



# Sri Lanka's Transition to Nowhere

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*Preventing War. Shaping Peace.*

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## *Executive Summary*

Two years into President Maithripala Sirisena's term, Sri Lanka's fragile hopes for lasting peace and cooperation across party and ethnic lines are imperilled. Despite significant achievements in the coalition government's first nine months, progress on most of its reform agenda has slowed to a crawl or been reversed. As social tensions rise and the coalition slowly fractures, it is unclear whether it can push its signature new constitution through parliament and to a national referendum. Neither the president nor prime minister has made a serious attempt to win support for a more inclusive polity or to reform the national security state to tackle the institutionalised impunity that has fed ethnic unrest and harmed all communities. To protect democratic gains, enable lasting reforms and reduce risks of social and political conflict, the "unity government" should put aside short-term party and individual political calculations and return to a politics of reform and openness.

Ambitious promises to improve the economy, eliminate corruption, restore rule of law, address the legacy of war and write a new constitution remain largely unrealised. Confidence in the government's reform will has been dented by lack of prosecutions in alleged corruption and political murder cases in the time of ex-President Mahinda Rajapaksa and by allegations of major corruption on its own watch. As the government struggles with large budget deficits and dangerously high debt, hopes for improved living standards have been frustrated, further eroding trust in it and strengthening the appeal of the Rajapaksa-led opposition.

Sirisena is locked in a battle with Rajapaksa for control of their Sri Lankan Freedom Party (SLFP) and hemmed in by the party's traditional nationalism. SLFP ministers were never enthusiastic about being the junior partner in a unity government with their long-time rival, the United National Party (UNP), and are unhappy with what many see as UNP arrogance and Prime Minister Ranil Wickremesinghe's less-than-consultative style. Afraid of being outflanked by Rajapaksa's nationalism, the Sirisena SLFP wing resists key governance and reconciliation promises, even as this weakens support from constituencies that brought Sirisena to power: Tamils, Muslims and Sinhalese dismayed by corruption, abuse of power and high cost of living under Rajapaksa.

Preoccupied with appearing patriotic and worried about dissent and Rajapaksa loyalists in uniform, the government has done little to reform the national security state or reduce the military's considerable autonomy. It continues to drag its feet on impunity for human rights violations and abuses of power. Torture of detainees remains routine, and the draconian Prevention of Terrorism Act has yet to be replaced, as promised.

Tamils in the north and east were assured of confidence building measures that require major changes in the security forces' role. Yet, the military resists returning additional occupied land to its owners in these areas and continues to run shops and hotels and build Buddha statues in Tamil and Muslim communities. Failure to reduce the military footprint has led to a campaign of protests by Tamils in the north that is weakening support for the Tamil National Alliance (TNA), the main Tamil party cooperating closely with the ruling coalition.

Government plans for transitional justice – which would inevitably reveal more about atrocities by the popular, powerful military – have largely not materialised. President Sirisena has prevented the Office on Missing Persons from operating since parliament approved it in August 2016. Mechanisms promised in 2015 are also increasingly in doubt, though the UN Human Rights Council has given the government two more years to make good on commitments. Due to the government's failure to explain the connection between transitional justice and rule-of-law reforms, many Sinhalese view justice for war-era abuses as a pro-Tamil, anti-military demand, rather than part of a program to protect all communities' rights.

The government's fate thus increasingly depends on that of the new constitution. The drafting process, which until late 2016 had been proceeding quietly, now hangs in the balance. Pro-Sirisena SLFP ministers oppose any changes requiring a referendum, which would rule out key reforms, including compromises reached with the Tamil National Alliance to strengthen provincial devolution instead of the federalism they had favoured. With no sustained narrative from the president or prime minister in favour of devolution, politics has been dominated by Rajapaksa-aligned Sinhala nationalists, who present even modest changes as existential threats to the nation's Sinhala and Buddhist character. The government is on the defensive, denying that it is weakening Buddhism and supporting separatism.

To salvage the chance to address fundamental sources of conflict and instability, the government needs to return to its original good governance and reconciliation agenda. Sirisena and Wickremesinghe must reach workable compromises on key issues: economic reform that shares the pain of change equitably and renewed anti-corruption, anti-impunity drives that prioritise a limited number of significant criminal cases implicating both major parties. To achieve a deal on the constitution that includes strengthened devolution, Sirisena must speak forcefully and lead a campaign that explains the reform package's benefits for all communities. Renewing transitional justice hopes requires rapid launch of the Office on Missing Persons and faster progress on reducing the military footprint in the north and east. Packaged as part of rule-of-law reforms that include prosecuting alleged corruption and political crimes under the Rajapaksas, transitional justice could yet gain support across communities.

But time is running out. Leaders in both parties should not discount a Rajapaksa return. For their own survival and to deliver on at least some of their big promises, they should reject chauvinistic politics and daily bickering and invest their political capital in promoting an inclusive vision and more accountable polity that can mitigate the risk of new conflict.

## *Recommendations*

*To restore momentum for democratic reforms sustainable peace requires*

### **To the Government of Sri Lanka:**

1. Redouble efforts to draft a new constitution that respects the rights of all citizens and communities equally, backed by a public campaign, led by the president, to win support in a referendum.
2. Restore civilian authority and build confidence in the north and east by:
  - a) expediting and making more transparent the return of military-occupied land to its owners;
  - b) ending military involvement in farms and shops that harm local businesses;
  - c) ending military involvement in construction of Buddha statues in Tamil and Muslim areas; and
  - d) ceasing intimidation and surveillance of lawful political activities.
3. Re-energise the process of addressing the war's legacy by:
  - a) constituting immediately the Office of Missing Persons, with an independent, experienced staff and a significant role for victims' families; and
  - b) acknowledging the Consultations Task Force on Reconciliation Mechanisms' report and using its recommendations to develop a public roadmap for full implementation of the UN Human Rights Council resolution.
4. Address widespread impunity and restore rule of law by repealing the Prevention of Terrorism Act and ensuring any replacement respects essential rights; and investigating alleged corruption and emblematic human rights cases, including:
  - a) the February 2015 Treasury Bond issue;
  - b) the series of cases implicating alleged military intelligence death squads in the murder and abduction of journalists and students; and
  - c) the 2006 massacres of aid workers in Mutur and students in Trincomalee.
5. Establish and empower a high-level United National Party-Sri Lankan Freedom Party team to develop and oversee a consensus policy on economic reforms and how to share resulting short-term hardships more equitably.

### **To International Financial Institutions, Development Agencies and Donor Countries:**

6. Explore with the government ways to support the economy without demanding disruptive reforms that could trigger social conflict.

**Colombo/Brussels, 16 May 2017**

# Sri Lanka's Transition to Nowhere

## I. Introduction

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In January 2015, the shock electoral defeat of President Mahinda Rajapaksa by his former ally, Maithripala Sirisena, rescued Sri Lanka from a slide into increasingly harsh nationalist authoritarianism. The victory of a broad coalition representing Sinhalese, Tamils and Muslims gave hope that the country could address its longstanding political challenges: remedying the 60-year failure to grant Tamils a fair share of power on the Sinhala-majority island, and restoring for all citizens the rule of law, damaged by decades of politicisation, bitter ethnic bias and impunity for grave abuses committed during and after the civil war with the Tamil Tigers.

The democratic benefits from the defeat of President Rajapaksa and the removal of his family and supporters from key government positions remain tangle. Sri Lanka's political dysfunctions began long before the Rajapaksas took power, however, and remain daunting.<sup>1</sup> Despite positive changes and promises of constitutional changes to come, there has been no substantial, sustainable progress on addressing the two biggest political challenges:

- Creation of independent institutions capable of upholding rule of law and a concomitant reduction in the power of the national security state and military that grew dangerously under the Rajapaksas. Limited progress has depended on the commitment of a few key politicians. Recent developments, including actions by the president and the growing dominance of party-political calculations, have deepened doubts about the leadership's ability and willingness to strengthen the rule of law.
- Beyond generic statements in support of "reconciliation" and "addressing the causes of the war", government leaders have done little to change the underlying ethno-nationalist dynamics that sustained the quarter-century of war. Promises of a new constitution have not been supported by articulation of a pluralist vision of the state as an alternative to one in which entrenched Sinhala Buddhist nationalism does much to alienate Tamils and Muslims.

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<sup>1</sup> For earlier Crisis Group analysis of Sirisena and the unity government, see Asia Reports N°s 278, *Sri Lanka: Jumpstarting the Reform Process*, 18 May 2016; and 272, *Sri Lanka Between Elections*, 12 August 2015; on the Rajapaksa era, see N°s 253, *Sri Lanka's Potemkin Peace: Democracy under Fire*, 13 November 2013; 243, *Sri Lanka's Authoritarian Turn: The Need for International Action*, 20 February 2013; and 209, *Reconciliation in Sri Lanka: Harder than Ever*, 18 July 2011; for the politics of the major communities, see N°s 239, *Sri Lanka: Tamil Politics and the Quest for a Political Solution*, 20 November 2012; 141, *Sri Lanka: Sinhala Nationalism and the Elusive Southern Consensus*, 7 November 2007; and 134, *Sri Lanka's Muslims: Caught in the Crossfire*, 29 May 2007; for background on impunity and the judiciary, see N°s 172, *Sri Lanka's Judiciary: Politicised Courts, Compromised Rights*, 30 June 2009; and 135, *Sri Lanka's Human Rights Crisis*, 14 June 2007.

Until significant progress is made on both sets of issues there is little hope of lasting reconciliation. This report examines the growing difficulties faced by President Sirisena and his national unity government across the interlinked areas that need reform. It is based on interviews with government officials, politicians, lawyers, diplomats, businesspeople and journalists, conducted in Colombo, Jaffna, London, and Geneva and by email and telephone over the past half year.

## II. The Politics of Reform

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### A. A Divided "Unity" Government

Sirisena's first nine months saw real progress.<sup>2</sup> His electoral coalition, anchored around the United National Party (UNP) and strengthened by much of his – and the Rajapaksa family's – Sri Lanka Freedom Party (SLFP), had the two-thirds parliamentary majority needed to approve the nineteenth constitutional amendment in April 2015. That fulfilled an electoral pledge to reduce the presidency's enormous powers and restore the independence of oversight commissions for the police, judiciary and human rights.<sup>3</sup> The government ended censorship and intimidation of the media and partly scaled back the heavy military presence in Tamil-majority areas in the north and east. The military was persuaded to return, reluctantly, some of the huge swathes of land it had seized there in and after the war.

The presidential election was followed in August 2015 by the narrow victory in parliamentary elections of a UNP-led coalition over a grouping led by former President Rajapaksa and including most of Sirisena's own SLFP. That allowed Sirisena to convince the fractured SLFP to form an unprecedented national unity government with its often bitter UNP rival, headed by Prime Minister Ranil Wickremesinghe. The grand coalition affirmed Sirisena's and the UNP's ambitious agenda to revive the economy, investigate alleged corruption under the previous regime, promote reconciliation and, most importantly, draft a new constitution in parliament.<sup>4</sup> The main aims of constitutional change were to further reduce presidential powers, adopt a new electoral system and expand the powers devolved to provinces so as to address longstanding Tamil demands for autonomy in the north and east.

Keen to reduce international pressure over human rights, the new government co-sponsored a UN Human Rights Council (UNHRC) resolution in September 2015 committing it to a package of transitional justice measures to address the legacy of the 30-year war with the separatist Tamil Tigers, including the horrific final months in 2009, when tens of thousands were killed.<sup>5</sup> Momentum slowed by mid-2016, however, and now seems stalled. Failing to deliver on good governance promises, particularly regarding corruption, and with few signs of the promised economic revival, the government is losing support from its main constituencies: Tamils, Muslims

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<sup>2</sup> See Crisis Group Report, *Sri Lanka Between Elections*, op. cit.

