



Sri Lanka Monitoring and Accountability Panel

THEMATIC REPORT:

An Alternative Roadmap to Victims' Justice

9 November 2017

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I. INTRODUCTION

1. The Sri Lanka Monitoring and Accountability Panel (MAP) was established to provide independent monitoring, advice, and recommendations on the progress of the transitional justice process in Sri Lanka, from a victims perspective.¹ The MAP's members are senior legal practitioners with considerable expertise in national and international criminal justice mechanisms designed to address wartime atrocities.²
2. Since its formation, the MAP has actively engaged in the ongoing debate over the most appropriate manner in which to deal with allegations of war crimes and crimes against humanity (and even genocide) committed during the protracted civil war between the Government of Sri Lanka (GSL) and the Liberation Tigers of Tamil Eelam (LTTE), which ended in 2009 and left more than 40,000 dead and some 280,000 displaced. Beginning with the publication of its report of 15 February 2016,³ the MAP has argued that the right choices will help foster accountability and reconciliation in Sri Lanka, while the wrong ones will not only waste an opportunity to deliver meaningful justice to victims, but also undermine stability for years to come.
3. In October 2015, pursuant to UN Human Rights Council (HRC) Resolution 30/1,⁴ Sri Lanka committed to a broad transitional-justice agenda made up of four distinct pillars, namely: an office on missing persons (OMP); an office on reparations; a truth and reconciliation commission, and a special court. Notably, with respect to the last pillar, the GSL initially agreed to the participation of international judges and prosecutors—something the MAP *still* considers to be essential in helping to ensure a credible judicial process. However, since the passage of Resolution 30/1, Sri Lankan President, Maithripala Sirisena, and his

¹ For the latest news and developments, please visit <http://war-victims-map.org>.

² The members of the MAP are Heather Ryan (USA), Richard J Rogers (UK), and Andrew Ianuzzi (USA). Geoffrey Robertson QC (UK) is an advisor to the MAP. Member biographies can be found on the MAP website.

³ See <http://war-victims-map.org/wp-content/uploads/2016/02/MAP-SPOT-REPORT-18.02.16.pdf>.

⁴ See UN Human Rights Council, 30th Session, Resolution 30/1, 'Promoting reconciliation, accountability, and human rights in Sri Lanka', Document No A/HRC/RES/30/1, 14 October 2015.

shaky coalition government appears to have reneged on most of the country's international commitments and legal obligations to victims.

4. As highlighted earlier this year, the GSL has been proceeding in bad faith with respect to Resolution 30/1.⁵ Yet, despite demonstrable shortcomings, in March of this year the HRC granted the GSL an additional two years in which to implement its ostensible justice agenda—without imposing any further demands on the GSL or setting any clear benchmarks for its compliance with the original resolution.⁶ The extended process is up for initial review by the HRC at its 37th Session in early 2018.⁷
5. This report—which amounts to an interim assessment in advance of a more detailed analysis to coincide with the HRC's 37th Session—is intended to: emphasize the lack of meaningful progress to date; highlight continued GSL obstruction; suggest alternative avenues for redress and accountability; and set out the MAP's renewed and additional recommendations going forward.

II. RECENT DEVELOPMENTS

A. Continued GSL Bad Faith

6. Commentators Shreen Saroor and Mytili Bala have recently canvassed the key practical and political issues impeding implementation of Sri Lanka's justice agenda:

The reality is that, two years after Sirisena assumed office, transitional justice in Sri Lanka is at a standstill. Following his visit in July [2017], Ben Emmerson, the UN special rapporteur on counterterrorism and human rights, said progress was 'not only slow but seems to have ground to a virtual halt'. It's no surprise then, that war-affected Tamils fear the government will end up squandering an ever-narrowing opportunity for reconciliation. [...]

Increasingly, Tamil voices are advocating for an abandonment of strategic engagement on justice issues, unconvinced the government will deliver on its

⁵ See MAP, 'Second Spot Report: A Roadmap to Victim's Justice', 28 February 2017.

⁶ See UN Human Rights Council, 34th Session, Resolution 34/L.1, 'Promoting reconciliation, accountability and human rights in Sri Lanka', Document No A/HRC/34/L.1, 15 March 2017.

⁷ *N.b.* The OHCHR will present a comprehensive final report, followed by a discussion on the implementation of Resolution 30/1, at its 40th Session (the first session of 2019).

promises. Civil society groups are struggling to offer assurances that continued engagement can be worthwhile. [...]

Transitional justice was never going to be easy. Those accused of war crimes are still powerful in politics and the military and enjoy broad support from the Sinhalese majority community. Though he lost the presidency, Rajapaksa is now a parliamentarian, and he has several allies in Sirisena's Cabinet. [...]

The government's inability to make a public case for transitional justice, or even to describe the basic humanitarian rationale for the [OMP], allows Sinhala-nationalist politicians, led by Rajapaksa, to sow disinformation.

Sri Lanka's failure to address justice issues on its own is what led to international involvement in the first place, and sustained pressure is needed to ensure follow-through. Yet the UN is doing little to guarantee the country upholds its obligations.⁸

The MAP agrees with the above analysis. While international observers and critics continue to push for compliance with stated commitments,⁹ the events of the last several months provide little reason to be hopeful.

7. In a press release issued on 30 August 2017, the MAP highlighted a number of notable developments in the six months following the *pro forma* extension of Resolution 30/1 that demonstrate the GSL's continued unwillingness or inability to pursue a meaningful transitional justice program.¹⁰ These include: the failure to repeal the Prevention of Terrorism Act (PTA); a damning report by the UN's Special Rapporteur on human rights and counter-terrorism; the failure to operationalize effectively the OMP; documented cases of abduction, illegal detention, torture, and/or sexual violence against Tamil victims by the Sri Lankan security forces in 2016 and 2017; the continued obstruction and harassment of victims' relatives; the continued denial of the military's criminal conduct during the

⁸ Shreen Saroor & Mytili Bala, 'In Postwar Sri Lanka, Hope Fades for Families of the Disappeared', *World Politics Review*, 29 August 2017; *ibid* ('For the average Sinhalese, development and good governance matter more than transitional justice. Unfortunately, the government has not made progress in those areas either. The awkward coalition between the SLFP and the UNP is fracturing, and each party is now trying to shore up support among the Sinhala-nationalist base before the presidential election planned for 2020. [...] Whether deliberately or not, the government is allowing growing political discontent in the Sinhalese south to threaten the stability of the fragile SLFP-UNP coalition and hold its ambitious reform agenda hostage.');

see also 'Sri Lanka president sacks "unruly" Justice Minister Rajapakshe', *bdnews24.com*, 23 August 2017 ('President Sirisena had 'openly confronted' UN Rapporteur Ben Emmerson 'by claiming that Sri Lanka's steps against terror and crime were same as those being adopted by Western democracies' and calling on governments advising Sri Lanka to 'cure themselves first'.)

