A UNHRC Resolution of Questionable Legality on Sri Lanka and its Importance as a Catalyst for Future UN Reform

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Abstract

From 2012-2019, the United Nations Human Rights Council (UNHRC) adopted a series of resolutions on Sri Lanka calling for accountability for war crimes and other crimes purportedly committed during the war against the Liberation Tigers of Tamil Eelam (LTTE). This paper challenges the traditional narrative regarding the resolutions – ie that it was a well-intentioned effort by the sponsoring nations, the United States (US) and its allies, to foster peace and reconciliation in Sri Lanka. Instead, this paper argues that in pursuing the resolutions, the UNHRC has violated the fundamental principles of the Charter of the United Nations (UN Charter) as well as the UNHRC's founding documents. The author contends that, through these resolutions, the US and its allies have developed a series of innovative tactics to enable them to intervene in the internal affairs of weak nations by using the UNHRC as a conduit. It is in the interest of the friends of the United Nations (UN) and, in general, all persons who value the rule of law in international affairs to know about what has happened so that they can advocate for the relevant reforms in order to prevent the UN from losing its credibility any further.

Introduction

The United Nations Human Rights Council (UNHRC) was established in 2006 by a resolution of the United Nations General Assembly (UNGA).[1] It replaced the UN Commission on Human Rights (The Commission), which had existed since 1946 under the auspices of the UN Economic and Social Council.[2] Then United Nations (UN) Secretary-General Kofi

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1 UN General Assembly (UNGA) Res 60/251 (3 April 2006) UN Doc A/RES/60/251.

2 Vineetha Pathak, 'Promoting Human Rights: The UN Record' (2009) 70 Indian Journal of Political Science 151.

Annan, in the addendum to a document titled, 'In Larger Freedom: Towards Development, Security and Human Rights for all', which many scholars regard as one of the key statements that presaged the creation of the UNHRC,[3] discusses the context, challenges as well as the promise of the new institution as follows:

> 1. The establishment of a Human Rights Council would reflect in concrete terms the increasing importance being placed on human rights in our rhetoric. The upgrading of the Commission on Human Rights into a full-fledged Council would raise human rights to the priority accorded to it in the Charter of the United Nations. Such a structure would offer architectural and conceptual clarity, since the United Nations already has Councils that deal with two other main purposes – security and development.
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> 2. The Commission on Human Rights in its current form has some notable strengths and a proud history, but its ability to perform its functions has been overtaken by new needs and undermined by the politicization of its sessions and the selectivity of its work. A new Human Rights Council would help serve to overcome some growing problems — of perception and in substance — associated with the Commission, allowing for thorough reassessment of the effectiveness of United Nations intergovernmental machinery in addressing human rights concerns.[4]

The UNHRC is still a relatively new institution. However, it is crucial that members of the public, especially the friends of international law, be familiar with even this short history as a means of assessing the prospects for the UN's playing a supranational role in protecting and promoting human rights worldwide. The object of this paper is to acquaint international readers with a series of actions of the UNHRC that, in the author's opinion, conclusively demonstrate that the UNHRC has failed in its mission and draw out its implications. To date, there has been no academic discussion of these events either in Sri Lankan journals or foreign ones. It is hoped that this paper will generate such a discussion.

From 2012–2019, the UNHRC adopted a series of resolutions on Sri Lanka, calling for accountability for war crimes and other crimes allegedly committed during the war against the Liberation Tigers of Tamil Eelam (LTTE), which ended in May 2009. A key resolution in this series, resolution 30/1 (October 2015), was co-sponsored by the Government of Sri Lanka (GOSL). In March 2020, the GOSL withdrew from this co-sponsorship.[5] However, in March

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[3] Jarvis Matiya, 'Repositioning the International Human Rights Protection System: The UN Human Rights Council' (2010) 36(2) Commonwealth Law Bulletin 313. Generally speaking, scholars identify four key documents as having helped pave the way for the creation of the Council, namely: the report of the special panel commissioned by then UN Secretary-General Kofi Annan to inquire into emerging challenges in the world (Report of the Secretary-General's High-level Panel on Threats, Challenges and Change, 'A More Secure World: Our Shared Responsibility' (2 December 2004) UN Doc A/59.565), the Secretary-General's response to the said report including especially the addendum to that report (Report of the Secretary-General, 'In Larger Freedom: Towards Development, Security and Human Rights for All' (23 May 2005) UN Doc A/59/2005/Add.1), the Secretary-General's address to the Commission on Human Rights in April 2005 (Statement of the Secretary-General Kofi Annan, 'Secretary-General's Address to the Commission on Human Rights' (*United Nations*, 7 April 2005) <https://www.un.org/sg/en/content/sg/statement/2005-04-07/secretary-generals-address-commission-human-rights> accessed 5 November 2023, and the 2005 World Summit Outcome (UNGA Res 60/1 '2005 World Summit Outcome' (24 October 2005) UN Doc A/RES/60/1.

[4] Report of the Secretary-General, 'In Larger Freedom' (n 3) paras 1-2.

[5] '43rd Session of the Human Rights Council – High Level Segment Statement by Hon Dinesh Gunawardena, Minister of Foreign Relations of Sri Lanka on 26 February 2020' (*United Nations*, 26 February 2020) <https://www.un.int/srilanka/news/43rd-session-human-rights-council-%E2%80%93-high-level-segment-statement-hon-dinesh-gunawardena> accessed 7 November 2023.

2021, the Council adopted a new resolution (resolution 46/1) calling for the full implementation of resolution 30/1, and also imposing further conditions. The GOSL rejected this resolution.[6]

Operative paragraph 6 of the said resolution authorises the Office of the UN High Commissioner for Human Rights (OHCHR) to establish a mechanism to collect and consolidate 'information and evidence' of war crimes purportedly committed during the war, and also develop 'future strategies for accountability'. Two overarching questions emerge. First, is the Council's adoption of resolution 30/1, a resolution co-sponsored by the nation adversely affected by it, consistent with Article 2(7) of the UN Charter, which prohibits the UN from interfering unduly in the internal affairs of nations?[7] Secondly, is the Council's adoption of resolution 46/1, in the light of paragraph 6, consistent with Article 2(7) of the UN Charter, along with relevant provisions of the Council's founding statutes? I answer 'no' to both questions.

In regard to the first, I argue that there is no evidence that the UNHRC has ever established a satisfactory standard of proof that the alleged war crimes ever took place. Therefore, to uphold the notion of a co-sponsored resolution would set a precedent for interested parties to level unsubstantiated allegations against a country and, based on such claims (which go unchallenged because of the co-sponsorship), get a resolution passed that allows them to intervene in the internal affairs of the targeted country. If true, it means that the sponsors of resolution 30/1 have developed a tactic by which they could lawfully circumvent Article 2(7) of the UN Charter without establishing a recognised standard of proof of the charges which presumably justify such action.

In regard to the second, I argue that resolution 46/1 is unlawful because of the following reasons. It appears that, through the impugned mechanism, the Council has acquired an enforcement capability that is beyond the scope of its mandate. The UNHRC's founding statutes, among other things, enjoin the Council always to be guided in its official actions by the principles of 'cooperation' and 'constructive international dialogue'.[8] With the impugned mechanism, the Council has seemingly delegated authority to the High Commissioner to promote human rights in a particular country (ie, Sri Lanka) by any means, including those that may not necessarily conform with these principles. This clashes with the aforesaid principles.

If the claims above are true, then both tactics set dangerous precedents. They can be used against not just Sri Lanka but against other countries, especially weak ones. In these circumstances, I argue that there is an urgent need for members of the public to call on the High Commissioner or the UN Secretary-General to seek an advisory opinion of the International Court of Justice (ICJ/the Court) on the legality of both resolutions 30/1 and 46/1, if there are further efforts to keep Sri Lanka on the agenda at the UNHRC. This matter

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6 UNHRC, 'Comments Received from the Permanent Mission of Sri Lanka on the Report of the Office of the United Nations High Commissioner for Human Rights on Promoting Reconciliation and Accountability in Sri Lanka' (1 March 2021) UN Doc A/HRC/46/G/16.

7 Charter of the United Nations (signed 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI (UN Charter) art 2(7): 'Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter, but this principle shall not prejudice the application of enforcement measures under Chapter VII'.

8 UNGA Res 60/251 (n 1) para 4.

is relevant to a wider international audience rather than just Sri Lankans because of the following reasons.

The larger issue that Sri Lanka's experience at the UNHRC highlights is the tension between, on the one hand, the need of Governments to combat rebellions, insurgencies, and other such threats to domestic peace and, on the other, the need for the UN to monitor such occasions to ensure that there are no abuses. It is not in dispute that Governments have committed atrocities in the name of 'national security'. However, it has become apparent in recent years, as shown in Iraq, Afghanistan, Libya, and elsewhere, that the UN's monitoring role is also prone to exploitation, and powerful nations have got the UN to endorse various interventions, including 'regime change' operations under the pretext of protecting or advancing human rights.

In this context, a definitive interpretation of Article 2(7) of the UN Charter would be one of the best ways to help rebuild the credibility of the UN system. Firstly, it would guide UN organs when they are asked to endorse various interventions in the future. Secondly, it will make it much easier for the 'victims' to challenge interventions they consider illegitimate. On the subject of UN reform in general, the following observation of Professor Richard Falk, the renowned expert on international law as well as the UN, is highly pertinent:

> To simplify matters, reformist energies need to be understood in relation to two overriding goals: a more legitimate United Nations and a more effective United Nations. The Organization, in general, will operate more legitimately and appear to be doing so in relation to three standards of assessment: a) acting in accordance with the UN Charter, including its broad principles and objectives, 2) achieving representativeness in relation to the peoples of the world, particularly on the Security Council and operating in a manner that embodies democratic practices of participation, transparency and accountability, 3) moving toward political independence in relation to the most powerful geopolitical actors in the world, which will depend on the avoidance of 'double standards' in regard to circumstances of conflict and emergency and staffing its bureaucracy with international civil servants who possess integrity and competence.[9]

If Sri Lanka's experience at the UNHRC could trigger a definitive interpretation of Article 2(7) of the UN Charter, it would benefit the whole world. The paper consists of seven sections, some further divided into several parts. The main sections are: i) the facts of the case, ii) the intention behind Article 2(7), iii) an inquiry into the legality of resolution 30/1, iv) an inquiry into the legality of resolution 46/1, v) meeting objections, 1, vi) meeting objections, 2, and vii) the case for a referral for an advisory opinion.

Methodology

The methodology followed in this paper is to analyse relevant provisions of certain primary sources, namely, the UN Charter and the UNHRC's founding statutes, in the light of i) scholarly commentary and ii) the UNHRC's official record of proceedings and reasonable inferences that can be drawn from such record, in order to assess the legality as well as propriety of the Council's conduct towards Sri Lanka.

Section 1: the facts of the case

[9] Richard Falk, 'The United Nations System: Prospects for Institutional Renewal' (2000) World Institute for Development Economics Research, Working Papers 189 <https://ageconsearch.umn.edu/record/295531/?ln=en> accessed 6 November 2023, 30.

On 19 May 2009, the Sri Lankan armed forces decisively defeated the Liberation Tigers of Tamil Eelam (LTTE) and ended a civil war that had been raging in the country for over thirty years.[10] On the same day, a group of 17 nations led by Germany called for a special session of the UNHRC to inquire into what they claimed were possible war crimes committed during the last phase of the war.[11]

The session was held from 26 to 27 May 2009. At its close, the Council adopted a resolution that had been tabled by a group of nations in the global south to counter a resolution that the German-led group presented. This resolution congratulated the Sri Lankan government on bringing the war to a successful close, commended the post-war reconstruction, resettlement, and de-mining efforts, and in essence, encouraged the government to keep up the good work.[12]

Soon afterwards, in August 2009, then UN Secretary-General Ban Ki Moon appointed a panel of experts to advise him on whether war crimes had been committed during the war.[13] The final report of the panel – the Report of the Secretary General's Panel of Experts on Accountability in Sri Lanka (POE) – concluded that sufficient allegations existed to indicate that such crimes may have been committed and recommended that they be investigated.[14]

Meanwhile, in April 2010, the Sri Lankan Government launched its domestic mechanism – the Lessons Learnt and Reconciliation Commission (LLRC) – to look into whether war crimes had been committed. The LLRC concluded that there was no evidence of crimes attributable to the State but said that crimes by individual soldiers or offices might have occurred.[15] The LLRC identified seven such incidents and recommended that these be investigated.[16]

However, in March 2012, the POE (ie, the Secretary-General's report) was submitted indirectly to the UNHRC and became the basis for a US-sponsored resolution on Sri Lanka which called for an international investigation.[17] This initial call was repeated and expanded in subsequent resolutions in 2013 and 2014. Finally, in March 2014, the Council authorised

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[10] 'Sri Lankan President Formally Announces End of Civil War' (*Deutche Press Agentur*, 19 May 2009) <https://reliefweb.int/report/sri-lanka/sri-lankan-president-formally-announces-end-civil-war> accessed 7 November 2023.

[11] UNHRC, 'Note Verbale dated 19 May 2009 by the Secretariat of the Human Rights Council in relation to the Eleventh Special Session' (19 May 2009) <https://www.ohchr.org/sites/default/files/Documents/HRBodies/HRCouncil/SpecialSession/Session11/NV11thSpecialSession.pdf> accessed 9 January 2024; See also UNHRC 'Report of the Human Rights Council on its Eleventh Special Session' (26 June 2009) UN Doc A/HRC/S-11/2.

[12] UNHRC, 'Assistance to Sri Lanka in the Promotion and Protection of Human Rights' (27 May 2009) UN Doc A/HRC/S-11/1.

[13] Report of the Secretary-General, 'Report of the Secretary-General's Panel of Experts on Accountability in Sri Lanka' (31 March 2011), 2.

