

Justice Nawaz Report Truth & Reconciliation Commission

Briefing Notes

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This Briefing Note is limited to the contours proposed by 624-page volume one of the PCOI report with regard to the Truth and Reconciliation Commission (TRC) to be established in Sri Lanka.

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ABBREVIATIONS

| | |
|-------|--|
| ACF | – Action Contre La Faim |
| AG | – Attorney General |
| GOSL | - Government of Sri Lanka |
| IIGEP | - International Independent Group of Eminent Persons |
| IHL | - International Humanitarian Law |
| IHRL | - International Human Rights Law |
| LTTE | - Liberation Tigers of Tamil Eelam |
| OHCHR | - Office of the Human Rights High Commissioner |
| OSIL | - OHCHR Investigation on Sri Lanka |
| Par. | - Paragraph |
| PCOI | - Presidential Commission of Inquiry (This refers to this presidential Commission) |
| TRC | - Truth and Reconciliation Commission |
| PC | - Paranagama Commission |
| UC | - Udalagama Commission |

INTRODUCTION

Over the decades since 2001 the government of Sri Lanka has appointed number of Commissions of Inquiry to investigate into serious human rights violations. Those violations include anti Tamil programs, disappearances, war crimes etc.

Those commissions faced criticism from various quarters, including human rights organizations and international observers, for perceived shortcomings in terms of independence, impartiality, transparency, and effectiveness.

As the GOSL lacked genuine commitment to accountability and reconciliation, the implementation of recommendations from these commissions has been partial, slow and zero.

The main challenges to implementing these recommendations include political resistance, lack of political will, institutional barriers, and ongoing ethnic tensions.

Overall, the failure to fully implement those recommendations has contributed to ongoing concerns about impunity for human rights violations in Sri Lanka and has hindered efforts to achieve lasting peace and reconciliation.



THE COMMISSION

'The Presidential Commission of Inquiry to Investigate and Inquire into, Take Necessary Action, and Report on the Findings and Recommendations of Proceeding Commissions of Inquiry and Committees, which had been Appointed to Investigate into Human Rights, Violations, Serious Violations of International Humanitarian Law, and Other Such Serious Offenses (PCOI)' was appointed by President Gotabaya Rajapaksa on 21st January 2021.

The commission was chaired by Justice, A.H.M.D. Nawaz¹ (Judge of the Supreme Court) Mr. Chandra Fernando² (former Inspector General of Police), Mr. Nimal Abeysiri³ (Retired District Secretary) and Miss Yogeshwari Pathunara⁴ were the other commission members. All members were hand-picked by the President Rajapaksa.

Incumbent President Ranil Wickramasinghe in a clear approval of the PCOI process extended its term until 31 December 2023.⁵

The first interim report of the Presidential Commission was submitted to the President on July 21, 2020. The second interim report of the commission was handed over to President Gotabaya Rajapaksa by Supreme Court Judge A. H. M. D. Nawaz at the Presidential Secretariat, on 18 February 2022.⁶

The commission submitted a synopsis of the recommendations in the draft final report of the commission, to President Ranil Wickremesinghe on 06 Feb 2023.⁷

¹A.H.M.D Nawaz is the first sitting judge and the senior-most judicial officer to have been charge sheeted by the [Bribery Commission for corruption](#) during his time at the Attorney General's Department. He was appointed by President Gotabaya Rajapaksa as the President of the Court of Appeal.

² Former IGP Chandra Fernando served as Presidential Advisor to President Mahinda Rajapaksa after retiring from the Police Service in 2006. President Gotabaya Rajapaksa appointed him as a member of the Commission of Inquiry to Investigate Allegations of Political Victimization During the Period Commencing 08th January 2015 and Ending 16th November 2019. The Commission report has been challenged in the courts and some of the decisions have been discarded. President Gotabaya Rajapaksa appointed him as the chair of the Police Commission in 2020. The commission charge sheeted the incumbent president Ranil Wickremesinghe as well.

