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S. Nagarajan

Territorial Identity of Eelam

R. Chelliah

Marxism and Law

CARE

Tamil National Question

Notes and Commentary:

M. Maha Uthaman

International War Crimes Tribunal

No 1 Spring 1988 **Journal of Eelam Studies**

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EDITORIAL

One aspect of the deprivation of the Tamil nation is the paucity of intellectual investment made at a local level. Like capital on a global scale, the intellectual resources of the Tamil people too have been drawn towards metropolitan centres, within Sri Lanka and abroad, leaving the peripheral Tamil nation impoverished and void of knowledge.

However, the dialectics of oppression is such that, even as impoverishment is imposed at every level, vigorous resistance and the emergence of self confident patriotic consciousness has been nurtured by the same process. In spite of this heroic response the existence of an intellectual void within the nation has not only been obvious, but its effects highly damaging.

In order to plug this gap, it is necessary to establish first and foremost a scholarly-academic tradition from which informed debate can flow. The journal of Eelam Studies is an academic, theoretical, non-sectarian journal which aims to disseminate knowledge, to provide a forum for discussion and debate and to bring together academics in Eelam and abroad to focus on issues of relevance to the areas where the Tamil speaking people of Sri Lanka live. The name Eelam in the title is not necessarily associated with the political demand for an independent Tamil state. It denotes the concept of the environment and the people who live in the North, East and Central parts of Sri Lanka.

The practical aim of the Journal of Eelam Studies is to create the conditions for the vigorous growth of committed intellectual discipline and the creative application of existing knowledge. An integral part of the project is to stimulate people to produce work which deals with subjects of concern for the Tamil nation.

There are two models of what it means to produce a publication such as the Journal of Eelam Studies. The first model emphasises theoretical excellence and originality; the second effectiveness in making a practical intervention. The

first could dismiss the second as eclectic; the second could criticise the first for being elitist. However, each of the two approaches are indispensable, for effective action is impossible without guidance by sound ideas, and sound ideas alone are useless if not accessible for the process of social transformation. It is therefore necessary to blend the two approaches in working towards the primary objective of the Journal of Eelam Studies which is to facilitate social action through theoretical practice.

The Journal of Eelam Studies will publish materials that use existing knowledge to analyse issues of relevance to Eelam as well as materials, although not of direct relevance to Eelam, are significant in terms of disseminating knowledge regarding methodologies, new schools of thought and development of knowledge per se. Within the above framework, the journal will concentrate on two main areas:

- a) Social Sciences and Humanities-historical, economic, political, anthropological, archeological, analysis of Eelam issues together with theoretical developments in the above fields.
- b) Natural and Applied Sciences-aspects that directly relate to the people of Eelam together with new discoveries and developments in these fields which are of potential use.

In defining the above areas, the objective is to identify fields for research and not to prevent an inter-disciplinary approach to any particular issue. The scope of the Journal is necessarily wide in order to address and analyse issues that are relevant to the Tamil nation in all its aspects. In this wide ranging project the Journal of Eelam Studies cannot have a political programme of its own. However, in carrying out theoretical and educational work of an academic, non-sectarian nature, and in providing the conditions for different schools of thought to develop, the Journal of Eelam of Studies does in fact have a different yet very important role to play.

In keeping with the aims of the Journal of Eelam Studies, all material published will be selected purely on the basis of scholarly standard and relevance to Eelam, reflecting merely

the opinion of the author and not of the Editorial Committee.

Supporting and inspiring those who are committed to the development of the Tamil nation by expanding and cultivating the intellectual terrain for creative growth would be a great achievement. Towards this task the production of the Journal of Eelam Studies is a small step, but in terms of progress from the present arid ground of intellectual barrenness, it represents a giant leap. The success or failure of the Journal of Eelam Studies in the final instance, however, depends on the vigour with which people respond to the challenge of undertaking and contributing work related to Eelam.

In this issue of the Journal of Eelam Studies, Nagarajan explores the Tamil-Sinhala perspectives on the territorial identity of Eelam. Although a territorial basis is not a pre-requisite condition for the definition of a nation, even if it were possible to formulate a universal definition of a nation, in the particular case of Eelam - with the historically continuous existence of the Tamil traditional homelands, and the cohesive base that it provides for the Tamil people - territorial issues are of vital concern. The article traces the historical developments in territorial conceptions and boundaries and presents the subject from both Tamil and Sinhala perspectives.

The legal system as an institution, through its integrative mechanisms as well as its ideological functions, is one of the pillars that supports, regulates and maintains modern day societies. In order to understand a social configuration, it is therefore necessary to understand its manifestation at the level of legal structures. Ramani Chelliah outlines one aspect of the Marxist theory of law by discussing the particular contribution of Pashukanis, a Soviet jurist. The article analyses the basis of law and the function it performs from a Marxist perspective and in doing so addresses the issues of social regulation and transformation. For a society undergoing fundamental upheaval, as in Eelam, such an exercise throws light on not only understanding the present social formation, but more importantly, on developing perceptions on the nature and requirement of the future social system that is to emerge from the present state of chaos and disruption.

The CARE document reproduced here on the Tamil National Question incorporates the new chapter in the history of Eelam marked by the Indian military intervention of October 1987 and analyses the developments leading to it including the "Peace Accord" of July 1987. It situates current developments within the context of the historical background to the Tamil national struggle for the exercise of the right to self determination. This approach is particularly useful at a time when the destabilising and confusing effects of the dramatic Indian action, both at a subjective and objective level, are still reverberating and the article seeks to re-anchor and re-launch the subject of the Tamil national question within this context.

Maha Uthaman draws attention to the project of a systematic inquiry into the allegations that the war policies pursued by the Sri Lankan government since 1983 and the military actions taken by the Indian government in recent months are a violation of International Law. Drawing on the principles of the 1945 Nuremberg charter and the precedent set by the 1967 International War Crimes Tribunal which tried President Lyndon Johnson for Crimes committed in Vietnam, the author suggests that certain actions taken by the Sri Lankan and Indian governments fall into the categories of crimes against humanity, war crimes and genocide.

