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Rear Admiral (Rtd.) Dr. Sarath Weerasekera
Federation of National Organizations

Mr. Sunil Chandrakumara
Co-President
Global Sri Lankan Forum

10th July 2017

Professor Robert McCorquodale
Director,
British Institute of International and Comparative Law
Charles Clore House
17 Russell Square
London, WC 1B 5JP, England

Sir,

REQUEST FOR RIGHT OF RESPONSE TO A STATEMENT BY THE UN HIGH COMMISSIONER FOR HUMAN RIGHTS

1. On 26th June 2017, UN Human Rights High Commissioner Zeid Ra'ad Al Hussein delivered the Grotius Lecture at your Institute. In the course of that lecture he specifically mentioned one of us – Rear Admiral (Rtd) Sarath Weerasekera – and two petitions we had filed with the Human Rights Council earlier in the month.

2. He said, *inter alia*:
"A few days ago, citing Prime Minister May, a former Sri Lankan rear admiral delivered a petition to the President of the Human Rights Council. He demanded action be taken against my Office for 'forcing' Sri Lanka to undertake constitutional reforms, and for exerting pressure on them to create a hybrid court to try perpetrators of war crimes and crimes against humanity – when in reality, he claimed all they had engaged in was fighting terrorism."[1]

[1] "Is International Human Rights Law Under Threat?" Zeid Ra'ad Al Hussein, Grotius Lecture, British Institute of International and Comparative Law, 26th June 2017, www.biicl.org

"My first question: Why is international human rights law such an easy target? Why is it so misunderstood, so reviled by some, feared by others, spurned, attacked?"[2]

"My second question: If the Prime Minister meant what she said, which universal right would the UK be willing to give away in order to punish people against whom there is insufficient evidence to justify prosecution?"[3]

3. We categorically state that, nowhere in our petitions did we try to target or belittle human rights, and we do not in any way revile, fear, or spurn human rights law.

4. Our main point in both petitions was that, where the Human Rights Council takes action against a particular country for purported violations of human rights, it should do so according to law, which is to say, within the boundaries set by the UN Charter and related statutes, including most importantly Article 2(7) of the Charter, and that where this is not done the Council compromises its credibility along with that of the United Nations Organization.

5. We take as self-evident that, to the extent the credibility of the UNO diminishes, international law is irreparably harmed. (Since the UNO is the guardian of international law, a 'broken' UNO threatens the future viability of international law.)

6. We wish to inform you that, our criticism of the High Commissioner's actions is based on the following facts:

   a) In March 2014 the UNHRC adopted resolution 25/1 which mandated the High Commissioner to carry out an investigation *inter alia* into war crimes allegedly committed during the last phase of the war.

   b) The High Commissioner submitted the final report of that investigation (the OISL report) in September 2015.

   c) On 1st October 2015 the Council adopted resolution 30/1, which endorsed without reservation the conclusions and recommendations of the OISL report. The panel had concluded that there was sufficient evidence to indicate that 'system crimes' involving violations of humanitarian law and human rights law had in fact been committed, and recommended hybrid courts including foreign judges to hear the related charges.

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[2] Ibid
[3] Ibid

d) Most importantly, the Government of Sri Lanka *co-sponsored* resolution 30/1, which committed the Government to accepting the OISL's conclusions and recommendations.

e) It is to be noted that, all reports commissioned by the Government prior to September 2015 to investigate war crimes and other crimes purportedly committed during the war – and this includes the Report of the Lessons Learnt and Reconciliation Commission (LLRC) plus a series of reports by world-renowned experts on Humanitarian Law such as Sir Desmond de Silva, Sir Geoffrey Nice, Rodney Dixon, Professor David Crane, Sir John Holmes – had concluded that there was no evidence of war crimes.

f) The said experts concluded further that, though civilians were killed in the course of the fighting, the Government was well within its rights to invoke the recognized defences of *collateral damage* and *proportionality* with respect to such deaths.

g) Just as important, Paragraph 3 of resolution 30/1 specifically states that the transitional justice mechanisms recommended in the OISL report should be implemented only *after* broad 'national consultations.' One must presume that 'national consultations' necessarily involves asking members of the Sri Lankan public for their views on the proposed mechanisms.

h) So, it is difficult to see how the Government could on 1st October 2015 agree to implement the recommendations of the OISL report, including to set up 'Special Courts' to pursue war crimes charges, when its own reports said that such crimes had not occurred, plus, the requirements of Paragraph 3 of had not been met.

i) Under the circumstances, we assert that the first thing the Government was obliged to do before co-sponsoring resolution 30/1 was to commission an official assessment of the OISL report.

j) Such an assessment was never done, or if it was the results were never made public.

k) We emphasize that an official assessment of the OISL report has not been done to this day, and yet, resolution 30/1 was re-affirmed in March 2017 by resolution 34/1, with the GOSL once gain co-sponsoring the new resolution.

l) In February 2017, we privately commissioned an assessment of the OISL report, in order to see whether the evidence cited in that report *warranted* the related conclusions and recommendations.

m) Our report, titled, "A Factual Appraisal of the OISL Report: A rebuttal to the Allegations against the Armed Forces" was released on 13th March 2017, and copies were formally handed over to the Presidential Secretariat (Sri Lanka), UN Resident Coordinator (Sri Lanka) and the OHCHR.

n) Our experts found that, the evidence in the OISL report was seriously compromised, characterized among other things by lies, exaggerations, contradictions and omissions, and a total failure to consider exculpatory evidence. (For your convenience, we attach both volumes of the said report marked as **P3a** and **P3b** to this letter.)

o) To this day, we have not received a response from the aforesaid three institutions to the contents of the Factual Appraisal, which leaves us with no choice but to conclude that these institutions accept the analysis and conclusions contained in the said document.

p) It is in the context of the above events that we wrote to the President of the Human Rights Council, because the High Commissioner was continuing to malign Sri Lanka, including its judiciary, for failing to implement the recommendations of resolution 30/1 to the letter.

7. We also wish to clarify the following matters with respect to our two petitions, because the High Commissioner's portrayal of what we said in those petitions, including Rear Admiral (Rtd) Sarath Weerasekera's intention in filing them are highly misleading, and defamatory:

a) In the first petition, we informed the President that on at least three occasions since September 2015 the High Commissioner has stated that the Sri Lankan judiciary lacks impartiality and independence, and recommended the establishment of hybrid courts including foreign judges to pursue charges of war crimes and other crimes – charges purportedly supported by evidence contained in the OISL report.

b) As explained earlier, we have made a *prima facie* case that the OISL report is based on compromised evidence. If an accuser cannot establish his allegations to a reasonable degree, he has no right to demand that those allegations be further pursued in courts of law, let alone to demand that special court entirely contrary to the legal traditions of the country be established in order to hear such cases.

c) We therefore requested the President to advice the High Commissioner to either clarify his statements with respect to the Sri Lankan judiciary and if he cannot do so to stop making such statements in the future. (For your convenience, we attach the first petition marked as **P1** to this letter.)

d) In the second petition, we dealt with a major theme in the High Commissioner's official statements of June 2016 and March 2017, to wit, his endorsement of and praise for the ongoing constitutional reform process in this country.

e) We informed the President that, there were political realities in this country that brought into question the legitimacy not to mention the legality of the ongoing constitution-making process, and if the Council, citing resolution 30/1, chose to insist on constitutional reform in Sri Lanka, it should do so only after familiarizing itself with the aforesaid realities.

f) We then attached a paper by a Sri Lankan attorney that we considered would be helpful to the President in broadening his knowledge of the related issues. (For your convenience, we attach our cover letter plus the paper, marked as **P2** to this letter.)

g) We repeat that, in neither of these petitions did we try to belittle or demean human rights law, or to suggest that the UN and its organs, especially the Human Rights Council – has no right to protect and advance human rights wherever possible. Our sole point was that when this is done the UN and its organs have a reciprocal obligation to operate within relevant statutes including the UN Charter.

h) Rear Admiral (Rtd) Sarath Weerasekera is a citizen of Sri Lanka. He is also a decorated officer of the Sri Lanka Navy, having served his country with honour and distinction over a 35-year career.

i) As a citizen and a public servant, he has every right to be concerned for the wellbeing of his country, and a right, if he considers that persons either in Sri Lanka or abroad including the UN is tarnishing the reputation and good name of the country, to speak out against such persons.

j) We fail to see how his attempt to bring to the attention of the President of the Human Rights Council the questionable mode of conduct of the High Commissioner with respect to Sri Lanka, makes him (Sarath Weerasekera) a demagogue, populist, or in general a person who does not value human rights – indeed, is a *threat* to such rights – as the High Commissioner seems to suggest.

8. Under the circumstances, we would appreciate very much if you can provide an opportunity for Rear Admiral (Rtd) Sarath Weerasekera and his lawyers to:

a. Meet with you in person to explain in greater detail our side of the story, and to provide a longer reply in writing to the High Commissioner's lecture.

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b. Address your Institute in response to the High Commissioner's statements, in a seminar, an interactive discussion, or any other such forum, with the High Commissioner's representatives also present.

Thank You,

Yours faithfully,

Rear Admiral (Rtd.) Dr. Sarath Weerasekera
Sarathw1@yahoo.com

Sunil Chandrakumara
sunil.chandrakumara@gmail.com

Copies to:

1. United Nations Secretary-General
2. President of the Human Rights Council
3. UN High Commissioner for Human Rights
4. Director, Legal Department, United Nations Organization
5. Director, Legal Department, Human Rights Council

Attachment P1

A Petition to draw to the attention of the President of the Human Right Council to a grave injustice against Sri Lanka being committed by the High Commissioner for Human Rights

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From:
Rear Admiral (Rtd.) Dr. Sarath Weerasekera
Federation of National Organizations
1st Lane, Hokandara Road
Thalawathugoda
Sri Lanka

Mr. Sunil Chandrakumara
Co-President
Global Sri Lankan Forum
Buhairah Corniche, Sharjah
UAE
10th June 2017

To:
Mr. Joaquin Alexander Maza Martelli
President of the Human Rights Council
Office of the United Nations High Commissioner for Human Rights (OHCHR)
Palais de Nations
Geneva 10, Switzerland

Sir,

A PETITION TO DRAW YOUR ATTENTION TO A GRAVE INJUSTICE AGAINST SRI LANKA BEING COMMITTED BY THE HIGH COMMISSIONER FOR HUMAN RIGHTS

1. On at least 3 occasions since September 2015, the UN High Commissioner for Human Rights Zeid Ra'ad Al Hussein has publicly accused the Sri Lanka judiciary of lacking in competence, impartiality and independence.

2. The said three occasions are as follows:

   a) **Statement to the UNHRC via video-link on 30th September 2015**

   "I welcome the Government's commitments, made before this Council, to investigate these violations and ensure accountability, despite the opposition of some political parties and sections of the military and society. The unfortunate reality is, however, that Sri Lanka's criminal justice system is not currently equipped to conduct an independent and credible investigation into allegations of this breadth and magnitude, or to hold accountable those responsible for such violations, as requested by the Council in resolution 25/1….."

