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Justice Delayed, Justice Denied? The Search for Accountability for Alleged Wartime Atrocities Committed in Sri Lanka

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JUSTICE DELAYED, JUSTICE DENIED? THE SEARCH FOR ACCOUNTABILITY FOR ALLEGED WARTIME ATROCITIES COMMITTED IN SRI LANKA

Aloka Wanigasuriya*

TABLE OF CONTENTS

I. Introduction.....	221
II. National Action.....	223
A. National Mechanisms.....	223
1. Human Rights Commission of Sri Lanka (HRCSL).....	224
2. Lessons Learnt and Reconciliation Commission (LLRC)	225
3. Military Court of Inquiry (MCI)	227
4. Presidential Commission to Investigate into Complaints Regarding Missing Persons (Paranagama Commission).....	228
5. Consultation Task Force (CTF) on Reconciliation Mechanisms	229
6. Office on Missing Persons (OMP) and Related Legislation.....	232
B. National Legal Action	235
III. International Reactions.....	242
IV. International, or Partially International, Avenues for Justice	245
A. International Criminal Court.....	245

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B. Hybrid Court..... 248
C. Extraterritorial Prosecutions 249
V. Conclusion 258

I. INTRODUCTION

During the final stages of its nearly three-decades-long civil war in 2009, Sri Lanka attracted considerable international attention due to the allegations of international crimes that were said to have been committed both by the Sri Lankan government Armed Forces, the Guerilla Force, and the Liberation Tigers of Tamil Eelam (LTTE). According to United Nations (UN) experts, an estimated 40,000 civilians were killed during the final offensive, which lasted from January to May 2009.¹ However, the Sri Lankan government has set this figure at 9,000 with no civilian casualties.² Several UN bodies found credible allegations that international crimes were committed by both parties taking part in the civil war, some of which amounted to war crimes and crimes against humanity.³ Further allegations of international crimes being committed by Sri Lankan government forces surfaced in two documentaries by Channel 4 (UK) that claimed to include video footage from the final phases of the civil war.⁴

Since the end of the civil war, multiple national and international actors repeatedly called for conducting transparent and impartial investigations and prosecutions, albeit with no success.⁵ Recently, the conflict once again

¹ U.N. Secretary-General, *Rep. of the Secretary-General's Panel of Experts on Accountability in Sri Lanka*, ¶ 137 (Mar. 31, 2011) [hereinafter UNSG Experts Accountability Rep.].

² *Id.* ¶¶ 2, 195; Charles Haviland, *Sri Lanka government publishes war death toll statistics*, BBC (Feb. 24, 2012), <http://www.bbc.com/news/world-asia-17156686>.

³ See Rep. of the OHCHR Investigation on Sri Lanka (OISL), Human Rights Council on Its Thirtieth Session, ¶¶ 5–6, 70, U.N. Doc. A/HRC/30/CRP.2 (Sept. 16, 2015) [hereinafter OISL Rep.]; UNSG Experts Accountability Rep., *supra* note 1, at ii–iv. Violations of Common Article 3 of the Geneva Conventions included unlawful killings, torture, sexual and gender-based violence, hostilities on civilians and civilian objects, abductions and forced recruitment, etc. OISL Rep., *supra* note 3, ¶¶ 1113–74.

⁴ See *Sri Lanka's Killing Fields*, CHANNEL 4 (June 14, 2011), <https://www.channel4.com/programmes/sri-lankas-killing-fields>; *Sri Lanka's Killing Fields: War Crimes Unpunished*, CHANNEL 4 (Mar. 14, 2012), <https://www.channel4.com/programmes/sri-lankas-killing-fields/on-demand/52949-001>.

⁵ *War Crimes in Sri Lanka*, INT'L CRISIS GRP. (May 17, 2010), <https://www.crisisgroup.org/asia/south-asia/sri-lanka/war-crimes-sri-lanka>;

received a rare yet fleeting dose of attention when former U.S. President, Barack Obama, made reference to it in his recent memoir, “A Promised Land.”⁶ In addition, in January 2021, the United Nations High Commissioner for Human Rights, Michelle Bachelet, outlined “a number of options [available to UN member states] to advance criminal accountability and provide measures of redress for victims [of the conflict]” in Sri Lanka, specifically mentioning referring the situation to the International Criminal Court (ICC).⁷ This led to the subsequent adoption of a resolution during the 46th session of the UN Human Rights Council (UNHRC), where a decision was made “to strengthen . . . the capacity of the Office of the High Commissioner to collect . . . and preserve information and evidence and to develop possible strategies for future accountability processes for gross violations of human rights or serious violations of international humanitarian law in Sri Lanka.”⁸ Despite this, eleven years after the end of the conflict, progress in terms of achieving justice and ending impunity has been limited. Despite their fading hopes, victims of the alleged international crimes committed during the civil war and its aftermath and their loved ones still continue to await justice.

Against this background, this article discusses: (1) the various national actions that have been initiated in Sri Lanka;

Sri Lanka: UN Members Should Back Hybrid Court, HUM. RTS. WATCH (Sept. 16, 2015, 5:47 PM), <https://www.hrw.org/news/2015/09/16/sri-lanka-un-members-should-back-hybrid-court>.

⁶ See Easwaran Rutnam, *Obama’s book notes UN failure in Sri Lanka*, DAILY MIRROR (Nov. 25, 2020, 12:07 AM), http://www.dailymirror.lk/front_page/Obama%E2%80%99s-book-notes-UN-failure-in-Sri-Lanka/238-200524.

⁷ Rep. of the OHCHR on Promoting Reconciliation, Accountability and Human Rights in Sri Lanka, Human Rights Council on Its Forty-Sixth Session, Feb. 22–Mar. 19, 2021, ¶ 59, U.N. Doc A/HRC/46/20 (Jan. 27, 2021) [hereinafter OHCHR Advanced Unedited Rep.]. This idea was again reiterated in the Advanced Edited Version of the Report released in February 2021. See Rep. of the OHCHR on Promoting Reconciliation, Accountability and Human Rights in Sri Lanka, Human Rights Council on Its Forty-Sixth Session, Feb. 22–Mar. 19, 2021, ¶ 59, U.N. Doc A/HRC/46/20 (Feb. 9, 2021) [hereinafter OHCHR Advanced Edited Rep.].

⁸ Rep. of the OHCHR on Promoting Reconciliation, Accountability and Human Rights in Sri Lanka, Human Rights Council on Its Forty-Sixth Session, Feb. 22–Mar. 23, 2021, ¶ 6, U.N. Doc A/HRC/46/L.1/Rev.1 (Mar. 16, 2021).

(2) the progress made with regard to the various international calls for justice; and (3) the possible international and partially international avenues for pursuing justice. Finally, the article concludes by outlining the present domestic conditions in Sri Lanka and making recommendations on possible avenues to pursue in order to ensure that justice is delivered.

II. NATIONAL ACTION

A. *National Mechanisms*

Since the end of the civil war, successive Sri Lankan governments have engaged in several box-ticking exercises in order to subdue both internal and external calls for justice. Thus far, three main steps have been taken by the Sri Lankan government to establish an institution resembling a national accountability mechanism. These steps have been: (i) the Lessons Learnt and Reconciliation Commission (LLRC);⁹ (ii) the Consultation Task Force (CTF) on Reconciliation Mechanisms;¹⁰ and (iii) the Office on Missing Persons (OMP).¹¹ As outlined below, other mechanisms and avenues have also emerged. However, in the absence of any viable means through which victims and aggrieved communities can seek justice for the alleged international crimes, all these initiatives have fallen short of any real attempt at delivering justice and combating impunity.

⁹ See REPORT OF THE COMMISSION OF INQUIRY ON LESSON LEARNT AND RECONCILIATION 1–3 (2011), <http://slembassyusa.org/downloads/LLRC-REPORT.pdf> [hereinafter LLRC REP.].

¹⁰ See generally FINAL REPORT OF THE CONSULTATION TASK FORCE ON RECONCILIATION MECHANISMS: VOL. I (2016), <http://war-victims-map.org/wp-content/uploads/2017/02/CTF-Final-Report-Volume-I-Nov-16.pdf>; ZONAL TASK FORCES, CONSOLIDATED REPORT – ZONAL TASK FORCES ON RECONCILIATION MECHANISMS: VOL. II (2016), <http://war-victims-map.org/wp-content/uploads/2017/02/CTF-Final-Report-Volume-II-Nov-16.pdf>.

¹¹ See generally *Office on Missing Persons (OMP)*, MINISTRY NAT'L INTEGRATION & RECONCILIATION, http://nirmin.gov.lk/web/index.php?option=com_content&view=article&id=127:office-on-missing-persons-omp&catid=9:projects&lang=en&Itemid=208 (last visited Mar. 22, 2021); *About Us – Establishment of the OMP*, OFF. ON MISSING PERS., <http://www.ompsrilanka.org/about/establishment-of-the-commission> (last visited Mar. 22, 2021).

1. Human Rights Commission of Sri Lanka (HRCSL)

The HRCSL was established through the Human Rights Commission of Sri Lanka Act No. 21 of 1996.¹² It was not specifically established to probe alleged international crimes committed during the course of the civil war. However, its capability to investigate complaints related to violations and imminent violations of fundamental rights enshrined in the Sri Lankan Constitution gave it the potential to transform the Commission into a key player in the search for justice and accountability. The Commission initiated “a special investigation into disappearances in Jaffna in 2003.”¹³ In March of 2006, it appointed a Special Rapporteur to investigate human rights violations related to the civil war, which led to the identification of the likely perpetrators in four murder cases including in the 2006 Trincomalee Five Case.¹⁴ The Special Rapporteur recommended further investigations into the incidents. In November 2006, this resulted in the establishment of a separate mechanism, the Commission of Inquiry to Investigate and Inquire into Alleged Serious Violations of Human Rights Occurring since August 1, 2005 (a.k.a. Udalagama Commission).¹⁵ The Udalagama Commission was established through Gazette 1471/6 of 2006, to investigate 16 cases of killings and enforced disappearances.¹⁶ This included the Trincomalee Five Case.¹⁷ Out of these 16 cases, the Udalagama Commission was only able to complete its investigations into seven cases.¹⁸ The Trincomalee Five Case, which is discussed further in a subsequent section of this article, later proceeded to court but experienced several setbacks over

¹² Human Rights Commission of Sri Lanka Act, No. 21 of 1996, ¶ 2(1) (L.D.-O 12/94), <https://www.hrcsl.lk/wp-content/uploads/2020/01/HRC-Act.pdf>.

¹³ OISL Rep., *supra* note 3, ¶ 1202.

¹⁴ *Id.* ¶¶ 1202, 1208–16. The Trincomalee 5 Case revolved around the alleged killing of five Tamil students in Trincomalee. See *Sri Lanka: No Justice for ‘Trinco 5’*, HUM. RTS. WATCH (July 8, 2019, 10:30 PM), <https://www.hrw.org/news/2019/07/08/sri-lanka-no-justice-trinco-5>.

¹⁵ OISL Rep., *supra* note 3, ¶ 1209.

¹⁶ *Id.* ¶ 1209 & n.1222.

¹⁷ *Id.* at 235 n.1222.

¹⁸ *Id.* ¶ 1216.

the years.¹⁹

The HRCSL's independence has come into question in recent years, especially with the passing of the 20th Amendment to the Constitution of Sri Lanka,²⁰ which now means that the Sri Lankan President directly appoints the members of the Commission.²¹ The appointment of members to independent commissions solely by the executive thus puts the impartiality of their work into question. On December 10, 2020, the Sri Lankan president appointed Jagath Balasuriya, a former Minister of National Heritage during the previous Rajapaksa government and a retired pro-government politician, as the Chairperson of the HRCSL.²² Given these developments, it is unlikely that this institution will be utilized in the near future as an avenue through which to pursue and initiate ongoing attempts at achieving justice for the alleged commission of international crimes linked to the civil war.

