2012

Accountability and the Sri Lankan Civil War

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*By Steven R. Ratner**

Sri Lanka's civil war came to a bloody end in May 2009, with the defeat of the Liberation Tigers of Tamil Eelam (LTTE) by Sri Lanka's armed forces on a small strip of land in the island's northeast. The conflict, the product of long-standing tensions between Sri Lanka's majority Sinhalese and minority Tamils over the latter's rights and place in society, had begun in the mid-1980s and ebbed and flowed for some twenty-five years, leading to seventy to eighty thousand deaths on both sides. Government repression of Tamil aspirations was matched with ruthless LTTE tactics, including suicide bombings of civilian targets; and for many years the LTTE controlled large parts of northern and eastern Sri Lanka.[1]

The war's last phase was characterized by a large intensification of violence from September 2008 through May 2009, as the government deployed an impressive military force against LTTE-controlled areas by land, sea, and air. In the process, its armed forces attacked civilians and hospitals, and denied food and medicines to the population; the LTTE, for its part, refused to let civilians under its control cross to the safety of government-held areas. As a result, thousands of civilians in the north were killed and injured, and hundreds of thousands displaced from their homes and eventually interned in government camps. Nearly the whole LTTE leadership was killed in the process. International organizations, nongovernmental organizations (NGOs), and foreign media had little access to the conflict zone. The government took credit internationally for its success in defeating a terrorist movement and won a huge majority in the next election.

In such a scenario, is it possible to devise strategies to hold accountable those from both sides who committed abuses against civilians? This Current Development reviews the efforts by international actors to address accountability for the civilian deaths and injuries during the final stages of the conflict. It examines the reactions of the United Nations to the war; the work of the secretary-general's Panel of Experts on Accountability in Sri Lanka; and the follow-up to that report culminating in the passage of a resolution on Sri Lanka in the Human Rights Council in March 2012. My goal is to highlight the key issues of international law that have arisen and the approach taken by the UN system. The Sri Lanka case shows that, despite an impressive set of legal norms in place to deal with atrocities such as those committed in this conflict, the infusion of politics and the limitations of unprepared institutions can seriously delay prospects for accountability.

THE INTERNATIONAL REACTION TO THE WAR'S FINAL STAGES

The war in Sri Lanka had long been the subject of international concern, but most states saw little benefit in investing political resources or time in a solution. India, the home of many Tam-

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[1] For useful background, see, for example, THE SRI LANKA READER: HISTORY, CULTURE, POLITICS (John Clifford Holt ed., 2011); NIRA WICKRAMASINGHE, SRI LANKA IN THE MODERN AGE: A HISTORY OF CONTESTED IDENTITIES (2006); JOHN RICHARDSON, PARADISE POISONED: LEARNING ABOUT CONFLICT, TERRORISM AND DEVELOPMENT FROM SRI LANKA'S CIVIL WARS (2005).

ils, had briefly sent peacekeepers to the island from 1987 to 1990, but disengaged diplomatically after its prime minister, Rajiv Gandhi, was assassinated in 1991 by an LTTE suicide bomber. The United States and the European Union had both designated the LTTE as a terrorist organization (in 1997 and 2006, respectively), but their doing so did not prevent either significant transfers of money and arms to the LTTE by elements of the Tamil diaspora and others or a continuation of its appalling tactics.[2] Norway had brokered a cease-fire in 2002 that recognized LTTE control over part of the island pending a political settlement based on devolution, but it unraveled by early 2008. The United Nations monitored the situation through an office in Colombo, and the International Committee of the Red Cross provided assistance to victims of the conflict throughout the island. Yet when the government began its final offensive in September 2008, it asked the United Nations, other international organizations, and NGOs to leave the region of LTTE control known as the Vanni.

International media access was also extremely difficult. As a consequence, outside monitoring of the last part of the war was limited. The press reported on civilian deaths as resulting from battles between the LTTE and the government, but the full scope of the violence and casualties, as well as their causes, remained unknown to the public, though other governments and the United Nations were more aware. Videos and photographs smuggled to Tamil exile groups in the West were not authenticated and were deemed by the government to be fabrications—a claim that could not be completely dismissed because some of those exile groups were raising funds for the LTTE. Notwithstanding the United Nations' new doctrine of the responsibility to protect,[3] the occasional public pleas by UN and governmental leaders to both sides for restraint in the first months of 2009 went unheeded. Global leaders and the public were focused on the conflict in Gaza.

Once the government achieved victory, it allowed UN Secretary-General Ban Ki-Moon to visit the island in May 2009. At the end of that mission, which included visits to camps for the more than three hundred thousand internally displaced persons, the secretary-general and Sri Lanka's president, Mahinda Rajapaksa, issued a "Joint Statement" addressing various aspects of postconflict reconstruction and reconciliation. At the end of the communiqué, a final paragraph, inserted at the behest of UN officials, stated:

> Sri Lanka reiterated its strongest commitment to the promotion and protection of human rights, in keeping with international human rights standards and Sri Lanka's international obligations. The Secretary-General underlined the importance of an accountability process for addressing violations of international humanitarian and human rights law. The Government will take measures to address those grievances.[4]

Days after the secretary-general's visit, the UN Human Rights Council convened a special session on Sri Lanka at the behest of Western governments concerned about the civilian casu-

[2] *See* U.S. DEP'T OF STATE, COUNTRY REPORTS ON TERRORISM 2010, ch. 6 (Aug. 18, 2011), *at* http://www.state.gov/j/ct/rls/crt/2010/170264.htm; Council of the European Union, Declaration by the Presidency on Behalf of the European Union Concerning Listing of the LTTE as a Terrorist Organisation, Doc. 9962/06 (May 31, 2006).

