



SRI LANKA: MAKING THE RIGHTS CHOICES

ESTABLISHING EFFECTIVE MECHANISMS TO DELIVER
JUSTICE, TRUTH AND REPARATION TO VICTIMS

AMNESTY
INTERNATIONAL



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First published in 2016

by Amnesty International Ltd

Peter Benenson House, 1 Easton Street
London WC1X 0DW, UK

Index: ASA 37/4902/2016

Original language: English

amnesty.org



Cover Photo: © Colin Foo

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1. EXECUTIVE SUMMARY

When Sri Lanka co-sponsored UN Human Rights Council Resolution 30/1 in October 2015, the authorities finally acknowledged the need to end the island's long cycle of violence and impunity for violations of human rights. The government committed to an ambitious agenda for change, promising to deliver justice for past crimes under international law, truth and reparation to repair the harm suffered by Sri Lanka's people, and reforms to prevent their recurrence.

The importance of this undertaking cannot be overstated. Amnesty International has monitored and reported on the human rights situation in Sri Lanka for more than forty years. In this time Sri Lanka has seen successive periods of violent insurgency, a long and debilitating armed conflict between government forces and the Liberation Tigers of Tamil Eelam (LTTE), which sought to establish a separate state for Sri Lanka's Tamil minority in the island's north and east) and repressive, often brutal state responses to these challenges.¹ In our work, impunity for violations perpetrated in the name of public security has been a core concern.

The failure of Sri Lankan authorities over many years to acknowledge, investigate or prosecute alleged violations and provide effective remedies to victims, as well as retaliation against human rights defenders and the media for raising human rights concerns led Amnesty International and other members of the human rights community to call for an independent international investigation into alleged war crimes and other crimes under international law committed in Sri Lanka. In March 2014 the UN Human Rights Council passed a resolution calling on the Office of the High Commissioner for Human Rights (OHCHR) to investigate the allegations "with a view to avoiding impunity and ensuring accountability."²

With Sri Lanka's change of government in January 2015 came new official openness to engage with the UN and other international actors on the way forward. It vowed to pursue ethnic reconciliation, account for alleged past violations, revive independence of institutions essential to protection and promotion of human rights, and rebuild Sri Lanka's international relationships.³

With Resolution 30/1, Sri Lanka committed it to 'a comprehensive approach to dealing with the past.' This included:

- A judicial mechanism with a Special Counsel to investigate allegations of violations and abuses of human rights and violations of international humanitarian law;
- A Commission for truth, justice, reconciliation and non-recurrence;
- An office on missing persons; and

¹ State crackdowns against armed insurrections by the leftist Sinhalese Janatha Vimukthi Peramuna (JVP or People's Liberation Front), in 1971 and again in 1989-1990 led to tens of thousands of deaths and an estimated 30,000 to 60,000 enforced disappearances; tens of thousands more were detained and many were tortured in these operations. Between July 1983 and May 2009 the armed conflict between government forces and the Liberation Tigers of Tamil Eelam (LTTE) was characterized by reports of killing of civilians by both sides, arbitrary arrest and detention of Tamils often based solely on ethnicity and place of origin, and widespread torture, enforced disappearances and extrajudicial executions, culminating in allegations that both sides had committed war crimes and possibly crimes against humanity.

² Human Rights Council Resolution 30/1 'Promoting reconciliation, accountability and human rights in Sri Lanka' A/HRC/RES/30/1, 14 October 2015.

³ Maithripala Sirisena unseated the incumbent President Mahinda Rajapaksa in a snap election called in January 2015.

- An office for reparations.⁴

Amnesty International strongly welcomed these commitments, which are essential to address impunity for past violations and abuses and to strengthen human right protections for all Sri Lankans in the future.

A year later, the government continues to commit to deliver justice, truth, reparation and guarantees of non-recurrence. Some progress has been made towards implementation, including the establishment of a national consultation process, ratification of the International Convention for the Protection of All Persons from Enforced Disappearance and the passage of legislation to establish the Office on Missing Persons.

However, valid concerns have also been expressed by Sri Lankan civil society groups and victims regarding the pace of progress, the transparency of some processes, the lack of resources allocated to the consultation in its early stages and the lack of a public coherent approach towards all these initiatives.

This briefing sets out Amnesty International's analysis and recommendations for establishing effective mechanisms to ensure justice, truth and reparation (including guarantees of non-recurrence) for victims. Section 1 identifies ten overarching principles that should be applied in designing and implementing all four mechanisms. The following sections then apply these principles to the proposed justice mechanism (Section 2), the Commission on truth, justice, reconciliation and non-recurrence (Section 3), the Office on Missing Persons (Section 4) and the Office for Reparation (Section 5).

METHODOLOGY

In 2015 our organisation resumed its visits to Sri Lanka, after a decade in which we could not access the country, and met with government officials.⁵ The main focus of these exchanges has been Sri Lanka's new commitment to accountability.

Amnesty International delegations did further work in the country during December 2015 and March 2016 and met with government officials, their advisors and appointees to bodies tasked with promoting and protecting human rights and guiding Sri Lanka's efforts to address impunity; representatives of the legal community, civil society, and victims of human rights violations in the capital city of Colombo, and in Batticaloa, Mannar, Mullaitivu, Puttalam and Vavuniya.

Our delegates conducted individual interviews and group meetings with more than 60 people aimed at gauging interest in and expectations for justice, truth, reparation and guarantees of non-recurrence and determining how Amnesty International could be of assistance in ensuring a rigorous and effective process.

This briefing is based on Amnesty International's submission to Sri Lanka's Consultation Task Force on Reconciliation Mechanisms in June 2016.

⁴ Human Rights Council Resolution 30/1 'Promoting reconciliation, accountability and human rights in Sri Lanka' A/HRC/RES/30/1, 14 October 2015.

⁵ During the interim period Amnesty International maintained close contact with Sri Lankan human rights defenders and victims but was forced to rely on meetings outside the country and on remote communication to keep abreast of the human rights crisis there. These were risky exchanges that took enormous bravery on the part of Sri Lankan colleagues, who faced vilification, arrest, and even physical harm for communicating their human rights concerns to international organizations.

2. TEN PRINCIPLES FOR EFFECTIVE JUSTICE, TRUTH AND REPARATION MECHANISMS

Based on decades of experience monitoring and campaigning for efforts to deliver justice, truth and reparation for victims of human rights violations and abuses in many national contexts, Amnesty International urges Sri Lanka to consider and apply the following principles in designing and implementing justice, truth and reparation mechanisms. The mechanisms should be:

1. INDEPENDENT

They must be independent of political control or interference, which would undermine their effectiveness and credibility. Mechanisms should be composed of persons who are independent of the government and authorities that are implicated in human rights violations.

2. REPRESENTATIVE

To ensure the engagement and trust of all victims and communities, members and staff of the mechanisms must be representative of all sectors of Sri Lankan society, including an equal representation of women and men at all levels.

3. CLEARLY MANDATED

Mechanisms must have a clear mandate that allows them to perform their work effectively and to which they will be held accountable.

4. SUFFICIENTLY RESOURCED

Effective and transparent systems, with safeguards to protect against political interference, should be put in place to ensure that mechanisms are provided with sufficient resources to perform their mandates.

5. INFORMED

Members and staff of the mechanism must have the expertise necessary to achieve the mandate. Where such expertise does not exist nationally, international expertise and technical support should be sought. They must also fully understand the context in which they are working, including through regular consultations with victims and civil society.

6. ACCESSIBLE

Victims will only be able to engage effectively with mechanisms if they are accessible. This requires:

- Effective outreach so that victims know about the mechanism, understand its mandate, what to expect and how to engage with it;
- Transparency about the mechanism and its work;
- Safeguards against discrimination;
- Assistance to victims to engage with the mechanism;
- Protection and support, so that victims can engage with the mechanism safely and without being re-traumatized;
- Continued communication throughout the process, especially when any delays occur.

7. VICTIM FOCUSED

Where the interests of victims are affected, mechanisms should seek and take into account the views of victims in defining their work and making decisions.

8. HUMAN RIGHTS COMPLIANT

The rights of all persons engaged in or affected by the proceedings must be protected, including suspected perpetrators, victims, witnesses, judges, lawyers, staff of the mechanism, representatives of victims and civil society groups supporting and assisting victims or other work of the mechanisms.

9. COHERENT

The mandate and the work of the mechanism must be consistent with and complement, not undermine, the work of other mechanisms and efforts to deliver justice, truth and reparation to victims.

10. ENDURING

As far as possible, the mechanisms should establish a legacy that strengthens respect for and protection of human rights in the future, including strengthening the rule of law and access to effective remedies.

3. JUSTICE MECHANISM

“Before Ragihar died, he cried out to me for help... when justice is served – when Sri Lanka finally tells the truth about what happened to my son – then we can say that Ragihar’s call for help has finally been heard.”

Dr, Kasipillai. Manoharan, father of Ragihar Manoharan, one of five secondary school students killed by Sri Lankan security forces in Trincomalee in January 2002, as told to Amnesty International in August 2013.

International law requires states to conduct prompt, thorough, effective, independent and impartial investigations into allegations of crimes under international law and other serious human rights violations. Where sufficient evidence exists, those suspected of committing crimes recognized under domestic or international law should be prosecuted in fair trials before civilian court. This should be without recourse to the death penalty.

Both Sri Lankan forces and the Liberation Tigers of Tamil Eelam (LTTE) have in recent decades committed crimes under international law and other serious violations and abuses of international human rights law on a massive scale. Impunity is widespread as Sri Lanka has failed to meet its national and international obligations to hold perpetrators accountable.

Tens of thousands of Sinhalese young people were killed and forcibly disappeared in sweeping government crackdowns that followed two armed insurrections by the leftist Sinhalese Janatha Vimukthi Peramuna (JVP or People’s Liberation Front), first in 1971 and again in 1989-1990; tens of thousands more were detained and many were tortured in these operations.⁶ For 26 years, Sri Lankan civilians also bore the brunt of the armed conflict that raged between government forces and the LTTE, which sought to establish a separate state for Sri Lanka’s Tamil minority in the island’s north and east. From the outbreak of fighting between the Sri Lankan government and the LTTE in 1983 to the Sri Lankan government’s declaration of victory in 2009, the conflict was characterized by reports of killings of civilians by both sides, arbitrary arrest and detention of Tamils often based solely on ethnicity and place of origin and widespread torture, enforced

⁶ A short-lived insurrection by the newly-formed leftist Janatha Vimukthi Peramuna (JVP or People’s Liberation Front) in April 1971 captured over 90 police stations before being crushed in a government crackdown in which thousands of Sinhalese young people (possibly over 10,000) were killed and many of their bodies were burned without identification or inquest. Some 15,000 to 20,000 more were detained. In March 1972 Amnesty International published a report of a mission to Ceylon (now Sri Lanka) undertaken in September 1971 by Lord Avebury, a British parliamentarian, to investigate the status and legal rights of detainees picked up on suspicion of involvement in the JVP insurrection. The JVP’s second insurrection between 1987 and 1990 claimed an estimated 6,000 lives before government forces wiped out its leadership. 30,000-60,000 people suspected of affiliation with the JVP were killed or forcibly disappeared by security forces, many of them by government-operated death squads; torture and deaths in custody were reported in large numbers.

disappearances and extrajudicial executions, culminating in 2009 in allegations that both sides had committed war crimes and possibly crimes against humanity.⁷

“THEY KILLED MY SON”

Dr. Kasipillai Manoharan spoke to Amnesty International about the 2 January 2006 extrajudicial execution of his son Ragihar and four other students in Trincomalee:

The last time I heard from my son, Ragihar, was a mobile phone text message. It just said: “DAD”. That was 2 January 2006. He had been on the beach with four of his friends in Trincomalee, Sri Lanka, near our home. That day, I heard a bomb blast near the beach. Two of my sons got back immediately. Ragihar did not. Within minutes of the explosion, I got a call from him. “Daddy,” he said, “the forces are around me.” He meant the security forces. That was all he said. After that, I got the text – my last contact with my son.

