

Jaffna
30 January 2019

Her Excellency Michelle Bachelet Jeria
The High Commissioner for Human Rights
Office of the United Nations High Commissioner for Human Rights (OHCHR)
Palais Wilson
52 rue des Pâquis
CH-1201 Geneva, Switzerland.

Your Excellency,

Re: Your Report to the UNHRC in March 2019 on Sri Lanka

We the undersigned civil society groups, in particular from the North and East of Sri Lanka, members of war victims' associations, other likeminded organisations and individuals concerned about the current state of affairs in Sri Lanka and lack of progress on peace and justice, bring to your kind attention the following issues to be taken up in your report to the forthcoming UN Human Rights Council session in March 2019.

Background

The war in Sri Lanka erupted after decades of oppression of Tamils and other numerically smaller communities, rooted in the deeply embedded nature of Sinhala Buddhist nationalist politics in the affairs of the State. After the end of the armed conflict in 2009, the UN Secretary General Ban Ki-moon appointed a Panel of Experts on Accountability in Sri Lanka, headed by Mr. Marzuki Darusman, to advise the Secretary General on the events that transpired during the last phase of the war and for the kind of action needed to hold those accountable for perpetuating those crimes. The panel concluded that the conduct of the war represented a 'grave assault on the entire regime of international law designed to protect individual dignity during both war and peace'. A number of UN Human Rights Council resolutions were subsequently passed, calling for accountability and justice in Sri Lanka. The OHCHR Investigation on Sri Lanka (OISL) established by a resolution of the Council in March 2014 *inter alia* recommended the establishment of a special court, integrating international judges, prosecutors, lawyers and investigators as an essential step towards justice. In 2015, with the election of President Maithripala Sirisena, Prime Minister Ranil Wickremesinghe, and the passing of UNHRC Resolution 30/1 with Sri Lanka's support, expectations to initiate reforms for lasting peace and justice grew. Crucially, the resolution supported the establishment of a special court with international participation – the first time the Sri Lankan government had accepted the need for international participation in justice and accountability mechanisms.

Progress

The Government appointed a Consultation Task Force, which held island wide consultations to recommend reconciliation mechanisms. Some of the recommendations made in this

report exhibited the potential for political will within the government to genuinely work towards political change and reconciliation. It particularly endorsed the call for a hybrid mechanism as suggested in the OISL report and Resolution 30/1 of 2015. However, the report was consciously and deliberately side-lined by the Government when designing its transitional justice mechanisms.

Office of the Missing Persons (OMP): This was the first mechanisms to be created and it was created by an act of parliament in 2016. But the office came into operation only in 2018 when commissioners were appointed. The OMP fell short of many expectations that the families of the enforced disappearances, particularly the Tamil families, had and it did not satisfy their needs and aspirations. The OMP has a representative from the security sector – a former Director/Legal of the Sri Lanka army who served in that position during the last stages of the war in 2009. By its own mandate the OMP is limited to tracing the whereabouts of the victims and recommend for reparations. Provisions in the Act with regard to the need to refer the OMP's findings of a criminal nature to an appropriate investigative/prosecutorial body have been deemed discretionary. Given that the Government has taken no steps to appoint a Special Prosecutor as per resolution 30/1 there appear to be no prospects for accountability for enforced disappearances. The Government's prosecutorial arm, the Attorney General's Department continues to appear for alleged perpetrators of the crime of enforced disappearance in *habeas corpus* cases. The Government has failed to win the confidence of the victims in establishing this mechanism. The mothers of the disappeared for a long time now have been asking to release a list of all those who surrendered to the armed forces during the last few days of the war and all those who have been kept in detention since 1983. The President promised to release this list in June 2017 but there has been no progress whatsoever.

Office for Reparation: Parliament approved legislation to set up an Office for Reparations last year, but this has not been set up yet and there has been no timeline announced. It has been pointed out that this Office depends too much on the Cabinet of Ministers for approval of its policies and in the process of funds allocations for reparations. This undermines the independence and autonomy of the office.

Other mechanisms: The appointment of a Special Prosecutor and the establishment of a Special Judicial mechanism, to the extent that we are aware, are not even being discussed. The commitment of the government in resolution 30/1 to have foreign judges in a Special Judicial mechanism has been repeatedly dismissed by the President, Prime Minister and Government Ministers as well as the Leader of the Opposition in Parliament, President Rajapaksa and other opposition parties such as the Janatha Vimukthi Peramuna.

The reports of the UN Special Mandate holders who visited Sri Lanka from 2015 – 2018 provide more information on the lethargic and complacent attitude and the lack of political will on the part of the government in working towards genuine peace and reconciliation. The 2016 report of the Working Group on Enforced and Involuntary Disappearances draws attention to the fact that many of their recommendations have not been carried out. The Sri Lankan government also failed to respond to a UN Committee Against Torture report. Special Rapporteur Ben Emmerson's report similarly finds lack of real political will to address the

issues faced by Tamil political prisoners and repeal the draconian Prevention of Terrorism Act. (The draconian Prevention of Terrorism Act's replacement is touted to be an equally draconian Counter Terrorism Act.)

