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Comprehensive report of the Office of the United Nations High Commissioner for Human Rights on Sri Lanka*

Summary

The present report contains the principal findings of the comprehensive investigation conducted by the Office of the United Nations High Commissioner for Human Rights into alleged serious violations and abuses of human rights and related crimes during the armed conflict in Sri Lanka. The Office reviews human rights-related developments in the country since March 2014, in particular reforms and the steps taken towards accountability and reconciliation by the new President elected in January 2015, and the new Government elected in August 2015. The report concludes with recommendations of the High Commissioner on the way forward, including on the establishment of a hybrid special court to try war crimes and crimes against humanity allegedly committed by all parties to the armed conflict.

* Late submission. For detailed findings of the investigation by the Office of the United Nations High Commissioner for Human Rights on Sri Lanka, see document A/HRC/30/CRP.2.

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Contents

I. Introduction

1. The present report is submitted pursuant to Human Rights Council resolution 25/1, in which the Council requested the Office of the United Nations High Commissioner for Human Rights (OHCHR) to monitor the human rights situation in Sri Lanka and to continue to assess progress on relevant national processes; to undertake a comprehensive investigation into alleged serious violations and abuses of human rights and related crimes by both parties in Sri Lanka during the period covered by the Lessons Learnt and Reconciliation Commission, with assistance from relevant experts and special procedures mandate holders; and to present a comprehensive report to the Council at its twenty-eighth session.

2. Following signals of engagement by the newly elected Government of Sri Lanka in January 2015 and the possibility that further information might become available for the investigation, the Human Rights Council accepted the recommendation made by the High Commissioner that consideration of the report be deferred until the thirtieth session (see A/HRC/28/23).

3. The present report includes the findings of the OHCHR investigation on Sri Lanka, a special team established by the former High Commissioner, Navi Pillay, to conduct the comprehensive investigation mandated by the Human Rights Council in its resolution 25/1 (see also A/HRC/30/CRP.2). The High Commissioner invited three distinguished experts – Martti Ahtisaari, former President of Finland, Dame Silvia Cartwright, former High Court judge of New Zealand, and Asma Jahangir, former President of the Human Rights Commission of Pakistan – to play a supportive and advisory role. Human Rights Council special procedure mandate holders also made their input to the investigation.

4. It is important at the outset to stress that the present report represents a human rights investigation, not a criminal investigation. The time frame covered by the investigation, the extent of the violations, the amount of information available and the constraints to the investigation, including lack of access to Sri Lanka and witness protection concerns, posed enormous challenges. Nevertheless, the investigation team attempted to identify the patterns of violations of international human rights and humanitarian law perpetrated, not only during the final stage of the armed conflict but during the whole period covered by investigation.

5. These patterns of conduct consisted of multiple incidents that occurred over time. They usually required resources, coordination, planning and organization, and were often executed by a number of perpetrators within a hierarchical command structure. Such systemic acts cannot be treated as ordinary crimes but, if established in a court of law, may constitute international crimes, which give rise to command as well as individual responsibility.

6. The report is submitted to the Human Rights Council in a very different context to the one in which it was mandated. The election of a new President and Government on a platform centred on good governance, human rights and the rule of law have given Sri Lanka a historic opportunity to address the grave human rights violations that have wracked its past, to pursue accountability and institutional reform, to ensure truth, justice and redress to many thousands of victims, and to lay the basis for long-term reconciliation and peace. Sri Lanka has, however, had such opportunities in the past, and the findings of the OHCHR investigation highlight the need for political courage and leadership to tackle comprehensively the deep-seated and institutionalized impunity that generates the risk of such violations being repeated.

II. Engagement of the Office of the High Commissioner and the special procedures

7. When the Human Rights Council adopted resolution 25/1, the Government of Sri Lanka "categorically and unreservedly rejected" it and refused to engage "in any related process". Former government ministers and officials repeatedly criticized and indeed vilified the OHCHR investigation in public and, more seriously, resorted to an unrelenting campaign of intimidation and harassment against victims, witnesses and representatives of civil society who might seek to provide information to OHCHR.

8. Since January 2015, the tenor of the Government's engagement with OHCHR has changed markedly. Although the new Government did not change its stance on cooperation with the investigation, nor admit the investigation team to the country, it engaged more constructively with the High Commissioner and OHCHR on possible options for an accountability and reconciliation process.

9. The Government also invited the Special Rapporteur on truth, justice, reparations and guarantees of non-recurrence to make a technical visit from 30 March to 3 April 2015. The Special Rapporteur stressed the importance of developing a comprehensive State policy on transitional justice through broad public consultation and participation, particularly of persons affected by violations.

10. The Working Group on Enforced or Involuntary Disappearances was also invited to visit Sri Lanka from 2 to 12 August 2015, but was requested to postpone its visit when these dates fell close to the parliamentary elections. The Working Group's visit has now been confirmed for November 2015.

III. Human rights and related developments

11. The presidential election of 8 January 2015 marked a watershed in the political environment in Sri Lanka. The common opposition candidate, Mathiripala Sirisena, defeated the incumbent President Mahinda Rajapaksa with the support of a broad coalition derived from all ethnic communities and spread over the ideological spectrum. A new Cabinet was formed with the former opposition leader, Ranil Wickremesinghe, as Prime Minister.

