



Comments and Recommendations to the Secretary General's Panel of Experts on the issue of accountability with regard to alleged violations of international human rights and humanitarian law during the final stages of the conflict in Sri Lanka

Joint submission of the Asian Human Rights Commission (AHRC), based in Hong Kong; the Redress Trust, based in London; and the Rehabilitation and Research Centre for Torture Victims (RCT), based in Copenhagen

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Overall Recommendation:

For the Panel to recommend to the UN Secretary-General to call on the UN Security Council under Chapter VII of the Charter to establish a Commission of Inquiry, which is mandated to investigate violations of international humanitarian law and human rights law in Sri Lanka by all parties during the final stages of the conflict and to identify the perpetrators of such violations so that the Council is in a position to determine appropriate measures to hold those responsible to account.

In the alternative, should the UN Security Council fail to consider this recommendation, for the Panel to recommend to the UN Secretary-General to establish a full fact-finding commission with the same mandate with a view to requesting Sri Lanka to take appropriate action. This should also be done with a view to providing the UN Security Council with the factual information that places it in a position where it can consider what steps are necessary to combat impunity for international crimes.

1. BACKGROUND TO THE CONFLICT, VIOLATIONS AND THE RULE OF LAW

The conflict between the Sri Lankan government and the Liberation Tigers of Tamil Eelam lasted around 26 years, ending in May 2009. At least 80,000 and as many as 100,000 Sri Lankans may have been killed over the course of the conflict, and about 275,000 people were internally displaced. Although accurate numbers on casualties and fatalities are not available, according to the UN, 7,000 civilians died in the period from January to May 2009 alone.¹

The violations committed during the last phase of the conflict are part of a broader pattern. Beginning with the insurgencies in Sri Lanka in 1971, and continuing through the conflict with the LTTE, the country's security apparatus has emerged as a very powerful actor. Notably, following a visit in October 2007, during which he was limited to non-LTTE-controlled areas, the UN Special Rapporteur on Torture stated "that torture was widely practised in Sri Lanka, and

¹ 'Sri Lankan Army Deaths Revealed', BBC, 22 May 2009, http://news.bbc.co.uk/2/hi/south_asia/8062922.stm.

that, in the context of counter-terrorism operations against suspected LTTE members, torture had become a routine practice.” He noted witness intimidation, corporal punishment in prison, and inadequate detention conditions.²

Even after the end of the conflict, the Prevention of Terrorism (Temporary Provisions) Act (PTA),³ which is incompatible with Sri Lanka’s human rights obligations, remains in force and violations continue to be reported.⁴ It is important to note that the security apparatus is by no means constrained by the legal limits of its statutorily conferred authority and moves beyond even these broad powers without inhibition. Accordingly, extrajudicial disappearances and killings are commonplace. Now, the targets of the security apparatus are ordinary citizens. Trade unionists, journalists, members of civil society organizations, officials and activists in opposition political parties, and even citizens engaged in simple protest are all of special concern – but all aspects of Sri Lankan life have now come under its surveillance. It is particularly keen to exert control over the electoral process, and does so by targeting the grassroots activities of opposition parties and even of members of the ruling party where internal competition arises. There has been no investigation of complaints against the security apparatus in recent years, and a culture has arisen where any calls for accountability are denounced as anti-patriotic and akin to treason, sabotage, or aiding and abetting terrorism.

The nearly three-decade long conflict witnessed a steady erosion of the rule of law that facilitated violations. The imposition of emergency laws and anti-terrorism laws severely curtailed the protective functions of the judiciary, while the law enforcement agencies were increasingly used for military purposes. The government has admitted that the law enforcement functions of the police had to be severely suppressed due to the mobilization of the police to counteract terrorist mobilizations and the threat of infiltration into the South, particularly in Colombo. Thus, the strategy relating to the police has been to utilize the police for anti-terrorism activities and to provide security for politicians against the possible attacks of the terrorist groups.

These developments resulted in a series of violations pertaining in particular to the right to liberty and security, freedom from torture and the right to life.⁵ Allegations of violations, in particular those possibly amounting to international crimes, have not met with adequate responses. A number of investigations and inquiries were set up in Sri Lanka over the years but these inquiries either lacked impartiality or Sri Lanka failed to act on recommendations made. The government appointed a Lessons Learned and Reconciliation Commission (LLRC) in July 2010. However, the LLRC lacks the mandate and the capacity to deal with the allegations of war crimes and serious violations of human rights.⁶ A legitimate inquiry is needed to break the cycle of impunity that perpetuates serious human rights violations, such as forced disappearances, and contributes to the continuing erosion of judicial power without any prospect of truth-telling or justice.

