

1 October 2020

James Wiblin  
Assistant Secretary, India and Indian Ocean  
Department of Foreign Affairs and Trade

**Copied:**

David Holly  
High Commissioner to Sri Lanka

Country Information Section

**Subject: Department of Foreign Affairs and Trade's Country Information Report Sri Lanka, November 2019**

Dear Assistant Secretary Mr Wiblin,

We wish to raise concerns regarding the accuracy, methodology and validity of the conclusions reached in the latest DFAT Report entitled, *Country Information Report Sri Lanka 4 November 2019 (COI Report)*. We note this COI Report contains serious flaws, deficiencies and inconsistencies that undermine the assessments and conclusions reached, with significant impacts for refugee protection applicants in Australia and around the world claiming protection on the grounds of future risk of harm of torture by the State in Sri Lanka. We regard the impacts as significant because of the requirement that decision makers at the Department of Immigration, the Immigration Assessment Authority and the Administrative Appeals Tribunal, take into account the DFAT's COI Report and findings in their assessment on applications for protection and that, departure from the findings of DFAT, are rarely made, having a significant effect on the real risk of harm facing people from Sri Lanka seeking asylum in Australia.

**1. About the ITJP and the ACIJ**

The International Truth and Justice Project (ITJP) was established in December 2013 in response to emerging evidence regarding war crimes and crimes against humanity committed in Sri Lanka both during the final phase of the civil war in 2009 and its aftermath. The Executive Director is transitional justice expert, Yasmin Sooka, who was part of the three-member Panel of Experts advising the Secretary General of the UN Ban Ki Moon on accountability for war crimes committed during the final stages of the war in Sri Lanka.

The ITJP gathers and records the testimonies of victims and survivors, people who managed to leave Sri Lanka and take refuge or asylum in several countries in Europe and North America (Norway, Canada, the US, Switzerland, Holland, France, Ireland and particularly, the United Kingdom) and in Asia (Malaysia and India). It also collects and preserves evidence of serious international crimes in Sri Lanka.

The ITJP team includes experienced former prosecutors and investigators from the international criminal tribunals for the Former Yugoslavia and Rwanda, lawyers who have worked for the South African Truth and Reconciliation Commission, the Timor-Leste Commission, the United Nations, the Special Court of Sierra Leone and the Office of the High Commissioner for Human Rights. They collectively have decades of experience in investigation of sexual violence and torture, and in many instances first-hand knowledge of investigations relating to Sri Lanka.

The Australian Centre for International Justice is a not-for-profit specialist legal centre working to develop Australia's domestic investigations and prosecutions of the international crimes offences in the Commonwealth Criminal Code, and also employs strategies to combat the impunity of the perpetrators of these crimes to seek justice, redress and accountability for the survivors.

## **2. Existence and Prevalence of Torture Since 2015**

In the conclusive assessment on torture in Sri Lanka, DFAT in its COI Report states:

DFAT assesses that the risk of torture perpetrated by either military, intelligence or police forces has decreased since the end of the war and is no longer state-sponsored. Because few reports of torture are verified, it is difficult to determine the exact prevalence of torture.<sup>1</sup>

This conclusion, relying on in country sources, effectively denies the prevalence of ongoing torture in Sri Lanka. It is a staggering assertion by DFAT that torture is no longer state-sponsored in the face of overwhelming evidence from independent and verified sources. In addition, this conclusion is inconsistent with the recent findings, cited in your COI Report, by the US State Department and credible international organisations including the Office of the High Commissioner for Human Rights (**OHCHR**), UN Special Rapporteurs, the UN Committee on Torture,<sup>2</sup> international NGOs including Freedom from Torture, the ITJP, the International Committee of Jurists<sup>3</sup> and Human Rights Watch,<sup>4</sup> all of whom have concluded that torture perpetrated by State agents and sponsored by the State, has been ongoing and systematic since the end of the civil war.

The international bodies cited in the COI Report,<sup>5</sup> including the Special Rapporteur to Sri Lanka on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Freedom from Torture, UN OHCHR, Amnesty International and ITJP, all conclude that torture perpetrated by State agents has been ongoing and systemic since the end of the civil war.

## **3. Methodology**

### ***In-Country Sources***

In the introductory section on Purpose and Scope of the COI Report, DFAT sets out the methodology used, including that the report is “informed by DFAT’s on-the-ground knowledge and discussions with

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<sup>1</sup> Department of Foreign Affairs and Trade, *Country Information Report – Sri Lanka* (4 November 2019) (“DFAT COI Report”) [4.28].

<sup>2</sup> Nick Cumming-Bruce, ‘Torture Is ‘Common Practice’ in Sri Lanka, UN Panel Finds’ *The New York Times* (7 December 2016) <<https://www.nytimes.com/2016/12/07/world/asia/sri-lanka-torture.html>>.

Original report, UN Committee Against Torture, *Concluding Observations on the Fifth Periodic Report of Sri Lanka*, UN Doc CAT/C/LKA/CO/5\* (27 January 2017), <<https://www.refworld.org/docid/596f5cc24.html>>.

<sup>3</sup> International Commission of Jurists, *Human Rights Day: South Asian States Must End Culture of Impunity for Torture*, 10 December 2019 (Press Release) <<https://www.icj.org/south-asian-states-must-end-culture-of-impunity-for-torture/>>.

<sup>4</sup> Human Rights Watch, *Locked Up Without Evidence* (29 January 2018) <<https://www.hrw.org/report/2018/01/29/locked-up-without-evidence/abuses-under-sri-lankas-prevention-terrorism-act>>.

<sup>5</sup> DFAT COI Report [4.21] – [4.22].

a range of sources in Sri Lanka.”<sup>6</sup> There is no further information on how DFAT has corroborated or sought to ensure the accuracy of the information, and what further analysis and research it undertook to make a final assessment.

