

Sri Lanka and the Politics of Justice

Here's a longish thinkpiece on the current state of the debate regarding appropriate strategies for pursuing accountability – and reconciliation – in post-war Sri Lanka. It's [published today](#) by *openDemocracy*.

Sri Lanka and the politics of justice

[Mark Salter](#) 14 October 2015

Truth and reconciliation is a project which inevitably needs to balance short term politics against long term justice. There are signs that Sri Lanka's new government understands the challenge

For Sri Lanka it's been something of a roller-coaster start to the autumn. First, mid-August parliamentary elections handed former president Mahinda Rajapaksa his second defeat of the year at the polls, confirming that the new political era heralded by Maithripala Sirisena's surprise victory in January presidential polls really was the genuine article. Then almost before the country had time to draw breath it was catapulted into the international arena, in the shape of the UN Human Rights Council (UNHRC)'s 30th session that opened in Geneva in mid-September.

Ever since Sri Lanka's 26 year long civil war reached its bloody, tumultuous climax in May 2009 the question of what really happened during the conflict, and in particular who was responsible for the atrocities committed during its final stages has been a constant bone of contention on the international, no less than domestic plane. As a result, up to now the HRC has been a, if not the forum where these issues

have been publicly – and often fiercely – debated.

Their patience finally worn down by the Rajapaksa government's intransigent refusal to engage seriously with the international community over war crimes allegations, in March 2014 a (narrow) majority of the HRC's 47 member states voted to set up an investigation by the main UN human rights body (OHCHR).

Specifically it was tasked with looking into a period stretching from early 2002 – when the Sri Lankan government and rebel Liberation Tigers of Tamil Eelam (LTTE) signed the Norwegian-brokered Ceasefire Agreement (CFA) – up to 2011. In other words the same period covered by the Lessons Learnt and Reconciliation Commission (LLRRC), a body established by Rajapaksa in 2012 as a domestic alternative to an international investigation.

The UN 'Office Investigation on Sri Lanka' (OISL) as it's known, was duly set up in late 2014, and despite a barrage of criticism from Colombo – backed up by a refusal to allow its investigators into the country – soon got down to the serious work of investigation.

UNHRC Geneva session opens

By the time the HRC's 30th Session opened in Geneva two things were clear. First, that OISL's final report would be presented as promised by High Commissioner Zeid al-Hussein in March, when he agreed to the newly-installed Sirisena administration's request for a six-month deferral to give it time to begin getting its domestic house in order. Second that the US, with support from the UK among others, would be tabling a resolution outlining a series of practical recommendations for advancing the twin causes of accountability and reconciliation in Sri Lanka.

Although Zeid devoted some of his opening remarks to the HRC

Session to the OISL report, the first real act in Sri Lanka's Geneva drama was an opening statement by Foreign Minister Mangala Samareweera. Underscoring the country's profoundly changed political circumstances – in particular what he called the 'return of centrists to power' and 'resounding defeat of extremists on both sides' at the polls – Samaraweera called for sceptics to be 'patient' with the new administration's assertions that it was genuinely different from the previous dispensation, and in particular not to judge it by the 'mistakes and distortions of the past'.

He went to outline a proposed four-tiered domestic accountability mechanism: a Commission for Truth, Justice and Reconciliation, to be established in consultation with South Africa; an Office of Missing Persons, set up by statute and in line with 'internationally-accepted standards'; what he termed a 'Judicial Mechanism with a Special Counsel'; and an 'Office of Reparations' – both also placed on a statutory footing. A couple of days later Samaraweera also explained that Colombo envisaged an 18-month timeframe for getting the new set of institutions up and running, starting with three months of consultations lasting from mid-October until the end of January 2016.

Overall many observers concurred that the Foreign Minister had made a good stab at navigating his way over an indubitably tricky set of obstacles. Keeping both international sceptics and Tamil critics happy while simultaneously managing to hold at bay Sinhalese nationalists wary of the slightest hint of 'sovereignty sell out' was indeed no small feat. Like other aspects of the Geneva HRC sessions, however, for the Sri Lankan authorities pleasant surprise was pretty much the order of the day.

