



Case Western Reserve Journal of International Law

Volume 46 | Issue 3

2014

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A WAR CRIMES TRIBUNAL FOR SRI LANKA? EXAMINING THE OPTIONS UNDER INTERNATIONAL LAW

Nihal Jayasinghe & Daley J. Birkett†*

In light of the growing international demands for accountability in relation to alleged war crimes committed in Sri Lanka during its twenty-six-year armed conflict, this article aims to evaluate the options available to both Sri Lanka and the international community under the applicable rules of international law. First, the background to the armed conflict in Sri Lanka will be investigated, with a particular focus on the escalation thereof in 2009. This article will then examine the options available under public international law to address the increasing calls for accountability. Throughout the analysis, comparisons will be drawn between the situation in Sri Lanka and those in which criminal tribunals have been established to prosecute those responsible for perpetrating alleged international crimes. By contrasting the options available in relation to the

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situation in Sri Lanka with analogous situations, conclusions will be drawn as to the most viable options through which the intensifying demands for accountability might be met under international law.

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I. INTRODUCTION

At the Commonwealth Heads of Government Meeting (CHOGM) held in Sri Lanka from November 10 through 17, 2013, leaders aimed to discuss global and Commonwealth issues and to decide on collective policies and initiatives thereto.¹ However, the undeniable focus of Western media and human rights groups was set on the war crimes allegedly committed in Sri Lanka during the final phase of the armed conflict between the Liberation Tigers of Tamil Eelam (LTTE) and the Government of Sri Lanka (GoSL), which resulted in a conclusive victory for the latter in May 2009.² Even though—at the time of this writing—over five years have passed since the end of the Sri Lankan conflict, the demand for an investigation of alleged war crimes does not seem to have abated. This article therefore offers an

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1. *What is CHOGM?*, COMMONWEALTH SECRETARIAT, <http://secretariat.thecommonwealth.org/Internal/180385/> (last visited Aug. 12, 2014); *What is CHOGM?*, CHOGM 2013, <http://www.chogm2013.lk/index.php/chogm-2013/about-chogm2013/#> (last visited Aug. 12, 2014).
 2. See James Robbins, *Sri Lanka Rights Abuse Allegations Divide Commonwealth*, BBC NEWS (Nov. 14, 2013), <http://www.bbc.co.uk/news/world-asia-24946590>; Tom Iggulden, *War Crimes Allegations Dominate ‘Extraordinary’ CHOGM in Sri Lanka*, ABC (Nov. 17, 2013), <http://www.abc.net.au/news/2013-11-17/war-crime-allegations-dominate-chogm-in-sri-lanka/5097302>; *Sri Lanka: World Must Not Abandon Sri Lanka’s Victims After CHOGM*, AMNESTY INT’L (Nov. 17, 2013), <http://www.amnesty.org/en/news/sri-lanka-world-must-not-abandon-sri-lanka-s-victims-after-chogm-2013-11-17>; James Ross, *Dispatches: Rights Issues Trump All at CHOGM in Sri Lanka*, HUMAN RIGHTS WATCH (Nov. 17, 2013), <http://www.hrw.org/news/2013/11/17/dispatches-rights-issues-trump-all-chogm-sri-lanka>.

assessment of the options available to both Sri Lanka and the wider international community under international law in order to address the growing demands that those responsible for the perpetration of alleged war crimes be held to account.³ First, a brief background to the armed conflict in Sri Lanka will be provided, followed by an examination of the attempts already made by the GoSL, the U.N., and non-governmental organizations to meet these intensifying demands.

The Democratic Socialist Republic of Sri Lanka is a sovereign island state situated in the Indian Ocean, having gained its independence from the United Kingdom in 1948. Sri Lanka is an ethnically, linguistically, and religiously diverse nation with a population of 20.3 million people.⁴ Of this population, almost 75 percent are ethnically Sinhalese, speak Sinhala, and 70 percent practice Buddhism.⁵ There is, moreover, a substantial Tamil minority, and the Tamil language is consequently spoken widely throughout Sri Lanka. Sri Lanka is an independent nation, with an elected legislature and executive.⁶ Indeed, the 2011 Report by the U.N. Secretary-General's Panel of Experts on Accountability in Sri Lanka ("Accountability Report") notes that: "Strong indicators of democracy, including universal franchise, a multi-party system and a vibrant electoral process, combined with important human development achievements, such as high literacy rates both for men and women and low infant mortality, contrast sharply with Sri Lanka's long history of war."⁷ It is generally agreed that the conflict in Sri Lanka grew out of increasingly violent ethnic tensions, and that 1983 was the starting point of the armed conflict when the GoSL responded with armed force in response to LTTE attacks in the northern district of Jaffna.⁸

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3. It is emphasized at the outset that the authors neither wish nor intend to make any judgment on the occurrence or otherwise of the war crimes, which are alleged to have taken place during the Sri Lankan conflict; rather, the article aims to present a systematic legal assessment of the options available in order to investigate the former.
 4. *Country Overview, GOV'T OF SRI LANKA*, http://www.gov.lk/web/index.php?option=com_content&view=article&id=197&Itemid=373&lang=en (last visited Aug. 12, 2014).
 5. *Id.*
 6. *See id.*
 7. U.N. Secretary-General, *Rep. of the Secretary-General's Panel of Experts on Accountability in Sri Lanka*, ¶ 26 (Mar. 31, 2011), http://www.un.org/News/dh/infocus/Sri_Lanka/POE_Report_Full.pdf [hereinafter *Accountability Report*].
 8. *See id.* ¶ 30.

After 1983, the LTTE became increasingly militarized and—in addition to silencing other Tamil groups through violence, thereby becoming the self-styled sole representative of the Tamil people—carried out large-scale suicide attacks against political, economic, military, civilian, and religious targets.⁹ The tactics adopted by the LTTE led to its inclusion on the lists of proscribed terrorist organizations in the U.S., the United Kingdom, India, Canada, and the European Union.¹⁰ The LTTE, moreover, exercised control over parts of northern and eastern Sri Lanka—sustained by the funding, advocacy, and support from its large, uncritical diaspora.¹¹ After the collapse of the Ceasefire Agreement signed by both the GoSL and the LTTE in 2002,¹² and supported by sectors of the international community as part of the “global war on terror,” the GoSL resumed full-scale hostilities in 2006, leading to its victory over the LTTE in the Eastern Province and in some parts of the Northern Province.¹³ In September 2008, the GoSL launched its final military offensive against the remaining LTTE forces in the Northern Province, which resulted in a decisive victory for the GoSL over the LTTE in May 2009.

