

# Sri Lanka: Evaluation of the report to the UN Human Rights Council

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The report by the Office of the High Commissioner for Human Rights Investigation on Sri Lanka (OISL) in 2015 is the outcome of a resolution of the Human Rights Council (HRC) in March 2014 requesting the Office of the High Commissioner for Human Rights to “undertake a comprehensive investigation into alleged serious violations and abuses of human rights and related crimes by both parties in Sri Lanka during the period covered by the Lessons Learnt and Reconciliation Commission (LLRC),” namely, February 2002 to November 2011, and to establish the facts and circumstances of such violations and crimes. The request stemmed from international and national concern about the lack of any credible national process to address the issue of accountability for alleged war crimes and crimes against humanity by the Government of Sri Lanka (GOSL) and the Liberation Tigers of Tamil Eelam (LTTE).

## **Enormous Amount of Information**

The report has chapters covering unlawful killings, violations related to the deprivation of liberty, enforced disappearance, torture, sexual- and gender-based violence, abduction and forced recruitment of adults, recruitment and use of children in hostilities, the impact of hostilities on civilians and civilian objects in the final few months of the conflict, controls on movement and the denial of humanitarian assistance, and finally, a chapter on the screening and deprivation of liberty of internally displaced persons (IDPs) in military-guarded closed camps.

Despite serious challenges—especially, lack of access to Sri Lanka, and witness protection concerns—the report puts together an enormous amount of information, drawing on its own investigations as well as testimonies collected by other bodies such as the LLRC, which was set up by the GOSL in 2010. The purpose of this article is not to convey this wealth of evidence, which is best done by reading the document itself, [\[1\]](#) but to evaluate it as a contribution to achieving justice and reconciliation in Sri Lanka.

The report stresses at the outset “that the OISL conducted a human rights investigation, not a criminal investigation” (p 6), but also points at what appears to be a strong evidence that both sides in the conflict committed war crimes and crimes against humanity. It notes “the impunity that is deeply embedded in Sri Lanka to this day,” which prevents “the victims and their relatives—of all communities—from exercising their rights to truth, justice and reparations” (p 7), arguing strongly

that there should be accountability for these crimes.

However, the report also displays an unprecedented sensitivity to political equations in Sri Lanka. The fact that it was withheld until after the parliamentary elections of August 2015 suggests an understanding of the way in which it could have been used to bolster the campaign of Mahinda Rajapaksa, who had categorically rejected the investigation, for prime ministership. It notes that,

“The new Government that took office after parliamentary elections on 17 August 2015 has a unique and historic opportunity to bring about institutional reforms that could herald a new and lasting culture of respect for human rights.”

And continues,

“The High Commissioner strongly encourages all sections of society—including the security forces and former supporters of the LTTE—to view this report as an opportunity to change discourse from one of absolute denial to one of acknowledgement and constructive engagement to bring about change (p 7).”

In other words, the primary purpose of the report and its recommendations is seen not as being punitive, but as contributing to a process of securing the rights of victims and their families, reforming institutions so that similar bloodbaths do not recur in the future, and bringing about reconciliation:

In presenting this report to the Human Rights Council and to the Government and people of Sri Lanka, OHCHR hopes that it will contribute constructively to a genuine process of accountability and reconciliation, above all so that the rights of the many victims and their relatives to truth, justice and reparations are finally fulfilled (p 7).

### **An even-handed approach**

One of the most striking features of the OISL report is its consistent effort to be even-handed in its view of GOSL and LTTE responsibility for atrocities. For example, in the section on “Contextual Background,” which describes the history of discrimination against and persecution of Tamils preceding the war, immediately after the description of “Black July” 1983, in which thousands of Tamils were killed and many more displaced by state-sponsored violence, it notes that,

“The LTTE developed as a ruthless and formidable military organisation, capable of holding large swathes of territory in the north and east, expelling Muslim and Sinhalese communities, and conducting assassinations and attacks on military and civilian targets in all parts of the island. One of the worst atrocities was the killing of several hundred police officers after they had surrendered to the LTTE in Batticaloa on 17 June 1990. The LTTE exerted significant influence and control over Tamil communities in the North and East, as well as in the large Tamil diaspora, including through forced recruitment and extortion (pp 13-14).”