⁹ See International Commission of Jurists, Press Release, 'Sri Lanka: operationalize the Office on Missing Persons and establish transitional justice mechanisms without further delay', 24 August 2017 (urging the GSL to 'swiftly operationalize' the OMP and 'set up other transitional justice mechanisms it committed to in the context of [Resolution 30/1], without further delay'.)

¹⁰ See <http://war-victims-map.org/press-release-thirty-sixth-session-of-the-un-human-rights-council/>.

conflict and lionization of government forces as ‘war heroes’; the continued erroneous characterization of international judicial participation in any justice mechanism as unconstitutional; and the persistence of other longstanding issues.¹¹

8. While the OMP finally became officially operational on 15 September 2017,¹² it has yet to actively take up its mandate. And there has been zero progress on the three remaining pillars of the agreed-upon justice agenda. As discussed at length in the Second Spot Report, the GSL lacks the political will to implement these pillars and is proceeding in bad faith.¹³ The protracted deferral has been consistently justified by excuses such as the need for ‘sequencing’ of the pillars and ongoing efforts at constitutional reform.¹⁴ Yet, as noted previously, there are plenty of steps that could and should have been taken by now without any *practical* impediments.¹⁵ The GSL simply refuses to do so. Putting off the establishment of additional justice mechanisms is an attempt to avoid them entirely, and the excuses put forward to date are nothing more than expressions of political intransigence.¹⁶ In this regard, given President Sirisena’s fragile coalition, the OMP has always been the most (and likely only) palatable option on the GSL’s *actual* justice agenda. Unlike the three other pillars—which, each in its way, would involve some acceptance of blame by government actors—the findings of the OMP will never ‘give rise to *any* criminal or civil liability’.¹⁷ Sadly, more than two years after the passage of Resolution 30/1, it appears that the GSL has no intention of diverting from its obstructionist course.
9. While a special (international crimes) court with international participation in Sri Lanka is still worth striving for, given the strength of the GSL’s propaganda in

¹¹ *Ibid.*

¹² See para 10, *infra*.

¹³ See Second Spot Report, *op cit*, paras 6–13.

¹⁴ *Ibid.*, para 8.

¹⁵ *Ibid.*, paras 9, 31 *et seq* (setting out a number of detailed findings and recommendations made with respect to the four pillars by the MAP and the Consultation Task Force).

¹⁶ *Ibid.*, paras 9, 13.

¹⁷ MAP, Initial Statement on the Recent Passage of the Office on Missing Persons Act, 27 September 2016 (citing the Office on Missing Persons (Establishment, Administration, and Discharge of Functions) Act, No 14 of 2016) (emphasis added).

support of its 'war heroes', it is becoming increasingly unlikely that such a court could act with the requisite independence or impartiality.

B. The OMP's Lack of Progress

10. On 15 September 2017, the OMP finally became officially operational. However, 'the efficacy of the body remains an open question'.¹⁸ Ruki Fernando, a Colombo-based human rights activist, has expressed doubts:

I spent last weekend, with some families whose loved ones had disappeared, from the 1980s to 2016. This was just after the latest announcement about the OMP. None of the families expressed enthusiasm, hope, and confidence about the OMP or obtaining truth, justice, and reparations in general. It's understandable. The latest OMP announcement comes amidst reports of continuing abductions and disappearances in Colombo and the North in 2016–2017. It comes after reports of reprisals against a campaigning wife of a disappeared man and the intimidation of journalists covering a protest on disappearances.¹⁹

While the set-up of the OMP may be just an attempt to placate international actors, it is still the best hope for many families to receive news of their loved ones. According to Fernando: 'I still believe it is important to work towards a strong, independent, effective OMP, particularly through appointments and ensuring its legality is beyond doubt. It will be a mistake to discourage families from pursuing truth through the OMP, as much as it will be a mistake to prematurely raise hopes and praise the OMP ignoring the ground realities and overall context'. According to another close observer of the Geneva process: 'The bottom line is that we don't yet know how significant this latest piece of news is. What we do know is that—given all the false promises, empty rhetoric and contradictory statements from the coalition government—a heavy dose of skepticism is more than warranted.'²⁰

¹⁸ Taylor Dibbert, 'Putting Sri Lanka's Office of Missing Persons in Perspective', *The Diplomat*, 19 September 2017.

¹⁹ *Ibid.*

²⁰ Taylor Dibbert, 'Putting Sri Lanka's Office of Missing Persons in Perspective', *The Diplomat*, 19 September 2017.

C. GSL Failure to Criminalize Enforced Disappearance

11. In a public forum held on 7 September 2017 at the UK Parliament, the MAP addressed the GSL's failure to comply with its commitments under the International Convention for the Protection of All Persons from Enforced Disappearance (ICPAPED).²¹ As noted previously by the UN Office of the High Commissioner for Human Rights (OHCHR), the 'scale of enforced disappearances in Sri Lanka has long been exceptional'.²² Historically, disappearances have been used 'to target those perceived as critical of the Government, supportive of opposition movements, or involved in armed conflict' and have been largely perpetrated by government security forces 'in collusion with paramilitary groups'.²³
12. The victims of enforced disappearance are not only the disappeared themselves, but also their family members.²⁴ In ratifying ICPAPED, the GSL has affirmed 'the right of any victim to know the truth about the circumstances of an enforced disappearance and the fate of the disappeared person, and the right to freedom to seek, receive and impart information to this end'.²⁵ Moreover, all states party to the convention are obliged to, among other things, take measures to: investigate enforced disappearances; ensure that enforced disappearance constitutes an offence under its criminal law; hold perpetrators

²¹ As recently noted in a report issued by Amnesty International (Amnesty Report), one of the 'important steps' taken by the GSL since the adoption of Resolution 30/1 has been the ratification of the International Convention for the Protection of All Persons from Enforced Disappearance. Amnesty International Statement, 'Sri Lanka Must Deliver on its Commitments Set Out by Human Rights Council Resolution 30/1', 21 August 2017. However, the GSL's commitments under the convention have yet to be fulfilled. A parliamentary debate on a bill criminalizing enforced disappearance scheduled for July 2017 was postponed without explanation. And, as noted, the success of the OMP remains an open question.

²² UN Human Rights Council, 'Report of the OHCHR Investigation on Sri Lanka (OISL)', Document No A/HRC/30/CRP.2, 16 September 2015 (the OISL Report) (noting: 'In its 2014 report, for example, the Working Group on Enforced or Involuntary Disappearances (WGEID) reported a total of 12,536 complaints of enforced disappearances registered over the years, the second highest number of disappearances on the list of the Working Group from any country in the world.')

²³ See OISL Report, paras 386–531.