OISL report goes public

On 16 September the High Commissioner went public with the OISL Report. Zeid noted that based on investigation of the

nine year period in focus, the report concluded that crimes 'amounting to war crimes' had been committed during the final phase of the war – and most likely in earlier stages as well. In response to this finding, moreover, the report calls for the establishment of a special 'hybrid' court to investigate individuals with alleged responsibility for the worst atrocities.

There is of course plenty more than the headlines to this carefully-researched 250 page report. Its account of the war's final stages is as detailed as it is grim. And while there is perhaps little in it that's new to seasoned Sri Lanka watchers, the report is nonetheless the most sustained and comprehensive account to date of the war's bloody finale. What's really new, however, is the report's provenance. OISL's investigation was originally mandated, and its report now accepted, by the 47-member UNHRC. In this sense it is, as one commentator argued, the culmination of six years of intense international scrutiny of Sri Lanka.

That said there were some important limitations on the enterprise, notably Colombo's refusal to allow in the UN investigating team – a response from the Rajapaksa regime that was continued by the Sirisena administration. Thus the UN team was forced to rely chiefly on the testimony of witnesses outside the country – of whom there are many, notably in the Tamil diaspora – along with previous reports such as that produced by a 2011 UN Panel of Experts. In addition – a first for the UN – the investigation was assisted by the Sri Lanka Monitoring Mission (SLMM), a Nordic body established in the wake of the 2002 CFA to oversee both sides' compliance with its provisions.

Liaison with SLMM members helps to explain the OISL report's detailed account of a range of abuses committed by the LTTE. For example the Nordic monitors' documentation of the Tiger's systematic forced child soldier recruitment practices in the North and East, as well as its determined efforts to eliminate

Tamil opposition in areas under its control provided the basis for the report's treatment of these issues.

Interestingly, OISL have put the 'naming and shaming' limitations constraining many UN investigations to good use. Their report stops short of naming or otherwise directly accusing individuals of having committed war crimes. At the same time it provides a detailed overview of, for example, the location of specific Sri Lankan Army divisions at the time atrocities are alleged to have been committed. In this sense OISL appear to be leaving the path open to follow-up criminal investigation and eventually charges to be brought against those in wartime leadership positions – should there be the political will to do so.

An example of the way the report indirectly points the finger by 'locating' Army commanders and units concerns the notorious 'White Flag' incident at the war's end, when a group of over 40 top LTTE leaders surrendered to Army forces on 18 May 2009 following protracted negotiations with the government, much of it via intermediaries.

Some hours later it was confirmed that the entire group were dead – murdered by the security forces in cold blood following their surrender, it is alleged. All in all, by (correctly) stressing that it is a human rights-based, not a criminal, investigation of war crimes charges, OISL may be seeking to clear the way precisely for the latter.

On a related tack the report points to 'good evidence' for what it calls 'system crimes'. It proceeds to enumerate a list of crimes – committed on both sides – it considers as falling into this category, ranging from 'unlawful killings', enforced disappearances, torture and gender-based violence to abduction, 'use of children in hostilities' and denial of humanitarian assistance.

The horrific detail of many of these crimes apart, their

description as 'system crimes' is, as Zeid underlined, intended to point to the fact that the alleged atrocities were committed not simply on the whim of individual commanding officers, but in response to top-level directives. These, then, are precisely the OISL findings that ought to be worrying Mahinda Rajapaksa, his brother and ex-Defence Secretary Gotabaya, General Sarath Fonseka, Army Commander-in-Chief during the war's final years along with a number of other senior military figures. The picture is different on the other side simply because there's hardly anyone to point the finger at: all but a tiny group of senior LTTE figures were wiped out during the war's final stages.

Addressing a long-running debate regarding the appropriate means of addressing wartime accountability in Sri Lanka, the report's chief argument is that the structural weaknesses of the country's legal system following decades of perversion and subversion, notably under Rajapaksa, prevailing distrust – notably among Tamils – of its capacity to act impartially, combined with clear evidence of its inability to act on, for example, the findings of a succession of official commissions of enquiry, mean that it is simply not fit for the purpose.