I rushed to the scene, but the navy guards there said: “No, you can’t go through at the moment.” They purposefully turned the lights off under the Gandhi statue, where my son and his friends had been sitting. And then I heard voices crying in Tamil: “Help us! Help us!” I kept arguing with the guards to let me in. Suddenly, gunfire flared by the Gandhi statue. Later, they said: “Five civilians are dead and two are injured.” I was in total shock.

I visited the mortuary. When I opened the door, the first body I saw was my son’s. He had five gunshot wounds. While I was there, a police officer demanded that I sign a statement saying that my son belonged to the Tamil Tigers, the armed group fighting for independence in Sri Lanka. He told me if I did this, they would release his body immediately. I refused. I told him that my son is not a Tamil Tiger. He is a sports person, a table tennis player and coach – he coaches police officers and children. He is a chess player, a student, a good boy.

The government claimed that my son and his friends were killed in a grenade attack. But three of the boys had head wounds – all of them shot through the back of the head. I have photographs, and the doctor’s report confirms this. The entry hole was small, and the exit wound was big. That shows they shot Ragihar at very close range. That night, I took a decision. I would challenge the authorities, no matter what. I was the first to give evidence in my son’s case in Sri Lanka. I said it was clear to me that Sri Lanka’s Special Task Forces [an elite commando unit] had killed my son.

Ten years on, the case remains stalled in a Trincomalee court waiting for the Magistrate to decide whether there is sufficient evidence to forward it to the Attorney General for prosecution:

From the moment I spoke out, I received death threats. My sons were threatened. My lawyer, too. The journalist Mr Sugirdharajan who came with me to the mortuary and took photos and video was shot dead a few weeks later. His photos disproved the army’s claim that the students were killed by a grenade explosion. A Buddhist priest who publicly condemned Ragihar’s murder was also killed. This shows how far the authorities were willing to go to hide the truth about what they had done to my son. It was too dangerous for my family to stay in Sri Lanka, so we left in December 2006. ... We lost our family, friends, medical practice, property. My wife cries every day in front of Ragihar’s photograph.

⁷ Eyewitness accounts provided to Amnesty International and the findings of UN investigators paint a grim picture of deprivation of food, water and medical care, injury and loss of life suffered by civilians trapped in the final phase of the armed conflict. They describe the LTTE’s forcible abduction of adults and children as soldiers, its use of civilians as human shields against the Sri Lankan army’s offensive, and its killing of civilians who tried to flee. They speak of the Sri Lankan armed forces’ indiscriminate artillery attacks on areas densely populated by civilians including hospitals, resulting in death and injuries of patients and staff. On 18 May 2009, the upper leadership of the LTTE was wiped out in what many allege were extrajudicial executions as they attempted to surrender, after which the government of Sri Lanka declared victory. 300,000 Tamils displaced from the war zones were detained en masse in closed camps guarded by the military. Out of this larger groups about 12,000 men, women and children were rounded up, detained separately and interrogated in military and police lock ups, paramilitary camps, detention centres, and so-called Protective Accommodation and Rehabilitation Centres (PARCs) where they were held without charge or legal recourse for months or years because of their actual or suspected links to the LTTE. Amnesty International has documented accounts of torture, extrajudicial executions and enforced disappearances of people so detained; violations that continued to be reported for years after the conflict ended.

Barriers at all stages of the justice process have led to ineffective investigations and stalled efforts to conduct prosecutions in the vast majority of cases. The police have consistently failed to investigate allegations of violations committed by the police and the military. When police have submitted cases to magistrates, those proceedings have stalled often on the basis of lack of evidence. When magistrates have sent cases to the Attorney General's Department to prepare an indictment and seek a trial at the High Court, the Attorney General has often failed to indict suspects.

Cases that do proceed to trial are often subject to repeated delays. Petitions to the Supreme Court seeking redress for violation of a petitioner's Constitutional Rights ("fundamental rights petitions"), while occasionally successful in securing compensation have failed to provide reliable and effective remedies for most victims. In many cases, victims and others seeking justice on their behalf as well as magistrates, judges and lawyers involved in cases, have been threatened, intimidated and attacked. As a consequence, some individuals have felt little choice but to leave Sri Lanka.

ANOTHER FATHER AWAITS JUSTICE

Ponnuthurai Yogarajah was forced into exile after two sons were killed in separate incidents that have become notorious examples of impunity in Sri Lanka. His youngest, Hemachandran, was one of five students shot and killed by Sri Lankan security forces on a beach in Trincomalee on 2 January 2006. His elder son, Kodeeswaran, was killed in August of the same year, one of 17 Action Contre la Faim (ACF) aid workers massacred in the town of Muttur. In 2008 he testified before a Presidential Commission mandated to investigate "serious violations of human rights". He spoke from an undisclosed location outside Sri Lanka of his frightening search for Hemachandran the night he was killed, and of finding his body hours later. He spoke of official misconduct, threats from the police, and the pain of losing a child. His testimony, like that of other members of victims' families, expressed doubt about the possibility of securing justice in Sri Lanka. Yogarajah's elder son, Kodeeswaran, received threatening phone calls at work after the death of his younger brother:

My son was working for Action Against Hunger [ACF, Action contre la Faim, a humanitarian organization], and the STF [Special Task Force, an elite police unit] gave him many calls and he feared for his life and told me not to reveal anything in the courts, saying that they would shoot us.

Six months later, Kodeeswaran was dead too.

The "ACF" case, as it has come to be called, was one of the worst single attacks on aid workers in history. The aid workers were gunned down after a period of intense fighting between the LTTE and the Sri Lankan security forces. 11 men and 4 women, all wearing their employer's t-shirts, were discovered lying face-down in the ACF compound with bullet wounds to the head and neck; the victims had been shot at close range. The bodies of two more ACF staff members were found in a vehicle nearby; possibly killed trying to escape. Victims' families are still waiting for truth and justice. The Sri Lankan human rights organization University Teachers for Human Rights (Jaffna), which investigated the incident accused state security forces of killing the aid workers and senior police officers of covering it up. A long suppressed report of a November 2006 Presidential Commission of Inquiry tasked with investigating this and 15 other "serious violations of human rights" was finally released in October 2015. The Commission admitted that it had failed to gather sufficient evidence to identify the perpetrators in the ACF killings, and said police investigations had "lacked professionalism." No one has been prosecuted for the ACF murders, let alone convicted. Sri Lankan police bungled the criminal investigation into the killings, failing even to secure the crime scene. Witnesses were threatened and harassed; family members, like Yogarajah, have been forced into exile abroad.

Successive Sri Lankan presidents have established Commissions of inquiry, particularly in response to international pressure on emblematic cases. However, many have been non-

transparent or flawed and have failed to lead to criminal investigations and prosecutions.⁸ In some cases, the independence of these bodies was compromised because Commissioners were appointed who had close ties to government institutions, and because the Presidential Secretariat maintained financial control over their operation. Final reports, when published have not been easily accessible to the public, and very few of their recommendations have been implemented. Some Commission findings were suppressed entirely for many years and were only released after the change in government in 2015.⁹

As a result of this poor record there is little confidence that, without significant reform, the national justice system will deliver justice effectively to victims of human rights violations and abuses committed before, during and following the conflict.

Even if the justice system were more effective in addressing such abuses, there is also currently a lack of technical knowledge and experience to investigate and prosecute crimes under international law, most of which – including crimes against humanity, war crimes, torture, extrajudicial execution and enforced disappearance - are currently not crimes under Sri Lankan law.

The Human Rights Council's Resolution of October 2015, which was co-sponsored by Sri Lanka, recognised Sri Lanka's commitment to a 'justice mechanism with a Special Counsel to investigate allegations of violations and abuses of human rights and violations of international humanitarian law'¹⁰. The Resolution affirms that 'a credible justice process should include independent judicial and prosecutorial institutions led by individuals known for their integrity and impartiality'. It also affirms the importance of the involvement of Commonwealth and other foreign judges, defence lawyers and authorized prosecutors and investigators.

However, beyond these commitments, Sri Lanka has provided little further information to the Sri Lankan public or the international community about the proposed justice mechanism. Some reports indicate that the government is currently considering establishing special chambers of the High Court. Most statements by government officials have however focused on whether the mechanism should be completely domestic or whether international judges, prosecutors, lawyers and investigators should be included.

(A) TYPE OF MECHANISM

Given the above context, Amnesty International recommends that the government enter into an agreement with the United Nations to establish a hybrid national-international justice mechanism to investigate and prosecute crimes under international law, in line with the ten principles outlined previously. This mechanism should also include national and international judges, prosecutors' lawyers and investigators.

The Agreement should set out the mechanism's mandate, structure, applicable law that will be applied, the government's obligations towards establishing and providing full cooperation with the mechanism and the funding mechanism. Although the mechanism may form part of the existing justice system, it is essential that it has independence and autonomy as necessary to perform its mandate effectively and without interference.

8 Sri Lanka: Twenty Years of Make-Believe. Sri Lanka's Commissions of Inquiry; 11 June 2009, Index Number: Asa 37/005/2009

9 In October 2015, the reports of two Commissions established by former President Mahinda Rajapaksa were tabled in Parliament. The "Paranagama Commission" had been tasked with investigating complaints of missing persons in the Northern and Eastern Provinces from 10 June 1990 to 19 May 2009 and its mandate was later expanded to examine alleged violations international humanitarian law with the assistance of a team of international lawyers hired for that purpose. The report dealt with the Commission's second mandate. The other report released was a report of the commission headed by retired justice Nissanka Udalgama which was mandated to investigate 16 cases of "serious human rights violations", that occurred after 1 August 2005, including the killings of 5 students in Trincomalee in January 2005 and of 17 aid workers of the Action Contre la Faim (ACF) on August 4, 2006 in Muttur. The Commission investigated only 7 of these cases before its mandate expired in June 2009.

10 Human Rights Council Resolution 30/1 'Promoting reconciliation, accountability and human rights in Sri Lanka' A/HRC/RES/30/1, 14 October 2015.

If the government is unable to establish the mechanism, for example, due to obstruction of legislation in parliament, then it should either request the United Nations Security Council to establish an ad hoc international criminal tribunal or make a declaration accepting the jurisdiction of the International Criminal Court (ICC) from 1 July 2002 (when the ICC was established and its jurisdiction began).

The mechanism should be developed and implemented, concurrently with efforts to reform the ordinary criminal justice system, with a view towards handing over functions initially conducted by international staff gradually, and subject to safeguards (see the following), to Sri Lankan nationals. Therefore, in time, the mechanism will transition from a hybrid tribunal to a fully domestic court.

(B) MANDATE

The mandate of the justice mechanism should clearly set out its purpose as well as the scope of its work. In particular, it is important that the mandate is not restricted in any way that will deny justice to victims before it is even established.

The mandate of the mechanism should have three clear objectives:

- To ensure the investigation of crimes under international law and other serious human rights abuses committed in Sri Lanka and, where sufficient admissible evidence exists, to prosecute those suspected of the crimes in fair trials;
- To ensure that victims can access justice and that the affected population sees justice being done; and
- To strengthen the national justice system to address such crimes effectively.

The mechanism should be expressly mandated to investigate and prosecute crimes committed by all sides, including Sri Lankan government forces and affiliated groups, the LTTE and any other non-state actors.

The temporal jurisdiction of the mechanism should cover the decades of violations and abuses committed in Sri Lanka recognizing that abuses against different ethnic and geographic communities occurred at different points along a timeline of more than four decades. Indeed, Amnesty International has documented serious human rights violations and abuses committed in Sri Lanka since the 1970s. The temporal mandate therefore should be broad enough to cover crimes committed during this period and should not be arbitrarily restricted to a shorter period, such as the 2002-2011 period which was the focus of both Sri Lanka's Lessons Learnt and Reconciliation Commission (LLRC)¹¹ and the UN's investigation.

