
LITMUS TEST OF OUR RESOLVE: WAR CRIMES AND
INTERNATIONAL HUMANITARIAN LAW IN SRI LANKA

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In the aftermath of a conflict with high levels of civilian casualties or war crimes, Jeremy Sarkin writes that there are three goals that a government or international commission can prioritize in the application of international humanitarian law (IHL): truth, justice, and reconciliation.¹ These may sound similar, but each requires very different things of the law and its administrators.² If truth is the administration's primary goal, then the powers that be must thoroughly examine all facets of the events that occurred with a single-minded dedication to fact, sometimes at the expense of intercommunity relations and the realities of reconstruction needs.³ If justice is chosen as the most important course of action, its pursuit often leads to the neglect of internal relations and reconciliation.⁴ Therefore, focusing on reconciliation can often seem the best option, but concentrating solely on rebuilding society can lead to a neglect of the past and its impact on individuals and the larger community.⁵

Of course, the objectives of IHL's application will vary from situation to situation, and may even encompass more than one of Sarkin's goals, but how should those goals be determined and who should determine them – the country itself or the international community? Many post-conflict situations are left with inadequate, biased, or absent governments. Who then can make these decisions for a society? Moreover, once a goal is defined, how should it be achieved? The United

¹ Jeremy Sarkin, *Promoting Justice, Truth and Reconciliation in Transitional Societies: Evaluating Rwanda's Approach In the New Millennium of Using Community Based Gacaca Tribunals to Deal With the Past*, 2 INT'L L.F. D. INT'L 112, 115-16 (2000).

² *Id.*

³ *Id.*

⁴ *Id.* at 116.

⁵ *Id.*

Nations (UN) and countries have historically preferred international tribunals with strategic interests in the countries in question. Sometimes, however, more traditional and localized systems of justice can be a better fit, especially in regions where legal systems, social and cultural priorities, and general worldview differ significantly from Western, first-world models. How much of the law implemented in post-conflict situations around the world should be standard practice for IHL, applicable to any situation in any region at any time, and how much should be innovated for use in a particular situation?

The uncertainty surrounding these questions has produced what I consider to be the most pressing problem in IHL today; that is, the uncertainty and inconsistency of its application. Leaders in both the national and international arenas who are involved with the application of IHL are unsure of the relationship between the two arenas;⁶ should the state cooperate with an internationally imposed tribunal? Does the international community have the authority to violate a state's sovereignty, and what makes intervention legally appropriate?

The result of this ambiguity is a society in which IHL is applied sporadically; great powers tend not to be held accountable for their actions in war while smaller nations are held more accountable. One of these smaller nations, Sri Lanka, provides a great example of a modern would-be war crimes tribunal.⁷ Sri Lanka fought a civil war between July 1983 and May 2009.⁸ Since then, the government and international organizations, like the UN, have tried to work with and around one another, performing a back-and-forth dance to negotiate the consequences of a war which claimed tens of thousands of lives.⁹ The process of dealing with the fallout of Sri Lanka's civil war is still very much ongoing,¹⁰ allowing insight into the work of negotiating with a government, rather than simply the results.

But results do matter. In three years since the war ended, there has been no full, impartial investigation of Sri Lanka's war crimes.¹¹ Is the absence of a much-needed war crimes tribunal in Sri Lanka a fluke,

⁶ Helen Durham, *International Humanitarian Law and the Gods of War: the Story of Athena versus Ares*, 8 MELB. J. INT'L. L. 2 (2007).

⁷ Interview with Indrajit Samarajiva, in Colombo, Sri Lanka (Jan. 27, 2011).

⁸ *Sri Lanka profile: Timeline*, BBC NEWS (Jan. 15, 2013), <http://www.bbc.co.uk/news/world-south-asia-12004081>.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

a response to a society which has moved on, or is it indicative of a more deeply-ingrained trend in international law: make tough-sounding policy, but enforce nothing? Are we really sincere about ending war crimes, or is it all hype? Sri Lanka is the litmus test of our resolve.



LEADING TO WAR

Sri Lanka is and has long been populated with two main ethnic groups, the Sinhalese (currently about seventy-five percent of the population) and the Tamils (about eight percent of the population), with a total current population of about 21.5 million.¹² Though the Sinhalese are the dominant population on the island,¹³ many observers have called them a “majority with a minority complex” because of their regional and global minority status.¹⁴ There are literally millions of Tamils across the Palk Strait in Tamil Nadu, India, and an even larger population worldwide.¹⁵ Smaller demographic breakdowns and groups, such as Muslims, Burghers (those of mixed Sri Lankan and Dutch descent), and Indian or plantation Tamils make up the remainder, and can play a decisive, though ignored role in relations between the two dominant (though not monolithic) groups.¹⁶ The Sinhalese and Tamils each have a separate language and practice separate religions: Sinhalese are mainly Buddhist, and Tamils are mainly Hindu.¹⁷

Nevertheless, the two groups generally coexisted peacefully in ancient times.¹⁸ It was only with the arrival of colonial powers that ethnic differences became important.¹⁹ Under the rule of Portuguese (1505-1658) and Dutch (1658-1796) colonists, and especially the more hands-on rule of British colonial leaders (1796-1948),²⁰ differences were exaggerated and exploited.²¹ This was particularly true in the field of edu-

¹² *The World Factbook: Sri Lanka*, CIA (Feb. 20, 2013), <https://www.cia.gov/library/publications/the-world-factbook/geos/ce.html>.

¹³ JOHN RICHARDSON, *PARADISE POISONED: LEARNING ABOUT CONFLICT, TERRORISM AND DEVELOPMENT FROM SRI LANKA'S CIVIL WARS* 24 (International Centre for Ethnic Studies 2005).

¹⁴ *Id.* at 27.

¹⁵ Interview by Michelle Foster & Elizabeth Leman with Jehan Perera, in Colombo, Sri Lanka (Jan. 21, 2011) [hereinafter Interview with Jehan Perera].

¹⁶ PATRICK PEEBLES, *THE HISTORY OF SRI LANKA* 7 (Frank W. Thackeray & John E. Findling eds., 2006).

¹⁷ *Id.* at 6.

¹⁸ *Id.* at 13-40.

¹⁹ *Id.* at 56.

²⁰ *Sri Lanka profile*, *supra* note 8.

²¹ PEEBLES, *supra* note 16, at 67.

cation; the best schools on the island were almost the exclusive domain of Tamils, who then obtained disproportionately more jobs in the civil service and colonial government.²² This trend was not purely accidental; according to Bandarage, “[d]ivide and conquer was a key to conquest, consolidation and maintenance of colonial regimes.”²³ This change in the relationship between Tamils and Sinhalese was the catalyst for mounting tensions when independence was declared in 1948.²⁴

At the time of independence, Sri Lanka was considered a model among developing postcolonial nations.²⁵ Its independence had been achieved peacefully in the wake of World War II in 1948, and the country now sustained one of the most democratic governments in the Global South.²⁶ Despite a per-capita GNP ranked among the lowest in the world, citizens’ quality of life was favorably comparable to that of European nations like Portugal and Yugoslavia, due to the high number of government-provided services.²⁷

After a few years, however, the price for Sri Lankan goods abroad began to drop, setting off a complicated series of events that eventually resulted in civil war.²⁸ The high cost of the government’s social programs, without export revenues to match, quickly began to drain the economy.²⁹

Over the next thirty-odd years, Sri Lanka’s Prime Ministers repeatedly nationalized and re-privatized Sri Lanka’s economy in an effort to get it back on track, all with relatively little success; increasingly censored the media and oppressed their citizens (mostly Tamils); attacked democratic institutions to keep themselves in power, weakening Sri Lankans’ faith in their effectiveness; and offered little in the way of calming the rising tide of ethnic tensions.³⁰ All of this in combination with the literate, politically aware population—created by the govern-

²² *Id.* at 62-63.

²³ ASOKA BANDARAGE, *THE SEPARATIST CONFLICT IN SRI LANKA: TERRORISM, ETHNICITY, POLITICAL ECONOMY* 29 (2009).

²⁴ PEEBLES, *supra* note 16, at 67; *see generally* PEEBLES, *supra* note 16, at 55-101 (detailing the breakdown of the Tamil-Sinhalese relationship from colonization to independence).

²⁵ RICHARDSON, *supra* note 13, at 12.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.* at 137-38.

