Sri Lanka after the war: Pearl of the Indian Ocean or Blood Diamond?

I. Introduction

Sri Lanka had to go through 30 years of a vicious civil war, leaving up to 100.000 people dead. Tamils had to go through discrimination and social exclusion, being left back with a sense of unwelcomed interlopers[1]. However, the anguish, misery, trials and tribulations suffered by both ethnic groups have not been effectively addressed. Who is responsible for the gross violations of international humanitarian law and human rights? There has been a shift from the cult of the victor to the cult of the victim[2].

The notion of accountability is linked with the desire to put an end to impunity, as impunity is often a recipe for continued violence and instability. Thus, as an extrapolation, a political philosophy that privileges peace over war and humanity over barbarism gives rise to global norms that are agreed to by the international community and international law[3].

The question is therefore, does accountability can facilitate standards of human rights and promote peace and reconciliation? What else has to be done to address the authoritarian shift in the political landscape? This article will examine the political system, address current developments and suggest opportunities to solve the current status quo.

II. Sri Lanka: democracy or managed democracy?

Aristotle once said: “At his best, man is the noblest of all animals; separated from law and justice he is the worst.”

It is the nature of the Sri Lankan Constitution, which ushers in an era of authoritarianism: the President is vested with generous executive powers. The 1978 Constitution has introduced the position of the President: Sri Lankan presidents are involved with every aspect of the government and are able to hold ministries, or can bypass the cabinet posts by delegating decisions to the Presidential Secretariat.

Presidents have little constraints on their power and they cannot be taken to court. However they can be impeached by a two-thirds majority in Parliament. They can place the country in a state of emergency, under which they can override any law passed by the Parliament and promulgate any regulation without needing legislative approval. However, to prolong the state of emergency for more than a month, parliamentary approval is needed.

Now, with the newly introduced 18th Amendment, President Rajapakse has extended his rights and privileges. Alongside the existing rights, the President can for example seek re-election any number of times and it also enables the President to attend the Parliament once in three months and entitles him to all the privileges, immunities and powers of a Member of the Parliament other than the entitlement to vote. In short, it is all about arming the President with absolute power, making a mockery of democracy in Sri Lanka. In this context, a delicate footnote: provinces were totally sidelined during the process[4]. According to the Standing Order 46 (A) the Provincial Councils should have been consulted on any Bill that provided for matters affecting their affairs. Provincial Police and Public Service Commission, which has been made defunct under the 18th Amendment, did affect the provinces and thus, ideally, the bill should have received the approval from the Provincial Councils.

All in all, the concentration of power in one hand is, frankly speaking, devastating. The President is not only the Head of State, but also the Finance Minister and Defence Minister. This is an unacceptable accumulation of offices, as this increases the power of President with the most precious ministries of any government, under any system. The institutions designed to check and influence the executive – always relatively weak in the strong presidential system – have been badly damaged, with the Parliament, and now the judiciary, in effect now arms of the executive. The executive, in turn, is controlled by an unusually small group of people, mostly of the same family.

III. Current developments

1. Dambulla Mosque

Sri Lanka’s handling with religious-based turmoil is worrisome. Most recently, the Dambulla mosque incident led to public awareness. Buddhist monks led a crowd trying to storm the mosque in the central town of Dambulla, triggering Sri Lanka's government to order the removal of a mosque from an area it says is sacred to the country's majority Buddhists. This sparks a climate of tension. A Hindu Temple in

Dambulla has also been demanded to be removed.

2. Culmination of power and number of ministries

Sri Lanka has one of the largest cabinets in the whole world: 66 members, formerly holding the largest cabinet in the world with 108 ministers. In times of lack of finances and strongly needed money for infrastructure and education, this is an unacceptable situation.

3. Political Foundations

Foreign Political Foundations find themselves in very threatening circumstances. Recently, the chief clerk of the famous Friedrich-Ebert-Foundation in Colombo was arrested and detained.[5] Political foundations must indeed comply with Sri Lankan laws and not engage in activities to topple the government. This is not their intended work. However, serious doubts arise regarding the developments of the Friedrich-Ebert-Foundation.

