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Post-War Sri Lanka: Roads to Reconciliation

*Round Table Discussion Organized by Ifri
on 9 December 2011*



Centre for Asian Studies



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Report written by Amaia Sanchez-Cacicedo

The Center for Asian Studies of the French Institute of International Relations (Ifri) organized on 9 December 2011 a round table discussion regarding the future of the ongoing reconciliation process in Sri Lanka, entitled 'Post-War Sri Lanka: Roads to Reconciliation'. The meeting aimed to provide a space to openly discuss the problems and prospects of reconciliation in the island nation by gathering a panel of practitioners and experts on Sri Lanka as well as non-regional specialists with expert knowledge of other post-conflict situations. The objective was to bring about a constructive debate and generate ideas on what forms of reconciliation can be sought in Sri Lanka, as well as on the challenges and favourable elements of a future reconciliation process. The discussion began with presentations by a panel of experts from various fields who presented on different aspects of the current post-war situation in the country, followed by an open debate with a broader range of participants. The morning's discussions were placed under the Chatham House Rule to facilitate a free exchange of ideas.

PRESENTATIONS AND GENERAL CONTEXT

Dr. Dayan Jayatilleka, Ambassador of Sri Lanka to France, Spain and Portugal, opened the discussion by presenting his views on the lessons learned from the Sri Lanka's conflict. He highlighted the complexity and unevenness of the Sri Lankan scenario. Thereafter, he referred to two lessons learned, namely: (i) the need for early reforms since this may undercut the momentum of an insurgency, as delayed reforms are less capable of doing so; and (ii) the need to understand the intrinsic character of the armed non-state actor in question and its evolution – the nature of the state's political and security response must be shaped by the latter.

In terms of the post-war situation in Sri Lanka, Ambassador Jayatilleka identified four core issues that need to be addressed, namely: political reconciliation, identity, accountability and the international dimension. He referred to the current opening-up of political space and re-enfranchisement of Tamils in the North and East via the Tamil National Alliance (TNA), currently engaged in a process of political negotiations with the Sri Lankan government which has, thus far, progressed little. Ambassador Jayatilleka then went on to explain the specificity of the Sri Lankan identity – particularly that of the Buddhist Sinhalese, considered to be a 'majority with a minority complex' when seen from a regional perspective and considering the large Tamil diasporic community. In relation to a potential international inquiry into the conduct of the war in Sri Lanka, he noted how there was no pressure at all from Asian countries in this regard. In his view, the classical notion of Westphalian sovereignty prevails in Asia and the global South, more broadly.

Ambassador Jayatilleka finalised his presentation by delving into the core issue of the discussion, namely, issues of accountability. He addressed the matter from the point of view of a political scientist, that is, in comparative perspective. After giving the examples of Brazil, Argentina and Bangladesh, he noted how most societies that have moved from authoritarianism to democracy - or from conflict to post-conflict - have deliberately chosen not to open up the issue of accountability until a new generation and a new mentality has been formed. In his eyes, the Sri Lankan case is even a more clear-cut case in that you currently have a widely popular army. He noted how no democratically elected government is going to risk being the first in the world to open up the military to an international inquiry on the

successful conclusion of a war, one considered by most of the citizens as liberation from terrorism. He emphasised the importance of accountability and also noted how universality works through the particular: democracy is fragile and every society must decide when it confronts issues of collective trauma and how. Sri Lanka, in his view, is not different from other countries: he does not believe that the process of accountability should happen now.

Presentations on various other aspects of the Sri Lankan conflict and the post-war situation followed Ambassador Jayatileka's presentation, beginning with a historical perspective on the socio-cultural roots of the Sri Lankan conflict with a strong emphasis on identity issues. Within this context, three key aspects within the broader debate on Sri Lankan identity, namely: language issues, representation of the other via media and education, as well as the economic dimension and in particular the issue of land rights.

Issues of internally displaced persons were also addressed, highlighting the multi-layered nature of displacement and how it intertwines with economic development, security, political power devolution, as well as the role of international actors operating in the country, such as international humanitarian and non-governmental organisations. Emphasis was placed on the need for a multi-pronged approach in order to ensure a long and lasting peace.

The current Sri Lankan scenario was also discussed in a regional context. The two most pertinent issues relating to the current situation in Sri Lanka were identified as relating to: (i) the challenges faced by any reconciliation process after a civil war; and (ii) the question of war crimes – if war crimes had been committed, is the quest for accountability supposed to encourage reconciliation or not? After addressing the different aspects of this crucial question, the centrality and complexity of India's role was discussed vis-à-vis Sri Lanka for both domestic and geo-political reasons. It was opined that New Delhi remains mostly concerned about its national interest beyond debates on stability and sovereignty versus accountability.