2. LEGAL CHARACTERISATION OF VIOLATIONS REPORTED TO HAVE BEEN COMMITTED IN THE LAST PHASE OF THE CONFLICT

There are credible allegations based on witness statements, documents and audio-visual materials that both parties to the armed conflict were responsible for a series of violations of international humanitarian law and human rights law amounting to war crimes. Government forces are alleged to have been responsible for the following acts:

- Shelling of civilians, hospitals and humanitarian operations⁷
- Killing of unarmed civilians⁸

² ‘Report of the Special Rapporteur on torture on his mission to Mission to Sri Lanka’, UN Doc. A/HRC/7/3/Add.6 (26 Feb 2008), in particular paras.70-87.

³ No. 48 of 1979.

⁴ ‘The State of Human Rights in Sri Lanka 2010’, Asian Human Rights Commission, 10 December 2010, <http://www.humanrights.asia/resources/hrreport/2010/AHRC-SPR-010-2010.pdf>

⁵ See ‘SRI LANKA: Repeal the Prevention of Terrorism Act (PTA) and end gross violations of rights’, Press Release, Asian Human Rights Commission, September 2009. See also Report of the Special Rapporteur, above note 2.

⁶ The LLRC will only focus on the period 2002-2009, thereby excluding the first two decades of the civil war from 1983-2002. The LLRC reportedly had a duty to report back “in six months”. If this is the case, it would be advisable to include the forthcoming report of the LLRC in the documents to be reviewed by the UN Panel.

⁷ See Report on the findings of the investigation with respect to the effective implementation of certain human rights conventions in Sri Lanka, 19 Oct. 2009, Commission of the European Communities, and War Crimes in Sri Lanka, International Crisis Group, 17 May 2010, Asia Report No. 191, <http://www.crisisgroup.org/en/regions/asia/south-asia/sri-lanka/191-war-crimes-in-sri-lanka.aspx>

- Killing of captives or combatants seeking to surrender⁹
- Enforced disappearances¹⁰
- Torture¹¹
- Denial of food and medical supplies to civilian populations¹²
- Arbitrary arrests and detention¹³
- Sexual violence.¹⁴

Rebel forces are alleged to have been responsible for the following acts:

- Killing of civilians¹⁵
- Inflicting suffering on civilians¹⁶
- Recruitment of child soldiers.¹⁷

The post-conflict phase has also been characterised by concerns over allegations that the panel should consider as inextricably linked to the conflict. More than a year after the purported end of the conflict, 8,000-11,000 detainees still languish in detention camps accused of being members of the LTTE. However, they have not been formally charged, nor have they been allowed legal representation or access to any procedure to review the legality of their detention. Allegations of mistreatment also abound,¹⁸ but the International Committee of the Red Cross has not been allowed access to the detainees.

If proven, the acts listed constitute violations of international criminal law, international humanitarian law, international human rights law and international criminal law, all of which apply during times of armed conflict.¹⁹

Crimes against humanity

Crimes against humanity are recognised as an international crime in the statutes of the ICC, the International Criminal Tribunal for former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), and in customary international law.²⁰ It encompasses particularly serious offences that are committed as part of a policy, plan or widespread practice. The acts listed above may constitute the crimes against humanity of murder (killing of captives, combatants who had given themselves up and civilians); forcible transfer of populations (moving to detention camps); imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law (detention camps); torture; and enforced disappearances if committed as part of a widespread or systematic attack against the civilian population.

⁸ See 'War crimes in Sri Lanka,' *ibid*.

⁹ 'Sri Lanka: Army Unit Linked to Executions', Human Rights Watch, 8 December 2010, <http://www.hrw.org/en/news/2010/12/08/sri-lanka-army-unit-linked-executions>

¹⁰ Report on the findings of the investigation with respect to the effective implementation of certain human rights conventions in Sri Lanka, 19 Oct. 2009, Commission of the European Communities

¹¹ *Ibid*.

¹² 'War Crimes in Sri Lanka,' above note 7.

¹³ "2009 Human Rights Report: Sri Lanka", Bureau of Democracy, Human Rights, and Labor, U.S. Department of State, 11 March 2010, <http://www.state.gov/g/drl/rls/hrrpt/2009/sca/136093.htm>

¹⁴ Tasha Manoranjan, 'Beaten but Not Broken: Tamil Women Struggle through Conflict and 'Peace' in Sri Lanka,' September 2010, <http://www.peacewomen.org>

¹⁵ 'War crimes in Sri Lanka,' above note 7.

¹⁶ *Ibid*.

¹⁷ 'Sri Lanka: More children victims of the conflict, says UNICEF', 17 February 2009, http://www.unicef.org/media/media_48044.html

¹⁸ Amnesty International, 'Unlock The Camps in Sri Lanka', AI Index: ASA 37/016/2009, http://www.amnesty.org.uk/uploads/documents/doc_19591.pdf

¹⁹ See on the applicability of human rights law during armed conflict. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, International Court of Justice, 9 July 2004, para.106 and General Comment No. 31 on Article 2 of the Covenant: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, 21 April 2004, UN Doc. CCPR/C/74/CRP.4/Rev.6, para.11.

