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UNHRC Resolution and Sri Lanka's 'Domestic Mechanism': Accountability for Human Rights Violations

Following the recent United Nations Human Rights Council (UNHRC) resolution on Sri Lanka, the Sirisena Government has embarked on a process of establishing a 'domestic mechanism'. It is imperative to set up this mechanism without further delay to address both domestic and international concerns over the alleged human rights violations in the country.

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In the context of positive signals on accountability and reconciliation by the newly elected government in January 2015, the United Nations Human Rights Council (UNHRC) decided to defer consideration of the report mandated by Human Rights Council Resolution 25/1, until the 30th session in September 2015.

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Addressing the 30th UNHRC session on 30 September 2015, the UN High Commissioner for Human Rights Zeid Ra'ad Al Hussein justified the recommendation of the OISL [Office of the High Commissioner for Human Rights (OHCHR) Investigation on Sri Lanka] report i.e. the recommendation to establish a *hybrid special court*, “integrating international judges, prosecutors, lawyers and investigators” to address the human rights violations that occurred as a result of the Sri Lankan civil war.² He further, emphasised that crimes of such ‘breadth and magnitude’ as documented in the OISL report cannot be examined by local judicial systems and emphasised the need for international participation in such a mechanism in order to fully address the accountability concerns.³

Though the renewed positive engagement by the new Government with OHCHR and the UN human rights mechanisms was acknowledged by Mr Zeid, he pointed out that the following issues⁴ *inter alia* required immediate attention:

- I. Surveillance and interference that continue in the North and East, including harassment and intimidation by military and intelligence services.
- II. The Government has not yet clarified the number of detainees held under the Prevention of Terrorism Act (PTA) and emergency regulations. Local civil society sources report 19 people arrested, 12 in detention and 14 cases of torture since January to August 2015.
- III. No prosecutions conducted over June 2014 attacks by the Bodu Bala Sena Buddhist Group on the Muslim community in Aluthgama.

² ‘SL Judicial system isn’t equipped to probe war crimes: Zeid’, *The Daily Mirror*, 30 September 2015. Available at <http://www.dailymirror.lk/89441/sl-judicial-system-isn-t-equipped-to-probe-war-crimes-zeid>. See also the Report of the OHCHR Investigation on Sri Lanka, read with the Report of the Office of the UN High Commissioner for Human Rights on Promoting Reconciliation, Accountability and Human Rights in Sri Lanka, Available at <http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session30/Pages/ListReports.aspx>

³ Ibid

⁴ Ibid

Nevertheless, the High Commissioner has commended the measures that have been so far adopted by the Sri Lankan Government. Some of these promising developments towards ensuring accountability and reconciliation are: the special “Declaration of Peace” in three languages, expressing sympathy and regret for all victims of the armed conflict issued by the Government on Independence Day, the establishment of the Office of National Unity and Reconciliation headed by former President Chandrika Kumaratunga, the conviction for the murder of eight Tamil civilians in Mirusuvil in 2000, the arrest of three navy personnel and a former police officer in relation to the assassination of parliamentarian Nadarajah Raviraj in November 2006,⁵ the arrest of several military personnel over the disappearance of the journalist Pradeep Ekneligoda, the release of some private lands from military occupation.

However, a number of criminal cases before courts is yet to be settled. The killing of five students on the Trincomalee beach in January 2006 and that of the seventeen humanitarian workers of the French NGO ‘Action Contre la Faim’ in Muttur in August 2006⁶ are still pending resolution.

The key findings of the report include *inter alia*:⁷

1. Numerous unlawful killings between 2002 and 2011, allegedly by both sides
2. Enforced disappearances affecting tens of thousands over decades
3. The "brutal use of torture" by security forces, in particular during the immediate aftermath of the conflict
4. Extensive sexual violence against detainees by the security forces

⁵ The Full Statement of UN Human Rights Chief. Available at ‘<http://www.dailymirror.lk/89441/sl-judicial-system-isn-t-equipped-to-probe-war-crimes-zeid>’. See also the Report of the OHCHR Investigation on Sri Lanka, read with the Report of the Office of the UN High Commissioner for Human Rights on Promoting Reconciliation, Accountability and Human Rights in Sri Lanka, Available at <http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session30/Pages/ListReports.aspx>