The mechanism should have jurisdiction to investigate and prosecute all crimes under international law and other serious violations and abuses of international human rights law, including: crimes against humanity, war crimes, torture, enforced disappearance and extrajudicial execution (see applicable law below). Given that crimes of sexual and other gender-based violence have been inadequately addressed in other national processes and the unique barriers to justice that survivors face, the mandate should expressly recognize the need to investigate these crimes and ensure that survivors can effectively access the justice process.

¹¹ The Lessons Learnt and Reconciliation Commission (LLRC) was appointed by President Mahinda Rajapaksa in May 2010 to "inquire and report" on events between 21 February 2002 and 19th May 2009, including the "facts and circumstances which led to the failure of the Ceasefire Agreement operationalized on 21st February 2002;" "whether any person, group or institution directly or indirectly bear responsibility in this regard;" and lessons to prevent recurrence. Its final report was submitted in November 2011. Despite shortcomings in its composition, mandate and operation the LLRC's report made important recommendations that if implemented could have led to some improvements in human rights conditions in Sri Lanka. (See, Report of the Commission of Inquiry on Lessons Learnt And Reconciliation, November 2011, http://www.priu.gov.lk/news_update/Current_Affairs/ca201112/FINAL%20LLRC%20REPORT.pdf, accessed 5 August 2016; see also "Sri Lanka Report Falls Short," 16 December 2011, <https://www.amnesty.org/en/press-releases/2011/12/sri-lanka-report-falls-short/> and Sri Lanka: When Will They Get Justice? Failures of Sri Lanka's Lessons Learnt And Reconciliation Commission, Amnesty International, 7 September 2011, Index number: ASA 37/008/2011, <https://www.amnesty.org/en/documents/ASA37/008/2011/en/>

The Special Counsel should have discretion to seek criminal charges against any person directly or indirectly accused of involvement in such crimes without any distinction based on official capacity. Although the mandates of other hybrid courts have emphasised the need to bring “those most responsible” to justice, this justice mechanism should not be restricted to investigating only a small group of political leaders and military commanders. Indeed, as the Prosecutor of the International Criminal Court has recently recognized in the context of her Office’s investigations in other situations, it may be strategic in some circumstances to focus on lower, mid and high-level suspects in order to ultimately have a reasonable prospect of conviction for the most responsible and to deliver justice in particularly grave or notorious cases.¹²

Binding time limits should not be imposed for the mechanism to complete its mandate. Prosecuting complex cases of crimes under international law and other serious human rights violations and abuses can take time, especially in countries where special mechanisms have to be established. Timelines established for the work of other hybrid courts have proved to be grossly under-estimated.¹³ Time limits for the functioning of the justice mechanism would threaten to limit its ability to perform its work effectively and put pressure on the Special Counsel to restrict cases to meet deadlines, regardless of the needs for justice. Instead, the progress of the mechanism towards achieving its mandate and implementing the strategy developed by the prosecution should be reviewed on an on-going basis.

(C) APPLICABLE LAW

Law reform must be addressed at the outset to ensure that the process meets international standards and does not result in impunity. All relevant crimes under international law, and principles of criminal responsibility for such crimes, should be incorporated into national law, in accordance with international law. Although it has been argued that violations and abuses of human rights and international humanitarian law could be prosecuted as ordinary crimes under national law – such as murder – this approach is flawed. Many of the abuses and violations are not adequately covered by such ordinary criminal offences, which may lead to impunity in many cases.

The laws and rules applied by the hybrid mechanism must be strictly in accordance with international law and compliant with international human rights law.

To prevent crimes under international law from being committed with impunity in the future, the national criminal code, criminal procedure code and other relevant national laws should be amended to remove any impediments to justice and to enable the hybrid mechanism and other national courts to exercise jurisdiction over such crimes in line with international law. This approach, which would strengthen the national justice system as a whole, is preferred over adopting stand-alone legislation that relates exclusively the hybrid mechanism.

The process should include consultation with the national legal community, civil society and international experts. In particular:

- Crimes under international law – genocide, crimes against humanity, war crimes, torture, enforced disappearances and extrajudicial execution should be defined in Sri Lankan law strictly in accordance with definitions in international law. The crimes should be applied retrospectively, consistent with the principle of legality that permits the trial and punishment of persons “for any act or omission, which at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations”.¹⁴

¹² ICC Office of the Prosecutor, Strategic Plan 2016-2018, para. 34.

¹³ For example, when the Special Court for Sierra Leone was established in 2002, it was originally estimated that it would complete its work in three years. In reality, the Special Court closed in 2013.

¹⁴ ICCPR, Article 15(2).

- Principles of criminal responsibility in international criminal law, including defences, command responsibility, the non-applicability of the defence of superior orders and the prohibition of statutes of limitations, immunities and amnesties for crimes under international law must be adopted.
- Legislation should ensure that the rights of accused persons, witnesses and victims during the process are protected and that the law will be applied consistently with international human rights law.
- As there is a high risk of intimidation, threats and attacks against or other interference with victims and witnesses, offences against the administration of justice, including those set out in Article 70 of the Rome Statute, must be made crimes under Sri Lankan law.
- Penalties must be consistent with the gravity of such serious offences. The death penalty should be abolished.

(D) LOCATION

In order to ensure access to justice for victims throughout the country and their ability to follow the proceedings the mechanism should not be located only in Colombo. Subject to thorough security evaluations, chambers of the justice mechanism should be established in several locations throughout Sri Lanka, including in towns or cities where regional branches of the High Court exist. Chambers should also be permitted to hold *in situ* hearings, as appropriate, throughout the country. Effective security systems should be put in place at each location.

(E) SIZE OF THE MECHANISM

The size of the mechanism, including the number of chambers, number of prosecution teams and other infrastructure should be based on a detailed independent assessment of the crimes committed, the alleged perpetrators, the places where the crimes were committed and the number of victims. The size should be flexible so that the number of chambers may be increased or reduced in response to the further development of the prosecution's strategy, the arrest or extraditions of suspects and other factors.

It is important that the size of the mechanism is ambitious with a view to bringing those responsible for crimes to justice and to deliver justice to victims. Some hybrid courts – notably the Special Court for Sierra Leone and the Extraordinary Chambers in the Courts of Cambodia - have ultimately prosecuted only a handful of cases, despite the massive commission of crimes and the complete failure of the national authorities to address other cases.

This model is ineffective as it permits impunity for the vast majority of suspected perpetrators and leaves the cases of many victims unaddressed. It is also highly inefficient to invest in costly infrastructure and systems that only address a small number of cases. The War Crimes Chamber in Bosnia had taken a more ambitious approach by establishing five judicial panels and, as a result, has investigated and prosecuted many more cases.

A panel of independent experts in prosecuting crimes under international law should review the situation and make recommendations on the initial size of the mechanism. The size of the mechanism should be reviewed when the Special Counsel is appointed and announces a strategy, and annually thereafter.

(F) STRUCTURE AND COMPOSITION

The structure of the justice mechanism should be tailored to its mandate, size and functions. Its composition should reflect all Sri Lankan communities and an equal representation of men and women at all levels. The balance between national and international officials and staff should be based on the need for international expertise in key areas and allow for mentoring and training of Sri Lankans so that they can eventually take over those roles.

(I) CHAMBERS

In light of the scale of crimes committed in recent decades, the justice mechanism should initially include multiple trial chambers and at least one appellate chamber so that it can conduct numerous parallel trials in order to deal promptly with a significant number of cases. Given the complex nature of the cases, they should be heard and decided by a panel of judges with relevant expertise rather than a jury. Any further appeals to Sri Lanka's Supreme Court (as several Sri Lankan legal experts have proposed) should be limited to issues of Sri Lankan law applied by the hybrid mechanism and conducted without delay.¹⁵

Each trial chamber should be made up of at least three judges and be composed, at least initially, of a majority of international judges with established expertise and experience in conducting such trials.

At an appropriate stage, no sooner than three years after the commencement of the hybrid mechanism, consideration should be given on a case-by-case basis to appointing a majority of national judges.

An appeals chamber mandated to consider interlocutory appeals and appeals against conviction or sentence should also initially include a majority of international judges and its composition may be reviewed at similar intervals as the trial chambers. If further appeals are conducted by the Supreme Court, ad hoc international judges should be appointed to work with national judges in considering the appeals. To ensure the confidence of all communities in the justice process, there should be a fair balance of Sri Lankan judges from the Sinhala, Tamil and Muslim communities. There should be an equal number of female and male judges appointed to the mechanism overall.

All judges must be of high moral character, impartiality and integrity. They must be independent and have a strong commitment to fair and effective trials. They must not accept instructions from any person, government or other source.

International judges should have established competence in international criminal law and procedure and relevant experience in international criminal proceedings. National judges, whether already sitting or appointed directly to the mechanism, should have established competence in criminal law and procedure and relevant experience in national criminal proceedings. Competence or experience in international criminal law, international humanitarian law and international human rights law should be highly desirable. Both international and national judges should have expertise in dealing effectively with crimes of sexual and gender-based violence as well as violence against children.

¹⁵ Lawyers Niran Ankatell and Rhadeena de Alwis for example note that while a right of appeal to the Supreme Court from a specialized trial court or a specialized appellate court is not constitutionally mandated and in their view could be legally dispensed with, and "[w]hile there may be a temptation to prevent a nonspecialized Supreme Court from hearing final appeals in respect of international crimes, caution must be exercised. ... the exclusion of a final appeal to the Supreme Court may lead to a proliferation of revision cases in the Court of Appeal from the specialized court." They suggest instead that the grounds of appeal to the Supreme Court could be restricted in some way, for example by only allowing appeals on questions of domestic procedure or Sri Lankan constitutional law. (Niran Ankatell and Rhadeena de Alwis, *A Hybrid Court*; Ideas for Sri Lanka, 2015, South Asian Centre for Legal Studies)

Appointed Sri Lankan judges should undertake appropriate training in international criminal law and practice, international humanitarian law and international human rights law.

An open, effective, independent and transparent process should be conducted to select national and international judges. This should include making the names of short-listed candidates under consideration public with sufficient time for public assessment and input, including submissions from the legal community and civil society. To ensure that the highest qualified candidates from Sri Lanka are considered, a call for applications should be made public and advertised nationally. The advertisement should set out the criteria upon which the candidates will be assessed.

Specific efforts should be made to bring the advertisement to the attention of highly qualified women and to encourage them to apply. Safeguards set out in the United Nations Basic Principles on the Independence of the Judiciary, including conditions and security of tenure, professional immunity and principles on discipline, suspension and removal must be applied.¹⁶

(II) OFFICE OF THE SPECIAL COUNSEL

Given the widespread allegations of human rights violations by the police and the continuing failures of the police, the magistrates' courts and the Attorney-General's Department to effectively investigate human rights violations and prosecute those suspected of committing them, the justice mechanism's systems of investigation and prosecution should be fully independent of these authorities. The 'Special Counsel' that the government has committed to establish, which Amnesty International understands to mean a special prosecutor, must be independent and provided with sufficient staff and resources, as well as the necessary powers, to conduct their work independently and effectively. As far as possible, investigation and prosecution strategies should be transparent.

The Special Counsel should be of high moral character, highly competent and have extensive experience in the investigation and prosecution of serious criminal offences, including human rights violations and sexual and gender-based violence. The Special Counsel should be recruited and appointed in an open, independent and transparent process which is brought to the attention of highly qualified women and encourages them to apply.

The Special Counsel should establish an independent office, including investigation units and prosecution teams that are fully independent of existing authorities and free from political pressure. All staff should be vetted to ensure that they have not engaged in past human rights abuses; are not professionally or personally connected to those that may be investigated and prosecuted; and have not been involved in obstructing investigations and prosecutions of human rights abuses.