²⁰ Article 5 of the ICTY Statute, article 3 of the ICTR Statute and article 7 of the Rome Statute of the International Criminal Court, as well as Antonio Cassese, *International Criminal Law*, Oxford University Press, 2003, pp.72 et seq.

War crimes

War crimes are recognised as an international crime in the statute of the ICC, the ICTY, ICTR, and in customary international law.²¹ In a conflict that is not of an international armed conflict, serious violations of article 3 common to the four Geneva Conventions and other serious violations are recognised to constitute war crimes. The acts listed above may constitute the war crimes of murder (committed against persons taking no active part in hostilities); cruel treatment or torture; intentionally directing attacks against the civilian population; intentionally directing attacks against hospitals.

- International humanitarian law

With respect to non-international armed conflicts, the basic treaty is the Protocol additional to the Geneva Conventions of 12 August 1949 relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), of 8 June 1977. Sri Lanka is not a party to this Protocol but is bound by common article 3 of the Geneva Conventions of 1949 and the rules of customary international law applicable to non-international armed conflict.²² Non-state actors such as the LTTE are also bound by the rules of customary international law applying to armed conflicts. The acts listed above may constitute violations of common article 3 (murder and torture) and of customary international law, including rules such as the prohibition of indiscriminate and disproportionate attacks, prohibition of attacks of specially protected objects; denial of quarter, as well as the treatment of civilians and of persons deprived of their liberty.²³

- International human rights law

During the final phase of the conflict, Sri Lanka was party to a number of international human rights treaties, including the International Covenant on Civil and Political Rights (ICCPR) and its Optional Protocol, the International Covenant on Economic, Social and Cultural Rights (ICESCR), the UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, the UN Convention on the Elimination of all Forms of Discrimination against Women and the UN Convention on the Rights of the Child.²⁴ The above listed acts may constitute violations of the right to life, the prohibition of torture, the right to liberty and security, freedom of movement as well as other rights, such as the right to health, and the rights of women and children in so far as applicable in relation to specific acts.

3. SRI LANKA'S OBLIGATION TO INVESTIGATE AND PROSECUTE VIOLATIONS COMMITTED DURING THE FINAL PHASE OF THE CONFLICT

The overall objective of effective responses to international crimes, as recognised by the UN,²⁵ is to combat impunity, which has been identified as a key contributing factor of the perpetuation of human rights violations:

...[impunity is] the impossibility, de jure or de facto, of bringing the perpetrators of violations to account – whether in criminal, civil, administrative or disciplinary proceedings – since they are not subject to any inquiry that might lead to their being accused, arrested, tried and, if found guilty, sentenced to appropriate penalties, and to making reparations to their victims.²⁶

²¹ Articles 2, 3 of the ICTY Statute, article 4 of the ICTR Statute and article 8 of the ICC Rome Statute. See also rule 156 of the ICRC rules on customary international law, ICRC, Summary of study on rules of international humanitarian law and list of rules, available at http://www.icrc.org/eng/assets/files/other/icrc_002_0860.pdf.

²² See ICRC, Summary of study on rules of international humanitarian law and list of rules, available at http://www.icrc.org/eng/assets/files/other/icrc_002_0860.pdf

²³ See on the status of these rules, *ibid*.

²⁴ It should be noted that in 2006, in the Singarasa case, Sri Lanka's Supreme Court attempted to reduce its obligations under the ICCPR. See <http://www.ohchr.org/EN/countries/AsiaRegion/Pages/LKIndex.aspx>, including relevant documentation.

²⁵ See for example Resolutions by the Security Council 1318 (7 September 2000) UN Doc S/RES/1318; 1325 (31 October 2000) UN Doc S/RES/1325 and 1820 (19 June 2008) UN Doc S/RES/1820. See also remarks by Deputy Secretary-General Asha-Rose Migiro, 'Migiro stresses need to end impunity for war crimes and human rights abuses' (UN News Centre 10 August 2008).

²⁶ Updated Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity, Report of the independent expert to update the Set of principles to combat impunity, Diane Orentlicher, UN Doc. E/CN.4/2005/102/Add.1, p.6.

