Observations by the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Mr. Pablo de Greiff, on the conclusion of his recent visit to Sri Lanka:

Sri Lanka continues to deprive itself of the benefits of Transitional Justice

Today, I conclude my 14-day official country visit to Sri Lanka. This visit completes a series of four previous trips to the country for which I was invited by the Government to provide advisory services. Hence, I have been able to regularly and closely follow the developments in Sri Lanka since my very first visit in March 2015 – barely two months after a new era for the country had started with the January 2015 Presidential election. This visit, which will lead to a report to the Human Rights Council, comes at a particularly critical juncture, in which determined decisions are called for. I hope to contribute to this process with my preliminary observations and recommendations, which I would like to share with you today, and with the fuller report to be presented to the Human Rights Council next year.

My five visits to the country manifest the openness and willingness on the part of the Government to engage in constructive dialogue, for which I would like to express my appreciation. Since my first visit in early 2015, the Ministry of Foreign Affairs has provided me with extraordinary support prior to and during the visits, including by facilitating and organizing official meetings. I equally extend my thanks to the United Nations Country Team, its Resident Coordinator, as well as the Senior Human Rights Advisor in Colombo and his team for supporting the visits.

During this visit, I have been able to travel extensively throughout the country, including the South, East, North and West, to hold discussions in Aluthgama, Jaffna, Kilinochchi, Mannar, Matara, Mullaitivu, Puttalam and Trincomalee, and visit emblematic locations in these districts related to violations, land issues and memorialization. I had the opportunity to listen to victims and their families, some of whom travelled from afar to share their experiences with me.

In Colombo, I had the honour to be received by His Excellency the President of Sri Lanka, Maithripala Sirisena and Prime Minister Ranil Wickremesinghe. I also had very productive discussions with other high level government officials including the Minister of Foreign Affairs; the Minister of Finance and Media; the Minister of Law and Order and Southern Development; the Minister of National Co-existence, Dialogue and Official Languages; the Minister of Prison Reforms, Rehabilitation, Resettlement and Hindu Religious Affairs; the Minister of Justice; the Minister of Education; the Secretary to the President; the Secretary of Defense; the Honourable

Speaker of Parliament; the Sectoral Oversight Committees on Legal Affairs and Media, and on Reconciliation and North & East Reconstruction; the Chief Justice; the Attorney General; the Chief of Defense Staff, the Commander of the Army; the Commander of the Air Force and the Commander of the Navy; the Chief of National Intelligence; the Inspector General of Police; the Chairperson of the Victim and Witness Protection Authority; the Secretary-General of the Secretariat for Coordinating Reconciliation Mechanisms; the Director-General of the Office for National Unity and Reconciliation; the Human Rights Commission, the National Police Commission, members of religious communities, political parties, and representatives of the diplomatic community, academics, civil society organizations, victims groups and many others who have shared their insights. At the local level, I had the opportunity to exchange views with the Governors of the Northern Province and the Eastern Province.

At the end of March 2015 I had the pleasure to undertake my first visit to Sri Lanka under the invitation of the then new government which had resolved to restore its tradition of strong engagement with the international community. This put an end to the temporary leave Sri Lanka had taken from its international cooperation with the human rights architecture to which the country had contributed and benefitted from. Since then, that resolve has continued to be manifested in many ways, amongst others, by engaging with various entities of the United Nations and by strengthening ties with a broad range of international actors at the multilateral and bilateral levels as well as with international civil society organizations.

From the standpoint of my mandate I will highlight not only the repeated invitations and the fruitful exchanges I have had in the course of multiple visits, but also the engagement of Sri Lanka with other Special Procedures of the Human Rights Council including the Working Group on Enforced and Involuntary Disappearances, the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Special Rapporteur on the Independence of Judges and Lawyers, the Special Rapporteur on Minority issues, and the Special Rapporteur on the protection of human rights while countering terrorism, (all of whom have made recommendations with which I concur). There is no question that because of its willingness to interact, Sri Lanka now has unprecedented levels of support in the international community.

