

Addressing Sri Lanka's Retreat on Justice

Third Cycle, Twenty-Eighth Session

Together Against Genocide, March 2017

ABOUT TOGETHER AGAINST GENOCIDE (TAG)

Together Against Gencode (TAG) is an international, non-governmental human rights organisation resolved to end the impunity of those responsible for international crimes and to assist those who have fallen victim to them. TAG provides expertise to governments and organisations, both foreign and domestic, in their efforts to seek justice for the victims of international crimes.

TAG's mission statement is on its website at <http://www.tamilsagainstgenocide.org/AboutTAG.aspx>.

More information can be obtained on the website www.tamilsagainstgenocide.org or by emailing TAG at info@tamilsagainstgenocide.org

Following English incorporation in 2012, all non-US activities were transferred to the UK. In June 2015, Tamils Against Genocide (Europe) was renamed to **Together Against Genocide**. The US organisation will continue its US war crimes litigation efforts under its original name.

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Executive Summary

1. Sri Lanka continues to violate its obligations under both international Human Rights instruments and international humanitarian law. Unfortunately, Sri Lanka is not a safe place for witnesses willing to speak up against the Government of Sri Lanka (GoSL) or for victims seeking justice. The Sri Lankan judiciary is not yet capable of justly administering a war crimes tribunal to the standard expected by victims and the international community. It is recommended that Sri Lanka ratifies the Rome Statute of the International Criminal Court, as recommended by the OHCHR Investigation on Sri Lanka (OISL report).

Introduction

2. Since September 2015, Sri Lanka's Foreign Minister Mangala Samaraweera has undertaken a vigorous international campaign including bi-lateral and public advocacy, propagating multi-ethnic, multi-religious and tolerant rhetoric abroad. This has been simultaneously accompanied by increasing engagement with Sinhala-Buddhist supremacists at home. These international pronouncements have paid dividends in signals of revival of economic and military relationships that had been side-lined pending the promised investigation into the crimes against humanity committed by Sri Lanka's security forces¹. In our own assessment of progress on Resolution 30-1,² we note that Sri Lanka has only made good progress on 3 of 33 recommendations of the OISL report. To date, there has been no substantive implementation of Resolution 30-1 beyond a planning exercise. The existence of statements made by Sri Lanka's senior political leadership, including outright denial of their commitment to implementing in full Sri Lanka's own pledges to the UN Human Rights Council had led a lack of confidence in Sri Lanka working towards preventing future mass atrocities.
3. This paper refers to our evidence of the deliberate targeting of victims and witnesses to the atrocities committed in the past,³ our observations regarding the Sri Lankan Judiciary⁴, and recommends that Sri Lanka ratifies the Rome Statute.

Continued targeting of victims and witnesses

4. The current UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka came into effect in December 2012⁵. It recognises certain 'Witnesses

¹ <http://www.pacom.mil/Media/News/tabid/5693/Article/706647/blue-ridge-arrives-in-sri-lanka-forging-new-ties.aspx>

² <http://www.tamilsagainstgenocide.org/Data/Docs/2017/TAG-Resolution-30-1-Progress-March-2017.pdf>

³ As per our report, 'Sri Lanka's silenced witnesses and victims', dated 16 September 2015, <http://www.tamilsagainstgenocide.org/read.aspx?storyid=163>

⁴ Also detailed in our briefing note, 'Sri Lanka's Judges: Unfit for International Crimes', dated 5 May 2016.

⁵ < <http://www.refworld.org/pdfid/50d1a08e2.pdf> > accessed 30 August 2015

of Human Rights Violations' and 'Victims of Human Rights Seeking Justice'⁶ as a category of persons at risk in Sri Lanka. These guidelines particularly recognise Tamil ethnicity as a factor in determining which victims are at risk.

