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Joint written statement* submitted by Society for Threatened Peoples, non-governmental organizations in special consultative status

The Secretary-General has received the following written statement which is circulated in accordance with Economic and Social Council resolution 1996/31.

[30 May 2016]

1 * This written statement is issued, unedited, in the language(s) received from the submitting non-governmental organization(s).

Sri Lanka's Judges: Unfit for International Crimes

Introduction

Recommendation 20 of the OHCHR Investigation on Sri Lanka (OISL) asked the government of Sri Lanka ('GoSL') to adopt legislation establishing an ad hoc special court, using international judges, mandated to try war crimes and crimes against humanity.² In recent months, GoSL has rejected the use of foreign judges in this tribunal, instead outlining its preference for using domestic judges.³⁴

We have consistently advocated for greater international involvement in any transitional justice mechanism, including the participation of international investigators and forensic experts, lawyers and judges.⁵ In this briefing note we focus on the capabilities of domestic judges.

We conclude that Sri Lanka's domestic judges are unfit to try the international crimes found credible by the report of the OHCHR Investigation on Sri Lanka (OISL) and that a credible transitional justice mechanism must involve international judges. Our findings are based on the experiences of lawyers and judges in Sri Lanka as well as observation of live proceedings conducted there.

The Inadequacies of the Sri Lankan Judicial System

There are 3 weaknesses of the judicial system that render it incapable of justly administering a tribunal to the standard required by the international community:

- Lack of independence
- Fails to abide by international standards of protection of fundamental rights and freedoms
- Lack of judicial competence

These weaknesses undermine the administration of justice. Simply, the judges cannot be trusted to fairly and competently reach their decisions. Consequently, it cannot be trusted to justly end impunity and dispense justice for the victims.

Lack of independence

The lack of independence in the judiciary is stark from the outset as the promotion of judges is heavily dependent on approval with the Executive. Although the 19th Amendment to the Constitution enabled the Constitutional Council to nominate judges,⁶ current career judges are from the pre-Sirisena era and the lack of independence persists. One lawyer remarked that the succession of judges to the higher courts is an "elevator" where progression is based on political patronage.⁷

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

3<http://www.reuters.com/article/us-sri-lanka-un-idUSKCN0V11O7>

4<http://www.sundaytimes.lk/160529/columns/alleged-war-crimes-pm-announces-probe-will-be-domestic-no-foreign-judges-195284.html>

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

6<https://www.parliament.lk/files/pdf/constitution/19th-amendment-act.pdf>

7TAG interview Q3 2015

TAG has reported extensively on the lack of independence between the GoSL and the judiciary. Our White Van Report from 2012 makes reference to the excessive power and influence of the Chief Justice and the great deference the judges of the Court of Appeal and Supreme Court have towards political considerations.⁸

The court martial of Field Marshal Sarath Fonseka demonstrate this deference. The Supreme Court upheld the guilty verdict of the Court Martial bestowed on Fonseka for corruption in military procurement.⁹ His arrest, trial and conviction all occurred upon his Presidential election bid against Mahinda Rajapaksa in 2010¹⁰. The judicial system was perceived as susceptible to political pressure in the administration of justice.

To a war crimes tribunal, questions over the lack of independence in the judiciary is damning to the administration of justice. Any potential bias from a judge creates a conflict of interest. Impartiality will be an essential requirement of the tribunal judges because high-ranking government officials are likely to be implicated in the proceedings.

In consequence, judicial findings cannot be relied upon. Although, following the ouster of President Rajapaksa the government is expected to decrease its interference, the mind-set of the career judges is still focused on political bias. Therefore, it cannot be trusted upon to end impunity to achieve justice for the victims.