"This is why I have recommended the establishment of an ad hoc hybrid special court, integrating international judges, prosecutors, lawyers and investigators, mandated to try notably war crimes and crimes against humanity, with its own independent investigative and prosecuting organ, defence office and witness and victims protections programme. ***In a highly polarized environment, such a mechanism is essential to give all Sri Lankans, especially victims, confidence in the independence and impartiality of this process****."*

(High Commissioner's Statement to the UNHRC via video-link on 30th September 2015, www.ohchr.org)

a) <u>High Commissioner's Report, A/HRC/32/CRP.4 (June 2016)</u>

"A key question remains the participation of international judges, prosecutors, investigators and lawyers in a judicial mechanism. In late May 2016, while addressing a large group of senior military officers, the Prime Minister was reported to have again ruled out international participation in a domestic Sri Lankan justice mechanism. ***The High Commissioner remains convinced that international participation in the accountability mechanisms would be a necessary guarantee for the independence and impartiality of the process in the eyes of victims, as Sri Lanka's judicial institutions currently lack the credibility needed to gain their trust****. It is also important to keep in mind the magnitude and complexity of the international crimes alleged, which the OHCHR investigation found could amount to war crimes and crimes against humanity."*

(High Commissioner's report to the UNHRC during its 32nd session, June 2016, www.ohchr.org, paragraph 32)

b) <u>High Commissioner's Report A/HRC/34/20 (March 2017)</u>

"A failure to show progress in the above-mentioned cases [certain 'emblematic cases listed in paragraphs 32 – 41 of the report, cases which are pending in the courts at the moment but on which according to the HC the courts are deliberately dragging their feet because of the ethnicity of the accused]only strengthens the case for establishment of a special court to deal with system crimes, staffed by specialized personnel and supported by international practitioners, as recommended by the Consultation Task Force in its final report. ***In the view of the High Commissioner international participation in accountability mechanisms remains a necessary guarantee for the independence, credibility and impartiality of the process and an integral part of the commitment of the Government under Human Rights Council resolution 30/1****."*

(High Commissioner's report to the UNHRC during its 34th session, March 2017, www.ohchr.org, paragraph 42)

3. To repeat, the High Commissioner's argument is that the Sri Lankan judiciary is:

a) Incompetent to hear cases involving 'system crimes'

b) lacks impartiality and independence in general. (Since by the HC's own admission, 'system crimes' have never been handled by the Sri Lankan judiciary, he cannot say that the said judiciary lacks impartiality and independence to hear such cases. If he maintains that the Sri Lankan judiciary lacks impartiality and independence to handle 'system crimes' such condemnation must stem from his assessment of the Sri Lankan judiciary in general).

Therefore, a hybrid court which includes foreign judges is needed.

4. Does the High Commissioner have a rational basis for either of the charges above?

5. In order to level a charge of incompetence, an accuser must first establish that the crimes in question did in fact occur.

6. It is to be noted that, as per UNHRC resolution 30/1, the High Commissioner conducted an investigation *inter alia* into war crimes allegedly committed during the last phase of the war, and the final report of that investigation (the OISL report) was officially released to the public on 16th September 2015.

7. The said report sets out 8 charges (4 relating to alleged violations of international humanitarian law and 4 relating to alleged violations of international human rights law) against the GOSL.

8. However, in March 2017, we produced a report titled, 'A Factual Appraisal of the OISL Report: A Rebuttal to the Allegations against the Armed Forces,' that in our view establishes a *prima facie* case that all 8 of the High Commissioner's charges are replete with evidentiary problems and therefore not credible. (The aforesaid report is now a public document and has been published inter alia in www.globalsrilankanforum.com and www.lankaweb.com, but for your convenience we are attaching hardcopies of both volumes of the document to this letter)

9. Furthermore, we state that the said report was:

a) Formally handed over to the Presidential Secretariat on 17th March 2017 ('Report contradicting Geneva allegations to be handed over to Prez today,' 16th March 2017, The Island, www.island.lk)

b) Approved at a People's Council on 13th March 2017, and subsequently handed over to the UN Country Representative in Sri Lanka Una McCauley on 24th March 2017 ('UN Colombo yet to comment on civil society rebuttal to war crimes accusations,' 24th March 2017, The Island, www.island.lk.)

c) Handed over to the OHCHR on 23rd March 2017. Mr. Thomas Huneche, Deputy Chief, Asia Pacific Section of the OHCHR, to whom we handed over the two documents, to be forwarded to the High Commissioner, has acknowledged receipt of those documents by letter dated 6th June 2017.

10. To the best of our knowledge (i.e. to the extent we have been able to inform ourselves by perusing newspapers, journals, official websites, and so on) the Presidential Secretariat, the UN, or the OHCHR have thus far not said whether they accept the analysis and conclusions contained in the said 'Factual Appraisal of the OISL Report,' reject them, or have no comment.

11. We note that, according to the well-known legal maxim:

Qui tacet consentire videtur ("He who is silent appears to consent")

12. Therefore, we have no choice but to conclude that, as at present, the aforesaid three institutions have accepted the analysis and conclusions in the said document.

13. Thus, the High Commissioner is not in a position to level the charge of incompetence against the Sri Lankan judiciary. That leaves the charges with respect to lack of impartiality and independence.

14. What is the basis of the High Commissioner's assessment that the Sri Lankan judiciary lacks impartiality and independence?

15. The said basis appears to be certain 'emblematic cases' that the High Commissioner has cited in paragraphs 32 – 41 of his report A/HRC/34/20 of March 2017, where according to the High Commissioner the courts have acted or are acting in a partial way because the accused in the cases are Sinhalas and the victims Tamils.

16. However, the High Commissioner is expressing his personal opinion with respect to the aforesaid cases. To the best of our knowledge, the High Commissioner does not cite an objective assessment, such as for instance the conclusions of an official report of the UN that has analyzed the rulings of Sri Lankan courts over an extended period of time, to determine whether they show partiality where the accused in the cases are Sinhalas, and the complainants or victims are Tamils. (To the best of our knowledge, such a report by the UN, or for that matter any other international organization, does not exist.)

17. We are aware that two reports by Special Rapporteurs, one on torture and the other on the independence of the judiciary (A/HRC/34/54), and A/HRC/35/31) have been filed.

18. However, we state categorically that, in neither of those reports is there a systematic analysis of Sri Lankan cases, including the High Commissioner's 'emblematic cases' which establishes persistent patterns of bias in the Sri Lankan judiciary.

19. We also point out that both Special Raporteurs explicitly place their work in the context of resolution 30/1 (paragraph 9 of A/HRC/34/54 and paragraph 6 of A/HRC/35/31).

20. More important, both Special Rapporteurs, in their recommendations, unreservedly endorse the recommendations of resolution 30/1, recommendations that are in turn based on the OISL report (paragraphs 12(a) and (c) of A/HRC/34/54 and paragraph 145 of A/HRC35/31).

21. As pointed out earlier, the 'Factual Appraisal of the OISL Report' establishes a *prima facie* case that the OISL report is highly compromised and lacking in credibility, a case that the OHCHR among others appears to have accepted, on account of their silence.

22. Since the Special Rapporteurs have chosen to accept without reservation the recommendations of the IOSL report, we submit that it:

    a. Raises serious questions about the objectivity with which they approached their respective subject matter

b. Taints their conclusions beyond repair

23. On account of the above, the two aforesaid reports of the Special Rapporteurs cannot be considered as providing an additional evidentiary basis or support for the High Commissioner's claims about the purported lack of impartiality and independence of the Sri Lankan judiciary.

24. Furthermore, we need hardly mention that the aforesaid reports were filed only within the last four months (i.e. after March 2017) which means that as a practical matter he cannot use them in order to support his statements going back to September 2015.

25. Therefore, we reiterate that the High Commissioner has no rational basis for the charge with respect to lack of impartiality and independence also.

26. We take as self-evident that, if a person has no rational basis for leveling accusations against another person, the reasonable thing to do is to stop making those accusations.

27. However, we find that, the High Commissioner continues to claim that the Sri Lankan judiciary lacks the impartiality and independence to hear and adjudicate on his allegations.

28. We note that, incompetence is a technical matter. For instance, if the judges of a country lack the competence to hear cases involving 'system crimes,' such defect can be cured by additional education, training and provision of other necessary resources. But, a lack of impartiality and independence cannot be so cured: it goes to the ***character*** of the judges in question.

29. In short, the High Commissioner is impugning the character of Sri Lankan judges *independently* of any capacity they may or may not have to hear cases involving 'system crimes.'

30. As citizens of Sri Lanka, we consider that the credibility of the judiciary is essential to the due administration of justice, and hence the repeated assertion by the High Commissioner, the highest official in the UN Organization entrusted with the subject of human rights that Sri Lankan judges lack impartiality and independence materially lowers the credibility of the Sri Lankan judiciary in the eyes of international observers, and more importantly Sri Lankans.

31. Normally, persons who venture to denigrate, demean, or in general bring into disrepute the members of the judiciary of a country are subject to contempt of court proceedings, and this is no different in Sri Lanka.

32. Unfortunately, the High Commissioner is immune from lawsuit, because as an official of the UN he has diplomatic immunity.

33. Thus, a situation has arisen where the High Commissioner continues to level accusations against the Sri Lankan judiciary, and thereby do irreparable harm to the credibility of the courts of this country, and there's no action in law that the citizens of this country in their private capacity can file against the High Commissioner to hold him accountable for his actions.

34. It is impossible to imagine that the High Commissioner is above the law. The High Commissioner is subject to the UN Charter, as indeed is the Council.

35. Article 2(7) of the UN Charter prohibits the UN and its subsidiary organs from interfering in matters which fall essentially within the domestic jurisdiction of States.

36. The administration of justice within the territory of a State is necessarily a matter which falls within the domestic jurisdiction of that State.

37. Therefore, the High Commissioner's continuing practice of impugning the impartiality and independence of Sri Lanka's judiciary is a violation of Article 2(7) of the UN Charter. Moreover, it is a violation against which Sri Lankan citizens have no defence at all at present, because the Government of Sri Lankan has *co-sponsored* resolution 30/1. (Otherwise, Sri Lankan citizens could at least have relied on the Government to raise objections to the conduct of the High Commissioner officially before the Council.)

39. Under the circumstances, the only recourse available for Sri Lankan citizens aggrieved by the High Commissioner's conduct is to appeal directly to you, and perhaps the UN General Assembly.

31. Accordingly, we consider that you are duty-bound to:

a) Demand of the High Commissioner that he either publicly clarify his statements of 30th September 2015, June 2016 (A/HRC/32/CRP.4), and March 2017 (A/HRC/34/20), by giving reasons as to why he considers that the Sri Lankan judiciary lacks impartiality and independence to hear and adjudicate on the specific types of charges that he is leveling against the State, and if he cannot do so advise him to cease and desist from making such statements in the future.

b) In the event the High Commissioner cannot give reasons for his statements as aforesaid, to demand that he issue a public apology to the Sri Lankan people for the harm he has already caused to the good name of the Sri Lankan judiciary, and thereby to the country.

c) Produce an official assessment of the OISL report with respect to whether the conclusions reached with respect to the various charges in the report follow from the evidence cited in relation to those charges. (Such a report will make it possible for Sri Lankan citizens to pursue administrative actions against the HC at the UN General Assembly and other international venues, in the event he continues making derogatory, demeaning, and defamatory statements against the Sri Lankan judiciary.)

d) Forward the 'Factual Appraisal of the OISL Report' to the United Nations General Assembly, and request an official response to such document.

32. We hereby implore you to take the necessary steps to carry out the tasks set out in paragraph 31 above.

Respectfully,

Rear Admiral (Rtd.) Dr. Sarath Weerasekera
Sarathw1@yahoo.com

Sunil Chandrakumara
sunil.chandrakumara@gmail.com

Copies to:`

1. United Nations Secretary-General
2. Special Rapporteur Mr. Juan E. Mendez
3. Special Rapporteur Ms. Monica Pinto

Attachment P2

A Petition to bring to the attention of the President of the Human Right Council a serious problem with the ongoing constitutional reform process in Sri Lanka

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Rear Admiral (Rtd.) Dr. Sarath Weerasekera
Federation of National Organizations

Mr. Sunil Chandrakumara
Co-President
Global Sri Lankan Forum

10th June 2017

Mr. Joaquin Alexander Maza Martelli
President of the Human Rights Council
Office of the United Nations High Commissioner for Human Rights (OHCHR)
Palais de Nations
Geneva 10, Switzerland

Sir,

BRINGING TO YOUR ATTENTION A SERIOUS PROBLEM WITH THE ONGOING CONSTITUTIONAL REFORM PROCESS IN SRI LANKA

In his report A/HRC/34/20 to the Council at its 34th session, the United Nations High Commissioner for Human Rights states, *inter alia*;

"Unlike the limited progress made with regard to transitional justice, some visible progress has been made in the constitutional reform process, commencing in March 2016….Constitutional reform can play a critical role in addressing systemic deficiencies and inadequate safeguards, which have facilitated past violations of human rights. In Sri Lanka, constitutional reform, as a means of establishing (or re-establishing) guarantees of non-recurrence, could contribute to creating the foundations for the prevention of violations and abuse of rights. The High Commissioner is encouraged by the manner in which political dialogue has progressed, and understands that there is a focus on political settlement and devolution….Constitutional reform is the appropriate vehicle for addressing other structural issues that have an impact on the protection of human rights." (paragraphs 24 -26)

We urge you to peruse the attached paper by a Sri Lankan lawyer that argues that the present constitutional reform process, to which the High Commissioner refers, is illegal. If the said argument has merit, it means that the process which the High Commissioner appears to praise may in fact end in the grossest possible violation of the human rights of Sri Lankans.

