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Annual report of the United Nations High Commissioner
for Human Rights and reports of the Office of the High Commissioner
and the Secretary-General

Promoting reconciliation, accountability and human rights in Sri Lanka*

* Reproduced as received.

1. This oral update is presented pursuant to Human Rights Council Resolution 30/1 on promoting reconciliation, accountability and human rights in Sri Lanka, which was adopted by consensus with the co-sponsorship of Sri Lanka. The Human Rights Council noted with appreciation the High Commissioner's report on Sri Lanka to its 30th session, including the findings and conclusions of the comprehensive investigation undertaken by OHCHR, and encouraged the Government of Sri Lanka to implement the recommendations contained therein. Sinhalese and Tamil versions of the OHCHR investigation are now available at: <http://www.ohchr.org/EN/Countries/AsiaRegion/Pages/LKIndex.aspx>. The Human Rights Council requested OHCHR to continue to assess progress on the implementation of its recommendations and other relevant processes related to reconciliation, accountability and human rights, and to present this oral update to the Human Rights Council at its thirty-second session.

2. Building on the recommendations made in the High Commissioner's report based on the OHCHR investigation, Resolution 30/1 sets out a comprehensive package of judicial and non-judicial measures necessary to advance accountability and reconciliation in Sri Lanka, as well as strengthen protection of human rights, democracy and the rule of law. The resolution represents an historic commitment by the Government of Sri Lanka not only to the international community, but also most importantly to the Sri Lankan people, of its determination to confront the past and end corrosive decades of impunity, serve justice, achieve reconciliation, and build inclusive institutions to prevent the recurrence of violations in the future. As President Sirisena eloquently argued in his Independence Day speech on 4 February 2016, "it will be freedom, democracy and reconciliation which will be brought by implementing these resolutions"¹.

3. Nine months on from the adoption of Resolution 30/1, and eighteen months since the inception of the National Unity Government, it is therefore timely to take stock of Sri Lanka's progress in implementing these commitments, to identify challenges and constraints, and to recommend strategies for moving forward, including how the Human Rights Council can continue to support this process.

4. This oral update has been greatly informed by the High Commissioner's own visit to Sri Lanka from 6-10 February 2016². The High Commissioner again expresses his appreciation to the Government for the full cooperation extended throughout his visit. He had the opportunity to meet with President Sirisena, Prime Minister Wickremesinghe, Leader of the Opposition Sampathan, Foreign Minister Samaraweera and other ministers, as well as military service chiefs. The High Commissioner travelled to Jaffna, Trincomalee and Kandy, where he met provincial chief ministers and officials, religious leaders and a broad spectrum of victims and civil society representatives.

5. This update has also benefited from the observations and recommendations made by a number of Special Procedures mandate holders who have visited Sri Lanka in recent months. The High Commissioner welcomes the Government of Sri Lanka's very positive and productive engagement with the United Nations human rights mechanisms including the standing invitation issued by Sri Lanka to all Special Procedures in December 2015. The Working Group on enforced and involuntary disappearances made a full country visit in November 2015³. The Special Rapporteur on truth, justice, reparations and guarantees of non-recurrence has continued to remain in close contact with both the Sri Lankan authorities and civil society, making his second and third technical visits in January and

¹ <http://www.president.gov.lk/news/speech-delivered-by-president-maithripala-sirisena-at-the-68th-independence-day-celebrations-on-february-4-2016/>

² <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=17025&LangID=E>

³ <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16771&LangID=E>

June 2016 respectively⁴. The Special Rapporteurs on torture and other cruel, inhuman and degrading treatment or punishment and the Special Rapporteur on the independence of judges and lawyers recently completed a joint official visit in April-May 2016⁵. The Special Rapporteur on minority issues is expected to visit in October 2016 and the Special Rapporteur on freedom of opinion and expression has been invited to visit in early 2017. The High Commissioner also welcomes Sri Lanka's ratification of the International Convention for the Protection of All persons from Enforced Disappearance (CED) on 25 May 2016. Several human rights treaty bodies will review progress of Sri Lanka's implementation of its treaty obligations in the coming months⁶. Sri Lanka will also come under review at the 28th session of the Universal Period Review Working Group in October-November 2017. On 21 June 2016, the Government provided information to OHCHR which has been taken into account in the preparation of this oral update.

