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

Report of the Office of the United Nations High Commissioner for Human Rights on advice and technical assistance for the Government of Sri Lanka on promoting reconciliation and accountability in Sri Lanka

Summary

The Lessons Learnt and Reconciliation Commission made significant and far-reaching recommendations towards reconciliation and strengthening the rule of law in Sri Lanka, despite its limitations. In order to define areas of possible advice and assistance by the Office of the United Nations High Commissioner for Human Rights and the special procedures pursuant to Human Rights Council resolution 19/2, the present report examines the recommendations of the Commission and the plans of the Government of Sri Lanka to implement them, and to address alleged violations of international law. To date, the Government has made commitments on only selected recommendations of the Commission, and has not adequately engaged civil society in support of a more consultative and inclusive reconciliation process. The Government has made significant progress in rebuilding infrastructure; and while the majority of internally displaced persons have been resettled, considerable work lies ahead in the areas of justice, reconciliation and resumption of livelihoods. The steps taken to investigate further allegations of serious violations of human rights have also been inconclusive, and lack the independence and impartiality required to inspire confidence. Meanwhile, continuing reports of extrajudicial killings, abductions and enforced disappearance in the past year highlight the urgency of action to combat impunity. It is against this background that possible areas of technical assistance are identified, and recommendations are made.

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I. Introduction

1. The present report is submitted pursuant to Human Rights Council resolution 19/2, in which the Council called upon the Government of Sri Lanka to implement the constructive recommendations made in the report of the Lessons Learnt and Reconciliation Commission¹ and to take all necessary additional steps to fulfil its relevant legal obligations and commitment to initiate credible and independent actions to ensure justice, equity, accountability and reconciliation for all Sri Lankans. The Council requested the Government to present a comprehensive action plan detailing the steps that the Government had taken and would take to implement the recommendations made in the Commission's report, and also to address alleged violations of international law. It encouraged the Office of the United Nations High Commissioner for Human Rights (OHCHR) and relevant special procedures mandate holders to provide, in consultation with and with the concurrence of the Government of Sri Lanka, advice and technical assistance on implementing the above-mentioned steps, and requested OHCHR to present a report on the provision of such assistance to the Council at its twenty-second session.

2. In June 2010, the Secretary-General appointed the Panel of Experts on Accountability in Sri Lanka to advise him on accountability issues in Sri Lanka and offered it as a resource to the Government, and particularly to the Lessons Learnt and Reconciliation Commission.² The Panel, which submitted its report to the Secretary-General in April 2011, found credible allegations of potential serious violations of international law committed by the Government of Sri Lanka and by the Liberation Tigers of Tamil Eelam (LTTE).³ The Government of Sri Lanka has never afforded any credence or legitimacy to the report of the Panel.

3. In July 2012, the Government issued a national plan of action for the implementation of the recommendations of the Lessons Learnt and Reconciliation Commission. According to the delegation of Sri Lanka participating in the fourteenth session of the universal periodic review, in November 2012, the Sri Lankan army had also appointed a board of inquiry to study the Commission's recommendations and to formulate a viable action plan to implement the recommendations that are relevant to the army. The relationship of this mechanism to the national plan of action is, however, unclear.

4. In order to define areas of possible advice and assistance that could be offered to the Government by OHCHR and the special procedures pursuant to Human Rights Council resolution 19/2, the recommendations of the Lessons Learnt and Reconciliation Commission and the steps taken by the Government of Sri Lanka or plans to implement

¹ Available from

www.defence.lk/warcrimes/lessons_learnt_and_reconciliation_commission_final_report.html.

² See the report of the Secretary-General's Panel of Experts on Sri Lanka, 31 March 2011 (available from www.un.org/en/rights/srilanka.shtml), annex 2.

³ According to the Panel of Experts, in the case of the Government, these were (a) the killing of civilians through widespread shelling; (b) the shelling of hospitals and humanitarian objects; (c) the denial of humanitarian assistance; (d) human rights violations suffered by victims and survivors of the conflict; and (e) human rights violations outside the conflict zone, including against the media and other critics of the Government. In the case of the LTTE, these were (a) using civilians as a human buffer; (b) killing civilians attempting to flee LTTE control; (c) using military equipment in the proximity of civilians; (d) forced recruitment of children; (e) forced labour; and (f) the killing of civilians through suicide attacks (paras. 176-177). The panel concluded that "the credible allegations trigger a legal duty of the Government to conduct immediate and genuine investigations and, if the evidence warrants, to prosecute those most responsible" (para. 425)

them, and also to address alleged violations of international law, are examined in the present report. The report also draws on observations by an OHCHR technical mission to the country in September 2012.⁴

II. Engagement by the Office of the High Commissioner

5. On 24 February 2012, the High Commissioner met with the Minister for External Affairs of Sri Lanka, and offered the assistance of her Office in follow-up to and the implementation of the recommendations made by the Lessons Learnt and Reconciliation Commission. In her statement of 2 March 2012 made to the Human Rights Council at its nineteenth session, the High Commissioner encouraged the Government to engage with the special procedures and with her Office on the follow-up to the reports submitted by the Commission and the Panel of Experts.

6. Following the adoption by the Human Rights Council of resolution 19/2, the High Commissioner wrote to the Minister for External Affairs of Sri Lanka on 14 May 2012 to propose a visit by a delegation of OHCHR officials to Sri Lanka to explore possible areas of cooperation and assistance, and to help prepare the ground for an eventual country visit by the High Commissioner herself.

