The UN's Sri Lanka Strategy and Its Implications for International Law

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This paper is an update to a previous paper of mine published in *Foreign Policy Journal* in March 2013, titled, "The illegality of UN Secretary General Ban Ki Moon's approach to Sri Lanka".[1] In that paper, I argued that the Secretary General had exceeded his authority in commissioning a certain report[2] on Sri Lanka, which report was later submitted indirectly to the United Nations Human Rights Council (UNHRC) and served as the basis for two resolutions passed against this country by the Council, calling among other things for international investigations into alleged war crimes committed during the last phases of the war.

I recommended that one of the principal remedies now open to Sri Lanka was to petition the International Court of Justice (ICJ) for an Advisory Opinion on the legality of the aforementioned report. If the court deemed the report illegal, all subsequent measures based on that report, including the two aforementioned resolutions, would become illegal, and of no effect in law. I provide this update now, because there has been a change in strategy on the part of Sri Lanka's critics at the UN, which I believe makes it more imperative than ever to file the aforementioned lawsuit.

The change in strategy is this: previously, the "accountability" campaign was primarily and principally based on allegations of war crimes contained in the Secretary General's report; since September 2013, it is based on the purported *reneging* by Sri Lanka on promises to investigate the allegations made in the Secretary General's report, along with certain allegations highlighted in the Lessons Learnt and Reconciliation Commission (LLRC)[3] report, as well as two videos produced under the auspices of a private TV station (Channel 4) in England.

I believe the advantage to Sri Lanka's critics in this change is this: If, as I suggest, the primary and principal basis for the accountability campaign right up to March 2013 is the Secretary General's report, it means that the campaign is on fundamentally shaky ground. The March 2013 resolution, meanwhile, mandates that the High Commissioner submit a written report on Sri Lanka to the Council in March 2014, to be followed by a general discussion, and a possible vote on yet another resolution. Sri Lanka's critics are now in a position to pass a resolution that authorizes war crimes investigations against Sri Lanka, if they can muster enough *votes*.

The key, however, is that they can't make explicit references to the Secretary General's report in any of the official documents or discussions that precede the resolution, because it would "taint" the resolution, and make it easier for Sri Lanka to mount legal challenges to it. The change in strategy makes it possible for them to do this. It shifts the burden onto Sri Lanka to justify or defend why it didn't investigate the various allegations against it and allows the critics, in the discussions that precede any future resolution authorizing war crimes investigations, to focus all attention on this country's *inadequacies* in pursuing allegations, rather than on whether those allegations were worth pursuing to begin with. In other words, it puts the critics in a position to basically indict Sri Lanka for war crimes, without giving this country a chance or an official forum to challenge the *credibility* of the allegations being leveled against it.

The purpose of this paper is to acquaint members of the public, particularly international readers, with this change in strategy, and to draw out its implications. The paper consists of three parts.

In Part One, I repeat my argument from the previous paper about the weaknesses of the Secretary General's report; In Part Two, I establish that the Secretary General's report was in fact the primary and principal basis for the accountability campaign prior to the change in strategy; and in Part Three, I explain the change in strategy, and discuss its implications.

Though the paper is intended primarily for a Sri Lankan audience, it is relevant to a wider international audience also. The remedy that I am suggesting—i.e. a country filing for an advisory opinion of the International Court of Justice—has never been attempted before. If successful, it would lead to an advance in international law, as well as an increase in the power of the ICJ, two things sorely needed today.

In this regard, it should be noted that just prior to the March 2013 resolution, a group of fourteen nations including Russia, China, Venezuela, and Iran, made a joint statement expressing their dismay and frustration at what was being done to this country. In particular, they objected to a report that had been issued by the High Commissioner's office in February 2013 to guide the discussions that were to be held on Sri Lanka during the March sessions. Among other things, they said,

> We note that the objective of resolution 19/2 was to mandate the OHCHR to provide, in consultation with and the concurrence of the government of Sri Lanka, advice and technical assistance on implementing the said resolution….We are of the view that in the report A/HRC/22/38 the High Commissioner has clearly exceeded her mandate of reporting on the provision of assistance, by making substantive recommendations and pronouncements. These recommendations are arbitrary, intrusive and of a political nature.[4]

My point is that, if in the future the sort of treatment that Sri Lanka has had to endure is meted out to another country (as no doubt will come to pass sooner or later), that country will also have little protection beyond the sympathy of its friends, and perhaps expressions of frustration and dismay, as above. If my remedy is proved valid, it will give teeth to the International Court of Justice to hold the UN accountable, and will be a powerful tool in the hands of the friends of international law, along with those nations that might become the focus of the UN's undue "attentions" in future years, to resist those impositions, and in the process also help and preserve the norms and institutes of international law.

Part One: The Secretary General's report and its main weaknesses

With respect to the main weaknesses of the Secretary General's report, I believe I have made a reasonable and substantial case in my previous paper, "The illegality of UN Secretary General Ban Ki Moon's approach to Sri Lanka," and, in the interests of time, will refer the reader to that paper. In brief, I made two points in that paper: first, that the report failed to make a prima facie case with regard to any of the allegations of violations of humanitarian law it levels at the Government; second, that the Secretary General exceeded his authority in commissioning the report, and hence that the report was illegal.

In my view, the report's factual weaknesses make it a thoroughly unsuitable document on which to base any further actions with respect to the accountability issue. The report's illegality, meanwhile, ensures that it not only cannot be used to sustain the accountability campaign, but any action or measure based on it also becomes illegal. As I mentioned earlier, I refer the reader to that previous paper, if he or she is interested in the details of the argument.

The reader, however, need not take just my word that the Secretary General's report is a thoroughly compromised document. When the Secretary General first announced that he would commission the report, international law experts and senior diplomats in a number of prominent countries expressed grave concerns about the dangerous precedent the Secretary General was about to set.