4. Detention camps and internally displaced persons camps

The government, in violation of international law, has since March 2008 confined virtually all civilians displaced by the fighting between government forces and the Liberation Tigers of Tamil Eelam ("LTTE") in detention camps, euphemistically called "welfare centers" by the government. Only a small number of camp residents, mainly the elderly, have been released to host families and institutions for the elderly. However, these are shut down now and the civilians relocated. But what remains unclear is the estimated number of unreported cases of LTTE fighters, who are still kept in detention and whose destinies are unclear to their families and the public.[6]

5. The Fonseka Case

The popular Sri Lankan Army Chief, General Sarath Fonseka, is regarded as a war hero among many Sinhalese in Sri Lanka and is credited with leading the bloody assault that finished off the Tamil Tiger insurgency. In 2010, the general unexpectedly mounted a campaign against Mr. Rajapaksa, earning the support of a disparate coalition of opposition parties. The general had promised to curtail the powers of the presidency and also fight corruption amid allegations of cronyism against Mr. Rajapaksa and his family. The general won 40 percent of the vote and was jailed not long after the election. He was court-martialed and sentenced to 30

months, then later convicted of separate criminal charges and sentenced to three years — convictions his supporters regarded as politically motivated. This event led to serious concerns regarding the understanding of democracy, leaving scars on the post-war Sri Lanka's self-conception as a democratic society.

IV. Why accountability?

International trials are by definition more visible than national proceedings and signal the will of the international community to break with the past by punishing those who have deviated from the acceptable standards of human behavior[7]. In post-war societies, there is a continuum of violence, which is accompanied with a climate of brutalization, repression and hardening of the societal roles.[8] In states recovering from violent conflict, the national judicial system is often not able or not willing to hold accountable individuals who have committed atrocities during the violent conflict[9].

Hence, there is a public acknowledgement of the right of victims to the investigation and prosecution of those responsible for international crimes. To deny this right is also to deny the applicability and relevance of international human rights law in the first place. However, human rights abuses still occur and much remains to be done and many practical problems call for resolution.[10] Hans Morgenthau once said that "in the span of century the doctrine of sovereignty became unchallengeable either from within the territory or from without. In other words, it became supreme." Victims of human rights abuses had to suffer alone, as governments made them understand that they cannot be looked after; they remained objects of international pity rather than subjects of international law.[11] A criminal trial brings past suffering into the public arena and enables the victimized community to deal with the trauma and perhaps can create conditions for a future social life.[12] Noteworthy is the effective communication and outreach of involving the local population. A one-size-fit-all solution cannot be applied to every situation, but there is an international legal imperative to ensure justice is done and bring perpetrators of widespread and egregious abuses to justice in the process of peace-building and post-conflict reconstruction.[13] The pursuit of accountability – including through international mechanisms - has intrinsic and instrumental value. There is inherent benefit in investigating and punishing serious violations of human rights and humanitarian law. By doing so, the norms of international human rights law are upheld.

The crimes allegedly committed by both war parties have to be fully investigated, such as the recruitment and use of child soldiers, use of human shields, the

bombardments of hospitals and safe zones leading to high civilian casualties, targeting civilian objects and distribution lines, extra-judicial killings, the targeted killing of high-rank LTTE members, who surrendered.[14] Up to know, there was neither an independent investigation, nor criminal procedure invoked against perpetrators.

Recent developments in Sri Lanka, such as the impeachment of the chief justice, facilitate this culture of impunity and authoritarian rule and undermine the rule of law. Belligerency and lawlessness, then, extend to the entire society. Barbarism is a predictable and inescapable outcome.[15]

V. Proposals

The proposal of the author is as follows:

1. Revised 13th Amendment

The key aspect in the 13th Amendment was the provincial council system within the unitary state based on a 1987 agreement with India, enabling the devolution of powers. Furthermore, the 13th Amendment made Singhala and Tamil official languages and English as link languages. But this 13th Amendment shall be modified with the introduction of the *subsidiarity principle*. This principle entails decentralization and as Toqueville once rightly said:

Decentralization has, not only an administrative value, but also a civic dimension, since it increases the opportunities for citizens to take interest in public affairs; it makes them get accustomed to using freedom. And from the accumulation of these local, active, persnickety freedoms, is born the most efficient counterweight against the claims of the central government, even if it were supported by an impersonal, collective will.

Equipping the lowest level of governance, such as municipalities with financial resources, legal responsibilities (schools, kindergartens, housing, road construction, fire fighters, garbage disposal, building inspection, etc.) will strengthen the municipalities, leading to more efficiency and also enhance the identification with the unitary state.