²⁴ According to the ICPAPED, an enforced disappearance 'is considered to be the arrest, detention, abduction or any other form of deprivation of liberty by agents of the state or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law'. ICPAPED, Article 2.

²⁵ ICPAPED, Preamble.

criminally responsible; and impose appropriate penalties which take into account the extreme seriousness of the offence.²⁶

13. However, to date, no implementing legislation has been passed in Sri Lanka. Apparently aiming to appease the pro military factions yet again, the prime minister emphasized that any legislation criminalizing enforced disappearance would have no retroactive effect.²⁷

D. The Case Against Jagath Jayasuriya

14. On 28 August 2017, frustrated by the lack of any domestic progress in Sri Lanka, the International Truth and Justice Project (ITJP) 'filed suits against Jagath Jayasuriya, a former Sri Lanka army general, for alleged war crimes and human rights violations'.²⁸

The [ITJP] has filed a war crimes case in Brazil and Colombia against Sri Lanka's Ambassador in Latin America, Jagath Jayasuriya, for his role in the final phase of the civil war in 2009. The lawsuit filed in Brasilia and Bogotá on Monday 28 August 2017 alleges that General Jayasuriya bears individual criminal responsibility as the commander of units that committed repeated attacks on hospitals, acts of torture and sexual violence, enforced disappearances, and extrajudicial killings.²⁹

According to ITJP lawyer Yasmin Sooka: 'In the pivotal period between 2007–2009, [Jayasuriya] was really in charge of what was happening in the Vanni area [...]. What was really awful was the perfidious conduct in putting people into no-fire zones and then shelling and bombarding them, which is why you have such a huge loss of life.'³⁰

²⁶ See ICPAPED, Articles 3, 4, 6, 7. *N.b.* While these are forward-looking treaty obligations, the act of enforced disappearance has been recognized as a crime against humanity under customary international law for some time. According to the International Committee of the Red Cross (ICRC), enforced disappearance is prohibited under international humanitarian law and '[s]tate practice establishes this rule as a norm of customary international law applicable in both international and non-international armed conflicts'. ICRC, Customary IHL, Chapter 32, Rule 98 ('Enforced disappearance is prohibited'). The convention, therefore, simply codifies what has already been a long-standing obligation on states.

²⁷ See 'Disappearances bill to have no retrospective effect: Lanka PM', *India Today*, 16 September 2017; 'Backtracking on accountability measures will harm all Sri Lankans: Tamil leader', *Daily Mirror*, 19 September 2017.

²⁸ 'South America rights groups file war crimes suits against former Sri Lanka army general', *Jurist*, 29 August 2017; see also 'Sri Lanka's Jagath Jayasuriya wanted for war crimes', *BBC*, 29 August 2017.

²⁹ ITJP website (www.itjpsl.com).

³⁰ 'Sri Lanka's Jagath Jayasuriya wanted for war crimes', *BBC*, 29 August 2017.

15. Perhaps fearing arrest, Jayasuriya immediately returned to Sri Lanka from his diplomatic post in Brazil. According to the GSL Foreign Ministry: 'His departure [...] was pre-planned and he has not fled as some media reports allege.'³¹ But Ms Sooka tells a different story: 'He was tipped off, and he skipped from Brazil', while emphasizing that 'what's wonderful is the Latin American countries can actually file an arrest warrant, they can put him on an Interpol red list and ask for his extradition—and really he will become a prisoner on the island of Sri Lanka'.³²
16. On 30 August 2017, GSL spokesman Rajitha Senaratne 'came out in defence' of Jayasuriya, noting that '[e]very death which occurred during the civil war could not be treated as a case of human rights abuse as we were conducting a war against terrorism', with army spokesman Brigadier Roshan Seneviratne claiming 'the allegations were baseless'.³³
17. However, former army chief Sarath Fonseka, announced that he was prepared to testify against Jayasuriya (Fonseka's successor) in any war crimes investigation: 'When I was the commander, I did receive certain complaints of crimes committed by Jayasuriya's brigade mostly to do with crimes perpetrated on those detained during the war.'³⁴ Currently a GSL minister, Fonseka said it was important for Sri Lanka to maintain the good name of its security forces: 'We must investigate crimes committed by a handful of individuals in order to clear the army of war crimes charges.'³⁵ By way of rebuttal, 'Sri Lanka's leader of the house said [...] that Mr Fonseka's views were personal and not [those] of

³¹ *Ibid.*

³² *Ibid.*

³³ 'Sri Lanka defends General accused of war crimes against LTTE', *Outlook*, 30 August 2017.

³⁴ 'Sri Lanka's Ex-army Chief Sarath Fonseka Ready to Testify Against Successor Jagath Jayasuriya', *News18.com*, 1 September 2017. *N.b.* Fonseka was also accused by human rights groups of being involved in war crimes during the final stages of the civil war. *Ibid.*

³⁵ 'Sri Lanka's Ex-army Chief Sarath Fonseka Ready to Testify Against Successor Jagath Jayasuriya', *News18.com*, 1 September 2017; see also *ibid* ('Fonseka had a fallout with former President Mahinda Rajapaksa, under whom he had served, following which he was charged in a number of cases, ranging from corruption to engaging in politics in uniform. He was also sentenced to 30 months in jail after having mounted a failed bid to unseat Rajapaksa in his January 2010 re-election. Fonseka, who was nearly assassinated by a LTTE suicide bomber in 2006, was pardoned by Maithripala Sirisena days after he assumed office as the new president last year. All ranks and medals denied to Fonseka by the Rajapaksa regime along with his pension were restored.')

the government'.³⁶ And '[s]everal Sri Lankan politicians have condemned Mr Fonseka's comments as traitorous'.³⁷ Former president Mahinda Rajapaksa said Fonseka should 'shut up' and reiterated the standard Sinhala line that war crimes were not committed in Sri Lanka.³⁸ Fonseka himself was apparently denied a visa to attend this year's meeting of the UN General Assembly due to 'unresolved war crime allegations against the military'.³⁹

18. In an apparent sop to Sinhalese hardliners, President Sirisena vowed to defend the military and condemned the ITJP suits as foreign meddling: 'This was an action taken outside Sri Lanka by an NGO sympathetic to the LTTE. I will not bow to their commands.'⁴⁰ He added: 'I state very clearly that I will not allow anyone in the world to touch Jagath Jayasuriya or any other military chief or any war hero in this country.'⁴¹

E. UN and International Responses

19. In response to continued criticisms in the lead up to the HRC's 36th Session (which was held in Geneva from 11 to 29 September), the GSL again 'rejected reports that the country's security forces committed war crimes or mass atrocities, and assured that the "government would not permit anyone to lay

³⁶ 'Sri Lanka government attempts to distance itself from Fonseka', *Tamil Guardian*, 7 September 2017.