Fails to abide by international standards of protection of fundamental rights and freedoms

The judiciary fails to protect fundamental rights to an international standard. Despite their constitutional enshrinement,¹¹ TAG found sections of the Sri Lankan legal community who would not advise clients to seek remedies for breaches of fundamental rights.¹² Among the many issues referred to, clients are unlikely to receive permission by lower courts to raise the matter in the senior courts. Furthermore, such cases have been withdrawn or filed in order to expedite the release or rehabilitation of former/suspected LTTE members. There is no proper judgment on the rights in issue, therefore, the interests of justice have not been served. Due to their lack of independence and the selection processes, there is an attitude to not progress cases capable of threatening or challenging the Executive.¹³

The judiciary's failure to protect fundamental rights is also evidenced in their acquiescence to the use of confessions obtained by torture in court, a phenomenon widely acknowledged in SriLankan legal circles.

Rather like the lack of independence, a failure to protect fundamental rights in the judges is dangerous to a war crimes tribunal. International criminal law seek to protect human rights and this is made clear in the Rome Statute of the International Criminal Court as internationally recognised human rights form the basis of international crimes, the freedom from torture for example. Previous

8TAG, 'Sri Lanka's White Vans' page 12

9<http://www.theguardian.com/world/2015/mar/23/ex-army-chief-sarath-fonseka-jailed-for-treason-made-field-marshal-in-sri-lanka>

10<http://www.bbc.co.uk/news/world-south-asia-10965135>

11Articles 10 - 17

12TAG interview Q3 2015

13TAG interview Q3 2015

war crimes tribunals, like Yugoslavia, have gone further and have actively sought to protect human right mechanisms.¹⁴ A disregard for the protection of fundamental rights could limit the application of international criminal law to Sri Lanka.

Lack of judicial competence

Finally, the general competence of the judiciary in the application of international criminal law is questionable. The judiciary do not have experience in the analysis of war crimes. Furthermore, in the application of law in general, judges have misunderstood principles of law and poorly applied their reasoning.¹⁵

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 poses obstacles for ending impunity and seeking redress for victims.

Racism

Furthermore, institutionalised racism against the Tamil community has an entrenched history in the judiciary.

In the early 2000s, the Supreme Court acquitted those accused of the Bindunuwewa Massacre. The explicitly racist behaviour of senior judges during that trial, now well publicised¹⁶ combined with the lack of any adverse impact to the careers of those judges when their behaviour was publicised, is but a high profile example of the historical bias of the Supreme Court judges towards the Sinhala-majority.¹⁷

“As the solicitor general repeatedly referred to the ways of the Tamil inmates had been murdered- “beaten, stabbed, and some even roasted alive” he would say with a flourish- one of the justices began to mock his emphasis on the word “roasted.” This brought much laughter from the other justices and the defense lawyer, and even, most disturbingly, from the government lawyers themselves... Judges’ utter disdain for the crime under consideration and for the state’s responsibility to determine the truth”

Alan Keenan, Boston Review, 2005: No Peace No War
<http://new.bostonreview.net/BR30.3/keenan.php>

The lawyers interviewed by TAG in 2015 and 2016 expressed concern that racism in the judiciary precludes case progression especially in fundamental rights cases.¹⁸ The potential implications of this racism are wide ranging; decisions could be racially motivated, overtly unfair and due process circumvented. Such problems are consistently faced when the complainant is Tamil.¹⁹

14Tadic Appeal Judgment [30]

15TAG interview Q3 2015

16Alan Keenan, The Boston Review, No Peace No War <http://new.bostonreview.net/BR30.3/keenan.php> 2005

17Asian Centre for Human Rights, ‘Sri Lanka: Miscarriage of Justice- Mass Acquittal in the Bindunuwewa Massacre Case’ June 2005

18TAG interview Q3 2015

19TAG interview Q3 2015

Conclusion

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. The lack of independence, failure to protect fundamental freedoms and lack of judicial competence significantly endangers a future tribunal.

It is concluded that the domestic judiciary is not equipped to administer a tribunal to the scale and magnitude required by the international community. Foreign judges, however, can be selected with a demonstrable track record. Their experience in a variety of tribunals with the safeguards put in place by foreign jurisdictions places them in a much better position to administer justice for the war crimes committed in Sri Lanka.

Together Against Genocide NGO(s) without consultative status, also share the views expressed in this statement.