Russia, through its UN Ambassador, even raised objections in the Security Council. A leading Sri Lankan newspaper, the *Sunday Times*, in an interview with then Russian Ambassador to Sri Lanka Vladimir P. Mikaylov, asked the Ambassador about the aforementioned objections. The interviewer asked him point blank, "On what grounds were the objections made?" The Ambassador replied:

> On the grounds that it was not a UN report. On the grounds that it was not done in accordance with the regulations and the procedures of the UN. From the very beginning it was told that the report was purely for the Secretary General. So if it was for the Secretary General why did they have to publish it?[5]

I believe that, with respect to the first task, i.e., establishing that the Secretary General's report is a liability, not much more need be said.

Part Two: Was the Secretary General's report the primary and principal basis for the accountability campaign prior to the change in strategy?

My contention is that the Secretary General's Report was the primary and principal basis for the accountability campaign right up to the second Resolution in March 2013. How can one prove this? I believe a reasonable way to do it is to look at the report to the Council made by the High Commissioner for Human Rights, Navi Pillay in February 2013. This report set the parameters for the discussions on Sri Lanka that were to take place during the March 2013 sessions, and its recommendations were all adopted, with minor changes, in the resolution that was subsequently passed at those sessions.

It is reasonable to presume that this report reflects the UN's best assessment, as of February 2013, on the topic of possible violations of humanitarian law by the Government. It is equally reasonable to presume that it would contain citations to *all* of the principal sources of such allegations on which the UN was relying on at the time to make its case that international investigations might be necessary.

The report mentions three sources in support of the call for independent investigations into alleged war crimes: the Secretary General's Report, the LLRC report, and the Channel 4 videos. In my view, the significance of the LLRC report and the Channel 4 videos as possible support for the demand for international investigations reduces considerably, for the following reasons. The High Commissioner is trying to argue that that there ought to be international war crimes investigations because the Government has failed to follow-up on the LLRC's recommendations to further investigate certain incidents that had been brought to its (the LLRC's) attention.

The LLRC report was released in November 2011. The High Commissioner's report was released in February 2013. There is roughly a year and three months between the two events. The LLRC does not set a time frame for the Government to complete the investigations that are recommended. There is, meanwhile, explicit admission in the High Commissioner's report that, at the time of writing, the Government had informed the High Commissioner that inquiries were underway with respect to the incidents the LLRC had recommended be further investigated.

Under the above circumstances, in my view, it is unreasonable for the High Commissioner to say she is dissatisfied with the pace at which the inquiries are the being conducted, or to question the quality or credibility of those inquiries, and advocate for international investigations, unless she has express evidence of mala fides on the part of the Government. In that case, she has to present such evidence to the Government, and give the latter a chance to respond before pushing for international investigations.

My point is that in the lack of any attempt to establish, say, that the Government is deliberately stalling or dragging its feet with respect to inquiries in question, the High Commissioner's personal opinion about the quality or the pace of the inquiries in question does not constitute a substantive basis for a demand for international investigations.[6] To turn to the Channel 4 videos, meanwhile, the High Commissioner's report mentions these only in connection with the LLRC's recommendations that those videos be further investigated. Therefore, they cannot be used as a basis for calls for international investigations if the LLRC report cannot be used for the same purpose.

Of course, it is possible for the High Commissioner (or anyone else) to pick incidents mentioned in the LLRC report or depicted in the Channel 4 videos and demand that they be further investigated. But, in that case, whoever is making such a demand has to specify the incidents they want further investigated and adduce some reasons as to why they feel the incidents in question reveal violations of international humanitarian law attributable to the Government (as opposed, say, to individual soldiers), and level the charges directly at the Government.

My point is that, in the lack of any such attempt to make an independent case with respect to incidents mentioned in the LLRC report, or the Channel 4 video, or any other source of allegations, the primary and principal source of allegations of violations of humanitarian law as of March 2013 was the Secretary General's Report. I believe this argument is strengthened considerably if it can be shown that where the LLRC made recommendations for further investigations into certain incidents, it was *primarily*, though perhaps not exclusively, for purposes of finding out if violations of law by individual soldiers had occurred, , and if so to prosecute and punish the offenders, and not to find out if violations of law attributable to the Government, i.e., violations that in one way or another can be tied to persons higher up in the chain of command, including ultimately the President, had occurred.

The reader will agree that the above argument could be satisfactorily established if the following five matters were established: one, that the High Commissioner's report explicitly calls for international investigations, and this call is repeated in the March 2013 resolution; two, that the High Commissioner's report does in fact explicitly cite the Secretary General's report, ostensibly for the purpose of demanding international war crimes investigations against Sri Lanka; three, that the Secretary General's report did in fact try to make a case for war crimes that could be attributed to the Government..

Four, that the High Commissioner's report explicitly cites the LLRC report, and through that the Channel 4 videos, and that along with the references to the LLRC and the Channel 4 videos is also an explicit admission that the High Commissioner was aware that the Government had begun inquiries into the incidents that the LLRC had recommended be further investigated; and finally, that the LLRC's recommendations for further investigations, whether of certain incidents brought to its attention in the course of testimony led before it, or depicted in the Channel 4 videos, was primarily for purposes of finding out if individual soldiers had violated the law, and not to see if violations of law attributable to the Government had occurred. I shall take each matter in turn.

i) The High Commissioner's report explicitly calls for international investigations, and this call is repeated in the March 2013 resolution

The High Commissioner in her report explicitly calls for international investigations into alleged violations of humanitarian law committed during the last phases of the war. The final chapter of the report is titled, "Conclusions and Recommendations," and the penultimate paragraph of this chapter reads as follows,

> The High Commissioner noted the views expressed by many stakeholders in Sri Lanka including prominent community leaders, that the attention paid by the Human Rights Council to issues of accountability and reconciliation in Sri Lanka had helped to create space for debate, and catalyzed positive steps forward, however limited at this stage. The High Commissioner encourages the Council to continue its engagement and build on this momentum. In this regard, she re-affirms her long-standing call for an independent and credible international investigation into alleged violations of international human rights and humanitarian law, which could also monitor any domestic accountability process.[7]

I believe there is no question that in the last sentence above, the High Commissioner is calling for international investigations.