S. Nagarajan

Territorial Identity of Tamil Eelam: Tamil — Sinhalese Perspectives

Change, not status quo is the meaning of History. Changing internal or external balance of power might add or reduce or restructure the territories of a State. Crisis management through accomodative spirit of give and take might help a state to carry on together. Under such circumstances a liberal federal set up could emerge in a plural society. But if willingness to live together and mutual love and trust is lost then there is a likelihood of a multinational state fragmenting. Under such circumstances new nations like Pakistan or Bangladesh will emerge. The concept of territorial identity of Tamil Eelam reflects the changing mood of the multinational Sri Lankan State. Political and military realities alone can give life and substance to such a new Sri Lankan concept.

Origin of the Concept of Tamil Eelam

Tamil Eelam as a cultural concept existed from the beginnings of Sri Lankan history. It appears to have existed as a political concept, especially during the time of the Kingdom of Jaffna, from the 13th century or probably even much earlier. However, in the context of the modern philosophy of nationalism it can be said that as a concept of nationalism it came into being only during the post-independence period in the twentieth century.

Suntharalingham could be described as the originator of the

concept of Tamil Eelam nationalism. He spoke about Tamil Eelam nation for the first time in 1958 in the House of Representatives of Ceylon. He said then on 14-8-1958; "We have made up our minds, come what may, that we shall constitute a separate state of Eelam". He established 'Eelam Tamil Unity Front' in 1959 and published a leaflet known as 'Eelam Tamils Freedom Struggle' (1959) and a book "Eylom: Beginnings of Freedom Struggle" (1967). But, it appears, he did not with clarity define the territorial personality of Tamil Eelam³.

In 1970s the concept of Tamil Eelam nationalism began to take concrete shape. But only in 1976 after the passing of Vaddukodai Resolution the concept of its territorial identity began to take shape.

Regarding the concept of the territorial limits of Tamil Homeland three viewpoints have emerged among the Tamils. Tamil speaking persons live in the whole of Sri Lanka. Tamil speaking refers to Sri Lankan Tamils, Muslims and Indian Tamils.

Sri Lankan Tamils mainly live in the North and East of Sri Lanka. Tamils also live outside the Northern and Eastern provinces. Indian Tamils live mainly in the plantation districts of Nuwara Eliya and Badulla. Tamils also live in the Districts of Colombo, Kandy Puttalam and Gampaha. In Colombo in 1981 two hundred and ten thousand Tamils were living. Sri Lankan Tamils have been living in Sri Lanka since the ancient period, but the Indian Tamils went to Sri Lanka's hilly region as indentured labourers only from the 19th century. Sri Lankan Tamils are predominantly Hindus, but there are also Christians and a sizeable number of Muslims. Sri Lankan Tamil Muslim population is much more in the East of Sri Lanka than in the North. These Tamil Muslims' mother tongue is Tamil.

Majority's view point: North and East Tamil Homeland

Majority of the Sri Lankan Tamils as represented by Tamil United Liberation Front (TULF) and LTTE (Liberation Tigers of Tamil Eelam) favour the inclusion of the whole of North and East of Sri Lanka.

Since 1976 from passing of Vaddukodai Resolution they have been demanding these territories as integral part of Tamil Eelam⁴.

The reasons given by them for demanding North and East as part of Tamil Homeland are many. The most important are (1) Geographical contiguity of North and East and hence clearly identifiable as an indivisible single region (2) traditionally and historically this Homeland belongs to the Tamil speaking people in the country⁴.

Historical perspectives : Two view points

History is also a handmaid of politics. Hence omissions, exaggerations and distortions will be there in politicised historical writings. Such interpretations become possible all the more if the evidences about the past are dark and dim.

The Sinhalese view point is Northern and Eastern provinces are not alien territories as far as the Sinhalese are concerned. There is ample historical evidence to show that these areas were an integral part of Sinhala Kingdom⁵.

In their opinion any of the Standard works on Sri Lankan history refers to or lists a long line of Kings of Sri Lanka (that is of the whole island) going back to 543 B.C. Even non-Sinhalese historians like H.W Condrington⁶, Burgher author L.B. Blaze⁷ and the "The Standard Concise History of Ceylon" published by the University of Ceylon Press Board 1961, give a similar list of Kings going back to antiquity⁸.

The Mahawamsa is replete with references to the unity of Sri Lanka and overlordship of numerous kings over the entire island. Their seat of Government for sixteen centuries from the fifth century B.C. to the eleventh century A.D. was Anuradhapura. One cannot ignore the evidence from rock inscriptions in all parts of the island including the northern and eastern parts. e.g. Tiruketisvaram Pillar inscription of Sena II (835-837), the Sinhala inscription of Dappula IV (10th Century) at Kandarakodai and Nainativu, inscription of Parakrama Bahu I (12th Century)⁹.

Further the existence of a large number of Buddhist vihares and dagobas in Jaffna and in the adjacent islands as referred to by Mudaliyar Rasanayagam¹⁰, indicates that they were constructed by the Buddhist Kings of Sri Lanka who were well known for constructing these vihares and dagobas¹¹.

Tamil's Reply

Throughout the centuries from the dawn of history the Sinhalese and Tamil nations have divided between them the possession of Ceylon, the Sinhalese inhabiting the interior of the country in its Southern and Western parts and the Tamils possessing Northern and Eastern parts¹².

The ancient geography of the sub-continent also proves that Sri Lanka was the traditional homeland of the Tamils. Sri Lanka was then a part of Kumari Kandam and its land boundary was a continuation of Ramanathapuram and Tirunelveli Districts of the present day Tamil Nadu. Later due to geological changes Sri Lanka became an island and was renamed as 'Eela Nadu'. The works of Russian and Greek historians as well as the Ceylonese Buddhist epic Mahavamsa, Sulavamsa, support this view point. For example Greek and Roman historians described Sri Lanka as 'Tamaraparani Nadu'. Tamaraparani is a river existing in the present day Tirunelveli, Tamilnadu, which it is believed during the ancient period was running through Sri Lanka before mixing with the sea. Sinhalese historian Paranavitana also refers to some of these facts¹³.

Doctor Kali Peries, a Sinhalese historian refers to the existence of four Tamil Siva temples at Koneswaram in the east, Nakhleswaran in the North, Tiruketeeswaram in the West and Munneswaram in the North-West about three thousand years ago in Sri Lanka¹⁴.

Regarding the ancient Tamil rulers the following facts could be cited. Senan, a Tamil was ruling in Sri Lanka around 206 B.C. Mahavamsa talks about the Sinhalese King Duttakaimanu's victory over the Tamil ruler named Elala Singan in the 2nd century.