12. The manifesto of the new Government included a 100-day programme of constitutional reform and other measures, which culminated in the passage of the nineteenth amendment to the Constitution limiting the powers of the executive presidency, re-introduced limits to presidential terms and restored the Constitutional Council, which makes recommendations on appointments to the judiciary and independent commissions. The Chief Justice, who was controversially impeached in January 2013, was briefly reinstated before the senior-most judge on the bench was appointed as her successor.

13. Parliamentary elections were subsequently held on 17 August 2015. The United National Front for Good Governance, the coalition of parties that had governed since January 2015, won the largest number of seats, and a new Cabinet was formed on 4 September 2015.

14. Since January 2015 there has been a significant opening of space for freedom of expression, at least in Colombo, although reports of surveillance, interference and harassment of human rights defenders continued to be received at the district level. On 16 January, the Government lifted restrictions on access by journalists to the northern region.

15. While President Sirisena appointed new civilian governors for both the Northern and Eastern Provinces, and the major security checkpoint leading to the North was removed in August 2015, the Government is still to embark on any comprehensive process of demilitarization. Local civil society sources recorded 26 cases of harassment and intimidation by military and intelligence services in the North and East during the period from January to August 2015. This figure highlights the reality that the structures and institutional cultures that created the repressive environment of the past remain in place and will require much more fundamental security sector reform.

16. Six years after the end of the war, many displaced populations have yet to achieve durable solutions, particularly with regard to livelihoods. One major continuing problem is the military occupation of private land, although the Government has proceeded with some land releases in Thellipallai and Kopai in the North and in Sampur in the East.

17. Land issues have been further complicated by secondary occupation by civilians; loss, destruction and damage to land documents; competing claims; landlessness; and un-regularized land claims. Care must also be taken to ensure that land distribution does not exacerbate existing intra- and inter-community tensions, since land disputes have become increasingly politicized and ethnicized in return areas.

18. Women head nearly 60,000 households in the Northern Province.[1] Owing to food insecurity, rising inflation and lack of livelihood opportunities, such households are pushed further into debt, thereby increasing their vulnerability to exploitation. In the militarized context in conflict-affected areas, they are extremely vulnerable to sexual harassment, exploitation and violence.

19. The Government has been slow to clarify the number and identity of detainees still held under the Prevention of Terrorism Act and emergency regulations. At the time of writing, the Government had reportedly acknowledged 258 remaining detainees: 60 had not been charged; 54 had a prior conviction; while the remaining cases were pending. Reports have continued to emerge about the existence of secret and unacknowledged places of detention, which require urgent investigation.

20. The Prevention of Terrorism Act, which has long provided a legal context for arbitrary detention, unfair trials and torture, remains in force (see CCPR/C/LKA/CO/5, para. 11). According to local civil society sources, from January to August 2015, 19 people were arrested under the Act, of whom 12 remain in detention. Although the Government has engaged in dialogue with Tamil diaspora groups, it has not yet taken steps to delist the numerous Tamil diaspora organizations and individuals proscribed under the Act in March 2013.

21. Torture and sexual violence remain a critical concern, both in relation to the conflict and in the regular criminal justice system. A non-governmental organization that provides victims with medical services has highlighted six cases since the change of Government in 2015. A total of 37 per cent of the cases documented in its report[2] concerned individuals who had returned to Sri Lanka after the conflict, a few of them rejected asylum seekers.

22. During the period between March 2014 and August 2015, one non-governmental organization reported 112 incidents of hate speech against the Muslim community, 22 since January 2015.[3] During the same period, Christian groups reported 126 incidents targeting

[1] Household Income and Expenditure Survey 2012/13, preliminary report, Department of Census and Statistics, Ministry of Finance and Planning, Sri Lanka.

[2] Freedom from Torture, “Tainted Peace: Torture in Sri Lanka since May 2009”, August 2015.

[3] See Secretariat for Muslims (http://secretariatformuslims.org/).

Christians and religious sites, 57 since January 2015.[4] In April 2015, the Government announced plans to revise the Penal Code to criminalize hate speech; these amendments have yet to be presented.

23. As at August 2015, there were no prosecutions in relation to attacks by the Buddhist group Bodu Bala Sena on the Muslim community in Aluthgama in June 2014, where four people were reportedly killed and 80 injured.

IV. Principal findings of the investigation

24. The section below summarizes the principal findings established by OHCHR as a result of its investigation and on the basis of the information in its possession. The sheer number of allegations, their gravity, recurrence and the similarities in their modus operandi, as well as the consistent pattern of conduct they indicate, all point to system crimes. While it has not always been possible to establish the identity of those responsible for serious alleged violations, these findings demonstrate that there are reasonable grounds to believe that gross violations of international human rights law, serious violations of international humanitarian law and international crimes were committed by all parties during the period under review. Indeed, if established before a court of law, many of the allegations may, depending on the circumstances, amount to war crimes if a nexus is established with the armed conflict and/or crimes against humanity if committed as part of a widespread or systematic attack against a civilian population. In some of the cases, the alleged acts were apparently committed on discriminatory grounds.

A. Unlawful killings

25. On the basis of the information obtained by the investigation team, there are reasonable grounds to believe the Sri Lankan security forces and paramilitary groups associated with them were implicated in unlawful killings carried out in a widespread manner against civilians and other protected persons. Tamil politicians, humanitarian workers and journalists were particularly targeted during certain periods, although ordinary civilians were also among the victims. There appears to have been discernible patterns of killings, for instance in the vicinity of security force checkpoints and military bases, and also of individuals while in the custody of security forces. If established before a court of law, these may, depending on the circumstances, amount to war crimes and/or crimes against humanity.