The Special Counsel must also have full authority over the management and administration of the Office, including the staff, facilities and other resources thereof. The Special Counsel should recruit international staff with expertise to ensure that the office can effectively investigate and prosecute crimes under international law and to build the capacity of national investigators and prosecutors. The Special Counsel should be mandated to develop, in consultation with victims and civil society, a prosecution strategy outlining the scope of the investigations and prosecutions planned and budget estimates for a two or three-year period. This should be made public and updated every two or three years.

¹⁶ Basic Principles on the Independence of the Judiciary, adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.

(III) DEFENCE AND LEGAL AID

Those accused of crimes have a right to a fair trial, which includes being able to conduct a defence in person or through legal assistance of their choosing, without payment if they lack sufficient means to pay for it.

A defence office should be established to develop and maintain a list of highly qualified national and international counsel, to administer legal aid and to provide expert legal and other support to defence teams. It should either be established as an independent office or as an autonomous office within the Registry for administrative purposes only (see below).

To ensure that suspects are able to exercise their right to choose their counsel they should be able to select counsel from the list or others of their choice. Defence counsel should be highly qualified with substantial experience of defending suspects in complex criminal cases, experience and knowledge in international criminal law, international humanitarian law and international human rights law, including defending suspects accused of crimes under international law and other serious human rights abuses.

If counsel selected lacks such experience and knowledge, they should be provided with training and expert support throughout the proceedings from co-counsel or staff within the defence team and through the defence office. Legal aid must be sufficient to conduct potentially complex proceedings, including allowing for the defence to conduct its own investigations and to seek expert assistance on matters of international law.

(IV) REGISTRY

The autonomy of the hybrid mechanism, as well as the need to establish specialized independent units for victims and witnesses and outreach recommended in this report, and the need to prepare budgets and report to the government of Sri Lanka, international community and funders means that an independent and neutral registry should be established to be responsible for the non-judicial aspects of the administration and servicing of the mechanism.

A registry should be established that is neutral to the other organs of the justice system and independent from the rest of the justice system. It should be headed by a highly qualified registrar with knowledge and experience of the administration of complex legal mechanisms and preferably outreach and victim and witness protection.

(G) VICTIM AND WITNESS PROTECTION AND SUPPORT

“There was a time when looking for my husband was a far greater crime than his abduction.”

Vallipuram Amalanayagi, quoted in “Sri Lanka's missing thousands: one woman's six-year fight to find her husband,” *The Guardian*, 28 January 2016

The level of threats, intimidation and attacks against victims, witnesses, NGOs and justice actors involved in pursuing justice for human rights abuses in Sri Lanka demands a robust system of protection and support to ensure that victims and witnesses can engage with the justice mechanism safely. The mechanism will need to establish the trust and confidence of victims,

treat them with respect and dignity throughout and keep them fully informed of the status and progress in the case as well as the reasons for certain decisions. Victims who give evidence must be protected and supported.

The Human Rights Council Resolution sets out the government's commitment to ensure effective witness protection. However, the current witness protection system in Sri Lanka is inadequate. The adoption of the Assistance to and Protection of Victims of Crime and Witnesses Act of 2015 establishing a national Victim and Witness Protection Authority and Division was a step towards establishing such protection, but the law has substantial shortcomings that weaken the Authority, including failing to provide a sufficient independence from law enforcement bodies that have been implicated in human rights violations and intimidation of witnesses. It must be revised to bring it in line with international standards.

An independent victims and witnesses unit should be established within the justice mechanism that will take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. In doing so, the mechanism should have regard to all relevant factors, including age, gender, health, and nature of the crime, in particular, but not limited to, where the crime involves sexual or gender violence or violence against children. These measures shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.¹⁷ In appropriate circumstances, victims and witnesses should be able to give testimony by means of audio or video-link.

In particular, the Unit should provide:

- Effective protection to victim and witnesses who become at risk due to their engagement with the mechanism and others who are at risk on account of testimony given by such witnesses;
- Provide training and advice to all staff of the mechanism on dealing with victims without causing any further harm; and
- Effective support, including psycho-social assistance, to witnesses giving testimony.

The unit must be independent of any security or law enforcement body that could be the subject of investigation under the mechanism and independent of the prosecution and the defence. If flaws in the Victim and Witness Protection Authority are properly addressed, it may however coordinate as appropriate with that agency.

The mechanism's unit should include both international and Sri Lankan staff. International staff with substantial expertise in witness protection and support will be needed to establish effective systems and procedures. National staff will be equally important to ensure that the systems are tailored to the national context and challenges of providing protection are understood and addressed. The unit should have a range of expertise, including: witness protection and security, logistics administration, psychology in criminal proceedings, gender and cultural diversity, children (in particular traumatized children), elderly persons, persons with disabilities, social work and counselling, health care, interpretation and translation.¹⁸

(H) VICTIM PARTICIPATION AND REPARATION

Common law justice systems, like that in Sri Lanka, traditionally, do not provide any role for victims in proceedings beyond being called as witnesses. Whereas civil law systems generally provide for participation of victims in proceedings, including as civil parties, and make orders for

¹⁷ Rome Statute, Article 68(1).

¹⁸ ICC Rules of Procedure and Evidence, Rule 20.

convicted persons to provide reparation to victims in criminal trials. Some international and internationalized courts in civil law countries, including Cambodia and Senegal, provide for this.

The International Criminal Court, which is a mixture of common and civil law systems, also provides for participation, including legal representatives for victims and ordering reparation against convicted persons. A number of common law jurisdictions have also taken steps in recent decades to expand the role of victims in criminal proceedings to make the process more meaningful and to better meet their needs, in line with international standards.¹⁹

Appropriate measures should be adopted that permit victims to participate in proceedings and to present their views and concerns at stages of the proceedings determined to be appropriate by the judges and consistent with the rights of the accused. Expert advice and assistance to identify the most effective procedures, including from common law countries that have expanded the roles of victims in criminal proceedings, should be sought.

Consideration should be given to whether the hybrid mechanism can order a convicted person to provide reparation against a convicted person or whether a conviction by the hybrid mechanism can lead to an expedited process for reparation in separate civil proceedings. Consideration should be given to allocating fines imposed on convicted persons to the Office of Reparation or a trust fund for the benefit of victims.

(I) OUTREACH

Outreach – the two-way communication between the mechanism and the Sri Lankan population – is essential to ensure that justice is seen to be done and that Sri Lankans fully understand the findings and decisions of the mechanism. It is particularly important to correct any misinformation, counter political attacks against the work of the mechanism and to ensure the engagement and confidence of victims and affected communities who have been denied justice for years and sometimes decades.

Although some hybrid courts have funded outreach through voluntary funds separate from the core budget of the courts, this has proved ineffective and has undermined outreach efforts in some cases. Outreach is increasingly recognized as a core function of international, hybrid and national criminal courts addressing serious human rights violations, which must be funded in the same manner as other parts of the system.

The Unit should develop and conduct a comprehensive outreach programme to inform Sri Lankans about the justice efforts of the mechanism and developments in investigations and cases from the beginning and at all stages of the process. It should be tailored to ensure effective communication with all communities, including using a range of media and translation of materials into local languages.

Special strategies should be developed to ensure communication with marginalized groups, including women and survivors of sexual violence. The Special Counsel and other appropriate officials of the mechanism should be actively engaged in the outreach programme and conduct, as appropriate, extensive and coordinated outreach to victims and affected communities from the earliest stages of their work to inform them of their mandates and to understand their demands for justice and other needs. Consideration should be given to broadcasting or streaming trials translated into local languages.

¹⁹ For examples of national practice, see Redress, Victim Participation in Criminal Law Proceedings: Survey of domestic practice for application to international crime prosecutions, September 2015, available at: <http://www.redress.org/downloads/1508victim-rights-report.pdf>

(J) TRIAL OBSERVATION AND *AMICUS CURIAE* BRIEFS

Taking into account the general rule that trials should be held in public and the high profile nature of the cases being prosecuted, most international and hybrid courts not only permit but encourage independent observers to monitor and analyse the work of the justice mechanism. Furthermore, given that the cases often raise complex issues of national and international law, they also provide that, subject to approval by the judges, third parties with expertise on relevant issues can submit *amicus curiae* briefs before trial and appeal chambers. Indeed, the latter may be particularly useful where chambers are composed of national and international judges who may benefit from expert third party input on complex matters of national or international law.

(K) COOPERATION BY SRI LANKAN AUTHORITIES

In order to achieve its mandate, the hybrid mechanism must receive full cooperation from the national authorities in gathering information, the examination of places or sites, the execution of search and seizures, the provision of records and documents, ensuring the security of the mechanism and the safety of its staff, arrest of suspects, subpoena of witnesses, appropriate aspects of victim and witness protection and other forms of assistance.

The agreement establishing the mechanism, other national legislation and instructions by the government to national authorities must require the full cooperation of all state authorities with the hybrid mechanism. For example, the Special Counsel should be provided with full unredacted versions of Commissions of inquiry reports and full access to their archives. Effective procedures must be put in place to respond to and address any instances of non-cooperation, including providing the hybrid mechanism with the power to refer non-cooperation to the government and the United Nations.

(L) COOPERATION BY THIRD STATES

With a large Sri Lanka diaspora around the world, including people who fled the conflict, family members who had been threatened and suspected perpetrators who have moved abroad, cooperation by third states will be essential. Assistance will be needed to obtain witness testimony and provide protection and legal assistance as well as for the purposes of arrest and extradition. Given the challenges of protecting the identity of witnesses in Sri Lanka's close-knit society, it should also be expected that there will be a need to relocate some witnesses who are at serious risk to third states.

Sri Lanka should work with the United Nations and other experts to develop model extradition, mutual legal assistance and witness relocation agreements with third states to support the effective functioning of the hybrid mechanism. Third states, in particular those with diaspora communities, if they have not done so, should enter into such agreements and provide full cooperation with the mechanism.

(M) FUNDING

Most hybrid courts established to date have encountered serious funding challenges, in many cases originating from decisions taken upon their establishment to fund them either wholly or

partly through voluntary contributions from the international community. This approach has proved highly ineffective. Lack of voluntary contributions has threatened the work and undermined the stability of these courts. Lessons should be learnt from this poor practice and an effective funding system for the justice mechanism must be established.

The Registry should be mandated to prepare an annual budget for the hybrid mechanism in consultation with the Special Counsel, the chambers, the defence office and other parts of the mechanism, which should be reviewed in a transparent process by the government of Sri Lanka and the United Nations. The Sri Lankan government should contribute a percentage agreed with the UN to the funding of the hybrid mechanism.

The remainder of the budget, including the costs of international officials and staff, should be funded through the regular budget of the United Nations. Voluntary contributions should only be considered as a last resort and, if employed, donors should make multi-year commitments.

(N) LEGACY

While establishing a hybrid mechanism to deal with past crimes is a very important step towards ending impunity in Sri Lanka, the initiative must not be created and exist in a vacuum. It is essential that it forms part of a broader national effort to strengthen the justice system so that ordinary courts can address all allegations of human rights violations and abuses. Ensuring that those who commit such crimes will no longer be able to enjoy impunity will contribute to ensure that they are not repeated.

A central aim of the mechanism must be to develop the knowledge, experience and skills of Sri Lankan officials and staff in order to build their capacity to take over the roles performed by international staff and to apply them in the broader justice system. Mentoring of Sri Lankan officials and staff by their international counter-parts, trainings and other capacity building initiatives must form a central part of the strategy in all parts of the mechanism. Full written judgments should be provided on each case and archives of the mechanism must also be retained as a permanent record of the crimes and to ensure that national courts can apply the judicial precedents set by the mechanism.

