

Sri Lanka and the Urgent Need for Accountability

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Commentators have argued that international pressure on war crimes issues in Sri Lanka is counterproductive because it alienates the majority community and strengthens the hand of a recalcitrant regime. This paper responds to these claims by arguing that the pursuit of accountability, including through international mechanisms, is morally and legally necessary, but also strategically the best available choice for those concerned with human rights and democratic reform in Sri Lanka.

The passage of a Resolution entitled ‘Promoting Reconciliation and Accountability in Sri Lanka’ at the 19th Session of the United Nations Human Rights Council (UNHRC) was received with a mixture of nationalistic bluster and discomfiture by the Sri Lankan government. The more sophisticated responses from government quarters asserted that international efforts to pressure the government on accountability for war crimes impedes the quest for genuine national reconciliation and a political solution to the ethnic problem. Similarly, Asanga Welikala – a constitutional lawyer and advocate of constitutional reform – has repeatedly argued elsewhere that international pressure on accountability ‘unintentionally creates the space for the regime to burnish its anti-terrorism, anti-western and patriotic credentials, and thereby shield itself from democratic scrutiny and normal politics.’¹ He contends that Tamil parties and civil society groups are better off ‘drawing the line at international intervention as well as immediate criminal accountability.’² In this paper, I argue that the pursuit of accountability for war crimes committed in Sri Lanka by Tamil political parties and civil society, including at relevant international fora, is legally and morally necessary, but also strategically the best available choice for furthering the human rights and democracy agenda in Sri Lanka.

1 Asanga Welikala, “Inconvenient Truths: International accountability and domestic politics in Sri Lanka”, available at: <http://www.opendemocracy.net/asanga-welikala/inconvenient-truths-international-accountability-and-domestic-politics-in-sri-lanka>

2 Asanga Welikala, “Sri Lanka: War crimes and accountability”, available at: <http://www.opendemocracy.net/asanga-welikala/sri-lanka-war-crimes-and-accountability>

The inability of the regime to deliver on its economic promises is beginning to cause popular unrest in the Sinhala-dominated South. Protests against the cost of living, burdensome taxes on petroleum products and economic mismanagement have erupted with a frequency that worries the regime. Nevertheless, the government has been successful in mobilizing mass ‘patriotic’ Sinhala support in opposition to international action on war crimes. Thus, the concern that the regime has used international pressure on accountability in an attempt to bolster its waning popularity is a valid one.

This, however, is only one half of a complicated reality. In fact, the regime’s bluster and intransigence – much of it owing to its antagonism to allegations of war crimes made by foreign governments and INGOs – has come with a heavy economic and reputational cost. The drying up of Western governmental aid has been instrumental in forcing the government – despite its socialist pretensions – to accept IMF assistance and, with it, deeply unpopular austerity measures. Moreover, the reputational costs associated with defying Western-led calls for accountability have stalled western foreign direct investments, causing an expensive dependence on Chinese finance, the bulk of which is provided at commercial rates. Going forward, the regime’s hostility to the United States, which sponsored the UNHRC Resolution, renders it exceedingly unlikely that Sri Lanka will qualify for a waiver from American sanctions on Iranian oil. This will very likely result in a spike in oil prices that will burden consumers even more. Additionally, a recent line of criticism directed at the government focuses on its incompetence in foreign affairs. Fissures within the regime are also gradually beginning to emerge. Some senior ministers and government apologists who are fearful at the prospect of international isolation are now publicly recommending greater engagement with the West, India and Sri Lanka’s Tamils.

All of these factors are, to some extent, a consequence of international pressure on Sri Lanka to initiate genuine accountability measures, as well as the Sri Lankan government's response to that pressure. Taken together, they are contributing to the steady decline of the regime's popularity. Thus, international pressure, despite producing a short-term

increase in the regime's popularity, also creates the conditions for the undermining of that popularity in the long term. In view of this, it is rather difficult to calculate the net effect of international pressure on the regime's popularity. And it is furthermore unclear whether a policy in which the international community were to instead cease to put pressure on the regime would bring any reform within Sri Lanka; this is particularly unclear given that, as Kumaravadivel Guruparan notes in an earlier piece in this series, there are no local peace initiatives underway within post-war Sri Lanka as things stand.³ The rapid and often brutal closing of space for democratic engagement under the current regime renders the prospect of reform through purely internal means very unlikely. The recent spate of abductions and killings⁴ – including the abduction of two leaders of a new youth-oriented, progressive opposition political party on the eve of its inaugural meeting – have rekindled fears among human rights activists and journalists. Many do not speak out for fear of reprisals, while those who do are branded as traitors and vilified. The failure to account for the long-term consequences of international pressure, and the failure to appreciate the lack of democratic alternatives within Sri Lanka, are critical deficiencies in Welikala's analysis.

