



UNHRC Report and Resolution on Sri Lanka: Findings, Recommendations and Responses

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Introduction

The much awaited report on Sri Lanka by the United Nations Human Rights Council (UNHRC) was released on 16th September. The report titled “Report of the OHCHR investigation on Sri Lanka (OISL)” covered extensively the alleged serious violations and abuses of human rights and related crimes by both the parties in Sri Lanka – the Government of Sri Lanka and the Liberation Tigers of Tamil Eelam (LTTE) – during the period that led to the failure of the Ceasefire Agreement (CFA), operationalised on 21st February 2002 and the sequence of events that followed thereafter up to the 19th of May 2009. The Lessons Learned and Reconciliation Commission (LLRC), appointed by the previous Rajapaksa regime to look into the alleged human rights violations, covered the same period. In this context, it is important to look into the report findings, recommendations, UN resolution, response of stakeholders and future direction.

The UN investigation report dealt in detail, under various heads, with the issues of unlawful killings, enforced disappearances, sexual and gender based violence, abductions, recruitment and use of children in hostilities, denial of humanitarian assistance, torture and other forms of cruel and inhuman treatment and deprivation of liberty of Internally Displaced Persons (IDPs).¹ A special team was appointed by the former High Commissioner, Navi Pillay,

in 2014 to conduct the investigation. The team members were Mr. Martti Ahtisaari, former President of Finland; Dame Silvia Cartwright, former High Court Judge of New Zealand; and Ms. Asma Jahangir, former President of the Human Rights Commission of Pakistan.

The report was prepared in a hostile situation, as the previous government of Rajapaksa “tried to undermine the overall investigation by questioning its objectivity, professionalism and integrity.”² The previous government also refused visas to the team to enter Sri Lanka for investigation. Despite the situation, the OHCHR was able to conduct “a comprehensive investigation” with over 3,000 written submissions, interviews in 11 countries, photos, videos, and satellite imagery with expert analysis”.³

Findings of the Report

According to the findings of the investigation, there were reasonable grounds to believe that Sri Lanka Security Forces and paramilitary groups were responsible for *systematic unlawful killing* of Tamil politicians, humanitarian workers and journalists. For instance, between January 2006 and November 2007, “the security forces committed a total of 700 extrajudicial executions in Jaffna.”⁴ The LTTE also ‘unlawfully killed Tamil, Muslim and Sinhalese civilians, who were not sympathetic to its cause, by using indiscriminate suicide bombings and claymore mine attacks’.⁵ The purpose of these killings was mainly to discourage moderate voices and critics of human rights violations. The report also noted that as of 2014, ‘Sri Lanka figured as one of the countries with the highest number of humanitarian workers killed’.

On the issue of *enforced disappearances*, the report pointed out that Sri Lankan authorities were ‘involved in widespread and systematic enforced disappearances and deprived a considerable number of victims of their liberty’⁶. Under international pressure, the former President Rajapaksa appointed a Presidential Commission to Investigate Complaints Regarding Missing Persons in 2013. Despite the ‘mistrust expressed in national mechanisms by majority of the family members, the Commission received 13,378 complaints covering the period January 1983 to 19 May 2009’.⁷ This showed that the problem persisted for long and the government of the day failed to initiate an appropriate mechanism to tackle the issue. The Working Group on Enforced or Involuntary Disappearances reported in 2014 that ‘a total of 12,536 complaints of enforced disappearances were received’. Many witnesses claimed that

many persons disappeared after being forced into a white van or after handing themselves over to the army at the end of the conflict. Most of the disappearances occurred in the Northern and Eastern Provinces, which were under military control'.⁸ Rape and other forms of sexual violence by security forces, particularly in the aftermath of the armed conflict, were reported in the course of investigation.