The relationship between peace, justice and reconciliation in Sri Lanka was then discussed in relation to other post-conflict situations (see written statement in Annex 1). It was reasoned that in situations arising on the heels of violent conflict there is a need for reckoning or else peace will not sustain. In this context, practices of various other countries were examined in order to understand what we are truly referring to when we talk about reconciliation. Four mechanisms were discussed in particular: (i) an international trial at the International Criminal Court (ICC); (ii) a hybrid or internationalised form of justice; (iii) a domestic trial; (iv) a domestic commission of enquiry. The first two are unlikely to take place in the Sri Lankan case, while in order for the last two to be successfully applied, there would need to be even-handedness and a clear-cut separation from political stakeholders. It was further noted that many countries adopt restorative justice measures in a post-conflict situation and how reparations are usually undertaken by the state.

DISCUSSION

Points of consensus

Need to understand the political context and the roots of the conflict

During the discussion, there was consensus on the need to understand the complexity of the political context and of Sri Lanka's conflict with a view to addressing its roots. It is only then that the key grievances that triggered the conflict in the first place can be tackled: these have to do with issues of identity, politicisation of institutions and political power devolution. Therefore, when thinking about a potential reconciliation process, there is a need to understand the nature of the conflict and its different actors, namely, the nature of the state, of the political regime in power, as well as of armed non-state actors, in case an armed insurgency had occurred.

There was consensus among the discussants that trust must lay at the core of any reconciliation process. Therefore, the question on whether there is currently enough political space for dissent was seen as a very pertinent one at a time when there is a risk of key institutions such as the judiciary, the police and political parties of becoming heavily politicised, if not so already. This is particularly the case if we perceive the Sri Lankan political scenario as growingly unipolar due to the implosion of the opposition party, the United National Party (UNP). There was agreement on the idea that the lack of political bipolarity (if not multipolarity) – resulting from a weak UNP seen as pro-Western and on the verge of collapse – has allowed for the possibility for elections to be won on the basis of a pure Sinhalese vote. This has further hindered progress in political negotiations between the Sri Lankan government and Tamil political representatives.

There is an ongoing dialogue between the Sri Lankan government and Tamil political representatives on issues of political power devolution. However, progress was seen as too slow, as shown by the fact that there have been no tangible results thus far. However, elections have been held at a local level in the North and some progress has been made in reopening of the political space and the re-enfranchisement of the Tamils of the North and East via the TNA. Yet the general perception was that much more can be done in relation to ongoing political negotiations on power devolution and issues of autonomy.

What do we mean by reconciliation?

There was consensus on the need to define what we mean by reconciliation with a view to actually pursuing it. Moreover, what specific mechanisms do we have in mind when we talk about undertaking a reconciliation process? The need to identify key actors that could mediate or help bring about reconciliation in Sri Lanka was raised: Christian representatives were mentioned, as well as local initiatives launched by the society without any specific links to political parties. Political representatives must not be forgotten; they too can play a constructive role in case the political will exists. There was additional agreement on the fact

that issues of legitimacy, as well as the pursuit of individual criminal responsibility must remain at the centre of any reconciliation process.

Points of 'dissensus'

The main points of disagreement were linked to issues of accountability with a view to a future reconciliation process in Sri Lanka. Discussants discerned in their views on timing and sequencing, as well as on the nature of international involvement in a future accountability process in Sri Lanka. There were also differences in view on what mechanism of transitional justice would suit the Sri Lankan context best within broader debates on universality versus specificity.

The key issue of dissent was linked to whether an accountability process should take place immediately or rather in a generation's time: in the background of this lies a broader question on justice versus reconciliation and whether transitional justice can bring about reconciliation or not. Some of the discussants were of the opinion that no democratic regime would confront such an accountability process so soon after the war has ended, following the examples of Latin America and Bangladesh; others, however, favoured a more immediate accountability process with international support in order to ensure even-handedness and avoid show trials. Those that supported going ahead with an accountability process at this point in time referred to existing examples in the cases of South and Central American countries; South Africa was also mentioned though consensus was lacking as to whether this was a good example to learn from in relation to Sri Lanka. Advocates of this path suggested that, without disregarding the specificity of the Sri Lankan case, there is scope to learn from other post-war situations.