II. SOME ATTEMPTS MADE THUS FAR TO MEET THE DEMANDS FOR ACCOUNTABILITY

On June 22, 2010, the U.N. Secretary-General appointed the Panel of Experts on Accountability in Sri Lanka (“Panel of Experts”) in order “to advise [it] on the issue of accountability with regard to alleged violations of international humanitarian and human rights law during final stages of armed conflict in Sri Lanka.”¹⁴ The Executive Summary of the Accountability Report further provides, in relevant part, as follows:

On 22 June 2010, the Secretary-General announced the appointment of a Panel of Experts to advise him on the implementation of the joint commitment included in the statement issued by the President of Sri Lanka and the Secretary-General at the conclusion of the Secretary-General’s visit to Sri Lanka on 23 March 2009. In the Joint Statement, the Secretary-General “underlined the importance of an

9. *See id.* ¶¶ 31–32.

10. *See id.* ¶ 32.

11. *See id.* ¶ 33–34.

12. The full text of which is available at *Full text of the Ceasefire Agreement*, THE GUARDIAN (Feb. 21, 2002), <http://www.theguardian.com/world/2002/feb/22/srilanka>.

13. *See Accountability Report*, *supra* note 7, ¶¶ 45–46.

14. *Id.* ¶ 5.

accountability process”, and the [GoSL] agreed that it “will take measures to address those grievances”. The Panel’s mandate is to advise the Secretary-General regarding the modalities, applicable international standards and comparative experience relevant to an accountability process, having regard to the nature and scope of alleged violations of international humanitarian and human rights law during the final stages of the armed conflict in Sri Lanka.¹⁵

In light of the allegations found credible thereby, the Panel of Experts recommended, *inter alia*, that the GoSL, “in compliance with its international obligations and with a view to initiating an effective domestic accountability process, should immediately commence genuine investigations into . . . [the] alleged violations of international humanitarian and human rights law committed by both sides involved in the armed conflict.”¹⁶ The Panel of Experts further recommended that:

The Secretary-General should immediately proceed to establish an independent international mechanism, whose mandate should include the following concurrent functions: (i) Monitor and assess the extent to which the [GoSL] is carrying out an effective domestic accountability process, including genuine investigations of the alleged violations, and periodically advise the Secretary-General on its findings; [and] (ii) Conduct investigations independently into the alleged violations, having regard to genuine and effective domestic investigations . . .¹⁷

Prior to the Accountability Report, the GoSL appointed a Commission of Inquiry on Lessons Learnt and Reconciliation (LLRC), which was mandated “to look back at the conflict Sri Lanka suffered as well as to look ahead for an era of healing and peace building in the country.”¹⁸ The LLRC was more specifically instructed as follows:

[T]o inquire and report on the following matters that may have taken place during the period between 21st February 2002 and 19th May 2009, namely;

15. *Id.* at i.

16. *Id.* at vii.

17. *Id.*

18. Comm’n of Inquiry on Lessons Learnt & Reconciliation, Report of the Commission of Inquiry on Lessons Learnt and Reconciliation 1 (2011), *available* *at* <http://www.llrcaction.gov.lk/Downloads/FINALLLRCREPORT.pdf>. The LLRC was founded under Sri Lankan law, namely Section 2 of the Commissions of Inquiry Act (Chapter 393). *Id.*

- (i) the facts and circumstances which led to the failure of the ceasefire agreement operationalized on 21st February 2002 and the sequence of events that followed thereafter up to the 19th of May 2009;
- (ii) whether any person, group or institution directly or indirectly bear responsibility in this regard;
- (iii) the lessons we would learn from those events and their attendant concerns, in order to ensure that there will be no recurrence;
- (iv) the methodology whereby restitution to pay persons affected by those events or their dependants [sic] or their heirs, can be effected;
- (v) the institutional, administrative and legislative measures which need to be taken in order to prevent any recurrence of such concerns in the future, and to promote further national unity and reconciliation among all communities and; to make any such other recommendations with reference to any of the matters that have been inquired into under the terms of the Warrant.¹⁹

Following its inquiries, the LLRC made a number of recommendations in order to promote reconciliation including the establishment of an independent institution to address the grievances of Sri Lankan citizens affected by state action, the devolution of power by the GoSL, better implementation of the state-led language policy, the pressing need to standardize access to education, the promotion of interfaith activities, linguistic and cultural affinities, and people-to-people contact, better engagement with the diaspora, and the need to establish political consensus among the major political parties and between Sinhala and Tamil communities.²⁰

On March 22, 2012, the U.N. Human Rights Council adopted a resolution—the draft of which was first proposed by the U.S.²¹—regarding the promotion of reconciliation and accountability in Sri Lanka.²² The text of this resolution provides, in relevant part, as follows:

19. *Id.* at iii–iv.

20. *See id.* at 375–88.

21. Human Rights Council Draft Res. 19/..., U.N. Doc. A/HRC/19/L.2 (Mar. 8, 2012).

22. Human Rights Council Res. 19/2, Rep. of the Human Rights Council, A/HRC/19/2 (Mar. 22, 2012). *See also UN Adopts Resolution on Sri Lanka War Crimes Probe*, BBC (Mar. 22, 2012), <http://www.bbc.co.uk/news/world-asia-17471300>.

The Human Rights Council . . .