2. Lessons Learnt and Reconciliation Commission (LLRC)

On May 15, 2010, the former Sri Lankan President, Mahinda Rajapaksa, established the LLRC.²³ It concluded its work on November 15, 2011.²⁴ The LLRC was not an investigative commission but had a limited mandate to only examine incidents that took place between February 21, 2002 and May 19, 2009.²⁵ Its mandate allowed it to look into the facts and circumstances that led to: the Ceasefire Agreement, which was operationalized on February 21, 2002; the events that unfolded up to May 19, 2009; the measures needed to ensure the recurrence of similar instances; and avenues for achieving

¹⁹ See discussion *infra* Section 2.2.

²⁰ See generally Twentieth Amendment to the Constitution, 2020 (L.D.-O 7/2020) (Sri Lanka), <https://www.parliament.lk/uploads/acts/gbills/english/6176.pdf>.

²¹ *Id.* art. 41A(1), at 4.

²² *President appoints new Chairperson, Members to Human Rights Commission*, ISLAND ONLINE (Dec. 20, 2020), <https://island.lk/president-appoints-new-chairperson-members-to-human-rights-commission/>.

²³ LLRC REP., *supra* note 9, at ii–vii, ¶ 1.1, at 5.

²⁴ See *id.* at viii.

²⁵ *Id.* ¶ 1.5.

national unity and reconciliation among all communities.²⁶

In 2011, the United Nations Secretary-General's Panel of Experts on Accountability in Sri Lanka criticized the mechanism, pointing out that: (i) the LLRC failed to satisfy key international standards of independence and impartiality; (ii) neither its mandate nor its work and methodology were tailored to investigating allegations of serious violations of international humanitarian and human rights law or to examining the root causes of the ethnic conflict; (iii) its work demonstrated that it had not conducted genuine truth-seeking on what happened during the final stages of the armed conflict; (iv) it had not sought to systematically and impartially investigate the allegations of serious violations on both sides of the war; (v) it had not employed an approach that treats victims with full respect for their dignity and their suffering; and, (vi) it had not provided the necessary protection for witnesses even in circumstances of actual personal risk.²⁷

The LLRC's final report, dated November 2011, was tabled in Parliament on December 6, 2011.²⁸ It concluded that civilian safety had been afforded the highest priority by the Sri Lankan military while conducting their military operations.²⁹ However, the report outlined several instances that warranted further investigations and expressed grave concern regarding allegations of disappearances of LTTE carders who had either been arrested by or surrendered to the Sri Lankan security forces.³⁰ The report generated considerable debate on reconciliation, human rights, and governance in Sri Lanka.³¹ However, the fact that it was only released in English meant

²⁶ *Id.* pmb., ¶ 1.5.

²⁷ UNSG Experts Accountability Rep., *supra* note 1, ¶ 344.

²⁸ *LLRC report tabled in Parliament*, SRI LANKA HIGH COMM'N OTTAWA, http://www.torontoslcg.org/ottawa2/index.php?option=com_content&view=article&id=185:llrc-report-tabled-in-parliament&catid=53:other-news&Itemid=120 (last visited Mar. 22, 2021).

²⁹ LLRC REP., *supra* note 9, ¶ 4.262.

³⁰ *See id.* ¶¶ 4.104–4.111, 4.261–4.265, 4.315–4.319.

³¹ *See generally Statement on the Report of Sri Lanka's Lessons Learnt and Reconciliation Commission*, INT'L CRISIS GRP. (Dec. 22, 2011), <https://www.crisisgroup.org/asia/south-asia/sri-lanka/statement-report-sri-lankas-lessons-learnt-and-reconciliation-commission>.

that those Sri Lankans who were not well versed in English were essentially left out of these discussions. Regardless, as outlined below, the LLRC's observations led to the establishment of several other mechanisms, albeit with limited success, in terms of achieving accountability.

3. Military Court of Inquiry (MCI)

In 2012, the MCI, also known as the Army Court of Inquiry, consisting of five members (all military officers), was established to probe the allegations of war crimes committed by the Sri Lankan military.³² It was established in response to observations made by the LLRC related to war crimes allegations against the military outlined in the initial Channel 4 documentary.³³ Its establishment—so close to a meeting of the UN Human Rights Council in Geneva where a resolution on the lack of accountability for alleged violations of international human rights and humanitarian law during the armed conflict was expected to be discussed—was viewed as being a delaying tactic by Sri Lanka to divert international attention from the issue of accountability.³⁴ Its impartiality was further questioned by the Presidential Commission to Investigate into Complaints regarding Missing Persons (a.k.a. Paranagama Commission).³⁵

The report of the MCI was never made public; however, the MCI claimed that “evidence before [it] ha[d] conclusively established that the Humanitarian Operation [during the last phases of the war] was conducted strictly in accordance with the

³² See *LLRC Observations Cleared; Army Commander Hands Over Court of Inquiry Report to Secretary Defence*, SRI LANKA ARMY, <https://www.army.lk/news/llrc-observations-cleared-army-commander-hands-over-court-inquiry-report-secretary-defence> (last visited Mar. 22, 2021). This was established under Regulation 4 of the Courts of Inquiry Regulations of 1952, which created the Army Court of Inquiry. *Id.*

³³ *Id.*

³⁴ *Sri Lanka: Army Inquiry a Delaying Tactic*, HUM. RTS. WATCH (Feb. 15, 2012, 5:28 PM), <https://www.hrw.org/news/2012/02/15/sri-lanka-army-inquiry-delaying-tactic#>.

³⁵ PARANAGAMA COMM'N, REPORT ON THE SECOND MANDATE OF THE PRESIDENTIAL COMMISSION OF INQUIRY INTO COMPLAINTS OF ABDUCTIONS AND DISAPPEARANCES ¶ 546 (2015), <https://parliament.lk/uploads/documents/paperspresented/report-of-paranagama.pdf> [hereinafter PARANAGAMA COMM'N REP.].

'Zero Civilian Casualty' directive made by . . . the President . . . and commanders . . ."³⁶ Its final report exonerated the military of any responsibility for the alleged crimes and instead laid all blame on the LTTE,³⁷ leading some to claim that the military and government of Sri Lanka could not be trusted to investigate the alleged crimes committed during the final phases of the conflict.³⁸

4. Presidential Commission to Investigate into Complaints Regarding Missing Persons (Paranagama Commission)

Subsequently, the Paranagama Commission was established by former President, Mahinda Rajapaksa, on August 15, 2013.³⁹ During its First Mandate, the Commission held public hearings in the North and East of Sri Lanka and considered evidence relating to approximately 2,700 complaints linked to missing and disappeared persons.⁴⁰ Eventually, on July 15, 2014, the Commission's mandate was expanded "to address the facts and circumstances surrounding civilian loss of life and the question of the responsibility of any individual, group or institution for violations of international law during the [civil war] that ended in May 2009," also known as the Second Mandate.⁴¹ The Commission was tasked with inquiring into and reporting on several matters referred to in the report of the LLRC, including allegations of crimes committed by the LTTE and the Sri Lankan armed forces.⁴² Upon the election of former president, Maithripala Sirisena, the Commission's First and

³⁶ *Army Court of Inquiry on Channel 4 Allegations Referred to in the LLRC Report Submits Its Findings to the Commander of the Army*, SRI LANKA ARMY, <https://www.army.lk/news/army-court-inquiry-channel-4-allegations-referred-llrc-report-submits-its-findings-commander> (last visited Mar. 22, 2021).

³⁷ See *LLRC Observations Cleared; Army Commander Hands Over Court of Inquiry Report to Secretary Defence*, *supra* note 32, for a synopsis of actions taken by the LTTE.

³⁸ Yasmin Sooka, *The empty findings of Sri Lanka's Military Court of Inquiry*, GROUNDVIEWS (Apr. 11, 2013), <https://groundviews.org/2013/04/11/the-empty-findings-of-sri-lankas-military-court-of-inquiry/>.

³⁹ PARANAGAMA COMM'N REP., *supra* note 35, ¶ 16.

⁴⁰ *Id.* ¶ 1.

⁴¹ *Id.* ¶ 2.

⁴² *Id.*

Second Mandates were once again extended until August 15, 2015.⁴³ Its second report was finalized in August of 2015.⁴⁴ The Commission was disbanded on July 15, 2016.⁴⁵

The Commission found that the Channel 4 documentaries “provide[d] enough material to form a reasonable basis to believe that war crimes may have been committed, warranting an investigation.”⁴⁶ However, it did not view this as providing conclusive evidence “of any overarching political or military directive to commit such crimes.”⁴⁷ It recommended the establishment of a credible Truth and Reconciliation Commission (TRC) as its preferred mechanism for ensuring accountability.⁴⁸ Had any international crimes been committed, given Sri Lanka’s reluctance to submit any accused to international fora for trial and its reluctance to accept international involvement, the Commission suggested setting up a purely domestic tribunal (without the involvement of international judges) for trying the alleged perpetrators (e.g., a Special Division of the Supreme Court).⁴⁹ In order to enable such prosecutions of international crimes, it further suggested that the government incorporate provisions on the criminalization of the core international crimes into domestic law.⁵⁰

5. Consultation Task Force (CTF) on Reconciliation Mechanisms

Following this, in January of 2016, the CTF was established by the Prime Minister.⁵¹ It was a result of Sri Lanka’s pledge to

⁴³ *Id.* ¶ 4.

⁴⁴ *See generally id.*

⁴⁵ SRI LANKA: MAKING THE RIGHT CHOICES: ESTABLISHING EFFECTIVE MECHANISMS TO DELIVER JUSTICE, TRUTH AND REPARATIONS TO VICTIMS, AMNESTY INT’L 30 (2016), <https://www.amnesty.org/download/Documents/ASA3749022016ENGLISH.PDF>.

⁴⁶ PARANAGAMA COMM’N REP., *supra* note 35, ¶ 425.

⁴⁷ *Id.*

⁴⁸ *Id.* ¶¶ 620, 625–26.

⁴⁹ *Id.* ¶¶ 616–17.

⁵⁰ *Id.* ¶ 613.

⁵¹ *Sri Lanka: Consultation Task Force report must lead to justice*, AMNESTY INT’L (Jan. 11, 2017), <https://www.amnesty.org/en/latest/news/2017/01/sri-lanka-consultation-task->

the UN Human Rights Council under Resolution 30/1, which Sri Lanka co-sponsored.⁵² It consisted of 11 members drawn from civil society.⁵³ Through a consultation process with various segments of the Sri Lankan public, the CTF's task was to ascertain the public's views on the most appropriate mechanisms for transitional justice and reconciliation proposed in Resolution 30/1.⁵⁴ The CTF's report, finalized on November 17, 2016, was presented to the Chairperson of the Office for National Unity and Reconciliation (ONUR)⁵⁵ in January of 2017.⁵⁶ It highlighted the findings of the community consultation process, including the frustration expressed by the public at yet another mechanism being established despite the failures and inconclusive nature of past initiatives on the one hand, and on the other hand, the yearning for justice and the hope that this mechanism would prove to be different from the others.⁵⁷ The report further mentioned the need for a political and constitutional settlement to the conflict in order to bring about true reconciliation.⁵⁸

Submissions made to the CTF by the government security forces and police highlighted their concerns that a reconciliation mechanism would be counterproductive, pose a threat to

force-report-must-lead-to-justice/.

⁵² *Id.*; *Sri Lanka: implement Task Force recommendations to deliver justice for victims of human rights abuse*, INT'L COMM'N JURISTS (Jan. 19, 2017), <https://www.icj.org/sri-lanka-implement-task-force-recommendations-to-deliver-justice-for-victims-of-human-rights-abuse/>.

⁵³ FINAL REPORT OF THE CONSULTATION TASK FORCE ON RECONCILIATION MECHANISMS – EXECUTIVE SUMMARY AND RECOMMENDATIONS ¶ 1, at 83 (2016), <http://war-victims-map.org/wp-content/uploads/2017/02/CTF-Final-Report-Exec-Summary-and-Comm-Nov-16.pdf>. [hereinafter CTF REP.].

⁵⁴ See *Sri Lanka: implement Task Force recommendations to deliver justice for victims of human rights abuse*, *supra* note 52.