2. A transparent Reconciliation Commission with an imperative mandate

The LLRC, the Lessons Learnt Reconciliation Commission, was a commission of inquiry appointed by Sri Lankan President Mahinda Rajapaksa in May 2010 after the 26-year long civil war in Sri Lanka, mandated to investigate the facts and circumstances which led to the failure of the ceasefire agreement made operational on 27 February 2002. The lessons that should be learnt from those events are institutional, administrative and legislative measures, which need to be taken in order to prevent any recurrence of such concerns in the future and to promote further national unity and reconciliation among all communities. But, however promising, due to its limited mandate, alleged lack of independence and its failure to meet minimum international standards or offer protection to witnesses, it was heavily criticized and can be considered a failure.

A new, independent and impartial commission is needed with a strong mandate, nominated by the Parliament to conduct fact-finding, hear victims, provide remedies and reparation for them with a binding outcome for all parties involved.

3. Independent Judiciary, Review of Emergency Laws, and strengthen Attorney General

The judiciary must be permitted at all times to review the basis for declaring a state of emergency as well as the measures taken in response to the crisis or emergency, ensuring the State's compliance with domestic law and international human rights law and standards. Furthermore, the judiciary as well as individual judges must not be subordinate to the other public powers, including the political branches of government. The judiciary must be kept independent of the executive and the legislature. Judicial institutions must be allowed to function independently, free from interference, intimidation, threats or violence. Independence of the judiciary is essential in maintaining the rule of law and the notion of a fair trial. Last but not least, the Attorney General acting as the State prosecutor must perform its duties fairly, consistently and expeditiously, respecting and protecting human dignity and human rights, thus contributing to ensuring due process and the smooth functioning of the criminal justice system.[16]

4. Extending the Freedom of Press, Speech and Assembly

Only a vibrant society can ensure accountability and uphold vigilance against wrongdoings by the government. The European Court for Human Rights once rightly judged that the press is a public watchdog and shall control the government and shed light on wrongdoings.[17] The German Constitutional Court then again pointed

out that freedom of speech and assembly is the cornerstone of democracy, the most powerful sword of citizens to fight for participation and against totalitarian ideologies and arbitrary power.[18]

One must note that Sri Lanka was ranked 162 by the Reporters without Borders in their 2013 index. The Government is in control of the state media and use intimidation to get privately-owned media journalists to censor themselves. During last January's elections, 96.7 percent of news program air-time was devoted to the President and his aides and less than 3.3 percent to the opposition. Unwanted journalists are detained and newspaper offices attacked.

Liberty is of utmost importance in democracy and is not a system succumbing to the vagaries of nature. Hence, eternal vigilance will be the prize of liberty.

5. Forceful Opposition and Parliament

The role of opposition is a vital aspect of any functioning democracy. While the parliamentary system is often criticized for spawning what appears to be endless bickering, this is certainly preferable to the alternative.

Unless there is a strong opposition challenging government policy, do the citizens have to accept everything governments tell them as the gospel truth? Oppositions are part of the checks and balances that prevent governments from indulging in the excesses of power. A weak opposition, such as now with the UNP-led one, paves the way to complacency of the most powerful.

VI. Conclusion

"For there can be no healing without peace; there can be no peace without justice; and there can be no justice without respect for human rights and the rule of law."

Through the establishment of accountability for gross violations of human rights, whether at an individual or an institutional level, a norm of accountability can be established, linked to the purported deterrent role of transitional justice,[19] also underscoring the pain suffered of the victims.[20]

But further more Tamils need to be recognized as equal citizens, with equal resources and possibilities to succeed in the Sri Lankan society. But as long as the Government of Sri Lanka is led by hardliners, defined by their Singhala-Buddhist chauvinism, there is no sustainable peace and the call for Tamil Eelam will be more

urgent than ever before. Corruption and nepotism deepen the gap between the citizens and the Government.

Current steps, such as the appointment of a panel on the 13th Amendment are promising, yet not comprehensive, as a dialogue with all parties is needed.

The Sri Lankan Government should regard current circumstances as an opportunity to redefine itself, break with the past and not to label any international protests and accusations as imperialist, considering this as part of a conspiracy. It should rather rethink its ties to Pakistan and China and work towards a multicultural and tolerant country, where Muslims, Hindus, Buddhists and Christian can live together in a vibrant and open-minded democracy. Voltaire rightly said: "What is tolerance? It is the consequence of humanity. We are all formed of frailty and error; let us pardon reciprocally each other's folly - that is the first law of nature." This pardon must be achieved through a reconciliation commission and war crimes tribunal. Justice needs to be served to the victims.

