



2ND LEAD

OISL report downplays mass killings, silent on genocide: Law academic

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An article which appeared on Monday in the Blog of the European Journal of International Law (EJIL: Talk!), comparing the 2011 UN's Panel of Expert's report on Sri Lanka with the Office of the High Commissioner on Human Rights Investigation on Sri Lanka (OISL) 2015 report, points out that the OISL shies away from estimating the scale of deaths and avoids attributing to the [Sri Lanka] government's intent in directing attacks against the civilian [Tamil] population. The article adds that "given this shift of focus away from mass killings of civilians...it is not surprising the OISL is silent on the crime of genocide..." The article is authored by Umesh Perinpanayagam, an Eezham Tamil academic, who works as a researcher at the Faculty of Law of the University of Auckland, New Zealand.

The article gains significance while The Hindu provides platform to the genocidal Sri Lanka's Prime Minister Ranil Wickramasinghe in [downplaying](#) the number of civilians slaughtered in the Vanni war.

In committing the slaughter of Eezham Tamils, the intention of genocidal Colombo on one hand, and the intention of Colombo abettors on the other hand, have to be carefully differentiated and disseminated in any international perusal, commented Tamil activists for alternative politics in the island.

Post-2009 events are clear evidences in understanding the 'intentions': genocide in the intention of Colombo and 'entry' in the intention of the abettors.

However, the confusion in comprehension is deliberately maintained by both, as the deed committed was the same and synchronization of intentions is in the need.

The OISL report contributes to the 'confusion' and has thus fundamentally failed in its international responsibility to humanity, the activists further commented appreciating the line of approach taken by the article of Mr Umesh Perinpanayagam.

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Full text of the article, published in EJIL: Talk!, follows:

On 1 October 2015 the United Nations Human Rights Council adopted by consensus the resolution '[Promoting reconciliation, accountability and human rights in Sri Lanka](#)'. The basis for the resolution was the release and consideration of the long awaited Office of the High Commissioner on Human Rights Investigation on Sri Lanka (OISL) (see [here](#) for links to the summary and full reports).

 [A/HRC/30/61 OHCHR Report](#)

 [A/HRC/30/CRP.2 OISL Report](#)

Strikingly, OISL moves away from the position on mass civilian killings taken in an earlier UN report of 2011 (see EJIL: Talk! post [here](#)) (2011 Report).

 [Report of UN Secretary-General's Panel of Experts on Accountability in Sri Lanka \(9Mb\)](#)

According to the 2011 Report, tens of thousands of Tamil civilians were killed between January and May 2009, in particular the final weeks leading up to the government declaration of victory over the Liberation Tigers of Tamil Eelam (LTTE), who immediately prior to this period controlled most of the Tamil-dominated Vanni region of the island.

The 2011 Report found reasonable grounds to believe that most of these deaths were the result of intentional government attacks directed at civilians, amounting to crimes against humanity.



Umesh Perinpanayagam

In contrast OISL neglects to estimate the scale of deaths and considers these same attacks only as a set of potential war crimes, denying their widespread and systematic nature against a civilian population.

The new report which proposes a domestically-based war crimes mechanism shifts attention away from the most egregious international crimes of the government in the 2011 Report, leaving the [demands](#) of Tamil representatives for consideration of the crime of genocide unaddressed.

The 2011 Report places these mass killings prominently, finding:

"... Between September 2008 and 19 May 2009, the Sri Lanka Army advanced its military campaign into the [LTTE-held] Vanni using large-scale and widespread shelling, causing large numbers of civilian deaths. This campaign constituted persecution of the population of the Vanni... The Government shelled on a large scale in three consecutive No Fire Zones, where it had encouraged the civilian population to concentrate, even after indicating that it would cease the use of heavy weapons. It shelled the United Nations hub, food distribution lines and near [ICRC] ships that were coming to pick up the wounded... It shelled in spite of its knowledge of the impact, provided by its own intelligence systems and through notification by the [UN], the ICRC and others. Most civilian casualties in the final phases of the war were caused by Government shelling... The Government also systematically deprived people in the conflict zone of humanitarian aid, in the form of food and medical supplies ... To this end, it purposefully underestimated the number of civilians who remained in the conflict zone. Tens of thousands lost their lives from January to May 2009, many of whom died anonymously in the carnage of the final few days." (p.ii. "Executive Summary, Allegations found credible by the Panel")

