



**Ontario Centre for Policy Research**  
**Inspiring, connecting, and discovering our future**

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July 30, 2022

Mr. Lucien Wong, SC  
Attorney General  
The Attorney-General's Chambers  
1 Upper Pickering Street  
Singapore 058288.

Dear Mr. Wong:

**Re: Submission against International Truth and Justice project request to enforce  
Universal Jurisdiction on former Sri Lanka's Head of State Mr. Gotabaya Rajapaksa**

Ontario Centre Policy Research is a Public Policy think tank having expertise in International Law based in Ottawa, Canada.

We have learned that International Truth and Justice Project (ITJP) submitted a criminal complaint against the former head of the state of Sri Lanka Mr. Gotabaya Rajapaksa.

We have carefully reviewed the allegations against Mr. Gotabaya Rajapaksa.

We are in a position that ITJP's submission has no legal basis.

Please find attached report, our submission against the ITJP.

We would be grateful if you could acknowledge receipt of the report.

If you need additional information, please contact our office anytime.

Sincerely,

**ONTARIO CENTRE FOR POLICY RESEARCH**

Per: Neville Hewage, Ph.D.  
Lead author of the report  
Senior Policy Analyst  
Lead Researcher – Public Policy Litigation Group

**Submission against Request  
to Enforce Universal Jurisdiction on  
Former Sri Lanka's Head of State  
Mr. Gotabaya Rajapaksa**

**International Truth and Justice project's request has no legal basis**

Submitted to

**MR. LUCIEN WONG, SC**  
Attorney-General  
The Attorney-General's Chambers  
1 Upper Pickering Street  
Singapore 058288.

Submitted by

**ONTARIO CENTRE FOR POLICY RESEARCH**  
Canada

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## **EXECUTIVE SUMMARY**

We have learned International Truth and Justice Project (ITJP) submitted a criminal complaint to Attorney General Singapore to enforce Universal Jurisdiction against former Sri Lanka's Head of State, Mr. Gotabaya Rajapaksa.

A self-proclaimed, so-called international project, ITJP is not addressing issues related to international human rights. Moreover, we have "reasonable grounds to believe" ITJP is a pro-Liberation Tigers Tamil Eelam (LTTE) Tamil Terrorist project run by a former LTTE cadre since their prime objective is to punish selected army officials and Sri Lanka's government officials.

Sri Lanka's armed forces successfully eliminated the world's most ruthless terrorist organization LTTE by removing their leader and senior cadre. But ITJP has not submitted any allegation or complaint against the former supreme military commander of the final stage of the battle Mr. Sarath Fonseka. Mr. Fonseka later joined with Tamil National Alliance (TNA) which supported LTTE's political ideology and contested the presidential election in 2010 as a joint candidate. It provides factual evidence that ITJP's sinister motive is to discredit Sri Lanka and take revenge for the military defeat of the LTTE against selected officials.

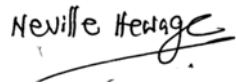
ITJP heavily depends on the Panel of Experts (PoE) report and the report of the office of the Human Rights commissioner's Investigation on Sri Lanka (OISL) to establish their claims. Therefore, our analysis is based on these reports. ITJP misinterpreted international law for its political advantage and should be rejected.

ITJP has no legal authority to validate information as evidence. ITJP submission is based on hearsay, double hearsay, and heavily biased non-scientific information and should not be considered for any legal proceedings. A chain of custody, method of collection, and the accuracy of the collected information are controversial, and fabricated information is submitted to gain benefit for the ITJP's political objective.

Our report submits a legal analysis of the armed conflict and an independent review of the conflict. Our report finds that the Government of Sri Lanka has fulfilled its constitutional obligation to protect all citizens of Sri Lanka and its territorial integrity by militarily defeating the Tamil terrorist group LTTE. We also submit information on Sri Lanka's post-reconciliation effort to support our arguments.

We respectfully submit that the ITJP submission should be dismissed without further consideration against Mr. Gotabaya Rajapaksa.

ALL OF WHICH IS RESPECTFULLY SUBMITTED



**ONTARIO CENTRE FOR POLICY RESEARCH**  
Canada.

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Dare: July 30, 2022

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## **APPENDICES**

### **Appendix A**

A panel of Experts (PoE) Report

[https://policy-research.ca/wp-content/uploads/2022/07/Exhibit-A-POE\\_Report.pdf](https://policy-research.ca/wp-content/uploads/2022/07/Exhibit-A-POE_Report.pdf)

### **Appendix B**

Office of the High Commissioner of Human Rights Council (OHCHR) Investigation on Sri Lanka OISL Report

<https://policy-research.ca/wp-content/uploads/2022/07/Exhibit-B-OISL-Report.pdf>

### **Appendix C**

Lessons Learnt and Reconciliation Commission (LLRC) report

<https://policy-research.ca/wp-content/uploads/2022/07/Exhibit-C-LLRC-REPORT.pdf>

### **Appendix D**

Humanitarian Operation by Sri Lanka against LTTE Tamil Terrorists

<https://policy-research.ca/wp-content/uploads/2022/07/Exhibit-D-Humanitario-Operation-GoSL.pdf>

### **Appendix E**

Factual Appraisal of the OISL report (FAOISL)

<https://policy-research.ca/wp-content/uploads/2023/02/Exhibit-E-Review-of-OISL-Report-FAOISL.pdf>

### **Appendix F**

Sir Geoffrey Nice QC and Rodney Dixon QC review the Report of the Secretary-General's Panel of Experts on Accountability in Sri Lanka

<https://policy-research.ca/wp-content/uploads/2022/07/Exhibit-F-Nice-and-Dixon-PPoE-review-Report.pdf>

## PART 1

### INTRODUCTION

01. Secretary-General of United Nations appointed Panel of Experts (PoE) to investigate alleged Human Rights violations in Sri Lanka related to armed conflict between the Liberation Tigers of Tamil Eelam (LTTE) Tamil Terrorist group. The PoE report or Darusman report was released on March 31, 2011, attached here as **Appendix “A”** to the report. Later, the Office of the High Commissioner of Human Rights Council (OHCHR) also appointed a panel to investigate the alleged violations. Its report, OISL, was released on September 15, 2015, and also released a comprehensive report on September 28, 2015, attached here as **Appendix “B”**. All reports have covered the period same as the Lessons Learnt and Reconciliation Commission (LLRC). A LLRC report also attached here to the report as **Appendix “C”**.
02. Atrocities committed by Liberation Tigers of Tamil Eelam (LTTE) Tamil terrorist group against the Government of Sri Lanka and its people and details of humanitarian operations by the government of Sri Lanka are submitted here to the report as **Appendix “D”**.
03. Both Darusman and OISL reports were instrumental in resolutions 30/1, 34/1, and 40/1 that were adopted by the Human Rights Council on Sri Lanka for promoting reconciliation, accountability, and human rights.
04. Both the Darusman report and OISL reports are riddled with factual inaccuracies, with numerous shortcomings, and failed to apply fundamental legal principles for their investigation.
05. Both reports ignored (recommendations) the complex nature of socio-economic and cultural characteristics of Sri Lankan society.
06. As a result, Darusman and OISL report recommendations have not properly tailored resolutions proposed in Sri Lanka for promoting reconciliation, accountability, and human rights.
07. Ontario Centre for Policy Research based in Ottawa, Canada public policy think-tanks having extensive experience in International Law, human rights and conflict resolution have

conducted a comprehensive analysis of both reports for their factual accuracy and legal standings.

08. Ontario Centre for Policy Research has no affiliation with the Government of Sri Lanka (GoSL) and the Liberation Tigers of Tamil Eelam Tamil Terrorist group or their proxy organizations.

09. Our prime objective is to provide accurate information, and rebut ITJP claims.

10. We have analyzed reports and reviewed processes related to accountability and reconciliation including the Truth and Reconciliation Commission (South Africa), National Unity and Reconciliation Commission (Rwanda), Transitional Justice Policy, African Union – 2019, Truth and Reconciliation Commission Report (Canada).

## **PART II**

### **BACKGROUND**

11. Founded in 1976, the Liberation Tigers of Tamil Eelam (LTTE) is a Sri Lanka-based Tamil terrorist organization that seeks to create an independent mono-ethnic state called "Tamil Eelam" for Sri Lanka's about five percent (5 %) ethnic Tamil minority living in the North and East. Over the years, the LTTE has waged a violent secessionist campaign with the help of ground, air, and naval forces, as well as a dedicated suicide bomber wing.<sup>1</sup> LTTE Tamil Terrorist organization is a proscribed Terrorist organization, in, thirty-two (32) countries, including the European Union, Canada, UK, USA and India.

