

Kilinochchi,
02 September 2016

His Excellency Ban Ki Moon
Secretary General, United Nations,
UN Headquarters. New York, NY 1007.

Your Excellency,

Visit to Sri Lanka: Concerns of the Tamil Community in relation to the Transitional Justice Process

We the undersigned Tamil activists and organisations working in the North and East of Sri Lanka wish to raise serious concerns regarding the transitional justice process currently underway in our country.

We hope that your visit takes critical stock of the developments in Sri Lanka since January 2015 and helps to reinforce the need to adhere to the international normative framework on 'transitional justice'¹. While any international framework needs to be take account of the specific context of any situation, ignoring key values developed over many decades will do irreparable damage to victims in Sri Lanka. We fear that the process unfolding in Sri Lanka is contrary to the basic principles enshrined within the framework and we highlight our concerns below. We believe there is no serious political will on the part of the Government to deliver a genuine truth and justice process.

- 1. The national consultations are tokenistic and have minimal or no impact on the design of the mechanisms:** The National Consultation Process on Transitional Justice being coordinated by the Consultation Task Force on Reconciliation Mechanisms ("CTF") has turned out to be a tokenistic exercise that is having no impact on the design of the transitional justice mechanisms. The process adopted in setting up the Office for Missing Persons ("OMP") is indicative of this tokenistic approach.

In the second week of May 2016, the Ministry of Foreign Affairs, independent of the CTF, met with some families of the disappeared providing them with a two page leaflet on the OMP while refusing to release details of the OMP Bill that had been shared with some sections of civil society in Colombo and certain political parties aligned with the Government. At the meeting families of the disappeared

¹ We use the word 'transitional justice' with caution. Many Tamil victims and activists strongly believe that there has been no 'transition' in Sri Lanka and hence that there is a lack of context to even speak of 'transitional justice'.

raised objections to the haphazard short-circuited nature of the consultations on the OMP and also asked questions about the substantive content of the proposals based on the minimal information made available to them. The Government for the first time made the OMP Bill public by placing it on the order paper of Parliament on the 22nd of June 2016. The Bill had not taken on board any of the significant concerns raised by the victims which would have strengthened the substantive content of the Bill. Indeed, the only opportunity that the victims had to comment on its contents was in May.

The CTF subsequently organised a fast tracked consultation process with relevant actors on the OMP, realising that the mechanism was going to be set up before the national consultations had concluded. The interim report from this consultation was published on 12 August 2016, on the same day the OMP Bill was set to be debated in Parliament. The CTF's recommendations were ultimately of no consequence because Parliament passed the OMP Bill with no opportunity for debate. Irrespective of the lack of a debate, it is reported that more than a dozen amendments to the OMP Bill tabled by opposition parties were adopted in Parliament without any debate. Two weeks after the passage of the legislation, confusion remains as to what amendments were in fact enacted. Now the government has announced that new amendments to the OMP Bill may be brought in, again without proper public scrutiny and consultation.

We are concerned that the government intends to set up the other mechanisms for transitional justice in a similarly haphazard and non-consultative manner. We understand that there is already a draft law on a Truth and Reconciliation Commission, which once again, is only being circulated to certain segments of civil society in Colombo, but not to victims' communities or organisations/activists that closely work with them in the North and East.

This approach to consultations runs contrary to the recommendations of the Special Rapporteur on the Promotion of Truth, Justice, Reparations and the Guarantee of Non-recurrence following his visit to Sri Lanka in April 2015 that consultation with those affected by the violations is essential and that victims cannot simply be presented with 'solutions' without being involved in their design.² In his observations on his second visit to Sri Lanka the Special Rapporteur noted that, 'consulting victims is crucial because it constitutes in itself a mode of recognition and respect - that people whose rights were violated, often in the most brutal ways, will be listened to respectfully and their views taken seriously as to the most effective ways of redressing those violations'³.

² Available here: <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=15820&LangID=E>

³ Available here: <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=17029&LangID=E>

Certain government and civil society actors have intimated that the short circuited consultations around the OMP are justifiable because the OMP Act in their view is well designed. However, this ignores the very real substantive concerns that victims voiced and continue to voice about the OMP Bill, including the process for appointments to the OMP, the connection or lack thereof to criminal prosecutions, the need to treat enforced disappearances as a separate issue, the composition of the investigative unit and the inclusion of 'soldiers missing-in-action' alongside other disappeared persons.

The process of setting up the OMP is a clear case of victims being 'presented with solutions'. Once more the victims have been given the appearance that their views will be respected and recognized while in fact they have been deliberately and grossly disrespected.

If the OMP Bill is indicative of how consultations will be incorporated into the design of Sri Lanka's transitional justice mechanisms, the National Consultation Process unfortunately only serves to placate the international community and not meaningfully to provide space for the views of victims and communities.

- 2. The National Consultation Process is procedurally and substantively flawed:** In addition to the National Consultations Process being completely ignored in the design of the mechanisms, the consultations themselves are being conducted in a manner that defies many salient features of an open, participatory and secure process outlined for example in The Office of the High Commissioner for Human Rights' 'Rule of Law Tools on Consultations'.

The Task Force has been given inadequate resources and time and consequently there have been very few outreach activities to encourage wide participation in the consultation process. There is very little awareness about what the mandate of the CTF is, and even those who attend consultations have often voiced confusion about the purpose of the Task Force. Victims in the North and East are frustrated and tired of participating in these consultations after having already testified to numerous commissions and inquiries in the past with no outcome. Confusion around the CTF's mandate only increases their reluctance to make yet another submission.