⁶ Ibid

⁷ ‘UN Human Rights Council urges Sri Lanka War crimes court’, BBC, 16 September 2016. Available at <http://www.bbc.com/news/world-asia-34266471>. The Full Statement of UN Human Rights Chief. Available at ‘<http://www.dailymirror.lk/89441/sl-judicial-system-isn-t-equipped-to-probe-war-crimes-zeid>’. See also the Report of the OHCHR Investigation on Sri Lanka, read with the Report of the Office of the UN High Commissioner for Human Rights on Promoting Reconciliation, Accountability and Human Rights in Sri Lanka, Available at <http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session30/Pages/ListReports.aspx>

5. Forced recruitment of adults and children by the rebels, particularly towards the end of the conflict
6. Extrajudicial executions of identified Liberation Tigers of Tamil Eelam (LTTE) cadres and unidentified individuals
7. Arbitrary arrest and detention by government security forces and abductions by paramilitary organisations.
8. Repeated shelling by Government forces in densely populated 'No Fire Zones', and the LTTE forcing civilians to remain within these areas and using them as human shields.
9. Almost 300,000 internally displaced persons being deprived of their liberties in camps for periods beyond what is permissible under international law.

Accordingly, both the Government of Sri Lanka and the LTTE failed to comply with the basic principles of international humanitarian law. The report indicates that pursuant to “the number of allegations, their gravity and recurrence, the similarities in their *modus operandi* and their consistent pattern of conduct”, all point to *system crimes* which cannot be regarded as ordinary crimes.⁸ If such crimes are established in a court of law, they may amount to international crimes which are of extreme concern to the international community.

Therefore, investigations of such crimes require a special mechanism; a mechanism that is not yet available under the domestic legal system. Sri Lanka lacks a domestic legal framework to adequately deal with international crimes of this magnitude. For example, under the current legal system in Sri Lanka, such crimes can only be dealt with under regular criminal law offences such as 'murder'. Most importantly, the independence and integrity of key institutions are questionable as they have been corrupted by decades of impunity. The international community is also concerned about the 'protectionist attitude' adopted by the Sri Lankan government towards security forces⁹.

⁸ See *supra* note 4

⁹ Rasika Jayakody, 'Cleaning up Augean Stables', the *Daily News*, 1 October 2015. Available at <http://www.dailynews.lk/?q=features/cleaning-augean-stables>

The Domestic Challenge

During the UNHRC session in Geneva, the Sirisena Government faced a dilemma; having to deal with the international community and protecting itself politically within the country. The government is aware of the driving forces of ethnic nationalism prevalent in the country. They were the very forces that stirred up political upheaval when the Indo-Lanka Peace Accord was signed in 1987, and also caused the downfall of the United National Party (UNP) government headed by Prime Minister Ranil Wickremesinghe in 2004 when he attempted peace negotiations with the LTTE through Norwegian intermediaries.¹⁰

This led the Sri Lankan delegation to hard-bargain over ‘hybrid court’ on the side-lines of the 30th session of the UNHRC in Geneva. The Sri Lankan delegation had to convince that the Sri Lankan judiciary was undergoing reforms especially in view of the 19th Amendment.¹¹ They emphasised the capacity, transparency and impartiality of Sri Lankan judges. Sri Lanka also decided to co-sponsor the US-initiated resolution presented to the 30th session of the UNHRC.¹² This hard bargaining resulted in UNHRC members arriving at a compromise. Thus, the resolution of the UNHRC affirms “the importance of participation in a *Sri Lankan judicial mechanism*, including the Special Counsel’s Office, of Commonwealth and other foreign judges, defence lawyers and authorized prosecutors and investigators”.¹³ This replaces the ‘hybrid court’ referred to in the UN Human Rights High Commissioner’s Report. The replacement is not only a significant victory for the Sirisena Government but it also gives much credibility to the government in appealing to the national sentiment back home.