OISL however moves away from attributing to the government intent to direct these attacks against the civilian population. The chapter detailing government shelling and bombardment (p.145-176) is titled "The impact of hostilities on civilians" a comparable section in the 2011 Report is titled "SLA shelling of civilians in the first No Fire Zone" (p.23).

OISL concludes firstly "that many of the attacks reviewed ... did not comply with the principles on the conduct of hostilities, notably the principle of distinction" (para.1145), despite finding, in the overwhelming number of the incidents examined, no military targets in the vicinity of attacks and government knowledge of this.

In the [press release](#) accompanying the OISL report, the High Commissioner lists "indiscriminate shelling" amongst a number of potential serious international crimes, but not discriminate shelling of civilians as was clearly found in the 2011 Report.

While OISL does also find "[d]irecting attacks against civilian objects and/or against civilians not taking direct part in hostilities... may amount to a war crime" (para. 1152) and that the use of indiscriminate fire weapons may amount to the direct

targeting of civilians (para. 1154), the 2011 Report further concludes "credible allegations support a finding of the crime against humanity of murder insofar as the SLA killed civilians through widespread shelling" (para. 251).

Similarly, with regards to denial of humanitarian assistance to the population in LTTE-held territory, the 2011 Report concludes that credible allegations support a finding of the crime against humanity of extermination (para. 251), while OISL finds only that these acts and omissions may amount to the war crime of the use of starvation of the civilian population as a method of warfare (para. 1169).

OISL is virtually silent on the death toll of Tamil civilians between January and May 2009. There is no indication of the scale of killings in the 19-page summary report, while in the full 262-page report, apart from numbers killed in specific incidents, scale is only addressed by general comments such as "considerable civilian casualties". In only one instance is a total number of casualties mentioned, however it is not attributed specifically to this period or to any particular ethnic group:

"Counting or estimating the exact number of civilian casualties during the different stages of the armed conflict is impossible without full access to the areas and communities affected, in particular in Sri Lanka. Yet, on the basis of the information compiled by OISL, there is no doubt that thousands, and likely tens of thousands, lost their lives, indicating the widespread scale of the attacks" (para. 1267)

In contrast, the 2011 Report has a specific section on "The number of civilian deaths" for the final months, in which it discusses various estimates ranging up to 75,000. It finds "multiple sources of information indicate that a range of up to 40,000 civilian deaths cannot be ruled out at this stage" and that "[o]nly a proper investigation can lead to ... the formulation of an accurate figure" (pp. 39-41).

A number of other sources have found over 100,000 people unaccounted for from the final conflict area (see [World Bank](#) and [local government](#) figures).

While the 2011 Report recommends "The Government of Sri Lanka should issue a public, formal acknowledgement of its role in and responsibility for extensive civilian casualties in the final stages of the war" (p.122), OISL contains no such recommendation.

A few days after the release of OISL, Sri Lanka's Chairman of the Presidential Commission on Missing Persons, Justice Paranagama, [rejected](#) the death toll cited in the 2011 Report stating it was probably a little above 7,000 and [that](#) the figure of "40,000 was certainly an overestimation".

Given this shift of focus away from mass killings of civilians between January to May 2009, it is unsurprising OISL is silent on the crime of genocide, despite being a key question [asked](#) of OISL by the elected representatives of the affected Tamil population. Nothing in the report indicates the allegations were considered or investigated, although in comparison to the 2011 Report it does recognise the crime as applicable law (paras. 200-3).

