

Kilinochchi
01 April 2015

Mr. Pablo de Greiff
UN Special Rapporteur on the Promotion of Truth,
Justice, Reparation and Guarantees of Non-Recurrence

Dear Mr. de Greiff,

**Transitional Justice and Domestic Mechanisms
for its realization in Sri Lanka.**

We are thankful for your visit to Kilinochchi today and take this opportunity to place on record in writing, certain issues of importance that we hope to raise with you in your brief meeting with us today.

1. Lack of progress to date in initiating a process of consultation with victims in designing an internal mechanism in pursuit of truth and justice.

The Government of Sri Lanka (GOSL) sought and was granted a deferral of the report of the OHCHR Inquiry on Sri Lanka (OISL) on the promise of putting in place a credible internal mechanism in the pursuit of truth and justice in Sri Lanka.

(Please see attached marked as 'A1' our letter to the High Commissioner on the deferral of the report and marked as 'A2' our statement on the decision to defer the report).

There was no credible proposal in the public domain that the Government had put out when it sought the deferral. The UN Human Rights Commissioner in his address to the Council on the 5th of March 2015 insisted that GoSL should consult the victims in designing this internal mechanism. To date no such process has been initiated¹.

The Prime Minister of Sri Lanka during a recent visit to Jaffna² has mentioned that discussions are underway with the assistance of the South African

¹ UN Human Rights High Commissioner Zeid Ra'ad Al Hussein, Opening Statement, 28th Session of the UN Human Rights Council, Available at: <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15642#sthash.XXYsHubz.dpuf> : "I urge the authorities to consult deeply with the people, particularly victims, in order to design mechanisms that will work and not repeat the failures of the past"

Government to set up a Truth Commission. He further elaborated that the advice of Sir Desmond de Silva, one of the experts appointed by the previous Government to advise the Presidential Commission on Missing Persons, has been tasked with identifying the legal framework necessary to provide for such an internal mechanism. The current Government has also decided to let the Presidential Commission on Missing Persons continue its investigations despite its flawed mandate and modus operandi.

(Please see attached, marked as 'A3' the statement by the Tamil Civil Society Forum and the Welfare Organisation of the relatives of those forcibly disappeared communicating our decision to not to attend any further hearings of the Commission)

We submit that it is more than clear from the above that the current Government has done very little or nothing to consult the victims in the design of its internal mechanism. The entirety of the process is being designed in secrecy. From what has been made public GoSL is attempting to show progress by rehashing the previous regime's strategy of talking to the South Africans and using the services of a person whose credibility and standing are highly suspect.

2. Lack of political will in the pursuit of truth and justice.

In a speech delivered in Parliament recently the Foreign Minister of Sri Lanka stated as follows:

"As you are aware, in the spirit of working in harmony with the international community, the Government has extended invitations to the UN High Commissioner for Human Rights and the Working Group on Enforced and Involuntary Disappearances. Some sections of the former regime call this a betrayal of the armed forces. However, this is furthest from the truth. Our objective, Hon. Speaker, is to clear the name of our armed forces who have received wide international recognition as professional and disciplined forces"³.

The Foreign Minister's assertion that the objective of his Government's engagement with the UN (and concomitantly the promise to establish a domestic mechanism) is to 'clear the name of the armed forces' is deeply problematic.

The Government's partiality towards the armed forces was made even clearer by President Sirisena in the order that he issues granting General Sarath Fonseka with the title of Field Marshal. In that order the President asserted that

² Video Footage of Public Meeting of the Prime Minister of Sri Lanka in Jaffna, 27 March 2015
<https://www.youtube.com/watch?v=UquXjjUkQjI&feature=youtu.be&t=10m7s>

³ Hansard, 18 March 2015, Column 216, available at
<http://parliament.lk/uploads/documents/hansard/1426856082005040.pdf>

Sarath Fonseka is bestowed with the honorary rank of Field Marshal for 'outstanding gallantry, meritorious performance and distinguished service to the nation during the humanitarian operation and the defeat of terrorism in Sri Lanka in May 2009'⁴. The characterization of the last phase of the war by the President of the country as a humanitarian operation does not bode well with his Government's promise of a credible inquiry. These statements by the President and the Foreign Minister we are afraid show no departure from the policy adopted by the former Government on accountability.

We also would like to remind you that the Foreign Minister of Sri Lanka in his speech to the UNHRC on the 2nd of March said that only UN *assistance* will be sought and not *involvement*⁵. Hence in the absence of significant international involvement in the design and delivery of an accountability mechanism and given the attitude of the present Government towards the credible allegations against the armed forces we have no reason to believe in the Sirisena Government's promise of a credible internal inquiry.