We hope that the matters discussed in the paper will enhance your understanding of the realities behind the present constitutional reform process in this country, and be of assistance to you in assessing statements like those of the high Commissioner's, on the said process.

Thank You,

Respectfully,

Rear Admiral (Rtd.) Dr. Sarath Weerasekera

Sunil Chandrakumara

Copies to:

1. United Nations Secretary-General
2. United Nations High Commissioner for Human Rights.

The Ongoing Constitution-Making Process in Sri Lanka: An Inquiry into its Legality

By: Dharshan Weerasekera, *Attorney-at-Law*

The modern constitutional history of Sri Lanka starts with the British colonial period. That period, spanning 1796 – 1948, was characterized by an evolutionary process where, through a series of constitutions, power and sovereignty vested in the United Kingdom was gradually transferred to the people of Sri Lanka, culminating in the 'Soulbury Constitution,' the first Constitution of independent Sri Lanka (then Ceylon).[1]

Since then, there have been two Constitutions - in 1972 and 1978 - and though they introduced many significant changes to the structure of the State, the single thread that connects them is that they consolidated the idea that in Sri Lanka sovereignty vests with the People, which is to say, the legal authority for the Constitution ultimately derives from the consent of the people, and no one else.

This tradition finds eloquent expression in the Preamble to the '78 Constitution, which says *inter alia*:

> The PEOPLE OF SRI LANKA, having by their mandate freely expressed and granted on…the twenty-first day of the month of July in the year one thousand nine hundred and seventy-seven, entrusted to and empowered their Representatives elected on that day to draft, adopt and operate a new Republican Constitution…and having solemnly resolved by the grant of such mandate and the confidence reposed in their said Representatives who were elected by an overwhelming majority to constitute SRI LANKA into a DEMOCRATIC SOCIALIST REPUBLIC:
>
> WE, THE REPRESENTATIVES OF THE PEOPLE OF SRI LANKA, in pursuance of such Mandate, humbly acknowledging our obligations to our People and gratefully remembering their heroic and unremitting struggle to regain and preserve their rights and privileges…do hereby adopt and enact this Constitution.[2]

In short, the business of changing the Constitution, and deciding what changes to make if any, has always been a matter under the exclusive control of the Sri Lankan People, and no one else.

Since early 2016, however, there has been a constitution-making process underway[3] that threatens to destroy the aforesaid tradition, by making it possible for foreigners to control

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[1] See L.J.M. Cooray, *An Introduction to the Legal System of Sri Lanka*, Stamford lake,. Colombo, 2003, p.12

[2] Preamble, Sri Lanka Constitution

[3] In March 2016, Parliament was converted into a 'Constitutional Assembly' by resolution, and a number of Parliamentary committees established to prepare reports on various areas of constitutional reform. (*Framework Resolution*, The Secretariat of the Constitutional assembly of Sri Lanka,

– or at any rate to materially influence - the making of the constitution. This is because, the present constitution-process is the result of constitutional and legal reforms endorsed and recommended by a resolution of the United National Human Rights Council.[4]

For instance, the UN High Commissioner for Human Rights, when updating the Council in June 2016 on the progress Sri Lanka had made in implementing resolution 30/1, said:

> 'Building on the recommendations made in the High Commissioner's report based on the OHCHR investigation, Resolution 30/1 sets out a comprehensive package of judicial and non-judicial measures necessary to advance accountability and reconciliation in Sri Lanka as well as to strengthen protection of human rights, democracy and the rule of law. The resolution represents a historic commitment by the Government of Sri Lanka not only to the international community, but also most importantly to the Sri Lankan people, of its determination to confront the past and end corrosive decades of impunity, serve justice, achieve reconciliation, and build inclusive institutions to prevent the recurrence of violations in the future.'[5]

The point to remember is that, by way of a resolution, the UNHRC has put itself in a position to intervene in the internal affairs of Sri Lanka, something which it would not normally be able to do because of the prohibition imposed by Article 2(7) of the UN Charter.

The purpose of this paper is to discuss a problem that goes to the very root of the constitution-making process, namely, the possible illegality of the said process, which has serious repercussions not just for Sri Lankans but for the international community as well.

My argument is based on three considerations: the difference between the amending procedure as set out in Chapter 12 of the constitution, and the present procedure; the nature of the power that Parliament wields when enacting legislation; the irreparable harm caused to the People if Parliament presumes to change the constitution without a mandate to bring such changes directly from the People.

If the constitution-making process is indeed illegal, but the government enacts a new constitution anyway, it would create a situation where a future government might be able to repudiate the new constitution *in toto*, and claim with good reason that during the period where the impugned constitution was in operation there was in effect no law in the country.

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www.consitutionalassembly.lk) Those reports were completed in November 2016. (Sub Committee reports, 19th November 2016, www.constitutionalassembly.lk) All that remains is for the Constitutional 'Steering Committee' to produce a report amalgamating the reports of the sub committees, and if that report is approved by parliament, to draft a Constitutional Proposal. The Prime Minister has said that he wants the Steering Committee report produced within the next two months. ('Interim report in two months,' Daily Mirror, 2nd May 2017, www.pressreader.com)

[4] Resolution A/HRC/30/L.29, 29th September 2015

[5] A/HRC/32/CRP.4, Paragraph 2, 28 June 2016, www.ohchr.org

In the event, all legislative and administrative acts including any concessions on devolution of power done under the former constitution would be null and void, which would inevitably lead to chaos, not to mention violence. The international community will have to share legal responsibility for such consequences if they occur, because the international community will have *participated* in bringing the constitutional reforms in question, on account of resolution 30/1.

The paper is intended primarily for a Sri Lankan audience, in order to encourage a richer and more substantial public discussion of constitutional reform and related issues. But, it is relevant to an international audience also, because the UNHRC's connection to the present process, as aforesaid.

The Difference between the procedure in Chapter 12 and the one now being followed

I shall begin with the necessary background information, for the benefit of international readers who may be unfamiliar with Sri Lankan politics. The impetus for the present constitution making process came on 8th January 2015 when Mr. Maitripala Sirisena defeated Mr. Mahinda Rajapaksa to become President of Sri Lanka. Mr. Sirisena came to power promising to restore democracy, good governance and the rule of law, which included an explicit promise to bring sweeping legislative and constitutional reforms.[6]

Eight months later, Parliamentary Elections were held, and the United National Party (UNP) won a narrow victory over the United People's Freedom Alliance (UPFA).[7] The main constituent of the UPFA is the Sri Lanka Freedom party (SLFP). Mr. Sirisena is the head of both the UPFA and the SLFP. After the elections, he engineered a switch of roughly 40 SLFP MP's to the UNP and formed a 'National Government.'[8]

The net effect of the forming of the 'National Government' was to give the President on the one hand and the Prime Minister on the other (the PM is the head of the UNP) an overwhelming majority in Parliament, the requisite basis to bring constitutional changes. And indeed, as mentioned earlier, the constitution-making process began in early 2016.

I shall now turn to the difference between the established amending procedure and the one now being followed. The procedure for amending the constitution is set out in Chapter 12 of the constitution (Articles 82(1) - 82(6) and Article 83) and involves five steps, as follows:

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[6] *Manifesto: Maithri*, New Democratic Front, www.president.gov.lk

[7] The UNP got 46% of the vote and the UPFA 42%, which translated to 106 seats in the 225-seat Parliament for the UNP and 95 seats for the UPFA (See, 'Sri Lanka parliamentary Elections 2015 result: What Direction will Foreign Policy take?' Dr. M. Samatha, Indian Council of World Affairs, 1st September 2015, www.icwa.in)

[8] See 'SLFP to join national govnt. In Sri Lanka,' T. Ramakrishnan, The Hindu, 20th August 2015, www.thehindu.com

1. A Bill to amend or repeal the Constitution must state such purpose in its long title. (Article 82(1))

2. The Constitution cannot be repealed without there also being a replacement for the one being repealed. (Article 82(2))

3 Once the amending Bill is placed on the Order Paper, and the relevant steps under Article 122 taken, it can be passed by a 2/3 majority if it does not violate any of the entrenched provisions of the Constitution. (Article 82(5))

4. If it violates any of the entrenched provisions, a referendum is needed. (Article 83)

5. Article 80(6) reiterates that the procedure consisting of the above four steps is the only way to amend or repeal the Constitution.

Let's turn to the procedure set out in the 'Framework Resolution" of 9th March 2016 by which Parliament converted itself by resolution[9] into a 'Constitutional Assembly,' or a 'Committee of the *whole* Parliament,' for purposes of generating a new constitution. The resolution begins with: 'Whereas there is broad agreement among the People of Sri Lanka that it is necessary to enact a Constitution for Sri Lanka,'[10] and then lays out the following procedure:

1. Parliament is to appoint a 'Steering Committee' along with a number of sub-committees for purposes of initiating the constitution-making process. These sub-committees are to produce reports on various areas of constitutional reform and submit them to the Steering Committee.[11]

2. The Steering Committee is to take into consideration the recommendations made in those reports and produce a report along with a draft constitutional proposal, and submit them to the Constitutional Assembly.[12]

3. The "Constitutional Assembly' is to then debate the general merits of the said report and draft proposal, and decide whether to request the Steering Committee to submit a *final* report along with a constitutional proposal.[13]

4. If such a request is made, the Steering Committee is to prepare the final report and the constitutional proposal and forward them to the Constitution Assembly, at which time the Chairman of the Assembly proposes a resolution on the proposal.[14]

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[9] Framework Resolution, The Secretariat of the Constitutional Assembly of Sri Lanka, www.constitutionalassembly.lk
[10] Preamble, Framework Resolution,
[11] Framework Resolution, Paragraph 5, 15
[12] Ibid, Paragraph 16
[13] Ibid, Paragraph 17
[14] Ibid, Paragraph 18

5. If a simple majority of the Constitutional Assembly approves the resolution, it is submitted to Parliament (i.e. Parliament sitting as Parliament and not as Constitutional Assembly) and if the resolution passes with a 2/3 majority, the constitutional proposal is submitted to the Cabinet of Ministers, and thereon the provisions of Chapter 12 of the constitution are followed.[15]

6. Conversely, if the Constitutional Assembly approves the proposal with a 2/3 majority, it is submitted directly to the Cabinet of Ministers, and the provisions of Chapter 12 followed.[16]

On the face of it, the above seems no different from the established procedure, at any rate it appears not to be in conflict with the latter, because steps '5' and '6' involve invoking chapter 12. In my view, however, Parliament has done something very dangerous and illegal when it devised the present procedure, because of the following reasons.

Recall that, the prescribed procedure set out in Chapter 12 consists of five steps, and the initial step is that a Bill whose long title says it is a Bill to amend or repeal the constitution, as the case may be, is presented in Parliament. Nowhere in the prescribed procedure is it ever specifically stated that Parliament is to convert itself into a 'Constitutional Assembly' or 'Committee of the whole Parliament' for purposes of generating amendments to the constitution or for drafting a new constitution.

It is not in dispute that, Article 75 of the Constitution confers wide powers on Parliament to 'pass laws' and that includes the power to amend or repeal the Constitution.[17] But, the crucial question is: 'In the light of the provisions of Chapter 12, can Article 75 be interpreted as covering a situation where Parliament turns itself into a 'Constitutional Assembly' or 'Committee of the *whole* Parliament' for purposes of generating amendments to the Constitution or for drafting a new Constitution?'

In my view, the answer is 'no,' because of two considerations, as follows:

1. The nature of the power that Parliament wields when generating legislation

2. The irreparable harm caused to the People if Parliament presumes to change the constitution without a mandate to bring such changes directly from the People.