³ Retired District Secretary Nimal Abeysiri was also appointed as a member of the high-powered Task Force for Poverty Eradication and Livelihood Development by President Gotabaya Rajapaksa in January 2020. He too was a trusted official of the President Rajapaksa.

⁴ Miss Yogeshwari Pathunara, a former Mayor of Jaffna, and a member of the Rajapaksa family-led United People's Freedom Alliance

⁵ <https://www.newswire.lk/2022/09/19/president-ranil-extends-term-of-coi-appointed-by-gotabaya-rajapaksa/>

⁶ <https://www.presidentsoffice.gov.lk/index.php/2022/02/18/second-interim-report-of-presidential-commission-of-inquiry-for-alleged-human-rights-violations-handed-over-to-president/>

⁷ <https://www.adaderana.lk/news/88192/coi-investigating-preceding-rights-probes-and-findings-submit-synopsis-of-final-report>



None of these reports have been made public. Volume 01 of the 623-page Commission report is dated December 2023, and a scanned copy is out on social media. GOSL has not rejected the said report. This Briefing Note is based on the scanned copy of Volume 01.

The Commission draws on the following non-exhaustive list of sources to make its recommendations. (Par. 1017)

MANDATE OF THE PCOI.

1. *Witness testimonies before the PCOI and consultations.*
2. *Recommendations of the previous commissions of inquiry.*
3. *Non-implementation of recommendations of the previous commissions of inquiry.*
4. *International instruments, guidelines, treaties, basic principles, and standards.*
5. *Transitional justice principles and templates.*

In general, the report agrees with the GOSL retracting from the UNHRC resolution 30/1 and says the appointment of the PCOI is an undertaking given to UNHRC by the GOSL. (Par. 1022-1024)

The PCOI provides its reasoning on why and how a Truth Commission should be set up and operationalized.

Only a compendious and terse summary of the salient items of the evidence of the above witnesses and consultees appears in chapter 4 of Volume 01 and comprehensive and full testimony of each witness appears in Volume 02 of the final report.

A FINAL WORD.

“In the end, we would like to say that we confer with the recommendations of the previous commissions. We are supportive and sympathetic to their conclusions that there must be investigations and prosecutions. Failing to do so promotes impunity and it will be a recipe for anarchy. We note with sadness that we have not been able to implement not only the recommendations of UC, LLRC and PC but also many of the recommendations of Commissions that preceded them. We seem to flatter and fall at the first hurdle. It is clear that we have had neither the political will no public support for full accountability. With heavy heart we suggest that we proceed with full implementation of all our recommendations inclusive of the recommendation for TRC at pace and create the political will and develop public support to create an environment for total accountability for all atrocities.” (Par.1156)



EXECUTIVE SUMMARY

In the Executive Summary, the report says that most witnesses believe a united, peaceful Sri Lanka is possible.

“After having heard witness narratives from people in the different parts of the nation from all social strata, the Commission is inclined to share the premise of a united, peaceful, and resurgent island home notwithstanding some challenging and downing tasks ahead.”

The report says that the commission is satisfied that its recommendations have been considered by the GOSL. However, the recommendations of previous commissions were not implemented by the Government of Sri Lanka (GOSL), it adds.

“The earnestness with the recommendation of this Commission made the second interim report for a truth-seeking mechanism have been translated into perspective reality gives us the hope and expectation that we transitioning in the right direction It is comforting to learn that our interim recommendations for an advisory council, immediate release of detainees on the long incarnation and truth-seeking mechanism have been accorded due cognizance through a number of recommendations of previous commissions, which we have served in this final repaired report have not met with the same fate.”

The report cast doubts on the political will to make that hope a reality.

“The government and all political leaders must, however, demonstrate political and sincerity and purpose, to make the necessary decisions to ensure the good faith implementation of this commission recommendations, if our expectations are to become a reality in the form of a multi-ethnic pluralistic nation at peace with itself in a democratic Sri Lanka. The previous commission made countless recommendations for implementation. There was no political will or public corporation in permitting or sanctioning recommendations.”