1. Calls upon the [GoSL] to implement the constructive recommendations made in the [LLRC report] and to take all necessary additional steps to fulfil its relevant legal obligations and commitment to initiate credible and independent actions to ensure justice, equity, accountability and reconciliation for all Sri Lankans;
2. Requests the [GoSL] to present, as expeditiously as possible, a comprehensive action plan detailing the steps that the Government has taken and will take to implement the recommendations made in the [LLRC report], and also to address alleged violations of international law;
3. Encourages the Office of the United Nations High Commissioner for Human Rights and relevant special procedures mandate holders to provide, in consultation with and with the concurrence of the [GoSL], advice and technical assistance on implementing the above-mentioned steps; and requests the Office of the High Commissioner to present a report on the provision of such assistance to the Human Rights Council at its twenty-second session.²³

Further, the resolution—although welcoming the recommendations made thereby—criticizes the LLRC for failing to “adequately address serious allegations of violations of international law.”²⁴ The GoSL was the subject of further criticism from the British Government, through the Minister with responsibility for Sri Lanka, Alistair Burt, who also criticized certain aspects of the LLRC report and called for the GoSL to implement its recommendations as soon as practicable.²⁵ These reactions clearly demonstrate that the international community remains significantly doubtful of GoSL’s commitment to satisfactorily probe the foregoing violations of international humanitarian law.

Non-governmental organizations have similarly sought to meet the international demands for accountability. For example, between January 14 and 16, 2010, the “People’s Tribunal on Sri Lanka”—organized by the Irish Forum for Peace in Sri Lanka and conducted by the Permanent People’s Tribunal (PPT) under the auspices of the Fondazione Leile Basso Sezione Internazionale—sat in

23. H.R.C. Res. 19/2, *supra* note 22.

24. *Id.*

25. *Foreign Office Minister Responds to Report on the Conflict in Sri Lanka*, FOREIGN & COMMONWEALTH OFFICE (Jan. 12, 2012), <https://www.gov.uk/government/news/foreign-office-minister-responds-to-report-on-the-conflict-in-sri-lanka> (noting that the British government felt the report left many “gaps and unanswered questions”).

the Republic of Ireland.²⁶ PPT is self-styled as “an international opinion tribunal, independent from any State authority . . . [which] examines cases regarding violations of human rights and the rights of peoples.”²⁷ As to this session on Sri Lanka, it is explained that:

[T]he PPT was first approached by representatives of a broad spectrum of NGOs, as early as July 2009. . . . The documents supporting the request to convene a session of the PPT with the primary objective of focusing on “the last phase of the war, the period after the collapse of the peace process, and especially the last months” were received and accepted on November 19, 2009.²⁸

In light of its examination of the accounts presented thereto, the PPT recommended, *inter alia*, that the GoSL “[e]stablish as a matter of urgency an independent and authoritative Truth and Justice Commission, to investigate crimes against humanity and war crimes committed by parties to the conflict in the course of the last phases of the war after the collapse of the 2002 ceasefire, and ensure the prosecution of those responsible for war crimes and crimes against humanity.”²⁹ Indeed, the PPT held a second session on Sri Lanka in Bremen, Germany from December 7 to the 10, 2013, following which it made additional recommendations to the U.N., the European Union, Germany, Sri Lanka, and international organizations and agencies.³⁰

26. See PERMANENT PEOPLES’ TRIBUNAL, PEOPLES’ TRIBUNAL ON SRI LANKA, Trinity College, Dublin, Ireland 7 (Jan. 14-16, 2010) available at <http://warwithoutwitness.com/images/stories/news/25851626-people-s-tribunal-on-srilanka-final-report-jan-2010.pdf>.

27. *Id.* This description, under the heading, “1. The Competence of the Permanent Peoples’ Tribunal,” continues, in relevant part, as follows: “The importance and strength of decisions by the PPT rest on the moral weight of the causes and arguments to which they give credibility, as well as the integrity and capability to judge of the Tribunal members. Complaints heard by the Tribunal are submitted by the victims, or by groups or individuals representing them. The PPT calls together all parties concerned and offers the defendants the possibility to make their own arguments heard. The Jury is selected for each case by combining members who belong to a permanent list of jurors, and individuals who are recognized for their competence and integrity.” *Id.* The PPT is not vested with legal authority.

28. *Id.*

29. *Id.* at 20.

30. See PERMANENT PEOPLES’ TRIBUNAL, PEOPLES’ TRIBUNAL ON SRI LANKA, Bremen, Germany (Dec. 7-10, 2013), available at <http://www.internazionaleleliobasso.it/wp-content/uploads/2014/01/Sentenza-Sri-Lanka-and-Tamil-II.pdf>.

In view of this renewed attention and criticism, it is apposite to further discuss the options available under public international law. This article will therefore now begin to examine the ways in which the growing demands for accountability might be met under the applicable rules thereof—including through the International Criminal Court (ICC), by unilateral action on the part of the U.N. Security Council or General Assembly, by mutual agreement between the U.N. and the GoSL, and by independent action on the part of the latter. Throughout this legal assessment, the options will be compared with similar cases in which tribunals were founded to investigate and try those responsible for the commission of alleged international crimes.

III. OPTIONS UNDER INTERNATIONAL LAW

A. *Action by the International Criminal Court*

Sri Lanka is not currently—and has never been—a state party to the Rome Statute of the International Criminal Court (“Rome Statute”),³¹ Article 12(2) of which provides as follows:

[T]he Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3:

- (a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft;
- (b) The State of which the person accused of the crime is a national.³²

In the instant case, the crimes in question were allegedly committed on the territory of Sri Lanka by Sri Lankan nationals. In light thereof, and given Sri Lanka’s status as a non-signatory to the Rome Statute, the ICC has—*prima facie*—no jurisdiction over the crimes allegedly committed in the Sri Lankan conflict. As argued by Professor Madeline Morris:

[There exists a] gap in jurisdiction. If a crime is committed by a non-party national on that non-party’s territory, then the ICC may not exercise jurisdiction. So, even if the ICC had existed at the relevant time, it would not, for example, have been able to

31. See *The States Parties to the Rome Statute*, INT’L CRIMINAL COURT, http://www.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx (last visited Aug. 12, 2014).