³⁷ *Ibid.*

³⁸ 'Fonseka should "shut up" says former Sri Lankan president', *Tamil Guardian*, 18 September 2017 ("Everybody was shocked by Fonseka's statement," he said. "An Army Commander should not behave like this." When asked what the former army commander should do next, Mr Rajapaksa responded, "he should shut up." The former president also denied reports of human rights violations taking place during the armed conflict. "All that is nonsense," said Mr Rajapaksa. "There were no war crimes here.")

³⁹ 'Sri Lanka general says denied visa to attend UN', *AFP*, 19 September 2017 ('The war-time general, who is now minister of regional development, said he was due to travel to New York this week, but he was the only one in the Sri Lankan delegation not issued a visa. Fonseka said he could not accompany President Maithripala Sirisena who left Colombo on Sunday to address the United Nations General Assembly. "I was not given a visa because of the war crimes allegations against the military," Fonseka told reporters. "That is why I say they must be investigated.")

⁴⁰ 'Sirisena vows to defend Lankan military', *Business Standard News*, 3 September 2017.

⁴¹ Bharatha Mallawarachi, 'Sri Lankan leader will protect general accused of war crimes', *Associated Press*, 3 September 2017; see also *ibid* ('Sirisena's comments are seen as an attempt to woo majority ethnic Sinhalese, most of whom oppose action against military personnel accused of crimes in the fight against minority Tamil rebels. Sirisena is being painted as anti-Sinhalese by hard-line sections of the community.')

their hands on our war heroes”.⁴² The comments came as UN High Commissioner for Human Rights, Zeid Ra’ad al Hussein, called for universal jurisdiction to be applied in the absence of government action on accountability:

In Sri Lanka, I urge the Government to swiftly operationalize the [OMP] and to move faster on other essential confidence building measures, such as release of land occupied by the military, and resolving long-pending cases registered under the [PTA]. I repeat my request for that act to be replaced with a new law in line with international human rights standards. In the north [of Sri Lanka], protests by victims indicate their growing frustration over the slow pace of reforms. I encourage the government to act on its commitment in Resolution 30/1 to establish transitional justice mechanisms, and to establish a clear timeline and benchmarks for the implementation of these and other commitments. This should not be viewed by the government as a box-ticking exercise to placate the [HRC], but as an essential undertaking to address the rights of all its people. *The absence of credible action in Sri Lanka to ensure accountability for alleged violations of international human rights law and international humanitarian law makes the exercise of universal jurisdiction even more necessary.*⁴³

The High Commissioner’s sentiments were echoed by Human Rights Watch,⁴⁴ the United States,⁴⁵ the United Kingdom,⁴⁶ and the European Union—the latter

⁴² ‘Sri Lankan minister says security forces did not commit any war crimes’, *Tamil Guardian*, 11 September 2017; see also *ibid* (‘There are various versions of the Geneva Human Rights conference of this year. Some claim our war heroes committed war crimes. None of them committed any such crimes, [...]. It was the LTTE that committed war crimes. The security forces ended a three-decade-long war and paved the way for the dawn of peace. It is the LTTE members who should be brought before international courts on war crimes and not the war heroes who fought for the liberation of motherland.’)

⁴³ Human Rights Council 36th Session, Opening Statement by Zeid Ra’ad Al Hussein, United Nations High Commissioner for Human Rights, 11 September 2017.

⁴⁴ See ‘Sri Lanka: 2 Years On, Scant Progress on UN Resolution: Human Rights Council Should Seek Timeline for Action’, *Human Rights Watch*, 13 September 2017 (‘[UN] member countries at the [HRC] should press Sri Lanka to promptly meet the targets of the council’s October 2015 resolution for transitional justice, Human Rights Watch said today. [...] “Governments at the [HRC] should be clear with Sri Lanka that setting up various reconciliation offices and talking of progress is not the same as implementing the 2015 resolution,” said Meenakshi Ganguly, South Asia director at Human Rights Watch. [...] “Sri Lankan officials need to show that they can do more than just talk the language of human rights and instead put those words into action.”’)

⁴⁵ See ‘US calls for meaningful transitional justice process in Sri Lanka’, *Colombo Gazette*, 12 September 2017 (‘The United States has called for meaningful transitional justice processes in Sri Lanka. Janel Balch speaking on behalf of the US at the 36th session of the UN Human Rights Council in Geneva said that the transitional justice process must have the confidence of the Sri Lankan people.’)

⁴⁶ See ‘UK calls on Sri Lanka to deliver on UN resolution’, *Tamil Guardian*, 13 September 2017 (‘The United Kingdom called on the Sri Lankan government to deliver on its commitments laid out in a UN resolution, at the UN Human Rights Council on Tuesday. Speaking at the 36th session of the Human Rights Council in Geneva, Britain said that it welcomed the “recent step towards operationalising the Office of Missing Persons”. However, it added that “we continue to urge the government to deliver on Resolution 34/1.”’)

of which specifically linked compliance to continued preferential access to the EU market.⁴⁷

20. While the acting US Assistant Secretary of State for South and Central Asian Affairs, 'said the US and Sri Lanka are working together to fulfill steps to which they agreed in' HRC Resolutions 30/1 and 34/L.1,⁴⁸ the US Senate has attempted to impose more stringent conditions on Sri Lanka by seeking to make the receipt of US funds contingent upon certification 'that Sri Lanka is supporting a credible justice mechanism as per [Resolution 301] [...], returning land or compensating owners, publishing a list of all persons who surrendered to the government, and redeploying armed forces out of the former conflict zone'.⁴⁹
21. Addressing the 72nd session of the UN General Assembly in September, President Sirisena said 'haste would not yield good results' and 'urged the international community to support his government's "moderate but steady path"

⁴⁷ See 'Torture must stop for Sri Lanka to retain duty free access: EU', *Economynext*, 13 September 2017 ('The European Union [...] said more action was needed to comply with international conventions including ending torture to retain duty free market access. [...] "Progressive implementation of the conventions is the condition for continued preferential access to the European Union market—the world's largest and Sri Lanka's biggest export market—under the GSP Plus." [...] Tung-Lai Margue said it is of paramount importance the government delivers on its commitments, including replacing the Prevention of Terrorism Act with counter-terrorism legislation consistent with international standards and allowing people in custody to have access to a lawyer from the point of arrest. "Clarifying the fate of those who disappeared at the end of the war and speeding up the return of land will help to restore confidence, particularly in the North and East, in the policy of national reconciliation." [...] The assessment, along with that of the other countries benefitting from GSP Plus, will be published in January 2018 and will be considered by the European Parliament and the Council of Ministers.')

⁴⁸ 'Sri Lanka's reform agenda prompting growth in ties with US', *Colombo Gazette*, 7 September 2017; see also 'US reiterates need for Sri Lanka to prosecute alleged war crimes', *Tamil Guardian*, 7 September 2017.