To turn to the March 2013 resolution, here's the relevant clause in the resolution, which repeats the High Commissioner's call quoted above, almost word for word:

> Noting the High Commissioner's call for an independent and credible international investigation into alleged violations of international human rights law and international humanitarian law.[8]

To repeat, then, the call for international investigations has been explicitly inserted into the text of the resolution itself.

To return to the High Commissioner's report, the relevant question for our purposes is, "What is the source of evidence or allegations on which the High Commissioner relies to reach her conclusion that international investigations are necessary?" As I indicated earlier, the report cites three sources in relation to the issue of alleged violations of humanitarian law: the Secretary General's report, the LLRC report, and the Channel 4 videos. Let us look at how each of these is handled.

ii) The place of the Secretary General's report in the High Commissioner's report

The High Commissioner's report is titled, "Report of the Office of the United Nations High Commissioner of Human Rights on advice and technical assistance for the Government of Sri Lanka on promoting reconciliation and accountability in Sri Lanka." The Secretary General's report is mentioned in the very first page of this report (in paragraph 2 of the introduction) as follows:

> In June 2010, the Secretary General appointed the Panel of Experts on Accountability in Sri Lanka and offered it as a resource to the Government, and particularly to the Lessons Learnt and Reconciliation Commission. The Panel, which submitted its report to the Secretary General in April 2011, found credible allegations of potential serious violations of international law committed by the

> Government of Sri Lanka and by the LTTE. The Government of Sri Lanka has never afforded any credence or legitimacy to the report of the Panel.[9]

What is the most reasonable explanation one can imagine as to why the above paragraph is inserted in as prominent a place as the second paragraph of a document whose avowed purpose, if we are to go by its title, is to advice and assist the Government with "reconciliation and accountability?"

I believe the only reasonable explanation is that the paragraph is where it is in order to make something like the following argument: The Panel of Experts have concluded that there are credible allegations of war crimes having been committed by the Government; the Government has known about those concerns at least since April 2011; the Government has taken no action to address those concerns; therefore, it may be necessary to initiate international investigations (if the Government persists in its recalcitrance).

This interpretation is strengthened if one considers the suggestion made in the passage that the Secretary General had offered his panel of experts "as a resource to the Government," as early as June 2010. In other words, the suggestion is that the Government was aware of, or could have made itself aware of, the Panel's concerns for nearly an year before the final report was published, and failed to do so: the implication is that in all that time the Government did nothing to refute the allegations in question, (meaning that the allegations are probably true) and therefore it is all the more necessary for the international community to look into them.

In sum, then, the Secretary General's report is cited explicitly in the High Commissioner's report, and it is done specifically to insinuate that international war crimes probes may be necessary: in other words, to support the demand for war crimes probes. I'll now turn to the *type* of case the Secretary General's report tries to make with respect to war crimes.

iii) The Secretary General's report tries to make a case against the Government

As I indicated earlier, what the Secretary General's report tries do is to make a case for war crimes against the Government, i.e. a case that could be leveled against the leadership of the State, including the President, senior officials, and commanders who were in overall charge and control of the conduct of the war, rather than rank and file members of the armed forces. In regard to the above, the following two passages, plus what follows, are relevant.

First,

> In its legal assessment, the Panel proceeded from the long-standing premise of international law that during armed conflict such as that in Sri Lanka both international humanitarian law and international human rights law are applicable…. Neither the publicly expressed aims of each side (combating terrorism in the case of the Government, and fighting for a separate homeland, in the case of the LTTE), nor the asymmetrical nature of the tactics employed affect the applicability of international humanitarian and human rights law.[10]

Second,

> Under international law, State responsibility applies only to acts of the State of Sri Lanka. Acts by non-state actors such as paramilitary groups or private citizens who act under the instructions of or are directed or controlled by the State are imputable to the State. Organizational responsibility is a concept that recognizes

> that international humanitarian law also places duties on non-state armed groups, including in this case the LTTE. Individual responsibility concerns whether particular individuals regardless of their affiliation in an armed conflict would be criminally responsible for violations. Criminal responsibility attaches to certain acts, regardless of whether the individual was acting on behalf of the Government or the LTTE (or neither).[11]

Immediately following the above quote one finds a chapter titled, "Alleged violations by the Government of Sri Lanka."[12] Note, the reference there is to the *Government*. The report then enumerates three specific allegations with regard to violations of humanitarian law: killing of civilians through widespread or indiscriminate shelling, the shelling of hospitals and humanitarian objects, and the denial of humanitarian assistance.[13] To repeat, then, those allegations are being leveled against the Government.

It is generally recognized, meanwhile, that in order to attribute war crimes to the Government of a country, it is necessary to make a case for what is often termed "Command Responsibility," i.e. that persons at or near the very top of the chain of command, by willful acts of omission or commission, *sanctioned* or allowed the abuses in question.[14]

To return to the place of the Secretary General's report in the High Commissioner's report, I believe that, given what has just been discussed, the fact that the SG's report is cited explicitly in the HC's report, and also the prominence given the former in the latter, there is no question that the SG's report is cited in order to support a demand for international investigations into offences that could be tied to the Government.

Let's turn to the references in the High Commissioner's report to the LLRC report and the Channel 4 videos.

iv) The High Commissioner's report and its references to the LLRC report and the Channel 4 videos

The references to the LLRC report and the Channel 4 videos occur in two consecutive passages, as follows:

> While the LLRC, in its report, found it difficult to determine the precise circumstances under which incidents involving the loss of civilian lives had occurred, it recommended that the State investigate action by the security forces, which may have led to death and injury to civilians (para 9.9 and 9.37a). It also recommended an independent investigation into allegations of torture and extra-judicial killing arising from video footage broadcast by Channel 4 (para 9.39). The Government assigned these recommendations to the Ministry of Defense, the Ministry of Justice, the Attorney-General's Department and the Presidential Secretariat for implementation. The commission also recommended that an inquiry be conducted into the civilian injuries and deaths resulting from shelling, as well as an examination into the adequacy of medical supplies provided to civilians in conflict areas (para 9.14 and 9.22). These recommendations were not included in the national action plan.
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> In its comments on the present report, the Government stated that the Sri Lanka Army had appointed a court of inquiry to investigate instances of civilian casualties mentioned in the Commission's report and also to investigate the allegations broadcast on Channel 4, irrespective of whether the video footage was

> authentic. According to the Government, as of the time of writing, the court had examined 50 witnesses. It was reportedly investigating more than 50 instances of shelling mentioned in the Commission's report, and would conclude its inquiry by mid-January 2013. It would subsequently investigate the Channel 4 allegations. No further details were provided regarding the composition and terms of reference of the court of inquiry. The High Commissioner is concerned about the transparency, independence and impartiality of this process, as well as for the protection of witnesses and victims.[15]

I believe the basic "argument" the High Commissioner is trying to make in these two passages is this: the LLRC had recommended that the State investigate certain incidents, including incidents depicted in the Channel 4 videos, but the State has dragged its feet with respect to those investigations; therefore, it may be necessary for the international community to initiate investigations.