12. LTTE Tamil terrorists' activities caused billions of dollars of massive destruction to Sri Lanka's economy. Many innocent civilians were killed as a result of indiscriminate attacks on civilian centers across the country.

13. During the three decades of armed conflict, civilians of all ethnic groups, Sinhalese, Tamils, Moor, and Muslims, were affected.

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<sup>1</sup> Refugee review Tribunal Australia (2005). RRT Research Response, LKA17724.

14. LTTE Tamil terrorist group was militarily defeated on May 18, 2009, which ended the civil war by eliminating a ruthless terrorist leader, Velupillai Prabhakaran.

15. The Federal Bureau of Investigation (FBI), USA noted that the LTTE was the only terrorist organization to have assassinated two world leaders, former Indian Prime Minister Rajiv Gandhi in May 1991 and Sri Lankan President Ranasinghe Premadasa in May 1993. Furthermore, the LTTE nearly killed Sri Lankan President Chandrika Kumaratunga in December 1999, and **former president Gotabaya Rajapaksa** in 2006. LTTE assassinated numerous Sri Lankan military leaders, intelligence officers, and prominent politicians — including Foreign Minister Lakshman Kadirgamar <sup>2</sup> in August 2005. <sup>3</sup>

16. Claiming to be the sole representative of the Sri Lankan Tamils, the organization also killed thousands of fellow Tamils who dissented from its ideology, actions, and regime. <sup>4</sup>

### PART III

#### PANEL OF EXPERTS (PoE) OR DARUSMAN REPORT

17. The United Nations (UN) Secretary-General appointed as members of the Panel Marzuki Darusman (Indonesia), Chair; Steven Ratner (United States); and Yasmin Sooka (South Africa) to advise 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. The Panel of Experts report, or Darusman report, was released on March 31, 2011. <sup>5</sup>

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<sup>2</sup> Tamil Politician was serving in the Sri Lanka government as a Foreign minister.

<sup>3</sup> Devotta, N. (2009). The Liberation Tigers of Tamil Eelam and the Lost Quest for Separatism in Sri Lanka. *Asian Survey*, 49 (6), 1021-1051. DOI:10.1525/as.2009.49.6.1021

<sup>4</sup> Devotta, N. (2009). The Liberation Tigers of Tamil Eelam and the Lost Quest for Separatism in Sri Lanka. *Asian Survey*, 49 (6), 1021-1051. DOI:10.1525/as.2009.49.6.1021

<sup>5</sup> RefWeb (2011 September). *Report of the Secretary-General's Panel of Experts on Accountability in Sri Lanka*. <https://reliefweb.int/report/sri-lanka/report-secretary-generals-panel-experts-accountability-sri-lanka>

18. The Panel focused on the period from September 2008 through May 2009. The Panel collected submissions from officials of the United Nations and international organizations and representatives of Governments and NGOs and individuals directly affected by the events of the final stages of the war. <sup>6</sup>

19. A submission contained alleged violations by the Sri Lanka armed forces, and documentary evidence such as photographs and videos were also received. <sup>7</sup>

20. Most importantly, Darusman's report states in para 19, that "submissions could not be individually verified by the Panel and, therefore, were not used as a direct source to meet the Panel's threshold of credibility for the allegations."

21. The Panel's mandate, however, does not extend to fact-finding or investigation. All recommendations proposed by the Panel of Experts are based on assumptions that submissions received are credible. Therefore, the Darusman report does not reflect the nexus between ground reality and submissions. Therefore, It is fatal to recommendations and administration of justice.

22. In other words, the credibility of the submissions or credibility of allegations has not been established

23. The Darusman report was prepared at UN Secretary-General Ban Ki-moon's request but not the General Assembly of the United Nations Human Rights Council (UNHRC).

24. Part III of the Darusman report submitted various allegations against Sri Lanka's armed forces.

25. However, based on assumptions (unproven allegations), the Darusman report has concluded that alleged violations of International Humanitarian Law are credible.

26. Therefore, the Darusman report is riddled with factual inaccuracies. Within the given mandate to the Panel of Experts, it has no authority to establish or determine or suggest that a violation of International Humanitarian Law is credible.

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<sup>6</sup> *Ibid* supra note 5

<sup>7</sup> *Ibid* supra note 5

27. In other words, the Panel performed beyond its mandate.

28. Further, the appointment of a Panel of Experts is contrary to Rule 96 and 102 of the UN General Assembly Rules of Procedure. Rule 96 states, *Establishment of committees* – The General Assembly may establish such committees as it deems necessary for the performance of its functions; Subcommittees Rule 102 states each committee may set up subcommittees, which shall elect their own officers.<sup>8</sup>

29. The General Assembly did not establish the Panel of Experts but the Secretary-General did. Therefore, it is contrary to the Rules of Procedure of the General Assembly.

30. Therefore, recommendations on the Darusman report cannot be considered at all and should be rejected.

#### **PART IV**

#### **UNITED NATIONS HUMAN RIGHTS COUNCIL REPORT OF THE OHCHR INVESTIGATION ON SRI LANKA (OISL REPORT)**

31. In order to mitigate deficiencies of the Panel of Experts report (Darusman Report), the Office of the High Commissioner of Human Rights (OHCHR) commissioned the Report of the OHCHR Investigation on Sri Lanka (OISL). OISL, a special investigation team established within OHCHR in Geneva by the then High Commissioner for Human Rights, Navi Pillay, began its work on July 1, 2014.<sup>9</sup>

32. The investigation was led by three distinguished experts, Mr. Martti Ahtisaari, former President of Finland, Dame Silvia Cartwright, former High Court Judge of New Zealand, and Ms. Asma Jahangir, former President of the Human Rights Commission of Pakistan.<sup>10</sup>

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<sup>8</sup> UNHRC (2014 June). OHCHR Investigation on Sri Lanka.  
<https://www.ohchr.org/EN/HRBodies/HRC/Pages/OISL.aspx>

<sup>9</sup> *Ibid* supra note 8

<sup>10</sup> *Ibid* supra note 8

## **Lack of credibility and deficiencies of the OISL Report**

33. Notably, Yasmin Sooka<sup>11</sup> has not been included in the OISL investigation committee.

34. The heavily biased website, International Truth and Justice Project (ITJP) states the Foundation for Human Rights administers a project in South Africa under the guidance of transitional justice expert Yasmin Sooka.<sup>12</sup>

35. Yasmin Sooka's report utilized applications to determine Tamils' asylum at the Asylum and Immigration Tribunal, UK.<sup>13</sup>

36. Further, Yasmin Sooka has apologized to Sri Lanka brigadier Ravindra Dias for her wrongful actions with ITJP.<sup>14</sup> Sri Lanka State Intelligence Services (SIS) Director, Major General Suresh Sallay had sought Rs. One billion as damages from South Africa-based human rights lawyer and activist Yasmin Sooka, the International Truth and Justice Project (ITJP), and a website operator for false, malicious, defamatory statements made against him. The case is ongoing and Yasmin Sooka and ITJP did not answer the court.<sup>15</sup>

37. Yasmin Sooka's affiliation with a heavily biased project — ITJP has undermined the UNHRC investigation's credibility all democratic nations must be vigilant about their politically motivated activities.

38. OISL report paragraphs 22 states that "Another critical source of information was the United Nations Secretary General's Panel of Experts, headed by Marzuki Darusman, with experts Yasmin Sooka and Stephen Ratner. Yasmin Sooka is involved in filing many reports against individuals in Sri Lanka Army and hence she is a highly prejudiced individual. Her presence compromises the investigative process.

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<sup>11</sup> Yasmin Sooka was appointed as director of the heavily biased International Truth and Justice Project

<sup>12</sup> About us ITJP-Sri Lanka (n.d). <https://itjpsl.com>.

<sup>13</sup> KV (scarring - medical evidence), [2014] UKUT 00230 (IAC)

<sup>14</sup> Asian Mirror (2020 September). *Yasmin Sooka apologises to Sri Lankan Brigadier*.  
<https://asianmirror.lk/news/item/32019-yasmin-sooka-apologises-to-sri-lankan-brigadier>

<sup>15</sup> <http://www.dailynews.lk/2021/11/15/local/264606/sallay%E2%80%99s-defamation-case-summons-yasmin-sooka-two-others>

39. The Darusman report has no binding authority for any form of recommendation within UNHRC against Sri Lanka since the UNHRC did not appoint the committee.