⁴⁹ See 'US Senate committee approves harsher conditions on Sri Lanka funds', *Tamil Guardian*, 9 September 2017 ('The US Senate Committee on Appropriations has approved the 2018 State & Foreign Operations Appropriations Bill, which includes new and harsher conditions on funds to be given to Sri Lanka. The committee approved \$51.35 billion in total for diplomatic and humanitarian programs that "strengthen US national security and support American values abroad". In its current form the document says that funds will be released for US programs on Sri Lanka only if the Secretary of State can certify that Sri Lanka is supporting a credible justice mechanism as per [HRC Resolution 30/1], returning land or compensating owners, publishing a list of all persons who surrendered to the government, and redeploying armed forces out of the former conflict zone. International Security Assistance, which includes military assistance by the US, would "only be made available for programs to support humanitarian and disaster response efforts; to redeploy out of former conflict zones; and to restructure and reduce the size of the Sri Lankan armed forces". The bill is still subject to debate before it is voted on to be finalized.')

to find solutions'.⁵⁰ A few days later, on the General Assembly sidelines, the UN High Commissioner for Human Rights responded that he would 'be more satisfied if this journey of the Sri Lankan government would be speeded up'.⁵¹

22. Upon GSL invitation, Pablo de Greiff—the UN Special Rapporteur on the promotion of truth, justice, reparation, and guarantees of non-Recurrence—visited Sri Lanka from 10 to 23 October 2017.⁵² At the conclusion of his mission, de Greiff emphasized the GSL's failure to 'address many of the issues he had highlighted during his last visit *more than two years ago*',⁵³ including 'the release of civilian lands occupied by the military, repealing [the PTA], speeding up cases against terror suspects languishing in jails, and putting an end to intimidating forms of surveillance'.⁵⁴ Such delays, he noted, 'raise questions [...] about the determination of the government to undertake a comprehensive transitional justice program' and risk 'action by foreign jurisdictions if [the GSL] did not take steps to ensure a credible investigation of its own'—referring, of course, to the case against Jagath Jayasuriya and others to come.⁵⁵ Moreover, the Special Rapporteur expressed concern over repeated GSL rhetoric

⁵⁰ 'Sirisena seeks support for a "moderate but steady path"', *The Hindu*, 20 September 2017; see also *ibid* ('"We all have heard that speedy journey is a dangerous journey. Therefore, I believe that you will understand the complex nature of issues that hinder the instant and radical solutions that some impatient groups are asking for," he said. While critics are frustrated with the government's pace on reconciliation and accountability, Mr Sirisena is also facing pressure from his political rivals opposed to such efforts.')

⁵¹ 'UN human rights chief tells Sri Lankan president to "speed up"', *Tamil Guardian*, 23 September 2017.

⁵² See 'UN Special Rapporteur to visit Sri Lanka in October', *Tamil Guardian*, 12 September 2017 ('The Special Rapporteur last visited the island in 2016, where he reiterated the importance of victim participation in an accountability mechanism for mass atrocities.');

Sunanda Deshapriya, 'Ongoing UNHRC session: What's in store for Sri Lanka?', *Groundviews*, 25 September 2017 ('Under the Rajapaksa regime, UN Special Rapporteurs were not welcome. There were eight pending requests by Special Rapporteurs to visit Sri Lanka by the time the new coalition government came to power. Now there is a standing invitation for all UN Special Rapporteurs to visit the country.');

'UN expert on transitional justice to review progress in Sri Lanka', *Sri Lanka Guardian*, 6 October 2017 ('The human rights expert will meet Government officials at central and provincial levels, representatives of the legislature, members of the judiciary, the armed forces, law enforcement officials, religious leaders, political parties, the Human Rights Commission, civil society, victims' groups, academics and representatives of the international community. He is scheduled to visit Colombo as well as other locations in the south, centre, north and east of the country. [...]. The final report on the visit will be presented to the [HRC] in September 2018.')

⁵³ 'UN rapporteur raps Sri Lanka for dragging feet on war-crime investigations', *Deutsche Welle*, 23 October 2017 (emphasis added).

⁵⁴ *Ibid*.

⁵⁵ *Ibid*; see also 'UN expert warns Sri Lanka of war crime prosecutions', *Economynext*, 23 October 2017 (De Greiff 'said the attempted prosecution of retired general Jagath Jayasuriya was the "tip of the iceberg". He feared more such cases in foreign jurisdictions unless Colombo ensured a credible domestic investigation.')

indicating that ‘war heroes [would] never be brought to trial’⁵⁶ and criticized the politicization of the conflict at the expense of victim’s rights: ‘In a highly polarised context, the absence of a comprehensive plan that includes provisions for the satisfaction of the rights to truth, justice, reparation and guarantees of non-recurrence has left transitional justice an easy target to attack.’⁵⁷

23. According to Human Rights Watch, while ‘Sri Lanka has invited several UN human rights experts to visit over the past two years and has given them free and unfettered access, the government has largely disregarded their recommendations’.⁵⁸ Initial signs suggest that this may be the case for de Greiff. At the start of de Greiff’s trip, the Ministry of Foreign Affairs was quick to emphasize that it would not be bound by the Special Rapporteur’s advice or recommendations, which would be for the GSL to take or leave.⁵⁹

III. UNIVERSAL JURISDICTION

24. In response to the GSL’s failure to bring perpetrators to account, the UN High Commissioner for Human Rights issued an extraordinary statement, encouraging states to ‘[w]herever possible, in particular under universal jurisdiction, investigate and prosecute those allegedly responsible for such violations as torture, enforced disappearance, war crimes and crimes against humanity’.⁶⁰

⁵⁶ ‘UN asks Lanka to get transitional justice house in Order’, *Eastern Mirror*, 23 October 2017; see also *ibid* (‘This seems to me to misrepresent the target of transitional justice accountability measures by suggesting that it is a generally anti-security agenda, and also by forgetting that no one who has committed violations of human rights law or of the laws of war deserves to be called a hero.’)

⁵⁷ ‘UN asks Lanka to get transitional justice house in Order’, *Eastern Mirror*, 23 October 2017.

⁵⁸ *Ibid*.

⁵⁹ ‘Governments not bound by UN experts advice: Ministry’, *Daily Mirror*, 11 October 2017 (‘Advice and expertise of UN experts can be obtained by countries in a manner that would benefit institutional capacity building, policy formulation, and policy reform and training needs as a Government may consider necessary’, said an MFA statement.); ‘Sri Lanka is not bound by UN rapporteur’s recommendations says government’, *Tamil Guardian*, 11 October 2017 (‘Once Mr de Greiff presents his Report to the [HRC] in September 2018, it is for the Government of Sri Lanka to decide whether there is anything that the Government considers beneficial to the people of Sri Lanka in his recommendations, and whether the Government wishes to draw on his knowledge, expertise and advice and consult him further in any manner.’)

