ABSTRACT

This report seeks to show that, in Sri Lanka, witnesses who testify against the government and/or its senior military or civilian officials in cases relating to alleged human rights violations, and in particular war crimes are at risk of intimidation and violence, including murder.
Persecution of War Crimes Witnesses and Victims Seeking Justice in Sri Lanka

Introduction

Approaching the release of the report of the UN Human Rights Council investigation (OISL) into the human rights violations and war crimes committed during the final stages of the Sri Lankan civil war in May 2009, this report seeks to assess the state of the country vis-à-vis witnesses and victims seeking justice in Sri Lanka. The initial response of the Government of Sri Lanka (GoSL) to the OISL call for witness in the country was to increase fear and intimidation on the Tamil population in general and on the people publicising the OISL call in particular. In the months since, the change of government is Sri Lanka has meant that the discourse is now focused on domestic and ‘hybrid’ mechanisms and the possibilities in the country, based on the view that the change of government makes it possible for justice and accountability to be achieved in country. The government of Sri Lanka (GoSL) is proposing an extended consultation with victims on appropriate in-country mechanisms for accountability.

This report assesses the safety for witnesses and victims seeking justice in Sri Lanka in the following ways. Firstly, we publish for the first time, a compilation of views of Tamils who have provided evidence to the OISL. We re-visited these OISL witnesses in September 2015, some 9 months after President Rajapaksa was ousted. Secondly we update the discourse around the UNHRC push for accountability with the current guidelines of the UN High Commissioner for Refugees (UNHCR) on persons at risk of persecution in Sri Lanka and current UK and European law that recognises witnesses and victims seeking justice as a social group in need of protection. Thirdly we assess the impact of the ‘new’ government and Sri Lanka’s witness protection legislation that took effect a month ahead of the UNHRC discussions on accountability.

Our research shows that Sri Lanka is not a safe place for witnesses or victims seeking justice.

The current UNHCR guidelines recognise certain ‘Witnesses of Human Rights Violations’ and ‘Victims of Human Rights Seeking Justice’ as a category of persons at risk in Sri Lanka and particularly recognise Tamil ethnicity as a factor in determining which victims are at risk. This position was reaffirmed in the (current) United Kingdom asylum country guidance case¹ which found that individuals who have “given evidence … implicating the Sri Lankan security forces, armed forces or the Sri Lankan authorities in alleged war crimes” are at “real risk of adverse attention or persecution on return as potential or actual war crimes witnesses.”

Thus, if prosecutions are conducted in Sri Lanka, the vast majority of witnesses who contributed to the OISL will not be able to provide evidence. The victims who participated in the OISL process will be dis-enfranchised; and any further ‘consultation process’ that requires Tamil victims to come forward and self-identify themselves to GoSL as seeking justice will place those victims at further risk of persecution.

¹ GJ and Others (post-civil war returnees _ Sri Lanka CG [2013] UKUT that 00319 (IAC) 7(d)], reaffirmed by the Court of Appeal in MP, NT v Secretary of State for the Home Department [2014] EWCA Civ 829]. TAG was an interested party in both proceedings.
Witness fear for their safety

Almost all witnesses to OISL did so under assurances of confidentiality. In September 2015 – some nine months after the election of the new President and in the days following the parliamentary elections that brought the current government into power – Together Against Genocide (TAG) re-interviewed OISL witnesses on their attitudes towards testifying in Sri Lanka. All interviewees re-affirmed they fear for their safety and did not feel they could testify in Sri Lanka.

Below are some of the more serious war crimes they witnessed:

The use of cluster bombs

“*We couldn’t really see much, it was more of a noise. When it exploded, within five minutes the area would be destroyed. Within that noise, 500-600 people would vanish like that.*”

“The government for the first time threw cluster bombs into that protective zone … one of them exploded and two or three people died. After 4-5 minutes, 100-200 people started dying.”