32. Rome Statute of the International Criminal Court art. 12(2), *opened for signature* July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

exercise jurisdiction [sic] over the crimes of Pol Pot in Cambodia or Kambanda in Rwanda if Cambodia or Rwanda, respectively, were non-parties to the [Rome Statute]. In this way, the ICC's effectiveness as an enforcement mechanism is significantly limited.³³

To this end, it is argued that the crimes allegedly committed in Sri Lanka fall through the same "gap in jurisdiction." However, the possibility remains that the jurisdiction of the ICC could be triggered by a resolution of the U.N. Security Council under Chapter VII of the U.N. Charter.³⁴ To this end, Article 13(b) of the Rome Statute provides as follows:

The ICC may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if:

- (b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations.³⁵

The Security Council has utilized this power on only two occasions since the Rome Statute came into force: in the situation in Darfur, Sudan;³⁶ and in the situation in Libya.³⁷ Consequently, the ICC

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- 33. Madeline Morris, *High Crimes and Misconceptions: The ICC and Non-Party States*, 64 LAW & CONTEMP. PROBS. 13, 14 n.3 (2001). *See also* Jordan J. Paust, *The Reach of ICC Jurisdiction over Non-Signatory Nationals*, 33 VAND. J. TRANSNAT'L L. 1, 1–2 (2000); Dapo Akande, *The Jurisdiction of the International Criminal Court over Nationals of Non-Parties: Legal Basis and Limits*, 1 J. INT'L CRIM. JUST. 618, 618–19 (2003); Michael P. Scharf, *The ICC's Jurisdiction over the Nationals of Non-Party States: A Critique of the US Position*, 64 LAW & CONTEMP. PROBS. 67, 69 (2001).
 - 34. U.N. Charter, ch. VII. *See generally* WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 168–69 (4th ed. 2011) (describing the process of Security Council referrals to the ICC); Luigi Condorelli & Santiago Villalpando, *Referral and Deferral by the Security Council*, in THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 627–54 (Antonio Cassese, Paola Gaeta, & John R. W. D. Jones eds., 2002); Sharon Williams & William Schabas, *Article 12*, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVERS' NOTES, ARTICLE BY ARTICLE 569–74 (2d ed. 2008).
 - 35. Rome Statute, *supra* note 32, art. 13(b).
 - 36. *See* S.C. Res. 1593, U.N. Doc. S/RES/1593 (Mar. 31, 2005). Sudan—like Sri Lanka—is not a state party to the Rome Statute. This referral led to the issuance of five warrants of arrest, including that of President Omar al-Bashir. *See* Prosecutor v. Omar Hassan Ahmad Al Bashir, Case No.

may—albeit in limited circumstances—exercise jurisdiction over crimes committed on the territory of non-states parties to the Rome Statute and by nationals of non-signatory states.³⁸ However, the Security Council failed to reach consensus as to binding measures at the time the Sri Lankan conflict escalated.³⁹ Indeed, the only action taken by the Security Council at that stage was the release of a press statement,⁴⁰ the text of which expressed, *inter alia*, grave concern at the worsening humanitarian situation in Sri Lanka, acknowledged the genuine right of the GoSL to combat terrorism, and demanded that all parties adhere to their obligations under international humanitarian law.⁴¹ Because one or more of the five permanent members of the Security Council opposed such binding measures,⁴² the Chapter VII option to create ICC jurisdiction was not activated.

ICC-02/05-01/09, Request for Arrest and Surrender (July 7, 2014), <http://www.icc-cpi.int/iccdocs/doc/doc1800331.pdf>.

37. See S.C. Res. 1970, U.N. Doc. S/RES/1970 (Feb. 26, 2011). This referral led to the issuance of three arrest warrants. See Press Release, Security Council, Chief Prosecutor of International Criminal Court Tells Security Council He Will Seek Arrest Warrants Soon Against Three Individuals in First Libya Case, U.N. Press Release SC/10241 (May 4, 2011). Libya—like Sudan and Sri Lanka—is not a state party to the Rome Statute.
38. See, e.g., Morris, *supra* note 33, at 14 n.3.
39. It has been argued that Russo-Chinese opposition to any action against the GoSL security forces in Sri Lanka has prevented consensus in the Security Council. See, e.g., *Russia China ‘Support Sri Lanka,’* BBC SINHALA (June 18, 2011), http://www.bbc.co.uk/sinhala/news/story/2011/06/110618_lanka_china_russia.shtml. If this view is accepted, it is not illogical to suggest that a binding measure by the Security Council on the Sri Lankan issue seems unlikely.
40. Press Release, Security Council, Security Council Press Statement on Sri Lanka, U.N. Press Release SC/9659 (May 13, 2009).
41. *Id.*
42. Indeed, China has publicly expressed support for the way in which the GoSL has acted in response to the growing demands for accountability in relation to alleged war crimes: “Sri Lanka has set up relevant institution to look into civil war-related issues. China believes that the [GoSL] and [the] people of Sri Lanka are capable of handling all relevant issues. We hope the international community can support and coordinate the endeavor of the [GoSL], create a favorable external environment for the [GoSL]’s efforts to stabilize domestic situation and accelerate economic development, and refrain from taking any measure to complicate the issue.” *Foreign Ministry Spokesperson Hong Lei’s Remarks on the Report of the UN Secretary-General’s Panel of Experts on Sri Lanka*, MINISTRY OF FOREIGN AFFAIRS OF THE PEOPLE’S REPUBLIC OF CHINA, <http://www.mfa.gov.cn/eng/xwfw/s2510/2535/t819905.htm>.

Consequently, because Sri Lanka is also not a state party to the Rome Statute, the ICC does not have jurisdiction over the crimes allegedly committed by Sri Lankan nationals during the armed conflict.