The Commission rejects impunity that prevails in wartime human rights violations.

“In our recommendations, we reject impunity and promote accountability to be achieved for all acts and incidents that have been documented by the previous commissions. “

TRUTH & RECONCILIATION COMMISSION

The report argues that a TRC is the only way forward for Sri Lanka to address wartime human rights violations and victims' expectations. The common desire of the victims is to find the truth.

“Having heard from countless victims, many of them did not place emphasis on the need for retribution. Their wish was to receive compensation for their suffering and to be able to move forward with their lives without adversarial trials. Some victims insisted on perpetrators being brought to trial and punished. The victims were all united in their desire to know the truth of what happened to them.



OVERRIDING GOAL OF THE COMMISSION

“This is precisely why a truth commission is imperative. You can provide the vehicle for finding out and revealing the truth once and for all. And so doing it can make recommendations for appropriate remedial action, taking into account the view of the victims in each case, whether that be reparations, forgiveness, or punishment. The Truth Commission is a vital step in ending impunity and promoting accountability. It can facilitate as an inquisitorial and inclusive body, and uncovering of the truth and acknowledgment of violations, as well as identifying the remedies tailored to the specific needs of victims recognizing justice can be achieved in various ways, the avenue for prosecution in certain cases, as has been recommended by all previous commissions, remains and disturbed it can be followed as recommended by the commission in parallel with the measure, that insured truth finding acknowledgment and apologies and compensation.

“The overriding goal of the commission is to foster, unity and reconciliation between all group’s victims and perpetrators on all sides. This can most effectively be harnessed in a non-adversarial setting through deploying all avenues for accountability under the healing of the Truth Commission.”

It is hoped that Truth and Reconciliation will take shape what is important to bear in mind is to ensure that the mechanism to be established in the future would satisfy international standards and ensure the victims their right to truth (Par.1041)

The PCOI calls for UNHRC to stand behind the domestic truth seeking mechanism though such a mechanism has not yet been established.

Now it's the time we must seize upon for once, for after this momentous moment has passed us, never will we achieve that ultimate goal of truth its ascertainment or its acknowledgment, national unity and ethnic reconciliation. This is the moment we all have been waiting for and the International Community including UNHRC as solemnly declared in the resolution must stand behind this country to forge ahead with its domestic truth seeking mechanisms with an avenue for prosecutions embedded in it. (Par.1037)

NEED FOR VICTIM CENTRALITY.

It is in such a background fortified by history and recommendations of the previous Commissions that such a commission must soon be a reality in this country. It has to be noted that the experiences of the Disappearance Commissions and the Sharvananda Commission collectively signal the potential of the transitional Justice process in addressing the priorities of victimized populations in the challenging political context in which we live. For it is victim centrality which will guide the destinies and mandate of a credible mechanism. (Par.1038)

The work of the previous Commissions and the lack of progress on the implementation of their recommendations have created a credibility gap and therefore it is crucial for strengthening human



rights protection. It is hoped that the truth seeking mechanisms to be established will be able to vindicate the trust to be reposed in such a mechanism. (Par.1042)

Undoubtedly, the Truth and Reconciliation Commission can provide the historical record of serious violations of human rights and international humanitarian law and influence the institutional reforms in law and practice to promote and protect human rights. Critically they assist in ensuring accountability for serious violations which is fundamental to prevent potential violations, promote compliance with the law and provide avenues for justice and redress for victims. (Par.1043)

POWERS OF PROPOSED FOR THE TRC.

