

of judicial and non-judicial measures, including, inter-alia, individual prosecutions, reparations, truth-seeking, institutional reforms, vetting of public employees and officials”.

1264. The recommendations below detail a series of measures addressed to the Government of Sri Lanka and the international community which it believes are necessary to end the impunity enjoyed by alleged perpetrators for many years, including those responsible for any orders, acts or omissions. The scale of the challenges to be addressed demand courage and strong political will, legal and institutional reform, extensive financial and human resources, and a robust programme for the protection of victims and witnesses, which would benefit from international support and assistance.

## **XIX. Conclusions and recommendations**

1265. OISL was tasked with carrying out a comprehensive investigation into human rights violations and related crimes that occurred between 2002 and 2011. To do so in such a short time, given the extent of the violations, the amount of available information, as well as the constraints to the investigation, posed enormous challenges. Nevertheless, this report has attempted to shed further light on the persistence, scale and gravity of the violations of international human rights and humanitarian law that have occurred, not only during the last phases of the armed conflict, but during the whole period covered by OISL’s mandate, and also prior to it.

1266. The report has shown that during the last phases of the armed conflict, the intense shelling by the armed forces caused great suffering and loss of life among the civilian population in the Vanni. Witnesses gave harrowing descriptions to OISL of the carnage, bloodshed and psychological trauma of bombardments in which entire families were killed. Lack of food, water and medical treatment because of strict controls of supplies allowed into the Vanni by the Government further impacted on their well-being and undoubtedly caused additional deaths. The LTTE caused further distress by forcing adults and children to join their ranks and fight on the front lines. The fact that the civilians were forced to remain in the conflict area by the LTTE and suffered reprisals if they tried to leave added to the trauma that they lived through.

1267. Counting or estimating the exact number of civilian casualties during the different stages of the armed conflict is impossible without full access to the areas and communities affected, in particular in Sri Lanka. Yet, on the basis of the information compiled by OISL, there is no doubt that thousands, and likely tens of thousands, lost their lives, indicating the widespread scale of the attacks. The patterns of commission of gross human rights violations and serious violations of international humanitarian law, the indications of their systematic nature, combined with the widespread character of the attacks all point to the possible perpetration of international crimes. These allegations must be promptly, thoroughly and independently investigated and those responsible should be brought to justice.

1268. Though the conflict ended on 18 May 2009, the plight of the civilians did not end once the war was over. More than 250,000 found themselves deprived of liberty in military-run closed IDP camps for months while the security forces carried out operations in the camps to filter out former LTTE cadres. Once released from the IDP internment camps (described as ‘welfare villages’ by the Government), they still risked further abuses, such as surveillance, detention, torture and ill-treatment and sexual violence. Former LTTE cadres and others are believed to have been secretly executed after handing themselves over to the SLA.

1269. While egregious violations occurred on a large scale during the last phase of the armed conflict, this report has also described the persistence of serious human rights

violations, abuses and related crimes that have impacted tens of thousands of individuals as well as whole communities – Sinhalese, Tamil and Muslim - not only during the period covered by the OISL's mandate, but also over past decades. These include extensive and endemic patterns of extrajudicial killings, enforced disappearances, abductions, unlawful arrests and arbitrary detention, torture and sexual violence committed with impunity by the Government forces over many years, as well as by paramilitary organisations linked to them. They also include the multiple unlawful killings, indiscriminate suicide bombings and claymore mine attacks by the LTTE which killed and maimed many civilians, and the recruitment of children and their use in hostilities by the LTTE and paramilitary groups.

1270. Most importantly, many of the structures responsible for the violations and crimes remain in place, ready to be reactivated when necessary as well as to prevent any progress in terms of addressing accountability. Indeed, OISL believes that there must be profound institutional changes to end the decades of repressive and persecutory attitudes, practices and structures to prevent their recurrence. Some of these will take time, but immediate steps can be taken to issue strict instructions to public officials and security forces indicating that violations will not be tolerated, and to send a message that the Government is determined to bring about change. Vetting to remove alleged perpetrators from the security forces should also be part of the process. Paramilitary groups must be disarmed, and their activities, including the extent, nature and identity of the support given to these groups by government officials and members of the security forces must be fully and independently investigated.