As I indicated earlier, however, along with the references to the LLRC report and the Channel 4 videos is also an explicit admission that, at the time of writing, the High Commissioner was aware that the Government had initiated inquiries into the matters the LLRC had recommended be further investigated. This is confirmed in the first sentence of the second paragraph quoted above, which says very clearly that the Government had indicated to the High Commissioner that inquiries were underway, i.e. that witnesses had been examined, that more witnesses were scheduled to be examined, and so on.

The High Commissioner says that she has not received adequate information about the ongoing inquiries, and that in any event she has no faith in them, because she has "concerns" about their transparency, independence and impartiality. But, in that case, in my view, the thing for her to do is to raise those concerns at the HRC sessions that were coming up, and give the Government a chance to respond, prior to calling for international investigations.

As it is, in my view, the Government's failures or inadequacies, if any, in following-up on the LLRC's recommendations for further investigations cannot be considered a legal or rational basis on which to ground a demand for international investigations: at any rate, in my view, the Government's failures or inadequacies, if any, were an insubstantial basis for a demand for international investigations at the point in time when the High Commissioner first officially made it, if those failures or inadequacies were the *only* basis for the demand in question.

I shall now turn to the additional argument I made earlier, which I believe strengthens the argument above, namely, that to the extent the LLRC may have recommended investigations, including with respect to the Channel 4 allegations, it was primarily to find out if violations of law attributable to individual soldiers had occurred, and not to find out if violations of law attributable in the final analysis to the Government had occurred.

v) The LLRC's recommendations for further investigations

My contention is that when the LLRC recommended further investigations into certain incidents, including incidents depicted in the Channel 4 videos, it was primarily to find out if violations of law by individual soldiers had occurred,, and if so to prosecute and punish the offenders, rather than to find out if violations of law attributable to the Government had occurred. In fact, in my view, the LLRC is quite emphatic in its conclusion that, at least with respect to allegations of indiscriminate or deliberate killing of civilians, there are no grounds to pursue investigations against the Government. How can one prove this?

In my view, the most reliable way to do it is to quote extensively from the LLRC report itself. Given the constraints of time, I shall limit myself to quoting the following: some portions of the LLRC's general conclusion on the issue of possible violations of humanitarian law, every one of the specific paragraphs referred to in the passages from the High Commissioner's report quoted above, plus one or two other relevant passages. I shall comment briefly on each set of passages as I go along, and then provide a brief analysis and assessment at the end.

First, here's part of the LLRC's general conclusion on the topic of possible violations of humanitarian law:

> On consideration of all facts and circumstances before it, the Commission concludes that the security forces had not deliberately targeted the civilians in the NFZ's[16], although civilian casualties had in fact occurred in the course of crossfire. Further, the LTTE targeting and killing of civilians who attempted to flee the conflict into safe areas, the threat posed by land mines and resulting death and injury to civilians, and the perils inherent in crossing the Nanthi Kandal Lagoon, had all collectively contributed to civilian casualties. It would also be reasonable to conclude that there appears to have been a bona fide expectation that an attack on LTTE gun-positions would make a relevant and proportional contribution to the objective of the military attack involved.
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> Having reached the above conclusions, it is also incumbent on the Commission to consider the question, while there was no deliberate targeting of civilians by the security forces, whether the action of the security forces of returning fire into the NFZ's was excessive in the context of the Principle of Proportionality. Given the complexity of the situation that presented itself as described above, the Commission after most careful consideration of all aspects, is of the view that the security forces were confronted with an unprecedented situation where no other choice was possible and all "feasible precautions" that were practical in the circumstances had been taken.[17]

I believe the main idea one can take from these passages is that, at least with respect to the issue of deliberate killings of civilians, the LLRC's view was that the Government committed no violations of humanitarian law, or, at any rate, that where the security forces conducted military operations in or near civilian areas, it was only after all "feasible precautions" had been taken, and where the attacks, if any, were expected to make a "relevant and proportional" contribution to advance the objectives of the military offensive then underway.

I believe that from the Commission's comments about the Principle of Proportionality, it is also possible to draw an inference about what the Commission's general feelings may have been on the issue of indiscriminate attacks, and whether or not such attacks may also have occurred on the battlefield. By "indiscriminate attacks" what is meant is that the attack does not discriminate between military targets and civilians or civilian objects. Since the Commission indicates that it felt the principle of proportionality was not violated, and also that it felt all "feasible precautions" had been taken when government forces conducted military operations, it is reasonable to say that the Commission felt indiscriminate attacks were not made.

I'll now turn to the specific passages cited by the High Commissioner in support of the contention that the Government's failure to adequately follow-up on the LLRC's recommendations with respect to certain incidents necessitates, in some way, international intercession. I'll start with paragraphs 9.9 and 9.37a, cited by the High Commissioner in regard to a recommendation by the LLRC to investigate instances of death and injury to civilians.