The Constitutional Process

The position of the Tamils is that unless and until a constitution which institutionally provides for their right to manage their own affairs, ie the right to self-determination, there is no future within Sri Lanka as equal stakeholders in the country. This position is shared by the other numerically smaller communities though their institutional demands may vary depending on context and experience. Hence the institutionalisation of a pluralist approach to sovereignty through a reform of State structures along federal lines and the affirmation of the secular nature of the state in the constitution as a basic principle of the State is essential for non-Sinhala communities to live in equality and dignity.

The progress on the new constitution is unclear at the moment, with the Government stating that ideologically the State will remain the same i.e. that the State will remain centralised as a unitary-state and give foremost place to Buddhism. The main Tamil political party remains partly optimistic that a federal-like solution is in the offering. But the reality is again that there is no real appetite for real reforms for reasons stated above. The Tamil people feel that the constitutional reform is merely kept alive to give impression to the international community that the 'peace' project is underway so as to justify their lack of progress on the 'justice' front, in effect reproducing the infamous peace vs justice paradigm and delivering none.

Concern

Our concern is that the 30/1 resolution has been proactively and deliberately abandoned by the Sri Lankan State. For reasons stated above we have no confidence that the mechanisms established will be able to adequately deliver truth or reparations in a way that will help reconciliation. Neither do we have any reasons to believe that the promised Truth and Reconciliation Mechanism and Special Judicial mechanism with foreign participation will be established anywhere in the near future.

Given the current political situation in Sri Lanka, particularly in the aftermath of the October Constitutional Coup, even those elements who championed Resolution 30/1 within the Sri Lankan Government have now chosen to go silent in the face impending elections. For decades now those who champion accountability, justice and the search for a political solution have been rejected by the Sinhala Buddhist nationalist vote base. **In fact, the accommodation of the political aspirations of the numerically smaller communities and accountability for crimes committed have been interpreted by forces powerful within the Sinhala Buddhist community as threats against their very political existence and the existence of the Sri Lanka as a united country. This reading of reform as a political existential threat has created a reform averse electorate within Sri Lanka's majority community. Hence the lack of democratic political incentive for any**

of the main political parties for real reform will remain as a permanent stumbling block for any meaningful reform in Sri Lanka.

For these reasons we are of the opinion that the member states and the OHCHR must revisit the recommendations in the OISL report and take suitable corrective action in the interest of peace and justice in Sri Lanka.

Our concerns are not rooted in impatience. We would welcome progress, even if slow, if it was on the right track towards accountability, justice, reconciliation and a sustainable peace. However, at this juncture, we believe that Sri Lanka is not on the right track and even going backwards.

Our expectations:

Under the above-mentioned circumstances, we recommend that Your Excellency considers the following programmatic interventions as relevant for consideration by the HRC session of March 2019:

1. That in your report to the Council in March 2019, report that Sri Lanka has shown and is incapable of developing political will for accountability and justice for all the reasons placed above, and thus recommend to the UN Secretary General to place the matter before an appropriate forum of the UN for suitable alternative action.
2. Mandate the Committee on Enforced and Involuntary Disappearances to investigate enforced disappearances in Sri Lanka and if found that Sri Lanka has refused to deal with the impunity on the subject, bring the matter to the attention of the General Assembly through the Secretary General.
3. At the very minimum, recommend to the UNHRC that a new resolution be moved on Sri Lanka, that calls for the fulfilment of all the obligations committed to in Resolution 30/1, condemning the ones not fulfilled and also calling to remedy the lapses and structural deformities in the Office of the Missing Persons and the Office of Reparations by taking into consideration the recommendations of the Government's Consultation Task Force on Reconciliation Mechanisms. The resolution must be timebound for fulfilling the key and important obligations. In order to assist in its implementation and monitor and report on progress to the UNHRC,
 - a. Appoint a Special Rapporteur on Sri Lanka to report to the Council and the General Assembly on the developments in relation to the above.
 - b. Mandate your office to assist in the implementation, monitor and report regularly to the UNHRC on progress, through the establishment of a field office of the OHCHR in Sri Lanka with branches in the North and East.

We, the undersigned trust that Your Excellency will take into due consideration our suggestions and submit a report to the UNHRC that takes seriously our yearning for justice and peace.

Organisations

Adayaalam Centre for Policy Research (ACPR) (Jaffna)
Centre for Human Rights and Development (CHRD)
Centre for Justice and Change (Trincomalee)
Centre for Society and Religion (CSR), Maradana
Centre for Society and Religion, Maradana
Ceylon Teachers Union
Child Development Initiative (CDI) (Vavuniya)
Inayam - Batticaloa Consortium of NGOs (Federation of 39 Organizations)
International Centre for Ethnic Studies (ICES)
Justice and Peace Commission, Diocese of Jaffna
Maatram Foundation (Vavuniya)
Mannar Citizens Committee
Mannar Women's Development Federation
Northern Muslims' Forum (NMF)
People for Equality and Relief in Lanka (Washington DC, USA)
Tamil Civil Society Forum (TCSF) (Network of more than 100 Tamil civil society activists)
University Employees Union, University of Jaffna
University Students Union, University of Jaffna
University Teachers Union, University of Jaffna
Vallamai (Journey for Social Change) – Jaffna
Women's Action Network

Individuals

Rt. Rev. C. Noel Emmanuel, Bishop of Trincomalee Diocese, Sri Lanka
Rt. Rev. Joseph Ponnaiah, Bishop of Batticaloa Diocese, Sri Lanka
Siva Sri R. Baskaran Kurukkal