<sup>3</sup> The nineteenth amendment in effect annulled Rajapaksa's 2010 eighteenth amendment, which abolished presidential term limits and gave the president control over police, judiciary, civil service and human rights commissions. Fully abolishing the executive presidency, as Sirisena and his coalition also promised and replacing it by a "Westminster" parliamentary majority arrangement requires more extensive constitutional change and final approval by referendum. On the nineteenth amendment, see Crisis Group Report, *Sri Lanka Between Elections*, op. cit., pp. 8-9.

<sup>4</sup> The pro-business, right-wing UNP and more statist centre-left SLFP have alternated in power since 1956, generally allied with smaller ethnic or leftist parties. While some in the unity government appear committed to the reforms its majority enables, it is mainly a marriage of convenience: a more stable UNP grip, portfolios and patronage for the pro-Sirisena section of the SLFP.

<sup>5</sup> For more on the war's last months and allegations of grave violations of the laws of war by both sides, see Crisis Group Asia Report N°191, *War Crimes in Sri Lanka*, 17 May 2010. On the UNHRC resolution, see Crisis Group Report, *Jumpstarting the Reform Process*, op. cit., pp. 25-29.



and liberal Sinhalese. This makes it vulnerable to the resurgent populist, majoritarian opposition politics led by Mahinda Rajapaksa.

Divisions inside and outside the government have led to a focus on manoeuvres for political survival rather than pursuit of reforms and maintenance of unity across party and ethnic lines. It is increasingly clear that the “unity” government was principally a creation of the UNP and some of those close to Sirisena that a meaningful part of the SLFP was persuaded to support in exchange for portfolios.

The split in the SLFP weakened Rajapaksa's hold over Sinhala voters and was the key to Sirisena's election but is now the cause of political paralysis. Sirisena is consumed with managing factional rivalries and policy divergences. Having done little to reshape the party around a less exclusionary, nationalist vision, he and his SLFP ministers are increasingly concerned with securing its traditional nationalist core, flirting with the Sinhala chauvinism against which they had campaigned.<sup>6</sup>

Ex-President Rajapaksa, whose charisma and civil war success have kept him popular with many Sinhalese, retains the loyalty of most of the SLFP, particularly local party activists, most of whom have never accepted the unity government. His attempt to regain control of the party benefits from the dissatisfaction of SLFP ministers who joined the government but now chafe at what they feel is UNP arrogance and the prime minister's unilateral policymaking. Looming large with them are local elections, originally due in 2015 but repeatedly postponed for fear the Sirisena-led SLFP might trail not only the UNP, but also Rajapaksa supporters, who operate in parliament as the “joint opposition” and are expected to form a new party. Three provincial council polls, with the same risk for Sirisena and his SLFP wing, are also scheduled in 2017.<sup>7</sup> The SLFP is a resentful junior coalition partner, whose ministers see uniting their own party – thus making peace with Rajapaksa – as the best way to regain control of government.

The Rajapaksa clan would need to overcome significant hurdles to return to power before 2020, the earliest that parliamentary elections can be called.<sup>8</sup> A more likely scenario is deepening coalition dysfunction, as the SLFP bides its time and prepares to regroup for both parliamentary and presidential elections that year, with Sirisena at growing risk of losing the SLFP presidential nomination to Mahinda's brother, ex-Defence Secretary Gotabaya Rajapaksa.<sup>9</sup> Meanwhile, the Rajapaksas are exciting

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<sup>6</sup> Sirisena's pledges to defend the military and criticism of NGOs increasingly recall Rajapaksa's presidential speeches. “Sri Lanka risks censure as president falters on war legacy”, Agence France-Presse (AFP), 10 March 2017.

<sup>7</sup> North Central, Sabaragamuwa and Eastern Provincial Council terms end in 2017. Unlike local government elections, the government appears to have no way of postponing them. Crisis Group interviews, constitutional lawyers, Colombo, March 2017.

<sup>8</sup> Unable to be president again due to the nineteenth amendment, Mahinda's only route to power is as Sirisena-appointed prime minister. Sirisena would need to abandon the unity government and constitutional reform, which requires a two-thirds majority and the Rajapaksas strongly oppose. It would also require an unlikely UNP split, with eighteen deputies joining the 95 SLFP and allied deputies in the 225-seat parliament to back a Rajapaksa-led SLFP government.

<sup>9</sup> Gotabaya, though never elected, is increasingly seen as an SLFP unifier, as presidential candidate or Sirisena's prime minister. He is thought to have support in the Sinhala middle class, due to his war role and reputation as a no-nonsense administrator. Liberals, governance advocates and minorities, who believe him responsible for human rights abuses, widely fear him. Crisis Group

their base, attacking constitutional reform and transitional justice as capitulations to anti-Sinhala and foreign forces.<sup>10</sup> Government ministers and others have said the family funds militant Buddhist monks and others to destabilise the ruling coalition, supported by pro-Rajapaksa elements in the military. Many civil servants are hedging their bets, concerned that the government is weak and fearful of retribution, should Mahinda or one of his brothers return to power.<sup>11</sup>

### B. *The Economy: Danger Signs Grow*

Inheriting large budget deficits and dangerously high debt, the government has been unable to deliver on election promises of jobs and improved living standards. Prolonged drought, which raised food prices and increased household debt levels, now threatens serious social and economic disruptions.<sup>12</sup> Facing a balance of payments crisis and with few other hard-currency sources, the government has been forced to do a U-turn on its campaign pledges and cancel what it had called wasteful, exploitive Chinese-funded infrastructure projects. A government plan to lease the port and much land for a Chinese-controlled industrial zone in Rajapaksa's home Hambantota district was met with violent protests in January 2017, organised by Rajapaksa supporters and causing delays in finalising the long-term lease, which would pay off \$1.1 billion of the \$8 billion owed to the Chinese.<sup>13</sup>

Despite the prime minister's repeated attempts to articulate an attractive export- and foreign-investment-oriented economic strategy, officials have issued multiple, often conflicting policy statements. Disagreements between the UNP and SLFP about the costs of International Monetary Fund (IMF)-supported economic restructuring, compounded by public anxiety at the absence of visible development projects and opposition criticism, have led Sirisena to reverse or modify numerous UNP tax and liberalisation proposals. The resulting policy uncertainty has contributed to lower

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interviews, politicians, journalists, Colombo, March 2017; also, "I have self-confidence to perform the duties of Presidency well: Gota", *Daily Mirror* (Sri Lanka), 19 October 2016.

<sup>10</sup> The Rajapaksa-led opposition's 2017 May Day rally was one of the largest in Sri Lanka's recent history. The national association of professionals, Viyath Maga (Right Way), aligned with Gotabaya Rajapaksa, is of growing importance.

<sup>11</sup> Crisis Group interviews, Colombo, March 2017.

<sup>12</sup> The budget deficit fell to 5.6 per cent of GDP in 2016, but total public debt reached 76 per cent of GDP at the end of 2015, and the government must repay some \$4 billion over the next eighteen months. Marwaan Macan-Markar, "Sri Lanka struggles to build foreign reserves", *Nikkei Asian Review*, 3 April 2017. "Drought may leave 80,000 Sri Lankans in need of 'life-saving' food aid", Integrated Regional Information Networks (IRIN), 6 March 2017. The drought has exacerbated inflation and could cost the economy \$1 billion. Crisis Group interview, UN official, March 2017; "Sri Lanka's national inflation soars to 8.6-pct in March", *Economy Next* ([www.economynext.com](http://www.economynext.com)), 21 April 2017.

<sup>13</sup> "Clashes erupt as Govt. launches southern development projects", *The Sunday Times* (Sri Lanka), 8 January 2017. While Rajapaksa bears significant responsibility for the economic woes, the impact of heavy reliance on Chinese-financed infrastructure projects was not felt while he was in office. This allows him to criticise Sirisena's concessions to Chinese loan repayment demands many Sri Lankans feel are humiliating. The port deal has also provoked Indian and U.S. concerns about potential Chinese military use. Crisis Group interviews, diplomats, March 2017.

than expected foreign direct investment.<sup>14</sup> Any benefits from the broad reforms encouraged by the IMF and investors would appear only over years, but their costs would be felt now, in higher taxes, lower subsidies, budget cuts and trade and investment policies giving foreign companies and governments politically controversial privileges.

The government and global financial institutions and development agencies should explore ways to support the economy while mitigating these and other potential sources of social conflict. Otherwise, the government risks a repeat of 2002-2004, when the social costs of abrupt economic liberalisation undermined support for a UNP government and contributed to the collapse of the peace process with the Tamil Tigers, paving the way for Mahinda Rajapaksa's 2005 election as president on a Sinhala nationalist, anti-ceasefire platform.<sup>15</sup> Sri Lanka is caught between economic paradigms whose interaction has spurred conflict in the past: liberalisation that further transforms the economy according to the needs of global and regional capital, with likelihood of nationalist resistance and increased inequality; and statist resistance to privatisation or trimming of an oversized state many citizens still see as the preferred employer.

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<sup>14</sup> In June 2016, the IMF and Sri Lanka agreed on a three-year "Extended Funds Facility" with \$1.5 billion support for reforms. In March, the IMF reported mixed results in implementation, with better tax collection slow to materialise. "IMF Staff Concludes Visit to Sri Lanka to Discuss Progress of Economic Reform Program", IMF, 7 March 2017. A draft tax law prepared with IMF help has been criticised. "New tax law: Capitulating to the IMF", *The Sunday Times* (Sri Lanka), 2 April 2017.

<sup>15</sup> Sunil Bastian, "Politics of market reforms and the UNF-led negotiations", in Jonathan Goodhand et al. (eds.), *Conflict and Peacebuilding in Sri Lanka: Caught in the Peace Trap?* (Abingdon, 2011); and, for an overview of the politics of economic reforms, Bastian, "Understanding the current regime", Groundviews (groundviews.org), 4 January 2017.

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### III. The Politics of Investigations and the National Security State

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For the unity government, fulfilling election pledges about corruption and rule of law is essential to retaining support needed to achieve its agenda's more controversial aspects: a new constitution with greater powers for provinces and dealing with the war legacy. With little to show for two years of investigations, however, many supporters of reform now view the government's *yahapalaanaya* (good governance) claims derisively.<sup>16</sup>

#### A. Sirisena's Bombshell Speech

On 12 October 2016, in a speech before military veterans and their families, President Sirisena angrily denounced his own government's investigations into alleged corruption, saying those undertaken by the police and the Commission to Investigate Allegations of Bribery or Corruption (CIABOC) were politically motivated.<sup>17</sup> This was met with shock and anger by civil society activists and sections of the public that had backed his good governance agenda. By criticising CIABOC and the Financial Crimes Investigation Division of the police, demanding they inform him in advance of filing charges in major cases and appearing to try to protect military suspects, he was seen as undermining the independence of investigations.<sup>18</sup>

Four days later, CIABOC Director General Dilrukshi Wickramasinghe humiliatingly resigned.<sup>19</sup> In subsequent weeks, courts released on bail all remaining military intelligence personnel held on suspicion of involvement in murder and abduction cases – including the January 2009 murder of editor Lasantha Wickrematunge and the 2010 abduction of cartoonist Prageeth Ekneligoda. The speech and the releases cast a cloud over ongoing investigations and deepened doubts about government willingness to pursue cases against the security forces and associates of the former regime in the face of military resistance.<sup>20</sup>

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<sup>16</sup> "Yahapalaanaya is no joke: President", *Daily Mirror* (Sri Lanka), 9 December 2016.

