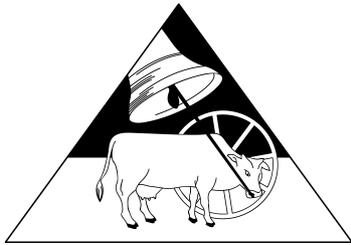


# THE POLITICS OF CRIMINAL JUSTICE REFORMS IN TIMES OF TRANSITIONAL JUSTICE

**SHENALI DE SILVA**

**THE POLITICS OF CRIMINAL JUSTICE  
REFORMS IN TIMES OF TRANSITIONAL  
JUSTICE**

JUNE 2017



LAW & SOCIETY TRUST

The Law & Society Trust (LST) is a not-for-profit organisation engaged in human rights documentation, legal research and advocacy in Sri Lanka. Our aim is to use rights-based strategies in research, documentation and advocacy in order to promote and protect human rights, enhance public accountability and respect for the rule of law.

3, Kynsey Terrace, Colombo 8, Sri Lanka

Tel: +94 11 2684845 / +94 11 2691228 / +94 11 2684853

Fax: +94 11 2686843

Web: [lawandsocietytrust.org](http://lawandsocietytrust.org)

Email: [lstadmin@sltnet.lk](mailto:lstadmin@sltnet.lk)

Facebook: [www.fb.me/lstlanka](http://www.fb.me/lstlanka)

Twitter: @lstlanka

Any responses to this report are welcome and may be communicated to us *via* email or post.

Published in June 2017

### **Acknowledgements**

This report was written by Shenali De Silva. Vijay K. Nagaraj provided comments on various drafts. The final report was edited and formatted by Nigel Nugawela.

This work is licensed under a [Creative Commons Attribution-NonCommercial-NoDerivatives 4.0 International License](https://creativecommons.org/licenses/by-nc-nd/4.0/)

## TABLE OF CONTENTS

Introduction – Relevance of Criminal Justice Reforms.....	Page 2
Part 1.1 – Recent Reforms.....	Page 4
Part 1.2 – Violence Against Women and Criminal Justice Reforms.....	Page 10
Part 1.3 – The Government’s Dangerous Trajectory.....	Page 11
Conclusion – Is this Sustainable?.....	Page 19
Part 2.1 – Magnitude of Reforms Required.....	Page 20
Part 2.2 – Recent Recommendations Related to the Reform of the Criminal Justice System.....	Page 26

## SUMMARY

This report seeks to place criminal justice reforms at the center of ongoing transitional justice debates and discussions in Sri Lanka. The country is eight years on from the end of the war, and in the early stages of its own transitional justice processes. The four mechanisms promised by the Government are either not yet operational (the Office of Missing Persons) or do not yet exist (the truth commission, the special court, and the office for reparations). While everything that is transitional justice related has received much energy and attention, much needed criminal justice reforms have received very little or arguably no attention at all.

There is a serious danger that the special court and its prosecutorial mechanism—the primary avenue for criminal accountability for past wrongs—will be conceived in isolation to the existing criminal justice system. However credible, such a mechanism, necessarily temporary and which will address a relatively small number of cases, cannot be a substitute for an entire criminal justice system. The existing criminal justice system must be contended with and it is artificial and dangerous to discuss criminal accountability and the special court without equally considering the failures of the existing criminal justice system and the many aspects of the system that warrant urgent reform.

This report highlights the need for developing a comprehensive criminal justice reform agenda that looks at the system holistically and to that end maps out the problem areas and the reforms needed. Alarming, however, the Government appears to be adopting a strategy of *ad hoc*, piecemeal and sporadic criminal justice reforms. This is evidenced by a number of reforms impacting on the criminal justice system either effected or attempted since the transitional justice commitments were made in September 2015. These are discussed in Part 1 of this report. Many of these came to fruition in almost total secrecy and/or are deeply flawed in substance. The haphazard approach to reforms signaled by what has happened to date raises concerns about the reform attempts yet to come. It also raises concerns about whether and how the problems of the criminal justice system—central to ensuring meaningful access to justice for all in the long run—will be addressed.

The extent of the problems in the existing criminal justice system have been surveyed and extensive recommendations for reform made by a variety of national and international bodies. Part 2 of this report brings together, thematically grouped, recent recommendations made by the Consultation Task Force, the Special Rapporteurs on torture and the independence of the judiciary, the UN Committees on Torture and the Elimination of Discrimination Against Women, and the Prime Minister's Task Force on Violence Against Women. These observations and recommendations highlight the nature of reforms that are necessary, both to overhaul the criminal justice system as a whole and to give meaningful effect to the transitional justice mechanisms themselves.

# THE POLITICS OF CRIMINAL JUSTICE REFORMS IN TIMES OF TRANSITIONAL JUSTICE

SHENALI DE SILVA\*

## INTRODUCTION – RELEVANCE OF CRIMINAL JUSTICE REFORMS

Since the United Nation Human Rights Council (UNHRC) Resolution of October 2015,<sup>1</sup> transitional justice has been the locus of much attention in Sri Lanka. Given the enormity of implementing transitional justice policies and mechanisms in a post-war society, a deliberate and targeted focus is both necessary and justified. However, in the flurry of all things transitional justice-related, there is a danger in what takes a back seat. Transitional justice is inextricably linked to processes around Geneva; it is a high-stakes game and acts of omission and commission by the state receive significant attention. Barring a few exceptions, the same however cannot be said of the levels of attention directed towards the existing criminal justice system, despite the fact that it is a crucial underpinning for justice—transitional or otherwise.

Justice and accountability have varying interpretations in contexts of political transition. The criminal justice aspect focuses on modalities to establish criminal accountability for past wrongs. In Sri Lanka's transitional justice architecture, it is the special court, which, if created, will deal with criminal accountability for egregious harms. Generally, in discussions around transitional justice in Sri Lanka, the special court is referred to as a separate entity; a discrete institution that is meant to deal with a specific set of crimes, especially those recognised as international crimes. The character of this separate entity to be created is proving to be a sticking point in the current processes; some vehemently call for a court with international involvement, including foreign judges, and some equally vehemently call for

---

\* Shenali De Silva is admitted to practice in New Zealand, and holds an LLB and BA from New Zealand and an LLM from The Netherlands. She is now based in Colombo.

<sup>1</sup> Human Rights Council Resolution, Promoting reconciliation, accountability, and human rights in Sri Lanka, 14 October 2015, UN Doc. A/HRC/RES/30/1 (adopted 1 October 2015). In the resolution, the Government committed to establishing “a commission for truth, justice, reconciliation and non-recurrence, an office of missing persons and an office for reparations” (para 4) and a “judicial mechanism with a special counsel to investigate allegations of violations and abuses of human rights and violations of international humanitarian law, as applicable; affirms that a credible justice process should include independent judicial and prosecutorial institutions led by individuals known for their integrity and impartiality; and also affirms in this regard the importance of participation in a Sri Lankan judicial mechanism, including the special counsel's office, of Commonwealth and other foreign judges, defence lawyers and authorized prosecutors and investigators” (para 6).

the exclusion of international involvement and to create a purely domestic mechanism. It is essential to bear in mind a key reason for seeking an entirely separate entity—the sheer and complete lack of credibility in the existing domestic criminal system to mete justice for conflict-related crimes. However, it is also essential to bear in mind that the lack of credibility in the domestic criminal justice system extends far beyond its ability to deal with conflict-related crimes—it is about the entire system, as it currently exists. It would be artificial, and unworkable, to focus attention on or reconstruct only one part of the system (a special court) to have credibility, leaving the rest broken as it is.

Special judicial mechanisms to try egregious cases of human rights violations in relation to armed conflicts or civil wars have a long history. This significant experience has also underlined, firstly, that such mechanisms generally tend to deal with a limited number of cases and perpetrators. Secondly, that there remain significant challenges with respect to the ability of such mechanisms to actually result in a positive transformation of existing domestic criminal justice systems. Crimes and harms related to a war or conflict are best understood as spanning a continuum rather than falling into binaries of everyday/routine/banal on the one hand and the egregious/monstrous/exceptional on the other. Hence redress, including by way of criminal liability, must necessarily span this spectrum. This implies there are ethical, conceptual, and practical reasons, which are further explored briefly below, for the ‘special’ end of the justice continuum to be considered in the context of the existing ordinary criminal justice system.

**It would be artificial, and unworkable, to focus attention on or reconstruct only one part of the system (a special court) to have credibility, leaving the rest broken as it is.**

Institutional reform, especially of those institutional and normative features of a justice system that enabled or failed to stop or enforce accountability for human rights atrocities, is central to transitional justice. In order to give meaningful effect to a transition in which justice and accountability is the new norm, rather injustice and impunity, the criminal justice system must invariably be reformed. Measures like a special court are premised on the understanding or reality that the existing justice system lacks the mandate, capacity, and/or will to deal with certain kinds of harms and crimes. But, as pointed out above, and quite explicit in the very designation of the mechanism as ‘special’, it cannot substitute for the existing criminal justice system.

Inherent in the failure to address problems in the existing criminal justice system is the danger of a mechanism like the special court being elevated as the exclusive answer to or the only option available for criminal accountability, leading to untenable expectations. Moreover, the result of an unreformed criminal justice system will be that victim-survivors whose cases do not make it to the special court will be left with no redress. In any case, by definition, measures like the special court are transitory and not long term, which will see a need for the existing justice system to be engaged, and hence its shortcomings must be seriously addressed. If not, problems inherent in the existing justice system are also susceptible to be eventually replicated in the workings of the transitional justice institutions as well, at some level.

It is against this backdrop that this paper considers the criminal justice reform agenda in the context of Sri Lanka’s transitional justice processes.

## Structure of report

Part 1.1 of this report presents an overview of recent reforms and reform attempts by the Government. Part 1.2 contains an overview of a reform process relating to violence against women. Part 1.3 presents a critique of the reforms and reform attempts. Part 2.1 discusses the magnitude of reforms called for in the current environment. Part 2.2 presents recent recommendations for reform of the criminal justice system identified by a variety of bodies.

## PART 1.1 – RECENT REFORMS

Since the transitional justice agenda was formally put on the table in September 2015, a number of reforms have either been attempted or carried through relating to criminal justice reforms and implementing transitional justice commitments.

### Hate speech – December 2015

In December 2015, the Government tabled two Bills that proposed to criminalise hate speech,<sup>3</sup> despite the fact that the prohibition already existed under the International Covenant on Civil and Political Rights Act 2007 (section 3) and the existing law was fully compliant with international standards. The problems related to enforcement of the offence.<sup>4</sup> The proposed new offence was also virtually identical to section 2(1)(h) of the Prevention of Terrorism Act 1979 (PTA), a broadly worded provision that tended towards abusive applications resulting in the chilling of free speech, including being used by the previous Government to target its critics.<sup>5</sup> For example, the Tamil journalist, J.S. Tissainayagam, who was sentenced to 20 years of rigorous imprisonment for accusing the previous Government of committing war crimes.<sup>6</sup> There was opposition to the Bills by the public,<sup>7</sup> the Human Rights Commission of Sri Lanka (HRCSL),<sup>8</sup> and the main opposition party.<sup>9</sup> Two petitions,<sup>10</sup> challenging the constitutionality of the Bills, were also filed in the Supreme Court.<sup>11</sup> The Bills were subsequently withdrawn.

---

<sup>3</sup> Penal Code (Amendment) Bill, 9 November 2015 – inserting a new s 291C into the Penal Code. Code of Criminal Procedure (Amendment) Bill, 9 November 2015 – amending s 135 and the First Schedule.

<sup>4</sup> Gehan Gunatilleke, “Hate Speech in Sri Lanka: How a New Ban Could Perpetuate Impunity”, 11 January 2016, <http://ohrh.law.ox.ac.uk/hate-speech-in-sri-lanka-how-a-new-ban-could-perpetuate-impunity/>

<sup>5</sup> Human Rights Commission, “Proposed Amendment to the Penal Code on Hate Speech”, 15 December 2015, <http://hrctl.lk/english/wp-content/uploads/2015/12/Proposed-amendment-to-the-Penal-code-on-Hate-Speech.pdf>

<sup>6</sup> Gehan Gunatilleke, “Hate Speech in Sri Lanka: How a New Ban Could Perpetuate Impunity”, 11 January 2016, <http://ohrh.law.ox.ac.uk/hate-speech-in-sri-lanka-how-a-new-ban-could-perpetuate-impunity/>

<sup>7</sup> Colombo Telegraph, “Civil Society Urges Govt To Withdraw Bills Criminalizing Hate Speech”, 15 December 2015, <https://www.colombotelegraph.com/index.php/civil-society-urges-govt-to-withdraw-bills-criminalizing-hate-speech/>

<sup>8</sup> Human Rights Commission statement, Proposed Amendment to the Penal Code on Hate Speech, 15 December 2015, <http://hrctl.lk/english/wp-content/uploads/2015/12/Proposed-amendment-to-the-Penal-code-on-Hate-Speech.pdf>

<sup>9</sup> Colombo Telegraph, “TNA Calls Govt. To Withdraw Penal Code Amendment Bill Regarding Hate Speech”, 15 December 2015, <https://www.colombotelegraph.com/index.php/tna-calls-govt-to-withdraw-penal-code-amendment-bill-regarding-hate-speech/>

<sup>10</sup> Dharisha Bastians, “Two petitions in SC against Govt amendments to Penal Code on hate speech”, Daily FT, 16 December 2016, <http://www.ft.lk/article/509053/Two-petitions-in-SC-against-Govt-amendments-to-Penal-Code-on-hate-speech>

<sup>11</sup> Gehan Gunatilleke, “Hate Speech in Sri Lanka: How a New Ban Could Perpetuate Impunity”, 11 January 2016, <http://ohrh.law.ox.ac.uk/hate-speech-in-sri-lanka-how-a-new-ban-could-perpetuate-impunity/>

## Office on Missing Persons (OMP) – August 2016

**It is unclear why the OMP was so rushed and was not able to be informed by the extensive information contained in the CTF's Interim Report or even the CTF's Final Report.**

The Office on Missing Persons (Establishment, Administration, and Discharge of Functions) Bill was gazetted in May 2016 and the OMP Act was enacted in August 2016. Creating the OMP was so expedited that it ran contrary to the process that the Government itself had created: tasking the Consultation Task

Force (CTF) to conduct nation-wide consultations on people's views on and suggestions for the design of the transitional justice mechanisms, of which the OMP was one. Prior to the CTF properly conducting consultations on the OMP, the OMP Act became law. The passage of the OMP Bill was so rushed that the CTF issued a summary of submissions it had received to date as well as an Interim Report.<sup>12</sup> Despite the CTF's Interim Report, the CTF's Final Report reiterated that *"...none of the amendments to the Bill adopted in the Act were reflective of recommendations from public consultations"*.<sup>13</sup> Given that, as at the time of writing, the OMP is still not operational, it is unclear why the OMP was so rushed and was not able to be informed by the extensive information contained in the CTF's Interim Report or even the CTF's Final Report.

## Certificates of Absence – September 2016

A law creating the certificates of absence scheme was enacted in September 2016, amending the Registration of Deaths (Temporary Provisions) Act 2010. The aim of the certificates is to afford legal recognition to the 'absent' status of missing or disappeared persons to facilitate families obtaining administrative relief without having to obtain death certificates.

The CTF noted that the only suggestion from public consultations incorporated in the Act was to make provision to cancel a certificate of death and opt for a certificate of absence. None of the other recommendations detailed in the Interim Report were incorporated into the Act.<sup>14</sup> The CTF report recommended that the Act be amended to ensure the word for 'absence' properly reflects the nature of a disappearance and absence rather than death in Tamil and Sinhala,<sup>15</sup> and that the validity period of a certificate be extended from two to ten years, to avoid burdening families having to renew the certificate every two years given that the OMP will take time to verify the status of a missing or disappeared person.<sup>16</sup> The CTF report also noted the lack of public awareness and information about certificates of absence, resulting in some affected communities viewing it with suspicion and fearing the consequences of accepting a certificate.<sup>17</sup>

---

<sup>12</sup> Summary of Submissions Received on the Disappeared and the Office of Missing persons (9 May 2016) and "The Office on Missing Persons Bill and Issues concerning the Missing, the Disappeared and the Surrendered (referred to as the Interim Report) – SCRM press release, [http://media.wix.com/ugd/bd81c0\\_3583553d441741deb4bc548c37b5e9e5.pdf](http://media.wix.com/ugd/bd81c0_3583553d441741deb4bc548c37b5e9e5.pdf)

<sup>13</sup> CTF report, p 178, para 6.

<sup>14</sup> CTF report, p 223, para 115.

<sup>15</sup> CTF report, p 439, para 3.11.

<sup>16</sup> CTF report, p 439, para 3.12.

<sup>17</sup> CTF report, pp 224-225.

## Amendment to Criminal Procedure Code – August 2016

This extremely problematic amendment to the Criminal Procedure Code suddenly appeared in the public domain when it was gazetted in August 2016. The amendment proposed to deprive persons arrested and detained by the Police from accessing a lawyer until their statement was recorded.<sup>18</sup> It also provided that where persons were unable to retain and consult a lawyer at their own expense, the Legal Aid Commission would provide legal counsel where it is in a position to do so.<sup>19</sup> The implications of the proposed amendment were far-reaching and constituted a grave curtailment of fundamental fair trial rights, enshrined in the Constitution<sup>20</sup> and under international law.<sup>21</sup> Depriving access to counsel between arrest and the recording of a statement would leave a suspect without the legal protections afforded by due process, including the right against self-incrimination. It increases the risk of torture and mistreatment being used to elicit a confession or other coerced statement, a practice that is undeniably prevalent in Sri Lanka. There was outrage and denunciation at the proposed amendment, including by the HRCSL,<sup>22</sup> the Bar Association,<sup>23</sup> and civil society.<sup>24</sup> It is understood that the proposed amendment has now been put on hold.<sup>25</sup>

## Counter-terrorism Framework – October 2016 and April 2017

In September 2015, the Government committed to review and repeal the PTA and replace it with anti-terrorism legislation in accordance with contemporary international best practices.<sup>26</sup> Over a year passed with a complete absence of information from the Government about the intended review of the PTA and any potential new legislation. Then, suddenly in October 2016, a document titled “Policy and legal framework of the proposed Counter Terrorism Act of Sri Lanka”<sup>27</sup> appeared in the public domain. The document was considered a leaked version of the proposed replacement to the PTA, and surrounding

---

<sup>18</sup> Code of Criminal Procedure (Amendment) Bill, 15 August 2016, cl 2 [s 37A(1)].

<sup>19</sup> Code of Criminal Procedure (Amendment) Bill, 15 August 2016, cl 2 [s 37A(2)].

<sup>20</sup> Constitution, art 12(1) – All persons are equal before the law and are entitled to the equal protection of the law and art 13(3) – Any person charged with an offence shall be entitled to be heard in person or by an attorney-at-law at a fair trial by a competent court.

<sup>21</sup> ICCPR, art 14.

