

Summary: OHCHR Report on Accountability for Enforced Disappearances in Sri Lanka

This report, issued pursuant to the United Nations High Commissioner for Human Rights' general mandate under General Assembly resolution 48/141 and OHCHR's mandate under Human Rights Council resolutions 46/1 and 51/1,¹ addresses the accountability deficit for enforced disappearances committed in Sri Lanka. From the 1970s through to the end of the civil war in 2009, Sri Lanka witnessed several waves of enforced disappearances. Primarily used by Sri Lankan security forces and affiliated paramilitary groups as a tool to intimidate and oppress perceived opponents, it is apparent that, at a minimum, tens of thousands have been subject to enforced disappearances. Perpetrators at all levels continue to escape justice. Impunity remains deeply entrenched. Families remain without knowledge of the fate and whereabouts of their disappeared relatives. The risk of future disappearances remains today given failures to tackle structural weaknesses and to undertake necessary reform.

In recent years, Sri Lanka has taken some positive steps, including ratifying the International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED), criminalising enforced disappearances, establishing a range of Commissions of Inquiry (CoIs), the Office on Missing Persons (OMP) and the Office for Reparations (OR). However, these steps have not resulted in tangible progress in realising victims' rights to truth, justice, reparations and guarantees of non-recurrence. For as long as the fate and whereabouts of a disappeared person remain unclarified, the enforced disappearance remains a "continuing violation".

Impact of Enforced Disappearances on Victims

Placing victims at the heart of its work, OHCHR conducted bilateral interviews with 39 victims (32 women and 7 men) and convened focus groups involving 43 victims (34 women and 9 men) to learn of their experiences and their perspectives on accountability. Victims of enforced disappearance include not only the individual who is forcibly disappeared, but anyone who has suffered harm as a direct result of an enforced disappearance, including family members. Key findings presented in the report relate to:

- *Psychological effects on relatives of disappeared persons:* Victims reported profound psychological effects of a relative's disappearance, including feelings of shock, fear, anger, helplessness and guilt. Decades later, victims reported the inability to find closure. Most cling to the hope that their relative will return. The absence of a body and the inability to hold funeral rituals has specific implications in Sri Lankan traditions and religious systems. There remains a lack of available or accessible psycho-social services, especially in the north and east of Sri Lanka.
- *Social isolation:* Many victims referred to painful experiences of social isolation and ostracization. For some this was self-imposed isolation after relatives and community members told them to "move on" or as a way to shield their children from stigma. Others reported that neighbours, friends and relatives stayed away from them to protect themselves from intimidation and reprisals from the authorities. Some women reported exclusion from family celebrations with "widows" being associated in some communities with bad omens or misfortune.
- *Socio-economic rights:* The complex financial, social and legal ramifications of an enforced disappearance impact on victim's rights, including the right to health, education and an adequate standard of living. As the majority of disappeared individuals have been male, women have often become the sole income-earner for a family, in a labour environment that poses many obstacles to women's participation, including risks of sexual harassment and exploitation. Children's enjoyment of certain rights has also been diminished, for example in relation to access to education, health care and family life, all impacting on their survival and development. Some victims also reported having been financially exploited by being approached to pay ransoms in exchange for the promised return of their relative.

Victims' Perspective on Accountability: Victims reported having been subject to concerted acts of harassment, intimidation, surveillance and violence, in connection with their searches for relatives, advocacy for accountability and/or their participation in demonstrations or attempted commemorations. On some occasions,

¹ Under these resolutions, the Human Rights Council requested OHCHR to strengthen its capacity to advance accountability for the gross violations of human rights and serious violations of international humanitarian law that had occurred in Sri Lanka.

victims reported having been subject to torture, including sexual and gender-based forms of torture. Notwithstanding these experiences, victims strongly supported further initiatives in relation to:

- *Truth:* All victims consulted considered discovering the truth of the fate and whereabouts of their loved ones and the circumstances of their disappearance to be of the utmost priority. It was necessary to understand how and why disappearances occurred *en masse*, and what factors facilitated their commission. Truth was seen as potentially helping to heal the memories of both the entire nation and victim communities. Victims expressed support for initiatives including the identification of human remains found in mass graves and making public the names of persons taken into government custody or held in camps at the end of the war.
- *Criminal Justice:* Victims stated a strong desire for perpetrators to be held criminally liable, especially those holding high ranking positions. Taking action against senior level personnel was seen as linked to non-recurrence, through both removing those in power, and deterring future violations. Most victims consulted felt Sri Lanka is currently unwilling and unable to deliver justice. Sources of resentment included alleged perpetrators being “forgiven”, elevated to higher official positions, or enjoying a “peaceful pensioned retirement” which contrasted with their own situations. Victims supported proceedings being brought in third-party States using principles of universal jurisdiction, believing such procedures prevented the authorities from “closing the chapter” and provided hope to victims. Some victims looked to the international community to refer the situation of Sri Lanka to the International Criminal Court.
- *Reparations and Guarantees of Non-Recurrence:* Victims stated that any payments offered as reparations needed to be accompanied by an acknowledgement of responsibility and provision of the truth. Most victims shared a perception that the reparation payments being offered were a tool to divert attention away from justice and to buy people’s silence. Greater receptiveness was shown to “interim relief” to meet basic needs, though none of the victims with whom OHCHR spoke had received such payments. Victims were generally opposed to receiving death certificates for their disappeared relative. Several victims expressed fear that the alternative “certificate of absence” offered would be converted automatically to a death certificate after a period. Non-financial reparations, such as acknowledgement and memorialization were seen as important, though victims reported often facing obstruction while seeking to engage in memorialization activities. For non-recurrence, victims saw the need for a real paradigm shift, with government commitment, robust legal protections, exposure of the truth and an end to the prevailing impunity.

