

Genocide of Tamils and the Nature of Transitional Justice in Sri Lanka

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Abstract

Transitional Justice is broadly seen as resting on twin pillars: the pursuit of truth and the working of accountability mechanism. There are five basic conditions towards realization of transitional justice. First, revelation and acknowledgement of truth. Secondly, accountability of the perpetrators of the mass crimes and crimes against humanity. Thirdly, ground for reconciliation could be explored by establishing the conditions for addressing issues like reform of the institutions and assurance of the nonrecurrence of what happened in the past. Fourthly, reform of institutions should be inclusive of the need for addressing justice for the victims. Lastly, reparation and compensation cannot be treated as monetary allowance or as part of so called rehabilitation of the victims without rights and scope for

political resolution of the conflict. This paper evaluates the working of transitional justice in Sri Lanka after the end of civil war and armed conflict in Sri Lanka in May 2009 based on the basic premises outlined above. Given the ethnic identity and nature of political conflict, there are substantial concerns related to the functioning of democracy, legal and political institutions as well as the role of civil society.

This paper also evaluates the role of international community and the international institutions as well as identifies the tensions between the globalized transitional justice process and the domestic conditions. This paper also recognizes, based on the lessons from Sri Lanka, the need for strengthening of national and international preventing mechanisms including the international coalition for the Responsibility to Protect (R2P).

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This paper evaluates the working of transitional justice in Sri Lanka after the end of civil war and armed conflict in Sri Lanka in May 2009 based on the basic premises outlined above. Given the ethnic identity and nature of political conflict, there are substantial concerns related to the functioning of democracy, legal and political institutions as well as the role of civil society. This paper also evaluates the role of international community and the international institutions as well as identifies the tensions between the globalized transitional justice process and the domestic conditions.

The successive Sri Lankan governments have neither acknowledged nor expressed any remorse until this day for the large-scale atrocities committed against the Tamils of Sri Lanka which include international crimes such as genocide, war crimes and crimes against humanity. Several of these crimes are related to violations of social, economic and cultural rights. According to Article 26 of ICCPR, the requirement of non-discrimination in fact imposes on states four separate obligations with guarantee of equality before law and effective protection against discrimination as core commitments. There is no acknowledgement of TRUTH yet in Sri Lanka of the

genocide, war crimes and crimes against humanity committed by the Sri Lankan government and its authorities against the ethnic Tamils.

In relation to the question of accountability, since 1956 no action has ever been taken with any commission that had been constituted to look into violence or mass crimes against ethnic Tamils of Sri Lanka. This long list includes:

1. The Sansoni Commission-1977
2. Presidential Truth Commission on Ethnic Violence-1984
3. MSF Vehicle attack -1991
4. Kokkadicholai Commission of Inquiry
5. 1991-93 Presidential Commissions
6. President Wijetunga Appointed Commission-1993
7. Commission into Disappearances-1994
8. Batalanda Commission-1995
9. All-Island Disappearances Commission-1998
10. Presidential Truth Commission on Ethnic Violence -2001
11. Bindunuwewa Commission -2001
12. International Independent Group of Eminent Persons – 2006
13. Lessons Learnt & Reconciliation Commission-2011

The main actors of the present Sri Lankan government, including the President Mathiripala Sirisena who acted as the Minister in Charge of Defence during the most brutal final fortnight of the war which includes the gruesome Mullivaikkal Massacres and the White Flag incidents, are defectors from the Mahinda Rajapaksa's government. His admission includes that "prior to the final phase of the war he had acted as the Minister of Defence five times during the height of war." Why should there be any surprise or twist of politics when the President Mathiripala Sirisena says that he is opposed to international investigations into allegations of war crimes and crimes against humanity during the final phases of the brutal war. The shocking disclosure is the attempt of a few countries to trade rights for politics with deliberate neglect of the fact that the State in Sri Lanka is not only a supreme Sinhala political organization but also the cultural war-head of the majority Sinhala community. Mathiripala Sirisena is on record to observe that "I will not allow President Rajapaksa or the security forces to be hauled before an international war crimes court." (<http://www.ft.lk/2014/11/29/sirisena-pledges-to-oppose-war-crimes-investigation>) This statement was

made by him during the campaign and he continues to maintain the same position in consistent with the genocidal policies of the successive Sri Lankan governments towards Tamils since 1948.