I would like to mention some of the changes I have observed inside Sri Lanka since my first visit in 2015. I will concentrate only on developments related to my mandate, without pausing to remark on progress in other areas crucial for the future of the country, such as the 19th Amendment to the Constitution, among other initiatives.

Regarding my area of concern, I will highlight the following:

- First, it is obvious that both civil society and parts of government have travelled on a very steep learning curve regarding transitional justice issues. Sri Lankan civil society, with its characteristic courage, persistence, and very high capacity, continues to be fully present– in my opinion as an insufficiently tapped resource—making crucial contributions to transitional justice debates. The Government of Sri Lanka has also successfully cultivated capacities on the topic, especially in the Secretariat for Coordinating the Reconciliation Mechanisms (SCRM) and the different technical Working Groups that supported its mandate, in the Ministry of Foreign Affairs, and in the Prime Minister's office, among

other places. These are crucial capacities as the country moves on to the design and implementation of a robust and comprehensive transitional justice policy – as it reiterates it will;

- Second, a very important development was the establishment and the work of the Consultations Task Force on Reconciliation Mechanisms (CTF). This task force -- created in response to the need to proceed in the area of transitional justice only in consultation with victims and other important stakeholders -- was established by the Government but run entirely by members of civil society displaying a degree of commitment that deserves to be celebrated. In an extraordinarily short period, without pre-existing structures, and sometimes only with limited support from some authorities, the CTF managed to establish its presence broadly and deeply in the country, including at the local level. Up to this point, this is the most comprehensive effort to capture the views of victims and others on transitional justice questions. While consultation should not be conceived of as a one-off experience, and mechanisms of on-going consultation should be built into all future transitional justice measures, the CTF's report should have been better received and its conclusions and recommendations should certainly be a part of all conversations regarding the design of those measures. The report reflects the most thorough representation up to now of the voices of those affected;

- The third observable change is that conversations about transitional justice have extended so as to include more stakeholders, including youth groups, academics, the media, Sri Lankans abroad, and the armed forces. Inclusive preparatory work will in the end be important for the sustainability of the process;

- Finally, I should also mention the progress achieved in the creation – after a long delay – of the Office on Missing Persons (OMP). While the process was protracted and involved insufficient communication with the public, the law has been enacted. I was informed that the selection of commissioners has just started. I understand that this will involve accepting self-nominations from the public at large, which is a positive development. It will be crucial for the Constitutional Council to select people that will bolster the credibility of the OMP by their moral standing and probity in the eyes of all communities, their expertise, their independence, and also their ability to collaborate and work expeditiously. The establishment of the OMP has taken a long time, despite being an arguably easy part of the transitional justice project. The urgency of clarifying the fate of the missing can be understood by everyone.

However, the fact that this list of achievements does not include most of the priority measures that I mentioned in the statement after my first visit[1] (dated April 11, 2015) makes obvious that the process is nowhere close to where it should have been more than two years later. These expectations were not merely those of the international community but of the Government of Sri Lanka and of Sri Lankans' generally. It was the Government's '100 Day Programme' that made

[1] See http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15820&LangID=E.

commitments to its people concerning accountability. Those commitments were specified in greater detail in a resolution at the Human Rights Council co-sponsored by Sri Lanka (HRC Res 30/1 Promoting reconciliation, accountability and human rights in Sri Lanka adopted on 1 October 2015), which won plaudits not just among the international community but in Sri Lanka as well. The country committed itself to establishing in a two-year period (which lapsed in March of this year) measures on four different areas including, truth, justice, reparations and guarantees of non-recurrence.

Let me emphasize one point; in a world in which nation states are still the basic units of political organization, the human rights architecture that *they* collectively construct is first and foremost the expression of commitments to their own citizens, beyond being voluntary pledges.

Some of the pending issues I had mentioned in April 2015, include: the release of land, the repeal of the Prevention of Terrorism Act (PTA) and its replacement by legislation that is fully compliant with human rights standards, the establishment of a mechanism to review expeditiously the cases of those held under the PTA, and the cessation of overbearing and intimidating forms of surveillance especially against women, human rights activists, and those involved in memorialization initiatives in the North and East.