40. Therefore, any recommendation issued on the OISL report, consulting with Darusman report is fatal to the administration of justice.

#### *Documents collected for Darusman report*

41. The OISL report paragraph 20 states, that the committee initially carried out desk review documentation that was already available. The documents were consulted, primarily collected for the Darusman report. Documents collected for the Darusman report were mere hearsay, double hearsay, and did not meet judicial standards of evidence.

42. Since the Darusman report has no binding authority, the documents collected on behalf of the Darusman report, cannot be further considered for the OISL report.

43. Therefore, any recommendation issued on the OISL report, consulting with Darusman report is fatal to the administration of justice.

#### *Satellite images*

44. The OISL report para 20 stated that the committee had consulted satellite images; also, para 21 states United Nations Operational Satellite Application Program (UNOSAT) provided invaluable satellite imagery analysis.

45. However, the OISL report has no comment on findings or analysis of satellite imagery.

46. American Association of Advancement of Science (AAAS) conducted an extensive review of high-resolution satellite images at the final stage of armed conflict in Sri Lanka. It has been concluded LTTE Tamil terrorists moved civilians from one No Fire Zone (NFZ) to another. Analysis of the Civilians Safety Zone (CSZ) images showed three gravesites with 1,346 burials between them.<sup>16</sup>

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<sup>16</sup> High-Resolution Satellite Imagery and the Conflict in Sri Lanka (2020, October 12). *American Association of Advancement of Science (AAAS)*. <https://www.aaas.org/resources/geotech/high-resolution-satellite-imagery-and-conflict-sri-lanka>

47. An independent recollection of evidence can be found through satellite images. However, there is no evidence in the OISL report; that scientific analysis was carried out when deriving recommendations and conclusions. Therefore, the OISL report findings are highly questionable and do not substantiate the allegations.

### *Authentication of documents*

48. The OISL committee has reviewed the documentation they have received. They are hearsay and double hearsay on every occasion. Therefore, the committee must take extra precautions when interpreting incidents and deriving recommendations.

49. However, the committee derived its recommendations assuming all allegations are true. In the recommendation section, para 1267 states that the patterns of the commission of gross human rights violations and serious violations of International Humanitarian Law, the indications of their systematic nature, combined with the widespread character of the attacks all point to the possible perpetration of international crimes fatal to the administration of justice.

50. The OISL report recommendations are derived based on the assumption that the allegations are true. The committee has been prejudiced without authenticating documents, and it is fatal to the administration of justice.

### *Standard of Proof*

51. In the OISL report, para 33 states its mandate was to carry out a human rights investigation, as this was not a criminal investigation.

52. The OISL report also states the committee has utilized a standard of proof restated "reasonable grounds to believe" (OISL Report Para 33 and 14) for deriving recommendations. However, how hearsay and double hearsay can be reasonable grounds to believe is not established.

53. If the OISL report considered the criminal nature of allegations of international crimes, the standard of proof should be "Beyond Reasonable Doubt."

54. The applying proof of standards "reasonable ground believes" does not substantiate against recommending investigation on violation of international crimes.

56. Therefore, the OISL report recommends an investigation into International crimes against Sri Lanka which is fatal to the administration of justice.

#### ***Authentication of audio-visual material***

57. The OISL committee collected submissions and accepted a large number of photographs and videos.

58. Those pieces of evidence are hearsay or double hearsay. OISL committee does not authenticate any video and photographic submissions used for their investigation. It is a well-known fact that LTTE Tamil terrorists had a library of propaganda videos based on fake and hyped-up material, with their own killings presented as GOSL killings. Even the authenticity of the so-called "documentary" (video) broadcasted by Channel-4 in the UK has been questioned by experts. Forensic analysis conducted on the Channel-4 video revealed that it was a doctored documentary.

59. Therefore, any recommendations derived from investigating unauthenticated photographs and videos are fatal to the administration of justice.

#### ***Total Impunity for the LTTE***

60. In the OISL report, part XIX recommendation section paragraph 1273 states, "likewise, there must be recognized within the Tamil community, for example, of the destruction and harm inflicted on civilians and communities by the LTTE. While the LTTE no longer exists nor controls territory, the legacy of the abuses, committed by and large with total impunity, remains and must be addressed.

61. The OISL report failed to recognize prominent LTTE leaders living in western countries such as Canada, the US, the UK, Germany, Denmark, and, Switzerland are responsible for gross violations of human rights and International Humanitarian Law. Further, the OISL report does not recommend them to bring before justice, for example, Adele Balasingham in the United Kingdom who trained LTTE women suicide cadre and child soldiers.

61a. List of designated persons (LTTE Cadre) under paragraph 4(2) of the United Nations Regulations No. 1 of 2012, Government of Sri Lanka was issued an extraordinary Gazette notification with reference No. 1854/41 on Friday, March 21, 2014. It was published under the *United Nations Act* No. 45 of 1968.<sup>17</sup>

62. The OISL committee failed to recommend that the LTTE cadres currently living in Western countries are responsible for international crimes and were granted total impunity of LTTE which is fatal to the administration of justice.

### ***Disappearances***

63. UN Working Group on Enforced and Involuntary Disappearances (WGEID) Sri Lanka is part of the UNOHCHR Investigation on Sri Lanka (OISL) report.<sup>18</sup>

64. LTTE Tamil terrorists assassinated Tamil Politicians and Tamil Academics, Tamil Intellectuals, and Tamil Government Officials. LTTE also attacked civilian targets and villages near the so-called Tamil homeland. Their attack extended to the army, navy, air force, and military establishments. As a result of LTTE Tamil terrorists' brutality, 29,033 civilians lost their lives, many were wounded or disappeared.<sup>19</sup>

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<sup>17</sup> Department of Government Printing (2014). Extraordinary Gazette Notifications with reference No. 1854/41 - FRIDAY, MARCH 21, 2014. Available on <http://www.documents.gov.lk/en/gazette.php> (Accessed on December 12, 2020).

<sup>18</sup> *Ibid* supra note 8

<sup>19</sup> OCPH (2020). *Submission against Petition No: 432 – 00052 Submitted by MP Gary Anandasangaree – Scarborough Rough Park* (Report submitted to the Honourable Francois-Philippe Champagne, MP, Minister of Foreign Affairs, Canada and others). [https://policy-research.ca/wp-content/uploads/2020/10/01-Neville\\_Hewage\\_Report\\_432-00052\\_V3.pdf](https://policy-research.ca/wp-content/uploads/2020/10/01-Neville_Hewage_Report_432-00052_V3.pdf)

65. WGEID reported a total of 12,536 complaints of enforced disappearances registered over the years (OISL Report Para 387).

66. Further, WGEID has admitted that forced recruitment by the LTTE amounted to disappearances.

67. WGEID committee collected information from their relatives and/or informants. It is reasonable to believe they are associated with LTTE or its proxy organizations. The OISL committee failed to introduce a mechanism determining the validity of their claims.

68. The majority of LTTE Tamil terrorists perished in the final stage of the armed conflicts. In the report, the WGEID stated that "not all cases of 'missing' persons fall within the definition of enforced disappearances" (OISL Report para 391).

69. Some of the presumed missing have claimed asylum in Canada, the UK, and other Western countries.<sup>20</sup>

70. Also, the OISL report did not review individual cases of disappearances. (OISL report para 389).

71. OISL report further states, "based on the information it gathered, OISL has grounds to believe that the LTTE committed human rights violations and violations of international humanitarian law by torturing and ill-treating people it held in captivity." (OISL Report para 570)

72. Regarding Article 19 of the International Convention for the Protection of All Persons, regarding Enforced Disappearance states

"Personal information, including medical and genetic data, which is collected and/or transmitted within the framework of the search for a disappeared person..."

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<sup>20</sup> *Ibid* note 19

73. The WGEID committee has not collected any medical or genetic data to verify the disappearances. The committee is merely relying on information gathered from the interviewers that they are LTTE supporters.

74. The OISL report has failed to establish enforced disappearances under establishing principles such as collecting medical and biometric data.