7. The OHCHR technical mission visited Sri Lanka from 13 to 21 September 2012, meeting with a wide range of Government counterparts, including ministers responsible for external affairs, economic development, defence, justice and plantation industries (the Minister for which portfolio is also the Special Envoy of the President on Human Rights). It also met with the official heading the committee tasked with overseeing the implementation of the national plan of action, the Attorney General, various political leaders within the Government and the opposition, the Human Rights Commission of Sri Lanka, civil society representatives, the diplomatic corps and the United Nations country team. The mission also visited field locations in Jaffna, Killinochchi, Mullaitivu and Vavuniya, meeting with the heads of the civil administration, local military commanders, regional coordinators of the Human Rights Commission and United Nations colleagues. On 26 November 2012, the High Commissioner wrote to the Minister for External Affairs to express her appreciation for the Government's efforts in facilitating the visit and to propose possible areas of technical cooperation between OHCHR and the Government in follow-up to Human Rights Council resolution 19/2. The Minister replied to the High Commissioner on 17 December 2012 (see paragraphs 57-60 below).

III. Engagement by human rights mechanisms

8. There are currently eight outstanding requests to visit Sri Lanka by special procedures mandate holders: on minority issues; freedom of peaceful assembly and of association; freedom of opinion and expression; extrajudicial, summary or arbitrary executions; enforced or involuntary disappearances; human rights defenders; independence of judges and lawyers; and discrimination against women in law and practice. At the time of writing, none of these visits had been agreed to by the Government. The Special Rapporteur on extrajudicial, summary or arbitrary executions, on 26 July 2012, the Independent Expert on minority issues, on 7 January 2013, and the Special Rapporteur on

⁴ In accordance with established practice, the Government of Sri Lanka provided its comments and observations on the draft report, which were taken into account, as appropriate. At the request of the Permanent Mission of Sri Lanka, the observations of the Government on the draft report are circulated as an addendum to the present report (A/HRC/22/38/Add.1).

the promotion and protection of the right to freedom of opinion and expression, on 30 January 2013, wrote to the Government to offer services and support pursuant to Council resolution 19/2.

9. Human rights treaty bodies have also made concluding observations pertinent to the report of the Lessons Learnt and Reconciliation Commission and matters of accountability in Sri Lanka: the Committee against Torture (in December 2011),⁵ the Committee on the Elimination of Discrimination against Women (in February 2011),⁶ and the Committee on the Rights of the Child (in October 2010).⁷

IV. National plan of action for the implementation of recommendations of the Lessons Learnt and Reconciliation Commission

10. Although there are concerns regarding the mandate, composition and methodology of the Lessons Learnt and Reconciliation Commission,⁸ including its interpretation of applicable principles of international humanitarian law, it made many important observations and far-reaching recommendations that, if implemented, could help advance reconciliation and respect for human rights in Sri Lanka. The Commission concluded that “the root cause of the ethnic conflict in Sri Lanka lies in the failure of successive Governments to address the genuine grievances of the Tamil people” and that the “process of reconciliation requires a full acknowledgement of the tragedy of the conflict and a collective act of contrition by the political leaders and civil society of both Sinhala and Tamil communities.” The Commission also paid considerable attention to allegations concerning missing persons and enforced disappearances, and called for further investigations. Significantly, it expressed repeated concern at the lack of Government implementation of its own interim recommendations as well as of previous commissions of inquiry (paras. 8.305, 9.64, 9.74, 9.120, 9.211, 9.240 and 9.250).

11. The national plan of action issued by the Government in July 2012 deals with only selected recommendations of the Lessons Learnt and Reconciliation Commission, with no explanation of the process or rationale in making that selection. It is not clear whether the Government has completely rejected the Commission’s recommendations that have not been incorporated into the plan or if they will be considered at a later stage. At its universal periodic review in November 2012, the Government pointed out that there was some duplication of recommendations as well as those falling under the ambit of the National Action Plan for the Protection and Promotion of Human Rights 2011-2016. A number of significant recommendations made by the Commission and not in the Action Plan have, however, been excluded from the national plan of action.

12. In several instances, the implementing activity described by the Government for a particular recommendation does not correspond directly to the recommendation made or does not envisage a substantive change in current practices.⁹ Institutional responsibilities as well as the performance indicators provided in the national plan of action are not always

⁵ CAT/C/LKA/CO/3-4, para. 21.

⁶ CEDAW/C/LKA/CO/7, paras. 40-41.

⁷ CRC/C/LKA/CO/3-4, paras. 32-33.

⁸ See press statement of the High Commissioner, 26 April 2011 (see www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=10962&LangID=E); CAT/C/LKA/CO/3-4, para. 21; report of the Panel of Experts, paras. 344-345.

⁹ See for example activities in the national plan of action in relation to the Commission recommendations in paras. 9.51, 9.57, 9.73, 9.106, 9.270 and 9.285.

clear or appropriate;¹⁰ and several recommendations are delegated to bodies yet to be established.¹¹

V. Areas of concern identified in Human Rights Council resolution 19/2

13. In the section below, the recommendations made by the Lessons Learnt and Reconciliation Commission and the steps proposed by the Government in the national plan of action are examined in greater detail as are more recent developments in the areas highlighted by the Human Rights Council in resolution 19/2 (in the fifth preambular paragraph), with a view to pinpointing possible areas of advice and assistance by OHCHR and relevant special procedures.

A. Rule of law and the administration of justice

14. In its report, the Lessons Learnt and Reconciliation Commission stressed that an independent judiciary, transparent legal process and strict adherence to the rule of law are essential for peace and stability. It identified a number of areas in which the integrity of key rule of law institutions had been compromised or where they could be further reformed and strengthened to promote reconciliation and generate confidence in the administration of justice (paras. 5.155-156, 5.163, 8.185-194 and 9.266-267).