A series of standards have been developed over the last decades that specify the obligations of states and the rights of victims in instances of alleged violations of human rights and breaches of international humanitarian law, including international crimes. As held by the UN Human Rights Committee, the obligation requires states “to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities [as well as anyone acting in an official capacity]”.²⁷

The landmark declaration *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, which identifies “mechanisms, modalities, procedures and methods for the implementation of existing legal obligations under international human rights law and international humanitarian law” sets out the applicable standards as follows:

The obligation to respect, ensure respect for and implement international human rights law and international humanitarian law as provided for under the respective bodies of law, includes, inter alia, the duty to: ... (b) Investigate violations effectively, promptly, thoroughly and impartially and, where appropriate, take action against those allegedly responsible in accordance with domestic and international law; (c) Provide those who claim to be victims of a human rights or humanitarian law violation with equal and effective access to justice, as described below, irrespective of who may ultimately be the bearer of responsibility for the violation; and (d) Provide effective remedies to victims, including reparation...²⁸

The duty to investigate and prosecute violations amounting to war crimes constitutes a rule of customary international law, applicable to non-international armed conflicts:

States must investigate war crimes allegedly committed by their nationals or armed forces, or on their territory, and, if appropriate, prosecute the suspects. They must also investigate other war crimes over which they have jurisdiction and, if appropriate, prosecute the suspects.²⁹

The duty to investigate allegations of gross human rights violations, serious violations of humanitarian law, and war crimes includes several discretely defined obligations. States must adopt a legislative framework that allows for the investigation and prosecution of violations of human rights amounting to international crimes. An investigation must be commenced as soon as there is credible evidence that violations have been committed. Such investigation must be capable of establishing the facts and identifying the perpetrators. It must be:

- (i) prompt, commenced without undue delay and conducted expeditiously throughout;
- (ii) impartial, carried out by a body without any institutional links with the alleged perpetrators and must be conducted without bias; and
- (iii) effective, i.e. by undertaking all necessary investigate steps in a thorough fashion, including by using internationally recognised manuals such as the Istanbul Protocol³⁰ and the Minnesota Protocol³¹ to investigate allegations of torture and extrajudicial killings respectively.

The protection of witnesses is key to an effective investigation. It has become an integral part of international investigations and trials and recognised by UN bodies and in human rights jurisprudence.³² The failure to protect witnesses also constitutes a human rights violation in its own right that contributes to preventing the prosecution of abuses. The OHCHR recently emphasized the importance of witness protection in the context of investigations:

²⁷ General Comment No. 31, above note 19, paras.8, 18.

²⁸ UN Doc. A/RES/60/147, 16 December 2005, Principle 3 (b).

²⁹ Rule 158 of the List of Customary Rules of International Humanitarian Law, see http://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule158.

³⁰ United Nations General Assembly. ‘Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Istanbul Protocol)’ GA Resolution 55/89, Annex (4 December 2000) UN Doc. A/RES/55/89.

³¹ United Nations Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions (‘Minnesota Protocol’), adopted by the Economic and Social Council, Resolution 1989/65 of 24 May 1989.

³² See in particular Report of the UN High Commissioner for Human Rights on the Right to Truth, UN Doc. A/HRC/15/33, 28 July 2010 and REDRESS, *Ending Threats and Reprisals Against Victims of Torture and Related International Crimes - A Call to Action*, December 2009.

There is a relationship between the efficient investigation and prosecution of perpetrators of gross violations of human rights and a successful witness protection programme. If a country's justice system is unable to secure convictions because of failures in the production of witness evidence, its capacity to deal effectively with past abuses as well as the confidence of its people in the justice system are compromised. Thus, the failure to provide protection to witnesses can severely affect fundamental rights, such as the right to justice and the right to the truth.³³

4. SRI LANKA'S FAILURE TO ENSURE ACCOUNTABILITY FOR SERIOUS VIOLATIONS

Sri Lanka has failed to fulfil its obligation to undertake prompt, impartial and effective investigations into allegations of serious violations amounting to international crimes despite the availability of credible evidence. During the war, the government denied journalists, humanitarian workers and independent observers access to the war-torn areas thereby thwarting efforts of independent war reporting that may have led to calls for accountability. The humanitarian agencies were ordered to evacuate their staff with short notice. Similarly, the government took measures to repress any reporting unfavourable to its image by prosecuting J S Tissainayagam; a large number of journalists were compelled to flee due to threats while several others were killed or abducted and tortured.³⁴ The Sri Lankan government denies any wrongdoing or human rights violations on the part of the government. It admits that acts which may constitute war crimes, crimes against humanity, and gross abuses of human rights have taken place on the part of the LTTE. However, it denies that the Sri Lankan forces under the command of the government committed war crimes. The only acknowledgement of ambiguity appears in the form of several statements of the leaders of the government asserting that a war with a ferocious enemy like the LTTE cannot be done without some excesses and that, in order to finish a protracted battle which has cost an enormous number of lives as well as resources, any action taken was justified. The Sri Lankan government has stated that any immediate inquiries into abuses, including those of the LTTE, would amount to reopening wounds and therefore would have negative consequences.³⁵ It has reacted negatively to all demands for inquiries, local or international, on war crimes, crimes against humanity and gross abuses of human rights. Even under international pressure, it has thus far agreed only to a commission with a limited mandate, the LLRC (see above ...). The LLRC does not have a mandate to conduct thorough inquiries into war crimes and subsequent human rights violations and has accordingly been criticised extensively by Amnesty International, the International Crisis Group, and Human Rights Watch, among other international observers and organizations.