Specifically, the COI Report, commenting on documented cases of torture reported by ITJP, concludes that:

[S]everal local sources in Sri Lanka, including from the north, were not aware of the specific alleged incidents of torture documented above [in an ITJP Report] and were unable to verify their claim... . DFAT is unable to verify allegations of torture since 2016. Local sources told DFAT they were not aware of recent cases of former LTTE members being subject to torture.<sup>7</sup>

In these circumstances this assessment by DFAT of ITJP’s work, absent any real detail regarding the basis for its conclusions beyond the citing of a few unnamed local sources, is problematic. The question was also surprising in that respondents were not invited to comment on what the United Nations said about ongoing torture but rather an NGO. DFAT acknowledges that their sources are confidential but without any further detail about these sources, it is difficult to reconcile the credibility of the sources and methodology used to verify claims and conclude assessments. In this letter, we raise concerns with representations made by actors in Sri Lanka, whether they are representatives of the government, quasi-government bodies and institutions and other local sources who would not be aware of reports of claims of torture for credible reasons identified below. In this context it is worth noting the UN High Commissioner for Human Rights has publicly complained of misrepresentation by a representative of the Northern Province of Sri Lanka.<sup>8</sup> Furthermore the interviews or ‘discussions’ by DFAT were conducted in the run up to the November elections during a period of fear, with a Rajapaksa victory an almost certainty. Journalists and NGOs in Sri Lanka were already beginning to face intense intelligence surveillance at this time, making reporting on torture cases even more difficult than usual.<sup>9</sup> That has intensified considerably since the parliamentary elections secured a “super majority” for Gotabaya Rajapaksa.

It is important to note the inaccuracy of in-country verification procedures when almost all of ITJP’s witnesses tell our investigators that they did not seek medical attention or tell anyone in Sri Lanka save immediate family members – and that too only some of what happened to them – due to threats of death they received from their captors. Therefore, it is unlikely that any local sources however well informed, would be able to provide verification to DFAT in the form of hearsay corroboration unless of course they received the information from the perpetrators, those who brokered their release, or the smuggling networks, which of course raises its own questions. We expand on these crucial points in our evaluation analysis below.

### ***Evaluation of Source Reports***

It is probable that DFAT’s over reliance on the verification of reports of torture by sources inside Sri Lanka has led to this completely inaccurate picture seriously minimising the prevalence of State sponsored torture in Sri Lanka. It is well established that organisations inside Sri Lanka have largely been unable to document and investigate complaints of torture and sexual violence in part due to the culture of fear that prevails in the country and also the lack of trust by victims and their families in Sri

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<sup>6</sup> DFAT COI Report [1.4].

<sup>7</sup> DFAT COI Report [4.23].

<sup>8</sup> OHCHR, *Sri Lankan Official Misrepresents Discussion of UN Human Rights Report – Bachelet* (27 March 2019) (Press Release) <<https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=24412>>.

<sup>9</sup> See Inform Human Rights Documentation Centre, *Repression of Dissent in Sri Lanka Before and After the Presidential Election: 1<sup>st</sup> July – 31<sup>st</sup> December 2019* (2019) <<https://www.inform.lk/wp-content/uploads/2020/02/RODJuly-dec2019.pdf>>.

Lanka about reporting allegations of abduction 'in country' even to bodies like the Sri Lankan Human Rights Commission (HRCSL).<sup>10</sup> In our experience there was a period after 2015 when an increasing number of families (but still only a fraction) did initially report a disappearance or abduction to the HRCSL but when the victim was subsequently released, typically after the family paid a ransom to the security services, the complaint would be dropped. Indeed, the HRCSL itself is clear in its statistical summaries that its mandate does not include people who disappeared or went missing and then are found again. This is by definition the case load that finds its way abroad; if they were dead or disappeared they wouldn't be interviewed by the ITJP. It is also noteworthy that a summary of complaints received by the HRCSL offices for 2019 reported on 282 cases of torture, 750 arbitrary arrests, 3 enforced disappearances, 7 deaths in custody and 4 extrajudicial killings.<sup>11</sup>

This is likely to be one of the reasons why local sources consulted by DFAT and other international reports based on such sources, i.e. the from the UK Home Office's report, paint an inaccurate picture about the prevalence of ongoing torture from other international organisations.

In addition many of the torture survivors whom the ITJP has interviewed were threatened before being released from detention that if they told anyone about what happened to them, they and their families would be killed.<sup>12</sup> These survivors routinely explain to ITJP investigators that this is the reason why they did not tell anyone, or if they did, only informed members of their immediate families, in broad terms about some of the torture they suffered.<sup>13</sup> It is also the reason why they generally do not seek medical assistance from a healthcare professional after their release from detention before they flee Sri Lanka. Instead family members, or those hiding them, treat them as best they can in Sri Lanka with ointments, creams, bandages and pain killers. It is not until they have arrived in their final destination in Europe that they seek proper medical assistance through their GP and feel safe enough to begin disclosing what happened to them.

Furthermore, even if survivors tell their immediate families that they were tortured they rarely speak about any sexual torture including oral, vaginal and anal rape. As the Australian government and DFAT should be aware, this is a very common phenomenon due to the stigma and shame experienced by survivors. The majority of survivors that the ITJP interviews are male and again as the Australian government should be well aware, male survivors face an additional fear that they will be prosecuted if they report sexual violence in countries such as Sri Lanka where homosexuality is illegal. In some instances, the first person a torture survivor confides in regarding the extent of their torture, is the

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<sup>10</sup> UK Home Office, *Report of a Home Office Fact-Finding Mission to Sri Lanka* (January 2020) 46, "Diplomatic Source, 2 October 2019: With Tamils there is a subjective fear and mistrust of the authorities... "

<[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/859277/Sri\\_Lanka\\_FFM\\_report\\_2020.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/859277/Sri_Lanka_FFM_report_2020.pdf)>.

<sup>11</sup> On file.