Each of these issues involve questions of basic rights and thus, the continued failure to achieve progress in fully addressing them constitutes a denial of justice. Furthermore, the delays raise questions in many quarters about the determination of the government to undertake a comprehensive transitional justice programme and undermine trust, which is not plentiful—as demonstrated by continued incidents of inter-ethnic violence. Moreover, the delays have additional spill-over consequences. To illustrate, although some of the land occupied by the Armed Forces, in some cases for decades, has been returned, the lack of clarity and comprehensiveness in the process – a process in which the Armed Forces are both a party and *the* Judge (they seem to solely determine which pieces of land are returned and when) has serious consequences from a developmental standpoint. It speaks about a weak regime of property rights, one of the greatest imaginable disincentives for foreign investors for whom reliable property rights is a *sine qua non* condition. Similarly, continued unnecessary surveillance both manifests and fuels low levels of trust which not only makes reaching agreements more difficult but constitutes a developmental drag through effects that are similar to a reduction in market sizes and an increase in transaction costs. The fact that the judicial system is so backlogged and slow (with a recent study pointing out that some cases take more than 17 years to resolve) only compounds the difficulties.

There is broad understanding of the fact that Sri Lanka faced in the past serious security challenges. Thus, Sri Lanka has not only the right, but the obligation, to provide security for all, compatible with human rights and other standards. Similarly, there is an understanding of the challenges faced by countries that attempt to face legacies of abuses while they simultaneously engage in democratizing and ambitious constitutional reforms. However, in assessing where and when to attempt progress on the transitional justice agenda, the following considerations need to be kept in mind: as many other country experiences show, long delays between the acknowledgment of

obligations to establish transitional justice measures and the fulfilment of these obligations involves risks: no one should be under the impression that waiting is a costless alternative.

First, it is usually the case that delays open up opportunities for the topic to become entangled in partisan politics, as it seems to be happening in Sri Lanka. I take the opportunity to reiterate a point that cannot be overstated: transitional justice deals with questions of basic, fundamental rights. Hence, it is not to be reduced to a matter of partisan politics.

Second, in a highly polarized context, the absence of a comprehensive plan that includes provisions for the satisfaction of the rights to truth, justice, reparation, and guarantees of non-recurrence, has left transitional justice as an easy target to attack. It has been narrowed to a discussion about one of its dimensions only –criminal accountability—and this topic further reduced to the question of the nationality of the judges in a future accountability mechanism.

Third, the scope of the transitional justice project has been reduced to events around the end of the conflict, when in fact it should have a much broader sweep in a country with a long history of cycles of violence. The absence of a comprehensive plan also means that transitional justice, already being present in public debates, generates apprehensions. Some of those fears are the result of the political manipulation of the topic. Others stem from a lack of concrete answers that may assuage those apprehensions. And finally, the politicization of the topic in this context has also meant that it has been increasingly ethnicized. As a result, transitional justice is represented as if it were essentially a threat to the majority community, of interest to one of the minorities only – and all others left at the margins.

In light of the risks and costs associated with further delays, the lack of an informed debate proactively supported by government, including its top leadership, is difficult to understand. The costs of delays can be measured in rights terms, in terms of human suffering (often involving victims in all communities that have been under-attended or ignored for years, some of whom are of advanced age, and vulnerable in many ways), in terms of the very possibility of implementing the transitional justice programme at all, as well as its costs in developmental terms.

In this context then it may be worth offering the following reminders:

- a comprehensive transitional justice policy, including its four constitutive elements (truth, justice, reparation, and guarantees of non-recurrence) if designed and implemented with inclusive participation has the potential to provide recognition to victims, strengthen the rule of law, foster civic trust, and promote social integration or reconciliation. Countries with legacies of authoritarianism and/or conflict have gravitated towards this policy for these very reasons.

- In low trust contexts, typical in the aftermath of large-scale violations, where trust between citizens, among groups, and between them and state institutions has been shattered, policies meant to increase understanding about the conditions that led to the violations, to make narrow and reliable attributions of responsibility, offer diverse forms of reparation to victims so as to contribute to their being able to resume at least part of their lives with an

increased sense of wellbeing, and to reform institutions so that the violations do not happen again, help to lay the foundations for increased trust.