The present refusal comes against a history of a lack of effective investigations and prosecutions for serious violations in Sri Lanka that has been documented at length elsewhere.³⁶ This has been complemented by the failure of internationalised investigations, such as the International Independent Group of Eminent Persons (IIGEP) mandated to observe the work of a Commission of Inquiry set up by the President of Sri Lanka to investigate into human rights violations, which terminated its work in early 2008.³⁷ IIGEP explained its decision as follows:

The Eminent Persons are fully aware of the overall context in which the Commission is operating, which makes its activities, however diligent, incapable of eliciting the kind of facts that would be necessary to ensure that justice is seen to be done. Underlying it all was the impunity that had led to the prior fruitless investigations that, in turn, led to the setting up of the Commission. There is a climate of threat, direct and indirect, to the lives of anyone who might identify persons responsible for human rights violations, including those who are likely to have been committed by the security forces. Civilian eye witnesses have not come forward to the Commission. Security forces' witnesses preferred to make themselves look incompetent rather than just telling what they know.

³³ Report of the Office of the High Commissioner for Human Rights: The Right to Truth, UN Doc. A/HRC/12/19, 21 August 2009, para.32.

³⁴ See in this context in particular Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue, UN Doc. A/HRC/14/23/Add.1, 1 June 2010, paras.2160-2239.

³⁵ 'Sri Lanka in Tug-of-War with UN, Relief Agencies', Asian Tribune, 26 June 2007; Lydia Polgreen, 'Justifying a Costly War in Sri Lanka', New York Times, 18 July 2009, http://www.nytimes.com/2009/07/19/world/asia/19lanka.html?_r=1&ref=mahinda_rajapaksa

³⁶ Kishali Pinto Jayawardena, *The Rule of Law in Decline: Study on the Prevalence, Determinants and Causes of Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment in Sri Lanka*, RCT, 2009.

³⁷ See <http://www.iataj.org/iipeg.pdf>.

Accordingly, it is evident that the Commission is unlikely to be in a position to pursue its mandate effectively. These inherent and fundamental impediments inevitably lead to the conclusion that there has been and continues to be a lack of political and institutional will to investigate and inquire into the cases before the Commission. The IIGEP is therefore terminating its role in the process not only because of the shortcomings in the Commission's work but primarily because the IIGEP identifies an institutional lack of support for the work of the Commission.³⁸

There are no indications that the situation underlying this assessment has fundamentally changed; indeed, the impunity lamented by IIGEP has been perpetuated by the lack of investigations following the end of the conflict and attempts to deflect international calls for such steps to be taken.³⁹ Indeed, following the exit of IIGEP, Sri Lanka has repeatedly rejected calls for independent complaints mechanisms and international monitoring. For example, in the context of Sri Lanka's Universal Periodic Review before the UN Human Rights Council, the Czech Republic recommended that Sri Lanka: "(a) adopt measures to strengthen the rule of law; prevent human rights violations, including enforced disappearances, extrajudicial executions and torture; ensure punishment of those responsible; and include, inter alia, systematic review of all detention areas; establish an independent complaint mechanism in prisons, and prompt, impartial investigation into allegations of torture as well as protection for witnesses and others alleging torture or ill-treatment against reprisals, intimidation and threats."⁴⁰ Sri Lanka did not "support" this recommendation.⁴¹ Sri Lanka also rejected recommendations to give access to international human rights monitoring mechanisms.⁴²

4. VICTIMS' RIGHT TO TRUTH AND REPARATION NECESSITATING A FULL AND IMPARTIAL INQUIRY INTO FACTS AND ACCOUNTABILITY

States have a duty to provide reparation for gross human rights violations, serious violations of humanitarian law and war crimes. The right to an effective remedy also entails a corresponding duty of states to provide anyone who alleges to have suffered a human rights violation or serious breach of international humanitarian law with effective access to justice and to provide reparation in case of breach.⁴³ The contents of the right to an effective remedy and to reparation under customary international law have been defined in the Basic Principles on the Right to a Remedy and Reparation, and include restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.⁴⁴

The right to truth is an integral part of the right to an effective remedy. This right has now become generally recognised as being relevant to all violations, in particular gross violations of human rights and serious violations of international humanitarian law.⁴⁵ As set out in the UN Principles on Impunity, the right encompasses the duty to preserve memory, the victim's right to know, guarantees to give effect to the right to know, the use of commissions of inquiry and the preservation of and access to archives bearing witness to violations.⁴⁶ Full and effective exercise of the right to the truth provides a vital safeguard against recurrence of violations.⁴⁷ It is particularly important in times of transition following a conflict as it may contribute to "restoring and maintaining peace..., facilitating reconciliation processes..., reconstructing national identities... and setting down a historical record".⁴⁸

³⁸ Ibid.