5. The Court of Appeal in England and Wales confirmed that witnesses already known to the GoSL for giving statements to the LLRC are at a real risk of persecution.⁷ Recent cases have extended this, to find even those who have been willing to testify more generally were in danger of targeting by the GoSL. The current country guidance in force within the UK recognised that any detention of Tamils by Sri Lankan security services entails the risk of torture.
6. We are concerned that witnesses, victims and campaigners for justice continue to be arrested and targeted under the new government. Balandran Jeyakumary, a prominent Tamil campaigner for the disappeared, was re-arrested in September 2015 on what are alleged to be trumped up charges.⁸ The Sri Lankan police have also been complicit in attempting to stop a civil signature campaign calling for an international mechanism to investigate the war crimes and crimes against humanity in the last stages of the war.⁹ The Prevention of Terrorism Act remains one of Sri Lanka's most controversial laws, being almost universally condemned not only for being inconsistent with contemporary human rights standards, but also for encouraging the pervasive violation of fundamental rights otherwise protected by the Sri Lankan constitution.¹⁰ More than 20 people have been arrested under the Prevention of Terrorism Act since the January 2015 and the election of the new government.¹¹ In September 2015, The International Truth and Justice Project published details of a further 11 cases of torture and sexual abuse in detention after the new government came into power.¹²

Concerns over the judiciary in Sri Lanka

7. Recommendation 20 of the OISL report asked GoSL to adopt legislation establishing an ad hoc special court, using international judges, mandated to try war crimes and crimes against humanity.¹³ However, GoSL has rejected the use of foreign judges in this tribunal, instead outlining its preference for using domestic judges.¹⁴ We maintain our view that the Sri Lankan Judiciary lack independence, judicial competence and fail to abide by the international protection of fundamental rights and freedoms.
8. TAG has reported extensively on the lack of independence between the GoSL and the judiciary. Our report from 2012¹⁵ makes clear reference to the excessive power and influence of the Chief Justice and

⁶ At section A.5

⁷ GJ and Others (post-civil war returnees_ Sri Lanka CG [2013] UKUT

⁸ <<http://www.tamilguardian.com/article.asp?articleid=15774>> accessed 30 August 2015

⁹ <<http://tamilguardian.com/article.asp?articleid=15831>> accessed 30 August 2015

¹⁰ See critique at <<http://www.cpalanka.org/the-need-to-repeal-and-replace-the-prevention-of-terrorism-act-ptt/>> accessed 30 August 2015

¹¹ <<http://www.tamilguardian.com/article.asp?articleid=15868>> accessed 30 August 2015

¹² Torture and Sexual Abuse Under the New Government in Sri Lanka, International Truth and Justice Project, September 2015

¹³ <http://www.ohchr.org/EN/HRBodies/HRC/Pages/OISL.aspx>

¹⁴ <http://www.reuters.com/article/us-sri-lanka-un-idUSKCN0VI1O7>

¹⁵ 'Sri Lanka's White Vans: Dual Criminality of the Sri Lankan State and the Rajapaksa Administration', dated 18 July 2012 <http://www.tamilsagainstgenocide.org/read.aspx?storyid=120>

the great deference the judges of the Court of Appeal and Supreme Court have towards political considerations.

9. The court martial system and the trial of Sarath Fonseka demonstrate this deference. The Supreme Court upheld the guilty verdict of the Court Martial bestowed on Fonseka for corruption in military procurement. His arrest, trial and conviction all occurred upon his Presidential election bid against Mahinda Rajapaksa in 2010. The judicial system was perceived as susceptible to political pressure in the administration of justice.
10. The judiciary do not have the practical experience in necessary to provide an impartial analysis of war crimes. We note that the Sri Lankan judiciary often err in correctly applying legal principals inherited from the Roman-Dutch and English common laws. A sound knowledge and experience of international criminal law is a pre-requisite for any judge involved in a war crimes tribunal. Using judges that are incapable of understanding and applying principles correctly would be dangerous for the administration of justice as it increases the risk of victims seeking appeals and, thereby, poses obstacles for ending impunity and seeking redress for victims.