<sup>22</sup> Human Rights Commission, “Proposed amendment to the Code of Criminal Procedure Act depriving suspects of access to lawyers until their statements are recorded”, 21 September 2016, <http://hrcls.lk/english/wp-content/uploads/2016/09/Letter-to-PM-on-21.09.2016.pdf>

<sup>23</sup> The Island, “BASL too opposes proposed amendment to criminal procedure code”, 28 September 2016, [http://www.island.lk/index.php?page\\_cat=article-details&page=article-details&code\\_title=152862](http://www.island.lk/index.php?page_cat=article-details&page=article-details&code_title=152862); Anurangi Singh, “CPC amendments shelved”, Sunday Observer, 16 October 2016, <http://www.sundayobserver.lk/2016/10/16/depth/cpc-amendments-shelved>

<sup>24</sup> Law and Society Trust, “LST Statement Protesting the Proposed Amendment to the Criminal Procedure Code”, 11 October 2016, [http://lawandsocietytrust.org/content\\_images/publications/documents/english-20161012112639.pdf](http://lawandsocietytrust.org/content_images/publications/documents/english-20161012112639.pdf); Centre for Policy Alternatives, “CPA urges Government to desist from proceeding with the amendment to the Criminal Procedure Code”, 5 October 2016, <http://www.cpalanka.org/wp-content/uploads/2016/10/Final-CPA-statement-CCP.pdf>

<sup>25</sup> Sunday Times, “Wiser counsel prevails: Criminal Procedure Code amendment put on hold”, 9 October 2016, <http://www.sundaytimes.lk/161009/news/wiser-counsel-prevails-criminal-procedure-code-amendment-put-on-hold-211917.html>; Sunday Observer, “CPC amendments shelved”, 16 October 2016, <http://www.sundayobserver.lk/2016/10/16/depth/cpc-amendments-shelved>

<sup>26</sup> Statement by Hon. Mangala Samaraweera, Minister of Foreign Affairs, Human Rights Council, 14 September 2015; Human Rights Council Resolution, Promoting reconciliation, accountability, and human rights in Sri Lanka, 14 October 2015, UN Doc. A/HRC/RES/30/1 (adopted 1 October 2015), para 12.

<sup>27</sup> Policy and Legal Framework of the Proposed Counter Terrorism Act of Sri Lanka, <http://www.sundaytimes.lk/161016/Cabinet%20Version%20-%20CT%20Polyc%20and%20Bill.pdf>

information suggested that it was the Government's proposed replacement to the PTA.<sup>28</sup> However, to date, there has been no official Government acknowledgement nor denial of the document, leaving its status unclear. The counter-terror framework, a 58-page document, alarmingly appeared to exacerbate and amplify the existing egregious situations created by the PTA, including some eight pages of offences and the permanent expansion of law enforcement powers to the armed forces and coastguard. Similar to the proposed amendment to the Criminal Procedure Code, there was outrage and denunciation of this apparent proposed law.<sup>29</sup> It is understood that the version approved by Cabinet in October has been amended.<sup>30</sup> On 10 January 2017, Cabinet agreed to “...forward the amended policy and legal framework for introduction of a new counter terrorism law to the observations of the Sectoral Oversight Committee on National Security...” and draft suitable legislation.<sup>31</sup> On 25 April 2017, Cabinet approved the framework and agreed for legislation to be drafted.<sup>32</sup>

The latest version of the counter-terror framework, which again was not officially released, shows no signs of taking heed of the extensive concerns raised. In fact, it is arguably worse than its previous iterations, which in and of itself reveals a particular state of mind in disregarding the concerns raised and masking content under the guise of supposed improvements. A particular example is the offence of espionage, which was in the original draft that was leaked but was subsequently removed following concerns raised. However, in the latest version, various espionage-related offences are by content included in the framework, but without using the word ‘espionage’.<sup>33</sup>

**The latest version of the counter-terror framework is arguably worse than its previous iterations—disregarding concerns raised and masking content as improvements.**

<sup>28</sup> It was reported that the Cabinet of Ministers had decided “to forward the policy and legal framework drafted by the said committee and presented by Hon Prime Minister Ranil Wickremesinghe, to the Sectoral Oversight Committee on National Security” – Cabinet Decisions, “Policy and legal framework for introduction of new counter terrorism law (Document No – 09)”, item 1, 11 October 2016, <http://www.news.lk/cabinet-decisions/item/14672-decisions-taken-by-the-cabinet-of-ministers-at-its-meeting-held-on-11-10-2016>. It was also reported that Opposition MP, M A Sumanthiran, stated that a draft counter-terror law was before the Parliamentary Oversight Committee – NewsIn.Asia, “Tamil National Alliance confident of modifying unacceptable new anti-terror draft law in parliament”, 16 October 2016, <https://newsin.asia/tamil-national-alliance-confident-modifying-unacceptable-new-anti-terror-draft-law-parliament/>

<sup>29</sup> Law and Society Trust, “LST Commentary on the Proposed Counter Terrorism Act”, November 2016, <https://drive.google.com/drive/folders/0B1uwgOzn6wz0UHdBVk1Hc0M1S0k>; Letter to the President in opposition to the proposed counter-terror law, 11 November 2017, <https://drive.google.com/file/d/0BzazV2px-2H4U2IKcDhuVGFaQIU/view>

<sup>30</sup> Rathindra Kuruwita, “Accent on securing national security”, Ceylon Today, 12 January 2017, <http://www.ceylontoday.lk/print20170101CT20170331.php?id=12931>

<sup>31</sup> Cabinet decisions, “Policy and Legal framework relating to the proposed counter terrorism Act of Sri Lanka (Document No – 56)”, item 26, 10 January 2017, <http://www.news.lk/cabinet-decisions/item/15539-decisions-taken-by-the-cabinet-of-ministers-at-its-meeting-held-on-10-01-2017>

<sup>32</sup> Cabinet decisions, “Policy and Legal Framework for proposed act on prevention of terrorism (Document No – 52)”, item 18, 25 April 2017, <https://www.news.lk/cabinet-decisions/item/16570-decisions-taken-by-the-cabinet-of-ministers-at-its-meeting-held-on-25-04-2017>

<sup>33</sup> Kishali Pinto Jayawardena, “Skulduggery, secrecy, and the counter-terror draft act”, Sunday Times, 30 April 2017, <http://www.sundaytimes.lk/170430/columns/skulduggery-secrecy-and-the-counter-terror-draft-act-238848.html>; Namini Wijedasa, “New anti-terrorism law undermines RTI”, Sunday Times, 30 April 2017, <http://www.sundaytimes.lk/170430/news/new-anti-terrorism-law-undermines-rti-238898.html>; Policy and Legal Framework relating to the Proposed Counter Terrorism Act of Sri Lanka (PMO/06/03/CM/10/2017), Revised version of 23 April 2017, [http://www.sundaytimes.lk/170430/Policy\\_Legal\\_Framework.pdf](http://www.sundaytimes.lk/170430/Policy_Legal_Framework.pdf)

Similarly, the vague term of ‘unity’ has been reintroduced in relation to the definition of terrorism and related offences: “...when the purpose of such conduct ... [is] to cause harm to the unity, territorial integrity, or sovereignty of Sri Lanka or of any other sovereign nation”.<sup>34</sup>

The access to counsel provisions in the latest version are linked to the Code of Criminal Procedure and Code of Criminal Procedure (Special Provisions), which are themselves under revision (an amendment to the latter, which is of serious concern, has been gazetted and is addressed below). Of particular concern is the limitation on counsel providing advice and being present during an interview and recording of a statement. The framework states that counsel’s right to provide advice to a suspect in police custody and to be present at an interview and at the recording of a statement is allowed *if* an interview and recording of a statement is carried out by a Superintendent of Police *and if* the statement is to be subsequently used as evidence by the prosecution at future judicial proceedings against the suspect.<sup>35</sup> This not only doubly qualifies a suspect’s access to counsel but also raises the threshold extremely high. Requiring the presence of a Superintendent of Police during any interview and recording of statement as a precondition to access to counsel makes it an impractical exercise—especially since, as high ranking officers, Superintendents of Police are far smaller in number. Further, requiring that the police, at that point in an investigation, states that the evidence is to be used in a future prosecution is extremely problematic—the police have no jurisdiction over decisions to prosecute, have no way of accurately stating that a prosecution will or will not ensue as result of a statement, and cannot make representations that are in the realm of the Attorney-General’s Department (whether a piece of evidence will be used in a prosecution or not). On this construction, the easiest way to prevent access to counsel would be to simply say that a statement is either not intended to be used in a future judicial proceeding or that police are unsure if it will be used. With a simple response in the negative (or of ‘unsure’), a suspect is prevented from gaining legal advice and having counsel present during an interview and at the recording of a statement.

### **Enforced Disappearance Convention – February 2017**

In February 2017, the Government gazetted a Bill to give effect to the Enforced Disappearance Convention<sup>36</sup> and criminalise enforced disappearances.<sup>37</sup> This is 17 months after it first committed to doing so “*without delay*”<sup>38</sup> and after disappearances being a documented, systematic, widespread and deliberate practice used since the 1970s, particularly by successive governments.<sup>39</sup> If enacted, and enforced disappearance becomes a criminal offence in Sri Lanka, this law reform will be highly significant. However, the Bill contains a number of omissions, including an absolute protection against

<sup>34</sup> Policy and Legal Framework relating to the Proposed Counter Terrorism Act of Sri Lanka (PMO/06/03/CM/10/2017), Revised version of 23 April 2017, Part III Offences, (A) Offence of ‘Terrorism’, (a), page 6.

<sup>35</sup> Policy and Legal Framework relating to the Proposed Counter Terrorism Act of Sri Lanka (PMO/06/03/CM/10/2017), Revised version of 23 April 2017, Part IV Powers of Arrest, Custody, Detention, and Investigation, (xlviii), page 30.

<sup>36</sup> International Convention for the Protection of All Persons from Enforced Disappearance, adopted 20 December 2006, UN Doc. A/61/448; 2716 UNTS 3 (entered into force 23 December 2010) (“Enforced Disappearance Convention”).

<sup>37</sup> This is 17 months after first agreeing to do so (September 2015), signing the Convention (December 2015), and ratifying the Convention (May 2016).

<sup>38</sup> Statement by Hon Mangala Samaraweera at the 30<sup>th</sup> session of the Human Rights Council, Geneva, 14 September 2015. These commitments were further confirmed through the Human Rights Council resolution, co-sponsored by Sri Lanka and adopted on 1 October 2015. Human Rights Council Resolution, Promoting reconciliation, accountability, and human rights in Sri Lanka, 14 October 2015, UN Doc. A/HRC/RES/30/1 (adopted 1 October 2015).

<sup>39</sup> OISL report, para 401.

being the subject of an enforced disappearance,<sup>40</sup> that enforced disappearance can never be justified even through exceptional circumstances, such as war or internal political instability,<sup>41</sup> explicit recognition that enforced disappearance is a continuing crime and the consequential effect on temporal jurisdiction,<sup>42</sup> and the offence of enforced disappearance as a crime against humanity,<sup>43</sup> which is a clear offence under international criminal law.<sup>44</sup>

**The Bill's absence of enforced disappearance as a crime against humanity relegates enforced disappearance in Sri Lanka to the level of an ordinary crime only.**

Also of concern is the inclusion of what appears to be a justification clause in a crucial aspect of the construction of the crime—the refusal to acknowledge the deprivation of liberty or the concealment of the fate of the person.<sup>45</sup> The Bill includes the circumstances in the previous sentence (refusal or concealment). But it also includes a third alternative: fails or refuses to

disclose or is unable *without valid excuse* to disclose the subsequent or present whereabouts of such other person.<sup>46</sup> The intention behind this third alternative is unclear. It raises serious concerns, particularly in light of the Bill's silence on the fact that enforced disappearance is not a justifiable offence: “No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification for enforced disappearance”.<sup>47</sup>

The absence of enforced disappearance as a crime against humanity and as an autonomous offence relegates enforced disappearance in Sri Lanka to the level of an ordinary crime. This is significant because the legal elevation that attaches to crimes against humanity, including the inapplicability of statutes of limitations and amnesty clauses, will be missing. Unless the Bill is amended to include a ‘crimes against humanity clause’, the only remaining available avenue, for the prosecution of enforced disappearance as a crime against humanity, is if it is within the jurisdiction of the special court statute.<sup>48</sup>

### **Amendment to Special Provisions Criminal Procedure Code – March 2017**

In March 2017, another Bill was gazetted proposing amendments relating to access to counsel. This time the amendment related to the Code of Criminal Procedure (Special Provisions) Act 2013,<sup>49</sup> rather than the primary Code of Criminal Procedure Act 1979 (as did last year's proposed amendment). This proposed amendment describes the circumstances in which a lawyer representing a person in police

<sup>40</sup> Enforced Disappearance Convention, art 1(1).

<sup>41</sup> Enforced Disappearance Convention, art 1(2).

<sup>42</sup> Enforced Disappearance Convention, arts 8(1)(b) and 24(6).

<sup>43</sup> Enforced Disappearance Convention, art 5.

<sup>44</sup> For example, Rome Statute, art 7(1)(i).

<sup>45</sup> Enforced Disappearance Convention, art 2.

<sup>46</sup> Enforced Disappearance Bill, 9 February 2017, cls 3(1)(b)(iii) and 3(2)(b)(iii).

<sup>47</sup> Enforced Disappearance Convention, art 1(2).

<sup>48</sup> Unless, of course, Sri Lanka becomes party to the International Criminal Court and accedes to the Rome Statute, which would require article 7 of the Rome Statute (including enforced disappearance as a crime against humanity) to be incorporated into domestic law.

<sup>49</sup> Code of Criminal Procedure (Special Provisions) (Amendment) Bill, 6 March 2017, [http://www.documents.gov.lk/files/bill/2017/3/165-2017\\_E.pdf](http://www.documents.gov.lk/files/bill/2017/3/165-2017_E.pdf)

make representations.<sup>50</sup> Of concern is that the proposed amendment qualifies the lawyer's access and imports significant discretion: the lawyer's right to access the police station and make representations "...shall not affect the investigations that may be conducted in respect of the person being represented..."<sup>51</sup> and the lawyer shall have access to the person in custody if requested "...unless such access is prejudicial to the investigation being conducted".<sup>52</sup> The amendment does not describe the circumstances that would amount to 'affecting investigations' and 'prejudicial', which leaves it open to arbitrary interpretation and inconsistent application. Further, and fundamentally, the right of a suspect to access legal counsel should not be restricted, particularly by police officers. It also raises concerns as to the intention of attempting this amendment through the Special Provisions Criminal Procedure Code, rather than the main Criminal Procedure Code.

## **PART 1.2 – VIOLENCE AGAINST WOMEN AND CRIMINAL JUSTICE REFORMS**

In 2014, the (then) Leader of the Opposition in Parliament set up a 'Commission on the Prevention of Violence against Women and the Girl Child' that included former policy makers, lawyers, researchers, and women's rights activists. The Commission engaged extensively with women's rights organisations and other experts. Its final report not only contained several wide-ranging recommendations but also attempted to bring together empirical data and crucially also contains important analyses of some of the major problems with respect to the criminal justice system *vis-à-vis* justice for violence against women and girls.

Following the change of political guard in 2015, the new Prime Minister reconvened the members of the Commission as the 'Task Force On Prevention Of Violence Against Women And The Girl Child'. In early 2016, the Task Force submitted an Action Plan that included a detailed mapping of the measures to be taken and actors responsible for each measure. While the recommendations of the Task Force itself are outlined (in summary) in Part 2 of the document, what is important to stress here is that this approach offers some insights into how criminal justice reform maybe steered.

Central to the approach of the Commission and the Task Force was reaching out to experts within and outside the State, engaging actively with a range of researchers and social activists as well as building on detailed assessments of lived realities and empirical data. It also underlines the value of a whole-of-system approach rather than piece-meal and disconnected 'fixes' that are not working towards an overall coherent vision.

Following on from the Action Plan, an 'Expert Committee On Recommended Amendments To The Prevention Of Domestic Violence Act (PDVA) Of 2005 Of Sri Lanka' was convened in July 2016. This was done under the aegis of the National Women's Committee, which is a subsidiary body under the Ministry of Women and Child Affairs. The Committee's objective is to review the situation in respect of the implementation of the PDVA and propose recommendations to strengthen this legislation, including through lessons from other jurisdictions. The work of the Committee is ongoing and the framework adopted focuses on victim centeredness, principles of due diligence in relation to state obligation, and, monitoring and provision of supportive services to victims of domestic violence.

---

<sup>50</sup> Code of Criminal Procedure (Special Provisions) (Amendment) Bill, cl 6A(1).

<sup>51</sup> Code of Criminal Procedure (Special Provisions) (Amendment) Bill, cl 6A(2).

<sup>52</sup> Code of Criminal Procedure (Special Provisions) (Amendment) Bill, cl 6A(6).

At the same time, there are also recommendations for criminal justice reforms with respect to violence against women and girls in:

- The ‘National Action Plan Policy Framework and National Plan of Action to address Sexual and Gender-based Violence in Sri Lanka 2016-2020’ (Ministry of Women and Child Affairs).
- The National Human Rights Action Plan (Ministry of Foreign Affairs).
- The report of the Consultation Task Force on Reconciliation Mechanisms—in the context of transitional justice (Secretariat for Coordinating Reconciliation Mechanisms).

It is not clear how or who is responsible for ensuring integration and implementation of the recommendations made by various bodies and processes. So in this instance it appears to be a case of multiple and some overlapping reform agendas anchored in different parts of the Government. However, the Action Plan of the Prime Minister’s Task Force does provide a certain degree of convergence, though it is not clear that there is a time-bound schedule and nor is it clear which body is currently owning the Action Plan and driving its implementation.

### **PART 1.3 – THE GOVERNMENT’S DANGEROUS TRAJECTORY**

The recent reforms highlighted above are illustrative of the haphazard manner in which the Government is approaching reforms and the dangers inherent in this approach.

#### **Secrecy is the antithesis to transparency**

A deeply problematic feature of the Government’s current approach to law reform is the shroud of secrecy that exists, with only select people being privy to precursor information, and then suddenly a Bill or a proposal appears in the public domain. This is abundantly obvious even when simply looking at the manner in which the Government has addressed the above law reforms, particularly with regard to the OMP.

In the seven months between committing to establish the OMP (September 2015) and April 2016, there was no visible movement on the OMP and no information made public by the Government. Then, suddenly in May 2016, there was a flurry of activity culminating in draft legislation. The chronology was as follows: **1 May 2016** – The initial deadline for submissions to the CTF. **6 May 2016** – A summary of submissions received to date was apparently presented and later handed over by CTF to the Government and the Government’s Working Group. **9 May 2016** – A meeting was hastily convened at the Ministry of Foreign Affairs (MFA) for a select group of civil society, with two days’ notice. Given the two-day notice period, many who worked directly with families of the missing and disappeared outside of Colombo could not attend. At the meeting, an outline of the OMP was shared by a member of the Government’s Working Group. Responses to the outline were requested within two weeks. However, the Government refused to share the presentation given at the meeting. Also at this meeting, the Government agreed to hold another meeting for families of the missing and disappeared and broader civil society on 20 May 2016. Civil society present at the meeting agreed to bring together families for the subsequent meeting. **13 May 2016** – On the instruction of the MFA, a 2-page leaflet was emailed to a few members of civil society organisations for wider dissemination.<sup>53</sup> According to those who attended the meeting on 9 May, the leaflet did not entirely reflect the substance proposed at the meeting.<sup>54</sup> Prior

---

<sup>53</sup> Document titled “Proposal for the Office for Missing Persons (OMP)”, released 13 May 2016.