15. The Commission welcomed the lifting of the Emergency Regulations in August 2011, but expressed its hope that subsequent regulations would not impair any benefits therefrom (para. 9.56). Unfortunately, many provisions of the Emergency Regulations that curbed key rights, particularly related to due process, remain as provisions or regulations of the Prevention of Terrorism Act. The Act was, for instance, recently used to arrest four students from Jaffna University for their reported involvement in an event held at the university to mark an LTTE commemorative day on 27 November; two were released on 22 January 2013. The Committee against Torture also noted in its concluding observations on Sri Lanka that the President continued to invoke Section 12 of the Public Security Ordinance (Chapter 40) to allow the armed forces to retain policing powers in all 25 districts (Presidential Order of 6 August 2011).¹²

16. The Lessons Learnt and Reconciliation Commission called for the Police Department to be delinked from the Ministry of Defence (para. 9.214). The Commission also emphasized the importance of an independent judiciary and independent commissions, such as the public service commission and police commission, upholding the rule of law (paras. 9.202, 9.215 and 9.226). International human rights mechanisms¹³ previously expressed concern that the independence of these key institutions had been undermined by the 18th amendment to the Constitution adopted in 2010, which empowered the President to appoint members of these commissions directly, as well as senior judicial posts. This concern deepened recently when the Chief Justice was impeached following a series of attacks and acts of intimidation against judges and judicial officers, which the High

¹⁰ See for example the activities in the national plan of action in relation to the Commission recommendations in paras. 9.9, 9.37, 9.39, 9.218 and 9.285.

¹¹ See for example the activities in the national plan of action in relation to the Commission recommendations in paras. 9.126, 9.128-129, 9.131-136, 9.150, 9.214 and 9.277.

¹² CAT/C/LKA/CO/3-4, para. 10.

¹³ A/HRC/WG.6/14/LKA/2, para. 2.

Commissioner¹⁴ and the Special Rapporteur on the independence of judges and lawyers¹⁵ warned could undermine the independence of judiciary and the rule of law.

B. Credible investigations of widespread allegations of extrajudicial killings and enforced disappearance

1. Extrajudicial killings

17. While the Lessons Learnt and Reconciliation Commission, in its report, found it difficult to determine the precise circumstances under which incidents involving the loss of civilian lives had occurred, it recommended that the State investigate action by the security forces, which may have led to death or injury to civilians (paras. 9.9 and 9.37a). It also recommended an independent investigation into allegations of torture and extrajudicial killing arising from video footage broadcast by Channel 4 (para. 9.39). The Government assigned these recommendations to the Ministry of Defence, the Ministry of Justice, the Attorney General's Department and the Presidential Secretariat for implementation. The Commission also recommended that an inquiry be conducted into the civilian injuries and deaths resulting from shelling, as well as an examination into the adequacy of medical supplies provided to civilians in conflict areas (paras. 9.14 and 9.22). These recommendations were not included in the national plan of action.

18. In its comments on the present report, the Government stated that the Sri Lanka army had appointed a court of inquiry to investigate the instances of civilian casualties mentioned in the Commission report and also to investigate the allegations broadcast on Channel 4, irrespective of whether the video footage was authentic. According to the Government, as at the time of writing, the court had examined 50 witnesses. It was reportedly investigating more than 50 alleged incidents of shelling mentioned in the Commission's report, and would conclude its inquiry by mid-January 2013. It would subsequently investigate the Channel 4 allegations. No further details were provided regarding the composition and terms of reference of the court of inquiry. The High Commissioner is concerned about the transparency, independence and impartiality of this process, as well as for the protection of witnesses and victims.

19. In its report, the Lessons Learnt and Reconciliation Commission also strongly recommended the implementation of recommendations from a previous, unpublished presidential commission of inquiry, which, in 2006, investigated alleged serious violations of human rights after August 2005, including the deaths of five students in Trincomalee in January 2006, and of 17 aid workers of the non-governmental organization Action contre la Faim in Muttur in August 2006 (para. 9.120). According to the national plan of action, the Ministry of Defence, the Police Department and the Attorney General's Department are the entities responsible for implementing this recommendation. It is worth recalling that Sri Lanka, at the second session of the universal periodic review, accepted a recommendation to "ensure the adequate completion of investigations into the killings of aid workers".¹⁶

20. When the OHCHR technical mission raised concerns about the delay in these cases, the Attorney General responded that the quality of investigations and evidence collected had to date prevented him from proceeding with charges and prosecutions. In reply to the Special Rapporteur on extrajudicial, summary or arbitrary executions in October 2012, the Government stated that the Attorney General had advised the Inspector General of Police to

¹⁴ See OHCHR press briefing note dated 18 January 2013.

¹⁵ See press statements dated 14 November and 31 December 2012.

¹⁶ A/HRC/8/46, para. 82, recommendation 15.

conduct comprehensive investigations and had submitted to him the material collected by and the recommendations made by the previous commission of inquiry. The Government pointed out that, if adequate evidence was disclosed by the investigations, filing of indictment would be possible within a reasonable period thereafter. It should be highlighted that it is now more than five years since the presidential commission of inquiry completed its report, and more than six years since the incidents.