The report dealt in detail with the *recruitment policy of the LTTE* that violated international norms. The LTTE recruited adults forcibly till 2009, who were obliged to perform both military and support functions. For example, the 'Sri Lanka monitoring Mission received 1,248 complaints of abductions of adults between 2002 and 2007. The LTTE introduced the policy of "one-person-per-family policy" whereby each family within the area it controlled had to contribute one member to the organisation.'⁹ The LTTE also recruited children under 15 forcefully and the UN team also gathered information on child recruitment by the Karuna/TMVP group after its split with the LTTE. The UNICEF documented that 6,905 children were recruited by the LTTE from 2002 to until the end of war, including 2,689 girls. However, "At the end of the war, only about 500 children associated with the LTTE were formally included in the Government's rehabilitation programme and many others are missing or (have) disappeared."¹⁰

During the final phase of the war, both the parties to the conflict – the Sri Lankan government and the LTTE – showed *disregard in protecting civilians caught in the war zone*, including in No Fire Zones (NFZs), having hospitals and settled families, which resulted in the loss of lives and impacted humanitarian facilities and food distribution centres. The report also questioned the 'logic behind choosing the location of NFZs by the government despite knowing the fact that LTTE purposefully constructed military fortifications in close proximity to civilian areas and medical facilities'.¹¹ No specific warnings were issued before conducting military operations. Hospitals, such as Kilinochchi Hospital and Mullaitivu Hospital, PTK Hospital and Offices of the United Nations and NGOs were attacked by the Sri Lankan Army (SLA), killing a large number of civilians. Civilian casualties also occurred due to control on movement and goods by the LTTE and the government after the end of CFA in 2006, which restricted civilian movement outside the LTTE areas, particularly in Vanni area and by 2009, the LTTE instructed its commanders to shoot people if they chose to leave the area.¹²

Restriction on access to food and medical care in the Vanni area also led to severe malnutrition among the populace, especially among the elderly and children. For instance, the Department of Health and Nutrition Survey in March 2009 pointed out that in conflict affected areas, a random sample of children aged 6 to 60 months showed that 69.91 percent of them were under-weight.¹³ Even now, there is no consensus on the civilian casualties that occurred there. For example, the Chairman of the Presidential Commission on Missing Persons, Maxwell Paranagama has rejected the death toll during the final phase of the conflict as cited in the United Nations panel report. The 2011 report of the Panel of Experts appointed by the UN Secretary General Ban Ki-moon claimed that ‘during the final phase of the conflict with the LTTE, over 40,000 civilians were killed’.¹⁴

The report criticised the inhuman conditions, deprivation of liberty and militarised nature of government *approach to the IDPs*. The report also pointed out the discrepancies in government statements regarding the number of IDPs in camps. For example, in January 2009, the government claimed that it is preparing to receive 200,000 refugees, but in relation to the delivery of relief supplies, the government claimed that there were only 70,000 civilians.¹⁵ Between 15th and 20th May 2009, the government reported about 284,000 IDPs in government controlled area and they were confined to closed military sites. The government’s screening process lacked transparency and the process did not differentiate between fighters and political and administrative cadres of LTTE before sending them to detention camps.

Recommendations

The UN report made a number of significant recommendations based on the findings of investigation. The recommendations made by the UN suggests that the UN is expecting a complete departure from previous regime policy of non-compliance with UN standards when it comes to addressing the human rights violations and reconciliation issue in Sri Lanka. This is evident from the fact that the report specifically commended the efforts of the present National Unity Government of Sri Lanka towards reconciliation and stressed that ‘the OISL conducted a human rights investigation, not a criminal investigation’. Some of the recommendations proposed by the report were as follows:¹⁶

1. Development of transitional Justice Policy

2. Setting up a high level executive group to develop a coordinated, time bound plan to oversee progress in implementing the recommendations of various commissions.
3. Prepare a plan for overall security sector reform
4. Return the private land, which has been occupied by the military and end military involvement in civilian activities.
5. Review and Repeal of Prevention of Terrorism Act (PTA) and Public Security Ordinance Act
6. Review of Victim and Victim Protection Act to ensure the independence and effectiveness of the Witness Protection Programme.
7. Enact legislation to criminalise war crimes, crimes against humanity, genocide and crimes against humanity without statute of limitation.
8. Adopt special legislation to establish an ad hoc hybrid Special Court, integrating international judges, prosecutors, lawyers and investigators, mandated to try war crimes and crimes against humanity including sexual crimes.
9. Review of all cases submitted to the Disappearance Investigation Unit and the Missing Persons Unit. Review of all cases under the PTA.
10. Publish all unpublished reports of the many human rights related Commissions of Inquiry, such as the Presidential Commission on the Missing; and the Army Court of Inquiry into civilian casualties.
11. Develop a national reparation policy in consultation with the victims and their families.
12. Ensure a policy of non-refoulement of Tamils, who have suffered torture and other human rights violations.
13. Continue to monitor human rights developments and progress towards accountability and reconciliation through the Human Rights Council.