Here's paragraph 9.9:

> The Commission is faced with difficulties in attempting a re-construction of certain incidents involving the loss of civilian lives which have been brought to the attention of the Commission. While the Commission finds it difficult to determine the precise circumstances under which such incidents occurred (as described in Chapter 4, Section iii above, vide paragraphs 4.106, 4.107, 4.109, 4.110 and 4.111) the material nevertheless points towards possible implication of the security forces for the resulting death or injury to civilians, even though this may not have been done with intent to cause harm. In these circumstances, the Commission stresses that there is a duty on the part of the State to ascertain more fully the circumstances under which such incidents could have occurred, and if such incidents disclose wrongful conduct, to prosecute and punish the wrongdoers.[18]

Here, meanwhile is paragraph 9.37a:

> The Commission recommends that action be taken to investigate the specific instances referred to in observation 4.359 VI (a) and (b) and any reported cases of deliberate attack of civilians.[19]

I wish to highlight the following point from the above passages: the Commission's recommendation for further investigations is with respect to seven specific incidences, and not a blanket recommendation to investigate losses of civilian lives during the last phases of the war. In my view, the relevant question for anyone who says that international investigations ought to be initiated if the Government does not follow up on the Commission's recommendations to investigate the above seven incidents is whether, in the Commission's comments on these incidents, the Commission might have felt that these incidents involved violations of international humanitarian law, attributable to the Government.[20]

Do the Commission's discussions or comments on these incidents reveal that the Commission felt they involved violations of humanitarian law attributable to the Government? I shall not tax the reader's patience by quoting each and every one of the paragraphs referred to in passages 9.9 and 9.37a. I shall simply indicate what the incidents are, and make a brief comment on them.

The five incidents mentioned in paragraph 9.9 are as follows: one, an incident reported by a civilian who had been part of a group escaping the fighting in a boat when the Navy allegedly fired on the boat and four passengers were killed[21]; another incident of a similar nature where Navy fire had allegedly killed eight civilians fleeing in a boat[22]; the testimony of a captured LTTE "Intelligence Officer" that he saw the Army preventing civilians from crossing over to Army lines in a place called Mattalan Pakkanai[23]; an incident where army shelling allegedly killed 35-40[24]; and finally, the testimony of a civilian with respect to an incident where 40-45 expectant mothers were killed when they had gone to collect "Triposha" (a nutritional supplement that comes in the form of a milk power) and a shell had fallen on the place where this "Triposha" was being distributed.[25]

The two incidents mentioned in paragraph 9.37a are: first, an incident where a group of security forces personnel had allegedly forced some civilians to retrieve the body of a dead Officer, and a number of the civilians had been killed in crossfire; second, two incidents of Navy fire which had killed some civilians.

When one considers these incidents as a whole, is it possible to say that the Commission would have felt that these incidents revealed offences that could be tied to the State? I don't think so, for the following reason. It seems to me that if one were to make a case with regard to the above incidents that they reveal violations of international humanitarian law attributable to the State, the most likely charges that could be framed are with respect to the categories of deliberate killings, or indiscriminate killings. As we saw in paragraphs 9.6 and 9.7 quoted earlier, however, the Commission's general observation about the possibility of the government engaging in deliberate or indiscriminate killings was that such things did not happen. Therefore, it cannot be that the Commission would have felt, with respect to the specific incidents mentioned above, that they reveal occasions of deliberate killings or indiscriminate killings attributable to the Government.

I shall next turn to paragraph 9.39, (cited by the High Commissioner in regard to a supposed recommendation by the LLRC to investigate the Channel 4 allegations):

> Based on the available material…the Commission wishes to recommend that the Government initiate an independent investigation into the matter to establish the truth or otherwise of the allegations arising from the video footage.[26]

The High Commissioner's report, however, does not mention the paragraph that immediately follows the above passage. Paragraph 9.40 gives the reasons that the LLRC Commission felt the Channel 4 videos ought to be further investigated. It says:

> The Commission considers this course action [i.e. further investigations of the Channel 4 videos] as necessary and urgent for two reasons:
>
> a) If the footage reflects evidence of real incidents of summary execution of persons in captivity and of possible rape victims, it would be necessary to investigate and prosecute offenders as these are clearly illegal acts….Offences if any, of a few cannot be allowed to tarnish the honor of the many who upheld the finest traditions of service
>
> b) If the footage is artificially constructed or the incidents are staged as contended by several experts, the issue becomes even more serious and the need to establish facts of the case equally compelling. The Commission shares some of the significant doubts expressed on the integrity of the video and feels strongly that if that were to be the case, whoever constructed the video and the organization that broadcast it should be held responsible for a serious instance of gross disinformation.[27]

I wish to highlight two points with regard to the above paragraphs. First, it is clear the Commission had serious doubts about the authenticity of the videos. Second, I draw the reader's attention to the Commission's observation, "Offences, if any, of a few cannot be allowed to tarnish the honor of the many who upheld the finest traditions of service."

I have already indicated that in order to make a case for war crimes against the Government of a country, it is necessary to establish a case for "Command Responsibility." If it was the Commission's general view that "the many" in Sri Lanka's armed forces "upheld the finest traditions of service," it is difficult to suppose that the Commission would have felt there was a case to be made for "Command Responsibility" with respect to the offences in question. In my view, the natural inference that flows from the Commission's observation is that even if the

Commission recommended further investigations into the offences in question, it had to be for purposes of attributing *individual* responsibility, and prosecuting individual offenders, and not, say, to level charges against the State.

I shall now turn to paragraphs 9.14 (cited by the High Commissioner in regard to civilian deaths and injuries resulting from "shelling"), and 9.22 (cited by the High Commissioner in regard to the LLRC purported recommendation to investigate the adequacy of medical supplies provided to the civilians in the conflict zone). Paragraph 9.4 says this:

> Although the Commission is not in a position to come to a definitive conclusion in determining responsibility that one party or the other was responsible for the shelling, nevertheless given the number of representations made by civilians that shells had in fact fallen on hospitals causing damage to the hospitals and in some instances loss or injury to civilian lives, consideration should be given to the expeditious grant of appropriate redress to those affected after due inquiry as a humanitarian gesture which would instill confidence on the reconciliation process.[28]

Paragraph 9.22, meanwhile, says this:

> The Commission also recognizes that given the inconclusive nature of the material before it, the issue of medical supplies to civilians in the conflict areas during the final days of the conflict is a matter that requires further examination given the humanitarian considerations involved. Such an examination should take into consideration all relevant factors such as the number of civilians injured, the types of injuries, the number of LTTE cadres injured and treated, and the capacity to treat the injured in the makeshift hospitals, against which the actual supplies could be assessed.[29]

That exhausts the list of paragraphs cited in the High Commissioner's report to make the case that the Government's failure to follow-up on the LLRC's recommendations for further investigations necessitates international investigations. What can one say about the High Commissioner's case? Let's review the passages again briefly.