<sup>54</sup> Letter to Minister of Foreign Affairs, “OMP – follow-up to submission dated 1 May 2016, meeting at Foreign Ministry on 9 May 2016, and leaflet of 13 May 2016”, 16 May 2016, <https://www.scribd.com/doc/312730188/Memorandum-to-the-Foreign-Minister-THE-OFFICE-OF-MISSING-PERSONS>

to the gazetting of the OMP Bill, this leaflet was the only written document made available by the Government, despite being asked by many to share information. **20 May 2016** – The second meeting at the MFA took place.<sup>55</sup> A member of the Working Group re-presented the presentation on the OMP. The Secretary-General of the Secretariat for Co-Ordinating Reconciliation Mechanisms (SCRM) stated that the Government had appointed a technical, not consultative, Working Group of professionals and experts to advise the Government and help formulate the mechanisms. **24 May 2016** – Upon a Cabinet Memorandum presented by Prime Minister, Ranil Wickremesinghe, titled “The Establishment of the Office of Missing Persons”, Cabinet approved the creation of the OMP.<sup>56</sup> **27 May 2016** – The OMP Bill was gazetted.<sup>57</sup> **11 August 2016** – The OMP Act was enacted by Parliament<sup>58</sup> and certified on 23 August 2016.<sup>59</sup>

This chronology raises serious concerns about the secrecy of the process. The meeting on the 9 May was the first instance of any information being made public about the Government’s proposal on the OMP. There was a mere three-week timeframe between this meeting (which was by invitation), Cabinet approving the Government’s proposal (24 May), and draft legislation being gazetted (27 May). The two-week deadline given (on 9 May) to make submissions on the outline, which was provided earlier, ran contrary to the Government’s commitments to hold genuine island-wide consultations with affected communities and civil society. Further, two meetings can hardly be considered as broad public consultations with victims and affected families on the design and operationalisation of the first, and arguably the most significant, transitional justice mechanism. By 9 May, it was understood that the outline had been shared with the President, the Prime Minister, and the Opposition, and the latter had already sent its responses.<sup>60</sup> Therefore, it is unclear if submissions made to the CTF—a summary of which was given to the Government on 6 May—even contributed to the proposed outline.

The fact that the Government was able to share an outline of its proposal on 9 May, that it was in a position to submit a complete Cabinet Memorandum for approval two weeks later, and that a draft Bill could be gazetted three days later illustrates a drafting process was already occurring—in tandem and in secret. Clearly, the Government was not waiting to be informed by affected communities and the public. It beggars belief why the Government adopted such a haphazard process, which (1) deliberately kept information out of the public domain until the ‘eleventh hour’ and (2) stifled the CTF carrying out its mandate by unnecessarily rushing the process, especially when the OMP is, to date, still not operational. The concern with the lack of transparency that culminated in the OMP law is that it is the first of the four proposed mechanisms. If, in May last year, the Government’s Working Group had already drafted

<sup>55</sup> On 19 May 2016, a discussion was organised by some civil society organisations with approximately 55 family members of disappeared persons from Jaffna, Vavuniya, Kilinochchi, Mannar, Trincomalee, Batticaloa, Puttalam, Ampara, Moneragala, Gampaha, Hambantota, and Colombo. A document was compiled containing questions and comments raised by the families on the OMP and was submitted to the Foreign Minister on 20 May 2016 – Letter to Minister of Foreign Affairs, “Questions and comments raised by families of the disappeared on the proposed Office for Missing Persons (OMP)”, 20 May 2016, <https://www.scribd.com/document/317668177/Questions-Comments-on-OMP-by-Families-of-the-Disappeared-20th-May-2016>

<sup>56</sup> Cabinet decisions, 24 May 2016, item 15, <http://www.news.lk/cabinet-decisions/item/13413-decisions-taken-by-the-cabinet-of-ministers-at-its-meeting-held-on-24-05-2016>

<sup>57</sup> Office on Missing Persons (Establishment, Administration, and Discharge of Functions) Bill, 27 May 2016, <http://www.parliament.lk/uploads/bills/gbills/english/6016.pdf>

<sup>58</sup> Parliament of Sri Lanka, Business of the House for August 11, 2016, <https://www.parliament.lk/en/news-en/view/1227>

<sup>59</sup> Office on Missing Persons (Establishment, Administration, and Discharge of Functions) Act No. 14 of 2016, <http://www.parliament.lk/uploads/acts/gbills/english/6016.pdf>

<sup>60</sup> Letter to Minister of Foreign Affairs, “OMP – follow-up to submission dated 1 May 2016, meeting at Foreign Ministry on 9 May 2016, and leaflet of 13 May 2016”, 16 May 2016, <https://www.scribd.com/doc/312730188/Memorandum-to-the-Foreign-Minister-THE-OFFICE-OF-MISSING-PERSONS>

at least an outline of the proposed OMP, it is wholly unrealistic to believe that such outlines, at the very least, are not available in May 2017 to be shared with the public on the truth commission, the reparations office, and the special court. In the Foreign Minister's latest statement to the HRC, he stated that draft legislation on the truth commission is expected to be presented to Cabinet within two months (making it the end of April).<sup>61</sup> The statement made no mention of the reparations office nor the special court. In April 2017, the Deputy Minister of Foreign Affairs, Harsha De Silva, said the truth commission would be set up soon.<sup>62</sup>

Another illustration relates to the repeal of the PTA and its proposed replacement. The Law Commission draft was apparently 'scrapped' and is, to date, not publicly available. The lack of official Government acknowledgement or denial about the status of the leaked counter-terror framework indicates a desire to maintain secrecy around the process and content of formulating a new counter-terror law and to restrict information available to the public.

### Interrelatedness of law reforms

Approaching law reforms holistically is imperative because it is only with that level of perspective, looking at a system as a whole, that interrelatedness becomes obvious. Reforms cannot exist in isolation. The bigger the reform, the more its impact will permeate through the system.

The amendment to the Criminal Procedure Code—to restrict access to counsel—is simply an outrageous proposition, from any view, but particularly in the Sri Lankan context, given the extensive allegations of torture and abuse in custody to extract self-

**Transitional justice mechanisms cannot be crafted in isolation to the criminal justice system and the wider system of law.**

incriminatory statements of suspects. With a one-paragraph insertion, the entire system of fair trial rights would be severely and detrimentally affected. Further, a notable feature of the PTA is that there is no express provision on the right of access to counsel, and delayed access to counsel has been a consistently reported problem.<sup>63</sup> The original leaked counter-terror framework restricted suspects' access to counsel until a statement was recorded or 48 hours had passed, whichever occurred first.<sup>64</sup> Through these two separate proposed provisions, the unsafe and untenable position under the PTA would be given explicit statutory validity. Formalising such a grave restriction in the counter-terror realm is bad enough, but the attempt was to expand the restriction and formalise it in the ordinary criminal realm too. The most recent version of the counter-terror framework does not contain the 'until a statement is recorded or 48 hours have passed' wording. However, (1) now there is a entirely new clause restricting access to counsel (as discussed earlier)<sup>65</sup> and (2) the right of access to counsel is to be provided in the manner provided for in the Criminal Procedure Code and the Criminal Procedure Code

<sup>61</sup> Statement by Hon Mangala Samaraweera at the 34<sup>th</sup> session of the Human Rights Council, Geneva, 28 February 2017, <https://www.news.lk/fetures/item/16053-statement-by-minister-of-foreign-affairs-at-the-34th-session-of-the-unhrc>

<sup>62</sup> Daily Mirror, "Truth Commission will be set up soon: Harsha", 10 April 2017, <http://www.dailymirror.lk/article/Truth-Commission-will-be-set-up-soon-Harsha-127096.html>

<sup>63</sup> See, for example, Human Rights Commission, "Report of the Human Rights Commission to the Committee Against Torture: Review of the 5<sup>th</sup> periodic report of Sri Lanka", October 2016, [http://tbinternet.ohchr.org/Treaties/CAT/Shared%20Documents/LKA/INT\\_CAT\\_NHS\\_LKA\\_25601\\_E.pdf](http://tbinternet.ohchr.org/Treaties/CAT/Shared%20Documents/LKA/INT_CAT_NHS_LKA_25601_E.pdf); Special Rapporteur on Torture report, paras 75-76; Ruki Fernando, "PTA detainees in Sri Lanka: Prospects for justice", Groundviews, 11 June 2015, <http://groundviews.org/2015/11/06/pta-detainees-in-sri-lanka-prospects-for-justice/>

<sup>64</sup> Policy and Legal Framework for the Proposed Counter-Terror Act of Sri Lanka, part (IV), (xlv).

<sup>65</sup> Policy and Legal Framework relating to the Proposed Counter Terrorism Act of Sri Lanka (PMO/06/03/CM/10/2017), Revised version of 23 April 2017, Part IV Powers of Arrest, Custody, Detention, and Investigation, (xlviii), page 30.

(Special Provisions).<sup>66</sup> As stated earlier, both pieces of legislation are under revision and both contain significant restrictions on access to counsel. Therefore, any and all restrictions are then automatically imported into the counter-terror framework. Further, the proposed amendment to the Special Provisions Criminal Procedure Code appears to be bringing in restrictions through the back door. This illustrates how reforms are connected and how essential it is to place them within the larger system to ascertain their purpose and consequences.

Transitional justice mechanisms cannot be crafted in isolation to the criminal justice system and the wider system of law. A significant impediment at present is the fact that there is no publicly available information about the interrelationship between the four mechanisms and their relationship to the wider justice system. With regard to criminal accountability, the mechanisms and the existing criminal justice system are inextricably linked. However, numerous issues are unclear, for example: how investigations in the OMP, the truth commission, and the judicial mechanisms will be co-ordinated; how they will be co-ordinated with existing or new criminal investigations in the existing system; how evidence will be handled (evidential standards) and co-ordinated given that crime scenes and incidents will realistically overlap across the OMP, truth commission, and special court; how witness protection will operate; how the prioritisation of cases will occur; and finally where the parameters of the transitional justice system will end and the ordinary criminal justice system will begin.

Enforced disappearance is one example of a law reform to come that will straddle both the ordinary criminal system and the transitional justice system. The draft Bill criminalising enforced disappearance, if enacted, will become part of the ordinary criminal laws of Sri Lanka. As mentioned earlier, the Bill does not contain the offence of enforced disappearance as a crime against humanity, elevating it to the level of an international crime. The investigation and prosecution of enforced disappearance as an ordinary crime will be the responsibility of the police and the Attorney-General's Department, respectively. If, as it ought to be, the judicial mechanism is given jurisdiction to prosecute enforced disappearance, investigations and prosecutions will also be the responsibility of the special court. Given the absence of information about which crimes will be in the special court's jurisdiction, it is unclear how enforced disappearance will be framed, but one would expect at least the offence of enforced disappearance to be viewed as a crime against humanity. If only the special court is given jurisdiction over the offence of enforced disappearance as a crime against humanity, there will be a lacuna in the law: the ordinary courts will not have jurisdiction and the police and Attorney-General's Department will be unable to investigate and prosecute enforced disappearance as a crime against humanity when the special court's mandate expires (unless the special court's statute is somehow subsequently absorbed into ordinary law).

Further, issues of the crime scenes, evidence, witnesses, victims, and perpetrators will need to be demarcated and co-ordinated as the subject matter (enforced disappearance) will be relevant to the police/Attorney-General's Department, the OMP, the truth commission, and the special court. The essential point here is the degree of intricacy of only one law reform, and that the intricacies must be mapped out and considered, including identifying overlaps and gaps, before the law reform is attempted, in order to comprehensively ascertain how the law reform will work in the system.

### **Consequences of new offences**

Giving effect to a judicial mechanism in the context of transitional justice means a raft of law reforms are required to incorporate a variety of new offences into domestic criminal law. Even if it is limited to the archetypal and internationally recognised violations and abuses—such as war crimes, crimes against

---

<sup>66</sup> Policy and Legal Framework relating to the Proposed Counter Terrorism Act of Sri Lanka (PMO/06/03/CM/10/2017), Revised version of 23 April 2017, Part IV Powers of Arrest, Custody, Detention, and Investigation, (xlvii), page 30.

humanity, and genocide—these are still significant additions to domestic penal laws. Further, modes of liability will also be a new import. These new offences, and corresponding modes of liability, are fundamentally different to ordinary criminal offences and consequently change the landscape of penal laws. The new nature of the crimes will not just be an issue for the judicial mechanism; if the ordinary criminal justice system is to prosecute cases that the judicial mechanism cannot, it too will have to contend with the change in landscape. This increase in what is on the statute books will have an impact on the entire criminal justice system and on how crimes are investigated, prosecuted, and adjudicated.

**The more fundamental and deep-rooted, and most difficult, shift required is attitudinal. Attitudes of individuals, over time, become synthesised into the operation and functioning of institutions. These negative institutional cultures require systematic change.**

This influx of new offences is required because they are currently absent in Sri Lanka. An issue arising from the need for extensive new offences is whether and how Sri Lanka—given the state of the existing criminal justice system and issues of non-enforcement of existing offences—will cope with the influx of new offences. Sri Lanka could enact laws to have the optimal levels of internationally compliant offences on the statute books. However, the offences will have no impact if they are not enforced. For example, with the hate speech law, the issue was not that

Sri Lanka did not have a prohibition on hate speech, but rather that the one in existence was not enforced.<sup>67</sup> The Torture Act 1994<sup>68</sup> gives effect to the Convention Against Torture and makes torture a specific offence. However, as clearly found by the Special Rapporteur on torture, torture is prevalent and is not sufficiently investigated and prosecuted. Since 1994, there have only been a ‘few’ convictions for torture.<sup>69</sup>

### **Change in institutional cultures required**

It is important to note that criminal justice reforms in Sri Lanka require change beyond creating new laws, new institutions, and overhauling the structures of the criminal justice system; matters which are visible and can be quantified. The more fundamental and deep-rooted, and most difficult, shift required is attitudinal. Attitudes of individuals, over time, become synthesised into the operation and functioning of institutions. These negative institutional cultures require systematic change. For example, new penal offences are ineffective in curbing criminal behaviour in the absence of investigations and prosecutions, which in turn hinges upon that particular conduct being accepted, in Government and society, as criminal conduct. Torture provides a useful example. Until the paradigm shift in attitudes occurs and torture is accepted as unacceptable conduct, which must be prosecuted and punished, across the board, the practice and occurrence of torture will continue to be an ongoing issue.

Another illustration lies in the issue of enforced disappearances. The omissions in the draft legislation, and capitalising on legal loopholes in the wording of the Enforced Disappearance Convention to justify not criminalising enforced disappearance as a crime against humanity, indicate current attitudes of the Government and society. This is despite an exclusive transitional justice mechanism to address missing and disappeared persons (the OMP), despite the CTF stating “...*disappearances constituted the most*

<sup>67</sup> Gehan Gunatilleke, “Hate Speech in Sri Lanka: How a New Ban Could Perpetuate Impunity”, 11 January 2016, <http://ohrh.law.ox.ac.uk/hate-speech-in-sri-lanka-how-a-new-ban-could-perpetuate-impunity/>

<sup>68</sup> Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment Act No. 22 of 1994.

<sup>69</sup> Special Rapporteur on Torture report 2016, para 88.

*recurrent and pressing issue brought before the CTF*”,<sup>70</sup> and despite the Office of the United Nations High Commissioner for Human Rights’ investigation on Sri Lanka stating that “...*the scale of enforced disappearances in Sri Lanka has long been exceptional*”<sup>71</sup> and concluding that there were reasonable grounds to believe enforced disappearances had been committed in a widespread and systematic manner, particularly by the Sri Lankan authorities.<sup>72</sup> If attitudes were such that the gravity and extent of enforced disappearances that have occurred in Sri Lanka ought to be prosecuted and punished, as an ordinary crime and as an international crime, there would not be such deliberate attempts to dilute the full protection and punitive effect contained in the Enforced Disappearance Convention. In essence, the shift in society’s attitudes—that the extensive disappearances in Sri Lanka is due to criminal conduct which should be punished—has not yet occurred.

In this regard, the explicit views of the Government are alarming and appear to reveal its approach with respect to overhauling the system and law reforms. In response to the CTF report, the Minister of Justice, Dr. Wijeyadasa Rajapakse, said he had “*no confidence*” in the CTF:

No one is complaining about the independence of the judiciary anymore. We have reconciliation and peace processes in place. This report, at this juncture, is totally unwarranted. Therefore, we don’t have to follow these recommendations by the CTF.<sup>73</sup>

In a similar vein, other Ministers have also made explicitly negative comments. Champika Ranawaka, Minister of Megapolis and Western Development, expressed doubt about those who were interviewed by the CTF and stated that implementing the CTF recommendations would only benefit the remaining LTTE and their sympathisers. Minister Ranawaka went as far as to relegate the CTF report to the waste paper basket.<sup>74</sup> Dr. Rajitha Senarathne’s comments, Cabinet Spokesperson and Minister of Health, related to dismissing the CTF’s hybrid court recommendation: “*Any institution or organisation can suggest anything. But, the Government’s clear policy is not to include any foreign judge in the judicial process ... No one can say the members of these committees have some ‘special intelligence’. They are not globally accepted experts ... Although the committee was appointed by the Government, it is up to the Government to make final decisions on such matters.*”<sup>75</sup>

The CTF report is a compilation of views expressed by Sri Lankan citizens and the “...*observations and recommendations are informed by the consultation process and relate to the context in which reconciliation is being pursued and the proposed mechanisms to achieve it*”.<sup>76</sup> The attempt by the head of the justice sector and other Ministers to de-legitimise the CTF—a body appointed by the Government itself (the Prime Minister)—alerts to a deeper issue of the Government disregarding the problems that exist and the urgent need for problems to be addressed. With such attitudes at play, the trajectory that reforms and the approach to reforms are taking is deeply worrisome.

---

<sup>70</sup> CTF report, p 176, para 1.

<sup>71</sup> Human Rights Council, Report of the OHCHR Investigation on Sri Lanka (OISL), thirtieth session, 16 September 2015, UN Doc. A/HRC/30/CRP.2, paras 387 (“OISL report”).

<sup>72</sup> OISL report, paras 1127-1128.