[3] GA Res. 60/1, paras. 138–39 (Oct. 24, 2005).

[4] Press Release, Secretary-General, Joint Statement by UN Secretary-General, Government of Sri Lanka, UN Doc. SG/2151 (May 26, 2009), *at* http://www.un.org/News/Press/docs/2009/sg2151.doc.htm.

alties during the war. Those governments prepared a resolution critical of the Sir Lankan government, but the Council passed an alternative resolution generally commendatory of the government.[5] It did not mention civilian casualties or accountability. This outcome seems to have been the result of a willingness by most Council members to give Sri Lanka the benefit of the doubt in light of the tactics of the LTTE and the uncertainty of the civilian casualty figures, coupled with a highly effective lobbying effort by the Sri Lankan government.

In the year following the war, international NGOs, which regained access to the island, began to issue lengthy reports that documented the extent of the violence in the Vanni during the final phases of the war. The reports by the International Crisis Group, Human Rights Watch, and Amnesty International proved especially important in gaining the attention of states and the UN leadership.[6] Meanwhile, as the government did not move toward an accountability process (any process by the LTTE being impossible due to its complete defeat), the secretary-general faced calls to take some kind of action, including the creation of a commission of inquiry to examine the war's final phases.[7] As the secretary-general was considering these appeals, the Sri Lankan government explored creating an internal mechanism to address the war, and in May 2010, Rajapaksa created a "Lessons Learnt and Reconciliation Commission" (LLRC) as the government's official inquiry into the conflict. However, that body's mandate stopped short of the focus on accountability that many outside observers had hoped to see.[8]

THE SECRETARY-GENERAL'S PANEL OF EXPERTS

On June 22, 2010, just weeks after the government created the LLRC, the secretary-general announced the formation not of a commission of inquiry, but of a panel of experts with a mandate to "advise [him] on the implementation of the [May 23, 2009] commitment" with respect to the war's final stages, and to advise the secretary-general on the "modalities, applicable international standards and comparative experience" relevant to the fulfilment of the joint commitment to an accountability process, having regard to the "nature and scope of any alleged violations."[9] The panel's members were Marzuki Darusman, a former attorney-general of Indonesia; this author; and Yasmin Sooka, the executive director of the Foundation for Human Rights in South Africa.[10] The Sri Lankan government opposed the creation of the

[5] UN Human Rights Council, S-11/1 Resolution on Assistance to Sri Lanka in the Promotion and Protection of Human Rights (May 27, 2009) (passed by 29-12-6). Documents and resolutions of the Human Rights Council are available at http://www.ohchr.org/EN/HRBodies/HRC/Pages/Documents.aspx.

[6] *See, e.g.*, INTERNATIONAL CRISIS GROUP, WAR CRIMES IN SRI LANKA (2010), *at* http://www.crisisgroup.org/en/regions/asia/south-asia/sri-lanka/191-war-crimes-in-sri-lanka.aspx.

[7] *See, e.g., id.* at 36–37.

[8] For the LLRC's mandate, see REPORT OF THE COMMISSION OF INQUIRY ON LESSONS LEARNT AND RECONCILIATION, at iii–iv (2011), *at* http://slembassyusa.org/downloads/LLRC-REPORT.pdf.

[9] Press Release, Secretary-General, Secretary-General Names Panel of Experts to Advise on Accountability for Possible Rights Violations During Sri Lanka Conflict, UN Doc. SG/SM/12967 (June 22, 2010), *at* http://www.un.org/News/Press/docs/2010/sgsm12967.doc.htm [hereinafter Secretary-General's Statement].

[10] Darusman had served on the UN commission of inquiry investigating the assassination of Benazir Bhutto; I had served on the secretary-general's Group of Experts for Cambodia; and Sooka had served on the South Africa and Sierra Leone Truth and Reconciliation Commissions.

panel, and its allies inquired regarding the secretary-general's legal and budgetary authority to create the panel without the approval of a political organ.[11]

The panel's mandate was sui generis compared to other bodies created to examine human rights violations and accountability for them. The expert commissions on Darfur, Gaza, Libya, Côte d'Ivoire, and Syria created by the Security Council (in the first case) and the Human Rights Council (for the other four) all had explicit mandates to engage in investigation or fact-finding.[12] The secretary-general's Group of Experts for Cambodia, created at the invitation of the General Assembly following the request of the Cambodian government, also had a mandate to evaluate evidence (to "determine" the nature of the crimes of the Khmer Rouge),[13] as did his earlier commission on Côte d'Ivoire, created at the request of the Security Council following the request of that government.[14] The UN commission that examined the assassination of Benazir Bhutto, created by the secretary-general with the consent of Pakistan, similarly had a fact-finding mandate.[15]

The Sri Lanka panel, however, lacked such an explicit mandate,[16] and the secretary-general and his aides repeatedly made clear that the panel was not a commission of inquiry and lacked authority to engage in formal fact-finding. The choice of mandate seemed determined by the political circumstances at the time, including the opposition of Sri Lanka and some other member states (including China and Russia) to any international investigation. As for the legality of the panel, the secretary-general is clearly entitled under his inherent powers to seek advice from outside experts, and, indeed, secretaries-general have created a number of advisory panels over the years.[17]

Plan of Work

The panel's creation was the United Nations' first concrete step toward international consideration of the accountability question. It worked over the course of approximately nine months, along with its secretariat of six full-time UN staff and a number of part-time consultants. The panel interpreted its temporal mandate—"the final stages of the conflict"[18]—to encompass September 2008 through May 2009; it was during that period, beginning with the government's final military offensive on the LTTE's de facto capital of Kilinochchi and the

[11] The panel was funded by the secretary-general's discretionary fund for peace and security matters.