There is an accepted range of powers and mandates within which different commissions are enjoyed to function. The mandates have to be broad and flexible. The Commissioners must be given the subpoena (The power to summon anyone and even strong search and see the powers.) The proposed truth seeking commission should list out in a schedule specific events that were directed to be investigated by the previous commissions so that the truth seeking Commission is empowered to prioritize its investigations and report around the facts and patterns of these cases inclusive of the emblematic cases. (Par.1046)

The commission must be empowered to hold public settings openly and transparently. This will include televised proceedings so that the truth seeking mechanism gains the confidence of the people. (Par.1047) The types of abuses to be investigated will include infringement of IHL and IHRL disappearances possible transfer etc. (Par.1048)

Before the truth seeking Commission is established through the legislative instrument there has to be the engagement of the public, victim communities, politicians and non-government organizations. Such a consultative process becomes necessary as the pre-legislative process progresses. (Par.1049)

Since any transitional justice mechanism has to be victim centric Justice these witnesses must be consulted first and they rank in priority regarding any consultation that should take place before the GOSL proceeds to establish the proposed truth seeking mechanism by way of a statute. (Par.1050)

SEGMENTS TO BE CONSULTED.

A sensitization program is an imperative requirement to be undertaken by suitably qualified expert personnel on the proposed truth seeking mechanism. Apart from the victims, the purple people in the northeast must also be consulted inclusive of the Sinhalese and Muslim population in the North & East. There must be a questionnaire that must be framed dealing



with reconciliation accountability criminal justice compensation/reparation programs and missing persons the following constituency must be consulted:

1. Security Forces personal police.
2. Families of the missing.
3. Victims and Civil Society groups representing victims.
4. War widows.
5. Civil servants.
6. Religious leaders.
7. Civil society personnel.
8. Political leaders
9. Members of the political parties.
10. Members of parliament.
11. Youth.
12. Rehabilitated LTTE cadre.
13. The conflict affected including the disabled, injured and people in areas that had been under LTTE.
14. Local level politicians namely members of Provincial Councils, Municipal Councils etc
15. Women and children
16. General public .
17. National Human Rights Commission
18. Professional organisations
19. Media personnel
20. Trade union personnel
21. Academics (Par.1050)

In order to ensure building up trust relations as an integral component of faith and restoration a wide consultation of process must be conducted with the victim survivors and other stakeholders in order to encourage and enable them to progress towards activity engaging in the truth seeking process. (Par.1054)

Being pluralistic and inclusive the membership of the commission must include persons skilled in specific areas of expertise that will be useful and should ensure a fair representation of various views and backgrounds as well as gender the composition must be multi-ethnic and must be drawn from Sinhala, Tamil, Muslim and Burgher communities. (Par.1057)

GENDER BALANCE

In the proposed TRC the participation of women as Commissioners either from the wrong and violated constancy or a representative of a group of such women is strongly recommended. Women feel comfortable to give vent their woes in the presence of women flock and therefore this recommendation has to be taken serious note of. Further, the participation of women Commissioners will promote their participation in peacebuilding conflict prevention, conflict resolution and decision making. (Par.1063)

Since the cases we have prioritized for investigation by the Truth Commission raise questions of law on questions of fact on accountability issues, and evaluation of these issues requires a trained illegal mind and therefore this necessary that lawyers find themselves as members of the TRC. Legal personalities learned in IHL and IHRL may be included in the composition. (Par.1064)



The facilitative process of the legislation must be utilized by the proposed truth seeking mechanism not only to afford protection to Witnesses and Victims but also to provide an enabling environment such as evidence to be given from remote locations. (Par.1067)

In this context PCOI recalls what the ICG, Human Rights Watch and Amnesty International had said in reference to the prospect of a witness protection program becoming available in Sri Lanka. (Par.1068)

INDEPENDENCE OF COMMISSIONERS.

Independence can generally be achieved if the following standards and principles are accepted.

State agencies have a duty to respect the independence of the commission. They must assist and protect the commission to ensure its impartiality, dignity, accessibility and effectiveness.

An efficient, competent, and impartial inquiry depends on the financial security and organization of professionalism of a Commission.

Commissioners and their staff should not be perceived as being biased to a political faction. This includes the second, that from the government agencies.

Commissioners should work for the commission on a full-time basis.

The commission should have sufficient funds to enable it to perform functions to the highest standards and participate in determining its resourcing.

The commission should have properly trained staff and adequate facilities and be fair, accessible and responsive. (Par.1070)

VIOLATIONS OF IHL AND IHRL.