⁵⁵ For background on the implementation and purpose of the ONUR, see generally *Implementing Agencies – Office for National Unity and Reconciliation*, MINISTRY NAT'L INTEGRATION & RECONCILIATION, http://nirmin.gov.lk/web/index.php?option=com_content&view=article&id=41&Itemid=205&lang=en (last visited Mar. 22, 2021).

⁵⁶ *CTF on Reconciliation Mechanisms fear recommendations will not be used*, DAILY NEWS (Mar. 17, 2017, 11:00 AM), <https://dailynews.lk/2017/03/17/local/110736/ctf-reconciliation-mechanisms-fear-recommendations-will-not-be-used?page=4551>.

⁵⁷ CTF REP., *supra* note 53, ¶ 2, at 85.

⁵⁸ *Id.* ¶ 10, at 87.

national security, and reignite ethnic tensions.⁵⁹ All security sector personnel who made submissions to the CTF rejected international involvement in a possible future reconciliation mechanism, and, while unequivocal support was expressed for the government's reconciliation efforts, they expressed their preference for a restorative, as opposed to a retributive, approach.⁶⁰ Representatives of the Sri Lankan army supported a truth seeking mechanism as well as prosecutions of the guilty should any criminal activity be concluded to have transpired; however, they categorically denied that any wrongdoing or criminal activity had taken place and, therefore, did not see the need for granting amnesties.⁶¹

The CTF recommended that effective remedies be granted to those who had suffered harm during the conflict, including through utilizing criminal justice.⁶² It recommended incorporating provisions criminalizing international crimes, such as war crimes and crimes against humanity, into Sri Lanka's domestic law.⁶³ The CTF's recommendation was for a hybrid court, "Special Court and Office of Special Counsel," to be established, comprising of a majority of national judges on the bench as well as a sufficient number of international judges with its material jurisdiction extending to prosecuting crimes against humanity, war crimes, and violations of customary international law with no temporal limitations on jurisdiction.⁶⁴ Recommendations for the establishment of a "Truth, Justice, Reconciliation and Non-Recurrence Commission (TJRNRC)" were also set out.⁶⁵

However, to date, neither a "Special Court and Office of Special Counsel" nor a "TJRNRC" has materialized. The law reform initiatives too have failed to see the light of day. Perhaps

⁵⁹ *Id.* ¶ 3, at 85.

⁶⁰ *Id.*

⁶¹ *Id.* ¶ 4, at 86.

⁶² *Id.* ¶ 1.5, at 98.

⁶³ *Id.* ¶ 11, at 87. Some submissions recommended including provisions on modes of responsibility, which recognize superior and command responsibility and joint criminal enterprise as domestic law. *Id.* ¶ 28, at 95.

⁶⁴ *Id.* ¶¶ 24–25, at 94; see also *id.* ¶¶ 6.1–6.15, at 114–15, for the judicial mechanisms of the Special Court and Office of Special Counsel.

⁶⁵ *Id.* at 112–14.

this lack of action comes as no surprise given the fact that the CTF's recommendations faced an uphill battle from the outset. Surprisingly, after the release of its final report, the Sri Lankan Justice Minister stated that he had "no confidence" in the CTF, indicating that the government had little interest in implementing its recommendations.⁶⁶

6. Office on Missing Persons (OMP) and Related Legislation

The bill for establishing the OMP was presented to the Sri Lankan Parliament on June 22, 2016,⁶⁷ while the CTF consultation process was still ongoing, raising doubts about the government's seriousness about any eventual findings and recommendations by the CTF. This fact was highlighted when the CTF issued an interim report on the establishment of the OMP.⁶⁸ The OMP was established through the Office on Missing Persons (Establishment, Administration and Discharge of Functions) Act, No. 14 of 2016.⁶⁹ The Act passed through the Sri Lankan Parliament on August 11, 2016 and was certified on August 23, 2016.⁷⁰ Subsequently, the OMP was operationalized on February 28, 2018.⁷¹ Its mandate allows it to probe the disappearances that took place during and after the civil war.⁷² This latest element in the push for accountability was

⁶⁶ *I have no confidence in the CTF: Wijeyadasa*, DAILY MIRROR (Jan. 6, 2017, 9:01 PM), <http://www.dailymirror.lk/article/I-have-no-confidence-in-the-CTF-Wijeyadasa-121817.html>.

⁶⁷ *Establishment of the OMP*, OFF. ON MISSING PERS., <http://www.ompsrilanka.org/about/establishment-of-the-commission> (last visited Mar. 23, 2021).

⁶⁸ CTF REP., *supra* note 53, ¶ 1, at 88; *see generally* CONSULTATION TASK FORCE ON RECONCILIATION MECHANISMS, INTERIM REPORT – THE OFFICE ON MISSING PERSONS BILL AND ISSUES CONCERNING THE MISSING, THE DISAPPEARED AND THE SURRENDERED (2016).

⁶⁹ *See generally* Office on Missing Persons (Establishment, Administration and Discharge of Functions) Act, No. 14 of 2016 (L.D.-O 32/2016) (Sri Lanka), <http://www.ompsrilanka.org/storage/app/uploads/public/5f4/25e/624/5f425e624f9b3557724334.pdf> [hereinafter OMP Act].

⁷⁰ *Id.*; *Establishment of the OMP*, *supra* note 67.

⁷¹ *See generally* OFF. ON MISSING PERS., 2018 ANNUAL REPORT 4 (2018), <https://www.parliament.lk/uploads/documents/paperspresented/annual-report-office-on-missing-persons-2018.pdf>, for a detailed explanation of the OMP's operationalization during 2018.

⁷² OMP Act, *supra* note 69, at 6–7.

accompanied by the enacting of the International Convention for the Protection of All Persons from Enforced Disappearances Act No.5 of 2018 (EDA).⁷³ The EDA incorporates the obligations outlined in the International Convention for the Protection of All Persons from Enforced Disappearances into Sri Lankan domestic law.⁷⁴ However, the national criminalization of enforced disappearances remains inadequate given that it does not:

- (i) include instances where some elements of the crime occurred prior to the enactment of the Act, in the definition of “enforced disappearances;”
- (ii) capture the full range of potential perpetrators and full scope of command responsibility; and
- (iii) recognize enforced disappearances as a crime against humanity.

Since 2018, in addition to its head office in Colombo, the OMP has opened several regional offices in Jaffna, Batticaloa, Mannar and Matara.⁷⁵ However, the mechanism has faced a multitude of difficulties along the way. Victims’ rights groups view the OMP as being a largely watered down version of victims’ aspirations.⁷⁶ Also, the families of the disappeared along with the lawyers who represent them continue to face

⁷³ See generally International Convention for the Protection of All Persons from Enforced Disappearances Act, 2018 (Act No. 5/2018) (Sri Lanka), https://www.srilankalaw.lk/gazette/2018_pdf/05-2018_E.pdf.

⁷⁴ See *id.* p.mbl.

⁷⁵ Office for Missing Persons, *Regional office*, MINISTRY JUST. SRI LANKA, https://www.moj.gov.lk/web/index.php?option=com_content&view=article&id=154&Itemid=242&lang=en (last visited Mar. 23, 2020).

⁷⁶ See MCM Iqbal, *The OMP and the Aspirations of Families of the Missing and Disappeared*, GROUNDVIEWS (May 17, 2018), <https://groundviews.org/2018/05/17/the-office-of-missing-persons-and-the-aspirations-of-affected-families-in-sri-lanka/>; *Distrust as Sri Lanka sets up body to probe missing people*, ALJAZEERA (May 13, 2018), <https://www.aljazeera.com/videos/2018/5/13/distrust-as-sri-lanka-sets-up-body-to-probe-missing-people>.

threats both from government authorities and non-state actors.⁷⁷ According to former OMP Chairperson, Saliya Pieris, one of the key challenges for the OMP included the “lack of cooperation from key state actors”⁷⁸ The polarized national context within which the OMP operates, with a large segment of the Sri Lankan population questioning the need for addressing the issue of missing and disappeared persons, poses additional challenges. Moreover, the recommendations outlined in the OMP’s interim report have seen limited progress concerning implementation.⁷⁹ Additionally, the OMP’s Chairperson, Saliya Peiris resigned in September of 2020.⁸⁰ Following his resignation, the former Chairperson of the Presidential Commission of Inquiry on Political Victimization, retired Supreme Court Justice Upali Abeyratne was appointed the Chairperson of the OMP on November 30, 2020.⁸¹ Some, including Sri Lankan human rights activists, have questioned

⁷⁷ *Sri Lanka: Deliver justice, truth and reparation to families of the disappeared*, AMNESTY INT’L (Nov. 27, 2020), <https://www.amnesty.org/en/latest/news/2020/11/sri-lanka-deliver-justice-truth-and-reparation-to-families-of-the-disappeared/>.

⁷⁸ *OMP made progress amidst lack of cooperation from state actors & continuous efforts to deny the rights of families of the disappeared – Saliya Pieris*, SRI LANKA BRIEF (Oct. 28, 2019), <https://srilankabrief.org/omp-made-progress-amidst-lack-of-cooperation-from-state-actors-continuous-efforts-to-deny-the-rights-of-families-of-the-disappeared-saliya-pieris/>.

⁷⁹ Ruki Fernando, *900 days of protests: Still searching for truth and justice*, SUNDAY OBSERVER (Sept. 1, 2019), <http://www.sundayobserver.lk/2019/09/01/opinion/900-days-protests-still-searching-truth-and-justice>.

⁸⁰ Skandha Gunasekara, *OMP Chief to resign*, MORNING (Aug. 25, 2020), <http://www.themorning.lk/office-on-missing-person-chief-to-resign/>; *About us – Profiles of the Commissioners*, OFF. ON MISSING PERS., <http://www.ompsrilanka.org/about/profiles-of-the-commissioners> (last visited Mar. 23, 2021).

⁸¹ OFF. ON MISSING PERSONS, ANNUAL REPORT 2020 ¶ 6.16 (2020), <http://www.ompsrilanka.org/storage/app/uploads/public/604/847/009/60484709edfb770550416.pdf> [hereinafter OMP ANN. REP. 2020]; Hiranyada Dewasiri, *The Office on Missing Persons didn’t achieve anything substantial*, MORNING (Feb. 23, 2021), <https://www.themorning.lk/the-office-on-missing-persons-didnt-achieve-anything-substantial/>; AMNESTY INT’L, SRI LANKA: RESPONSE TO THE QUESTIONNAIRE ON FOLLOW UP TO RECOMMENDATIONS BY THE SPECIAL RAPPORTEUR ON THE PROMOTION OF TRUTH, JUSTICE, REPARATION AND GUARANTEES OF NON-RECURRENCE 8 (2021), <https://www.ecoi.net/en/file/local/2043952/ASA3735492021ENGLISH.pdf> [hereinafter AMNESTY INT’L RESPONSE].

the new OMP Chairperson's impartiality,⁸² criticized his track record and view him as being "a pawn of the Government."⁸³ Of late, the continued operation of the OMP has also been brought into question. The remaining Commissioners of the OMP were to complete their mandates in February 2021.⁸⁴ At the date of writing, it is unclear as to whether new Commissioners have been appointed to the OMP. Additionally, in November 2020, Amnesty International expressed concern that the budget of the OMP may be scaled back by the Sri Lankan government.⁸⁵ No express mention of allocation of funds for the OMP was mentioned in either the National Budget for 2021 or the Budget Speech for 2021.⁸⁶ Funding has however been allocated for the Ministry of Justice, which acts as the OMP's immediate line ministry, in the 2021 National Budget.⁸⁷ With the OMP being the only functioning transitional justice mechanism that has been in operation in Sri Lanka until quite recently, these issues pose significant challenges for achieving justice.

B. National Legal Action

Generally, states are only bound by their national laws, treaty obligations that they have entered into, and the rules of customary international law. Being a state that follows a dualist system, Sri Lanka is not automatically bound by international treaty obligations once it signs such treaties but has to

⁸² AMNESTY INT'L RESPONSE, *supra* note 81 at 8; OHCHR Advanced Edited Rep., *supra* note 7, ¶ 44.

⁸³ Dewasiri, *supra* note 81.