The pursuit of accountability – including through international mechanisms - has intrinsic and instrumental value. There is inherent benefit in investigating and punishing serious violations of human rights and humanitarian law in that, by doing so, the norms of international human rights law are upheld. Jurisprudence from the Inter-American Court of Human Rights⁵ and the European Court of Human Rights⁶, and more relevantly to Sri

³ Kumaravadivel Guruparan, "Some reflections on the relationship between 'peace' and 'justice' in post-war Sri Lanka", available at: <http://www.csls.ox.ac.uk/otjr.php?show=currentDebate8>

⁴ WATCHDOG, "New Wave of Abductions and Dead Bodies in Sri Lanka", available at: <http://groundviews.org/2012/02/26/new-wave-of-abductions-and-dead-bodies-in-sri-lanka/>

⁵ Velásquez Rodríguez vs. Honduras, Judgment of July 29, 1988, Inter-Am.Ct.H.R., Series C No. 4, para.174; Barrios-Altos vs. Perú, Judgment of March 14, 2001. Series C, No. 75, para. 41; Trujillo-Oroza vs. Bolivia, Reparations (Art. 63(1) American Convention on Human Rights), Judgment of February 27, 2002. Series C, No. 92, para. 101; Almonacid-Arellano et al. vs. Chile, Preliminary objections, Merits, Reparations and Costs. Judgment of September 26, 2006. Series C, No. 154, para.104

⁶ Aksoy v. Turkey, Judgment of 18 December 1996, European Ct. H.R, No. 100/1995/606/694, para. 98; Aydin v. Turkey, Judgment of 25 September 1997, European Ct. H.R, No. 57/1996/676/866, para. 103.

Lanka, the Human Rights Committee⁷, acknowledges the right of victims to the investigation and prosecution of those responsible for international crimes. To deny this right is to also deny the applicability and relevance of international human rights law in the first place. Moreover, since international crimes trigger universal jurisdiction, it follows that, if Sri Lanka fails to investigate and prosecute international crimes committed within its territory, any State – and by extension the International Criminal Court or subsidiary bodies of the United Nations if appropriately authorized – may exercise jurisdiction over the those crimes. Though the government has tried to invoke the principle of sovereignty to ward off the charges against it, Sri Lanka’s accession to the International Covenant on Civil and Political Rights, the Geneva Conventions, and the Torture Convention among others, militate against that invocation by the government. Indeed, the demand that the Sri Lankan government investigate serious criminal conduct merely holds it to the standards it voluntarily undertook to respect.

Further, the Tamil people in the North and East – the main victims of the war – overwhelmingly support international action on accountability. Although the Tamil National Alliance (TNA), the dominant political party representing Tamils in the North and East, was silent on war crimes issues in the immediate aftermath of the war, it is now front and centre of the call for accountability. Since breaking its silence in early 2011, the TNA has consistently urged an international investigation into war crimes and crimes against humanity committed by both sides during the war.⁸ In fact, it campaigned heavily on the issue of war crimes at the 2011 Local Government elections in the North and even interpreted its landslide victory as a mandate for an impartial international investigation

7 Human Rights Committee, “The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, General Comment No. 31 [80]” 26 May 2004, CCPR/C/21/Rev.1/Add. para. 18

8 Tamil National Alliance, “Response to UN Panel of Experts Report”, 18 April 2011, available at: http://www.sangam.org/2011/05/TNA_Response.php?uid=4348; Tamil National Alliance, “Initial Response to LLRC Report”, 20 December 2011, available at <http://transcurrents.com/news-views/archives/6827>; Mr. R. Sampanthan MP, “Letter to UNHRC member countries”, 27 February 2012, available at: http://www.sangam.org/2011/05/TNA_Response.php?uid=4348

into war crimes.⁹ Further, the overwhelming support for an international investigation from Tamil civil society groups, political parties outside the TNA umbrella and Tamil diaspora groups evidences a wide consensus amongst Sri Lankan Tamils that full accountability ought to be pursued.

There are a number of other powerful reasons that buttress the demand for accountability. The most important reasons were stated succinctly in the TNA's Response to the government-appointed Lessons Learnt and Reconciliation Commission's Report [LLRC]:

...accountability remains an urgent and important need to help victim communities overcome trauma and rebuild their lives, to bring closure to our collective and personal grief, to ensure genuine reconciliation, to break the cycle of impunity in Sri Lanka, to insure against a return to violence, and to prevent historical revisionism by narrowing the range of permissible lies about the last stages of the war.¹⁰

Beyond these principled reasons, however, there are strong instrumental arguments for the pursuit of full accountability, including through international mechanisms. The demand for accountability for serious crimes is the single most effective instrument through which sustained multilateral international pressure can be brought to bear on the government to improve its human rights record across the board, including on those matters that are not directly related to alleged criminal conduct during the war. The state of human rights in Sri Lanka, while deeply troubling, is insufficiently grave to place Sri Lanka permanently on the UNHRC's agenda. Countries facing similar levels of repression such as Pakistan, Iran, Russia and Venezuela have escaped the sustained attention of the Council. On the issue of a permanent political solution to the ethnic issue, while many foreign governments are concerned that the Sri Lankan government has not taken steps to share power meaningfully with minority communities, they have generally avoided the appearance of dictating the terms of a future constitution

9 Suresh Premachandran, "On TNA's Election Victory", 27 July 2011, available at: <http://www.tamilguardian.com/article.asp?articleid=3318>