<sup>17</sup> Sirisena also criticised long detention of military personnel in murder cases and expressed displeasure at ex-Defence Secretary Gotabaya Rajapaksa and retired navy commanders being taken to court on corruption charges and his not being informed before charges were filed. "President warns investigative arms: Don't work to political agendas", *Daily News*, 13 October 2016; "Sri Lanka president intervenes on behalf of accused military men", Journalists for Democracy in Sri Lanka ([www.jdslanka.org](http://www.jdslanka.org)), 14 October 2016.

<sup>18</sup> "President slams Bribery Commission for 'hauling' Gota and navy chiefs to court", *Daily FT*, 13 October 2016.

<sup>19</sup> Wickremesinghe did not explain her resignation. A senior lawyer in the attorney general's department known as a determined investigator willing to pursue hard cases, she is also a close friend of the prime minister. "Crisis continues: Bribery Commission Director General quits", *Daily FT*, 18 October 2016; Crisis Group interviews, lawyers, Colombo, November 2016.

<sup>20</sup> "Army not helping probe – ASG", *Ceylon Today*, 14 October 2016; "Political interference suspected in Prageeth's case", *Sunday Leader*, 20 November 2016. The murder of Wickrematunge, known for articles exposing alleged government corruption, and the abduction and presumed murder of Ekneligoda, both Sinhalese, were two of many attacks on media people in the Rajapaksa era. They received wide international notice. At his death, Wickrematunge was involved in a court battle with Gotabaya Rajapaksa, who sued his paper after articles alleged he accepted kickbacks in the purchase

Those doubts remain, even after new arrests in the Wickrematunge case and in cases related to other attacks on journalists that appear to implicate the highest levels of the Rajapaksa-era defence establishment. On 20 March, police investigators presented court testimony from ex-army commander Sarath Fonseka alleging Gotabaya Rajapaksa oversaw a military intelligence “death squad” responsible for attacks on journalists, including Wickrematunge’s murder. Rajapaksa denied this and said Fonseka had been responsible.<sup>21</sup> On 29 March, in a speech to a military audience, President Sirisena vowed that he would protect “war heroes” from prosecution but not security personnel “who killed journalists, sportsmen or others”.<sup>22</sup>

Despite the progress investigators appear to have made and Sirisena’s stated commitment not to protect military killers, his earlier intervention showed two main prosecution obstacles: party-political tensions in the coalition and a desire to placate and be seen to respect the military and the national security state.

### B. *Party Politics Intervene*

Many Rajapaksa-era criminal cases are complex, involving hard-to-unravel financial transactions, but the lack of high-profile indictments appears at least partly a result of partisan efforts to protect members of the old regime. Sirisena’s intervention responded to and deepened tensions within the government over differing approaches to cases. Responding to widespread criticism of his October 2016 speech, Sirisena complained that SLFP ministers were being investigated for relatively minor improprieties, while investigations into larger fraud and other crimes were being obstructed by unnamed sections of his government.<sup>23</sup> He alleged in particular that certain cases involving accusations against Gotabaya Rajapaksa and the investigation into the 2013 murder of rugby player Wasim Thajudeen were being ignored or blocked.<sup>24</sup>

The lack of decisive response to alleged irregularities in a February 2015 Treasury Bond issue has particularly angered Sirisena and SLFP ministers and become a focus of opposition attacks. A 27 October 2016 report by the parliamentary Committee on Public Enterprises stated that the ex-Central Bank governor, a friend of the prime

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of MiG fighter jets. “MiG deal: court issues warrant through Interpol to arrest Gota’s first cousin Weeratunga”, *Colombo Telegraph*, 20 October 2016.

<sup>21</sup> In February 2017, the police Criminal Investigation Department arrested military intelligence officers allegedly responsible for attacks on journalists, including Wickrematunge’s murder. “Sri Lanka ex-leader’s brother ‘led death squad’”, AFP, 20 March 2017; “Gotabaya denies role in killings”, *The Hindu*, 21 March 2017; “‘Whodunnit’ high noon duel between Gota and Fonseka”, *The Sunday Times* (Sri Lanka), 2 April 2017. Fonseka led the military’s final offensive against the Tamil Tigers in 2009 but broke with the Rajapaksas and challenged Mahinda for president in 2010. Following his defeat, Fonseka was convicted of corruption and other charges and stripped of his rank. Sirisena named him field marshal in 2015 and minister in 2016 after his release in May 2012.

<sup>22</sup> “Sri Lanka’s leader backs arrests of ‘official’ killers”, AFP, 29 March 2017.

<sup>23</sup> This includes at least one minister, known as close to Sirisena, charged with misusing state vehicles. “Crisis continues: bribery commission director general quits”, *Daily FT*, 18 October 2016.

<sup>24</sup> “President concerned – probe on Dubai account has ceased, Thajudeen case has gone under”, *The Sunday Times* (Sri Lanka), 6 November 2016. Gotabaya Rajapaksa has rejected all allegations of wrongdoing. Investigations into Thajudeen’s murder reportedly implicated members of the Rajapaksa family, who denied any involvement. Greg Bearup, “Phantoms of Mahinda Rajapaksa and Sri Lanka’s reign of terror”, *The Australian*, 26 November 2016.

minister who appointed him, was directly responsible for a possibly illegal deal believed to have lost the government millions of dollars. After SLFP and opposition demands for criminal investigations, Sirisena appointed a commission of inquiry in January to investigate the alleged scam further. Public hearings regularly offer new detail that keeps the controversy, and coalition divisions, alive.<sup>25</sup>

Partisan interests also appear to be a key obstacle to investigations against Rajapaksa family members. The prime minister is widely seen as working to ensure they do not proceed too far, so as to keep the Rajapaksas politically alive and the SLFP divided and weakened.<sup>26</sup> Others more sympathetic to the UNP argue that the president and SLFP ministers are interested in going easy on the Rajapaksas, in exchange for a reunified, Sirisena-led SLFP.<sup>27</sup> Senior government officials continue to promise early breakthroughs.<sup>28</sup> Regardless of the causes, the more time passes without prosecution of major corruption and political crimes, the more people will lose faith the government is different from its predecessors. The government would then have lost its most powerful asset.

### C. *Fear and Resistance of the Military and Security State*

Sirisena's corruption intervention was one of a series of speeches praising military audiences' heroism and promising to preserve their honour and protect national security.<sup>29</sup> It was followed two weeks later by one that attacked NGOs, journalists and "traitors" for misusing their freedom to criticise his national security policies.<sup>30</sup>

Following its victory over the Tamil Tigers, the military is very popular among Sinhalese, a fact the Rajapaksas exploit, given their leadership roles at the end of the war. This helps explain why, as a well-placed political analyst said, "Sirisena has a soft spot for the military. He is giving them a big margin and is protecting them to a large extent .... He wants to keep them happy".<sup>31</sup> He and other officials appear both

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<sup>25</sup> Excess money earned in the deal is widely believed to have gone to the UNP to pay election debts. The former Central Bank Governor, Arjuna Mahendran, and the prime minister deny any wrongdoing. "Mahendran hits back", *Daily Mirror* (Sri Lanka), 7 February 2017. While the prime minister publicly welcomed the report, it was released only after strenuous resistance by the committee's UNP members, who challenged its conclusions. Crisis Group interviews, politicians and activists, Colombo, November 2016. For more, see Crisis Group Report, *Sri Lanka Between Elections*, op. cit., p. 5; and "Sri Lanka panel questions central bank chief over bond sale", Reuters, 21 February 2017.

<sup>26</sup> Crisis Group interviews, journalists, politicians, lawyers, Colombo, March 2017. Critics of the UNP note that the police are under the law and order ministry, led by Sagala Ratnayaka, a UNP minister and confidante of the prime minister. Crisis Group interviews, Colombo, November 2016.

<sup>27</sup> Crisis Group interviews, politicians, diplomats, Colombo, March 2017. In a 24 January parliament speech, opposition and Tamil National Alliance leader R. Sampanthan accused the main parties of protecting each other. "UNP-SLFP hand in glove on corruption: Opposition Leader", *Daily FT*, 26 January 2017.

<sup>28</sup> Crisis Group interview, Colombo, March 2017; "Mangala says Lasantha and Prageeth investigations moving forward despite delays", *Colombo Telegraph*, 22 January 2017.

<sup>29</sup> Explaining why he objected to Gotabaya and the former navy commanders being taken to court by CIABOC, Sirisena argued that "the public perception should be understood when action is taken. We should not act against the will of the people". "President concerned – probe on Dubai account has ceased, Thajudeen case has gone under", *The Sunday Times* (Sri Lanka), 6 November 2016.

<sup>30</sup> "President slams some NGOs, media, traitorous forces", *Daily Mirror* (Sri Lanka), 27 October 2016.

<sup>31</sup> Crisis Group interview, Colombo, November 2016.

generally content with the military's role in the security state and uncertain about the loyalty of at least some elements and reportedly fearful that a section of military intelligence, still aligned with Gotabaya, will be deployed in a pro-Rajapaksa destabilisation campaign.<sup>32</sup> The government avoids policies the military is thought to oppose, rather than proactively countering a threat.

Sirisena's 12 October speech reportedly was sparked by a report, later disproved, from the director of military intelligence, Suresh Salley, detailing allegedly growing opposition to government policies within the military.<sup>33</sup> His November decision to replace that director, widely believed a Gotabaya loyalist, followed sustained civil society calls for the removal, which grew louder after that speech.<sup>34</sup>

#### D. *Bureaucratic and Political Resistance to Reform*

In addition to military interference and non-cooperation with investigations in which military intelligence personnel are suspects, powerful bureaucrats and politicians fight to keep the security state beyond the control of the judiciary and civilian leadership.<sup>35</sup> Key officials in the justice and defence ministries, police and attorney general's office have taken positions or made statements that directly undermine efforts to reform the institutions responsible for decades of major human rights violations.<sup>36</sup> Among the most important instances of resistance:

- Despite promises to citizens and the UN, the government has yet to repeal the draconian Prevention of Terrorism Act (PTA). A proposed replacement Counter-Terrorism Act (CTA) a military- and police-dominated committee drafted added clauses that increase the likelihood of state abuses.<sup>37</sup> Following outcry when it was leaked in October 2016 and eager to regain the European Union's human rights-linked Generalised Scheme of Preferences Plus (GSP+) tariff relief, the government initially removed some of the most troubling bits.<sup>38</sup> Nonetheless, the

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<sup>32</sup> The Rajapaksas are alleged to use considerable money to fund protests, militant Buddhists and, possibly, rogue military intelligence-unit actions. Crisis Group interviews, journalists, government officials, advisers, Colombo, November 2016.

<sup>33</sup> Crisis Group interviews, lawyers, diplomats, journalists, Colombo, November 2016.

<sup>34</sup> Many wondered why Sirisena had not removed Salley earlier, given his close links to Gotabaya. According to a government adviser, "Sirisena assumed Salley would follow orders. He generally assumes subordinates will follow his orders, despite this being proved wrong repeatedly in his attempt to win control of the SLFP". Crisis Group interview, Colombo, November 2016.

<sup>35</sup> Some are Sinhala nationalists who believe a strong security state is needed to keep potential terrorists at bay; others may be concerned about being implicated in abuses that reforms could reveal. Crisis Group interviews, government officials, lawyers, Colombo, March 2017.