²⁹ *Id.*

³⁰ *Id.* at 135-38, 149, 172, 199-210, 217, 225, 289-92, 312, 321-23, 341, 353-62, 370, 385-425, 495.

ment's own very available school system—resulted in a population with high expectations for their country's development and their own opportunities.³¹ The lag in meeting these expectations created discontent with the governing elite as a whole.³²

Sri Lanka's Tamils, suddenly the political minority, wavered during this time between working with Sinhalese politicians to form a coalition and have a say in the political system as it existed, and advocating federalism and a community-oriented system.³³ Over time, they moved from the first option to the second, and when that still produced relatively few results, a small faction of Tamils (youth in particular) began to militarize.³⁴ The Liberation Tigers of Tamil Eelam (LTTE) was formed by Velupillai Prabhakaran in 1976 with the explicit goal of achieving Tamil statehood by violent means.³⁵ Though it was only supported by a small faction of Tamils, the separatist movement gained currency as politicians on both sides vied with each other to come across as the most dedicated to the rights of their ethnic group.³⁶ As politics became more polarized, rhetoric became more extreme, and it became less possible for politicians to compromise or back down.³⁷ By this point, it took only a small spark to ignite war.³⁸

On July 23, 1983, an LTTE ambush attacked a group of fifteen Sinhalese soldiers, killing thirteen, and though such attacks had occurred before, there never had so many been killed in one incident.³⁹ The attack spurred a week of ethnic rioting throughout Sri Lanka, centered in Colombo.⁴⁰ Tamils were killed, beaten, and saw their homes and businesses destroyed.⁴¹ Most had lived and worked peacefully alongside their Sinhalese neighbors for years and were not supporters of the separatist agenda.⁴² Although some Sinhalese risked their lives to protect friends and neighbors, military and police forces did little to offer protection or restore order.⁴³ By the end of the week on July 31,

³¹ *See id.* at 330-33.

³² *Id.* at 140.

³³ *Id.* at 148.

³⁴ *Id.* at 149, 195.

³⁵ *Id.* at 351.

³⁶ *Id.* at 149, 353.

³⁷ PEEBLES, *supra* note 16, at 126-28.

³⁸ RICHARDSON, *supra* note 13, at 516-21.

³⁹ *Id.* at 524.

⁴⁰ *Id.* at 525.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

over 60,000 Tamils had become refugees.⁴⁴ Soon the number swelled to 100,000.⁴⁵ An event like this called for retaliation from the LTTE, and the war began.

EELAM WARS I-IV

Sri Lanka's monolithic civil war is broken by some observers into multiple, smaller wars punctuated by (short-lived) peace deals.⁴⁶ The "first Eelam war" lasted from Black July in 1983 until the intercession of India under Prime Minister Indira Gandhi in 1987.⁴⁷ Gandhi had become concerned with the pro-Western tilt of Sri Lanka's policies and also needed to secure support among India's Tamils.⁴⁸

Thus, in the early 1980s, while recruits poured into the LTTE, India provided covert training and resources.⁴⁹ In 1987, India began to intervene directly (previous involvement had been in the form of support and sanctuary for LTTE and other Tamil forces)⁵⁰ by sending the Indian Peacekeeping Force (IPKF), supposedly to help the government quash rebellion.⁵¹ Of course, the IPKF (or, as it was known for the atrocities it committed, the Innocent People Killing Force)⁵² only continued to give aid to the rebels in what Bandarage calls a "proxy war" against its own Tamil secessionist movement.⁵³

Finally, the two-way "Indo-Sri Lanka Agreement to Establish Peace and Normalcy in Sri Lanka" (or, Indo-Sri Lanka Accord) was signed on July 29, 1987.⁵⁴ Signed in secrecy without the consultation of the Sri Lankan people or Parliament,⁵⁵ the Accord joined the Northern and Eastern provinces (traditional Tamil homelands; a referendum was to

⁴⁴ *Id.*

⁴⁵ BANDARAGE, *supra* note 23, at 105.

⁴⁶ See *TIMELINE: Sri Lanka – 25 Years of Civil War*, REUTERS (Sept. 7, 2008, 7:05 AM), <http://www.reuters.com/article/2008/09/07/us-srilanka-violence-timeline-idUSSP23922420080907> [hereinafter Reuters].

⁴⁷ *Id.*

⁴⁸ BANDARAGE, *supra* note 23, at 111.

⁴⁹ *Id.* at 113-14.

⁵⁰ *Id.* at 135.

⁵¹ *Id.*

⁵² *Id.* at 150.

⁵³ *Id.* at 112.

⁵⁴ *Id.* at 132.

⁵⁵ *Id.*

follow later),⁵⁶ established Tamil as an official language of Sri Lanka,⁵⁷ and established a ceasefire within forty-eight hours of the signing.⁵⁸ The most important concession of the government, however, was its implicit acceptance of the “Tamil homelands” idea.⁵⁹ Angry at not being consulted, the Accord sparked “widespread Sinhala opposition . . . [which] was expressed in massive street protests and anti-government demonstrations.”⁶⁰ Even more important was the fact that the LTTE was not consulted;⁶¹ “India signed the accord with the Sri Lankan government ‘leaving the LTTE free to do what it wanted.’”⁶²

Midway through Eelam War I in late 1986, the LTTE began some of the actions that it became notorious for: recruitment of child soldiers,⁶³ the employment of women suicide bombers,⁶⁴ and the creation of the “cults” of suicide and martyrdom.⁶⁵ It also began to represent itself as the “sole representative” of the Tamil people, a position that further polarized the situation and associated moderate and cooperative Tamils with their extremist brethren.⁶⁶

The “second Eelam war” began in 1990 and lasted until 1995, when the President signed a peace deal with the LTTE.⁶⁷ By this point, the LTTE was in control of Jaffna, the island’s northernmost port city and long a Tamil stronghold.⁶⁸ From this position of relative power, it felt very little need to negotiate a solution and only issued demands.⁶⁹ Because “the LTTE position seemed to be inflexible on a ‘federal’ solution,”⁷⁰ discussions with the government were not truly negotiations, only a series of demands.⁷¹

⁵⁶ The Indo-Sri-Lanka Accord, India-Sri Lanka, § 2.1, July 29, 1987, http://www.sangam.org/FB_HIST_DOCS/ISL%20Accord%20.htm.

⁵⁷ *Id.* § 2.18.

⁵⁸ *Id.* § 2.9.

⁵⁹ BANDARAGE, *supra* note 23, at 133–34.

⁶⁰ *Id.* at 135.

⁶¹ *Id.* at 147.

⁶² *Id.*

⁶³ *Id.* at 129.

⁶⁴ *Id.*

⁶⁵ *Id.* at 70.

⁶⁶ *Id.* at 3, 150, 175.

⁶⁷ Reuters, *supra* note 46.

⁶⁸ BANDARAGE, *supra* note 23, at 153.

⁶⁹ *Id.* at 161–62.

⁷⁰ *Id.* at 161.

⁷¹ *Id.* at 162.

The “third Eelam war” began later in 1995 when the LTTE sank a government naval craft and lost control of Jaffna.⁷² It continued until 2002, when a ceasefire was signed under Norwegian mediation.⁷³ For the next several years—the longest period of “peace” since the outbreak of war—the fighting stopped.⁷⁴

In 2004, though, the LTTE regained control of the eastern part of the country.⁷⁵ That same year, the Boxing Day Tsunami hit in December, killing 30,000 people and devastating Sri Lanka’s still-lucrative tourist industry as well as local homes and businesses along the southern coast.⁷⁶ In 2005, a boycott of the presidential election by the LTTE helped anti-Tiger hardliner Mahinda Rajapaksa come to power.⁷⁷ Rajapaksa is a charismatic leader, popular for his humble beginnings and “man of the people” demeanor.⁷⁸ Significantly, Rajapaksa shifted political discourse about the conflict from an ethnic basis (Tamil versus Sinhalese) to a question of loyalty (patriots versus traitors).⁷⁹ Fighting did not officially resume when he took office, but unrest was rampant.⁸⁰

In 2006, both sides publicly recommitted to the 2002 peace agreement, though the flaring of violence off and on between April and July led many to fear the start of the “fourth Eelam war.”⁸¹ After the LTTE blocked a reservoir that supplied water to thousands of farmers in February 2006, Rajapaksa opened a new offensive against them.⁸² This prompted Prabhakaran’s renewal of the “freedom struggle” in April.⁸³ With the help of LTTE defectors Pellian and Karuna,⁸⁴ the government recaptured Vakarai, a Tamil stronghold in the east, displacing tens of thousands of civilians.⁸⁵ By July 2007, the government declared that it had driven the LTTE from its last eastern stronghold.⁸⁶ To retaliate, in

⁷² Reuters, *supra* note 46.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ BANDARAGE, *supra* note 23, at 196.

⁷⁷ Reuters, *supra* note 46.

⁷⁸ Interview with Charles Haviland, in Colombo, Sri Lanka (Jan. 24, 2011).