Hence the report's proposal for a hybrid court combining international and domestic judges – a proposal known to be favoured strongly by sections of the international community as well as key Tamil political forces inside and outside the country, but viewed with extreme caution by Colombo authorities chary of any suggestion that the country's judicial sovereignty might be undermined.

Geneva resolution drafting

Following the report's release next up was the arduous process of negotiating agreement on a related UNHRC resolution. A draft tabled on 18 September by the US – which had committed itself in advance to achieving a consensus text with Colombo – proposed a hybrid court in terms that were functionally

identical to OISL's. Reports of the reaction in Colombo were mixed. While some commentators suggested that Samaraweera and colleagues were pleasantly surprised by the overall tone and substance of the lengthy draft resolution, others suggested they were seriously concerned by the references to a hybrid court.

A week of high-profile diplomatic horse-trading ensued, with the Sri Lankan side playing hardball in negotiations over the text in Geneva while reportedly adopting a more conciliatory tone in closed-door discussions. The outcome was negotiations that went right down to the wire, and a final draft including an outline of the new accountability court's composition that made significant concessions to Colombo's vocally-stated preferences.

Gone was the reference to a hybrid court, replaced by a Sri Lankan 'Judicial Mechanism with a Special Counsel' that would encompass 'Commonwealth and other foreign judges' – the draft referred to 'international' judges – defence lawyers and authorized prosecutors and investigators'. The Sri Lankan side also managed to secure inclusion of several paragraphs pointing to progress on reconciliation achieved in the country since January 2015, as well as a reference to LTTE crimes detailed in the report.

Beyond the hybrid/domestic court issue the resolution includes some fairly hard-hitting paragraphs on, for example, the need to address allegations of torture and sexual violence by the military as well as initiate security sector reform. In addition, it welcomes Colombo's 'positive engagement' with Zeid's office since assuming office, and expresses support for the four-tiered accountability mechanism earlier outlined by Samaraweera.

There are also important references to the need to strengthen witness protection, follow through on stated intentions to repeal the Prevention of Terrorism Act (PTA) and continue down

the path of seeking a final political settlement to the conflict that encompasses 'devolution of political authority'.

With an eye to prospective indictments of wartime military personnel, moreover, an important opening paragraph, whose wording bears all the marks of hard-nosed diplomatic bargaining, states that a 'credible accountability process' will 'safeguard the reputations of those, including within the military, who conducted themselves . . . with honor and professionalism'.

While this is hardly the sort of language calculated to endear the resolution to human rights activists who have documented the torture and systematic abuse of civilians they allege still continues in the Tamil-dominated North, for the government it may help to bolster the case for setting up a domestic accountability mechanism. This is true not least amongst the island's majority Sinhalese population, who have long been accustomed to viewing the Army leadership as heroic liberators of the nation from the scourge of terrorists intent on dividing the island rather than prospective war criminals.

Finally, the resolution calls for an 'oral update' by Zeid in June 2016, and a comprehensive report to the UNHRC in March 2017. Many see this as a critical provision, since it ensures that Colombo's performance in implementing reforms doesn't disappear off the international radar screen. From the government's perspective, moreover, freed from facing further potentially hostile Geneva resolutions in the near future, it will be in a position to channel its energies into implementing wide-ranging commitments on accountability and reconciliation.

Resolution responses

Responses to the resolution, which was eventually passed without recourse to a vote in Geneva on 2 October, varied. Unsurprisingly US Secretary of State John Kerry, who made a

high-profile official visit to Sri Lanka in May – the first in over 20 years by such a high-level US official – and who has since made consistently positive noises about the reform process initiated by the Sirisena administration, welcomed the resolution, in particular Sri Lanka's decision to co-sponsor it.

This latter fact, announced by Colombo in tandem with the release of the revised resolution, surprised some. Not only because this was not a formal requirement on Sri Lanka but also because by doing so Colombo bound itself more tightly to the need to demonstrate clear results from its verbal commitments to furthering reconciliation and accountability.