The nature of the power that Parliament wields when generating legislation

Under our Constitution, Members of Parliament when enacting laws exercise a delegated power, delegated to them by the People. According to Article 3 of the Constitution, the

[15] Ibid, Paragraph 20, 21
[16] Ibid, Paragraph 21
[17] Article 75 is explicitly cited as the sole legal basis of the Framework Resolution in Paragraph 1 of that resolution.

sovereignty of the country is in the People, and inalienable.[18] Meanwhile, Article 4 sets out how executive, legislative and judicial power is to be exercised. Our Supreme Court has consistently held that Articles 3 and 4 are to be read together.[19]

More important, the Court has held that, because of the wording of Articles 4(a),(b) and (c) which refer to the executive power 'of the People,' legislative power 'of the People,' and judicial power 'of the People,' when the President or Parliament as the case may be exercise the said powers they do so at all times on behalf of the People. For instance, in in *Re: 19th Amendment to the Constitution*, the court says:

> The powers of government are separated as in most Constitutions, but unique to our Constitution is the elaboration in Article 4(a), (b) and (c) which specifies that each organ of government shall exercise the power of the People attributed to that organ. To make this point clearer, it should be noted that subparagraphs (a), (b) and (c) not only state that the legislative power is exercised by Parliament, executive power is exercised by the President, and judicial power by Parliament through courts, but also specifically state in each subparagraph that the legislative power 'of the People' shall be exercised by Parliament, the executive power 'of the People' shall be exercised by the President, and the judicial power 'of the People' shall be exercised by Parliament through courts. This specific reference to the power of the People in each subparagraph which relates to the three organs of government demonstrates that the power remains and continues to be reposed in the People who are sovereign, and its exercise by the particular organ of government being its custodian for the time being, is for the People.[20]

The interpretation by court that the exercise of the related powers 'by the particular organs of government being its custodian for the time being, is for the People,' clearly indicates that the Public Trust Doctrine is to be considered as applying to the relationship between Parliament and the People, which is to say, when MP's exercise legislative power they do so in trust for the People.

The above means that, MP's invariably assume the duties that customarily accompany relations of trust, i.e. fiduciary duties. To the best of my knowledge, the primary fiduciary duty is that of loyalty, i.e. the trustee must administer the trust solely in the interests of the beneficiary. For instance, some experts on trusts have said: 'The essence of fiduciary duty requires the trustee to be always promoting the beneficiary's interests.'[21]

Therefore, when MP's exercise legislative power in our country, they have an imperative duty to protect and advance the interests of the People, and not do anything to harm or compromise such interests. Conversely, if a legislative act harms or compromises the

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[18] Article 3, SL Constitution

[19] For instance, Supreme Court Special Determination cases: SD 5/80, 1/82, 2/83, 1/84, 7/87, 12/2002, 1/2010

[20] *Re: 19th Amendment to the Constitution*, (2002) 3 SLR 85, p. 97

[21] 'Fiduciary Duties and Trustees,' www.inbrief.co.uk

interests of the People, or is carried out where harm can reasonably be *anticipated*, such act is contrary to the letter as well as spirit of Articles 3 and 4, and by definition *illegal*.

The irreparable harm caused to the People if Parliament presumes to amend or repeal the Constitution without a mandate for such action directly from the People

Under Article 82(5) of the Constitution, a 2/3 majority in Parliament is sufficient to enact into law any constitutional amendment other than one that violates the entrenched provisions. Article 82(5) does not expressly indicate whether the 2/3 majority that approves a constitutional amendment should be comprised of MP"s who at some level or other have a mandate for such action from their constituents.

There are two ways that a Government in power that aspires to change the Constitution can get a 2/3 majority in Parliament: either it must receive the 2/3 majority at an election, which is to say the People directly give the Government in question a 2/3 majority in Parliament; or, it has the capacity to get other parties in Parliament, along with crossovers, to join it in order to bring the proposed changes.

The question is whether, in light of the matters discussed in the previous section, an implied condition can be read into or interpreted as being included in Article 82(5), namely, that a 2/3 majority that endorses a constitutional amendment (as opposed to any other type of law) must at some level or other be able to claim a direct mandate from the People for such action. In my view, it is, because of the following reasons.

If a Government gets a 2/3 majority at an election, there is no question that the said 2/3 majority reflects the support of roughly 2/3 of the voters, meaning that the Government has the overwhelming support of the People. Under the circumstances, I do not dispute that, subject to Article 83, such a Government can pursue any constitutional changes that it wishes.

Now, let's turn to a situation where a Government has cobbled together a 2/3 majority in Parliament by getting other parties and crossovers to join it for purposes of pursuing a common legislative program, including bringing constitutional amendments. What happens to the interests of the voters if the parties or crossovers that join the Government for the aforesaid purpose do not have a mandate to engage in such action?

It should be noted that, under Article 84 of the Constitution, a Bill that is not intended to amend or repeal the Constitution but which is incompatible with the Constitution can be enacted into law by a 2/3 majority in Parliament. However, Article 84 also explicitly states that any law enacted in that way can be repealed by a *simple majority*.[22]

Therefore, if any law *other* than a constitutional amendment is passed by a 2/3 majority that includes MP's who don't have a mandate to approve the law in question, the voters

[22] See Article 84(3)

whose interests are thereby compromised do not suffer *irreparable* harm. This is because of two reasons, as follows.

First, as explained above, a law other than a constitutional amendment that is passed by a 2/3 majority can be repealed by a simple majority. So, voters whose wishes are contravened when their MP's participate in passing such a law have a chance later on to bring pressure on those MP's to join with others in Parliament and repeal the law in question by a simple majority.

Second, in the event the MP's fail to take action, the voters can always elect different MP's at the next elections and get the impugned law repealed. Either way, for any law other than a constitutional amendment, the voters who are 'betrayed' when their MP's participate in enacting a particular law, have a chance to hold those MP's accountable, and thereby to undo the damage caused by the impugned law.

Now, let's turn to a constitutional amendment. If the Government gets a constitutional amendment approved in Parliament with a 2/3 majority but some of the MP's in the coalition don't have a mandate to participate in such action, the voters whose interests are thereby compromised have a much more difficult time if they want to recoup their losses. This is because of two reasons, as follows.

First, a constitutional amendment cannot be repealed by a simple majority. So, voters whose interests are compromised as aforesaid need to get a 2/3 in Parliament to support their 'cause': that is much harder to do than getting the support of a simple majority.

Second, with a constitutional amendment the Government can postpone elections, or even cancel them. That means that, voters who wish to hold their representatives accountable at a future election have to wait *longer* for their chance, and there is a possibility they may never get that chance at all.

Most important, by changing the Constitution, the Government can change the political and legal environment in the country in such a way that it becomes easier to carry out various actions against political rivals and thereby prevent them from giving leadership to popular fronts capable of defeating the Government. Since the Constitution is the framework within which all other laws function, if the framework changes, it has the potential to affect the operation of all those other laws.

To digress a moment, there is historical precedence in this country for some of the things suggested in the points above. The UNP Government of Mr. J. R. Jayawardena that enacted the present Constitution cancelled the General Elections scheduled for 1982 and held a referendum instead.[23] They also prosecuted Mrs. Sirimavo Bandaranaike, the leader of the SLFP, considered at the time the person most capable of marshalling a successful campaign against the UNP, and deprived her of her civic rights.[24]

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[23] See '1982 Referendum and July 1983,' Rajan Hoole, 7th January 2017, www.colombotelegraph.com
[24] See 'Sirimavo Bandaranaike,' *The Telegraph*, 11th October 2000, www.telegraph.co.uk

It is the considered view of many commentators that, the aforesaid two acts, more than anything else, helped the UNP at the time to extend its reign of power for more than a decade, when in all likelihood it would have ended with the `1982 elections.[25] History is known to repeat itself ('the first time as tragedy, and the second as farce' as Marx observed) so it is not inconceivable that some version of the tactics once deployed by JRJ will be repeated again.[26]

The point is this. With a constitutional amendment, as opposed to any other law, the People invariably lose the control they have over when, whether and under what conditions future elections are held. There is always a possibility that the voters whose interests are compromised when their MP's participate in enacting a constitutional amendment will never be able to hold those MP's accountable for the said actions.

A critic, however, might point out that the voters have a safeguard in Article 83. For instance, if a proposed constitutional amendment threatens any of the entrenched provisions of the constitution, which is to say poses an especially grave danger to the interests of the People, such amendment must be put to a referendum. That means that, voters whose interests are compromised as aforesaid have a chance to block that amendment at the referendum.

It should be noted that, under Article 85(3) of the Constitution, the threshold for wining a referendum is an absolute majority (i.e. 50% +1) of the votes cast at such referendum.[27] Therefore, it is possible to pass a constitutional amendment into law even if it is rejected by close to 50% of voters.

The practical effect of the above is that, even if *all* the voters whose wishes are contravened when their MP's join the Government in order to pass a particular constitutional amendment reject it at a referendum, such amendment can nevertheless become law.

Therefore, when a constitutional amendment runs counter to the interests of a group of voters, the one and only chance they have to protect their interests is by blocking the passage of the amendment when it is brought up in Parliament: if their MP's betray the trust place in them and *participate* in enacting the amendment, they lose that chance. In short, the voters suffer irreparable harm.

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[25] For instance, the article by Rajan Hoole cited in footnote 23, if I'm not mistaken, takes this position.

[26] In this regard, it is pertinent to consider an editorial in *The Island* that discusses a recent attempt by the Government to set up a special tribunal to handle bribery and corruption cases (which cases would invariably involve political rivals). The paper opines: 'One is reminded of how the late Prime Minister Sirimavo Bandaranaike was stripped of her civil rights and her parliamentary seat in the most despicable manner for seven years through a special presidential commission in 1980. ...The Civil Rights Movement, in a hard-hitting statement on Dec. 10, 1980 said the course of action the JRJ government had resorted to had 'inflicted a kind of second class justice for political offenders.' Is the UNP-led government planning a repeat performance?' "Justice hurried, justice buried,' *The Island*, 6 January 2017

[27] Article 85(3) SL Constitution

Recall that, for any law other than a constitutional amendment, voters whose wishes are contravened when their MP's help enact such a law always have a chance to hold those MP's accountable at a future election, and thereby to recoup their losses.

Is it reasonable to suppose that a Constitution which gives to voters such a safeguard when their MP's pass laws that are by nature inferior or secondary to the Constitution, will deny to the same voters even a minimal safeguard on occasions when their MP's try to change the Constitution, a task which invariably carries with it far graver consequences to the voters? In my view, it is not: in fact it is an absurdity.

Under the circumstances, reason, common sense and the interests of justice dictate that Article 82(5) must be read as including an implied condition, namely, the MP's that make up a coalition that approves a constitutional amendment must themselves have received a mandate for such action directly from their constituents.

Legal Analysis

Recall that, the Preamble to the Framework Resolution says: 'Whereas there is broad agreement among the People of Sri Lanka that it is necessary to enact a Constitution for Sri Lanka.' The issue is not whether there is broad agreement among the People that amendments or a new Constitution are needed, but whether there is agreement that the present Parliament ought to bring the said amendments or new Constitution.

Under our Constitution, there are two objective ways for the Government to find out the sentiments of the People on important issues: the referendum, and elections. If the Government wanted to find out whether the People approved of Parliament turning itself into a 'Constitutional Assembly' to draft a new Constitution, or amendments to the present one, that question could have put to the People at a referendum.

The Government could then have relayed the said information to Parliament. It was not done. That leaves us with the results of the elections, and the evidence is that UPFA voters did not give a mandate to their candidates to pursue a common legislative program with the UNP. The primary basis for this claim is the UPFA Election Manifesto for the 2015 elections.[28]

Nowhere in the UPFA's manifesto does it say that, if after the elections the UPFA did not win enough seats to gain a majority in parliament, its members reserve a right to join their rivals during the elections, and form a government.[29] But, this is exactly what

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[28] I take as self evident that an election manifesto is the official program of action of any political party, and for any given election, the principal means by which voters who vote for a party know what they are voting for. I further take as self evident that, if the act of voting is to mean anything, we must suppose that a voter must have an assurance that if he votes for candidate 'X' and 'X' says he will do such and such, that once elected he will do what he said and not something else.