In passages 9.9 and 9.37a the Commission recommends further investigations with respect to certain specific incidents. As I indicated earlier, if one were to think of possible charges that could be framed with respect to these incidents in terms of international humanitarian law, the most likely charges will have to be indiscriminate killings or deliberate killings.

If, however, one were to consider the LLRC's general conclusion on possible violations of humanitarian law, parts of which I quoted (paragraphs 9.6, 9.7) what the Commission indicates in those passages is that in its view indiscriminate attacks or deliberate attacks did not happen. It is unlikely therefore that the Commission would have felt that indiscriminate or deliberate attacks, attributable to the Government, took place with regard to these particular incidents.

I'll turn next to Paragraph 9.39. Paragraph 9.39 recommends further investigations into the Channel 4 videos, but paragraph 9.40 (which is not cited in the High Commissioner's report) contains a telling remark which reveals something about the Commission's overall assessment about the conduct of Government troops. The Commission's general observation on the videos, to repeat, is that, "Offenses, if any, of a few cannot be allowed to tarnish the honor of the many who upheld the finest traditions of service." In light of this observation, as I pointed out earlier, it is difficult to suppose that the Commission would have felt the offences depicted in

the videos could be used as a basis for a case of "Command Responsibility," which in turn could ground a case for war crimes against the State.

Finally, to turn to paragraphs 9.14 and 9.22, Paragraph 9.14 contains a recommendation that certain inquiries be made into the possible shelling of hospitals. Paragraph 9.22, meanwhile, contains a suggestion that medical supplies sent to the conflict zone during the very last days of the war may have been inadequate, and that it might be a good idea for the Government to look into this. I concede that, at least on the face of it, these two recommendations would involve investigating whether violations of international humanitarian law attributable the State had occurred.

In my view, if we look at the passages as a whole with respect to the High Commissioner's argument that the Government's failures in following-up on the LLRC's recommendations entail the need for international investigations, the most one can say in fairness is that the Government's failures, if any, can be used only as a basis to demand international investigations into shelling of hospitals, the issue of the adequacy of medical supplies to civilians during the final days of the war, and the seven specific incidents of possible indiscriminate and/or deliberate attacks mentioned by the LLRC, and nothing else.

In my view, if we take the High Commissioner's argument at its strongest, she would still have to adduce some evidence *independent* of the LLRC, particularly with respect to the issue of indiscriminate attacks and deliberate attacks, if she wanted such matters covered in the international investigations she had in mind.

Summary

The High Commissioner's report of February 2013 cites three sources in support of the call for international investigations: the Secretary General's report, the LLRC report, and the Channel 4 videos. If we remove the Secretary General's report from consideration for a moment, where does that leave the High Commissioner's overall argument about the need for international investigations? The High Commissioner is saying that the Government's failures and inadequacies in following up on the LLRC's recommendations necessitates international investigations. I have pointed out that the High Commissioner was aware at the time of the writing of her report that the Government had initiated inquiries, as per the LLRC's recommendations. In my view, her argument falls just on that score.

I have also tried to show, however, that even if one gives the High Commissioner the benefit of the doubt and says that the Government's inadequacies in following-up the LLRC's recommendations necessitates international investigations, the best that she could insist on is that investigations be launched into the shelling of hospitals, the issue of medical supplies to civilians during the very last days of the war, and the seven specific incidents mentioned in paragraphs 9.9 and 9.37a, and none others. In short, if the demand for international investigations was a demand to investigate a range of issues broader than the ones specified in the LLRC's recommendations—particularly, for instance, if it was to investigate incidents of indiscriminate or deliberate killings attributable to the Government—it *had* to be based on the Secretary General's report.

The Secretary General's report, as opposed to the LLRC report, levels three clear and unambiguous charges against the Government: indiscriminate shelling of civilians, shelling of hospitals, and depriving the civilians of humanitarian aid; and it adduces what it considers to be extensive "evidence" in support of these charges. More important, it contains a detailed assessment of the relevant law, which in the opinion of the Secretary General's experts makes

the Government ultimately answerable for the offences in question, if in fact those offences were committed. By contrast, the LLRC contains none of these things. The LLRC's discussion of the incidents it wants further investigated is limited to the passages I have quoted. As for the law, LLRC provides no discussion of relevant provisions or principles of humanitarian law that tie the offences in question to the Government..[30]

The Secretary General's report is cited explicitly in the High Commissioner's report. Therefore, in my view,, whether or not one accepts that the Government's failures or inadequacies (as the High Commissioner saw them) are relevant to her demand for international investigations, to the extent there was a case for "accountability" circa March 2013, a case that could be leveled against the Government, the *bulk* of that case derived from the Secretary General's report: as I said at the very beginning, the Secretary General's report was the *primary and principal* basis of the campaign for accountability, as of March 2013.

Part Three: The change in strategy and its implications

I shall now turn to the change in strategy, and its advantage to the various parties pursuing an "accountability" agenda against Sri Lanka. The change in strategy, to repeat, is that since September 2013, the demand for war crimes investigations is being based on the purported reneging by Sri Lanka on promises to investigate the allegations made in the Secretary General's report, along with allegations highlighted in the LLRC report and the Channel 4 videos. This change in strategy is revealed in the High Commissioner's oral report on Sri Lanka submitted to the Council on 25 September 2013, a report mandated by the March 2013 resolution.