21. The importance of effective action against extrajudicial killings to prevent their recurrence was highlighted again by two serious incidents in which prisoners were killed while in custody. During a riot at Vavuniya prison, in June 2012, it is alleged that excessive force was used by State forces and prisoners were subjected to torture, resulting in the death of two remand prisoners. During another riot in Welikada prison, in November 2012, which resulted from a raid on the prison by special task force officers, 27 prisoners were reportedly killed and 43 wounded with allegations that a number were extrajudicially executed. The Government states that police investigations into the two cases are currently in progress, but no further information is available.

2. Missing persons and enforced disappearances

22. In its report, the Lessons Learnt and Reconciliation Commission called for a comprehensive approach, as a matter of urgency, to address the issue of missing persons. It also called for recommendations of past commissions to be implemented given “past incidents of disappearances from different parts of the country” (para. 9.48). To date, the Government has not established a comprehensive mechanism to trace adults who went missing during the latter stages of the war, and investigations of disappearances have not yielded tangible results in the form of arrests or prosecutions.

23. A distinction should be made from the outset between missing persons and those forcibly disappeared. While the former are persons whose whereabouts are unknown as a result of, for example, armed conflict or internal violence, enforced disappearances is understood as the deprivation of liberty of a person by the State, direct or otherwise, and the refusal to acknowledge the deprivation of liberty or the concealment of the fate or whereabouts of the disappeared person.

24. On missing persons, the Commission recommended that every effort be made by law enforcement authorities in cooperation with relevant bodies, particularly the International Committee of the Red Cross (ICRC) to trace the whereabouts of missing persons, ensure reunification with their families, and for these families to be informed of such progress (para. 9.50). The Government has chosen not to include this recommendation in the national plan of action, although it has established a tracing programme for missing children. The Government reported that it had recorded 2,564 untraceable persons, of whom 676 were children and 1,888 adults, also noting that a large number of tracing requests related to children reportedly recruited by the LTTE.

25. The Commission’s recommendation on providing assistance to families of the missing in terms of legal aid and psychosocial support (para. 9.58) was also unfortunately excluded from the national plan of action. The Commission’s recommendation on the creation of a centralized system of data collection on missing persons maintained by different agencies (para. 9.51) was assigned in the plan of action to the Ministry of Defence, in partnership with the Department of Census and Statistics. While how this centralization of data collection will function still remains to be seen, it is important to highlight the fact that victims’ relatives must have trust and confidence in it, including in the circumstances where Government forces are believed to be responsible for missing persons.

26. In its statement on its review during the fourteenth session of the universal periodic review, the Government stated that the Registration of Deaths (Temporary Provisions) Act, No. 19 of 2010 envisages the issuance of death certificates to next of kin and the families of the missing to claim monies due to them. Noting this Act, the Secretary-General's Panel of Experts, in its report, stated, however, that:

Issuance of a death certificate following an administrative process is not a substitute for a bona fide investigation into the circumstances of an individual's death, which meets international standards. It is also crucial to ensure that a relative's acceptance of a death certificate does not lock the individual into a definitive legal position that precludes any further legal recourse in the future.¹⁷

27. Regarding enforced disappearances, the Commission recommended that a special commissioner of investigation be appointed and supported by experienced investigators to investigate alleged disappearances and to provide the Attorney General with material for further action (para. 9.51). Although the Government incorporated this recommendation into the national plan of action, it did not commit to the establishment of a new mechanism and has opted to rely primarily on the existing system as provided in the Code of Criminal Procedure, which to date has failed to resolve such cases. The Government also reported that a working committee had been appointed, led by a deputy inspector general, to respond to cases of disappearances and to conduct ground verifications of such cases to ascertain their current status.

28. The Commission strongly recommended that domestic legislation be framed to specifically criminalize enforced disappearances (para. 9.59), which the Government undertook in the national plan of action to examine. It should be noted that the Working Group on Enforced or Involuntary Disappearances (in 1999), the Human Rights Committee (in 2003) and the Committee against Torture (in 2011) all recommended that Sri Lanka criminalize disappearances.¹⁸ At its review during the second session of the universal periodic review, the Government of Sri Lanka also accepted recommendations to "adopt measures to investigate, prosecute and punish those responsible for serious human rights crimes such as enforced disappearances, in accordance with international norms and in a transparent manner."

29. Concerted action on this issue is particularly critical given the continuing recurrence of cases of enforced disappearance since the end of the armed conflict. As at November 2012, the Working Group on Enforced or Involuntary Disappearances had 5,676 cases of enforced or involuntary disappearance in Sri Lanka still outstanding. At the fourteenth session of the universal periodic review, the Government pointed out that more than 4,000 of the said cases related to the pre-1990 period, while another 1,089 belonged to the period between 1991 and 2005. The Government added that an inter-agency mechanism was being established to clear the backlog of cases with the Working Group;¹⁹ however, the period from the last quarter of 2011 to mid-2012 witnessed new reports of abductions and disappearances, including of political activists,²⁰ as well as politicians and their family members.²¹ During that period, there were also reported cases of abducted persons being

¹⁷ Report of the Panel of Experts, paras. 392 and 395.

¹⁸ E/CN.4/2000/64/Add.1, para. 63; CCPR/CO/79/LKA, para. 10; CAT/C/LKA/CO/3-4, para. 9.

¹⁹ In the past two years, the Government has provided responses on 159 cases for consideration by the Working Group.

²⁰ Affiliated with the Frontline Socialist Party, previously the People's Struggle Movement.

²¹ The Urban Council Chairman of Kolonnawa, his brother, the brother-in-law of a Government minister and the son of a former provincial councillor.

found tortured and killed.²² The Government reports that these cases are under investigation.