“*People arrived like onions, their skin was black and would fall off … When we went there to help and carry people we saw how their skin peeled off. No one who was brought there could be saved.*”

Targeting hospitals

“*People were under trees and next to bunkers in tents. … Shell pieces fell where we were located. People who were sitting at the edge came to our side with new injuries with their mats, they weren’t even real mats. … The cluster bomb hit the hospital ward and the pieces hit the trees there. [The hospital] was destroyed at the side walls.*”

“*[The hospitals were intentionally hit] … There were so many people, there were signs, there were ambulances, there were drone flights above as well. So they knew exactly what was going on there … There was a cross-printed white flag at the entrance of the hospital, and above the trees so that you could see it from the air and the rooftop was also painted with a cross so that you could see it.*”

Killing those surrendering

“*They took them there, tied their hands and legs and used the sand of the walls to bury them alive while they were begging and praying*”

“At the end, there were around 400 meters between us and the army. We saw those who were at the back of the group, shells were hitting from all sides…those who were half a km behind us were dying enmasse. Those were people who were about to surrender.”

“When we walked [to surrender] … on both sides soldiers were on the ground, so when we walked people were squeezing and pushing and running towards the army. I
watched how from the both sides the army shooting at people who were walking at the edges. They were running towards the road from the forest, when they were running towards the bridge, the army was shooting from 300-400 meters afar the people from right there. ... We were watching it. We watched how they captured young boys who were standing next to us, between 20-30 years and making them sit down on the sides. They sat them down right there and began executing them. Bodies were already amassing there.”

Rape and sexual violence

“As we surrendered, they tied up women and raped them ... They tied their hands behind their backs and they were left with their bra and knickers, or even without that. The [soldiers] who came into that area picked out the pretty women, looking for able women, they took them and did whatever they wanted to right there. They were raped and shot right there.”

“As the team behind was chasing the people forward, the ones in front were picking them out. Straight in front of us. ... How many people were bitten on the cheeks, breasts, and humiliated ... They shot them in front of us.”

“It was two or three people, one person would hold her, the other would undress her and then the others would go do this and that in exchange. ... Some of them were dead...there were people who haven’t eaten properly for a month or two with real food not being available. What happens if you rape someone in such a condition? They were exhausted, so they end up dying. ... Many young women died like that.”

For these witnesses, Sri Lanka continues to be an unsafe place. While intimidation of the general Tamil population continues, people identified as potential witnesses, and their relatives, continue to be specifically targeted. The GoSL reaction to the OISL call for witnesses in Sri Lanka was to target potential witnesses or those who could facilitate witness communication. The Sri Lankan military ordered internet cafe owners to alert the authorities of anyone scanning or copying documents to be sent to OISL. 2 A man was arrested in Kilinochchi for distributing OISL evidence collection forms. 3 In March 2015, 8 people were arrested for making a documentary, which contained scenes portraying the Sri Lanka Army as "immoral, inhumane and atrocious" 4.

While witnesses are willing to give testimony in camera outside Sri Lanka, the TAG interviewees confirm that all witnesses fear death if they had to return to Sri Lanka and they fear for the safety of the families they have left behind.

“If I didn’t have children, I’d surely provide testimony because I’m not that sad about dying. They will certainly kill us. The moment we will give testimony, they won’t let us go. They will certainly kill us in one way or another. They won’t let us stay alive.”

“I can’t return to my country anymore. If I do, they will certainly arrest me. If they arrest me, a lot of troubles with start and I don’t think they will keep me.”

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“We cannot provide testimony for a tribunal in Sri Lanka. When the UNHRC was talking to us there, the government already gave us limits to how much we could say. Those who did were beaten … So there is certainly no way to say the truth there.”

“If I spoke [to a Sri Lankan government investigation] my life would be in danger. … I can’t speak in Sri Lanka as there would not be safety for me.

Experts agree there is a valid fear of persecution

The current UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka came into effect in December 2012. It recognises certain ‘Witnesses of Human Rights Violations’ and ‘Victims of Human Rights Seeking Justice’ as a category of persons at risk in Sri Lanka. These guidelines particularly recognise Tamil ethnicity as a factor in determining which victims are at risk.