⁷⁹ Interview with Jehan Perera, *supra* note 15.

⁸⁰ Reuters, *supra* note 46.

⁸¹ *Id.*

⁸² BANDARAGE, *supra* note 23 at 198.

⁸³ Jon L. Anderson, *Death of the Tiger: Sri Lanka’s Brutal Victory Over its Tamil Insurgents*, THE NEW YORKER, Jan. 17, 2011, at 40, 47.

⁸⁴ *Id.*

⁸⁵ Reuters, *supra* note 46.

⁸⁶ *Id.*

October, the LTTE mounted its most extensive ground assault since the beginning of the war.⁸⁷

In early January 2008, the government formally annulled the 2002 ceasefire, marking the official beginning of the “fourth Eelam war.”⁸⁸ In January 2009, the government recaptured the LTTE’s headquarters in Kilinochchi.⁸⁹ In mid-April 2009, the government called for a two-day truce to allow civilians to escape the conflict zone.⁹⁰ The LTTE declared that the government’s call for peace was “merely an act of hoodwinking” designed to fool the international community; however, the LTTE was and always had been ready for peace talks.⁹¹

By late April, the LTTE issued its own unilateral ceasefire due reportedly to the humanitarian disaster within the no-fire zone;⁹² however, the fact that it had been reduced to a five-square-mile zone probably also played a role in their wish to stop the fighting.⁹³ This time, it was the government that rejected the ceasefire, calling it “a joke.”⁹⁴ The government stated its intent to return to war, although it did assure the international community that it would “take all measures to avoid civilian casualties.”⁹⁵

The humanitarian disaster cited by both sides was itself a subject of strenuous debate.⁹⁶ Although the UN reported that 50,000 civilians were trapped in the safe zone,⁹⁷ the army tallied 15,000.⁹⁸ It was impossible to find the truth because aid workers and journalists had been blocked from the area in 2008 when the fighting escalated.⁹⁹ A propa-

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Sri Lanka Profile*, BBC NEWS (Jan. 15, 2013), http://news.bbc.co.uk/2/hi/south_asia/1166237.stm.

⁹⁰ See Anbarasan Ethirajan, *Sri Lanka Rejects UN Truce Appeal*, BBC NEWS (Apr. 18, 2009), http://news.bbc.co.uk/2/hi/south_asia/8005433.stm.

⁹¹ Anbarasan Ethirajan, *Sri Lanka Ceasefire ‘a Deception’*, BBC NEWS (Apr. 14, 2009), http://news.bbc.co.uk/2/hi/south_asia/7997502.stm.

⁹² *Sri Lanka Rebels Call Ceasefire*, BBC NEWS (Apr. 26, 2009), http://news.bbc.co.uk/2/hi/south_asia/8019199.stm.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ Ethirajan, *supra* note 90.

⁹⁶ *Sri Lanka Rules Out Outside Probe*, BBC NEWS (May 31, 2009), http://www.news.bbc.co.uk/2/hi/south_asia/8075779.stm [hereinafter BBC NEWS].

⁹⁷ *Sri Lanka Rebels Call Ceasefire*, *supra* note 92.

⁹⁸ *Id.*

⁹⁹ *Sri Lanka: End ‘War’ on Civilians: Army Shells and Detains Displaced Persons, Tamil Tigers Prevent Their Flight*, HUMAN RIGHTS WATCH (Feb. 20, 2009), www.hrw.org/en/news/2009/02/19/sri-lanka-end-war-civilians.

ganda battle concerning the trapped civilians started, with the LTTE accusing the government of shelling civilians in supposed “safe zones,”¹⁰⁰ while the government blamed the LTTE for using civilians as human shields, holding them against their will, and murdering those who tried to run away.¹⁰¹ Both were, in all likelihood, correct.

Regardless of who was imposing suffering on whatever number of Sri Lankan civilians, the fact of a humanitarian crisis remained.¹⁰² Charles Haviland, the BBC’s correspondent in Sri Lanka, reported that the tens of thousands of civilians trapped behind the fighting lines in the last weeks of the war were “living in makeshift shelters, densely packed together on the shore, without the basics of decent life, and constantly at risk of being caught in the crossfire of bitter war. Many of those worst off, who the Red Cross evacuated by ship, ha[d] wounds from shrapnel, bullets and grenades.”¹⁰³

On May 19, 2009, the Sri Lankan army announced that it had killed Prabhakaran, thus ending the war.¹⁰⁴ Photos of his bloated and gruesome-looking corpse were widely disseminated (a simple Google search will turn up a number of them)¹⁰⁵ as proof of the army’s mighty deed.¹⁰⁶ Although for some time the LTTE via news outlets like TamilNet tried to keep up the appearance that Prabhakaran was still alive,¹⁰⁷ the government’s reports were soon accepted, and the war was over.¹⁰⁸

In a televised address announcing the end of the war, President Rajapaksa declared that it was his responsibility to protect the Tamil people of Sri Lanka and that all people should live without fear and with equal rights.¹⁰⁹ However, critics condemned that the President

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² See BBC NEWS, *supra* note 96.

¹⁰³ Charles Haviland, *Anticipating an End to Sri Lanka’s War*, BBC NEWS (Apr. 25, 2009, 11:38 AM), http://news.bbc.co.uk/2/hi/programmes/from_our_own_correspondent/8016683.stm.

¹⁰⁴ *Sri Lanka Leader Hails ‘Victory,’* BBC NEWS (May 19, 2009, 4:09 PM), http://news.bbc.co.uk/2/hi/south_asia/8056752.stm [hereinafter *Hails Victory*].

¹⁰⁵ Google search for “Velupillai Prabhakaran death”, GOOGLE.

¹⁰⁶ *Hails Victory*, *supra* note 104.

¹⁰⁷ *War Crime in the Massacre of LTTE Officials*, TAMILNET (May 19, 2009, 1:52 PM) <http://www.tamilnet.com/art.html?catid=13&artid=29409>.

¹⁰⁸ *EU Must Investigate Sri Lanka War Crimes - Boston Globe*, TAMILNET (May 19, 2009, 11:30 AM), <http://www.tamilnet.com/art.html?catid=13&artid=29413>.

¹⁰⁹ *Hails Victory*, *supra* note 104.

offered no concrete political solution to the problem, and many citizens remain skeptical.¹¹⁰

In the wake of a nearly three-decade-long war, many observers in Sri Lanka and elsewhere called for peace, reconciliation, and unity.¹¹¹ The government proclaimed the end of ethnic divisionism, political reconciliation, and even declared “celebration” and “momentous joy.”¹¹² Many guidelines, both non-political and political, were issued for the betterment of Sri Lanka’s future.¹¹³

One of the non-political guidelines was issued by Judge C.G. Weeramantry of the International Court of Justice (ICJ).¹¹⁴ Weeramantry addressed the Lessons Learnt and Reconciliation Commission (“LLRC”), calling for “peace education” to rebuild the country.¹¹⁵ He advocated counseling for victims and children as well as educational policies whereby children would learn all three languages of Sri Lanka (Sinhalese, Tamil, and English) as ways to unify and rehabilitate the country.¹¹⁶ As an integrated part of all children’s curriculum, observers such as Member of Parliament R.P. Perera believe that in the long run, peace education will work.¹¹⁷ In its efforts toward reconciliation, the government is reportedly offering a one-time bonus of about 250 dollars to any civil servant who learns another Sri Lankan language, but one must suspect that this offer is primarily directed toward the Western world.¹¹⁸

Contrary to these efforts toward reconciliation, pretend or otherwise, the Tamil diaspora community—those Tamils who fled the country during the course of the war—have been, by all accounts, absolutely instrumental in egging on remnants of the LTTE.¹¹⁹ From the sidelines and with no stakes in the consequences, they spew “racist vit-

¹¹⁰ *Id.*

¹¹¹ Olindhi Jayasundere, *Opportunity to Build Stable and Durable Peace: Weeramantry*, DAILY MIRROR, (Nov. 30, 2010, 12:53 AM), <http://print2.dailymirror.lk/news/news/28629.html>; Interview with Jehan Perera, *supra* note 15.

¹¹² *Sri Lanka Vows to Resettle Tamils*, BBC NEWS (May 21, 2009, 8:20 PM), http://news.bbc.co.uk/2/hi/south_asia/8061623.stm.

¹¹³ Jayasundere, *supra* note 111; Interview with Jehan Perera, *supra* note 15.

¹¹⁴ Jayasundere, *supra* note 111.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ Interview with R.P. Perera in Colombo, Sri Lanka (Jan. 27, 2011).