⁶⁰ UN HRC, ‘Report of the Office of the United Nations High Commissioner for Human Rights on Sri Lanka’, Document No A/HRC/34/20, 10 February 2017.

A. Law and Practice

25. The term *universal jurisdiction* refers to the idea that a national court may prosecute individuals for any serious crime against international law—such as crimes against humanity, war crimes, genocide, and torture—based on the principle that such crimes harm the international community or international order itself, which individual states may act to protect. Generally, universal jurisdiction is invoked when other traditional bases of criminal jurisdiction do not exist, for example: the defendant is not a national of the state in which the case was filed; the defendant did not commit a crime in that state’s territory or against its nationals; or that state’s own national interests are not adversely affected.⁶¹
26. The rationale of universal jurisdiction is to avoid impunity and to prevent those who committed serious crimes from finding a safe haven in third countries. Indeed, universal jurisdiction enables all states to fulfill their duty to prosecute and punish the perpetrators of war crimes categorized as grave breaches of the Geneva Conventions. In order to make this principle effective, states are required to establish universal jurisdiction for war crimes in their national legislation.⁶² The definition and exercise of universal jurisdiction varies around the world.
27. A national or international court’s authority to prosecute individuals for international crimes committed in other territories depends on the relevant sources of law and jurisdiction, such as national legislation or an international agreement, which may (for example) require that only individuals within the

⁶¹ See, e.g., International Justice Resource Center (www.ijrcenter.org/cases-before-national-courts/domestic-exercise-of-universal-jurisdiction/). See also TRIAL (Track Impunity Always) (which provides an explanation of universal jurisdiction in its international law resources); Global Policy Forum (which provides resources on universal jurisdiction, along with relevant UN documents and other articles discussing universal jurisdiction); Amnesty International’s report, *Universal Jurisdiction: A Preliminary Survey of Legislation Around the World – 2012 Update* (which summarizes domestic legislation incorporating universal jurisdiction); Beth Van Schaack’s article, *Universal Jurisdiction Cases Involving US Defendants*; and Just Security (which catalogs universal jurisdiction cases brought in non-US courts against US personnel).

⁶² ICRC, *Advisory Service on International Humanitarian Law, ‘Universal jurisdiction over war crimes’*, March 2014.

country's national territory be subject to prosecution.⁶³ A range of states' national laws provide for some form of universal jurisdiction. Such domestic legislation empowers national courts to investigate and prosecute persons suspected of crimes potentially amounting to violations of international law *regardless* of where the crime was committed, the nationality of the suspect, or the nationality of the victim.⁶⁴

28. Amnesty International reports that more than 160 of the 193 UN member states 'can exercise universal jurisdiction over one or more crimes under international law, either as such crimes or as ordinary crimes under national law.'⁶⁵ Prominent cases involving universal jurisdiction include: the United Kingdom's consideration of Spain's request to extradite former Chilean dictator Augusto Pinochet; US prosecution of the former Liberian president's son, Chuckie Taylor; the Spanish prosecution of Guatemalan officials in the Guatemalan genocide case; the Spanish prosecution of El Salvadoran officials for the murder of six Jesuit priests; and the Spanish prosecution of an Argentine naval officer for crimes against humanity committed during the so-called 'Dirty War'.⁶⁶
29. While, as a general matter, it will ultimately fall on national prosecution services to robustly pursue cases in their respective jurisdictions, victims as well as NGOs can play key roles. In many civil-law jurisdictions, victims are statutorily

⁶³ See, e.g., International Justice Resource Center (www.ijrcenter.org/cases-before-national-courts/domestic-exercise-of-universal-jurisdiction/); see also ICRC, Advisory Service on International Humanitarian Law, 'Universal jurisdiction over war crimes', March 2014 ('Universal jurisdiction refers to the assertion of jurisdiction over offences regardless of the place where they were committed and the nationality of the perpetrator or the victim. It is held to apply to a range of offences the repression of which by all states is justified, or required, as a matter of international public policy due to the gravity of the crimes and the importance of their repression in the eyes of the international community.')

⁶⁴ See, e.g., International Justice Resource Center, *op cit*.

⁶⁵ See Amnesty International, *Universal Jurisdiction: A Preliminary Survey of Legislation Around the World – 2012 Update* (2012), at 2. The annexes to Amnesty International's report indexes state definitions of crimes under international law and the circumstances in which States allow the domestic exercise of universal jurisdiction. See *ibid*, Annexes I & II. As of 2012, a total of 147 States have provided universal jurisdiction over one or more crimes under international law. See *ibid*, at 12. No fewer than 166 States have defined at least one of the four crimes upon which universal jurisdiction can be exercised—war crimes, crimes against humanity, genocide, and torture—as crimes in their national law. See *ibid*. Many of these definitions, however, do not always align with the strictest requirements of international law, which may create a gap of impunity. See *ibid*. Furthermore, 91 States have provided for universal jurisdiction over ordinary crimes under national law, which may or may not also constitute violations of international law. See *ibid*.

⁶⁶ See, e.g., International Justice Resource Center, *op cit*.

authorized to initiate criminal actions; and, in all jurisdictions, NGOs and/or other interested organizations can provide crucial assistance with respect to many aspects of preliminary investigations.

B. The Case Against Jagath Jayasuriya

30. As noted above, the ITJP has recently filed a case against Jagath Jayasuriya. To date, claims have been filed in Brazil and Colombia; and, according to reports, will also be filed in Argentina, Chile, and Peru.
31. According to the OISL Report, the most widely documented case concerns:

the surrender of a group led by a Catholic priest, Father Francis Joseph on 18 May 2009. That morning, a number of witnesses saw Father Francis together with a group of LTTE fighters who had laid down their arms and identified themselves to the Sri Lankan Army [in the North of the country]. Father Francis was seen facilitating the 'surrender' of LTTE cadres directly with security forces members [...]. Shortly afterwards, Father Francis and the group were seen being led away by the security forces [...]. Some witnesses saw Father Francis and the group of LTTE cadres boarding buses [...]. Father Francis and other members of the group have not been seen or heard from since.⁶⁷

By way of additional support, the ITJP has compiled a list of more than 100 persons seen by eyewitnesses in army custody who have disappeared; the list includes many women and young children.⁶⁸

32. As Ambassador Jayasuriya has fled to the safety of Sri Lanka, it is highly likely that he will never face prosecution, unless he leaves the island. Certainly, the GSL shows no signs of taking the allegations against him seriously. However, the ITJP case is a welcome starting point and sends a strong signal to other alleged perpetrators. In late-September, the Sri Lanka Campaign for Peace and Justice suggested that the case would 'act as a loud deterrent message to all would-be perpetrators' and highlighted the 'great potential for universal jurisdiction cases to disturb the political narratives about the war that help prop up impunity', noting that 'the protection [the GSL] continue[s] to afford

⁶⁷ OISL Report, *op cit*.