Responding to the resolution Foreign Minister Samaraweera stressed 'openness' to different ideas of how to implement its most important provisions. Concerning the precise nature of the judicial mechanism to be established, for example, in a (Sri Lanka) Sunday Times interview he suggested that it 'must be a credible mechanism which is acceptable to all concerned.' 'Within those parameters', he continued, however, 'we leave our options open for discussion'.

In clear contrast, to date Prime Minister Wickremesinghe's account of the HRC resolution's implications to local audiences has strongly emphasized the domestic character of the proposed judicial mechanisms, with foreign help to be sought purely to ensure their 'efficient functioning'. And in perhaps his most revealing comment in this context Wickremesinghe maintained that 'everyone agrees we should find out the truth.' At the same time, he argued, 'finding out that truth means reconciliation [must not] suffer'.

The Tamil National Alliance (TNA), the largest Tamil party in the newly-elected parliament, gave the OISL report a guarded welcome – the 'best possible' outcome that could be achieved on the 'basis of a consensus' as party leader R. Sampanthan put it. In a significant shift the TNA also announced that it

would be leading Tamils in some soul-searching regarding 'our own community's failures and the unspeakable crimes committed in our name' – a clear reference to the LTTE's behaviour during the conflict.

In particular its treatment of Tamil civilians – precisely the people it was supposedly defending – in the war's final stages, including forced child recruitment, placing their forces among the civilian population and thus inviting attacks on them, violently preventing civilians from escaping the war zone and so on.

In their own way both pronouncements were firsts for the Tamil community, opening up new possibilities of inter-ethnic dialogue. They were also remarkably restrained in view of what commentator Jude Fernando describes as Tamil's 'bitter experiences' with no less than 18 official government commissions established between 1963 and 2013 to investigate violence and injustice against the community, whose actual impact has by and large ranged minimal to non-existent.

Across the ethnic divide, Rajapaksa and a few other prominent nationalists apart, to date the Sinhala response to the OISL report has been markedly restrained. One potential line of attack has, however, opened up in the form of a constitutional challenge to the proposed new court. But in response President Sirisena has stressed that all provisions of the UNHRC resolution are firmly in line with the country's Constitution.

Whatever the formal legal determinations, and despite the cautious way in which the resolution frames external involvement, giving foreign judges and legal personnel any sort of role in the proposed court looks set to provide a future rallying point for forces opposed to such alleged infringements of national sovereignty – Rajapaksa included.

About the author

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Sinhalese challenges

A key question now is whether the majority Sinhalese community proves itself able and willing to go down a path of critical self-examination comparable to that proposed by the TNA for the island's Tamil population. For its part the government is understandably anxious to avoid setting in motion anything that might provoke a backlash among the majority community. Moreover, as a New York Times leader recently opined, the government's rejection of the hybrid court proposal potentially places it in a 'stronger position to 'sell the OHCHR report's other recommendations to the Sinhalese population' – an important step forward if it happens.

At the same time it seems clear that nudging the majority population towards acceptance of the need for an honest examination of the wartime past requires leadership. Moreover, this isn't going to happen either overnight, or by itself. It will need time. Encouragingly, however, there's a historical precedent. In the mid-1990s, on the back of strenuous official attempts to conclude a peace deal with the LTTE President Chandrika Kumaratunga initiated the Sudu Nelum ('White Lotus') movement, whose main goal was to persuade the majority Sinhala Buddhist population of the overarching imperative of achieving peace with the Tamils. The movement proved a real success: as Kumaratunga proudly told me in the course of an interview, over a two year period Sudu Nelum's efforts resulted in an

increase in popular support for peace moves from 20 to almost 70 per cent.

And the leading figure in Sudu Nelum? Step forward Mangala Samaraweera, then a junior minister in the Kumaratunga administration. What's more, if he and the Sirisena administration should decide to go down the path of leading from the front in bringing the Sinhalese community to accept the notion of confronting the past, warts and all, they will be supported by a bedrock of civil society organizations able and willing to assist in the task.

Encouragingly in this context Jehan Perera, Director of the National Peace Council and a long-time proponent of reconciliation between the majority and minority communities – the latter including Muslims and well as Tamils – recently suggested that early signs point to the fact that Wickremesinghe seems to have learned from his earlier failure, following the 2002 cease fire agreement, to engage civil society in helping to 'sell' the peace process to the majority population.