It says Eelala Singan was a just ruler. He ruled for 56 years. Thus there is Sinhalese proof that the Tamils were ruling in Sri Lanka more than two thousand years ago¹⁵.

According to the Sinhalese work 'Rajaveli' the first Chola King to invade Sri Lanka was the early Chola ruler Karikalan in the 2nd century A.D. Between the sixth and eleventh century A.D. there was constant war between the Tamil Kings of Tamil Nadu and the Sinhalese and a majority of the battles were won by the Tamils. Sri Lanka came under the later Chola rule between 915 A.D. and 1070 A.D. But according to the Sinhalese historians it was under complete Chola domination for over 86 years. The Chola rulers not only built Hindu temples but also Buddhist vihares in Sri Lanka¹⁶.

Jaffna Kingdom: Sinhalese view point

At the peak of their power the kings of Sri Lanka ruled not only over the entirety of the island but extended their power as far as South India and for a brief period even to Burma. Parakrama Bahu I for example sent punitive expeditions to Burma and landed an army in South India. Among other Kings who sent expeditions abroad were Sena II (866-901) who captured Madura and Gajabahu (113-135) who invaded the Chola Kingdom in South India and brought back 12,000 prisoners. Kings as powerful as these are scarcely likely to have tolerated an independent Kingdom of Jaffna within Sri Lanka itself¹⁷.

If there was an independent Jaffna Kingdom, it existed for only a brief interlude in our history of twenty-five centuries - from the thirteenth century to 1619 when its weak organisation collapsed before the Portuguese. However, even during that period, this Kingdom often paid tribute to the Vijayanagar empire, in South India¹⁸ and the Sinhalese Kingdom in the South¹⁹. According to the Dutch Historian Baldaeus, the King of Kandy included the description "King of Jaffna" among his many royal titles. Fr. Fernando de Queyroz, a contemporary, records that when the Portuguese arrived there were 15 "Kinglets" subject to the King of Kotte among whom was the "Kinglet" of Jaffna Patao²⁰.

Among the "Kinglets" mentioned by Queyroz as being subject

to the king of Kotte were the "Kinglets" of the Bay of Trincomalee and Batticaloa. Around 1660, when Robert Knox the Englishman landed near Trincomalee he was captured by the officers of the king of Kandy and not by the Tamils.¹¹

When Sri Lankan Muslims were massacred by the Portuguese in 1626 the survivors appealed for asylum to the king of Kandy, who settled them in the Eastern province. He could not obviously have done this if he had no power over that area. Some 4000 were settled in Batticaloa alone¹².

Jaffna kingdom: Tamil viewpoint

In the thirteenth century we see the emergence of the kingdom of Jaffna. Magha the Kalinga invader was probably the founder of the kingdom and the Javaka invaders succeeded him. At the end of the thirteenth century the Pandya feudatories, Aryachakravarttis, gained control of the kingdom and began a career of conquest along the Western Coast of the island. Under them the Kingdom with its capital at a place called Cinkainakar (Skt. Simhanagara) emerged as the most powerful one in the fourteenth century. Foreign trade was the basis of its power and we find that merchant vessels from this kingdom played an important part in the Indian ocean trade. The Aryachakravarttis controlled the Chank and Pearl fisheries off the Western Coast and enjoyed a share of the island's cinnamon trade. Under them there must have been a significant growth of Muslim settlements on the Western Coast¹³.

The Kingdom had closer political, economic and cultural ties with South India than with the Southern part of Sri Lanka. At this time there were minor chieftains called the Vanniyars controlling the southern parts of the present Jaffna district, and most of the Mannar, Vavuniya, Mullaitivu and Trincomalee Districts. These chieftains usually paid tribute to the Jaffna rulers and their territories served as an effective buffer between the Tamil kingdom in the north and the Sinhala Kingdom in the South. Only on one occasion did the armies of the South succeed in penetrating through this buffer and holding the Kingdom briefly on behalf of the Southern ruler. That was in the middle of the fifteenth century when Sapumal Kumaraya

(Senpaka Perumal), the Prince of Kerala origin brought up by Parakrama Bahu VI in the court at Jayavardhanapura Kotte, led an invasion to Jaffna and occupied the Kingdom for seventeen years. He later returned to Kotte on the death of Parakramabahu to ascend the throne there and Jaffna again came under the rule of the Tamil dynasty¹⁴.

With the Portuguese conquest of Jaffna and the consequent disruption of trade with South India, the region was gradually cut off from the mainstream of development in Tamilnadu. This helped the region to consolidate the developments of the period of the Aryachakravattis and to strengthen its separate identity. From now on, its fortunes were linked with those of Southern Sri Lanka and soon it was drawn into the mainstream of Sri Lanka politics¹⁵.

At the time when the Portuguese conquered Jaffna in the east at Pazhakamal and Panamai the Tamil Vannians were ruling and these areas remained as self-governing areas till 1803. Tamil Kings had passed decrees affixing their signature in Tamil. For example Sri Vikrama Rajasingam alias Kannuswamy, the ruler of Kandy, signed in his surrender document to the English in Tamil, which is even today preserved in England¹⁶.

As late as 1833 the Tamils and Sinhalese had well demarcated areas and the maps too show these. The map drawn by the British in 1801 clearly proves that Tamil Eelam was a separate sovereign state. Even though in 1815 the English captured Sri Lanka, the Tamil and the Sinhala areas were separately administered and only in 1833 both these parts were united¹⁷.

Therefore the "Sinhalese did not obtain a mandate from the Tamil people either by consent, conquest or legal continuity to rule us" (Tamil Eelam). Hence the Tamils have a right to claim a separate state¹⁸.

Concept of a Single Tamil Homeland: Geographical contiguity

TULF, LTTE, PLOTE, in fact more than a majority of the Tamils view that North and East together constitute a single

Tamil Homeland. However because of the presence of the Sinhalese population and Muslim population in the East as well as the presence of the Indian Tamils in the hill country, the Sri Lankan Government, a section of the Tamil Muslims population and a section of the Tamil militants do not agree with this view point of TULF and LTTE.

ENLF: We want Bigger Tamil Eelam

ENLF (Eelam National Liberation Front), EROS (Eelam Research Organisation) and EPRLF (Eelam Peoples Revolutionary Front) appear to favour the establishment of a bigger Tamil Eelam, which would include also the hill country areas where the Indian Tamils, who migrated to Sri Lanka in the 19th and 20th centuries live. ENLF says "don't undermine the natural territorial identity of the Tamil people by excluding the plantation Tamils and the areas inhabited and developed by them for generations"²⁹.