This even-handedness is maintained rigorously throughout. In the account of the last stages of the war, the report describes how the Sri Lankan armed forces used indirect-fire attacks against the three No-Fire Zones (NFZs) and surrounding areas, causing large-scale civilian casualties due to the lack of accuracy (p 151). The NFZs were declared unilaterally by the government and coincided with pre-existing LTTE military positions rather than being in neutral areas; despite reassuring civilians that if they moved to these areas they would be safe, government forces shelled them repeatedly (pp 152-53), and the shelling targeted protected civilian objects like hospitals (p 154). These attacks on

civilian targets are described in detail.

During the same period, the report says, there is evidence that the LTTE launched attacks from the close proximity of hospitals (p 154); imposed severe restrictions on the freedom of movement of civilians in the areas it controlled, preventing them from leaving with increasingly coercive measures (pp 180-86); forcibly recruited civilians to do military work such as digging trenches on the frontline (p 182); and intensified the forcible recruitment of children (p 225).

Significantly, the report does not find evidence that the government or its armed forces engaged in genocide. From the beginning, the LTTE supported its claim to be the sole representative of Tamils by physically eliminating Tamil political and military rivals and critics, starting with Alfred Duraipappah (1975), the Tamil Eelam Liberation Organisation (1986) and Rajani Thiranagama (1989). The LTTE itself was identified with V Prabhakaran, with internal rivals like Mahattaya similarly being liquidated. Thus, accusations of genocide by LTTE supporters are based on the equation: the Tamil people = the LTTE = Prabhakaran. That would equate the killing of Prabhakaran with genocide, but no one conversant with international law would accept such an equation. Instead, the crimes are described by the report as consistent with war crimes and crimes against humanity. Well-meaning foreigners who echo the genocide charge based on the high death toll at the end of the war ignore the LTTE's contribution to the carnage.

### **Not biased towards LTTE**

No honest person who has read the report could accuse it of being biased towards the LTTE. The importance of this fact is immense. Many reports and films about the end of the war (like Callum Macrae's Channel 4 film *No Fire Zone: The Killing Fields of Sri Lanka*) deliberately or unconsciously airbrush the contribution of the LTTE to the enormous death toll. Even from the standpoint of a criminal investigation, this has negative consequences. If a soldier is about to shoot an enemy combatant, the enemy seizes an innocent civilian to use as a human shield, and the soldier shoots anyway, killing both the enemy combatant and the civilian hostage, who is responsible for the death of the hostage? If the soldier had not fired, the hostage would be alive; but equally, if the enemy combatant had not used the civilian as a human shield, the hostage would be alive. Thus, they are both responsible for the death of the civilian, which is what is indirectly suggested by the report (p 229). Taking LTTE actions into account would enormously complicate a criminal investigation into the last months of the war, which is why LTTE supporters assiduously avoid any mention of them, but this is no reason for those who are genuinely pursuing truth and justice to do the same.

Perhaps even more important for the future of Sri Lanka, however, is the impact of the unbiased character of the report on reconciliation. This factor is vitally important for people living in Sri Lanka. Support for Mahinda Rajapaksa among the majority of the Sinhalese population in the immediate post-war period has often been interpreted as indicating a racist anti-minority bias among most Sinhalese, but this interpretation does not take into account all the factors underlying this support. First and foremost, undoubtedly, is enormous relief that the defeat of the LTTE means their young men will not be sent back to them dead or disabled, nor will they constantly have to fear terrorist attacks on public transport or in markets.