[29] The version of the UPFA Manifesto I have consulted is the one posted in www.adaderana.lk ('UPFA Manifesto Long Version, 28th July 2015). Unfortunately, that version is in Sinhala. Try as I might, I have been unable to find an English translation of the 2015 UPFA election manifesto online. Since I cannot

expect international readers to know Sinhala, I shall endeavor to provide supplementary evidence to support my claim that UPFA voters at the 2015 Parliamentary Elections did not give a mandate to their candidates to join the UNP in case of a loss and carry on a joint government. I present two types of evidence: first, some representative comments, both from international and local sources, that describe the power-struggle within the UPFA in the run-up the elections, from which I propose to draw reasonable inferences as to what type of mandate UPFA voters may have given their candidates. Second, a series of comments from reputed sources that describe an attempt by the Government to delay local government elections. From those comments, I propose to draw reasonable inferences about the popularity of the present government, and from these, inferences about the mandate given by UPFA voters to their candidates at the Parliamentary Elections.

Here are the three quotes about the power-struggle in the run-up to the elections. The first is from a report by *The International Crisis Group*: 'The SLFP which has a large majority in Parliament resented Sirisena's unprecedented experiment with a "national government' dominated by its arch-rival UNP. Many SLFP parliamentarians remain loyal to Rajapaksa; others see the ex-president as the party's best chance to retain its majority in the next parliament, given his popularity among Sinhala voters. After months of resisting Rajapaksa's selection as the prime ministerial candidate of the SLFP-led United Peoples Freedom Alliance (UPFA), lack of support in the party forced Sirisena to yield in early July.' ('Sri Lanka between Elections,' Report No. 272, 12th August 2015, www.crisisgroup.org.)

Next, we shall turn to a quote from an article in the *World Socialist Website*, a respected source for alternative-news: 'Sirisena is the nominal leader of the SLFP and the UPFA, but has virtually lost control of them. While Prime Minister Wickremasinghe is pressing for an early dissolution of parliament, the majority of the SLFP is demanding that elections be postponed until electoral changes are made....The SLFP is seeking to postpone the elections to the end of the year, hoping to exploit growing popular opposition to the government. Its insistence on electoral changes is a delaying tactic. ('Sri Lanka Lankan President postpones Parliamentary Elections,' K. Ratnayake, 29th May 2015, www.wsws.org)

Finally, I turn to the *Sunday Times,* a leading mainstream newspaper: 'It was an epochal, rare and historic moment in Sri Lanka's three decade old executive presidency: a President heaping both agony and ecstasy on his fellow countrymen on the eve of a parliamentary election. Just one sentence, in a 62-minute address to the nation said it all. President Maithripala Sirisena declared that he will urge 'the people to select those who are suitable to march forward with the January 8 mandate.' The message was clear: support the United National Party (UNP) and its allies....That it came from Sirisena, who is the leader of the Sri Lanka Freedom Party (SLFP) the predominant partner in the United Peoples freedom Alliance (UPFA) was agony for their leaders and supporters. The shock was too much to bear. If only days earlier they had decided not to criticize Sirisena at election rallies, the mood changed. During their own discussions they accused him of treachery and betrayal.' (President Battles with his own Party,' *The Sunday Times*, 19 July 2015, www.sundaytimes.lk

I hope the above quotes are sufficient to show the reader that, Mr. Sirisena did not enjoy the support of a vast majority of SLFP voters in the run-up to the election: in fact he was disliked if not reviled by them. Under the circumstances, it is unreasonable to suppose that those voters would endorse their party joining the UNP after the election, a union orchestrated if not overseen by Sirisena himself. Therefore, even without consulting the contents of the UPFA election manifesto it is possible to conclude that SLFP voters could not have given a mandate to their candidates, in case they lost, to enter into a union with the UNP, and help the latter to further its (i.e. *UNP*) policies and programs.

If that is not enough, I shall now turn to the second 'proof,' the apparent reluctance of the government to hold local-government elections, and reasonable inferences that can be drawn from this fact. I must first provide a little background to readers who may be unfamiliar with this issue. The term of every local government council is four years, and the last elections were held in 2011. So, elections were due to be held in 2015. But, the government has so far failed to hold such elections citing various excuses such as that a new Delimitation Report was needed, and (when the report was produced) that it needed to be translated into all three official languages, and so on. Critics have accused the government of postponing the elections because it is afraid of suffering a crushing defeat. The question is whether there is any merit in the government's excuses or whether the critics are correct in their take on events.

With that background, let's look at the quotes. The first is a statement by CAFFE (Campaign for Free and fair Elactions) a respected elections monitoring group here: 'Although the Committee was to hand over its report to the Minister of Local Government and provincial Councils yesterday (27) it has not handed over

the report stating that they still need to finalize translating the document to all three languages. The Committee initially said that they will hand over the report on March 2016 but it continuously extended the deadline stating various reasons. Chairman of the Committee Asoka Peiris once said that they were given an extension even without them requesting for such an extension adding the report can be presented by 30th November. However a few days later he stated that the report can be only handed over on the 15th December and the Minister of Local Government and Provincial Councils said that if he receives the document on 15th December he will gazette it on the 16th. But as usual the deadline was extended again and the Committee was to hand over the report yesterday but the report was not handed over. CAFFE believes that the Committee has come under the influence of a powerful force that wants to delay the election to fulfill narrow political agendas.' ('Legal action against those who delay delimitation report – CAFFE, 1st January 2017, www.lankaweb.com)

I shall turn next to an interview with Mr. Asoka Peiris the Chairman of the Delimitation Committee published in the *Daily Mirror* on 4th January 2017. The following exchanges are especially relevant. Q: 'Could you explain to us the present status of the Delimitation Report?' A: "The Committee had taken a decision to hand over the report the Delimitation Committee report on December 27, 2016. Though it was not a constitutional requirement we felt that it was getting dragged on. I with my experience in a government department, we know that the date for an election is decided early, and we strive together to hold the election. Following the same procedure, we handed over the report on the above date. There are three sections to this report. One about the changes to the electorates and our comments, second the gazette notification showing the composition of the electorate, and third the relevant map which refers to the gazette. We finalized all these, including the criteria of delimitation. But in accordance with the State language policy this had to be translated into the Tamil and English languages. It was apparent that certain individuals were keen on delaying this.

Q: 'Who is keen on delaying this?' A: 'The Ministry or better to say the government. Both the main parties in the government are keen to delay this.'

Q: 'What do you think is the main reason for these groups to delay this?' A: 'There is a political need. It is very clear but it does not apply to us. Due to an administrative issue, the Tamil translations were not available in five districts up to December 27. This has happened in the most essential districts such as Jaffna, Kilinochchi, Mannar, Mullatitivu and Vavuniya. Without Tamil translations, introducing the report was very unjustifiable. We had only two translators and that was inadequate. These facilities were to be provided by the Ministry of Local Government and Provincial Councils. I am not leveling allegations but the Ministry failed to provide these facilities well in time. I made a request about two months ago for additional translators since two were inadequate. As we failed to get the two translators whom I knew personally were attached to the Ministry of Lands were taken by us for this job. Even after acting in this manner, and if someone is trying to delay it, it is an act against the people of this country.' (*Interview of Asoka Peiris, Delimitation Committee report*, Daily Mirror, 4th January 2017)

Finally, I shall turn to an editorial in *The Island* that sums up the view of that paper on the above issues:

"Minister of Provincial Councils and Local Government Faizer Mustapha acted like a real bull in a china shop on Monday, when Chairman of the Delimitation Review Committee Asoka Peiris tried to submit his outfit's final report. Refusing to accept the document on the grounds that it had not been signed by two of the five review committee members, an irate minister locked horns with the media personnel who threw curve balls. There was no reason for him to throw such a hissy fit. The fault was his; he was trying to defend the indefensible!"

"However it will be a mistake for anyone to lay the blame for Monday's brouhaha solely at Mustapha's doorstep. He has been acting in this manner at the behest of his political bosses."

"President Maithripala Sirisena not only accepted but also praised the original report submitted by the delimitation Committee headed by Jayalath Dissanayake. It was duly ratified by parliament and signed by Speaker Karu Jayasuriya. But, the government made a volte-face as it was looking for an excuse to postpone the local government polls which it was not ready to face. It appointed the Asoka Peiris committee to review the Jayalath committee report obviously in a bid to delay the mini polls in the hope that it would be able to get its act together in time for the next electoral contest. But, its plans have manifestly gone awry and it is scared of an election owing to several factors such as the ignominious defeats its constituents have suffered at the first round of co-operative society elections, over rising cost of living, mega rackets like the central bank bond scandal, unfulfilled pre-election pledges, rampant corruption, the absence of development drive and the not-so-cold war within the ruling coalition between

happened: a group of MP's elected under the UPFA banner, and thus bound to the UPFA's program of action, joined the rivals in the UNP to form the 'National Government'

(True, as per the relevant Supreme Court ruling, MP's elected under one party can switch to other parties once elected, but that ruling envisions any such switches to be made by

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the UNP and the SLFP." ('Waiting for Godot,' *The Island, Editorial*, 4 January 2017, www.sleditorials.blogspot.com)

I trust that the above sets of quotes are sufficient to show that, there are reasonable grounds to believe the claims of the critics when they say that the government is deliberately delaying the local government polls because it is scared of losing at those elections.

The question is, from this state of affairs, can we infer anything about the possible mandate that UPFA voters may have given their candidates at last year's Parliamentary Elections? I believe we can.

Mr. Sirisena as President is the head of the government, and he can order the LG Polls to be held post haste if he so wished. So, regardless of who else in the government may not want the polls to be held, it is impossible not to conclude that, in the final analysis, Sirisena himself is either directly or indirectly for the delays, i.e. it is being done with his knowledge and consent.

But, why would Sirisena be afraid of elections? As the editorial in the Island quoted earlier makes clear, the country is in a bad way, with 'rampant corruption,' soaring cost of living, and so on. So, this is a perfect opportunity for Sirisena to advance his party. It is not in dispute that, between the UNP and SLFP faction in the Government, the UNP is the predominant partner: the UNP after all has a majority in Parliament.

No SLFP voter will vote for the UNP, especially if the country is in as bad a shape as suggested by *The Island's* editorial. Is it possible that Sirisena fears that SLFP voters will abandon their party because the SLFP (at least Sirisena's faction) has been cooperating with the government?

I do not think so because: Sirisena's faction can make the excuse that, it is the UNP that is responsible for the various disasters, and they (i.e. Sirisena's SLFP'ers) have had no power to prevent this, even though they have been trying their hardest to do so. Besides, they can ask the SLFP voter, 'If you leave us, where would you go? The UNP?' For reasons I have explained, turning to the UNP is not an option for SLFP voters.

Therefore, if Sirisena is afraid of facing elections, it is because he knows that SLFP voters will go somewhere *other* than the UNP. But, where could they go? Obviously, to Mahinda Rajapaksa. And conveniently, Rajapaksa has set up a new political party called the *Sri Lanka Pudujaja Peramuna* (SLPP) to receive his 'flock.'

So, Sirisena's fear is that the SLFP voter will turn to Rajapaksa at a future election. But, why would Sirisena have this fear if just an year-and-a-half ago those voters voted wholeheartedly for a party that he headed?

From this, one can infer that, if a portion of SLFP voters voted for the UPFA at the 2015 Parliamentary Elections, it is not because of Sirisena's association with the SLFP, but in spite of it: in other words, because of their loyalty to Rajapaksa. (It should be noted that, Rajapaksa was the *de facto* prime ministerial candidate of the UPFA, until Sirisena wrenched that option away at the last moment.)

If a portion of SLFP'ers remained loyal to Rajapaksa at the Parliamentary Elections, it is unreasonable to suppose that they would have approved of their party joining the UNP after the elections. Therefore, again, without consulting the UPFA manifesto, it is possible for one to surmise that, the SLFP voters who voted in the 2015 Parliamentary Elections, at any rate a sizable portion of such voters, did not give a mandate to their candidates to join the UNP and form a government.

I reiterate that my submissions above are intended as alternatives and not a substitute to consulting the UPFA Election Manifesto itself. Without question, the best way to discover what the UPFA voters voted for in the August 2015 elections is to read the UPFA manifesto and find out directly, and I urge the reader to do so.

MP's acting individually and out of reasons of conscience, and not an entire bloc of MP's switching their allegiance to the ruling party under a 'Memorandum of Understanding.'[30])

Therefore, the statement by Parliament that there is 'broad agreement among the People for a Constitution,' if we are to take that as meaning that there is broad agreement for the present Parliament to bring constitutional amendments, is without basis. In other words, the resolution lacks *warrant*.