<sup>12</sup> See, for example, "The majority described threats, including of death, of further torture and of harm to family members", *Freedom from Torture, Too Little Change: Ongoing Torture In Security Operations In Sri Lanka* (February 2019) at page 13, [https://www.freedomfromtorture.org/sites/default/files/2019-03/fft\\_sri\\_lanka\\_report\\_v5\\_lr.pdf](https://www.freedomfromtorture.org/sites/default/files/2019-03/fft_sri_lanka_report_v5_lr.pdf) and, "Victims have been threatened with death or having their case escalated if their families don't pay the ransom for their release." See, ITJP, *Unstopped* (2017) at page 60, <<https://itjpsl.com/reports/unstopped>> and "Most victims are too terrified to speak to anyone about their ordeal until they have reached safety abroad." (at page 34), and, "In all 20 cases, the remaining family members in Sri Lanka had been repeatedly visited and threatened after the victim had fled abroad in 2015. In at least two cases a parent had been detained and in other cases a parent was forced to report to the security forces on a routine basis. Victims remain frightened to phone home lest they put their families in danger. There are also reprisals if they give interviews to the media.", (page 30 and more reprisals described at page 31) from ITJP, *Silenced* (2016) <<https://itjpsl.com/reports/silenced-report>>.

<sup>13</sup> On why survivors do not report inside the country is extensively dealt with on page 35, ITJP's Report, *Silenced*, where it says: "Timing: most of the survivors of "white van" abduction we meet leave Sri Lanka very quickly after being released. The vast majority never even go home or see their family to say goodbye. That makes it highly unlikely that they would give a statement to an investigator about their experiences while in Sri Lanka." See more, ITJP, *Silenced* (2016) <<https://itjpsl.com/reports/silenced-report>>.

ITJP investigator as they finally feel that they are in a space that is safe enough for them to be able to speak.

This is likely to be the reason why the in-country sources spoken to by DFAT “were not aware of the specific alleged incidents of torture documented above and where unable to verify their claims.”<sup>14</sup> This sentence appears to cast doubt on the 76 recent cases as well as to the involvement of the Terrorism Investigation Division (**TID**) in torture. This is bizarre because the involvement of the TID in torture is corroborated by several US State Department Human Rights reports, the UN OISL report, UN special rapporteurs on torture, Manfred Nowak and Juan Mendez, as well as Ben Emmerson, the UN Special Rapporteur on Human Rights and Counter Terrorism and even the HRCSL after the change of government in 2015. A perusal of Annexure 1 of the ITJP’s *Terrorism Investigations Division* report would have made this clear to your DFAT COI assessors.<sup>15</sup>

### **Misrepresentation of Severe Beatings**

Also, of serious concern, DFAT appears to misunderstand what torture entails. In the COI report, DFAT asserts that “[m]istreatment could range from a slap to the face to severe beatings, and, in some cases, may amount to torture.”<sup>16</sup> Is a severe beating not torture?

#### **4. Successful Asylum Claims in the UK of Torture Since 2015**

The COI Report refers to the following:

The [ITJP] cited 76 alleged cases of torture between 2015 and 2017 involving individuals suspected of LTTE involvement, the majority of which followed ‘white van’ abductions.<sup>17</sup>

These cases are the subject of the DFAT’s remarks which we have already referred to above, regarding DFAT’s inability to ‘verify’ these claim and allegations of torture.<sup>18</sup>

We provide the following information to assist DFAT’s research on abduction, illegal detention and torture inside the country. To assist to verify these claims, they should examine the recent cases in which Sri Lankan people seeking asylum have secured protection in the UK and Switzerland, based on a claim of recent torture and future risk if returned to Sri Lanka. Decisions by the UK Home Office and immigration authorities in Switzerland accepted survivors’ claims of recent torture in Sri Lanka by State agents.

Of these 76 cases of torture the ITJP reported on occurring from 2015–2017, and cited by DFAT but unable to be verified by DFAT, as of August 2020, 63 have been granted protection asylum in the UK, and 1 in Switzerland (totalling 64 or 84%).

<b>ITJP cases</b>	<b>Applications for Protection</b>	<b>Granted protection</b>	<b>Pending final decision</b>
<b>Tortured in 2015</b>	32	28	3 of 4 w/o asylum in CH
<b>Tortured in 2016</b>	34	27	2 of 7 w/o asylum in CH
<b>Tortured in 2017</b>	10	9	1 in UK
<b>Total</b>	76	64	

<sup>14</sup> DFAT COI Report [4.23].

<sup>15</sup> ITJP, *Terrorism Investigation Division* (2017) <<https://itjpsl.com/reports/terrorism-investgation-division>>.

<sup>16</sup> DFAT COI Report [4.23].

<sup>17</sup> DFAT COI Report [4.22].

<sup>18</sup> DFAT COI Report [4.23].

Furthermore, an examination of the profile of these successful claimants shows they are not high-profile or moderate LTTE or tortured only by the police in Sri Lanka. Ten torture victims were child recruits – in other words victims of the LTTE, as well as the Sri Lankan State. Twenty-three were civilians. Four were arguably hardcore LTTE – the remaining 27 were low level LTTE, often forcibly recruited, and generally in the final months or years of the war. In addition, almost half of the cases involved the Sri Lankan Army as a perpetrator.

<b>Tortured in this year &amp; already granted protection (ITJP cases only)</b>	<b>Numbers</b>	<b>Hardcore LTTE</b>	<b>LTTE Child recruits</b>	<b>No LTTE affiliation</b>	<b>SL Army involved in torture</b>
<b>2015</b>	28 (1 outside UK)	2	7	4	14
<b>2016</b>	27 (1 outside UK)	1 (joined 2003 – but in the LTTE civil administration)	2	15	9
<b>2017</b>	9	1 (but LTTE lawyer)	1	4	6

It is important to note, that this list is not exhaustive and by no means does it include all the recent torture cases involving victims who have successfully claimed protection in the UK.

Further, the ITJP has been studying an additional 40 cases where the victim was detained and tortured in the period between 2015-2018 and where he or she has already been granted protection and leave to remain in the UK. This is significant because it can take years to obtain asylum and the numbers are likely to rise as time passes and more cases are appealed.

