby, the OMP's ability to discharge its mandate effectively. The High Commissioner believes that the Government must demonstrate that the OMP is fully independent and effective, including by ensuring that the OMP retains its full mandate for search and investigation, and is afforded the independence, resources and political support needed for its crucial work.[64]

45. The Office for Reparations remains operational and produced a draft Reparations Policy submitted to the Ministry of Justice in May 2020. According to the Government, the office has received 16,275 applications of which 4,385 have been processed from January to November 2020, totalling Rs 142 million (USD 750,000) paid in compensation.[65] The High Commissioner encourages a strong gender focus in the reparations program, given that many victims and survivors are women, and OHCHR stands ready to advice on best practice in this regard.

46. The Secretariat for Coordinating Reconciliation Mechanisms, which supported and coordinated efforts on transitional justice, did not have its mandate extended in March 2020 after its Secretary General resigned in November 2019. On 21 November 2019, former president Chandrika Bandaranaike Kumaratunga also resigned from her position as the Chairperson of the Office for National Unity and Reconciliation (ONUR), whose mandate was to promote an inclusive and diverse society through educational and community based initiatives.66 Cabinet approval has been sought for the appointment of a new Chairperson and Director General for ONUR.[67]

47. With regard to confidence building measures outlined in resolution 30/1, the return of military-occupied land in the Northern and Eastern provinces has seen progress, with cumulative figures provided by the Government showing that around 89.26 per cent of State lands and 92.22 per cent of private lands held in 2009 had been returned by 31 December 2019. The Government has not reported figures for 2020.[68] On 3 January 2021, the Government announced the establishment under the Governor of Eastern Province of a "Panel of Experts on Social Injustices" and invited complaints from the public, primarily about land and property issues over four decades, by 31 January. It is not clear at time of writing how this initiative relates to other reparation mechanisms.

[63] http://www.ompsrilanka.org/omp-documents/omp-publications.
[64] Note Verbale to OHCHR from the Permanent Mission of Sri Lanka in Geneva, 28 December 2020.
[65] *Ibid.*
[66] www.onur.gov.lk.
[67] Note Verbale to OHCHR from the Permanent Mission of Sri Lanka in Geneva of 28 December 2020.
[68] Ibid.

48. During the 43rd session of the Human Rights Council, the Government renewed its pledge to undertake a review of the Prevention of Terrorism Act (PTA).[69] The Counter-Terrorism Bill drafted by the previous Government which would have replaced the PTA was withdrawn.[70] The Government confirmed to OHCHR its intent to revisit provisions of the PTA and establish a dedicated Court for the expeditious disposal of cases concerning the remaining ex-LTTE cadres in detention.[71] As highlighted above in paragraph 36, the PTA has continued to be used during 2020.

B. Impunity in emblematic cases

49. In previous reports to the Human Rights Council, OHCHR has tracked the investigation and prosecution of emblematic cases as a key measure of Sri Lanka's commitment to ending impunity. These include the killing of five Tamil students in Trincomalee and of 17 humanitarian workers in Muttur in 2006; the assassination of journalist Lasantha Wickrematunge in 2009; the disappearance of journalist Prageeth Eknaligoda in 2010; the killing of protestors by army personnel during a demonstration at Weliwerya in August 2013; the anti-Muslim riots in Aluthgama in 2014 and Digana, in 2018, as well as others. Despite investigations over the years by domestic Commissions of Inquiry and the police, and the arrest of some suspects and trials at bar, not a single emblematic case has been brought to a successful conclusion or conviction.

50. An illustrative example is the enforced disappearance of 11 individuals between 2008 and 2009, allegedly committed by a special intelligence unit of the Sri Lankan Navy72. Police investigations concluded that Navy squads had conducted abductions, torture and disappearances for ransom or other reasons and operated secret detention sites in Navy Camps, with the knowledge and at least tacit endorsement of the Navy command. While the case has continued before the courts, the proceedings have exemplified many of the shortcomings that affect all the other emblematic cases: a lack of equality of arms before the law; perceived bias towards State officials; the conflict of interest in the Attorney-General's department in leading both the prosecution and defence of State agents; political or security interference with the courts; tampering with, concealing or destroying evidence; procedural delays; and the arrest of the police investigator and threats to witnesses and lawyers.

51. The decade-long lack of progress and the insurmountable barriers for victims to access justice in emblematic cases of this kind indicate the inability and unwillingness of the State to prosecute and punish perpetrators of crimes when State agents are the alleged perpetrators. A rare exception to the lack of accountability was the conviction of Staff Sergeant Sunil Ratnayake, the only one of the five defendants to be convicted in 2015 for the murder of eight Tamil civilians, including four children in Mirusuvil in April 2000; however, he was granted a Presidential pardon in March 2020. The High Commissioner reminds the Government that the exercise of powers of amnesty or pardon must comply with Sri Lanka's international obligations under human rights and international humanitarian law, and should exclude those responsible for international crimes or gross violations of human rights.