The UN Resolution

Based on the recommendations, a draft resolution was placed on 24th September and the final resolution was adopted on 1st October. The resolution titled “Promoting Reconciliation, Accountability and Human Rights in Sri Lanka”, was adopted ‘through consensus and Sri Lanka co-sponsored the resolution along with 25 other countries’.¹⁷ The resolution touched upon many aspects of peace building and reconciliation, and when compared to previous UN resolutions, this resolution was more moderate in its proposed approach towards the process

of reconciliation in Sri Lanka. While welcoming the steps taken by the new government in Sri Lanka, particularly in investigating allegations of bribery and corruption, the resolution proposed that:

- The resolution welcomed the government of Sri Lanka's commitment to undertake a comprehensive approach to deal with the past incorporating the full range of judicial and non-judicial measures and welcomed in this regard the proposal by the government of Sri Lanka to establish a Commission of Truth, Justice, Reconciliation and Non Recurrence, an Office of Missing Persons and an Office for Reparations. The resolution welcomes the government's willingness to give each mechanism the freedom to obtain assistance, financial, material and technical from international partners including the OHCHR.
- The resolution called upon the international community, including the United Nations to assist the government of Sri Lanka, in its efforts at strengthening civilian administration in the former conflict-affected provinces of the North and East, by rebuilding infrastructure, demining and resettling internally displaced persons.
- On the question of accountability, a "credible justice process should include independent judicial and prosecutorial institutions led by individuals known for integrity and impartiality and further affirmed in this regard, the importance of participation in a Sri Lankan judicial mechanism, including the Special Counsel's Office, of Commonwealth and other foreign judges, defence lawyers and authorised prosecutors and investigators."¹⁸
- On the question of punishment to those involved in human rights violations, the resolution proposed reforms in domestic law in accordance with international obligations. The resolution also touched upon security sector reforms as part of its transitional justice process. It has also asked the Government of Sri Lanka to accelerate the return of land to its rightful civilian owners and end military involvement in civilian areas.
- On the question of devolution of power to provinces, the resolution proposed that, "the Government of Sri Lanka will have to ensure that all Provincial Councils are able to operate effectively in accordance with the 13th Amendment to the Constitution of Sri Lanka."¹⁹

- The resolution requested the Office of the High Commissioner to continue to assess progress on the implementation of OHCHR's recommendations and other relevant processes related to reconciliation, accountability and human rights.

The content of the resolution has to be seen in the context of efforts and willingness expressed by the Government of Sri Lanka to cooperate or include international mechanisms in a best possible manner. The government's Declaration of Peace of 4th February 2015 affirms this hope, as the declaration reads, "On this solemn occasion, we pledge to adopt consensual approaches through democratic means to advance national interest, national reconciliation, justice and equality for all citizens. We shall do this in a spirit of tolerance, accommodation and compromise and uphold the unity and territorial integrity of the nation for the progress and development of our pluralistic society."²⁰ This optimism was evident in the statement given by the Foreign Minister, Mr. Mangala Samaraweera on the UN resolution when He said, "Sri Lanka achieved a path-breaking success in the UN Human Rights Council in Geneva at the 30th Session" and "Sri Lanka has once again succeeded in joining the international community as a responsible, confident and peaceful nation that respects the universal values of freedom, equality and justice."²¹

Responses

The Government of Sri Lanka

From the beginning, the Government of Sri Lanka was hopeful that the international community would recognise the efforts made by the government towards reconciliation and peace building. As expected, the change of government had a positive impact, which reflected in the report, when it mentioned that even though the new government did not change its stand on cooperating with the investigation, "the new government has a unique historic opportunity to bring about institutional reforms that could herald a new and lasting culture of respect for human rights."²²