6. OHCHR has continued to provide technical assistance to the Government in a number of areas through its in-country presence and the deployment on mission of experts and senior officials from OHCHR headquarters. This has included support to the design and roll-out of the national consultations process, and advice on concepts for transitional justice mechanisms. OHCHR also works closely with the Human Rights Commission of Sri Lanka and civil society, and is fully engaged with the Resident Coordinator and UN Country Team in developing programmatic activities under the UN Peacebuilding Fund.

7. The National Unity Government formed in September 2015 among a broad spectrum of political parties, including the Sri Lankan Freedom Party (SLFP) and the United People's Party (UNP), has consolidated its position, creating a political environment conducive to reforms. But the full promise of governance reform, transitional justice and economic revival has yet to be delivered and risks stalling or dissipating. Negotiating party politics and power sharing within the coalition has proved complex as the Government seeks to build and retain the two-thirds majority in parliament necessary to reform the Constitution. This is manifest in an extensive Cabinet with overlapping ministerial mandates, and mixed messages on crucial issues such as accountability.

8. Significant momentum has been achieved in the process of constitutional reform. On 10 March 2016, Parliament adopted a resolution establishing a constitutional assembly to draft and approve a new constitution or amendments by the end of 2016, which would then be put to a referendum in 2017. The drafting process has benefitted from an inclusive public consultation process overseen by a Public Representations Committee that received submissions and held district level consultations in the first quarter of 2016.

9. From a human rights perspective, the constitutional reform process presents an important opportunity to rectify structural deficiencies that contributed to human rights violations and abuses in the past and reinforce guarantees of non-recurrence. These could include a more comprehensive Bill of Rights, stronger institutional checks and balances, enhanced constitutional review, improved guarantees for the independence of the judiciary, effective individual complaints mechanisms and greater direct enforceability of international human rights treaty. Also, as demonstrated by other countries' experience, is the strengthening of civilian oversight over the military in the form of multiple oversight and accountability mechanisms over defence policy, discipline and promotion, budgeting

⁴ <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=17029&LangID=E>

⁵ <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=19943&LangID=E>,
<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=19942&LangID=E>

⁶ In 2016, Sri Lanka will be reviewed by CERD (combined 10th – 17th periodic reports) in August, CMW (2nd periodic report) in September, and CAT (5th periodic report) in November. In 2017, Sri Lanka will be reviewed by CEDAW (8th periodic report) in February.

and procurement. The new Constitution will also be important in facilitating the establishment of the transitional justice mechanisms envisaged by the Government, for instance the criminalisation of international crimes in national law or allowing for the involvement of international judicial personnel. At the same time, the High Commissioner hopes that the political process of adopting constitutional changes will not involve trade-offs and compromises on core issues of accountability, transitional justice and human rights.

10. An early gain from the Government's first tranche of constitutional reform, the 19th amendment adopted in April 2015, has been the restoration of the Constitutional Council to recommend appointments to the senior judiciary and key independent institutions. This in turn has seen the appointment of reputed members to the Human Rights Commission of Sri Lanka. Although the Human Rights Commission still requires strengthening in terms of resources and staff, its newfound independence is already showing results with public statements and interventions on draft laws and issues such as the death penalty, police abuse, detention, and witness protection. The High Commissioner hopes that other Government bodies will give this important institution greater cooperation and respect, and involve it fully in all aspects of the transitional justice and constitutional reform process.