<sup>73</sup> Daily Mirror, “I have no confidence in the CTF: Wijeyadasa”, 6 January 2017, <http://www.dailymirror.lk/article/I-have-no-confidence-in-the-CTF-Wijeyadasa-121817.html>

<sup>74</sup> The Island, “WPB, place for CTFRM report, says Champika”, 11 January 2017, [http://www.island.lk/index.php?page\\_cat=article-details&page=article-details&code\\_title=158678](http://www.island.lk/index.php?page_cat=article-details&page=article-details&code_title=158678)

<sup>75</sup> Sunday Observer, “CTF Report: A challenge and a window of opportunity”, 8 January 2017, <http://www.sundayobserver.lk/2017/01/08/columns/ctf-report-challenge-and-window-opportunity>

<sup>76</sup> CTF report, p 427.

## Reforms not on the agenda

Having lost GSP Plus status in 2010 due to Sri Lanka's poor human rights record, regaining the trade concession privileges is another factor at play in the current space. The Government reportedly agreed to 58 conditions imposed by the European Union to regain GSP Plus status.<sup>77</sup> Recently, however, both the European Union and the Government have denied such conditions were imposed, and that the only requirement was the ratification and implementation of the 27 international conventions.<sup>78</sup>

In the context of GSP Plus negotiations, the issue of decriminalising homosexuality arose again. The 58-point document titled "Conclusions and commitments (after Human Rights Dialogue between EU and SL – Jan 2016)" contained a number of points relating to criminal law reform, including "...*legislative changes to ensure non-discrimination on the basis of sexual orientation*".<sup>79</sup> An initial inclusion of this issue in the National Human Rights Action Plan was subsequently dropped after objections from Ministers and on the instructions of President Sirisena.<sup>80</sup> According to the Government spokesman and Health Minister, Dr Rajitha Senarathne, "*In view of the protests by members of the cabinet of ministers, as well as other groups, we have decided to drop the proposal*".<sup>81</sup> He further said the Government "*...is against homosexuality, but we will not prosecute anyone for practising it...*" and that the Government "*...did not want to create 'social problems' by inviting a challenge to the law that makes homosexuality illegal and is punishable by up to 12 years of imprisonment*".<sup>82</sup> The ease with which decriminalising homosexuality was dropped from the reform agenda is alarming and illustrates a fickle approach to crucial law reforms. The contradiction in the Minister's statement above is also worth noting. If no one is to be prosecuted for practicing homosexuality, it raises the question as to why the repeal of an arcane law, inherited from Colonial rule, is so vehemently resisted.

Other criminal justice reform matters contained in the 58-point document that were not accepted by the Government include: adopting new regulations for public disorder management by the police; tabling the new Prisons Administration Act in Parliament and adopting a strategy against prison overcrowding; introducing reforms to address delays in the administration of justice; reforms relating to the security sector and peacekeeping operations; amending the law to introduce a minimum age of marriage under Muslim law; amending the law to address marital rape and abortion; amending the law to raise the

<sup>77</sup> SBS, "SL Government gives the nod to 58 EU conditions to regain GSP+", 16 January 2017, <http://www.sbs.com.au/yourlanguage/sinhalese/en/article/2017/01/16/sl-government-gives-nod-58-eu-conditions-regain-gsp>; Sunday Times, "EU links human rights to trade: 58 conditions for GSP Plus" 8 May 2016, <http://www.sundaytimes.lk/160508/news/eu-links-human-rights-to-trade-58-conditions-for-gsp-plus-193327.html>

<sup>78</sup> Sri Lanka Mirror, "No 58 conditions to regain GSP plus", 20 January 2017, <http://srilankamirror.com/news/1509-no-58-conditions-to-regain-gsp-plus>; Colombo Page, "EU reiterates implementation of 27 international conventions only criteria for Sri Lanka to regain GSP Plus", 18 January 2017, [http://www.colombopage.com/archive\\_17A/Jan18\\_1484723293CH.php](http://www.colombopage.com/archive_17A/Jan18_1484723293CH.php); Delegation of the European Union to Sri Lanka and Maldives, "Implementation of 27 international conventions only criteria for GSP Plus", 18 January 2017, [https://eeas.europa.eu/delegations/sri-lanka/18727/implementation-27-international-conventions-only-criteria-gsp-plus\\_en](https://eeas.europa.eu/delegations/sri-lanka/18727/implementation-27-international-conventions-only-criteria-gsp-plus_en)

<sup>79</sup> Conclusions and commitments (after Human Rights Dialogue between EU and SL – Jan 2016, section 2.1. Freedom of expression and association, including situation of civil society and human rights defenders, point 32.

<sup>80</sup> Sunday Times, "GSP Plus: Govt. rushing through rights plan", 15 January 2017, <http://www.sundaytimes.lk/170115/news/gsp-plus-govt-rushing-through-rights-plan-225020.html>; Sri Lanka Mirror, "Homosexuality, the latest reason for SLFP-UNO clash", 20 January 2017, <http://srilankamirror.com/news/1507-homosexuality-the-latest-reason-for-slfp-unp-clash-video>

<sup>81</sup> EBL News, "Sri Lanka drops proposal to decriminalise homosexuality", 18 January 2017, <https://eblnews.com/news/world/sri-lanka-drops-proposal-decriminalize-homosexuality-52519>

<sup>82</sup> Business Standard, "Sri Lanka against decriminalising homosexuality", 18 January 2017, [http://www.business-standard.com/article/pti-stories/sri-lanka-against-decriminalising-homosexuality-117011801277\\_1.html](http://www.business-standard.com/article/pti-stories/sri-lanka-against-decriminalising-homosexuality-117011801277_1.html)

minimum age of criminal responsibility; enacting the Children (Judicial Protection) Act; and ratifying the Optional Protocol to the Convention against Torture.<sup>83</sup>

Ratifying the Enforced Disappearance Convention with accompanying legislation; issuing certificates of absence; and fully operationalising all provisions of the Protection of Victims of Crime and Witness Act, reviewing the Act, and setting up an independent witness protection authority were also not accepted by the Government.<sup>84</sup> However, some aspects have been implemented; for example, the Enforced Disappearance Convention has been ratified and a witness protection authority was created.

The reform issues that were put on the table with the 58-point document, and rejected by the Government, provide insight into the Government's thinking and approach to reforms.<sup>85</sup> It signals that reforms are being conceived of as individual issues, rather than from a holistic approach to the entire system. An assessment of a number of issues—including an assessment of the legal framework, the substantive reasons for calling for reforms, and the impact that reforms will have on the system—is required to understand the significance of a particular law reform proposal. This lack of a holistic approach and the absence of a comprehensive strategy acknowledging the interrelatedness of law reforms mean, *inter alia*, that issues can easily fall off the reform agenda based purely on political exigency.

### Constitutional reform

Another crucial aspect of the current environment is the constitutional reform process. The overhaul of the Constitution will necessarily impact on the criminal justice system. Of concern is the Government's prioritisation of constitutional reform over transitional justice/

**Transitional justice, constitutional reform, and criminal justice reforms are not mutually exclusive and reforms cannot be undertaken in a disconnected manner.**

reconciliation. The clearest, and most authoritative, stance coming from the President himself to the CTF: when the CTF met with the President to discuss the CTF report, it is understood that the President made it clear that constitutional reform would be given priority over transitional justice.<sup>86</sup> Creating a binary situation—in terms of addressing constitutional reform or transitional justice first—is another instance of dangerously overlooking the interconnectedness of reforms. It falsely paints a picture of constitutional reform and transitional justice as mutually exclusive issues, which they patently cannot be. Just as transitional justice cannot happen in a vacuum from criminal justice reforms, constitutional reform cannot occur in a vacuum from transitional justice and the criminal justice system. The issues traversed and recommendations made by the thematic sub-committees appointed by

<sup>83</sup> Conclusions and commitments (after Human Rights Dialogue between EU and SL – Jan 2016, points 5, 12, 14, 26, 41, 42, 43, 44, 47.

<sup>84</sup> Conclusions and commitments (after Human Rights Dialogue between EU and SL – Jan 2016, points 25 and 9.

<sup>85</sup> From the large number of matters contained in the 58-point document, only a handful are said to have been accepted by the Government, including reviewing or repealing the Prevention of Terrorism Act to ensure it meets acceptable international standards, amending the Criminal Procedure Code to include rights of detainees (access to legal counsel at the moment of arrest, notifying family members, and criminalising the use of unofficial places of detention), reviewing the Public Security Ordinance, and proposing legislation to allow individuals to submit complaints to the UN Human Rights Committee under the First Optional Protocol to the ICCPR and to the UN Committee against Torture.

<sup>86</sup> Colombo Gazette, "Constitutional reform to get priority over transitional justice", 2 February 2017, <http://colombogazette.com/2017/02/02/constitutional-reform-to-get-priority-over-transitional-justice/>; Sri Lanka Brief, "Sri Lanka: President Sirisena to prioritise constitutional reform over transitional justice", 2 February 2017, <http://srilankabrief.org/2017/02/president-sirisena-wants-to-prioritise-constitutional-reform-over-transitional-justice/>

the Constitutional Assembly directly relate to issues at play in the transitional justice realm and overhauling the criminal justice system.

## CONCLUSION – IS THIS SUSTAINABLE?

Sri Lanka not only carries the burden of a protracted armed conflict but also the legacy of debilitating post-war authoritarianism that only added to a history of systematic abuses of human rights and democratic freedoms. A much-needed overhaul of the criminal justice system is currently embroiled in the dynamics generated by two interrelated and politically complex processes—transitional justice on the one hand and constitutional reform on the other. As is evident from Part 2 of this report, the reforms required of the Sri Lankan criminal justice system are far-reaching. While the challenges cannot be gainsaid, it is imperative that these reforms are addressed in tandem with transitional justice and constitutional reform measures. But this is not proving to be the case.

**While the challenges cannot be gainsaid, it is imperative that these reforms are addressed in tandem with transitional justice and constitutional reform measures. But this is not proving to be the case.**

In fact, where Sri Lanka currently stands in May 2017 is a far cry away from reforming the criminal justice system or even approaching reform, as it ought to. There is already one transitional justice mechanism that was short-circuited into creation. Three more transitional justice mechanisms are supposedly in the pipeline, yet little is publicly known about them or how these

four mechanisms will interrelate with each other and with the existing criminal justice system. It appears that constitutional reform is being prioritised over transitional justice; but even while the Fundamental Rights Sub-Committee of the Constitutional Assembly is recommending an expansion of rights protections, two blatant attempts have been made to curtail rights to a fair trial (access to counsel). If the latest draft of the counter-terrorism framework backslides on due process rights and safeguards, the draft legislation on enforced disappearances offers a significantly diluted set of standards compared to those in the Enforced Disappearance Convention. Further, a veil of secrecy envelops the approach to all law reforms.

Even prior to addressing the content of the many reforms the criminal justice system urgently requires, the process as evidenced to date illustrates a disturbing underlying continuity with previous approaches to law and justice reforms, which largely served to entrench exclusion and impunity while contracting rights and freedoms. What is currently unfolding raises grave concerns about the Government's willingness and ability to pursue a justice reform agenda that is both genuine and comprehensive, and one that can cover the full spectrum of reforms required. If the inevitably negative consequences of the current approach to justice reforms are to be avoided, then it is imperative that flaws in the process adopted thus far are urgently addressed.

## **PART 2.1 – MAGNITUDE OF REFORMS REQUIRED**

Part 2 of this report surveys the recent observations of problems and recommendations for reforming the criminal justice system, since the Government made transitional justice commitments. The observations and recommendations of the CTF,<sup>87</sup> the Special Rapporteur on the independence of judges and lawyers (Special Rapporteur on IJL),<sup>88</sup> the Special Rapporteur on torture and other cruel, inhuman, or degrading treatment or punishment (Special Rapporteur on torture),<sup>89</sup> the Committee against Torture (CAT),<sup>90</sup> the Committee on the elimination of discrimination against women (CEDAW),<sup>91</sup> and the Prime Minister's Task Force<sup>92</sup> are indicative of the nature of the reforms to the criminal justice system that are necessary—both to give effect to transitional justice mechanisms and to overhaul the criminal justice system as a whole.

The observations and recommendations in Part 2 paint an alarming picture of the current state of affairs in Sri Lanka's criminal justice system. Even in the absence of implementing transitional justice measures, the information in Part 2 illustrates that significant and vast reforms are necessary to make the criminal justice system transparent, robust, adhere to the rule of law, and able to deliver justice. It should also be noted that the information in Part 2 is neither reflective of the entirety nor of the depth of reforms relating to the criminal justice system. The information is extracted from bodies with specific mandates, which did not extend to specific inquiry into the criminal justice system in detail.

However, prior to the recommendations summed up below, largely made in the context of a transitional justice agenda, a vast array of recommendations for reforming the criminal justice system have been consistently made over the years. These will be addressed in a separate forthcoming paper, but they do need to be read in conjunction with this report.

### **Consultation Task Force on Reconciliation Mechanisms**

In 2016, the CTF conducted nationwide public consultations on the design of the transitional justice mechanisms that the Government intends to create. While the focus was, therefore, on what the transitional justice mechanisms ought to look like, the CTF did make recommendations specifically relevant to the criminal justice system. Further, when looking at the recommendations about the mechanisms, particularly the judicial mechanism, it becomes clear that the basis for many of the recommendations is the fact that the existing criminal justice system is so fraught with problems.

---

<sup>87</sup> Final Report of the Consultation Task Force on Reconciliation Mechanisms, 17 November 2016, Vol 1 (CTF report).

<sup>88</sup> Human Rights Council, Report of the Special Rapporteur on the independence of judges and lawyers on her mission to Sri Lanka, thirty-fifth session, 15 March 2017, UN Doc. A/HRC/35/31/Add.1 (Special Rapporteur on IJL report).

<sup>89</sup> Human Rights Council, Report of the Special Rapporteur on torture and other cruel, inhuman, or degrading treatment or punishment on his mission to Sri Lanka, thirty-fourth session, 22 December 2016, UN Doc. A/HRC/34/54/Add.2 (Special Rapporteur on torture report).

<sup>90</sup> Committee against Torture, Concluding observations on the fifth periodic report of Sri Lanka, 27 January 2017, UN Doc. CAT/C/LKA/CO/5 (CAT report).

<sup>91</sup> Committee on the Elimination of Discrimination against Women, Concluding observations on the eighth periodic report of Sri Lanka, 3 March 2017, UN Doc. CEDAW/C/LKA/CO/8 (CEDAW report).

<sup>92</sup> Task Force on Prevention of Violence Against Women and the Girl Child, *Action Plan Based on Recommendations of the Leader of the Opposition's Commission on Violence Against Women and the Girl Child*, 5 February 2016

The CTF noted the “...*extensive evidence on the failure of the existing justice system to deliver justice and re-victimisation of victims and witnesses through the justice system.*”<sup>93</sup> The calls for justice were referred to in the context of the failure of the existing system to deliver justice, accountability, and redress for a wide range of crimes/affected persons.<sup>94</sup> The failure of the existing justice system also grounds the call for international involvement and/or supervision and the need to reform the existing system alongside any special justice mechanism.<sup>95</sup> The CTF further commented that the judicial mechanism is seen as a significant mechanism that will challenge the culture of impunity in Sri Lanka.<sup>96</sup>

While submissions on reforming the function of the ordinary courts, the Attorney General’s Department, investigative agencies, and on addressing a broader mandate or legacy for the judicial mechanism were few, the CTF noted that there were a large number of submissions highlighting the failure of the existing system.<sup>97</sup> The reform of ordinary justice is also imperative in the event that not all cases of international crimes are taken up by the judicial mechanism and the remaining cases are to be taken up by ordinary courts.<sup>98</sup>

The CTF report comments on the clear need to review and reform the structures and processes of justice as well as of law and order.<sup>99</sup> Effective remedy and accountability through ordinary courts must involve systemic reform and structural change to address broad issues that impede access to justice and accountability, including systemic delays, lack of independence and politicisation, conflict of interest, lack of capacity and competence, and an overall lack of victim centredness at every level, including the judiciary, the Attorney-General’s Department, Judicial Medical Officers (JMOs), investigators, and victim and witness protection.<sup>100</sup> Where human rights violations do not meet the threshold of the special court’s jurisdiction and/or where, due to prosecutorial policy, the special court does not prosecute cases, measures must be in place to ensure prosecutions within the ordinary justice system.<sup>101</sup>

---

<sup>93</sup> Final Report of the Consultation Task Force on Reconciliation Mechanisms, 17 November 2016, Vol 1, p 234, para 2 (“CTF report”).

<sup>94</sup> CTF report, p 235, para 6.

<sup>95</sup> CTF report, p 235, para 7.

<sup>96</sup> CTF report, p 238, para 14.

<sup>97</sup> CTF report, p 250, para 57 and p 235, para 6.

<sup>98</sup> CTF report, p 259, para 75.

<sup>99</sup> CTF report, p 430, para 1.22.

<sup>100</sup> CTF report, p 430, para 1.23.

<sup>101</sup> CTF report, p 430, para 1.24.

## Special Rapporteur country visits

In 2016, the Special Rapporteur on IJL and Special Rapporteur on torture conducted a joint country visit to Sri Lanka. The importance of their findings is in providing recent inquiries into the criminal justice system, as it currently exists. Both noted that *“It is now critical and urgent to replace the legal framework that allowed serious human rights violations to happen and set up sound democratic institutions and legal*

**The elaborate but skeletal transitional justice plan of the Government was first announced by the Minister of Foreign Affairs in September 2015. Twenty-one months later, there is still no publicly available comprehensive transitional justice strategy.**

*standards that will give effect to and protect the human rights embodied in the constitution of Sri Lanka as well as the international human rights treaties it has voluntarily ratified.”*<sup>102</sup>

The Special Rapporteur on IJL considered that the *“...country needs to conduct a strict exercise of introspection, so as to improve the independence, quality, and credibility of its judiciary, the Attorney-General’s Department, and the police forces.”*<sup>103</sup> Further, the Rapporteur noted, *“...administration of justice deserves to be more transparent,*

*decentralised and democratic.”*<sup>104</sup> The Special Rapporteur on torture was of the view that the current legal framework and the lack of reform within the structures of the armed forces, the police, the Attorney-General’s Department and the judiciary perpetuate the risk of torture. Sri Lanka needs urgent and comprehensive measures to ensure that structural reform takes place in these institutions in order to eliminate torture and ensure that all authorities comply with international standards. According to the Rapporteur, a piecemeal approach is incompatible with the transitional justice process and could undermine it before it really begins.<sup>105</sup>

## Lack of comprehensive strategy/sporadic reforms

The elaborate but skeletal transitional justice plan of the Government was first announced by the Minister of Foreign Affairs, Mangala Samaraweera, in Geneva in September 2015.<sup>106</sup> Twenty-one months later, there is still no publicly available comprehensive transitional justice strategy. This shortcoming is encapsulated in the CTF’s recommendations that—given the prevailing confusion over the relationships between the transitional justice mechanisms and to ensure the overall coherence of

<sup>102</sup> Preliminary observations and recommendations of the Special Rapporteur on torture and other cruel, inhuman and degrading treatment or punishment, Mr Juan E Mendez, on the official joint visit to Sri Lanka – 29 April to 7 May 2016, 7 May 2016, <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=19943&LangID=E> and Preliminary observations and recommendations of the Special Rapporteur on the independence of judges and lawyers, Ms Mónica Pinto of the official joint visit to Sri Lanka – 29 April to 7 May 2016, 7 May 2016, <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=19942&LangID=E>

<sup>103</sup> Special Rapporteur on IJL report, para 96.