- Transitional justice can achieve its potential only to the extent that it is not used as an instrument of 'turn-taking,' a means to benefit one community over others, to further partisan political interests, a complex form of patronage.

- The promotion and strengthening of human rights is at the core of the transitional justice programme. That means the rights of *all*, independently of all other considerations, including ethnicity, religion, politics, gender, etc., are what is meant to be strengthened. While the events around the end of the conflict in 2009 merit particular examination, in a country with a long history of violence and violations, in which *all* communities have victims, and where it would be a gross simplification –and the product of manipulation— to reduce that history to its intercommunity dimension, this might be especially useful. It should be recalled that the 1971 insurrection, and the 1987-89 violence, and LTTE violence against Tamils are examples of intra-communal violence, showing what we know to be the case, that wherever violations are tolerated, no one is safe—and that the violations tend to recur.

- Similarly, and as a consequence, it is worth recalling that this is a country in which *every* community has victims that have rights to truth, justice, reparations, and guarantees of non-recurrence. So, in addition to the Tamil victims during and at the end of the conflict, a quick list of victims that are still awaiting redress include those of the insurrections mentioned above, many victims of terrorist attacks, the family members of the over 600 policemen gruesomely murdered in 1990, and the Muslim population forced out of Jaffna in 1990. And this is obviously an incomplete list.

- The point is that transitional justice measures, to the extent that they are instruments for strengthening the regime of rights, the rights of *all*, may be particularly useful in a context with such a history. In February 2016 at the Human Rights Council, providing some comments on my visits to Sri Lanka I argued: "Those who approach questions of truth, justice, reparations, and guarantees of non-recurrence as if they were the subject of a zero sum game, a matter of interest to one community alone, do a great disservice to the country. This includes some politicians, members of the media, and even some religious leaders, who speak as if the measures will either target or benefit one group alone." I reiterate the point. Transitional justice should be of interest, and in any case is meant to protect the rights of all.

- Transitional justice processes can help in settling interminable debates precisely of the sort that manifest and produce low levels of trust and that lend themselves easily to political manipulation. As I write this statement the debate continues in the newspapers concerning the number of victims at the end of the conflict, whether it was 40,000 or 'merely' 8,000. While the final number may be impossible to determine with absolute precision, there is of

course a lot that has been learned in the last 30 years about forensics and other methods offering reliability that political opinions cannot.

- Similarly, transitional justice processes are nothing like 'witch hunts,' they do not involve massive purges, and do not trade on charges of collective responsibility or guilt by association. In this respect, I note with concern the use of rhetoric such as 'war heroes will never be brought to trial.' This seems to me to misrepresent the target of transitional justice accountability measures by suggesting that it is a generally anti-security agenda, and also by forgetting that no one who has committed violations of human rights law or of the laws of war deserves to be called a hero. Sifting precisely between the legitimate and lawful use of force and the contrary, under conditions in which all relevant due process guarantees are meticulously adhered to, and in which not only the rights of victims but also the rights of suspects and the accused are protected, is one of the points of transitional justice accountability.

- I will add that the promise mentioned above regarding 'war heroes' is a legally unenforceable political statement, and therefore cannot offer any real security. In order to make it effective it would ultimately require a violation of the principle of the separation of powers, the independence of the judiciary, amongst others. Moreover, needless to say, it offers absolutely no warranty internationally. As the recent case presented in Brazil against a former member of the Armed Forces demonstrates, accountability will be sought either here or abroad. In my opinion, this is an additional reason for the country, with the full support of the Armed Forces --who stand a lot to gain from this process-- to establish a robust and credible comprehensive transitional justice policy.

In what follows I will offer some concrete recommendations moving forward. Both the analysis and the recommendations will receive further elaboration in the report to be presented to the Human Rights Council in September 2018.