³⁹ Such as in the Draft decision on the human rights situation in Sri Lanka put forward during the 11th special session of the Human Rights Council "The human rights situation in Sri Lanka", 26 and 27 May 2009, which was not adopted as Sri Lanka rallied support for an alternative resolution, S-11/1 Assistance to Sri Lanka in the promotion and protection of human rights <http://www2.ohchr.org/english/bodies/hrcouncil/docs/11specialsession/S-11-1-Final-E.doc>, which omitted reference to violations and accountability.

⁴⁰ Report of the Working Group on the Universal Periodic Review: Sri Lanka, UN Doc. A/HRC/8/46, 5 June 2008, para.55.

⁴¹ Ibid, para.84.

⁴² Ibid.

⁴³ General Comment 31, above note 19, paras.15, 16.

⁴⁴ A/RES/60/147, 16 December 2005, Principle 3 (b).

⁴⁵ See Basic Principles on Reparation, Principle 22 (b) "Verification of the facts and full and public disclosure of the truth to the extent that such disclosure does not cause further harm or threaten the safety and interests of the victim, the victim's relatives, witnesses, or persons who have intervened to assist the victim or prevent the occurrence of further violations".

⁴⁶ See Updated Set of Principles, Principle 2-18, above note 26.

⁴⁷ Principle 2 *ibid*.

⁴⁸ See Y. Naqvi, 'The right to the truth in international law: fact or fiction?' in *ICRC Review*, Volume 88, Number 862 (June 2006), pp.245-273, at p.247.

The lack of adequate national responses constitutes a denial of the right to truth. The victims of various violations have been deprived of any opportunity to speak out their grievances. Eyewitness accounts and other evidence have not found any opportunity to be expressed, to be recorded and to be analyzed from a legal, political and social point of view. The consequence of this suppression is that the direct and indirect victims and the whole of the nation affected by all the events of this period have not had any occasion to learn authentically of what has happened. As a result, a legal, social and psychological backlog remains that affects the cognitive process of individuals and society as a whole. This is bound to hamper healing at the community level as well as at the individual and family level, thus thwarting the right to a remedy and the right of everyone to the enjoyment of the highest attainable standard of physical and mental health guaranteed in article 12 ICESCR.

The right to reparation entails identifying legislative and institutional reforms guaranteeing non-repetition, which is particularly pertinent in a country such as Sri Lanka that has witnessed repeated cycles of violence and conflict as well as a continuous erosion of the rule of law. The Basic Principles on Reparation provide guidance in this respect as they specify a duty to “[review and reform] laws contributing to or allowing gross violations of international human rights law and serious violations of international humanitarian law”.⁴⁹ Legislative reforms are to be complemented by “institutional reforms and other measures necessary to ensure respect for the rule of law, foster and sustain a culture of respect for human rights, and restore or establish public trust in government institutions.”⁵⁰ In the Sri Lankan context, this should entail the repeal of legislation facilitating violations, such as the Prevention of Terrorism Act and Emergency Regulations. It should also encompass a thorough reform of the military, law enforcement agencies and the judiciary, which are increasingly characterised by their arbitrariness, corruption and lack of protection provided. Continuation of the practice of torture, along with crimes such as forced disappearance and extrajudicial killings, has implications beyond the individual for democracy and society as a whole. Torture gravely undermines and perhaps even precludes the rule of law. When tortured or conscious of the possibility of torture with impunity, it is so disruptive—and the lack of basic security so apparent—that individuals cannot conceive of a higher authority and law.

With regard to reparation and reform, it is important to note also the extent to which the domestic system has been undermined by constitutional changes, such as the 17th and 18th Amendments to the Constitution that have virtually displaced the separation of powers principle with the absolute power principle in favour of the executive.⁵¹ Independent mechanisms, such as the National Police Commission and the National Human Rights Commission, have been severely weakened by these amendments, a development that should be reserved in order to guarantee better human rights protection. A framework for adequate investigations into alleged human rights violations also requires the adoption of witness protection legislation and its effective implementation.⁵²

A further development of concern in relation to guarantees of non-repetition that needs to be addressed is the militarisation of the North-East. Following the 2009 end to the conflict with the LTTE, the Sri Lankan government justified the militarization of the area as a precaution to prevent future armed struggles in this region. Conditions of silence have been imposed in these areas by military camps, which bring the people of the area directly under the control of the military in all aspects of life. As the memory of these events will not pass easily and for a long time, the attempt at suppression would also have to last over a long period of time. The direct consequence of this would be the prevention of a civilian rule in the north and east and keeping the people of the North and East over a long period under direct military control. It also engages in ‘colonisation’ efforts in the North and East in an attempt to change the demography of the area.⁵³ Its continued repressive policies and military presence preclude a return to the rule of law let alone reconciliation. Instead, this situation facilitates further violations and may even precipitate renewed violence.