As regards to the current international dimension of the accountability debate, it became clear that international pressure can have not only constructive but also counterproductive effects. Some discussants saw an internationally-driven accountability process along the lines of a future UN-led report (not the current Advisory UN Report from April 2011) as a must in order for the Sri Lankan regime to regain its legitimacy. Others, however, considered that this was unrealistic and flawed considering the popular support that the current Sri Lankan regime and the Army continue to enjoy, particularly in the South of the country. In the eyes of the latter, no democratic regime would expose itself to such an accountability process, less so at such an early stage and after a military victory by the Sri Lankan government.

In terms of the nature of international actors and their ways of exercising pressure on the Sri Lankan regime, a clear-cut distinction was made between Asian countries and emerging powers within the global South versus Western countries. The former have not exercised any pressure on the Sri Lankan government, certainly not publicly; the bulk of the pressure is coming from Western countries that favour a UN-led investigation. This illustrates how divergences in views on national sovereignty and the principle of non-interference have shaped the nature of international actors' pressure on the Sri Lankan regime with a view to any future accountability process. India, nonetheless, remains the key international actor as Sri Lanka's larger neighbour and home to a much more substantial Tamil population located in the southern State of Tamil Nadu. New Delhi has been cautious not to antagonise Colombo on the issue of accountability, instead remaining cautiously ambivalent: this is partly due to shifting geo-politics in the region – with Colombo increasingly tapping into Chinese and Pakistani support - combined with its own domestic concerns due to Tamil Nadu.

A number of obstacles were pinpointed with a view to undertaking a reconciliation process. There was no agreement on the idea that the way a war is fought will affect the nature and evolution of the reconciliation process. Notwithstanding, there was agreement on the fact that there is a need to break the cycle in order to interrupt a certain mentality or mindset that has prevailed during the war. Those that saw the current situation as a continuation of the war dynamics during a time of peace argue that a spill-over effect is currently a reality. This, in their view, reflects itself in the 'supra-nationalist' mentality that prevails at an institutional level and among the security apparatus in Sri Lanka. The role – both constructive and counterproductive – that the diaspora, particularly the Tamil one, could play was also raised in this context. Those that rejected the idea of an inevitable spill-over effect from the time of war suggested focusing on specific issues as a means to move forward, such as the North Provincial Council elections or the implementation of the 13th Amendment to the Constitution.

Additional issues of concern

Despite the fact that the discussion focused mainly on the political context and debates surrounding accountability, additional issues were raised which remain of concern with a view to a future reconciliation process in Sri Lanka. These can be broadly categorised into two groups, though they are intertwined: (i) humanitarian and security issues; (ii) issues of economic development.

Humanitarian and security issues

The internally displaced persons (IDPs) from the North and Eastern Provinces in Sri Lanka remain at the core of humanitarian concerns in the country. The high levels of displacement and the persisting difficult conditions for the return of IDPs reflect the damage inflicted against civilians during the war by both parties. The ongoing militarisation of the North and East is an important factor that is hindering the return of displaced persons: the widespread presence of the Sri Lanka Army, as well as their control over the administration of these areas illustrates this. Such a level of militarisation has enhanced the distrust towards the Army among Tamil civilians in these areas. The lack of transparency with regard to the legal process pertaining to detainees and ex-combatants has added to the perception among Tamils in the North and East of impunity of the Sri Lankan security apparatus. Notwithstanding, the legitimate fear by the Sinhalese that the fighting will start again was also acknowledged. Therefore, the suggestion was to establish some form of confidence-building measures in order to help reduce the suspicion of Tamils in the conflict-affected areas and increase the feeling of security among the Sinhalese.

Economic development

After years of economic stagnation of the North and East due to decades of war, the current scenario is seen as an opportunity for the normalisation of the economic situation throughout the country. This entails reducing the dependence on foreign humanitarian aid by achieving a certain level of economic self-sufficiency instead. For this purpose, the Sri Lankan government is actively encouraging economic development, particularly in the conflict-affected areas. However, important obstacles remain linked not only to landmines, population displacement and the remaining High Security Zones (HSZs) but especially with regard to land. The question of land was raised repeatedly, particularly in what concerns

proof of ownership of land and the rejection of availability of land by the Sri Lankan government. Areas where the LTTE had settled were in fact public land; this combined with issues of population displacement and landmines have added to the confusion in land entitlement. The issue is, nonetheless, multilayered and highly political. Therefore, as noted during the discussion, it will remain a crucial question to look out for in years to come and with a view to achieving reconciliation in Sri Lanka. It was also noted that international and non-governmental organisations (NGOs) remain important players that can help with humanitarian assistance and support the country's economic development.