It is completely astonishing and improbable, that accounts of abduction and torture from approximately 100 people (64 of which we are aware of, and 40 additional successful cases that we have been recently been informed about) have been found credible by the courts in the UK and Switzerland, while DFAT’s country guidance fails to account for prevalence of torture from these significant numbers.

### ***Request for Immediate Correction***

Given the analysis of the data provided above, we expect that this should remove any doubt DFAT had about the 76 documented cases of torture in the period between 2015-2017. On this basis, we request that DFAT issue an immediate notice that previous reports contained inaccuracies, including a notice in all future reports, and alert all responsible agencies, including the Department of Home Affairs, the Immigration Assessment Authority and the Administrative Appeals Tribunal and all refugee and community organisations in the sector. This vital information regarding documented cases of torture should also be a major consideration in all future reports.

### ***Harmful Assumptions***

The COI Report is posited on the idea and assumption that all categories of grave violations that occur in Sri Lanka are known to and accurately reported at least to some extent by organisations or individuals inside Sri Lanka. Historically in the last decade a large number of accepted violations of human rights have not been highlighted initially inside the country. For example, the International Crisis Group (2010) and the UN Panel of Experts report (2011), were the first to detail the violations

of International Humanitarian Law in 2009. The extent of post-war sexual violence was first highlighted by Human Rights Watch in a report in 2013. Reports on the prevalence of male sexual violence have also originated outside the country. Even now, human rights activists in Sri Lanka have focused more on enforced disappearances rather than on torture and sexual violence given the conservative culture in such a society in which stigma remains an issue and issues of security and the likelihood of being able to secure a more positive outcome for the victims. Reporting torture and sexual violence had led to further intimidation and harassment of family members as well as compromising their safety.

## 5. Scope of Investigation and Terminology

### ***DFAT on Reform and Torture in Police Custody***

The COI Report contains inaccuracies regarding reform in Sri Lanka. In the COI Report, DFAT asserts that:

[L]ocal sources, including Tamils, say mistreatment and torture by police continues to occur, but is primarily due to outdated policing methods and is not ethnically-based. Senior police do not endorse mistreatment or torture, but reform messages have been slow to filter down.<sup>19</sup>

This cannot be considered the case in 2019 when DFAT's COI Report was published, and even less so in 2020. Ben Emmerson, in his report noted that the most senior judge in Colombo informed him that in over ninety per cent of the cases he had dealt with so far in 2017, he had been forced to exclude essential evidence because it had been obtained through the use or threat of force.<sup>20</sup> Torture was so widespread that in the course of an official meeting, a Minister referred to 'torturers' within the police and in prisons.<sup>21</sup> Several alleged torturers remained in senior positions in the police force, exemplifying that torture was indeed endorsed by the Sri Lankan State and also making a mockery of the commitment to reform. This has been well covered in the Sri Lankan press but ignored by DFAT.<sup>22</sup> To cite a few examples:

- Sisira Mendis who was sent to Geneva to the UN Committee against Torture in 2016, is named in a UN report as being in charge of a notorious police torture site at the war end.<sup>23</sup> This caused great commotion and was reported in the international and local media<sup>24</sup> but

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<sup>19</sup> DFAT COI Report [4.26].

<sup>20</sup> OCHR, *Report of the Special Rapporteur on the Promotion and Protection of Human Rights While Countering Terrorism*, HRC, 40<sup>th</sup> sess, Agenda Item 4, UN Doc A/HRC/40/XX/Add.3 (23 July 2018) <[https://www.ohchr.org/Documents/Countries/LK/Sri\\_LankaReportJuly2018.PDF](https://www.ohchr.org/Documents/Countries/LK/Sri_LankaReportJuly2018.PDF)>.

<sup>21</sup> Ibid.

<sup>22</sup> See for example, citing the Police spokesman who responded to the allegations in *The Sunday Morning*, 'No Complaints Against TID Officers Accused of Torture: Police' (19 September 2019) <<http://www.themorning.lk/no-complaints-against-tid-officers-accused-of-torture-police/>>.

<sup>23</sup> OHCHR, *Report of the OHCHR Investigation on Sri Lanka*, HRC, 30<sup>th</sup> sess, Agenda Item 2, UN Doc A/HRC/30/CRP.2 (16 September 2015), 134 <[https://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session30/Documents/A\\_HRC\\_30\\_CRP\\_2.docx](https://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session30/Documents/A_HRC_30_CRP_2.docx)>.

<sup>24</sup> See, Reporters Without Borders, *RSF Urges Un Committee to Question Sri Lanka's Intelligence Chief* (15 November 2016) (Press Release) <<https://rsf.org/en/news/rsf-urges-un-committee-question-sri-lankas-intelligence-chief>> and, Jamey Keaten, *Sri Lankan Official Dodges UN Questions Over Alleged Torture* (17 November 2016) <<https://apnews.com/35d63d93e8d242d680884e4ed2d5de12/Sri-Lankan-official-dodges-UN-questions-over-alleged-torture>> and, Dharisha Bastians, *Barrage of Questions Fired at National Intelligence Chief Sisira Mendis DIG by UN Committee Against Torture in Geneva* (17 November 2016) <<http://dbsjeyaraj.com/dbsj/archives/49664>>. To see the video Mendis being questioned in Geneva, Journalists for Democracy in Sri Lanka, *Sri Lanka Shy Away from Answering UN Questions on Torture* (17 November 2016) <<http://www.jdslanka.org/index.php/news-features/politics-a-current-affairs/643-sri-lanka-shy-away-from-answering-un-questions-on-torture>>.