Notwithstanding, it is noted that the GoSL may elect to lodge a declaration with the Registrar under Article 12(3) of the Rome Statute, accepting jurisdiction of the ICC on an ad hoc basis over a particular situation or certain crimes. Pursuant to Article 12(3), if a non-state party accepts the ad hoc jurisdiction of the ICC by making such a declaration, the foregoing jurisdictional gap is filled; in other words, this gap is only relevant as regards non-states parties that are unwilling to make such a declaration.⁴³ Although it appears unlikely that the GoSL will shortly lodge a declaration, it is nonetheless noteworthy that there exists a statutory mechanism for non-states parties to consent to the ad hoc jurisdiction of the ICC, which has been utilized to date by Côte d'Ivoire,⁴⁴ the Palestinian National Authority,⁴⁵ and Ukraine.⁴⁶

B. Action by the U.N.: An Ad Hoc Tribunal for Sri Lanka?

The Security Council is, however, further empowered to act under Chapter VII of the U.N. Charter, Article 39 of which provides as follows:

The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall

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43. Article 12(3) of the Rome Statute provides as follows: "If the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9." See also Prosecutor v. Laurent Koudou Gbagbo, Case No. ICC-02/11-01/11 OA 2, Judgment on the Appeal of Mr. Laurent Koudou Gbagbo Against the Decision of Pre-Trial Chamber I on Jurisdiction and Stay of the Proceedings, ¶¶ 72–84 (Dec. 12, 2012), <http://www.icc-cpi.int/iccdocs/doc/doc1526463.pdf> (noting the example of Côte d'Ivoire, which is not a party to the Rome Statute, but was nonetheless subject to ICC jurisdiction pursuant to an Article 12(3) declaration).
44. See *Laurent Koudou Gbagbo*, Case No. ICC-02/11-01/11 OA 2, ¶ 75.
45. See Victor Kattan, *Palestine and the International Criminal Court*, EURO. COUNCIL ON FOREIGN RELATIONS (Sept. 1, 2014), http://www.ecfr.eu/content/entry/commentary_palestine_and_the_international_criminal_court303.
46. *Ukraine Accepts ICC Jurisdiction over Alleged Crimes Committed Between 21 November 2013 and 22 February 2014*, Int'l Crim. Ct. (Apr. 17, 2014), http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/pages/p997.aspx.

make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.

It was pursuant to this legal basis that the Security Council established the International Criminal Tribunal for the former Yugoslavia—in Resolution 827 (1993)⁴⁷—and the International Criminal Tribunal for Rwanda—in Resolution 955 (1994).⁴⁸ However, it must be noted that the formation of these two ad hoc criminal tribunals was only possible owing to the non-opposition of all five permanent members of the Security Council. Accordingly, without consensus, the U.N. Security Council is unable to pass a binding measure regarding the crimes allegedly committed during the armed conflict in Sri Lanka. It is consequently suggested that a more viable alternative might be a mechanism established by an international agreement between the U.N. and the GoSL, similar to that which occurred in Cambodia.

The Extraordinary Chambers in the Courts of Cambodia (ECCC) was established jointly by the 2001 Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, as amended in 2004,⁴⁹ and the 2004 Agreement Between the U.N. and the Royal Government of Cambodia Concerning the Prosecution Under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea.⁵⁰ The ECCC resulted from a ten-year negotiation process between the Royal Government of Cambodia and the U.N. and is *sui generis* insofar as, *inter alia*, it forms a separate court structure, but is still housed within the Cambodian legal system, staffed by both Cambodian and international judges, lawyers, and other personnel.⁵¹ The ECCC is able to exercise subject-

47. See S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993).

48. See S.C. Res. 955, U.N. Doc. S/RES/955 (Nov. 8, 1994).

49. Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, amended Oct. 27, 2004 (NS/RKM/1004/006), *available at* http://www.eccc.gov.kh/sites/default/files/legal-documents/KR_Law_as_amended_27_Oct_2004_Eng.pdf.

50. See Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution Under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea, June 6, 2003, 2329 U.N.T.S. 1, *available at* http://www.eccc.gov.kh/sites/default/files/legal-documents/Agreement_between_UN_and_RGC.pdf.

51. For a comprehensive overview of the history and structure of the ECCC, see David Scheffer, *The Extraordinary Chambers in the Courts*

matter jurisdiction over violations of international conventions as specified in its constitutive instruments, as well as certain crimes under the 1956 Cambodian Penal Code. In this way, the ECCC may be viewed as a domestic court supported by international staff.

It is clear from the Cambodian experience that the U.N. General Assembly—in addition to the Security Council—is able to play a role in the establishment of an accountability mechanism, such as a criminal tribunal.⁵² However, the *legally* binding effect of U.N. General Assembly resolutions is disputed.⁵³ Indeed, pursuant to the doctrine *expressio unius est exclusio alterius*, it can be argued that, because Article 25 of the U.N. Charter expressly provides that member states are obligated to carry out Security Council resolutions, the absence of an equivalent power attributed to General Assembly resolutions renders the latter not legally binding. Thus, General Assembly resolutions *a fortiori* contain no legal obligation for member states, unlike those of the Security Council. An analysis of the U.N. Charter and the *travaux préparatoires* thereof demonstrate further that such a competence is ascribed to the Security Council, but not to the General Assembly.⁵⁴ Accordingly, if it is correct that as “a general rule of modern international institutional law, it has been accepted that international organizations cannot take binding external decisions unless their constitutions expressly so provide,”⁵⁵ the General

of Cambodia, in INTERNATIONAL CRIMINAL LAW 219–56 (M. Cherif Bassiouni ed., 2008).

52. See, e.g., G.A. Res. 57/228, ¶¶ 1–2, U.N. Doc. A/RES/57/228 (Dec. 18, 2002), in which the General Assembly requested, *inter alia*, the Secretary-General to resume negotiations to conclude an agreement with the Government of Cambodia and made recommendations as regards the subject-matter and personal jurisdiction of the ECCC.
53. For the ‘moral’ and ‘political’ effects of General Assembly Resolutions, see, for example, D. H. N. Johnson, *The Effect of Resolutions of the General Assembly of the United Nations*, 32 BRIT. Y.B. INT’L L. 97 (1956). See also HENRY G. SCHERMERS & NIELS M. BLOKKER, INTERNATIONAL INSTITUTIONAL LAW 770, 935 (5th ed. 2011); F. Blaine Sloan, *The Binding Force of a ‘Recommendation’ of the General Assembly of the United Nations*, 25 BRIT. Y.B. INT’L L. 1, 29 (1948); Richard A. Falk, *On the Quasi-Legislative Competence of the General Assembly*, 60 AM. J. INT’L L. 782, 783 (1966).
54. See Falk, *supra* note 51, at 783 (stating that for example, at the United Nations Conference on International Organization in San Francisco, the delegation of the Philippines proposed that “The General Assembly should be vested with the legislative authority to enact rules of international law which should become effective and binding upon the members of the Organization after such rules have been approved by a majority vote of the Security Council;” however, this proposal was rejected by twenty-six votes to one).
55. See SCHERMERS & BLOKKER, *supra* note 51, at 825.