¹¹⁸ Lydia Polgreen, *Justifying a Costly War in Sri Lanka*, N.Y. TIMES INT’L (July 18, 2009), <http://www.nytimes.com/2009/07/19/world/asia/19lanka.html?fta=y&r=0>.

¹¹⁹ Interview with anonymous representative, United States Embassy in Sri Lanka, in Colombo, Sri Lanka (Jan. 28, 2011).

riol”¹²⁰ through avenues like TamilNet to encourage a rekindling of the war in the pursuit of a Tamil homeland.¹²¹ For example, in a letter dated February 18, 2010, the Reverend Father S. J. Emmanuel laments that “strong attempts are [being] made by the government and their Tamil-collaborators under cover of ‘development’ to divide the Tamils and make them give up their long standing desire to be liberated and free as a dignified people on their homeland,” and urges Tamils that they “have the noble responsibility to be the true voice and champions of their aspirations.”¹²² Because expatriates control much of the international dialog on the situation in Sri Lanka, many refer to them as one of Sri Lanka’s biggest problems today.¹²³

Many Sri Lankans have an interesting kind of respect for President Rajapaksa (he is often referred to almost affectionately as “Mahinda”), despite the human rights violations his government has allegedly committed (or, depending on what you read, continues to commit).¹²⁴ They appreciate that he has held the country together and are thankful simply that the war is over—many do not care about the manner in which it ended, only that it did.¹²⁵ Whereas three or four years prior to this writing, Sri Lankans had to wonder every time they boarded a bus if they would make it to their destination or meet a suicide bomber, instead, today, life can continue relatively normally.¹²⁶

This does not mean, however, that the corruption and dictatorial nature of Rajapaksa’s government should be ignored. At the local level, for example, the police system is plagued by corruption.¹²⁷ A career police officer who has served for over thirty-six years was interviewed by the Sri Lanka Guardian about the corruption in the national police network.¹²⁸ He called it “devastating,” stating that corruption is

¹²⁰ Interview by Michelle Foster and Elizabeth Leman with anonymous source in Colombo, Sri Lanka (Jan. 24, 2011).

¹²¹ Open letter from S. J. Emmanuel to TamilNet.com (Feb. 18, 2010), available at [HTTP://TAMILNET.COM/ART.HTML?CATID=13&ARTID=31221](http://TAMILNET.COM/ART.HTML?CATID=13&ARTID=31221).

¹²² *Id.*

¹²³ Interview with Indrajit Samarajiva, *supra* note 7.

¹²⁴ Interview with Charles Haviland, *supra* note 78; Interview with Indrajit Samarajiva, *supra* note 7.

¹²⁵ Interview with Indrajit Samarajiva, *supra* note 7.

¹²⁶ *Id.*

¹²⁷ S.S.P. Angunawala, *Retired Senior Police Officer talks about the Devastating Degeneration of the Police*, SRI LANKA GUARDIAN (July 13, 2010), available at <http://www.srilankaguardian.org/2010/07/retired-senior-police-officer-talks.html>.

¹²⁸ *Id.*

a huge concern in the system.¹²⁹ “Officers taking the law into their own hands are a great concern because extrajudicial killings are also happening today where generally the magistrate sits and has no knowledge of what is happening. There is no knowledge of rights.”¹³⁰

Corruption in the upper levels of the government must also be dealt with, especially in the context of the “irregularities” of the January 2010 election.¹³¹ After the war, Mahinda Rajapaksa called for elections two years early, supposedly in the interests of democracy for the newly reunited country, though early elections have often been used to catch opponents off-guard.¹³² The president affirmed that the people in the north and east of the country “had not witnessed a democratic election for the past 30 years” and that many “had the opportunity of voting for the first time.”¹³³ However, the BBC reported that voter turnout in Jaffna was under thirty percent.¹³⁴

Mahinda Rajapaksa seemed “unassailable” in the weeks before the vote, despite complaints of corruption, rampant nepotism, and harsh intolerance of criticism.¹³⁵ Notwithstanding his apparent invincibility as the so-called defeater of the Tamil Tigers, his leading general, Sarath Fonseka, claimed to have in fact been the mastermind behind the defeat of the LTTE and declared his intent to run against the incumbent in the election.¹³⁶ This promised an actual race and a truly competitive election—something Rajapaksa could not allow. Fonseka’s campaign was one part anti-Rajapaksa (Fonseka called him a “tin-pot dictator” and promised to scrap his corrupt practices),¹³⁷ one part promotion of national reconciliation. In an effort to get rid of Rajapaksa, the Tamil community rallied largely behind Fonseka.¹³⁸ The campaign became increasingly nasty, though Rajapaksa remained a favorite.¹³⁹

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Sri Lanka President Mahinda Rajapaksa Hails Victory*, BBC NEWS (Jan. 28, 2010), http://news.bbc.co.uk/2/hi/south_asia/8484669.stm.

¹³² See JOHN RICHARDSON, *supra* note 13, at 134, 512-13.

¹³³ *Don't Use Politics of Violence*, THE DAILY NEWS (Feb. 12, 2010), <http://www.dailynews.lk/2010/02/12/pol01.asp>.

¹³⁴ *Sri Lanka President Mahinda Rajapaksa Hails Victory*, *supra* note 131.

¹³⁵ Chris Morris, *A Fresh Start for Sri Lanka?*, BBC NEWS (Jan. 25, 2010), http://news.bbc.co.uk/2/hi/south_asia/8479093.stm.

¹³⁶ *Id.*

¹³⁷ *Ex-army Chief Fonseka Will Run for Sri Lanka Presidency*, BBC NEWS (Nov. 29 2009), http://news.bbc.co.uk/2/hi/south_asia/8384416.stm.

¹³⁸ Morris, *supra* note 135.

¹³⁹ *Id.*

And indeed, on a wave of what might be called popular support or alternately, coercion (depending on who you ask), Rajapaksa was once again elected to the presidency in late January 2010 by a vote of six million to four million.¹⁴⁰

Monitoring institutions, including Sri Lanka's own election commissioner, Dayananda Dissanayake, complained of the abuse of state resources, infractions of polling-day regulations, and violations of fair campaigning practices.¹⁴¹ In addition, Fonseka reported that his supporters had been intimidated and that after the election, he was prevented from leaving the country and felt that his life was in danger.¹⁴² But, according to the independent Center for Monitoring Election Violence, "despite many election day irregularities, there were not complaints of very wide-scale chaos or vote rigging."¹⁴³

Immediately following his election victory, the President made speeches extolling national reconciliation, economic development, and raising the national living standard¹⁴⁴ and pledged to serve as "President not only for those who voted for me but for all people . . . serv[ing] each one impartially."¹⁴⁵ He stated that "politics should not be based on violence or vindictiveness and with the last Presidential election we have ended both these evil trends."¹⁴⁶ Critics and international observers remained skeptical,¹⁴⁷ and rightly so, for infractions of international law soon followed.¹⁴⁸

Sarath Fonseka, however, was not ready to let go and challenged the legitimacy of Rajapaksa's victory, challenging him to a recount.¹⁴⁹ He alleged that "[t]here is no law and order in this country" and that "[t]hey are planning to assassinate me."¹⁵⁰ His campaign headquarters

¹⁴⁰ *Sri Lanka President Mahinda Rajapaksa Hails Victory*, *supra* note 131.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Fonseka Rejects Sri Lanka Election Win for Rajapaksa*, BBC NEWS (Jan. 27, 2010), http://news.bbc.co.uk/2/hi/south_asia/8482963.stm.

¹⁴⁴ *See Sri Lanka Vows to Resettle Tamils*, BBC NEWS (May 21, 2009), http://news.bbc.co.uk/2/hi/south_asia/8061623.stm.

¹⁴⁵ *Don't Use Politics of Violence*, DAILY NEWS (Feb. 12, 2010), <http://www.dailynews.lk/2010/02/12/pol01.asp>.

¹⁴⁶ *Id.*

¹⁴⁷ *See Charles Haviland, Where Now for Post-election Sri Lanka?*, BBC NEWS (Jan. 29, 2010), http://news.bbc.co.uk/2/hi/south_asia/8487405.stm.

¹⁴⁸ *See Sri Lanka: New Evidence of Wartime Abuses*, HUMAN RIGHTS WATCH (May 20, 2010), <http://www.hrw.org/en/news/2010/05/20/sri-lanka-new-evidence-wartime-abuses>.

¹⁴⁹ *See Fonseka Rejects Sri Lanka Election Win for Rajapaksa*, *supra* note 143.