11. The Government has also continued to take some important symbolic steps towards promoting reconciliation and changing the majoritarian political culture. In November 2015, the Government de-listed a number of Tamil diaspora organisations and individuals who had been proscribed under the Prevention of Terrorism Act (PTA). The decision to sing the national anthem in both Sinhala and Tamil on Independence Day in February 2016 for the first time since the early 1950s was a powerful gesture, followed the next day by the reciprocal visit of the Tamil Chief Minister of the Northern Province to a Buddhist temple in Jaffna. On 19 May 2016, the previously hubristic military celebrations of the 2009 victory were replaced by a more understated Remembrance Day. President Sirisena and Prime Minister Wickremesinghe have visited war-affected and displaced communities, and the President pardoned a convicted LTTE prisoner who once plotted to assassinate him.

12. The High Commissioner firmly believes that bold and visible steps of this kind can have a far-reaching effect in creating a climate of confidence and trust, but obviously need to be accompanied by more institutionalized change. At the same time, he is concerned by continued aggressive campaigns in social media and other forms (such as the "Sinhale" bumper sticker campaign) that stoke nationalism against ethnic, religious and other minorities. In recent months, incidents targeting the Muslim community, evangelical Christian and LGBT groups have continued to be recorded. The High Commissioner encourages the Government to be more forthright in combating such discriminatory violence, including through appropriate legislation to regulate hate speech and incitement to violence.

13. The Government has also not moved fast enough with other tangible measures that would help to build confidence among victims and minority communities. In 2015, the Government made initial progress in the identification and release of civilian land in the North and East still held by the military, with 3,136 acres returned to some 2,200 families. In 2016, the Armed forces have reportedly released further 2,652 acres, mostly in Jaffna and Mannar areas. During his visit, the High Commissioner was told of some of the complexities being encountered in the release of land and relocating structures built by the military, but he was assured a new task force was expected to complete the process by June. Since then, little progress has been reported and civilian leaders and officials seem to be struggling to secure cooperation from the military. Reports continue of military engagement in commercial activities, including farming and tourism. During his visit to displaced communities in Jaffna, the High Commissioner observed that the lack of transparency and information is feeding new levels of frustration and disenchantment. As

one IDP camp resident in Jaffna told him: "We have good governance now, but we just want to go home."

14. The fate of remaining security detainees held under the PTA remains a major concern for the Tamil community. In December 2015, the Government released on bail 39 individuals detained without charge, but around 250 detainees are believed to remain in detention. The Government has made indictments in 117 of these cases, and in January created a special High Court bench to expedite proceedings. The Government had promised the Attorney-General's Office would make decisions by the end of March but there have been no further charges or releases this year. This situation is not only traumatic for the individuals concerned -some of whom resorted to hunger strikes- and for their families, but a source of growing frustration among Tamil political parties and community at large. At the end of his visit in February 2016, the High Commissioner urged the Government to quickly find a formula to charge or release the remaining security-related detainees.

15. This situation is compounded by the Government's continued reliance on the PTA to make new arrests, despite its commitment to repeal the law. According to reports, the Government has made more than 40 new PTA arrests in 2015-16, including more than 25 in March-April 2016 during a security operation after the discovery of an explosives cache in Jaffna. The manner in which some of these arrests reportedly took place, in an arbitrary manner and without following proper legal procedure, have led some to compare them to the infamous "white van" abductions/disappearances of the past. While there are clear differences (all those arrested reappeared in detention in matter of hours), such cases strike fear in the community and undermine confidence in the Government's efforts to restore the rule of law and criminal procedures in accordance with the law and international standards. The Special Rapporteur on torture also highlighted at the end of his visit recurring allegations of torture and ill-treatment of security detainees, albeit with less frequency and severity than the past. Some groups have also reported cases of torture and sexual abuse of Tamils returning to Sri Lanka from abroad who are suspected of LTTE involvement.

16. These continuing concerns point to a deeper challenge for the Government in asserting full civilian control over the military and intelligence establishment and dismantling the units and structures allegedly responsible for grave violations in the past. Despite welcomed steps towards demilitarization, such as the removal of checkpoints, the military presence in the north and east remains heavy and a culture of surveillance and, in certain instances, intimidation and harassment persists. Former detainees released after rehabilitation and civil society groups working with victims continue to face regular security checks and questioning about their work.