1271. The need for strengthening rule of law institutions, including by ending the political interference in the justice sector was highlighted by the LLRC. The restoration of the Constitutional Council offers hope of the appointment more independent members to the Human Rights Commission of Sri Lanka and other senior public posts. In this regard, OISL hopes the new Government will take urgent measures to restore the independence of the Human Rights Commission of Sri Lanka, and to reinforce its mandate by legislating on its powers to refer cases to the courts. The effectiveness of the Commission has been seriously eroded since 2006, yet it is a key institution regarding the protection of human rights and contributing to accountability.

1272. Reconciliation and addressing root causes of systematic human rights abuses and entrenched impunity are critical to securing the new Government's vision for Sri Lanka. Accountability must be part of that vision, including processes of truth-telling, justice and reparations. The previous Government's unbending narrative that it protected civilians, provided adequate humanitarian assistance in the conflict zone and for the basic needs of IDPs – is in stark contrast with the countless detailed descriptions of witnesses who lived through these events and therefore must change.

1273. Likewise, there must be recognition within the Tamil community, for example, of the destruction and harm inflicted on civilians and communities by the LTTE. While the LTTE no longer exists nor controls territory, the legacy of the abuses, committed by and large with total impunity, remains and must be addressed. Even now, in some parts of Sri Lanka, those who were the victims of abuses by the LTTE are still afraid to talk about what happened in the presence of former LTTE cadres.

1274. The design of any mechanisms, such as a truth-seeking mechanism or future institution to deal with disappearances, must be through a process of genuine, informed and participatory consultation, especially with victims and their families. A vital initial step towards progress in addressing the past and allowing accountability for future violations must also be the creation of an environment where victims and other witnesses can provide testimony without fear of persecution. Fear of reprisals has prevented many from coming forward to seek truth, justice and reparations. Relatives of the disappeared have, nevertheless, courageously continued their search for the truth about their missing loved

ones in spite of the many and repeated attempts by governments to deny and obfuscate responsibility.

1275. Creating an environment conducive to open testimony and dialogue requires putting in place an independent, effective witness protection system. While the Witness Protection Act of 2015 marks a start, it requires amendment to bring it into line with international standards and best practices. This should be a priority for the new Government. At the same time, creating such an environment requires measures to prevent security forces and others from threatening and abusing victims or their families.

1276. OISL's report has shown how impunity is deeply entrenched throughout Sri Lankan institutions, in spite of the professionalism and expertise of many individual officials. The majority of the many commissions of inquiry appear to have been designed to deflect criticism in high profile cases rather than as effective mechanisms to enable accountability, the exceptions being the commissions of inquiry into disappearances set up in 1994 and 1998. Despite their flaws, they did nevertheless document many cases, including alleged perpetrators. However, the majority of the alleged perpetrators were never prosecuted and some have since been promoted within the security forces.

1277. There has been intense debate nationally and internationally about the mechanisms needed to prosecute the alleged violations and crimes committed in Sri Lanka. Much of the debate has focussed on what type of mechanisms would best achieve accountability, and the form they should take. The contribution of the Human Rights Council, though resolution 25/1, stressed the need for 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.<sup>1237</sup>

1278. The commitment 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. OISL believes, however, that Sri Lanka's criminal justice system is not yet ready or fully equipped to promptly conduct the "independent and credible investigation" into the allegations contained in this report, or "to hold accountable those responsible for such violations", as requested by the Human Rights Council.<sup>1238</sup> The chapter on Justice and Accountability in this report explains the complex reasons for this, and why the High Commissioner believes that for an accountability mechanism to succeed in Sri Lanka, it will require more than a domestic mechanism. Sri Lanka should draw on the lessons learnt and good practices of other countries 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. It will be important that the international community supports these initiatives and that they also continue to monitor these developments, to take further actions that may be required at the international level should there not be concrete results.