But these efforts alone will not be sufficient to address all barriers to justice for human rights violations and abuses before national courts. Significant reform must be led by the government, the relevant authorities and the legal community itself to ensure that:

- The police promptly, effectively, independently and thoroughly investigate all allegations of human rights abuses, including violations by the police;
- Where sufficient evidence exists, those suspected of the crimes are prosecuted. In particular, the establishment of an independent Director of Public Prosecutions should be considered;
- An independent and effective victim and witness protection agency is established; and
- The massive delays which are commonplace in the criminal justice system and for fundamental rights petitions are addressed.

4. COMMISSION ON TRUTH, JUSTICE, RECONCILIATION AND NON-RECURRENCE

“I am alone. I am going everywhere to find [my children] but I could not find them. I have made so many appeals to various people but nothing has happened. I hope I can get a favourable response through you. At least the future generations should live in peace. I am not asking for money, land or property, I am asking for my children who have been my treasure.”

Witness 3, Kandawalai Divisional Secretariat, Proceedings of public sittings of the Commission of Inquiry on Lessons Learnt and Reconciliation, 19 September 2010.

Victims of human rights violations and abuses have a right to truth.²⁰ States must take measures to establish the truth about violations and abuses, including the reasons, circumstances and conditions in which they were committed; the progress and results of any investigation; the identity of perpetrators (both subordinates and their superiors); and in the event of death or enforced disappearance, the fate or whereabouts of the victims.

²⁰ See for example: Article 32, Additional Protocol I to the 1949 Geneva Conventions; Article 24 (2) of the International Convention for the Protection of All Persons from Enforced Disappearance; Principles 2 and 4 of the Updated Set of principles for the protection and promotion of human rights through action to combat impunity, addendum to the Report of the independent expert (UN Doc: E/CN.4/2005/102/Add.1), 8 February 2005; Principle 24 of the United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, adopted by General Assembly Resolution 60/147, 21 March 2006; and Study on the right to the truth, Report of the Office of the United Nations High Commissioner for Human Rights, (UN Doc: E/CN.4/2006/91), 8 February 2006, para. 38 and Conclusions.

Truth can help victims and their families understand what happened to them, counter misinformation and highlight factors, such as discrimination, that led to the abuses. It allows societies to know why abuses were committed and may help prevent their repetition.

The failure of the formal justice system to address violations and abuses of human rights has been a focus of domestic and international pressure on the Sri Lankan government for decades. Commissions of Inquiry in Sri Lanka have been hampered by political pressure and conflicts of interest which have compromised their independence; lack of effective victim and witness protection; lack of transparency and timeliness in the proceedings; lack of full co-operation by state bodies; and lack of financial independence.²¹

Amnesty International strongly welcomes the commitments by the new government to establish a Commission for truth, justice, reconciliation and non-recurrence. But lessons must be learned from the failures of past commissions of inquiry.

In recent decades, truth commissions have been established in more than 30 countries to investigate patterns of abuses of human rights and/or humanitarian law during armed conflicts and periods of political violence. In many situations, they have made an important contribution by documenting the truth regarding abuses and promoting measures to ensure they are never repeated. However, some truth Commissions have undermined victims' access to truth, justice and reparation by implementing restrictive mandates and granting amnesties to suspected perpetrators. In many cases important recommendations made by truth Commissions have not been implemented.

In order for the proposed Commission for Truth, Justice, Reconciliation and Non-recurrence to operate effectively it should factor in the important principles on truth Commissions set out in the United Nations' *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*.

(A) DESIGNING THE COMMISSION

Involvement of victims and civil society from all affected communities in the design and implementation of truth-seeking and other processes is essential to establish confidence and engagement by all sectors of Sri Lankan society in the work of the Commission.

The national consultations that are currently being conducted are an important first step towards engaging victims and civil society in the design of the Commission. But consultation should not stop there, especially as, at this early stage, few details of the proposed Commission have been made public. Therefore, in addition to the current national consultation, the government should plan further consultations focused on the design of the Commission at appropriate stages of the process.

In particular, civil society, including women's' organizations, should participate in mechanisms tasked with drafting legislation. A workshop, open to all Sri Lankan civil society groups to review and comment on the draft law should be organized before it is submitted to parliament. Particular effort should be made to ensure that men and women participate in these deliberations on an equal basis.²²

(B) MANDATE

The mandate of the proposed Commission must ensure that it is able to establish the truth for all

²¹ Sri Lanka: Twenty Years of Make-Believe. Sri Lanka's Commissions of Inquiry; 11 June 2009, Index Number: Asa 37/005/2009.

²² Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity, Principle 6.

victims of human rights abuses and that its work complements other efforts to deliver justice, truth and reparation.

Amnesty International recommends that the mandate of the Commission should be to:

- To clarify, as far as possible, the facts about human rights violations and abuses;
- Provide the information it gathers to continuing and new investigations and criminal or civil proceedings; and
- Formulate effective recommendations for providing full reparation to all the victims and their relatives, including guarantees of non-recurrence and transformative measures.

This three-part mandate provides a clear definition of what is expected from the Commission avoids any uncertainty or conflicts of jurisdiction with other mechanisms. It recognizes that the Commission will gather information that is also relevant to both justice and reparation efforts.

The Commission's investigation of human rights violations and abuses should lead, where possible, to the identification of persons, authorities, institutions and organizations involved and shall determine whether the violations were the result of deliberate planning on the part of the state, authority, or political organization, movement or group of individuals. The Commission should gather information indicating individual criminal responsibility and forward it on a confidential basis to the Special Counsel of the justice mechanism for further criminal investigation.²³

The Commission's investigations should also provide a detailed overview of the harm caused to victims by violations and abuses as well as their needs. The Commission's should share this information and recommendations for effective reparation to the government and the proposed Office for Reparation to inform their decision making.

The title of the proposed Commission indicates that reconciliation is also an aim of this mechanism, which may include efforts to establish individual and collective reparation. Amnesty International recognizes that the establishment of the facts is a precondition for, and can help to promote, individual and collective reconciliation. However, reconciliation, both at the individual and at the collective level, cannot be imposed by either a truth Commission or any other official body or procedure.²⁴ It is important that reconciliation measures fully respect the rights and dignity of both victims and alleged perpetrators. Victims and their families should not be forced to meet alleged perpetrators or pressured to engage in any act of reconciliation.

The mandate should not restrict the Commission to examining certain types of violations and abuses of international human rights and humanitarian law. Such restrictions would exclude victims of violations and abuses that fall outside the scope from accessing the truth and preclude the Commission from drawing links between different kinds of violations and abuses, which may be essential to fully understand the truth and identify effective recommendations for reparation and non-recurrence. For example, in many cases violations of economic, social and cultural rights play a key part in the commission of violations of civil and political rights and crimes under international law. Making these connections will enhance the Commission's findings and potential impact.

Amnesty International has documented serious violations and abuses of human rights in Sri Lanka for more than four decades. Individuals from all ethnic and regional communities have at one point or another along this timeline experienced human rights violations and had their access to justice for these violations frustrated by Sri Lanka's pervasive climate of impunity. The Commission's mandate should be broad enough to address these abuses.

²³ Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity, Principle 8(e): 'Commissions of inquiry shall endeavour to safeguard evidence for later use in the administration of justice'.

²⁴ See: Office of the United Nations High Commissioner for Human Rights, Rule of Law Tools for Post-Conflict States: Truth Commissions, UN Doc. HR/PUB/06/1, 2006, p.2.

ENFORCED DISAPPEARANCES AT EASTERN UNIVERSITY, SEPTEMBER 1990

On 5 September 1990, 158 young Tamil men were rounded up by the army from a displacement camp on the Eastern University campus in Vantharamoolai, Batticaloa District. They were taken away in front of thousands of witnesses. Amnesty International published the names of the victims in 1991. None of them have been seen again and no apparent action has been taken to bring alleged perpetrators to justice

In September 1993, a now-defunct government agency, the Human Rights Task Force (HRTF) which for a short time monitored the welfare of detainees, published an account of the incident and named four officers who witnesses said were involved. The HRTF called for a proper investigation, and indicated that there were witnesses willing to testify but no investigation was forthcoming.

In 1994 a Presidential Commission of Inquiry again investigated the case and its report, released in 1997 named suspected perpetrators¹. But once again there was no official follow up.

Dr. Thangamuthu Jayasingam, now Vice Chancellor of Eastern University was the Officer in charge of the Vantharamoolai refugee camp in 1990:

*I have made my comments to various national and international persons regarding these facts. ... I told the commissioners that I want to know what happened to all those? There was no answer. I told them the next time when another commission comes looking for these facts, I won't be there and you won't be there Perhaps all relevant parties may have died when the next commission comes around.*²⁵

In setting time-frames for the Commission to complete its work, an appropriate balance needs to be found between establishing the truth promptly and ensuring adequate time for an inclusive and thorough process. Taking into account that the Human Rights Committee considered that 18 months was too short for the Truth and Justice Commission in Paraguay²⁶ and the experience of other truth Commissions, Amnesty International recommends that the Commission should be asked to complete its work within two years, with the possibility for extension, if necessary. The Commission should provide regular interim reports regarding its work, including interim recommendations where appropriate.

(C) COMPETENCE, INDEPENDENCE AND IMPARTIALITY

Members of the truth Commission should be selected on the basis of their competence in human rights and other relevant fields, proven independence and recognized impartiality. The composition of the Commission should reflect a fair balance of women and men and pluralism in Sri Lankan society, including representatives of non-governmental organizations involved in the promotion and protection of human rights and women's groups.

The Commission must be independent of the institutions and agencies under investigation and of the executive functions of government, and free of political pressures. In particular:

- Commissioners and staff should be required to act independently without political or other bias, prejudice or motive;

²⁵ Thangamuthu Jayasingam, "Eastern University Massacre: Missing, Missing, Missing for 25 Years," 4 September 2015, Colombo Telegraph, Opinion.

²⁶ Human Rights Committee, Consideration of reports submitted by States Parties under article 40 of the Covenant, Concluding observations of the Human Rights Committee: Paraguay, UN Doc. CCPR/C/PRY/CO/2, 24 April 2006, para. 7.

- Commissioners should have security of tenure – except on grounds of incapacity or behaviour rendering them unfit to discharge their duties and pursuant to procedures ensuring fair, impartial and independent determinations²⁷;
- Commissioners should be provided with privileges and immunities necessary for their protection, including in the period following their mission, especially in respect of any defamation proceedings and other civil or criminal action brought against them on the basis of facts or opinions contained in the Commission's reports;²⁸
- The Commission should exercise executive authority and be responsible for the implementation of its mandate without supervision; and
- The Commission should be able to establish an independent secretariat.

Commissioners should have proven knowledge, expertise and experience in the promotion and protection of international human rights and humanitarian law and dealing with traumatized victims, victims of sexual violence and child victims. Consideration should be given to appointing international Commissioners or establishing an international committee of experts to advise national Commissioners on key issues and best practice.

Commissioners should not be political appointees. Instead, taking into account the Liberian practice,²⁹ consideration should be given to establishing a public nomination process, including clear criteria set out above and a highly regarded, qualified and representative selection panel that will review candidates and present a short-list of highly qualified candidates to the President for consideration.

The Commission should be able to hire qualified professional, technical and administrative national or international staff, as well as to request the secondment of public officials. It should also be able to obtain advice from consultants providing technical expertise in disciplines such as law, medicine, forensic science, psychology or other areas relevant to its investigations.

The Secretariat should include a separate victim and witness protection unit and an outreach unit (see below). Where appropriate, regional offices should be established to perform these and other functions. All members and staff of the Commission should receive comprehensive training in human rights. Women and men should be equally represented at all levels.

(D) POWERS

The Commission should be able to conduct prompt, thorough and effective investigations without obstruction. It should have powers to pursue all available sources of information and to conduct on-site investigations, visits, interviews and hearings that it deems appropriate. Legislation establishing the Commission should provide it with the full scope of the state's resources and powers, necessary to perform its mandate.