¹⁵⁰ *Id.*

in Colombo were raided in the days after the election on the pretense that he was planning a coup¹⁵¹ and less than a week later, he was arrested on the vague charge of “military offenses.”¹⁵² Earlier that day, he had pledged to go public with what he knew about offenses committed by the government during the war.¹⁵³ He remained in jail on charges of corruption and working with anti-government forces (which he denies) until May 2012.¹⁵⁴ His wife alleged that he had been denied visits from his doctor, who must monitor the shrapnel lodged near his heart and kidneys.¹⁵⁵ The arrest has caused disquiet among human rights groups around the world.¹⁵⁶

With his competition out of the way, Rajapaksa moved quickly to dissolve Parliament and remove Sri Lanka’s constitutional term limit for presidents.¹⁵⁷ In February 2010, Rajapaksa disbanded Parliament so that a new one could be formed, hopefully capitalizing on his election win.¹⁵⁸ He also cultivated “presidential hubris” with declarations extolling his own role in ending the war.¹⁵⁹ “When I took over five years ago the country was heading for breakup, but today it is a unified nation where terrorism has been defeated,” he said.¹⁶⁰ “I have full confidence that the young people of this country will make Sri Lanka the wonder of Asia.”¹⁶¹

Worse, Sri Lanka’s Parliament voted 161 to seventeen in early September 2010 to greatly expand President Rajapaksa’s constitutional powers.¹⁶² Among these new powers is the abolition of Rajapaksa’s

¹⁵¹ *Sri Lanka Police ‘raid Fonseka Campaign HQ’*, BBC NEWS (Jan. 29, 2010), http://news.bbc.co.uk/2/hi/south_asia/8487331.stm.

¹⁵² *Sri Lanka Election Loser Sarath Fonseka Arrested*, BBC NEWS (Feb. 8, 2010), http://news.bbc.co.uk/2/hi/south_asia/8504882.stm.

¹⁵³ *Id.*

¹⁵⁴ *Sri Lanka’s Sarath Fonseka Freed from Prison*, BBC NEWS (May 21, 2012), <http://www.bbc.co.uk/news/world-asia-18143907>.

¹⁵⁵ *Defeated Sri Lankan Candidate Sarath Fonseka Urges Calm*, BBC NEWS (Feb. 11, 2010), http://news.bbc.co.uk/2/hi/south_asia/8510522.stm.

¹⁵⁶ *Id.*

¹⁵⁷ *Sri Lanka MPs Vote in Sweeping Powers for President*, BBC NEWS (Sept. 8, 2010), <http://www.bbc.co.uk/news/world-south-asia-11225723>.

¹⁵⁸ *Sri Lanka President Rajapaksa Dissolves Parliament*, BBC NEWS (Feb. 9, 2010), http://news.bbc.co.uk/2/hi/south_asia/8506563.stm.

¹⁵⁹ Charles Haviland, *Sri Lanka’s President Rajapaksa Sworn in for New Term*, BBC NEWS (Nov. 19, 2010), <http://www.bbc.co.uk/news/world-south-asia-11795299>.

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Sri Lanka MPs Vote in Sweeping Powers for President*, BBC NEWS (Sept. 8, 2010, 11:16 AM), <http://www.bbc.co.uk/news/world-south-asia-11225723>.

term limit.¹⁶³ He is now able to serve an unlimited number of terms as president.¹⁶⁴ The opposition suggests that threats and bribes were used to persuade members of Parliament to vote the way they did, and Fonseka called this “the last nail into the coffin of democracy.”¹⁶⁵ Supporters, however, still praise Rajapaksa’s role in ending the civil war and the benefits of political continuity.¹⁶⁶ Foreign Minister G.L. Peiris stated that, “political instability is the last thing we want in Sri Lanka as we seek to derive the fullest benefit for our people from the unique opportunity we have today having eradicated terrorism.”¹⁶⁷

The media has also been especially targeted during and since the war, leading Freedom House to categorize Sri Lanka’s press as “not free” and rate its press environment at seventy-two¹⁶⁸ (the United States, for reference, is rated at eighteen).¹⁶⁹ Even though the war is over, “media freedom remain[s] severely restricted in Sri Lanka, with journalists subject to several forms of legal harassment and physical intimidation,”¹⁷⁰ which the government fails to prevent to the degree stated in the Constitution.¹⁷¹

Although criticisms of the Rajapaksa government appear nearly every day in newspapers,¹⁷² it is debatable whether they represent deep-rooted criticisms or only surface critiques.¹⁷³ To prevent truly “unwanted” material from being published, more discretionary measures than those listed above are available.¹⁷⁴ In 2006, the Media Center for National Security was created, allowing the government to edit and censor defense- or government-related media stories.¹⁷⁵ Broadcasting licenses are only issued to those without “formal political affiliations”

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Freedom of the Press: Sri Lanka (2010)*, FREEDOM HOUSE, <http://www.freedomhouse.org/report/freedom-press/2010/sri-lanka> (last visited Jan. 21, 2013).

¹⁶⁹ *United States (2010)*, FREEDOM HOUSE, <http://www.freedomhouse.org/report/freedom-press/2010/united-states> (last visited Apr. 24, 2011).

¹⁷⁰ *Freedom of the Press: Sri Lanka (2010)*, *supra* note 168.

¹⁷¹ *Sri Lanka (2010)*, FREEDOM HOUSE, <http://www.freedomhouse.org/report/freedom-world/2010/sri-lanka> (last visited Nov. 30, 2010).

¹⁷² See *Prelate Says Govt. Should Not Suppress Opposing Views*, DAILY MIRROR (Jan. 8, 2010, 1:56 PM), <http://print2.dailymirror.lk/news/front-page-news/753-prelate-says-govt-should-not-suppress-opposing-views.html>.

¹⁷³ Interview with Charles Haviland, *supra* note 78.

¹⁷⁴ Interview with Indrajit Samarajiva, *supra* note 7.

¹⁷⁵ *Freedom of the Press: Sri Lanka (2010)*, *supra* note 168.

and any form of criticism of the government is demonized as “treason.”¹⁷⁶ Foreign journalists from organizations like the Associated Press and Britain’s Channel Four News are often denied visas, while others such as the BBC see their broadcasts tampered with or delegitimized.¹⁷⁷ Additionally, although only about nine percent of Sri Lanka’s population used the Internet in 2009, both major Internet providers in the country have been ordered by the government to block TamilNet, a Tamil news site popular among expatriates.¹⁷⁸ Other websites, such as Human Rights Watch, have also been intermittently blocked.¹⁷⁹ When the war escalated in early 2009, restrictions on entering northern territories made it almost impossible for reporters to cover the war.¹⁸⁰

These measures have created a level of self-censorship among those Sri Lankan journalists who do not choose to flee the country.¹⁸¹ For those who do not conform, verbal and even physical threats become the government’s last defense.¹⁸² The most famous of these attacked journalists was Lasantha Wickrematunge, a reporter at the *Sunday Leader* who was killed on his way to work on January 8, 2009.¹⁸³

Wickrematunge’s former newspaper, the independent *Sunday Leader*, lamented in December 2010 that, “the government’s censorship work is done. After the assassination of Lasantha Wickrematunge . . . and public assaults on . . . The *Sunday Leader*, anyone who hasn’t got the message is surely dumb.”¹⁸⁴ Since 2006, fifteen journalists have been killed and at least twenty have fled the country.¹⁸⁵ These crimes are never investigated, creating a climate of impunity for those who choose to harass journalists.¹⁸⁶

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ Interview with Indrajit Samarajiva, *supra* note 7.

¹⁸² *Freedom of the Press: Sri Lanka (2010)*, *supra* note 168.

¹⁸³ See *Sri Lanka*, *supra* note 171.

¹⁸⁴ *If You Can’t Speak, then Leak*, THE SUNDAY LEADER, Dec. 5, 2010, <http://www.the.sundayleader.lk/2010/12/05/if-you-can-t-speak-then-leak/> [hereinafter THE SUNDAY LEADER].

¹⁸⁵ See *Silencing Dissent: Media Workers in Sri Lanka*, AMNESTY INTERNATIONAL (May 3, 2010), <http://www.amnesty.org/en/library/asset/ASA37/001/2010/en/224fc01a-ba43-4c54-ac34-ca0ea0d6bc32/asa370012010en.pdf> [hereinafter *Silencing Dissent*].