Disagreeing with this claim PLOTE says the upcountry areas are not part of the Tamil Homeland because they were the traditional lands of the Sinhalese people. So we should not drag the plantation Tamils, who are waging a class struggle, into our national struggle³⁰.

Sinhalese View point

Sri Lanka is the traditional Homeland of all Sri Lankans. Her population consists of Malays, Moors, Burghers, Sinhalese, Tamils and Indian Tamils. It is true that some groups of the population have lived for long periods in certain areas. The Kandyans have always lived in Kandyan provinces and have never been militarily defeated even by the British. This does not mean in modern Sri Lanka that such groupings can claim exclusive or special rights to their parts of the country. There would be chaos if they did. Besides, it is against all known concepts of nationhood³¹.

Further the expression "Tamil speaking" refers not to one ethnic group but to three different ethnic groups namely the Sri Lankan Tamils, the Muslims and Indian Tamils³².

Ethnic composition of Districts in the North and East

District	Sinhalese	Sri Lankan Tamils	Muslims	Indian Tamils	Others
1. Jaffna (including Killinochchi)	0.5	95.3	1.6	2.4	0.2
2. Mannar	8.1	50.6	26.6	13.2	1.5
3. Vavuniya	16.5	56.9	6.9	19.4	0.3
4. Mullaitivu	5.1	76.0	4.9	13.9	0.1
5. Trincomalee	33.6	33.8	29.0	2.6	1.0
6. Batticaloa	3.2	70.8	24.0	1.1	0.9
7. Share of Total Population in Districts 1-6	7.7	75.3	12.1	4.3	0.6
8. Share of Total Population in ethnic group outside Districts 1-6	98.8	31.6	80.5	91.0	98.1

(Source: *Inter-Racial Equity and National Unity in Sri Lanka. A Marg Institute publication, Colombo, Jan 1985, P47*)

(In the above table it can be noticed that Amaparai has not been listed separately as a part of the Eastern Province).

Neither the Muslims of Sri Lanka nor the Indian Tamils have claimed any particular area of Sri Lanka as being exclusively their homeland and in fact ninety percent of the Indian Tamils live outside these two provinces of North and East³⁸.

At present the Sri Lankan Tamils are in a minority in the Eastern province while the Sinhalese and Muslims constitute nearly 60 percent of the population. The Tamil population consists of a minority of less than 41% in the 3 districts of the Eastern province. Tamils predominate in Batticaloa with 71% but are in a minority in Trincomalee with 34% and a still smaller minority in the Ampari District with only 20%³⁹. Since the Sri Lankan Tamils constitute more than 90% of the population in the Northern province the object of the amalgamation of North and East is clear. The Sri Lankan Tamils will after amalgamation become the majority group in the combined unit of administration⁴⁰.

The Sinhala people consider the whole island of Sri Lanka as their homeland from time immemorial along with other communities who have also come to inhabit it. In its practical application the Tamil Homeland theory would exclude the Sinhala people from most of the major land development schemes in the future, most of which are located in the Eastern province and to a lesser extent in Northern Province⁴¹.

But North and East are not alien areas as far as the Sinhalese are concerned. There is ample historical evidence to show that these areas were an integral part of the Sinhala Kingdom and abounded in Sinhala settlement from very ancient times though later invasions and the vicissitudes of history led to their gradual disappearance from these areas in the ensuing periods⁴².

As shown by the 1981 census nearly 33 percent of the Sri Lankan Tamils live outside the Northern and Eastern provinces amongst the Sinhalese people and over 90 percent of the Indian Tamils live in the hill country in the heartland of the Sinhala people. Their demand to maintain the so called "integrity of the Tamil Homeland" will therefore seem to be nothing but a negation of the historic right of all the people of Sri Lanka from time immemorial irrespective of their ethnic origins to settle in

all parts of the island which the Sri Lankan Tamils have exercised in full measure³⁸.

Tamils reply: Sinhalese a deliberate measure

The whole of North and East have been the traditional homeland of the Tamil. The motive behind Sinhalese of the Tamil traditional homeland is to reduce the majority of the Tamils in their Homeland.

The Eastern province is an integral part of the Tamil Homeland inhabited predominantly by the Tamil speaking people including those of the Islamic faith. Hence North and East should not be divided into two units³⁹.

In 1827, in Northern Lanka there were only 0.35% Sinhalese and in the East only 0.51% Sinhalese. During the First World War the Sinhalese came in search of jobs to Trincomalee. Therefore in 1921 in the East the Sinhalese population increased to 4.4%. But by 1981 they have increased to 24.9% in the East. In the East alone 180,000 Sinhalese have come and settled, thereby grabbing one third of the total territory of the Tamil Homeland in the East. According to Human Rights organisation (London) between 1953 and 1971 the Sinhalese population has trebled in Jaffna and in Batticaloa in the East, their total population has increased much more in Northeast, Western Central parts of Sri Lanka (especially Trincomalee, Puttalam). During the last 30 years more than 2,500 sq. miles of the Tamil Homeland have been the target of Sinhalese. And since 1981 more than 83,000 Sinhalese have been settled in Amparai in the Eastern province.

Sinhala Colonisation in four Tamil Districts

Districts	Sinhala Population		Tamil Population		Population increase%	
	1953	1971	1953	1971	Sinhalese	Tamils
Jaffna	6,183	20,402	477,304	673,043	330	141
Batticaloa	31,174	94,150	130,381	246,582	302	189
Trincomalee	15,296	55,308	37,517	73,255	361	195
Puttalam	31,587	309,298	90,107	30,994	979	344

Sinhala Colonisation in the East: Two Districts

Year	Trincomalee		Batticaloa & Amparai	
	%Sinhalese	%Tamils	%Sinhalese	%Tamils
1921	3.0	55.2	4.5	53.3
1946	20.6	44.5	5.9	50.3
1971	28.8	38.2	17.7	46.4

(Source: Dept of Census and Statistics, Sri Lanka)