Conclusion

11. We are deeply disappointed at the lack of progress on Justice for crimes against humanity, including genocide, in Sri Lanka almost 8 years after the end of the war, and 2 years after Sri Lanka's new government made commitments of reform to the UN Human Rights Council.
12. Sri Lanka lacks an effective and appropriate mechanism for the investigation and prosecution of war crimes, crimes against humanity and genocide committed against the Tamil people by the Sri Lankan State.
13. While domestic Truth and Reconciliation Commissions may have been suitable in other contexts, due to the continued relevance of the political, social and cultural climate in Sri Lanka and the prevalence of denial, it is submitted that an international judicial mechanism would be more appropriate. For the same reasons, neither a domestic mechanism nor a hybrid mechanism in the image of the Extraordinary Chambers in the Courts of Cambodia will adequately address the atrocities committed against the Tamil people, rather a fully independent internationally operated tribunal is required. While it is also open to the UNSC, under Chapter VII of the UN Charter, to establish an ad-hoc tribunal in the image of the International Criminal Tribunals for Yugoslavia 1993 and Rwanda 1994, it is important to note that these were established before the International Criminal Court (ICC) came into being under the Rome Statute¹⁶ and arguably the presence of the functioning ICC negates the need for such special ad-hoc tribunals in the future.
14. The ICC currently has jurisdiction over three crimes¹⁷; genocide (Article 6), crimes against humanity (Article 7), and war crimes (Article 8).

¹⁶ Rome Statute of the ICC, available at: https://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf

¹⁷ As stated in Article 5 (2), the court will have jurisdiction over the crime of aggression once it has been defined and an amendment made to the Statute.

15. It would be desirable for the Sri Lankan State itself to ratify the Rome Statute and thus come under the jurisdiction of the Court, allowing itself to refer the situation to the Prosecutor. This would send a strong message that the Sri Lankan State wishes to end impunity and make those responsible accountable. However, failing ratification it is still possible to trigger the ICC's jurisdiction over the crimes committed in Sri Lanka. Either through a referral by the United Nations Security Council under Chapter VII of the UN Charter to the International Criminal Court (ICC), as it has done in relation to suspected crimes in Darfur, Sudan¹⁸. Or through the Chief Prosecutor Fatou Bensouda launching an investigation of her own initiative - a so called 'proposito motu' investigation as has been done in relation to Kenya¹⁹ and now Georgia²⁰.

16. Pursuant to Article 15 in order to launch a proposito motu investigation, the Chief Prosecutor will analyse the seriousness of information which she has received, and may seek supporting evidence from UN organs, States, NGOs, other reliable source and may also receive oral or written testimony at the Court. If following the analysis, she finds there to be a reasonable basis to proceed with an investigation, she will submit the request to the Pre- Trial Chamber for authorisation. If the Pre- Trial Chambers concurs in relation to the reasonable basis, it will authorise the commencement of proceedings. If either the Prosecutor or the Trial- Chamber find there to be lacking reasonable basis the Chief Prosecutor must inform those who provided the information, however, initial rejection does not preclude resubmission based on new material and evidence.

17. While ratification by the Sri Lankan State itself of the Rome Statute would be symbolically significant, the other two avenues for triggering the Court's jurisdiction are equally important for reaching the ultimate goal of bringing those responsible to account. Especially in relation to the investigations proposito motu, civil society has a vital role to play in compiling all relevant information about the atrocities into a compelling narrative and bringing it to the attention of the Chief Prosecutor.

Recommendations to the UN

18. That the Special Rapporteur on Extrajudicial, Summary and Arbitrary Executions conduct a special investigation into Sri Lanka to identify the ethical biases in instances of extrajudicial, summary or arbitrary executions in all circumstances and for whatever reason.
19. That the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment undertake a fact finding country visit to Sri Lanka to confirm ongoing use of torture in particular against the Tamils, and report to the Human Rights Council for further action to be taken.
20. That the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance investigates the ongoing persistent denial of the recognised human rights of the Tamil population in Sri Lanka as he is mandated to do under Resolution 16/33 of 2011.
21. That the Special Adviser on the Prevention of Genocide prepares a report on Sri Lanka to collate information on the massive and serious violations of human rights and international humanitarian law of ethnic and racial origin that is ongoing, as he is mandated to do under the 2004 letter (S/2004/567).

¹⁸ <https://www.icc-cpi.int/darfur>

¹⁹ <https://www.icc-cpi.int/kenya>

²⁰ <https://www.icc-cpi.int/georgia>

22. That the Working Group on Enforced or Involuntary Disappearances investigate cases of deprivation of liberty imposed arbitrarily or otherwise with a view to confirming the ethnical biases inherent in these acts and to include these findings in their annual report.