The Sri Lankan government's call for a domestic mechanism and the strategic bargain with Sri Lanka should be evaluated against its own background of discriminatory policies and denial of justice for the Tamils for over six decades. The moral crisis of Sri Lankan polity is inextricably linked to the dominant discourse of Sinhala nationalism. Neither Maithripala Sirisena is a beacon of hope nor Mahinda Rajapaksa is politically dead with the resurgence of Sinhala nationalism since his sudden exit from power. It is therefore unjust to trade rights for politics as well as assume that the change of regime can provide the solution to ethnic crisis in Sri Lanka.

South Asia Director for Amnesty International, observed in February 2017 that:

"Repressive laws continue to hinder Sri Lanka's transition out from under the shadow of the decades-long conflict there. Despite commitments to deliver on accountability for alleged crimes under international law, the authorities made frequent use of the Prevention of Terrorism Act (PTA), despite the government's 2015 pledge to repeal it. Tamils suspected of links to the Liberation Tigers of Tamil Eelam (LTTE) continued to be detained under the PTA, which permits extended administrative detention and piles the burden of proof onto the detainee alleging torture or other ill-treatment. It is a problem that was noted by the UN Special Rapporteur on torture, who said the practice persists on a visit to the country last May. While the problem is at levels lower than during Sri Lanka's conflict, impunity still prevails for both old and new cases. The government is similarly failing to hold people accountable for enforced disappearances and extrajudicial executions that took place during the conflict."

The essential driving forces of Sinhala nationalism are race and violence. There is a social vitality to the recognition of Tamils as a distinct group. Tamils have been affected by the socio-economic and political discrimination and oppressive policies of the Sri Lankan government for long. Genocide of Tamils in Sri Lanka has taken place within a social paradigm which not only destroys the victims but also first humiliates them by deliberately inflicting a 'complete loss of freedom and control over one's body and other vital interests.'

There is good evidence to suggest that the Sri Lankan government and military held a systemic approach to rape as an instrument of power and control of the dominant over hapless Tamils. We may note here that the Fourth Geneva Convention of 1949 states that “Women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault.” The International Committee of the Red Cross (ICRC) considers rape to be among the serious breaches specified by that convention. In 1995 Justice Richard Goldstone, Prosecutor for the International Criminal Tribunal for the Former Yugoslavia (ICTY), affirmed that rape can constitute torture. The ICTY at the Hague and International Criminal Tribunal for Rwanda (ICTR) at Arusha explicitly include rape among crimes against humanity. The systematic rape of Tamil women by the Sri Lankan military had a cultural intent of humiliating and keeping the Tamil community in virtual condition of fear and helplessness. The rape has become an instrument of oppression, discrimination and cultural prejudice against Tamils, carried out at great ease along with the mass killings of civilians. These are the factors that determine the nature of this conflict in Sri Lanka assuming the proposition of genocide of ethnic Tamils in Sri Lanka.

Given the large presence of Sinhala military in the North & East of Sri Lanka even after the military conflict, a simple question is how can we expect a Sinhala soldier to protect a Tamil woman when the entire political, military and executive leadership had shown scant regard towards the rights and dignity of Tamil women in Sri Lanka. The status of Tamil women in Sri Lanka combines all the categories (of persons/women/racial/ethnic/religious minority) to draw attention of the international community and the United Nations. The process of reconciliation begins with acknowledgement of TRUTH. The disappearance of 150,000 Tamil civilians has neither been acknowledged by the LLRC nor the Sri Lankan government has shown any interest about the people who had disappeared. Impunity has been the rule of Sri Lankan government’s response towards its own actions and atrocities committed against the Tamils rather than an exception. Impunity has been institutionalized for long and the intermittent transitions like regime changes cannot be mistaken as political transformation in an environment of Sinhala dominated ethno-nationalism with a recorded history of discrimination of minority ethnic Tamils.

