New government, persistent challenges: Human rights, accountability and justice in Sri Lanka

Summary of proceedings of a seminar hosted by the Centre for Human Rights Law at SOAS, University of London, on 25 April 2016

Human rights protection, as well as accountability and justice for serious violations, have been persistent issues of concern in Sri Lanka for over three decades. The atrocities committed during the final phase of the civil war in 2009 in particular have prompted calls at the national and international level for effective investigations capable of resulting in the accountability of those responsible. The Rajapakse regime rejected these demands, and engaged in practices that deepened concerns about the human rights situation in the country. The coming into power of a new government in January 2015 has revived debates, and prompted hopes that the human rights situation in the country be improved and that the impasse over a commission of inquiry could be solved. While just over one year into a government’s term is too early to judge its record on these matters, the passage of time provides an opportunity to assess progress made, and to consider the reasons for persisting concerns. The seminar hosted by the Centre for Human Rights Law, SOAS, brought together key actors who have in different capacities engaged closely on relevant issues. They are therefore uniquely placed to assess recent developments and the current situation against the background of structural factors that have resulted in human rights violations and blighted Sri Lanka’s history. The panel was composed of:

- M.C.M. Iqbal, former Secretary to Four Presidential Commissions of Inquiry; later Consultant, National Human Rights Commission of Sri Lanka and Asia-Pacific Division of UN HRC, Geneva;
- Ingrid Massage, formerly Sri Lanka researcher at Amnesty International and member of staff at OHCHR-Nepal;
- Fred Carver, Campaign Director, Sri Lanka Campaign for Peace & Justice;
- Chandra Lekha Sriram, Professor of International Law and International Relations, Director Centre on Human Rights in Conflict, University of East London.

Dr. Lutz Oette, Centre for Human Rights Law, SOAS, chaired the seminar.

M.C.M. Iqbal presented a paper on ‘Enforced disappearance of persons in Sri Lanka: Legacy and ongoing challenges’. He highlighted the fact that “enforced disappearance of persons remains one of the widely known human rights violations in Sri Lanka”, which has persisted even after the end of the war in May 2009. The main challenge, following the change in government in early 2015, was to dismantle the machinery that had been put in place to commit acts of enforced disappearance. Numerous complaints about enforced disappearances, as well as of torture and sexual abuse, have been brought in Sri Lanka. Dealing with these complaints in a way that satisfies victims is now a “daunting legacy the government has to face”. This includes reforming the Prevention of Terrorism Act, particularly given that emergency laws have facilitated violations and that extra-legal practices have seeped into and impacted policing. A
key concern is impunity, which “had become endemic among the police and security forces of Sri Lanka some years ago”. No action has been taken, either against those responsible for the crime of enforced disappearances, other than some prosecutions of lower-ranking personnel, or in response to misconduct such as hiding evidence and obstructing the work of commissions of inquiry. There is a current commission of inquiry but its mandate overlaps with that of past commissions of inquiry, and there is a need to clarify that matter so as to avoid duplication and confusion. In practical terms, securing the cooperation by the military will be critical to enable judges to inquire into acts of enforced disappearance. One of the problems in the legal system is the lack of recognition of enforced disappearance as a crime, despite Sri Lanka’s ratification of the UN Convention on Disappearance of Persons in December 2015, and the challenge of retroactivity once it is so recognised. There is a need for the Government of Sri Lanka to cooperate in creating a Hybrid Tribunal. In addition, there is already considerable evidence against individuals, and specific recommendations have been made by past commission of inquiry that should be acted upon. M.C.M. Iqbal’s paper, which is available online at [http://srilankabrief.org/wp-content/uploads/2016/05/Disappearances-Legacy-and-Challenges-edited-1.pdf](http://srilankabrief.org/wp-content/uploads/2016/05/Disappearances-Legacy-and-Challenges-edited-1.pdf) and [http://groundviews.org/2016/05/19/enforced-disappearances-in-sri-lanka-legacy-and-ongoing-challenges](http://groundviews.org/2016/05/19/enforced-disappearances-in-sri-lanka-legacy-and-ongoing-challenges), concludes as follows:

The Government is faced with the legacy of persistent misrule by a regime that thought it was invincible. Condoning and overlooking the breaches of the rule of law by its agents led to its demise. If that pattern is allowed to continue unchecked and appropriate remedial measures not taken diligently the perpetrators of human rights and disappearances in particular would continue to be a law unto themselves. The current regime has to face the challenge of disciplining the very same State machinery that brought disrepute to the previous regime and the Country itself. The lessons learnt should not be in vain. The State should henceforth be seen as protector of its citizens and not as a perpetrator of abductions, torture and enforced disappearances. It should not also be seen as a protector of those had had been responsible for enforced disappearances or other offences. The Disappearances Convention does not condone enforced disappearances even when the country is at war or when there is internal political instability. Past events clearly show that when the Reports of Commissions of Inquiries into Enforced Disappearances were made public none of the major political parties in the Parliament, pressed for the implementation of the recommendations and to deal appropriately with the perpetrators identified. Let us hope that this situation has now changed and the current government which is saddled with many sordid legacies of the past, would face the challenges and change the course of history by boldly taking appropriate steps to enforce accountability and provide adequate reparations to the victims of enforced disappearances.