V. Conclusions

52. Nearly 12 years on from the end of the war, domestic initiatives for accountability and reconciliation have repeatedly failed to produce results, more deeply entrenching impunity, and exacerbating victims' distrust in the system. Sri Lanka remains in a state of denial about the past, with truth-seeking efforts aborted and the highest State

[69] Statement by Hon. Dinesh Gunawardena, Minister of Foreign Relations of Sri Lanka, 27 February 2020.

[70] http://www.colombopage.com/archive_20A/Jan03_1578067614CH.php

[71] Note Verbale to OHCHR from the Permanent Mission of Sri Lanka in Geneva, 28 December 2020.

[72] Commonly referred as the Trincomalee 11, as the disappeared are believed to have been detained in the Gun Site illegal detention facility at Trincomalee Naval Base. While there are allegations of other disappearance cases linked to this site, the police investigation and court case proceeding since June 2019 before Colombo Fort Magistrate Court focuses on 11 of them.

officials refusing to make any acknowledgement of past crimes. This has direct impact on the present and the future. The failure to implement any vetting or comprehensive reforms in the security sector means that the State apparatus and some of its members credibly implicated in the alleged grave crimes and human rights violations remain in place. The 2015 reforms that offered more checks and balances on executive power have been rolled back, eroding the independence of the judiciary and other key institutions further. The beginnings of a more inclusive national discourse that promised greater recognition and respect of and reconciliation with minority communities have been reversed. Far from achieving the "guarantees of non-recurrence" promised by resolution 30/1, Sri Lanka's current trajectory sets the scene for the recurrence of the policies and practices that gave rise to grave human rights violations.

53. While fully appreciating the challenges posed by the COVID-19 pandemic, the High Commissioner is deeply concerned by the trends emerging over the past year, which represent clear early warning signs of a deteriorating human rights situation and a significantly heightened risk of future violations, and therefore calls for strong preventive action. Despite the Government's stated commitment to the 2030 Agenda, Tamil and Muslim minorities are being increasingly marginalized and excluded from the national vision and Government policy, while divisive and discriminatory rhetoric from the highest State officials risks generating further polarization and violence.

54. The High Commissioner is concerned that the emergency security deployments that followed the Easter Sunday terrorist attacks in 2019 have evolved into an increased militarization of the State. The Government has appointed active and former military personnel, including those credibly implicated in war crimes to key positions in the civilian administration, and created parallel task forces and commissions that encroach on civilian functions. Combined with the reversal of important institutional checks and balances on the executive by the 20th Constitutional Amendment, this trend threatens democratic gains.

55. The High Commissioner is alarmed that the space for civil society, including independent media, which had widened in recent years, is rapidly shrinking. The High Commissioner urges the authorities to immediately end all forms of surveillance, including intimidating visits by State agents and harassment against human rights defenders, lawyers, journalists, social actors and victims of human rights violations and their families, and to refrain from imposing further restrictive legal measures on legitimate civil society activity.

56. The Human Rights Council therefore is – once again – at a critical turning point in its engagement with Sri Lanka. Twice before, the Council has leant its support to domestic accountability and reconciliation initiatives, culminating in resolution 30/1. The Government has now demonstrated its inability and unwillingness to pursue a meaningful path towards accountability for international crimes and serious human rights violations, and signalled instead a fundamentally different approach which focusses on reparation and development, but threatens to deny victims their rights to truth and justice and further entrench impunity.

57. It is vital that the Human Rights Council takes further action on Sri Lanka for three important reasons. Firstly, the failure to deal with the past continues to have devastating effects on tens of thousands of survivors – spouses, parents, children and other relatives - from all communities who continue to search for the truth about the fate of their loved ones, to seek justice and are in urgent need of reparations. Secondly, the failure to advance accountability and reconciliation undermines the prospects for sustainable peace and development in line with the 2030 Agenda, and carries the seeds of repeated patterns of human rights violations and potential conflict in the future. Finally, the trends highlighted in this report represent yet again an important challenge for the United Nations, including the Human Rights Council, in terms of its prevention function. Independent review of the United Nations' actions in 2009 in Sri Lanka concluded there had been a systemic failure of the prevention agenda as the conflict concluded. The international community must not repeat those mistakes, nor allow a precedent that would undermine its efforts to prevent and achieve accountability for grave violations in other contexts.

58. The High Commissioner welcomes the Government's stated commitment to the 2030 Agenda and to continue some measures of peacebuilding, reparation and restitution, but Sri Lanka will only achieve sustainable development and peace if it ensures civic space and effectively addresses the institutionalised and systemic issue of impunity. However, by withdrawing its support for resolution 30/1 and related measures, and by repeatedly failing to undertake meaningful action across the full scope of that resolution, the Government has largely closed the possibility of genuine progress being made to end impunity through a domestic transitional justice process. In view of recent trends, the High Commissioner calls on the Human Rights Council to enhance its monitoring of the human rights situation in Sri Lanka, including progress in the Government's new initiatives, and to set out a coherent and effective plan to advance accountability options at the international level.