[12] SC Res. 1564, para. 12 (Sept. 18, 2004) (Darfur); HRC Res. S-9/1, para. 14 (Jan. 12, 2009) (Gaza); HRC Res. S-15/1, para. 11 (Mar. 3, 2011) (Libya); HRC Res. S-16/1, para. 7 (May 4, 2011) (Office of the High Commissioner for Human Rights mission to Syria); HRC Res. 16/25, para. 10 (Apr. 13, 2011) (Côte d'Ivoire).

[13] GA Res. 52/135, para. 16 (Feb. 27, 1998); Report of the Group of Experts for Cambodia Established Pursuant to General Assembly Resolution 52/135, para. 6 (Feb. 18, 1999), *addended to* Identical Letters Dated 15 March 1999 from the Secretary-General to the President of the General Assembly and the President of the Security Council, UN Doc. A/53/850-S/1999/231 (Mar. 16, 1999); *see also* Steven R. Ratner, *The United Nations Group of Experts for Cambodia*, 93 AJIL 948, 949 (1999).

[14] Statement by the President of the Security Council, UN Doc. S/PRST/2004/17 (May 25, 2004).

[15] Letter Dated 2 February 2009 from the Secretary-General to the President of the Security Council, UN Doc. S/2009/67 (Feb. 3, 2009) (informing Council of commission of inquiry).

[16] *See* Secretary-General's Statement, *supra* note 9.

[17] *See, e.g.*, Press Release, Secretary-General, Secretary-General Names Members of High-Level Advisory Group on Mobilizing Climate Change Resources, UN Doc. SG/A/1223-ENV/DEV/1113 (Mar. 4, 2010); United Nations, Johannesburg Summit 2002, Secretary-General's High-Level Advisory Panel, *at* http://www.johannesburgsummit.org/html/documents/sgpanel.html.

[18] Secretary-General's Statement, *supra* note 9.

departure of international observers, through the defeat of the LTTE, that the war was at its worst.

The panel determined early on that its mandate—and in particular, the phrase "taking into account the nature and scope of any alleged violations"—required it to gather information about the conduct of the war, based on the view that any allegations, if credible, would create certain obligations and other responsibilities for the Sri Lankan government with respect to the alleged conduct.[19] Thus, the first half of the panel's mission entailed lengthy meetings with experts on the conflict and individuals who were on the ground during the last phase, including Sri Lankans and officials of individual governments and international organizations (including other components of the United Nations).[20] To gather as much information as possible and allow any victim of the conflict an opportunity to convey views to the panel, it publicly established an email address for any communications and, by the end of 2010, had received 4000 communications from over 2300 senders. The panel also received information from sources it believed were closely tied to the government or the LTTE (or, since its demise, its supporters in the Sri Lankan exile community). The Sri Lankan government refused to allow the panel to visit Sri Lanka and meet the LLRC or other officials, despite the urging of the secretary-general, who said such a visit could allow the LLRC to benefit from the panel's advice. In the end, the government responded to a list of written questions and dispatched its attorney-general to meet the panel in New York.[21]

Once this information was gathered, the panel examined the relevant norms in terms of the responsibility of the state, the LTTE, and individuals for violations of international humanitarian and human rights law; the legal duties and other responsibilities of the government to respond to the alleged violations; and the government's actual response up to that time. The last of these tasks required close scrutiny of the LLRC's work (which, although it did not conclude until November 2011, was nonetheless far advanced by the time that the panel wrote its report), the judicial system, and the National Human Rights Commission.

Conclusion Regarding Allegations

Because the panel was not a commission of inquiry, it did not make formal findings of fact. Faced with numerous allegations of abuses, the panel decided to treat an allegation as serious and to include it in its report if the panel regarded the claim as "credible" in the sense that "there is a reasonable basis to believe that the underlying act or event occurred."[22] The panel adopted this standard because, in its view, such a standard "gives rise to a responsibility under domestic and international law for the State or other actors to respond."[23] The standard adopted is below

[19] *Id.*

[20] Within the United Nations, the panel received briefings from military experts as well as the United Nations Operational Satellite Applications Programme.

[21] *See* Report of the Secretary-General's Panel of Experts on Accountability in Sri Lanka, paras. 20–22 & Annex 2 (Mar. 31, 2011), *at* http://www.un.org/News/dh/infocus/Sri_Lanka/POE_Report_Full.pdf [hereinafter POE Report]. The panel's report does not have a UN document number because no entity within the UN system with authority to give it such a number has done so. The report is on the UN Human Rights Council's extranet, however, along with other documents received by the Council president.

[22] *Id.*, para. 51.