Accountability Initiatives within Sri Lanka: gaping deficits

Collective Truth Seeking: Sri Lanka is no stranger to truth-seeking mechanisms, with the convening of a Commission of Inquiry (CoI) having been the most common policy response of the Sri Lankan Government to allegations of enforced disappearances committed on a large scale. While some inquiries have provided significant insights into the patterns of disappearances, the lack of follow-up action has given rise to a perception that CoIs have been used to mask inactivity on “harder edge” aspects of accountability. A brief examination of, for instance, the Zonal Commissions of Inquiry and the All-Island Commission of Inquiry of the 1990s and the Lessons Learned and Reconciliation Commission (2011) and Paranagama Commission (2013), shows that reports of such CoIs have largely languished, with few of the reports made public and key recommendations left unimplemented. Given this history, there is significant scepticism amongst victims and CSOs concerning the new National Unity and Reconciliation Commission proposed in 2023 by the Sri Lankan Government. As the United Nations High Commissioner for Human Rights has noted, there remained absent an environment that would be conducive to a credible truth-seeking mechanism. The Human Rights Commission of Sri Lanka, along with victim groups and CSOs, have highlighted the need for a comprehensive approach to transitional justice.

Clarifying the Fate and Whereabouts: The vast majority of victims of enforced disappearance in Sri Lanka remain without substantive knowledge of the fate and whereabouts of their loved ones.² In 2016, the Government of Sri Lanka established the Office on Missing Persons (OMP). Over the last seven years, the OMP, despite having broad powers under its legislation, appears to have taken what might be described as an administrative “case management approach”, with preliminary inquiries focused on the eligibility of victim families to financial assistance, rather than carrying out thorough investigations to clarify the fate and whereabouts of individuals. The OMP faces a lack of trust from victim communities. Ideally, international technical assistance should be directed

² The report notes it is not evident that thousands of cases previously considered “clarified” by the WGEID in the 2000s would meet the criteria now used for clarification of the fate and whereabouts. The WGEID’s current working methods state that cases can be reopened with the WGEID.

to supporting a re-orientation of the OMP towards clarifying the fate and whereabouts of disappeared persons, strengthening the institution's independence and ensuring a safe environment for victims to engage.

Legal Proceedings in Sri Lanka

Criminal Justice: The rate of prosecution and conviction for enforced disappearances has been low. Cases illustrating the lack of progress in criminal investigations and prosecutions include the “Trincomalee 11” case and the disappearance of political cartoonist and journalist Prageeth Ekneligoda. Key weaknesses in the justice system, include:

- *Gaps in the domestic legal framework:* Whilst the act of enforced disappearance was criminalised in 2018, it remains unclear whether the Act applies to disappearances that occurred in earlier years. The Sri Lankan legal framework also does not recognize enforced disappearance as potentially amounting to a crime against humanity, nor does it cover all internationally recognized modes of liability, such as command responsibility.
- *Police unwillingness to accept and investigate complaints of enforced disappearance:* Victims have had significant difficulties in even registering complaints of enforced disappearance with police. Many have faced procedural obstacles, intimidation and harassment. The credibility of the police to effectively investigate cases of enforced disappearance has been questioned, and appointments such as that of the current Inspector General of Police (who the Supreme Court found responsible for perpetrating and ordering torture), further erodes faith in the police as an institution.
- *Conflicts of interest of the Attorney-General's Office:* Currently, prosecutorial powers are vested in the Attorney-General, who acts also as the Government's chief legal advisor and defender. The Attorney-General can be both called upon to represent respondents from the army, police or other state institutions in *habeas corpus* cases, and potentially to lead a prosecution against those individuals.
- *Lack of protection of the independence of the judiciary:* Concerns continue to be raised about structural weaknesses undermining the independence of the judiciary, and political pressures that undermine the judiciary's ability to adjudicate highly politicized conflict-related cases.
- *Lack of protection for victims and witnesses:* Currently, there is an inadequate system of protection for victims and witnesses who, as the Human Rights Committee has concluded, face threats, intimidation and harassment. Lawyers also report facing intimidation and reprisals.
- *Pronounced delays in criminal proceedings:* While criminal proceedings in Sri Lanka are generally beset by prolonged delays, in cases involving enforced disappearances or other serious violations involving state officials, the delays are even more pronounced, leading victims' lawyers to the conclusion that delays are a strategy to avoid accountability.
- *Use of pardons in violation of human rights obligations:* In one of the few enforced disappearance-related cases where an individual was convicted, in 2020 the then Sri Lankan President pardoned that individual.
- *Politicized use of Presidential CoI:* In 2020, a CoI was set up by the then President of Sri Lanka to look into so-called “political victimization”. Of particular concern were this Commission's recommendations that specific investigations and prosecutions be halted and convictions overturned in cases involving gross human rights violations.

