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Political Obstacles to Justice and Reconciliation Mechanisms in Sri Lanka

Mark S. Cogan¹

Kansai Gaidai University

Nirmanusan Balasundaram²

Independent Scholar

***Abstract:** After more than three decades of armed conflict, Sri Lanka continues to struggle to meet internal and external demands, which call for independent, transparent and accountable mechanisms to address human rights abuses and past mass atrocities. When authoritarian President Mahinda Rajapaksa was ousted in the January 2015 Presidential election by an unexpected rival, optimism for a more cooperative approach surged. However, this paper argues that the current government has outlined political distinctions between Sirisena and Rajapaksa, but their positions on key reconciliation mechanisms are comparative. It demonstrates this through a review of political documents and policy positions, and provides an analysis of statements, commitments, and engagements made internally and at the international level, presented in contrast with contradictory remarks made by Sri Lankan authorities.*

Keywords: Sri Lanka, human rights, reconciliation, justice, accountability, war crimes

Introduction

During former U.S. Secretary of State John Kerry's visit to Colombo in May 2015, he urged his Sri Lankan counterpart to work towards a credible human rights investigation that satisfied international and domestic legitimacy concerns. (Morello, 2015) Kerry addressed a newly-elected government, swept into office in an unexpected electoral victory. (Cronin-Furman, 2015) Maithripala Sirisena, a former health minister, assumed office by developing a center-right coalition (Burke, 2015) of rural conservatives and urban elites—beating his former ally, Mahinda Rajapaksa, who had ruled the island nation for a decade.

Kerry's message was conciliatory. On the one hand, he called for the same kinds of reforms that his predecessor, Hillary Clinton had called for—namely democratic reforms, a pathway to national reconciliation, and mechanisms that could potentially offer justice to thousands of victims of alleged

¹ Mark S. Cogan is an Assistant Professor at Kansai Gaidai University.

² Nirmanusan Balasundaram is a freelance journalist and former Berghof Foundation consultant.

human rights violations and mass atrocities. (Uyangoda, 2010, p. 105) On the other hand, he heaped praise on Sri Lanka's existing institutions and acknowledged that the timetable to reconciliation would be long. Kerry likely operated on two assumptions, that the defeat of Rajapaksa was a partial rejection of Rajapaksa's brand nationalism and authoritarianism that had dominated his tenure in office or, Sirisena's election was the consequence of a regime that had mismanaged its hold on power, with the opposition fueling legitimate long-standing concerns over corruption and nepotism. (DeVotta, 2013)

In reality, Sirisena benefited from Rajapaksa's political troubles. A significant factor in his victory came from the support of the Tamil people, who voted in high numbers in the northeast and center of the country. After it was rumored that Muslim and Tamil political parties were going to back the opposition, the majority United People's Freedom Alliance (UPFA) claimed the new coalition was a "conspiracy." ("Sri Lanka fears attempts to divide country", 2014) The feud between the two major candidates was real, even their political promises were suspect. The question before Kerry and the West was whether there were policy differences as well as political divisions.

Optimism for a more cooperative government dramatically increased at a September 2015 meeting of the UN Human Rights Council, where the Government of Sri Lanka (GoSL) addressed Member States in Geneva and detailed a departure from the policies of the former government. Sri Lanka's Foreign Minister, Mangala Samaraweera, proposed several sweeping changes and reforms, including a new constitution, an office for missing persons, a judicial mechanism and a new truth and reconciliation commission:

"Therefore, I say to the sceptics: don't judge us by the broken promises, experiences and u-turns of the past. Let us design, define and create our future by our hopes and aspirations, and not be held back by the fears and prejudices of the past. ("Sri Lanka's Response to the UNHRC", 2015)

The Geneva speech preempted a report by the Office of the High Commissioner for Human Rights (OHCHR) Investigation on Sri Lanka (OISL) detailing abuses by both the Rajapaksa government and the Liberation Tigers of Tamil Eelam (LTTE) and calling for an special court to investigate them. Samaraweera announced that key mechanisms, such as the constitution and the reconciliation commission would be implemented with special input from South Africa, whose 1994 reconciliation efforts have crystallized the legitimacy of similar processes in the eyes of the international community.