[23] *Id.*

that which would normally be seen in a commission of inquiry.[24] Yet as a matter of fact, it is fair to say that the panel worked with a somewhat higher standard and excluded from its report various allegations that some might view as at least credible. The panel nonetheless included in its report two allegations that had garnered strong media attention but on which it was unable to make a conclusion on credibility: (1) allegations of the Sri Lankan army's use of cluster munitions and white phosphorus as weapons against civilians, and (2) the so-called white flag incident, in which allegedly the government accepted the surrender of the LTTE's top leadership and then proceeded to execute them.[25]

Unlike various commissions of inquiry, the panel decided to present the credible allegations in chronological narrative form, accompanied by both photographs and maps that the panel found to be reliable.[26] This format provided for a more compelling read than a dry grouping by legal category. In the end, the panel found credible allegations of the government's commission of (1) killing of civilians through widespread shelling, (2) shelling of hospitals and humanitarian objects, (3) denial of humanitarian assistance, (4) human rights violations suffered by victims and survivors of the conflict, including both internally displaced persons and suspected LTTE cadre, and (5) human rights violations outside the conflict zone, including against the media and other critics of the government. For the LTTE, it found credible allegations of (1) using civilians as human buffers, (2) killing civilians attempting to flee LTTE control, (3) using military equipment in the proximity of civilians, (4) forced recruitment of children, (5) forced labor, and (6) killing of civilians through suicide attacks.[27] It further found that a civilian casualty figure of up to forty thousand dead could not be ruled out.[28]

Key Legal Determinations

The panel's legal conclusions should interest both international lawyers and future bodies, judicial and otherwise, asked to appraise conduct under international humanitarian and human rights law. On one level, the panel's conclusions regarding the conduct of the two sides were not legally controversial in that the allegations, if true, represented obvious violations of well-established norms of both bodies of law (in addition to Sri Lankan criminal law) and would also result in individual criminal responsibility for war crimes and crimes against humanity.[29]

On another level, beyond the application of the law to the facts, the panel made a number of other important legal conclusions and decisions, notably:

[24] *See, e.g.*, Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, para. 5, UN Doc. A/HRC/S-17/2/Add.1 (Nov. 23, 2011) ("the standard of proof used was one of 'reasonable suspicion' . . . [which] was met when the commission obtained a reliable body of evidence, consistent with other information, indicating the occurrence of a particular incident or event."); Report of the United Nations Fact-Finding Mission on the Gaza Conflict, para. 171, UN Doc. A/HRC/12/48 (Sept. 25, 2009) ("assessing whether, in all the circumstances, there was sufficient information of a credible and reliable nature for the Mission to make a finding in fact").

[25] *See* POE Report, *supra* note 21, paras. 169–71.

[26] *Id.*, paras. 48–175.

[27] *Id.*, para. 177.

[28] *Id.*, para. 137.

[29] *Id.*, paras. 192–259. Although various Tamil exile groups routinely deployed the word *genocide* to describe governmental actions, the panel made no such legal determination based on the credibly alleged violations.

- Because of the disagreements among states over the application and scope of human rights obligations during armed conflict, the panel addressed only those human rights violations "materially or temporally outside the conduct of the war."[30] This strategic approach, while in no way a legal conclusion that human rights law did not apply, could be a model for future panels who wish to avoid this interpretive thicket. That said, one could argue that such panels can contribute to our understanding by taking positions on these questions.
- The panel reaffirmed the view that "non-state groups exercising *de facto* control over a part of a State's territory must respect fundamental human rights of persons in that territory."[31] In particular, it assumed that, "at a minimum, the LTTE was bound to respect the most basic human rights of persons within its power, including the rights to life and physical security and integrity of the person, and freedom from torture and cruel, inhuman or degrading treatment and punishment."[32] This position is more cautious than that of the Goldstone Commission in its consideration of human rights violations by Hamas and the Palestinian authority. That report was willing to hold those two Palestinian entities responsible for the full range of human rights obligations based on their "government-like function."[33] The panel, however, sought to avoid addressing the full scope of nonstate-actor liability (even for the LTTE, which had significant government structures in place in the Vanni), while clearly setting out a minimum set of core obligations.
- The panel unambiguously rejected claims by both sides in the conflict that their stated aims—defeating terrorism, in the case of the government, and self-determination, in the case of the LTTE—justified their tactics. It reaffirmed that the state has a right to ensure its national security and that international humanitarian law (IHL) respects that right.[34] While this conclusion may be obvious to legal scholars, the panel wished to rebut claims that IHL was fundamentally flawed insofar as it failed to address a state's right to survival against terrorists in noninternational conflicts.

Conclusions Regarding Sri Lanka's Obligations and Actions

Relying on a variety of treaty sources, authoritative UN resolutions, state practice, and opinions of expert bodies, the panel concluded that Sri Lanka had a clear duty to investigate the alleged acts, as identified through our investigation. The panel's conclusions were largely based on the framework of "truth, justice, and reparations" that has become part of international expectations for a state in a postconflict situation. When measured up against these standards, Sri Lanka's LLRC, judicial system (both criminal and civil), and National Human Rights Commission were found to be woefully ineffective. These shortcomings were aggravated by a

[30] *Id.*, para. 185.

[31] *Id.*, para. 188.

[32] *Id.*

[33] Report of the United Nations Fact-Finding Mission on the Gaza Conflict, *supra* note 24, para. 305 ("non-State actors that exercise government-like functions over a territory have a duty to respect human rights"). For an endorsement of the panel's more cautious position, see Report of the International Commission of Inquiry to Investigate All Alleged Violations of International Human Rights Law in the Libyan Arab Jamahiriya, para. 62, UN Doc. A/HRC/17/44 (Jan. 12, 2012) ("where non-State groups exercise de facto control over territory, they must respect fundamental human rights of persons in that territory").