Mendis had his contract renewed on return home and the Government of Sri Lanka never answered the UN Committee against Torture's still outstanding official questions about his past role.<sup>25</sup>

- Nandana Munasinghe was named in a UN report in 2008 by Manfred Nowak as a person who should have been investigated for torture but was nevertheless promoted to Senior DIG (see Exhibit B, Gotabaya Rajapaksa case).<sup>26</sup>
- Prasanna de Alwis named in court documents by victims of torture was promoted and is now in 2020 CID Director.<sup>27</sup>

A collection of 25 dossiers on alleged police torturers, many of them in service still, is included in Exhibit B to the court documents filed in the torture case brought against Gotabaya Rajapaksa in the US.<sup>28</sup> The dossiers include a great deal of open source information from reports by Sri Lankan human rights activists who strangely do not seem to be the sources relied upon by DFAT for the COI Report.

### **Unofficial Detention Sites**

The COI Report overstates the access to and reporting of detention sites, but is silent on the prevalence of unofficial detention sites.

In this regard it is worth noting that the Human Rights Commission in Sri Lanka said in its *Submission to the Third Universal Periodic Review of Sri Lanka 30 March 2017* that "[t]he Commission has received complaints of persons being held at detention centres that are not gazetted (i.e. illegal sites), which creates opportunity for torture."<sup>29</sup>

Similarly, the UN High Commissioner for Human Rights in 2015 commented on the Sirisena-era abduction and torture cases the ITJP and Freedom from Torture shared with them:

Reports have continued to suggest the existence of secret and unacknowledged places of detention. These require urgent investigation.<sup>30</sup>

The existence of secret torture sites is therefore widely recognised. Did your team investigate this and if not why not?

The UN Committee on Torture made the following observations regarding unofficial detention sites:

The Committee urges the State party to ensure that all allegations of unlawful detention, torture and sexual violence by security forces are promptly, impartially and effectively investigated by an independent body. The Committee urges the State party to publish a full list of all gazetted detention centres, close down any unofficial ones still in existence and

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<sup>25</sup> Journalists for Democracy in Sri Lanka, *UN Gets No Response From Sri Lanka on Role of Spy Chief in Torture* (5 February 2018) <<http://www.jdslanka.org/index.php/news-features/human-rights/741-uncat-sisiramendis-srilanka>>.

<sup>26</sup> ITJP, *Exhibit B: Collection of Dossiers: Alleged Perpetrators of Torture and Other Violations* (August 2019) <<https://itjpsl.com/assets/press/ECF-No.-0066-3-Exhibit-B-to-Sooka-Decl.pdf>>.

<sup>27</sup> ITJP, *Alleged Torturer heads Sri Lankan CID* (26 May 2020) (Press Release) <<https://itjpsl.com/assets/press/English-26-May-2020-Alwis-press-release.pdf>>.

<sup>28</sup> ITJP, *Exhibit B: Collection of Dossiers: Alleged Perpetrators of Torture and Other Violations* (August 2019) <<https://itjpsl.com/assets/press/ECF-No.-0066-3-Exhibit-B-to-Sooka-Decl.pdf>>.

<sup>29</sup> Sri Lanka Human Rights Commission, *Submission to the Third Universal Periodic Review of Sri Lanka* (30 March 2017), 21 <<https://uprdoc.ohchr.org/uprweb/downloadfile.aspx?filename=4432&file=EnglishTranslation>>.

<sup>30</sup> OHCHR, *Statement by Un High Commissioner for Human Rights Zeid Ra'ad Al Hussein via videolink to the Human Rights Council* (30 September 2015) <<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16539&LangID=E#sthash.H3kgCTxj.dpuf>>.



ensure that no one is detained in unofficial detention facilities, as this practice is per se a breach of the Convention.<sup>31</sup>

### ***DFAT on Military Torture***

Referring again to DFAT's assessment "that the risk of torture perpetrated by either military, intelligence or police forces has decreased since the end of the war and is no longer state-sponsored. Because few reports of torture are verified, it is difficult to determine the exact prevalence of torture."<sup>32</sup>

There is an inherent contradiction – if there are so few reports how is it possible to pass judgement on the identity of the alleged perpetrators and their relationship to the State?

### ***White Van Abductions***

The COI Report defines the term "White Van Abductions" to mean "instances where individuals were abducted by unknown perpetrators in unmarked vehicles and were mostly never seen again."<sup>33</sup>

By contrast, the ITJP employs the term in its reports to mean any abduction by State agents where a white van is used. It is not contingent on whether the individual is disappeared. Has DFAT considered this type of abduction in producing the COI Report?

According to the ITJP's reports all of the 76 ITJP recently documented cases from 2015-17 involved abduction in a vehicle – generally a white coloured van but sometimes a green jeep or differently coloured van. We therefore consider the lack of any real analysis of this type of abduction a significant omission from the COI Report and invite you to consider it. To assist you we refer you to the ITJP's reports, inter alia *Unstopped*<sup>34</sup>- published in 2017 and based on 24 torture cases from 2016-2017, *Silenced* published in 2016, based on 20 cases in 2015,<sup>35</sup> and the OHCHR report already cited in your COI Report.

After a poor analysis, not helped by its poor terminology and scope of investigation into the phenomena, DFAT concludes the following in relation to white van abductions:

DFAT assesses that reports of a small number of abductions involving white vans in 2016 and 2017 likely referred to incidents where police did not follow protocol during arrest. DFAT understands that such disappearances are no longer common.<sup>36</sup>

In distinction, the UN Committee against Torture drew the following conclusions:

The Committee expresses concern at credible reports indicating that the practice of so-called "white van" abductions of Tamils has continued in the years following the end of the armed conflict. The Committee notes allegations of this practice documented by the Office of the United Nations High Commissioner for Human Rights (OHCHR) Investigation on Sri Lanka during the period 2002-2011 as well as by non-governmental organizations, which have

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<sup>31</sup> Ibid.

<sup>32</sup> DFAT COI Report [4.28].

<sup>33</sup> DFAT COI Report [4.28].

<sup>34</sup> ITJP, *Unstopped* (2017) <<https://itjpsl.com/reports/unstopped>>.

<sup>35</sup> ITJP, *Silenced* (2016) <<https://itjpsl.com/reports/silenced-report>>.