I now come to the heart of the matter. A critic might say something like this:

'The sole purpose of the 'Constitutional Assembly' is to generate the constitutional amendments or a new Constitution as the case may be. Once these are produced, Parliament has every intention of following the prescribed procedure. So, the fact that the People have not given a specific warrant for a 'Constitutional Assembly' doesn't mean that what Parliament has done is illegal. Besides, under Article 75 of the Constitution, Parliament has very wide powers to 'pass laws' and that includes the power to amend or repeal the Constitution, and these powers are sufficient to cover the conduct of Parliament in forming the 'Constitutional Assembly.''

In my view, the 'Constitutional Assembly' is illegal, regardless of the purported ambit of Article 75, because of the following reasons. Recall that, in the previous section, I showed that Article 82(5) must be read as including an implied condition that a 2/3 majority in Parliament that passes a constitutional amendment must have at some level or other a mandate for such action directly from the People.

Therefore, on a plain reading of the prescribed procedure set out in Chapter 12, what it envisions is for a Government elected with the overwhelming support of the People, or which is capable of forming a coalition with other parties or crossovers who have a mandate to a common legislative program including constitutional amendments, to draft the proposed amendments and present them in Parliament.

At that point, MP's representing the interests of voters who for whatever reason are opposed to the constitutional changes—i.e. voters who are of the view that the amendments in question ought not to be pursued at all—raise objections. If the Government can maintain its 2/3 majority support for the amendments in the face of those objections, then the Government can pass the amendments subject to Article 83.

I emphasize that, under the prescribed procedure, it is the *Government* that drafts the proposed constitutional amendment or amendments, and there is at all times within Parliament a certain number of MP's who represent the interests of voters who don't want the proposed changes.

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[30] The UNP – SLFP union was sealed with an MOU, that is to say, the SLFP'ers who joined the National Government agreed, *en masse*, to *cooperate* with the UNP in pursuing common legislative program. (See 'UNP – SLFP sign MOU on National Government,' *Asian Mirror*, 21st August 2015, www.asianmirror.lk) The point is that, if the SLFP leadership intended to sign and MOU with the UNP they should have done it before the elections, so that SLFP voters could have known what to expect from their candidates.

If we apply the above considerations to the facts surrounding the commencement of the present constitution-making process, 3 things follow. First, under normal circumstances, i.e. if the wishes of UPFA voters had been *honored*, the Government would not have been able to commence the said process at all.

It is not in dispute that, the only reason that the Government commands a 2/3 majority in Parliament is because about 40 SLFP MP's who contested under the UPFA banner along with a handful of other MP's appointed through the National List have decided to join the UNP and form the "National Government,' the purpose of which is to pursue a common legislative program.[31]

Second, if the prescribed procedure had been followed, it is the Government—or the 'National Government'—that would have drafted the amendments. Actions of the Government can be challenged in courts of law—i.e. government officials no matter how high their positions can be hauled up before the courts. But, actions of Parliament cannot be so challenged, or at any rate such challenges usually fail in the preliminary stages.[32]

So, if the Government had initiated the process of drafting the present amendments, then voters aggrieved by the forming of the 'National Government' could have challenged the said act in the courts. I am not saying they will have necessarily won the case. But, at the very least, they will have been have been able to obtain a definitive ruling on the *legality* of the 'National Government.'

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[31] Please refer to footnote 30. However, the following quote, from the political columnist of the *Sunday Times* three days after the elections also provides relevant details about how the 'National Government': was put together: 'According to talks underway the Cabinet of Ministers is likely to be 51 – 33 from the UNP led coalition and 18 from the SLFP. The number of deputy ministers is likely to be 40 – 22 from the UNP and 18 from the SLFP....That some of the SLFP Parliamentarians may rebel against the UNP – SLFP memorandum of understanding was not lost on Sirisena. He has decided to address the SLFP MP's in groups representing different provinces. The first such meeting will be held today. Sirisena is expected to warn his MP's that they faced expulsion from the party if they did not extend support to the MOU....[Meanwhile] in allowing names for the National List, Sirisena has ensured that only those from the SLFP and not the rest of the UPFA coalition partners were accommodated. All the new additions are those who have *lost* Monday's parliamentary elections.' ('Another Jumbo cabinet with National Government,' *The Sunday Times*, 23rd August 2015, www.sundaytimes.lk

[32] The principal reason for this is, Article 4(c) says that judicial power is to be exercised *by* Parliament *though* courts, tribunals etc. Our courts have consistently interpreted this as conveying on Parliament a certain immunity from suit. The following, from the ruling of the Supreme Court that overturned a judgment of the Court of Appeal with respect to the impeachment of Chief Justice Shirani Bandaranaike, is representative of the reasoning of the court on this matter: 'It is significant that the legislative, executive and judicial powers of the People is vested either with Parliament or the President, both elected by the People, so as to maintain accountability and transparency, and the courts and like tribunals and institutions which are not elected by the People, are accountable and responsible to the People through Parliament....In light of the constitutional arrangements contained in Article 4 and other provisions of our constitution, there is no room for doubt that Parliament including its select committees cannot be regarded as inferior to our Court of Appeal when it exercises its writ jurisdiction conferred by Article 140 of the constitution, and would therefore not be amendable to such jurisdiction.' (*SC/Appeal No. 67/2013*, p.18)

The ruling itself might have gone either way. But, the voters will have been able to vindicate their rights under the Constitution, something which the citizens of this country are entitled to do with respect to practically any other issue, and something which no one, especially the MP's who have betrayed the trust place in them, ought to be able to deprive them of.

Third, if the prescribed procedure had been followed and the Government had drafted the amendments or new Constitution, then at the point in time when those documents were first introduced in Parliament, UPFA voters would have had MP's in Parliament who could raise objections on grounds of *principle*, i.e. on grounds that the amendments or new Constitution as the case may ought not to be brought at all.

Since the 'Constitutional Assembly' is comprised of the *whole* of Parliament which means the entire Parliament will have *participated* in drafting the amendments, it is difficult to see how any particular faction within the Constitutional Assembly (and this includes the Joint Opposition[33]) can now object to the amendments on grounds of principle, i.e. that they ought not to be brought at all.

There could be disagreements, but those would be on how far the suggested reforms should go, not whether the reforms are needed at all at this particular point in time. It is true that under the present procedure the amendments once drafted will be re-submitted to Parliament. So, the JO can claim that it can still raise objections on principle at that stage. I concede that this is possible.

Nevertheless, there is no excuse for failing to raise objections on principle when the constitution-making process commenced, since the underlying reality is that the majority of UPFA voters did not give a mandate to their candidates to join the UNP in order to bring constitutional amendments.[34] The sum of these considerations is that the device of a "Constitutional Assembly' has permitted the Government to do the following three things:

First, commence a process of changing the Constitution that was not possible under normal circumstances i.e. if the wishes of voters had been *honored*; second, preclude legal challenges being made to the 'National Government' and thereby to the constitution-making process; finally, deny UPFA voters an opportunity to raise objections on principle at the commencement of the said process.

In short, on each the aforesaid three matters, the 'Constitutional Assembly' has permitted the Government to materially harm the interests of the UPFA voters who voted at the August 2015 General Elections, and do so under cover of the law. Since the *entire* Parliament approved the resolution that established the 'Constitutional Assembly' the *entire* Parliament is complicit in the said act of the Government.

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[33] The JO is comprised of parliamentarians loyal to former president Mahinda Rajapaksa
[34] Please see footnote 30

As discussed earlier, Parliament cannot act in ways that harm the interests of the People: if it does, such act is by definition illegal. UPFA voters are citizens of this country; furthermore, as pointed out earlier, UPFA voters got roughly 42% of the votes cast at the August 2015 General Elections.

I concede that, Article 75 confers very wide powers on Parliament to 'pass laws' and that includes the power to amend or repeal the Constitution.' But, Article 75 cannot be interpreted as granting unlimited or absolute power: Parliament is not above the law, it is *subject* to the law, which is to say, it is at all times bound by the terms and conditions, both implied as well as expressed, imposed by the Constitution.

What then do we have here? The Constitution prohibits Parliament from acting in ways that harm the interests of the People, and the creation of the 'Constitutional Assembly' has indisputably harmed the interests of UPFA voters as aforesaid. Meanwhile, UPFA voters indisputably comprise a portion of the 'People' of this country. The conclusion is inescapable that the present constitution-making process, which derives its purported validity from the said 'Constitutional Assembly,' is quite illegal.

I would be remiss if I didn't address an objection that certain critics have raised to the argument made in this paper. They say that, there is historical precedence in this country for Parliament turning itself into a 'Constitutional Assembly,' i.e. in order to enact the 1972 Constitution also Parliament converted itself into a 'Constitutional Assembly' or something akin to one. Therefore, the present process cannot be illegal.

I have four replies. First, the United Front Government that enacted the '72 Constitution had an overwhelming majority in Parliament, which it had received at the 1970 elections.[35] So, under the first limb of my argument, that a Government elected with the overwhelming support of the People ought to be able, subject to Article 83, to bring whatever constitutional changes it wishes, the objection cannot stand.

Second, I take as a premise that the immediate need is to explore whether the attempt to change the *present* Constitution is lawful. Therefore, one's concern must be with the terms and conditions—including Supreme Court interpretations—of the present constitution, not the one that was replaced in 1972, i.e. the Soulbury Constitution.

To the best of my knowledge, there is no interpretation of any provision of the Soulbury Constitution by our Supreme Court or of the British Privy Council (which had jurisdiction over Sri Lankan cases at the time) equivalent to the interpretation given by our courts to Articles 3 and 4 of the present Constitution. Therefore, the argument in the present paper cannot be impugned by referring to substantive clauses in the Soulbury Constitution.

Third, I have not indicated anywhere in this paper that I consider what happened in 1972 to be *lawful*. It may be unlawful: we will never know, because there is no judicial

[35] The UNF Government had a majority of 121 members in the 157 member House. (See L. J. M. Cooray, *Constitutional Government in Sri Lanka, 1796 – 1977* (Stamford Lake, 1984 and 2005, p. 155)

determination on the matter.[36] Two wrongs don't make a right, as the saying goes. Therefore, the fact that something might have been done in the past that appears to be similar to something being attempted in the present doesn't absolve us of our obligation to probe the legality of that second act.

Finally, to the best of my knowledge, what happened in '72 was that the House of Representatives first abolished the Senate by amending the Constitution, and then turned itself into a Constitutional Assembly in order to generate the new constitution. In other words, they first amended the amending process.[37]

In the instant case, there is no attempt to amend Chapter 12. Quite the contrary, what Parliament is trying to do, is to resort to Chapter 12 *after* the new Constitution has been generated. So, there's no comparison with what happened in '72. On this ground also the objection fails.

Conclusion

I have in this paper argued that the ongoing constitution-making process in this country is illegal, because it is being carried out by a body - the 'Constitutional Assembly - for which there is no provision in the law, and is in fact contrary to the letter as well as spirit of Articles 3 and 4 of the Constitution.

On account of the dire consequences for Sri Lanka, it is my hope that international readers will urge their respective governments to stop pushing for constitutional reform in Sri Lanka, or to do so in a more informed and fair manner, commensurate with the real needs of the people, and the political realities of the country.

Dharshan Weerasekera was born and raised in Sri Lanka but educated in the United States, at UC Berkeley and at the University of Iowa. He has worked briefly at the Sri Lanka Defence Ministry. He later attended the Sri Lanka law College and is presently practicing as an attorney-at-law in Colombo.

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[36] Actions were filed both in the District Court as well as the Supreme Court, but they 'did not go beyond the procedural stage. The substantive issue of whether the constitutionally prescribed procedure had been followed in the passage of the Bill was not an issue which the courts were called upon to decide.' (Cooray, *Constitutional Government in Sri Lanka*, p. 165.)

[37] See *Constitutional Government in Sri Lanka*, pages 155 - 158

Attachment P3a

Rebuttal to OISL war crimes allegations against Sri Lankan Armed Forces

- **UNHRC acknowledgement of our submission**
- **Our follow-up letter**
- **Volume 1: http://www.globalsrilankanforum.com/oisl-rebuttal/**

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REFERENCE:

6 June 2017

Dear Dr Weerasekera and Mr Chandrakumara,

I write to acknowledge receipt of your letter dated 24 May 2017 in follow-up of a meeting held on 23 March 2017.