[34] POE Report, *supra* note 21, para. 189.

set of emergency regulations that gave the government extraordinary powers in security-related matters.[35]

Recommendations

Perhaps the panel's most politically arduous task was to devise a set of recommendations in a situation quite different from that of the paradigmatic instances of transitional justice. Instead of a new government navigating the demands of the victims and the potential lingering power of the abusers—trying to look forward while not neglecting the past—in Sri Lanka the government that had presided over the conduct of the war remained in power. It was and is popular internally and has significant supporters externally.

The panel thus undertook two balancing acts. First, it needed to balance the principles of accountability and non-impunity—the upholding of universal standards—with the universe of feasible options. It did not wish either to surrender to the politics of the moment or to offer a plan for accountability that stood no chance of enactment. Second, the panel sought to balance the need to make recommendations to guide the policy of the United Nations and its member states with the need to garner the support of domestic constituencies within Sri Lanka. Those recommendations were not merely for international (let alone international NGO) consumption but would need to be sufficiently nuanced to elicit significant domestic endorsement. In a word, it was critical to the panel that it not issue recommendations that would be too dangerous politically for anyone in Sri Lanka to support. One consequence of these imperatives was that recommending an International Criminal Court investigation, as some NGOs had advocated, would have been counterproductive.[36]

In the end, the panel issued four sets of recommendations. The first and most important called for Sri Lanka immediately to begin credible investigations into the alleged violations, and for the UN secretary-general immediately to create an "independent international mechanism" to monitor any Sri Lankan investigations, investigate the allegations itself, and serve as a repository for records.[37] The panel believed the UN investigation was essential without delay because the Sri Lankan government had thus far shown no interest in undertaking any investigation of its own. The panel also recommended, however, that the international mechanism "hav[e] regard to genuine and effective domestic investigations"—a phrase that suggests a form of complementarity similar to the International Criminal Court, such that if and to the extent that Sri Lanka fulfilled its responsibilities, the international mechanism would not need to investigate on its own.[38]

The panel considered three other questions related to the international mechanism. First, Did the secretary-general have the legal authority to create such a follow-on body? In the panel's view, there was no doubt that he could create such a body with the consent of Sri Lanka or with the advance approval of a political organ, as there were ample precedents for these types of bodies.[39] But given the reality of Sri Lankan opposition (at least in the short run), coupled with

[35] *Id.*, paras. 290–399.

[36] Because Sri Lanka is not a party to the ICC Statute and would likely not consent to ICC jurisdiction in any case, only a Security Council referral would allow an ICC case to proceed.

[37] POE Report, *supra* note 21, para. 444 (Recommendation 1).

[38] *Id.*

[39] See sources cited *supra* notes 12–14.

the possibility that the secretary-general would not find enough votes in the General Assembly or Human Rights Council, or would face a veto in the Security Council from China or Russia, the panel considered the extent of the secretary-general's inherent authority. Though not addressed in the report, there is ample basis for the view that his authority under the Charter extends to the creation of fact-finding missions.[40]

Second, unless the investigative body were created pursuant to Chapter VII, how would it conduct its work—notably, the need to meet witnesses and gather evidence in the absence of consent by the Sri Lankan government (a practical issue even with a Chapter VII mandate)? The panel was not willing to assume that Sri Lanka would deny access to such a mechanism simply because it had denied access to the panel; if both the international and domestic political environment changed, such access might well be granted. Moreover, such an investigation could be conducted outside Sri Lanka—which was, indeed, the modus operandi for the Human Rights Council's Commission of Inquiry on Syria.[41] Given the vast number of witnesses to the conflict living outside the country and the possibility of verifying certain technical evidence (satellite imagery, videos, intercepts), such a mechanism could complete a thorough investigation even if it were denied access to Sri Lanka.

Third, given the detail with which the panel examined the allegations, what would a follow-on mechanism do? In fact, such a mechanism would be engaged in a fundamentally different task from the panel's own work. The international mechanism, like other commissions of inquiry, would need to make findings of fact subject to a high standard of proof, including perhaps identifying individuals who should be held accountable.[42] Perforce, such a body would require a large staff, adequate time, and substantial funding, none of which was provided to the panel of experts.

As for the remaining recommendations, the second set contained a list of immediate measures to benefit victims. The third set centered on long-term goals—namely, the need for the government to start a process for examining both the evolution of the conflict and various institutional responsibilities, to publicly acknowledge its role in civilian casualties, and to establish a reparations program. The panel stated that none of these goals could be accomplished in the short term, given the government's current attitude of triumphalism.[43] Finally, the panel urged that the secretary-general review the United Nations' role in the conflict and that the Human Rights Council "reconsider" its May 2009 resolution.[44] These last proposals, directed to the United Nations itself, resulted from the panel's serious concerns, only briefly suggested in the report, that the United Nations had not been active enough in preventing civilian casualties and had erred too far on the side of cooperation with the government during the war, and from

[40] *See, e.g.*, Declaration on Fact-Finding by the United Nations in the Field of the Maintenance of International Peace and Security, GA Res. 46/59, annex, paras. 12–13, UN Doc. A/RES/46/59 (Dec. 9, 1991); SC Res. 1405, pmbl., op. para. 4(2) (Apr. 19, 2002) (commending secretary-general for creation of fact-finding mission).

[41] Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, *supra* note 24, paras. 7–13.