⁸⁴ Int'l Movement Against All Forms of Discrimination and Racism, Oral Statement at the 46th Session of the Hum. Rts. Council: Interactive Dialogue on the OHCHR Report on Sri Lanka (Feb. 24, 2021); Dewasiri, *supra* note 81.

⁸⁵ *Sri Lanka: Commit funds to support transitional justice process for victims of conflict*, AMNESTY INT'L (Nov. 16, 2020), <https://www.amnesty.org/en/latest/news/2020/11/sri-lanka-commit-funds-to-support-transitional-justice-process-for-victims-of-conflict/>.

⁸⁶ Appropriation Act, No. 7 of 2020 (L.D.-O 11/2020) (Sri Lanka) <https://www.parliament.lk/uploads/bills/gbills/english/6202.pdf> [hereinafter Appropriation Act]; Hon. Mahinda Yapa Abeywardana, M.P., Honourable Speaker, Sri Lanka Parliament, Budget Speech 2021 (transcript available at <https://www.parliament.lk/files/pdf/budget/2021/budget-speech-2021.pdf#page=113>).

⁸⁷ OMP ANN. REP. 2020, *supra* note 81, ¶¶ 6.10–6.15; Appropriation Act, *supra* note 86, at 19–20.

subsequently enact national legislation in order for the international legal obligations to apply domestically.⁸⁸ Sri Lanka signed Geneva Conventions I to IV on February 28, 1959, and domestically enacted the Geneva Conventions Act, No. 4 of 2006.⁸⁹ However, it has not ratified Additional Protocol II to the Geneva Conventions, which applies to non-international armed conflicts.⁹⁰ At the time of writing this article, the Geneva Conventions Act 2006 has not yet been operationalized in Sri Lanka. Even if it had been operationalized, the Act does not criminalize violations of Common Article 3 that apply to non-international armed conflicts.⁹¹ Despite this, it is important to note that Sri Lanka continues to be bound by its obligations under customary international law.

As for Sri Lanka's penal code, it does not include any provisions criminalizing the commission of either of the core international crimes (e.g., genocide, crimes against humanity, war crimes, crime of aggression).⁹² Hence, in the absence of judicial reform, certain crimes that would otherwise be classified as a core international crime would have to be tried as a domestic crimes (e.g., murder, assault, etc.).⁹³ Moreover, even when attempting to prosecute the alleged international crimes as domestic crimes utilizing the penal code offences, several

⁸⁸ Jeeva Niriella, *An Appraisal on Some Aspects of the Rome Statute of the International Criminal Court*, 21 SRI LANKA J. INT'L L. 193, 212 (2009).

⁸⁹ See *Treaties, State Parties and Commentaries, Sri Lanka*, INT'L COMM. RED CROSS, https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/vwTreatiesByCountrySelected.xsp?xp_countrySelected=LK (last visited Mar. 26, 2021); Geneva Conventions Act, No. 4 of 2006 (L.D.-O 64/2004) (Sri Lanka), https://www.moj.gov.lk/web/images/latest_document//2006/1480651525-a04-geneva-convention-2006-en.pdf [hereinafter Geneva Conventions Act].

⁹⁰ See *Treaties, States Parties and Commentaries, Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, 8 June 1977, INT'L COMM. RED CROSS, https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=475 (last visited Mar. 23, 2021).

⁹¹ See generally Geneva Conventions Act, *supra* note 89.

⁹² See generally Penal Code (Ordinance No. 2 of 1883) (Sri Lanka), <https://www.lawnet.gov.lk/penal-code-consolidated-2/>, which lacks a provision criminalizing core international crimes.

⁹³ See *id.*, for penalties for domestic crimes.

issues arise. Some of these challenges stem from the lack of availability of senior LTTE members for prosecution, an apparent reluctance to prosecute senior LTTE members who have become allies of the Sri Lankan government, an apparent reluctance to prosecute senior government officials and members of the military, evidentiary challenges, etc.

The senior leadership of the LTTE is believed to have been wiped out at the end of the civil war.⁹⁴ Thus, domestic prosecutions of these senior LTTE members for any alleged crimes they may have committed during the course of the civil war cannot be initiated posthumously. Selvarajah Pathmanathan (a.k.a. Selvarasa Pathmanathan, a.k.a. Kumaran Pathmanathan, a.k.a. KP), the LTTE's diplomatic chief (Head of International Relations) who was in charge of the LTTE's smuggling and weapon acquisitions, is believed to be the most senior LTTE operative still alive.⁹⁵ He was said to have been hiding in Southeast Asia and was wanted by Interpol.⁹⁶ Reports of his capture emerged in August 2009.⁹⁷ Despite statements by Sri Lankan government officials that he was in government custody⁹⁸ and will be prosecuted under Sri Lankan law,⁹⁹ he has never been prosecuted and convicted in connection to crimes committed during the civil war. Reports later emerged in 2015 that he had fled the island.¹⁰⁰ However, a 2020 interview

⁹⁴ Ranga Sirilal, *Sri Lanka's Tigers acknowledge leader's death*, REUTERS (May 29, 2009, 1:56 AM), <https://www.reuters.com/article/us-srilanka-war/sri-lankas-tigers-acknowledge-leaders-death-idUSTRE5400VL20090525>.

⁹⁵ *Id.*; Manjula Fernando, *Arrest of Nanthagopan: Turning point in battle against LTTE remnants*, SUNDAY OBSERVER (Apr. 13, 2014), <http://archives.sundayobserver.lk/2014/04/13/fea00.asp>.

⁹⁶ Sirilal, *supra* note 94.

⁹⁷ C. Bryson Hull, *Sri Lanka snares new Tamil Tiger head overseas*, REUTERS (Aug. 6, 2009, 11:01 PM), <https://www.reuters.com/article/us-srilanka-tigers/sri-lanka-snares-new-tamil-tiger-head-overseas-idUSTRE57553420090807>.

⁹⁸ *Id.*

⁹⁹ *KP will be prosecuted under our laws, says Lankan Govt*, INDIAN EXPRESS (Aug. 9, 2009, 2:57 AM), <https://indianexpress.com/article/news-archive/web/kp-will-be-prosecuted-under-our-laws-says-lankan-govt/>.

¹⁰⁰ *Lanka to prosecute LTTE leader wanted for Rajiv Gandhi killing*, BUS. STANDARD (Jan. 10, 2015), <https://www.business-standard.com/article/pti-stories/lanka-to-prosecute-ltte-leader-wanted-for-rajiv-gandhi-killing->

revealed that he had been living in Kilinochchi, Sri Lanka, under protective custody, for the preceding 8 years.¹⁰¹ Other former LTTE members, such as the former eastern commander of the LTTE, Vinayagamoorthy Muralitharan (a.k.a. Colonel Karuna Amman), have also never faced accountability.¹⁰² Muralitharan defected from the LTTE in 2004, and led a paramilitary group, the Tamil Makkal Viduthalai Pulikal (TMVP), that is alleged to have assisted the Sri Lankan military in fighting the LTTE.¹⁰³ It is alleged that the TMVP was involved in the commission of war crimes, including the recruitment of child soldiers.¹⁰⁴ The TMVP formed a political party,¹⁰⁵ and Muralitharan was elected as a member of the Sri Lankan parliament even as the civil war was still raging on.¹⁰⁶ In 2009, he left the TMVP to join the then ruling party, headed by ex-president Mahinda Rajapaksa and was appointed Sri Lanka's Minister of National Reconciliation and Integration.¹⁰⁷ The TMVP is now led by former LTTE cadre and ex-deputy to Colonel Karuna Amman, Sivanesathurai Chandrakanthan

115011000850_1.html.

¹⁰¹ *Attempts to revamp LTTE futile under GR government: KP*, DAILYFT (July 30, 2020), <http://www.ft.lk/opinion/Attempts-to-revamp-LTTE-futile-under-GR-government-KP/14-703851>.

¹⁰² Bhavani Fonseka, *The long wait for justice*, HIMAL SOUTHASIAN (Aug. 7, 2020), <https://www.himalmag.com/the-long-wait-for-justice-srilanka-2020/>.

¹⁰³ *Id.*

¹⁰⁴ JOHN BRAITHWAITE & BINA D'COSTA, CASCADES OF VIOLENCE: WAR, CRIME AND PEACEBUILDING ACROSS SOUTH ASIA 371 (2018); *Sri Lanka: Probe into LTTE Crimes Should Start with Karuna*, HUM. RTS. WATCH (Mar. 28, 2013, 5:45 AM), <https://www.hrw.org/news/2013/03/28/sri-lanka-probe-ltte-crimes-should-start-karuna>.

¹⁰⁵ See Immigration & Refugee Bd. of Can., *Sri Lanka: The Tamil Makkal Viduthalai Pulikal (TMVP) and Karuna factions; their relationship with each other; reports concerning their treatment of Sinhalese and Tamil citizens; whether they are still active as paramilitary groups*, REFWORLD (Feb. 17, 2002), <https://www.refworld.org/docid/4f4f35d22.html>, for details regarding the establishment of TMVP's political party.

¹⁰⁶ Ajith Jayasinghe, *Breakaway Tiger leader sworn into Sri Lanka parliament*, REUTERS (Oct. 7, 2008, 3:15 AM), <https://www.reuters.com/article/idINIndia-35834420081007>.

¹⁰⁷ *Ex-LTTE commander appointed Minister for National Integration*, INDIAN EXPRESS (Mar. 9, 2009, 7:52 PM), <http://archive.indianexpress.com/news/exltte-commander-appointed-minister-for-national-integration/432820/>.

(a.k.a. Pillayan),¹⁰⁸ who too has evaded the long arm of the law.

There have been some instances where LTTE members, who sat lower down in the organizational hierarchy, have been tried by domestic Sri Lankan courts for their alleged involvement in the commission of crimes related to the civil war. For instance, on January 10, 2019, “the North Central Provincial High Court sentenced two former LTTE members to 185 years’ rigorous imprisonment for shooting down a Sri Lankan Air Force plane in March 2000, which killed 37 [individuals].”¹⁰⁹ Subsequently, on January 23, 2019, “the Anuradhapura High Court sentenced two former LTTE members to 25 years’ rigorous imprisonment for the murder of eight people, including an Army officer, in 2007.”¹¹⁰

The Report of the United Nations Office of the High Commissioner for Human Rights (OHCHR) Investigation on Sri Lanka (OISL Report) states that in Sri Lanka “[c]hallenges in delivering judicial accountability . . . [are] exacerbated when the suspects belong to the security forces.”¹¹¹ Domestic prosecutions of military personnel for the alleged commission of crimes during and/or connected to the civil war, have been rare. Convictions in such cases have been rarer still.¹¹² One such instance includes the acquittal on July 27, 2016, of six former army corporals charged with the killing of 24 civilians in the village of Kumarapuram—known as the Kumarapuram massacre committed on February 11, 1996—where a jury trial delivered a not guilty verdict.¹¹³ Moreover, the abovementioned

¹⁰⁸ *Sri Lanka: Collapse of Joseph Pararajasingham murder case a failure of justice*, AMNESTY INT’L (Jan. 13, 2021), <https://www.amnesty.org/en/latest/news/2021/01/sri-lanka-collapse-of-joseph-pararajasingham-murder-case-a-failure-of-justice/>; *Lanka court acquits child soldier-turned-lawmaker in ethnic Tamil leader’s murder case*, TRIBUNE INDIA (Apr. 11, 2021), <https://www.tribuneindia.com/news/world/lanka-court-acquits-child-soldier-turned-lawmaker-in-ethnic-tamil-leaders-murder-case-197924>.

¹⁰⁹ U.S. Dep’t of State, Bureau of Counterterrorism, Country Reports on Terrorism 2019: Sri Lanka (2019).

¹¹⁰ *Id.*

¹¹¹ OISL Rep., *supra* note 3, ¶ 1233.

¹¹² *Id.* ¶ 1224 (“It was a very rare case in which a member of the security forces was convicted for a grave human rights violation . . .”).

¹¹³ See *Justice undone – Kumarapuram massacre case*, CTR. FOR HUM.