The Sri Lankan government realises the fact that the delay in the release of report had given the much needed space to implement the reform agenda. This realisation had reflected in a statement given by the President after the release of the report. The President, Maithripala Sirisena, said that the 'international community would have insisted on hard strictures and conditions on Sri Lanka in the Report, if not for the change of government. The

indications were that the UN body would have named some people – politicians, bureaucrats and members of the armed forces – as perpetrators of human rights violations and barred them from travelling abroad and imposed other sanctions'.²³ However, the government made it clear that 'there will be no international mechanism to investigate war crimes and the local mechanism will not include any international partners or interference and should cover a broad scope, encompassing all parties'.²⁴

After the release of the report, in a statement at the General Assembly, the Foreign Minister of Sri Lanka, Mangala Samaraveera, proposed various mechanisms to create conditions for political settlement.²⁵ The proposed Mechanisms were:

- a) *On truth seeking*, there are two proposed mechanisms: A Commission for Truth, Justice, Reconciliation and Non-recurrence to be evolved in consultation with the relevant authorities of South Africa; an Office on Missing Persons to be set up with expertise from the ICRC (International Committee of the Red Cross).
- b) *On the Right to Justice*, the government proposed a Judicial Mechanism with a Special Council.
- c) *On the right to Reparations*, an Office for Reparations to be set up by Statue to implement the recommendations proposed by the above commissions and LLRC and any other entity.
- d) The government proposed a series of measures *to ensure non-recurrence*, such as administrative and judicial reforms, adoption of new constitution and setting up a Constituent Assembly of Parliament.²⁶

Apart from the above initiatives, the government also proposed to review and repeal the Prevention of Terrorism Act (PTA) and replace it with Anti-Terrorism Legislation (ATL) and vowed to engage Sri Lankans living overseas belonging to all communities and to involve them in the peace building and reconciliation efforts. The government, in its reply on the report, also mentioned that 'the report recommendations will receive due attention in the future'.²⁷ After the resolution was passed at the UN, the President of Sri Lanka said that, 'the judicial mechanism that is going to be set up to try the alleged war crimes and human rights abuses will be a domestic one and foreign judges will conform to Sri Lanka's Constitution'.²⁸

Tamil Parties

The Chief Minister of Northern Province, Mr. Wigneswaran, while welcoming the report, said that Sri Lanka "will require more than a domestic mechanism" and the need to form a mechanism, which would give confidence to the victims of such violations, confidence in the independence and impartiality of the process. Therefore, the government should adopt international best practices of "integrating international judges, prosecutors, lawyers and investigators".²⁹ According to the Tamil National Alliance (TNA), the resolution on Sri Lanka presents a "constructive starting point for what will inevitably be a long road to reconciliation." In particular, the TNA welcomed the 'UN resolution's call on 'accountability issue and proposed justice process to be set up in Sri Lanka that would be mandated to try international crimes'.³⁰ According to the TNA leader, Mr. Sampathan, Sri Lanka achieved a "best possible resolution that could have been achieved at the UNHRC on the basis of a consensus."³¹ According to a news report 'the final form of the resolution was the outcome of a backroom intrigue involving the Prime Minister of Sri Lanka and the TNA. Mr. Ranil also held a meeting with UK High Commissioner, James Dauris in Colombo and a teleconference with US ambassador for Sri Lanka, Atul Keshap in Geneva. Meanwhile, TNA leader M.A.Sumanthiran held a meeting with Michele J.Sison, US deputy envoy to the UN during the UNHRC session.³² However, consensus will have to be evolved, on the extent of involvement of foreign players in the justice process between the government, Sinhala parties and the TNA. While the TNA expressed its support to the government and international stakeholders to evolve justice process, the Prime Minister was of the view that, "the government could only act within the framework of Sri Lanka's Constitution and it does not allow foreign judges to operate in the country, but they can only assist in the investigation."³³ The extent of involvement of foreign judges might become a contentious point in the future. According to the former President Rajapaksa, even though the resolution was adopted without a vote, 'involving foreign judges to probe human rights abuses during the war was not a diplomatic victory'³⁴.