75. Therefore, the OISL report allegations against the Sri Lankan Armed Forces for enforced disappearances fall short and do not substantiate. Therefore, the OISL recommendations are fatal to the administration of justice.

### ***Non-International Armed Conflict***

76. The Appeals Chamber for the International Criminal Tribunal for the Former Yugoslavia (ICTY), relying on existing custom, established what is now widely recognized as a two-part test for determining whether a conflict qualifies as a Non-International Armed Conflict, whether there is:

- (1) protracted armed violence
- (2) between governmental authorities and organized armed groups within a state.

77. This two-fold test has since been adopted by many other international criminal courts, including the Special Court for Sierra Leone (SCSL) and the International Criminal Court (ICC), and is widely considered authoritative. As to the first element, one highly dispositive factor is the duration of the conflict. Here, the conflict between the LTTE and the Government of Sri Lanka (GoSL) lasted almost 30 years, undoubtedly a sufficient period to satisfy the first element of the definition.

78. As to the second element, the ICTY has made it clear that some degree of organization by the parties will suffice, thereby establishing a very low threshold for what constitutes an organized armed group. It is well documented that the LTTE has been a conventional fighting force since the late 1990s, possessing both naval and air assets. The LTTE's military capabilities were undoubtedly sufficient to establish the second element of the definition.

79. With both elements satisfied, the Sri Lankan conflict is correctly categorized as a Non-international Armed Conflict. Any analysis of the legal issues pertaining to that conflict should be dealt with accordingly.

80. Therefore, LTTE's utilization of civilians as a human shield <sup>21</sup> needs to be addressed when assessing civilian casualties, disappearances, and international crimes.

81. The OISL report failed to identify the armed conflict's legal classification between the LTTE and GoSL, leading to the recommendation's deficiencies. Therefore, the OISL proposal is fatal to the administration of justice.

### ***Collateral damage***

82. Further, from a legal perspective, the critical failure of the Protocols of the Geneva Convention to provide a precise definition of the term "civilian," "civilian population" and a similar lack of clarity with regard to the term "take a direct part in hostilities" has contributed to a substantial degree of ambiguity, leaving, vital terms which have a bearing on core International Humanitarian Law (IHL) principles such as the "Principle of Distinction" to be dealt with largely on a case by case basis.

83. This aspect assumes a heightened degree of uncertainty in the context of the complexities involved and the challenges posed by the very nature of non-international armed conflicts involving non-state armed groups. It is often the case that the non-State armed groups do not intentionally, as a matter of strategy, distinguish themselves from the civilian population and conceal their identity among the civilians until the very moment of attack, placing civilians in peril.

84. This leads to a position where the civilian, either willingly or unwillingly, becomes part and parcel of an overall combat strategy of the non-State armed groups, thereby placing at risk the protection the civilian is entitled to under IHL. <sup>22</sup> The LTTE had a policy of using civilians as

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<sup>21</sup> *Ibid* supra note 8

<sup>22</sup> It is also a fact that Tamil LTTE terrorists used civilians as a human shield.

combatants under the name of "*Makkal Paddi*", where these fighters wore the civilian dress and looked like civilians.

85. A Right to defend by the state was added to Protocol II in 1977 under the Prevention and Punishment of the Crime of Genocide Convention. It has given authority to defend any action against the state. LTTE Tamil terrorism is a separatist agenda against the sovereign state of Sri Lanka, and the state has a clear mandate to defend against any aggression.

86. The conflict against the LTTE Tamil terrorist group should be studied in its entirety; even the OISL report was mandated to investigate allegations at the final stage of the battle.

87. Therefore, the collateral damage principle must be considered. However, both the PoE report and the OISL report completely ignored the collateral damage principle when deriving recommendations and conclusions. Thus, the OISL report recommendation is fatal to the administration of justice.

### ***The non-consensual nature of belligerent occupation***

88. The LTTE is a terrorist organization that fights against a democratically elected government and the armed forces in Sri Lanka. Its mandate was to create a separate state and also to establish a de facto state Eelam. The LTTE consists of the conventional military with naval and air assets. It is a foreign occupation of Sri Lanka's territory.

89. The OISL committee conveniently ignored the fact that the LTTE's non-consensual nature of the belligerent occupation

90. The International Humanitarian Law declared armed organizations such as the LTTE — Belligerents because of (1) the existence of an armed conflict; (2) occupying a significant part of the national territory; (3) the Armed Group exercising sovereignty on that part of the territory.

91. Provisions of the International Law certainly do not provide any legitimacy to the LTTE cause. Meaning — Common Article 3 of the Geneva Convention does not offer, or did not

provide, any legitimacy to the LTTE cause, namely, creating a separate state Tamil Eelam in the North and East of Sri Lanka.

92. The Protocol applied to the internal conflict between the LTTE and the Government of Sri Lanka armed forces as the threshold had passed. Once this threshold is given, the Protocol's application is automatic, i.e. no declaration has to be made by the parties to the conflict as long as Article 1 of Protocol II requirements is met.

93. Common Article 3 and Protocol II apply simultaneously and automatically to internal conflicts when certain threshold criteria are reached.

94. We identified in Sri Lanka how these threshold criteria have been met.

95. Sri Lanka has a democratically elected government with every right to act against non-consensual belligerent occupation by LTTE.

96. In general, human rights law will be superseded by the law of occupation, including Article 43 of the Hague Regulations. If international humanitarian law is applicable – and this is a big "if" with regard to effective occupation – the standards of human rights law will, as a rule, not apply but may inform the application of international humanitarian law regarding precautions and after-the-fact investigations. Thus, international humanitarian law and human rights law may complement each other, but their different applicability conditions need to be strenuously observed.<sup>23</sup>

97. The level of control is relevant to the question of the applicability of the law of occupation, the law on the conduct of hostilities, and, finally, to the proportionality analysis to be made under human rights law if applicable. Effective control and a well-functioning law enforcement regime exclude the applicability of norms on the use of force, whether under the *jus ad bellum* or under the law on the conduct of hostilities. However, the moment effectiveness wanes, an armed attack occurs, and armed conflict is renewed, those two branches of law become applicable again. In addition, the occupying power is obliged to apply Human Rights

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<sup>23</sup> ICRC Report (2012). Occupation and other forms of administration of foreign territory. <https://www.icrc.org/en/doc/assets/files/publications/icrc-002-4094.pdf> p. 144

law. Still, Human Rights law needs to consider the degree of control in applying the proportionality principle and the relativity of the optimization clauses in some human rights treaties.<sup>24</sup> The OISL and PoE reports failed to consider these important factors of Human Rights Law principles.

98. The International Humanitarian Law is not a "general" *lex specialis*" necessarily excluding the application of Human Rights law. Still, it is necessary to identify the *lex specialis* in every situation separately.<sup>25</sup> Thus, international humanitarian law is *lex specialis* – such as during "hot" armed conflict – Human Rights law is not applicable.<sup>26</sup>

99. The OISL committee totally ignored or failed to identify the occupation of territory by the LTTE. Therefore, it is fatal to the administration of justice.

## PART V

### FURTHER ANALYSIS OF THE OISL REPORT

100. We have carefully reviewed the OISL report in conjunction with the report of the Office of the United Nations High Commissioner for Human Rights- Promoting reconciliation, accountability and Human Rights in Sri Lanka (A/HRC/30/61).

101. The OISL report has numerous deficiencies and is filled with factual inaccuracies. The OISL report ignored fundamental legal principles in deriving a recommendation.

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<sup>24</sup> ICRC Report (2012). Occupation and other forms of administration of foreign territory. <https://www.icrc.org/en/doc/assets/files/publications/icrc-002-4094.pdf> p.143

<sup>25</sup> P. Alston *et al*, "The competence of the UN Human Rights Council and its special procedures in relation to armed conflicts: Extra-judicial executions in the 'War on Terror'," *European Journal of International Law*, 19 (2008), 183 at 192; in the same vein, see Koskeniemi, *Fragmentation of International Law*, para. 96. (interpreting the ICJ *Nuclear Weapons* opinion, p. 240, para. 25)

<sup>26</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Adv. Op., ICJ Rep. 2004, 136, at 144-177, paras 95-101; *Nuclear Weapons*, p. 240, para. 25. See also Sassoli, "The international legal framework for stability operations," p. 203; Droege, 'Elective affinities?' p. 539.