Eastern Districts

Year	All Racial Groups	Sinhalese	%	Tamils	%	Moors	%
1921	192821	6744	4.5	103251	53.5	75992	39.4
1946	279112	23456	8.4	146059	52.3	109024	39.1
1953	384490	46470	13.1	167898	47.3	135322	38.1
1963	546130	109690	20.1	246120	45.1	185750	34.0
1971	717571	148572	20.7	315560	43.9	248567	34.6
1981	976475	243358	24.9	409451	41.9	315201	32.2

Northern District

Year	All Racial Groups	Sinhalese	%	Tamils	%	Moors	%
1921	374829	3795	1.0	356801	95.2	13095	3.4
1946	479572	9602	2.0	449958	93.8	18183	3.6
1953	570650	14222	2.4	531399	93.1	23233	4.0
1963	741910	20270	2.7	689470	92.9	30760	4.1
1971	874629	25847	2.9	809100	92.5	38565	4.4
1981	1111468	33149	3.0	1023228	92.1	52638	4.7

(Moors are Tamil speaking Sri Lankans)

(Source: Dept of Census and Statistics, Sri Lanka)

North and East Together (Tamil Eelam)

Year	All Racial Groups	Sinhalese	%	Tamils	%	Moors	%
1921	567,650	125,39	2.2	460052	81.0	89087	15.7
1946	758,684	33058	4.4	596017	78.6	127207	16.8
1953	925,050	60692	6.6	699297	75.6	158555	17.1
1963	1288,040	129960	10.1	935590	72.6	216510	16.8
1971	1592,200	174419	11.0	1124660	70.6	287132	18.0
1981	2087,943	276507	13.2	1432676	68.6	367839	17.6

(Source: *ibid*)

Therefore North and East are not only the traditional homeland of the Tamils but also constitute a single indivisible Tamil Homeland. Sinhalese can come into the North and the East while not one Muslim or Tamil can hold land in any land settlement scheme outside the North and East. It is for this reason that the TULF has claimed that the totality of the entitlement of the land of the Tamils and Muslims including plantation workers be reserved for them in the Northern and Eastern provinces⁴¹.

Population do not support: Sri Lankan Government

The 1977 election voting pattern indicates that only 48% of voters in the Northern and Eastern provinces i.e not more than one million Tamilians support the demand of a separate state. In the Districts of Mannar and Mullaitivu almost half of the Tamil population have opted against a separate state⁴².

In the Eastern Sector of Tamil Eelam the idea of a separate state appears to have been viewed with less favour. But of the total 41% Tamil population of this province only 26% voted for TULF. In Batticaloa 68% of the population and in the Amparai 73% of the population have voted against TULF and its proposal for a separate state⁴³.

Population supports our demand : TULF's Reply

Out of the 19 electorates in the Northern and Eastern provinces Tamil people elected TULF in 18 electorates with a preponderant majority⁴⁴.

It is not correct to claim that they (Jeyawardene) won 10 out of 12 seats in the Eastern province. There are only five seats which can be correctly described as Tamil seats. Of these in four places - Batticaloa, Paddiruppu, Trincomalee and Pottuvil TULF won. After winning on the TULF ticket, Mr. Kanagaratnam crossed over to the UNP before the 1978 constitution and the constitution which had a provision against defection had to be amended to enable Mr. Rajadurai, who won on a TULF ticket, to cross over and become Minister. If votes are taken into account, the votes in favour of Eelam in the entirety of the

Northern and Eastern provinces were 445,339, while the votes against were 389,490. Thus 53.5% percent of the total votes polled was in favour of Eelam. The votes cast against TULF also consisted of nearly 75,000 Sinhalese who were settled in the North and East after independence. If these are not taken into account then 60% of Tamil speaking voters of North and East opted for Eelam. The TULF won absolute majorities in the six of the seven districts of the North and East⁴⁵.

Referendum of 1982: The TULF campaigned against the extension of the life of Parliament. In all districts in the North and East except Amparai, the Government lost and TULF won. These figures speak for themselves and show clearly the will of the people⁴⁶.

Can We divide East? New Formula of the Sri Lankan Government

Sri Lankan Government has rejected the concept of a sovereign, independent separate Tamil Homeland. It also rejects the notion of a single Tamil Homeland of the whole of North and East within the Union of Sri Lanka. In its view three ethnic groups live in North and East (1) Tamils (2) Sinhalese (3) Muslims. On the basis of the presence of these three groups it offers formulas for dividing the East to solve the territorial identity problem of Tamil Eelam.

Between September 1986 and January 1987 the Sri Lankan Government came out with three different formulas relating to the territorial identity of Tamil Eelam. All these formulas attempt to divide the East and to maintain the separate identity of the North and East without offering to unite them into a single homeland. These three formulas were (a) to create a separate Tamil Batticaloa province in the East along with a separate Sinhalese Trincomalee and Muslim Amparai" (b) to create a Tamil majority province in the East without including the Muslims and the Sinhalese occupied territories in the East" (c) to create a Tamil majority province in the East which would include all the Muslims occupied territories minus Amparai

(December 19th 1986 proposal). Regarding this third Formula of 19th December it was stated that half of the Sinhala population in the East is concentrated in the Amparai District. If this proposal is implemented then the demographic pattern of the East will change from the figure 42% Tamils 33% Muslims and 25% Sinhalese to 48% Tamils, 37% Muslims and 14% Sinhalese⁴⁹.

Tamils' Reaction

The most noteworthy change among the Tamils is that they are not emphasising the Eelam demand. In his letter dated November 3, 1983 to the Tamil Nadu Chief Minister, LTTE leader Prabhakaran did not emphasise the Eelam demand⁵⁰.

However the majority of the Tamils including LTTE emphasise that a meaningful political solution would have to be based on the recognition of a traditionally constituted and indivisible homeland comprising of the North and East⁵¹.

They reject the idea of a separate Muslim province which is a deliberate device "to divide our community who have lived together in harmony. Can we imagine Tamil Nadu being divided into a Muslim Tamil Nadu and Hindu and Christian Tamil Nadu"⁵².

They reject the creation of a separate Sinhala Trincomalee province. In their view the Sinhalese are not in an absolute majority in this district. Contiguous constituencies in the Trincomalee District have consistently returned Tamil representatives in successive Parliamentary elections. There are also strong sentimental reasons for Tamils insisting on retaining a part of Trincomalee District because according to Ramayana it was in this area that Hanuman had landed and it came to be known as Trikula Sikavam. Further the famous Tamil temple located in Trincomalee is of great sentimental importance to the Sri Lankan Tamils, who have a strong religious attachment to this shrine⁵³.