1279. Although OISL's findings regarding issues on attacks on civilians and humanitarian assistance differ at times from those of the LLRC in its report, OISL believes that many of the LLRC's findings and recommendations remain pertinent today and should be considered as part of the follow-up to this report, particularly regarding detention and disappearances, long-term grievances of the many different communities and proposals for

<sup>1237</sup> A/HRC/RES/25/1, preamble.

<sup>1238</sup> Ibid.

reconciliation. It is regrettable that many key recommendations which they made almost five years ago and which could help to safeguard human rights have yet to be implemented.

1280. OISL recognises the measures to improve human rights have been taken by the Government which took office in January and that the new Government that took office in August 2015 has committed to bringing about change. The High Commissioner sincerely hope that the new Government will seize this unique opportunity to articulate the “common vision of an interdependent, just, equitable, open and diverse society” as highlighted by the LLRC. It will require courage and political will to challenge the status quo and address the many long-standing grievances in order to restore the full protection of human rights for all its citizens.

1281. OHCHR hopes that this report will contribute to the development of that vision, and that it will be embraced as a means to move forward constructively rather than lapse into defensive, recriminatory discourses. Below are a set of recommendations which it believes should be implemented as part of the process of creating a vision and programme of change which does full justice to the positive resources and diversity of its people. The international community also has an important role to play in supporting change and advance accountability for past violations and abuses and longer term reconciliation.

## **Recommendations**

### **General**

1. Develop a comprehensive transitional justice policy for addressing the human rights violations of the past 30 years and preventing their recurrence;
2. Set up a high-level executive group to develop a coordinated, time-bound plan and oversee progress in implementing the recommendations contained in this report and previous reports by the High Commissioner to the Human Rights Council, as well as relevant outstanding recommendations of the LLRC and past commissions of inquiry;
3. Invite OHCHR to establish a full-fledged country presence to monitor the human rights situation, advise on implementation of the High Commissioner’s recommendations and of all HRC resolutions, and provide technical assistance;
4. Initiate genuine consultations on transitional justice, in particular on truth-seeking, 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; Invite the Special Rapporteur on truth, justice, reparations and guarantees of non-recurrence to continue his engagement so that he accompanies and advises in this process;
5. Ensure full cooperation with the Special Procedures of the Human Rights Council. Invite the Special Representative of the Secretary-General on conflict-related sexual violence and the Special Representative of the Secretary-General on Children and Armed Conflict, the Special Rapporteurs on extrajudicial killings and torture, the Working Group on Arbitrary Detention and other relevant Special Procedures mandate holders to make early country visits.

### **Institutional reforms**

6. Ensure that the Constitutional Council is fully operational as soon as possible, so that it can appoint qualified new members of the utmost independence and integrity to key institutions such as the Human Rights Commission of Sri Lanka;

7. Review legislation to strengthen the Human Rights Commission's independence and its capacity to refer cases to the courts;
8. Initiate action to seek Supreme Court review of its decision in the Singarasa case<sup>1239</sup> to affirm the applicability of international human rights treaties in domestic law and reinstate the competence of the UN Human Rights Committee to consider individual complaints;
9. 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, either directly or as commander or superior, will be investigated and punished. Subject to due process, anyone suspected of being involved in such acts should be immediately suspended until an effective investigation has been completed. Order and end to all surveillance, harassment and reprisals against civil society actors, human rights defenders and journalists; ;
10. Prepare an overall plan for security sector reform to ensure the civilian nature, independence and professionalism of the law and order forces, and reducing the role of the military in internal security matters;
11. Clarify the roles and chain of command for all branches of the security forces, including the different intelligence services, the CID and the TID.
12. Develop a fully-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 were involved in human rights violations;
13. Ensure that no member of the Sri Lankan security forces is sent on a UN peacekeeping without vetting to establish that the individual, including commanders, have not in any way been involved in human rights violations or criminal acts. Any allegations of abuses by Sri Lankan peacekeepers while on peacekeeping duties must be fully investigated by the authorities;
14. Prioritize the return of private land which has been occupied by the military and end military involvement in civilian activities;
15. Take immediate steps to identify and disarm groups affiliated with political parties and sever their linkages with security forces, intelligence services and other Government authorities;
16. Initiate a high-level review of the Prevention of Terrorism Act (PTA) 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 complying with international law;