Trincomalee Five Case witnessed years of toing and froing. Specifically, in 2006, 12 police Special Task Force (STF) members were arrested in connection with the killing of five Tamil Students in Trincomalee, but were later released due to lack of evidence.¹¹⁴ Subsequently, in July of 2013, they were rearrested but released three months later because no criminal proceedings were initiated against them.¹¹⁵ Most recently, on July 3, 2019, the Trincomalee Chief Magistrate acquitted 13 defendants, including 12 STF members, due to lack of evidence.¹¹⁶ The defendants were charged under Section 296 of the Penal Code for committing murder of five individuals and under Section 300 of the Penal Code, read with section 32, for the attempted murder of three others.¹¹⁷

However, in a rare occurrence in June of 2015, the Colombo High Court sentenced Army Sergeant, Sunil Rathnayake, to death for his participation in a massacre in Mirusuvil (near Jaffna) in December of 2000 of eight Tamil IDPs, which included children (an event that occurred after the end of the civil war).¹¹⁸ Four other accused soldiers were acquitted due to insufficient evidence.¹¹⁹ The conviction was confirmed by the Supreme Court

RTS. & DEV., <https://srilankachrd.org/la-kumarapuram.php> (last visited Mar. 25, 2021), which discusses the Kumarapuram massacre case (HCEP/1959/02—HC/133/08).

¹¹⁴ *Sri Lanka: No Justice for 'Trinco 5'*, *supra* note 14. For a summary of facts and circumstances surrounding the case, see CTR. FOR POLY ALT., THE NEED FOR ACCOUNTABILITY IN SRI LANKA'S CRIMINAL JUSTICE SYSTEM: A GLANCE AT SEVEN EMBLEMATIC CASES 16–21 (2019), <https://www.cpalanka.org/wp-content/uploads/2019/03/FINAL-A-Glance-at-Seven-Emblematic-cases-.pdf>.

¹¹⁵ Easwaran Rutnam, *Trinco 5 massacre: A father's cry for justice*, MORNING (Jan. 14, 2019), <http://www.themorning.lk/pg6lead-2/>.

¹¹⁶ *Sri Lanka: No Justice for 'Trinco 5'*, *supra* note 14.

¹¹⁷ A.T.M. Gunananda, *STF men acquitted in Trinco students murder case*, DAILY NEWS (July 4, 2019), <http://www.dailynews.lk/2019/07/04/law-order/190200/stf-men-acquitted-trinco-students-murder-case>.

¹¹⁸ See *Army Sergeant found guilty and sentenced in the Mirusuvil massacre case*, CTR. FOR HUM. RTS. & DEV., <https://srilankachrd.org/la-mirusuvil.php> (last visited Mar. 26, 2021), for a discussion on the Mirusuvil massacre case (HC/1092/2002).

¹¹⁹ Veluppillai Thangavelu, *International Community Should Enforce Universal Jurisdiction Clause Against Sri Lankan Officials*, COLUMBO TELEGRAPH (Apr. 3, 2020), <https://www.colombotelegraph.com/index.php/international-community-should-enforce-universal-jurisdiction-clause-against-sri-lankan-officials/>.

of Sri Lanka—the country’s highest judicial body—in April of 2019.¹²⁰ This sentence was viewed as a rare case, exhibiting how Sri Lanka’s domestic legal system and its courts are, in fact, capable of conducting investigations and rendering convictions for grave human rights violations.¹²¹ However, in a widely condemned move, the current Sri Lankan President issued a presidential pardon to Mr. Rathnayake in March of 2020, which did not come as a surprise.¹²² While campaigning for the presidency in 2019, Gotabaya Rajapaksa claimed that “[a] large number of war heroes are in jails on trumped up charges” and that “[he’d] like to say . . . all of them would be acquitted and freed.”¹²³ Unfortunately, he appears to be delivering on this promise.

Numerous habeas corpus (writ) applications, which are civil suits brought by relatives and loved ones of victims, have also been filed at domestic courts.¹²⁴ Some of these have been filed by the families of those who disappeared during the final stages of the war while attempting to cross from the battle zone to the government declared “no fire zone,” and the families of those who surrendered to the Sri Lankan Army whose whereabouts are still unknown.¹²⁵ The petitioning families have cited the Commander of the Sri Lankan Army and the General Officer Commanding in Mullaithivu of the Sri Lankan Army as

¹²⁰ Rathnayake Mudiyanseelage Sunil Ratnayake v. Hon. Attorney General, SC. Appeal No. 19/2003, at 24 (Apr. 25, 2019) (Sri Lanka), http://www.supremecourt.lk/images/documents/sc_tab_1_2016.pdf.

¹²¹ OISL Rep., *supra* note 3, ¶ 1224.

¹²² *Mirusuvil Massacre – Accused Pardoned; No Reparations for Victims’ Families*, CTR. FOR POL’Y ALT. (Mar. 30, 2020), <https://www.cpalanka.org/mirusuvil-massacre-accused-pardoned-no-reparations-for-victims-families/>. For further commentary on public concern surrounding the pardon, see *Justice reversed for victims of the Mirusuvil massacre, Sri Lanka*, AMNESTY INT’L (Mar. 26, 2020), <https://www.amnesty.org/en/latest/news/2020/03/justice-reversed-for-victims-of-the-mirusuvil-massacre-from-sri-lanka/>.

¹²³ Tisarane Gunasekara, *Asking the Future*, GROUNDVIEWS (Oct. 20, 2019), <https://groundviews.org/2019/10/20/asking-the-future/>.

¹²⁴ See *Journey towards truth seeking – Habeas Corpus (writ) applications*, CTR. FOR HUM. RTS. & DEV., <https://srilankachrd.org/la-writ.php> (last visited Mar. 24, 2021).

¹²⁵ *Id.*

respondents in several of their applications.¹²⁶ The progress of these cases has been slow and there have been numerous delays.¹²⁷

III. INTERNATIONAL REACTIONS

Though some governments and international organizations condemned the events occurring during the last phase of the civil war in Sri Lanka, strong, decisive action was lacking.¹²⁸ In May of 2009, the United Nations Security Council (UNSC) expressed its concern regarding the humanitarian crisis in northeast Sri Lanka, calling for urgent action by all parties to the conflict to ensure the safety of civilians.¹²⁹ During a visit to Sri Lanka in March of 2009, the UN Secretary-General (UNSG) recommended establishing an accountability process for any international crimes allegedly committed during the conflict, and the Sri Lankan government appeared to agree.¹³⁰ However, faced with a lack of concrete action, a year after the end of the civil war, on June 22, 2010, the UNSG appointed a Panel of Experts to advise him on the implementation of this joint commitment.¹³¹ The Panel's report, dated March 31, 2011, concluded that serious violations attributable to both sides of the conflict had taken place, some of which amounted to war crimes and crimes against humanity, warranting accountability under domestic and international law.¹³² It recommended establishing an international mechanism to carry out independent investigations into the alleged violations, whilst also monitoring and assessing the extent to which the government was carrying out an effective domestic accountability process.¹³³ Despite its

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ See Lyse Doucet, *UN 'failed Sri Lanka civilians', says internal probe*, BBC (Nov. 13, 2012), <https://www.bbc.com/news/world-asia-20308610>.

¹²⁹ Press Release, Security Council, Security Council Press Statement on Sri Lanka, U.N. Press Release SC/9659 (May 13, 2009) [hereinafter UN Press Release SC/9659].

¹³⁰ Press Release, Secretary General, Joint Statement by United Nations Secretary General, Government of Sri Lanka, U.N. Press Release SG/2151 (May 26, 2009).

¹³¹ UNSG Experts Accountability Rep., *supra* note 1, at i.

¹³² *Id.* ¶¶ 421, 425.

¹³³ *Id.* at vii–viii.

previous commitments, “[t]he report received a cold reception from the Sri Lankan government.”¹³⁴

However, calls for setting up a legal mechanism for trying the alleged perpetrators of wartime atrocities continued. In 2013, UK Prime Minister David Cameron urged the Sri Lankan government to hold an independent international inquiry into the alleged commission of war crimes, setting the deadline of March 2014 by which to take action.¹³⁵ March 2014 came and went. The UK government initiated no further action except for voting in favor of the UNHRC Resolution 25/1, “Promoting reconciliation, accountability and human rights in Sri Lanka.”¹³⁶ The Resolution, passed in March of 2014, requested the OHCHR to undertake a comprehensive investigation into alleged international crimes and serious violations of human rights perpetrated by both parties to the conflict in Sri Lanka.¹³⁷ Moreover, it urged the Sri Lankan government “to conduct an independent and credible investigation into allegations of violations of international human rights law and international humanitarian law . . . [and] to hold accountable those responsible”¹³⁸

Subsequently, in September of 2015, the OISL Report was released.¹³⁹ The report presented findings of a comprehensive investigation carried out into alleged serious abuses and violations of human rights in Sri-Lanka by both parties to the civil war during the period covered by the LLRC.¹⁴⁰ It outlined several instances where violations of Common Article 3 to the

¹³⁴ B. Aloka Wanigasuriya, *Ten Years Later: Seeking Justice for Wartime Atrocities in Sri Lanka*, JUST. CONFLICT (May 18, 2019), <https://justiceinconflict.org/2019/05/18/ten-years-later-seeking-justice-for-wartime-atrocities-in-sri-lanka/>.

¹³⁵ Susannah Cullinane, *Cameron sets March deadline for Sri Lanka rights investigation*, CNN (Nov. 16, 2013), <https://edition.cnn.com/2013/11/16/world/asia/sri-lanka-commonwealth-cameron-march/index.html>.

¹³⁶ See generally Human Rights Council Res. 25/1, U.N. Doc. A/HRC/RES/25/1 (Apr. 9, 2014).

¹³⁷ *Id.* ¶ 10(b).

¹³⁸ *Id.* ¶ 2.

¹³⁹ OISL Rep., *supra* note 3.

¹⁴⁰ *Id.* ¶ 17.

four Geneva Conventions of 1949 and international humanitarian law had occurred, amounting to war crimes and/or crimes against humanity, such as abductions and forced recruitment,¹⁴¹ unlawful killings,¹⁴² torture,¹⁴³ sexual and gender based violence,¹⁴⁴ hostilities on civilians and civilian objects,¹⁴⁵ control of movement,¹⁴⁶ and denial of humanitarian assistance,¹⁴⁷ among others. It also recommended the establishment of “truth-seeking mechanisms, investigations, prosecutions . . . and measures to prevent the recurrence of . . . abuses.”¹⁴⁸ It further suggested that in order to combat impunity, acts amounting to international crimes should be tried as such and not as regular national penal code offences.¹⁴⁹ To accomplish this, establishing a hybrid accountability mechanism with “international judges, prosecutors, lawyers and investigators” was recommended.¹⁵⁰ “The rationale was to provide legitimacy to and instill confidence in the process [when such a hybrid mechanism is established], particularly among victims who doubted the impartiality of any [purely domestic] process given the ‘politicisation and highly polarised environment in Sri Lanka.’”¹⁵¹

Less than a month afterwards, on October 1, 2015, a further resolution by the UNHRC, Resolution 30/1, again echoed the findings of the OISL report.¹⁵² On September 11, 2017, the U.N. High Commissioner for Human Rights called on Sri Lanka “to act on its commitment in Resolution 30/1 to establish transitional justice mechanisms, and to establish a clear timeline and benchmarks for [its] implementation”¹⁵³ He

¹⁴¹ *Id.* ¶¶ 1136–39.

¹⁴² *Id.* ¶¶ 1116–19.

¹⁴³ *Id.* ¶¶ 1129–30.

¹⁴⁴ *Id.* ¶¶ 1131–35.

¹⁴⁵ *Id.* ¶¶ 1145–60.

¹⁴⁶ *Id.* ¶¶ 1161–64.

¹⁴⁷ *Id.* ¶¶ 1165–71.

¹⁴⁸ *Id.* ¶ 1181.

¹⁴⁹ *Id.* ¶ 1242.

¹⁵⁰ *Id.* ¶ 1246.

¹⁵¹ Wanigasuriya, *supra* note 134.

¹⁵² See Human Rights Council Res. 30/1, U.N. Doc. A/HRC/RES/30/1 (Oct. 14, 2015).