Responding to this criticism, [OHCHR staff](#) as well as the [High Commissioner](#) have stated that they did not come to the assessment that genocide was committed on the basis of information they were able to gather but stated "[OISL] does not preclude such a finding being made as a result of further criminal investigations, including by the hybrid court that we recommend."

The report's recommendation for a special court however only calls for it to be "mandated to try war crimes and crimes against humanity, including sexual crimes and crimes committed against children" (p. 251).

Reactions to the report's findings and recommendations have been mixed.

While certain organisations hailed the report as “a dramatic advance” (International Crisis Group), with “robust findings” (Sri Lanka Campaign), the Sri Lankan government’s own assessment is perhaps more accurate, claiming the report is “lukewarm” and that a heavily toned down document was a “major victory” for Sri Lanka.

Even the High Commissioner for Human Rights Zeid [said](#) the report was not “earth-shattering in terms of revelations”, but it would provide “focus and clarity” and “a good foundation for criminal investigations to proceed”.

As a basis for “criminal investigations to proceed”, however, OISL provides less “focus and clarity”, shifting attention away from the most egregious international crimes alleged in the 2011 Report, the intentional killings of tens of thousands of Tamil civilians between January and May 2009 by the government.

While OISL [identifies](#) “patterns of grave violations in Sri Lanka between 2002 and 2011, strongly indicating that war crimes and crimes against humanity were most likely committed by both sides to the conflict” these crimes against humanity are only in relation to violations of the deprivation of liberty (paras. 1174, 1139), unlawful killings (paras. 1116, 1118, 1119), torture (para. 1130) sexual violence (para. 1135), and presumably enforced disappearances (para. 1128).

OISL moves in some ways closer towards the Sri Lankan government’s own, much [criticised](#), Lessons Learnt and Reconciliation Commission report from 2011, which denies both a large civilian death toll for this period and government responsibility for it. While recognising potential involvement of government forces in crimes such as enforced disappearances, it places greatest responsibility for causalities and crimes on the LTTE.

One commentator in the New York Times noted OISL [was](#) “arresting for the disconnect between the seriousness of the abuses it documents and the mildness of its recommendations.”

The headline recommendation in the report was for the government itself to establish a special hybrid court “integrating international judges, prosecutors, lawyers and investigators”.

This was not far from the wording in the final resolution, co-sponsored by the US, UK, Sri Lanka and others, which “affirm[ed]...the importance of participation in a Sri Lankan judicial mechanism ... of Commonwealth and other foreign judges, defence lawyers and authorized prosecutors and investigators”. The resolution also “Recognizes that the [OISL] investigation...requested by the Human Rights Council in ... [March 2014] was necessitated by the absence of a credible national process of accountability”.

This mirrors the Sri Lankan government’s own position since early 2015, who [planned](#) “a new domestic inquiry that would bring in some foreign experts if necessary”.

The outcome of the resolution is unsurprising given prior [US](#) support for “a credible domestic inquiry”, a position shared by the [UK](#).

This is despite many of those civilian and military leaders from 2009 [continuing](#) to hold high office, including the new President who was acting Defence Minister during the final days before the government declaration of victory, which the 2011 Report describes as the most intense period of killings.

As a point of comparison, recent OHCHR reports on [DPRK](#) (2014) and [Syria](#) (Sep 2015) both call for the Security Council to refer the respective situations to justice (the ICC or ad-hoc tribunal). As noted in the Syria report, “in the context of the Syrian Arab Republic, only the Security Council is competent to refer the situation” (p. 23) which also applies to DPRK and Sri Lanka.

External Links:

EJIL: [Mass killings of Tamil civilians downplayed in new UN report on Sri Lanka, silent on genocide question](#)

The Hindu: [Death toll in last stage of Eelam War uncertain: Ranil Wickremesinghe](#)

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