The UK courts also recognise that those who are identified as witnesses in Sri Lanka continue to be in danger of persecution. In the currently operative ‘Sri Lanka Country Guidance’, GJ, MP, NT v SSHD, the Upper Tribunal found:

“Witnesses: Individuals who have given evidence to the Lessons Learned and Reconciliation Commission implicating the Sri Lankan security forces, armed forces or the Sri Lankan authorities in alleged war crimes. Among those who may have witnessed war crimes during the conflict, particularly in the No-Fire Zones in May 2009, only those who have already identified themselves by giving such evidence would be known to the Sri Lankan authorities and therefore only they are at real risk of adverse attention or persecution on return as potential or actual war crimes witnesses.”

The Court of Appeal confirmed that witnesses already known to the GoSL for giving statements to the LLRC are at a real risk of persecution. Recent cases have extended this, to find even those who have been willing to testify more generally were in danger of targeting by the GoSL.

In GT [2013], where the appellant had disseminated information on the use of banned weapons, the tribunal found:

“He is, I consider, quite evidently at equal risk as he would be if he were a journalist as his actions are implicitly critical of the government and expose it to criticism or opprobrium, not just locally but internationally.”

In PS [2015] the court found that as the appellant had given evidence to an international organisation which discredits the GoSL, he was of adverse interest to the authorities and consequently at risk of torture in detention in Sri Lanka.

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5 <http://www.refworld.org/pdfid/50d1a08e2.pdf> accessed 30 August 2015
6 At section A.5
7 GJ and Others (post-civil war returnees_ Sri Lanka CG [2013] UKUT
“I find also that someone who has given evidence of genocide or war crimes by Sri Lankan forces is likely to be viewed as working towards the destabilisation of the government”.

In SA [2014], the tribunal found that a journalist who had provided evidence on the last stages of the war, would be at risk if he was returned to Sri Lanka. The judgement notes:

“On the evidence I have, I regard it as improbable that he would be able to negociate the airport successfully.”

In SG [2015] the court found SG was at risk of persecution for reasons including:

“he has given detailed evidence of events in Sri Lanka which would tend to substantiate alleged war crimes being committed by the Sri Lankan army”

It is important to note that some of the determinations cited are as recent as July 2015: there is no shift in the findings of UK courts following the change of government in Sri Lanka. On the contrary new evidence of persecution continues to be presented to the courts every month.

While this report focuses primarily on the United Kingdom, European courts have taken a similar view. For example in a Swiss judgment in October 20118 said

“According to the Federal Administrative Court, victims or witnesses to human rights violations during and after the war, and people who complain about violations have to expect reprisals and persecution by Sri Lankan security forces.”

**New government, but no change**

The election of a new President and the formation of a new government have not impacted the position of the witnesses. Not only do the witnesses speak of ongoing intimidation and harassment to relatives in Sri Lanka and of their fear of persecution were they to go back, the UK courts continue to find that witnesses to allegations of war crimes by the Sri Lankan army remain at real risk of persecution.

The current Sri Lankan government, which is seen by some as a break from the past regime, is intrinsically intertwined with the events of 2009. President Sirisena himself had long served as a senior minister (Health, and briefly at the end of the war, Defence) in former President Mahinda Rajapaksa’s governments. Moreover, many senior officials in the former government, having become increasingly unhappy with former President Mahinda Rajapska’s governing style, in particular resenting his family members being in control of economic and political administration9 had switched sides and are now senior officials in the current government. As The Guardian (UK) newspaper’s editorial of 11 January 2015 noted, the removal of Rajapaksa from power is to be welcomed,

“But that does not mean extending an unqualified welcome to the new president, Maithripala Sirisena, and his disparate coalition. What has happened in Sri Lanka was

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8 A_ Sri Lanka v BFM 27 October 2011 [see translation by TAG in the litigation section of our website]  
not a revolution nor, at least not yet, a restoration of the democratic checks and balances of the past. It was instead an uprising within the dominant party in government against the high-handed style of the Rajapaksas.”

As The Economist succinctly put it, current President Maithripala Sirisena “offers a different brand of Sinhala Buddhist nationalism, not its repudiation.”