A May 2016 New York Times article underscores the wave of optimism surrounding Sirisena's surprise victory. Drawing upon the conclusion that his coalition of minority groups and his "agreeable and self-

effacing” nature, (Anand & Bastians, 2016) it extols the view that he is a political moderate. Others have gone much farther. At the August 2016 LawAsia conference, Upul Jayasuriya, Chairman of the Board of Investment of Sri Lanka, called President Sirisena “the Nelson Mandela of modern Sri Lanka.” (Jayasuriya, 2016). These assessments of Sirisena’s potential have been matched with early political victories curtailing presidential power in an amendment to the state constitution (Ramakrishnan, 2016), and alleviating fears of Chinese intrusion on the island. He also presented a more balanced foreign policy towards Xi Jinping, as well as smoothing over his predecessor’s diplomatic missteps with India, and the West. (Gunaratne & Miller, 2015). The Government has made some advances in returning some Tamil lands, seized by the military between 1982 and 2009. In March 2016, approximately 700 acres of land was returned in Thelippalei and Kopai (Perera, 2016).

However, the Mandela narrative is premature. Critics have pointed to the facts that Sirisena performed duties as acting defense minister during the final weeks of the military campaign against the LTTE (Medhora, 2015) and that reluctance to release hundreds of Tamil political prisoners (Dibbert, 2016b), demonstrates a reluctance on the part of the Government to meet Tamil demands or risk alienating key Sinhala voting blocs. It is this political dichotomy that peaks our interest. We suggest that the larger GoSL political narrative in offering a pathway to justice and accountability through mechanisms that involve the international community is misleading. We suggest that there has been little change in policy from the Rajapaksa era to the present administration. Divided into two sections, this paper examines Sri Lanka’s first attempt at national reconciliation and subsequent domestic political events leading up to the 2015 Presidential election. We then provide a review of statements, commitments, and engagements made internally and at the international level, presented in contrast with seemingly contradictory remarks made by GoSL authorities.

The End of Armed Conflict

Armed conflict between the LTTE and the GoSL came to an end in May of 2009, after the military victory over the LTTE by the Armed Forces. Shortly thereafter, then-President Mahinda Rajapaksa announced that government forces had been successful, and were “liberated” from the bonds of terrorism. (Weaver & Chamberlain, 2009) As decades of armed conflict came to an abrupt end, the task of assessing the cost of war began. Rajapaksa announced plans to conduct a formal census (Francis, 2013) on costs associated with conflict, in accordance with a recommendation made by the Lessons Learnt and Reconciliation Commission (LLRC), began deploying tens of thousands of officials from the Department of Census and Statistics to visit homes and villages across the country.

Casualty figures have been longstanding sources of conflict between the GoSL and the international community, who have repeatedly called for independent investigations into victims and a host of other human rights abuses dating back to 1982. A March 2011 Report on the Secretary General's Panel of Experts on Accountability in Sri Lanka estimated that approximately 40,000 people died toward the end of the war in 2009, and independent estimates on the number of civilians killed could have exceeded 100,000. Reports suggest that as many as 1 million Tamils have fled, while another 146,000 remain unaccounted for. (Wigneswaran, 2016)

Isolation by the International Community

When former UN Secretary General Ban Ki-moon visited Sri Lanka shortly after armed conflict ended, (Uyangoda, 2010, p. 106) a dispute began over how the GoSL would set up institutional mechanisms for justice and accountability. A joint statement reiterated that the Secretary-General emphasized the "importance of an accountability process for addressing violations of international humanitarian and human rights law." ("Joint Statement", 2009) Immediately, then-UN High Commissioner for Human Rights, Navi Pillay urged an "independent and credible international investigation" into related events. Rajapaksa and his Indian allies pushed back, calling into question the legitimacy and the impartiality of the Human Rights chief (Chellaney, 2009). These initial exchanges prompted a back and forth by Rajapaksa and the Office of the High Commissioner, with one side suggesting that parties should absolve themselves to an international inquiry that is both open and transparent, hinting national justice institutions could not fully maintain their independence--and the other, in contrast suggesting that any approach should be locally managed and largely free from Western demands. These exchanges and positions would last throughout Rajapaksa's decade as President--and has formed the basis for acrimony between the GoSL and the international community to date.