In the analysis of the evidence regarding the last phase of the war there exists divergence between LLRC and the PC on the one hand and the POE and OISL on the other hand as regards the occurrence of violations of IHL and IHRL. As a credible truth seeking mechanism is about to take control of the process and international support should be extended to Sri Lanka to conduct a credible investigation via the truth seeking mechanism whilst such a mechanism continues to provide an avenue of prosecution if sufficient evidence is obtained. (Par.1072)

This is not for us to judge where this evidence will lead us and that would be a conclusive full independent inquiry that Sri Lanka must ensure in a domestic setting and with all four pillars of transitional Justice intermingled and intervened inextricably for the long term peace and harmony. It is our fervent hope that only a TRC structured on both restorative and retributive



models will be held for this country the elusive piece we all Sri Lankans have yearned for. (Par.1073)

An inclusive political solution that addresses the underlying causes of the conflict will further contribute to the advancement of peace and Justice Just peace. it is open to the TRC to make its recommendation on this issue such as devolution will lead this country to the unification of its people. (Par.1074)

LIMITED ROLE FOR INTERNATIONAL EXPERTS.

Responsibility for a successful commission does not lie slowly in the hands of the GOSL. There are several important roles for the International Community, not only in oversight where needed in the form of observation of the proceedings but also in providing technical support and institutional capacity. The UNHRC resolutions have pledged support for truth seeking mechanism in Sri Lanka and it is recommended that Sri Lanka submits a direct request to the UNHRC to support the initiative in the country. (Par.1075)

Sri Lanka must immediately proceed to appoint 203 International technical advice to assist the GOSL in fast-tracking the structure, mechanism, and process of the truth seeking mechanism. (Par.1076)

The statutory role of both domestic and international experts to the proposed Truth and Reconciliation Commission must be restricted to proffer advice only on legal and technical matters and in no way would they be involved in investigation or decision making. Such statutory requirements must be clearly demarcated in the agreements that would be reached with experts. This will obviate the difficulties that UC and IIGEF encountered in the conduct of the Investigations. (Par.1077)

The GOSL must create a high-powered Transitional Justice International Advisory Council to demonstrate its good faith and it is taking the initiative seriously. Since there is an ongoing consultation, this is likely to take some months to garner the support of the public and victim community and it's ready to take off. In the interim it is essential that the international support at Sri Lanka needs is secured through the International Advisory Council on Transitional Justice. (Par.1078)

FOLLOW UP ON THE TRC.

The TRC would be a statutory body with the power to issue recommendations among affected populations. The recommendations made by the Truth Commission would involve criminal



prosecution of systematic crimes, reparations for the victims or reform to strengthen the respect for women's rights. (Par.1079)

1080 The Final report of TRC must be tabled in Parliament and made available to the public. (Par. 1080)

The recommendations of the previous commissions have not been satisfactorily implemented. It is for this reason that we recommend that all these cases that we set down below must be investigated and inquired into as a priority by the proposed Truth and Reconciliation Commission. (Par.1085)

CASES TO BE PRIORITIZED.

The cases as found by the UC, LLRC and PC as potential violations are given below and it is the recommendation of this PCOI that they should be incorporated in a schedule to the Act creating the proposed truth seeking mechanism for the propose according to priority on the cases. (Par.1087)

1. Trinco Five case (the Udalagama Commission)
2. The killing of 17 ACF workers (the Udalagama Commission)
3. Investigation into death and inquiry to civilians and prosecution of the wrongdoers upon evidence.
4. Though the LLRC said that it is immaterial as to which party was culpable in the shelling of hospitals and recommended only to grant of redress to those affected after inquiry the PCOI recommends an investigation of the above incidence afresh by the proposed to seeking mechanism as the PC had recommended a Judge led inquiry into this matter.
5. An examination of the humanitarian issue of medical supplies to civilians in conflict areas during the final days of the war considering all relevant factors upon which the surprise could be assessed.
6. An examination and investigation into specific areas of surrender to SLA. If there is evidence of enforced disappearances after surrendering the official custody the PCOI recommends that offenders have to be prosecuted.
7. Investigation of reported cases of deliberate attacks on civilians and upon the revelation of evidence appropriate legal action must be taken to prosecute offenders such reported cases are referred to in paragraphs 4.359 of the LLRC report.
8. Investigation to determine the velocity of allegations in Channel 4 documentary video footage. the PCOI's observations regarding PC's discussion on the Channel 4 video