This should include:

- The power to take statements and investigate any person, group of persons or institution, including victims and witnesses in foreign countries, in public or private at the Commission's discretion. This includes the power to travel outside the country to obtain statements;
- The power to gather information by taking written or oral statements and by conducting both public and confidential hearings;

²⁷ Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity, Principle 7(a).

²⁸ Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity, Principle 7(b).

²⁹ See: Truth, justice and reparation: Establishing an effective truth Commission (POL 30/009/2007).

- The power to compel attendance and co-operation of any person, group of persons or institution, including state officials. This includes the power to publish a warrant, subpoena, or citation after attendance before the Commission, as well as the power to impose penalties for non-compliance with such orders;
- The power to administer oaths during investigation for the taking and making of statements, the falsity of which is punishable for perjury;
- The power to order production of any documents, records or other information from any source in the country, including executive, legislative and judicial authorities. This includes the power to impose penalties for non-compliance with such orders;
- The power to request any documents, records or other information from relevant authorities and government officials of foreign countries;
- The power to appoint experts, including in the fields of psychology, pathology and forensics; and
- The power to seek court action under an emergency procedure or take other appropriate measures to address threats or risks to the life, health or safety of a person concerned by its inquiry.³⁰

Amnesties for crimes under international law are prohibited, as they deny the right of victims to justice.³¹ Amnesty International has consistently opposed, without exception, amnesties, pardons and similar measures of impunity for crimes under international law that are prohibited by international law and prevent the emergence of truth, a final judicial determination of guilt or innocence and full reparation to victims and their families.³²

(E) VICTIM AND WITNESS PROTECTION AND SUPPORT

Victims and witness protection and support by the Commission is equally important, and in many instances will be connected, to protection and support systems before other mechanisms.

A victim and witness protection unit should be established within the secretariat to provide:

- Effective protection to victims, witnesses, their families, and others who become at risk due to their engagement with the Commission;
- Training and advice to all staff of the Commission and Commissioners on dealing with victims without causing any further harm; and
- Effective support, including psycho-social assistance, to witnesses participating in the Commission and giving testimony.³³

As appropriate, it should coordinate with the victim and witness units of other mechanisms and with the national Victim and Witness Protection Authority and Division, once the flaws in that body are addressed (see: Section II.G).

³⁰ Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity, Principle 10(b): 'Social workers and/or mental health-care practitioners should be authorized to assist victims, preferably in their own language, both during and after their testimony, especially in cases of sexual assault'.

³¹ Although the South African Truth and Reconciliation Commission granted conditional amnesties to perpetrators, this was in violation of international law.

³² See: Amnesty International, Sierra Leone: Special Court for Sierra Leone: denial of right to appeal and prohibition of amnesties for crimes under international law (AI Index: AFR 51/012/2003), October 2003.

³³ Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity, Principle 13.

(F) A FAIR PROCEDURE

The rights of suspected perpetrators participating before the Commission must be fully respected, including to ensure that they engage in the process and that the work and findings of the Commission do not undermine any on-going or future criminal proceedings.

The rights of persons suspected of committing crimes in international human rights law apply before truth Commissions and should be reflected in the law establishing it. In particular, suspects must be presumed innocent unless and until they are proven guilty beyond a reasonable doubt according to law in separate criminal proceedings. They should not be compelled to confess guilt or to testify against themselves. When suspects participate voluntarily, they should be informed that allegations have been made against them, that statements they make may have criminal consequences and that they may, if they choose, be assisted by legal counsel.

The Commission should provide legal assistance to suspects where they lack the means to pay for it. If the Commission identifies suspects, it should not name them publicly but instead pass on information and evidence that they have collected to the Special Counsel of the justice mechanism confidentially for criminal investigation.

'Use immunity' – offering suspects or witnesses a guarantee that evidence they disclose to the Commission will not be used against them in any later criminal proceedings – or confidentiality agreements not to disclose information to criminal investigators do not extinguish criminal responsibility. They establish significant barriers to justice and may result in denial of justice to victims despite admissions by the suspect.

If such immunities and agreements are provided, they must exclude immunities or confidentiality for information regarding crimes under international law, which the state has obligations under international law to investigate and, where sufficient evidence exist, prosecute those suspected of committing them.

(G) OUTREACH AND TRANSPARENCY

To ensure public awareness of the Commission, engagement with its work and confidence in its findings and recommendations, the Commission must reach out to all sectors of Sri Lankan society and encourage victims and witnesses to participate. Transparency throughout the process will be essential to maintain engagement and confidence.

A detailed outreach and public communication strategy, taking into account the Sri Lankan context and communications infrastructure, will need to be developed and implemented by a dedicated outreach unit within the secretariat. At the outset a national plan should be developed to inform Sri Lankans about the mandate of the Commission, the composition of the Commission, its plans and initial timelines. Once the Commission is fully operational, the media and public should be given access to the proceedings as far as possible and to the evidence on which the Commission bases its findings.

However, confidentiality may be required to protect the rights of individual victims and witnesses and the rights of suspected perpetrators. If the Commission considers that measures are necessary, it should have the power to decide to hold a hearing *in camera* or to conceal the identities of victims, witnesses and suspected perpetrators or other information that may pose a risk to them. Information regarding crimes under international law should however be provided confidentially to the judicial authorities, subject to effective safeguards to protect the safety of those concerned.

(H) FUNDING

A number of truth commissions have faced significant funding challenges, which have delayed and undermined their work. It is important that the Sri Lankan government allocates sufficient resources to the Commission from the outset in a process that ensures the independence of the Commission.³⁴

Once the Commissioners are appointed, their first task should be to prepare a strategic plan for the work of the Commission and develop a two-year budget proposal both of which should be made public. The proposal should be reviewed by the government in a transparent process which includes international experts and organizations with experience of establishing and implementing truth commissions and respects the functional independence of the Commission. The government should approve the final budget and make a public commitment to fund the Commission. It may also seek funding assistance from donor states and bodies such as the United Nations Peacebuilding Commission. The Commission should report publicly and regularly on the status of its funding.

(I) FINAL REPORT AND RECOMMENDATIONS

The Commission's interim and final reports should be proclaimed by the government and communicated nationally to all sectors of Sri Lankan society through appropriate media.³⁵ A summary of the final report may be communicated through radio, town hall meetings, distribution of books and education materials to schools etc. The summary and full reports should be translated into Sinhala and Tamil.

(J) LEGACY

In addition, to the Commission's final report, archives of documents and evidence obtained during its investigations must be preserved and be accessible to ensure the legacy of its work.

The archives should be preserved as a permanent record of the Commission. They should be accessible to victims to give full effect to their right to know the truth,³⁶ as well as to researchers³⁷ and other justice, truth and reparation mechanisms to support their mandates.³⁸ At the outset of its work, the Commission should clarify the conditions that will govern access to their documents, including conditions aimed at preventing disclosure of confidential information while facilitating public access to the archives.³⁹ The archives should be managed by an appropriate body that will be responsible for preserving the information, assisting with the identity of information and protecting confidential information regarding victims, witnesses and suspected persons.

³⁴ See also: Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity, Principle 11.

³⁵ Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity, Principle 13.

³⁶ Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity, Principle 14.

³⁷ Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity, Principle 15.

³⁸ Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity, Principle 16.

³⁹ Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity, Principle 8(f).

5. OFFICE ON MISSING PERSONS

“They ask for very little. Tell us where our children or our husbands are. Let us know so we can mourn them with dignity. If they are alive, let us go and look for them.”

Dr. Manorani Saravanamuttu, mother of slain journalist Richard de Zoysa ⁴⁰

In May 2016, Sri Lanka’s cabinet approved a proposal to create an Office on Missing Persons to assist families seeking information about missing persons, including victims of enforced disappearances, those missing in the context of the armed conflict or in connection with political unrest or civil disturbance. A bill to establish an Office on Missing Persons was issued in the Gazette on 27 May 2016. In August 2016 the Office on Missing Persons (Establishment, Administration and Discharge of Functions) Act was enacted by parliament.

In announcing the new initiative, the Sri Lankan government acknowledged having received over 65,000 disappearance complaints since 1994. Since the establishment of the first Presidential Commission to investigate reports of enforced disappearances in 1991, families seeking missing loved ones have testified before at least 10 such *ad hoc* bodies but few have received answers.⁴¹ The latest Presidential Commission to Investigate Complaints Regarding Missing Persons (Paranagama Commission), was appointed by President Rajapaksa on 15 August 2013 with a mandate to investigate complaints of abduction or disappearance of residents of the northern and eastern provinces affected by armed conflict between June 10, 1990 and May 19, 2009. That Commission, which is to be disbanded on 15 July 2016, had major shortcomings in both its treatment of witnesses and general operations.⁴² Although it has received at least 19,000 civilian complaints (most of which were written submissions) held 14 public sittings and claimed to have made 6,500 inquiries, it failed to deliver truth to victims in the vast majority of cases largely due to ineffective investigations of complaints and lack of witness protection. In June 2016, the

⁴⁰ Richard de Zoysa was abducted from his home in a suburb of Colombo by a government-linked death squad in February 1990. His mother, Dr Manorani Saravanamuttu, who witnessed his abduction, spearheaded early efforts to organize mothers of the disappeared and to provide much-needed assistance to families of the missing. She died in February 2001. Her comments, originally featured in a film by Nimal Menids for Article 19, were captured in a video tribute <https://www.youtube.com/watch?v=nJ5WJUMkNq4> (accessed 5 August 2016).

⁴¹ Sri Lanka: Twenty Years of Make-Believe. Sri Lanka’s Commissions of Inquiry; 11 June 2009, Index Number: Asa 37/005/2009.

⁴² Centre for Policy Alternatives, “The Presidential Commission to Investigate into Complaints Regarding Missing Persons; Trends, Practices and Implications,” December 2014 <http://www.cpalanka.org/wp-content/uploads/2014/12/Dissappearances-COI-Dec-2014-FINAL.pdf>, accessed 15 June 2016

Commission announced that it would archive its documentation for use by the Office on Missing Persons.

Amnesty International welcomes the positive step by the government to establish a new Office on Missing Persons. The Act contains many positive elements, including: a broad definition of missing persons; broad powers of the Office to conduct its investigations with the cooperation of national authorities; the establishment of a Victims and Witnesses Protection Division; powers to issue certificates of absence to families; detailed provisions on keeping victims and families informed of investigations; the establishment of offences of contempt against the authority of the Office; and a mandate to recommend reparation, including guarantees of non-recurrence for victims.

However, victims' families have expressed concern over a lack of consultation during the process of developing the Office and reports that information gathered during investigations might be withheld from criminal investigators and other truth and reparation mechanisms.

It is essential that the following considerations are taken into account in the establishment of the Office and the implementation of the Act.

(A) COMPETENCE, INDEPENDENCE AND IMPARTIALITY

In order to ensure that the Constitutional Council considers the highest qualified candidates for membership, it should issue a public call and assign a reasonable time period for applications and nominations highlighting the requirements that the Office reflect the pluralistic nature of the Sri Lankan society and have relevant experience set out in section 4(2). Regrettably the Act does not expressly require a fair balance of female and male members. This should be addressed by the Constitutional Council in its public call, including by encouraging highly qualified women to apply and ensuring that the call is brought to their attention.

Security of tenure is essential to ensure that members of the Office can perform their responsibilities without hindrance or political interference. Section 7(3) contains a number of grounds for removal from office. This should be applied strictly in accordance with the requirement in international standards that persons should not be removed during their term of office except on grounds of incapacity or behaviour that render them unfit to discharge their duties and pursuant to procedures ensuring fair, impartial and independent determinations.⁴³

(B) OUTREACH AND COMMUNICATIONS

To ensure public trust and confidence in the Office and ensure the engagement of victims and their families, the government should develop and launch a public outreach campaign as soon as possible which includes addressing some of the criticisms regarding the process to date and concerns about the content of the Act. As soon as the Office is established, it should develop an on-going outreach strategy to inform victims and families from all sectors of Sri Lankan society about the work of the office, its strategies and how victims and their families can engage with it. Family members of victims who are active on enforced disappearances have advocated appointment of victim representatives to work with the Office to support this engagement.