Moreover the consultative processes in the North and East of the country are taking place under a highly securitized environment where there have been reports of intimidation and surveillance by Sri Lankan Army intelligence. In numerous instances, it has been reported that plainclothes military intelligence officers have been inside the consultations videotaping and photographing submissions being made. Even where a Zonal Task Force has given members of the public the opportunity to make their oral submissions privately, adequate

safeguards were not provided and those individuals were still speaking in full view of the public.

3. Role of the Task Force and its perceived relationship with the Government.

We are concerned about the close relationship of the Task Force, Civil Society members involved in the Task Force and their connection to the Government. The Task Force members themselves seem to have very strong views on the outcomes of the transitional justice process (which appear closely aligned with those of the Government). We fear that this may have an impact upon the impartial nature of the consultations. For example the training organized by the National Task Force for those in Zonal Task Forces (“ZTF”) recommended ZTF members point out the unrealistic prospects for international involvement in the mechanisms. This is in line with statements from the President and Prime Minister that clearly indicate their intention to withdraw from the obligations of the UNHRC 2015 Resolution where they agreed to set up a hybrid process for transitional justice. In fact at one of the consultations held in Colombo by the National Task Force the Chairperson was heard to say that ‘international participation would be too expensive for Sri Lanka’.

4. Deeply penetrative militarization in the North and East and its impact on consultations:

The Government has failed to take the necessary steps to create a conducive environment for the consultations and for the implementation of the mechanisms being considered. The impact of militarization on the consultation process has been extremely troubling and will ultimately extend to any mechanisms the government chooses to implement. In this regard, we are extremely concerned that sections of the Government have claimed that they have no control over the security apparatus. These claims are not substantiated and are rather being used as an excuse by the Government to avoid undertaking meaningful security sector reform that is essential for any transitional justice processes to have a meaningful impact on the lives of the people in the North and East. Furthermore the continuing use of the Prevention of Terrorism Act with a view to intimidating the population is unacceptable and creates an insecure environment for open dialogue about transitional justice. Credible reports suggest that the committee set up to review the PTA is composed of a majority of members from the security sector as well as public officials and individuals who are sympathetic to the views of the security establishment, including those who have been complicit in the obstruction of justice in regard to abuses committed under the cover of Sri Lanka’s security laws. Also of concern is the appointment of members to the Victim and Witness Protection Authority who have in the past been responsible for the abuse of victims and witnesses.

5. Lack of an overall policy and political will on transitional justice: At the core of our concerns is what we believe is a lack of will on the part of the Government

to initiate any meaningful process for Transitional Justice. From the beginning we have articulated the need for the Government to put forward a coherent policy on Transitional Justice that lays out the inter-linkages between the different mechanisms. The Government has in various statements by the President and Prime Minister indicated that it will not initiate any criminal prosecutions that target the Sri Lankan Armed Forces. As a result we are skeptical that the delay in the Government releasing a coherent policy is merely part of the sequencing the Transitional Justice mechanisms. We are afraid that the strategy is to undermine the need for tackling impunity through criminal prosecutions. The Government and certain civil society actors have also been suggesting that the constitutional process currently underway should not be disrupted by demands for criminal prosecutions. This only repeats the discredited dichotomy of 'peace versus justice'. In fact, we believe that the Government could demonstrate its commitment to transitional justice by incorporating a chapter or clauses that make reference to the same into the new constitution. Overall we are concerned that for the Government transitional justice is just a tool for managing foreign policy goals.

We hope that Your Excellency will take up some of these concerns in your meeting with the Government. What Sri Lanka needs is not praise and recognition from the International Community but constructive and critical engagement that reminds the Government of its international obligations and obligations to its own people. We trust that you will use your trip to speak truth to power and not be allowed by those in power to instrumentalise your visit to further their political goals. In this regard we urge you to re-evaluate the overall UN policy towards Sri Lanka. A fundamental rethink that is willing to engage and listen to critical voices about the actual and real prospects for democratic transition and justice in Sri Lanka is essential for the UN not to repeat its past mistakes as detailed in the Petrie Report.

Signatories:

Organisations

1. Centre for Human Rights and Development
2. Centre for the Protection and Promotion of Human Rights
3. Home for Human Rights
4. Tamil Civil Society Forum
5. The Social Architects

About the signatory organisations:

Home for Human Rights (HHR): HHR has close to 40 years of institutional history in documenting and litigating human rights in North-East Sri Lanka. Founded in 1977, the breadth of HHR's focus includes the documentation and dissemination of

information; the provision of assistance for survivors; the provision and encouragement of legal intervention as well as active defense for those lacking the resources to defend themselves. It has offices in all districts in the North-East, one in Hatton and another in Colombo. HHR has represented over 33,000 Political Prisoners and documented around 90,000 human rights violations since its inception.

Centre for Human Rights and Development (CHRD): CHRD founded almost 20 years ago is an organization of human rights lawyers who have over the past two decades appeared in numerous cases relating to political prisoners, disappearances, extra judicial killings and related all over the North and East of the country and in Colombo. They are also involved in Human Rights education, training and advocacy.

Centre for Promotion and Protection of Human Rights (CPPHR): CPPHR is a Trincomalee based organization that has for many years engaged in public interest litigation, advocacy and documentation of human rights violations in Trincomalee.

The Social Architects (TSA) is a collective of activists from the North-East formed with the intention of educating, informing and providing timely and thoughtful analysis on Sri Lankan issues. TSA recently released a film titled '*Mutrupulliyaa*' that documents the impact of militarisation on the North-East. TSA also published an investigative report on coercive population control programmes in the North-East in 2014.

Tamil Civil Society Forum (TCSF): TCSF founded in 2010 is a network of 100 plus civil society activists across the country. Its membership, drawn from community organisers, religious priests, academics, professionals and lawyers, have lived and worked in the North-East for many decades and have been leading voices for justice, peace and self-determination throughout the war and in the post-war context. TCSF provides a platform for these activists to network and take action collectively.