[14] ibid ii.

[15] Government of Sri Lanka, 'Report of Commission of Inquiry on Lessons Learnt and Reconciliation (16 December 2011) <https://reliefweb.int/report/sri-lanka/report-commission-inquiry-lessons-learnt-and-reconciliation> accessed 7 November 2023.

[16] ibid paras 9.9 and 9.37a. I have analysed the relevant sections in my essay. See Dharshan Weerasekera, 'The UN's Sri Lanka Strategy and Its Implications for International Law' (*Foreign Policy Journal*, 4 February 2014) <https://www.foreignpolicyjournal.com/2014/02/04/the-uns-sri-lanka-strategy-and-its-implications-for-international-law/> accessed 5 November 2023.

[17] UNHRC, 'Promoting reconciliation and accountability in Sri Lanka' (3 April 2012) UN Doc A/HRC/RES/19/2.

the OHCHR to undertake the investigation in question.[18] The High Commissioner thereon appointed a 3-member panel, and they set to work in August 2014.

Their final report – the OHCHR investigation on Sri Lanka (OISL Report) – was released to the public on 16 September 2015.[19] It concluded that 'system crimes'[20] had occurred and recommended that the perpetrators be tried and punished. An advance copy of this report had already been sent to the Government about a week earlier, and on 15 September 2015 (a day before the report was released to the public), the Government thanked the Council for the report and accepted its conclusions without challenge.[21]

The UNHRC's thirtieth session was held from 14 September – 2 October 2015.[22] On or about 1 October 2015, the United States (US) tabled draft resolution 30/L.29, which was co-sponsored by Sri Lanka.[23] Subsequently, the Council adopted the resolution without a vote.[24]

Two points need to be made about resolution 30/1. First, it is sweeping in scope. Consisting of twenty operative paragraphs, it calls on the GOSL to implement a wide range of legal reforms, including constitutional reforms. Operative paragraph sixteen is key

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[18] UNHRC Res 25/1 'Promoting reconciliation and accountability in Sri Lanka' (9 April 2014) UN Doc A/HRC/RES/25/1. Paragraph 10 of this resolution mandates the High Commissioner to conduct a comprehensive investigation into possible violations of humanitarian law and human rights law that may have happened in the period covered by the LLRC.[18]

[19] UNHRC, 'Report of the OHCHR Investigation on Sri Lanka (OISL)' (16 September 2015) (OISL Report) UN Doc A/HRC/30/CRP.2.

[20] This is how the High Commissioner describes the findings of the OISL Report in the 18-page summary of that report submitted to the Council prior to the tabling of resolution 30/1: 'the sheer number of allegations, their gravity, recurrence and the similarities in their modus operandi, as well as the consistent patterns of conduct that they indicate, all point to system crimes….Indeed, if established before a court of law, many of these allegations may, depending on the circumstances, amount to war crimes if committed as part of a widespread or systemic attack against a civilian population'. See UNHRC, 'Comprehensive Report of the Office of the United Nations High Commissioner for Human Rights on Sri Lanka' (28 September 2015) UN Doc A/HRC/30/61, para 24. The High Commissioner also observes: '[t]hese patterns of conduct consisted of multiple incidents that occurred over time. They usually required resources, coordination, planning and organization, and were often executed by a number of perpetrators within a hierarchical command structure. Such systemic acts cannot be treated as ordinary crimes but, if established in a court of law, may constitute international crimes, which give rise to command as well as individual responsibility' (para 5).

[21] 'Note Verbale dated 16th September 2015 from the Permanent Mission of Sri Lanka to the United Nations Office at Geneva (28 September 2015) UN Doc A/HRC/30/G/4.

[22] UNHRC, 'Report of the Human Rights Council on its Thirtieth Session' (30 September 2019) UN Doc A/HRC/30/2, para 1.

[23] Ibid para 54. See also Ministry of Foreign Affairs Sri Lanka, 'Statement by Democratic Socialist Republic of Sri Lanka - 30th Session of the Human Rights Council' (*Ministry of Foreign Affairs Sri Lanka*, 1 October 2015) <https://mfa.gov.lk/wp-content/uploads/2020/01/30-0.pdf> accessed 5 November 2023.

[24] UNHRC, Report 30/2 (n 22) para 59.

in this regard. It calls for a 'political settlement' that would involve, among other things, the thirteenth amendment to the Sri Lankan Constitution.[25]

Secondly, the OISL Report is the sole factual basis for resolution 30/1. This is because of two reasons: a) there are only two references to reports in the entire resolution, both occur in paragraph, 1 and they are to the OISL Report and the 18-page redacted version of that report tabled at the Council by the High Commissioner when he first introduced the report to the Council,[26] and c) the recommendations in the resolution exactly mirror the recommendations in the OISL Report.

To fast forward, in 2017 and 2019, the Council reviewed the progress of resolution 30/1, and on both occasions, the delegate purporting to represent the Government re-affirmed the co-sponsorship. In November 2019, former President Gotabhaya Rajapaksa took over the reins of power in the country. As mentioned earlier, at the UNHRC's 43rd session in March 2020, the new government withdrew from the co-sponsorship.

Finally, in March 2021, a group of nations led by the UK, Germany, Canada, and others tabled resolution 46/1, which called for the full implementation of resolution 30/1. This resolution was subsequently adopted by the Council. As mentioned earlier, paragraph 6 of the resolution authorises the High Commissioner to set up a mechanism to 'collect, consolidate, analyse and preserve information and evidence of war crimes' and 'develop possible future strategies of accountability'.[27]

Section 2: the intention behind article 2(7)

The main issue in discussing Article 2(7) of the UN Charter is whether one should interpret this provision strictly or in a more flexible manner.[28] The problem can be briefly set out as follows. International law is ultimately based on the concept of the sovereign equality of the various nations and their consent to be bound by this system of law.[29] From this perspective, Article 2(7) is an ultimate safeguard for the integrity of international law. If so, one would have to interpret the provision strictly.

However, the world is constantly changing. Today, there is an explosion of human rights abuses in many parts of the world. Much of this is caused by internal conflict, for instance, ethnic conflict, and also popular uprisings against repressive governments. As a result, horrendous human rights abuses, for instance torture, extra-judicial killings, arbitrary arrests, and so on, have become common in many countries. The international community cannot be expected to turn a blind eye to these situations. To do so would be morally wrong. Therefore, the real issue is not what Article 2(7) might have meant in the past but what it should mean in the present as well as the future.

Precisely because of considerations such as the above, certain leading scholars – John Rawls, Joseph Raz, and Erasmus Mayr, to name just a few – have argued that human rights should be considered a special category of individual rights that are capable of overcoming the traditional immunity accorded to sovereignty. Joseph Raz says, for instance: '[s]overeignty does not justify State action, but it protects States from external interference. Violation of human rights disable this protection [ie disables the protection from external interference]'.[30]

Therefore, the exact meaning and scope of Article 2(7) remains very much open to debate. I argue that the most reasonable option is still the strict interpretation for following reasons. First, the original intention of the framers of a treaty must be given special weight when interpreting such a treaty. One must presume that it is the assurance that the said

[25] UNHRC Res 30/1 'Promoting reconciliation, accountability and human rights in Sri Lanka' (14 October 2015) UN Doc A/HRC/RES/30/1, para 16. Paragraph 16 states: '[the Human Rights Council welcomes] the commitment of the Government of Sri Lanka to a political settlement by taking the necessary constitutional measures, encourages the Government's efforts to fulfill its commitments on the devolution of political authority, which is integral to reconciliation and the full enjoyment of human rights by all members of its population; and also encourages the Government to ensure that all Provincial Councils are able to operate effectively, in accordance with the thirteenth amendment to the Constitution of Sri Lanka'. To international readers who may be relatively unfamiliar with Sri Lankan history and politics, this passage may seem innocuous. However, the 13th Amendment to the Sri Lankan Constitution (13A), and indeed devolution of power as a 'political solution' to the so-called 'ethnic problem' in Sri Lanka, remains a hugely controversial topic in the country. For the benefit of readers who may be unfamiliar with the backdrop to this issue, it is important to place the following matters on record. First, many Sri Lankans, especially the Sinhalese (the majority community) allege that the 13A was foisted on this country by a powerful neighbour. The circumstances under which the 13A became law in 1987 lend some credence to these allegations. The 13A is the result of a pact between Sri Lanka and India signed by then Sri Lankan President J.R. Jayawardena and Indian Prime Minister Rajiv Gandi in July 1987. Bryan Pfaffenberger, an American scholar who has written extensively on Sri Lanka, describes the mood at the said signing as follows: 'Riots in Colombo showed widespread public anger among Sinhalese at the government for signing the pact, a mood that infected even the official state ceremonies. As Gandhi reviewed Sri Lanka's honour corps, a Sinhalese sailor struck the Indian leader in full view of a world television audience. Absent from the ceremonies were three senior ministers in Jayawardena's own government who had opposed the accord, the popular Prime Minister Ranasinghe Premadasa, Agriculture Minister Gamini Jayasuriya and Defence Minister Lalith Athulathmudali.' (Bryan Pfaffenberger, 'Sri Lanka in 1987: Indian Intervention and Resurgence of the JVP' (1988) 28 Asian Survey 137, 142.). See also Vasantha Amerasinghe, 'Sri Lankan Presidential Election: An Analysis' (1989) 24(7) Economic and Political Weekly 346. Secondly, to turn to the LLRC, the LLRC in its recommendations does discuss devolution. However, it sets out three crucial qualifications, to wit: i) before there is any further devolution, there should first be a political consensus on the issue of devolution itself – ie the LLRC admits that, as of the time of writing, there appeared to be no consensus on the issue; ii) there were shortcomings in the provincial council system (ie the 13A) and these had to be addressed if a proper system of devolution was to be designed; and iii) the issue of a 'political solution' should not be internationalised. See LLRC Report (n 15) paras 9.229, 9.231(d), 9.234. If the LLRC's conclusion is that, as of the time of writing there appeared to be no consensus on the issue of devolution, and furthermore, that there were shortcomings in the 13A, then this obviously clashes with the Council's recommendation that a 'political settlement' must invariably be based on the 13A, or at any rate, that the 13A is indispensable to such a solution. Thirdly, to turn to the findings of the LLRC, the LLRC observes that over the years many Sinhalese people, as well as Muslims, may have been forcibly evicted from the north and east of the country. See LLRC Report (n 15) paras 6.18-6.27. If true, it means that these people and their descendants would have a right of return to their former homes. Some Sinhalese fear that, if more power is devolved to the northern and eastern provinces (where Sri Lanka's second largest minority, the Tamils, predominate) they might invoke a right to self-determination under international law and try to secede, something they would not be able to do if the evacuees were present in these areas. See Suneetha Lakshman Gunasekara, *Tigers, 'Moderates' and Pandora's Package* (Ceylon 1996). Finally, to go back to the UNHRC's 2012 resolution on Sri Lanka, which first set the stage for an international investigation into possible war crimes that may have been committed during the war, the following is what it states: '[Calls upon] the Government of Sri Lanka to implement the constructive recommendations of the Lessons Learnt and Reconciliation Commission.…[and encourages] the Office of the United Nations High Commissioner for Human Rights and relevant special procedures mandate holders to provide, in consultation with, and the concurrence of, the Government of Sri Lanka, advice and technical support on implementing the above-mentioned steps'. See UNHRC, 'Annotations to the Agenda for the Nineteenth Session of the Human Rights Council' (5 January 2012) UN Doc A/HRC/19/1, paras 1–3. There is no record of the Council ever commissioning a report on the feasibility of the 13A, or for that matter devolution of power, as a 'political solution' in Sri Lanka. The point is that a process that started with a very limited scope in 2012, namely, a request to OHCHR to provide 'advice and technical assistance' to the GOSL in implementing the recommendations of the domestic mechanism, and that also in 'consultation with, and concurrence of', the GOSL, has morphed into one where the international community is now making recommendations on highly sensitive national issues. Clearly, these are matters that are very much within the domestic jurisdiction of Sri Lanka.

intention would continue to be honoured in the future that prompts the signatories to bind future generations of the citizens of their respective countries to the treaty in question.

Secondly, if one starts from the premise that the foundation of international law is consent, then to concede that there may be occasions that may warrant a breach of sovereignty entails shaking the very foundations of international law, which is counterproductive. Finally, in practice, the potential harm of taking a flexible approach to the prohibition imposed by Article 2(7) outweighs the benefits for reasons that I shall explain later.

In this section, I shall first set out the case for a strict interpretation. For this purpose, I rely on the work of the Australian scholar David R Gilmour, along with the American scholar J S Watson. I also rely on certain observations of the ICJ. Gilmour's work is important for gaining an understanding of what may have been the original intent of the framers when formulating the various provisions of the UN Charter. Watson's work is important because, in the author's opinion, he presents some of the strongest arguments against a teleological or purposive interpretation of Article 2(7). Meanwhile, the observations of the ICJ largely support the strict interpretation.

I shall then briefly discuss the ideas of Rawls, Raz, and Mayr in regard to the contention that human rights are capable of limiting sovereignty. I show that these ideas do not conflict with the limited point that I am trying to make. Finally, I shall provide an assessment and the relevant conclusions.

The case for a strict interpretation

The ideas of D R Gilmour

I discuss Gilmour's paper, 'The Meaning of "Intervene" within Article 2(7) of the UN Charter: An Historical Perspective' (1967).[31] In it, he analyses the proceedings of the San Francisco Conference in order to derive various conclusions about the intention of the drafters. Presuming that his facts are correct, it is the closest that one can get to what may have been the original intention behind the various provisions.

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[26] See UNHRC Res 30/1 (n 25) para 1.

[27] UNHRC Res 46/1 'Promoting reconciliation, accountability and human rights in Sri Lanka' (26 March 2021) UN Doc A/HRC/RES/46/1, para 6.