26. The investigation team also gathered information that gives reasonable grounds to believe that the Liberation Tigers of Tamil Eelam (LTTE) also unlawfully killed Tamil, Muslim and Sinhalese civilians perceived to hold sympathies contrary to LTTE. LTTE targeted rival Tamil political parties, suspected informers and dissenting Tamils, including political figures, public officials and academics, as well as members of rival paramilitary groups. Civilians were among the many killed or injured in indiscriminate suicide bombings and claymore mine attacks carried out by LTTE. Depending on the circumstances and if confirmed by a court of law, these may amount to war crimes and or crimes against humanity.

27. The team also investigated allegations of extrajudicial executions of identified LTTE cadres and unidentified individuals on or around 18 May 2009, some of whom were known

[4] See National Christian Evangelical Alliance, incident reports (http://nceasl.org/category/incident-reports/)

to have surrendered to the Sri Lankan military. Although some facts remain to be established, on the basis of witness testimony as well as photographic and video imagery, there appears to be sufficient information in several cases to indicate that they were killed after being taken into custody. Depending on the circumstances and if confirmed by a court of law, many of the cases described in the report may amount to war crimes and/ or crimes against humanity.

B. Violations relating to the deprivation of liberty

28. The investigation team documented long-standing patterns of arbitrary arrest and detention by government security forces, and of abductions by paramilitary organizations linked to them, which often reportedly led to enforced disappearances and extrajudicial killings.

29. The typical modus operandi involved the arbitrary arrest or abduction of individuals by the security forces, sometimes with the assistance of paramilitary group members operating in unmarked "white vans" that were reportedly able to pass security checkpoints or to enter security force bases.

30. These violations were and still are facilitated by the extensive powers of arrest and detention provided for in the Prevention of Terrorism Act still in force, and by the emergency regulations that were in force until 2011. Such cases of unlawful and arbitrary arrest and detention are clearly in violation of the State's obligations under international human rights law. Depending on the circumstances and if confirmed by a court of law, these violations may amount to war crimes and/or crimes against humanity.

C. Enforced disappearances

31. During the course of its investigation, the team reviewed reliable information on hundreds of cases of enforced disappearance arising during the period under review in various parts of the country, with particular prevalence in the Northern and Eastern Provinces. Furthermore, the mass detention regime after the end of hostilities also led to enforced disappearances.

32. On the basis of the information available, the team has reasonable grounds to believe that the Sri Lankan authorities have, in a widespread and systematic manner, deprived a considerable number of victims of their liberty, and then refused to acknowledge the deprivation of liberty or concealed the fate and whereabouts of the disappeared person. This, in effect, removed these persons from the protection of the law and placed them at serious risk. Family members of the disappeared persons were also subjected to reprisals and denied the right to an effective remedy, including the right to the truth.

33. There are reasonable grounds to believe that enforced disappearances may have been committed as part of a widespread and systematic attack against the civilian population, given the geographical scope and time frame in which they were perpetrated, by the same security forces and targeting the same population. In particular, there are reasonable grounds to believe that those who disappeared after handing themselves over to the army at the end of the conflict were deliberately targeted because they were or were perceived to be affiliated with LTTE forces.

D. Torture and other forms of cruel, inhuman or degrading treatment

34. The investigation team documented the use of torture by the Sri Lankan security forces, particularly in the immediate aftermath of the armed conflict, when former LTTE members and civilians were detained en masse. This conduct followed similar patterns by a range of security forces in multiple facilities, including army camps, police stations and "rehabilitation camps", as well as in secret, unidentified locations.

35. On the basis of the information obtained by the team, there are reasonable grounds to believe that acts of torture were committed on a widespread or systematic scale. Such acts breach the absolute prohibition of torture and the State's international treaty and customary obligations. If established before a court of law, these acts of torture may, depending on the circumstances, amount to crimes against humanity and/or war crimes.

E. Sexual and gender-based violence

36. The information gathered by the investigation team gave reasonable grounds to believe that rape and other forms of sexual violence by security forces personnel was widespread against both male and female detainees, particularly in the aftermath of the armed conflict. The patterns of sexual violence appear to have been a deliberate means of torture to extract information and to humiliate and punish persons who were presumed to have links with LTTE.

37. Owing in particular to the fear of reprisals, the stigma and trauma attached, and the other constraints its investigation faced, the team was unable to assess fully the scale of the sexual violence used against those detained. The team nevertheless considers that, on the basis of the information it gathered, there are reasonable grounds to believe that violations of international human rights law and international humanitarian law relating to sexual violence were committed by government security forces, and that some of these acts may amount to war crimes and crimes against humanity.

F. Abductions and forced recruitment

38. The investigation team gathered information that reflected a pattern of abductions leading to the forced recruitment of adults by LTTE until 2009. The forced recruits were obliged to perform both military and support functions and were often denied contact with their families. Towards the end of the conflict, abductions leading to forced recruitment became more prevalent. Victims and families who tried to resist were physically mistreated, harassed and threatened.

39. In the view of the team, abductions leading to forced recruitment and forced labour were in contravention of common article 3 of the Geneva Conventions and of the obligations under international humanitarian law of LTTE to treat humanely persons taking no direct part in hostilities and those placed hors de combat. In cases in which the movement of those forcibly recruited was severely restricted, the investigation team is of the view that this may amount to a deprivation of liberty. If established by a court of law, these violations may, depending on the circumstances, amount to war crimes and/or crimes against humanity.