Amnesty International welcomes that section 3(3) allows the Office to establish such number of regional offices as may be necessary, to achieve its mandate. The Office should establish a number of regional offices, in particular at its early stages, to reach out to all communities and assist victims and their families to engage in the process.

⁴³ Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity, Principle 7(a).

(C) FORENSIC EXPERTISE AND CAPACITY

Since the 1990s, grave sites of alleged victims of disappearances have been identified in many parts of Sri Lanka. Since 2012, over two hundred bodies have been exhumed from gravesites in Matale in Sri Lanka's Central Province and Mannar in the north of Sri Lanka. Another site in Kaluwanchikudy in eastern Sri Lanka was alleged in 2014 to contain about 100 bodies, but has not yet been exhumed. Exhumations have sometimes provided answers to families seeking missing loved ones, but there have also been allegations that exhumations and the evidence collected have been mishandled or suppressed.

MATALE GRAVES: WAS FORENSIC EVIDENCE MISHANDLED?

In November 2012 skeletal remains were discovered during construction of a bio gas facility at Matale General Hospital. Exhumations uncovered 154 human skeletons before the site was closed on court order. Forensic archaeologist Raj Somadeva and Judicial Medical Officer Ajith Jayasena who investigated the site concluded that the remains dated from 1986-1990 – the time of the JVP insurgency when tens of thousands of suspected JVP members disappeared at the hands of the security forces. Their examination of the remains found evidence of torture and extrajudicial execution. Families of suspected victims of enforced disappearances during that period petitioned the Court asking for DNA analysis of the remains to determine whether they matched the DNA of their missing relatives. President Mahinda Rajapaksa appointed a three-person commission of inquiry: three retired judges. Material alleged to be remains from the gravesite was sent to the US for carbon dating and based on the report of that analysis the Commission concluded that the remains dated from before 1950, although they agreed that the remains showed evidence of torture and murder. Dr. Ajith Jayasena has questioned the chain of custody of the skeletal evidence:

When I handed over the samples of bone fragments I recovered from the mass grave in Matale to be dispatched for the American test, I sealed the samples and gave them over to the CID. But, I do not know whether the sealed bone fragment samples were the same ones that were sent to the American laboratory. ... I wanted to send the samples to the American laboratory through a Judicial Medical Officer designated by us. However, the CID said... they did not have the ability to send on their expense a medical officer to America. If I was able to send such a medical officer as I required, I would have handed-over the sealed samples to him.

Excavations of grave sites, exhumations and autopsies can provide valuable evidence towards establishing the identity of the person and their cause of death, as well as identifying those responsible for killing, disappearance or other crimes. But without appropriate handling, forensic analysis and preservation of evidence, critically important evidence can be discredited or lost forever. Amnesty International therefore supports the recommendations of the Centre for Policy Alternatives for the establishment of a dedicated forensics unit or team within the Office on Missing Persons composed of highly qualified experts in forensics and related fields.⁴⁴ In practice, when an order is granted by a Magistrates Court following an application by the Office to carry out an excavation or exhumation, the Office's unit or team should have full authority over the site and the evidence gathered and the power to conduct the excavation or exhumation independently and without hindrance, with the full cooperation of relevant authorities.

⁴⁴ Office on Missing Persons: Outstanding Issues for Consideration to Strengthen Legislation and Post-Enactment Implementation, July 2016.

(D) EVIDENCE OF CRIMES UNDER INTERNATIONAL LAW

Consistent with Sri Lanka's concurrent obligations to ensure justice, truth and reparation, it is important that when the Office gathers information indicating individual criminal responsibility for crimes under international law (including enforced disappearance, torture, war crimes and crimes against humanity), this information should be forwarded confidentially to the Special Counsel of the proposed justice mechanism or other appropriate authorities for further criminal investigation or preserved until independent and effective investigating authorities are established.⁴⁵

Amnesty International acknowledges that section 12(i) provides the Office with discretion to report information to the 'relevant law enforcement or prosecuting authority', however, it is not mandatory. In order to meet the Office's objectives in section 2(c) and (d) to 'protect the rights and interests of missing persons and their relatives' and 'identify proper avenues of redress to which such missing persons or their relatives may have recourse' such information must be shared.

Other vague provisions of the Act, raise concern that the Act could be applied narrowly to restrict the transfer of information regarding crimes under international law gathered by the Office to criminal investigators. These provisions can and should be interpreted progressively. In particular:

- A Section 11(a) of the Act empowers the Office to 'enter into agreements, as are necessary to achieve the mandate of the OMP, with any person or organization'. The requirement that such agreements must be necessary to achieve the mandate of the Office, clearly prohibits providing confidentiality for information that would undermine its ability to protect the rights of victims and their relatives and their recourse to proper avenues of redress.
- Section 25(2)(c) states 'no proceedings civil, or criminal, or administrative shall be instituted against any person consequent to such person in good faith, providing evidence or documentation to the [Office]'. This section must however be read to preclude only legal proceedings against persons specifically for the act(s) of providing evidence and documentation to the Office, not in relation to content of the evidence or documentation they provide to the Office, especially when such evidence relates to crimes under international law.

Following its establishment, the Office on Missing Persons should publicly clarify that it will submit all information and evidence of crimes under international law to the Special Counsel or other appropriate investigating authorities to ensure that victims can access justice. In establishing a process to accept information on the condition of confidentiality pursuant to section 12(c)(v), the Office should clarify that such agreements will exclude information relating to crimes under international law.

⁴⁵ Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity, Principle 8(e): 'Commissions of inquiry shall endeavour to safeguard evidence for later use in the administration of justice'.

6. OFFICE FOR REPARATION

“Prageeth was the main breadwinner in our family. After he disappeared our entire family maintenance structure broke down. It is the same for many of us from the families of the disappeared. We need to have some system for ensuring compensation and reparation for our loss...”

Sandya Eknaligoda, wife of disappeared political cartoonist Prageeth Eknaligoda, Geneva, August 31, 2012

Victims of human rights abuses and violations of international humanitarian law, including crimes under international law, have a right to full and effective reparation to address the harm they have suffered.⁴⁶ Reparation should seek to be transformative and address the individual, institutional and structural aspects that constitute the cause, contributing factors and/or consequences of violation and abuses.

Successive governments have announced programmes to provide permanent housing for the displaced; repair damaged houses; improve water and sanitation, assist with livelihood development and improve infrastructure, but the programmes did not reach all those in need.⁴⁷ Families still struggle to secure the return of lands occupied by the military during the war and to rebuild homes and re-establish livelihoods with minimal assistance. Many live in temporary or unfinished structures seven years after the armed conflict ended. Amnesty International has

⁴⁶ See for example: Article 3 of 1907 Hague Convention IV; Article 91 of Additional Protocol I; Article 14 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; Article 24 (4) of the International Convention for the Protection of All Persons from Enforced Disappearance; Article 75 of the Rome Statute of the International Criminal Court; United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law; Rule 150 of ICRC's Customary Rules of International Humanitarian Law; Human Rights Committee, General Comment 31, Nature of the General Legal Obligation on States Parties to the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004), para. 16.

⁴⁷ Ministry of Prison Reforms, Rehabilitation, Resettlement and Hindu Religious Affairs, “Notes on Performance – 2015.” reported that there were “230,000 families who yet need durable solutions such as housing, clean water, sanitation, sustainable livelihood.” <http://resettlementmin.gov.lk/site/images/stories/pdf/per2015e.pdf> accessed, accessed 15 June 2016, p. 25.

received reports of gender discrimination when women have attempted to access humanitarian assistance programmes.⁴⁸

Amnesty International welcomed a Cabinet decision in August approving a national policy to provide durable solutions for persons displaced by armed conflict that attempts to address these issues; early implementation of measures to relieve immediate needs is essential.

The new national policy emphasizes the need to respond to all displaced people and displacement affected populations in a fair, just and equitable and non-discriminatory manner,⁴⁹ and in accordance with international standards. It addresses shortcomings in previous government efforts to provide assistance and compensation to victims of human rights violations, those who have lost lands, homes or livelihoods or who suffered mental or physical injuries as a result of the armed conflict, which have been piecemeal and inadequate. It also emphasizes the need to ensure access to justice and reparations.

ENSURING JUSTICE, REPARATIONS AND COEXISTENCE

The Government needs to ensure that the displaced and displacement-affected have access to justice, which means, inter alia, respect for due process, being able to bring their complaints to the police (including to officers who are proficient in Tamil and to female police officers), to the courts, and to other grievance mechanisms, be provided with legal aid where this is needed and medical and psycho-social support where required. In addition, transitional justice issues must be addressed. As part of this effort the Government should set out a comprehensive policy for reparations relating to loss, including compensation for persons killed, missing or disabled, and for economic losses, ensuring recognition of the issue of displacement and its impact. Eligibility for such reparations or compensation packages should include persons who worked in conflict affected areas although they were not residents and therefore are not eligible for resettlement assistance packages. Given the challenges relating to tensions and hostility between and within communities, including at an ethnic level, measures to acknowledge these grievances and to create trust and coexistence should be designed. As a part of this effort, programs should be undertaken to sensitise government officials at the district and central levels on issues such as displacement and continuing problems for return and reclaiming of rights⁵⁰.

The Policy seeks to articulate and guarantee the internationally recognized human rights of people affected by displacement and promote measures to address their immediate, medium and long-term needs for protection and assistance. It seeks to ensure their public consultation and participation in policymaking; coordination between institutions and agencies working for the displaced; development of mechanisms for redress of grievances, and to identify urgent priorities.

Compensation has been paid to individuals for deaths, injuries and property damage resulting from 'terrorism',⁵¹ and the Constitution allows victims of human rights violations to petition the Supreme Court for compensation, but it is an arduous process that can take years and can be a significant financial burden on petitioners. Securing reparation through the Courts for a human rights violations and abuses is out of reach for most Sri Lankans. The Sri Lankan government has committed to addressing these and other challenges, to guarantee victims satisfaction and ensure

⁴⁸ See: Sri Lanka: Waiting to go home - the plight of the internally displaced, Amnesty International June 2006, AI Index: ASA 37/004/2006, pp. 32-33; See also, "Briefing Note; A Gender Perspective on Humanitarian Assistance in Northern Sri Lanka, February 2009, United Nations Resident Co-ordinator's Office, Sri Lanka, pg. 7, <http://gbvaor.net/wp-content/uploads/sites/3/2015/03/A-Gender-Perspective-on-Humanitarian-Assistance-in-Northern-Sri-Lanka-2009.pdf>, accessed 5 August 2016

⁴⁹ Ministry of Prison Reforms, Rehabilitation, Resettlement and Hindu Religious Affairs National Policy on Durable Solutions for Conflict-Affected Displacement, <http://resettlementmin.gov.lk/site/images/stories/pdf/final%20policy.pdf>, accessed 1 September 2016

⁵⁰ Ministry of Prison Reforms, Rehabilitation, Resettlement and Hindu Religious Affairs National Policy on Durable Solutions for Conflict-Affected Displacement, page 22

⁵¹ Ministry of Prison Reforms, Rehabilitation, Resettlement and Hindu Religious Affairs, "Notes on Performance – 2015", pp. 31-32.

non-recurrence (for example by bringing laws into accordance with international standards), but it must ensure that all its reforms are part of a coherent plan and are adequately resourced.