102. The armed conflict between GoSL and the LTTE is a non-international armed conflict. The non-state armed group LTTE is also subjected to International Humanitarian Law and International Human Rights Law.

103. The fundamental deficiency of the OISL report is that it has failed to identify the correct categorization of armed conflict between GoSL and the LTTE. Therefore, its recommendations are fatal to the administration of justice.

104. Concerning International Human Rights obligations, the traditional approach has been to consider that they bind only States. However, in evolving practice in the Security Council and the reports of some special rapporteurs, it is increasingly considered that under certain circumstances, non-State actors can also be bound by International Human Rights Law and can assume, voluntarily or not, obligations to respect, protect and fulfill Human Rights. For instance, the Security Council has called in a number of resolutions on States and non-State armed groups to abide by International Humanitarian Law and International Human Rights obligations.<sup>27</sup>

105. The Special Rapporteur on extrajudicial, summary, or arbitrary executions indicated in the context of his mission to Sri Lanka that "[a]s a non-State actor, the LTTE does not have legal obligations under [the International Covenant on Civil and Political Rights], but it remains subject to the demand of the international community, first expressed in the Universal Declaration of Human Rights, that every organ of society respect and promote human rights." Moreover, "[t]he international community does have human rights expectations to which it will hold the LTTE, but it has long been reluctant to press these demands directly if doing so would be to 'treat it like a State.'<sup>28</sup>

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<sup>27</sup> See, for example, resolution 1894 (2009), in which the Security Council, while recognizing that States bear the primary responsibility to respect and ensure the human rights of their citizens, as well as all individuals within their territory as provided for by relevant international law, reaffirms that parties to armed conflict bear the primary responsibility to take all feasible steps to ensure the protection of civilians, and demands that parties to armed conflict comply strictly with the obligations applicable to them under international humanitarian, human rights and refugee law

<sup>28</sup> The Special Rapporteur further indicated that "[i]t is increasingly understood, however, that the human rights expectations of the international community operate to protect people, while not thereby affecting the legitimacy of the actors to whom they are addressed. The Security Council has long called upon various groups that Member States do not recognize as having the capacity to formally assume international obligations to respect human rights." See E/CN.4/2006/53/Add.5, paras. 25–27.

106. International Humanitarian Law contains two different legal frameworks dealing with non-international armed conflicts. On the one hand, article 3, common to the Geneva Conventions, stipulates that "in the case of armed conflict not of an international character," a series of minimum International Humanitarian Law provisions shall apply.<sup>29</sup>

107. Protocol II to the Geneva Conventions provides that the Protocol applies to armed conflicts "which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol" (art 1).<sup>30</sup>

108. International Committee Red Cross (ICRC) proposes a criterion of the intensity of violence and organization of non-State parties as determining the lower threshold for the application of international humanitarian law of non-international armed conflicts; "non-governmental groups involved in the conflict must be considered as 'parties to the conflict,' meaning that they possess organized armed forces. For example, this means that these forces have to be under a specific command structure and have the capacity to sustain military operations."<sup>31</sup> The LTTE very well fits with the definition, but the OISL report ignored the fact.

109. It should be noted that the regulations in Protocol II concerning non-international armed conflicts are narrower than those under common article 3. For example, Protocol II introduces a requirement of territorial control for non-State actors. Furthermore, while Protocol II expressly applies only to armed conflicts between State armed forces and dissident armed forces or other organized armed groups, common article 3 applies to armed conflicts occurring only between

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<sup>29</sup> According to common article 3, these minimum guarantees are: "(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons: (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; (b) taking of hostages; (c) outrages upon personal dignity, in particular humiliating and degrading treatment; (d) the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples. (2) The wounded and sick shall be collected and cared for."

<sup>30</sup> UNHR-Office of the High Commissioner (2011). International Legal Protection of Human Rights in Armed Conflict. United Nations Publication, HR/PUB/11/01. New York. p. 36

<sup>31</sup> See ICRC, "How is the term "armed conflict" defined in international humanitarian law?"

non-State armed groups. In this context, the ICRC has indicated that "Protocol II 'develops and supplements' common article 3 'without modifying its existing conditions of application.' This means that this restrictive definition is relevant for the application of Protocol II only, but does not extend to the law of [non-international armed conflicts] in general."<sup>32 33</sup> Again, The LTTE very well fits with the definition, but the OISL report ignored the fact.

110. Moreover, Protocol II requires a command structure for non-State armed groups, which is not expressly included in common article 3.

111. Determining what constitutes "responsible command" is difficult as an armed group (LTTE) command might change over time. Ascertaining the exercise of control over a part of the territory is particularly complex as armed groups rarely maintain a single sustained area of operations but may frequently move from place to place.

112. The above legal reasonings establish that the LTTE is responsible for alleged international crimes committed. Therefore, LTTE must be held accountable. The LTTE well fits with the definition, but the OISL report ignored the fact.

## **PART VI**

### **DOMESTIC MECHANISM FOR RECONCILIATION, ACCOUNTABILITY, AND HUMAN RIGHTS INITIATED BY FORMER HEAD OF STATE MR. GOTABAYA RAJAPAKSA**

113. Sri Lanka has committed and continues to commit itself to advocating for accountability, sustainable peace, and human rights for all citizens and residents regardless of their ethnic origin and religious beliefs in Sri Lanka and worldwide.

114. Interestingly, fifty-eight percent (58%) of Tamils live in the South of Sri Lanka with the Sinhalese community peacefully.<sup>34</sup>

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<sup>32</sup> UNHR-Office of the High Commissioner (2011). International Legal Protection of Human Rights in Armed Conflict. United Nations Publication, HR/PUB/11/01. New York. p. 38

<sup>33</sup> See ICRC, "How is the term "armed conflict" defined in international humanitarian law?"

<sup>34</sup> Central Bank of Sri Lanka (2020). Economic and Social Statistics of Sri Lanka. <https://www.cbsl.gov.lk/en/publications/other-publications/statistical-publications> (accessed on December 12, 2020)

115. The LTTE Tamil terrorists started a violent armed campaign against the sovereign state of Sri Lanka. Their prime intention is to create a mono-ethnic state for Tamils in the North and East part of the country.

116. After defeating the world's most ruthless terrorist organization on May 18, 2009, Sri Lanka has worked tirelessly to promote reconciliation and accountability.

117. The Lessons Learned and Reconciliation Commission (LLRC) has conducted a comprehensive inquiry. The commission's mandate is to promote reconciliation, accountability, and Human Rights in Sri Lanka.

118. A fact-finding mission (FFM) to Sri Lanka was established on January 20, 2020, by the Home Office, United Kingdom.

119. The purpose of the mission was to gather accurate and up-to-date information from a range of sources about a number of issues concerning the treatment of Tamils, including the government's attitude to diaspora activities and the treatment of members of diaspora groups, in particular members of the Transnational Government of Tamil Eelam (TGTE). The mission was also interested in gathering information about the treatment of members and former Liberation Tamil Tigers of Eelam (LTTE) members.<sup>35</sup>

120. The Home Office FFM report states, "most Tamils have more pressing concerns such as housing, employment, the return of land and accessing information about relatives who disappeared during the war."<sup>36</sup>

121. In other words, the latest fact-finding mission of the Home Office, UK identified critical criteria for promoting reconciliation, accountability, and Human Rights in Sri Lanka as providing

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<sup>35</sup> Home Office United Kingdom (2020 January) *Report of a Home Office fact-finding mission to Sri Lanka*  
[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/859277/Sri\\_Lanka\\_FFM\\_report\\_2020.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/859277/Sri_Lanka_FFM_report_2020.pdf)

<sup>36</sup> Home Office United Kingdom (2020 January) *Report of a Home Office fact-finding mission to Sri Lanka*  
[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/859277/Sri\\_Lanka\\_FFM\\_report\\_2020.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/859277/Sri_Lanka_FFM_report_2020.pdf) p. 8

housing, employment, land return, and accessing information about relatives who disappeared during the war.

122. This is contrary to the proposed UNHRC accountability process in Sri Lanka. Post-conflict reconciliation must re-establish the destroyed livelihood by the LTTE in North and East in Sri Lanka and nothing more. Therefore, the domestic reconciliation process must be strengthened rather than proposing destructive international mechanisms.