⁴⁹ UN GA Resolution 60/147, 16 December 2006.

⁵⁰ Principle 35 of the Updated Set of Principles, above note 26.

⁵¹ See statement by Centre for Policy Alternatives at <http://www.jdslanka.org/2010/09/sri-lanka-18th-amendment-assault-on.html>

⁵² ‘The State of Human Rights in Sri Lanka 2010,’ above note 4. See also AHRC, ‘Sri Lanka: International criticism of failed criminal investigations and absence of witness protection highlights urgent need for a detailed rescue plan’, 12 March 2007.

⁵³ ‘One country, two nations’, The Economist, 25 November 2010, http://www.economist.com/node/17574969?story_id=17574969&fsrc=rss

5. THE NEED FOR AN INTERNATIONAL COMMISSION OF INQUIRY

As discussed, Sri Lanka has shown itself unwilling to investigate the violations committed during and following the conflict between the government and the LTTE. Sri Lanka is also incapable of upholding its international responsibilities because of its structural limitations. The Constitution has been amended to the point of severely reducing the roles of the legislature and especially the judiciary, with deep-seated concerns over the legacy of impunity.

These factors necessitate an authentic inquiry into all alleged international crimes and gross violations of human rights as well as serious violations of international humanitarian law. This should take the form of an international inquiry with the direct participation of the United Nations. No other effective avenues are available at the moment to address the problems mentioned above. This includes identifying the underlying root causes, which may prevent a recurrence of the civil war and the violations committed.

The UN General Assembly, the UN Secretary-General and the Office of the High Commissioner for Human Rights have repeatedly affirmed the right to truth and justice. In a number of instances, this has led to calls for, and the establishment of, Commissions of Inquiry.⁵⁴ The purpose of such Commissions is commonly twofold, namely to establish the facts and to recommend what action the relevant UN body should take based on its findings. Practice to date indicates that such Commissions, in order to be effective, should be:

mandated to inquire into all alleged serious violations (of international human rights and international humanitarian law); require state cooperation, including access to relevant locations and witnesses, and provide for witness protection; and be empowered to make recommendations as to how best to provide both accountability of the perpetrators and justice for victims of gross violations.⁵⁵

A further example is the UN Fact Finding Mission on the Gaza Conflict (UN Human Rights Council resolution (A/HRC/S-9/L.1)), which had the mandate to investigate all violations of international human rights law and international humanitarian law in a given – albeit very limited – period.⁵⁶

In light of past evidence, there are serious doubts as to whether Sri Lanka will accept an international commission of inquiry. Inquiries have been undertaken in relation to countries where the government concerned refused to cooperate, which has not prevented the bodies in question from obtaining relevant information from other sources and basing their findings on such sources.⁵⁷ However, such refusal may weaken any inquiry and there is therefore a need for a strong legal basis, such as a UN Security Council Chapter VII resolution, so as to enhance the prospect of cooperation.

The UN Security Council has set up international commissions of inquiry, such as in the Darfur case (1564 (2004)). The resolution, *inter alia*:

requests that the Secretary General rapidly establish an international commission of inquiry in order immediately to investigate reports of violations of international humanitarian law and human rights law in Darfur by all parties, ..., and to identify the perpetrators of such violations with a view to ensuring that those responsible are held to account.

Resolution 1593 (2005) followed the recommendation of the UNSC and referred the situation in Darfur to the prosecutor of the International Criminal Court for investigation. The UNSC also established two ad hoc tribunals, ICTY and ICTR, in response to the two situations that were characterised as constituting genocide and other international crimes, including crimes against humanity and war crimes.⁵⁸ In addition, the UN has also entered into agreements with states to set up

⁵⁴ See e.g. United Nations Rule of Law, Tribunals & other mechanisms, available at http://www.unrol.org/article.aspx?article_id=18.

⁵⁵ See in particular 'Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General pursuant to Security Council resolution 1564 of 18 September 2004' (Geneva 25 January 2005).

⁵⁶ UN Human Rights Council resolution A/HRC/S-9/L.1 is available at: <http://www2.ohchr.org/english/bodies/hrcouncil/specialsession/9/docs/A-HRC-S-91-L1.doc>

⁵⁷ See for example 'Report of the High-Level Mission on the situation of human rights in Darfur pursuant to Human Rights Council decision S-4/101', UN Doc. A/HRC/4/80, 7 March 2007.