With reference to the report that you shared with me at the margins of the 34th Human Rights Council session I would like to inform you that the Office of the United Nations High Commissioner for Human Rights (OHCHR) receives and considers all information provided by civil society organizations. Your report as is the case with other civil society contributions will help OHCHR to broaden its knowledge about the situation in Sri Lanka.

Yours sincerely,

Thomas Hunecke
Human Rights Officer
Asia-Pacific Section

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A Factual Appraisal of the OISL Report; A Rebuttal to the Allegations Against the Armed Forces

We wish to draw your attention to the background of our protest held today. Sri Lanka has been unjust fully marginalized and cornered by parties with vested interests, completely built upon utter lies fabricated by so called Tamil diaspora. To the disarray of peace loving people all around the world, continuous lies made by Tamil separatist terrorists have succeeded to undermine the independent nature of the UNHRC risking its credibility. We urge you to revisit the current proceedings based on the counter report which was submitted by Rear Admiral (Retd) Dr. Sarath Weerasekara to the UNHRC on behalf of the Federation of National Organizations in Sri Lanka, sponsored by Global Sri Lankan forum. The following basic facts hereby illustrated anticipating your unbiased judgment.

UNHRC by resolution A/HRC/25/L.1/Rev.1 on 26th March 2014 requested OHCHR to undertake a comprehensive investigation into violations of human rights allegedly committed during the last phase of the humanitarian war conducted against the world most brutal terrorist organization in Sri Lanka. The OHCHR thereon launched the above investigation and a report was set out and the resolution A/HRC/30/L.29 was endorsed on 29th Sept. 2015 based on the same.

It is worthwhile to note that at the end of the UN high commissioner's official visit in Sri Lanka on 9th February 2016, he said; "Sri Lanka's armd. Forces have to clean up the stain on their reputation caused due to the alleged human rights violations conducted during the last phase of the war". We are specially concerned by the High Commissioner's assertion that there is a **stain** on the reputation of Sri Lankan Armd forces. The aforesaid 'stain'. Presumably, is the allegation that the armd. Forces are collectively responsible for war crimes and other serious crimes purportedly committed.

The OISL report levels seven charges against the government of Sri Lanka; three out of 7 are under international Humanitarian law and the four under International Human rights law. All the allegations were made by unknown people and their testimonies cannot be challenged in the court of law. The evidence in the OISL report is seriously flawed, characterized among other things by contradictions, omissions, lies, obfuscations and half-truths, and also lacking in any consideration of exculpatory evidence the cumulative effect of which is that the report fails to establish its primary claim, namely that the state (i.e. the military as well as civilian leaders who oversaw the conduct of the war, and thereby the armed forces collectively as contra-distinguished from individual soldiers)is responsible for war crimes and other serious crimes allegedly committed during the relevant period.

It is worthwhile to know that these baseless accusations were well rejected by the expert report which was tabled by Rear Admiral (Retd) Dr. Sarath Weerasekara at the general assembly on 20th March 2017 prepared by Lawyer Darshana Weerasekara supported with factual papers authored by Sir Geoffre, Nice QC & RodneyDixon QC, Kalyananda Thiranagama and Sir. Desmond Silva.

Therefore, it is very much evident that the ulterior motivation of the "OHCHR Investigation on Sri Lanka" (OISL) report is to make a case for war crimes against the state. It argue that the civilian as well as military leaders who oversaw the war against the LTTE are responsible for certain acts committed during the period 2002/2011, which is proved would amount to war crimes against humanity. Cont...

Cont....

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That the purpose of the OISL report is to make a case against the State as opposed to individual soldiers is established beyond any doubt.

Therefore, we urge that the general assembly of what has been taking place at the UNHRC regarding Sri Lanka, and compel the UNGA to assign a special Rapporteur to investigate the entire sordid affairs, Also to impose a moratorium on the UNHRC from pursuing any further measures with respect to Sri Lanka based on resolution A/HRC/30/L.29, until such investigation is complete.

Thanking you,

Yours Faithfully,

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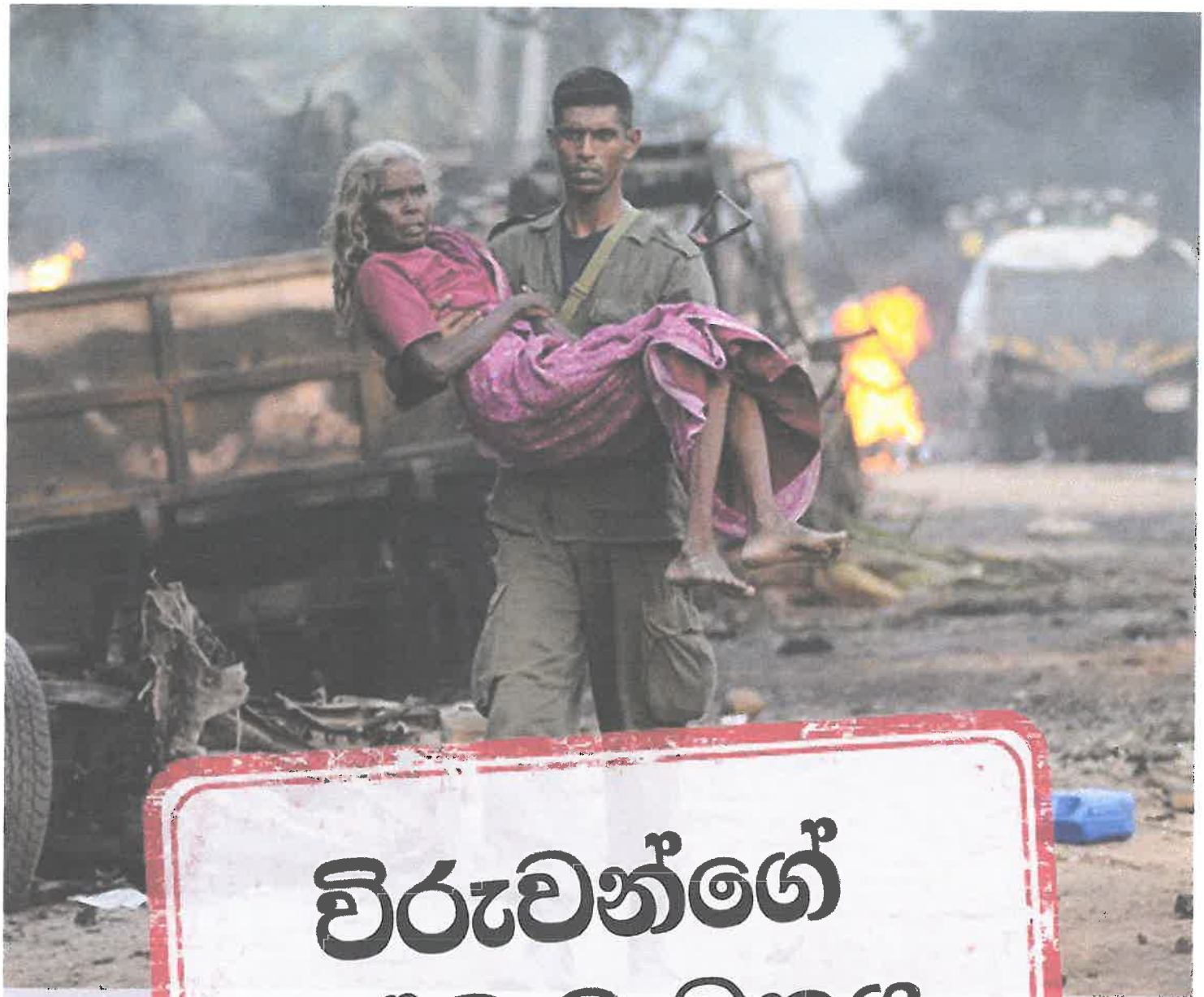

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IN DEFENCE OF THE ARMED FORCES OF SRI LANKA

VOLUME ONE

A Factual Appraisal of the OISL Report: A Rebuttal to the Allegations Against the Armed Forces

Commissioned by - The Federation of National Organizations

Sponsored by – The Global Sri Lanka Forum

Author: Dharshan Weerasekera

Editors :
- **Kalyananda Thiranagama**
- **Raja Gunaratne**

Volume One

Federation of National Organizations
Colombo, Sri Lanka
27th January 2017

Dear Mr. Weerasekera,

Mandate

We wish to draw your attention to the following matters which form the background to our present request. On 9th February 2016, UN Human Rights High Commissioner Zeid Al Hussein ended his official visit to Sri Lanka with a statement where he said *inter alia*:

"Let me be as plain as I can: the international community wants to welcome Sri Lanka back into its fold without any lingering reservations. It wants to help Sri Lanka become an economic powerhouse. It wants Sri Lanka's armed forced to face up to the stain on their reputation, so that they can once again play a constructive role in international peace-keeping operations, and command the full respect that so many of their members deserve." ('Statement by UN High Commissioner for Human Rights Zeid Al Hussein, at the end of his mission to Sri Lanka,' 9th February 2016, www.reliefweb.int)

We are especially concerned by the High Commissioner's assertion that there is *a stain on the reputation of Sri Lanka's armed forces.* The aforesaid 'stain,' presumably, is the allegation that the armed forced are collectively responsible (i.e. where the purported acts can be imputed to the command structure of the armed forces and thereby the State itself) for war crimes and other serious crimes purportedly committed during the last phase of the war.

To the best of our knowledge, the *only* Report especially one with the imprimatur of the UN or any of its subsidiary organs to level the above allegation is the OISL Report (OHCHR investigation on Sri Lanka), released to the public on 16th September 2015.

The Government of Sri Lanka by note verbale UN/HR/1/30 dated 15th September 2015 endorsed and accepted without reservation the conclusions and recommendations of the said Report. In a one-and-a-half-page response (it should be noted that the OISL Report is a 260-page document) the GOSL said *inter alia*:

"Takes note of the Report of the OHCHR Investigation on Sri Lanka (OISL), recognizes fully that this Report represents a human rights investigation and not a criminal investigation, and will ensure that its contents as well as recommendations receive due attention of the relevant authorities including the new mechanisms that are envisaged to be set up" (Note Verbale Ref. UN/HR/1/30)

Meanwhile, on 29th September 2015, the GOSL co-sponsored UNHRC resolution A/HRC/30/L.29, which again endorsed without reservation the conclusions and recommendations of the OISL Report. The said resolution was subsequently adopted unanimously by the Council.

On the above occasion, Sri Lanka's Permanent Representative to the UNHRC stated *inter alia*:

"You have all seen our written response dated 15th September to the OHCHR on the Report of the Office of the High Commissioner for Human Rights and the Report of the OHCHR Investigation on Sri Lanka which set out clearly the path we intend to take. We stated that we take note of the Report of the OISL and that we will ensure that its contents as well as recommendations receive the due attention of the relevant authorities including the new mechanisms that are envisaged to be set up." ('Statement by H. E. Ravinatha P. Ariasinha Ambassador/Permanent Representative of Sri Lanka,' Geneva, 30th September 2015, www.mea.gov.lk)

To the best of our knowledge, at the time the GOSL issued note verbale UN/HR/1/30/ on 15th September 2015 or the above statement on 30th September 2015 it had not subjected the OISL Report to an official assessment with respect to its facts.

As far as we are aware, the OISL has not been subjected to such an assessment to this day. And yet, we note that there are renewed efforts to implement the recommendations of the OISL, in particular its calls for establishing special courts to pursue the allegations of war crimes and other crimes mentioned in the Report. Under the circumstances, we consider that there is a pressing need for a thorough assessment and analysis of the facts in the OISL Report.

We note with appreciation that you have been writing on the UN's seemingly relentless pursuit of 'accountability' in Sri Lanka since 2012, in particular the series of resolutions that culminated in the authorization of the OISL Report. We note that two of your essays, 'The Illegality of UN Secretary-General Ban Ki Moon's Approach to Sri Lanka,' and 'The UN's Sri Lanka Strategy and its Implications for International Law,' originally published in the *Foreign Policy Journal* have been posted *inter alia* in the website of the *Peace Palace Library*, the vast library attached to The Hague.