59. Member states have a number of options to advance criminal accountability and provide measures of redress for victims. In addition to taking steps towards the referral of the situation in Sri Lanka to the International Criminal Court, Member States can actively pursue investigation and prosecution of international crimes committed by all parties in Sri Lanka before their own national courts, including under accepted principles of extraterritorial or universal jurisdiction. The High Commissioner encourages Member States to work with OHCHR, victims and their representatives to promote such avenues for accountability, including through opening investigations into possible international crimes, and to support a dedicated capacity to advance these efforts. Member States can also apply targeted sanctions, such as asset freezes and travel bans against State officials and other actors credibly alleged to have committed or be responsible for grave human rights violations or abuses, as well as support initiatives that provide practical benefits to victims and their families.

VI. Recommendations

60. The High Commissioner recommends that the Government of Sri Lanka:

(a) Actively promote an inclusive, pluralistic vision for Sri Lanka, based on non-discrimination and protection of human rights for all, and in line with the 2030 Sustainable Development Agenda;

(b) Ensure constitutional and legislative reforms address recommendations made by United Nations human rights mechanisms and the resolutions of the Human Rights Council;

(c) Publicly issue unequivocal instructions to all branches of the military, intelligence and police forces that torture, sexual violence and other human rights violations are prohibited and will be systematically investigated and punished;

(d) Order all security agencies to immediately end all forms of surveillance and harassment of and reprisals against human rights defenders, social actors and victims of human rights violations;

(e) Promptly, thoroughly and impartially investigate and prosecute all allegations of gross human rights violations and serious violations of international humanitarian law, including torture and ill-treatment, and give the highest priority to ensuring accountability in long-standing emblematic cases;

(f) Remove from office security personnel and other public officials credibly implicated in human rights violations, in compliance with human rights standards; implement other reforms of the security sector to strengthen and ensure accountability and civilian oversight;

(g) Ensure structural safeguards for the Human Rights Commission to function independently and receive adequate resources;

(h)Ensure an environment in which the Office on Missing Persons and Office for Reparations can operate effectively and independently; provide both Offices with sufficient resources and technical means to effectively fulfil their mandate; and proceed

with interim relief measures for affected vulnerable families with a gender focus, notwithstanding their right to effective and comprehensive reparations and rights to truth and justice;

(i) Establish a moratorium on the use of the Prevention of Terrorism Act for new arrests until it is replaced by legislation that adheres to international best practices;

(j) Establish standard procedures for the granting of pardons or other forms of clemency by the President, including subjecting it to judicial review, and excluding grave human rights and international humanitarian law violations;

(k) Honour its standing invitation to Special Procedures by scheduling renewed country visits by relevant thematic mandate holders; continue engagement with treaty bodies; and seek continued technical assistance from OHCHR in implementing the recommendations of UN human rights mechanisms.

61. The High Commissioner recommends that the Human Rights Council and Member States to:

(a) Request OHCHR to enhance its monitoring of the human rights situation in Sri Lanka, including progress towards accountability and reconciliation, and report regularly to the Human Rights Council;

(b) Support a dedicated capacity to collect and preserve evidence and other related information for future accountability processes, to advocate for victims and survivors, and to support relevant judicial proceedings in Member States with competent jurisdiction;

(c) Cooperate with victims and their representatives to investigate and prosecute international crimes committed by all parties in Sri Lanka through judicial proceedings in domestic jurisdictions, including under accepted principles of extraterritorial or universal jurisdiction;

(d) Explore possible targeted sanctions such as asset freezes and travel bans against credibly alleged perpetrators of grave human rights violations and abuses;

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

(f) Prioritize support to civil society initiatives and efforts for reparation and victims' assistance and prioritise victims and their families for assistance in their bilateral humanitarian, development and scholarship programs;

(g) Review asylum measures with respect to Sri Lankan nationals to protect those facing reprisals and avoid any refoulement in cases that present real risk of torture or other serious human rights violations.

62. The High Commissioner recommends that United Nations entities:

(a) Ensure that the Secretary-General's Call to Action on human rights guides all United Nations policy and programmatic engagement in Sri Lanka;

(b) Ensure that all development programmes are founded on principles of inclusion, non-discrimination, and support for effective, accountable and inclusive institutions, in line with the 2030 Sustainable Development Agenda;

(c) Incorporate strict human rights due diligence in engagement with the security forces and all bodies under the purview of the Ministry of Defence or the Ministry Public Security;

(e) Whilst fully understanding force generation challenges in the context of UN peacekeeping, keep under review Sri Lanka's contributions to UN peacekeeping operations and screening systems for Sri Lanka personnel.