⁵⁸ UNSC Res 827 (25 May 1993) UN Doc S/RES/827, Annex: 'Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law committed in the territory of the former Yugoslavia since 1991

hybrid (mixed) tribunals, such as the Special Court for Sierra Leone,⁵⁹ or to establish the International Commission Against Impunity in Guatemala.⁶⁰

The Panel may also wish to consider a recent development of note, which places emphasis on the twin objectives of accountability and reconciliation. The African Union adopted an approach that may provide a model for conflict and post-conflict situations effectively to address the nexus between justice, reconciliation and peace. The AU established the AU High-Level Panel on Darfur (AUPD) with a mandate:

to examine the situation in depth and submit recommendations to [AU] Council on how best the issues of accountability and impunity on the one hand, and reconciliation and healing, on the other, could be comprehensively addressed, including through the establishment of truth and/or reconciliation commissions, with the active involvement of the AU and its relevant institutions, and, as necessary, the support of the larger international community.⁶¹

The AUPD took a broad participatory approach and extensively consulted victims, national and international stakeholders on the issues falling within its mandate. Significantly, though it dealt with a conflict that seemingly concerns only parts of Sudan's territory, it located the conflict in wider governance problems that affect the country as a whole. This approach allowed it to take a more holistic view of the challenges and to recommend a series of measures needed to achieve the objectives sought. The AUPD recommended, *inter alia*, legislative reforms, in particular within the criminal justice system, strengthening of the judiciary (after finding that the Sudanese population has lost faith in the system), the setting up of hybrid tribunals (which would operate in addition to the International Criminal Court, which has jurisdiction on the basis of the UN Security Council referral (UN Security Resolution 1593 (2005)), the establishment of a truth and reconciliation commission, as well as reparation and social and economic development measures.

RECOMMENDATIONS

AHRC, REDRESS and RCT recommend that the Panel recommend to the UN Secretary-General:

(1) to call on the UN Security Council under Chapter VII of the Charter to establish a Commission of Inquiry. The CoI should be mandated to:

- (i) investigate violations of international humanitarian law and human rights law in Sri Lanka by all parties during the final stages of the conflict and
- (ii) identify the perpetrators of such violations with a view to determining appropriate measures to holding those responsible to account.

The CoI should be composed of persons of high moral standing and expertise, be provided with adequate resources and be given full and unhindered access to Sri Lanka as well as persons and locations within Sri Lanka. Adequate witness protection should form an explicit part of the CoI's mandate. In addition, it should have the power to compel Sri Lanka to co-operate.

(2) In the alternative, should the UN Security Council fail to consider this recommendation, to establish a full fact-finding commission with the same mandate with a view to requesting Sri Lanka to take appropriate action. This should also be done with a view to providing the UN Security Council with the factual information that places it in a position where it can consider what steps are necessary to combat impunity for international crimes.

(Report of the Secretary-General pursuant to paragraph 2 of Security Council resolution 808 (1993) Doc S/25704 of 3 May 1993) and UNSC Res 955 (8 November 1994) UN Doc S/RES/955, Annex, 'Statute of the International Tribunal for Rwanda.'

⁵⁹ Agreement between the United Nations and the Government of Sierra Leone on the Establishment of the Special Court for Sierra Leone, signed on 16 January 2002, <http://www.sc-sl.org/LinkClick.aspx?fileticket=CLk1rMQtCHg%3d&tabid=176>

⁶⁰ Agreement between the United Nations and the State of Guatemala on the Establishment of an International Commission Against Impunity in Guatemala ("CICIG"), 12 December 2006, available at http://www.un.org/Depts/dpa/CICIG_English.pdf

⁶¹ 'Darfur: The Quest for Peace, Justice and Reconciliation', Report of the African Union High-Level Panel on Darfur (AUPD), PSC/AHG/2 (CCVII) (29 October 2009).

THE RATIONALE FOR DECISIVE ACTION

Sri Lanka used to be considered a model for democracy in Asia. It was, for a long time, perceived as the one country in the region where there was a serious hope of establishing a strong democracy. However, during several critical domestic crises, the international community failed to act. Had the UN or other international actors intervened at key points, the outcome for Sri Lanka may have been very different. Instead, in 1971, during what should have been a minor insurrection, 10,000 youth were killed in Sri Lanka. Then in 1983, racial riots instigated by the government resulted in tremendous violence. From 1987-91, the JVP insurrection claimed 40,000 lives—either through death or forced disappearance—a figure accepted by state commissions. Throughout the nearly 30-year conflict between the government of Sri Lanka and the LTTE, there were multiple, credible claims of war crimes, including killings of volunteers, perpetrated by both sides. Yet in none of these cases did the international community become involved, investigate, or prosecute these crimes. The result was the gradual erosion of the rule of law system. Non-investigation into crimes affected the mentalities of the law enforcement agencies, which gradually began to ignore the obligations they had under the criminal justice system. Impunity became entrenched. The people themselves began to lose expectations about protection under the law. The judicial system was unable to resolve even the habeas corpus applications. Today there is serious collapse of the rule of law system. If the UN ignores a crisis moment for human rights issues in Sri Lanka once again and does not take decisive steps, that inaction will not only further entrench the injustices suffered by victims, it will also be catastrophic to the political, legal and social system of the country.

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