ANNEX 1

Written statement of Dr. Chandra Sriram, Professor of Law, SOAS, University of London

Justice, Peace and Reconciliation: Past experiences relevant to the Sri Lanka case

Thank you to Ifri, to the director of the Ifri Center for Asian Studies, Dr Françoise Nicolas, and to John Seaman for really helpful logistics.

I am going to talk about options for transitional justice, generally, for postwar Sri Lanka. I think that the ICG and Chatham House reports regarding challenges for reconciliation are really useful, and will not presume to repeat their arguments. Instead I will give a comparative perspective on processes elsewhere, and their relevance to Sri Lanka.

First, though, it is important to recognize a few aspects about the situation in Sri Lanka. First, that the situation here is very different from many of the transitional situations I will discuss insofar as it is one following military victory by the government over the rebel LTTE. This means that many of the negotiated options available with stalemate, internationally negotiated settlements, or internationally imposed peace through peacekeeping forces are not really on the table.

Second, it is important to recognize the very serious allegations of war crimes and crimes against humanity for acts committed during the conflict, perhaps most notably in the final stages in 2009, as documented both by the UN commission of experts and the ICG. There is clear responsibility on the parts of both the government and the LTTE; however it is only in the hands of the government to pursue accountability. However, the Lessons Learned and Reconciliation Commission was not structured to address these violations systematically. As we know, there remain calls for more systematic investigations and possible prosecutions at domestic or international levels.

In this context, what might be the options for justice in Sri Lanka, and what have we learned from other contexts? I will take a broad view of transitional justice here, considering nonjudicial and nonpunitive measures as well as trials.

International criminal trials at the ICC

There have been some suggestions that the ICC (International Criminal Court) might be the right venue for prosecutions. The ICC of course has jurisdiction over war crimes, crimes against humanity, and genocide committed after its statute entered into force in mid-2002, so its temporal jurisdiction does cover nearly the last 7 years of the conflict. Moreover, the ICC (like other international courts, it appears from the ruling of the International Court of Justice in the Yerodia case) does not have to defer to official immunities for heads of state or other top leaders. However, Sri Lanka is not a state party to the statute of the ICC. While a case could be brought via a referral by the United Nations Security Council, several states appear to be prepared to veto such a referral. Nonstate parties can accept the jurisdiction of

the court with respect to a specific alleged crime under article 12(3) but that appears unlikely. In any event, any ICC prosecutions would undoubtedly face resistance, whether in pursuit of a head of state, as we have seen with Omar al-Bashir in Sudan, or lower-level officials, as in Kenya where formal cooperation has masked a series of undermining activities.

An international ad hoc tribunal of the sort established for Rwanda and the former Yugoslavia. These were of course created by UN Security Council Resolutions invoking chapter VII, threats to international peace and security, and in light of what I have already noted regarding any ICC referral political support for this seems unlikely. Further, such ad hoc bodies appear to have fallen out of favour given that they are costly (the average cost for each of these tribunals, now in operation over 15 years, has been about \$100m/year) and time-consuming. They have also tried relatively small numbers of defendants, and are often criticized for being remote, geographically and socio-politically from the affected countries, but this is the case for most international and internationalized justice mechanisms. Nonetheless, hybrid or internationalized justice mechanisms appear to be easier to create, though not without their limitations.

Hybrid or internationalized criminal tribunals

These have been created with a variety of structures for a range of countries, and through very different legal and political means. Countries which have hosted or been the subjects of them include Sierra Leone, Cambodia, Bosnia, Timor Leste, Kosovo, and Lebanon. One is under debate in the parliament of the Democratic Republic of Congo. Generally these apply international law, particularly international criminal law, but in many cases also relevant substantive domestic law and in some cases supplemented by domestic procedural law constrained by international practice. They also utilize domestic and international staff, lawyers and judges. Most of the time (Lebanon and the trial of Charles Taylor at the Special Court for Sierra Leone are exceptions), the courts are sited in the country affected. There are a number of supposed benefits to these courts. They are less expensive than ad hoc tribunals have been; they are more accessible to the population, and it is hoped that they will contribute to the reform or capacity-building of domestic judiciaries which may have been corrupted or collapsed by conflict. The presence of international staff is said to provide protection against political manipulation and bias, or the perception of it. In reality, it is not always evident that such tribunals have much impact domestically—in Sierra Leone the claims that the Special Court would help rebuild a collapsed judiciary were to say the least exaggerated. And in some cases political manipulation remains possible, as has been alleged not only of the domestic judges but also of one international judge in Cambodia. Whether there are longer-term effects remains to be seen. An important point for Sri Lanka—all of these hybrid tribunals have been created with the consent of the governments of states affected—by bilateral pacts with the UN or by UN Security Council Resolution with support of at least the executive of the state—except for the special panels created by regulations of UN peacekeeping forces in Kosovo and Timor Leste. However the situations of the latter two are not analogous to Sri Lanka for obvious reasons—they were states under UN international administration. So again here the obvious issue is state consent, and it appears unlikely that the current government would support a hybrid tribunal with a strong international presence applying international criminal law.