Assembly is able to initiate an accountability mechanism in the instant case only with the agreement of the GoSL. However, on the other hand, if the mechanism were to be triggered by the Security Council pursuant to Chapter VII of the U.N. Charter, Sri Lanka—as a member state thereof—is obliged to accept and carry out the decision under Article 25 of the Charter.⁵⁶

Indeed, it was under Chapter VII of the U.N. Charter that the Security Council established the Special Tribunal for Lebanon (STL).⁵⁷ The establishment of the STL is particularly illustrative in demonstrating that, if an accountability process is initiated by a state requesting assistance from the U.N., it might be concluded without the necessary constitutional measures having been fulfilled in the state concerned. The foundation of the STL stems from, *inter alia*, a request by the Government of Lebanon that the U.N. create a criminal tribunal of international character to try those responsible for terrorist bombings as well as other attacks in Lebanon since October 2004.⁵⁸ An agreement to establish such a tribunal was drafted but never ratified by the Lebanese Parliament.⁵⁹ The Security Council consequently made use of its powers under Chapter VII, thereby creating the STL, despite the ultimate failure by the state to sign the constitutive instrument thereof.⁶⁰ In the instant case, however, in order to establish a similar tribunal for Sri Lanka, it would require that either (i) the GoSL consent to the creation thereof or (ii) the Security Council reach consensus as to binding measures thereto.

Due to the limitations of the foregoing international options and the Security Council's inability to reach a consensus regarding a tribunal for Sri Lanka, the GoSL may consider adopting a similar approach to the one Bangladesh took in response to the alleged crimes committed during its Liberation War. Bangladesh equally suffered as a result of alleged international crimes, but decided to create a tribunal that was arguably more aligned with the principle of national sovereignty. The International Crimes Tribunal (ICT) is a Bangladeshi domestic court with no direct involvement of the U.N. or any other state. The ICT is described as “a war crimes tribunal in

56. See U.N. Charter art. 25.

57. See S.C. Res. 1757, U.N. Doc. S/RES/1757 (May 30, 2007).

58. *the STL*, SPECIAL TRIBUNAL FOR LEBANON, <http://www.stl-tsl.org/en/about-the-stl/creation-of-the-stl> (last modified Dec. 24, 2012); Frédéric Mégret, *A Special Tribunal for Lebanon: The UN Security Council and the Emancipation of International Criminal Justice*, 21 LEIDEN J. INT'L L. 485 (2008).

59. See *Creation of the STL*, *supra* note 56; see also Mégret, *supra* note 56, at 492.

60. See *Creation of the STL*, *supra* note 56; see also Mégret, *supra* note 56, at 492.

Bangladesh set up in 2009 to investigate and prosecute suspects for the atrocities committed in 1971 . . . during the Bangladesh Liberation War.”⁶¹ In addition to the narrow options available under public international law, internationalized tribunals have faced growing criticism. Indeed, according to Ambassador Stephen Rapp, “we are at the end of the era of *ad hoc* international tribunals.”⁶² It is thus arguably more appropriate in the present circumstances to adopt a similar domestic approach in Sri Lanka.

C. *The Exercise of Universal Jurisdiction over International Crimes*

Although the ICC *potentially* has universal jurisdiction, this concept may have broader implications for the prosecution of the alleged war crimes committed during the conflict in Sri Lanka. Universal jurisdiction is, however, not subject to a universally agreed definition.⁶³ Nonetheless, the following definition adopted by the Institute of International Law at its 2005 Session in Krakow is sufficient for the purposes of the present article:

Universal jurisdiction in criminal matters . . . means the competence of a State to prosecute alleged offenders and to punish them if convicted, irrespective of the place of commission of the crime and regardless of any link of active or passive nationality, or other grounds of jurisdiction recognized by international law.⁶⁴

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61. *International Crimes Tribunal (Bangladesh)*, MINISTRY OF FOREIGN AFFAIRS BANGL., http://www.mofa.gov.bd/index.php?option=com_content&view=article&id=692&Itemid=177 (last visited Aug. 12, 2014).
62. Stephen J. Rapp, *The Reach and the Grasp of International Criminal Justice—How Do We Lengthen the Arm of the Law?*, 45 CASE W. RES. J. INT’L L. 651, 655 (2013).
63. For example, Dr. Roger O’Keefe adopts the following negative definition: “universal jurisdiction amounts to the assertion of jurisdiction to prescribe *in the absence of any other accepted jurisdictional nexus* at the time of the relevant conduct.” Roger O’Keefe, *Universal Jurisdiction: Clarifying the Basic Concept*, 2 J. INT’L CRIM. JUST. 735, 745 (2004) (emphasis added). See generally Georges Abi-Saab, *The Proper Role of Universal Jurisdiction*, 1 J. INT’L CRIM. JUST. 596 (2003); Antonio Cassese, *Is the Bell Tolling for Universality? A Plea for a Sensible Notion of Jurisdiction*, 1 J. INT’L CRIM. JUST. 589 (2003); Olympia Bekou & Robert Cryer, *The International Criminal Court and Universal Jurisdiction: A Close Encounter?*, 56 INT’L & COMP. L.Q. 49 (2007); George P. Fletcher, *Against Universal Jurisdiction*, 1 J. INT’L CRIM. JUST. 580 (2003); Claus Kreß, *Universal Jurisdiction over International Crimes and the Institut de Droit International*, 4 J. INT’L CRIM. JUST. 561 (2006).
64. Instit. of Int’l Law, *Universal Criminal Jurisdiction with Regard to the Crime of Genocide, Crimes Against Humanity and War Crimes*, Krakow