⁶⁸ See ITJP website (www.itjpsl.com).

perpetrators of mass atrocities is not boundless or cost-free'.⁶⁹ For its part, the MAP will continue to closely monitor this and other similar cases.

IV. REFERRAL BY THE UN SECURITY COUNCIL TO THE INTERNATIONAL CRIMINAL COURT

A. Law and Practice

33. Sri Lanka is not a state party to the Rome Statute of the International Criminal Court (ICC). Accordingly, the only realistic route to the exercise of ICC jurisdiction over war crimes and/or crimes against humanity committed during Sri Lanka's civil war would be a referral to the ICC by the UN Security Council pursuant to Chapter VII of the UN Charter.⁷⁰ Since the founding of the ICC, such a scenario has occurred only twice. Essentially, Chapter VII referrals are meant to address situations that threaten or breach the peace, as well as those of ongoing acts of aggression.⁷¹ The stated goal of any action to be taken in this regard is 'to maintain or restore international peace and security'.⁷² Perhaps the most well known actions taken under Chapter VII are the Security Council resolutions establishing the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR).⁷³ Both of those resolutions pre-dated the ICC and were specifically crafted in

⁶⁹ 'Case against Jayasuriya "should act as a loud deterrent" – SL Campaign', *Tamil Guardian*, 22 September 2017.

⁷⁰ See Rome Statute, Article 13 (Exercise of Jurisdiction): 'The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if: (a) a situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party in accordance with article 14; (b) a situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations; or (c) the Prosecutor has initiated an investigation in respect of such a crime in accordance with article 15.'

⁷¹ See UN Charter, Chapter VII (Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression), Article 39: 'The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.'

⁷² UN Charter, Chapter VII, Article 39.

⁷³ See UN Security Council Resolution 827 of 25 May 1993, S/RES/827 (1993) (establishing the ICTY) and UN Security Council Resolution 955 of 8 November 1994, S/RES/955 (1994) (establishing the ICTR).

response to recently concluded mass atrocities in situations of relative international political consensus.⁷⁴

34. As noted by one commentator, the ‘relationship between the [ICC] and the United Nations Security Council has generated much discussion, criticism, and controversy’.⁷⁵ The road to referral is fraught with political hurdles. Accordingly, it is unsurprising that only two instances have occurred in the ICC’s near twenty-year history in which the Security Council has made use of its powers to refer situations in non-party states to the ICC: Sudan (Darfur) in 2005 and in Libya in 2011.⁷⁶ While both cases were ‘applauded and criticized’ for various reasons, the key to successful referral was the approval and/or abstention of ‘powerful states outside the Rome Statute system such as the United States, Russia, and China’.⁷⁷ At the same time, ‘accusations of politicization of the court emerged: why does the Security Council choose to refer certain situations outside the Rome Statute system and not others?’⁷⁸
35. An additional issue is the limited terms of the two successful resolutions (Darfur and Libya) requiring only those states that have ratified the Rome Statute and the governments of the particular situations to cooperate with the ICC:

As non-states parties to the Rome Statute, China, Russia, and the USA refuse to accept any obligations to cooperate with the ICC. Instead, the Security Council’s resolutions only ‘urge’ them, and other governments that have not ratified the Rome Statute, to cooperate with the ICC. Unsurprisingly, in many cases, governments have thumbed their noses at the ICC’s requests. For example, in June 2011, China joined the list of countries who have welcomed ICC fugitive Sudanese President Omar al-Bashir—who is charged with genocide, crimes against humanity and war crimes in Darfur—and refused to arrest and surrender him to the ICC. On several occasions, the ICC has reported states refusing to cooperate with Omar al-Bashir’s arrest to the Security Council. But, the Security

⁷⁴ See Resolution 827 (noting ‘continuing reports of widespread and flagrant violations of international humanitarian law occurring within the territory of the former Yugoslavia’) and Resolution 955 (noting ‘reports indicating that genocide and other systematic, widespread and flagrant violations of international humanitarian law have been committed in Rwanda’).

⁷⁵ Tiina Intelmann, ‘The International Criminal Court and the United Nations Security Council: Perceptions and Politics’, *The World Post*.

⁷⁶ See UN Security Council Resolution 1593 of 31 March 2005, S/RES/1593 (2005) (‘Determining that the situation in Sudan continues to constitute a threat to international peace and security, [...]’); UN Security Council Resolution 1970 of 26 February 2011, S/RES/1970 (2011) (‘Considering that the widespread and systematic attacks currently taking place in the Libyan Arab Jamahiriya against the civilian population may amount to crimes against humanity, [...]’).

⁷⁷ Tiina Intelmann, ‘The International Criminal Court and the United Nations Security Council: Perceptions and Politics’, *The World Post*.

⁷⁸ *Ibid.*

Council has failed to even formally consider, let alone act on, any of those reports.⁷⁹

Even assuming a successful referral, there is no guarantee that Sri Lanka—or any other country—would capitulate to any ICC demands.

B. Although Unlikely, Referral of Sri Lanka to the ICC is the Correct Course

36. It is now clear to all honest observers that (1) the international crimes committed in Sri Lanka were some of the most heinous anywhere in the world during this century and (2) there is no realistic prospect of those persons most responsible for the crimes being prosecuted in Sri Lanka's national courts. For these reasons, the MAP has previously made the following recommendation:

Should the GSL continue to act in bad faith and/or fail to take significant steps towards implementing the word and spirit of HRC Resolution 30/1, the *United Nations Security Council* should, within one year, refer the Sri Lanka situation to the *International Criminal Court*. These steps must include meaningful progress towards establishing a hybrid war crimes court with the participation of international judges and prosecutors.⁸⁰

37. Since crimes of this magnitude are said to amount to crimes against all humanity, it is incumbent on the international community to ensure remedies for the victims, even if those remedies are outside Sri Lanka's jurisdiction. Moreover, as there is no appetite for a specific *ad hoc* international criminal tribunal for Sri Lanka, an ICC investigation into the situation, combined with universal jurisdiction cases, appears to be the best option. Rather than succumbing to national self-interests, the members of the Security Council should respect their mandate and moral obligations. This requires referring Sri Lanka to the ICC.
38. Unfortunately, the members of the Security Council have a history of placing their geopolitical interests and alliances over their mandate to maintain

⁷⁹ Jonathan O'Donohue, 'The Security Council's Appalling Record of Referring Situations to the ICC', *Justice in Conflict*, 23 May 2014.

⁸⁰ Second Spot Report, *op cit* (emphasis added).

international peace and security,⁸¹ even if that means sacrificing the chances of tens of thousands of victims obtaining justice. The failure of the Security Council to refer the ongoing conflict in Syria is demonstrative of a situation in which permanent members of the Security Council are deeply divided.