### ***Treatment of Tamils***

123. According to the FFM report, most sources noted that Tamils are not specifically targeted and do not suffer persecution just for being a Tamil. While there are increased opportunities in the North, the lack of housing and unemployment remain high.<sup>37</sup>

124. The report also highlighted comments from active (Non-Governmental Organizations) NGO in the North. An NGO noted that political parties need to be based in the country to affect change, and therefore the Transnational Government of Tamil Eelam (TGTE) would have little support from Tamil youth.<sup>38</sup>

### ***Ex-cadre of LTTE***

125. Home Office, the UK FFM states when the war finished, those connected to the LTTE were arrested, sent to court, and ordered to go through a rehabilitation process. Some younger, former cadres were allowed to complete their education at school and university; some have been employed by the security forces or civil defense force, with some given government employment as bus drivers and conductors. One source noted that some former cadres have gone into politics.

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<sup>37</sup> Home Office United Kingdom (2020 January) *Report of a Home Office fact-finding mission to Sri Lanka* [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/859277/Sri\\_Lanka\\_FFM\\_report\\_2020.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/859277/Sri_Lanka_FFM_report_2020.pdf) p. 12.

<sup>38</sup> Home Office United Kingdom (2020 January) *Report of a Home Office fact-finding mission to Sri Lanka* [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/859277/Sri\\_Lanka\\_FFM\\_report\\_2020.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/859277/Sri_Lanka_FFM_report_2020.pdf) p. 13.

## ***Rehabilitation***

126. Home office, the UK Fact-Finding Team (FFT) highlighted the Commissioner General of Rehabilitation, activities on rehabilitation that in 2009 more than 10,000 LTTE cadres surrendered to the government and were handed over to armed forces to commence rehabilitation in one of the 24 rehabilitation centers. The rehabilitation of these initial 10,000 cadres was completed in 2013. Two thousand (2000) more former cadres were arrested and ordered to undergo rehabilitation by the courts. Over 12,000 ex-cadres have been reintegrated into districts mainly in the North and East of the country, with the last rehabilitee being reintegrated into the society, earlier in 2019.<sup>39</sup>

127. The UK Home Office Fact-finding Mission also noted that according to the Commissioner-General of Rehabilitation, the rehabilitation process involved psychological treatment, education, and therapies, which included treatment for Post-Traumatic Stress Disorder (PTSD). When the rehabilitation process is completed, rehabilitees were supported to get employment with the government offering to pay 50% of the salary of ex-cadres employed in the private sector. Support was also provided to help rehabilitees acquire the means to make livelihoods, such as help to buy fishing equipment, boats, farm animals, and machinery.<sup>40</sup>

## ***Challenges to accountability and reconciliation***

128. Sri Lanka is a developing country, and social and economic issues are not different than any other developing nation.

129. There is significant inequality between urban and rural areas. The urban centers have received economic and social support, and their living status is higher than counterpart rural centers. However, in Sri Lanka, 70% of the population is living in rural areas.<sup>41</sup> This is an added

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<sup>39</sup> Home Office United Kingdom (2020 January) *Report of a Home Office fact-finding mission to Sri Lanka* [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/859277/Sri\\_Lanka\\_FFM\\_report\\_2020.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/859277/Sri_Lanka_FFM_report_2020.pdf) p. 15.

<sup>40</sup> Home Office United Kingdom (2020 January) *Report of a Home Office fact-finding mission to Sri Lanka* [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/859277/Sri\\_Lanka\\_FFM\\_report\\_2020.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/859277/Sri_Lanka_FFM_report_2020.pdf) p. 16.

<sup>41</sup> Central Bank of Sri Lanka (2020). Economic and Social Statistics of Sri Lanka. <https://www.cbsl.gov.lk/en/publications/other-publications/statistical-publications> (accessed on December 12, 2020)

burden on delivering social and economic programs. This disparity is no different in all ethnic communities.

130. Sri Lanka has suffered severe damage to its social, political, and economic development due to the LTTE's three-decade-long insurgency, which cannot be recovered overnight.

131. The LTTE and proxy organizations of the LTTE are continually attempting to destabilize Sri Lanka. After being defeated militarily in May 2009, they have been heavily involved in a misinformation campaign. It harms reconciliation.

132. Economically active youth and adults experience numerous challenges due to the lack of good employment opportunities in conflict-affected areas or insufficient livelihood support programs.<sup>42</sup>

133. Many of them in the Tamil diaspora in western countries left Sri Lanka for economic reasons and took full advantage of generous asylum programs, especially in Canada and the UK. However, there are thousands of Tamil asylum applications rejected or pending. Therefore, they consider a sense of peace and stability in Sri Lanka as a threat to their asylum applications. They continually campaign against Sri Lanka. Tamil Eelam or separate state ideology poses unprecedented challenges for the reconciliation process.

134. LTTE has attempted on fourteen (14) occasions to revive its violent campaign after being defeated militarily in May 2009. The LTTE agents living overseas, are continually trying to recruit Tamil youth, providing them with a short-term economic benefit.<sup>43</sup>

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<sup>42</sup> Dharmawardhane, I. (2013). Sri Lanka's Post-Conflict Strategy: Restorative Justice for Rebels and Rebuilding of Conflict-affected Communities. *Perspectives on Terrorism*. 07 (06), 27-57. (page 40)

<sup>43</sup> Security in North-East tightened after unearthing assassination plot (2020 March 07). *Daily Mirror*. [http://www.dailymirror.lk/breaking\\_news/Security-in-North-East-tightened-after-unearthing-assassination-plot/108-184488](http://www.dailymirror.lk/breaking_news/Security-in-North-East-tightened-after-unearthing-assassination-plot/108-184488)

## PART VII

### SRI LANKA'S APPROACH LED BY FORMER HEAD OF STATE MR. GOTABAYA RAJAPAKSA

135. In the modern world, International Affairs and Human Rights have to be balanced to mitigate International Humanitarian Law and International Human Rights Law issues. The OISL report completely ignored evolving legal principles and adhered to the traditional (old school) approach.

136. The OISL investigation failed to address "responsible command." The OISL report completely ignored the legal classification of the conflict between the LTTE and GoSL. Those are fatal to its recommendations and administration of justice.

137. A report of the Office of the United Nations High Commissioner for Human Rights- Promoting reconciliation, accountability, and human rights in Sri Lanka, A/HRC/30/61, recommends ending impunity for Sri Lanka Armed Forces and holding to account for surviving LTTE members (part VIII, para 86). So, the "holding to account" for surviving members means punishing any surviving LTTE cadre.

138. The OISL Recommendation "holding account" for surviving members of LTTE must be rejected. Implementation of such a recommendation is harmful to the administration of justice

139. Further, the OISL committee acted beyond its mandate.

140. In the recent presidential election in Sri Lanka, Gotabaya Rajapaksa won more than 60% of the popular votes and also won at the parliamentary polls securing a two-thirds (2/3) majority.

141. The people of Sri Lanka overwhelmingly rejected UNHRC resolutions, 30/1, 34/1, 40/1 against Sri Lanka.

142. The UNHRC should not interfere with the affairs of the democratically elected government of Sri Lanka in a manner that contravenes the democratic will of the majority of the people that including all ethnic groups, but its recommendation should be to strengthen reconciliation and Human Rights.

143. By virtue of the foregoing and for all of the reasons set out above, we propose that the OISL recommendations are dismissed since they are fatal to the administration of justice.

144. Recommendations of the OISL and report on Sri Lanka A/HRC/30/61 are instrumental in Resolution 30/1 (October 1, 2015), and subsequent resolutions 34/1 (April 3, 2017) and 40/1 (April 4, 2019) adopted by the Human Rights Council.

145. Therefore, it is reasonable and legitimate to withdraw resolutions 30/1, 34/1 and 40/1 resolution against Sri Lanka.

### ***Rationale***

146. We have rejected both the Panel of the Expert report and the OISL report, including the recommendations which are fundamental to the International Truth and Justice project submission. We found that both reports were prejudiced and assumed Human Rights violations by Sri Lanka's Armed Forces and the leadership of the country.

147. We have also confirmed that the LTTE and proxy organizations had a propaganda campaign against Sri Lanka to discredit the Armed Forces. The LTTE sympathizers completely ignored atrocities committed by the LTTE throughout the 30 years of the civil war.