¹⁵³ Zeid Ra’ad Al Hussein, U.N. High Comm’r for Hum. Rts., Opening

further urged the country to treat its obligations not as a mere “box-ticking exercise to placate the Council, but as an essential undertaking to address the rights of all its people.”¹⁵⁴ Recently, the Report of the Office of the United Nations High Commissioner for Human Rights (2020) once again called upon the Sri Lankan government to implement the measures outlined in Resolution 30/1.¹⁵⁵ Despite these calls, limited action has materialized in the pursuit of achieving true justice and accountability either at the domestic level in Sri Lanka or at the international level.

IV. INTERNATIONAL, OR PARTIALLY INTERNATIONAL, AVENUES FOR JUSTICE

A. *International Criminal Court*

Sri Lanka is not a State Party to the constitutive instrument of the International Criminal Court (ICC)—the Rome Statute.¹⁵⁶ Hence, it is not subject to the Court’s jurisdiction. However, there are two avenues through which any alleged commission of the core international crimes in Sri Lanka can be investigated by the ICC. The first is through a self-referral pursuant to Article 12(3) of the Rome Statute, whereby Sri Lanka lodges a declaration with the ICC’s registrar, accepting the Court’s jurisdiction with regard to such crimes either conditionally for a particular set of crimes, for a particular period of time, or unconditionally.¹⁵⁷ The second is through a UNSC referral of the

Statement at the Human Rights Council Thirty-Sixth Session: Darker and More Dangerous: High Commissioner Updates the Human Rights Council on Human Rights Issues in 40 Countries (Sept. 11, 2017) [hereinafter UNHCHR Opening Statement].

¹⁵⁴ *Id.*

¹⁵⁵ Rep. of the OHCHR on Promoting Reconciliation, Accountability and Human Rights in Sri Lanka, Human Rights Council on Its Forty-Third Session, Feb. 24–Mar. 20, 2020, ¶ 19, U.N. Doc. A/HRC/43/19 (Feb. 26, 2020).

¹⁵⁶ See *The States Parties to the Rome Statute*, INT’L CRIM. CT., https://asp.icc-cpi.int/en_menus/asp/states%20parties/pages/the%20states%20parties%20to%20the%20rome%20statute.aspx (last visited Mar. 24, 2021).

¹⁵⁷ See Rome Statute of the International Criminal Court art. 12, ¶ 3, July 17, 1998, 2187 U.N.T.S. 3.

situation to the Court.¹⁵⁸ The chances of either of these taking place are highly unlikely.

The UNSC previously referred the situation in Libya and that of Darfur (Sudan) to the ICC, despite both countries being non-State Parties to the Rome Statute.¹⁵⁹ In May of 2009, the UNSC expressed concern regarding the humanitarian crisis in north-east Sri Lanka.¹⁶⁰ However, despite the alleged international crimes committed in Sri Lanka considered as being on par with those committed in Libya and Darfur (Sudan),¹⁶¹ the situation has failed to attract similar levels of international attention. Moreover, the chances of a UNSC referral of the situation in Sri Lanka to the ICC remain bleak due to the country's links to powerful nations such as Russia¹⁶² and China.¹⁶³ During a January 2020 diplomatic visit to Sri Lanka, the Chinese Foreign Minister, Wang Yi, assured President Gotabaya Rajapaksa of China's continued friendship with Sri Lanka, and stated that "China will not allow any outside influences to interfere with matters that are essentially internal concerns of Sri Lanka."¹⁶⁴ During the previous

¹⁵⁸ *Id.* art. 13(b).

¹⁵⁹ See generally S.C. Res. 1970 (Feb. 26, 2011); S.C. Res. 1593 (Mar. 31, 2005).

¹⁶⁰ UN Press Release SC/9659, *supra* note 129.

¹⁶¹ See Amanda Kramer & Rachel Killean, *Security Council Referrals to the ICC: A Politicised System*, 7 IRISH Y.B. INT'L L. 117, 122–35 (2012), for further discussion regarding the international crimes committed in Libya, Darfur, and Sri Lanka.

¹⁶² Russia has issued Sri Lanka with lines of credit and supplies and continued to supply military equipment and aircraft during the civil war and afterwards. *US sanctions on Russia firms hurting Sri Lanka, against SOFA for American forces: President*, ECONOMYNEXT (June 26, 2019), <https://economynext.com/us-sanctions-on-russia-firms-hurting-sri-lanka-against-sofa-for-american-forces-president-14556/>; see also *Three world powers in Sri Lanka for diplomatic talks*, NEWS 1ST (Jan. 14, 2020, 8:32 PM), <https://www.newsfirst.lk/2020/01/14/three-world-powers-in-sri-lanka-for-diplomatic-talks/> (noting the appreciation both Russia and Sri Lanka have for their partnership).

¹⁶³ Ganeshan Wignaraja et al., *Chinese Investment and the BRI in Sri Lanka*, CHATHAM HOUSE 30 (Mar. 2020), <https://www.chathamhouse.org/sites/default/files/CHHJ8010-Sri-Lanka-RP-WEB-200324.pdf>. Between 2006 and July of 2019, the value of the Chinese infrastructure investment to Sri Lanka totaled 12.1 billion USD. *Id.* at 3.

¹⁶⁴ *Three world powers in Sri Lanka for diplomatic talks*, *supra* note 162.

Mahinda Rajapaksa government, China was also one of Sri Lanka's greatest allies at the UNHRC, who lobbied to defend Sri Lanka against war crimes allegations.¹⁶⁵ Economic ties between the three countries have continued to flourish, and with China and Russia as permanent UNSC member states, they are very likely to veto any potential referral of the situation to the ICC.¹⁶⁶

The usual practice of the ICC is to prosecute high-level perpetrators, leaving the prosecuting of low-level perpetrators to the national level. Even if the situation is referred to the ICC, and a preliminary examination and potential investigation lead to prosecutions stemming from the situation in Sri Lanka, as outlined above, it is doubtful how many senior LTTE leaders are still alive to face prosecution, with the exception of Selvarajah Pathmanathan, Vinayagamorthy Muralitharan, and Sivanesathurai Chandrakanthan. The former LTTE leader, Velupillai Prabhakaran, was killed during the last phases of the war¹⁶⁷ along with several other senior LTTE members, including intelligence head, Pottu Amman, and Sea Tiger leader, Soosai.¹⁶⁸ The OISL Report further outlined reasonable grounds for believing that additional senior members of the LTTE, such as the Head of LTTE Peace Secretariat, Seevaratnam Puleedevan, the Head of the LTTE Political Wing, Balasingham Nadesan,¹⁶⁹ and the LTTE Commander, Thambirasa Thurairajasingham, alias Col. Ramesh,¹⁷⁰ either surrendered to or were captured by the Sri Lankan armed forces during the

¹⁶⁵ See *Russia and China pledge to protect Lanka's sovereignty against Western meddling*, SOUTHASIAN MONITOR (Jan. 15, 2020), <https://southasianmonitor.net/public/en/srilanka/russia-and-china-pledge-to-protect-lankas-sovereignty-against-western-meddling>.

¹⁶⁶ See *The UN Security Council*, COUNCIL ON FOREIGN REL. (Sept. 16, 2020, 8:00 AM), <https://www.cfr.org/backgrounder/un-security-council>, which highlights Russia's frequent use of their veto power, whereas China has only more recently begun to invoke such power.

¹⁶⁷ Memorandum from Selvarasa Pathmanathan, Head of Int'l Relations – Liberation Tigers of Tamil Eelam, Mark of Respect for Our Supreme Leader: The Indestructible Flame of Freedom (May 24, 2009), https://sangam.org/2010/06/LTTE_Announcement_English.pdf.

¹⁶⁸ Amantha Perera, *Colombo: Tamil Tiger Leader Killed in Ambush*, TIME (May 18, 2009), <http://content.time.com/time/world/article/0,8599,1899160,00.html>.

¹⁶⁹ OISL Rep., *supra* note 3, ¶¶ 289–304.

¹⁷⁰ *Id.* ¶¶ 306–10.

final stage of the civil war.¹⁷¹ The OISL Report further outlined that these LTTE members were believed to have been extrajudicially executed by the security forces, actions that potentially amount to war crimes.¹⁷² Hence, even if any prosecutions were initiated at the ICC, it is likely that the majority of those appearing in front of the Court would be high-ranking Sri Lankan government and military officials from the civil war era.

Doubts have been raised in the past as to whether the ICC would be able to prosecute sitting heads of state. However, the ICC's Appeals Chamber (AC) found in the Jordan Referral re Al-Bashir Appeal judgment that "neither State practice nor *opinio juris* . . . support[s] the existence of Head of State immunity under customary international law *vis-à-vis* an international court."¹⁷³ This was further held to be relevant "for the horizontal relationship between States when a State is requested by an international court to arrest and surrender the Head of State of another State."¹⁷⁴ Hence, either following a self-referral or a UNSC referral, the ICC's Prosecutor should be able to initiate prosecutions against a current Sri Lankan Head of State for their alleged involvement in the commission of core international crimes connected to the civil war, and if requested by the ICC, a third state would be able to arrest the Head of State in question and surrender them into the custody of the Court. However, it is unclear whether the AC's conclusion was based on the fact that the situation in Darfur (Sudan) was referred to the ICC by the UNSC and, if so, whether the Court would only be able to prosecute a current Head of State if the situation is referred to the Court by the UNSC.

B. Hybrid Court

As mentioned previously, the option of establishing a hybrid court in order to prosecute the alleged international crimes committed during the civil war and in its aftermath has been

¹⁷¹ *Id.* ¶¶ 285–322.

¹⁷² *Id.*

¹⁷³ Prosecutor v. Al-Bashir, ICC-02/05-01/09 OA2, Judgment on the Jordan Referral re Al-Bashir Appeal, ¶ 1 (May 6, 2019).

¹⁷⁴ *Id.* ¶ 2.

presented by various international and domestic bodies. Such a mechanism usually entails both national and international aspects, including mixed jurisdictional aspects and a mixed composition of the bench. The Special Tribunal for Lebanon (STL), the Extraordinary Chambers in the Courts of Cambodia (ECCC), the Special Court for Sierra Leone (SCSL), the Kosovo Specialist Chambers and Specialist Prosecutor's Office, and the Special Panels and Serious Crimes Unit in East-Timor are all examples of present and former hybrid mechanisms established to address individual criminal responsibility for the alleged commission of international crimes.

The establishment of such a mechanism requires the cooperation of the Sri Lankan government. While the country previously appeared to be amenable to such a suggestion,¹⁷⁵ successive governments have repeatedly sought extra time for initiating national prosecutorial action against the alleged perpetrators. In February 2017, Sri Lanka reiterated that the country needed more time in order to fulfill its promise to the UN Human Rights Council to investigate war crimes allegations stemming from the civil war.¹⁷⁶ The former Prime Minister ruled out the possibility of a hybrid court for prosecuting the alleged crimes, stating that it was not politically feasible and instead proposed the establishment of a truth and reconciliation commission.¹⁷⁷ Given this lack of political will from Sri Lanka, receiving justice for the alleged international crimes committed during the civil war through a hybrid prosecutorial mechanism would be an uphill struggle.

C. Extraterritorial Prosecutions

In September of 2017, the UN High Commissioner for Human Rights advocated for the use of universal jurisdiction

¹⁷⁵ See H.R.C. Res. 30/1, *supra* note 152, ¶ 6.

¹⁷⁶ Rasika Jayakody, *Government making progress on reconciliation mechanisms*, SUNDAY OBSERVER (Mar. 5, 2017), <http://www.sundayobserver.lk/2017/03/05/columns/government-making-progress-reconciliation-mechanisms>; *Sri Lanka to Ask UN for More Time to Probe War Crimes*, VOICE AMERICA (Feb. 8, 2017, 7:44 PM), <https://www.voanews.com/east-asia-pacific/sri-lanka-ask-un-more-time-probe-war-crimes>.