39. Given today's geopolitical realities in Sri Lanka—including the instability of the coalition government and the fear of weakening it still further—it seems highly unlikely that the Security Council would obtain the required votes and/or abstentions to refer the case to the ICC. Sadly, civil-war atrocities in Sri Lanka will almost certainly remain beyond the reach of the ICC for the foreseeable future.

V. 'MAGNITSKY-STYLE' SANCTIONS

40. It is now widely recognized that human rights abusers and corrupt officials in third countries regularly invest their ill-gotten gains within, or enjoy visits to, Western democracies. In other words, the foreign abusers reap the benefits of the West's financial stability and rule of law, while denying similar opportunities to their own citizens back home. Despite a desire to tackle this issue, it has proven difficult to bring legal action through regular courts due to jurisdictional or evidential hurdles. For these reasons, several Western states have enacted national legislation that allows their governments to target the worst individual human rights abusers and corrupt officials through sanctions. Such sanctions may be applicable to corrupt or abusive Sri Lankan officials who have interests (including travel, education, and investment) in European or North American countries.

⁸¹ See Jonathan O'Donohue, 'The Security Council's Appalling Record of Referring Situations to the ICC', *Justice in Conflict*, 23 May 2014 ('It should also be pointed out that, while Russia and China have vetoed the referral of Syria and they have already indicated they will not support a referral of the Democratic Peoples' Republic of Korea, they are not the only members of the Council blocking referrals. The UK and USA staunchly oppose the Security Council even considering a referral of the situation in the Occupied Palestinian Territories to the ICC Prosecutor. In particular, in March 2011, both voted against a UN Human Rights Council resolution, which called for the Security Council to consider the step. The focus of permanent members on protecting their individual geopolitical interests and alliances over their mandate to maintain international peace and security is extremely damaging to the credibility and effectiveness of the Security Council and must be confronted.')

41. One such example is the Global Magnitsky Accountability Act (GMA) enacted in the United States of America (US) in December 2016. The GMA targets any foreign individual who engages in the extrajudicial killing, torture, or infliction of other gross human rights abuses abroad, when the abuse is targeted at those who seek to expose illegal activity by officials or obtain fundamental freedoms.⁸² It also targets government officials who engage in significant corruption as well as those who materially assist them. The enforcement of the GMA lies purely at the discretion of the US President. The Act strongly encourages the President to consider information given by NGOs and agencies of other nations. On 20 April 2017, President Trump sent a letter to the relevant House and Senate Committees stating:

My Administration is actively identifying persons and entities to whom the [Global Magnitsky] Act may apply and are collecting the evidence necessary to apply it. Over the coming weeks and months, agencies will undertake thorough interagency vetting to ensure we fulfill our commitment to hold perpetrators of human rights abuses and corruption accountable.⁸³

If the US President finds there is credible evidence that the alleged perpetrator has engaged in abuses (or corruption) within the definition of the GMA, that person may be banned from entering the US and have his US assets frozen.

42. The United Kingdom (UK) recently enacted the Criminal Finance Act (CFA), (which modifies the 2002 Proceeds of Crime Act). It expands the ability of the UK authorities to file lawsuits in the UK to recover assets that are the products of unlawful acts. Crucially, 'unlawful acts' now include the 'international commission of gross human rights abuses' by public officials against persons who seek to expose unlawful activity by officials or gain fundamental human rights and freedoms.⁸⁴ It also includes activity in connection with these abuses, such as, profiting from or materially assisting these abuses. The CFA places both individuals and businesses with any assets in the UK on notice that, if they choose to transact with foreign governments tainted by human rights abuses, the entire value of that transaction may be seized.

⁸² Global Magnitsky Human Rights Accountability Act, S. 284, 114th Cong. §3(a)(1) (2017).

⁸³ www.whitehouse.gov/the-press-office/2017/04/20/letter-president-certain-congressional-committee-chairs.

⁸⁴ Proceeds of Crime Act 2002 §241A (as modified by Criminal Finance Act 2007 §13(3)).

43. Canada has recently adopted its own individual sanctions regime, namely, the Justice for Victims of Corrupt Foreign Officials Act.⁸⁵ The European Union is considering new legislation in line with this global trend.
44. In practice, several criteria would need to be satisfied before authorities in either the US, UK, Canada (or other countries) seek to impose sanctions on individuals from Sri Lanka. For example, in the UK, applicants would need to identify financial assets in the UK owned by a proven human rights abuser (or those doing business with him). They would need to demonstrate that the abuse was an act of retribution. And for the CFA to apply retroactively (for example, to acts during the civil war), the human rights violations must rise to the level of torture--'lesser' abuses are actionable only *after* the act came into force. Etc. With respect to the US regime, it is worth remembering that the GMA sanctions rely on President Trump exercising his discretion to target human rights abusers.
45. Nonetheless, in cases where the criteria are satisfied, victims and activists should be ready to use these new individual sanctions regimes. The sanctions can help highlight the plight of the victims and would hit the abusers where it hurts. Considering the recalcitrance of the GSL to pursue real justice at home, Western authorities should make it known that they are open and willing to apply the full range of sanctions against Sri Lankan officials who are human rights abusers.

VI. CONCLUSIONS & RECOMMENDATIONS

46. Given the GSL's continued obstructionist posture and the developments discussed above, the MAP hereby:

⁸⁵ See <https://112.international/politics/canada-adopts-sergei-magnitsky-law-21369.html>

- a. Adopts by reference and reiterates the various recommendations made in its First and Second Spot Reports and press release of 30 August 2017;
- b. urges the Human Rights Council at its 37th Session in 2018 to set strict deadline for compliance with Resolution 30/1;
- c. encourages victims and civil society to collate and submit to national prosecutors, dossiers of evidence against Sri Lankan torturers and war criminals in states practicing universal jurisdiction;
- d. urges prosecutors in third states to pursue cases against Sri Lankan torturers and war criminals under the doctrine of universal jurisdiction;
- e. encourages the UN High Commissioner for Human Rights to disclose evidence from the OISL investigation to national prosecutors seeking to pursue cases under universal jurisdiction, subject to confidentiality agreements necessary to protect vulnerable individuals;
- f. calls upon the UN Security Council to consider the referral of Sri Lanka to the ICC;
- g. urges victims and civil society to file applications under national individual sanctions regimes, such as the US Global Magnitsky Accountability Act, the UK Criminal Finance Act, and the Canadian Justice for Victims of Corrupt Foreign Officials Act;
- h. urges the authorities in the US, UK and Canada to demonstrate a willingness to apply the full range of individual sanctions under the above regimes against Sri Lankan human rights abusers;
- i. calls upon individual governments (especially the US) and regional blocs (especially the EU) to exert unilateral pressure on the GSL in the

form of strict conditions to be attached to current and future aid packages, trade agreements, etc.

End.