The tenor of diplomacy between the international community and the GoSL has remained inharmonious since 2010. In June of that year, the UN Secretary General appointed a Panel of Experts ("Statement Attributable", 2010) in hopes of drafting a more cooperative approach to justice and accountability mechanisms. The domestic alternative, the establishment of the LLRC fell short of the supposed standard, with the Panel of Experts Report calling it, "deeply flawed, [and] does not meet international standards for an effective accountability mechanism." ("Panel Report", v) The criticism lobbied at Sri Lanka and the LLRC is a relevant case study in the complicated dynamics of truth and reconciliation politics. Human rights groups such as Amnesty International charged that the LLRC was a deliberate attempt to circumvent the prospect of an international mechanism for transitional justice and accountability. ("Human Rights Groups", 2010)

While Rajapaksa benefited from the spoils of war that came with the decisive military defeat of the LTTE in 2009, he was denounced by political opponents and the international community as obstinate. Following the LLRC report and recommendations in December 2011, the United Nations Human Rights Council brought forward two resolutions: the first in March of 2012 (A/HRC/19/L.2), calling for implementation of the recommendations made by the LLRC, and again in March of 2013 (A/HRC/22/L.1/Rev.1), a more strongly worded resolution reiterating previous recommendations and insisting on an independent and credible investigation. Rajapaksa rejected both resolutions, remarking on the latter, that he was not surprised by the “attacks” on Sri Lanka and linked the strategies by Western countries that sponsored the resolution to pro-LTTE Tamil diaspora. (“Sri Lanka Undeterred”, 2013)

Rajapaksa’s authoritarian streak became more pronounced and political opponents began seizing upon his strongman characteristics. Sri Lanka hosted the 2013 Commonwealth Heads of Government Meeting, of which Rajapaksa was chair, but the occasion was marked by local Tamil protesters (Dominiczak, 2013) and a boycott by fellow members, India, Canada, and Mauritius. Canadian Prime Minister Stephen Harper decried Rajapaksa’s “absence of accountability for the serious violations of human rights and international humanitarian standards during and after the civil war”. (Milewski, 2013) His counterpart in India, then-Prime Minister, Manmohan Singh declined to attend based on outcry in neighboring Tamil Nadu state, and potential political consequences for neglecting the interests of minority voters in the 2014 elections. (Burke & Sparrow, 2013)

Regime Change

The current coalition government came to power on a platform change, commonly referred to now as the “reform agenda.” (Uyangoda, 2015) On the surface, it bound Sirisena to his campaign agenda, or at the very least articulate policy differences between his new government and that of his predecessor and suggest a change in direction from the country’s decade-long lurch toward autocracy. Through this agenda, the Sirisena-Wickremesinghe government has rather successful in ending Sri Lanka’s international isolation, achieved by neutralising demands for an independent international investigation into wartime mass atrocities and turning calls for international and hybrid mechanisms into more domestic, or nationally-controlled mechanisms.

For example, in consideration of the new administration, the Office of the High Commissioner for Human Rights delayed the release of a key report from its investigation on Sri Lanka, known more commonly as the OISL report. UN High Commissioner for Human Rights Zeid Ra’ad Al Hussein deferred on grounds

that the new government would be more cooperative or that new information could be brought to light (“UNHRC Chief Grants Deferral”, 2015). The deferral was met with disappointment by rights groups such as the Tamil Civil Society Forum, who charged that the delay was “completely unnecessary and [was] a possible final blow to any further search for accountability through international means” (“TCSF Expresses Disappointment over OISL Deferral”, 2015). While Rajapaksa was recalcitrant in his refusal to allow OISL special investigators from Geneva access into the country, Sirisena was only slightly more hospitable. It did not extend a welcome, but merely stated it would consider their expertise when creating a domestic inquiry.