Sinhala Parties and Groups

The fourth largest party in parliament, the Janatha Vimukthi Peramuna (JVP) took a stand that the previous governments' appointed commissions were a waste of public money,

and criticised former Sri Lankan President, Mahinda Rajapaksa, for paving the way for a hybrid court to prosecute war crimes. Therefore, the party demanded 'domestic investigation and condemned any international interference in the country'.³⁵ On the question of involving foreign judges, the JVP opposed the stand on the grounds that "there are no provisions within the constitution and the legal framework of the country for the interference of foreign judges in the internal matters of the country."³⁶

The Jathika Hela Urumuya (JHU) took a position that 'the UN resolution on Sri Lanka supported by America does not threaten the sovereignty of the country but at the same time, the party will not let any force to overpower the judiciary system in Sri Lanka and threaten the sovereignty of the country at any cost. JHU took a stand that, 'if any system which overpowers the Sri Lankan judiciary is proposed to parliament, they will not support it'.³⁷

Sinhala groups, such as Pivithuru Hela Uramaya (PHU) stated that 'the Foreign Minister is internationalising the internal matter of Sri Lanka and an effort would be made to protect "war heroes" by introducing a Bill in the Parliament'.³⁸

Rajapaksa's Response

The Former President of Sri Lanka, Mahinda Rajapaksa called upon the Government to reject the Report on Sri Lanka. In a statement to media, the former President said that his government did not cooperate with the OHCHR investigation because:

- It was instituted outside the established procedure of the UN Human Rights Council (UNHRC).
- It lacked independence as the investigation was funded for the most part not through the regular budget of the UN, but "through 'voluntary contributions' from the very Western states that sponsored the resolution against Sri Lanka."
- Thirdly, since Sri Lanka is not a signatory to the Rome Statute under which the International Criminal Court (ICC) functions, Sri Lanka cannot be taken before the ICC for a trial and the only way for a war crime tribunal is if the government cooperates voluntarily with the UN to set up a hybrid court, as the OHCHR report suggested.³⁹

Despite the loss in elections, among the majority Sinhala community, Rajapaksa is regarded as a leader, who defeated the LTTE and brought peace to the island. In this scenario,

bringing accountability through judicial and institutional reforms, as suggested by the report, is going to be a difficult task, because the former President can mobilise public opinion in the future against any reforms.

SLMC

The Sri Lanka Muslims Congress (SLMC) welcomed the resolution. According to the party, 'the consensus resolution, co-sponsored by the Government of Sri Lanka, is an important step in addressing the sufferings experienced by citizens from all communities over the past decades.⁴⁰ The SLMC will support the government in implementing the recommendations of the report. However, the bone of contention is going to be on the issue of devolution of power to the provinces and on the merger of Northern and Eastern provinces as demanded by some Tamil political parties. The party will try to block any attempts by the government that go against the Muslim community's interest.

International Community

The change of stand, particularly by the US, in addressing the reconciliation process in Sri Lanka was evident since the beginning of this year. The defeat of Rajapaksa in presidential and parliamentary elections, who consistently took a stand against the West during his term as the President, paved the way for more engagement with the new Sri Lankan government. The US was mainly responsible for UN resolutions against Sri Lanka in the past years 2012, 2013 and 2014. However, this year, the resolution was co-sponsored by Sri Lanka, indicating a shift in US-Sri Lanka relations. Many argue that 'the present Sri Lankan government's policy of more engagement with the West is responsible for this shift'.⁴¹ The United States said that it 'would support a credible domestic process for justice and reconciliation in Sri Lanka in cooperation with the UN and with international support'.⁴²

Countries, such as the UK, Netherlands, Germany and Pakistan expressed their willingness to work with the government and supported the draft resolution. The German Foreign Minister, Frank-Walter Steinmeier stressed the need for international involvement in Sri Lanka's process for accountability during his visit to Colombo. Germany was ready to share its experiences in the matter of reconciliation and justice, if it was desired by Sri Lanka."⁴³