148. Our research also found LTTE propaganda tools utilized for its terror campaign and post-conflict situation. We can summarize their campaign as follows:

- Tamils are the innocent victims of a government dominated by the Sinhalese
- Sri Lankan Tamils living in the North and East, constituting 5% of the population, are subjected to constant discrimination and military oppression.
- Tamils can never peacefully coexist with the Sinhalese in a single state
- There can be no peace in Sri Lanka until the Tamils, led by the LTTE, are granted their homeland<sup>44, 45</sup>

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<sup>44</sup> Anthony Davis, "Tiger International," *Asiaweek*, 26/11/96.

<sup>45</sup> Chalk, P. (2000). Liberation Tigers of Tamil Eelam's (LTTE) International Organization

149. Our research indicates that LTTE Tamil terrorism started not as a result of discriminatory practices of the majority. Tamils enjoyed a higher percentage of government jobs, university admissions, and many other facilities than the ethnic proportion.

150. Our research found that the LTTE is a criminal organization that later converted to a political campaign to create a separate Tamil state in Sri Lanka. It has become a lucrative business of drug trafficking, weapons, and human smuggling for many of them associated with the LTTE.

151. We have also noted that 58% of Tamils live in the southern part of Sri Lanka peacefully, with the majority Sinhalese.

152. Our research also found that every Sri Lankan parliament session from 1947 has reasonable Tamil representation compared to the ethnic proportion, and lawmakers had the ability to raise their concerns through a democratic process.

153. We have also considered Resolution 74/194 on "Measures to eliminate International Terrorism," adopted on December 18, 2019, at the 74<sup>th</sup> session of the United National General Assembly. A report on Sri Lanka states, Revamping the LTTE - Although the Liberation Tigers of Tamil Eelam (LTTE) was militarily defeated in 2009, the terrorist organization's overseas networks including trained cadres have committed atrocities, and its financial links remain intact. A series of discoveries of weapons and arms caches and assassination attempts against Tamil political leaders indicate attempts to revive the organization's terrorist activities.<sup>46</sup>

154. We also acknowledge that the military aim was to defeat the LTTE. In the absence of their surrender, this meant killing or capturing their cadres/leaders and seizing their strongholds, even when they were located in areas populated by civilians.

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and Operations - A Preliminary Analysis, Canadian Security Intelligence Service (CISIS), Commentary 77. Available on [https://fas.org/irp/world/para/docs/com77e.htm#N\\_1\\_](https://fas.org/irp/world/para/docs/com77e.htm#N_1_) (Accessed on November 25, 2020)

<sup>46</sup> This report is submitted pursuant to the request of the Office of Legal Affairs of the United Nations (UN) with respect to UNGA Resolution 74/194 of 18 December 2019, by which member States were requested to provide data on agreements and other aspects undertaken to prevent and fight the threat to international peace and security as a result of terrorist activities.

155. We also recognized that the last phase of the conflict was part of a clear and understandable mission to target, capture, or kill Prabhakaran, the LTTE leader. He was a legitimate military target, like Saddam Hussein (Iraq) or Osama bin Laden (Afghanistan, killed in Pakistan).

156. We have also carefully reviewed all evidence available to us. We have found that Sri Lanka's army operations, in broad terms, were proportionate to the circumstances.

157. We also found nexus between LTTE's willingness and sacrifice of their civilians at the conflict's last phase. It has been acknowledged by many.<sup>47</sup>

158. We have also noted no military or political advantage to GoSL in killing civilians or shelling hospitals indiscriminately. But from the LTTE's perspective, the killing of civilians was an acknowledged part of their strategy.

## ACCOUNTABILITY

### *Retributive justice*

159. One of the main arguments favoring requiring prosecutions is that justice is an essential step to attaining peace.<sup>48</sup>

160. In our recent memory Iraqi Special Tribunal to Try Crimes Against Humanity, an UN-sponsored treaty-based court known as the Special Court for Sierra Leone,<sup>49</sup> was established to address alleged crimes. However, both courts conducted a few trials and no peace was achieved.

161. Former High Commissioner for Human Rights, Louise Arbour, has noted that matters in Libya and Darfur, even though it has been forwarded to the International Criminal Court by the

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<sup>47</sup> US State Department Report, 2009. p24.

<sup>48</sup> ICC Prosecutor Fatou Bensouda, *Statement to the United Nations Security Council on the Subject of 'Working Methods of the Security Council'*, ICC, 23 October 2014, < [http://www.icc-cpi.int/en\\_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/reports%20and%20statements/statement/Documents/Prosecutor%27s%20Statement\\_UNSC\\_Working%20Methods.pdf](http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/reports%20and%20statements/statement/Documents/Prosecutor%27s%20Statement_UNSC_Working%20Methods.pdf) >.

<sup>49</sup> Agreement between the United Nations and the Government of Sierra Leone and Statute of the Special Court for Sierra Leone, 16 January 2002.

Security Council, the process has contributed very little to peace and reconciliation in their respective regions.<sup>50</sup>

162. The armed conflict between the LTTE and GoSL ended on May 18, 2009. Reconstructions of alleged incidents and verifying the accuracy of evidence and credibility of witnesses, eleven (11) years after the event, have become challenging tasks. In our view, it is not practical at all. Our research also confirmed that GoSL security forces, in broad terms, acted proportionately in all circumstances.

163. Therefore, prosecution of GoSL Armed Forces and officials will have no success; even if special courts had been established. Such prosecutions, do also not contribute to achieving peace and reconciliation.

164. The OISL report recommends adopting specific legislation establishing an *ad hoc* hybrid special court, integrating international judges, prosecutors, lawyers, and investigators rejected by Sri Lankans. The current administration has secured a two-thirds (2/3) majority in the parliament, and former defense secretary Gotabaya Rajapaksa who led the war against LTTE won the presidential election with 60% popular votes. Establishing an *ad hoc* hybrid special court required constitutional reform, but Sri Lankans have rejected the recommendation and any form of foreign interference in domestic affairs.

### ***Restorative Justice***

165. It is important to note that over 97% of LTTE cadre, including their Leader Prabhakaran, belonged to the so-called lower caste. The majority of Tamils belonging to elite castes were not joined with LTTE and used the ethnic conflict to leave Sri Lanka and have claimed asylum in Western countries.<sup>51</sup> The population statistics revealed that 58% of Tamils live in the Southern part of Sri Lanka. Therefore, Restorative Justice is a popular approach among LTTE cadres and their surviving parents and relatives.

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<sup>50</sup> Michael P. Scharf, 'Swapping Amnesty for Peace: Was There a Duty to Prosecute International Crimes in Haiti?', (1996) 31 *Texas International Law Journal*, 1, 6, p. 8.

<sup>51</sup> Balasooriya, BCAJ (2013). Issues on own backyard: caste based socio-economic inequalities as "unseen hurdles" in post-conflict Northern Sri Lanka. *Journal of International Development and corporation*. 19 (3), pp 15-29.

166. Restorative justice for former LTTE combatants involved in the rehabilitation, reinsertion, and reintegration of 11,481 former LTTE combatants, including 594 child soldiers (January 2013). This figure includes 10,329 of the approximately 12,000 LTTE members who surrendered or were detained at the end of the conflict and were rehabilitated and reintegrated into society by October 2011.<sup>52</sup>

167. GoSL has opted-out of prosecution of LTTE cadre. Sri Lankans were able to identify members of the LTTE as victims of radicalization. It was also well-known that the LTTE propagated what many considered to be misinformation among the Tamil community in the North and East of Sri Lanka and among the Tamil diaspora living abroad.<sup>53</sup>

168. Sri Lanka is a nation that suffered severe damage to its social, political, and economic development due to the LTTE's decades-long insurgency.

169. However, Presidential Amnesty issued in support of restorative justice for LTTE members at the end of the conflict, which directly promotes reconciliation, stands in opposition to retributive justice, which seeks to punish individuals for their wrongdoings through the judicial and prison systems.<sup>54</sup>

170. Therefore, we reject the OISL recommendations for achieving peace and accountability and, any form of a mechanism by prosecuting officials, and members of Sri Lanka's Armed Forces.

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<sup>52</sup> Dharmawardhane, I. (2013). Sri Lanka's Post-Conflict Strategy: Restorative Justice for Rebels and Rebuilding of Conflict-affected Communities. *Perspectives on Terrorism*. 07 (06), 27-57. (page 34)

## PART VIII

### INTERNATIONAL TRUTH AND JUSTICE PROJECT, A POLITICAL PROJECT THAT CONCEALED FINDINGS OF THE OISL AND PoE REPORTS

171. A panel of the expert report and OISL Report identified LTTE atrocities and none of the acts were not considered by the so-called human rights defender ITJP. It raised “reasonable grounds to believe” whether the ITJP is a Pro-LTTE project.