When the OISL Report was finally released in September 2015, Al Hussein recommended a hybrid special court to try war crimes and crimes against humanity allegedly committed by all parties to the armed conflict, reiterating past assessments that Sri Lanka’s domestic legal institutions did not have the capacity to handle “international crimes”, as well as expressing concerns that the “State’s security sector and justice system [had] been distorted and corrupted by decades of impunity” (“Statement by UN High Commissioner”, 2015). It is important to distinguish that the OISL is a human rights investigation rather than a criminal proceeding, however the patterns of human rights violations, the OISL Report noted, were “deeply embedded” in the country and “may constitute war crimes and crimes against humanity”. (“Report of the OHCHR”, 2015)

In response, Sri Lanka co-sponsored Resolution 30/1, with the United States, which was adopted at the 30th Session of the UN Human Rights Council (UNHRC) in October 2015. The resolution affirmed calls to end the culture of impunity, ensure accountability for wartime mass atrocities and establish a commission for truth, justice, reconciliation and non-recurrence, an office of missing persons and an office for reparations. It also reiterated the importance of participation of international judges, prosecutors and investigators. However, it failed to reaffirm Al Hussein’s call to establish a hybrid special court, and instead supported the setup of a domestic mechanism with the inclusion of the alleged perpetrator, Sri Lanka. (“Resolution” 2015)

Progress within the promises of Resolution 30/1 have stalled, with some exceptions, such as the release of some political prisoners and the establishment of the Constitutional Task Force on Reconciliation Mechanisms (CTF). The CTF was born out of the Resolution 30/1 process, created in early 2016 by Wickremesinghe to conduct public consultations on the design of four reconciliation mechanisms, a judicial mechanism (with a Special Counsel), a new truth and reconciliation commission, and the establishment of an office of Reparations and an Office on Missing Persons. (“Frequently Asked

Questions”, 2017) The CTF recommended a hybrid court of local and international judges to prosecute war crimes, and the establishment of the office of the Special Counsel. (“Final Report”, 2017) Within hours of the Report’s release, Cabinet Spokesman Rajitha Senarathne categorically rejected the hybrid recommendation, raising the eyebrows of Al Hussein, yet again. (“UN human rights chief”, 2017). The sentiment was echoed by Justice Minister Wijeyadasa Rajapakshe, who expressed a lack of confidence in the CTF. (Pothmulla, 2017) Remarkably, the Prime Minister, who created the CTF, and the President were found to have abstained from the event where the CTF report was handed-over to the Chairperson of the Office for National Unity and Reconciliation. Their absence suggests that the CTF process was conducted by the government to portray progress to the international community, rather than a firm commitment to the reconciliation process.

Transitional Justice

The transitional justice process too has lacked transparency. Despite Al Hussein having urged for consultations with victims and the GoSL agreeing at the UNHRC to hold nationwide public consultations on all transitional justice mechanisms, the process has lacked in consultations and communications with the war survivors and victims. The creation of the Office of Missing Persons (OMP) was done without consultations with families of the disappeared (“Sri Lanka: Consultations Lacking”, 2016), and despite being hailed by Ministers as an act which would enhance prestige internationally (“Sri Lanka parliament passes bill”, 2016) it has been slammed by critics as a “total lie in practise” (Perera, 2016).

Resolution 30/1 also called for the GoSL to review the Public Security Ordinance Act, and review and repeal the Prevention of Terrorism Act (PTA), replacing it with anti-terrorism legislation in accordance with contemporary international best practices. However, the draft framework of the ‘Counter Terrorism Act’ (CTA), the legislation intended to replace the draconian PTA, human rights campaigners, have suggested, is worse than PTA itself and far from international best practices (“Sri Lanka: Proposed”, 2016).