One of the suggestions was that the Tamil majority coastal belt of Trincomalee District could be tagged on to the Northern province so that the rest of this District could be merged into one of the adjoining Sinhala provinces. But Jayewardene opposed this because acceptance of this demand would automatically lead to a claim for a corridor connecting the Northern Province with the new Batticaloa province⁵⁴.

Muslims Reaction

The Muslims are not united regarding this issue. Some want unity with the Tamils of the North and East and some oppose such a solidarity.

A section of the Muslims demand a separate Muslim province in the East. They reject the creation of 3 councils with Amparai for Muslims. Because the proposed scheme would only help create two councils for the Sinhalese in Amparai, where the Muslims who were predominant have been reduced since 1981 to a minority⁵⁵.

They also oppose the merger of the East with North as it would reduce the percentage of the Muslims from 32% in the Eastern province to 18% in a combined Northern and Eastern province⁵⁶. They also oppose the formation of Tamil speaking councils including Muslim areas in the Northern and Eastern provinces⁵⁷.

They demand that the proposed Muslim Council should be constituted with Kalmunai, Sammanthurai, Pothuvil in Amparai District as the base and Kattankudi, Eravur, Valaichenai, Ottamavadi in Batticaloa District and Kinniya, Muttur and Thampalagamam in Trincomalee Districts as administrative units linked to the base. Although they are not contiguous they can be administered on the Pondichery model in India. The land area i.e one third of the land of the East, do not coincide with the present ethnic concentration and the boundaries of the units will have to be redrawn.

However, it appears a majority of the Muslims do not support this separatist viewpoint. They believe this separatist proposal has emerged from the Colombo Muslim leadership who have no base in the East and who do not know what is happening here. In their view Tamils whether Hindu or Muslim or Christian have same language, common culture and could live together. Barring some incidents the two communities had always lived in harmony.

Though the Muslims are concentrated in some places, their lands are in the midst of Tamil areas and thus indivisible. Territory wise the Tamils and Muslims are linked and interdependent. Also they are not against the creation of a Tamil majority province in the East cutting out the Sinhalese areas of Amparai District⁹.

Conclusion

Thus this ethnic crisis is transforming itself into an exercise in the history, geography, cartography and demography of the eastern province indicating that Sri Lanka is now at the crossroads. Destabilisation is eating the vitals of Sri Lanka. Politico military solutions would depend on the bargaining parties capacities to control Tamil Eelam. Any solution can be long lasting only if it can be backed by people power. It must be admitted that the Sinhalese have earned the deep suspicion of the Tamils, especially after the genocide of the Tamil civilian population by Jayewardene's Government. Frankly speaking, it may take many more decades for the Sinhalese to win back the warm friendship of the Tamils on the political plane within the united Sri Lanka. Political unity without emotional unity is an empty shibboleth, but such a situation would be capitalised by the politics of destabilisation. And all these politico-military realities alone could determine firmly the territorial identity of Tamil Eelam.

Foot-Notes

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53. Ibid, Dec 7, 1986, Dec 15 1986.
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Ramani Chelliah

Marxist Theory of Law: Pashukani's Contribution

At the present conjuncture in Eelam, in the wake of war, invasion and attendant resistance, signs of rupture are evident throughout the Tamil social formation. Not only has the social configuration been severely disrupted and deformed, but even the cement that held the social fabric together is beginning to crack. In these times of change different social forces are competing for ideological and political hegemony within Eelam often backed by military persuasion. In this context, the project of analysing and understanding the basis of our social formation becomes critically important if the way is to be paved towards a revolutionary social transformation.

The general purpose of Marxism is to mount a sustained offensive against the existing organisations of power by exposing the structures of domination and subverting the beliefs and values which sustain them, thereby facilitating the overthrow of the present oppressive social system. Within this programme, the theory of law assumes an important place. Law permeates all realms of social behaviour. Its pervasiveness and social significance are felt in all walks of life. The law in any social system is, in fact, a fundamental framework of the nature of all its forms of association and institutions. Analysis of law has the potential to reveal, more than just law itself. To understand law as a social phenomenon, means, not only to understand much more about

the society in which it exists, but also to understand the basic premises for its transformation.

The following is an essay on Pashukanis's contribution to the Marxist theory of law. Evgeny Pashukani was a Soviet Jurist who wrote his important works shortly after the Russian Revolution during the early period of the Union of Soviet Socialist Republics. His brilliant insights, although published over sixty years ago, remain to this day a highly significant Marxist work on the theory of law.

In bourgeois jurisprudence general theories of law are predicated on a belief that legal systems are a unique and essential component of social order and civilisation¹. Much of the motivation behind the construction of these theories lies in a desire to demonstrate the coherence of the predominant legitimating ideology of power in bourgeois society. For Marxists, whose purpose is to challenge rather than defend the present organisation of power, the primary focus rests on the economy and the corresponding power relations within a society and hence law has until recently been treated as a peripheral concern.

Apart from very recent literature, there are only two major works devoted exclusively to the formation of a Marxist theory of law, both of which were written in the early part of this century. The first was Karl Renner's "The Institutions of Private Law and their Social Functions" first published in 1904², and the second was Evgeny Pashukanis's "The General Theory of Law and Marxism" first published in 1924³.

Looking first at bourgeois legal philosophy and one approach taken within it, represented by the Neo-Kantian school⁴, jurisprudence is taken to be a normative discipline restricted to the confines of the formal, logical sense of the category of OUGHT. The legislative function itself is transferred to the meta juridical sphere and the task of jurisprudence is confined exclusively to ordering the various normative contents in a logically determined manner. Purpose itself becomes immaterial to the purely juridical OUGHT. On the plane of the juridical OUGHT, there is nothing but a transition from one norm to another on the rungs of a hierarchical ladder, at the top

of which is the all embracing, supreme norm-setting authority, a delimiting concept-from which jurisprudence proceeds as from something given. Such a general theory of law explains nothing and disassociates itself from the outset from the facts of reality, i.e. of social life, without being interested in the origins of norms or their relationship to any material matters. Such a theory makes no attempt to analyse the legal form as a historical form and as such is of little use.

On the other hand, the sociological and psychological theories of law undertake to interpret law as a real phenomenon in its origin and development adopting a materialist explanation of law as the product of conflict of interest, as the manifestation of State coercion or even as a process which takes place in the human psyche. Law as a creation of the State apparatus to further the ends of the ruling class is a popular approach adopted within the Marxist school⁵.