<sup>36</sup> DFAT COI Report [4.28].

identified 48 sites where torture allegedly occurred or which were used as transit points to torture locations between 2009 and 2015.<sup>37</sup>

The Committee also made the following recommendation:

The State party should expedite the establishment of the mechanisms called for in Human Rights Council resolution 30/1 and, in particular, a judicial mechanism with a special counsel to investigate allegations of torture, enforced disappearances and other serious human rights violations.<sup>38</sup>

## 6. Failure Consider or Properly Consider Relevant Reports by ITJP and Others

The COI Report claims to have used “relevant and credible open source reports”<sup>39</sup> but that does not appear to have applied to the reading of ITJP’s reports which appears to have been selective. There appear to be only two citations of ITJP reports, with reference to the report on the Terrorism Investigation Division.

Other highly relevant ITJP reports that should have been considered by DFAT include:

- **Unstopped** – published in 2017 and based on 24 torture cases from 2016-17.<sup>40</sup>
- **Silenced** – published in 2016 and based on 20 cases from 2015.<sup>41</sup>
- **The Navy: A Collective Blind Eye (2019)** – covers navy torture, abduction and disappearance.<sup>42</sup>
- **The Gotabaya Rajapaksa Complaint case documents (2019)** – covers torture among other violations.<sup>43</sup>
- **Ongoing Torture (2019)**<sup>44</sup> summary of data and press release.<sup>45</sup>
- **Unsilenced (2018)** – an independently commissioned academic work looking at 121 male sexual violence (torture) cases.<sup>46</sup>
- **The Special Task Force (2018)** – a report on torture among other violations committed by the STF of the Sri Lankan police.<sup>47</sup>
- **Joseph Camp (2017)** – a case study on Sri Lanka’s well known torture site.<sup>48</sup>
- **Case filed in Latin America against Jagath Jayasuriya (2017)** – includes details of 14 torture cases by military in Joseph Camp.<sup>49</sup>
- **A Still Unfinished War (2015)**<sup>50</sup> – report documenting torture from 2009-15.
- **An Unfinished War (2014)**.<sup>51</sup>

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<sup>37</sup> UN Committee against Torture (CAT), *Concluding Observations on the Fifth Periodic Report of Sri Lanka*, UN Doc CAT/C/LKA/CO/5 (27 January 2017) <<https://www.refworld.org/docid/596f5cc24.html>>.

<sup>38</sup> Ibid.

<sup>39</sup> DFAT COI Report [1.4].

<sup>40</sup> ITJP, *Unstopped* (2017) <<https://itjpsl.com/reports/unstopped>>.

<sup>41</sup> ITJP, *Silenced* (2016) <<https://itjpsl.com/reports/silenced-report>>.

<sup>42</sup> ITJP, *The Navy: A Collective Blind Eye* (2019) <<https://itjpsl.com/reports/the-navy-a-collective-blind-eye>>.

<sup>43</sup> ITJP, *The Gotabaya Rajapaksa Complaint* (2019) <<https://itjpsl.com/reports/gotabaya-rajapaksa-complaint>>.

<sup>44</sup> ITJP, *Ongoing Torture* (2019) <<https://itjpsl.com/reports/ongoing-torture-update>>.

<sup>45</sup> ITJP, *High Time for Sri Lanka to Investigate Well-Known Alleged Perpetrators of Torture* (Press Release) (25 February 2019).

<sup>46</sup> ITJP, *Silenced* (2016) <<https://itjpsl.com/reports/silenced-report>>.

<sup>47</sup> ITJP, *The Special Taskforce* (2018) <<https://itjpsl.com/reports/special-task-force>>.

<sup>48</sup> ITJP, *Terrorism Investigation Division* (2017) <<https://itjpsl.com/reports/terrorism-investgation-division>>.

<sup>49</sup> ITJP, *The Case Against Jagath Jayasuriya* (2017) <<https://itjpsl.com/reports/the-case-against-jagath-jayasuriya>>.

<sup>50</sup> ITJP, *A Still Unfinished War: Sri Lanka’s Survivors of Torture and Sexual Violence* (2015)

<[https://itjpsl.com/assets/stoptorture\\_report\\_v4\\_online.pdf](https://itjpsl.com/assets/stoptorture_report_v4_online.pdf)>.

<sup>51</sup> ITJP, *A Unfinished War* (2014) <<https://itjpsl.com/reports/unfinished-war>>.

It is worth noting that the ITJP's research on torture in Sri Lanka has been compiled since 2014 though some of its investigators have worked on human rights in Sri Lanka since 2005 and its Executive Director was one of a three member UN panel appointed by the Secretary General on Sri Lanka. Its investigators include international lawyers who have worked as prosecutors, defence lawyers and legal advisors to international judges at international and hybrid criminal courts including the International Criminal Court, the UN International Criminal Tribunals for the former Yugoslavia and Rwanda and the Special Court for Sierra Leone. In addition our investigators include former staff members of the United Nations Office of the High Commissioner for Human Rights and the Truth and Reconciliation Commission in South Africa as well as independent experts for the UK Government's Preventing Sexual Violence in Conflict Initiative – one of whom drafted some of the key UK government guidance on how to document sexual violence in conflict.

### ***Special United Nations Investigation into Ongoing Torture Allegations 2018***

Perhaps most significantly, in 2018 the Office of the High Commissioner for Human Rights under the leadership of the High Commissioner for Human Rights, Zeid Ra'ad Al Hussein, deeply concerned at the allegations of ongoing torture in Sri Lanka, decided to commission a three-person independent team to investigate the allegations of ongoing torture, including of white van abductions. This was precisely because of the gap between what was reported in country and what was being reported outside the country.

This UN special investigation team spent three months interviewing people (long distance) in Sri Lanka and then interviewed in person 29 alleged victims of torture outside the country, mainly in the UK. None of these 29 victims had been interviewed by any NGO including the ITJP, prior to meeting the UN team. Their investigation focused on new evidence and did not rely on evidence taken by other bodies.