172. OHCHR Investigation on Sri Lanka (OISL)<sup>55</sup>, report para 5 states:

"It is important at the outset to stress that the OISL conducted a human rights investigation, not a criminal investigation"<sup>56</sup>

173. Similarly, OISL report para 33 states:

"OISL's mandate was to carry out a human rights investigation. As this was not a criminal investigation"

174. Also, OISL report used "reasonable ground to believe"<sup>57</sup> as a standard of proof even though to prove criminality requires “beyond reasonable doubt”. However, ITJP attempts to establish criminality against Sri Lankan government and former head of state of Sri Lanka Gotabaya Rajapaksa using OISL report<sup>58</sup> have failed.

175. OISL report para 62 states: the LTTE stepped up a new campaign of violence, particularly in the form of roadside claymore mine attacks, which increasingly affected Tamil

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<sup>55</sup> **Note:** A similar report has been published by the Panel of Experts (POE). The report is not a UN report but a prepared committee appointed by the high commissioner of the UNHRC. Refer Appendix “A”

<sup>56</sup> United Nations, Human Rights Council, “Report of the OHCHR Investigation on Sri Lanka (OISL)” 13th Sess, Agenda Item 2 (16 September 2015),

<sup>57</sup> *Supra* note 56 para 33

<sup>58</sup> **Note:** It should be noted that international courts and tribunals have confirmed that the reasonable basis to believe standard – if that is what the OISL panel had in mind – is the lowest evidentiary standard of proof. The standard does, nevertheless, require that there exists a proper foundation of identifiable evidence on which to form a reasonable belief that crimes have been committed. It allows for, and expects, an ability on the part of anyone applying the standard to be able to articulate why the standard has been met. That ability is not revealed by the OISL panel where it asks its readers to take its analysis of evidence – and its partition of primary from secondary/corroborative evidence – entirely on individualized opinions.

civilians, many of them children, although the security forces may have been the primary target.<sup>59</sup>

176. Further, it states in para 63 that targeted killings between the LTTE, rival paramilitary groups, and the Sri Lankan military intelligence operatives also reached new levels, including against prominent Tamil members of parliament members and journalists.<sup>60</sup>

177. Also, the OISL report states that LTTE military installments were located in the vicinity of the civilian population.<sup>61</sup>

178. OISL report paras 150 – 169 described LTTE as a fully pledged well organized armed terrorist group that has recruited more than **30,000 Tamil civilians** as its fighting force.<sup>62</sup> In addition, LTTE has abducted Tamil civilians, specifically youth.

179. OISL report) para 638 states: LTTE has abducted **13,378 Tamil civilians**.<sup>63</sup>

180. The LTTE forcibly and arbitrarily took young males and females to serve with the LTTE. In addition, they introduced a de facto one-person-per-family policy whereby each family within the area it controlled had to contribute one member.<sup>64</sup> During the years before the final phase of the conflict, Tamil civilians were abducted from their homes, temples, churches, schools, places of work, and at LTTE checkpoints.<sup>65</sup>

181. OISL report para 636 – 655 explains patterns of abductions and forced recruitment by the LTTE Tamil terrorist group.<sup>66</sup>

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<sup>59</sup> *Supra* note 56 para 62.

<sup>60</sup> *Supra* note 56 para 63.

<sup>61</sup> *Supra* note 56 para 65.

<sup>62</sup> *Supra* note 56 para 150-169.

<sup>63</sup> *Supra* note 56 para 638.

<sup>64</sup> *Supra* note 56 para 640.

<sup>65</sup> *Supra* note 56 para 641.

<sup>66</sup> *Supra* note 56 paras 636 – 655.

182. OISL report para 663 states: the LTTE recruited and used thousands of Tamil children throughout the armed conflict.<sup>67</sup>

183. OISL para 673 – 700 explains LTTE recruitment and the use of Tamil children, recruitment processes, use of Tamil children in hostilities by the LTTE.<sup>68</sup>

184. OISL report para 759 noted that the Sri Lankan government had informed civilians of the creation of the No Fire Zones (NFZ), encouraging people to move to these areas where their security would be provided for, through leaflets that were dropped in the conflict zone, and messages conveyed through loudhailers.

185. OISL report para 913 stated that Tamils felt they could not leave because they had a family member or relative with the LTTE – including those who had been forcibly recruited.<sup>69</sup>

186. OISL report alleged violations under International Humanitarian Law and International Human Rights Law. A Factual Appraisal of the OISL report (FAOISL) has been prepared by the Federation of National Organizations, The Global Sri Lanka Forum, Sri Lanka, and the UK-based Human Rights organizations. The report has been submitted to UNHRC and has also received acknowledgment. I attached the report hereto as **Appendix “E”**.

187. In the FAOISL report, chapter two has provided a rebuttal to allegations as set out the impact of hostilities on civilians and civilian objects (page 12-31), denial of humanitarian assistance (page 31-40), unlawful killings (page 31-40), violations related to deprivation of liberty (page 49-61), enforced disappearance (Page 61 – 68), torture (page 68-73), sexual and gender-based violence (Page 74 – 78).

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<sup>67</sup> *Supra* note 56 para 663.

<sup>68</sup> *Supra* note 56 paras 673 – 700.

<sup>69</sup> *Supra* note 56 para 913.

### **Panel of Expert (POE) Report**

188. Panel of Expert (POE) report para 422 identified the credible allegations involving the conduct of LTTE associated with the final stages of the war. It reveals six core categories of serious violations:

- (i) using Tamil civilians as a human buffer;
- (ii) killing Tamil civilians attempting to flee LTTE control;
- (iii) using military equipment in the proximity of Tamil civilians;
- (iv) forced recruitment of Tamil children;
- (v) forced labour; and
- (vi) killing of Tamil civilians through suicide attacks.<sup>70</sup>

189. Further, I am attaching Sir Geoffrey Nice QC, and Rodney Dixon QC's review on the Report of the Secretary-General's Panel of Experts on Accountability in Sri Lanka marked as **Appendix “F”** to this report.

190. Both experts identified shortcomings of the Panel's work when measured against well-established legal standards for assessing the evidence. They state: “The absence of identified and verified primary sources of evidence and information, susceptible to rigorous analysis, is a clear and substantial gap in the Panel's workings and weaknesses. It dilutes, undermines, and finally invalidates the Panel’s conclusions and recommendations.”<sup>71</sup>

191. Most importantly, POE Report and OISL report provides substantial evidence/facts Liberation Tigers of Tamil Eelam have caused massive destruction to Tamils in Sri Lanka. As a result of LTTE Tamil terrorism, tens of thousands of Tamil civilians' lives were lost, including Tamil politicians, Tamil intellectuals, and Tamil children. LTTE also used civilians as human shields, recruited Tamil child soldiers. They are crimes against humanity committed by the LTTE against Tamils.

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<sup>70</sup> Supra note 55 para 422.

<sup>71</sup> Review of POE panel report - Exhibit F para 79

192. The government of Sri Lanka has acted promptly and fulfilled the constitutional guarantee to the best of its ability to protect all citizens in the country from LTTE Tamil terrorism. LTTE Tamil terrorism was defeated on May 18, 2009, by eliminating the entire senior leadership. All Sri Lankans are now enjoying peace and living in harmony.

193. It is “reasonable to believe” some in the Tamil diaspora Including so-called human rights defender International Truth and Justice Project promoting LTTE ideology has been the most vital obstacle to peace and reconciliation in Sri Lanka.

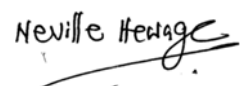
## **CONCLUSION**

194. International Truth and Justice project’s request has no legal basis to impose universal jurisdiction against the former head of state, Sri Lanka Mr. Gotabaya Rajapaksa.

195. Finally, we submit that International Truth and Justice project has failed to prove facts against former Sri Lanka’s head of the state Mr. Gotabaya Rajapaksa to exercise Universal Jurisdiction against him in Singapore.

196. Therefore, by virtue of the foregoing and for all of the reasons set out above International Truth and Justice Project’s request to enforce universal jurisdiction against former Sri Lanka’s Head of the State Mr. Gotabaya Rajapaksa should be dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.



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