G. Recruitment of children and their use in hostilities

40. The investigation team documented extensive recruitment and use of children in armed conflict by LTTE over many years, which intensified during the last few months of

the conflict, as did reports of recruitment of children under the age of 15. It also gathered information on child recruitment by the Tamil Makkal Viduthalai Pulikal (TMVP)/Karuna Group after its split from LTTE in 2004. Recruitment of children is a violation of the Convention on the Rights of the Child and the Optional Protocol thereto on the involvement of children in armed conflict, and could also constitute a war crime if proven in a court of law.

41. On the basis of the information gathered by the investigation team, there are reasonable grounds to believe that government security forces may have known that the Karuna Group recruited children in areas under its control. This indicates that the Government may also have violated the Convention on the Rights of the Child and the Optional Protocol thereto on the involvement of children in armed conflict to which it is a party, in particular to ensure the protection and care of children affected by armed conflict. The High Commissioner also notes the State's failure to date to prosecute those responsible, including individuals widely suspected of child recruitment, some of whom have since been appointed to public positions.

H. Impact of hostilities on civilians and civilian objects

42. On the basis of the information in the possession of the investigation team, there are reasonable grounds to believe that many of the attacks reviewed in the present report did not comply with the principles on the conduct of hostilities, notably the principle of distinction.

43. While it may have been permissible for the security forces to target any military objective located in the no-fire zones declared by the Government, these attacks were subject to the rules on conduct of hostilities, including the obligation to take all feasible precaution to avoid or to minimize incidental loss of civilian lives or damage to civilian objects. The presence of large numbers of civilians, including many children, some of them living in flimsy shelters without access to bunkers, constituted an obvious risk that substantial loss of civilian lives and damage to civilian objects in the no-fire zones might ensue as a result of an attack.

44. The investigation team recognized the complexities inherent in conducting military operations against legitimate military targets in or near densely populated areas. Nevertheless, the presence of LTTE cadres participating in hostilities from within the predominantly civilian population did not change the character of the population, nor did it affect the protection that should be afforded to civilians under international humanitarian law. It is important to recall that the obligations of a party to an armed conflict under international humanitarian law are not conditioned on reciprocity. Violations attributable to one of the parties do not justify lack of compliance on the part of the other. While the investigation was not conclusive on the proportionality assessment for each of the incidents reviewed in the present report, the team believes that this matter should be investigated.

45. The team noted with grave concerns the repeated shelling of hospitals in the Vanni. Hospitals and other medical units and personnel enjoy special protection under international humanitarian law, and cannot be made the object of attack. The protection they should enjoy does not cease unless these are used to commit hostile acts, outside their humanitarian function. The recurrence of such shelling despite the fact that the security forces were aware of the exact location of hospitals raises serious doubt that these attacks were accidental. Other civilian facilities in the no-fire zones, in particular humanitarian facilities and food distribution centres, were also affected. The information available to the team indicated that in none of the incidents reviewed were there any grounds that could have reasonably led the security forces to determine that the facilities were being used for

military purposes; they therefore maintained their civilian character and should not have been directly targeted. Directing attacks against civilian objects and/or against civilians not taking direct part in hostilities is a serious violation of international humanitarian law and, depending on the circumstances, may amount to a war crime.

46. Another concern is that security forces employed weapons that, when used in densely populated areas, are likely to have indiscriminate effects. This concern is strengthened by the fact that the security forces reportedly had the means to use more accurate weapons and munitions so as to better respect their legal obligations, notably the requirements of distinction and precaution. In addition, the security forces publicly declared that they had means at their disposal, such as real-time images from drones, which would have helped them accurately target military objectives.

47. Another precautionary measure – circumstances permitting – is to issue effective warnings when attacks are likely to affect civilians, leaving them adequate time to evacuate before military operations commence. The team obtained no information indicating that any specific warnings were issued to the civilian population in no-fire zones informing them that military operations were imminent.

48. The investigation team did not find information suggesting that hospitals and other civilian facilities, including those of the United Nations, were used by LTTE for military purposes. The investigations did, however, indicate that LTTE repeatedly constructed military fortifications and positioned artillery and other weaponry in close proximity (and often adjacent) to civilian areas, including humanitarian and medical facilities and the surrounding areas of with a high concentration of displaced persons in no-fire zones, thereby exposing the civilian population to the dangers of the military operations taking place around them, including by placing civilian lives at increased risk from strikes by the Sri Lankan Army. There are therefore reasonable grounds to believe that the conduct of the LTTE violated its obligations under international humanitarian law to take all feasible measures to protect the civilian population and civilian objects against the effects of attacks.

I. Control of movement

49. The findings made by the investigation team indicate that there are reasonable grounds to believe that LTTE had a clear high-level policy of preventing civilians from leaving the Vanni, thereby unlawfully interfering with their freedom of movement. Findings also showed that the policy hardened in January 2009, although the specific instructions on how LTTE cadres should prevent anyone from leaving have yet to be clarified. Nevertheless, the information gathered indicated that a number of individuals, including several children, were shot dead, injured or beaten by LTTE cadres as they tried to leave, in contravention of their right to life and physical integrity. These acts may amount to direct attacks on civilians not taking direct part in hostilities, in violation of international humanitarian law. If established before a court of law, and depending on the circumstances, such conduct may amount to a war crime.