Domestic trials

These are often politically disruptive in immediate post-conflict environments, as they are most likely, if conducted even-handedly, to pursue both members of the state security forces but also of relevant nonstate armed groups, who will object strenuously. Thus the

trials of the military junta leaders as well as key officers in Argentina following the fall of the junta in 1983 generated at least 5 coup attempts and ultimately, although 5 of 9 junta members were convicted, a pardon was put in place. However, the threat of disruption can be overstated. Guatemala is currently holding its first genocide trial, and Argentina has returned to prosecution of officials responsible for repression in the 1970s and 1980s. It is worth noting that in the 1990s Sri Lanka did hold trials of a number of members of the security forces for serious violations, including the massacre at Embilipitiya. This was during the conflict with the LTTE and did not prove destabilizing. Trials by national authorities, if held in a transparent fashion, can help to dispel myths and restore faith in state institutions, including faith from marginalized communities. On the other hand one-sided trials or show-trials, as the Cambodia genocide trials in the 1970s were alleged to be and as the war crimes trials in Bangladesh are said to be, can have the reverse effect. Widespread consultation amongst all communities as well as some international guarantors would be essential to bolster legitimacy and trust. However, it does not appear that there is any likelihood that the current Sri Lankan government to support new domestic trials for accused from not only the LTTE but also government forces.

Domestic commission of inquiry

In many countries, commissions of inquiry are expected to serve a number of functions. They are presumed to develop a public historical record of prior abuses, patterns of victimization and in many cases the naming of specific perpetrators. This is most likely to be possible where they are even-handed, investigating all sides of a conflict or repressive situation, and where testimony of both victims and alleged perpetrators is possible. Thus for example the Truth and Reconciliation Commission of Sierra Leone took extensive public statements across the country, hearing victim statements and statements by alleged perpetrators from a range of actors in the conflict, many of whom made apologies. While there are numerous criticisms that might be made of the commission, the final report is often referred to as part of national dialogue about the causes of the conflict and responsibility of the main fighting factions. Such commissions are also expected to provide a measure of recognition to victims, not only for the specific harms suffered but also to counter their social ostracism. Thus in Argentina, many of the arrested, tortured, or disappeared were tainted with suggestions that “they must have done something to deserve it”; the CONADEP commission report helped to outline the legacy of state abuses and rehabilitate the reputations of victims. Sri Lanka has a long history of commissions of inquiry, most notably the inquiries into disappearances initiated under President Kumaratunga, although those were limited by security constraints on accessing Jaffna. The current Lessons Learned and Reconciliation Commission is extremely limited in its mandate, and has not been prepared to take detailed victim statements including ones implicating not only the LTTE but also government forces and related militias. This seems likely to limit the effects of any report with regard to the primary goals of commissions I have outlined. The report was handed to the President on 20 November, and is ostensibly to be made public via parliament, but to date it has not been.

Reparations, apology, memorial

Many countries have experienced a range of restorative justice measures, including provisions for reparations in the CNRR in Colombia, reparative measures in Chile which included excusing children of the disappeared from national military measures, and public apologies by individual abusers and by leaders: individual members of the Argentine military have engaged in public apology for the so-called “vuelos de muerte”, President Kumaratunga

issued a public statement of regret for the 1983 pogroms against Tamils, and individual officials of the state and of the ANC and other opposition groups testifying at the South African Truth and Reconciliation often accompanied their statements with apology. Public memorials are often used, alongside historical and textbook projects, to enshrine the memories of past abuses both on behalf of those affected, but as part of a public commitment not to engage in such similar abuses in the future. In countries such as East Timor, Uganda and Sierra Leone, among many others, traditional cleansing ceremonies are also used to facilitate return of excombatants and in some case perpetrators of serious crimes into communities. Such restorative measures are expected to promote reconciliation—across society, between victims and perpetrators, and wider affected communities.

In sum, there are a range of transitional justice measures which have been utilized globally, in Latin America, Africa, Europe, and Asia, which might be deployed in Sri Lanka, and indeed Sri Lanka has utilized some of these in the past. However many of these measures have their own limitations, and all require evenhandedness and strong political will to be implemented in any useful way.