The summary finding of OHCHR's investigation is reflected in the 2019 report of the High Commissioner to the Human Rights Council:

OHCHR has continued to receive credible information about cases of abduction, unlawful detention, torture and sexual violence by Sri Lanka security forces, which allegedly took place in 2016 to 2018. A preliminary assessment of the information received indicates that there are reasonable grounds to believe that accounts of unlawful abductions and detention and of torture, including incidents of sexual violence against men and women, are credible, and that such practices might be continuing in northern Sri Lanka. Such allegations should be the subject of prompt, effective, transparent, independent and impartial investigations. In the past, the Government has condemned any act of torture, and indicated that any allegation of torture would be properly investigated and prosecuted. OHCHR is not aware of any investigations undertaken to date into the above-mentioned allegations.<sup>52</sup>

It is worth noting, though DFAT cites the US Department of State annual Human Rights report, it omits to mention that the US report highlights<sup>53</sup> the UN's finding that there are credible allegations of

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<sup>52</sup> OHCHR, *Promoting Reconciliation, Accountability and Human Rights in Sri Lanka*, HRC, 40<sup>th</sup> sess, Agenda Item 2, UN Doc A/HRC/40/23 (8 February 2019), 56 <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/G19/029/25/PDF/G1902925.pdf?OpenElement>>.

<sup>53</sup> The US State Department says "In its report to the March session of UNHRC, the Office of the High Commissioner for Human Rights noted it "has continued to receive credible information about cases of abduction, unlawful detention, torture and sexual violence by security forces, which allegedly took place between 2016 and 2018." See, US Department of State, *2019 Country Reports on Human Rights Practices: Sri Lanka* (2019) <<https://www.state.gov/reports/2019-country-reports-on-human-rights-practices/sri-lanka/>>.

ongoing abduction, unlawful detention and torture from 2016 – 2018. This is at best sloppy, and at worst highly selective.

### **Other United Nations Reports**

We refer you to the following selected highlights of the findings of these international organisations which are diametrically opposite to local sources cited in DFAT’s COI Report:

- **UN High Commissioner for Human Rights Report to Human Rights Council 2018:** “The use of torture remains a serious concern. The High Commissioner was deeply concerned over serious allegations in foreign media about ongoing abductions, extreme torture and sexual violence, as recently as in 2016 and 2017. OHCHR is exploring options for how best to pursue further investigations of these allegations.”<sup>54</sup>
- **UN High Commissioner for Human Rights Report to the Human Rights Council 2017:** “OHCHR received credible information from a well-known human rights organization according to which “white van” abductions, and torture and sexual violence, by the Sri Lankan security forces persisted. These allegations must be properly investigated. OHCHR raised this matter with the authorities.”<sup>55</sup>
- **UN Special Rapporteur on Human Rights and Counter Terrorism, Ben Emmerson QC** in his 14 July 2017 Statement: “all of the evidence points to the conclusion that the use of torture has been, and remains today, endemic and routine, for those arrested and detained on national security grounds.”<sup>56</sup>
- **UN Special Rapporteur on Torture Juan Mendez’s Report on Sri Lanka in 2016:** “Authorities claimed that all arrests, without exception, are made by police officers in uniform using officially marked vehicles. However, the Special Rapporteur received credible reports of recent (up to April 2016) “white van abductions” by officers in plain clothes believed to belong to the Criminal Investigations Department or the Terrorism Investigation Division.”<sup>57</sup>
- The torture methods Special Rapporteur Juan Mendez describes, are the same as in the ITJP documented cases, further stating: “The Special Rapporteur ... received well-documented accounts of extremely brutal methods of torture, including burns; beatings with sticks or wires on the soles of the feet (falanga); stress positions, including suspension for hours while handcuffed; asphyxiation using plastic bags drenched in kerosene and hanging of the person upside down; application of chili powder to the face and eyes; and sexual torture, including rape and sexual molestation, and mutilation of the genital area and rubbing of chili paste or onions on the genital area.”<sup>58</sup>

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<sup>54</sup> OHCHR, *Promoting Reconciliation, Accountability and Human Rights in Sri Lanka*, 37<sup>th</sup> sess, Agenda Item 2, UN Doc A/HRC/37/23 (25 January 2018), 44 <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/G18/018/53/PDF/G1801853.pdf?OpenElement>>.

<sup>55</sup> OHCHR, *Report of the Office of the United Nations High Commissioner for Human Rights on Sri Lanka*, 34<sup>th</sup> sess, Agenda Item 2, UN Doc A/HRC/34/20 (10 February 2017), 57 <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/G17/030/56/PDF/G1703056.pdf?OpenElement>>.

<sup>56</sup> United Nations Sri Lanka, *Full Statement by Ben Emmerson, UN Special Rapporteur on Human Rights and Counter Terrorism, at the Conclusion of his Official Visit* (14 July 2017) <<http://lk.one.un.org/news/full-statement-by-ben-emmerson-un-special-rapporteur-on-human-rights-and-counter-terrorism-at-the-conclusion-of-his-official-visit/>>.

<sup>57</sup> OHCHR, *Report of the Special Rapporteur on Torture And Other Cruel, Inhuman or Degrading Treatment or Punishment on His Mission to Sri Lanka*, 34<sup>th</sup> sess, Agenda Item 3, UN Doc A/HRC/34/54/Add.2 (22 December 2016), 23 <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/440/12/PDF/G1644012.pdf?OpenElement>>.

<sup>58</sup> *Ibid*, 26.

- **UN High Commissioner for Human Rights in 2016** after visiting Sri Lanka: “The number of torture complaints has been reduced but new cases continue to emerge – as two recent reports detailing some disturbing alleged cases that occurred in 2015, have shown – and police all too often continue to resort to violence and excessive force.”<sup>59</sup>
- **UN Committee on Torture Concluding Observations on Sri Lanka 2017:** “The Committee remains seriously concerned at consistent reports from national and United Nations sources, including the Special Rapporteur on torture, indicating that torture is a common practice carried out in relation to regular criminal investigations in a large majority of cases by the Criminal Investigation Department of the police, regardless of the nature of the suspected offence.”<sup>60</sup>

### ***Other Report Not Considered***

We also refer to the Journalists for Democracy in Sri Lanka’s report ***Inconvenient Truths: The Newspapers They Didn’t Read***<sup>61</sup> which lists Tamil media reporting on ongoing violations, including abduction and torture against 51 individuals over 26 months. Did the local sources or DFAT assessors investigate these allegations some of which include the names of victims and other identifying details, and if so, what were their findings?