Legislation such as the Assistance to and Protection of Victims of Crime and Witnesses Act which is imperative for any justice system to challenge and put an end to the culture of impunity, is yet to be meaningfully implemented, and the timing of its enactment a mere two weeks before the 28th session of the UNHRC (Perez, 2015) adds to the notion that the GoSL has a culture of establishing commissions and enacting bills when international pressure emerges with little intention of implementing it. The OMP was created just prior to the 30th Session and three months before the 34th Session, the Cabinet accepted the President’s proposal for a ‘National Integration and Reconciliation Week’ in January (“Decisions Taken”,

2016) - a move critics argue is yet another cosmetic fix principally intended for international consumption, as senior journalist and political commentator, Kusal Perera noted, “[T]here’s lots of talking done on reconciliation while on the ground what’s done contradicts everything necessary for reconciliation.” (Dibbert, 2016c)

This lack of political will by the Sirisena-Wickremesinghe government towards full implementation of Resolution 30/1 and its delay in establishing transitional justice mechanisms including judicial proceedings to investigate and prosecute war crimes has not only raised serious questions among the victim community of the government’s intention and commitments towards justice, accountability and genuine reconciliation, but has begun to cause actors in the international community to view the GoSL as attempting to avoid delivering on truth and justice for war victims (Bastians, 2016).

Culture of Impunity

When the United Nations Committee of Torture (UNCAT) met in November 2016, human rights observers complained when the GoSL sent Sisira Mendis, the Chief of Criminal Investigation Department (CID) and Terrorist Investigation Division (TID) as a part of its official delegation. (Dibbert, 2016d) Critics pointed to his past involvement in the Rajapaksa government as head of the CID, an institution that the OISL Report detailed an extensive list of human rights allegations. The CID “Fourth Floor” facility in Colombo, the OISL noted, had an array of torture devices, such as barrels for waterboarding and devices from which to suspend detainees. (A/HRC/30/CRP.2, Para 553)

Rather than finding a roadmap to ending Sri Lanka’s culture of impunity, there have been rather encouraging signs for culprits, despite promises to the international to the contrary. In July 2016, six military officials accused of taking part in a massacre of 26 Tamil civilians (including women and children) in Kumarapuram, Trincomalee in 1996 were acquitted by the Anuradhapura High Court. (“Kumarapuram judgement”, 2016). Soon after, the Colombo High Court acquitted and released all involved, (“Sri Lankan Court Acquits”, 2016) including three navy intelligence officials accused in the assassination of former Tamil Parliamentarian Nadaraja Raviraj in 2005. Such decisions have further added to victim mistrust of Sri Lanka’s judiciary mechanisms.

Amnesty International has previously found state agents to have directly intervened in some cases in order to eliminate witnesses through use of bribes, threats, harassment, intimidation and violence, including murder, to discourage police investigations and mislead the public. It has accused the criminal justice system of being subject to political pressure, its critical shortcomings leading to the obstruction of justice

for victims (“Sri Lanka: Twenty Years of Make-Believe”, 2009) Furthermore, these concerns were echoed by Al Hussein’s remarks in 2015 on Sri Lanka’s inadequate domestic legal system, and its security and justice systems being entangled in corruption and impunity.

Writing on war crimes tribunals, David Scheffer, the first U.S. Ambassador-at-Large for War Crimes Issues (1997-2001) noted that “[i]f the tribunals’ work had been left to domestic courts, particularly in devastated societies, there simply would not have been any justice at all.” (Scheffer, 2) These statements not only highlight the importance of an independent international investigation, but underscores the Tamil lack of confidence in the capacity Sri Lanka’s justice system or in a domestic mechanism.

Similar Policies and Positions

While the Rajapaksa government was less diplomatic and more confrontational with the U.S.-led West, the incumbent Sirisena-Wickremesinghe government has appeared to be more conciliatory and less confrontational with the international community, including China. Foreign policy approaches and strategies may differ between the two administrations, yet there appears to be no shift in the Sri Lanka’s ethnocentric policies and practices (Balasundaram, 2016).