<sup>104</sup> Preliminary observations and recommendations of the Special Rapporteur on the independence of judges and lawyers, Ms Mónica Pinto of the official joint visit to Sri Lanka – 29 April to 7 May 2016, 7 May 2016, <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=19942&LangID=E>

<sup>105</sup> Human Rights Council, Report of the Special Rapporteur on torture and other cruel, inhuman, or degrading treatment or punishment on his mission to Sri Lanka, thirty-fourth session, 22 December 2016, UN Doc. A/HRC/34/54/Add.2, para 113 (“Special Rapporteur on torture report”).

<sup>106</sup> Statement by Hon Mangala Samaraweera at the 30<sup>th</sup> session of the Human Rights Council, Geneva, 14 September 2015. These commitments were further confirmed through the Human Rights Council resolution, co-sponsored by Sri Lanka and adopted on 1 October 2015. Human Rights Council Resolution, Promoting reconciliation, accountability, and human rights in Sri Lanka, 14 October 2015, UN Doc. A/HRC/RES/30/1 (adopted 1 October 2015).

the mechanisms and the reconciliation process—the Government should prioritise this issue and swiftly make the mechanisms’ policy and operation frameworks public and operational.<sup>107</sup> Further, the CTF recommended that the Government must (1) draw up a roadmap laying out the establishment and functioning of the transitional justice mechanisms, addressing the multiplicity of state bodies with overlapping mandates for reconciliation and (2) streamline the number of Government entities involved and their mandates, clarify their powers and functions, relationships to each other, and relationships to the transitional justice mechanisms.<sup>108</sup>

This lack of comprehensive strategy also exists with respect to criminal justice reforms. The Government’s plan, as announced in Geneva, also included the statement that:

Accountability is essential to uphold the rule of law and build confidence in the people of all communities of our country, in the justice system. We also recognise fully, the importance of judicial and administrative reform in this process. These are essential factors that must be addressed for the culture of accountability and the rule of law which have eroded through years of violence to once again ingrained in our society. We recognise how important this is to prevent impunity not only for violations of human rights but corruption and other crimes; and how vital these processes are for the long-term development of our country and for the peace dividend to be felt by our citizens including generations to come.”<sup>109</sup>

However, there is no public information about how the Government intends to carry out these reforms. The criminal justice reforms needed in Sri Lanka, as well as implementing transitional justice measures, are complex and interrelated. It requires the system to be viewed holistically, and reforms and the consequences of reforms to be placed within that larger picture. Piecemeal reforms, without a holistic strategy, have the danger of missing the wood for the trees. Further, in light of much of the attention focusing on the transitional justice mechanisms, the lack of a comprehensive criminal justice reform strategy lends itself to sporadic reform attempts by the Government. The danger in sporadic attempts is that the significance of the reform proposed, its effect on the wider criminal justice system, and the ability to have critical discourse is greatly reduced.

### **Judicial mechanism completion strategy**

From the outset, when discussing the judicial mechanism, it is important to note that beyond the title ‘judicial mechanism with a special counsel’, there is a complete absence of publicly available information about what the potential mechanism will entail and how the Government intends it to operate. This is significant because it impacts on the ability to have critical discussions about how it will interrelate with the existing criminal justice system and what will happen after it winds up. At best, discussions revolve around normative requirements or alternatives; at worst, the discussions are theoretical and academic.

The CTF report did note that prosecutions should occur in the ordinary courts, where the judicial mechanism cannot prosecute cases. However, it is important to emphasise the extent of the cases that *will not* be prosecuted through the judicial mechanism. The judicial mechanism simply cannot and will not deal with *all* allegations of international crimes and serious human rights violations. This can be seen when looking at criminal accountability efforts in other post-atrocity situations. For example, the

---

<sup>107</sup> CTF report, p 428, para 1.15.

<sup>108</sup> CTF report, p 428, para 1.13.

<sup>109</sup> Statement by Hon Mangala Samaraweera at the 30<sup>th</sup> session of the Human Rights Council, Geneva, 14 September 2015.

civil war in Sierra Leone, from 1991 to 2002, is estimated to have killed about 70,000 people.<sup>110</sup> The Special Court for Sierra Leone indicted 13 individuals and convicted nine of those.<sup>111</sup> The 1994 Rwandan genocide is estimated to have killed about one million people, including the rape of an estimated 150,000-250,000 women.<sup>112</sup> The International Criminal Tribunal for Rwanda indicted 93 individuals and convicted 62.<sup>113</sup> The series of wars comprising the 1990s Balkan wars is estimated to have killed about 200,000 people.<sup>114</sup> The International Criminal Tribunal for the former Yugoslavia (ICTY) indicted 161 individuals and has convicted 83.<sup>115</sup> The casualties during the Khmer Rouge regime in Cambodia (1975-1979) are estimated at up to three million people.<sup>116</sup> The website of the Extraordinary Chambers of the Courts of Cambodia (ECCC) contains nine names as “...charged or accused persons before the ECCC”.<sup>117</sup> Three people have been convicted by the ECCC.<sup>118</sup>

Further, owing to prosecutorial policy, the ordinary courts most likely will be triggered, even before the judicial mechanism winds up. If, as the CTF report recommends, those bearing the most responsibility should be prioritised, alleged perpetrators who do not meet that threshold may have to be dealt with by the ordinary courts. For example, similar to the ICTY transferring lower to middle-level perpetrators within its jurisdiction for prosecution by the War Crimes Chamber of Bosnia and Herzegovina.<sup>119</sup>

The judicial mechanism cannot be viewed as the exclusive measure to provide criminal accountability for conflict-related crimes. A completion strategy is a practical reality and should be an integral part of the creation of the judicial mechanism, including managing public expectations about what, in reality, the judicial mechanism can be expected to do.

### Rebuilding credibility of domestic institutions

The deficit of trust and confidence in existing domestic institutions overwhelmingly resonates throughout the CTF report. When viewed in light of the problems identified relating to the current system, the reasons for the deficit become increasingly clear. This is apparent with regard to international involvement—in operations and oversight. The calls for international involvement stem from a complete lack of faith and confidence in domestic accountability processes. International involvement in the mechanisms is viewed as a means of providing legitimacy and transparency to the

<sup>110</sup> UNDP, Sierra Leone, <http://web.undp.org/evaluation/documents/thematic/conflict/SierraLeone.pdf>

<sup>111</sup> Residual Special Court for Sierra Leone, <http://www.rscsl.org>

<sup>112</sup> Outreach Programme on the Rwanda Genocide and the United Nations, <http://www.un.org/en/preventgenocide/rwanda/education/rwandagenocide.shtml>

<sup>113</sup> UN Mechanism for International Criminal Tribunals, *International Criminal Tribunal for Rwanda*, <http://unictr.unmict.org/en/tribunal>

<sup>114</sup> Milton Leitenberg, “Deaths in Wars and Conflicts in the 20<sup>th</sup> Century”, [http://www.clingendael.nl/sites/default/files/20060800\\_cdsp\\_occ\\_leitenberg.pdf](http://www.clingendael.nl/sites/default/files/20060800_cdsp_occ_leitenberg.pdf)

<sup>115</sup> International Criminal Tribunal for the former Yugoslavia, *Judgment List*, <http://www.icty.org/en/cases/judgement-list>, Key Figures of the Cases, <http://www.icty.org/en/cases/key-figures-cases>

<sup>116</sup> Extraordinary Chambers of the Courts of Cambodia, *About the ECCC*, <https://www.eccc.gov.kh/en/about-eccc>

<sup>117</sup> Extraordinary Chambers of the Courts of Cambodia, *Charged or Accused Persons before the ECCC*, <https://www.eccc.gov.kh/en/all-cases/en>

<sup>118</sup> Extraordinary Chambers of the Courts of Cambodia, *Case 001*, <https://www.eccc.gov.kh/en/case/topic/1>; Extraordinary Chambers of the Courts of Cambodia, *Supreme Court Chamber quashes part of the convictions, affirms life imprisonment for Nuon Chea and Khieu Samphan in Case 002/01*, 23 November 2016, <https://www.eccc.gov.kh/en/articles/supreme-court-chamber-quashes-part-convictions-affirms-life-imprisonment-nuon-chea-and-khie>; New York Times, “11 Years, \$300 Million, and 3 Convictions. Was the Khmer Rouge Tribunal Worth It?”, 10 April 2017, <https://www.nytimes.com/2017/04/10/world/asia/cambodia-khmer-rouge-united-nations-tribunal.html>

<sup>119</sup> Under Rule 11*bis* of the ICTY’s Rules of Procedure and Evidence.

accountability process. Addressing this issue, and enabling international involvement in the transitional justice mechanisms, and particularly the judicial mechanism, is only part of it. Irrespective of how 'ideally' created the judicial mechanism is and how legitimate it is perceived to be, it is not a replacement for ordinary criminal courts. Given that the judicial mechanism practically cannot deal with all cases related to past atrocity crimes in Sri Lanka, criminal accountability will invariably land on the doors of domestic institutions; that of the police, the Attorney-General's Department, and the judiciary. For this reason, rebuilding the credibility of these domestic institutions is paramount and must occur in tandem with implementing the transitional justice mechanisms.

Given that the ordinary criminal courts (and the criminal justice system) will invariably be confronted with cases of international crimes/serious human rights violations, the process of reform, including substantive efforts to persuade the public that ordinary courts can mete out justice, is imperative. The absence of which will result in a situation where the judicial mechanism deals with a handful of cases within its jurisdiction, if that, and the remainder will enter a system for which the public does not have confidence in its ability to provide justice and accountability.

### **Reforms of police, Attorney-General's Department, and judiciary**

The law enforcement, prosecutorial, and adjudicative functions are arguably the most crucial functions of a criminal justice system. There is immense power that is conferred upon the institutions to carry out these functions. In situations where those powers are not used to fulfil their designated functions or are used to bypass adherence to the rule of law, the functions cease to be effective and an enormous power imbalance is created, which is dangerous to citizens.

When looking at the nature of reforms required of these three bodies, as highlighted above, the reforms broadly fit into two categories. Firstly, certain issues relate to improving capacity and 'making the system better'. For example, improving language proficiency is required so that those engaging with these three functions (the victims and accused in particular) are not detrimentally affected by the inability of state officers to communicate in a particular language. Improving language capacity will also enrich the system, particularly given the multi-ethnic fabric of Sri Lanka's society. An increase in the number of state officers (particularly state counsel and judges) is required in order to overcome the extensive backlogs of cases and reduce delays. Additional and ongoing trainings will improve the subject-matter knowledge and competence of state officers, and enable them to effectively carry out their duties.

Secondly, certain reforms are required due to more insidious problems that fundamentally require upheaval of the *status quo*. This category is not merely about making the system better; rather it is about rectifying the corrosion of the system and about stopping the negative elements/aspects of the system. The lack of transparency, discretion, politicisation, and accountability for actions fall into this category. In relation to the judiciary, for example, the lack of transparency surrounding the promotion and transfer of judges illustrates processes that are too discretionary and that cannot be subject to checks and balances. Without a proper code of conduct, with misconduct and sanctions stipulated, the errant behaviour and actions of judges goes unchecked. This is detrimental to a functioning rule of law system, where the judiciary is supposed to protect citizens against abuses of state power. In a similar vein, superficial oversight of police action is indicative of a judiciary that is not adequately discharging its duties. For example, the dual role of the Attorney-General's Department, as the Government's legal advisor and prosecutor, is untenable in a country with extensive allegations of state officers committing or being complicit in the commission of crimes. The unregulated discretion of the Attorney-General's Department in initiating prosecutions and the bottleneck created illustrates, once again, a function without proper checks and balances. Another example is the police force, where due process for

suspects cannot be a normative or aspirational standard; it is the bare minimum required to give effect to fair trial rights. The right to access a lawyer should not be up for discussion or qualified—it should be unequivocally guaranteed and the police should be duty bound to inform suspects of that right. Crucially, the use of torture to extract self-incriminatory statements and gather evidence while a suspect is in custody, as primary investigative tools, is indicative of flawed police investigative techniques.

## **PART 2.2 – RECENT RECOMMENDATIONS RELATED TO THE REFORM OF THE CRIMINAL JUSTICE SYSTEM**

The information below surveys recent recommendations (from 2016 and 2017) about the criminal justice system made by the CTF,<sup>120</sup> the Special Rapporteur on the independence of judges and lawyers,<sup>121</sup> the Special Rapporteur on torture,<sup>122</sup> CAT,<sup>123</sup> CEDAW,<sup>124</sup> and the Prime Minister's Task Force.<sup>125</sup> The recommendations are clustered into thematic areas.

The level of detail covered by these recent recommendations for reform illustrates the extent to which the criminal justice system requires attention, which extends far beyond creating a special entity (a special court).

### **Transparency**

- Urgently adopt comprehensive measures to address impunity within the transitional justice context and the whole justice chain.<sup>126</sup>
- Increase public confidence, transparency, and accountability by ensuring key actors involved in the investigative, prosecutorial, and judicial processes formulate and make public their policies and procedures on the treatment of cases involving human rights violations, international crimes and sexual violence.<sup>127</sup> Address the current practice of the judiciary impeding justice, including systemic delays in the hearing and management of cases.<sup>128</sup>
- Avoid the politicisation of the appointment process by increasing the non-partisan membership of the Constitutional Council to include representation from civil society, the Bar Association, and academia.<sup>129</sup>

---

<sup>120</sup> Final Report of the Consultation Task Force on Reconciliation Mechanisms, 17 November 2016, Vol. 1 (CTF report).

<sup>121</sup> Human Rights Council, Report of the Special Rapporteur on the independence of judges and lawyers on her mission to Sri Lanka, thirty-fifth session, 15 March 2017, UN Doc. A/HRC/35/31/Add.1 (Special Rapporteur on IJL report).

<sup>122</sup> Human Rights Council, Report of the Special Rapporteur on torture and other cruel, inhuman, or degrading treatment or punishment on his mission to Sri Lanka, thirty-fourth session, 22 December 2016, UN Doc. A/HRC/34/54/Add.2 (Special Rapporteur on torture report).

<sup>123</sup> Committee against Torture, Concluding observations on the fifth periodic report of Sri Lanka, 27 January 2017, UN Doc. CAT/C/LKA/CO/5 (CAT report).

<sup>124</sup> Committee on the Elimination of Discrimination against Women, Concluding observations on the eighth periodic report of Sri Lanka, 3 March 2017, UN Doc. CEDAW/C/LKA/CO/8 (CEDAW report).

<sup>125</sup> Task Force on Prevention of Violence Against Women and the Girl Child, *Action Plan Based on Recommendations of the Leader of the Opposition's Commission on Violence Against Women and the Girl Child*, 5 February 2016

<sup>126</sup> Special Rapporteur on IJL report, para 144.

<sup>127</sup> CTF report, p 431, para 1.24e.

<sup>128</sup> CTF report, p 430, para 1.24c.

<sup>129</sup> Special Rapporteur on IJL report, para 103.

- The Constitutional Council should set out and publish its rules of procedures, including the criteria used to evaluate candidates' suitability for a given position, which should be scrupulously and consistently applied.<sup>130</sup>

## Constitution

- Thoroughly review the fundamental rights chapter of the Constitution and protect a large set of civil, cultural, economic, political, and social human rights, all of which are in line with Sri Lanka's international human rights obligations.<sup>131</sup>
- The Constitution should clearly and expressly recognise the fundamental principle of the separation of powers, establish checks and balances, and guarantee the independence of the judiciary and the courts, as well as of the legal profession.<sup>132</sup>
- Enshrine the right to have access to a lawyer from the moment of arrest in the Constitution.<sup>133</sup>
- Repeal article 16(1) of the Constitution to introduce judicial review of all laws.<sup>134</sup>

## Judiciary

### *Appointment*

- The selection and appointment of judges of both superior and first instance courts should be transparent at all stages and follow clear recruitment criteria, including technical requirements.<sup>135</sup>

### *Promotions and transfers*

- Decisions on promotions should be reached following a fair and transparent evaluation procedure based on objective factors, in particular the merits, integrity, experience, and seniority of the candidates. These factors and the procedure should be made public.<sup>136</sup>
- The Judicial Service Commission should review and clarify its policy regarding transfers of first instance court judges, in particular it should look into the seriously negative impact such transfers can have on the timely delivery of justice. The Commission should draw up and publicise objective criteria, which should also take into account the specific expertise of judges.<sup>137</sup>
- Judges should be remunerated with due regard for the responsibilities and the nature and the dignity of their office. Their salary scale should be different from the one used for other public officers.<sup>138</sup>

---

<sup>130</sup> Special Rapporteur on IJL report, para 104.

<sup>131</sup> Special Rapporteur on IJL report, para 101.

<sup>132</sup> Special Rapporteur on IJL report, para 102.

<sup>133</sup> Special Rapporteur on IJL report, para 133.

<sup>134</sup> CEDAW report, para 11(d).

<sup>135</sup> Special Rapporteur on IJL report, para 105.

<sup>136</sup> Special Rapporteur on IJL report, paras 105 and 107.

<sup>137</sup> Special Rapporteur on IJL report, para 108.

<sup>138</sup> Special Rapporteur on IJL report, para 109.

### *Conduct and disciplinary action*

- Adopt a code of conduct for judges, in line with international standards such as the Bangalore Principles on Judicial Independence. It should be adopted in consultation with members of the judiciary and its drafting should be entrusted to an independent panel of retired and sitting judges, lawyers, and academics.<sup>139</sup>
- Disciplinary proceedings should respect due process and allow for independent reviews of decisions to be made. The specific causes triggering misconduct and the corresponding sanctions, which must be proportionate and adequate, as well as the procedures to follow should be established in law.<sup>140</sup>
- Create an independent and impartial special disciplinary panel.<sup>141</sup>

### *Impeachment*

- The impeachment procedure should be regulated by an Act of Parliament, which should explicitly set out what constitutes misbehaviour in light of the international standards contained in the Principles on the Independence of the Judiciary and the Bangalore Principles on Judicial Independence. The final decision should be made by a panel or appellate tribunal (comprised of retired judges), who should make a determination on the merits of the case. Selectivity in the composition of the panel can be avoided by automatically enrolling judges as they retire in a list to serve as a member of the impeachment panel or appellate tribunal.<sup>142</sup>

### *Judicial Service Commission*

- Broaden the composition of the Judicial Service Commission. Include judges of other courts and tiers and other experts, such as retired judges, lawyers, and academics.<sup>143</sup>

### *Contempt of court*

- Enact legislation to define a clear and precise scope and application for the offence of contempt of court, identifying behaviours constituting contempt of court, and setting up a procedure to deal with contempt cases.<sup>144</sup>

### *Fundamental Rights applications*

- High Courts should have jurisdiction to receive fundamental rights applications. The time limit to file an application should be extended and an appeal procedure should be established.<sup>145</sup>

---

<sup>139</sup> Special Rapporteur on IJL report, para 113.