<sup>36</sup> In some of the cases below, protests, at times backed by diplomatic pressure, have helped mitigate the resistance, indicating the current government, unlike that of the Rajapaksas, is still open to persuasion from constituencies whose support it needs.

<sup>37</sup> Security force officials and lawyers with the attorney general's department reportedly vetoed a more human rights-friendly draft. Crisis Group interviews, lawyers, government officials, Colombo, November 2016.

<sup>38</sup> In January, the European Commission (EC) announced support for renewal of GSP+ trade benefits to Sri Lanka, which depend on effective implementation of 27 human rights, labour and environmental conventions. The EC revoked GSP+ privileges in 2010 for serious human rights failings. The EC stressed need for further progress on implementing the 27 conventions, in particular bringing anti-

latest version would still give the state dangerously broad and ambiguous powers.<sup>39</sup> Arrests under the old law have ceased, but some 125 people arrested under it are in prison or on bail awaiting trial, many for years.<sup>40</sup>

- ❑ A draft revision of the Criminal Procedure Code released in October 2016 contained new restrictions on suspects' access to a lawyer while in detention. The justice minister said the restrictions were necessary to prioritise victims' rights. Following strong condemnation from lawyers and rights activists and worries the draft would not meet criteria for regaining GSP+, the prime minister said it would be amended. However, the version approved by the cabinet on 25 April contains provisions the Human Rights Commission of Sri Lanka earlier found "whittles down the rights of detainees in police custody to have unimpeded access to lawyers".<sup>41</sup>
- ❑ In December, the UN Committee Against Torture (UNCAT) issued a strongly critical report on the "routine" use of torture by the security sector and near complete lack of accountability for wartime and post-war human rights violations. Many of these concerns were echoed the next month in the UN Special Rapporteur on Torture's report, which found a continuing "culture of torture" in the police. Both reports urged repeal of the Prevention of Terrorism Act.<sup>42</sup>
- ❑ Both UN reports also recommended overhaul of the weak witness protection program, originally drafted by the Rajapaksa government, to ensure independence from the police and ability to protect victims and witnesses. There is no sign the government has reviewed or strengthened the law, as it committed to do in the 2015 Human Rights Council. The national protection authority established under

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terrorism legislation in line. "Commission Proposes Enhanced Market Access for Sri Lanka as Reform Incentive", EC press release, 11 January 2017. The European Parliament and Council had until 15 May to object to the EC "proposal" but neither did.

<sup>39</sup> The cabinet approved a new draft CTA on 25 April 2017, two days before the European Parliament voted down a resolution to block Sri Lanka gaining GSP+. The draft defines "terrorism-related offences" very broadly and authorises extended detention and broad powers of investigation without meaningful judicial oversight and potentially significant restrictions on suspects' access to counsel. The draft has been widely condemned by rights activists, with the Tamil National Alliance criticising it in unusually strong terms. TNA press release, 4 May 2017.

<sup>40</sup> "PTA no longer operational – SCRM chief", *Daily FT*, 3 March 2017. Crisis Group interviews, lawyers and activists, Colombo, March 2017.

<sup>41</sup> "Amendment to the Code of Criminal Procedure Act: HRCSL sets out its recommendation", *Colombo Telegraph*, 16 March 2017. The government has been widely criticised for the secretive way in which it drafted the CTA and Criminal Procedure Code amendments, even refusing to share drafts with the Human Rights Commission, which is mandated to review such legislation. "Leaked version: Amendment to code of criminal procedure", Groundviews, 27 April 2017.

<sup>42</sup> "Report of the Special Rapporteur on torture ... on his mission to Sri Lanka", 22 December 2016; "Concluding observations on the fifth periodic report of Sri Lanka", UNCAT, 27 January 2017. The November UNCAT session in Geneva was a major embarrassment for the government following revelations its delegation included the former head of the Criminal Investigation Department (CID) of the police, which is credibly accused of torture and sexual violence. "UN Committee on Torture demands answers from DIG on Lankan delegation", *Daily FT*, 17 November 2016.



the law includes officials against whom allegations of involvement in intimidation and cover-ups have been made.<sup>43</sup>

The government has taken some positive steps, but their impact will depend on the willingness of officials to comply with their legal obligations.

- ❑ The Right to Information (RTI) Act parliament approved in June 2016 and in force since February gives potentially powerful tools to citizens to make authorities more transparent and accountable. The RTI Commission it established has shown itself to be proactive, and NGOs and individual citizens have filed important requests for information on land issues and missing persons.<sup>44</sup> For the act to be effective, the government will need to give adequate resources to the commission and officers in public bodies tasked with responding to requests.
- ❑ After May 2016 ratification, the cabinet approved in February a draft incorporating the international convention on enforced disappearances into domestic law. Criminalisation of disappearances, if parliament adopts the law, would be a significant step long sought by human rights defenders, but enforcement requires a fundamental shift in how the state relates to victims of abuses by its own personnel. As the above-cited UN reports make clear, a strong law (also incorporating an international convention) has not ended torture and has only rarely been used to prosecute alleged state perpetrators.<sup>45</sup>

#### E. *Continued Impunity for Militant Monks*

Despite election promises to crack down on anti-Muslim agitations, the government has not used laws criminalising hate speech and has sent mixed signals in response to renewed threats against Muslims and Tamils by militant Buddhist groups actively cultivated by the Rajapaksa government.<sup>46</sup> In November 2016, the leader of the best-known militant Buddhist group, Bodu Bala Sena (Buddhist Power Force, BBS), threatened violence against Colombo Muslims if a local Salafist activist who criticised

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<sup>43</sup> The Special Rapporteur's report recommends the law be strengthened "to make the National Authority set up under the Act an independent and accountable agency not managed only by the police but subject to judicial oversight". The witness protection and anti-torture responsibilities given to Deputy Solicitor General Yasantha Kodagoda have been widely criticised, given his efforts in Geneva to block UN investigations and alleged involvement, as documented by the International Independent Group of Eminent Persons, in undermining past human rights investigations, allegedly including by witness intimidation. "Putting the Wolf to Guard the Sheep: Sri Lanka's Witness Protection Authority", International Truth and Justice Project, February 2017.

<sup>44</sup> "Sri Lanka's new information law puts corrupt officials in crosshairs", Nikkei Asian Review, 27 February 2017.

<sup>45</sup> According to UNCAT, *op. cit.*, "only 17 cases of torture have been filed under the Convention against Torture Act since 2012 and only 2 have resulted in convictions, suggesting that only a small number of allegations of torture have actually been investigated".

<sup>46</sup> The 2007 act incorporating the International Convention on Civil and Political Rights makes it a crime to "advocate national, racial or religious hatred that constitutes incitement to discrimination, hostility, or violence"; offences are punishable by up to ten years imprisonment. This clause has been applied only once. Gehan Gunatileke, "Hate Speech in Sri Lanka: How a New Ban Could Perpetuate Impunity", Oxford Human Rights Hub, 11 January 2016. On Rajapaksa government support for militant Buddhists, see Crisis Group Report, *Sri Lanka's Potemkin Peace*, *op. cit.*, pp. 27-30.

it was not arrested.<sup>47</sup> On 19 November, BBS held its largest rally in over two years, denouncing the Muslim threat as it marched to the country's holiest Buddhist temple in Kandy. This came in the wake of a widely circulated videotaped incident in which a prominent monk, Ampitiye Sumana, was seen abusing and threatening a Tamil civil servant in Batticaloa for resisting attempts to settle Sinhalese in the Tamil district. No action was taken against the monk.<sup>48</sup>

Rising tensions prompted the president to call an emergency security council meeting, at which he announced that anyone inciting racism would be arrested. Days later, Justice Minister Wijeyadasa Rajapakse met with BBS leader Galagoda Atte Gnanasara and Sumana with the declared purpose of encouraging dialogue among communities.<sup>49</sup> On 22 December, Gnanasara was among the monks in attendance at a meeting Sirisena held on preserving Buddhist archaeological sites.

Unlike during the Rajapaksa regime, the police now intervene to keep the peace when communal tensions rise, and the government does not promote violence as a political instrument.<sup>50</sup> But appearing to treat Gnanasara and other militant monks as legitimate Sinhala Buddhist representatives has eroded faith among Muslims and those in other communities hoping to see an end to impunity and attacks on minorities and makes militant forms of nationalism seem acceptable.

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<sup>47</sup> The activist, head of Sri Lanka Towheed Jamaat, was arrested in days, along with a Buddhist activist who had called for his murder. Dharisha Bastians, "More equal than others", *Daily FT*, 24 November 2016.

<sup>48</sup> "You Tamil dog, I will kill you' Buddhist Monk Tells Grama Sevaka in Batticaloa", *Colombo Telegraph*, 12 November 2016.

<sup>49</sup> "Arrest all inciters, President orders", *Daily Mirror* (Sri Lanka), 20 November 2016. The Office of National Unity and Reconciliation called for "the strictest action ... against persons or groups who act to provoke disharmony ... along ethnic and religious lines". "Statement by ONUR on the Rise of Hate Speech in the Recent Past", 25 November 2016. "Govt. to start dialogue among religious and ethnic groups", *Daily Mirror* (Sri Lanka), 23 November 2016; "Justice Minister holds talks with BBS and Batticaloa monk", *Colombo Gazette*, 21 December 2016.

<sup>50</sup> A court order blocked a planned rally in Batticaloa on 3 December designed to link up with a march led by BBS leader Gnanasara. Police brought in armed reinforcements to control crowds led by Ampitiye Sumana, who was later charged with organising an unlawful assembly and released on bail. "Unruly Batticaloa monk summoned to court", *Ceylon News*, 6 December 2016.

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## IV. Transitional Justice Without a Transition

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The security services' successful resistance to investigations and legal reforms, combined with Sirisena's pro-military statements, add to deep concerns about the government's ability and willingness to pursue the transitional justice policies promised to the UN Human Rights Council in 2015.<sup>51</sup> Having established none of the agreed institutions – offices on missing persons and reparations, a truth commission and a special court – the government negotiated a “technical roll over” resolution in March to give it more time to implement its initiatives.<sup>52</sup>

Unless there is a major change in the government's approach, the extra time is unlikely to make a big difference. Transitional justice has always been the reform issue with the least backing in government and the Sinhala public, consequently the most dependent on international pressure. The government has done little to build greater support among Sinhalese and Muslims by making a case for the link between transitional justice and the rule-of-law/anti-impunity agenda that has significant backing in all three communities, or explaining the specific benefits of a transitional-justice program.<sup>53</sup> By contrast, the Rajapaksa-led opposition has defined transitional justice for many Sinhalese as a pro-Tamil, anti-military agenda.

The lack of progress on establishing the mechanisms and making the rule-of-law reforms necessary for those mechanisms to function effectively appears to confirm long-standing criticisms that transitional-justice promises were principally designed to win international support and manage and ultimately end Human Rights Council oversight. Nonetheless, the March 2017 resolution and the two additional reports it mandates by the High Commissioner for Human Rights offer a framework for continued domestic and international engagement in support of greater efforts to address the legacy of war and strengthen the rule of law.

### A. *Transitional Justice Mechanisms in Limbo*

The government and activists have largely kept the transitional justice focus on the four promised big mechanisms, rather than creating the conditions for their success by putting checks on the national security state and addressing impunity. Even so, none of the mechanisms has been established. Other than parliament's approval of the Office of Missing Persons in August, 2016 saw no progress.<sup>54</sup> The office itself

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<sup>51</sup> Crisis Group Report, *Jumpstarting the Reforms Process*, op. cit., pp. 24-29.