30. In its report, the Lessons Learnt and Reconciliation Commission recommended that a full investigation be launched and, where necessary, prosecutions be brought for cases of alleged disappearances of those who had surrendered to and/or been arrested by the security forces around the time of the end of the armed conflict (para. 9.23). In its national plan of action, the Government instructs the Ministry of Defence to complete an unspecified ongoing disciplinary process, and the Ministry of Justice and the Attorney General's Department to take follow-up action to prosecute, where relevant. These provisions fall short of an independent and impartial investigation, given that the Ministry of Defence is made responsible for investigating the armed forces.

C. Detention policies

31. The Lessons Learnt and Reconciliation Commission recommended that law enforcement agencies strictly adhere to existing legal provisions with regard to powers of arrest and detention. It also called for all places of detention to be formally designated and adequately publicized, stressing the importance for detainees' access to next of kin (paras. 9.53-55 and 9.67). The Government did not include these recommendations in its national plan of action. The Commission also recommended that an independent advisory committee be appointed to monitor and examine the arrest and detention of persons taken into custody pursuant to provisions of the Public Security Ordinance or the Prevention of Terrorism Act (para. 9.57). The Government assigned this recommendation to the Ministry of Public Administration and Home Affairs, although the actions to be implemented lack clarity.

32. The Commission also recommended the establishment of a centralized comprehensive database of detainees to be made available to the next of kin (para. 9.63). In its national plan of action, the Government assigned the Ministry of Defence the task of enhancing the "present database" to ensure easy access to information for next of kin. In its comments on the present report, the Government stated that a centralized, comprehensive database of detainees had been established at the Terrorist Investigation Division of the Police, and that 3,073 next of kin had made inquiries. This does not, however, address the needs of those whose family members either went missing during the last stages of the war or surrendered to the army and disappeared thereafter. Furthermore, some of those who approached the designated Government entities were reportedly unable to obtain any information owing to the uncooperative and sometimes hostile behaviour of State officials.

33. Noting that some detainees at the Boossa Detention Centre had spent long periods of detention without any charges filed against them, the Commission, in its report, reiterated its interim recommendation that "a special mechanism be created to examine such cases on a case-by-case basis and recommend a course of action in regard to disposal of each case, as appropriate" (para. 9.62). In the national plan of action, the Government called on the Attorney General's Department to identify and establish procedures within the existing system to address this issue, and to complete decision-making regarding detainees through a dedicated unit in the Department. According to a progress (undated) report, a four-member special committee was set up by the Department, which, in January 2011, began to study cases of LTTE suspects in detention and to expedite releases for rehabilitation or expedite investigations where adequate evidence of hard-core involvement in the LTTE

²² For example, on 4 January 2012, a person who had been abducted the previous day was found dead with a gunshot wound to the head.

was available.²³ In its statement made at the fourteenth session of the universal periodic review, the Government declared, with regard to the treatment of ex-combatants, that, as at 22 October 2012, 11,012 people, included 594 LTTE child soldiers, had been rehabilitated and reintegrated into society, and that of the approximately 12,000 identified as ex-combatants and provided with rehabilitation, only 782 were actually undergoing rehabilitation, while 262 were under judicially mandated custody (remand).²⁴

34. On 23 May 2012, the Leader of the House announced in Parliament that the Government had taken measures to establish four special courts to hear cases against LTTE suspects. Government representatives gave differing accounts to the OHCHR technical mission with regard to the quantity, functionality and location of the courts. The technical mission was also informed that the delay in the establishment of the courts had been due to the lack of judges and interpreters, and that the Judicature Act was being amended in order to expedite the appointment of judges. Although the Attorney General's Department assured that the courts would be functional by the end of 2012, this was still not the case at the time of writing.

35. There are many concerns regarding those who have gone through the rehabilitation process,²⁵ including the criteria used to subject an individual to rehabilitation; questions regarding the supposed voluntary nature of persons surrendering themselves for rehabilitation; the transfer of persons between rehabilitation and detention centres, which results in the deprivation of freedom of liberty of individual through the increase of the detention period; and the lack of such basic procedural safeguards as legal representation and judicial oversight for lengthy rehabilitation periods.

36. The OHCHR technical mission was further informed by the Secretary for Defence that those who had undergone rehabilitation were continually monitored after their release. It has been reported that those released have to register regularly with either the local Civil Affairs Office of the military, or the local army camp. In addition, multiple military and intelligence agencies visit the homes and even workplaces of those released for interrogation purposes. Such continued monitoring and harassment have an adverse impact on the ability of those released from rehabilitation to reintegrate successfully into the community, as they are perceived to be Government informants, and are therefore shunned by the community. Women are particularly affected by this problem and subject to stigma following contacts with the military.

D. Internal displacement and land issues

37. The Lessons Learnt and Reconciliation Commission noted that, while the process of returning those displaced during the final stages of the armed conflict had largely been completed, concerns remained regarding the needs of those resettled (para. 9.102). In discussing the issue of displaced Muslims from as far back as October 1990, the Commission recommended the appointment of a special committee to examine durable

²³ Report of the Panel of Experts, p. 172, annex 2.15.3.

²⁴ The Panel of Experts, quoting the figure of 11,696 persons provided by the Government, pointed out in its report (para. 164) that the number could not be verified independently, given that the Government had refused independent oversight by the United Nations, ICRC or the Human Rights Commission of Sri Lanka.

