STATEMENT BY ICPPG ON UN HIGH COMMISSIONER ON HUMAN RIGHTS report on WAR CRIMES IN SRI LANKA

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The Centre for the Prosecution and Prevention of Genocide welcomes the Report of the Office of the Human Rights Commissioner's Investigation on Sri Lanka (OISL) . The Report contains serious allegations of a full range of heinous international crimes committed by the Sri Lankan armed forces. The OISL Report provides easy means of identification of the perpetrators of these crimes. On existing theories of international criminal law relating to command responsibility and joint criminal enterprise, there is little room for doubt that the commanders on the field as well as operational commanders have responsibility for these crimes. The President of Sri Lanka at that time, Mahinda Rajapakse, being the supreme commander of the armed forces, bears direct command responsibility. The operational and field commanders are also easily indentifiable. Many of them are named. Some names appear frequently in the Report. All of them have command responsibility and were possibly engaged in a joint criminal enterprise.

The thoroughness of the Report is admirable. There is need for the Report to be followed up by the institution of proper mechanisms ensuring accountability.

In anticipation of the release of the Report, the High Commissioner had already stated that the OISL's "findings are of the most serious nature". (Speech of High Commissioner at the Opening Session of the Human Rights Council on 14 September, 2015). He promised to make his recommendations after releasing the Report. In his speech he said: "..this Council owes it to Sri Lankans-and to its own credibility- to ensure an accountability process that produces results, decisively moves beyond the failures of the past, and brings the deep institutional changes needed to guarantee non-recurrence". Equally importantly, the Centre believes that if there is no meaningful prosecution of the crimes, it would set-back to the international community as a whole. A link in the precedents that meaningful prosecutions will follow the violations of serious international crimes will be severed. An excellent Report, the first of its kind, stating with authority the whole episode in history in the context of international humanitarian law will go waste if meaningful follow-up action is not taken.
The Centre agrees with all the recommendations made in the Report except the reference to hybrid tribunals. The Centre particularly welcomes the recommendation that legislation should be enacted to make war crimes, crimes against humanity and genocide, crimes without any statute of limitation applying to them. It welcomes the idea of a permanent presence of the Office of the High Commissioner for Human Rights in Sri Lanka.
The Centre believes that the crimes committed against Tamils was genocide and nothing less. The opportunity for testing out this view must be provided.
The Centre believes that the hybrid tribunal, recommended in the Report, will not be effective in ensuring accountability. The rejection of domestic tribunals is sound but a hybrid tribunal will be flawed not only on constitutional grounds but also on grounds that domestic judges, who are already biased or subject to pressure, will sit on the tribunal.

The manner in which the system of accountability is created will be the test of the credibility of the

United Nations system, the international community and the Government of Sri Lanka. It is on that the attention of the international community should be focused especially in light of the excellent Report of the High Commissioner.

The Sri Lankan Government's proposal of a domestic tribunal or as an offer of compromise to the international community, a hybrid tribunal, will not secure the aims that the Human Rights Commissioner has stated. The Report's acceptance of an hybrid tribunal having both domestic and external judges is flawed.
The Centre gives the following reasons for taking such a view:

1. It is unlikely that the Sri Lankan judges, chosen by even a neutral party like the Secretary General of the United Nations, will remain unbiased. The Report itself speaks about the pressures that Sri Lankan judges are subject to. Such pressures will continue if domestic judges are appointed to a hybrid tribunal. The experience of the hybrid tribunal in Cambodia is a case in point. In situations where the alleged perpetrators still enjoy power within the Sri Lankan society, the possibility of such pressure is indeed certain.
2. The constitutionality of such a tribunal within Sri Lanka will be endlessly queried as it would not have been appointed in accordance with the constitution that mandates judges exercising judicial functions in Sri Lanka be appointed by the Judicial Services Commission.
3. The rule relating to nullum crimen sine lege is a constitutional principle in Sri Lanka. It prohibits ex post facto legislation. The potential application of any new Sri Lankan law becomes difficult.
4. The OISL Report rightly points out that there is no existing structure for accountability in Sri Lankan law. The Penal Code of Sri Lanka, if relevant, is an archaic legislation made for India in 1860. It does not contain modern doctrines relevant for international crimes such as command responsibility or joint criminal enterprise. A possibility is to enact, as in Bangladesh, an International Crimes Tribunals Act or similar legislation containing international crimes and the necessary procedural rules. But the two-thirds majority or any majority necessary for such legislation will not be forthcoming in Sri Lanka.
5. The belief circulated by the Government of Sri Lanka that Article 13 (6) cures this defect is false. Article 13 (6) states :
"No person shall be held guilty of an offence on account of any act or omission which did not, at the time of such act or omission, constitute such an offence, and no penalty shall be imposed for any offence more severe than the penalty in force at the time such offence was committed.
Nothing in this Article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by the community of nations.
It shall not be a contravention of this Article to require the imposition of a minimum penalty for an offence provided that such penalty does not exceed the maximum penalty prescribed for such offence at the time such offence was committed".
6. It is facile to believe that the second paragraph of Article 13 (6) enables the inclusion of international crimes existent at the time of its commission into the Sri Lankan law. It refers to acts "criminal according to general principles of law recognized by the community of nations". International crimes, which exist, are created by treaties not by general principles. General principles are seldom used in international criminal law.
7. In any event, the punishment for these offences, if they can indeed be found in general principles, cannot be ascertained with any certainty. The constitution requires that the minimum and maximum punishment for a crime is stated in the law creating the crime.
8. The principles of joint and several liability and other adjectival law, the nature of the defences that can be pleaded in international law are based on treaties and precedents of tribunals under such treaties. They are not based on general principles. These concepts are novel. The concept of joint criminal enterprise liability had to be argued as a novel proposition before the Cambodian Tribunal. It would be difficult to fit them into the archaic Penal Code of Sri Lanka.
9. Constitutionally, the above are not the only impediments to a trial by a hybrid tribunal in Sri Lanka.