[28] Generally speaking, following the adoption of the UN Charter, two schools of thought emerged regarding the intention behind Article 2(7) of the UN Charter. One view, associated with Sir Hersch Lauterpacht, is that the provision should be interpreted narrowly, ie by 'intervention' what is meant is only 'dictatorial intervention'. See Lassa Oppenheim, *International Law: A Treatise, Vol 1, Peace* (Hersch Lauterpacht (ed), Longmans 1955). The other, associated with Hans Kelsen, is that the provision should be interpreted broadly, ie as intended to prevent all interference other than what is covered under the relevant exception. See Hans Kelsen, *The Law of the United Nations: A Critical Analysis of Its Fundamental Problems* (Stevens 1950); Leland M Goodrich, Edvard Hamro and Anne Patricia Simons, *Charter of the United Nations: Commentary and Documents* (World Peace 1949).

[29] Matthew J Lister, 'The Legitimating Role of Consent in International Law' (2011) 11(2) Chicago Journal of International Law 663; Hans Kelsen, 'The Principle of Sovereign Equality of States as a Basis for International Organization' (1944) 53(2) The Yale Law Journal Company 207.

[30] Joseph Raz, 'Human Rights without Foundations' in Samantha Besson and John Tasioulas (eds), *The Philosophy of International Law* (Oxford University Press 2010) 328.

[31] D R Gilmour, 'The Meaning of "Intervene" with Article 2(7) of the United Nations Charter: An Historical Perspective' (1967) 16(2) The International and Comparative Law Quarterly 330.

Gilmour argues that the discussions that preceded the final formulation of Article 2(7) show that the framers intended to impose a very strong prohibition on the UN from intervening in the domestic affairs of nations; that is to say, they wanted to prevent intervention 'pure and simple' rather than merely 'dictatorial interference' as suggested by some. He bases this argument on three points: a) the prohibition is a principle of the Organisation, b) the import of Article 10 of the UN Charter[32] and c) the import of the exception in Article 2(7). In the last two matters, the Australian delegation, especially its head, Dr Evatt, had played a critical role.

In regard to the first, Gilmour points out that, originally in the Dumbarton Proposals, the prohibition on interference had been placed in Chapter VIII (today's Chapter VI). The four sponsoring governments had proposed an amendment to move the provision to Chapter II, which contains the principles of the Organisation.[33] According to Gilmour, this shows that the framers considered the provision to be of overriding value.[34] It implies that the provision should be interpreted in an expansive rather than a restrictive way.

To turn to Article 10, the drafting committee had initially agreed that the UNGA would have the power to discuss all matters that fell 'within the sphere of international relations'.[35] However, the Russian delegation had insisted that a clause be included to limit these powers to matters relating to the 'maintenance of international peace and security'.[36] Gilmour explains that the gist of the Russians' objection was that there was a danger that under the original version, a country 'could raise for discussion at the UNGA any act of another which it did not like'.[37]

Therefore, the provision was re-drafted. The final version states, *inter alia*, that the UNGA has the power to discuss 'any matters within the scope of the present Charter or relating to the powers and functions of any organs provided for in the present Charter'. This formulation takes full cognizance of the prohibition imposed by Article 2(7). Gilmour observes:

> The early discussions on the general question of the power to be given to the General Assembly demonstrated a desire to bestow on that body wide powers of discussion. However, while there was general agreement on this question of principle, when it came to drafting a specific proposal, difficulties arose over the exact scope of those powers. Australia was instrumental in working out the wording that was finally accepted by the Conference and her delegation made it clear that discussion of domestic affairs was not within the powers of the General Assembly under Article 10. No major objections were made to this and it must therefore be presumed that the interpretation was accepted by the Conference.[38]

Finally, to turn to the exception mentioned in Article 2(7), Gilmour explains that, as originally conceived, the exception was not limited to the United Nations Security Council's

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[32] UN Charter (n 7) art 10: 'The General Assembly shall discuss any questions or any matters within the scope of the present Charter or relating to the powers and functions of any organs provided for in the present Charter, and, except as provided in Article 12, may make recommendations to the members of the United Nations or to the Security Council or to both on any such questions or matters'.

[33] Gilmour (n 31) 335.

[34] ibid 336.

[35] ibid 339.

[36] ibid 340-341.

[37] ibid 341.

[38] ibid 343.

(UNSC) powers of enforcement but its powers to make recommendations as well. The Australian Delegation had pointed out that this latter raised a problem. Dr Evatt had said, *inter alia*:

> Should the Charter authorize the Security Council, in cases where a state is threatened or attacked by reason of some matter of domestic jurisdiction, to intervene in that matter by making recommendations to the state threatened or attacked? The Australian delegation contends that the answer should be 'no' […]. Such a provision is almost an invitation to use or threaten force, in any dispute arising out of a matter of domestic jurisdiction, in the hope of inducing the Security Council to extort concessions from the state that is threatened. Broadly, the exception cancels out the rule, whenever an aggressor threatens to use force.[39]

The Australian amendment sought to limit the application of the exception only to enforcement measures, and this was the version that was finally accepted by the Conference. Gilmour says: '[b]y introducing this amendment Australia hoped to prevent the UNSC dealing with any domestic matter whether by way of discussion, study or recommendation'.[40]

In sum, the original intention of the framers of Article 2(7) was to impose the strongest possible prohibition against interference of any kind, other than enforcement measures triggered under the relevant provisions of Chapter VII.

The ideas of J S Watson

I discuss here Watson's paper, 'Auto-interpretation, Competence and the Continuing Validity of Article 2(7) of the UN Charter'.[41] The paper is important for my purposes here because Watson sets out to rebut three of the most popular arguments of those who claim that the UN must play a supranational role in the world in order to advance such things as human rights, namely, a) a teleological or purposive interpretation is the best way to advance the UN's purposes, b) UN practice and c) the domestic affairs of a nation, if they lead to matters of 'international concern', should come within the purview of the UNGA. In the following, I shall limit myself to quoting his observations on each of these matters at length.

In regard to the first, his argument is that international law is still in its early stages of development and, therefore, adherence to its fundamental principles is more important than ever. Any deviation from these principles risks undermining the entire system. For instance, he says:

> Theory must yield to reality because the problem of credibility that would be created affects not only the public perception of international law, but also, more importantly, those intangibles upon which legal systems rely so heavily for obedience […]. They include the habits of obedience, the acceptance of the long-range benefits of order as opposed to chaos, the sense of security presented by predictable and reasonably stable norms, the realization that law is based on consensual reciprocity and so on. It is international law's inevitable reliance on these intangibles that dictate a very careful approach to the interpretation of this particular Charter provision and one would be well advised to adopt the classical positivistic doctrine of the Permanent Court of International Justice in the *Lotus* case: 'The rules of law binding upon states

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[39] Gilmour (n 31) 347.

[40] ibid 348.

[41] J S Watson, 'Autointerpretation, Competence, and the Continuing Validity of Article 2(7) of the UN Charter' (1977) 71 American Journal of International Law 60.

> […] emanate from their own free will as expressed in conventions […] restrictions upon the independence of states cannot be presumed'.[42]

In regard to the claims about UN practice, Watson argues that much of the UN's work is political and, therefore such practice cannot be incorporated as customary international law. He says:

> The 'customary interpretation' is widespread and tends to run as follows: the meaning of any given provision of the Charter or of the Charter as a whole may be found in the practice of the UN organs, and this practice becomes valid international law on the basis of customary acceptance regardless of the specific provisions of the Charter […]. What is usually lacking in this argument is an analysis of the relationship between usage and custom and the mechanism whereby usage becomes custom. This is a particularly unfortunate omission since the United Nations is primarily a political organization and consequently the motivation for much behavior there is *ad hoc* or political and thus not susceptible of systematic treatment to a degree necessary for establishment of customary international law.[43]

Finally, in regard to issues of 'international concern' coming within the purview of the General Assembly, Watson points out that there is an inherent danger that this idea can be abused for ideological purposes, depending on who decides what issue is of 'international concern'. He says:

> It would be strange indeed to give legal recognition to a rule which has as its basic premise that the Charter may be systematically ignored. If, as is so frequently claimed, the use of international concern as a basis for jurisdiction is now a valid rule, then all that is required is an amendment to the Charter.[44]

The above passages are self-explanatory and do not require additional commentary.

The rulings of the International Court of Justice

The ICJ has not had an occasion to rule definitively on the scope of Article 2(7).[45] However, from some of its observations on related matters, it is possible to extract an idea of what the ICJ's general position might be as to whether the provision should be interpreted strictly. For instance, in *Conditions of Admission of a State to Membership in the United Nations*, the Court observes:

> The political character of an organ cannot release it from the observance of the treaty provisions established by the Charter when they constitute a limitation on its powers or criteria of its judgment. To ascertain whether an organ has freedom of choice for decisions, reference must be made to the terms of its constitution.[46]

In the *Corfu Channel case*, the Court states:

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[42] Watson (n 41) 71.
[43] ibid 73.
[44] ibid 82.
[45] See Antonio Augusto Cançado Trindade, 'The Domestic Jurisdiction of States in the Practice of the United Nations and Regional Organisations' (1976) 25(4) The International and Comparative Law Quarterly 715.
[46] Watson (n 41) 83, citing *Conditions of Admission of a State to Membership in the United Nations* (Press Release 19448/30) <https://www.icj-cij.org/node/100002> accessed 13 December 2023.

> The Court can only regard the alleged right of intervention as the manifestation of a policy of force, such as has, in the past, given rise to most serious abuses and such as cannot, whatever be the defects in present international organization, find a place in international law. Intervention is still perhaps less permissible in the particular form it would take here; for, from the nature of things, it would be reserved for the most powerful States, and might easily lead to perverting the administration of international justice itself.[47]

Meanwhile, in the *Asylum case*, the Court states:

> The decision to grant diplomatic asylum implies derogation of the sovereignty of the state in which the refugee had committed his crime: this decision permitted the criminal to escape punishment by the state and constitutes intervention into a domain which falls exclusively within the jurisdiction of the territorial state. Such a derogation of territorial sovereignty cannot be admitted unless its legal basis was established in every single case.[48]

In sum, it appears that the Court would be inclined to consider that a) limitations placed on a treaty should be honoured (even though it may at times be politically inconvenient to do so), b) intervention inherently favours the strong nations over the weak and therefore as a general rule should be looked on with suspicion and c) if any derogation from the prohibition against intervention is to be allowed, it should be done uniformly in respect of all the nations.

The ideas of John Rawls, Joseph Raz, and Erasmus Mayr on human rights

The ideas of John Rawls, Joseph Raz, and Erasmus Mayr are important to the present discussion because they comprise the vanguard of an academic project to formulate a theoretical basis for human rights law that would impose an obligation on the international community to concern itself with human rights, and possibly to even intervene in countries in order to prevent human rights abuses. If true, this would mean that Article 2(7) has to be interpreted flexibly. However, these ideas do not affect my arguments regarding the need to interpret Article 2(7) strictly, and in fact, in certain respects, support them because of the following reasons.

First, to give a brief overview of the work of these three thinkers for readers who may be relatively unfamiliar with them, all three thinkers are adherents of what is termed the 'political conception' of human rights, ie, the view that human rights are individual rights that are capable of limiting sovereignty.[49] However, they occupy different positions along a spectrum of opinion regarding the extent to which morality is a part of human rights. Rawls, one of the first proponents of the 'political conception', holds that human rights need not be moral rights.[50]

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47 *Corfu Channel Case (UK v Albania)* (Judgment) [1949] ICJ Rep [35], [44]. Tomislav Mitrovic, 'Non-intervention in the Internal Affairs of Nations' in Milan Sahovic (ed), *Principles of International Law Concerning Friendly Relations and Cooperation* (Institute of International Politics and Economics 1972) 257. (The original title of this book, in Serbo-Croatian, is, KODIFICACIJA PRINCIPA MIROLJUBIVE I AKTIVNE KOEGZISTENCIJE – Zbirka radova Institut za medunarodnu politiku I privedu 1969)

48 *Asylum Case (Colombia v Peru)* (Judgment) [1951] ICJ Rep [266], [275]. Mitrovic (n 47) 258.

49 Erasmus Mayr, 'The Political and Moral Conception of Human Rights – a Mixed Account' in Gerhart Ernst and Jan-Christoph Heilinger (eds), *The Philosophy of Human Rights* (De Gruyter 2012) 73.

50 ibid 73.

On the other hand, Raz is considered by many scholars to have presented a more moderate version of the 'political conception'.[51] In his view, human rights are moral rights.[52] Nevertheless, he maintains that the primary characteristic of human rights is that of limiting sovereignty.[53] Mayr, the most recent of the thinkers, argues that morality is the essence of human rights and, therefore, must remain the ultimate justification for respecting such rights.[54] As mentioned earlier, these ideas do not affect the point I am trying to make regarding Article 2(7).

The ideas of these thinkers relate to concepts and principles for a future system of international law where the requisite concessions to human rights over sovereignty have been formally made. This is very clear in Rawls. For instance, he says:

> [Finally,] I note the distinction between the law of peoples and the law of nations, or international law. The latter is an existing, or positive, legal order, however incomplete it may be in some ways, lacking say an effective scheme of sanctions that normally characterizes domestic laws. The law of peoples, by contrast, is a family of political concepts along with principles of right, justice and the common good that specify the content of a liberal conception of justice worked up to extend to and apply to international law. It provides the concepts and principles by reference to which that law is to be judged.[55]

I agree that if Article 2(7) were to be amended by the UNGA in order to include limitations to sovereignty for human rights abuses, then human rights would be able to play the role that these thinkers envision. However, such an amendment has not yet been brought. If a human rights crisis were to arise in a particular country today, action under Article 10 or the relevant provisions of Chapters 6 or 7 could be triggered. Therefore, the international community is not entirely lacking in the means to address such situations under the UN Charter as it exists at present.