3. On the exhaustion of domestic remedies:

The point is repeatedly made that domestic remedies will have to be exhausted for an international process to be entrusted with the burden of discharging accountability. Under the former Government the UN system concluded that the domestic remedies had been exhausted and that there was no political will for accountability⁶. With the removal of the former Government by the Sirisena Government the argument is made afresh that domestic remedies will have to be again demonstrated to have been exhausted. The UN system took 5 years to conclude that domestic remedies had been exhausted with the previous regime. We worry that any efforts at finding truth and justice will be completely washed away as the argument is being made again that domestic remedies will have to be proven to be inadequate again under the new regime.

We believe that the domestic remedies exhaustion criterion should be viewed more holistically by carefully looking at the contextual and structural factors that historically explain the lack of accountability and the pervasive nature of impunity in Sri Lanka. A closer analysis of these factors will help better explain

⁴ Extra Ordinary Gazette Notification No. 1906/51, (March 22, 2015) available at http://documents.gov.lk/Extgzt/2015/PDF/Mar/1906_51/1906_51%20E.pdf

⁵ Full text of the Statement delivered by Mangala Samaraweera, Minister of Foreign Affairs of Sri Lanka and Leader of the Sri Lanka Delegation, at the High Level Segment of the 28th Session of Human Rights Council, 02 March 2015 available at <https://www.colombotelegraph.com/index.php/foreign-affairs-minister-mangala-samaraweerass-unhrc-speech-today-full-text/>

⁶ Oral Report of the UN High Commissioner for Human Rights on the promotion of accountability and reconciliation in Sri Lanka (24 February 2014) available at http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session27/Documents/A.HRC.27.CRP.2_AV.doc.

as to why impunity reigned not just under the previous regime but also under all successive governments in the past 40-50 years.

Our understanding is that a vast majority of the Sinhala Buddhist population in the South condones the war and impunity for violations committed in its name as a necessary and unavoidable cost in the attempt to retain the united and unitary character of the state. Hence even very minimal action taken against the Sri Lankan Armed Forces has been interpreted as a betrayal of the Sinhala Buddhist Nation and an act that amounts to siding with foreign, alien powers that seek to contain and destroy the Sinhala Buddhist nation-state of Sri Lanka. In this imagination Tamils, Western Governments, the UN and all those who demand accountability are considered to be participants of the foreign conspiracy that is seeking to break the unity and territorial integrity of the state.

It is most unfortunate not even the Sirisena Government is willing to tackle this fear by addressing it directly. No Government in post-independent Ceylon/Sri Lanka has made an attempt to address these issues honestly and hence unsurprisingly Sinhala Buddhist ideology has received democratic endorsement repeatedly at Sri Lankan elections. This is why even President Sirisena was unwilling to make any substantive promise with regard to accountability in his election manifesto and in fact repeatedly claimed that it is his victory alone that will be able to safeguard the former President from international attempts at holding him to account. Post-elections, we are witnessing a continuation of this dormant and idle political strategy of wooing the Sinhala Buddhist vote base. The best example of this is how the deferral of the OISL report is being trumpeted as a major victory for the Sirisena Government with an eye on the upcoming General elections. Unless the Sirisena Government is willing to accept and explain to its electorate that the violations committed by the Sri Lankan Army were morally wrong there is no real hope for accountability and non-recurrence. As someone who believes that transitional justice should be viewed from a contextual and holistic picture we believe that you will understand the complex set of factors that best helps us understand historically the lack of accountability for the violations committed in the troubled history of post war-Ceylon/ Sri Lanka.

4. The need for criminal prosecutions as part of a holistic transitional justice programme in Sri Lanka.

We are given to understand that criminal prosecutions will not feature in the internal mechanism design that the current Government is drawing up. To tackle impunity and to ensure non-recurrence we believe that criminal prosecutions are an essential part of any transitional justice programme in Sri Lanka.

5. Institutional Reforms should encompass reform of the state structure.

A holistic transitional justice programme should include institutional reforms that will ensure non-recurrence of mass atrocities. This is traditionally defined as institutional reforms of the security sector and the law enforcement

authorities including the court system. We believe that in the Sri Lankan context that this has to go even deeper. Unless the unitary character of the Sri Lankan State imagined and constructed around a Sinhala Buddhist Nation-State is abandoned Tamils will not feel secure in this island. This necessarily means an internationally mediated process towards finding a sustainable and just political solution. Such reforms should also include the repeal of draconian legislations such as the Prevention of Terrorism Act.

We conclude expressing hope that you will engage in fruitful discussions that lend towards a nuanced and honest assessment of the possibility of Transitional Justice in Sri Lanka.

(Signed)

Elil Rajendram
Co-Spokesperson
Tamil Civil Society Forum