<sup>52</sup> “Promoting reconciliation, accountability and human rights in Sri Lanka”, HRC 34/1, 24 March 2017. Many Tamil groups and some human rights activists criticised the two-year extension, which had no additional conditions. “Joint Appeal by Tamil Civil Society Organisations, Political Parties and Trade Unions”, March 2017.

<sup>53</sup> “Opinion Poll on Constitutional Reform – Topline Report”, Centre for Policy Alternatives, April 2017. For arguments that in Sri Lanka anti-impunity and transitional justice measures need to be intertwined and would have backing among all communities, see Niran Anketell, “Forgetting the Past: A warning”, *Daily Mirror* (Sri Lanka), 22 March 2017; and Gehan Gunatilleke, “Confronting the Complexity of Loss”, Law and Society Trust, 2015.

<sup>54</sup> In 2016, the Secretariat for Coordinating Reconciliation Mechanisms (SCRM) was launched, led by businessman Mano Tittawella and reporting to the prime minister. It sees itself as “the apex body that coordinates all government reconciliation mechanisms”. Crisis Group interview, Tittawella,

remains in limbo, as Sirisena has put obstacles in its path, including not assigning it to a ministry, which is necessary for it to function.<sup>55</sup>

The government has repeatedly pushed back the timetable for the other three mechanisms: a reparations office, truth commission and special court. The whole project increasingly appears on hold, with the president worried about military discontent and the potential for the Rajapaksas to exploit it.<sup>56</sup> Ex-President Chandrika Kumaratunga, a Sirisena ally, made clear nothing will be done to establish the court before completion of the slow-moving constitutional reforms process when she told reporters: “If you start the war crimes tribunals now, you can be sure there will be no constitution. There will be such an uproar in the country. ... We have to prioritise and see what is more important”.<sup>57</sup>

Regular statements by the president and prime minister opposing any role for foreign judges in the special court, as agreed in the 2015 Human Rights Council resolution, also raise doubts the government will set up this body.<sup>58</sup> Sirisena said on 26 November that he was writing to ask U.S. President-elect Donald Trump to “free” the military from “accusations” it had committed war crimes and to end U.S. support for Council action.<sup>59</sup> Statements casting doubt on the court carry particular weight given the failure to pursue even cases in which the Sinhala public is interested and supportive, like the Wickrematunga murder. The surprise acquittal in December 2016 of all accused in the 2006 murder of N. Raviraj, a Tamil National Alliance

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Colombo, November 2016. A working group aided by two international experts prepares draft laws for the four transitional justice mechanisms but has few staffers and no one below Tittawella with bureaucratic experience or political influence. It is thus hostage to the lack of direction and political will from the top. “Coordinated” by but independent of SCRM, the Office of National Unity and Reconciliation (ONUR), led by ex-President Chandrika Kumaratunga, has significant UN funding but no clear mission or significant policy impact. SCRM reportedly may be restructured as a formal government “authority” with cabinet approval. Crisis Group interviews, SCRM staff, Colombo, March 2017. Until political leaders commit to coherent reconciliation and transitional justice policies, however, neither body can play more than a limited role.

<sup>55</sup> An amendment the cabinet approved in February needs parliament’s approval. The president’s refusal to make the office operational largely responds to strong criticism of the law by the Rajapaksa-led opposition and is unlikely to change. “He won’t touch it”, said a well-connected activist. “He sees it as slippery slope that will get the joint opposition up in arms”. Crisis Group interviews, government advisers, human rights lawyers, Geneva, Colombo, February-March 2017.

<sup>56</sup> This was reportedly the president’s blunt message to the members of the consultation task force (CTF) with whom he met on 30 January. Crisis Group interviews, CTF members, March 2017.

<sup>57</sup> “Govt. to launch hearts and minds campaign to win support for constitution: CBK”, *Daily FT*, 16 February 2017. Kumaratunga, previously supportive of trials, also said once a new constitution and the Office of Missing Persons are in place, “there would not be any necessity to have courts to probe war crimes”. “CBK drops bombshell, says no need for war crimes probe”, *Colombo Telegraph*, 2 February 2017.

<sup>58</sup> On 4 March, the president said, “I will not listen to ... calls to prosecute my troops”. “Sri Lanka risks censure as president falters on war legacy”, AFP, 10 March 2017. The prime minister appeared to suggest a truth commission could be a possible substitute for a war crimes court. “‘Hybrid court’ not feasible: Prime Minister”, *Daily News*, 3 March 2017. There has been no effort to introduce legislation to make prosecution of war crimes and crimes against humanity possible, which would be essential to the ability to consider the worst wartime atrocities.

<sup>59</sup> “Sirisena to write to Trump seeking relief for Sri Lanka from human rights allegations”, *The New Indian Express*, 27 November 2016.

parliamentarian, dented slim hopes the judiciary might fairly try cases in which the accused are military or police and the victims Tamil.<sup>60</sup>

With war-related prosecutions off the table, the government may eventually establish a truth commission.<sup>61</sup> Properly designed, staffed and publicised, it might have potential to inform each community about the suffering of others in ways that build trust and generate the acknowledgement of state crimes Tamil victims have long been denied. That might help reduce the Tamil Tigers' continued appeal for many Tamils and to change Sinhala attitudes enough to open political space for war-related trials. But Sri Lanka's specific history of commissions of inquiry that ratify, rather than end, impunity, lead many to fear a truth commission would at best merely substitute for eventual trials.<sup>62</sup> To mitigate this risk, no truth commission should be created until there is tangible progress toward prosecutions in emblematic human rights cases, ideally led by a properly-resourced special prosecutor's office, independent of the attorney general.<sup>63</sup>

#### B. *National Consultations with No Visible Government Support*

The government's failure to publicise or build cross-ethnic support for even the less controversial of its reconciliation and transitional justice initiatives is striking.<sup>64</sup> Lack of enthusiasm was evident in the treatment of its own national consultations on "reconciliation mechanisms". Appointed by the prime minister in January 2016, the eleven-member, multi-ethnic Consultations Task Force on Reconciliation Mechanisms (CTF) was composed entirely of well-known civil society advocates. Working with fifteen "zonal task forces", it held hearings in all provinces and received over 7,000

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<sup>60</sup> The case was heard before an all-Sinhala jury. In July 2016, a similar jury acquitted six soldiers of the 1996 massacre of 26 Tamil civilians at Kumarapuram in the eastern port city Trincomalee. "Impunity reigns in Sri Lanka: The Kumarapuram massacre and acquittals", PEARL, March 2017.

<sup>61</sup> With little backing in government and no larger momentum behind it, this is far from guaranteed. The foreign minister told the Human Rights Council on 28 February a draft law for a "truth seeking commission" would be presented to cabinet "within the next two months". "Statement to the High-Level Segment of the 34th Session of the UN Human Rights Council Geneva", 28 February 2017. Draft laws for a truth commission and reparations office have been prepared by the reconciliation "working group" that reports to SCRM and the prime minister, but he made no mention of the latter. Crisis Group interviews, government officials, March 2017.

<sup>62</sup> Indumini Randeny and Isabelle Lassée, "The Politics of Sequencing: A Threat to Justice?", South Asian Centre for Legal Studies, November 2016.

<sup>63</sup> Numerous Sri Lankan commissions of inquiry have recommended such an office. See Crisis Group Report, *Jumpstarting the Reform Process*, op. cit., p. 9. Should it be successful at prosecuting the non-battlefield cases noted by the UN High Commissioner, the office could later be strengthened to deal with the alleged war crimes to be handled by the UN-mandated special court. "Report of the Office of the United Nations High Commissioner for Human Rights on Sri Lanka", 10 February 2017, pp. 8-10.

<sup>64</sup> On 2 May, the Cabinet approved a long-delayed National Policy on Reconciliation and Coexistence, prepared by the Office of National Unity and Reconciliation (ONUR). The policy argues power sharing and recognition of ethnic and religious pluralism are necessary to reconciliation. The "National Action Plan" that is due to follow will need strong backing from the president and prime minister to be effectively implemented. "National policy on Reconciliation and Co-existence approved", *Daily News* (Sri Lanka), 4 May 2017.

submissions from the public.<sup>65</sup> However, the president and prime minister ignored its report and senior ministers attacked it, particularly for its endorsement of a role for foreign judges.<sup>66</sup>

Public distancing from the report was only the most obvious example of reluctance to support the consultations process, which from the beginning faced delays and complications. Lack of backing from government leaders and minimal media outreach reduced public awareness of hearings and the call for submissions, particularly among Sinhalese. Failure to develop an effective media campaign was due in part to the process' ad hoc, civil society-led nature, which also resulted in bureaucratic hurdles for paying staff and other expenses that led in turn to frustration. Despite assurances of cooperation from civilian and military leaders, some who attended hearings in the north and east, as well as members of the zonal task forces, were later questioned and intimidated by the military and police.<sup>67</sup> All this limited the consultations' ability to generate a national conversation on and support for transitional justice and other reconciliation means.

Nevertheless, the report is a landmark that offers a roadmap for the changes needed if the government decides it is serious about addressing the war legacy. It articulates the stories of victims from all communities and builds on them and preferences of the war-affected to develop practical recommendations for how all four transitional justice mechanisms could best support reconciliation and democracy. Crucially, it reminds the government of the many steps it must still take, independent of the four mechanisms, to address the immediate needs of conflict-affected communities in the north and east – on livelihoods, land, military economic activities and surveillance – and to strengthen rule of law for all.<sup>68</sup>

The failure to pay more attention to these enabling conditions has contributed to the lack of progress. Domestic and international focus on the four mechanisms – and civil society preoccupation with educating people in the international language of transitional justice – diverted attention and energy from many reforms needed for those mechanisms to function effectively: reducing the security state's political influence, repealing the Prevention of Terrorism Act, creating effective witness protection, ending military surveillance and intimidation of activists in the north and east and prosecuting key corruption and political murder and abduction cases. These steps would help open space for transitional justice by making it safer to discuss and challenge state abuse. Connecting the two agendas would also make it easier to explain transitional justice to Sinhalese audiences.

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<sup>65</sup> "Final Report of the Consultations Task Force on Reconciliation Mechanisms", 17 November 2016, p. viii, at [www.scrm.gov.lk/consultations](http://www.scrm.gov.lk/consultations).

<sup>66</sup> To disappointment of victims, grassroots activists and the CTF, neither the president nor prime minister attended the 3 January report launch, though it was postponed at least once to fit the president's schedule. He met the CTF privately on 30 January, with no announcement. CTF members have criticised the failure to take ownership of the process. "Statement by the former members of the Consultation Task Force on Reconciliation Mechanisms (CTF)", 15 March 2017.

<sup>67</sup> Crisis Group interviews, CTF members, Colombo, March 2017.

<sup>68</sup> See in particular its chapter VI, "Transitional justice beyond the four mechanisms".

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## V. Growing Discontent in the North

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The growing doubts about government commitment to even a basic transitional justice process is further weakening low levels of trust among Tamils in the north and east. The second half of 2016 saw little progress on the confidence-building measures the Sirisena government had promised. The slow but steady return of military-occupied land to Tamil owners in Sirisena's first year waned; indeed, additional land has been taken for new camps.<sup>69</sup> The military continues to run shops, hotels and farms in the north, to the local economy's detriment, and to involve itself in a range of civilian activities. Buddha statues are still being set up with its help in Tamil and Muslim villages where the only near Buddhists are soldiers.<sup>70</sup>

Since the start of 2017, there has been a wave of protests across the north and into the east demanding return of military-occupied land and information on the disappeared. Angry at unfulfilled government promises, communities have launched sit-down strikes outside military camps, and relatives of the disappeared have gone on hunger strikes. Following direct appeals to the president from Tamil National Alliance leader Sampanthan, small amounts of military-held land in Mullaitivu districts were released in March. TNA meetings with the military led to further small releases in April, with more promised, but protests continue.<sup>71</sup>

The sense of grievance generated by the continued heavy military presence and lack of progress on addressing the war legacy is strengthening the nationalist sentiments of many Tamils and increasing tensions with Sinhalese and Muslims.<sup>72</sup> With the Tamil National Alliance leadership working to maintain smooth relations with the government so as to facilitate constitutional negotiations, Tamil disappointment and anger have largely been channelled by Northern Province Chief Minister C.V.