10 Tamil National Alliance, "Response to the Lessons Learnt and Reconciliation Commission Report", January 2012, available at: http://www.sangam.org/2012/01/TNA_LLRC_Response.pdf

The question of accountability for serious abuses is, in contrast, a much more effective instrument for sustained international attention, precisely because international crimes attract the jurisdiction of foreign [and international] investigatory and prosecutorial bodies. Sri Lanka has already been the subject of a Report by a UN Panel of Experts and a country-specific Resolution at the UNHRC. Moreover, the follow-up mechanisms contained in the UNHRC Resolution ensure that Sri Lanka will remain on the Council's agenda for at least another year, and possibly much longer. This attention makes it exceedingly difficult for the government to attempt to conceal abusive conduct and systemic violations of rights.¹¹ In short, almost all of the gains made by civil society groups in directing the attention of multilateral bodies to Sri Lanka have been through the vehicle of accountability.

Crucially, though, this attention, while directed to Sri Lanka under the rubric of promoting accountability, has been used to broaden the scope of issues under scrutiny. For example, the UNHRC Resolution calls on the government to address accountability, but also to implement the recommendations of Sri Lanka's own LLRC. These recommendations are broad and cover a variety of areas of interest to human rights activists in Sri Lanka – from demilitarization and resettlement, to freedom of information, power-sharing and rule of law reforms.

The LLRC, however, was created as a direct response to the UN Panel Report. External Affairs Minister Prof. G. L. Peiris repeatedly proclaimed that the LLRC would deal comprehensively with the allegations made against Sri Lanka regarding its conduct during the last stages of the war.¹² The Report in turn largely exonerated the government

11 In another piece in this series published in May 2011, I argued that while the government's immediate response to international pressure on human rights has been to noisily object to the perceived attack on its sovereignty, it has also attempted to manage international pressure by making concessions on human rights issues. Examples include the termination of the state of emergency, the faster than expected release of IDPs interned in camps, the pardoning of a Tamil journalist convicted under Sri Lanka's anti-terrorism law, and the creation of the LLRC. See Niran Anketell, "The Silence of Sri Lanka's Tamil Leaders on Accountability for War Crimes: Self-Preservation or Indifference?" 11 May 2011, available at: <http://www.csls.ox.ac.uk/otjr.php?show=currentDebate8>

12 See Interview of Prof. G.L. Peiris by Asia Society Executive Vice President Jamie Metz, on 27th September 2010, Asia Society, New York, available at http://asiasociety.org/video/policy/politics/sustainable-peace-srilankacomplete_at_min.50; 'Sri Lanka

of war crimes, but made wide recommendations for governance reforms. It was, in short, an unsuccessful attempt to bury the question of war crimes by diverting attention to a nascent governance reform agenda. The end result, however, has been that democracy and human rights activists now have a powerful tool – one for which they have been indefatigably, yet unsuccessfully, lobbying for decades – with which to highlight Sri Lanka’s governance and human rights issues, including those affecting the Sinhala and Muslim people.

In conclusion, a few comments on the responsibility of civil society in Sri Lanka are required. Reflecting on the choices facing Tamil political parties and civil society in Sri Lanka, we should recall Chilean human rights lawyer José Zalaquett’s invocation ‘to forgo easy righteousness, to learn how to live with real-life restrictions, but to seek nevertheless to advance one’s most cherished values day by day to the extent possible. Relentlessly. Responsibly.’¹³ Welikala’s contributions, discussed above, encourage civil society groups and Tamil political parties in Sri Lanka to reflect introspectively on their actions and forgo self-righteous posturing. It is a warning against counterproductive support for unsustainable and unrealistic causes. Yet, for the reasons discussed in this piece, Welikala’s conclusions are unconvincing because the premise on which his argument is based is flawed.

But even if we assume Welikala’s assessment to be accurate, we must never sacrifice principles for expediency, much less to sacrifice them on behalf of otherwise voiceless victims. The call to speak for the voiceless is a rare privilege – and one that must be heeded with humility and diligence. The decision to forgive is one that only victims may make, and even then, not through a cynical bargain foisted on them by those interested in escaping justice for their crimes. If indeed victims choose a form of reconciliation

‘war crimes’ video: who are these men?’ *Channel 4*, 2nd December 2010, at <http://www.channel4.com/news/sri-lanka-war-crimes-video-who-are-these-men> at min.2.41. Prof. G. L. Peries on Hot seat’, *The Daily Mirror*, 1st November 2011, <http://video.dailymirror.lk/videos/1129/prof.-g.-l.-peries-on-hot-seat> at min.10.30.

13 José Zalaquett, “Balancing Ethical Imperatives and Political Constraints: The Dilemma of New Democracies Confronting Past Human Rights Violations”, [1992] 43 *Hastings L.J.* 1425 at 1438.

without justice, we will then face an unprecedented dilemma of principle. But unless and until they do so consciously and voluntarily, we must never deign to make a Faustian bargain on their behalf. Instead, we must advance the values of justice, human rights and full accountability for serious crimes. Indeed, we must do so relentlessly.

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