<sup>140</sup> Special Rapporteur on IJL report, para 112.

<sup>141</sup> Special Rapporteur on IJL report, para 112.

<sup>142</sup> Special Rapporteur on IJL report, para 111.

<sup>143</sup> Special Rapporteur on IJL report, para 106.

<sup>144</sup> Special Rapporteur on IJL report, para 137.

<sup>145</sup> Special Rapporteur on IJL report, para 141.

### *Court resources*

- Adopt urgent special measures to redress the discrepancies of available material resources between the different courts. Particular attention should be paid to courts in the Northern and Eastern Provinces.<sup>146</sup>

## **Attorney-General's Department**

### *Mandate*

- Review the roles and powers of the Attorney-General to reinforce the independence of the office and reduce conflicts of interest.<sup>147</sup>
- Decentralise the work of the Attorney-General's Department, in consultation with all parties involved in criminal prosecutions.<sup>148</sup>
- Urgently adopt a code of conduct for state counsel, in line with international standards, such as the Guidelines on the Role of Prosecutors.<sup>149</sup>

### *Appointment*

- To ensure transparency, credibility, and independence, the objective selection criteria for the appointment of the Attorney-General should be clearly set out in law.<sup>150</sup>
- Review the appointment of state counsel to increase transparency and impartiality. Include objective evaluation criteria in the selection process.<sup>151</sup>

### *Prosecution guidelines*

- Issue clear and proper guidelines for the investigation and prosecution of crimes, including victim-oriented protocols respecting women's and children's rights. Adopt specific guidelines for the effective investigation and prosecution of gross violations of international human rights law and serious violations of international humanitarian law.<sup>152</sup>
- Supervise the investigation of crimes tried before the High Courts.<sup>153</sup>
- Urgently reduce delays in the investigation of crimes and the indictment of accused.<sup>154</sup>

---

<sup>146</sup> Special Rapporteur on IJL report, para 110.

<sup>147</sup> Special Rapporteur on IJL report, para 123.

<sup>148</sup> Special Rapporteur on IJL report, para 122.

<sup>149</sup> Special Rapporteur on IJL report, para 120.

<sup>150</sup> Special Rapporteur on IJL report, para 114.

<sup>151</sup> Special Rapporteur on IJL report, para 115.

<sup>152</sup> Special Rapporteur on IJL report, para 117.

<sup>153</sup> Special Rapporteur on IJL report, para 118.

<sup>154</sup> Special Rapporteur on IJL report, para 121.

### *Conflict of interest*

- Address the pressing conflict of interest issues in the Attorney-General's Department. The Attorney-General's Department should be divided with a Director of Public Prosecutions as a separate and independent entity to avoid conflict of interest in prosecuting crimes involving state officers.<sup>155</sup> Alternatively, establish an independent special office to handle the prosecution of state officials.<sup>156</sup>

### **Police and criminal investigations**

- Amend the Police Act to make the police more accountable, effective, and trustworthy.<sup>157</sup>

### *Arrests and detention*

- Enact legislation requiring the police to obtain an arrest warrant issued by a judicial authority in order to conduct an arrest, except in cases of *flagrante delicto*.<sup>158</sup> Ensure all arrests are transparent, with the arresting officer showing proper identification and based on objective evidence.<sup>159</sup> Ensure that arresting officers register the exact date, time, grounds for the detention, and place of arrest of all detained persons.<sup>160</sup>
- Ensure detained persons are promptly brought before a judge within the time limit established by law, which should not exceed 48 hours.<sup>161</sup>
- Closely monitor compliance with the detention registration system and penalise any officers who fail to adhere to it or to ensure that their subordinates do so.<sup>162</sup>

### *Oversight on police investigations*

- Establish effective prosecutorial oversight over police actions during investigations.<sup>163</sup>
- Closely monitor the legality of investigations through effective judicial oversight.<sup>164</sup>

### *Police investigation methods*

- Improve criminal investigation methods in order to end the reliance on statements obtained during police interrogation as the central element of proof in criminal prosecutions.<sup>165</sup>

---

<sup>155</sup> CTF report, pp 431, para 1.24d.

<sup>156</sup> Special Rapporteur on IJL report, para 124

<sup>157</sup> Special Rapporteur on torture report, para 116(i).

<sup>158</sup> CAT report, para 10(a).

<sup>159</sup> Special Rapporteur on torture report, para 118(g).

<sup>160</sup> CAT report, para 10(c).

<sup>161</sup> CAT report, para 10(b).

<sup>162</sup> CAT report, para 10(c).

<sup>163</sup> CAT report, para 10(d).

<sup>164</sup> Special Rapporteur on IJL report, para 116.

<sup>165</sup> CAT report, para 10(d).

### *Custodial surveillance*

- Install video surveillance in all places of custody, except where detainees' right to privacy or to confidential communication with their lawyer or doctor may be violated. Recordings should be kept in secure facilities and be made available to investigators, detainees and lawyers.<sup>166</sup>

### *Conflict of interest*

- Create a separate unit within the police force to investigate allegations against the police. Officers of this unit should be independent of and insulated from the regular police force.<sup>167</sup>

### *Pre-trial non-custodial alternatives*

- Apply non-custodial measures as alternatives to pre-trial detention.<sup>168</sup>

## **Institutional reform of the security sector and public service**

- Immediately undertake institutional reform of the security sector. Develop a vetting process to remove from office all levels of military personnel, security force personnel, or any other public official, where there are reasonable grounds to believe that they were involved in human rights violations.<sup>169</sup>
- Ensure the police, security forces, and intelligence agencies follow the Presidential Directives on Arrest and Detention reissued in June 2016.<sup>170</sup>
- Ensure national security and policing procedures are compliant with international standards.<sup>171</sup>
- Rebuild the security sector so they are trustworthy and effective in protecting citizens, without violating human rights.<sup>172</sup>
- Establish independent oversight authorities to monitor national security agencies.<sup>173</sup>

## **Fair trial rights and legal safeguards**

- Verify that law enforcement officials respect legal safeguards. Apply Crimes Circular No. 02/2013 and penalise any failure on the part of officials to do so.<sup>174</sup>

### *Access to counsel*

- Ensure in law and practice that every person arrested or detained has access to a lawyer of his/her choice from the moment of arrest, and ensure access is regular and throughout all stages of criminal proceedings. Every person arrested or detained should be immediately informed about

---

<sup>166</sup> CAT report, para 10(f).

<sup>167</sup> CTF report, p 431, para 1.24d; CAT report, para 20.

<sup>168</sup> CAT report, para 10(g).

<sup>169</sup> CAT report, para 14(a).

<sup>170</sup> CTF report, p 428, para 1.10.

<sup>171</sup> Special Rapporteur on torture report, para 118(j).

<sup>172</sup> Special Rapporteur on torture report, para 119(b).

<sup>173</sup> Special Rapporteur on torture report, para 119(b).

<sup>174</sup> CAT report, para 28(c).

this right and of the avenues available in case he/she cannot afford to pay for a lawyer.<sup>175</sup> Guarantee access to lawyers through the Legal Aid Commission or bar association or other services.<sup>176</sup>

- Immediately withdraw the proposed amendment to the Criminal Procedure Code intending to deprive a suspect of access to a lawyer until his or her statement has been recorded.<sup>177</sup>

#### *Plea bargaining*

- Clearly regulate the practice of plea bargaining through legislation, including stipulations that defendants should never be pressured into pleading guilty and should be informed, in languages they understand, of all the consequences and implications of pleading guilty.<sup>178</sup>

#### *Confessions*

- Ensure statements or confessions made by a person deprived of liberty, other than those made in the presence of a judge and with the assistance of legal counsel, have no probative value in proceedings against that person.<sup>179</sup>

#### *Notifying family*

- Ensure in law detainees' right to notify a relative, or other person of the detainees' choice, of the reasons for and place of detention.<sup>180</sup>

#### *Detention*

- Publish a full list of all gazetted detention centres, close down any unofficial ones still in existence and ensure that no one is detained in unofficial detention facilities.<sup>181</sup>
- Ensure prompt and official registration of all persons deprived of their liberty and periodically inspect records at police and prison facilities to ensure that they are maintained in accordance with the established procedures. Failure to do so would entail investigating senior officers and holding them accountable.<sup>182</sup>
- Digitise all registrations and records of all persons deprived of their liberty and make them accessible to the HRC.<sup>183</sup>

---

<sup>175</sup> Special Rapporteur on IJL report, para 133; Special Rapporteur on torture report, paras 116(f) and 118(d); CAT report, para 28(a).

<sup>176</sup> Special Rapporteur on torture report, para 118(d).

<sup>177</sup> Special Rapporteur on torture report, para 116(f).

<sup>178</sup> Special Rapporteur on IJL report, para 136.

<sup>179</sup> Special Rapporteur on torture report, para 118(f).

<sup>180</sup> CAT report, para 28(b).

<sup>181</sup> CAT report, para 12; Special Rapporteur on torture report, para 118(a).

<sup>182</sup> Special Rapporteur on torture report, para 118(b).

<sup>183</sup> Special Rapporteur on torture report, para 118(c).

### *Habeas corpus*

- Ensure all detainees can challenge the lawfulness of detention before an independent court, through habeas corpus proceedings, where a magistrate can order the immediate release of detainees.<sup>184</sup>
- Adjudication of habeas corpus proceedings should be expedited.<sup>185</sup>

### *Language*

- Enshrine in national legislation the right of the accused to have access to an interpreter from the outset of the deprivation of liberty and throughout the proceedings.<sup>186</sup>

### **Diversity**

- Urgent measures should be taken to allow people coming from different strata of society to be part of the justice system and to have access to it. Measures should include: reviewing recruitment; selection and appointment procedures; including evaluation criteria; making language requirements mandatory for certain positions; considering language abilities to fill positions in mostly Tamil-speaking areas; identifying barriers preventing minorities from reaching positions in the justice system and devising strategies to overcome them; and ensuring adequate access to secondary and university education.<sup>187</sup>
- Ensure the Tamil population is adequately represented in the police force at all ranks in the North and East.<sup>188</sup>

### **Legal profession**

- Legally recognise the independence of lawyers, and the vital role they play in upholding the rule of law and promoting and protecting human rights.<sup>189</sup>
- Revise the admission, enrollment, and discipline of attorneys-at-law, in consultation with lawyers and the Bar Association. The Bar Association should oversee the authorisation to practice law and the enforcement of disciplinary measures. Any decision should be subject to review before an independent court. Disciplinary proceedings, including disbarment, should provide for all guarantees of fairness and due process, including the right to an independent review.<sup>190</sup>
- Any threats or attacks against lawyers, or any improper interference in their work, should be promptly investigated and sanctioned. Authorities should ensure their security and that of their families.<sup>191</sup>

---

<sup>184</sup> Special Rapporteur on torture report, para 118(h); CAT report, para 28(c).

<sup>185</sup> CAT report, para 28(c).

<sup>186</sup> CAT report, para 32(c).

<sup>187</sup> Special Rapporteur on IJL report, para 125.

<sup>188</sup> Special Rapporteur on torture report, para 118(j).

<sup>189</sup> Special Rapporteur on IJL report, para 128.

<sup>190</sup> Special Rapporteur on IJL report, para 129.

<sup>191</sup> Special Rapporteur on IJL report, para 130.

## Education, training, and capacity building

- Adequately educate and train all who participate in the justice system, including mandatory education and training on human rights. There should also be opportunities for continuing education and on-the-job training.<sup>192</sup>
- Law curricula should include mandatory courses on international human rights law, including gender perspectives, women's rights, international humanitarian law, and international criminal law.<sup>193</sup>
- Provide systematic capacity-building to judges, prosecutors, lawyers, the police, and other law enforcement officials on the CEDAW Convention, as well as on the Committee's general recommendations and its jurisprudence under the Optional Protocol, to ensure that the judiciary is independent, impartial, professional, and gender sensitive as a means of safeguarding women's rights.<sup>194</sup>
- Increase the personnel of the Attorney-General's Department, the police (including forensics), and JMOs to address existing gaps, delays, and the backlog of cases as well as complaints. This should include the need for specific competencies, including language, forensic skills, and adequate representation of women and all ethnic groups.<sup>195</sup>
- Strengthen the capacity and competence of the judiciary, Attorney-General's Department, and police, including resources for dedicated forensic facilities, training on transitional justice and the jurisprudence of human rights, international crimes, and sexual violence, and providing local officers access and exposure to international technical expertise. Specifically designed courses on transitional justice, especially on human rights jurisprudence, international crimes, and sexual violence, should be provided in all educational institutions of legal learning, including for judges and practising lawyers. Promotions should take into account the improved competence of personnel in the above institutions and should be clearly set out and implemented.<sup>196</sup>
- The justice system should be bilingual throughout, including having an adequate number of competent interpreters in the courts.<sup>197</sup>
- Ensure security sector officials (military, intelligence, and police) undergo a rigorous reform programme, including human rights education, training in effective interrogation techniques, and proper use of force.<sup>198</sup>
- Provide specialised training in forensic medical investigation and documentation of torture and ill-treatment in accordance with the Istanbul and Minnesota Protocols.<sup>199</sup>

---

<sup>192</sup> Special Rapporteur on IJL report, para 131.

<sup>193</sup> Special Rapporteur on IJL report, para 132.

<sup>194</sup> CEDAW report, para 15(a).

<sup>195</sup> CTF report, p 430, para 1.24a.

<sup>196</sup> CTF report, p 430, para 1.24b.

<sup>197</sup> CTF report, p 431, para 1.24f.

<sup>198</sup> Special Rapporteur on torture report, para 118(i).

<sup>199</sup> Special Rapporteur on torture report, para 118(l).

- Provide periodic and compulsory training on the provisions of the Torture Convention, the Istanbul Protocol, and on non-coercive interrogation techniques to all officials involved in the treatment and custody of persons deprived of their liberty (in detention).<sup>200</sup>
- Develop and apply a methodology for evaluating the effectiveness of educational and training programmes relating to the Torture Convention and the Istanbul Protocol.<sup>201</sup>
- Adequately train police officers and state counsel to discharge their functions. Trainings should include specialised training in human rights, including on integrating gender perspectives in their work, as well as technical training.<sup>202</sup>

### Counter-terrorism laws

- Immediately repeal the PTA. Any legislation to replace the PTA should fully respect international human rights law and standards.<sup>203</sup>
- Ensure anti-terror legislation adopts a precise definition of terrorist acts and has safeguards against arbitrary arrest and detention; safeguards against torture or cruel, inhuman or degrading treatment; provisions for access to legal counsel from the moment of deprivation of liberty; strong judicial overview of law enforcement and security agencies; provisions guaranteeing the requirements of strict necessity and proportionality of the detention; periodic review of the detention by a court that can order the immediate release of the detainee or alternative measures; and protections for the privacy rights of citizens.<sup>204</sup>
- Abolish the regime of administrative detention, which confines individuals outside of the criminal justice system and makes them vulnerable to abuse. Pending abolishment, guarantee that magistrates promptly review all detention orders under the PTA and detainees designated for potential prosecution are charged and tried as soon as possible, and those who are not charged or tried are immediately released.<sup>205</sup>
- Incorporate the recommendations by the HRC relating to draft anti-terror legislation, including procedural safeguards when adopting or amending legislation on national security.<sup>206</sup>
- Ensure a timely, robust and transparent national debate on the draft anti-terror legislation, which is inclusive of all civil society.<sup>207</sup>

### Rehabilitation

- Abolish the current system of ‘rehabilitation’ under anti-terrorism regulations, which allows persons to be confined in centres without due process safeguards. Pending the abolishment of the system, ensure magistrates promptly review all of the pending decisions on rehabilitation to guarantee that detainees designated for potential prosecution are charged and tried as soon as possible and those who are not charged or tried are immediately released.<sup>208</sup>

---

<sup>200</sup> CAT report, para 48.

<sup>201</sup> CAT report, para 48.

<sup>202</sup> Special Rapporteur on IJL report, para 119.

<sup>203</sup> Special Rapporteur on IJL report, para 134; Special Rapporteur on torture report, para 116(a); CAT report, para 22.

<sup>204</sup> Special Rapporteur on torture report, para 116(b); CAT report, para 22.

<sup>205</sup> CAT report, para 22.

<sup>206</sup> Special Rapporteur on torture report, para 116(c).

<sup>207</sup> Special Rapporteur on torture report, para 116(b).

<sup>208</sup> CAT report, para 26.

- Account for the 12,169 persons who have been ‘rehabilitated’ and ensure that they were not subjected to arbitrary detention.<sup>209</sup>

## Torture

- Reform the judiciary to address deficient procedures that continue to undermine any effective monitoring and documentation of and accountability for torture and ill-treatment through prompt, thorough, and impartial investigations.<sup>210</sup> Remind judges of their duty to actively ask a detainee appearing before them about treatment during detention and request a forensic examination if there are reasons to believe he or she may have been subjected to torture or duress.
- Ensure allegations of torture and ill-treatment are admitted at all stages of judicial proceedings.<sup>211</sup>
- Those whose duty it is to apply the law, including judges who fail to respond appropriately to allegations of torture raised during judicial proceedings, should be held responsible.<sup>212</sup>
- Uphold an obligation to genuinely investigate, prosecute, and punish the well-documented and numerous acts of torture in the past, as there is no statute of limitations for such crimes under international law.<sup>213</sup>
- Ensure investigations into recent cases are launched *ex officio*, without any need for formal complaints by prosecutors, whenever there are reasonable grounds to suspect torture or ill-treatment.<sup>214</sup>
- Hold perpetrators, including superiors who may have tolerated or condoned the act, criminally responsible for torture or other ill-treatment and impose adequate disciplinary measures.<sup>215</sup>
- Ensure the exclusionary rule with regard to evidence obtained under torture is fully implemented by the courts and that confessions in criminal proceedings are not admitted in the absence of any corroborating evidence.<sup>216</sup>
- Order independent medical examinations by forensic doctors properly trained on the Istanbul Protocol as soon as any suspicion of mistreatment arises.<sup>217</sup>
- Ensure all aspects of the chain of criminal justice (investigation, detention, interrogation, arrest, and conditions of incarceration) comply with the rule of law.<sup>218</sup>
- Establish an effective torture prevention programme by undertaking comprehensive institutional reforms and a vetting process at all levels of the security sector (the army, the intelligence agency, and the police) in order to overhaul these institutions, which continue to function with impunity.<sup>219</sup>

---

<sup>209</sup> CAT report, para 26.

<sup>210</sup> Special Rapporteur on torture report, para 120(a).

<sup>211</sup> Special Rapporteur on torture report, para 120(d).

<sup>212</sup> CAT report, para 10(e).