Ingrid Massage gave a presentation on: ‘Inquiries into serious human rights violations in Sri Lanka – a never ending history with predictable outcomes?’ Commissions of Inquiry (CoIs), such as the disappearances commissions (the UN identified a total of 32 CoIs between 1948 and 2011, not all of which were related to human rights) are set up under the Commission of Inquiry Act, 1948. This act was designed to investigate misconduct by civil servants, and, as experience with CoIs in Sri Lanka shows, is not fit for the purpose of investigating serious human rights violations. After 2009, three key CoIs were set up/in operation, Udalagama CoI (set up in 2006 to examine forced disappearances, then widened in scope), Paranagama CoI (set up in 2013) and the Lessons Learnt and Reconciliation Commission (set up in May 2010 in direct response to the UN Panel of Expert report). The CoIs set up by the Rajapakse
government have become politicised, and often constitute a response to external pressure. The UN has also set up investigation bodies but these are not fully-fledged international CoIs. The UN Panel of Experts (which reported in 2011) did not have a mandate as a fact finding body but carried out an assessment of the nature and scope of the violations. The UN Secretary General referred the report to the Human Rights Council, which led to the resolution that set up the Office of the High Commissioner for Human Rights (OHCHR) Investigation on Sri Lanka (OSIL) (which reported in September 2015). There was also an internal UN report by Charles Petrie that examined the failures of the UN during the period leading up to the end of the war. It was published begrudgingly after it had been leaked to the media. Considering the general achievements of CoIs in Sri Lanka, the overall assessment has to be one of grave concern. According to the OHCHR CoIs have been a “total failure”. They have been used to expose abuses by previous regimes or to deflect pressure. In some instances, they have resulted in some compensation and made good recommendations, which have not been implemented. Broader concerns are that CoIs have been slow, with weak/overlapping mandates, and are silent on how disclosure of criminal acts should lead to prosecutions. There is also a conflict of interest in the role of the Attorney-General and a lack of cooperation of state bodies. Despite this legacy, none of the CoIs has investigated the failures of the Attorney General and police to secure successful prosecutions. In addition, witnesses who come forward are intimidated. CoIs are not to be viewed in isolation but also in context of flaws in the criminal justice system, which include: serious human rights violations such as enforced disappearances are not crimes in Sri Lanka’s law; laws providing immunity; no clear provisions for command responsibility; identity parades are not held, chain of custody is often lost, forensic examinations not conducted properly; Attorney General’s department subject to political influence (during Rajapakse’s office); lack of effective Victim and Witness Protection; major delays; only low-ranking/junior personnel charged; rare convictions; charges are for lesser offences; state does not appeal against acquittals. All of this is underpinned by the lack of political will, and in these circumstances it is better not to have a CoI at all. At present, there is slow progress and the government is divided on how to proceed. The oral report to the September 2016 Human Rights session and written report in March 2017 should provide a good indication of prospects for an effective CoI.

Fred Carver addressed ‘Recent developments in the struggle for human rights and accountability in Sri Lanka’. He recalled that, in 2009, the then Government of Sri Lanka tried to fight a war without witnesses. Since 2009, the Human Rights Council has become a major forum, in which Sri Lanka, initially successfully, sought to ward off international scrutiny. In 2014, following the US lead in drafting a resolution, and UK support following the Commonwealth debacle, OHCHR set up an investigation into Sri Lanka, which made 25 recommendations that Sri Lanka endorsed after the report was published in September 2015. Sri Lanka has set up various bodies – at least 13 mechanisms – but they have overlapping mechanisms and have not proved effective. The main problem is the absence of trust in the North-East of Sri Lanka where most people expect mechanisms to fail before they even start. If one asks whether Sri Lanka has the capacity to undertake measures, one needs to ask further whether there can be capacity without trust. In that regard, the atmosphere in the North-East is not conducive, and it is impossible to talk about reconciliation in a climate of fear, with surveillance and violations ongoing.

Chandra Lekha Sriram, acting as discussant, attributed the fading of the January 2015 euphoria to the growing awareness of the problems that an institutional infrastructure of violence pose. In light of the absence of trust and legacy of failed CoIs, the question is where to start. There is a clear need to tackle
current problems, such as the sense of occupation and repression. Professor Sriram also addressed the challenge of universal jurisdiction and the potential role of the International Criminal Court.

The presentations were followed by vibrant discussions with the audience of about 50 persons who attended the event. Several themes and points of concern emerged. Several interveners were skeptical of Sri Lanka’s commitment to human rights, justice and accountability, and highlighted the need to take the Tamils’ right to self-determination and protection seriously. Others stressed the willingness of the Government of Sri Lanka to engage and the need to seize this opportunity, rather than pursue what they considered a perpetuation of narratives that view developments along ethnic lines. A related issue was what international actors (and which actors) could do towards strengthening human rights protection and securing justice for serious violations in Sri Lanka. The panelists stressed the importance of focusing on underlying structural problems, such as discrimination, land ownership, security sector reform, and more broadly the need for respect for the rule of law. They also highlighted the damage done by Sri Lanka’s position (2009-2014) for accountability efforts, and the need for international actors, such as the United Kingdom and the Commonwealth to push for accountability. One panelist stressed that the solution lies with the Government of Sri Lanka and others agreed that local actors, such as citizenship committees and victims of multiple violations sharing common experience, have a key role to play in the broader effort to ensure human rights protection and justice in Sri Lanka.