The commitment given by Sri Lanka in the Human Rights Council Resolution to establish an Office of Reparation is a potentially significant step towards finally recognizing and addressing the harm suffered by victims and their families, if it entails creating a comprehensive reparation programme for victims. However, at present, there is no further information about the government's plans regarding the Office. The following recommendations should be considered to develop an effective reparation programme in line with international standards, most notably the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.

(A) MANDATE

The Office for Reparation should be established through legislation developed in consultation with civil society providing it with a clear mandate to establish a national reparation programme for victims of human rights violations and abuses committed in Sri Lanka and setting out its relationship to other mechanisms that will address issues of reparation.

The scale of violations and abuses committed in Sri Lanka and the length of time that victims have had to wait for reparation requires the establishment of a national programme that will provide a broad range of measures to victims in an accessible administrative process. The Office should be primarily responsible for establishing and implementing this process. In doing so, the Office should take into account any reparation orders to victims made by the justice mechanism and the recommendations of the Commission for Truth, Justice, Reconciliation and Non-recurrence and the Office of Missing persons. Legislation establishing the Office and other mechanisms should reflect this.

As with other mechanisms, it is important that the mandate provides the Office with a broad mandate so that it is accessible to all victims of human rights violations and abuses committed in Sri Lanka in recent decades. The scope of victims therefore should not be limited in any way for example by time-frame, type of abuses or harm suffered. In particular, the mandate should include the following definition of victims, which is in accordance with international standards:

Victims are persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute violations of international human rights law and international humanitarian law. A person should be considered a victim regardless of whether the perpetrator of the violation is identified, apprehended, prosecuted or convicted, and regardless of any familial or other relationship between the perpetrator and the victim. The term 'victim' also includes immediate family or dependants of the victim as well as persons who have suffered harm in intervening to assist victims or to prevent victimization.⁵²

Legislation and other regulations governing the Office for Reparation should contain strong provisions on non-discrimination and establish mechanisms for victims to challenge any decision of the Office on such grounds.

⁵² See for example, Principle 8 of the UN Basic Principles and Guidelines and the Committee against Torture's definition of victims in General Comment No. 3.

(B) COMPETENCE, INDEPENDENCE AND IMPARTIALITY

The Office should be independent of the government and managed by independent experts, including international experts with experience of developing and implementing large-scale reparation programmes in other contexts and national experts, representative of all affected communities who understand the national context and have substantial experience in working with victims and affected communities. The experts should appoint the staff of the Office and have full authority over the management and administration of the Office.

(C) DESIGNING A REPARATION PROGRAMME

The design of a reparation programme must be victim-focussed to identify the harm suffered by victims and their specific needs.

The national consultation currently taking place is expected to provide a first indication of the needs of victims. However, further detailed consultation will be necessary to design a programme tailored to the diverse needs of all victims taking into account the different kinds of harm experienced. These consultations should be organized by the Office at an early stage and be coordinated with consultations by other mechanisms on reparation. Strategies, as they are developed, should be shared with victims and civil society for their input before adoption.

The Office should consider a staged approach to reparation, bearing in mind that some victims require urgent assistance, the length of time that it will take to conduct consultations and to receive recommendations from other mechanisms. The Office should seek to put in place interim measures as soon as possible to help those experiencing serious on-going harm or hardship as a result of the violations. These measures should be based on initial consultations with victims and civil society.

Both individual and collective reparation measures will be necessary to address individual and collective harm suffered by victims. Whereas it has been recommended to apply collective reparation in some situations involving large-scale violations, such measures will be ineffective in addressing individual harm fully. To ensure its effectiveness, the Office should have discretion to tailor both individual and collective measures to each situation.

The Office should be mandated to use all forms of reparation as these will be necessary to fully address the harm suffered by victims in different contexts. Restitution, compensation, rehabilitation, satisfaction and guarantees of non-recurrence involve a range of measures that can be tailored to the needs of victims.⁵³ Guarantees of non-recurrence will be particularly important to develop transformative measures that seek to address the underlying causes of the abuses, including discrimination and marginalization.

Victims, especially those who experience trauma or marginalization or certain violations, may be reluctant to claim reparation at first and the Office will need to work with them and civil society to build their trust and confidence in the process. This and other measures to inform all victims of their right to seek reparation will take time. Strict timelines for applications should therefore not be put in place at the stage of designing the programme or defining the mandate of the Office. Instead, any timelines should be considered on an on-going basis taking into account the progress of the Office.

⁵³ For a detailed definition of each form see Principles 19-23 of the UN Basic Principles and Guidelines.

(D) VICTIM AND WITNESS PROTECTION AND SUPPORT

Measures must be put in place to protect victims so that they are able to claim reparation safely. A victim and witness protection unit should be established within the office to:

- Develop effective measures to protect the privacy of victims claiming reparation;
- Provide effective protection to victims who become at risk as a result of seeking reparation; and
- Provide effective psycho-social and other support to victims in claiming reparation. As appropriate, it should coordinate with the victim and witness units of other mechanisms and with the national Victim and Witness Protection Authority and Division, once the flaws in that body are addressed.

(E) OUTREACH AND TRANSPARENCY

As with other mechanisms, it is essential that victims know about the reparation programme, understand what to expect and how to engage with it. National outreach is therefore required. Experiences in other situations demonstrates that claiming reparation can be complex and potentially traumatizing for victims. It is therefore important that they are provided with support in making applications and updated regularly on the status of their application and the implementation of the programme.

(F) FUNDING

The Sri Lankan state, which is responsible for violations perpetrated by state actors and agents and for its long-term failure to provide effective remedies to victims of crimes committed by non-state actors, must be primarily responsible for funding the reparation programme. A number of secondary funding measures should also be considered, including:

- Providing that fines imposed by criminal courts on persons convicted of human rights violations and abuses are paid to the Office to be used for the benefit of victims;
- Establishing a trust fund to receive voluntary contributions from other states, corporations and other entities and the public.

(G) LEGACY

In addition to these measures a detailed analysis of the obstacles faced by victims in seeking reparation before national courts and other mechanisms should be conducted by the Office of Reparation, which should provide recommendations to the government to ensure that victims of violations and abuses in the future can access prompt and effective remedies.

7. RECOMMENDATIONS

By seeking to deliver on all four pillars – justice, truth, reparation and guarantees of non-recurrence – through the establishment of these four mechanisms, Sri Lanka promises to break new ground and set global precedents that other states may follow in seeking to address impunity. It is important that the commitments are delivered without delay and that all mechanisms coordinate with each other to ensure the effectiveness of their work.

JUSTICE MECHANISM:

- Establish a hybrid-international justice mechanism
- Provide the mechanism with a clear mandate
- Mandate the mechanism to address crimes by all sides
- Establish a broad temporal jurisdiction
- Provide jurisdiction over all crimes under international law
- Allow the Special Counsel to prosecute suspects at all levels
- Do not impose time-limits on the mechanism
- Conduct a thorough and transparent law reform process to bring Sri Lanka's laws in line with the highest standards of international criminal law
- Establish chambers in locations throughout Sri Lanka and permit in situ hearings
- Base the initial size of the mechanism on an assessment by independent experts
- Multiple trial chambers and appropriate appeals chambers should be established
- Chambers should be composed of international and national judges, Sri Lanka judges from all communities and an equal representation of women and men
- Judges should be highly qualified and willing to undertake training
- Judges should be selected in an open, independent and transparent process
- The Special Counsel should be highly qualified and appointed through an open, independent and transparent process
- The Special Counsel should establish an office of highly qualified and independent national and international staff and develop a transparent strategy
- An independent defence office should be established
- An independent registry should be established

- An independent Victims and Witnesses Unit should be established to protect and support victims and witnesses
- Victims should be able to participate in the proceedings and to seek reparation against convicted persons
- An outreach unit should be established and properly funded
- Express provision should be made for trial observation and amicus curiae briefs
- Effective systems must be put in place to ensure the full cooperation of all Sri Lankan authorities with the mechanism
- Sri Lanka should seek to establish extradition, mutual legal assistance and witness relocation agreements with relevant third states
- An effective system of funding should be established at the outset
- The mechanism must form part of a broader initiative to strengthen the national justice system to address human rights violations and abuses

COMMISSION ON TRUTH, JUSTICE, RECONCILIATION AND NON-RECURRENT:

- Consult stakeholders at all stages of designing the Commission
- Provide the Commission with a clear mandate
- Mandate the Commission to investigate all human rights violations and abuses committed by all sides
- Mandate the Commission to investigate human rights violation and abuses covering a broad timeframe
- Task the Commission to carry out its mandate in at least two years
- Establish a fully independent Commission
- Appoint highly qualified Commissioners
- Appoint Commissioners in a transparent process
- Establish a secretariat to support the Commission's work
- Provide the Commission with powers to gather any information it considers relevant
- Preclude amnesties or similar measures of impunity with respect to crimes under international law
- Protect and support victims and witnesses
- Put in place safeguards to ensure that rights of persons suspected of committing human rights violations and abuses are respected
- Preclude use immunities and confidentiality agreements with suspects that may obstruct the criminal investigation of crimes under international law
- Establish a public information and outreach programme to keep victims and Sri Lankan society fully informed of the Commission's work
- Allocate sufficient resources to the Commission

- Proclaim, publish and widely disseminate the results of a Commission's investigations and its recommendations without delay
- Establish public archives of the Commission

OFFICE ON MISSING PERSONS:

- Appoint the members of the Office in a transparent process, ensuring an equal representation of women and men
- Ensure security of tenure of the members
- Conduct national outreach to inform all victims and their families of the work of the Office and how to engage with it
- Establish regional offices as appropriate
- The Office should report all information regarding crimes under international law to the Special Counsel
- Preclude confidentiality agreements that may obstruct investigations into allegations of crimes under international law
- Clarify that there are no amnesties or immunities that may apply to persons suspected of crimes under international law

OFFICE FOR REPARATION:

- Mandate the Office to develop and implement a national reparation programme in coordination with other mechanisms
- Ensure reparation to all victims of human rights violations and abuses and violations of international humanitarian law without discrimination
- Appoint independent members of the Office with strong experience in human rights and providing reparation to victims
- Consult with victims in designing the reparation programme
- Provide interim measures for victims that require urgent assistance
- Provide for both individual and collective reparation
- Provide for all forms of reparation
- Do not impose time-limits for reparation
- Protect and support victims claiming reparation
- Establish a national outreach programme to inform victims about the reparation programme and assist them to make claims
- Strengthen national mechanisms to ensure access to reparation for future human rights violations and abuses

TIMING AND COORDINATION:

- Establish all four mechanisms concurrently and as soon as possible to prevent delaying some remedies to victims and lost momentum
- Establish coordination systems between the four mechanisms, including to ensure coordinated and effective outreach

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SRI LANKA: MAKING THE RIGHTS CHOICES

ESTABLISHING EFFECTIVE MECHANISMS TO DELIVER JUSTICE, TRUTH AND REPARATION TO VICTIMS

When Sri Lanka co-sponsored UN Human Rights Council Resolution 30/1 in October 2015, the authorities finally acknowledged the need to end the long cycle of violence and impunity for violations of human rights. The government committed to an ambitious agenda for change, promising to deliver justice for past crimes under international law, truth and reparation to repair the harm suffered by Sri Lanka's people, and reforms to prevent their recurrence.

A year later, the government continues to commit to deliver justice, truth, reparation and guarantees of non-recurrence. However, valid concerns have also been expressed by Sri Lankan civil society groups and victims regarding the pace of progress, the transparency of some processes, the lack of resources allocated to the consultation in its early stages and the lack of a public coherent approach towards all these initiatives.

This briefing sets out Amnesty International's recommendations for establishing effective mechanisms to ensure justice, truth and reparation (including guarantees of non-recurrence) for victims. Amnesty International outlines ten principles that should be applied in designing and implementing all four mechanisms. These principles are then applied to the proposed justice mechanism, the Commission on truth, justice, reconciliation and non-recurrence, the Office on Missing Persons and the Office for Reparation.