Recommendations:

Overall recommendations:

a) Adopt a comprehensive Transitional Justice Strategy that includes a clear calendar for the implementation of the different transitional justice mechanisms, including truth, justice, reparations, and guarantees of non-recurrence, identifies needs in terms of budget, staff and required expertise, and outlines the links between the different elements of the strategy. Allow for public consultation of the plan.

b) The Government should take advantage of the report of the National Consultations on the Reconciliation Mechanisms carried out by the Consultation Task Force. The report identifies expectations, needs, challenges and priorities as expressed by key stakeholders and could be invaluable to align the Government's designs with the needs of the victims.

The network that the Consultation Task Force and its Zonal Task Forces put in place in 2016 can be a very positive structure to continue dialogue and consultations around the design and implementation of the mechanisms.

c) Thus far, Sri Lanka has regrettably underutilized the support offered by the United Nations. The country should particularly tap more into expertise that can be provided by the Office of the High Commissioner for Human Rights.

1. Slow progress on pre-conditions for transitional justice erodes trust in the Government's capacity to move forward with the reforms.

Since one of the aims of transitional justice is to foster trust (among individuals, between communities, and among them and state institutions), but of course transitional justice initiatives do not operate in a vacuum, other measures that have the potential to either foster or undermine the achievement of that aim need to be carefully considered. These confidence building measures include:

a) Repeal of the Prevention of Terrorism Act (PTA) and its prompt replacement by new counterterrorism legislation that adheres to international best practices. Promptly deal with long-standing cases pending under the PTA and put in place a procedure to review PTA convictions that were based solely on the confession of the accused.

b) Move to terminate military involvement in commercial activities and reduce military presence in those areas, such as the Northern and Eastern provinces.

c) Carry out a comprehensive mapping of land occupied by the military and land recently released and produce a strategy with deadlines for release and plans for compensation of those areas that will not be returned; consider establishing a procedure that does not make the Armed Forces the sole voice in deciding this question.

d) Cease continued harassment and surveillance by security and intelligence personnel of human rights defenders and other social actors, especially female.

e) Given continued apprehensions about surveillance and security, the transitional justice process should incorporate its own witness and victim protection instruments. The existing (but incipient) witness and victim protection scheme should be strengthened, as it is relevant for emblematic cases pending before the courts.

2. Truth

a) Publish all reports of previous commissions that have not yet been published, and make their records and archives available for any future transitional justice mechanism.

b) Operationalize the Office of Missing Persons immediately.

a. Appoint commissioners on the basis of objective criteria to ensure the independence, effectiveness, transparency and accessibility of the institution; ensure the commissioners represent the diversity of Si Lankan society. Period of application should be long enough to permit those outside Colombo and the usual circles to be considered.
b. Ensure the OMP has physical presence in at provincial or district level to facilitate access of victims' and families. Establish offices in different parts of the country so as to facilitate access.
c. Consider establishing a Committee of victims' to monitor the OMP.
d. Provide capacity building by experts (national, regional, international) on crucial skills including forensic investigations.
e. Require all State institutions to collaborate with the OMP procedures.
f. Incorporate psycho-social support for victims to avoid re-traumatization.

c) Truth Commission
   a. A Truth Commission will be a crucial tool to establish patterns of violations over many cycles of violence, demonstrating that all communities have victims and to uncover root causes of discriminatory practices leading to conflict. This calls for giving the commission a broad temporal scope. Legislation establishing a Truth Commission should be adopted promptly.
   b. Ensure that victims are adequately represented among the Commissioners and its staff.
   c. Ensure support to victims in terms of security and psycho-social services. Make sure that gender considerations are adequately institutionalized at all levels of the Truth Commission's work.