Meanwhile, as mentioned earlier, the ideas of the three thinkers, in certain respects, are very favourable to my argument. This is especially the case with Joseph Raz. For instance, he states categorically: '[t]he contemporary practice of human rights identifies as human rights only those that should be enforced by law'.[56]

I do not question that if a country agrees, by treaty, to subject itself to the jurisdiction of an extra-territorial agency in regard to specified human rights, then such a nation effectively limits its sovereignty. For instance, the signatories to the European Convention on Human Rights have accepted limitations on their sovereignty in respect of the rights specified in the treaty. If such rights are abused, the victims can file an action before the relevant tribunals.

However, the question is whether the signatories to the UN Charter, convening under the auspices of an organ of the UN, can claim a right to intervene in the internal affairs of a nation on the basis of human rights. That is, where the members, as yet, have not consented to limits on their sovereignty in such circumstances. Raz's observation does not apply to these types of situations. Therefore, there is no conflict, *per se*, between contemporary practice on human rights and the need to interpret Article 2(7) strictly. To pursue this matter further, Raz also observes:

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51 Mayr (n 49) 78.
52 ibid 81.
53 ibid.
54 ibid 102.
55 John Rawls, 'The Law of Peoples' (1993) 20 Critical Inquiry 36, 43.
56 Joseph Raz, 'Human Rights in the Emerging World Order' (2010) 1 Transnational Legal Theory 31.

> The vital importance of impartial, efficient and reliable institutions for administering and enforcing human rights has three implications for arguments about them. First, if there is a human right to something, then there is also a duty to establish and support impartial, efficient and reliable institutions to ensure its implementation and protect it from violation. Second, until such institutions exist, normally one should refrain from attempts to use coercive measures to enforce the rights […]. Third, if, given the prevailing circumstances, there is no possibility that impartial, efficient and reliable institutions may come into existence regarding a certain right, then that right is not a human right.[57]

Clearly, Raz's view that human rights should limit sovereignty is premised on there existing impartial, efficient, and reliable institutions for enforcing such rights. The question that I raise in this paper is precisely whether, at least as far as the UNHRC is concerned, the international community has managed to create such an institution.

Finally, to turn to Erasmus Mayr, he wishes to add a certain ingredient to contemporary human rights discourse that he considers is lacking from it at present, namely a sufficient emphasis on morality. He argues that, ultimately, if there is to be effective enforcement of human rights, such rights must be accepted by the international community as universal, and the only way to do this is on the basis of morality. For instance, he observes:

> The answer to the question of whether there is one system of human rights or many ultimately depends on the success of the project pursued by adherents of the moral conception of human rights of showing which rights are possessed by human beings per se. If they can show that there are fundamental interests common to all human beings per se, then these interests – or, rather, those of them that are of sufficient weight – will provide the basis for a set of individual rights that are valid interculturally.[58]

The above point does not affect my argument. I agree that human rights, if they are to be effectively enforced, must be rights, the abuse of which is capable of generating moral outrage in the international community generally. However, it does not follow that moral outrage should trump the prohibition against intervention imposed by Article 2(7). For instance, who decides the threshold of outrage necessary to overcome Article 2(7)?

Clearly, in the context of the UN, an intervention would be authorised by a vote. Therefore, the threshold for moral outrage for a human rights intervention would be determined by the consensus of the majority of members at any given time. However, is there a method to guarantee consistency in consensus? For instance, how does one ensure that the same set of nations that approve of an intervention against a particular country at one time will approve an intervention against a different country under the same circumstances?

A final note on Mayr. He makes an important distinction between external and internal limitations on sovereignty. For instance, he says:

> What the exclusive focus on the international role of human rights misses is the centrality of the function of imposing internal limits on state power, ie limits directly within the relationship between the state and citizen. This function is clearly systemically and historically primary, and must be so in any adequate account of human rights. These rights only limit state sovereignty

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[57] Raz (n 56) 43-44.

[58] Mayr (n 49) 101.

> on the international level because they limit (any) state power internally, and the former function derives from the latter.[59]

This point is very useful to my argument. If human rights are individual rights capable of limiting sovereignty, then the first option for such limitation is the internal, namely, the right of the citizens to challenge their government. If the international community were to intervene in an overhasty fashion, it could potentially impede the capacity of the citizens to address the problem domestically.

Assessment

It is impossible to deny that the basis of international law is the concept of the legal equality of nations and the related consent of such nations to be bound by the said system of law. This, coupled with the details discussed by Gilmour and also the observations of the ICJ, indicate beyond any reasonable doubt that if there is a 'standard interpretation' of Article 2(7) based on the intention of the framers, it is that the provision is designed to impose a very broad prohibition on the UN from interfering in the internal affairs of nations.

It is difficult to see how, in the absence of an amendment to the provision, human rights can prevail over the prohibition imposed by Article 2(7) if a country were to insist on such prohibition in a situation that does not come under the relevant exception. It seems to me that the difference of opinion between the strict constructionists and thinkers such as Rawls, Raz, and Mayr stems ultimately from the fact that the two sides hold two fundamentally different conceptions as to what international law should be, ie whether it should be based on consent or consensus.

One can agree that there are profound difficulties in having consent as a basis for a system of law. However, this does not mean that a consensus-based model is without difficulties. There are two in particular. For instance, as mentioned earlier, how does one ensure consistency in consensus? Also, what happens if there is a consensus for an evil end? The international community should, no doubt, engage in a serious conversation about whether the basis of international law should be changed from one of consent to one of consensus. However, until such a change is formally accepted by all of the nations, one must presume that the validity of provisions based on the consent model of international law remains intact.

One must also consider the following two matters. First, a flexible interpretation of Article 2(7) would favour strong nations over the weak because the former can control the occasions when the UN would play its proposed supranational role in advancing human rights. This is inherently unfair. Second, the UN Charter does not have a provision to let the citizens of a country adversely affected by an intervention to claim compensation for the harm they may have suffered. The UN is a forum for governments to meet and discuss issues. There is no mechanism for a private citizen to lodge a complaint against the Organisation.

And yet, it is the private citizens of a country who are ultimately affected by an intervention. For instance, what happens if an intervention, ostensibly for the sake of human rights, were to lead to disastrous consequences such as exacerbating existing ethnic rivalries, famine, or a refugee crisis? For persons who suffer such consequences to be without a means of holding the UN accountable for its actions is unjust. In these circumstances, it is reasonable

[59] Mayr (n 49) 90.

that Article 2(7) should be interpreted as strictly as possible to protect the sovereignty of the individual nations, at least until the issues discussed above are addressed.

Section 3: an inquiry into the legality of resolution 30/1

In this section, I turn to resolution 30/1. My contention is that the UNHRC's adoption of this resolution is inconsistent with both the letter as well as spirit of Article 2(7) of the Charter, hence, illegal. I shall: i) discuss the overall importance of the Sri Lankan case in terms of the UNHRC's history, ii) discuss the obligations on Sri Lanka as well as the UNHRC assumed when adopting a co-sponsored resolution, iii) explain the key procedural violation committed by the UNHRC in adopting resolution 30/1, and iv) provide an assessment and conclusion as to the legality of the said action.

i) The importance of the Sri Lankan case

As mentioned at the very start of this paper, the UNGA decided to replace the UN Commission on Human Rights in 2006 mainly because the Commission had come to be viewed in many quarters as being partial and biased in its dealings. One of the chief criticisms in this regard, it should be noted, is that the Commission had begun the practice of taking action based on country-specific resolutions, which many considered were brought in a seemingly arbitrary manner according to the wishes of powerful nations.[60]

When creating the UNHRC, the UNGA inserted into the founding document itself that the new institution was to be guided by the principles, *inter alia*, of 'objectivity, impartiality and non-selectivity'. The UNGA also gave the UNHRC the freedom to devise the mechanisms through which it was to carry out its mandate in conformity with these principles. Accordingly, UNHRC resolution 5/1 'Institution-Building in the Human Rights Council' sets out a number of such mechanisms.

The main mechanism is the Universal Periodic Review (UPR). It is an interactive process involving the country being reviewed, the members of the Council, civil society organisations, and others. Some scholars have pointed out that the UPR is an especially innovative mechanism for carrying out the UNHRC's mandate while avoiding the pitfalls into which the Commission had fallen.[61]

There is a famous legal maxim that states: '*nihil simul inventum est et perfectum*' ('nothing is invented and perfected at the same time'). It is reasonable to suppose that, given time, the UPR could have reached its full potential. However, in the very first decade after the founding of the UNHRC, the UNHRC began resorting to country-specific resolutions. It is true that there were numerous crises that might have called for such resolutions. However, with Sri Lanka, the Council went a step further.

It should be recalled that the first country-specific resolution against Sri Lanka was in 2012. However, there was no ongoing crisis in Sri Lanka at the time. This was admitted even by the US, which tabled the resolution. Ambassador Eileen Chamberlain Donahue, then head of the US delegation, said:

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[60] Patrizia Scannella and Peter Splinter, 'The United Nations Human Rights Council: A Promise to be Fulfilled' (2007) 7 Human Rights Law Review 41; See also Kevin Boyle, 'The United Nations Human Rights Council: Politics, Power and Human Rights' (2009) 60(2) Northern Ireland Legal Quarterly 121.

[61] Scannella and Splinter (n 60) 41.

> The case of Sri Lanka is different and difficult. It is essentially dealing with large-scale civilian casualties during a civil war that took place over many years, but ended in 2009. It's not an ongoing crisis, and for that reason it's slightly more challenging.[62]

This raises a number of questions. For instance, 'could the international community have pursued its concerns on Sri Lanka through the UPR process, and if so, has the evolution of the UPR been permanently derailed?' Also, 'if the UNHRC (or some other future institution that the UNGA creates to advance human rights) resorts to country-specific resolutions, what are the criteria or standards that it should follow in determining when to do so and when to desist?'

Finally, 'what does all this entail for the future development of international law as well as human rights law, if one presumes that the UN will be the driving force in such development in both instances?' The Sri Lankan case, to repeat, compels one to reflect on such questions.

ii) The legal obligations on Sri Lanka as well as the UNHRC in regard to a co-sponsored resolution

I consider two questions: i) 'what are the legal obligations that Sri Lanka might have assumed in co-sponsoring resolution 30/1?' and ii) 'was there an obligation on the UNHRC to discuss and assess the contents of the OISL Report (the basis for resolution 30/1) prior to adopting the said resolution regardless of the fact that the GOSL had accepted the report?' I shall take each in turn.

Legal obligations on Sri Lanka

Before one can discuss the legal obligations that Sri Lanka might have assumed in co-sponsoring resolution 30/1, one must first decide what the legal status of a resolution of the UN or its subsidiary organs on the members of the UN is. Some commentators in Sri Lanka have argued that UN resolutions other than UNSC resolutions are not legally binding but only morally binding because there are no means of enforcing such resolutions.[63] However, in my view, a duly adopted resolution of the UN or one of its subsidiary organs is legally binding on the countries that participate in the vote on the resolution because of the following reasons.

Firstly, reasonable inferences can be drawn from Articles 2(1), 2(2) and 2(5) of the UN Charter. It is to be noted that all these provisions are principles of the Organisation. Article 2(1) states: '[t]he Organization is based on the principle of the sovereign equality of all its Members'.[64] Article 2(2) states: '[a]ll members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfill in good faith the obligations assumed by them in accordance with the present Charter'.[65] Article 2(5) states: '[a]ll members shall give the United Nations every assistance in any action it takes in accordance with the present Charter'.[66]

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[62] 'Pieris-Samarasinghe Differ in Geneva as US Talks Tough' (*The Sunday Times*, 4 March 2012) <https://www.sundaytimes.lk/120304/Columns/political.html> accessed 7 November 2023.

[63] See for instance Palitha Kohona, 'Western Remedies for Sri Lanka's ills: Lessons from History' (*In Depth News*, 20 April 2017) <https://indepthnews.net/western-remedies-for-sri-lanka-s-ills-lessons-from-history/ > accessed 7 November 2023.

[64] UN Charter (n 7) art 2(1).

[65] ibid art 2(2).

[66] ibid art 2(5).

The gravamen of Articles 2(2) and 2(5) is that cooperation is a *sine quo non* for the work of the UN. Meanwhile, Article 2(1) states that all members of the Organisation are sovereign equals. Among equals, the only way to decide what should be done is by the democratic principle, ie the will of the majority must prevail. A resolution is a formal expression of the wishes of a majority of the members of an organisation at a given time. If a country takes up the position that it will obey a resolution only when it is convenient to do so, it cannot expect others to follow its wishes on occasions where it sides with the majority.

It necessarily follows that a duly adopted resolution is legally binding on members if they intend on continuing to be a part of the organisation.[67] The fact that there may be no mechanisms to ensure compliance does not mean that a recalcitrant member is immune from the potential future consequences of non-compliance. For instance, members could in theory cooperate in devising enforcement measures to address specific situations.

Meanwhile, to turn specifically to the UNHRC, paragraph 8 of the Council's founding document states that 'the Council may suspend the membership of a country for habitual violation of human rights'.[68]

A persistent refusal to honour the wishes of the Council can arguably be considered a habitual violation of human rights since the Council's mandate is to promote and protect human rights worldwide. Therefore, it would be possible for the Council to suspend the membership of a country if it persistently refuses to honour the terms of a resolution. It is clear that, in co-sponsoring resolution 30/1, the then GOSL assumed a serious legal obligation to comply fully with the terms of that resolution.

In fact, there is perhaps a greater obligation on Sri Lanka to live up to its commitments under the resolution since a co-sponsored resolution involves a nation accepting an adverse finding made against it. It is reasonable to suppose that a nation that admits that it has done something wrong has a greater responsibility to remedy such wrong. It follows that the Council could hold successor governments accountable if they withdraw from the co-sponsorship without good reason.