¹⁸⁶ See *id.*

On the whole, the government “actively discourages” equal access to information, even when it is in the public interest, if leaders judge that the information may jeopardize their power.¹⁸⁷ According to Sri Lankan free press advocate Sunanda Deshapriya, “If you read Sri Lankan newspapers, you still get the government version . . . Very rarely, you get a critical point of view.”¹⁸⁸ In addition, *The Sunday Leader* writes that “our public news . . . is often a set of glorified press releases and sacrificial lambs,” and that “[our news stories are] a thin layer of news on top of a bigger layer of entertainment on top of, ultimately, propaganda and government PR.”¹⁸⁹ The author goes on to argue that what Sri Lanka really needs are watchful citizens who will not be afraid to report government wrongdoing.¹⁹⁰

Finally, despite a veneer of communal reconciliation, Tamils have found it difficult to carve out a place in post-war society.¹⁹¹ After the war, President Rajapaksa stated that he did not believe that the LTTE was capable of normal political activity after so many years of violence.¹⁹² The army has actually increased its presence in the north since the end of the war, allegedly because it wants to “insure that Tamil radicalism never start[s] again.”¹⁹³ However, observers have reported that the LTTE has very few hardcore supporters left over within Sri Lanka since the war (though there are many LTTE supporters among the diaspora community),¹⁹⁴ and senior LTTE spokesman Selvarasa Pathmanathan says that the LTTE is resigned to using non-violent methods and is prepared to enter the democratic process.¹⁹⁵ Most of the LTTE’s senior leadership was killed in the last days of fighting, so that only a slight risk of resurgence in the violence exists.¹⁹⁶

THE LEGAL AFTERMATH

On his official visit of May 23–24, 2009, UN Secretary-General Ban Ki-Moon stated that, “[t]he government is doing its utmost best . . .

¹⁸⁷ *Freedom of the Press: Sri Lanka*, *supra* note 168.

¹⁸⁸ *Silencing Dissent*, *supra* note 185.

¹⁸⁹ THE SUNDAY LEADER, *supra* note 184.

¹⁹⁰ *See id.*

¹⁹¹ *See Sri Lanka Rejects Tigers’ Offer*, BBC NEWS (May 26, 2009), http://news.bbc.co.uk/2/hi/south_asia/8067524.stm.

¹⁹² *See id.*

¹⁹³ Anderson, *supra* note 83.

¹⁹⁴ Interview with anonymous representative, *supra* note 119.

¹⁹⁵ *See Sri Lanka Rejects Tigers’ Offer*, *supra* note 191.

¹⁹⁶ *See id.*

[but that there is a] wide gap between what is needed and what can be done.”¹⁹⁷ Ban advocated three goals: reintegration of refugees into society, humanitarian aid, and political reconciliation. He called his visit “very sad and very moving.”¹⁹⁸

Sri Lanka was slow to act on the first two of these goals, prompting international criticism.¹⁹⁹ The humanitarian situation in refugee camps following the war was “horrible,”²⁰⁰ with limited access to food, clean water, sanitation, and medical attention.²⁰¹ Between 250,000 and 300,000 people had fled their homes after being caught in the crossfire of battles and lived packed into internally displaced person (IDP) camps throughout the northern and eastern parts of the island.²⁰² The vast majority of refugees were housed in Menik Farm camp in Vavuniya.²⁰³ International aid agencies were restricted by the government from entering the camps,²⁰⁴ apparently because groups “pretending to be humanitarian and aid agencies” were using the situation in Sri Lanka “to secure their income.”²⁰⁵

Even more problematic were accusations that the government was detaining the refugees deliberately and illegally, in order to “weed out” remaining LTTE cadres, who the government maintained had “infiltrated” the camps at the end of the war.²⁰⁶ Critics of the government argued that it was against international law to keep people “incarcerated” in camps.²⁰⁷ By this point, the camps have closed and the refugees have returned to whatever is left of their homes, but the specter of misconduct continues to hover over the government.²⁰⁸

¹⁹⁷ *UN Chief in Sri Lanka Access Plea*, BBC NEWS (May 24, 2009), http://news.bbc.co.uk/2/hi/south_asia/8064754.stm.

¹⁹⁸ *Id.*

¹⁹⁹ *See Sri Lanka Tamils Facing Misery*, BBC NEWS (June 1, 2009), http://news.bbc.co.uk/2/hi/south_asia/8076407.stm.

²⁰⁰ *Id.*

²⁰¹ *Id.*; see P. Krishnaswamy, *Menik Farm IDPs Being Evacuated*, SUNDAY OBSERVER (Aug. 23, 2009), available at <http://www.sundayobserver.lk/2009/08/23/new03.asp>.

²⁰² *See Sri Lanka Extends Emergency Laws*, BBC NEWS (June 9, 2009), http://news.bbc.co.uk/2/hi/south_asia/8091840.stm.

²⁰³ *See id.*

²⁰⁴ *See Sri Lanka Vows to Resettle Tamils*, *supra* note 112.

²⁰⁵ *Sri Lanka Fury at Aid Coalition*, BBC NEWS (March 24, 2009), http://news.bbc.co.uk/2/hi/south_asia/7961088.stm.

²⁰⁶ *Sri Lanka Tamils Facing Misery*, *supra* note 199.

²⁰⁷ *A Trip to Sri Lanka's Tamil Country*, BBC NEWS (Aug. 22, 2009), http://news.bbc.co.uk/2/hi/programmes/from_our_own_correspondent/9047814.stm.

²⁰⁸ *Sri Lanka's Menik Farm Refugee Camp 'to Close'*, BBC NEWS (Sept. 21, 2011), <http://www.bbc.co.uk/news/world-south-asia-15007375>.

Work on the third of Secretary-General Ban's goals, political reconciliation, has been a much lengthier process, though according to Jon Lee Anderson, an experienced journalist in Sri Lanka, it needn't be.²⁰⁹ Because the death of Prabhakaran represented a clean break from the past, the full defeat of one side by the other, the usual "messy, protracted negotiations"²¹⁰ that follow a modern war are absent.²¹¹ As a result, it would be very easy to implement international humanitarian law, if it were deemed necessary—if only the government would cooperate.

Cooperation by the Sri Lankan government in a full international investigation is not likely, given their humanitarian record during the war.²¹² In addition to the post-war detention of refugees, both the government and the remaining fragments of the LTTE have been accused of a number of other war crimes.²¹³ The government is accused of firing on hospitals and safe zones, of executing surrendering Tigers, and of excessive violence in general.²¹⁴ The LTTE, in turn, is accused of detaining civilians behind the front lines and using them as forced labor, of using child soldiers, and of employing terrorist tactics throughout the war.²¹⁵ Because independent observers were restricted from the battle zones for years, it is impossible to ascertain what atrocities were committed, by whom, and to what scale; thus, rumors abound.²¹⁶

To establish the truth and begin to deal with war crimes, the international community has continuously advocated opening a war crimes commission or other investigation even before the end of the war.²¹⁷ Both Secretary of State Hillary Clinton and UN High Commissioner for Human Rights Navi Pillay released statements to that effect,²¹⁸ and

²⁰⁹ *Sri Lanka's Long War*, THE NEW YORKER (Jan. 17, 2011), http://www.newyorker.com/online/2011/01/17/110117on_audio_anderson.

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² See *UN Fears Sri Lanka 'War Crimes'*, BBC NEWS (March 13, 2009), http://news.bbc.co.uk/2/hi/south_asia/7942051.stm.

²¹³ *Id.*

²¹⁴ *Sri Lanka: End 'War' on Civilians*, *supra* note 99; *UN Fears Sri Lanka 'War Crimes'*, *supra* note 212; *AI Slams LTTE 'Human Shield'*, BBC SINHALA (Aug. 15, 2008), http://www.bbc.co.uk/sinhala/news/story/2008/08/080815_ai_civilians.shtml.

²¹⁵ *UN Fears Sri Lanka 'War Crimes'*, *supra* note 212; *AI Slams LTTE 'Human Shield'*, *supra* note 214.

²¹⁶ See *Sri Lanka*, FREEDOM HOUSE (2010), <http://www.freedomhouse.org/report/freedom-world/2010/sri-lanka> (last visited Nov. 30, 2010).

²¹⁷ *UN Fears Sri Lanka 'War Crimes'*, *supra* note 212.

²¹⁸ *Id.*

groups like Human Rights Watch, Amnesty International, and the International Crisis Group have all released reports with similar calls for investigation.²¹⁹ Nevertheless, the government maintains the position that there is nothing to investigate.²²⁰

The international media has done little to encourage the government to work with the international community on reconciliation, having portrayed the situation far from fairly.²²¹ The government has been criticized across the board for its human rights offenses; terrible acts, surely, but not the only ones.²²² The LTTE was characterized by many nations, including the United States, as a terrorist organization, notable for such acts as perfecting the suicide bomb, assassinating two world leaders, and becoming the first militant group to acquire air power.²²³ The LTTE should not receive undue sympathy or be painted as a victim; it only puts the Sri Lankan government in a defensive position.