[42] *See* Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, paras. 643–46 (Jan. 25, 2005), *at* http://www.un.org/news/dh/sudan/com_inq_darfur.pdf (noting list of names passed confidentially to secretary-general).

[43] *See* POE Report, *supra* note 21, paras. 401–03, 444 (Recommendation 3).

[44] *See supra* note 5 and accompanying text.

the panel's sense that the May 2009 resolution represented a low point for the Human Rights Council.[45]

REACTIONS TO THE PANEL'S REPORT AND THE LLRC REPORT

The secretary-general shared the panel's report with the Sri Lankan government the day that he received it in April 2011. The Sri Lankan government rejected the report, accusing the panel of exceeding its mandate, of relying on LTTE sympathizers for its information, and of interfering with the work of the LLRC.[46] Tamil groups within Sri Lanka and the diaspora generally greeted the report with support.[47] A few weeks later, the secretary-general released it in full (including annexes with correspondence between UN and Sri Lankan officials, maps, and the Sri Lankan government's written responses to the panel's questions) to member states and the public. The panel had recommended that the secretary-general release the complete report, though the Sri Lankan government urged him not to release a report that it regarded as unofficial.

In an accompanying statement, the secretary-general endorsed the recommendations concerning an investigation by Sri Lanka and also the other short-term and long-term recommendations, and agreed to initiate an internal investigation of the United Nations' conduct during the war. With respect to the panel's core proposal for the independent UN mechanism, the secretary-general stated that he "is advised that this will require host country consent or a decision from Member States through an appropriate intergovernmental forum."[48] The statement did not specify who provided such advice or whether the advice was legal or political. The absence of a legal qualifier suggests that the secretary-general was deferring to the views of his advisers who saw either Sri Lankan consent or a mandate from a political organ as politically necessary. The statement also did not specify whether the secretary-general would ask any political organ for such a mandate, suggesting that member states would need to take the first steps in this regard. In September 2011, the secretary-general announced that, having waited for a formal response from the government to the panel's report and received none, he was now sending it to the president of the Human Rights Council and to the High Commissioner for Human Rights, though he did not request any particular action from them on the report.[49]

Despite the Sri Lankan government's denunciation of the panel's report, the report received public praise from a variety of mostly Western governments and NGOs as well as quiet support from a number of important developing countries, such as South Africa and India.[50] At the

[45] POE Report, *supra* note 21, paras. 136, 444 (Recommendation 4).

[46] *See, e.g.,* Sri Lanka Ministry of External Affairs, *The Government of Sri Lanka Reiterates Its Position That the "Darusman Report" Is Fundamentally Flawed in Many Respects* (Apr. 27, 2011), *at* http://www.mea.gov.lk/index.php/media/2742-the-government-of-sri-lanka-reiterates-its-position-that-the-qdarusman-reportq-is-fundamentally-flawed-in-many-respects.

[47] *See, e.g.,* Tamil National Alliance, *TNA Response to the UN Expert Panel's Report on Sri Lanka,* Apr. 18, 2011, *at* http://www.sangam.org/2011/05/TNA_Response.php?uid=4348 (translation from *Tamil Guardian*).

[48] Statement Attributable to the Spokesperson for the Secretary-General on Public Release of Panel of Experts' Report on Sri Lanka (Apr. 25, 2011), *at* http://www.un.org/sg/statements/index.asp?nid=5222. The internal investigation had just begun as of the spring of 2012.

[49] Statement Attributable to the Spokesperson for the Secretary-General on the Sri Lanka Panel of Experts Report (Sept. 12, 2011), *at* http://www.un.org/sg/statements/index.asp?nid=5506.

[50] *See, e.g.,* U.S. Mission to the UN, Statement by Ambassador Susan E. Rice, U.S. Permanent Representative to the United Nations, on the Release of the UN Panel of Experts' Report on Sri Lanka (Apr. 25, 2011), *at* http://

same time, most governments indicated that they would not take any action on Sri Lanka until the LLRC issued its final report in the fall of 2011. Governments argued that Sri Lanka had to be given a chance to address accountability through the one mechanism that it had established to examine the war, and some hoped that the LLRC might even take into account the panel's conclusions. Nonetheless, political pressure on Sri Lanka increased in the aftermath of the report—in particular, after video footage appearing to show the execution of LTTE cadres by Sri Lankan soldiers was leaked to a British TV station and was found to be genuine in a remarkable and detailed report by the UN special rapporteur on summary executions.[51]

When the LLRC finally issued its 400-page report in November 2011, it contained both positive and negative elements. On the one hand, it recognized some of the root causes of the war, as well as the responsibility of both the government and LTTE for civilian casualties. And it endorsed the panel's view that Sri Lanka had a duty to provide truth, justice, and reparations to victims; to release detainees; and to protect the state's besieged journalists.[52] On the other hand, the LLRC did not sufficiently attend to the credible allegations of serious violations of human rights and humanitarian law addressed by the panel; for example, the LLRC characterized all civilian deaths caused by government forces as a response to alleged LTTE shelling or as the result inevitable cross-fire, denied attacks on medical facilities, and characterized the shortage of food and medicine as due to logistical problems or theft by the LTTE.[53] It took no position on the panel's conclusion that up to forty thousand people may have been killed, but said, despite its full access to the former battle zone, that it could not estimate the number killed.[54]