Two weeks after taking office on January 9, President Sirisena “fully pardoned” former army commander Lt General Sarath Fonseka who was jointly responsible for the 2009 military campaign with then Secretary of Defence Gotabaya Rajapaksa (brother of then President Mahinda Rajapaksa); a statement from the President’s office added: “Fonseka’s rank will be restored and will be entitled to all military and social privileges without any legal barrier. He will be awarded back his medals and honors.” In March 2015, President Sirisena went further, promoting Fonseka to the highest rank of Field Marshall – six years after he had retired from the army – at an elaborate ceremony attended by the President, Prime Minister Ranil Wickramasinghe, the Chief Justice, the Chief of Defence Staff, the Tri Forces Commanders, and foreign diplomats. According to the Defence Ministry statement, Field Marshall Fonseka is entitled to “a separate staff with security.” In short, Field Marshall Fonseka, who led the Army in 2009, is now a prominent figure in the current governmental disposition with his public standing (at least among the majority Sinhalese) restored and enhanced.

Meanwhile, in May 2015, Major General Jagath Dias was appointed as the chief of staff of the Sri Lankan Army. The Major General was in charge of the 57th division during May 2009 and is alleged both to be directly responsible and to hold command responsibility for mass atrocities committed by his troops, especially during the final phase of the war. Swiss officials declared in 2011 that he would face criminal investigation for these allegations if he were to enter that country.

Witnesses, victims and campaigners for justice also continue to be arrested and targeted under the new government. Balendran Jeyakumary, a prominent Tamil campaigner for the disappeared, was re-arrested in September 2015 on what are alleged to be trumped up charges. The Sri Lankan police have also been complicit in attempting to stop a civil signature campaign calling for an international mechanism to investigate the war crimes and crimes against humanity in the last stages of the war. More than 20 people have been arrested under the Prevention of Terrorism Act since the January 2015 and the election of the

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new government. The Prevention of Terrorism Act remains one of Sri Lanka’s most controversial laws, being almost universally condemned not only for being inconsistent with contemporary human rights standards, but also for encouraging the pervasive violation of fundamental rights otherwise protected by the Sri Lankan constitution.

Though the new Sri Lankan government has enacted legislation aimed at protecting witnesses, the Act has fundamental flaws that makes it an insufficient safeguard for potential witnesses. The Assistance to and Protection of Victims of Crime and Witness Act 2015 (the Act) aims to create a witness protection regime, but while it has some useful aspects, it fails to encourage people to give evidence and it fails to adequately deter people breaching the terms of protection. The Act is based on a 2007 draft, which was formulated under the old government and many of the criticisms raised about the 2007 draft have not been addressed in the 2015 Act.

Section 46 of the Witness Protection Act defines a witness as anyone who has already given information in the course of an investigation to a legal enforcement officer or another legal authority, extending that definition to the children and other family members of the witnesses. However, the focus of the definition is on those who have already given information and, therefore, does not include those who might be expected to give information. Thus, even assuming the Act delivers on its promise, potential witnesses willing to speak in a domestic mechanism in Sri Lanka are in an unenviable position – since they have no protection until they are recognised as witnesses they will be at increased risk between the time they speak up and that formal recognition is achieved.

More fundamentally, the promise of a witness protection regime does not exist in the Act itself. The Act does not contain any guidance as to when protection may be granted. What constitutes a reasonable ground to believe harm may be inflicted is ambiguous, as are the considerations to be made when considering the need for protection. While ambiguity can allow for a great deal of flexibility and scope, it also has the potential to create institutional bias in favour of the state authorities. Further, eight months after the bill was passed, the main body responsible for the protection of victims and witnesses, the National Authority for the Protection of Victims of Crime and Witnesses, is yet to be established, raising concerns about the practicality of the protection offered witnesses.

Conclusion

Sri Lanka is not a safe place for witnesses willing to speak up against the GoSL or for victims seeking justice. Witnesses in Sri Lanka who have spoken out, and any witnesses outside Sri Lanka who have provided testimony, are at risk of persecution if they return to Sri Lanka to testify. If prosecutions are conducted in Sri Lanka, regardless of whether under domestic or

international mechanisms, the vast majority of witnesses who contributed to the OISL will not be able to provide evidence safely. A consultation process that requires Tamil victims to come forward and self-identify themselves to the Sri Lankan government as seeking an international mechanisms for justice will place those victims at further risk of persecution. The change of government has so far proved not to have a significant impact on this situation – if anything, the individuals, sentiments and actions of the government suggest it is ‘more of the same’.

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