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<sup>69</sup> Since April 2016, there have been some small land releases in the north. There are no public, trusted figures for how much land, public or private, the military holds and no transparency regarding often contradictory government claims. Crisis Group interviews, Colombo, November 2016. A government baseline study of such land, preferably with the northern and eastern provincial councils and the UN or another international body, would build trust and capacity.

<sup>70</sup> Crisis Group interviews, community leaders, Jaffna, March 2017.

<sup>71</sup> A small amount of private land was returned on 1 March in Pilakudiyiruppu. Owners complain the military looted and destroyed their houses. An additional 480 acres in nearby Kepapilavu division remains occupied. "In Post-war Sri Lanka, Returning IDPs Face Fresh Challenges", Roar.lk, 10 March 2017; "We will not move from here until we get our land back': from inside the Pilavu protest", Tamil Guardian ([www.tamilguardian.com](http://www.tamilguardian.com)), 13 February 2017. On 30 April the Navy returned 100 acres to families in Mullikulam. "Navy to release 100 acres of land for the Mullikulam public", [www.defence.lk](http://www.defence.lk), 30 April 2017. "Govt. agrees to release more military-occupied land: TNA, *Daily Mirror* (Sri Lanka), 18 April 2017. Despite hunger strikes, including by elderly women, there has been no progress on disappearances. Families were angry when a meeting with the president and prime minister, promised for ending the strike, was hosted by ministers and the head of police. "Sri Lankan government sends back families of missing with yet another promise", *The New Indian Express*, 18 February 2017.

<sup>72</sup> Crisis Group interviews, Colombo, Jaffna, March 2017. While both Tamils and Muslims in the north and east have suffered from militarisation and Sinhala nationalist policies, mistrust is strong between the communities over land issues, the war legacy and Tamil Tiger violence. Crisis Group Asia Report N°219, *Sri Lanka's North I: The Denial of Minority Rights*, 16 March 2012, pp. 26-30.

Wigneswaran and his Tamil People's Congress (TPC), which poses a growing challenge to the more accommodating TNA.<sup>73</sup>

The TPC-organised "Eluga Tamil" ("Tamil, Rise") rally in Jaffna in September 2016 was the post-war's largest in the north. Some 10,000-15,000 protested continued militarisation of area and what many see as growing threats to the Tamil character of the province. The rally, addressed by Wigneswaran, highlighted many grievances and called on the government to live up to its promises to return private land, resettle those still in camps, remove the military from economic and civilian activities and give answers to the families of the thousands of Tamils who disappeared in the war, many after being taken into military custody. Many Tamils in and out of Sri Lanka were gratified by the turnout and publicity, but there was wide criticism by many Sinhalese and Muslims, and by Tamils committed to engaging the government on constitutional and other reforms. The chief minister and organisers were called "extremists", even racists and pro-Tamil Tiger separatists.<sup>74</sup>

Criticism centred on calls for an international investigation into alleged genocide against Tamils, removal of the military from the north (as distinct from reducing its size and removing it from non-military activities) and a halt to the spread of Buddha statues and settling of Sinhalese in the north. Echoes of Tamil Tiger-organised "Pongu Tamil" ("Tamil Uprising") rallies and failure to reach out to Muslims caused the standard Tamil nationalist demand for a federal constitution and recognition of the Tamil homeland in the north and east to look more threatening.

The negative reaction among Sinhalese, including many who see themselves as supporters of reconciliation, reveals how wide the gap is between communities.<sup>75</sup> It resulted from organisers' failure to frame demands in ways that could be more easily accepted by potential allies in other communities. The lack of a Sinhala translation of the chief minister's speech as he spoke made it more likely Sinhala media would present a distorted version of the rally.<sup>76</sup>

The rally also needs to be seen in the context of political struggles within the Tamil community. Tamil National Alliance leaders were publicly critical of its timing, sought postponement and reportedly tried to persuade people not to take part.<sup>77</sup> The rally was at least in part an expression of discontent with Sampanthan and his de

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<sup>73</sup> The TPC does not contest elections and has TNA members, including the chief minister, as well as smaller political parties, including the Tamil National People's Front.

<sup>74</sup> Critics included ministers, radical Buddhist nationalists and some northern Tamils. "Demo in North; Govt not afraid – Ruwan", *Daily Mirror* (Sri Lanka), 25 September 2016; "Eluga Tamil' and the constitutional litmus test", *Daily FT*, 30 September 2016. For the rally's declaration, see "Thousands take part in Ezhuka Tamil rally in Jaffna", *Tamil Guardian* ([www.tamilguardian.com](http://www.tamilguardian.com)), 24 September 2016.

<sup>75</sup> The limited support for the rally outside the north angered many Tamil activists and deepened divisions with counterparts in Colombo and the south. Relations were already tense due to differences over how and whether to engage the government on its reform initiatives, including the civil-society run CTF, the Office of Missing Persons and the March 2017 Human Rights Council extension. Crisis Group interviews, Tamil Civil Society Forum members, March 2017.

<sup>76</sup> Following the strong criticism of the rally, Wigneswaran reached out more to Sinhalese, including by press conferences with the Sinhala- and English-language media. "Wigneswaran calls for north-south dialogue", *The Hindu*, 23 November 2016.

<sup>77</sup> "Wigneswaran urges Tamils to join mass protest in Jaffna tomorrow", *Daily FT*, 23 September 2016. Crisis Group interviews, Tamil Civil Society Forum members, Jaffna, March 2017.



facto deputy, M.A. Sumanthiran. Often overlapping political formations that have been very critical if not directly opposed to the alliance leadership organised this rally: Wigneswaran and the TPC, but also the Tamil Civil Society Forum and a chief TNA electoral rival, the Tamil National People's Front.<sup>78</sup>

The TNA's Tamil rivals argue that its strategy of working closely with the government on constitutional reforms has led it to soften criticism of unfulfilled promises. Growing anger and frustration at lack of change in the north could make it harder for the TNA leadership to win Tamil support in a constitutional referendum, though expected opposition from the Rajapaksa-led opposition could be enough to generate a strong Tamil vote for even relatively modest changes.<sup>79</sup>

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<sup>78</sup> Unhappiness with the TNA's pro-engagement policies among northern Tamil civil society, backed by many in the diaspora, has not been enough to overcome Tamil voters' desire for unity and traditional support for the Illankai Tamil Arasu Kachchi (ITAK), the main constituent of the TNA. Crisis Group interviews, Tamil academics, Jaffna, March 2017. The January 2017 foiling of a plan to assassinate Sumanthiran, allegedly by ex-militants with links to rump Tamil Tigers abroad, came in the wake of denunciations of Sumanthiran as a traitor to the Tamil cause. There are suspicions the plot may have been planned by military intelligence elements loyal to ex-Defence Secretary Gotabaya Rajapaksa. Crisis Group interviews, journalists, diplomats, Colombo, March 2017. Dharisha Bastians, "The perils of traitorisation", *Daily FT*, 2 February 2017.

<sup>79</sup> Crisis Group interviews, Tamil academic, Jaffna, March 2017.

## VI. A New Constitution?

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Sirisena came to office on a promise to change the constitution, a goal also endorsed by the victorious UNP-led coalition in the 2015 parliamentary elections and by the unity government. Key changes envisaged are abolition or further weakening of the executive presidency, a new mixed electoral system, a bill of rights, and, most important but most controversial, deepened devolution of power to provincial councils so as at least partially to resolve the Tamil national question.<sup>80</sup>

Abolishing the executive presidency and devolution beyond what is in the thirteenth amendment have been stated government goals since 1994. Once a president is in office, however, surrendering powers has been difficult; likewise, the required cross-party consensus on devolution repeatedly has been blocked by Sinhala fears of separatism, as well as more cynical party politics.<sup>81</sup> With the unity government's two-thirds majority in parliament and support expected from the Tamil National Alliance's sixteen deputies, there is, in principle, an unprecedented opportunity both to achieve devolution and design a more coherent constitution, rather than piecemeal amendments.

While encouraging progress was made in negotiations through 2016, deep divisions over the nature of the state and short-term calculations on the political futures of individuals and factions have reasserted themselves and threaten any compromise. The government's apparent decision to postpone major transitional justice initiatives until after constitutional reforms has increased the stakes.

### A. A Quiet Process

Parliament began drafting a new constitution in March 2016 by forming a Constitutional Assembly of its whole membership. The Assembly formed a cross-party steering committee and six subcommittees (with all parties represented) to draft proposals.<sup>82</sup> Work proceeded quietly throughout 2016, backed by occasional direct meetings between the president, prime minister and Tamil National Alliance.<sup>83</sup> Though slower than the original one-year timetable, the process appeared to be on track as late as

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<sup>80</sup> For a useful overview of constitutional promises made at various elections, see "Two Years in Government: A Review of the Pledges Made in 2015", Centre for Policy Alternatives, February 2017, pp. 13-14. While Sirisena is believed to have agreed to pursue greater devolution in exchange for the Tamil National Alliance support in the January 2015 election, the issue was not mentioned in his manifesto or in the UNP-SLFP coalition agreement. For more on constitutional reforms, see Crisis Group Report, *Jumpstarting the Reforms Process*, op. cit., pp. 19-23.

<sup>81</sup> The most sustained attempt at constitutional reform was President Kumaratunga's, 1995-2000, but Mahinda Rajapaksa, too, was elected on a pledge to end the executive presidency and maximise devolution, though in a unitary state. For more on constitutional reform history, see Crisis Group Report, *Tamil Politics and the Quest for a Political Solution*, op. cit.

<sup>82</sup> There are subcommittees for fundamental rights, the judiciary, law and order, public finance, public service and centre-periphery relations. The Steering Committee took the "nature of the state, sovereignty, religion, form of government, electoral reforms, principles of devolution, land and "matters covered by Chapter 1 and 2 of the present constitution". <http://english.constitutionalassembly.lk>. Finding consensus on the full range of issues was always going to be hard, and no partial agreement is considered final until the whole package is agreed.

<sup>83</sup> Crisis Group interviews, steering committee members, Colombo, November 2016.

November, when the subcommittees published reports on a range of issues. Devolution proponents welcomed the proposals of the subcommittee on centre-periphery relations, and the steering committee was poised to ratify and even strengthen them in its report to the full Assembly by year's end.<sup>84</sup>

While short of the TNA's federalism goal, a compromise appeared in the works to strengthen the limited and ambiguous powers of provincial councils under the never-fully-implemented thirteenth amendment.<sup>85</sup> Most contentious is the definition of Sri Lanka as a "unitary state", which courts have invoked to restrict devolution. The emerging consensus was to retain "unitary" but define and contextualise it to allow greater provincial powers.<sup>86</sup> While pleasing neither Sinhala nationalists (for whom "unitary" is synonymous with "united") nor Tamil nationalists (whose minimal demand is federalism), there was hope this could win cross-party and public endorsement and allow meaningful autonomy in the north and east.