Government's earlier proposal for a specialized Judicial Mechanism: In 2015, the Human Rights Council noted with appreciation the proposal of the Government of Sri Lanka to establish a judicial mechanism with a special counsel to investigate allegations of violations and abuses of international human rights law and international humanitarian law. In HRC Res 30/1 (which Sri Lanka co-sponsored) the Human Rights Council (HRC) affirmed the necessity for independent judicial and prosecutorial institutions, and the importance of participation of Commonwealth and other foreign judges, defence lawyers and authorized prosecutors and investigators. In 2020, following a change of Government, Sri Lanka formally withdrew its support of the resolution and in subsequent years successive Governments have maintained that establishing such a mechanism with foreign judges and prosecutors would be unconstitutional, though that view has been sharply contested by some practitioners, academic experts and CSOs. No real alternative plan has been advanced by Sri Lanka as to how authorities intend to address impunity.

Civil cases: Some victims' families have instituted habeas corpus actions before the courts. These cases have been beset with significant procedural delays, and victims' access has been negatively impacted by applications to transfer the cases to locations away from the site of the enforced disappearance. However, some cases have resulted in court judgments concluding that security forces were responsible for taking persons into custody.

Reparations: On the topic of reparations, there has been a failure to engage sufficiently with victims and communities and to ensure a comprehensive approach to accountability. There remains a need for further inclusive and gender-responsive consultations on reparations and a fuller conceptualisation of reparations, including non-financial aspects such as acknowledgment, memorialisation, and legal support.

Non-recurrence of Violations: Numerous inquiries and reports have pointed the way to taking effective steps to prevent recurrence, including the vetting of security forces, tightening civilian control of the military, repealing draconian emergency regulations and the Prevention of Terrorism Act and ensuring adherence to legal safeguards around detention and access to courts. Additional measures are required including strengthening civic space, instituting education programmes, anti-discrimination initiatives, memorialization, opening archives and providing adequate psychosocial support.

International Contributions to Accountability

Given the accountability gap at the domestic level, it is vital that the international community remain engaged and actively contribute to furthering accountability in Sri Lanka. Individual States can investigate and prosecute individuals alleged to have committed enforced disappearances in Sri Lanka under the accepted principle of universal jurisdiction. There have been some attempts, particularly by NGOs, to stimulate such action. Stumbling blocks have included, amongst other issues, immunities of officials. OHCHR has also repeatedly called for further targeted sanctions against those credibly alleged to have perpetrated violations. The report supports intensified cooperation in these areas, as well as more rigorous application of screening procedures for Sri Lankan personnel being potentially deployed to UN peacekeeping, bilateral exchanges/trainings, and other restrictive measures.

RECOMMENDATIONS

The report makes a range of recommendations to the Government of Sri Lanka and the international community to address the continuing accountability deficit for enforced disappearances.

It recommends the Government acknowledge the scale of disappearances and the involvement of State security forces and armed groups, and the issuance of a public State apology. It calls upon Sri Lanka to intensify independent investigations, and expedite Constitutional and legal reform to ensure an effective framework for the investigation and prosecution of enforced disappearances. The report recommends that Sri Lanka establish as a matter of urgency an independent prosecutorial authority, a Special Prosecutor and an ad hoc special court to address gross violations of international human rights law and serious violations of international humanitarian law. Several recommendations are directed towards improving the OMP, ensuring the proper investigation of mass graves, and making available information from relevant archives and CoI reports. Before any new truth-seeking mechanism is established, OHCHR recommends that Sri Lanka creates an enabling environment and implements crucial confidence building measures, including ending threats, harassment and unlawful and arbitrary surveillance against human rights defenders and victims' groups. Any truth-seeking mechanism needs to be part of a comprehensive transitional justice strategy that includes a judicial mechanism. Similarly, OHCHR recommends a comprehensive and gender-sensitive approach to reparations. It also calls for the taking of immediate steps to prevent recurrence of enforced disappearances, including refraining from appointing or promoting credibly alleged perpetrators of violations to high level positions.

OHCHR recommends that the international community continue to closely monitor developments and progress towards accountability by Sri Lanka through the HRC, and use all means at its disposal to ensure accountability, including through its bilateral and multilateral relationships, its use of universal jurisdiction and other avenues of international justice as well as targeted sanctions.