17. Meanwhile, the Government has initiated the drafting of new security laws to replace the PTA. The High Commissioner hopes it will take into account the many previous observations made by UN human rights mechanisms, and offers the support and engagement of his Office in this regard. The Human Rights Commission has recently re-issued directives intended as safeguards upon arrest under the PTA. On 17 June, the President issued similar directions to the Commanders of the Armed Forces and the Police to enable the Human Rights Commission to exercise and perform its powers, functions and duties and for the purpose of ensuring that fundamental rights of persons arrested or detained are respected and such persons are treated humanely. The High Commissioner welcomes these directions and encourages the Government to involve the Human Rights Commission fully in the review of legislation, and strengthen its powers for the full, independent and unimpeded monitoring of places of detention.

18. Another way for the Government to quickly build public and international confidence in its determination to pursue accountability, and meet its obligations under international human rights law, would be to achieve successful prosecutions in some of the

emblematic human rights cases pending before the courts. During its first months in office, there were a number of high profile breakthroughs and arrests made in a number of prominent cases, for instance the disappearance of journalist Prageeth Eknaligoda, the killings of newspaper editor Lasantha Wickrematunge and Tamil MPs Joseph Pararajasingham and Nadarajah Raviraj, and the murder of rugby player Wasim Thajudeen, but progress has since slowed. The Trincomalee Five and ACF cases remain at various stages of summary proceedings, although the Government has made renewed efforts to facilitate the appearance of witnesses.

19. In October, four soldiers were found guilty of sexually assaulting two Tamil women in Vishvamadu in 2010. However, such convictions are rare. During his visit to Sri Lanka the High Commissioner requested a progress update on the 39 sexual violence cases involving military that the Government had acknowledged to the Human Rights Committee in 2014. In January 2016, the police also arrested hardline Buddhist leaders for contempt of court after they threatened the wife of Prageeth Eknaligoda at Homagama magistrates court and tried to disrupt ongoing court proceedings. Pillayan, a leader of the paramilitary TMVP/Karuna Group, remains on remand in the Pararajasingham case. Other paramilitary leaders, allegedly responsible for killings, abductions and widespread recruitment of child soldiers, continue to hold public positions and have faced no criminal investigation. The High Commissioner strongly recommends that these existing cases be expedited and not be put to one side while the new transitional justice mechanisms are developed.

20. A major constraint remains the lack of a viable system for the protection of victims and witnesses. The new Government adopted a long pending law in February 2015, but this legislation has shortcomings that the High Commissioner has highlighted in previous reports. The Government committed in Resolution 30/1 to further review the law, although this has yet to occur. Meanwhile, a Victim and Witness Protection Authority has been appointed under the law since January 2016, although it has suffered from the departure of its first chairperson and the deployment of his replacement on another assignment overseas. Clearly the strengthening of an effective witness protection system, that is fit for the purpose of international crimes and that has the confidence of the people, will be essential before witnesses can have confidence to come forward and transitional justice mechanisms be considered credible.

21. The High Commissioner strongly urges the Government to review and amend the Assistance to and Protection of Victims of Crime and Witnesses Act of 2015 in order to incorporate better safeguards for the independence and effectiveness of the victim and witness protection program in line with international standards.

22. In Resolution 30/1, the Government set out its commitment to implement a comprehensive transitional justice agenda, incorporating the full range of judicial and non-judicial measures, which should include prosecution initiatives, truth-seeking, reparations programmes, and institutional reforms. While the Government has been engaged in a variety of preparatory processes, overall progress in setting up structures that would allow for the design and establishment of the different transitional justice components has been hesitant and slow.

23. Progress has been hampered by a lack of clarity of responsibilities between various overlapping ministries and institutions. Further, the lack of an overall, comprehensive transitional justice strategy raises questions about how the different transitional justice mechanisms will link together. In November 2015, a Prime Minister's Action Group was established to provide overall political coordination among the different ministries involved. This is to be supported by a dedicated Secretariat for the Coordination of the Reconciliation Mechanisms (SCRM), the recent appointment to which of a Secretary-General is very much welcomed. Nevertheless, it still needs to further strengthen institutional capacity and dedicated expertise.