Legal obligations on the UNHRC when adopting a co-sponsored resolution

The question is whether there was an obligation on the UNHRC to assess the OISL Report prior to adopting resolution 30/1, regardless of the fact that the GOSL had accepted that report? In my opinion, there was, because of the following three reasons: i) sentiments expressed in the UNHRC's founding statutes, ii) relevant provisions of the International Law Commission's Draft Articles on the Responsibility of International Organisations, and iii) reasonable inferences that can be drawn from Article 28 of the Universal Declaration of Human Rights (UDHR) about a possible connection between individual human rights and violations of Article 2(7) by the UN. I shall take each in turn.

Sentiments expressed in the UNHRC's founding statutes

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[67] This idea is supported, in my opinion, by the ideas associated with the 'soft positivism' of Herbert L A Hart. Hart rejected the view of earlier positivists who argued that law necessarily involved commands or orders backed by threats. Instead, he argued that law is more an affair of rules and that in order for a law to be valid what is needed was agreement as to the rules that would apply to the context or situation in question. See Herbert L A Hart, *The Concept of Law* (Oxford University Press 1961).

[68] UNGA Res 60/251 (n 1) para 8.

I quote below some of the relevant sections. For instance, preambular paragraphs 9 and 10 of UNGA Resolution 60/251 state:

> Recognizing also the importance of ensuring universality, objectivity and non-selectivity in the consideration of human rights issues, and the elimination of double standards and politicization,
>
> Recognizing further that the promotion and protection of human rights should be based on the principles of cooperation and genuine dialogue and aimed at strengthening the capacity of Member States to comply with their human rights obligations for the benefit of all human beings.[69]

Meanwhile, operative paragraph 4 of the resolution states:

> Decides further that the work of the Council shall be guided by the principles of universality, impartiality, objectivity and non-selectivity, constructive international dialogue and cooperation, with a view to enhancing the promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development.[70]

Finally, Chapter 5 of resolution 5/1 (Institution Building in the Human Rights Council), which explicitly lists the principles that are to guide the Council in its work, sets out the following:

> Universality, Impartiality, Objectivity, Non-selectivity, Constructive dialogue and cooperation, Predictability, Flexibility, Transparency, Accountability, Balance, Inclusive/comprehensive, Gender perspective, Implementation and follow-up decisions.[71]

In all these passages, there is a clear insistence that the UNHRC act with objectivity and impartiality. It necessarily follows that, if the UNHRC intends to take action against a particular nation based on an adverse finding, the Council must assess and evaluate the said finding prior to proceeding with such action. Otherwise, the Council would not have a rational basis for its action, which by definition entails a lack of objectivity and impartiality. This argument is strengthened when one considers the International Law Commission's Draft Articles on the Responsibility of International Organisations.

Relevant provisions of the 2011 Draft Articles of the International Law Commission on the Responsibility of International Organisations

I draw the reader's attention, in particular, to Articles 4 and 10 of the draft proposals. Article 4 states:

> [Elements of an internationally wrongful act of an international organization]
> There is an internationally wrongful act of an international organization when conduct consisting of an action or omission,
> (a) Is attributable to that organization under international law, and
> (b) Constitutes a breach of an international obligation of that organization.[72]

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[69] UNGA Res 60/251 (n 1) preamble.

[70] ibid para 4.

[71] UNHRC Res 5/1 'Institution-Building in the Human Rights Council' UN Doc A/HRC/RES/5/1, Ch 5.

[72] ILC, 'Draft Articles on the Responsibility of International Organizations' (2011) UN Doc A/66/10, para 88 (ILC Draft Articles) art 4.

Meanwhile, Article 10 states:

> [Existence of an international obligation]
> 1. There is a breach of an international obligation by an international organization when an act of that international organization is not in conformity with what is required of it by that obligation, regardless of the origin or character of the obligation concerned.
> 2. Paragraph 1 includes the breach of any international obligation that may arise from an international organization towards its members under the rules of that organization.[73]

Clearly, these provisions entail that the UNHRC could be held accountable if it violates obligations stemming from its founding statutes.

The argument concerning Article 28 of the UDHR

I contend that there is a connection between Article 2(7) of the UN Charter and human rights, which, if true, means that if a proposed action entails interfering in the internal affairs of a nation, the Council has an obligation to the citizens of the affected country to subject the basis of that action to extra scrutiny, regardless of whether the government of that country has accepted the said basis. This is because of the following reasons.

Article 28 of the UDHR states: '[e]veryone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized'.[74]

It is reasonable to suppose that, in order for human rights to thrive, it is imperative that the rule of law be honoured throughout the world. The UN Charter is one of the central pillars of international law. Therefore, in order for human rights to thrive, the UN Charter has to be honoured and respected. In these circumstances, the phrase 'international order' in Article 28 of the UDHR must be interpreted to mean a world where the UN Charter is honoured and respected.

The above assertion gains support from the interpretation given to Article 28 by a number of well-known scholars of the UDHR who see a connection between Article 28 and i) the existence of an organisation such as the UN that can provide overarching guarantees of human rights independently of national mechanisms and ii) the reference to 'rule of law' in the preamble of the UDHR. For instance, Josh Curtis and Shane Darcy of the National University of Ireland Galway have said:

> The rationale for the inclusion of Article 28 seems to have been to emphasize that no particular existing national order could be favored, and that the full realization of rights and freedoms was also dependent on a certain international order. Malik himself [Ambassador Charles Malik of Lebanon who drafted Article 28] later explained his understanding of the provision that 'the declaration should clearly set forth the rights of mankind to have in a United Nations a world organization, as well as a social order, in which these rights and freedoms could be realized'. The organization was already in existence while the Declaration was being drafted, and perhaps the idea was that it would have a more prominent role to play in the protection of human rights.[75]

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[73] ILC Draft Articles (n 72) art 10.

[74] Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR) art 28.

[75] Josh Curtis and Shane Darcy, 'The Right to a Social and International Order for the Realization of Human Rights: Article 28 of the Universal Declaration and International Cooperation' in David Keane and Yvonne McDermott (eds), *The Challenge of Human Rights: Past, Present and Future* (Edward Elgar Publishing 2012).

> Both the social and international order should be based on the rule of law, mention of which is made in the Universal Declaration's preamble.[76]

If the intention behind Article 28, as conceived by its draftsman, was *inter alia* to permit the UN to play a more prominent role in protecting human rights, and if both the social and international order as envisioned in Article 28 are to be based on the rule of law, it necessarily follows that in order to achieve the objectives of the UDHR, which include the full realisation of Article 28, one must respect the UN Charter, the legal basis of the UN. Therefore, a breach of any provision of the UN Charter by the UN or any of its subsidiary organs can be considered a breach of an individual's rights in the circumstances specified above.

The UNHRC is the UN's main organ for promoting and protecting human rights worldwide. It would be absurd to suppose that an institution dedicated to such a cause could lightly deprive the citizens of a country of the protection they would normally enjoy under Article 2(7) of the UN Charter merely because a particular government, at a particular time, chooses to accept an adverse finding against itself. In democratic countries, governments invariably change. However, the citizens must live with the consequences of the actions of successive governments.

In these circumstances, if a co-sponsored resolution involves matters that fall within the domestic jurisdiction of a particular country, the Council would have an obligation to the *citizens* of the affected country, as opposed to the *Government* of such country, to adopt the resolution only after assessing and evaluating the adverse finding that gives rise to the resolution. On this ground also, the Council had an obligation to discuss and debate the OISL Report prior to adoption of resolution 30/1 regardless of the fact that the GOSL has accepted the report without challenge. The only remaining question is whether the Council discussed and debated the OISL Report as aforesaid. To this, I turn next.

iii) The key procedural violation that the UNHRC committed in adopting resolution 30/1

It is my contention that the UNHRC failed to subject the OISL Report to an assessment prior to adoption of resolution 30/1. The proof of this is found in the official record of the proceedings of the 30th session. The relevant portion, which I shall quote shortly, states that the High Commissioner made a statement via video and presented a redacted version of the OISL Report, which was followed by a discussion on the implementation of resolution 25/1, ie, the resolution that authorised the OISL investigation. There is not a word about discussing the OISL Report let alone debating it or subjecting it to an interactive dialogue.

The best way to demonstrate the unique nature of what happened at the 30th session is to contrast it with other sessions where the High Commissioner submitted reports on Sri Lanka. Accordingly, I present below representative passages from the official account of the proceedings of the UNHRC at its 22nd (March 2013), 30th (September 2015) and 34th (March

[76] Curtis and Darcy (n 75). See also Guðmundur S Alfreðsson and Asbjørn Eide, *The Universal Declaration of Human Rights: A Common Standard of Achievement* (Martin Nijhoff Publishers 1999) 605; Mary Ann Glendon, 'The Rule of Law in the Universal Declaration of Human Rights' (2004) 2 Northwestern Journal of International Human Rights 1.

2017) sessions.[77] At each of these the High Commissioner tabled reports on Sri Lanka: A/HRC/22/38 in February 2013; A/HRC/30/CRP.2 (the OISL Report) and its 18-page summary A/HRC/30/61 in September 2015; and A/HRC/34/20 in March 2017.

The following is from the Report of the Human Rights Council of its 22nd session:

> 66. At the 45th meeting, on 20 March 2013, the Deputy High Commissioner for Human Rights introduced the country-specific reports submitted under agenda item 2 (A/HRC/22/17/Add.1, Add.2 and Corr.1 and Corr.2, Add.3 and Corr.1, A/HRC/22/18, A/HRC/22/38 and A/HRC/22/48).
> 67. At the same meeting, on the same day, the representatives of Bolivia (Plurinational State of), Colombia, Cyprus, Guatemala, Iran (Islamic Republic of) and Sri Lanka made statements as the States concerned.
> 68. During the ensuing general debate on the country-specific reports of the High Commissioner and the Secretary General submitted under agenda item 2 at the same meeting, on the same day, the following made statements.[78]

The following is from the 34th session:

> 48. At the 54th meeting, on 22 March 2017, the High Commissioner for Human Rights presented the report of the United Nations High Commissioner for Human Rights on the progress made in the implementation of Human Rights Council resolution 30/1, on promoting reconciliation, accountability and human rights in Sri Lanka, under item 2.
> 49. At the same meeting, the Deputy Minister of Foreign Affairs of Sri Lanka, made a statement as the State concerned.
> 50. During the ensuing interactive dialogue, at the same meeting, the following made statements and asked the High Commissioner questions.[79]

Contrast the above two with the following, from the 30th session:

> 46. At the 37th meeting, on 30 September 2015, the United Nations High Commissioner for Human Rights made a statement by video message to present the report prepared by OHCHR on promoting reconciliation, accountability and human rights in Sri Lanka (A/HRC/30/61), pursuant to Council decision at its organizational meeting, held on 16 February 2015, to defer the consideration of the report until its thirtieth session. In accordance with Council resolution 25/1, the presentation was followed by a discussion *on the implementation of that resolution*.
> 47. At the same meeting, the representative of Sri Lanka made a statement as the State concerned.

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[77] From 2013 to 2017 there were four High Commissioner's reports on Sri Lanka, to wit: 1) UNHRC, 'Report of the Office of the United Nations High Commissioner for Human Rights on Advice and Technical Assistance for the Government of Sri Lanka on Promoting Reconciliation and Accountability in Sri Lanka' (11 February 2013) UN Doc A/HRC/22/38; 2) UNHRC, 'Report of the Office of the United Nations High Commissioner for Human Rights on Promoting Reconciliation and Accountability in Sri Lanka' (24 February 2014) UN Doc A/HRC/25/23; 3) UNHRC 'Comprehensive Report of the Office of the United Nations High Commissioner for Human Rights on Sri Lanka' (28 September 2015) UN Doc A/HRC/30/61; 4) UNHRC 'Report of the Office of the United Nations High Commissioner for Human Rights on Sri Lanka' (10 February 2017) UN Doc A/HRC/34/20. Because of the constraints of space, I have discussed only three.

[78] UNHRC, 'Report of the Human Rights Council on its twenty-second session' (24 November 2017) UN Doc A/HRC/22/2), paras 66-68.

[79] UNHRC, 'Report of the Human Rights Council on its thirty-fourth session' (4 May 2020) UN Doc A/HRC/34/2, paras 48-50.

> 48. During the ensuing discussion, at the 37th and 38th meeting, on the same day, the following made statements and asked the Deputy High Commissioner for Human Rights questions.[80]

These entries show that overall, at the 37th Meeting held on 30 September 2015 the Council discussed only the *implementation* of the resolution; there is not a word about discussing the report. Further, the Report that the High Commissioner presented to the Council, ie, A/HRC/30/61, is the 18-page summary of the OISL Report. Therefore, almost inevitably, the Council must not have discussed and may not have been able to discuss the full-length version at the 37th and 38th meetings mentioned in paragraph 48 of the HRC report.

The High Commissioner's reports in 2013 and 2017, indeed all such reports other than the OISL Report, were routine productions where the High Commissioner had been requested by the Council to report on the progress of the GOSL in implementing the various resolutions. However, the OISL Report is the result of an investigation specifically ordered by the Council to provide a definitive answer to the question that had vexed the Council since 2012, namely, whether the allegations of war crimes and other crimes being levelled by Sri Lanka's critics were true. Hence, there was all the more reason to discuss it. And yet, when the report came out, it seems the Council never discussed it or was never given a chance to discuss it.

Assessment

It is important to note that resolution 30/1 contains recommendations for constitutional changes, matters that indisputably come within the domestic jurisdiction of a state. If, as mentioned earlier, the intention behind Article 2(7) of the UN Charter is to bar the UN from interfering in the internal affairs of nations other than where enforcement measures under UNSC authorisation are involved, then what has happened with the adoption of resolution 30/1 is that any protection that Sri Lankan citizens could have expected under that provision has been completely nullified. The conclusion is inescapable: the adoption of resolution 30/1 is inconsistent with Article 2(7).