²⁵ Administrative detention of persons without charge or trial for purposes of rehabilitation was previously provided for under the Emergency Regulations, which have now lapsed. The Prevention of Terrorism (Detainees and Remandees) Regulations No. 4 of 2011, which were introduced when the Emergency Regulations expired, ensured the continued detention of those detained under the latter.

solutions for internally displaced persons and to formulate a comprehensive State policy in consultation with internally displaced persons and host communities, which was included in the national plan of action (para. 9.113). During its universal periodic review of Sri Lanka in 2008, the Government also voluntarily pledged to develop a comprehensive and uniform compensation policy for the displaced, and to complete the process of drafting a bill on the rights of internally displaced persons in consultation with all relevant stakeholders. The Government also accepted recommendations to take the measures necessary to protect the rights of the displaced in accordance with international standards, including with regard to long-term housing and property restitution, facilitating the reintegration of displaced persons in areas of return, and the provision of assistance to them. The National Action Plan for the Protection and Promotion of Human Rights 2011-2016 launched in October 2011 envisaged a national policy on displacement that would be formulated within six months. To date, however, no comprehensive national policy for displaced persons, no policy on compensation for the displaced and no legislation on the rights of the displaced has been drafted or adopted.

38. Another obstacle is the lack of official and comprehensive figures on internally displaced persons, given that no comprehensive profiling of displaced persons has been undertaken in Sri Lanka since 2007. At the end of 2012, a compilation of Government source data by the United Nations High Commissioner for Refugees on internally displaced persons indicated that, of those displaced over the 26-year long conflict, approximately 483,300 individuals had returned to their area of origin, while about 94,000 remain displaced. Of those displaced after April 2008 and housed in Menik Farm following the end of the war, approximately 271,200 have returned to their area of origin, while an estimated 18,000 continue to live with host families or in welfare camps, transit situations or on relocation sites.

39. The return of internally displaced persons to their area of origin alone does not imply a durable solution to their plight. The recommendation of the Lessons Learnt and Reconciliation Commission that assistance be provided to returnees to enable them to repair or build permanent houses, as well as for basic infrastructural needs to be met, including adequate roads, schools and hospitals where people have been resettled, was not incorporated into the national plan of action (para. 9.103). The Government has, however, embarked on a major reconstruction and resettlement programme for internally displaced persons. The OHCHR technical mission was able to visit several resettlement sites, which varied enormously in many respects, including the standard of housing and access to basic amenities.

40. In response to the Commission's recommendation that the Government should be clear on its resettlement policies (para. 9.106), the Ministry of Lands is to conduct awareness-raising programmes on the implementation of circular No. 2011/4 of the Commissioner General of Lands. It should be noted, however, that the circular was withdrawn in January 2012 after its legality was challenged in court. The Government subsequently undertook to issue a new circular, which is, to date, still pending.

41. Many recommendations made by the Lessons Learnt and Reconciliation Commission related to land issues, including ensuring that State policy on land is not used as an instrument to effect unnatural changes in the demographic pattern of a given province, were assigned in the national plan of action to a body yet to be established, namely, a fourth land commission, to be appointed under the Ministry of Lands (paras. 9.124, 9.126, 9.128-129 and 9.131-136).

42. The resolution of land-related issues is essential to attaining durable solutions for internally displaced persons. Some of the main land-related challenges include loss or damage to documentation, competing claims, landlessness, land grabs and secondary occupation by civilians. The lack of clarity on the Government's approach and policy in

this regard not only hinders the resolution of associated issues for the displaced but also exacerbates feelings of mistrust and suspicion in minority populations, which account for the majority of all displaced persons.

E. Right to freedom of opinion and expression

43. In its report, the Lessons Learnt and Reconciliation Commission strongly recommended that attacks on journalists and media institutions be properly and conclusively investigated, and urged the imposition of deterrent punishment for such offences (para. 9.115a-c). Under the national plan of action, investigations of current cases are to be completed by the police, while the Ministry of Mass Media and Information is to take appropriate action to ensure media freedom. Furthermore, the Ministry is to promote responsible journalism and consider a code of conduct for journalists, which, however, does not seem to be an adequate response to concerns about the security of media personnel, and which could instead lead to greater media control.

44. It is worth recalling that the Government accepted recommendations at its universal periodic review in 2008 to ensure a safe environment for human rights defenders, as well as to investigate allegations of attacks on journalists, media personnel and human rights defenders and to prosecute those responsible.

45. In 2012, journalists and media institutions continued to be harassed and attacked. In March, the Minister for Public Relations and the Minister for the Media made vicious public attacks on human rights defenders who had advocated at the nineteenth session of the Human Rights Council. The Minister for External Affairs publicly rejected these comments, but no action was taken against either minister.²⁶ On 29 June, the Criminal Investigation Department raided the office of Sri Lanka X News and its sister website, Sri Lanka Mirror; nine staff members were arrested and later released on bail. On 5 July, there was a failed attempt by two men in a white van to abduct the lead investigative journalist (a vociferous critic of the current Government) for Sri Lanka X News. He had reportedly been receiving threats since 2008 for criticizing the Government.

F. Demilitarization

46. The Lessons Learnt and Reconciliation Commission made a clear recommendation in its report on the reduction of military involvement in civilian matters (paras. 9.171 and 9.227), which was assigned in the national plan of action to the Ministry of Defence. The ubiquitous military presence in the north is not confined to the overt physical presence of military personnel, but extends to the deep involvement of the military in civilian matters through direct power transfers and exercise of power, and by indirectly preventing the capacity-building and effective development of civilian institutions. Several important civilian functions were brought under the purview of the Ministry of Defence, such as the Non-Governmental Organizations Secretariat and the Urban Development Authority in 2010.