While it is undeniable that there exists a fascist fringe of Sinhala ultra-nationalists, it does not follow that all those who were grateful to Rajapaksa for ending the war belong to it. Many supported earlier peace processes; for example, they voted overwhelmingly for Chandrika Kumaratunga's programme of peace with justice for Tamils in 1994. It is largely thanks to the intransigence of the LTTE, which used every ceasefire and peace process to liquidate Tamil critics, rearm, recruit and

restart the war, that the majority of Sinhalese became convinced that only a military victory over the LTTE could end the war. It is also relevant that the story of Sinhalese soldiers rescuing innocent Tamil civilians from the LTTE was not directed solely at an international audience: it was also beamed out to a Sinhala-speaking audience. The fact that the government thought it necessary to carry out this propaganda in Sinhala tells us that its domestic support base did not want Tamil civilians to be killed en masse.

In the 2015 parliamentary elections, the majority of voters in Sinhalese-majority areas voted against Rajapaksa for various reasons, including growing authoritarianism, inflation and allegations of corruption. But he continued to retain a substantial support base of people who could easily be persuaded that there is an international conspiracy, driven by diasporic LTTE supporters, to frame him and the heroic armed forces who liberated the country from terrorists bent on dividing it. The fragile consensus on which the new government is based could be destroyed and ethnic tensions reactivated by such allegations. This is the minefield the government has to negotiate: attempting to combat impunity and achieve accountability without creating a backlash. As the report says, the "OISL believes that there must be profound institutional changes to end the decades of repressive and persecutory attitudes, practices and structures to prevent their recurrence" (p 248). Some of these changes have been initiated after the elections, but completing the task would take time, and require stability and popular support.

The government and those who support the recommendations of the report should summarise it in Sinhala and Tamil and disseminate it widely. Sinhalese people can and must be made to understand the hell that Tamil people in the North and East have been through, and admit the role played by the previous government and armed forces in creating it, but this needs to be done with sensitivity to the feelings of the families of tens of thousands of dead and maimed soldiers in the South.

### **Pursuing truth, justice and reconciliation**

It may be best to start with trying to establish the truth about what happened during the period covered by the OISL report, protect survivors and witnesses from intimidation and harassment by perpetrators by removing the latter from positions of power and even putting them behind bars if necessary, and extend material and psychological support to the survivors to rebuild their lives. So far as prosecutions are concerned, it may be better to start with earlier violations and post-war ones, where responsibility is easier to assign; for example, the extrajudicial killings of five students in Trincomalee in January 2006 (p 61) and of 17 humanitarian workers of Action Contre la Faim in August 2006 (p 53).

The detention of around 2,84,000 IDPs in military-run internment camps after the end of the war (pp 210-20), depriving them of liberty, was especially cruel, given the traumatised state of the IDPs, many of whom were wounded, bereaved, or had lost contact with family members. The government's claim that they were being held for screening simply did not hold water in light of the fact that infants were not released to relatives outside (Hensman 2009), making it feasible to define the detention as a crime against humanity and prosecute those responsible for it.

It is equally necessary that

"...there must be recognition within the Tamil community...of the destruction and harm inflicted on civilians and communities by the LTTE. While the LTTE no longer exists nor controls territory, the legacy of the abuses, committed by and large with total impunity, remains and must be addressed. Even now, in some parts of Sri Lanka, those who were the victims of abuses by the LTTE are still afraid to talk about what happened in the presence of former LTTE cadres (p 248)."

Indeed, the damage done by the LTTE to Tamil and Muslim communities in the North and East is arguably greater than the loss of life and limb inflicted by LTTE terrorist attacks on communities in the rest of the country, because the former were deprived of democratic rights and freedoms for decades, and thousands of children were deprived of a future by forcible conscription. Although the LTTE leadership is not alive to be charged, it is important to acknowledge the truth and address this legacy.