Moreover, and of significance to both decision makers and scholars of IHL, the LLRC adopted a seriously flawed conception of that body of law to guide its legal evaluation of the government's conduct. It relied upon minor disagreements among states on certain aspects of IHL, quoting U.S. and ICRC positions out of context, to suggest that IHL is fundamentally ambiguous regarding internal conflicts and offers far more discretion to commanders regarding the principles of distinction and proportionality than states accept.[55] This suggestion is simply wrong, and the law applied by the panel—including the ban on direct, indiscriminate, or disproportionate attacks on civilians and civilian objects like hospitals—was clear in treaty and customary international law. Finally, on future measures, while the LLRC acknowledged systematic shortcomings of the Sri Lankan judicial system and the mistrust of the people in it,

usun.state.gov/briefing/statements/2011/161769.htm; Foreign & Commonwealth Office, Foreign Office Welcomes UN Panel of Experts Report on Sri Lanka, Apr. 27, 2011, *at* http://www.fco.gov.uk/en/news/latest-news/?view=News&id=589066282.

[51] For the TV broadcast, see *Sri Lanka's Killing Fields* (Channel 4 broadcast June 14, 2011), *at* http://www.channel4.com/programmes/sri-lankas-killing-fields/episode-guide/series-1/episode-1. *See also* Report of the Special Rapporteur on Extrajudicial Summary or Arbitrary Executions, Christof Heyns, Addendum: Summary of Information, Including Individual Cases, Transmitted to Governments and Replies Received, appendix, at 423–82, UN Doc. A/HRC/17/28/Add.1 (May 27, 2011).

[52] REPORT OF THE COMMISSION OF INQUIRY ON LESSONS LEARNT AND RECONCILIATION, *supra* note 8, paras. 8.150, 4.351, 4.319, 5.34, 5.64, 5.156. For other examples of ideas that seem to be taken from the panel's report, see *id.*, paras. 8.136 (need to acknowledge the suffering of the victims and to compensate them), 8.146 (need for government to avoid triumphalism in its approach).

[53] *Id.*, paras. 4.42–.359.

[54] *Id.*, para. 4.359(x).

[55] *Id.*, paras. 4.5–.17, 4.323–.339.

the LLRC recommended a "Special Commissioner of Investigation" who would report his findings to the attorney-general, notwithstanding doubts inside and outside Sri Lanka about that office's commitment to prosecuting serious human rights violations.[56]

The LLRC report—and its shortcomings, in particular—focused governmental attention on Sri Lanka again. In late January, the United States announced that it would distribute a draft resolution on accountability in Sri Lanka to members of the Human Rights Council. Weeks of diplomacy followed, with the text carefully negotiated. In the end, despite an unprecedented lobbying effort by the Sri Lankan government in capitals and Geneva, the Council passed a resolution at its March 2012 session. In addition to the United States, all the European and Latin American states (except Cuba), as well as Benin, Cameroon, India, Libya, Mauritius, and Nigeria, voted in favor. In a tone designed to be cooperative rather than confrontational, it called on Sri Lanka to "implement the constructive recommendations" of the LLRC report and "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." The resolution also requested Sri Lanka to produce an action plan as soon as possible, and encouraged the Office of the High Commissioner for Human Rights (OHCHR) to offer its support and to present a progress report by the September 2012 session.[57] The panel of experts' report and recommendations were not mentioned in the resolution (U.S. officials told this author at the time that mention of the report would make passage of the resolution more difficult). Sri Lanka, for its part, protested the passage of the resolution but began to draw up a plan that it hoped would satisfy the resolution's supporters and, in particular, the United States.

CONCLUSIONS

The international response to the Sri Lankan civil war offers a vivid picture of the legal and institutional landscape with respect to accountability for massive violations of human rights and humanitarian law. On the one hand, as the panel of experts' report makes clear, the relevant bodies of law—human rights law, IHL, and international criminal law—are well equipped to classify the sorts of abuses committed by the two sides and to specify the required responses of states. While IHL may have some areas ripe for progressive development or codification,[58] the worst abuses against civilians are unlawful and indeed criminal. With respect to a state's obligations in the face of credible allegations, even though the basic human rights treaties are explicit only on the matter of reparations,[59] the jurisprudence of the regional courts, UN resolutions adopted by consensus, and the work of UN experts all support the presence of a legal

[56] *Id.*, paras. 8.185, 5.48. Given the assessment of the LLRC's work and report presented in their own report, panel members conveyed their concerns to the secretary-general, to various member states in meetings in New York, Geneva, and elsewhere, and to the public. *See* Marzuki Darusman, Steven Ratner & Yasmin Sooka, *Revisiting Sri Lanka's Bloody War,* INT'L HERALD TRIB., Mar. 3, 2012, at 6.

[57] HRC Res. 19/2, para. 1 (Apr. 3, 2012) (passed 24-15-8).

[58] *See* Int'l Comm. of the Red Cross, *Strengthening Legal Protection for Victims of Armed Conflicts* [resolution], 31st International Conference 2011 Res. 1 (Dec. 1, 2011), *at* http://www.icrc.org/eng/resources/documents/resolution/31-international-conference-resolution-1-2011.htm; Int'l Comm. of the Red Cross, *Strengthening Legal Protection for Victims of Armed Conflicts* [report], ICRC Doc. 31IC/11/5.1.1 (Oct. 2011), *at* http://www.icrc.org/eng/assets/files/red-cross-crescent-movement/31st-international-conference/31-int-conference-5-1-1-report-strength-ihl-en.pdf.