In this class instrumentalist analysis, the legal system is seen in connection with other social and political institutions (eg. the armed forces, the police and the bureaucracy) as being integrally involved in the process of maintaining social order under class rule. Thus the economic base determines the legal superstructure through a process of class rule in which the participants further their interests through the legal system by deliberately constructing laws.

Such an analysis, Pashukanis complains, operates from the outset with concepts of a non-judicial nature and excludes the legal form as such from its field of observation. To Pashukanis, this approach only provides a history of economic systems with a fairly faint juridical tinge, or a history of institutions, but by no means a history of law. He argues that the attempt to proclaim the primacy of the State (ie political power) and to make the idea of external regulation the fundamental logical element in law leads to law being equated with a social order established in an authoritarian manner. Pashukanis holds that the idea of unconditional subjection to an external norm-setting authority has nothing whatever to do with the legal form. Taking the military unit or the Jesuit order as examples of structures where the principle of authoritarian regulation is applied at its fullest, excluding all reference to separate

autonomous wills, clearly the category of law becomes irrelevant in such situations.

What Pashukanis overlooks, however, is the relative autonomy of the State⁶. The modern State including its legal system is notable for its considerable degree of independence from the control of the dominant class. The basis for the relative autonomy of the State lies in the logic of the capitalist mode of production which requires equality at the market place for commodity exchange together with the requirement of the owners of the means of production to share power equally among themselves. By failing to appreciate the separation of the State from civil society Pashukanis fails to grasp the interconnection between the legal form and the autonomous State.

The purpose of Marxist theory is not only to analyse the material content of legal regulation in different historical epochs, but also to provide a materialist interpretation of legal regulation as a specific historical form. The key to this, Pashukanis holds, lies in the analysis of the fundamental juridical concepts such as "legal norm", "legal relation", "legal subject" and so on which give expression to the fundamental essence of the legal form. He considers it ahistorical to define the concept of law in terms of external authoritarian regulation, which applies equally to all epochs and all stages of social development. Instead Pashukanis seeks a concept of law in its most distinct and consummate form, thereby demonstrating its relevance to a particular historical epoch.

For Pashukanis, it is only with the advent of bourgeois-capitalist society that all the necessary conditions are created for the juridical factor to attain complete distinctness in social relations. These, he considers to be a clear dividing line between law as objective norm and law as legal power (ie distinction between the general norm and its concrete application), as well as the antithesis between public and private law (ie the opposition of man as a private person to man as member of a political group). They constitute facets of the legal form, developed through a long process and crystallised with complete precision only in the bourgeois epoch. Thus, he argues, the dialectical development of the fundamental juridical concepts

not only provides us with the legal form as a fully developed and articulated structure, but also reflects the actual process of historical development, a process which is synonymous with the process of development of bourgeois society itself.

Behind the abstractions which the theory of law makes use of, Pashukanis maintains, lie perfectly real social forces. While agreeing with other Marxists on the ideological nature of law, he asserts the necessity to seek out the objective reality of particular concepts. His intention is to demonstrate that law can be conceived of as a social relation in the same sense in which Marx called capital a social relation⁷. However, if judicial concepts express objective social relations, it raises the question of how it can be said that law regulates social relations. Pashukanis gets around this tautology through the conception of law as a mystified form of a specific social relation which in certain cases transmits its own form to some other social relation, or even to the totality of social relations. For Pashukanis, only under certain conditions does the regulation of social relations assume a legal character.

Pashukanis consistently argues that there is a homology between the logic of the commodity form and the logic of the legal form and founded what became known as "the Commodity Exchange School of Law". For production to be carried on as production of commodities, suitable ways of conceiving social relations, and the relations of men to their products, have to be found, and are found in the form of law.

Legal regulation, as opposed to other forms of traditional regulation which may be based on moral, aesthetic or utilitarian considerations is fundamentally derived from, according to Pashukanis, the conflict of private interests. It is, this he argues, which provides the logical premise of legal form and the actual origin of the development of the legal superstructure. Accordingly, Pashukanis distinguishes between those rules which serve the universal interest and those which serve particular interest. The former are technical rules and are based on unity of purpose, the latter are legal rules and are

characterised by controversy. Thus the technical rules of rail traffic presuppose a single purpose ie maximum efficiency of the enterprise, whereas the legal rules governing the liability of the railways are predicated on private claims and isolated interests. Again, the treatment of invalids presupposes a series of rules both for the patient and the medical personnel; but inasmuch as these rules are established to achieve a single purpose-the restoration of the patient's health-they are of a technical character. But when the patient and the doctor are regarded as isolated, antagonistic subjects, each of whom is the bearer of his own private interests, they then become the subjects of rights and obligations, and the rules which unite them become legal rules. Pashukanis asserts that this isolation and conflict of private interests required for legal regulation exists under commodity production where the most diverse relations assume legal form since they approximate the prototype commercial relation characterised by mutually opposed separate subjects, each of whom represents his own private interests.

This distinction between legal and technical relation, however, is not one which is acceptable to all Marxists. For example, Collins⁸ raises the question of whether the complex rules governing income tax should be seen as merely regulatory or as law. It is hard to know whether tax laws serve a single purpose of financing government or whether they are controversial regulations governing the claims between government and individual citizens. Collins concludes that such a distinction itself is too vague to provide the analytic basis for a definition of law. This criticism, however, does not negate Pashukanis's contribution towards understanding different types of social regulation.

Analysis of another concept, the "legal subject" is seen as crucial by Pashukanis for understanding the legal form. Every legal relation is a relation between subjects who form the atom of legal theory, its simplest irreducible element. For Pashukanis the legal system differs from every other form of social system precisely in that it deals with private, isolated subjects. The legal norm acquires its characteristic specificity, marking it out

from the general mass of ethical, aesthetic, utilitarian and other such regulations, precisely because it presupposes a person endowed with rights on the basis of which he actively makes claims. Property becomes the basis of the legal form only when it becomes something which can be freely disposed of in the market. The category of the subject serves precisely as the most general expressions of this freedom.