Besides the government's (somewhat understandable) unwillingness to cooperate with an investigation, the main legal obstacle facing any potential court is that it is difficult to prosecute a non-state actor (i.e. terrorist organization) under international law.²²⁴ In general, IHL deals with States and not subnational groups like the LTTE.²²⁵ In any case, Sri Lanka is not party to the International Criminal Court, which makes prosecution trickier and necessitates another approach.²²⁶

SRI LANKA'S RESPONSE

Regardless of international opinion on the question of a war crimes inquiry, there is a serious lack of political will to build one.²²⁷

²¹⁹ *Sri Lanka: New Evidence of Wartime Abuses*, *supra* note 148; *War Crimes in Sri Lanka: Asia Report N 191*, INTERNATIONAL CRISIS GROUP (May 17, 2010), <http://www.crisisgroup.org/~media/Files/asia/south-asia/sri-lanka/191%20War%20Crimes%20in%20Sri%20Lanka.pdf> [hereinafter *WAR CRIMES IN SRI LANKA*]; *Sri Lanka rules out outside probe*, *supra* note 102.

²²⁰ *Sri Lanka Rules Out Outside Probe*, *supra* note 102.

²²¹ Charles Haviland, *War Crimes Commission 'Not Addressing' Final Days of War*, BBC NEWS (Aug. 14, 2010), http://news.bbc.co.uk/today/hi/today/newsid_8913000/8913864.stm [hereinafter *Final Days of War*].

²²² Interview with Indrajit Samarajiva, *supra* note 7.

²²³ BANDARAGE, *supra* note 23.

²²⁴ *Id.* at 17-18.

²²⁵ *Id.*

²²⁶ *The States Parties to the Rome Statute*, INTERNATIONAL CRIMINAL COURT (last visited Nov. 16, 2010), <http://www2.icc-cpi.int/Menus/ASP/statesparties/>.

²²⁷ Interview with Indrajit Samarajiva, *supra* note 7.

The Obama administration has “maintained a policy of circumspection,”²²⁸ and in any case, China’s influence is much greater due to the many donations it has made.²²⁹ For example, besides billions of dollars in military aid during the war,²³⁰ China recently built a new port in Hambantota (Rajapaksa’s hometown) and has signed “a number of economic deals” with the Sri Lankan government.²³¹ China is not expected to pressure the government to investigate war crimes, and Sri Lankan political analyst Harim Peiris scoffs that “there is no serious international pressure” from other powers.²³²

This lack of commitment from the international community became apparent when, a week after the war ended, the UN Human Rights Council met in Geneva and agreed to support Sri Lanka’s version of an inquiry instead of forcing one on the country.²³³ To be fair, the situation in Sri Lanka is legally tricky because judgment would be leveled against a group that is still in power.²³⁴ Nonetheless, Sri Lanka’s leadership touted this as an important political victory because it seemed to show international confidence in the regime.²³⁵ The final vote of twenty-nine to twelve welcomed “what it called Sri Lanka’s continued commitment to the protection of human rights.”²³⁶

In response, the government formed the LLRC.²³⁷ But it was not, as the international community wanted, designed to examine the war crimes committed in the last months of the war, but to examine the failure of the 2002 Norwegian-brokered peace deal.²³⁸ This commission avoided the topic of violations of the laws of war and is criticized as being a tool of the government.²³⁹ The LLRC began its work on May 17, 2010 and issued its report on December 16, 2011.²⁴⁰

²²⁸ Anderson, *supra* note 83, at 51.

²²⁹ *Id.* at 51-52.

²³⁰ *Id.* at 52.

²³¹ *Id.* at 51.

²³² *Id.* at 52.

²³³ Colombo Hails UN “Diplomatic Win”, BBC NEWS (May 28, 2009, 10:33 GMT), http://news.bbc.co.uk/2/hi/south_asia/8071661.stm.

²³⁴ Interview with Indrajit Samarajiva, *supra* note 7.

²³⁵ Colombo hails U.N. “Diplomatic Win,” *supra* note 233.

²³⁶ *Id.*

²³⁷ Sri Lankan War Inquiry Commission Opens Amid Criticism, BBC NEWS (Aug. 11, 2010, 7:37 PM), <http://www.bbc.co.uk/news/world-south-asia-10934663>.

²³⁸ Final Days of War, *supra* note 221.

²³⁹ *Id.*

²⁴⁰ See Sri Lanka: New Evidence of Wartime Abuses, *supra* note 148; See Sri Lanka MPs Receive Controversial Civil War Report, BBC NEWS (Dec. 16, 2011, 10:29 PM), <http://www.bbc.co.uk/news/world-asia-16214783>.

Unexpectedly, the LLRC has encouraged the open expression of Sri Lankans' experiences and grievances.²⁴¹ The Tigers have of course been roundly criticized, both by the eight-member panel and by witnesses in their testimony.²⁴² However, the West, the Norwegian government, and even the Sri Lankan government have also been criticized for the failed 2002 ceasefire.²⁴³ One businessman requested a formal public apology from the government for its role in wartime casualties, and two former federal employees complained of enforced "disappearances" and the estimated 2,000 former rebels still in prison.²⁴⁴ BBC correspondent Charles Haviland writes that "[p]eople in Sri Lanka generally do not venture to air these subjects. Yet they are now being raised in this public forum,"²⁴⁵ and not only by the most important figures. Ordinary people, including Tamils, have been encouraged to testify and assured that no one need fear reprisal,²⁴⁶ but a report by the US Department of State cautioned that those who testified could be targeted by the government.²⁴⁷ Either way, beyond being a tool for the public expression of grievances, the LLRC has achieved little in the way of a war crimes investigation, much less the identification and prosecution of perpetrators.²⁴⁸

In a TamilNet article of February 7, 2010, the authors established the duty of the international community and of expatriate Tamils in particular in terms of a more legitimate war crimes commission.²⁴⁹ The author writes that:

The strong transnational expatriate Tamil community now has the burden (a) to prevent Sri Lanka from erasing the massacres from historical record, (b) to resist attempts by international powers to persuade Tamils for reconciliation without establishing justice and accountability for the crimes, and (c) to seek justice for tens of thousands of Tamil victims by

²⁴¹ *Final Days of War*, *supra* note 221.

²⁴² Charles Haviland, *Seeking the Truth in Sri Lanka*, BBC NEWS (Sept. 30, 2010, 2:53 GMT), http://news.bbc.co.uk/2/hi/programmes/from_our_own_correspondent/9047814.stm.

²⁴³ *Id.*

²⁴⁴ *Id.*

²⁴⁵ *Id.*

²⁴⁶ Charles Haviland, *Sri Lanka War Panel Hears Tamil Grievances*, BBC NEWS (Aug. 14, 2010), <http://www.bbc.co.uk/news/world-south-asia-10973969>.

²⁴⁷ *Id.*

²⁴⁸ Charles Haviland, *US Warns Sri Lanka Over War Investigation Standards*, BBC NEWS (Mar. 1, 2011), <http://www.bbc.co.uk/news/world-south-asia-12607615>.

²⁴⁹ *Sri Lanka, Acid Test for International Law*, TAMILNET (Feb. 7, 2010, 11:15 PM), <http://tamilnet.com/art.html?catid=79&artid=31156>.

charging Sri Lanka of war crimes and genocide against Tamils in world courts.²⁵⁰

The author reports that the Sri Lankan government was “widely reported to have engaged in ethnic cleansing, and committed war crimes, crimes against humanity, and acts of genocide.”²⁵¹ TamilNet accuses the international community of failing to protect Tamils during the war and their “internment” at IDP camps like Menik Farm.²⁵² Because the international community has been slow to act in this regard, TamilNet concludes that it is up to the expatriate community to press for a war crimes investigation by the International Court of Justice.²⁵³ Several articles from TamilNet function as how-to guides for expat Tamils to put together a case for war crimes, genocide, and crimes against humanity in Sri Lanka.²⁵⁴

In late June 2010, apparently fed up with the government’s war crimes “investigation,” Secretary-General Ban set up a three-member advisory panel to look into the feasibility of setting up a war crimes probe for Sri Lanka.²⁵⁵ Finally, the Sri Lankan government conceded to the UN.²⁵⁶ It allowed the panel of experts (POE) to evaluate allegations made against both the government and the LTTE—but not conduct their own investigations—beginning on September 16, 2010.²⁵⁷ The POE was able to confirm a number of the allegations concerning the government firing on safe zones, the LTTE using civilians as shields, and more.²⁵⁸ It also placed some blame on the UN itself and the international community for failing to protect civilians in the last months of the war.²⁵⁹ Confirming many observers’ beliefs, the POE furthermore found that the LLRC was “deeply flawed, [and did] not meet international standards for an effective accountability mechanism.”²⁶⁰ Unfortunately, although the POE recommended a full and

²⁵⁰ *Id.*

²⁵¹ *Id.*

²⁵² *Id.*

²⁵³ *Id.*

²⁵⁴ *Id.*; *Time for International Criminal Tribunal on Sri Lanka*, says Boyle, TAMILNET (Mar. 7, 2010, 10:03 PM), <http://tamilnet.com/art.html?catid=13&artid=31320>.