3. Justice

a) The lack of tangible progress on emblematic cases suggests serious limitations of the current justice system in addressing human rights violations. Decisive action on these cases could contribute to establishing the justice system's *bona fides* regarding human issues.
b) Both the current and any future reliable accountability system will require strengthening capacities that are currently weak or non-existent. Many countries have developed such capacities including in police investigations, forensics, and the articulation of prosecutorial strategies. South-south cooperation agreements to strengthen or develop the relevant capacities are easy to reach and should be sought immediately.
c) The debate about the nationality of judges has led to politicization of the transitional justice discussions. The focus of the discussions about accountability should be on the means and preconditions for the establishment of credible procedures that guarantee the rights of victims and of the accused.

d) Preserve records, documentation of violations, and mapping of existing archives of previous relevant mechanism

4. Reparation

a) Undertake the serious work (including mapping of the universe of potential beneficiaries, costs, and necessary structures) that will be required to establish a reparations programme to redress violations, and in which the triggering criterion is the fact of having suffered a violation, regardless of all other considerations, including ethnicity, religion, regional origin, or other factors.
b) Make sure that all aspects of the design of such a programme are gender-sensitive, and that they respond to the special needs of women, particularly heads of households.
c) Reparations should not be seen as a tool to 'sideline' truth and justice efforts.
d) A reparations program is not the same as a crime insurance programme. Reparations need to be accompanied by an acknowledgement of responsibility. A link with the work of the Truth Commission would be useful in this respect.

a) Restitution/land
    a. Carry out comprehensive mapping of occupied land. On that basis, define a strategy with deadlines of release.
    b. The Armed Forces should only retain land that is strictly necessary for security purposes (narrowly and objectively interpreted).
    c. Decisions to retain land should not be within the sole purview of the military. A body or procedure should be set up in order to broaden the scope of stakeholders and decision-makers on this issue.
    d. Consider establishing a Land Commission as a specialized entity in light of the fact that the land issues go beyond military-occupied private and public land but encompasses multiple conflicting claims over land by communities displaced at different times.
    e. While acknowledging that a resettlement policy exists, IDP camps where people have lived for almost 30 years and in conditions that do not befit a middle income country, suggest that this policy needs to be strengthened.
    f. Consult beneficiaries on issues regarding new housing programmes to avoid future problems including questions about suitability and indebtedness particularly of vulnerable communities.

b) Memorialization
    a. Memorialization can have a reparative effect provided that it is even-handed and not used by anybody as part of a zero-sum game in which the basic task is to reaffirm a single-sided narrative. Spaces are needed for communities to

mourn and remember those they have lost, especially those sites across all regions where civilians died.

5. **Guarantees of non-recurrence**
   a) The Constitutional reform project was correctly undertaken in part as a non-recurrence initiative. It has tremendous both preventive and reconciliatory potential. The articulation of a bill of rights for all Sri Lankans is of utmost importance. There are many other issues that are relevant from a transitional justice perspective that could have been a part of the constitutional reform project. They include strengthening provisions on the independence of the judiciary, the powers of the office of the Attorney General, the delimitation of functions of the different parts of the security system (armed forces, police, intelligence services) and the establishment of multi-layered oversight systems, to mention only a few. As the constitutional reform process moves forward, consideration could be given to some of these issues.
   b) 'Domestication' of international human rights standards. After the ratification of the International Convention on Enforced Disappeared, enact legislation to incorporate it in the domestic legal system.
   c) I strongly welcome the (re-)establishment of the Human Rights Commission and of other independent commissions. The Human Rights Commission, in particular, should be invited to take the role it deserves in the transitional justice process, including participation in the drafting of legislation. More generally, it is not enough to have an independent Human Rights Commission if its views are not taken seriously.
   d) In the report I will make a series of specific recommendations concerning the judiciary and the Attorney General's office, both of which are crucial for the success of transitional justice. I take it as a positive sign that there is awareness of the impact that the enormous backlog has on both victims and the accused, and acknowledge the efforts planned to increase the numbers of courts and judges.
   e) Similarly, I will make specific recommendations about the human rights dimensions of security sector reform. Concerning recommendations both on the judicial system and on the security sector, they will be consistent with general recommendations I have made in thematic reports to the Human Rights Council and to the General Assembly on these very issues.
   f) For the time being, I reiterate that increasing capacities on investigations, forensics, and prosecutorial strategies can only help current and future justice initiatives.

In all reports I have included recommendations concerning civil society and interventions in the cultural and individual spheres including education, arts and cultures, and archiving. I will address these issues in the full report.