It is, however, widely accepted that universal jurisdiction applies to certain crimes—including piracy, genocide, crimes against humanity, and war crimes—because it is argued that every state has a legitimate interest in the suppression of these serious crimes.⁶⁵ A notable example of universal jurisdiction—and specifically relevant to the instant situation in Sri Lanka—is the number of arrest warrants that have been issued against Israeli representatives for crimes allegedly committed in Gaza in response to rocket attacks emanating therefrom. These warrants were issued without any territorial link, any link of active or passive nationality, or other grounds of jurisdiction under the applicable rules of international law. Indeed, the United Kingdom has made several attempts to exercise universal jurisdiction against former Israeli Foreign Minister Tzipi Livni,⁶⁶ Major General Doron Almog—the former Head of the Israel Defense Forces (IDF) Southern Command,⁶⁷ Defense Minister Ehud Barak,⁶⁸ and the former IDF Chief of Staff, Moshe Ya'alon.⁶⁹ Similar such attempts to exercise this form of jurisdiction have been made in the Netherlands against former Head of the Shin Bet—Israel's internal security service—Ami Ayalon⁷⁰ and in Spain against former Defense

Sess. Res., 17th Comm'n, ¶ 1 (Aug. 26, 2005), *available at* http://www.idi-iil.org/idiE/resolutionsE/2005_kra_03_en.pdf.

65. *See, e.g.*, Julia Geneuss, *Fostering a Better Understanding of Universal Jurisdiction: A Comment on the AU-EU Expert Report on the Principle of Universal Jurisdiction*, 7 J. INT'L CRIM. JUST. 945, 952 (2009). *See also* Arrest Warrant of 11 April 2000 (Congo v. Belg.), 2002 I.C.J. 3, 14 (February 14); O'Keefe, *supra* note 61, at 757.
66. *See, e.g.*, *Israel Fury at UK Attempt to Arrest Tzipi Livni*, BBC (Dec. 15, 2009), <http://news.bbc.co.uk/1/hi/8413234.stm>.
67. *See, e.g.*, *Israel Fury at UK Attempt to Arrest Tzipi Livni*, BBC (Dec. 15, 2009), <http://news.bbc.co.uk/1/hi/8413234.stm>.
68. *See* Ian Black & Ian Cobain, *Israeli Minister Ehud Barak Faces War Crimes Arrest Threat During UK Visit*, THE GUARDIAN (Sept. 29, 2009), <http://www.theguardian.com/world/2009/sep/29/ehud-barak-war-crimes-israel>; *Lawyers Seek Arrest of Israeli Defence Minister in UK for Alleged War Crimes*, THE GUARDIAN (Sept. 29, 2009), <http://www.theguardian.com/world/2009/sep/29/ehud-barak-warrant-war-crimes-gaza>.
69. *See, e.g.*, *Israel Minister Feared UK Arrest*, BBC (Oct. 5, 2009), <http://news.bbc.co.uk/1/hi/8290554.stm>.
70. In this case, an arrest warrant was sought based on allegations of torture. *See Vervolging ex-hoofd Shin Bet*, DE TELEGRAAF (NETHERLANDS) (Aug. 19, 2009), <http://www.telegraaf.nl/binnenland/article20492744.ece>. The court, however, found that it had no jurisdiction. *See Geen vervolging ex-hoofd Shin Bet*, DE TELEGRAAF (NETHERLANDS), (Oct. 27, 2009), http://www.telegraaf.nl/binnenland/20512624/___geen_vervolging_ex-hoofd_shin_bet___html.

Minister Binyamin Ben-Eliezer and six other military officers under his command, including Major General Almog and Moshe Ya'alon.⁷¹ Despite these numerous attempts, however, the authors note that the exercise of universal jurisdiction is not yet governed by an international agreement and is therefore devoid of a well-structured, coherent body of law.⁷² Nonetheless, regardless of this absence, the possibility that a domestic court outside Sri Lanka might try to exercise this form of jurisdiction cannot be discounted. Indeed, Sri Lankan President Mahinda Rajapaksa's visit to the United Kingdom in 2010 prompted lawyers on behalf of Tamil activists to seek a warrant for his arrest—under the head of universal jurisdiction—for the alleged commission of war crimes during the Sri Lankan conflict.⁷³

IV. CONCLUDING REMARKS

Thus far, the U.N. Secretary-General has not opted to institute an independent international accountability mechanism—as recommended by the Panel of Experts—without the consent of the GoSL or action by other member states.⁷⁴ It has also been established

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71. See, e.g., Manuel Altozano, *La Audiencia Investigará A Un Ex Ministro Israelí Por Un Bombardeo En Gaza en 2002*, EL PAÍS (Jan. 29, 2009), http://elpais.com/elpais/2009/01/29/actualidad/1233220623_850215.html. In this case, the Spanish prosecutor chose not to proceed with the investigation, having been assured that Israeli jurisdiction prevailed. See José Yoldi, *La Audiencia No Investigará el Ataque de Israel a Gaza*, EL PAÍS (SPAIN) (Jun. 30, 2009), http://elpais.com/elpais/2009/06/30/actualidad/1246349822_850215.html.
72. See, e.g., Cassese, *supra* note 61, at 595 (stating that a treaty delineating the use and limits of universal jurisdiction would reduce uncertainties of customary international law, but that creation of such a treaty would be time-intensive, and thus application of universal jurisdiction is left to regular construction of customary international law).
73. See Owen Bowcott & Sam Jones, *War Crimes Lawyers Seek Arrest of Sri Lankan President in Oxford*, THE GUARDIAN (Nov. 30, 2010), <http://www.theguardian.com/world/2010/nov/30/sri-lanka-president-arrest-war-crimes>. It is noted that the law in England and Wales has since changed so that the consent of the Director of Public Prosecutions is required before an arrest warrant is issued in universal jurisdiction cases brought by individuals. See *Press Release: Universal Jurisdiction*, MINISTRY OF JUSTICE (Sept. 15, 2011), <https://www.gov.uk/government/news/universal-jurisdiction>.
74. See, e.g., U.N. Secretary-General, *Rep. of the Secretary-General's Internal Review Panel on United Nations Action in Sri Lanka*, ¶ 182 (Nov. 2012), available at http://www.un.org/News/dh/infocus/Sri_Lanka/The_Internal_Review_Panel_report_on_Sri_Lanka.pdf (“In the absence of both a mandate and a Government’s consent—as is likely to be the case of Sri Lanka—