24. A critical first step, reflected in Resolution 30/1, is to undertake broad national consultations to ensure that victims and those traditionally excluded are central to the design and implementation of these mechanisms and processes. Importantly, transitional justice mechanisms must provide for special measures to ensure that women receive adequate redress for conflict-related violations, and can fully participate in these processes. Consultations also need to be accompanied by a tailor-made sensitization programme as the people to be consulted need to have the necessary information and understanding so that they can express informed viewpoints. In this regard, measures of confidence building and clear institutional safeguards for victims and witnesses to come forward are crucial.

25. In January 2016, the Government appointed an 11-member Task Force formed by prominent members of civil society mandated to conduct the national consultation process. Consultations were launched online in February, with the Task Force setting up a mechanism to receive written submissions. Focus group discussions and direct consultations with stakeholders were launched in June, and will extend to provincial and district levels. It would be important that the process of consulting the various constituencies enters a new phase of direct interactions, and that those participating in the consultations are not subject to harassment or intimidation. The High Commissioner emphasizes the need to include the voices of victims abroad and encourages further outreach in the diaspora.

26. A parallel fast-track consultation process was conducted in May 2016 with respect to the proposed Office of the Missing Persons that has been prioritized by the Government. The fact that parallel consultations on constitutional reform have proceeded successfully, albeit of a different nature and with greater investment of resources, gives hope that Sri Lanka can embark on such complex processes efficiently and peacefully.

27. At the same time, the Government has commissioned different consultants and experts working in various capacities to work already on the design of different models for the transitional justice mechanisms, with little coordination or transparency. While such groundwork is necessary, it is important that it does not pre-empt the results of the consultation process and render it less meaningful. There is a need to better connect the public, participatory dimensions of the process with the private, expert work that is going on behind the scenes.

28. This tension has already become apparent in the preparation of legislation to create a dedicated Office of Missing Persons (OMP). Addressing disappearances is an urgent need and would generate trust and confidence among victims and affected communities, so the Government is right to prioritise this task. The proposed Office will be a permanent structure that is intended to provide victims with access to the services they require, whether legal, administrative or psychosocial, and to uncover the fate of their disappeared relatives.

29. A working group of Government advisors had prepared draft legislation to establish the OMP. However, the draft had not been publicly shared and discussed. When victims and civil society raised concerns regarding the limited public debate on the draft, there was a late effort to incorporate submissions from stakeholders, including meetings with victims and the Consultations Task Force. The draft legislation was approved in Cabinet in late May, gazetted on 27 May and tabled in Parliament on 22 June.

30. More broadly, the Government signed the Disappearances Convention (CED) in December 2015 and completed its ratification in May 2016. Enabling legislation is now being drawn up and the High Commissioner hopes this will include criminalizing enforced disappearances in the Penal Code in line with Sri Lanka's obligations under the CED. On 7 June, the Cabinet of Ministers also approved draft legislation enabling the issuance of Certificates of Absence. The draft legislation has been gazetted and will be placed before

Parliament shortly. The second report of the Presidential Commission on Missing Persons (Paranagama Commission) was tabled in Parliament in October, and it has continued to conduct hearings, but no information is available to OHCHR on further criminal investigation, including in a number of cases where the Commission identified Government perpetrators.

31. The experts that produced the Office of Missing Persons draft bill may also be working on different conceptual transitional justice models such as for a Truth and Reconciliation Commission and the special court. However, these documents have not been shared. While such groundwork is necessary and welcome, the lack of transparency undermines the parallel ongoing consultation process and involvement of victims. National consultations should be a form of vigorous and respectful dialogue whereby the consulted parties are given the space to express themselves freely, including the participation of international actors in transitional justice mechanisms, as recommended in my last report to the Human Rights Council and recognized in Resolution 30/1, with a view to shaping or enhancing the design of transitional justice programmes.