## **7. Culture of Impunity**

Since the COI Report’s publication on 4 November 2019, the Presidential elections were held twelve days later on 16 November 2019, and brought Gotabaya Rajapaksa to the Presidency and his brother, former President, Mahinda Rajapaksa the role of Prime Minister. In the Parliamentary elections just held on 5 August 2020, President Gotabaya Rajapaksa, declared victory over his party – Sri Lanka Podujana Party (SLPP) – securing a ‘super majority’ of seats that with parliamentary allies will afford him the two thirds majority needed to amend the Constitution – something he’s in the process of doing to consolidate his powers.

The situation on the ground has worsened since Gotabaya Rajapaksa came to power – an individual who stands accused on credible allegations of war crimes and other crimes against humanity. Last year he was being sued for his alleged role in torture in a US Court until he was elected Head of State and granted immunity.

We invite you to monitor the ongoing situation as well as the effect this may have on ongoing torture against Tamils. As you recognise, Sri Lanka has made no progress towards accountability for war crimes and the President has even pardoned a soldier convicted of a massacre of eight Tamils.<sup>62</sup> Any prospect of real accountability is now even less likely to occur as those in charge face credible allegations of war crimes. This includes President Gotabaya Rajapaksa himself,<sup>63</sup> and the head of the

<sup>59</sup> OHCHR, *Statement by UN High Commissioner for Human Rights, Zeid Ra’ad Al Hussein, at the End of His Mission to Sri Lanka* (9 February 2016) (Press Release)

<<https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=17025>>.

<sup>60</sup> UN Committee Against Torture, *Concluding Observations on the Fifth Periodic Report of Sri Lanka*, UN Doc CAT/C/LKA/CO/5 (27 January 2017), 9<<https://www.refworld.org/docid/596f5cc24.html>>.

<sup>61</sup> Journalists for Democracy in Sri Lanka, *Inconvenient Truths: The Newspapers They Didn’t Read* (18 September 2018) <<http://www.jdslanka.org/index.php/news-features/human-rights/810-sri-lanka-two-abductions-reported-every-month>>.

<sup>62</sup> Human Rights Watch, *Sri Lanka: Justice Undone for Massacre Victims: Presidential Pardon Shows Rajapaksa’s Indifference to Army Atrocities* (27 March 2020) <<https://www.hrw.org/news/2020/03/27/sri-lanka-justice-undone-massacre-victims>>.

<sup>63</sup> ITJP, *The Gotabaya Rajapaksa Complaint* (2019) <<https://itjpsl.com/reports/gotabaya-rajapaksa-complaint>>.

army Lieutenant General Shavendra Silva. The US Government has designated Lieutenant General Shavendra Silva, current Commander of the Sri Lanka Army and Acting Chief of Defence Staff, as required under Section 7031(c) of the *Department of State, Foreign Operations, and Related Programs Appropriations Act*, due to credible information of his involvement, through command responsibility, in gross violations of human rights, namely extrajudicial killings, by the 58th Division of the Sri Lanka Army during the final phase of Sri Lanka's Civil War in 2009.<sup>64</sup>

In reality the appointment of individuals such as Silva to positions of power signals a culture of impunity.<sup>65</sup> Brigadier Priyanka Fernando was rewarded with a promotion in Sri Lanka to Major General having been convicted by the Chief Magistrate of England and Wales of Public Order Act offences consisting of threatening Tamil protestors.<sup>66</sup> One could argue that this promotion was a brazen act of defiance towards the ruling of the UK courts by the Sri Lankan government. The same government is only likely to be emboldened if the Department of Home Affairs and Trade downplays the occurrence of ongoing torture in Sri Lanka which your current COI Report does. In turn this puts Tamil civilians at risk, and we invite you to reconsider the sources that you have relied on in producing it.

## 8. Conclusion

We are of the opinion that DFAT's COI Report should be set aside on the basis that it is factually incorrect and relies on sources which are unreliable and lack knowledge of the real situation on the ground in Sri Lanka. It also downplays the sources which other governments have used to good effect including that of the UN Special Rapporteurs, OHCHR, the UN Committee on Torture and the ITJP reports. DFAT's Report is also deeply unprofessional as it seeks to downplay the risk involved to Sri Lankan survivors of torture who have come to Australia to seek refuge. If this report is going to be relied upon by the Department of Home Affairs, the Immigration Assessment Authority and the Administrative Appeals Tribunal, to deal with people from Sri Lanka seeking asylum, the ITJP and organisations working in this field will need to consider whether it should bring an action to review it and have it set aside.

We look forward to your response.

Yours sincerely,



Yasmin Sooka  
Executive Director  
International Truth and Justice Project



Rawan Arraf  
Principal Lawyer & Director  
Australian Centre for International Justice

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<sup>64</sup> US Department of State, Public Designation, *Due to Gross Violations of Human Rights, of Shavendra Silva of Sri Lanka Under Section 7031(c) of the Department of State, Foreign Operations, and Related Programs Appropriations Act* (14 February 2020) (Press Release) <<https://www.state.gov/public-designation-due-to-gross-violations-of-human-rights-of-shavendra-silva-of-sri-lanka-under-section-7031c-of-the-department-of-state-foreign-operations-and-related-programs-appropriations-a/>>.

<sup>65</sup> See the IJTP's dossier, ITJP, *Gotabaya's Inner Circle* (2020) <<https://itjpsl.com/reports/gotabayas-inner-circle>>.

<sup>66</sup> The conviction is pending appeal at the High Court.