¹⁷⁷ Jayakody, *supra* note 176.

due to “[t]he absence of credible action in Sri Lanka to ensure accountability for alleged violations of international human rights law and international humanitarian law”¹⁷⁸ More recently, in January and February 2021, the UN High Commissioner for Human Rights once again highlighted that UN “[m]ember States can actively pursue investigations and prosecutions of international crimes committed by all parties in Sri Lanka before their own national courts, including under accepted principles of extraterritorial or universal jurisdiction” in order “to advance criminal accountability and provide measures of redress for victims”.¹⁷⁹ Universal jurisdiction arises from the notion that every state has an interest in and a responsibility to bring to justice perpetrators of the gravest international crimes. However, numerous previous failed attempts indicate that the exercise of universal jurisdiction to bring perpetrators of alleged international crimes to justice is no easy task. For instance, in 2012, a United States court rejected a lawsuit against the then Sri Lankan President, Mahinda Rajapaksa, reasoning that, as a foreign Head of State, he enjoyed immunity from prosecution.¹⁸⁰ Similarly, in late 2010, an attempt at seeking an arrest warrant against Mr. Rajapaksa and senior members of his entourage during a visit to the UK came to naught.¹⁸¹ In October of 2011, a similar arrest attempt was made during his visit to Australia for the Commonwealth Heads of Government meeting by a Sri Lankan born Australian citizen, Arunachalam Jegatheeswaran, at the Melbourne Magistrates Court.¹⁸² Specifically, “Jegatheeswaran alleged that Rajapaksa had deliberately targeted civilians and civilian infrastructure . . . in 2007 and 2008[, which] . . . amounted to war crimes and crimes against humanity.”¹⁸³

¹⁷⁸ UNHCHR Opening Statement, *supra* note 153.

¹⁷⁹ OHCHR Advanced Edited Rep., *supra* note 7, ¶ 59.

¹⁸⁰ *US court dismisses lawsuit against Sri Lanka president*, BBC (Mar. 1, 2012), <https://www.bbc.com/news/world-asia-17218697>.

¹⁸¹ *Oxford fiasco: Who misled the President?*, SUNDAY TIMES (Dec. 5, 2010), <http://www.sundaytimes.lk/101205/Columns/political.html>.

¹⁸² Anna Hood & Monique Cormier, *Prosecuting International Crimes in Australia: The Case of the Sri Lankan President*, 13 MELB. J. INT'L L. 1, 2 (2012).

¹⁸³ *Id.* For further discussion surrounding the accusations, see Michael Gordon, *Sri Lankan President accused in Australian court*, SYDNEY MORNING HERALD (Oct. 25, 2011, 3:00 AM), <https://www.smh.com.au/world/sri-lankan->

However, within one day of this indictment being filed, the Australian Attorney-General intervened, stating that the case could not proceed due to Mr. Rajapaksa's Head of State immunity.¹⁸⁴

Instances such as (i) the prosecution of former Chilean leader, General Pinochet,¹⁸⁵ and (ii) the International Court of Justice (ICJ) Arrest Warrant Case (*Democratic Republic of the Congo v. Belgium*),¹⁸⁶ both involved attempts to apply universal jurisdiction to prosecute individuals using a second state's domestic legal system. With regard to the latter instance, the ICJ found no exception under customary international law that revokes the immunity from criminal jurisdiction granted to incumbent government ministers who are alleged to have committed war crimes or crimes against humanity.¹⁸⁷ However, this personal immunity appears to terminate at the cessation of the state official's official duties; thus, exposing them to a real possibility of prosecution. Still, wishing to avoid a diplomatic minefield, the chances of a second state arresting and prosecuting senior Sri Lankan government officials who are alleged to have committed international crimes once their term in office ends through exercising universal jurisdiction, remains slim.

Since the end of the civil war, Sri Lanka appointed several decorated "war heroes" who played key roles in the civil war against the LTTE to key diplomatic positions.¹⁸⁸ In January of

president-accused-in-australian-court-20111024-1mgea.html.

¹⁸⁴ Hood & Cormier, *supra* note 182, at 1.

¹⁸⁵ R v. Bow St. Metro. Stipendiary Magistrate & Others, *ex parte Pinochet Ugarte* (No. 1) [1998] UKHL 41, [1999] 1 AC (HL) 61; R v. Bow St. Metro. Stipendiary Magistrate & Others, *ex parte Pinochet Ugarte* (No. 2) [1999] 1 All ER 577 (HL); R v. Bow St. Metro. Stipendiary Magistrate & Others, *ex parte Pinochet Ugarte* (No. 3) [2000] 1 AC (HL) 147.

¹⁸⁶ Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), Judgement, 2002 I.C.J. 3, ¶ 41 (Feb. 14).

¹⁸⁷ *Id.* ¶ 70.

¹⁸⁸ For example, the former Director of Operations of the Sri Lankan Army, Major General Udaya Perera, was appointed as Deputy High Commissioner to Malaysia, former Air Force Commander and Chief of Defence Staff, Air Chief Marshal Donald Perera, was appointed as ambassador to Israel, and former Navy Commander Admiral, Wasantha Karannagoda, was appointed as ambassador to Japan, among others. Mandana Ismail

2011, the European Center for Constitutional and Human Rights (ECCHR) presented a dossier to the German Federal Foreign Office, outlining allegations of war crimes committed by the former Major General of the 57th division of the Sri Lankan Army, Jagath Dias.¹⁸⁹ During that time, Mr. Dias was the Deputy Ambassador of Sri Lanka to Switzerland, the Holy See, and Germany.¹⁹⁰ Subsequently, in April of 2011, the dossier was further submitted—in cooperation with the Society for Threatened Peoples and TRIAL International—to the Vatican and Swiss Federal Department of Foreign Affairs.¹⁹¹ On each occasion, the ECCHR and its partner organizations called for the withdrawal of Mr. Dias's diplomatic visa as well as for him to be declared *persona non grata*.¹⁹² Eventually, following a criminal claim filed with the Office of the Attorney General of Switzerland on August 4, 2011,¹⁹³ Mr. Dias was dismissed from his post.¹⁹⁴ While the case against him has since been closed, the Office of the Attorney General of Switzerland has indicated that should he re-enter Swiss territory, it would open an investigation into the allegations of suspected war crimes against him.¹⁹⁵

Abeywickrema, *The Militarisation of Sri Lanka's Diplomatic and Administrative Services*, SUNDAY LEADER (Jan. 23, 2011), <http://www.sacw.net/article1890.html>.

¹⁸⁹ See generally EUROPEAN CTR. FOR CONST. & HUM. RTS., ALLEGATIONS OF WAR CRIMES COMMITTED BY THE 57 DIVISION OF MAJOR GENERAL DIAS IN NORTHERN SRI LANKA BETWEEN APRIL 2008 AND MAY 2009 (2011), <https://www.legal-tools.org/doc/cac228/pdf>, for more detailed information concerning these allegations.

¹⁹⁰ *Id.* at 1.

¹⁹¹ *Germany, Switzerland and Vatican grant diplomatic protection to alleged war criminal*, TRIAL INT'L (July 17, 2017), <https://trialinternational.org/latest-post/germany-switzerland-and-vatican-grant-diplomatic-protection-to-alleged-war-criminal/>.

¹⁹² *Id.*

¹⁹³ See *Criminal Complaint Filed Against Deputy Ambassador of Sri Lanka for War Crimes*, TRIAL INT'L (Oct. 3, 2019), <https://trialinternational.org/latest-post/criminal-complaint-filed-against-deputy-ambassador-of-sri-lanka-for-war-crimes>.

¹⁹⁴ *Diplomatic Status of Sri Lankan War Crimes Suspect Revoked*, TRIAL INT'L (Oct. 31, 2019), <https://trialinternational.org/latest-post/diplomatic-status-of-sri-lankan-war-crimes-suspect-revoked/>.

¹⁹⁵ *Jagath Dias*, TRIAL INT'L (Oct. 31, 2019), <https://trialinternational.org/latest-post/jagath-dias/>; *Jagath Dias Will Face*

In August of 2017, the International Truth and Justice Project filed lawsuits in Brazil and Colombia against former Sri Lankan Military General, Jagath Jayasuriya, who is said to have been in charge of government troops in the northeast of the country who allegedly attacked hospitals and killed masses of civilians during the final stages of the war.¹⁹⁶ Following the end of the war, Jayasuriya was appointed as Sri Lanka's ambassador to Brazil, Colombia, Peru, Chile, Argentina, and Surinam.¹⁹⁷ Because of this, he enjoyed diplomatic immunity, which prevented his arrest as long as he was still attached to his post.¹⁹⁸ Jayasuriya later fled from Brazil back to Sri-Lanka and no longer holds a diplomatic position.¹⁹⁹ Hence, should either Brazil or Colombia exercise universal jurisdiction for trying international crimes and issue an arrest warrant against Jayasuriya, this could result in him being put on an Interpol red list. If this were to happen, as Jayasuriya is no longer covered by diplomatic immunity, he risks being arrested and extradited to the warrant issuing state to stand trial if he were to travel outside of Sri Lanka.

As it is apparent from the above discussions, functional and diplomatic immunity²⁰⁰ acted as an obstacle in the exercise of universal jurisdiction by other states in bringing Sri Lankans who are alleged to have committed international crimes, to justice. Under Article 31.1 of the *Vienna Convention on Diplomatic Relations* (1961), diplomats enjoy immunity from the criminal, civil, and administrative jurisdiction of the receiving state with some limited exceptions.²⁰¹ The wording of Article 31.1 suggests that the immunity from the criminal jurisdiction

Investigations if He Returns to Switzerland, Federal Attorney General Confirms, TRIAL INT'L (Oct. 31, 2019), <https://trialinternational.org/latest-post/jagath-dias-will-face-investigations-if-he-returns-to-switzerland-federal-attorney-general-confirms/>.

¹⁹⁶ *Sri Lanka's Jagath Jayasuriya wanted for war crimes*, BBC (Aug. 29, 2017), <http://www.bbc.com/news/world-asia-41089396>.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ See Vienna Convention on Diplomatic Relations art. 31.1, Apr. 18, 1961, 500 U.N.T.S. 95, for the rules on diplomatic immunity from criminal and civil/administrative jurisdiction of a receiving state.

²⁰¹ *Id.*

of a receiving state is absolute and the only sanction at the disposal of a receiving state would be to utilize Article 9 of the Convention and declare the diplomat *persona non grata*.²⁰² This would leave the sending state with two options, namely: (i) recall its diplomatic agent; or (ii) terminate the diplomatic agent's functions with regard to that particular mission.²⁰³ However, while diplomatic immunity precludes a diplomatic agent from personal liability from legal action, it is not a personal right that is directly attached to the diplomatic agent.²⁰⁴ Instead, the right is only tied to the sending state.²⁰⁵ Therefore, should a receiving state wish to prosecute a Sri Lankan diplomatic agent in relation to alleged international crimes, it can request that Sri Lanka, as the sending state, waive the diplomatic immunity of its agent. However, assuming that such a request is made, it is highly unlikely that Sri Lanka would agree to waiving the diplomatic immunity of its agent.

As for LTTE members, in 2011, the District Court of The Hague in the Netherlands delivered its judgment pertaining to five members of the LTTE in *Prosecutor v. Ramalingam* based on the exercise of universal jurisdiction.²⁰⁶ The defendant and four others were naturalized Dutch citizens.²⁰⁷ They were charged by the Public Prosecutor with membership of the LTTE and funding its activities from The Netherlands.²⁰⁸ The charges included participation in an organization whose object is committing crimes against humanity, war crimes, and criminal

²⁰² ROSANNE VAN ALEBEEK, *THE IMMUNITY OF STATES AND THEIR OFFICIALS IN INTERNATIONAL CRIMINAL LAW AND INTERNATIONAL HUMAN RIGHTS LAW* 163 (2008).

²⁰³ *Id.*

²⁰⁴ *Id.* at 164–65.

²⁰⁵ *Id.* at 165.

²⁰⁶ See generally *Rb's-Gravenhage* [The Hague District Court] 21 October 2011, ECLI:NL:RBSGR:2011:BU2066 (Prosecutor/Ramalingam) (Neth.), <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBSGR:2011:BU2066> [hereinafter *The Hague District Court*].