<sup>213</sup> Special Rapporteur on torture report, para 120(b).

<sup>214</sup> Special Rapporteur on torture report, para 120(c).

<sup>215</sup> Special Rapporteur on torture report, para 120(e).

<sup>216</sup> Special Rapporteur on torture report, para 120(f).

<sup>217</sup> Special Rapporteur on torture report, para 120(h).

<sup>218</sup> Special Rapporteur on torture report, para 120(i).

<sup>219</sup> Special Rapporteur on torture report, para 119(a).

- Provide directives to the security sector to ensure all officers are informed and given clear and unequivocal instructions that all acts of torture—including rape and other forms of sexual violence—and ill-treatment are prohibited, and that those responsible, either directly or as commander or superior, will be investigated, prosecuted, and punished.<sup>220</sup>

#### *Investigations and prosecutions*

- Ensure that all allegations of unlawful detention, torture, and sexual violence by security forces are promptly, impartially, and effectively investigated by an independent body.<sup>221</sup>
- Ensure allegations of torture and sexual violence in rehabilitation centres are promptly, impartially, and effectively investigated by an independent mechanism.<sup>222</sup>
- Establish an office to investigate and prosecute allegations of torture, independent of the Attorney-General's Department, to ensure a break from the past culture of impunity.<sup>223</sup> Alternatively, strengthen the independence of the prosecutorial authority responsible for torture.<sup>224</sup>
- Vest prosecutors with the ability to mandate ex officio investigations into torture.<sup>225</sup>
- Ensure persons under investigation for torture are immediately suspended from duty for the duration of the investigation, particularly when there is a risk that they might otherwise be in a position to repeat the alleged act, to commit reprisals against the alleged victim or to obstruct the investigation.<sup>226</sup>
- Ensure those responsible for committing, ordering, consenting to, or acquiescing in the commission of torture are duly prosecuted, tried and, if found guilty, punished in a manner that is commensurate with the gravity of their acts.<sup>227</sup>

#### *Redress for torture victims*

- Take necessary legislative and administrative measures to ensure that victims of torture and ill-treatment receive or are able to access effective remedies and can obtain all forms of redress, including restitution, adequate compensation, full rehabilitation, satisfaction, and guarantees of non-repetition, and are not subject to reprisals.<sup>228</sup>
- Fully assess the needs of torture victims and ensure that specialised holistic rehabilitation services are available and promptly accessible without discrimination, through the direct provision of rehabilitative services by the Government or through the funding of other facilities, including those administered by NGOs.<sup>229</sup>

---

<sup>220</sup> Special Rapporteur on torture report, para 119(c).

<sup>221</sup> CAT report, para 26.

<sup>222</sup> CAT report, para 26.

<sup>223</sup> Special Rapporteur on torture report, para 121(d).

<sup>224</sup> CAT report, para 20.

<sup>225</sup> CAT report, para 20.

<sup>226</sup> CAT report, para 20.

<sup>227</sup> CAT report, para 20.

<sup>228</sup> CAT report, para 46(a); Special Rapporteur on torture report, para 120(g).

<sup>229</sup> CAT report, para 46(b).

### *Forced confessions*

- Ensure in law, and in any proposals to replace security legal framework, strict guarantees that coerced confessions are inadmissible in practice as evidence in court, including in cases concerning state security.
- Where an allegation that a statement was made under torture exists, ensure the burden of proof effectively remains on the prosecuting authority, without exception. A forensic medical examination should immediately be ordered and the necessary steps should be taken to ensure that the allegations are promptly and properly investigated.<sup>230</sup>
- Enforce the operation of the Evidence Ordinance in all criminal cases, including in terrorism-related offences. Ensure extrajudicial confessions that are recanted by defendants, when they appear before a magistrate on grounds of having been coerced, are effectively excluded from the proceedings, especially when the medical examination sustains the claim.<sup>231</sup>
- Adopt measures required in order to permit proceedings to be re-opened on grounds that they were held on the basis of confessions extracted under torture.<sup>232</sup>

### **Medical examinations**

- Ensure a medical examination is performed promptly at the beginning of the deprivation of liberty by independent doctors, including doctors of the detainee's own choosing, who have been trained in the use of the Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the Istanbul Protocol).<sup>233</sup>
- Ensure the medico-legal report is made directly available to the detainee or the detainee's counsel on request.<sup>234</sup>
- Ensure all examinations are performed out of earshot and sight of police officers and prison staff.<sup>235</sup>
- Ensure doctors are able to report any signs of torture or ill-treatment to an independent investigative authority in confidence and without risk of reprisals.<sup>236</sup>

### **Access to justice**

- Study the backlogs of courts and analyse the causes of judicial delays. Design a comprehensive plan to improve the efficiency of the administration of justice without encroaching on the interests of justice. The design and implementation of any measures should be done in consultation with all stakeholders, particularly judges, lawyers, and state counsel.<sup>237</sup>

---

<sup>230</sup> CAT report, para 32(a).

<sup>231</sup> CAT report, para 32(b).

<sup>232</sup> CAT report, para 32(d).

<sup>233</sup> CAT report, para 30(a).

<sup>234</sup> CAT report, para 30(b).

<sup>235</sup> CAT report, para 30(c).

<sup>236</sup> CAT report, para 30(d).

<sup>237</sup> Special Rapporteur on IJL report, para 135.

- The Supreme Court should also sit in other parts of the country, including in the Northern and Eastern provinces, in order to facilitate access to justice, sensitise judges to the specific situation of people in regions outside of the capital, and contribute to trust building.<sup>238</sup>
- Increase the number of Tamil-speaking judicial enforcement officers in the North and East of the country.<sup>239</sup>
- The work of the Legal Aid Commission should be duly acknowledged and supported, including through the allocation of additional resources.<sup>240</sup>
- Adopt special measures to ensure persons in particularly vulnerable situations—such as children, people living in remote areas, and victims of sexual violence—have meaningful access to the justice system and other complaint procedures, including the provision of qualified legal aid.<sup>241</sup>

### Victim centredness

- Develop and enforce a national policy on victim centredness through departmental circulars to ensure effective implementation.<sup>242</sup> Urgently address current procedural bars to access to justice. These include the failure to provide adequate information to affected persons, the current practice of denying persons a copy of their own judicial medical report and the restrictive nature of the statute of limitations.<sup>243</sup>

### Victim and witness protection

- Urgently review the witness protection mechanism and strengthen its independence to provide meaningful protection.<sup>244</sup>
- Expedite the review and amendment of the Assistance to and Protection of Victims of Crimes and Witnesses Act, to incorporate better safeguards for the independence and effectiveness of the witness protection programmes, in line with international standards.<sup>245</sup>
- Make the National Authority, which was established under the Act, more independent and accountable, and ensure that its membership is fully vetted. Ensure it is subject to judicial oversight and not managed only by the police. Ensure its jurisdiction extends to the protection of all victims, including those who are trafficked or subjected to torture or sexual violence, due to the real risk of reprisals.<sup>246</sup>
- Exclude authorities who were part of the security forces from the witness protection programme.<sup>247</sup>

---

<sup>238</sup> Special Rapporteur on IJL report, para 138.

<sup>239</sup> CEDAW report, para 15(b)

<sup>240</sup> Special Rapporteur on IJL report, para 140.

<sup>241</sup> Special Rapporteur on IJL report, para 139.

<sup>242</sup> CTF report, p 431, para 1.24f.

<sup>243</sup> CTF report, p 431, para 1.24f.

<sup>244</sup> Special Rapporteur on IJL report, para 143.

<sup>245</sup> CEDAW report, para 17(c).

<sup>246</sup> Special Rapporteur on torture report, paras 116(h) and 119(j); CAT report, para 18.

<sup>247</sup> Special Rapporteur on torture report, para 121(d).

## Women

- Urgent attention must be given to the “...grave human rights violations against women during the conflict as well as to the long ranging, systematic and structural misogyny that manifested itself through the use of rape as a form of punishment, persistent harassment of women – especially women perceived to be single - by persons in authority...in a threatening social context, not limited to the war affected and militarised areas of the North and East...context where many government personnel consider sexually predatory behaviour towards women who come to access services, to be the norm.”<sup>248</sup> Women’s economic, social, political, legal, and cultural rights should be safeguarded and ensured in the Constitution, law, policy, and practice.<sup>249</sup> A National Commission on Women should be established without delay, and women’s representation in key decision-making and operational positions should be ensured.<sup>250</sup> Gender sensitivity training is required at all levels of society, including in educational institutions and in training for the public services. The harassment of women should be a punishable crime within the public service code and there should be a complaints mechanism for such harassment.<sup>251</sup>
- Implement a plan of action to improve women’s representation in all legal professions, ensuring in particular their equal representation at all levels of the justice system.<sup>252</sup>
- Enact the 30% quota for women candidates of political parties at the provincial level and introduce a similar quota for women at the national level.<sup>253</sup> Adopt legal quotas for women, including minority women, with a view to ensuring the targeted representation of women, including minority groups.<sup>254</sup> Establish a disaggregated data collection system on the participation of women representing different minorities in decision-making positions in all sectors and at all levels.<sup>255</sup>

## Sexual and gender-based violence

- Criminalise marital rape and expand the definition of torture in the Torture Act to include in it severe forms of sexual violence.<sup>256</sup>
- Amend the Prevention of Domestic Violence Act to ensure Protection Orders, upon Court issuance, are immediately made available to the parties and effectively enforced, and remove any requirement to participate in mediation prior to pursuing a case in court.<sup>257</sup>

---

<sup>248</sup> CTF report, p 432, para 1.31.

<sup>249</sup> CTF report, p 433, para 1.31a.

<sup>250</sup> CTF report, p 433, para 1.31b-c; CEDAW report, para 19(b).

<sup>251</sup> CTF report, p 433, para 1.31e-f.

<sup>252</sup> Special Rapporteur on IJL report, para 127.

<sup>253</sup> CEDAW report, para 29(a).

<sup>254</sup> CEDAW report, para 29(b).

<sup>255</sup> CEDAW report, para 29(d).

<sup>256</sup> CEDAW report, para 23(a).

<sup>257</sup> CEDAW report, para 23(b).

- Establish a special unit in the Attorney-General's Department to expedite the handling of cases of sexual violence.<sup>258</sup>
- Enact legislation to prohibit suspended sentences and stipulate mandatory minimum sentences for acts of violence against women.<sup>259</sup>
- Implement the zero tolerance policy for sexual violence perpetrated by the army and the police, ensuring accelerated investigation of, prosecution into, and punishment of all allegations of violence perpetrated against women and girls, including arbitrary arrest, torture, and sexual violence, as well as surveillance and harassment.<sup>260</sup>
- Reinforce national investigative and prosecutorial capacities as well as witness and victims' protection and support, including through facilitating the secure and confidential testimony of witnesses in and out of the country. Ensure that prosecutions are conducted impartially, objectively, in a timely manner, and according to international standards. Ensure the right of victims to reparations and the right of victims and societies to know the truth about violations, and to guarantees of non-recurrence of violations, in accordance with international law.<sup>261</sup>
- Comprehensively map all pending criminal investigations, *habeas corpus*, and fundamental rights petitions related to sexual violence cases, as well as the findings of all Commissions of Inquiries, particularly the cases involving the armed forces and the police.<sup>262</sup>
- Implement the National Plan of Action to Address Gender-based Violence in line with its international obligations and with the international protocol on the documentation and investigation of sexual violence in conflict, to tackle impunity for sexual torture and to ensure survivors are able to seek redress.<sup>263</sup> Allocate adequate resources to ensure its implementation in a co-ordinated and effective manner, including by increasing the number of shelters and providing medical treatment, legal support, psychosocial rehabilitation, reintegration programmes, and compensation to victims.<sup>264</sup>
- Intensify public awareness efforts, through strategic media campaigns and educational programmes, to address discriminatory stereotypes against women and gender-based violence.<sup>265</sup>
- Ensure systematic collection and analysis of data on all forms of gender-based violence against women, disaggregated by age, ethnic group, region, and relationship between the victim and the perpetrator.<sup>266</sup>

---

<sup>258</sup> CEDAW report, para 23(c).

<sup>259</sup> CEDAW report, para 23(c).

<sup>260</sup> CEDAW report, para 7.

<sup>261</sup> CEDAW report, para 7.

<sup>262</sup> CEDAW report, para 7.

<sup>263</sup> Special Rapporteur on torture report, para 116(j).

<sup>264</sup> CEDAW report, para 23(d).

<sup>265</sup> CEDAW report, para 23(e).

<sup>266</sup> CEDAW report, para 7.

## Trafficking and exploitation of prostitution

- Ensure sufficient human, technical, and financial resources for the effective implementation and monitoring of the National Strategic Plan to Monitor and Combat Human Trafficking (2016).<sup>267</sup>
- Provide continuous capacity-building for law enforcement and other concerned public officials on the early identification, referral, rehabilitation, and social integration of trafficking victims, including by providing them with access to shelters, legal, medical, and psychosocial assistance.<sup>268</sup>
- Prevent, prosecute, and adequately punish traffickers. Adopt gender-specific protection measures for women and girl victims.<sup>269</sup>
- Address the legal gaps that impede the prosecution of traffickers under Article 360[c] of the Penal Code.<sup>270</sup> Engage in bilateral, regional, and international co-operation to prevent trafficking, including by executing memoranda of understanding with other countries in the region and by harmonising legal procedures to prosecute traffickers.<sup>271</sup>
- Repeal the Vagrants Ordinance Act. In the interim, impose penalties on police officers who misuse the Act to harass sex workers as well as women of sexual minorities.<sup>272</sup>
- Ensure victims are provided with gender-sensitive protection and support, including exit programmes for women wishing to leave sex work.<sup>273</sup>

## Violence against women – recommendations relating to “A Gender Sensitive Justice System which Ensures Protection of Rights of Victims and Accountability of Perpetrators”<sup>274</sup>

- Expand the definition of torture to include non-state actors and sexual violence as a form of torture (or enact separate offences to cover the situations) and section 345 Penal Code on sexual harassment to include cybercrime.
- Investigate sexual violence and torture used on women and men in detention.
- Introduce guidelines on disciplinary action where police or armed forces personnel are convicted of torture or are found to have committed torture in fundamental rights proceedings.
- Ensure section 363 Penal Code on statutory rape has a zero tolerance policy for underage sexual relations below 16 years.
- Decriminalise offences, including abortion and homosexuality.

---

<sup>267</sup> CEDAW report, para 27(a).

<sup>268</sup> CEDAW report, para 27(b).

<sup>269</sup> CEDAW report, para 27(c).

<sup>270</sup> CEDAW report, para 27(d).

<sup>271</sup> CEDAW report, para 27(f).

<sup>272</sup> CEDAW report, para 27(g).

<sup>273</sup> CEDAW report, para 27(g).

<sup>274</sup> Task Force on Prevention of Violence Against Women and the Girl Child, *Action Plan Based on Recommendations of the Leader of the Opposition's Commission on Violence Against Women and the Girl Child*, 5 February 2016, pp 5-11. All recommendations in this section are taken from the Action Plan.

- Criminalise marital rape. Criminalise gang rape and rape of disabled, elderly, and pregnant women as distinct offences and grave crimes. Criminalise spousal, partner, and male relative coercion and intimidation of women to transact women's property, cash, and other assets.
- Introduce guidelines for the prosecution of incest. Amend the definition of relationships to exclude cousin relationships.
- Amend the defence of provocation to reflect 'battered women's syndrome'.
- Review and reform the victim and witness protection law to spell out clear victim protection mechanisms and means of implementation, including establishing a programme outside the control and purview of the regular law enforcement apparatus which must be able to provide protection to all victims and witnesses, including those involved in cases against the police.
- Adopt sentencing guidelines on sentencing rape cases, including statutory rape, to prevent arbitrary exercise of judicial discretion in sentencing.
- Prohibit suspended sentences and introduce minimum sentences for grave crimes, including violence against women.
- Amend the Evidence Ordinance to remove discriminatory provisions on the credibility of women's evidence, including the need for independent corroboration.
- Amend the Bribery Act and make sexual bribery a specific violation, with aggravated penalties.
- Amend guidelines to address sexual harassment in state sector institutions, which have been developed by the HRCSL to deal with complaints of sexual bribery.
- Create a gender sensitive complaints procedure on sexual bribery and extortion in the HRCSL.
- Repeal the Vagrants Ordinance. Strengthen implementation of laws on forced prostitution and trafficking in women and girls for prostitution. Penalise those who exploit them in brothels, ensuring that women and girls are not prosecuted.
- Comprehensively review all existing National Action Plans relevant to violence against women and consolidate them where necessary. Prioritise the area of sexual and gender-based violence.
- Introduce legislation to address violence against women in political life.

### **Violence against women and the armed conflict**

- Ensure investigation and prosecution of allegations of violence against women committed during the armed conflict.
- Make special provision for receiving testimonies of survivors of violence, particularly alleged violence against women committed by the armed forces.
- Ensure women have adequate support services and are fully informed of the process and the protections available to allow an informed choice to testify and be supported to do so.
- Ensure that women are represented as commissioners/members on all transitional justice mechanisms.
- Amend the Geneva Conventions Act No. 4 of 2006 and bring it into operation by promulgating regulations.

## Juveniles

- Raise the age for criminal responsibility of juveniles to one that is internationally acceptable.<sup>275</sup>
- Ensure the separation of juvenile and adult detainees, and that children are held in detention only as a last resort and for as short a time as possible.<sup>276</sup>

## Places of detention

- Ensure minimum standards of conditions of detention in accordance with the Standard Minimum Rules for the Treatment of Prisoners (Mandela Rules), including urgently repairing, upgrading, or closing old prisons. Further, ensure that current practices and conditions do not give rise to unsafe, cruel, inhuman or degrading treatment, or punishment or torture.<sup>277</sup>
- Reduce overcrowding in prisons by overhauling the prison system to reduce the number of detainees. Increase prison capacities in more modern prison facilities and remodel facilities, such as Welikada prison, which do not meet international standards.<sup>278</sup>
- Accelerate the judicial process and review sentencing policies by introducing alternatives to incarceration (bail and electronic surveillance for pre-trial defendants; non-custodial sentences for non-violent offenders and juveniles; parole and early release for the convicted; and suspended sentences for first time offenders or for certain minor offences).<sup>279</sup>
- Design a criminal justice system that aims to rehabilitate and reintegrate offenders, including by creating work and education opportunities.<sup>280</sup>
- Allocate sufficient budgetary resources to provide adequate health care by employing a sufficient number of qualified professionals and providing infirmaries in detention centres, with adequate equipment and medicines.<sup>281</sup> Ensure the daily presence of truly independent and qualified medical health staff—including psychiatric and dental specialists, in all places of deprivation of liberty, in co-operation with the public health services—to perform a medical entrance examination for all detainees, conduct regular check-ups, and provide medical assistance as necessary.<sup>282</sup> Ensure the swift transfer of patients to the National Hospital in cases of emergencies and serious illnesses.<sup>283</sup>
- Monitor the quantity and quality of food and water; ensure adequate sanitary and hygienic conditions; satisfactory ventilation; and adequate access to exercise, sunlight, and recreational activities.<sup>284</sup>
- Authorise more frequent family visits and facilitate them by providing transportation and other

---

<sup>275</sup> Special Rapporteur on torture report, para 118(n).