50. By compelling civilians to remain within the area of active hostilities, LTTE also violated its obligation under international humanitarian law to take all feasible measures to protect the civilian population under its control against the effects of attacks from the security forces.

J. Denial of humanitarian assistance

51. The investigation team found that the Government of Sri Lanka placed considerable restrictions on freedom of movement of humanitarian personnel and on humanitarian activities in the Vanni. These restrictions had an impact on the ability of humanitarian organizations and personnel to exercise their functions effectively and to ensure access to relief of civilians in need. According to rule 56 of customary international humanitarian law, such restrictions may only be justified by imperative military necessity.

52. There are reasonable grounds to believe that LTTE also failed to respect its obligations to respect and protect humanitarian relief personnel and not to restrict their freedom of movement.

53. The team found reasonable grounds to believe that the Government knew or had reasons to know the real humanitarian needs of the civilian populations in the concerned areas, including from its own agents on the ground, and nonetheless imposed severe restrictions on the passage of relief and the freedom of movement of humanitarian personnel. This conduct apparently deprived the civilian population in the Vanni of basic foodstuffs and medical supplies essential to survival. If established by a court of law, these acts and omissions point to violations of international humanitarian law, which, depending on the circumstances, may amount to the use of starvation of the civilian population as a method of warfare, which is prohibited by rule 53 of customary international humanitarian law. Such conduct, if proven in a court of law and depending on the circumstances, may constitute a war crime.

K. Screening and deprivation of liberty of internally displaced persons

54. The investigation team believes that the internally displaced persons held in Manik Farm and other closed camps were deprived of their liberty for periods far beyond what would have been permissible under international law. Moreover, the material conditions in these closed camps amounted to violations of the rights to health and to an adequate standard of living, including food, water, housing and sanitation. Depending on the circumstances, such conditions may also amount to inhumane and degrading treatment as defined in international human rights law.

55. On the basis of the information in the possession of the team, there are reasonable grounds to believe that internally displaced persons IDPs were treated as suspects and detained because of their Tamil ethnicity and because they had come from territory controlled by LTTE. This conduct may amount to discrimination under international human rights law and, if established by a court of law, may amount to the crime against humanity of persecution.

V. Steps towards accountability and reconciliation

56. As demonstrated in previous reports submitted by OHCHR to the Human Rights Council, recent years have witnessed a total failure of domestic mechanisms credibly to investigate, establish the truth, ensure accountability and provide redress to victims of the serious human rights violations and abuses described above.

57. In the course of its investigation, the team obtained access to the unpublished reports of several domestic investigations, including the Udalagama Commission of 2006 and the Army Court of Inquiry of 2012. The reports confirmed the concerns of OHCHR with regard

to their lack of independence and follow-up to their recommendations highlighted in previous reports of OHCHR (see A/HRC/25/23).

58. Since January 2015, President Sirisena and other government figures have struck a very different tone on reconciliation in public statements. On Independence Day, 4 February, the Government issued a special "declaration of peace" in three languages in which it expressed sympathy and regret for all the victims of the 30-year armed conflict, and pledged to advance "national reconciliation, justice and equality for all citizens".

59. By a cabinet decision dated 25 March 2015, the Government established a new Office of National Unity and Reconciliation, headed by former President Chandrika Bandaranaike Kumaratunga, with a mandate to drive progress on pending issues such as the release of detainees and civilian land occupied by the military. The Government also continued to place emphasis on implementation of the recommendations made by the Lessons Learnt and Reconciliation Commission.

A. Presidential Commission to Investigate into Complaints regarding Missing Persons

60. At the time of writing, there were indications that the Presidential Commission to Investigate into Complaints regarding Missing Persons appointed by the previous Government had received a further extension to complete its work,[5] despite widespread concerns raised about its credibility and effectiveness. In June 2015, two additional Commissioners were appointed to expedite the hearing of cases. In July, the Government also announced the appointment of a special investigative team to expedite investigation into some cases, although its status is not known.

61. As at 30 June, the Commission had received a total of 16,826 complaints of missing civilians and 5,000 complaints relating to missing members of the security forces; 2,200 complainants were subsequently invited to give testimony at 47 public hearings in different districts.

62. Reports from independent observers and organizations working with families of the disappeared continued to criticize the lack of transparency and public information, the conduct of proceedings, and intimidation and harassment of family members by military and intelligence officials (see A/HRC/27/CRP.2). These concerns were raised with the Government by the Working Group on Enforced or Involuntary Disappearances in February 2014 (see A/HRC/WGEID/102/1, paras. 128-138 and A/HRC/WGEID/103/1, para. 157), although they were largely rejected at the time.

63. The Commission presented its first interim report to the President on 10 April 2015 and is reported to have submitted its second; neither report has been published. OHCHR did, however, obtained access to a copy of the first report, which sheds some light on the work of the Commission. The Commission's analysis of written complaints shows that the security forces accounted for 19 per cent of them, LTTE for 17 per cent, and persons or groups unknown for more than 50 per cent. A larger proportion of LTTE cases appear, however, to have been invited for the public hearings, raising questions of selectivity. It also reported complaints received against paramilitary groups such as the Tamil Makkal Viduthalai Pulikal /Karuna Group and the Eelam People's Democratic Party.

[5] In 2014, the beginning of the period covered by the Commission was extended back from 1 June 1990 to 1 January 1983.