47. Military officers informed the OHCHR technical mission that the military was able to deliver on different projects in areas where the civilian administration lacked capacity. In one particular presentation, the military was shown to be involved in a wide range of activities, from building and repairing homes to delivering livelihood projects to donating blood and transporting patients in a critical condition to medical facilities, through to

²⁶ See A/HRC/21/18, paras. 38-46.

organizing sporting and cultural events. The Government stressed that these are temporary measures until civilian institutions took over these functions. However, consideration must be given to whether adequate resources are being allocated for the capacity-building of civilian institutions in post-war Sri Lanka, as well as to the perception of such a continued visible military presence by the minority population in the north.

48. In addition to the remaining designated high-security zones, the military occupies land formerly occupied by civilians, such as Mullikulam in Mannar and Keppapulavu in Mullaitivu, who have since been displaced as a consequence. It is not clear whether the military presence in these areas is temporary or more permanent in nature; furthermore, those dispossessed have made claims that due process was not followed and they have yet to be properly compensated. In addition, and as noted by the Commission, the military is also involved in various economic activities with an adverse impact on the local population's right to livelihood (paras. 9.171 and 9.227).

49. General members of the public are required to give notice to the local army post whenever they plan to hold a gathering, irrespective of size or the social or apolitical nature of the event. Where external actors are expected to be present at the gathering, army officers are known to attend and observe the proceedings. Non-governmental organizations, which are expected to be registered with the Non-Governmental Organizations Secretariat, must request authorization to undertake certain activities and keep the authorities informed about, inter alia, sources of funding.

50. The heavy military presence heightens the vulnerability of women and young girls to violence and harassment and thereby restricts their freedom of movement, which has an adverse impact on other aspects of their lives, including their livelihood opportunities and access to education.²⁷ The Lessons Learnt and Reconciliation Commission noted particularly the impact of the armed conflict on certain groups, including women, and made several recommendations acknowledging the role of women heads of households and the hardships that they endure, including providing for such different needs as economic assistance, educational opportunities and a more secure environment (paras. 9.87-90). None of these recommendations were incorporated into the national plan of action.

G. Reconciliation and reparations

51. Among the recommendations made by the Lessons Learnt and Reconciliation Commission to promote reconciliation included the establishment of a mechanism, in consultation with interfaith groups, to serve as an early warning system to prevent future conflict resulting from communal or religious tension (para. 9.270). In the national plan of action, the Government proposes the continuation of existing practices to implement this recommendation. The Government has assigned another relatively straightforward Commission recommendation for the national anthem to be continued to be sung in both Sinhala and Tamil (para. 9.277) for the consideration of a yet to be established parliamentary select committee.

52. The Commission made particular recommendations concerning the implementation of the 13th amendment to the Constitution which, among others, provides for devolution of powers to provincial councils. Calls have, however, increasingly been made from within the Government for the repeal of the amendment in the wake of Supreme Court decisions in favour of petitioners challenging the constitutionality of the Divineguma bill, presented in July 2012, which sought to assume functions currently exercised by the provincial councils

²⁷ See also CEDAW/C/LKA/CO/7, para. 41.

for the objective of poverty alleviation and economic development. While the Government is reportedly committed to the holding of (overdue) elections for the Northern Provincial Council, doing so without the full and proper implementation of the 13th amendment would leave the Council without substantive powers.

53. On reparations, the Commission considered the role of compensatory relief in facilitating reconciliation, and examined the structures in place, focusing its recommendations on ensuring that those who are eligible for payments have access to it within a reasonable time frame (para. 9.153). Its recommendations revolved around the effective working of the Rehabilitation of Persons, Properties and Industries Authority which is responsible for providing compensatory relief to those who suffered loss and damage due to terrorist violence and security forces operations. By focusing only on the Authority and its shortcomings, including the lack of funds, the Commission regrettably disregarded other forms of reparations, beyond compensation, that may be possible.

54. The Commission nonetheless acknowledged the importance of “commemorative gestures” in providing the necessary impetus to the reconciliation process, and strongly recommended the expression of solidarity and empathy with all victims of the armed conflict at a high political level and through a separate event on Sri Lanka’s National Day (para. 9.285). Although this recommendation was incorporated into the national plan of action, the activities proposed regrettably do not go beyond current practices.

55. Following the end of the armed conflict, memorialization, an integral component of reparations, has been non-inclusive, a fact that risks further disaffecting the minority population. While memorials to soldiers and war museums have been built by the Government, it has to date made no effort to commemorate civilians who lost their lives in the war. Furthermore, most of the memorials have been built in the Tamil-majority Northern Province and tend to use triumphalist images from which the local population feels a strong sense of alienation. LTTE cemeteries, which also utilized militarist images, have also been destroyed. Furthermore, since the end of the armed conflict in May 2009, the military has reportedly prevented civilians in the north from holding private and religious ceremonies to commemorate family members, both civilians and combatants, killed in the war. In another illustration of insensitivity, the military has constructed a holiday bungalow, called “Lagoon’s Edge”, on the site of the last battle during which thousands are believed to have been killed.

56. From the briefings that the OHCHR technical mission received on development and reconstruction initiatives in the north, it noted that several Government representatives viewed these efforts as benevolence on the part of the State, particularly towards the conflict-affected and minority populations, rather than the fulfilment of the State’s fundamental obligations towards its citizens. As a result, this may be a missed opportunity to couple the framework for development with a national reparations policy in which rights-holders are entitled to redress.