that action by the U.N. Security Council is unlikely in light of the lack of consensus therein. Moreover, this article establishes that the General Assembly is similarly unable to act without the consent of the GoSL. Accordingly, the onus rests on the GoSL to satisfactorily meet the increasing demands for accountability in relation to the alleged war crimes committed in Sri Lanka during the conflict between the LTTE and the former. It is argued that the GoSL ought not to shy away from the demand for a state-led accountability mechanism because such an exercise would negate the requirement for the establishment of an international criminal tribunal, thereby avoiding the criticisms with which such mechanisms are continually faced. This course of action would, moreover, reduce the likelihood that a domestic court outside Sri Lanka would choose to exercise universal jurisdiction over the alleged war crimes, which would raise the additional problem of discerning a coherent body of applicable law. It is the view of the present authors that any domestic inquiry must be both credible and independent. If not, there is a concrete risk that it might be considered as an attempt by the current regime to escape justice and that it might consequently be discarded as such.

It is pleasing to note that the GoSL has launched an action plan for the implementation of LLRC recommendations.⁷⁵ Indeed, the GoSL action plan has consolidated the recommendations under five headings: International Humanitarian Law Issues; Human Rights; Land Return and Resettlement; Restitution/Compensatory Relief; and Reconciliation.⁷⁶ Under the auspices of the GoSL plan of action, *inter alia*, a commission was formed with the mandate to investigate alleged abductions or disappearances of persons resident in the Sri Lankan Northern and Eastern Provinces during the period from 1990 to 2009.⁷⁷ The present authors hope that the GoSL will continue to

the establishment of a Commission of inquiry to conduct investigations in its territory is virtually impossible. The option of conducting an investigation outside the territory of Sri Lanka is, of course, possible (as was the case in a number of occasions in the past), but if it is, it is likely to replicate the experience of the present [Panel of Experts] with little added value.”); see also *Accountability Report*, supra note 7, ¶ 444.

75. See NATIONAL PLAN OF ACTION FOR THE IMPLEMENTATION OF LLRC RECOMMENDATIONS, <http://www.llrcaction.gov.lk/> (last visited Aug. 12, 2014).

76. *Id.*

77. See *Presidential Commission to Investigate Alleged Disappearances*, MINISTRY OF DEF. SRI LANKA, http://www.defence.lk/new.asp?fname=Presidential_commission_to_investigate_alleged_disappearances_20140117_05 (last modified Jan. 17, 2014). The present authors note that the Commission held its first public sittings between January 18 and 21, 2014. See also Rasika Somarathna, *Commission to Investigate into Complaints Regarding*

put into effect the recommendations by the LLRC, which can be quickly implemented, and that others, which are not yet practicable, will be realized in due course. It is noted that on February 1, 2014, the U.S. Department of State—through Assistant Secretary for South and Central Asia, Nisha Desai Biswal—confirmed that the U.S. is not entertaining the possibility of economic sanctions against Sri Lanka “at this point.”⁷⁸ It is the view of the present authors that if the GoSL remains indifferent to the views of the international community, Sri Lanka may face an international investigation without the consent and participation of the former in addition to such measures. In order to prevent further instability thereby, it is consequently emphasized that there is a pressing need for the GoSL to establish an appropriate accountability mechanism in relation to alleged war crimes committed during the armed conflict in Sri Lanka.

Although the U.S. cannot be said to speak on behalf of the entire international community,⁷⁹ recent statements delivered thereby suggest that there is growing impatience at the international level over the pace at which the GoSL is implementing the recommendations of the LLRC.⁸⁰ To this end, the U.S. sponsored a third resolution when the U.N. Human Rights Council reconvened in March 2014, calling for, *inter alia*, the establishment of a Sri Lankan-led reconciliation and accountability process.⁸¹ In light thereof, it is evident that at least part of the wider international community would prefer a process initiated by the GoSL; however, should the latter choose not to take positive action, it is equally clear that further measures might be considered by third party states in order to put an accountability mechanism into effect. It is the hope of the present

Missing Persons: Compensation to Next of Kin, DAILY NEWS, <http://www.dailynews.lk/?q=features/compensation-next-kin> (last visited Aug. 12, 2014) (noting that thus far, the Commission has received approximately 16,000 complaints).

78. *Press Conference with Assistant Secretary Nisha Biswal in Colombo, Sri Lanka*, U.S. DEP'T OF STATE (Feb. 1, 2014), <http://www.state.gov/p/sca/rls/rmks/2014/221143.htm>.
79. *See, e.g., Foreign Ministry Spokesperson Hong Lei's Remarks*, *supra* note 42.
80. The Prime Minister of the United Kingdom, David Cameron, emphasized that a state-led investigation must be completed by March 2014, lest his government press for an international process. *See Cameron Calls for War Crimes Inquiry in Sri Lanka*, BBC (Nov. 16, 2013), <http://www.bbc.co.uk/news/world-asia-24967501>.
81. *See Human Rights Council Adopts a Resolution on Reconciliation, Accountability and Human Rights in Sri Lanka*, HUMAN RIGHTS COUNCIL (Mar. 27, 2014), <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=14447&LangID=E>.

authors that this article will stimulate further discussion on the issues raised herein. It is noted that, in March 2014, the U.N. High Commissioner for Human Rights, Navi Pillay made public her written report based on her week-long visit to Sri Lanka in August 2013.⁸² It is hoped that this report, alongside the aforementioned meeting of the U.N. Human Rights Council, will significantly contribute towards the realization of credible justice, accountability, and a reconciliation process in Sri Lanka.

82. U.N. High Comm'r for Human Rights, *Promoting Reconciliation and Accountability in Sri Lanka*, U.N. Doc. A/HRC/25/23 (Feb. 24, 2014).