Even as negotiations over the UNHRC resolution were continuing in earnest, the Prime Minister chaired meetings with the heads of media organizations and civil society activists to review developments and discuss how best both to defeat 'communal groups and religious extremists' and communicate the outcomes of the Geneva deliberations.

It is of course true that when it comes to enacting legislation to deal with charges of war crimes and crimes against humanity, in common with other countries Sri Lanka's penal code is simply not designed to address such charges. Moreover, domestic legal experts are divided on whether the penal code can be adapted to accommodate the kind of crimes detailed in the OISL report.

At the same time, even if the hybrid court recommended by OISL

has been ruled out – at least in name – by the recent UNHRC resolution, in practice there's plenty Sri Lanka can learn from experience with hybrid courts elsewhere: Cambodia and Sierra Leone, for example, where UN-mandated hybrid legal entities were set up in the aftermath of devastating conflicts.

Transitional justice in question

All in all it is important to bear in mind the fact that by its very definition, transitional justice implies compromises and as such the delivery of less than perfect justice. In transitional contexts, in other words, no one, neither victors nor victims, gets everything they want, and quite possibly deserve. On the one hand there is clearly a fundamental need to avoid the pursuit of what is perceived as purely 'victors justice'. But at the same time – and here's the rub – if national reconciliation is considered an overriding objective, it may be that some of victim's legitimate demands for justice have to be deferred until satisfying them becomes politically practicable.

In this context, too, there's a need to bear in mind the real political risks potentially involved in pursuing justice. An instructive example in this regard is the Croatian General Ante Gotovina. Following a 2001 announcement that the ex-Yugoslavia War Tribunal (ICTY) had issued sealed indictments against him, Gotovina rapidly assumed the status of nationalist symbol and rallying point for all who rejected criticism of Croatian forces' conduct in the Balkan wars. In a similar vein, it doesn't take too much imagination to conjure up the kind of reaction that the indictment or arrest of wartime Sri Lankan military leaders such as Sarath Fonseka might still provoke among the Sinhalese population.

The implication, and lesson learned from other experiences here is that when framing a country's transitional justice and reconciliation agenda, some key aspects of justice may have to

wait until such time as the country's judicial institutions – and in particular its civil-military relations – have undergone the thorough-going transformation needed to allow them to deal adequately (and safely) with them. In many ways it is not pleasant to say this: but it may be true nonetheless. And there is hope, too. For the victims of General Pinochet in Chile, Hissène Habré in Chad, Charles Taylor in Liberia and Sierra Leone, and Radko Mladic in Bosnia, the wait for justice has been a long one. At the wait's end, however, has come real justice in visible, tangible form.

This is not, however, to advocate a wait-and-see attitude to delivering justice. There are concrete things the Colombo government can do now, for example to bolster low levels of confidence – notably among Tamils – in its commitment to go beyond words to deeds. A good start would be over consultation. In his keynote speech to the UNHRC Samaraweera announced a three-month period of national consultation on the set of accountability mechanisms he outlined. (By contrast, Sirisena and Wickremesinghe were both solicitous in consulting the country's military leadership in advance of the Geneva UNHRC session.)

The question now is whether these consultations will prove to be a cosmetic, Colombo-based exercise in public image management, or whether there will be a real effort to listen to the views of the North East's Tamil population, which bore the brunt of brutalities in the civil war's final phase – and some of whom complain that they have remained under de facto military occupation by Sri Lankan security forces to this day.

In the overall scheme of things such consultations may well constitute a small part of the jigsaw. At the same time they could represent a necessary, and symbolically critical, effort to involve victims, no less than victors, in the process of addressing the painful legacy of the country's civil war.

More On

Mark Salter's new book, *To End A Civil War: Norway's Peace Engagement in Sri Lanka* (Hurst) will be launched at SOAS, London on 28 October, and officially released the following day. Further information at: www.marksalter.org and www.cisd.soas.ac.uk/event/book-launch-to-end-a-civil-war-norways-peace-engagement-with-sri-lanka,29177493

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