Rajapaksa rejected accusations of major violations of international law during the final stages of the armed conflict and unequivocally objected any international participation including constructive engagement with the United Nations human rights bodies, with regard to wartime mass atrocities. The incumbent Sirisena-Wickremesinghe government, while not explicitly rejecting serious violations of international law, has opened the door for dialogue and engagement with the international community, and at the same time, stalling international participation in prescribed mechanisms under Resolution 30/1. The GoSL maintains an intractable position that the referenced international component is limited to technical advice and assistance, rather than full international participation in trials. (“Sri Lankan President: No Allegations”, 2016)

While approaches, structures and processes may differ between Rajapaksa and Sirisena with regard to international participation on accountability and justice for wartime mass atrocities, their political goals remain very similar. Rajapaksa communicated in the same fashion nationally and internationally, in matters related to wartime atrocities and accountability mechanisms, isolating Sri Lanka from the West. The Sirisena-Wickremesinghe administration, on the other hand uses a more liberal tone internationally, while domestically, remains persistent that it had no intention of punishing perpetrators. This position has remained constant, during and after the 2015 Presidential election. For example, Sirisena boasted in his

campaign manifesto that he would “allow no international power to ill-treat or touch a single citizen of this country on account of the campaign to defeat terrorism” (Sirisena, 44), nor would he permit his predecessor, “his family or any member of our armed forces to be taken before any international war crimes tribunal” (“Sri Lanka opposition candidate”, 2014). In order to appease repeated calls for an international investigation, Sirisena also stated that he would launch a domestic war crimes inquiry, if elected. (Mallawarachi, 2014). Two years later, this promise has been reiterated by the Foreign Minister. (“The Reconciliation Process”, 2017). While persisting on the establishment of the domestic mechanism, Sirisena recently asked U.S. President Donald Trump to pressure the UNHRC to drop war crimes allegations against the country’s troops (“Sri Lanka seeks Donald Trump’s help”, 2016).

In an interview to *The Hindu* in November 2016, Sirisena said:

“Before I came to power there was a fear that those who had given commands during the war could be taken to international courts of justice, that they may even face execution, and that they may have to sit on the electric chair. The international community is so satisfied with my performance that they have completely changed their impression of the country. Now there is no threat of international courts, now we don’t have to talk about electric chairs, there is no problem [of foreign judges investigating alleged violation of human rights]; I have told the international community that I cannot accept any proposal that allows foreign judges to probe our domestic matters. This is another great victory I was able to achieve in this time.” (“Solving problems”, 2016)

Earlier, Sri Lanka’s Prime Minister, Ranil Wickremesinghe, too had explicitly ruled out the possibilities for international judges’ involvement and emphasised that any probe would be purely domestic (“Alleged war crimes”, 2016). Aware of the weaknesses and mistakes of its predecessor with regard to international engagement, the Government neither categorically rejects nor objects any international engagement. Rather, it has verbalised commitments, given rhetorical promises and delivered make-believe statements on international platforms while agreeing for engagements. However, despite failing to act upon commitments and delaying implementation of promises, it has managed to continue its engagement with the intention of mitigating international pressure.

Conclusion

While consecutive Sri Lankan governments may change their approaches to demands for accountability, there has been no paradigm shift in major policies given that the State has not shown willingness to have

punished any perpetrators of mass atrocities. The authoritarian tenor of the Rajapaksa administration may have dissipated and its diplomatic strategy altered, yet policy has remained constant as the Sirisena-Wickremesinghe administration enters its third year in power. The CTF, which was an outcome of Resolution 30/1, has been dismissed by the very government that created it, stalling momentum with regard to national reconciliation and accountability.

The Government's proclamation of delivering justice through a domestic mechanism contradicts historical and ongoing realities. Failure to implement its own commitments adds strength to the criticism that like past governments, it too has neither the capacity, nor the political will to deliver justice to victims. Rather, it continues to engage in stalling measures with no indication of delivering justice. As long as Sri Lankan officials hold all decision-making authority, regardless if some international participation is allowed, any such mechanism will likely fail to deliver justice due to the positions of these consecutive governments, state institutions and various structures being strongly interconnected.

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