64. In its interim report, the Commission recommended further investigation of a number of cases. Significantly, it highlighted 10 cases in which it had identified by name or rank members of the security forces responsible for abductions or disappearances; the status of any further investigation is, however, unknown.

B. Emblematic cases

65. A Committee appointed by the new Government to re-investigate the death of 27 prisoners during a security operation to control a riot at Welikada prison in November 2012 (see A/HRC/25/23, para. 24) found that a number of those killed or injured had not been involved in the riot, and recommended further criminal investigation and compensation.

66. In the case of the killing of protestors by army personnel at Weliwerya in August 2013 (see A/HRC/25/23, para. 23), an investigation conducted by the Human Rights Commission of Sri Lanka concluded in a report published in 2015 that the deaths of three people, the injury of 36, and the destruction of property indicated the security forces had used excessive force. It also noted the presence of senior officers at the scene, which suggested that the shooting could not have taken place without orders.

67. In a noteworthy development, on 25 June, the Colombo High Court found a former army staff sergeant guilty of the murder of eight Tamil civilians at Mirusuvil, Jaffna District, in 2000; four others charged were acquitted. This is a rare case of a conflict-related violation being successfully prosecuted, and a reminder of the many other such cases have stalled or are pending at various stages of proceedings. While welcome,[6] the case highlights the systemic problems of delays in the Sri Lankan judicial system.

68. With regard to the killing of five students at Trincomalee beachfront in January 2006 and of 17 humanitarian workers of the non-governmental organization Action Contre la Faim in Muttur in August 2006, the Government reported having intensified its investigations, but highlighted the difficulties involved in summoning or interviewing potential witnesses now living abroad.[7] These cases highlight the unfortunate lack of confidence that witnesses have in the State's domestic process and the absence of witness protection.

69. During the first weeks in office of the new Government, some ministers made public statements about reopening investigations into other prominent cases of human rights violations. In March 2015, three navy personnel and a former police officer were arrested and are on remand in relation to the killing of Nadarajah Raviraj, a Member of Parliament for the Tamil National Alliance, in November 2006, while a fourth suspect is being sought abroad.

70. In August 2015, police announced that they had arrested several military personnel, including two lieutenant colonels, and two former LTTE cadres in relation to the disappearance of journalist and cartoonist Prageeth Eknaligoda.[8]According to State media,

[6] The High Commissioner points out his opposition to the death penalty handed down in the case, and the current status of Sri Lanka as a de facto abolitionist State.

[7] According to the Government, in the case of Action Contre la Faim, the Criminal Investigation Department has recorded statements of 18 military personnel since January 2015 and a further 22 are to be interviewed. The Department wishes to interview two key witnesses believed to be living in France. In the Trincomalee case, the prosecution has presented the depositions of 25 witnesses, while eight other witnesses are being sought from overseas. The next hearing in the case is scheduled for 7 December 2015.

[8] "CID arrests four Army officers", *Daily News*, 25 August 2015.

the investigation has revealed that Eknaligoda was taken to an army camp in Girithale in North Central province following his abduction on 24 January 2010.[9]

71. The above developments are most welcome, but it is important that the momentum in these cases be sustained and broadened to the many other criminal cases languishing before the courts. The High Commissioner recalls that breakthroughs of this kind have been reported before other sessions of the Human Rights Council, only to stall later on.

C. Mass graves

72. In previous reports, OHCHR highlighted the pending investigations into mass graves that had been discovered in different parts of the country. Developments in 2015 in the investigation into gravesites at Mannar and Matale have highlighted ongoing forensic challenges and possible tampering with evidence.

73. In recent years, many other graves have been found in the former conflict zone, often of persons who died in shelling during the final stages of the conflict. This fact highlights the critical need for greater local capacity and international technical assistance in the field of forensics, particularly forensic anthropology and archaeology. Ensuring the preservation and investigation of sites will be critical to any future criminal investigation and to the identification of missing persons for their families.

VII. Looking ahead

74. The new Government has pledged to deal with accountability issues "within the country's legal framework".[10] Much of the debate has turned on the type of mechanisms that achieve this, and whether they should be domestic, international or a hybrid of the two. As the Human Rights Council stressed in its resolution 25/1, however, what is needed is a "comprehensive approach to transitional justice incorporating the full range of judicial and non-judicial measures", including individual prosecutions, reparations, truth-seeking, institutional reform and vetting of public employees and officials.

75. The commitment made by the new Government to pursue accountability through a domestic process is commendable, particularly in a context where some political parties and sections of the military and society remain deeply opposed. The unfortunate reality is, however, that the State's criminal justice system is not yet ready or equipped to conduct an independent and credible investigation into the allegations reported by the investigation team,[11] or to hold accountable those responsible for such violations, as requested by the Council in resolution 25/1.

76. First and foremost is the absence of any reliable system for victim and witness protection, particularly in a context where the risk of reprisals is very high. In February 2015, the Government finally passed a long-pending law on victim and witness protection, although no concrete steps have yet been taken to render it operative. OHCHR has previously highlighted various shortcomings in the law that could compromise the independence and effectiveness of the new system (see A/HRC/27/CRP.2, para. 25). Much will depend on the integrity of appointments to the new witness protection authority, the vetting of police assigned to it, and the resources allocated to make it functional.

[9] "Sgt. Major confesses to grilling Eneligoda", *Daily News*, 11 August 2015.

[10] See the election manifesto of the United National Front for Good Governance, available from www.colombotelegraph.com/wp-content/uploads/2015/08/Election-held-LAA.xls-.pdf.