²⁵⁵ Raul Connolly, *Sri Lanka: UN Appoints War Crimes Panel*, GREEN LEFT (June 27, 2010), <http://www.greenleft.org.au/node/44583>.

²⁵⁶ *Sri Lanka Ends Ban on UN War Crimes Probe Team*, BBC NEWS (Dec. 18, 2010), <http://www.bbc.co.uk/news/world-south-asia-12027993>.

²⁵⁷ U.N. Secretary-General, *Report of the Secretary-General’s Panel of Experts on Accountability in Sri Lanka*, at i (Mar. 31, 2011).

²⁵⁸ *Id.* at iii-iv.

²⁵⁹ *Id.* at vi.

²⁶⁰ *Id.* at v.

“genuine” investigation by the government with supervision and parallel investigation by a UN panel,²⁶¹ the government is highly unlikely to cooperate with such a thorough examination.²⁶²

THE ROLE OF THE INTERNATIONAL COMMUNITY IN SRI LANKA

What can the international community do to hasten the process of reconciliation? Observers request financial assistance from the international community, but prefer the community not to become involved in their domestic political affairs.²⁶³ Instead, what Sri Lanka needs is something it has never before had—a strong nonviolent leader in the tradition of Mahatma Gandhi or Martin Luther King, Jr.²⁶⁴

In addition, the international community should encourage human rights, but not use them as political leverage or to “beat people over the head with.”²⁶⁵ This can start by enforcing human rights evenly around the world: Sri Lankans are a highly literate and educated population, aware of world events.²⁶⁶ They see that the US and other Western powers are not prosecuted for their human rights violations in the Middle East and Guantánamo Bay, for example, and wonder why, as the first nation to successfully deal with terrorism, they should have to answer for the byproducts of that war.²⁶⁷ In fact, “the tendency of human rights organizations based in the West to use human rights to pressure weak ‘Third World’ states over selected, ethnically identified issues without exerting similar pressures on their own states have led to the charge of ‘human rights imperialism’ from some in the [Global] South.”²⁶⁸

The West should, however, learn when it is appropriate to intervene. Because they hold the power in international relations, Western

²⁶¹ *Id.* at vii.

²⁶² Jason Burke, *Sri Lanka Unlikely to Face War Crimes Investigation*, THE GUARDIAN (Apr. 26, 2011), <http://www.guardian.co.uk/world/2011/apr/26/un-sri-lanka-possible-war-crimes>.

²⁶³ Interview with World Food Program Spokesperson, in Colombo, Sri Lanka (Jan. 28, 2011).

²⁶⁴ Rajitha Senaratne, Keynote Address at the Lakshman Kadirgamar Institute of International Relations and Strategic Studies: Lessons Learnt and Reconciliation Commission (Jan. 27, 2011).

²⁶⁵ Interview with Indrajit Samarajiva, *supra* note 7.

²⁶⁶ Interview with R.P. Perera, *supra* note 117.

²⁶⁷ Interview with Indrajit Samarajiva, *supra* note 7.

²⁶⁸ BANDARAGE, *supra* note 23, at 122.

powers and the UN are the “final arbiters in contests over self-determination and sovereignty;” that is, when a nation should maintain its sovereignty and when that sovereignty should be violated in favor of human rights.²⁶⁹ The concept of “Right to Protect” (R2P) attempts to establish a “concrete point of reference” for when intervention is appropriate.²⁷⁰ This, however, leads to important questions:

Is R2P simply a new name for the right to intervene? . . . What are the criteria for intervention? Who makes the decisions? What makes a ‘failed state’ requiring external intervention? Who holds non-state actors responsible to international humanitarian laws at a time when their financial power is growing and their violence—terrorism—is becoming an increasing threat to peace and security everywhere?²⁷¹

The issues surrounding R2P and knowing when intervention is appropriate are some of the most important problems facing international law today.²⁷² Before passing judgment on the Sri Lankan situation, these issues need to be worked out.

Even more importantly, the international community should consult the people of Sri Lanka on the subject of a war crimes commission. From my own conversations with Sri Lankans of a variety of demographics came the widespread feeling that many citizens, and especially Tamils in the north and east, simply want to move on with their lives. Ruki Fernando of the Law and Society Trust says that war crimes prosecution, as the international community envisions it, is not a priority for most Sri Lankans.²⁷³ Instead, they want to rebuild their homes, send their children to school, and get a good jobs.²⁷⁴ In other words, bread and butter issues are the order of the day. They might perhaps be interested in justice on the individual level—that is, finding out who killed their loved ones—but have no interest in an all-encompassing international tribunal.²⁷⁵ These findings may not encompass Sri Lankans’ opinions on the whole, but should be investigated and considered before any major action is taken.

The international community should also make sure that global media outlets represent the Sri Lankan situation fairly. The international community should understand that the situation is more

²⁶⁹ *Id.* at 206.

²⁷⁰ *Id.*

²⁷¹ *Id.* at 206-07.

²⁷² *Id.* at 207.

²⁷³ Interview with Ruki Fernando, in Colombo, Sri Lanka (Jan. 26, 2011).

²⁷⁴ *Id.*

²⁷⁵ *Id.*

nuanced than the traditional “genocide narrative”;²⁷⁶ that is, the ideas about genocide (such as a good-versus-evil dichotomy) which we gained from events like the Holocaust and Rwandan genocide. If the government feels targeted as the sole perpetrator of war crimes and sees the LTTE portrayed as a victim in international media, the government becomes defensive (which is “unfortunate,” as it thereby looks more guilty)²⁷⁷ and every disagreement seems traitorous.²⁷⁸ This position is far from conducive to the reconciliation and rebuilding of Sri Lankan society.

At the same time, the international community should recognize the effects of the war on Sri Lanka. Aside from the estimated 100,000 lives lost, including “scores of government ministers, parliamentarians, military officers, and other officials,”²⁷⁹ the war has devastated the country’s tourist industry, diverted money for social-welfare projects, and increased “activism” by Sinhalese nationalists.²⁸⁰ Hundreds of thousands were displaced from their homes and fled abroad.²⁸¹ Observers state that the international community should give more visas to Sri Lankans, allowing them to work abroad and send money home.²⁸² One worker abroad can support an entire extended family at home, pouring money into the country’s economy.²⁸³

Additionally, attitudes toward democracy are now largely negative.²⁸⁴ It is seen by many Sri Lankans as simply a “tool of the powerful” to get what they want, instead of a legitimate government of the people.²⁸⁵ One step that can be taken during the reconciliation process to correct this is the consideration of several different points of view. The war was characterized not only by Tamil-Sinhalese violence, but also Sinhalese-Sinhalese, Tamil-Tamil, Tamil-Muslim, and Sinhalese-Muslim violence.²⁸⁶ Neshan Gunasekara, a Sri Lankan lawyer, stresses the importance of considering not only Tamil and Sinhalese viewpoints,

²⁷⁶ Interview with Indrajit Samarajiva, *supra* note 7.

²⁷⁷ Interview with anonymous representative, *supra* note 119.

²⁷⁸ Interview with Indrajit Samarajiva, *supra* note 7.

²⁷⁹ Anderson, *supra* note 83, at 47.

²⁸⁰ *Id.*

²⁸¹ *Id.*

²⁸² Interview with Indrajit Samarajiva, *supra* note 7.

²⁸³ *Id.*

²⁸⁴ *Id.*

²⁸⁵ Interview with anonymous representative, *supra* note 119.

²⁸⁶ Interview with Neshan Gunasekara, in Colombo, Sri Lanka (Jan. 22, 2011).

but also those of Muslims, Indian Tamils, and Burghers in creating solutions to the war.²⁸⁷



Sri Lankan society has been deeply fragmented along many fault lines; it will take years of careful physical reconstruction and emotional healing before Sri Lanka is once again truly a united country.²⁸⁸ Promisingly, the younger generations—those who have lived only during times of war—seem to be the most optimistic about Sri Lanka's future;²⁸⁹ a foothold for reformers to encourage change. It remains the responsibility of the international community to sort out its role in Sri Lanka's rebuilding; surely not an easy task, but one that can be accomplished with cooperation and understanding.

²⁸⁷ *Id.*

²⁸⁸ Anderson, *supra* note 83, at 47.

²⁸⁹ Anonymous representative, *supra* note 119.