<sup>276</sup> Special Rapporteur on torture report, para 118(o).

<sup>277</sup> Special Rapporteur on torture report, para 117(a)-(b).

<sup>278</sup> Special Rapporteur on torture report, para 117(c)(i); CAT report, para 36(b).

<sup>279</sup> Special Rapporteur on torture report, para 117(c)(ii); CAT report, para 36(a).

<sup>280</sup> Special Rapporteur on torture report, para 117(d); CAT report, para 36(b).

<sup>281</sup> Special Rapporteur on torture report, para 117(e).

<sup>282</sup> Special Rapporteur on torture report, para 117(f).

<sup>283</sup> CAT report, para 36(c).

<sup>284</sup> Special Rapporteur on torture report, para 117(g).

support for indigent families.<sup>285</sup> Purchase and use body and parcel scanners—as promised by the Ministry of Prison Reforms, Rehabilitation, Resettlement, and Hindu Religious Affairs—to address the indignity of invasive body searches of family members visiting detainees.<sup>286</sup> Install telephones or computers for inmates so that they are able to communicate with their families.<sup>287</sup>

### Monitoring and complaints

- Create an effective public complaints and monitoring system of all structures involved in justice delivery so that inaction, delay and other forms of conduct by the state, which impede access to justice, are identified and addressed as a matter of priority.<sup>288</sup> Current disciplinary proceedings against state officers lack transparency and are ineffective. Accountability of errant state officers must be transparent and must be proportionate to the alleged violation. For example, the practice of transferring officers found guilty of torture/custodial violence, without further steps to ensure non-recurrence, erodes public confidence in the system and perpetuates a culture of impunity.<sup>289</sup>
- Introduce independent, effective, confidential, and accessible complaint mechanisms at all detention sites, including victims of torture. Install emergency telephone hotlines or confidential complaint boxes that are operational, and ensure complaints can be safely made and complainants are not subject to reprisals.<sup>290</sup>
- Authorise and facilitate regular, effective and independent monitoring of places of detention sites by international and national bodies, including the HRCSL and civil society organisations.<sup>291</sup>
- Ratify the Optional Protocol to the Torture Convention in order to establish an independent mechanism in charge of the regular monitoring of all places of detention.<sup>292</sup>

### *Deaths in custody*

- Ensure post-mortem examinations are conducted outside the area in which the death occurred, in order to avoid collusion.<sup>293</sup>
- Ensure all instances of death in custody are promptly and impartially investigated by an independent investigation unit that has no institutional or hierarchical link with the custodial body.<sup>294</sup>
- Ensure those found responsible for deaths in custody are brought to justice and, upon conviction, adequately punished.<sup>295</sup>

---

<sup>285</sup> Special Rapporteur on torture report, para 117(h).

<sup>286</sup> Special Rapporteur on torture report, para 117(i).

<sup>287</sup> Special Rapporteur on torture report, para 117(j).

<sup>288</sup> CTF report, p 431, para 1.24g.

<sup>289</sup> CTF report, p 431, para 1.24h.

<sup>290</sup> Special Rapporteur on torture report, para 118(k); CAT report, para 18.

<sup>291</sup> Special Rapporteur on torture report, para 118(m).

<sup>292</sup> CAT report, para 36(d).

<sup>293</sup> CAT report, para 38(b).

<sup>294</sup> CAT report, para 38(a).

<sup>295</sup> CAT report, para 38(c).

## Human Rights Commission

- Support the HRCSL to comply with the Paris Principles (on the status of national institutions for the promotion and protection of human rights).<sup>296</sup> Strengthen the powers of the HRCSL to ensure its independence and impartiality.<sup>297</sup>
- Provide sufficient resources—human and financial—to fulfil its broad mandate; strengthen and expand its activities; reform its methods of work; and adequately train its staff.<sup>298</sup>
- Abide by the legal obligation to provide information to the HRCSL swiftly on all arrests, transfers, and any violations in detention facilities. <sup>299</sup>
- Take prompt action on the HRCSL’s recommendations and on the complaints of torture documented and referred for criminal investigation.<sup>300</sup>
- Mandate the HRCSL to refer cases directly to the courts.<sup>301</sup>
- Designate the HRCSL as the national preventive mechanism, as contemplated by the Optional Protocol to the Convention against Torture, to undertake scheduled and unannounced prison visits to effectively monitor the legal status of detainees and conditions of detention of all detainees at all locations, where persons are deprived of their liberty.<sup>302</sup>

## Law reform

- Amend the Bribery Act to include the offence of sexual bribery, ensuring that perpetrators are adequately punished.<sup>303</sup>
- Amend article 363 of the Penal Code to ensure that the crime of statutory rape applies to all girls under the age of 16, without exception.<sup>304</sup>
- Repeal all relevant legislation to explicitly prohibit corporal punishment in all settings.<sup>305</sup>
- Abolish capital punishment or, as a minimum, commute all death sentences to prison sentences.<sup>306</sup>
- Remove barriers to women’s access to safe abortion services, such as the requirement of a judicial inquiry as to whether there should be a medical termination of the pregnancy and the need for a medical certificate authorising an abortion.<sup>307</sup> Legalise abortion in cases where the life of the

---

<sup>296</sup> Special Rapporteur on torture report, para 119(d).

<sup>297</sup> Special Rapporteur on torture report, para 119(e).

<sup>298</sup> Special Rapporteur on IJL report, para 142; Special Rapporteur on torture report, para 119(d).

<sup>299</sup> Special Rapporteur on torture report, para 119(d).

<sup>300</sup> Special Rapporteur on torture report, para 119(d).

<sup>301</sup> CAT report, para 34.

<sup>302</sup> Special Rapporteur on torture report, para 119(d).

<sup>303</sup> CEDAW report, para 37(b).

<sup>304</sup> CEDAW report, para 45(f).

<sup>305</sup> Special Rapporteur on torture report, para 116(k).

<sup>306</sup> Special Rapporteur on torture report, para 116(g).

<sup>307</sup> CEDAW report, para 35(b).

pregnant woman is threatened and in all cases of rape, incest, and severe foetal impairment. Decriminalise abortion in all other cases.<sup>308</sup>

## International law

### *Human rights treaties*

- Enact implementing legislation for all international treaties Sri Lanka has ratified, including the International Covenant on Civil and Political Rights (ICCPR). Enforce the decisions adopted by the United Nations Treaty Bodies whose jurisdiction Sri Lanka has voluntarily accepted.<sup>309</sup>
- Incorporate all provisions of the CEDAW Convention into national law without further delay, to ensure the domestic legal framework is sufficiently comprehensive to ensure women's exercise of all rights enshrined in the CEDAW Convention.<sup>310</sup>
- Urgently ratify and implement the Optional Protocol to the Torture Convention in order to recognise the competence of the Subcommittee on Prevention of Torture and enable it and other international and national monitoring mechanisms to conduct regular unannounced inspections of all places of detention.<sup>311</sup>

### *International criminal law*

- Sign and ratify the Rome Statute.<sup>312</sup>
- Ratify the Additional Protocols to the 1949 Geneva Conventions.<sup>313</sup>
- Criminalise enforced disappearance, in line with the definition of the crime under the Enforced Disappearance Convention. Ensure the crime will be punished with penalties that take into account its grave nature.<sup>314</sup>
- Criminalise international crimes, including war crimes and crimes against humanity. In particular, ensure there are no temporal restrictions, thereby allowing for the prosecution of past crimes, in line with Article 13(6) of the Constitution and Article 13(2) of the ICCPR.<sup>315</sup>
- Enact legislation to cover modes of liability, including ordering, superior and command responsibility, and joint criminal enterprise.<sup>316</sup>
- Amnesties for international crimes, such as war crimes, crimes against humanity, and gross human rights abuses, including torture, enforced disappearances, and rape are illegal, unacceptable, and should not be considered.<sup>317</sup>

---

<sup>308</sup> CEDAW report, para 35(a).

<sup>309</sup> Special Rapporteur on torture report, para 116(m); Special Rapporteur on IJL report, para 100.

<sup>310</sup> CEDAW report, paras 8-9.

<sup>311</sup> Special Rapporteur on torture report, para 116(e).

<sup>312</sup> Special Rapporteur on IJL report, para 145; CEDAW report, para 51; Special Rapporteur on torture report, para 116(l)

<sup>313</sup> Special Rapporteur on torture report, para 116(l)

<sup>314</sup> CTF report, recommendations, para 1.11; CAT report, para 24(a).

<sup>315</sup> CTF report, recommendations, para 1.12.

<sup>316</sup> CTF report, recommendations, para 6.11. The recommendation on modes of liability appeared in the recommendations specially relating to the judicial mechanism. However, it is appropriate to include it along the other law reform recommendations relating to international crimes. Special Rapporteur on torture report, para 116(d).

<sup>317</sup> CTF report, recommendations, para 6.13; CAT report, para 16.

### *Refugees/non-refoulement*

- Ratify the 1951 Convention relating to the Status of Refugees and the 1967 Protocol.<sup>318</sup>
- Enact legislation to fully incorporate the principle of non-refoulement (article 3 of the Torture Convention) into domestic law.<sup>319</sup>
- Promptly establish a national asylum determination procedure that permits a thorough assessment of whether there is a substantial risk that the applicant would be subjected to torture in the country of destination. Conduct medical and psychological examinations when signs of torture or traumatising have been detected among applicants.<sup>320</sup>
- Ensure persons in need of international protection are not detained or that detention is a last resort, after alternatives have been duly examined and exhausted, and for the shortest possible time. Detention centres should be suitable for this purpose and should be different from penal institutions.<sup>321</sup>

### **Other**

#### *Human rights defenders*

- End the practice of detaining or prosecuting journalists and human rights defenders as a means of intimidating them or discouraging them from freely reporting on human rights issues.<sup>322</sup>

#### *Peacekeeping operations*

- Ensure military staff deployed to MINUSTAH and responsible for child abuse are criminally punished in accordance with the seriousness of their acts. Ensure victims receive redress, including just and adequate compensation, and as complete a rehabilitation as possible.<sup>323</sup>
- Take effective steps to prevent this type of abuse in peacekeeping operations, including by providing specific training on the prevention of sexual abuse. Vet any individual, including commanders, involved in child abuse in Haiti as well as other human rights violations in Sri Lanka, in order to ensure that they are not deployed to United Nations peacekeeping operations.<sup>324</sup>

### **TJ mechanisms**

#### *Victim centredness*

- Ensure tri-lingual and sign language capacity at headquarters and regional sub-offices, as well as in outreach activities.<sup>325</sup> The judicial mechanism must be equipped to address the specific needs of affected persons and witnesses, particularly women and children. Affected persons should not be re-traumatised through the court process and the process itself should be fair to the

---

<sup>318</sup> CAT report, para 44(d); CEDAW report, para 51.

<sup>319</sup> CAT report, para 44(a).

<sup>320</sup> CAT report, para 44(b).

<sup>321</sup> CAT report, para 44(c).

<sup>322</sup> CAT report, para 40(d).

<sup>323</sup> CAT report, para 42.

<sup>324</sup> CAT report, para 42.

<sup>325</sup> CTF report, p 436, para 2.8.

affected persons and the accused.<sup>326</sup> Affected persons should be able to participate at every stage of court, with or without counsel, and sufficient information must be given to the affected persons at all stages, while ensuring legal processes are not jeopardised.<sup>327</sup> With regard to sexual and gendered crimes, justice schemes should be created, which are sensitive, guarantee confidentiality, protect privacy, and offer a safe environment to ensure that survivors are encouraged to come forward and are not re-victimised or re-traumatised.<sup>328</sup>

#### *Personnel in transitional justice mechanisms*

- Establish clear criteria for the choice and positions on the mechanisms, including the required time commitments, and to ensure diversity of ethnicity, language, gender, experience, and skills.<sup>329</sup> Gender and ethnic representation should be ensured for all staff of the mechanisms, including judges and prosecutors.<sup>330</sup> The staff of the mechanisms must be sensitive to the needs of all, including minorities, indigenous peoples, the marginalised, depressed castes, the LGBTQI community, and differently-abled persons, and ensure that stigma and discrimination do not deter or impede their engagement with them.<sup>331</sup>
- Ensure a careful process of vetting the staff of the four mechanisms. Officials associated with human rights violations should be ineligible to become staff.<sup>332</sup> Measures are required to prevent sexual exploitation, bribery, breaches of confidence, and intimidation by staff of the mechanisms. These should include strict codes of conduct and processes for monitoring, complaints mechanisms, and disciplinary action.<sup>333</sup>

#### *International involvement*

- Ensure international participation in the mechanisms as a necessary guarantee for the independence and impartiality of the process. Ensure participation ranging from the provision of advice and expertise to active membership of the mechanisms, including as judges, prosecutors, investigators, and lawyers, as spelled out in the HRC resolution of October 2015, co-sponsored by the Government of Sri Lanka.<sup>334</sup>

---

<sup>326</sup> CTF report, p 443, para 6.6.

<sup>327</sup> CTF report, p 444, para 6.14.

<sup>328</sup> CTF report, p 437, para 2.19.

<sup>329</sup> CTF report, p 436-437, para 2.11.

<sup>330</sup> CTF report, p 437, para 2.16 and p 443 6.5.

<sup>331</sup> CTF report, p 437, para 2.18.

<sup>332</sup> CTF report, p 437, para 2.14.

<sup>333</sup> CTF report, p 437, para 2.15.

<sup>334</sup> CTF report, p 436, para 2.10. Human Rights Council resolution, co-sponsored by Sri Lanka and adopted on 1 October 2015. Human Rights Council Resolution, Promoting reconciliation, accountability, and human rights in Sri Lanka, 14 October 2015, UN Doc. A/HRC/RES/30/1 (adopted 1 October 2015). CEDAW report, para 17(b).

- Ensure transparency of the process of international involvement, including clear criteria and justifications for the choice and positions, particularly relating to their independence, integrity, training, and experience.<sup>335</sup> The involvement of internationals should be phased out once trust and confidence in exclusively national mechanisms, national capabilities, and competence have been built up.<sup>336</sup>

*Special court/judicial mechanism*

- Ensure the independence, impartiality, competence, and credibility of the judicial mechanism, including the prosecution and investigation sides of the mechanism and the personnel involved domestically as well as foreign personnel.<sup>337</sup>
- Ensure the selection criteria for the appointment of national and international judges is set out by the Constitutional Council, in consultation with professional and civil society organisations and the Office of the UN High Commissioner for Human Rights (for international personnel), and made public.<sup>338</sup> There should be an adequate number of judges so as to prevent delays as a result of absences.<sup>339</sup> Each bench should have a majority of national judges and at least one international judge.<sup>340</sup>
- Ensure the judicial mechanism has explicit reference to key international standards of courts hearing international crimes, including the Bangalore Principles of Judicial Conduct and International Commission of Jurists' Practitioners Guide on Judicial Accountability. Procedures and evidentiary standards should conform to international best practice and should be incorporated into domestic law.<sup>341</sup> Legal advice and representation to the defence must be safeguarded.<sup>342</sup> If practicality, time, or resource constraints limit the prosecution of all cases, the prosecutorial policy must ensure at least those bearing the greatest responsibility for international crimes are held accountable.<sup>343</sup>
- The Special Counsel should have its own investigative unit, including international personnel. All personnel should be vetted to ensure independence, credibility, and no allegations of involvement in any of the crimes forming the material jurisdiction of the Special Court. Given the potential conflict of interest of specific units or offices, like the TID, which had prior involvement in investigating such cases, the members of such units should be barred from the investigative unit.<sup>344</sup>

---

<sup>335</sup> CTF report, p 437, para 2.12.

<sup>336</sup> CTF report, p 437, para 2.13.

<sup>337</sup> Special Rapporteur on IJL report, para 146; CAT report, para 16.

<sup>338</sup> CTF report, p 443, para 6.2.

<sup>339</sup> CTF report, p 443, para 6.3.

<sup>340</sup> CTF report, p 443, para 6.4.

<sup>341</sup> CTF report, p 444, para 6.7.

<sup>342</sup> CTF report, p 445, para 6.15.

<sup>343</sup> CTF report, p 444, para 6.11.

<sup>344</sup> CTF report, p 444, para 6.12.

- Map all pending criminal investigations related to (1) serious human rights violations perpetrated during the course of the conflict and its aftermath and (2) the findings of all Presidential Commissions of Inquiry that documented such cases. Ensure prompt, thorough, and independent investigations are conducted to establish the truth and ensure those responsible, directly or as commanders or superiors, are held to account. Ensure ongoing investigations into emblematic cases of violations during the conflict and post-conflict eras are concluded as expeditiously as possible and result in prosecutions of the perpetrators.<sup>345</sup>

#### *Witness protection*

- Urgently create a protection system to guarantee the security of the consultation process that occurred, the participants, and those who will access the mechanisms, given “...*the instances of surveillance reported to the CTF and witnessed by its members at consultations, the intimidating presence of security personnel at consultations, the questioning of participants and fears expressed by them in the consultations with regard to repercussions.*”<sup>346</sup> Clear instructions must be issued by the Ministry of Defence and the Ministry of Law and Order to avoid incidents of harassment and intimidation.<sup>347</sup>
- Establish a Special Victim and Witness Protection Unit. It should be overseen by a board (including the members of the HRCSL and of the transitional justice mechanisms), and have a monitoring body comprising affected families, human rights defenders, civil society, and the international community.<sup>348</sup> The monitoring body should be appointed by the President, as recommended by the Constitutional Council, from nominations by civil society.<sup>349</sup> At the outset, the monitoring body must follow-up on the security and protection of those who were subjected to surveillance, questioning, intimidation, detention, and torture during the consultation process.<sup>350</sup> The Unit should report to the President, be independent from political influence and other interference, have the necessary powers for training, for enforcement, for rapid response and for the continued protection of affected persons and witnesses throughout their engagement with the mechanisms and beyond.<sup>351</sup> The current Witness and Victim Protection Authority<sup>352</sup> should be re-constituted as an independent body and its powers and functions revised in line with the CTF’s recommendations.<sup>353</sup>

---

<sup>345</sup> CAT report, para 16.

<sup>346</sup> CTF report, p 435, para 2.2.

<sup>347</sup> CTF report, p 435, para 2.2.

<sup>348</sup> CTF report, pp 435-436, paras 2.3 and 2.5.

<sup>349</sup> CTF report, p 436, para 2.6.

<sup>350</sup> CTF report, pp 435-436, para 2.5.

<sup>351</sup> CTF report, p 435, para 2.3.

<sup>352</sup> Under the Protection of Victims of Crime and Witnesses Act (No. 4 of 2015).

<sup>353</sup> CTF report, p 435, para 2.4.

SUPPORTED BY



**diakonia**

PEOPLE CHANGING THE WORLD