The most controversial proposal in the report was the formation of “hybrid special courts, integrating international judges, prosecutors, lawyers and investigators” (p 244) to try criminal cases. The reasons put forward are persuasive, especially the failure of all previous attempts to investigate and bring to justice perpetrators of war crimes including sexual crimes, and the lack of any concept of command responsibility in Sri Lankan law. The proposal was welcomed by many civil society groups and activists (Sri Lanka Brief 2015), and especially, warmly welcomed by the Women’s Action Network (WAN), which called attention to the serious threat posed by the escalation of sexual violence due to the war, and the impossibility of curtailing it while impunity reigned (Sunday Observer 2015).

Predictably, however, the proposal was opposed vehemently by Rajapaksa supporters, some of whom also opposed every single measure demanded by human rights defenders and democracy activists, such as demilitarisation of the North and East, return of land in the North East to its rightful owners, and constitutional reform: measures that the new government had already begun to implement in accordance with promises made in the January 2015 presidential election. What is interesting is that these measures were opposed on the grounds that their objective was “to serve US global interests, while, at the same time, rendering the country dependent on Washington, and, therefore, subservient” (Kunanayakam 2015), thus hiding behind Mahinda Rajapaksa’s “anti-West, anti-imperialist façade” (Bhushan 2012).

### **Consensus resolution**

In the end, the consensus resolution in the United Nations Human Rights Commission (UNHRC) was co-sponsored by Sri Lanka and adopted unanimously on 1 October 2015 (Sri Lanka Mirror 2015). It made no mention of hybrid special courts, but instead said that the UNHRC

“Welcomes the positive engagement between the Government of Sri Lanka and the High Commissioner and his Office since January 2015 and encourages the continuation of such engagement in the promotion and protection of human rights and in exploring appropriate forms of international support to and participation in Sri Lankan processes for seeking truth and justice”

and

“Supports the Government of Sri Lanka’s commitment to strengthen and safeguard the credibility of the processes of truth seeking, justice, reparations, and guarantees of non-recurrence by engaging in broad national consultations with the inclusion of victims and civil society, including non-governmental organisations, from all affected communities that will inform the design and implementation of these processes, drawing on international expertise, assistance and best practices (Colombo Telegraph 2015).”

Thus, international engagement, support and participation were affirmed, but the mode of such interaction left open.

In conjunction with the results of the August parliamentary elections, where voters rejected both

“aggressive, authoritarian Sinhala Buddhist politics” and “aggressive, exclusivist Tamil national politics” (Arulingam and Kadirgamar 2015), the OISL report and UNHRC resolution could, if implemented thoroughly, bring about a democratic transformation in Sri Lanka. This will require not only international oversight and prodding, but also comprehensive involvement of domestic actors. Groups like University Teachers for Human Rights (Jaffna), with its unparalleled documentation and analysis of violations in the North and East, WAN and other women’s groups battling impunity for sexual crimes, and individuals like Jayantha Dhanapala and Radhika Coomaraswamy, who have made contributions to global peace and human rights, should be officially involved in truth-seeking, institutional change to prevent recurrence, and victim support. Many obstacles remain, but the resources to overcome them are also available.

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#### Note

1 Report of the OHCHR Investigation on Sri Lanka (OISL) 2015, [www.ohchr.org/EN/HRBodies/HRC/.../A\\_HRC\\_30\\_CRP\\_2.docx](http://www.ohchr.org/EN/HRBodies/HRC/.../A_HRC_30_CRP_2.docx)

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\*<http://www.epw.in/commentary/report-un-human-rights-council-sri-lanka.html>

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## Footnotes

[1] Report of the OHCHR Investigation on Sri Lanka (OISL) 2015, [www.ohchr.org/EN/HRBodies/HRC/.../A\\_HRC\\_30\\_CRP\\_2.docx](http://www.ohchr.org/EN/HRBodies/HRC/.../A_HRC_30_CRP_2.docx)