With respect to the accountability issue, the report says:

> In resolution A/HRC/22/L.1/Rev.1 the Human Rights Council also calls upon the Government to conduct an independent and credible investigation into allegations of violations of international human rights law and international humanitarian law, as applicable.
>
> Regrettably, the High Commissioner detected no new or comprehensive effort to independently or credibly investigate the allegations which have been of concern to the Human Rights Council. She received little new information about the courts of inquiry appointed by the army and navy to further investigate allegations of civilian casualties and summary executions raised in the LLRC report and the Channel Four documentaries, and urges those reports to be made public to allow them to be evaluated….
>
> The High Commissioner encourages the Government to use the time between now and March 2014 to show a credible national process with tangible results, including successful prosecution of individual perpetrators, in the absence of which she believes the international community will have a duty to establish its own inquiry mechanisms.[31]

I believe two points stand out in these passages. First, Sri Lanka is being given an ultimatum: The High Commissioner is saying that if by March 2014 credible domestic investigations are not underway she *will* push for international investigations. Second, there is absolutely no mention in these passages, (or anywhere else in the report), to the Secretary General's Report.

Let us look a bit more closely at the significance of these two points. I believe the key passage is the middle one, which sets out the reasons for the ultimatum. To repeat, the High

Commissioner says that she will be forced to support a push for independent investigations because of Sri Lanka's failure on two counts: first, the failure to investigate the allegations which "have been of concern to the Human Rights Council," and second, the failure to investigate allegations raised in the LLRC report and the Channel 4 videos. Let us reflect on this a moment.

The reader will recall, from the discussion in the previous section, that the allegations which were "of concern" to the Human Rights Council, as of March 2013, if those allegations are with respect to possible violations of international humanitarian law attributable to the State, *had* to be primarily and principally the allegations that came from the Secretary General's Report.

Sri Lanka, however, was never under any obligation to investigate the allegations contained in the Secretary General's Report, because that report was never submitted officially to the Human Rights Council and Sri Lanka was never given a chance to respond to it; the SG's report's claim that its allegations were *credible* was never properly tested, which in turn meant that the *credibility* of those allegations was never established. . As far as the LLRC's recommendations may be a basis for the call for international investigations, as I have tried to show, those would have to be limited to the specific instances mentioned in the LLRC report, and, even there, at most to investigate the possible shelling of hospitals, and the adequacy (or otherwise) of medical supplies to civilians during the very last days of the war.

Even if Sri Lanka completes every one of the investigations recommended by the LLRC, the international community can still say that Sri Lanka has not investigated the allegations "which have been of concern to the Human Rights Council" and slap Sri Lanka with war crimes investigations.

Thus, we come to the "discussion" scheduled for March 2014. No doubt, Sri Lanka will be asked to defend why it has apparently dragged its feet in pursuing the allegations "which have been of concern to the Human Rights Council." Let us suppose that, at that point, one of Sri Lanka's delegates gets up and says something to the effect, "Can you please enumerate the specific the allegations which you say "have been of concern to the Human Rights Council?" At that point, *any* allegation can be cited, and, whatever the merits (or demerits) of Sri Lanka's response, the critics will still be able to win the day, as long as they can muster enough *votes*.

Meanwhile, since reference to the Secretary General's report has now been quietly dropped from the record, Sri Lanka can't immediately invoke that report for purposes of impugning it, and mounting technical legal challenges: at any rate, it would be much more difficult to mount such legal challenges than if there had been explicit reference made to the report in the official record. By the time Sri Lanka mounts the requisite challenges, the vote would have been taken, and the resolution most likely passed. In short, whichever way one looks at it, it seems only one outcome is possible at the end of this "discussion": a resolution authorizing international war crimes investigations against this country, or at any rate setting the tangible groundwork for such investigations. Sri Lanka has been "set up" in a rather clever fashion.

I shall not belabor the implications of the above situation to Sri Lanka. In my view, a resolution authorizing war crimes investigations against Sri Lanka will allow the international community to meddle more and more in the internal affairs of this country, and open the door to various parties who may wish to carry out "regime change" in this country[32] to intensify their efforts.

I shall now turn to the implications for international law, which is the more important matter for the purposes of this paper. I believe those implications can be put briefly, as follows. If the UN's Sri Lanka strategy is allowed to go unchallenged, it will set a dangerous precedent, in that

the lack of opposition will be taken as tacit approval or endorsement of the strategy. And if this happens, it will be possible to use the strategy on other countries.

In the case of Sri Lanka, what appears to have happened is that the Secretary General deviated from procedure in commissioning his report[33], and that in turn has set the stage for subsequent actions which have materially compromised Sri Lanka's interests, with the possibility of even more harm to come.

If the above strategy becomes a sort of standard "fall-back" option at the UN, it means that whenever the Secretary General (or a factions within the UN capable of influencing the Secretary General's office) want to pursue a policy-goal with respect to a particular country, and the law as it stands doesn't allow that policy-goal to be pursued, the Secretary General can simply commission a report, which directly or indirectly promotes the policy-goal being sought, introduce it into the agenda of a subsidiary UN agency, and then let the subsidiary agency agitate the issue until the policy-goal is finally attained.

The UN is the world's apex body entrusted with preserving, protecting and upholding international law. It cannot be allowed to become a place where its highest officials take "short cuts" with the law, or try to introduce innovations and expedients so as to get around impediments placed by the law. If the Secretary General (or his supporters) want to introduce innovations and expedients into the law, they have to do it properly, by following the procedures set down in the law itself,[34] and not through arbitrary and peremptory action.

To repeat, if the UN's Sri Lanka strategy is allowed to succeed, it will be taken as a tacit approval and endorsement of that strategy, which means there's a possibility it can be applied with respect to other countries: and if that happens, no country is safe. The UN, meanwhile, will lose all credibility. To the extent that the UN loses credibility, international law loses its most stalwart guardian.

Conclusion

I have in this paper argued that there is a change in strategy in the UN's "accountability" campaign with respect to Sri Lanka, and that this change in strategy now places Sri Lanka in a legally perilous position at the upcoming March 2014 sessions of the UNHRC, where a resolution authorizing war crimes investigations will most likely be passed. I have argued that, if the above is allowed to happen, given what appears to be the unfair and unjust way in which it has been achieved, it would set a dangerous precedent, and ultimately do irreparable damage to the integrity, sanctity, and future viability of international law.