¹⁰ Jehan Perera, ‘Taking Reconciliation Process Forward After Co-sponsored Resolution’, the *Colombo Telegraph*, 28 September 2015. Available at <https://www.colombotelegraph.com/index.php/taking-reconciliation-process-forward-after-co-sponsored-resolution/>

¹¹ See Jayakody, *supra note 8*

¹² Ibid

¹³ See Perera, *supra note 9*

The Tamil National Alliance (TNA), the main Tamil political party¹⁴ and the Sri Lanka Muslim Congress (SLMC)¹⁵ also welcomed the resolution. However, the Global Tamil Forum (GTF), the London-based Tamil diaspora organisation has ‘cautiously’ welcomed the resolution¹⁶.

Government Initiatives

The government had introduced a mechanism to address the issues of the armed conflict. This fourfold system includes a Commission for Truth, Justice, Reconciliation and Non-recurrence,¹⁷ an Office of Missing Persons, a judicial mechanism with Special Counsel to be set by statute and an Office of Reparations¹⁸.

Mr Wickremesinghe has explained the mechanism and specific features of the investigation. The South African-style Truth Commission will include a ‘Compassionate Council’ which consists of representatives of religious dignitaries.¹⁹ This move had been appreciated by the international community.²⁰ The Missing Persons’ Office will be a permanent institute looking into relevant complaints, and the Special Counsel’s Office will decide on the investigations that will directly be sent to the judiciary or will be dealt with by the Truth Commission. The Special Counsel may obtain assistance of international lawyers, and foreign prosecutors *may* join as the need arises.²¹ Mr Wickremesinghe also highlighted the importance of ensuring an expeditious process where

¹⁴ ‘TNA hopes UNHRC Resolution will mark a new chapter in Sri Lanka’s quest for Reconciliation’, *Colombo Telegraph*, 4 October 2015. Available at <https://www.colombotelegraph.com/index.php/tna-hopes-unhrc-resolution-will-mark-a-new-chapter-in-sri-lankas-quest-for-reconciliation/>

¹⁵ ‘SLMC welcomes UNHRC Resolution’, *Daily News*, 12 October 2015. Available at <http://www.dailynews.lk/?q=local/slmc-welcomes-unhrc-resolution>

¹⁶ ‘Global Tamil Forum cautiously welcome the UNHRC Resolution’, Global Tamil Forum, 26 September 2015. Available at <http://www.globaltamilforum.org/media/press-releases/global-tamil-forum-cautiously-welcomes-the-draft-resolution-tabled-at-the-unhrc.aspx>

¹⁷ ‘Sri Lanka to set up a South African – style Truth and Reconciliation Commission’, *The Guardian*, 15 September 2015. Available at <http://www.theguardian.com/world/2015/sep/15/sri-lanka-to-set-up-a-south-africa-style-truth-and-reconciliation-commission>

¹⁸ See Perera, *supra note 9*

¹⁹ ‘We want to know the Truth-Ranil Wickremesinghe’, the *Island News Desk*, 29 September 2015. Available at <http://www.lankaweb.com/news/items/2015/09/29/pmwe-want-to-know-the-truth/>

²⁰ Ibid

²¹ See Jayakody, *supra note 8*

there will be day-to-day sittings with only one appeal against orders and that the Supreme Court will decide whether foreign defence counsel will be permitted.²²

International Involvement

It is noteworthy that there is no clear understanding as to how the mechanism will be implemented and to what extent international involvement will actually take place. The question remains as to whether it will address the people's demands and most importantly, the demands of the aggrieved Tamil people.

One cannot entirely rule out the possibility of a domestic mechanism affecting the core principles of natural justice; *nemo iudex in causa sua* (no one should be the judge of his own cause) and *audi alteram partem* (listen to the other party) and allow a fair hearing. The primordial issue is whether a country can investigate into its own human rights violations and whether it could ensure a fair trial.