Section 4: an inquiry into the legality of the evidence-gathering mechanism established under resolution 46/1

In this section, I turn to the evidence-gathering mechanism established under resolution 46/1 of March 2021. The GOSL rejected this resolution. In these circumstances, the question is whether the mechanism is lawful. I argue that it is not because it is fundamentally inconsistent with the Council's founding principles. Furthermore, it sets a dangerous precedent of providing the Council an enforcement capacity that, arguably, is beyond its mandate. I shall first briefly discuss the evolution of this mechanism to date and then point out the problems that it raises.

First, this is paragraph 6 of resolution 46/1:

> [The Council] [r]ecognizes the importance of preserving and analyzing evidence relating to violations and abuses of human rights and related crimes in Sri Lanka with a view to advancing accountability and decides to strengthen in this regard the capacity of the Office of the High Commissioner to collect, consolidate, analyze and preserve information and evidence and to develop possible future strategies of accountability processes for gross violations of human

[80] UNHRC, 'Report of the Human Rights Council on its thirtieth session,' (30 September 2019) UN Doc A/HRC/30/2, paras 46-48.

> rights and serious violations of international humanitarian law in Sri Lanka, to advocate for victims and survivors and to support relevant judicial and other proceedings, including in Member States with competent jurisdiction.[81]

Under this provision, the High Commissioner has established something called the 'Sri Lanka accountability Project'.[82] At the UNHRC's 51st session in September 2022, the High Commissioner reported on the progress of the mechanism. She said, *inter alia*:

> OHCHR continues to develop the information and evidence repository using an e-discovery platform […].OHCHR commenced identifying material held by other actors and engaging with information providers. To date, the databases of two organizations have been migrated into the repository, and negotiations with other information providers are ongoing.[83]

The High Commissioner also discussed the plans for 'future accountability strategies'. She said:

> To develop possible strategies for future accountability processes, the project team started mapping potential accountability process at international level, including through consultations with relevant stakeholders, in particular national authorities, victims and civil society organizations.[84]

Meanwhile, the High Commissioner's report on Sri Lanka filed at the Council's 54th session in September 2023, contains a further update on the mechanism. The High Commissioner states, *inter alia*:

> The team continues to prioritize the establishment and development of a repository of information and evidence, to maximize OHCHR's long-term contribution to supporting accountability initiatives. The repository was originally populated with data from the earlier OHCHR investigation on Sri Lanka, together with other material collected over the years by OHCHR. It has been supplemented by material from nine key non-governmental organizations and academic sources. The project team is engaging with other stakeholders to seek to bolster the repository's holdings, subject to appropriate terms of access.[85]
>
> An initial analysis of available material by the project team highlighted further investigations would be necessary to address outstanding gaps in the factual basis of some violations, as well

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81 UNHRC Res 46/1 (n 27) para 6.

82 The mechanism is allocated a budget of $3.4 million for 2023. See UNHRC, 'Revised Estimates Resulting from Resolutions and Decisions Adopted by the Human Rights Council at its Forty-Ninth, Fiftieth and Fifty-First Regular Sessions, and at its Thirty-Fourth Special Session, in 2022' (4 November 2022) UN Doc A/77/579. It is reported that, the Council has already spent $5.46 million in pursuing various measures on Sri Lanka related to the accountability resolutions. See UNGA, 'Fifth Committee Approves $3.4 Billion Programme Budget for 2023, Permanent Shift from Biennial to Annual Cycle, Concluding Main Part of Seventy-Seventh Session' (30 December 2022) Press Release GA/AB/4414 <https://press.un.org/en/2022/gaab4414.doc.htm> accessed 14 December 2023.

83 UNHRC 'Comprehensive Report of the United Nations High Commissioner for Human Rights on Situation of Human Tights in Sri Lanka' (4 October 2022) UN Doc A/HRC/51/5, para 54.

84 ibid para 56.

85 UNHRC 'Report of the Office of the United Nations High Commissioner for Human Rights on Situation of Human Rights in Sri Lanka' (6 September 2023) UN Doc A/HRC/54/20, para 50.

> as in material linking violations and related crimes to specific individuals, whether those directly involved or bearing command responsibility.[86]

Finally, on the evolving 'accountability strategies, the High Commissioner states:

> The project has provided increased support to jurisdictions that are investigating and prosecuting international crimes committed in Sri Lanka […]. During this period, the project has also sought to increase its engagement with State prosecutorial authorities. In April 2023, the project briefed representatives from 29 States drawn from national prosecutorial authorities and/or law enforcement agencies on the mandate and work of the project, and to explore potential collaboration.[87]

The above observations of the High Commissioner raise the following concerns. First, the High Commissioner admits that the repository initially consisted of material from the OISL investigation and other material in OHCHR's possession. This has now been supplemented by material from nine NGOs and academic sources. However, these nine sources have not been identified. It raises the question whether any of these sources have received funding from, or are in any other way connected to or associated with, Sri Lanka's critics. It is a factor that could potentially affect one's assessment of the material in question.

Secondly, there is absolutely no mention about whether Sri Lanka's domestic mechanisms, the two key ones are the LLRC (2011) and the subsequent Paranagama Commission (2015),[88] along with their respective databases, have been 'migrated into' the repository. It is reasonable to suppose that if material in the domestic mechanisms suggest conclusions different from those suggested by the team's sources, prosecuting authorities would be interested in seeing such material. This is especially so since the High Commissioner admits that the team has done an initial analysis of the material in its possession and found that there are 'outstanding gaps in the factual basis' of some allegations.

Because the GOSL has rejected the impugned mechanism and hence cannot, in principle, collaborate with it, there is no way for anyone to check whether the material of the domestic mechanisms is included in the repository and, if it is, whether it is being given due weight in discussions with prosecutorial agencies. Meanwhile, if there are 'outstanding gaps' in the team's material, as mentioned above, then why the seeming rush to initiate prosecutions? It is in this context that one has to consider the legality of the mechanism. I argue that it is illegal because of the following reasons.

First, recall that the UNGA has explicitly stated, among other things, that the Council must be guided in all its actions by the principles of cooperation and constructive international dialogue. Nowhere in paragraph 6 does it say that the impugned mechanism has to submit its material to the Council for review. Indeed, it is clear that the mechanism has begun to submit its data directly to prosecuting agencies. Meanwhile, Sri Lanka, the country concerned, has expressly rejected both resolution 46/1 as well as the impugned mechanism. Therefore, by definition, the mechanism contravenes the Council's obligations under the aforesaid principles.

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86 UNHRC 'Report A/HRC/54/20' (n 85) para 52.

87 ibid paras 56-57.

88 Office on Missing Persons, 'Report of the Second Mandate of the Presidential Commission of Inquiry Into Complaints of Abductions and Disappearances' (August 2015) (Paranagama Report).

Secondly, the UNGA has delegated the task of protecting and promoting human rights worldwide to the UNHRC, not to any other entity. One must presume that this is because the UNGA was convinced that a group of nations rather than an individual or agency was the best means through which to carry out the said task. If the Council can, by resolution, delegate the task of advancing human rights in a particular country to the High Commissioner, and the High Commissioner can in turn create an entity for such purpose that is not obliged to submit its material to the Council, then this goes against the UNGA's vision and objectives in establishing the Council.

Thirdly, it appears that the OHCHR has been given the sole discretion to decide what material it will forward to prosecuting authority and other entities and when it will do so. The accused persons, along with the GOSL, which one presumes would have an overwhelming interest in the matter since the accused persons are Sri Lankan citizens, never get to see the material in question or respond to it before the Council. This is a violation of the principles of natural justice of both the accused persons as well as the GOSL. It is also a violation of the individual rights of the accused persons to due process and a fair trial. These are all rights guaranteed under the UDHR.

Fourthly, the so-called 'new strategies for accountability' are intended only for Sri Lanka. This violates the principle of 'non-selectivity,' another one of the UNHRC's guiding principles. Finally, the UNHRC has numerous investigative options provided under its founding statutes. These include the UPR, special procedures, and others. All of these are based on cooperation among the members. Therefore, the question arises whether the UNHRC could have pursued the Sri Lankan case through these mechanisms rather than by resorting to country-specific resolutions.

However, someone might object that the Sri Lankan case involves alleged humanitarian law violations. Therefore, a process such as the UPR might not be the best means through which to pursue such issues. I reply that this objection does not apply in the instant case because of the following reasons. Paragraph 5(e) of UNGA resolution 60/251 states:

> [The Council shall] undertake a universal periodic review, based on objective and reliable information of the fulfillment by each State of its human rights obligations and commitments in a manner which ensures universality of coverage and equal treatment with respect to all States; the review shall be a cooperative mechanism, based on an interactive dialogue with the full involvement of the country concerned and with consideration given to its capacity-building needs.[89]

Meanwhile, Section 1 of the Annex to UNHRC resolution 5/1 sets out detailed operating procedures for the UPR. It states that the basis of the review is: a) the UN Charter, b) the UDHR, c) human rights instruments to which a state is party, and d) voluntary pledges and commitments made by States. Section 2 of the Annex states: '[i]n addition to the above and given the complementary and mutually interrelated nature of international human rights law and international humanitarian law, the review shall take into account applicable humanitarian law'.[90]

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[89] UNGA Res 60/251 (3 April 2006) UN Doc A/RES/60/251, para 5(e).

[90] UNHRC Res 5/1 (n 71) Annex, para 2.

It is clear that the framers intended that the UPR should look into possible violations of human rights law as well as humanitarian law. Therefore, if there were questions regarding accountability in Sri Lanka, they could conceivably have been pursued through the UPR. This does not mean that the UNHRC cannot investigate a country without its consent. For instance, it can be done through Special Rapporteurs, but here again, the nation concerned has recourse to the Council if it has a complaint.

Neither UNGA resolution 60/251 nor UNHRC resolution 5/1 explicitly prohibits resorting to country-specific resolutions. However, given the instructions for the UPR in paragraph 5 (e) and also the broad scope of the UPR as envisioned in UNHRC resolution 5/1, it follows that if the Council resorts to a country-specific resolution, it should be for a crisis of a magnitude and urgency that cannot be addressed through the UPR or special procedures. Otherwise, it makes no sense to have the UPR and special procedures.

It is reasonable to suppose that whether or not a crisis of a magnitude and urgency that cannot be addressed through the UPR exists in a particular country is a question of fact that must be decided by the Council prior to authorising mechanisms that are not expressly mentioned in the relevant statutes. There is no evidence that the sponsors of resolution 46/1 ever submitted to the Council a report to establish that the need to address the allegations of war crimes purportedly committed during the war constitutes, both for Sri Lanka as well as the world a crisis of a magnitude and urgency that cannot be handled by the UPR or special procedures.

In sum, under paragraph 6 of resolution 46/1, the UNHRC has given itself an enforcement capability through country-specific resolutions that are entirely contrary to the purposes that the UNGA envisioned for that institution. It is a power that, arguably, not even the UNGA or the UNSC has under the relevant provisions of the UN Charter. It necessarily follows that such a capacity is illegal.

Section 5: meeting objections, 1

In the next two sections, I address two further objections that critics might raise. First, it could be pointed out that if the allegations of wrongdoing against a country are strong enough, technical issues should not prevent the Council from looking into them. For instance, a critic could say that, even if it were true that the Council may have failed to discuss or debate the OISL Report prior to the adoption of resolution 30/1, nevertheless, the resolution is not unjustified since, in the final analysis, it is only asking the GOSL to ensure that the human rights/fundamental rights of its citizens are protected.

Moreover, even the domestic mechanisms appear to have found that violations of humanitarian law may have occurred during the war. Therefore, there cannot be anything wrong per se in the Council recommending that these matters be pursued further. Second, the GOSL is on record as having co-sponsored resolution 30/1. Unless there is some indication that the GOSL did not co-sponsor willingly, ie, that the co-sponsorship was obtained through pressure or other nefarious means, it would be futile to challenge the act. The Council cannot be expected to look behind the formal act of a government in order to judge whether it is correct or not. I shall take each one in turn.

In regard to the first, I reply that if the Council is to accuse a country of wrongdoing, there is an obligation on the Council to substantiate its allegations to an acceptable standard of proof – for instance, the standard set out in the terms of reference of the Council's report

that presents the allegations in question.[91] It should not be possible for the Council to merely assert that it has produced a report and that it substantiates the allegations in question and then proceed to recommend measures against the targeted country.

The only reasonable way for the Council to ensure that a report meets acceptable standards is to file it of record and give an opportunity to the country concerned, or anyone else that may be interested, to respond to it. With the OISL Report, this was not done. This harms the interests of Sri Lankan citizens because of the following reasons. The problem is, precisely, the existence of the reports of the domestic mechanisms.

It is true that the domestic mechanisms, ie, the LLRC and the Paranagama Commission, found that violations of humanitarian law by individual soldiers may have happened and recommended further investigation of these incidents.[92] However, at no time did they accept that there was evidence of so-called 'system crimes,' ie, crimes showing concert and organisation as well as patterns of conduct and similarities in *modus operandi,* which suggest or indicate a widespread and systemic attack against a civilian population.[93] More

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[91] For instance, the standard of proof of the OISL Report is, '[r]easonable grounds to believe'. See OISL Report (n 19) 3.

[92] For instance, the Paranagama Commission states: 'The Commission is of the view, as found by the LLRC, that there are matters to be investigated in terms of specific instances of deliberate attacks on civilians. These matters need to be the subject of an independent judicial inquiry. There are credible allegations, which if proved to the required standard, may show that some members of the armed forces committed acts during the final phase of the war that amounted to war crimes giving rise to individual criminal responsibility'. Paranagama Report (n 88) para 47.