Therefore, on behalf of the Federation of National Organizations, and in the public interest, we request that you produce a factual appraisal of the OISL Report, in order to assist The Federation of National Organizations to:

a. Facilitate and encourage a wider public discussion of the OISL report

b. Help defend the interests of Sri Lanka before the United Nations Human Rights Council with respect to allegations of war crimes and other crimes stemming from resolution A/HRC/30/L.29;

c. Help clear the reputation of the armed forces from the allegations contained in the OISL report, and to produce a document that will be useful in establishing before the international community that there is no stain on the honour of the members of Sri Lanka's armed forces that they must first wipe clean *before* they can command the full respect that they deserve.

d. Explore possible avenues of legal and/or administrative action against officials, both Sri Lankan as well as foreign, responsible for the OISL report or connected thereto, in the event that the report is found to be compromised either with respect to its facts or the law.

We request further that in the aforesaid task you work under the guidance and advice of a panel of editors and consultants comprising of:

- Kalyananda Thiranagama, Senior Attorney-at-Law
- Raja Gunaratne, Attorney-at-Law and Senior Lecturer at the Open University Colombo
- Shamindra Ferdinando, Investigative journalist
- Shenali Waduge, Writer, and commentator on nationalist issues

The said report will be submitted for review to a distinguished panel of jurists.

We also propose to present the said report to the general public of Sri Lanka by way of a public resolution in order to seek their approval to deliver the said report to the UNHRC and the U.N. General Assembly for appropriate action.

This entire project will be coordinated and managed by Dr. K. M. Wasantha Bandara. The project will be sponsored by the Global Sri Lanka Forum.

We shall request all Patriotic Sri Lankan Organizations to extend their fullest cooperation to you and the team of editors in this endeavor.

Thank You,

Signed by Rev. Bengamuwe Nalaka Thero

Signed by Dr. Gunadasa Amarasekara

Signed by Rear Admiral (Retd) Dr. Sarath Weerasekara

Dharshan Weerasekera
Attorney-at-law
Thalawathugoda
7th March 2017

Dear Sirs,

Completion of Assignment

As per your request by letter dated 27th January 2017 I take pleasure in forwarding a brief factual appraisal of the OISL report. I would draw your attention to the following.

Since you indicate that one of the objectives of this report is to encourage wider public discussion of the OISL report I have presumed a reader who is relatively unfamiliar with the background as well as content of the said report.

Therefore, when rebutting the OISL's charges I have thought it best to quote at length from that report as well as the primary sources. Though this approach is not typical of reports of the present type I ask your indulgence given the exigencies of the task.

Second, you informed me that you wished the report completed by the end of February, which left me 3 – 4 weeks to complete the task. Therefore, the present report is not as comprehensive as I would have liked it to be. I was also compelled to draw heavily on work I had already done on this subject, particularly the two essays you mentioned in your letter, and a third published subsequently in my book, "The UN's Subversion of International Law: The Sri Lanka Story."

Within those constraints, I have done my best to produce an appraisal of the OISL report and I hope it will be of use in your various activities. I state categorically that I have performed the present work out of the personal regard I have for the three of you. I must confess, however, that the following thought has also pushed me to complete this work as soon as possible.

You indicate in your letter that the UN High Commissioner for Human Rights (and one must presume his speaks for his Office, as well as for the Human Rights Council) has said that there is a *stain* on the honour of the armed forces of Sri Lanka. If he said such a thing in my view it is an insult hurled not just at the armed forces but at the country itself. The armed forces are the guardians of the nation, and a stain acquired as a result of guarding the nation is necessarily a stain on the honour of the motherland itself.

Under the circumstances I consider it a moral duty of every citizen to stand up and counter such slurs and set the record straight, and for that purpose, contribute whatever they can of their labour and skill.

Dharshan Weerasekera

Executive Summary

By letter dated 27th January 2017, Ven. Bengamuwe Nalaka Thero, Dr. Gunadasa Amarasekera and Rear Admiral (Retd) Dr. Sarath Weerasekara on behalf of the Federation of National Organizations requested Attorney-at-law Mr. Dharshan Weerasekera to produce a factual appraisal of the OISL report. On 7th March 2017, Mr. Weerasekera completed the said task and forwarded the present report.

The OISL report levels seven charges against the Government of Sri Lanka (GOSL). Three of those charges deal with offences that fall under International Humanitarian Law (IHL), and four deal with offences that fall under International Human Rights Law (IHRL). The findings with respect to these charges are as follows:

Charges under IHL

1. **Impact of hostilities on civilians and civilian objects. (There are two separate charges under this topic – indiscriminate shelling of civilians, and shelling of hospitals)**

   a) **Indiscriminate shelling**
   It was found that the best available estimates of the number of civilians that died during the last phase of the war, coupled with testimony of outsiders including foreign journalists present at or near the conflict zone during the relevant times, negate the charge.

   b) **Shelling of hospitals**
   It was found that, the OISL Panel has among other things deliberately attempted to mislead the OHCHR with respect to the above charge, and this negates the charge.

2. **Denial of humanitarian assistance to civilians in the conflict-zone**
   It was found that, the Panel has completely neglected to interview crucial witnesses who had first-hand knowledge including documents as to exactly how much food and medicine was in the Vanni at the relevant times, therefore this negates the charge.

3. **Unlawful Killings**
   Four allegations of unlawful killings were analyzed, and it was found that, one, either the OISL Panel itself says that it doesn't have enough evidence to come to a definite conclusion as to who was responsible for those incidents, or, the Panel's evidence lends itself to interpretations that lead to conclusions other than the ones the Panel has drawn. Thus, the charge is negated.

Charges under IHRL

4. **Violations related to deprivations of liberty (arbitrary arrests, and so on)**

It was found that, the Panel's chief source of evidence for the above charge is anonymous witnesses, whose statements are not available to the public. The Panel compounds this problem in various other ways also, which tend to further negate the charge.

5. **Enforced Disappearance**
It was found that, the Panel engages in an obfuscation with respct to the number of complaints of purported enforced disappearances, and compounds this problem by certain other ways explained more fully later, the combined effect of which is to render the charge inconsequential.

6. **Torture**
It was found that, as with the charge of deprivations of liberty, the Panel's chief source of evidence for the charge of torture was also witnesses whose statements are not available to the public. The Panel compounds this problem in certain ways explained more fully later, the combined effect of which is to render the charge inconsequential.

7. **Sexual and gender-based violence**
Just a with the charges of deprivations of liberty and torture, the Panel's chief source of evidence for the charge of sexual and gender-based violence is also anonymous witnesses, witnesses whose statements are kept secret. The Panel compounds this problem in certain ways explained more fully later, the combined effect of which is to negate the charge entirely.

In spite of the aforesaid defects, the GOSL accepted and endorsed the conclusions of the OISL report on 15th September 2015. Meanwhile, the United Nations Human Rights Council, on 29th September 2015, adopted resolution A/HRC/30/1.29, which resolution in Operative Paragraph 1 endorsed and accepted without reservation the conclusions and recommendations of the OISL report.

The demands that the said resolution make of Sri Lanka including the call to establish special courts to try Sri Lanka's war time leaders for war crimes pursuant to the charges in the OISL report, are based on the recommendations of the latter report. It should be noted that, the GOSL co-sponsored resolution A/HRC/30/L.29.

Under the circumstances, the author has argued that the GOSL, the UNHRC as well as the UN General Assembly, have contravened both the spirit as well as letter of relevant laws, and have an obligation to inquire into how this could have happened, and accordingly, has recommended that:

1. The Federation of National Organizations and its affiliates are duty bound to the people of Sri Lanka to use their resources, influence and energy to pressure the GOSL to produce an official assessment of the OISL report.

2. The Federation of National Organization and its affiliates are duty bound to the people of Sri Lanka to use their resources, influence and energy to pressure the UNHRC to authorize an official assessment of the OISL report.

3. The Federation of National Organizations and its affiliates are duty bound to the people of Sri Lanka to use their resources, influence and energy to inform the UN General Assembly of what has been taking place at the UNHRC re Sri Lanka, and compel the UNGA to assign a Special Rapporteur to investigate this entire matter. Also, to impose a moratorium on the UNHRC from pursuing any further measures with respect to Sri Lanka based on resolution A/HRC/30/L.29, until such investigation is complete.

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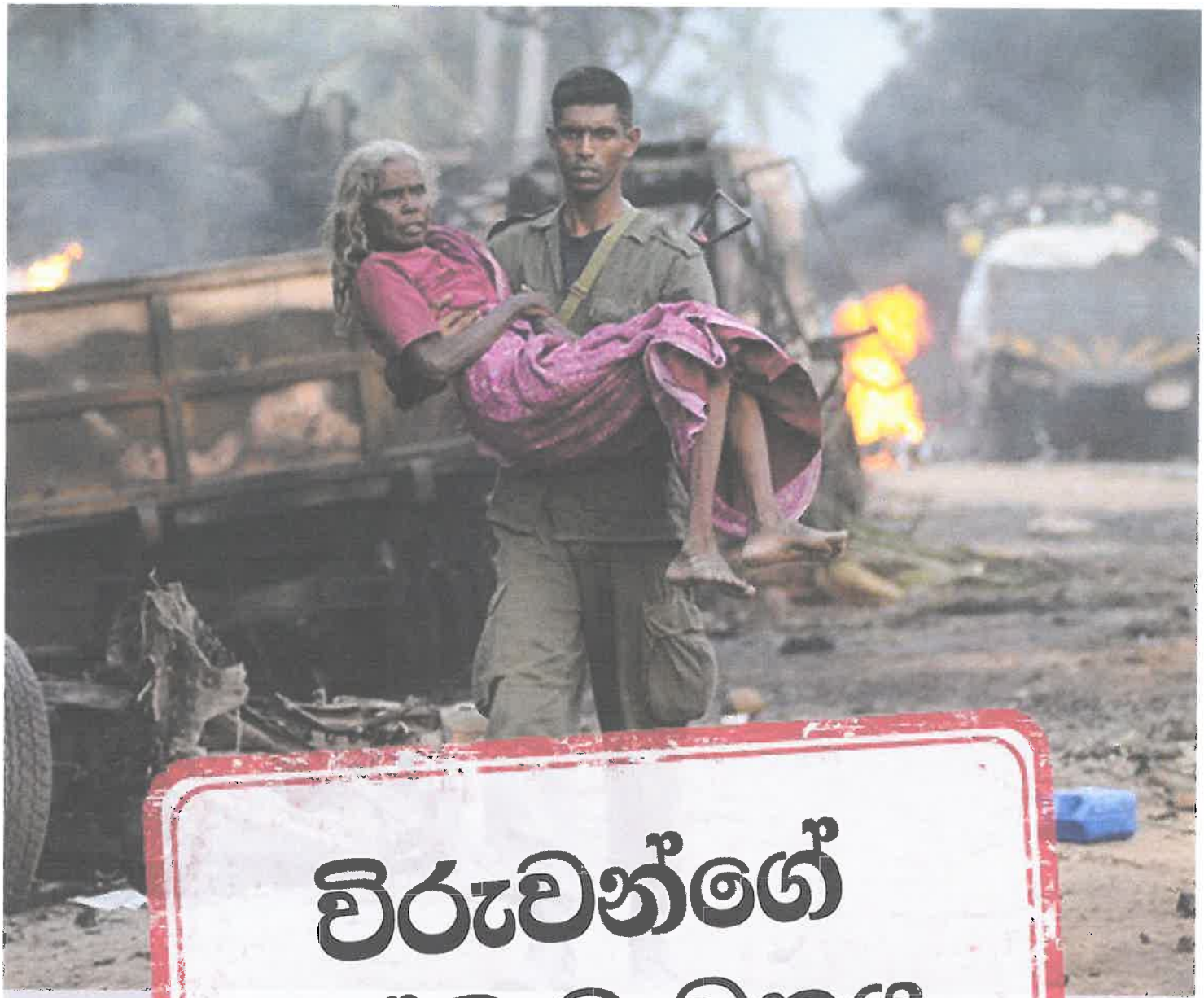
Rebuttal to OISL war crimes allegations against Sri Lankan Armed Forces

- **Volume 2:** http://www.globalsrilankanforum.com/oisl-rebuttal/



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