The domestic judges appointed to the tribunal are unlikely to have knowledge or experience in international criminal law.
10. The Sri Lankan judges are notorious for bias. Three recent appointments as Chief Justice (excepting the present holder of that office) are doubtful ones. They were political appointments. The International Bar Association and several other bodies have acknowledged the extent of political interference with the appointments of Justices in Sri Lanka.
11. An important book, written by two Sinhalese lawyers, attests to the ethnic and religious biases of the judges of the Supreme Court. The book, Judicial Mind in Sri Lanka: Responding to the Protection of Minority Rights, indicated the inability to leave behind ethnic and religious prejudices when dealing with minority issues. A tribunal consisting of such judges would be an enactment of a farce.
12. If the tribunal is to be a hybrid tribunal, it will have to have international judges. It may be unconstitutional for foreign judges to sit in Sri Lanka and exercise jurisdiction over crimes committed in Sri Lanka. Judges in Sri Lanka have to be appointed by the procedure specified in the constitution for the appointment of judges. The procedure involves the Judicial Service Commission making the appointment. The Commission cannot appoint overseas judges. It is unlikely that a hybrid tribunal would act constitutionally if it sits in Sri Lanka.
13. The practical issues of holding such trials in Sri Lanka are immense. Given the political support that the former President Rajapakse still has in the country, such trials will be attended by riots and demonstrations. Given the militarization that has taken place in Sri Lanka, the trial of military personnel will provoke backlashes that may be a threat to democracy in the country.
14. The Centre notes the difficulties that have attended hybrid tribunals that have been established so far.
15. The seriousness of the crimes recorded in the Report invite the question as to what the international community and the United Nations were doing while these atrocities were being committed. The international community and its institutions must rectify its omission through the establishment of proper mechanisms for accountability. The hybrid tribunal is not the solution.
16. The crimes of such a serious nature must be prosecuted before an international tribunal. The Centre readily concedes that the International Criminal Court may not have jurisdiction without a resolution of the Security Council as Sri Lanka is not signatory to the Rome Statute of the Court. A Security Council resolution may not be forthcoming due to the exercise of the veto by some permanent members.
17. But, this does not by itself preclude the establishment of an international tribunal. Under the law, every member state of the international community has universal jurisdiction over crimes such as war crimes, crimes against humanity and torture. The Report of the High Commissioner records such crimes as having been committed in Sri Lanka.
18. Every court of every state has universal jurisdiction over such crimes. It is possible for states to join together to establish tribunals to try such crimes. It is within their legal powers to do so. The earliest tribunals, the Nuremberg and Tokyo Tribunals, were so established by treaties. The Centre asks states to establish such a tribunal in recognition of the seriousness of the charges that have been raised in the Report.
19. The Centre suggests that an independent Prosecutor, with the powers similar to the powers of the Prosecutor of the International Criminal Court, be appointed first so that he could file charges on the basis of the report he makes on the evidence that has already been collected by the OISL. The OISL, in its mandate, was required to satisfy itself that there were “reasonable grounds to believe” that the allegations of international crimes were made out. The Prosecutor must detail in her Report that the evidence shows grounds to establish the crimes she investigates on the basis of a standard that would support criminal convictions. Thereupon, she should file charges against the person who allegedly committed the crime before the international tribunal, created in the manner suggested.
20. The International Tribunal would then hold a trial at which the guilt of the offender would be determined using the same procedures that are used by the International Criminal Court. This bold move will create a precedent for the future. There should be a back-up procedure for the International Criminal Court to provide for circumstances in which the Court lacks jurisdiction. It would be a

pioneering exercise for the international community to devise such a default procedure.
21. The international community must ensure that strong deterrents are provided against the commissions of similar crimes in other states. It will be an opportunity for establishing strong precedents that is wasted if the Sri Lankan Government is permitted to wriggle out of these immense crimes it has committed or condoned through the mirage of an imperfect prosecution.
22. Only an impartial Prosecutor, appointed from overseas, performing the functions similar to those of the Prosecutor of the ICC, could perform the prosecutorial functions in an acceptable manner. Only an international tribunal trying crimes under international law through procedures devised in international conventions could deliver justice in respect of the international crimes recorded by the Report of the High Commissioner.
23. The Sri Lankan Government as the Report points out is known for its vacillation and duplicity. Its promises are never kept. It would be wise to transfer competence over the process of accountability to an international tribunal.
For the reasons stated above, the Centre believes that the findings of the Human Rights Commissioner should be followed up through an international mechanism that ensures accountability.

Issued on behalf of the Centre for the Prevention and Prosecution of Genocide, London. The Legal Committee, which prepared this statement, consisted of Professor M Sornarajah and Arun Gananathan, Barrister.

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