[93] See for instance, LLRC Report (n 15) para 4.360. See also, Paranagama Report (n 88) paras 619-626 ('The Commission's recommendation.')

importantly, they never recommended constitutional amendments involving the 13th Amendment.[94] The OISL does both these things.[95]

It is not my contention that the conclusions of the domestic mechanisms should invariably be preferred to those of the Council's reports. However, given the principle of international law that domestic remedies must be exhausted before resorting to international ones, it necessarily follows that if the Council's reports reach conclusions that are different from, or inconsistent with, those of the domestic mechanisms, then those who advocate for the conclusions of the Council's reports must justify why the former should prevail over the latter. Otherwise, there is no point in having domestic mechanisms.

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[94] See for instance, LLRC Report (n 15) paras 9.236. 9.237 and 9.282. In these paragraphs, the Commission discusses the lack of consensus on devolution, and the need for all parties to first reach such a consensus if there is to be any reconciliation. Para 9.282, in particular, states: '[o]ne of the dominant factors obstructing reconciliation in Sri Lanka is the lack of political consensus and a multi-party approach on critical national issues, such as the issue of devolution'. (para 9.282)

[95] It is difficult to provide international readers who may be unfamiliar with the charges that the UNHRC has been levelling against Sri Lanka any objective third-party assessments of the contents of the OISL Report. This is because, the GOSL has not published an official rebuttal to the OISL Report. Neither does the UNHRC's official record contain a comprehensive review, analysis and assessment of the report published by any other government, international organisation, NGO or academic institution. However. the present author produced a rebuttal to the report in March 2017. See Dharshan Weerasekera, *A Factual Appraisal of the OISL Report: A Rebuttal to the Allegations against the Armed Forces, Vols 1 & 2* (Kalyananda Thiranagama and Raja Gunaratne (eds), Global Sri Lanka Forum 2017). This report was handed over to UNHRC representatives both in Colombo and in Geneva. Therefore, the Council is aware of this report. For a critique of the report, see Michael Cooke, 'War Crimes in Sri Lanka: Stain or Slander?' (*Groundviews*, 16 September 2018) < <https://groundviews.org/2018/09/16/war-crimes-in-sri-lanka-stain-or-slander/> accessed 14 December 2023. In November 2020, a copy of the report was also filed of record in the Sri Lankan Parliament. See Parliament of the Democratic Social Republic of Sri Lanka, 'Parliamentary Debates (Hansard) Official Report' vol 280 no 3 (25 November 2020) <https://www.parliament.lk/uploads/documents/hansardvolumes/1630904311054580.pdf> accessed 14 December 2023. Finally, in November 2020, a revised and updated version of the report was published through a reputed Sri Lankan publisher. Therefore, it is in the public domain as well. The said report, is based on work that the author has been doing on the accountability resolutions since about 2012, and published in three long articles in the Foreign Policy Journal, edited by Jeremy Hammond. The articles are: Dharshan Weerasekera, 'The UNHRC Resolution Against Sri Lanka: What it Really Means' (*Foreign Policy Journal*, 18 April 2012) <https://www.foreignpolicyjournal.com/2012/04/18/unhrc-resolution-against-sri-lanka-what-it-really-means/> accessed 14 December 2023; Dharshan Weerasekera, 'The Illegality of UN Secretary-General Ban Ki Moon's Approach to Sri Lanka' (*Foreign Policy Journal*, 19 March 2013) <https://www.foreignpolicyjournal.com/2013/03/19/the-illegality-of-un-secretary-general-ban-ki-moons-approach-to-sri-lanka/> accessed 14 December 2023; Weerasekera (n 16).
The aforesaid three articles, along with the book, arguably comprise the most extensive treatment currently available of the accountability resolutions and matters connected thereto. They would be helpful to any international reader seeking information on the said resolutions, especially the nature of the charges that the UNHRC has been levelling against Sri Lanka. In this regard, the OISL levels eight charges, four on alleged violations of international humanitarian law and four on alleged violations of international human rights law. The four on humanitarian law are: indiscriminate shelling of the 'no-fire' zones, shelling of hospitals, depriving civilians in the conflict zone of food and medicine, and deliberate or unlawful killings. The four on human rights law are: deprivations of liberty (arbitrary arrests, etc), enforced disappearance, torture, and sexual violence. The author has gone into detail in examining the evidence that the OISL panel has adduced in support of each of these charges and pointed out various problems with it. See Weerasekera, *A Factual Appraisal of the OISL Report: A Rebuttal to the Allegations Against the Armed Forces* (rev ed, Sarasavi 2020).

Therefore, the failure to debate or discuss the OISL Report prior to the adoption of resolution 30/1, if true, is not a mere technical glitch or deficiency. It goes to the root of the issue as to whether Sri Lanka can ever expect justice at the UNHRC.

Section 6: meeting objections, 2

In this section, I discuss some circumstantial evidence that suggests that the GOSL may have been pressured into co-sponsoring resolution 30/1. If true, it goes to the issue of motive, which is important in understanding not just the possible reasons that might have led the GOSL to co-sponsor resolution 30/1 but also why the US and its allies continue to pay special attention to Sri Lanka at the UNHRC. I shall discuss four matters: i) the geopolitics of the Indo-Pacific region in the past decade-and-a-half and its impact on Sri Lanka, ii) some key developments in the domestic politics in Sri Lanka over this same period, iii) evidence of disagreement over resolution 30/1 within the GOSL at the time of the co-sponsorship, and iv) statements by other countries that Sri Lanka is being subjected to a politicised process at the UNHRC.

i) Geopolitics

The key geopolitical development in the Indo-Pacific region over the past decade or so is the so-called 'Pivot to Asia' by the US. This is a policy determination by the Obama Administration that the US's future prosperity and security depends on developments in the Indo-Pacific region, and to expand and consolidate American power over that region as much as possible. As President Obama put it in 2011, in a speech to the Australian Parliament, '[t]he United States will play a larger and long-term role in shaping this region and its future'.[96] The policy was continued during the Trump years.[97] It is also very much a part of the foreign policy of the Biden Administration.

The Pivot inevitably pits the US against China, Asia's traditional 'superpower'. Unfortunately, Sri Lanka has become a great prize in this contest because of its strategic location in the middle of the Indian Ocean. The following observation by one Thomas Shannon, a US Under-Secretary of State, while on a visit in 2015, conveys something of how US policymakers see the island. He says:

> Your nation sits at the crossroads of Africa, South Asia and East Asia […]. Our wonderful US Ambassador here my good friend Atul [Keshap] has recounted to me his amazement at seeing, from the ramparts of the old Dutch Fort in Galle, the countless ships that sail past Sri Lanka along the sea lanes between the Straits of Hormuz and the Straits of Malacca. Forty percent of all seaborne oil passes through the former, and half the world's merchant fleet capacity sails through the latter. To put it simply, the stability and prosperity of the entire world is dependent on the stability of these energy and trade routes. And Sri Lanka is at the center of this.[98]

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[96] The White House, Office of the Press Secretary, 'Remarks by President Obama to the Australian Parliament' (*White House National Archives*, 17 November 2011) <https://obamawhitehouse.archives.gov/the-press-office/2011/11/17/remarks-president-obama-australian-parliament> accessed 7 November 2023.

[97] See for instance David Rothkopf, 'Op-Ed: One Foreign Policy Move Trump is Getting Right—Maintaining Obama's Pivot to Asia' (*Los Angeles Times*, 15 July 2018) <https://www.latimes.com/opinion/op-ed/la-oe-rothkopf-trump-shift-to-pacific-20180715-story.html> accessed 7 November 2023.

[98] 'US Under-Secretary of State Thomas Shannon's Speech at the Lakshman Kadirgamar Institute of International Relations and Strategic Studies' (*US Embassy in Sri Lanka*, 6 December 2015) <https://lk.usembassy.gov/u-s-secretary-state-designate-thomas-shannons-speech-lakshman-kadirgamar-institute-international-relations-strategic-studies/> accessed 7 November 2023.

Starting around 2009 (ie, during the tenure of President Mahinda Rajapaksa), China began pouring vast sums of money into various development projects in Sri Lanka, including new freeways and harbours. These efforts led to concerns among the US and its allies that Sri Lanka was becoming unduly close to China.[99]

In these circumstances, it is reasonable to suppose that the US would seek to gain a degree of influence and indirect control over Sri Lanka in order to prevent China from gaining a foothold on the island. The accountability resolutions undoubtedly provide the UNHRC, and thereby any country or group of countries that can control or manipulate the Council, a convenient means of exerting pressure on Sri Lanka, including in regard to constitutional changes.

ii) Domestic politics

The defeat of Mahinda Rajapaksa in January 2015 and the rise to power of Maithripala Sirisena (as President) and Ranil Wickremasinghe (as Prime Minister) paved the way for an unprecedented engagement between the US Government and that of Sri Lanka.[100] To give just a few examples, starting in January itself the Government handed over the formulation of the entire 'economic growth policy' of the country to an official flown in from the US Treasury Department.[101] The former Prime Minister Ranil Wickremasinghe during his testimony at the Bond Scam hearings is heard to say 'he [the American] gave us this system'.[102]

The Government also overhauled the finance laws, including the tax law, with the help of IMF advisors introduced by the Americans.[103] Meanwhile, the Americans and their allies, the British, undertook the task of 'reforming' the Sri Lankan security forces.[104] This involved the UK giving Sri Lanka a 'grant' of 6.6 million pounds with the condition that a British military attaché was to be stationed within the security forces to oversee the disbursal of the funds.[105] The Americans also helped develop a contingent of Marines in the Sri Lanka Navy capable of being deployed with the US Marines.[106] There were many other such measures.

Therefore, starting in January 2015, the US Government had begun to steadily increase its capacity to influence the internal policy decisions of the Sri Lankan Government, including

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[99] Jack Goodman, 'Sri Lanka's Growing Links with China' (*The Diplomat*, 6 March 2014) <https://thediplomat.com/2014/03/sri-lankas-growing-links-with-china/> accessed 14 December 2023.

[100] Frederic Grare, 'What Sri Lanka's Presidential Election Means for Foreign Policy' (*Carnagie Endowment for International Peace*, 16 January 2015) <https://carnegieendowment.org/2015/01/16/what-sri-lanka-s-presidential-election-means-for-foreign-policy-pub-57739> accessed 14 December 2023.

[101] Chaturanga Pradeep Samarawickrama, 'Had to Raise Money to Pay for Unaccounted Expenditure: PM' (*Daily Mirror*, 20 November 2017) <https://www.dailymirror.lk/article/Had-to-raise-money-to-pay-for-unaccounted-expenditure-PM-140753.html> accessed 7 November 2023.

[102] ibid.

[103] 'New Tax Law: Capitulating to the IMF' (*The Sunday Times*, 2 April 2017) <https://www.sundaytimes.lk/170402/editorial/new-tax-law-capitulating-to-the-imf-235109.html> accessed 7 November 2023.

[104] Jeff Smith, 'Sri Lanka: A Test Case for the Free and Open Indo-Pacific Strategy' (*The Heritage Foundation*, 14 March 2019) <https://www.heritage.org/asia/report/sri-lanka-test-case-the-free-and-open-indo-pacific-strategy> accessed 14 December 2023.

[105] 'Cameron Meets Sirisena, Offers £6.6 M Over 3 Years' (*Daily FT*, 28 November 2015) <https://www.ft.lk/Front-Page/cameron-meets-sirisensa-offers-6-6m-over-3-years/44-501669> accessed 7 November 2023.

[106] 'First Ever Marines of the Sri Lanka Navy Pass out in Mullikulam' (*Sri Lanka Navy Marines*, 27 February 2017) <https://marine.navy.lk/index.php?id=23> accessed 14 December 2023.

by introducing foreigners into key ministries and other institutions. This is the context in which the co-sponsorship happened.

iii) Disagreement within the GOSL over resolution 30/1

Following the adoption of resolution 30/1, President Sirisena, on a number of occasions, publicly stated that he would never permit the establishment of special courts to try Sri Lankan soldiers for war crimes, an express provision of resolution 30/1 (paragraph 6).[107] The Prime Minister also expressed similar sentiments, saying *inter alia* that special courts are not politically feasible.[108] Accordingly, as a matter of inevitable inference, it follows that the delegate who approved the Council passing resolutions bringing in such measures could not have been properly mandated to do so by the President.

If special courts are not politically feasible because of the constitutional change they would require, it is incomprehensible why the President/Government/Council delegate would co-sponsor a resolution that expressly calls for such courts unless the President and the delegate were under improper political pressure. Therefore, to repeat, it is possible that the GOSL was pressured into co-sponsoring resolution 30/1. At any rate, it is a plausible scenario.

iv) Statements by other States

From the very start of the accountability resolutions, many countries went on record pointing out that Sri Lanka was being unfairly targeted. In this section, I set out some of their observations. When the Report of the Secretary-General's Panel of Experts was released in May 2011, Russia raised objections to it at the UNSC. A reporter for a local newspaper asked the then Russian Ambassador to Sri Lanka, Vladimir P Mikaylov, on what grounds the objections had been made, and he replied:

> On the grounds that it was not a UN report. On the grounds that it was not done in accordance with the regulations and the procedures of the UN. From the very beginning it was told that the report was purely for the Secretary General. So, if it was for the Secretary General why did they have to publish it?[109]

In both 2013 and 2014, significant numbers of UNHRC members expressed strong disapproval of the push by some countries for an international investigation of Sri Lanka. For instance, at the March 2013 session, a group of fourteen nations, including China, Russia, Venezuela, and Iran issued a joint statement objecting to the report that the High Commissioner tabled calling for such an investigation. The OHCHR's official press release states:

> Russia, speaking on behalf of a group of 14 States, said that they were of the view that in the report (A/HRC/22/38) on Sri Lanka, the High Commissioner had exceeded her mandate of

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[107] 'Sri Lanka Rejects UN Call for Foreign Judges in War Probe' (*NDTV*, 5 March 2017) <https://www.ndtv.com/world-news/sri-lanka-rejects-un-call-for-foreign-judges-in-war-probe-government-1666321> accessed 7 November 2023.