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References

[1] Dharshan Weerasekera, "The Illegality of UN Secretary General Ban Ki Moon's approach to Sri Lanka," *Foreign Policy Journal*, 19 March 2013, http://www.foreignpolicyjournal.com/2013/03/19/the-illegality-of-un-secretary-general-ban-ki-moons-approach-to-sri-lanka/.

[2] *The Report of the Secretary General's Panel of Experts on accountability in Sri Lanka*, 31 March 2011

[3] The LLRC is a domestic mechanism instituted by the Government of Sri Lanka

[4] "Russia, China, etc., slam Pillay's Office," *Daily News*, 21 March 2013

[5] "Moscow may veto UN resolution against Sri Lanka: Russian Envoy," *Sunday Times*, 1 May 2011

[6] In my view, if the High Commissioner is to call for international investigations while the Government is conducting its own investigations, as stipulated by the LLRC recommendations, she has to supplement or compliment her reliance on the LLRC's recommendations with some source or evidence or allegations independent of the LLRC.

[7] *Report of the Office of the United Nations High Commissioner of Human Rights on advice and technical assistance for the Government of Sri Lanka on promoting reconciliation and accountability in Sri Lanka*, *A/HRC/22/38*, 11 February 2013, p. 7, para 64

[8] *Promoting reconciliation and accountability in Sri Lanka*, A/HRC/22/L.1/Rev.1, 19 March 2013

[9] *Report of the Office of the United Nations High Commissioner of Human Rights on advice and technical assistance for the Government of Sri Lanka on promoting reconciliation and accountability in Sri Lanka*, *A/HRC/22/38*, 11 February 2013, p. 1, para 2

[10] *The Report of the Secretary General's Panel of Experts on accountability in Sri Lanka*, 31 March 2011,

p. ii

[11] Ibid, p. 55, para 191

[12] Ibid, p. 55, para 192

[13] Ibid, p. 55 – 60, para. 192-212

[14] *Yamashita v. Styler*, U.S. Supreme Court, Application of Yamashita, 327 U.S. 1(1946)

[15] Ibid, p. 7, para 17 and 18

[16] "No-fire-zones"

[17] *Report of the Commission of Inquiry on Lesson's Learnt and Reconciliation*, November 2011, p. 328, para 9.6 and 9.7

[18] Ibid, p. 329, para 9.9

[19] Ibid, p. 335, para 9.37a

[20] I want to emphasize again a point I made earlier. I am not saying that incidents mentioned in the LLRC report or the Channel 4 videos cannot be construed or interpreted by a third-party observer (including, say, the reader) to be violations of international law attributable to the Government. I am only saying that if one goes by the LLRC's assessment of these incidents, the LLRC's determination was that they revealed, if anything, violations by individual soldiers, and not violations that could be tied to the Government.. In my view, if the international community wants the Government to investigate further the incidents mentioned in the LLRC report or the C4 videos, the international community, at a minimum, has to specify the incidents it wants so investigated, the reasons why it considers those incidents to be violations of international humanitarian law attributable to theGovernment, and give the Government an opportunity to respond.

[21] Ibid, p. 72

[22] Ibid, p. 72

[23] Ibid, p. 73

[24] Ibid, p. 73

[25] Ibid, p. 74

[26] Ibid, p. 337, para 9.39

[27] Ibid, p. 337, para 9.40

[28] Ibid, p. 330, para 9.14

[29] Ibid, p. 332, para 9.22

[30] On the contrary, where the LLRC discussions principles of humanitarian law, such as, say, the Principle of Proportionality, the Commission indicated very clearly that in its view the Government committed no violations of that principle

[31] *Oral update of the High Commissioner for Human Rights on promoting reconciliation and accountability in Sri Lanka*, 25 September 2013, www.ohchr.org, p. 4-5 (para 15, 16, and 18)

[32] The basis for this observation is a remark by Ambassador Tamara Kunanayakam, Sri Lanka's permanent representative to the UNHRC in March 2012, when the first of the resolutions against this country was passed. In the run-up to the vote on the resolution, Ambassador Kunanayakam commented on R2P, and its possible connection to what was happening to Sri Lanka. She said, "The West has been developing this argument to justify and legitimize interventions in Yugoslavia, Iraq, Afghanistan, Libya, and now Syria. Their real objective is "regime change"! Many Ambassadors in Geneva have been telling me that this is also what they want to achieve in Sri Lanka, so we take it very seriously. ("The battle will have to be fought to the last minute," www.lankamission.org,, 7 March 2012)

[33] In my previous paper, I explained in some detail how the SG deviated from procedure in commissioning his report. In brief, I argued that the SG can commission a report like the one he commissioned on Sri Lanka under three types of circumstances. One, for his own personal use, two, if it is authorized by some agreement between the country in question and himself, and three, by exercising his discretion under Article 99. The SG's report (also known as the Panel of Experts (POE) report, once generated, was leaked, as well as published (for instance in the UN official website) so it went beyond the SG's personal use. The joint statement with the President in May 2009, which the SG claimed gave him the right to commission the POE, did not do so (as I showed in my previous paper by looking at the relevant clauses in the joint statement). Finally, if he is going to invoke Article 99 it has to be on an issue which involves international peace and security, and accountability in Sri Lanka does not reach that threshold. Hence, on all three points, the SG deviated from procedure. If he wanted to pursue an accountability agenda against SL, in my view he had to get authority from the Security Council or the General Assembly, and proceed accordingly.

[34] In my view, if the SG or anyone else at the UN wants to pursue the current accountability campaign against SL, since that campaign is based more or less on the SG' report (i.e the POE report), they should submit that report officially to the UNHRC, the General Assembly, or any other organ where they want to pursue the campaign, and give SL a chance to respond. And really, why not do it? The SG has gone to all the trouble and expense of hiring experts, setting up a secretariat for the report, and so on, so why not make proper use of it. Surely, after all that effort, they ought to be confident of their case? So why not submit it officially, and have SL respond? What is there to be afraid of?