[59] International Covenant on Civil and Political Rights, Art. 2(3)(a), Dec. 16, 1966, 999 UNTS 171.

duty for a state to engage in bona fide investigations.[60] While the law is still open to interpretation about the permissibility of amnesties,[61] a state is required at a minimum to investigate credible allegations.

Moreover, the United Nations' reaction after the war demonstrates the possibility for some creative action in the face of a government or opposition group that insists that it has not violated the law or that sees no need to engage in any form of accountability. Sensing that a full-fledged commission of inquiry would elicit significant opposition from member states, the secretary-general created a panel that was formally to advise him on how Sri Lanka should carry out its own pledge from the May 2009 joint communiqué in light of international standards and best practices. Yet the secretary-general, his advisers, those drafting the panel's mandate, and the panel understood that the panel represented an opportunity to move the accountability process forward by offering an unbiased account of the allegations, their legal character, the duties and practices of states faced with such allegations, and Sri Lanka's response.

Under this view, the report would have the credibility that even the most careful NGO report would lack in the eyes of many states and, more importantly, many Sri Lankans. In particular, with respect to the events of the war, the panel's report would stand in contradistinction to the account of the government (which blamed nearly all casualties on the LTTE) or the expatriate supporters of the LTTE (who blamed everything on the government). And unlike a report from his own staff, a panel report would permit the secretary-general to say that the report was not just his assessment of what Sri Lanka must do, but that of outside experts—thereby creating some distance that would both insulate him and give him more leverage in urging acceptance of the findings. The panel thus represents a precedent for future situations where the secretary-general lacks political support for a commission of inquiry but nonetheless wants to change the expectations of the affected state, nonstate actors, and others about the next steps that must be taken.

The Sri Lanka case also demonstrates, however, three clear obstacles on the bridge between law and behavior. First, much of the law regarding accountability for human rights atrocities has developed in situations where governments are judging their predecessors—true cases of transitional justice. There, the new government may fear the lingering political power of its predecessors, but at least it has only its power to lose. For nontransitional situations, the obstacles to accountability are profoundly increased, for the leaders have much more at stake: full investigation could lead to freezing of assets, public humiliation, and even a trial before a national, foreign, or international court. Transitional justice offers a rich template of law and practice for examining the past—full of encouraging examples from states in Eastern Europe, Latin America, and Africa—but the limiting principle still seems to be that governmental officials do not like to investigate themselves. Those states may be willing to investigate the violations of the losing side—as Sri Lanka is with regard to LTTE crimes—but such investigations then appear to be no more than victor's justice.

Second, the selectivity that curses much of the application of international law seems especially pronounced here. UN members' willingness to open an investigation into human rights atrocities in Côte d'Ivoire, Libya, and Syria, with or without the support of the host state (and

[60] *See* POE Report, *supra* note 21, paras. 262–77.

[61] *See* STEVEN R. RATNER, JASON S. ABRAMS & JAMES L. BISCHOFF, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBERG LEGACY 174–76 (3d ed. 2009).

in some cases while those atrocities were ongoing), stands in sharp contrast to their inaction on Sri Lanka not merely during the war but, equally disturbing, after it. Just as the international attitude while the war waged was a significant blow to the responsibility to protect, the reaction after the war was a setback in the uneven progress made since the early 1990s with respect to accountability. This selectivity is more alarming when we consider that the final stage of the Sri Lankan civil war involved many multiples of increased casualties compared to other ongoing wars.

Third, less obvious though equally important, the international institutional architecture for accountability remains ad hoc. The panel's unusual mandate (especially when compared to formal commissions of inquiry) was a blessing and a curse as the panel had to invent itself as it went along. Although the OHCHR provided useful ideas regarding technical issues like the handling of confidential information, the panel received no guidance from the secretary-general or political organs as to how or even where to undertake its business. Nonetheless, the panel greatly benefited from meeting, and having its secretariat, at UN Headquarters, near the locus of UN power—the secretary-general, his senior staff, and the well-staffed permanent missions. This location enabled the panel to receive useful political advice and, at times, political support for its work. Other advisory panels and fact-finding bodies have not had that advantage, and while Geneva provides proximity to OHCHR expertise, proximity to political power counts for more. Yet once the panel issued its report and the secretary-general responded, the locus of attention and decision making quickly dissipated. Would the next steps be in New York, Geneva, Brussels, or Sri Lanka? There was a great deal of logic in expecting the Human Rights Council to be the best venue for a resolution, but that body's record of selectivity did not augur well for progress.

Once expectations began to center on the Council, action still took many months. While many member states seemed embarrassed by the May 2009 resolution once the panel's report was issued, none seemed to want to take a leading role, or to take the first step, in reversing it—despite nonstop advocacy by the world's best-connected human rights NGOs. The United States eventually broke the impasse, briefly moving Sri Lanka to the top tier of its diplomatic agenda in Geneva and around the world. In the sphere of human rights, where international lawyers rightfully take pride in the construction of courts, commissions, and expert bodies expected to be free of political influence, old-fashioned power politics and effective bilateral diplomacy still play a central role.

Nearly four years after the war, the Sri Lankan accountability process has finally been set in motion, but in a sense it has barely begun. The majority within the Human Rights Council that the United States cobbled together for the March 2012 resolution may dissipate over time. In the end, states may emphasize other important aspects of national reconciliation within Sri Lanka and may no longer push the question of accountability. It may well be that a full and fair examination by the Sri Lankan government of the state's own conduct and that of its adversary will need to await electoral developments some years down the road.