[11] See A/HRC/30/CRP.2.

77. Second is the inadequacy of the State's domestic legal framework to deal with international crimes of this magnitude. Sri Lanka has not acceded to several key instruments, notably the Additional Protocols to the Geneva Conventions, in particular Additional Protocol II, the International Convention on the Protection of All Persons from Enforced Disappearance and the Rome Statute of the International Criminal Court. It does not have laws criminalizing enforced disappearances, war crimes, crimes against humanity or genocide. Its legal framework does not allow individuals to be charged with different forms of liability, in particular command or superior responsibility.

78. In the past, when Sri Lanka has prosecuted conflict-related cases, it has relied on offences in regular criminal law, such as murder. This approach fails to recognize the gravity of the crimes committed, their international character, or to duly acknowledge the harm caused to the victims. It also constrains and undermines prosecution strategies, as it does not follow the chain of responsibility and prosecute those who planned, organized or gave the orders for what may be system crimes.

79. Effective prosecution strategies for large-scale crimes, such as those described by the investigation team,[12] focus on their systemic nature and their planners and organizers. The presumption behind such "system crimes" is that they are generally of such a scale that they require some degree of organization to perpetrate them. Even sophisticated legal systems like those in Sri Lanka – which may be well suited to deal with ordinary crimes – may lack the capacity to address system crimes and to bring effective remedy to their victims. This challenge is even greater in an environment where the criminal justice system remains vulnerable to interference and influence by powerful political, security and military actors.

80. Judicial accountability should also be accompanied by broader transitional justice measures, including truth-seeking and reparations, to ensure that the right of victims to redress is realized. In this regard, it will be important that any accountability process in Sri Lanka examine the entire period of conflict and insurgencies dating back to at least the 1970s, not just the last years of the armed conflict.. This will also pre-empt the temptation for accountability measures to be driven by political considerations.

81. The design of any truth-seeking and accountability mechanisms must be pursued through a process of genuine, informed and participatory consultation, especially with victims and their families. New mechanisms should not be established under the Commissions of Inquiry Act, which has systematically failed to deliver results; new, purpose-specific legislation will therefore be required.

82. The third challenge is the degree to which the State's security sector and justice system have been distorted and corrupted by decades of emergency, conflict and impunity. For years, political interference by the executive with the judiciary has become routine, as demonstrated in many of the cases investigated in the present report. The independence and integrity of key institutions such as the Attorney General's Office and the Human Rights Commission remain compromised.

83. The security forces, police and intelligence services have enjoyed near total impunity and have not undergone any significant downsizing or reform since the armed conflict. The Prevention of Terrorism Act and the Public Security Ordinance Act both remain in force. The military retains an oppressive presence in the war-affected areas of the north and east, still occupying extensive private land, expanding into commercial economic activities and maintaining a culture of surveillance and harassment of the local population and civil society.

[12] Ibid.

84. Without far-reaching institutional and legal reform, there can be no guarantee of non-recurrence. Sadly, the history of Sri Lanka includes moments where Governments pledged to turn the page and end such practices as enforced disappearances, but the failure to address impunity and root out the deep structures that had perpetrated such abuses meant the "white vans" could be reactivated when needed.

85. Against this backdrop, the High Commissioner believes that the Government of Sri Lanka will need to embark on fundamental reforms of the security sector and justice system, including a full-fledged vetting process to remove from office security forces personnel and public officials suspected of involvement in human rights violations, before it can hope to achieve a credible domestic accountability process and hope to achieve reconciliation.

VIII. Conclusions and recommendations

86. **The findings of the OHCHR investigation contained in the present report were born out of the past failure of the Government of Sri Lanka to address accountability for the most serious human rights violations and crimes. Ending the impunity enjoyed by the security forces and associated paramilitary groups, and holding to account surviving members of LTTE, will require political will and concerted efforts to ensure that these violations and crimes do not recur.**

87. **The commitments made by the new Government in this respect are welcome, but it needs to convince a very sceptical audience – Sri Lankan and international – that it is determined to show results. Prosecuting a few emblematic cases will not be sufficient; Sri Lanka needs to address the patterns of serious human rights violations and other international crimes that have caused such suffering for all communities over decades if it is to prevent them from haunting its future.**

88. **The High Commissioner remains convinced that, for accountability to be achieved in Sri Lanka, it will require more than a domestic mechanism. Sri Lanka should draw on the lessons learned and good practices of other States that have succeeded with hybrid special courts, integrating international judges, prosecutors, lawyers and investigators. Such a mechanism will be essential to give confidence to all Sri Lankans, in particular the victims, in the independence and impartiality of the process, particularly given the politicization and highly polarized environment in Sri Lanka. OHCHR stands ready to continue to provide its advice and technical assistance in the design of such a mechanism**.

89. **The High Commissioner also believes that the Human Rights Council has played – and should continue to play – a critically important role in encouraging progress on accountability and reconciliation in Sri Lanka. As the process now moves into a new stage, he urges Council members to sustain their monitoring of developments in Sri Lanka with a view to further actions that may be required at the international level should concrete results not be achieved.**

90. **In particular, the High Commissioner wishes to highlight the following recommendations below.**[13]

[13] See also A/HRC/30/CRP.2.