Given the complete absence of accountability for genocide, war crimes and crimes of the present situation in Sri Lanka constitutes an ongoing “threat to peace” under Chapter 7 Article 39 of the UN Charter. The history of acts of the Mahinda Rajapaksa’s government as well as the attempts of so called ‘Government of Good Governance’ under Mathiripala Sirisena in punishing witnesses and denying access of the witnesses to the OHCHR’s investigation of Sri Lanka (OSIL) raises concerns about the lack of environment for the protection of witness than the passage of Witness Protection laws as on 20 February, 2015.

The nature of the State and the socio-political environment in Sri Lanka cannot be set aside in our assessment of the political transitions that take place as an outcome of electoral politics in the Sinhala polity. It is therefore necessary for us to advocate that the genocide, war crimes, crimes committed against humanity by the Sri Lankan government and its authorities (agencies) on grounds of ethnic discrimination of Tamils should be referred to the ICC for investigation and prosecution.

In many ways, the UN Human Rights Council initiative of March 2012 in asking Sri Lankan government to address the issues of accountability is the opening of the road to justice for Tamils in Sri Lanka. The Geneva process cannot be set aside for trade and geo-strategic bargains of the influential powers in the world in the name of renewed opportunity for hope because of regime change and tacit agreements. The United Nations has a long-standing policy of opposing even peace agreements that include amnesties for genocide, war crimes and crimes against humanity, gross violations of human rights, or serious violations of international humanitarian laws.

It is vital to cite here the Human Rights Council adopted resolution on 1st October, 2015 (A/HRC/30/1), titled “Promoting reconciliation, accountability and human rights in Sri Lanka”. This resolution was co-sponsored the resolution and legally implied that it accepted and assented to the resolution in full, and thereby commended it to other members of the Human Rights Council. The refusal of the Sri Lankan government authorities to comply with its own commitment given at the Human Rights Council reveals two distinct but inter-related realities of international politics and the role of global institutions. For the Tamils, this trait of Sri Lankan

government co-sponsoring the resolution (A/HRC/30/1) is neither unusual nor unprecedented. This is a typical trait of Sinhala survival in the face of crises and walking out of this commitment is achieved through bargains of time and diplomatic maneuvers. There are several historical and contemporary instances to this effect. The international governments including the sponsors of the resolution (A/HRC/30/1) are also responsible for allowing the Sri Lankan government to wriggle away from its own commitment as co-sponsor.

The Geneva process should be followed and respected along with its logical course of a recommendation by the UN Human Rights Council that United Nations General Assembly set up an International Criminal Tribunal as a subsidiary organ under Article 22 of the UN Charter. The international process cannot be subordinated to the parasitic worldview of “Sinhala Only” which tolerates neither democratic dissent from within nor genuine critique from outside including the United Nations and the global community of nations. If world governments led by influential powers see light in the regime change in Sri Lanka, then darkness of injustice in Sri Lanka cannot be eliminated by abandoning the well-meaning international process for domestic investigations. Let us ponder over the implications of this moral dilemma and move forward with a recommendation for referral to the ICC.

In March 2017, the report of the UN Office of the High Commissioner for Human Rights assessing the

progress made in the implementation of the Human Rights Council Resolution 30/1, on promoting reconciliation, accountability and human rights in Sri Lanka between October 2015 and January 2017 was released at the UN HRC’s 34th session in Geneva. The report of the UN Office of the High Commissioner noted that the **fulfilment of transitional justice commitments has, however, been worryingly slow, and the structures set up and measures taken during the period under review were inadequate to ensure real progress.**

We need to recognize that the rhetoric covered in the sophistry of sovereignty of a nation-state is not being considerate of the sovereign rights of the people, in this context, of Tamils in Sri Lanka for an equal and dignified life. International governments including the United States, European Union, Russia, Japan and India have not been influential in convincing the Sri Lankan government about the need for an appropriate political solution. The role and influence of China in protecting Sri Lanka has not only been detrimental to the pursuit of justice for Tamils but also the politics of countervailing influences resulting in the appeasement of Sri Lanka. This is the double tragedy.

It is also time for us to recognize, based on the lessons from Sri Lanka, the need for strengthening of national and international preventing mechanisms including the international coalition for the Responsibility to Protect (R2P).