[108] Ajith Siriwardana, 'Hybrid Court Not Politically Feasible: PM' (*Daily Mirror*, 3 March 2017) <https://www.dailymirror.lk/breaking-news/Hybrid-Court-not-politically-feasible-PM/108-124837> accessed 7 November 2023.

[109] Anthony David, 'Moscow May Veto UN Resolution Against Sri Lanka: Russian Envoy' (*The Sunday Times*, 1 May 2011) <https://www.sundaytimes.lk/110501/News/nws_26.html> accessed 7 November 2023.

> reporting on the provision of assistance, by making substantive recommendations and pronouncements, and that the recommendations were of a political nature. The High Commissioner specifically in paragraph 64 of the report had hastened to prejudge the outcome of Sri Lanka's domestic reconciliation process.[110]

In March 2014, just after the vote on resolution 25/1, which authorised the international investigation in question, Ambassador Dilip Sinha, the head of the delegation for India, said:

> It has been India's firm belief that adopting an intrusive approach that undermined national sovereignty and institutions is counter-productive….Moreover, any external investigative mechanism with an open-ended mandate to monitor national processes for protection of human rights in a country is not reflective of the constructive approach of dialogue and cooperation envisaged by UN General Assembly resolution 60/251 that created the HRC in 2006, as well as UNGA resolution 65/281 that reviewed the HRC in 2011.[111]

Meanwhile, the OHCHR's official press release reports that Pakistan responded to the resolution, particularly the proposed investigation, as follows:

> Pakistan, in an explanation of the vote before the vote, said that this approach to Sri Lanka was counterproductive, and that any initiatives had to be taken with Sri Lanka's cooperation….An international investigation by the Office of the High Commissioner was a clear violation of the sovereignty and territorial integrity of Sri Lanka, and had unfortunate budget implications. If this investigation should be funded by countries supporting this resolution, this would be a serious breach of its impartiality….Pakistan called for a vote for the deletion of operative paragraph 10 of this resolution.[112]

To turn to the UNHRC's 46th session in March 2021, China made the following observation during the interactive dialogue on the High Commissioner's report on Sri Lanka:

> It is the consistent stand of China to oppose politicization of and double standards on human rights, as well as using human rights as an excuse in interfering in other countries' internal affairs. We are concerned about the clear lack of impartiality shown in the OHCHR's report to

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[110] 'Council Discusses Country Reports under Agenda Items and Annual Report of the High Commissioner and on Technical Assistance' (*United Nations Office of the High Commissioner for Human Rights*, 20 March 2013) <https://www.ohchr.org/en/press-releases/2013/03/council-discusses-country-reports-under-agenda-items-annual-report-high> accessed 9 January 2023.

[111] 'Explanation of Vote by the Permanent Representative of India to the UN Offices in Geneva, Amb Dilip Sinha at the UNHRC on Agenda Item 2 on the Resolution on Promoting Reconciliation, Accountability and Human Rights in Sri Lanka' (*Ministry of External Affairs Government of India*, 27 March 2014) <https://www.mea.gov.in/Speeches-Statements.htm?dtl/23150/Explanation+of+Vote+by+the+Permanent+Representative+of+India+to+the+UN+Offices+in+Geneva+Amb+Dilip+Sinha+at+the+UNHRC+on+Agenda+Item+2+on+the+resolution+on+Promoting+reconciliation+accountability+and+human+rights+in+Sri+Lanka> accessed 14 December 2023.

[112] 'Human Rights Council adopts a resolution on reconciliation, accountability and human rights in Sri Lanka,' (*United Nations Office of the High Commissioner for Human Rights*, 27 March 2014) <https://www.ohchr.org/en/press-releases/2014/03/human-rights-council-adopts-resolution-reconciliation-accountability-and> accessed 9 January 2023.

> this session on Sri Lanka and express our regret over the failure of the OHCHR to use the authoritative information provided by the Sri Lankan Government.[113]

Meanwhile, the official report of the proceedings of the UNHRC's 51st session (where yet another resolution on Sri Lanka was adopted) reports on the observations of the head of delegation for Venezuela, as follows:

> His delegation wished to reiterate its opposition to the selective approach taken by certain members of the Council in putting forward draft resolutions, such as the one under consideration, for purely politicized reasons. Such texts do not enjoy the support of the country concerned and violate the principle of respect for state sovereignty and non-interference in the internal affairs of states. His delegation was deeply concerned to note that the text granted OHCHR the power to collect criminal evidence for future judicial proceedings, in violation of the Offices mandate set out in General Assembly resolution 48/141.[114]

Finally, at the interactive dialogue following the tabling of the latest High Commissioner's report on Sri Lanka, the head of the delegation for the Islamic Republic of Iran observed:

> The Human Rights Council has a key text in promoting human rights through dialogue and international cooperation based on the principle non-selectivity, impartiality and objectivity. The Council and its mechanisms should refrain from politicization and political prejudice towards any country.[115]

There are many other similar statements. It is clear that at the time of the adoption of resolution 30/1 as well as afterward there was information in the public domain – information that one can reasonably expect at least some Council officials to have been aware of – that indicated that when Sri Lanka co-sponsored the resolution it might not have done so willingly. More importantly, there were statements in the Council's own record where other countries had explicitly stated that Sri Lanka was being subjected to a politicised process.

In these circumstances, it is reasonable to suppose that the Council had an obligation to discuss and debate the OISL Report prior to the adoption of the resolution. It would be absurd for anyone to suggest that the Council could 'impartially and objectively' decide to take action on Sri Lanka based on such a report without first considering its contents.[116] A critic might object that all of the statements of the other countries are themselves political in nature. However, it is impossible to deny that all these nations seem to agree that what is

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[113] 'China Strongly Supports Sri Lanka During UNHRC Session in Geneva' (*The Island*, 27 February 2021) <https://island.lk/china-strongly-supports-sri-lanka-during-unhrc-session-in-geneva/> accessed 7 November 2023.

[114] UNHRC, 'Summary Record of the 40th Meeting' (1 November 2022) UN Doc A/HRC/51/SR40, para 28.

[115] UNHRC, 'Interactive Dialogue on OHCHR Report on Sri Lanka' (11 September 2023) <https://www.ohchr.org/en/statements-and-speeches/2023/09/sri-lanka-update> accessed 7 November 2023.

[116] Indeed, it raises a reasonable suspicion that, the OHCHR waited until the last moment to release the OISL Report to the public precisely because it knew that the report would not stand up to scrutiny. Further, it should be noted that, by releasing the report on 16 September 2015, barely two weeks before the resolution was tabled at the Council, the OHCHR effectively denied Sri Lankan citizens the opportunity to scrutinise the evidence for themselves, and if they found problems with it, to challenge the GOSL's decision to accept the report, and also the co-sponsorship, before the domestic courts. In this sense, the OHCHR has also arguably violated the human rights of all Sri Lankan citizens.

happening to Sri Lanka somehow offends the Council's, as well as the UN's, most basic principles. Can they all be wrong?

Section 7: the case for a referral for an advisory opinion

There is a famous legal maxim that states: '*ubi jus in vertum, ibi jus nullum*' ('where the law is uncertain, there is no law'). It is not in dispute that Sri Lanka, as a member of the UN, is obliged when conducting military operations during an internal armed conflict to comply with international humanitarian law as well as international human rights law as applicable. However, the UN must also abide by its obligations when condemning or taking action against a member. For the convenience of the reader, I summarise below what has happened:

1. Sri Lanka successfully ends a civil war, and there are allegations that the Government may have committed war crimes during the last phase of the conflict.
2. A special session of the UNHRC is held to discuss these concerns. At the end of that session, the Council passes a resolution congratulating the Government on ending the war and also the post-war efforts. There is absolutely no mention of war crimes.
3. In spite of this, the Secretary-General commissions a panel to advise him on whether war crimes may have been committed. They report that such crimes might have happened. This report is then submitted indirectly to the Council to anchor a resolution calling for an international investigation.
4. The initial resolution is expanded over time, and in 2014 the Council authorises the investigation in question.
5. The final report of this investigation states that war crimes were committed.
6. However, by this time, the government in Sri Lanka has changed. The new government [for whatever reason] is unwilling to challenge the findings in the report.
7. Instead, it co-sponsors a resolution based on the report. The resolution contains recommendations for constitutional changes and other matters well within the domestic jurisdiction of Sri Lanka.

It is clear that the initial allegations of war crimes have never been established to an acceptable standard before the Council. Therefore, Sri Lanka's critics in the Council have developed a process to target a country and thereby gain the means to intervene in the internal affairs of such a country including pushing for Constitutional changes without ever having to prove or establish the initial charges which purportedly warrants the intervention in question.

In sum, a co-sponsored resolution is the perfect means for the UN or its subsidiary organs, or interested groupings of nations capable of carrying a vote on any issue of their choice, to overcome the prohibition imposed by Article 2(7) of the UN Charter, by getting the targeted country to *acquiesce* in any type of intervention. If this continues, there is no more need for Article 2(7), or for that matter, international law: whatever the powerful nations wish to do, they will be able to do.

As mentioned earlier, resolution 30/1 recommends constitutional changes for Sri Lanka. If these changes are pushed through without adequate reflection or genuine consent of the people and ends in destabilising the country or causing some other grave harm, can the

High Commissioner, the Secretary-General, or any of the other UN officials who prepare the reports to urge action against Sri Lanka indemnify the citizens of this country against such damage? Therefore, the citizens of Sri Lanka have a right to expect fair play.

They have a right to expect that the protection accorded to a country under Article 2(7) of the UN Charter will apply to their country when they most need it. This is not to say that the allegations of war crimes and other crimes against Sri Lanka ought not to be investigated. It is only to say that if the UN is to do the investigating, it must have clean hands.

In this situation, what can the friends of international law do? If, as I have suggested, what has happened to Sri Lanka strikes at the very foundations of international law, the only reasonable course of action is to try and get the ICJ to inquire into this matter. Article 65 of the Statute of the ICJ states:

> 1. The Court may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request,
> 2. Questions upon which the advisory opinion of the court is asked shall be laid before the court by means of a written request containing an exact statement of the question upon which an opinion is required and accompanied by all documents likely to throw light upon the question.[117]

Unfortunately, private citizens do not have *locus standi* at the court. However, the UN Secretary-General and the UN High Commissioner for Human Rights do. Therefore, it is in the interests of the friends of international law to demand of the High Commissioner or the Secretary General that they seek an advisory opinion of the ICJ on whether the adoption of resolution 30/1 is consistent with Article 2(7) along with the relevant provisions of the UNHRC's founding documents. Also, whether the continuing operation of the evidence-gathering mechanism established under resolution 46/1 is consistent with the said documents.

The Secretary-General or the High Commissioner, as the case may be, have two choices: either to do nothing, in which case it will be 'business as usual' in their respective institutions, or take a dramatic step to raise the status as well as the relevance of international law. By referring the matter to the ICJ, the High Commissioner or the Secretary General would be doing the whole world an enormous favour. It would, at long last, trigger a definitive interpretation of Article 2(7) of the UN Charter.

The moment a request for an advisory opinion is made, the Court is obliged to forward the related question to all UN members in order for them to provide their input. Therefore, all of these members will get a chance to share their perspectives on the present matter, which will be determined, amongst other things, by how the question affects their particular national interests. This will result in as comprehensive a treatment as possible of the different permutations of the question – ie, the different ways that Article 2(7) can or has been exploited – which in turn will ensure that the Court's judgment will cover all those angles.

Inevitably, a resulting interpretation, whether it is in favour of Sri Lanka or otherwise, will be invaluable for rebuilding the credibility of the UN. Among other things, it would provide weak nations as firm a foundation as can reasonably be expected to vindicate their rights under Article 2(7) before the Court as well as other venues in the years to come.

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[117] Statute of the International Court of Justice (24 October 1945) 1 UNTS XVI art 65.

Conclusion

I have in this paper explained that the UNHRC's adoption of resolution 30/1 of October 2015 and the subsequent resolution 46/1 of March 2021 is inconsistent with the provisions of Article 2(7) of the UN Charter along with the UNHRC's founding statutes. I have also shown that the impugned evidence-gathering mechanism established under resolution 46/1 is an affront to the sanctity of the principles that underpin the said documents. This violation is continuing, with no end in sight.

Someone might say that, even if all of the above were true, it is no reflection on the nature or quality of much of the rest of the Council's work. Furthermore, that the Council is fully capable of addressing its mistakes and that the Council should be left alone to carry on with its work without incessant criticism. However, if one accepts that the backbone of international law is consent, then the institutions that are established to facilitate such consent must carry out their task in good faith. A co-sponsored resolution permits groupings of interested nations to subvert the principle of consent. This strikes at the very foundations of international law. The tactics developed in regard to Sri Lanka can now be used against any other nation.

The nations of the world came together in 1945 in the aftermath of World War II and established the UN in the hopes of preventing a calamity such as the one that had just ended from ever happening again. They also hoped to prevent horrendous crimes such as those committed by the Nazis, including genocide and crimes against humanity, from ever again being repeated. An organisation that violates its own principles cannot be expected to accomplish the original purposes for which it was created. Therefore, what has happened to Sri Lanka at the UNHRC poses an existential threat not just to the continuance of the UN system but ultimately to the future viability of international law. It is up to the friends of international law and all those who wish for an international order predicated on stability, predictability, and, above all, adherence to the rule of law to decide what they should do about this situation.

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