A. Government of Sri Lanka

1. General

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

(a) Set up a high-level executive group to develop a coordinated, time-bound plan and oversee progress in implementing the recommendations contained in the present and previous reports of the High Commissioner submitted to the Human Rights Council, as well as relevant outstanding recommendations of the Lessons Learnt and Reconciliation Commission and past commissions of inquiry;

(b) Invite OHCHR to establish a full-fledged country presence to monitor the situation of human rights, advise on implementation of the recommendations made by the High Commissioner and the Human Rights Council in its resolutions and to provide technical assistance;

(c) Initiate genuine consultations on transitional justice, in particular truth-seeking and accountability mechanisms, reparations and memorialization, with the public, victims and witness groups, civil society and other stakeholders; these should be accompanied by public education programmes that ensure informed participation in the process;

(d) Invite the Special Rapporteur on truth, justice, reparations and guarantees of non-recurrence to continue his engagement in accompanying and providing advice in this process, and invite other relevant Special Representatives of the Secretary-General and special procedure mandate holders, in particular the Special Rapporteur on extrajudicial, summary or arbitrary executions and the Special Rapporteur on torture and other cruel, inhuman and degrading treatment or punishment, to make early country visits.[14]

2. Institutional reforms

(e) Through the Constitutional Council, appoint qualified new members to the Human Rights Commission of Sri Lanka of the utmost independence and integrity, and review legislation to strengthen the Commission's independence and its capacity to refer cases to the courts;

(f) Issue clear, public and unequivocal instructions to all branches of the military and security forces that torture, rape, sexual violence and other human rights violations are prohibited and that those responsible, both directly or as commander or superior, will be investigated and punished; and order an end to all surveillance, harassment and reprisals against human rights defenders;

(g) Develop a full-fledged vetting process respecting due process to remove from office military and security force personnel and any other public official where there are reasonable grounds to believe that they have been involved in human rights violations;

(h) Prioritize the return of private land that has been occupied by the military and end military involvement in civilian activities;

[14] See also A/HRC/30/CRP.2, p. 248, recommendations.

(i) Take immediate steps to identify and disarm groups affiliated with political parties, and sever their linkages with the security forces, intelligence services and other government authorities;

(j) Initiate a high-level review of the Prevention of Terrorism Act and its regulations and the Public Security Ordinance Act with a view to their repeal and the formulation of a new national security framework fully compliant with international law;

3. Justice

(k) Review the Victim and Witness Protection Act with a view to incorporating better safeguards for the independence and effectiveness of the witness protection programme in accordance with international standards; ensure the independence and integrity of those appointed to the Witness Protection Authority and that the police personnel assigned to the programme are fully vetted; and ensure adequate resources for the witness protection system;

(l) Accede to the International Convention on the Protection of All Persons from Enforced Disappearance, the Additional Protocols to the Geneva Conventions, and the Rome Statute of the International Criminal Court;

(m) Enact legislation to criminalize war crimes, crimes against humanity, genocide and enforced disappearances without statutes of limitation; and enact various modes of criminal liability, in particular command or superior responsibility;

(n) Adopt specific legislation establishing an ad hoc hybrid special court, integrating international judges, prosecutors, lawyers and investigators, mandated to try war crimes and crimes against humanity, with its own independent investigative and prosecuting organ, defence office and witness and victims protection programme, and provide it with the resources necessary for it to be able try those responsible to promptly and effectively;

(o) Carry out a comprehensive mapping of all criminal investigations, habeas corpus and fundamental rights petitions relating to serious human rights violations, and of the findings of all commissions of inquiries where they have identified specific cases, and refer these cases to the special court upon its establishment;

(p) Reinforce the forensic capacity of the judiciary and ensure that it is adequately resourced, including for DNA testing, forensic anthropology and archaeology;

(q) Review all cases of detainees held under the Prevention of Terrorism Act and either release them or immediately bring them to trial; and review the cases of those convicted under the Act and serving long sentences, particularly where convictions were based on confessions extracted under torture;

4. Truth/right to know

(r) Dispense with the current Presidential Commission on Missing Persons and transfer its cases to a credible and independent institution developed in consultation with families of the disappeared;

(s) Develop a central database of all detainees, with independent verification, where relatives may obtain information of the whereabouts of family members detained, and publish a list of all detention centres;

(t) Publish all unpublished reports of the many human rights-related commissions of inquiry, the Presidential Commission on the Missing and the Army Court of Inquiry into civilian casualties;

(u) Develop a comprehensive plan/mechanism for preserving all existing records and documentation relating to human rights violations, whether held by public or by private institutions;

5. Reparations

(v) Develop a national reparations policy that takes into account the specific needs of women and children, and make adequate provision from the State budget;

(w) Strengthen programmes of psychosocial support for victims.

B. United Nations system and Member States

92. **The High Commissioner recommends that the United Nations system and Member States:**

(a) Provide technical and financial support for the development of transitional justice mechanisms, provided that they meet international standards; and set up a coordination mechanism among donors in Sri Lanka to ensure focused and concerted efforts to support the transitional justice process;

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

(c) Wherever possible, in particular under universal jurisdiction, investigate and prosecute those responsible for such violations as torture, war crimes and crimes against humanity;

(d) Ensure a policy of non-refoulement of Tamils who have suffered torture and other human rights violations until guarantees of non-recurrence are sufficient to ensure that they will not be subject to further abuse, in particular torture and sexual violence;

(e) Continue to monitor human rights developments and progress towards accountability and reconciliation through the Human Rights Council; if insufficient progress is made, the Council should consider further international action to ensure accountability for international crimes.