Political reality struck when the steering committee postponed debate on the subcommittee reports planned for 10 December and a subsequent debate planned for the second anniversary of Sirisena's January election, when its own report was to be discussed. The SLFP and left-wing Janatha Vimukthi Peramauna requested additional time to study the still-unpublished latter, which proposes on overall outline of a new constitution, drawing on the subcommittee reports and adds its own ideas on the unitary state, executive presidency, privileged status of Buddhism and a new electoral system.<sup>87</sup>

SLFP ministers were actually backing away from key assumptions underpinning the process. In a 3 January meeting with Sirisena, they unanimously decided to oppose any devolution beyond the thirteenth amendment and any changes requiring a referendum, which in effect rules out significant reform. The ministers also announced support for the executive presidency and called on Sirisena to be the SLFP's presidential candidate in 2020, despite his promises to abolish the position and not stand again.<sup>88</sup>

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<sup>84</sup> Ibid. In an attempt to generate cross-party consensus from the initial stages of negotiations, members of Rajapaksa's "joint opposition" were on all subcommittees and endorsed their reports.

<sup>85</sup> The thirteenth amendment, adopted as a consequence of the 1987 India-Sri Lanka accord, established provincial councils with limited powers. Resistance from Sinhala nationalists and central government bureaucrats has meant provinces have never had power over land and police. A host of "concurrent" powers and ambiguous, open-ended clauses have allowed the central government to reclaim many apparently devolved powers. See Crisis Group Report, *Tamil Politics and the Quest for a Political Solution*, op. cit., pp. 18-21.

<sup>86</sup> "Report of the Public Representations Committee on Constitutional Reform", May 2016, pp. 20-25. While expanding and clarifying provincial powers, including over land and police, the emerging compromise was expected to keep the clause giving Buddhism pre-eminent status, despite Tamil and Muslim support for a secular state, and keep the northern and eastern provinces apart, though Tamil nationalists and the Alliance's 2015 election manifesto demanded re-merger.

<sup>87</sup> Dharisha Bastians, "President steps in to break deadlock in constitutional negotiations", *Daily FT*, 16 February 2017. On the electoral system, there is cross-party consensus to move from the proportional, party-list preferences system to a mixed first-past-the-post and proportional system, but deep differences remain on details. Smaller parties are concerned their votes could be diluted. Attempts to reach consensus on a twentieth constitutional amendment failed in 2015. Crisis Group Report *Sri Lanka Between Elections*, op. cit., pp. 11-12.

<sup>88</sup> "SLFP wants executive president retained and Sirisena to contest", *The Sunday Times* (Sri Lanka), 8 January 2017. Their position on devolution is also in the mainstream of Sinhala political

Without a referendum, there can be no new constitution – which the SLFP agreed to pursue when it voted to create the Constitutional Assembly – nor any meaningful increase in the powers devolved to provinces.<sup>89</sup>

While the SLFP central committee has not formally endorsed the position, it is clear Sirisena has not persuaded even the wing of the party that formally supports him. He has since increased his effort to broker an SLFP-UNP-Tamil National Alliance compromise, and a new steering committee report is being drafted, but it is an uphill battle. “The president is insisting he is committed to a new constitution and ending the executive presidency”, said a close observer, “but it’s also clear SLFP bigwigs are opposed. The big question now is who will come out on top”.<sup>90</sup>

SLFP ministers are spooked by the threat Mahinda Rajapaksa and the joint opposition present to the pro-Sirisena SLFP in 2017 local and provincial polls. Rajapaksa denounced the subcommittee proposals, particularly on devolution, as “designed to end the unitary character of Sri Lanka without however deleting that word from the constitution”. The new constitution, he warned, “will divide the country without using the word division”.<sup>91</sup> In March, he accused the government of a “traitorous agenda” to encourage “separatism”, saying proposed constitutional changes and other reforms were aimed at “demoralising and breaking the will of the majority of the population and the armed forces”.<sup>92</sup> The SLFP is also responding to worries about the difficulty of winning a referendum that have grown in the wake of recent results in the UK, Colombia and Italy and are compounded by discontent over the government’s failure to deliver on the economy or governance.<sup>93</sup>

Doubts are also an effect of the lack of consistent, strong, public support for expanded devolution from the president, prime minister and other key ministers. While Sirisena defended devolution before parliament on 2 December, he avoided

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thinking and consistent with traditional SLFP policy, with the exception of the Kumaratunga years. Key players in the SLFP’s pro-devolution wing such as Mangala Samaraweera and Rajitha Senarathne are now aligned with the UNP. Considerable uncertainty remains about the UNP, which on 8 December restated support for a new constitution, for “maximum devolution within a unitary state”, and for retaining the executive presidency (which it pledged to abolish in 2015). “UNP approves two resolutions to honour mandate”, *Daily News*, 9 December 2016.

<sup>89</sup> Change of certain “entrenched” constitutional clauses requires a two-thirds parliamentary majority and a referendum. These include Article 2: “The Republic of Sri Lanka is a Unitary State”; and Article 9: “The Republic of Sri Lanka shall give to Buddhism the foremost place and accordingly it shall be the duty of the State to protect and foster the Buddha Sasana”.

<sup>90</sup> Crisis Group telephone interview, Colombo lawyer, February 2017; Dharisha Bastians, “President steps in to break deadlock in constitutional negotiations”, *Daily FT*, 16 February 2017.

<sup>91</sup> Among other aspects, Rajapaksa opposed reducing provincial governors’ powers, removing the list of powers shared by the centre and provinces and giving provinces significant powers over land and police. He also warned against limiting executive and emergency powers and expanding rights. His statement rejected positions he had taken as president, even criticising national-language status for Tamil, which is already in the constitution. “Rajapaksa fires first salvo against constitutional reform process”, Sri Lanka Brief ([srilankabrief.org](http://srilankabrief.org)), 4 December 2016.

<sup>92</sup> Mahinda Rajapaksa, “Constitutional and legal reforms to destroy the nation”, Colombo Telegraph, 14 March 2017.

<sup>93</sup> Crisis Group interviews, government officials, Colombo, November 2016. “Most people worried about referendum: Chandrika”, *The Hindu*, 16 February 2017. Some advisers are counselling Sirisena to give up the constitution and limit changes in provincial powers to laws needing only a parliamentary majority, such as an amended Provincial Councils Act. Ibid.

taking positions on specific provisions. His strategy has been to keep discussions out of the public eye, in the hope the Constitutional Assembly would produce a detailed consensus. This has backfired, leaving public debate on constitutional reform and devolution dominated by nationalists on both sides, but particularly Rajapaksa-aligned Sinhala politicians.<sup>94</sup> Having failed to propose any alternative to the exclusionary Sinhala nationalist vision of the state articulated by Mahinda Rajapaksa, the government is on the defensive, denying that it plans to weaken Buddhism and supports separatism.<sup>95</sup> A prominent pro-devolution activist said, “Ranil is hopeless, and Maithri is staying quiet”.<sup>96</sup> The costs are now uncomfortably clear.

### B. *The Way Forward*

With nationalist sentiments rising in north and south, the government needs to make a major effort to inform the public about the reforms under negotiation. The president and other top officials should begin a campaign to persuade Sinhalese that a fair political solution to the ethnic conflict requires expanded provincial powers, while reassuring Tamils a united Sri Lanka can protect their rights. Repeated promises to launch such a campaign have not materialised.<sup>97</sup> Chief ministers from all provinces should be at the forefront. Many support more devolution and could speak to what all communities could gain.<sup>98</sup> Sinhalese and SLFP chief ministers would be particularly effective at diluting the line it is only for Tamils.<sup>99</sup>

The government has reached the limits of quiet deal making. Without a fight, there is little chance a decent constitutional package will emerge and survive a referendum. The president and prime minister face a crucial choice: going all out risks a defeat that could well mean the end of the unity government and a strengthened hand for the Rajapaksas in their battle to win back the SLFP. Alternatively, they could abandon the constitution and new devolution and give up on the agenda central to their already-damaged *yahapaalanaya* brand. But that retreat would almost certainly only postpone a collapse back into dangerous, polarising politics as usual. Abandoning the constitution would also deal another blow to Tamil hopes of securing meaningful autonomy from the Sinhala-dominated state. It would cripple pro-engagement Tamil leaders who have taken a big risk in working closely with the

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<sup>94</sup> “Need of the hour is leaders who can find just solutions – President”, PMD News ([www.pmdnews.lk](http://www.pmdnews.lk)), 2 December 2016. The lack of a government information campaign has also contributed to poor knowledge of the constitutional reforms process in the public. “Opinion Poll on Constitutional Reform – Topline Report”, Centre for Policy Alternatives, April 2017.

<sup>95</sup> “Prime Minister reassures foremost place for Buddhism”, *Daily News*, 11 October 2016.

<sup>96</sup> Crisis Group email correspondence, February 2017.

<sup>97</sup> “Govt. to launch hearts and minds campaign to win support for constitution: CBK”, *Daily FT*, 16 February 2017. Plans for a media campaign have been under consideration for months. Crisis Group interviews, government officials, November 2016, January 2017.

<sup>98</sup> See, for instance, “A New Devolution Settlement for Sri Lanka: Proceedings and Outcomes”, Conference of Provincial Councils, Centre for Policy Alternatives, August 2016.

<sup>99</sup> Proponents say the constitution should include a bill of rights, likely also socio-economic rights, but there is a debate over whether these would be justiciable in court. Such enforceable rights could make a constitution more attractive to Sinhala in a context where devolution would otherwise dominate debate. Crisis Group interviews, lawyers, activists, Colombo, March 2017.

government and being willing to accept compromises at a considerable distance from the traditional Tamil nationalist demand for federalism.<sup>100</sup>

Should Sinhala political leaders again fail to offer meaningful provincial autonomy, the repercussions may be felt for decades. Restlessness and radicalisation among Tamils in the north and east almost certainly would grow, provoked daily by the heavy presence of a virtually all-Sinhala military. While the 100,000 or more troops and their thousands of informants would be able to prevent a return to war, the lack of political power they signify and prolong would perpetuate conflict.

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<sup>100</sup> These have been most recently articulated in a Tamil People's Council statement: "A viable solution to the Tamil National question could only be achieved by establishing sovereign institution[s] of self-government which recognise the Tamil people of the North and East as a distinct nation, while ... respecting their right to self-determination". "Ezhuga Thamizh" Declaration, Batticaloa, 10 February 2017. Moves to amend the provincial councils act as a step toward more effective provincial autonomy would fall far short of demands and likely be viewed as humiliating.

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## VII. International Support

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Internationals have been too quick to celebrate a Sri Lanka success story and failed to maximise their leverage. Today's greatest danger is moving too slowly on reforms and losing what remains of the public support and enthusiasm essential to success. Without significant external pressure, the government is unlikely to pursue reforms seriously enough. A renewed "good governance" agenda needs more effective backing from partners beyond the essential UN oversight that will be maintained through the rollover resolution unanimously approved at the Human Rights Council's March 2017 session. Lacking enforcement powers, the Council has impact primarily through the willingness of UN member states to use their influence to encourage Sri Lanka to fulfil the commitments it has reaffirmed in Geneva.