On the other hand, despite the replacement of the term 'hybrid', the Government of Sri Lanka received wide criticisms, especially from the Sinhalese that this an opening for international interventions to the detriment of Sri Lanka's sovereignty. Mr Wickremesinghe clearly stated his government's stance – "Sri Lanka's sovereignty is guaranteed by formulating a domestic mechanism to find out the truth about the war, within the provisions of the Constitution".²³

Yet, Sri Lanka does not have an adequate legal framework and jurisprudence to ensure a credible mechanism to look into the alleged grave human rights violations. Moreover, Sri Lanka is known to have fenced off democracy and human rights in the past.

²² Ibid

²³ Wimalanath Weeraratne, "Challenges before the Truth and Reconciliation Commission in Sri Lanka", *The Sunday Leader*, Available at <http://www.thesundayleader.lk/2015/10/11/challenges-before-the-truth-and-reconciliation-commission-in-sri-lanka/>

Sri Lanka is not a signatory to the Rome Statute²⁴ and, therefore, cannot be tried in the International Criminal Court (ICC) except under the unlikely circumstance where the UN Security Council would refer Sri Lanka to the ICC. This would be an unlikely scenario because China and Russia, allies of Sri Lanka, could veto such resolution in the Security Council.

Yet, the Government of Sri Lanka should also take note that Sri Lanka is a signatory to the Geneva Conventions which prohibit war crimes, and that Sri Lanka ratified the International Covenant on Civil and Political Rights (ICCPR) and acceded to its first optional protocol which recognises the competence of the UN Human Rights Council to consider individual complaints against the violation of rights under the ICCPR. Though Sri Lanka has the right to be free from external interferences under the doctrine of sovereignty of states in international law, Sri Lanka has also agreed to abide by the international standards by virtue of ratifying the aforementioned international conventions.

In this backdrop, a possible remedial measure that would both be credible and that would fall within the frontiers of the island's sovereignty, is setting up a Special High Court as recommended by the Maxwell Paranagama Commission²⁵ Report.²⁶ As Sri Lanka is awaiting a new constitution, it would be necessary to promulgate a Special High Court that would try war crimes and International Humanitarian Law violations.

²⁴ The ICC is established under the Rome Statute. 'Among other things, it sets out the crimes falling within the jurisdiction of the ICC, the rules of procedure and the mechanisms for States to cooperate with the ICC. The countries which have accepted these rules are known as States Parties and are represented in the Assembly of States Parties' - https://www.icc.cpi.int/en_menus/icc/about%20the%20court/frequently%20asked%20questions/Pages/3.aspx

²⁵ The Presidential Commission to Investigate into Complaints Regarding Missing Persons headed by Retired High Court Judge Maxwell Paranagama, appointed on 15 August 2013 (First Mandate) which was further expanded in July 2014 (Second Mandate)

²⁶ Rasika Jayakody, 'Waiting in a Quagmire', *Daily News*, 6 November 2015. Available at http://www.dailynews.lk/features/waitingquagmire#sthash.pgtLBZts.gbpl&st_refDomain=www.facebook.com&st_refQuery=

Conclusion

The Government of Sri Lanka can no longer remain unresponsive to the international probe on Sri Lanka's human rights violations. Sri Lanka is required to provide an oral update at the UNHRC's 32nd session (likely in June 2016) and submit a comprehensive document by March 2017 at the UNHRC's 34th session²⁷.

The Tamil people in the country voted for a regime change in January presidential elections and reaffirmed it in August parliamentary elections, expecting the government to resolve the problems of the past. With this wide public mandate, the government is now required to take action without further delay as delay can only lead to frustration and severe mistrust towards the government. The government's policy declarations alone will not suffice without meaningful implementation and winning back the trust and confidence of the Tamil people in the country.

Although implementation measures are at a stage which requires further clarification and public awareness, there is hope that this resolution will initiate a promising course for reconciliation, to construct a conducive atmosphere for all ethnicities in the island. Reconciliation will nevertheless stand impossible without an effective system of devolution of powers; a core concern and a challenge that the architects of the new constitution will have to address in the coming year.

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²⁷ T Ramakrishnan, "UN Body Asks Sri Lanka to probe 'rights abuses'", *The Hindu*, 2 October 2015. Available at <http://www.thehindu.com/news/international/unhrc-adopts-consensus-resolution-on-sri-lanka/article7712259.ece>