### Justice

17. Review the Victim and Witness Protection Act with a view to incorporating better safeguards for the independence and effectiveness of the witness protection programme. Ensure the independence and integrity of those appointed to the Witness Protection Authority and that the police personnel assigned to this program are fully vetted. Ensure adequate resources for the witness protection

<sup>1239</sup> Nallaratnam Singarasa v Attorney General, SC Special App. (LA) No.182/99, decided on Sept. 15, 2006.

- system, including with international assistance; Ensure special protection mechanisms for children and victims of sexual violence.
18. Enact legislation to criminalize war crimes, crimes against humanity, genocide and enforced disappearances, without statute of limitation. Enact various modes of criminal liability, notably command or superior responsibility;
  19. Ratify the International Convention on the Protection of All Persons from Enforced Disappearances, the Additional Protocols to the Geneva Conventions and the Rome Statute of the International Criminal Court;
  20. 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, including sexual crimes and crimes committed against children, with its own independent investigative and prosecuting organ, defence office, and witness and victims protection programme. Resource the court so that it can effectively try those responsible;
  21. Carry out a comprehensive mapping of all pending criminal investigations, habeas corpus, and fundamental rights petitions related to serious human rights violations, as well as the findings of all Commissions of Inquiries where they have identified specific cases, and refer these cases to the special court upon its establishment; Initiate prosecutions in all cases in which the Presidential Commission to Investigate Complaints Regarding Missing Persons has identified perpetrators and *prima facie* evidence;
  22. Review all of the cases submitted to the Disappearance Investigation Unit and the Missing Persons Unit by the Zonal and All Island Commissions, including in cases where the courts subsequently acquitted the accused, to identify those which require further investigation, including chain of command responsibilities;
  23. Review all the cases of the more than 11,000 individuals perceived or known to be linked to the LTTE reported to have been registered and rehabilitated to account for their current whereabouts to ensure that none subsequently disappeared.
  24. Review all cases of detainees held under the PTA and either release them or immediately bring them to trial. Review the cases of those convicted under the PTA and serving long sentences, particularly where convictions were based on confessions extracted under torture;

#### **Truth/right to know**

25. 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;
26. Develop a central database of all detainees, with independent verification, where relatives can obtain information of the whereabouts of family members detained;
27. Publish a full gazetted list of all detention centres, and close down any unofficial ones still in existence;
28. 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;
29. Develop a comprehensive plan/mechanism for preserving all existing records and documentation relating to human rights violations, whether held by public or private institutions;

**Reparations**

30. Develop a national reparations policy in consultation with victims and their families, considering the specific needs of each victims, including women and children and finance appropriately from the state budget;
31. Develop and strengthen programmes of psychosocial support for all victims of the conflict;
32. Amend legislation to ensure that those who have received death certificates for the missing are not prevented from pursuing judicial cases to determine what happened to their loved ones;
33. Ensure durable solutions for old and new displaced populations through land restitution, resettlement and livelihood support;

**To the United Nations system and Member States**

34. Provide technical and financial support for the development of transitional justice mechanisms provided that they meet international standards. Set up a coordination mechanism among donors in Sri Lanka to ensure focussed and concerted efforts to support the transitional justice process;
  35. Apply stringent vetting procedures to Sri Lankan police and military personnel identified for peacekeeping, military exchanges and training programmes;
  36. Whenever possible, notably under universal jurisdiction, investigate and prosecute those allegedly responsible for violations, such as torture, war crimes or crimes against humanity ;
  37. 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;
  38. In countries where there is a significant Tamil population, carry out an assessment of needs for psychosocial support for those who have been victims of violations and as necessary fund the development of such services;
  39. Continue to monitor human rights developments and progress towards accountability and reconciliation through the Human Rights Council. Should there be insufficient progress, the Human Rights Council should consider further international action to ensure accountability for international crimes.
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