Influential states, multilaterals and campaigners have limited tools to influence Sri Lanka, particularly as sovereignty concerns are not always a mere proxy for chauvinism or resistance to change. But smart, calibrated engagement could play a useful role in putting reforms back on track:

- ❑ Sri Lanka's international partners should send clear messages to President Sirisena and his wing of the SLFP that reunifying the party around either Gotabaya or Mahinda Rajapaksa will not only damage Sri Lanka's long-term prospects for sustainable peace but also endanger the international backing it has recently regained.
- ❑ With the renewal of GSP+ trade benefits, the European Commission should devise a rigorous monitoring process, and should work with the government to strengthen the National Human Rights Commission including by codifying its right to review all draft bills with impact on fundamental rights as part of its mandate to monitor Sri Lanka's compliance with treaty commitments.
- ❑ Foreign militaries and the UN could use increased cooperation with the military to encourage security sector reform and greater accountability, while rigorously vetting personnel considered for training and peacekeeping operations.<sup>101</sup>
- ❑ Global financial institutions and development agencies could tailor support to encourage equitable sharing of costs and benefits of growth from economic reforms and minimise risks of social conflict from abrupt economic liberalisation.
- ❑ Civil society's ability to hold the government to at least some promised reforms is encouraging. Donors should strengthen support to its efforts to hold government accountable and encourage groups to collaborate more actively across regional, linguistic and ethnic differences.
- ❑ India should follow up on Prime Minister Modi's successful May visit to reaffirm India's traditional support for expanded provincial powers and encourage more effective cooperation between President Sirisena and Prime Minister Wickremesinghe.
- ❑ China should show flexibility, allowing renegotiation of Rajapaksa-era loans to give the government manoeuvre room in a difficult economic situation that produces hardship for ordinary people and potential political instability.

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<sup>101</sup> The UN and key military partners, notably the U.S., should press the government to hold criminally accountable army personnel responsible for documented peacekeeper sexual abuse in Haiti in 2007. "UN child sex ring left victims but no arrests", Associated Press, 12 April 2017.

## VIII. Conclusion: Renew or Collapse

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If the government is to not lose its chance to address Sri Lanka's key sources of conflict and instability, it must return to its good governance and reconciliation agenda. The democratic middle ground is still there to be had, but the government must work to expand it. Achieving sustainable changes to the political culture requires retaining support from the three key constituencies that brought it to power: reform-minded Sinhalese, Muslims, and Tamils. While few from these are likely to support the Rajapaksa-led opposition, discouragement and abstentions could be enough for an SLFP triumph under restored Rajapaksa leadership.

Rebuilding trust in the *yahapaalanaya* project requires compromise and balancing expectations and risks across the spectrum of challenges. At a minimum, president and prime minister need to agree on a five-point program of renewal:

- ❑ Set up an UNP-SLFP economic team to develop and oversee consensus policy on **economic reforms** and sharing short-term hardships more equitably.
- ❑ Launch a campaign for a new, more democratic, pluralist **constitution**, including increased devolution, and commit to achieving the two-thirds majority needed in parliament, while building support to win a referendum.
- ❑ Operationalise the **Office of Missing Persons**, with independent staff well-versed in disappearance issues and a significant role for victims' families.
- ❑ **Restore normalcy in the north and east and increase Tamil trust** by returning military-occupied land to owners, ending military involvement in farms and shops and spread of Buddha statues, and ceasing surveillance and intimidation of political activities.
- ❑ **Restore rule of law** by long-promised institutional reforms, pursuing crimes allegedly committed by military intelligence death squads and preventing and punishing any corruption by insiders in either party, including a thorough criminal investigation into the February 2015 Treasury Bond issue.

Civil society in all communities has an important role in achieving meaningful reforms. Sinhala groups that backed Sirisena's good governance agenda should do more to bring Tamil issues to the Sinhala south and argue the concerns of all communities on rule of law, ending impunity and achieving a constitution with deeper devolution, expanded rights and a less powerful presidency. In turn, Tamil activists and civil society groups in the north and east should resist the growing trend toward exclusively Tamil positions and advocacy, however severe their frustrations. There is no other route to achieving their rights than with Sinhala and Muslim allies; appeals for international intervention lack traction in today's context.

Finally, Tamils and Muslims need to do more to rebuild their relationship. Each community has made mistakes and has much to gain from strengthened ties. Both continue to suffer from language discrimination and expansionist forms of Sinhala Buddhist nationalism. They should press their political leaders to develop a transparent and equitable process to ensure return of those displaced by the war in both communities, as well as the small number of Sinhalese.



This year is another decisive one in Sri Lanka's political history. If current dynamics continue, the country will likely lose a real opportunity to address the roots of its decades of political turmoil. The chances of an eventual return to violence would then grow considerably. To prevent this, the president, prime minister and leaders in both unity-government parties will need to jointly take up the challenge of persuading their colleagues and the public that a more equal and inclusive Sri Lanka is possible and the best way of insuring prosperity and peace for all.

**Colombo/Brussels, 16 May 2017**



## Appendix B: Glossary of Terms

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- CIABOC** – Commission to Investigate Allegations of Bribery or Corruption: One of Sri Lanka's independent government commissions, members appointed by the Constitutional Council.
- CTA** – Counter-Terrorism Act: Draft legislation designed to replace the widely-criticised Prevention of Terrorism Act, as agreed in the 2015 UNHRC resolution.
- CTF** – Consultation Task Force on Reconciliation Mechanisms: 11-member group of civil society activists appointed by the prime minister in January 2016 to lead nationwide public consultations on the design of transitional justice mechanisms agreed in the 2015 UNHRC resolution; issued report in January 2017.
- GSP+** – Generalised System of Preferences Plus: The European Union's program of unilateral tariff preferences for developing countries, designed to support sustainable development and the full implementation of 27 international conventions on human and labour rights and environmental protection.
- ONUR** – Office of National Unity and Reconciliation: Established in 2015, led by ex-President Chandrika Kumaratunga and reporting to President Sirisena in his capacity as Minister of National Integration and Reconciliation.
- SCRM** – Secretariat for Coordinating Reconciliation Mechanisms: Established in 2016 to coordinate government work on transitional justice and reconciliation; reporting to the prime minister.
- SLFP** – Sri Lanka Freedom Party: The main left-of-centre party, headed by Mahinda Rajapaksa until January 2015 and now by President Maithripala Sirisena. Party is split between those aligned with Sirisena and those still loyal to Rajapaksa. The latter faction forms the core of the "joint opposition" in parliament and includes smaller parties formerly part of the United People's Freedom Alliance: the Sinhala nationalist National Freedom Front (NFF), Mahajana Eksath Peramuna (MEP) and PHU (Pivithura Hela Urumaya), and the leftist Lanka Sama Samaja Party (LSSP) and Democratic Left Front (DLF).
- TNA** – Tamil National Alliance: A coalition of four parties – Illankai Tamil Arasu Kachchi (ITAK), Eelam People's Liberation Front (EPRLF), People's Liberation Organisation of Tamil Eelam (PLOTE) and Tamil Eelam Liberation Organisation (TELO) – led by veteran politician R. Sampanthan. Originally formed in 2001 under pressure from the Tamil Tigers to support its claims to leadership of the Tamil people, it currently supports a political solution under a federal system in a united Sri Lanka.
- TPC** – Tamil People's Council: A Tamil civil society group uniting groups and activists dissatisfied with the positions of the leadership of the Tamil National Alliance; formed in December 2015 and co-chaired by Northern province Chairman C.V. Wigneswaran.
- UNP** – United National Party: The traditional centre-right party, headed by Prime Minister Ranil Wickremesinghe.
- UNCAT** – UN Committee Against Torture: Oversees compliance by signatory states with requirements of the UN Convention Against Torture; formally considered Sri Lanka in November 2016.
- UNHRC** – UN Human Rights Council: The council unanimously approved resolution on accountability and reconciliation in Sri Lanka in October 2015, reaffirmed in March 2017, committing Sri Lanka to establishing a range of transitional justice institutions and related governance reforms.

## Appendix C: About the International Crisis Group

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The International Crisis Group (Crisis Group) is an independent, non-profit, non-governmental organisation, with some 120 staff members on five continents, working through field-based analysis and high-level advocacy to prevent and resolve deadly conflict.

Crisis Group's approach is grounded in field research. Teams of political analysts are located within or close by countries or regions at risk of outbreak, escalation or recurrence of violent conflict. Based on information and assessments from the field, it produces analytical reports containing practical recommendations targeted at key international, regional and national decision-takers. Crisis Group also publishes *CrisisWatch*, a monthly early warning bulletin, providing a succinct regular update on the state of play in up to 70 situations of conflict or potential conflict around the world.

Crisis Group's reports are distributed widely by email and made available simultaneously on its website, [www.crisisgroup.org](http://www.crisisgroup.org). Crisis Group works closely with governments and those who influence them, including the media, to highlight its crisis analyses and to generate support for its policy prescriptions.

The Crisis Group Board of Trustees – which includes prominent figures from the fields of politics, diplomacy, business and the media – is directly involved in helping to bring the reports and recommendations to the attention of senior policymakers around the world. Crisis Group is chaired by former UN Deputy Secretary-General and Administrator of the United Nations Development Programme (UNDP), Lord Mark Malloch-Brown. Its Vice Chair is Ayo Obe, a Legal Practitioner, Columnist and TV Presenter in Nigeria.

Crisis Group's President & CEO, Jean-Marie Guéhenno, served as the UN Under-Secretary-General for Peacekeeping Operations from 2000-2008, and in 2012, as Deputy Joint Special Envoy of the United Nations and the League of Arab States on Syria. He left his post as Deputy Joint Special Envoy to chair the commission that prepared the white paper on French defence and national security in 2013. Crisis Group's international headquarters is in Brussels, and the organisation has offices in nine other locations: Bishkek, Bogota, Dakar, Islamabad, Istanbul, Nairobi, London, New York, and Washington DC. It also has staff representation in the following locations: Bangkok, Beijing, Beirut, Caracas, Delhi, Dubai, Gaza City, Guatemala City, Jerusalem, Johannesburg, Kabul, Kiev, Mexico City, Rabat, Sydney, Tunis, and Yangon.

Crisis Group receives financial support from a wide range of governments, foundations, and private sources. Currently Crisis Group holds relationships with the following governmental departments and agencies: Australian Department of Foreign Affairs and Trade, Austrian Development Agency, Canadian Department of Foreign Affairs, Trade and Development, Dutch Ministry of Foreign Affairs, Finnish Ministry for Foreign Affairs, French Ministry of Foreign Affairs, German Federal Foreign Office, Irish Aid, Principality of Liechtenstein, Luxembourg Ministry of Foreign Affairs, New Zealand Ministry of Foreign Affairs and Trade, Norwegian Ministry of Foreign Affairs, Swedish Ministry of Foreign Affairs, Swiss Federal Department of Foreign Affairs, and U.S. Agency for International Development.

Crisis Group also holds relationships with the following foundations: Carnegie Corporation of New York, Henry Luce Foundation, Humanity United, John D. and Catherine T. MacArthur Foundation, Koerber Foundation, Open Society Foundations, Open Society Initiative for West Africa, Ploughshares Fund, Rockefeller Brothers Fund, and Tinker Foundation.

**May 2017**

## Appendix D: Reports and Briefings on Asia since 2014

### Special Reports

*Exploiting Disorder: al-Qaeda and the Islamic State*, Special Report N°1, 14 March 2016 (also available in Arabic).

*Seizing the Moment: From Early Warning to Early Action*, Special Report N°2, 22 June 2016.

*Counter-terrorism Pitfalls: What the U.S. Fight against ISIS and al-Qaeda Should Avoid*, Special Report N°3, 22 March 2017.

### North East Asia

*Old Scores and New Grudges: Evolving Sino-Japanese Tensions*, Asia Report N°258, 24 July 2014 (also available in Chinese).

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