²⁰⁷ *Cases – The Prosecutor v. Ramalingam/Liberation Tigers of Tamil Eelam (TTLE)*, INT'L CRIMES DATABASE, <http://www.internationalcrimesdatabase.org/Case/835> (last visited Mar. 25, 2020).

²⁰⁸ *Id.*

offenses under domestic law.²⁰⁹ In rendering its judgment, the Court utilized the national laws of the Netherlands and international law.²¹⁰ The defendant was sentenced to a term of imprisonment for involvement in a criminal organization, but because the conflict in Sri Lanka was found to be a non-international armed conflict not involving the Netherlands, the Court did not address the alleged crimes committed by the LTTE.²¹¹ In 2015, the Court of Appeal convicted the five individuals for participation in a criminal organization with the intent to commit terrorist offences, as well as participation in and leading of an organization with the intent to commit crimes.²¹² In 2017, the Supreme Court followed the decision of the Court of Appeal and confirmed the conviction.²¹³

Some of the victims of the alleged international crimes linked to the Sri Lankan civil war and its aftermath have also attempted to initiate civil claims against the perpetrators in foreign jurisdictions. Such an attempt was made by some Tamil victims of the civil war when they sought to bring the former Sri Lankan Army General, Shavendra Silva, to justice for his alleged involvement in the extrajudicial killings and torture of LTTE members that took place during the final stages of the war while he led the 58th Division of the Sri Lankan Army.²¹⁴ The lawsuit was brought under the *Alien Torts Claims Act*, which allows civil actions to be filed against someone for conduct that took place outside of the USA, and the *Torture Victims Protection*

²⁰⁹ The Hague District Court, *supra* note 206.

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² Gerechtshof Den Haag [The Hague Court of Appeal] 30 April 2015, ECLI:NL:GHDHA:2015:1082 (Prosecutor/Ramalingam) (Neth.), <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:GHDHA:2015:1082>.

²¹³ Rosalie Dieleman & Emma Bakkum, *International crimes in Dutch Courts: Supreme Court upholds conviction of Dutch 'Tamil Tigers'*, PILPG (June 4, 2017), <https://www.publicinternationallawandpolicygroup.org/lawyering-justice-blog/2017/6/4/international-crimes-in-dutch-courts-supreme-court-upholds-conviction-of-dutch-tamil-tigers>.

²¹⁴ See *US court dismisses war crimes case against Shavendra silva*, BBC, https://www.bbc.com/sinhala/news/story/2012/02/120209_shavendra (last visited Mar. 25, 2021).

*Act.*²¹⁵ This attempt was thwarted in February of 2012 however, because at the time when the District Court for the Southern District of New York was making its decision on whether to address the merits of the case against Mr. Silva, he was Sri Lanka's Deputy Permanent Representative to the UN in New York.²¹⁶ Therefore, the District Court dismissed the lawsuit because Mr. Silva's diplomatic immunity precluded the court from addressing the merits of the case.²¹⁷ However, in an interview with the BBC Sinhala Service, Mr. Silva stated that he would not be a diplomat for life and would "be happy to defend the conduct of the forces at any court at any time."²¹⁸ Despite the allegations levied against him, in a widely criticized move, the Sri Lankan president appointed him the Commander of the Sri Lankan Army in August of 2019.²¹⁹ Subsequently, in February of 2020, the US Secretary of State declared the imposition of US sanctions on Mr. Silva, who at the time was acting both as Sri Lanka's Acting Chief of Defense Staff and the Commander of the Sri Lanka Army.²²⁰ As a result, Mr. Silva is now deemed a person who is:

[R]equired under Section 7031(c) of the Department of State, Foreign Operations, and Related Programs

²¹⁵ Chandra Lekha Sriram, *Sri Lanka: Atrocities, Accountability and the Decline of Rule of Law*, in TRANSITIONAL JUSTICE IN THE ASIA-PACIFIC 61, 84 (Renée Jeffery & Hun Joon Kim eds., 2014).

²¹⁶ Brad Hamilton, 'War criminal' gets a UN job, N.Y. POST (Nov. 21, 2010, 5:00 AM), <https://nypost.com/2010/11/21/war-criminal-gets-a-un-job/>.

²¹⁷ *US court dismisses war crimes case against Shavendra silva*, BBC, https://www.bbc.com/sinhala/news/story/2012/02/120209_shavendra (last visited Mar. 25, 2021).

²¹⁸ *Id.*

²¹⁹ *U.N. suspends Sri Lankan troops from peacekeeping over army chief appointment*, REUTERS (Sept. 25, 2019, 4:47 PM), <https://www.reuters.com/article/us-sri-lanka-un-peacekeepers/un-suspends-sri-lankan-troops-from-peacekeeping-over-army-chief-appointment-idUSKBN1WA2SL>; *Sri Lankan general accused of war abuses appointed army chief*, ALJAZEERA (Aug. 19, 2019), <https://www.aljazeera.com/news/2019/8/19/sri-lankan-general-accused-of-war-abuses-appointed-army-chief>.

²²⁰ See Press Statement, Michael R. Pompeo, Secretary of State, Public Designation, Due to Gross Violations of Human Rights of Shavendra Silva of Sri Lanka Under Section 7031(c) of the Department of State, Foreign Operations, and Related Programs Appropriations Act (Feb. 14, 2020) (on file with the U.S. Dep't of State Archive).

Appropriations Act, due to credible information of his involvement, through command responsibility, in gross violations of human rights, namely extrajudicial killings, by the 58th Division of the Sri Lanka Army during the final phase of Sri Lanka's Civil War in 2009.²²¹

Thus, Mr. Silva and his immediate family members are currently ineligible for entry into the United States.²²²

In 2019, Sri Lanka's former controversial wartime Defense Secretary, Gotabaya Rajapaksa, was elected as the country's new president.²²³ Due to his naturalized US citizenship, some raised the possibility of him being prosecuted in the US for his alleged involvement in the commission of international crimes during Sri Lanka's civil war prior to his election.²²⁴ The possibility of prosecution existed under the War Crimes Act 1996, which enables the prosecution of alleged war crimes committed abroad if the alleged perpetrator or victim is a US citizen or a member of the US armed forces.²²⁵ It would have involved the exercise of US federal jurisdiction, but is subject to prior approval by the Assistant Attorney General (AAG) of the Criminal Division or their designee.²²⁶ It is doubtful, however, if this option for prosecution would still be available to US federal prosecutors given that, in 2020, the US Treasury Department's notice of persons who have renounced their US citizenship included Gotabaya Rajapaksa's name.²²⁷

²²¹ *Id.*

²²² Meera Srinivasan, *Sri Lanka 'strongly objects' to U.S. blacklisting its Army chief*, HINDU (Feb. 16, 2020), <https://www.thehindu.com/news/international/sri-lanka-takes-strong-objection-to-us-travel-ban-on-army-chief-requests-to-review-decision/article30827872.ece>.

²²³ Dharisha Bastians & Kai Schultz, *Gotabaya Rajapaksa Wins Sri Lanka Presidential Election*, N.Y. TIMES (Nov. 17, 2019), <https://www.nytimes.com/2019/11/17/world/asia/sri-lanka-Gotabaya-Rajapaksa-election.html>.

²²⁴ Ryan Goodman, *Helping Sri Lanka's New Democracy*, N.Y. TIMES (Jan. 19, 2015), <https://www.nytimes.com/2015/01/20/opinion/helping-sri-lankas-new-democracy.html>.

²²⁵ *Id.*; 18 U.S.C. § 2441.

²²⁶ U.S. Dep't of Just., Just. Manual § 9-2.139(E) (2018).

²²⁷ Quarterly Publication of Individuals, Who Have Chosen To

Additionally, in 2019, multiple lawsuits were filed against Gotabaya Rajapaksa in the US, some of which are linked to his former role as the country's wartime Defense Secretary.²²⁸ Some of these cases are still ongoing.²²⁹ However, now that he has been elected president, should he be summoned to appear in court, he would most likely claim head of state immunity from such foreign prosecutorial action.

V. CONCLUSION

The road to achieving accountability for the alleged international crimes committed in connection with Sri Lanka's civil war has been both long and painful; especially, for victims and their loved ones. The international community appears to have lost interest in the conflict and the search for justice. Domestically, in Sri Lanka, given the lack of progress for initiating investigations and prosecutions and establishing a robust transitional justice mechanism, the options for justice and accountability that are available to the affected citizens are limited. Events that have transpired over the past 11 years in the country also indicate a lack of political will to see justice served. On February 26, 2020, the Sri Lankan government announced its withdrawal of support for Human Rights Council (HRC) Resolution 40/1, which incorporates the preceding Resolutions 30/1 and 34/1; essentially, withdrawing from its commitment to establish a domestic accountability mechanism that would probe the alleged international crimes committed during the civil war.²³⁰ Additionally, following Gotabaya

Expatriate, as Required by Section 6039G, 85 Fed. Reg. 27507, 27535 (May 8, 2020).

²²⁸ Shihar Aneez, *Sri Lankan presidential hopeful Rajapaksa faces new lawsuits in U.S. court*, REUTERS (June 27, 2019, 6:56 AM), <https://www.reuters.com/article/us-sri-lanka-politics-rajapaksa/sri-lankan-presidential-hopeful-rajapaksa-faces-new-lawsuits-in-us-court-idUSKCN1TS119>; Michael Safi, *Brother of Sri Lanka ex-president sued over alleged torture and killings*, GUARDIAN (Apr. 9, 2019), <https://www.theguardian.com/world/2019/apr/09/brother-of-sri-lanka-ex-president-sued-over-alleged-torture-and-killings>.

²²⁹ See Bharatha Mallawarchi, *Lawsuit vs Sri Lankan presidential favorite dismissed in US*, AP NEWS (Oct. 22, 2019), <https://apnews.com/article/29b2c39b2961449a86c65dfdba84f887>, regarding the dismissal of one case brought on behalf of a Sri Lankan journalist.

²³⁰ Hon. Dinesh Gunawardena, Minister of Foreign Relations of Sri

Rajapaksa's election as the new Sri Lankan president in 2020, his brother, the former president of Sri Lanka, who acted as the Commander-in-Chief of the government armed forces and allegedly committed international crimes during the final stages of the war, now acts as the country's Prime Minister.²³¹ Because those who allegedly bear responsibility for the commission of international crimes occupy the most senior positions within the government of Sri Lanka, the chances of establishing a credible accountability mechanism that will investigate and prosecute any alleged international crimes committed during the civil war appear to be slim.

Impunity, however, should not be allowed to rule the day. If Sri Lanka is to achieve true reconciliation following the civil war, it is important that it establishes mechanisms for creating a complete record of how and why certain events transpired during and after the conflict and deliver justice through investigating and prosecuting those responsible for the international crimes that are alleged to have been committed in connection with the war. For this purpose, Sri Lanka should introduce an impartial truth and reconciliation commission with the purpose of establishing a thorough record of events pertaining to the conflict and its aftermath. Simultaneously, it should open investigations into the allegations of international crimes with the view of prosecuting those who bear responsibility. A hybrid mechanism that involves both Sri Lankan and international judges and legal personnel would be most apt for this task, especially if it is to be viewed by victims as a true attempt at achieving justice and reconciliation, while concomitantly assuaging the fears held by some segments of the Sri Lankan population of undue foreign influence in the country's affairs. Given the ongoing distrust and disappointment that has been generated due to the lack of action and the slow progress by former and current domestic mechanisms, a hybrid mechanism might be received more favorably by the victim populations as a more impartial option.

Lanka, High Level Segment Statement at the Forty-Third Session of the Human Rights Council (Feb. 26, 2020).

²³¹ *Sri Lanka's new president picks brother Mahinda Rajapaksa as PM*, ALJAZEERA (Nov. 20, 2019), <https://www.aljazeera.com/news/2019/11/20/sri-lankas-new-president-picks-brother-mahinda-rajapaksa-as-pm>.

Domestic legal reforms should also be initiated where provisions pertaining to the criminalization of the core international crimes and modes of liability—especially, with regard to command and superior responsibility—are introduced into domestic law. Without such action, the delay in delivering justice for alleged international crimes committed during the civil war and its aftermath, is slowly cementing itself as a denial of justice, particularly with regard to victims.