32. A key question remains the participation of international judges, prosecutors, investigators and lawyers in a judicial mechanism. In late May 2016, while addressing a large group of senior military officers, the Prime Minister was reported to have again ruled out international participation in a domestic Sri Lankan justice mechanism. The High Commissioner remains convinced that international participation in the accountability mechanisms would be a necessary guarantee for the independence and impartiality of the process in the eyes of victims, as Sri Lanka's judicial institutions currently lack the credibility needed to gain their trust. It is also important to keep in mind the magnitude and complexity of the international crimes alleged, which the OHCHR investigation found could amount to war crimes and crimes against humanity.

33. In light of recent reports on new evidence that has emerged on the use of cluster munitions towards the end of the conflict, following similar allegations in the OHCHR investigation report, the High Commissioner calls for an independent and impartial investigation to be carried out.

34. Another challenge for the Government is how to begin the process of security sector reform, including a comprehensive vetting process that would ensure that "no scope exists for retention in or recruitment into the security forces of anyone credibly implicated through a fair administrative process in serious crimes involving human rights violations or abuses or violations of international humanitarian law".⁷ This will be important for Sri Lanka's Armed Forces to resume their rightful place in international defence cooperation, in particular participation in UN peacekeeping. Preparations are already advancing for the prospective contribution of a Sri Lankan combat convoy battalion to MINUSMA in Mali, but it will be essential that the Government puts in place an appropriate vetting procedure - with an independent, civilian human rights component - in advance of this deployment. To this end, the UN will be working with the Government to put in place stringent screening procedures, at both national and international level, for all personnel Sri Lanka intends to deploy.

Conclusions

35. Overall, the Human Rights Council should be encouraged thus far by the steps that the Government of Sri Lanka has taken to implement some of the key

⁷ A/HRC/RES/30/1, OP. 8

commitments made in Resolution 30/1, and the consultations and preparations now underway to further elaborate and design the transitional justice mechanisms. The restoration of the Constitutional Council, an independent Human Rights Commission and the ratification of the Disappearances Convention (CED) are important achievements that will leave a legacy for the future. Once established, the new Office of Missing Persons will hopefully provide at least a form of immediate redress for the families of the disappeared. Nonetheless, the establishment of full transitional justice mechanisms will be needed to provide a comprehensive response to past human rights violations and ensure that they do not reoccur.

36. More rapid and sustained progress could have been made on other issues, such as the release of land and detainees and the revision of the PTA and witness protection laws, which would build confidence with the minority community. The early momentum established in investigating emblematic cases must be sustained, as early successful prosecutions would mark a turning point from the impunity of the past. Continuing allegations of arbitrary arrest, torture and sexual violence, as well as more general military surveillance and harassment, must be swiftly addressed, and the structures and institutional culture that promoted those practices be dismantled, to show there will be no tolerance for practices of the past.

37. The High Commissioner believes the Government's efforts to implement its commitments in Resolution 30/1 will require a comprehensive strategy that enables it to pursue different processes in a coordinated, integrated and appropriately sequenced manner. Such a strategy would bring together the currently unwieldy coordination arrangements within Government and facilitate greater coordination of international donor support. It should be backed up by a concerted public information campaign that would mobilise the power and participation of civil society behind the transitional justice process. This would also increase transparency and ensure that the current consultation process with victims and civil society can be maximized and have a meaningful input into the design of transitional justice mechanisms. OHCHR continues to stand ready to provide further advice and technical assistance.

38. Inevitably, the transformative process on which Sri Lanka is embarked will take time. Dealing with the multiple tracks of constitutional reform, transitional justice, economic recovery and security sector reform would tax the capacity of any government. Nevertheless, the High Commissioner urges the Government to take concrete steps to address the impatience, anxiety and reservations towards the process that stem from various quarters, and reiterates the importance for all Sri Lankans to rally behind the process. The encouragement and support of the Human Rights Council has been crucial in underpinning this process and giving assurance and confidence to all stakeholders, particularly the victim community. The High Commissioner therefore hopes the Human Rights Council will sustain its close engagement and he looks forward to reporting on further progress at its thirty-fourth session.