footage are found at paragraphs 311 to 315 of this final report. PCOI's observations regarding the PC's discussion on Channel 4 video footage are found at 466- 472 of this final report.

DEATHS OF ISAI PRIYA, COLONEL RAMESH AND BALACHANDRAN PRABHAKARAN
As a result, the PCOI recommends the alleged killing of Isaipriya, Colonel Ramesh and Balachandran Prabhakaran need to be investigated by the proposed truth seeking mechanism as these cases so specially referred by both LLRC and PC in their final reports. (Par. 1088)

1092 There were witnesses from Jaffna, Kilinochchi, Kattankudy and Batticaloa who have testified before PCOI as to the circumstances under which they lost their loved ones due to abductions or killings at the hands of security forces or the LTTE. There were allegations made by witnesses in Jaffna of sexual violations and they also have to be investigated by the proposed truth seeking mechanism. (Par.1092)

1095 It was brought to the notice of this PC I that the OMP has sought instructions and advice from the Attorney General on some urgent matters such as exhumations which are the subject matter of inquiries in Court. The Court cases are likely to be delayed if there is no expeditious tender of advice. It is recommended that a special unit is established in the attorney general's department to deal with OMP issues.

COMMAND RESPONSIBILITY OF VIOLATIONS

The Udalagama Commission whilst recommending further investigation of the emblematic cases also put forward recommendations that command responsibility should form part of the law of this country. The Paramagama Commission too discusses this aspect in the context of non-International armed conflict. In the case of so-called wild flag killings of LTTE leaders such as Balasingham Nadesan, the head of the political wing of the LTTE, Seevarathnam Pulidevan, the LTTE's head of the Peace Secretariat and others the Paramagama Commission was of the view as found by the LLRC that these are matters to be investigated in terms of specific instances of deliberate attacks on civilians. In paragraph 46 on the PCR the doctrine of command and superior responsibility is discussed and it is to the effect that military and civilian superior can be held responsible for the crimes committed by their subordinates if they knew or had reason to know that the subordinates were about to commit or had committed or crimes and the superior failed to prevent such a crimes (Par.1123) This basis of liability of worthy consideration by the TRC if cogent evidence emerges to establish a chain of liability in terms of procedures and substance international law. (Par. 1124)



THE POSSIBLE FATE OF THE RECOMMENDATIONS

The fate of recommendations of several previous commissions appointed by the GOSL to look into human rights violations during the last phase of the war as well as disappearances of 80s and 90s are well known. The most critical recommendations are still gathering dust.

The PVOI provides a striking example of GOSL negligence of such collision findings.

“After having heard the testimony of Maxwell Paranagam, who headed the Paranagama Commission the PCOI was quick to point out in its second interim report, that the notes of investigation that he said emerged out of investigations carried out by his inspectors were still lying unattended at the department of National Archives and that it must be turned over to the Attorney General's office. It appeared that this recommendation has still not been acted upon. In these circumstances, the PCOI recommends that the Attorney General takes over these notes of investigation under a special unit and I ascertain whether the notes of investigation collected by the Paranagama Commission disclosed evidence of commission of offenses such as disappearances. If so the material could be used to commence investigation and prosecution.” (Par. 1132)

The second Interim Report was handed over to the then president Gotabhaya Rajapaksa on 18 February 2022. For two years, the previously mentioned recommendation of the PCOI too was gathering dust like notes of the Paranagama Commission.

This is a bad omen. As usual this report also may be only for foreign consumption as most of the recommendations of the previous Commissions of Inquiry appointed by the GOSL.

The End.