In Sri Lanka, we have to accept the differences we have, which make the whole picture of this beautiful country. It's the diversity of our beliefs, languages and ethnicities that unites us. Broad tolerance in the matter of beliefs is necessarily a part of the new ethics.

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[1] Damien Kingsbury, *Sri Lanka and the Responsibility to Protect: Politics, ethnicity and genocide* (Abingdon: Routledge, 2012), p. 63; Francesca Bremner, "Fragment of Memory, Processes of State: Ethnic Violence through the Life Histories of Participants" in Deborah Winslow & Michael D. Woost, eds., *Economy, Culture and Civil War in Sri Lanka* (Indianapolis: Indiana University Press, 2004), p. 142.

[2] Thorsten Bonacker, *Globale Opferschaft*, in ZIB 1:2012, p. 7.

[3] Damian Kingsbury, *supra* note 1, p. 94.

[4] *Daily Mirror*, September 8, 2010.

[5] "Leiterin der Ebert-Stiftung in Sri Lanka inhaftiert", online: Berliner Zeitung http://www.berliner-zeitung.de/politik/leiterin-der-ebert-stiftung-in-sri-lanka-inhaftiert-,10808018,23305238.html, last visited 25th of June 2013.

[6] “All detained ex-LTTE fighters to be released next year”, online: The Indian Express http://www.indianexpress.com/news/all-detained-exltte-fighters-to-be-released-next-year/886925/, last visited 23rd of June 2013.

[7] Antonio Cassese, *International Criminal Law*, 2nd ed (Oxford: Oxford University Press, 2008), p. 440.

[8] Franziska Martinsen, *Gerechtigkeit für Betroffene!?*, in: Kritische Justiz, 3:2012, p. 263.

[9] Majbritt Lyck, *Peace Operations and International Criminal Justice- Building Peace after mass atrocities* (Abingdon: Routledge, 2009), p. 22.

[10] Paul G. Lauren, “From Impunity to International Accountability: Forces of transformation and the changing international human rights context” in Ramesh Thakur & Peter Malcontent, eds, *From Sovereign Impunity to International Accountability*: *The search for justice in a world of states*, New York, United Nations University Press, 15, p. 35.

[11] *Ibid* p. 10.

[12] Martti Ahtisaari, “Preface – Justice and accountability: Local or international?” in Ramesh Thakur and Peter Malcontent, *supra* note 10, p. xii, xv.

[13] Rachel Kerr & Eirin Mobekk, *Peace and Justice- Seeking Accountability After War* , p. 182.

[14] War Crimes in Sri Lanka, Asia Report No. 191, 17th of May 2010, online: http://www.crisisgroup.org/en/regions/asia/south-asia/sri-lanka/191-war-crimes-in-sri-lanka.aspx; Report of the Secretary-General’s Panel of Experts on Accountability in Sri Lanka, 31st of March 2011, online: http://www.un.org/News/dh/infocus/Sri_Lanka/POE_Report_Full.pdf last visited 24th of June 2013.

[15] Damien Kingsbury, *supra* note 1, p. 64.

[16] International Commission of Jurists, *Authority without accountability. The crisis of impunity in Sri Lanka* (Geneva: International Commission of Jurists, 2012), online: http://reliefweb.int/sites/reliefweb.int/files/resources/SRI-LANKA-IMPUNITY-REPORT-NOV-12-FINAL.pdf last visited 25th of June 2013.

[17] European Court of Human Rights, *Factsheet - Protection of journalistic sources*, July 2013, online: http://www.echr.coe.int/Documents/FS_Journalistic_sources_ENG.pdf last visited 25th of June 2013.

[18] Oliver Jouanjan, “Freedom of Expression in the Federal Republic of Germany” (2009) 84:3 Ind LJ 867, online: http://www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=1126&context=ilj last visited 25th of June 2013.

[19] Rachel Kerr & Eirin Mobekk*, supra* note 13, p. 4; Majbritt Lyck*, supra* note 9, p. 24.

[20] Franziska Martinsen, *supra* note 8, p. 260.

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