VI. Possible areas of technical assistance by the Office of the High Commissioner

57. Following the OHCHR technical mission, on 26 November 2012, the High Commissioner wrote to the Government of Sri Lanka to propose possible areas for technical cooperation pursuant to Human Rights Council resolution 19/2. The proposed areas fall under four key components of a comprehensive and human rights-based approach to transitional justice, namely, the right to truth, criminal justice and accountability, legal and institutional reforms, and the right to a remedy and reparations. In particular, the High Commissioner offered advice on the establishment of a follow-up truth-seeking mechanism

that would examine the different accounts of past events and the history of the conflict, including its root causes, provide an inclusive narrative of why it happened, contribute to the creation of a historical record and bring clarity to the question of casualty figures. Last but not least, such a mechanism could also permit effective progress in resolving the cases of disappeared and missing persons pending proper criminal investigations.

58. Regarding past cases of serious violations of human rights identified by the Lessons Learnt and Reconciliation Commission, the High Commissioner urged for the publication of the presidential commission of inquiry report of 2006 and offered assistance in identifying international experts in criminal and forensic investigations to review relevant case files and advise on additional lines of inquiry that could help to resolve these cases in accordance with international standards. Advice was also offered for the drafting of laws dealing with witness and victim protection, the right to information, the criminalization of enforced disappearances and the revision of existing laws to bring them into line with the International Covenant on Civil and Political Rights and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Best practices and comparative experiences were also offered to help strengthen and ensure the independence of national institutions.

59. The High Commissioner also offered technical advice in the development of a national reparations policy in accordance with international standards, and suggested that the Government consider engaging with the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, who could provide valuable advice in this field. The High Commissioner also recommended that the Government invite the Special Rapporteur on the human rights of internally displaced persons to undertake a country visit to examine and advise on issues falling under his mandate, as well as respond positively to the eight outstanding requests for country visits by other special procedures.

60. The High Commissioner stressed the importance of a comprehensive approach addressing all the elements of transitional justice, including criminal justice and accountability, and of clear benchmarks with which to measure progress, based on Sri Lanka's international human rights obligations. She expressed her hope of seeing meaningful progress in the areas described above before her country visit in the first half of 2013. In a letter of reply dated 17 December 2012, the Minister for External Affairs suggested that the High Commissioner visit Sri Lanka in early 2013 to assess first-hand the situation on the ground, which would then provide a meaningful basis on which to identify possible areas of technical assistance.

VII. Conclusion and recommendations

61. Achieving reconciliation following decades of violence and mistrust is challenging in any context, but is only possible through a genuine, consultative and inclusive process that addresses the grievances of all those affected by the conflict, in an environment where the rule of law and human rights for all are respected.

62. While the Lessons Learnt and Reconciliation Commission had some limitations, it nonetheless made significant and far-reaching recommendations for reconciliation and strengthening the rule of law. This was widely heralded by prominent community figures, religious leaders and civil society in Sri Lanka eager to join hands in a genuinely consultative and inclusive reconciliation process. The Government therefore has a unique opportunity to build upon the Commission's work and findings to move towards a more all-encompassing and comprehensive policy on accountability and reconciliation. Unfortunately, however, the Government has made commitments to only some of the Commission's recommendations, and has not adequately engaged

civil society to support this process. The steps taken by the Government to investigate allegations of serious violations of human rights further have also been inconclusive, and lack the independence and impartiality required to inspire confidence.

63. The High Commissioner recommends that the Government of Sri Lanka:

(a) Give positive consideration to the offers of assistance made in her letter dated 26 November 2012, in particular expertise in:

(i) The establishment of a truth-seeking mechanism as an integral part of a more comprehensive and inclusive approach to transitional justice;

(ii) Criminal and forensic investigations to review relevant case files and advise on additional lines of inquiry to resolve outstanding cases in accordance with international standards;

(iii) Drafting laws dealing with witness and victim protection, the right to information, the criminalization of enforced disappearances and the revision of existing laws to bring them into line with the International Covenant on Civil and Political Rights and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;

(iv) Strengthening and ensuring the independence of national institutions;

(v) The development of a national reparations policy in line with international standards;

(b) Invite special procedures mandate holders with outstanding requests to make country visits, particularly those who have offered assistance pursuant to Human Rights Council resolution 19/2;

(c) Hold public and inclusive consultations on the national plan of action for implementation of the recommendations of the Lessons Learnt and Reconciliation Commission with a view to revising and expanding its scope and clarifying commitments and responsibilities;

(d) Revisit and implement the Commission's recommendation on appointing a special commissioner of investigation into disappearances, and extend tracing programmes to include all missing persons;

(e) Open proceedings of military courts of inquiry and future trials of LTTE detainees to independent observers to increase public confidence, and allow proceedings to be evaluated in line with international standards;

(f) Publish the final report of the presidential commission of inquiry 2006 to allow the evidence gathered to be evaluated and accept international assistance to resolve outstanding cases;

(g) Take further steps in demilitarization and devolution to involve minority communities fully in decision-making processes;

(h) Engage civil society and minority community representatives in dialogue on appropriate forms of commemoration and memorialization that will advance inclusion and reconciliation.

64. The High Commissioner noted the views expressed by many stakeholders in Sri Lanka, including prominent community leaders, that the attention paid by the Human Rights Council to issues of accountability and reconciliation in Sri Lanka had helped to create space for debate, and catalyzed positive steps forward, however limited at this stage. The High Commissioner encourages the Council to continue its engagement and build on this momentum. In this regard, she reaffirms her long-standing call for

an independent and credible international investigation into alleged violations of international human rights and humanitarian law, which could also monitor any domestic accountability process.