The New York-based Human Rights Watch, on the other hand, criticised Sri Lanka's conduct of proposing amendment after amendment to water down UNHRC resolution on the report. The HRW release said, "The Sri Lankan delegation even suggested deleting proposals to ensure victim and witness protection, to investigate attacks on human rights defenders and journalists and to address sexual violence and torture." Referring to the "trust us" plea by the Sri Lankan Foreign Minister, Mangala Samaraweera, the HRW said, "Sri Lanka is asking the world to accept its promise to bring accountability as it sees fit."⁴⁴

India

Meanwhile, within India, resentment against the Sri Lankan government over its efforts to push for domestic mechanisms was severely criticised by the Tamil Nadu government and other opposition political parties. The Tamil Nadu Assembly on 16th September unanimously passed a resolution asking the central government to move a "strong resolution" in the UNHRC for an international probe into the alleged war crimes and genocide in the final phase of the civil war in Sri Lanka. The Chief Minister of Tamil Nadu earlier said that, "in case, the United States takes a pro-Lankan stand, India should take diplomatic efforts to change that," and urged India not to treat Sri Lanka as a "friendly nation" and impose "economic sanctions" on the island nation for its war crimes".⁴⁵ Tamil Nadu also witnessed protests 'demanding an international investigation into the alleged genocide of Tamils, referendum for Tamil Eelam and lifting of the ban on the LTTE by all the countries'.⁴⁶ After the resolution was adopted, the Chief Minister of Tamil Nadu Jayalalithaa said "although the resolution has features like participation of foreign judges it would in no way be equal to an international judicial probe. This weak resolution adopted by perceiving a change of heart of the Sri Lankan government will not do any good to Srilankan Tamils,".⁴⁷ On India's stand, she opined that, the "central government has not taken any positive steps over this issue has caused unhealable wound".⁴⁸ Apart from the state government, Tamil Nadu opposition parties such as DMK and MDMK also expressed 'disappointment over India's support to the UN resolution that supported domestic probe in to war crimes'.⁴⁹

However, Indian government's stand to support the UN draft resolution on Sri Lanka indicated the government's wish to forge a strong bilateral cooperation in all the matters with the Government of Sri Lanka. India's support to the Sri Lankan government was clear when

the MEA spokesperson, on the sidelines of the UN session, said that India ‘stands for justice and, at the same time, for Sri Lankan sovereignty’.⁵⁰ The draft resolution has asked the Government of Sri Lanka to devolve power to the provinces based on the 13th Amendment to the Constitution. This is the same position taken by India for long on Sri Lanka’s ethnic conflict resolution. The recent visit by the Prime Minister of Sri Lanka to India in the second week of September was used to reiterate the point that “India and Sri Lanka have huge stake in each other’s success, stability and development” by enhancing trade, investment and connectivity.⁵¹ In the process, the government will have to deal with the resentment within Tamil Nadu about the Sri Lankan government, which is needed to fulfil the promise of improved connectivity between the two nations.

The way ahead

Despite the differences of opinion regarding some aspects of the resolution, overall, the UN resolution was generally welcomed in Sri Lanka. The UN has taken note of the concerns of the Sri Lankan government and its first indication was that the resolution did not mention about the hybrid court as recommended in the report. The traditional rival parties, the SLFP and the UNP, since the beginning of this year, showed keen interest in setting aside political differences to form the National Unity government that can work towards reconciliation, good governance and stability in the country. Sri Lanka has shown the resilience to adopt a bipartisan approach needed for reconciliation. This is a positive step in finding a common ground on the political settlement. By appointing a TNA leader, Mr. R. Sampanthan, as the opposition leader, the government sent a strong message that it is willing to provide space to the minority opposition. This has worked in government’s favour in getting the support of the TNA on UN resolution. The main hurdle in implementing the recommendations will be on the question of accountability and judicial and security sector reforms and devolution of power to the provinces. Another hurdle is the lack of consensus among Sinhala political parties and groups on the question of accountability and justice and this will hinder any attempt at bringing justice to the victims. The government has to find a common ground on these issues to achieve reconciliation, which is going to be a long drawn process and the government also has to ensure non-recurrence in the process.

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Disclaimer: Views expressed are of author and do not reflect the views of the Council.*

Endnotes:

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