The commodity is a thing in which the concrete multiplicity of use-values becomes simply the material shell of the abstract property of value, which manifests itself as the capacity to be exchanged with other commodities in a specific relation. Whereas the commodity acquires its value independently of the will of the producing subject, the realisation of its value in the process of exchange presupposes a conscious act of will on the part of the owner of the commodity. Thus at the same time that the product of labour becomes a commodity and a bearer of value, man acquires the capacity to be a legal subject and a bearer of rights. Concrete man is relegated to an abstract man who incorporates egoism, freedom and the supreme value of personality; the capacity to be a subject of rights is finally disassociated from the specific living personality and becomes a purely social attribute.

The relationship between legal subjects is expressed in legal terms as a contract or an agreement concluded between autonomous wills. Hence the contract is an integral part of the idea of law. Pashukanis observes that the legal form in its purest and simplest form, acquires a material base in the act of exchange. In contradiction to theorists of public and constitutional law, Pashukanis holds that all law is necessarily private law in that it emanates from commodity exchange. The distinction between private law and public law is therefore, he argues, a false ideological distinction and it reflects a real contradiction in capitalist societies between the individual and the social interest.

With respect to the State, Pashukanis argues that only the development of trade and of the money economy make the

juridical interpretation of the phenomenon of power possible. When exchange becomes a regular phenomenon, the maintenance of peace becomes a necessity. By appearing as a guarantor, authority becomes social and public, an authority representing the impersonal interest of the system. For Pashukanis the State as an organisation of class rule and for waging external wars needs no legal interpretation. But, power as a guarantor of market exchange employs the language of law and functions as law alone, ie it becomes one with the abstract objective norm. Coercion as the imperative addressed by one person to another and backed up by force, contradicts the fundamental precondition for dealings between the owners of commodities, based on autonomous will. It has to appear rather as coercion emanating from an abstract, collective person-exercised in the interest of all parties to legal transactions. Thus, the power of one person over another is brought to bear in reality as the force of law.

Such a formulation, however, is highly problematic and in particular Pashukanis's statement that the State as organisation of class rule needs no legal interpretation is contentious. As discussed earlier Pashukanis ignores the relative autonomy of the State and the reasons that give rise to the separation of the State from civil society. By missing this important facet of the modern State Pashukanis fails to appreciate the close relationship between class rule and the legal form. Political power in the modern bourgeois State is so dependent upon public and positive laws, that it is often referred to by the term "the Rule of Law", which is at once a description of the State and an ideal. The Rule of Law as an ideal symbolises a commitment to the preservation of the neutrality of the State between classes and interest group; maintains the sovereignty of laws in determining the issues of who should hold political power and how it can be exercised (specified in the constitution); and creates the concept of the autonomy of legal thought, whereby legal rules are applied impartially through juridical logic. The fact that dominant ideology operates in such a way as to confine the concepts of formal justice and autonomy of legal thought within the bounds of class interest does not reduce the legitimating function of the Rule of Law in the exercise of

political power by the dominant class.

Pashukanis's analysis of the legal form leads to his implacable opposition to any concept of "Proletarian Law". Since he treats law as a historical form which achieves fullest expression in the bourgeois epoch, and which is tied closely to the commodity form, he opposes pseudo-radicalism that talks of the overthrow of bourgeois law and its replacement by proletarian law. For Pashukanis such a line is implicitly conservative since it accepts the form of law as supra historical and capable of infinite renewal. Just as the transition to communism does not mean that new proletarian categories of value, capital and so on, appear as the bourgeois forms die out, so Pashukanis argues there cannot be new proletarian categories of law. Instead the juridical element itself, in social relations, will gradually disappear with the transition to communism. In reaching this conclusion, Pashukanis's position converges with that adopted by class instrumentalist theorists of law who arrive there via a different route. For class instrumentalism the State is an instrument of class oppression, and the legal system is a sector of the State apparatus. Hence the law is also an instrument of class oppression and once the division of society into classes is terminated under communism, there will no longer be any need for the State and its legal system.

Yet it is conceded by both economic reductionists like Pashukanis and class instrumentalists that there will be both rules for the administration of a planned economy and elementary rules of social life even under communism. The whole thesis of the withering away of law rests upon a specific definition of law as either a set of rules serving class oppression or rules regulating commodity exchange. Collins considers such definition to be unduly narrow and points to the importance of laws not only as a means of repressing subordinate classes, but also as serving to construct a set of relations of production.

In Marx's view, the eventual destiny of communist society is: *"In a higher phase of communist society, after the enslaving subordination of the individual to the division of labour, and*

therewith also the antithesis between mental and physical labour has vanished; after labour has become not only a means of life but life's prime want; after the productive forces have also increased with the all round development of the individual, and all the springs of co-operative wealth flow more abundantly - only then can the narrow horizon of bourgeois right be crossed in its entirety and society inscribe on its banners: From each according to his ability, to each according to his needs"¹⁰.

This idea of a passage beyond the narrow horizon of bourgeois right presupposes spontaneously produced forms of social behaviour and social organisation, unmediated by prescriptions enjoining justice and equality. People can be "measurable by an equal standard only in so far as they are brought under an equal point of view" and yet, Marx reminds us, "they would not be different individuals if they were not unequal".

In fact the demand for equality, or for equity in economic and legal arrangements, does not go beyond a radical bourgeois framework and does not grasp the qualitative break with previous forms that Marx looks forward to. It is this which leads Pashukanis to the view that throughout the transition period to communism the legal forms retained are, in reality, bourgeois forms. Any society which is constrained by the level of development of its productive forces, to retain an equivalent relation between expenditure and compensation of labour, in a form which even remotely suggests the exchange of commodity values, will be compelled to retain the legal form as well.

To Pashukanis, concepts such as "crime", "guilt" and "punishment" are linked with the form of equivalent exchange according to values and thus criminal procedure assumes the character of commercial transaction. The concept of strictly personal liability corresponds to the radical individualism of bourgeois society. In the concept of punishment again, Pashukanis points out, it is the formal principle of equivalence which triumphs rather than the principle of defending society or reforming the deviant. If the latter was predominant, Pashukanis argues, the prevention of crime would take on a social

educational dimension and cease to be a juridical problem. To maintain that there must always be offences against the person despite the greatest possible economic provision, means in Pashukanis's eyes, taking secondary, minor aspects for the main fundamental ones.

The importance of Pashukanis's contribution, as far as Marxist politics is concerned, is that he effectively counters the view, common to Stalinists and Social-democrats alike, that the form of law is essentially neutral and can be filled with a given class content according to the will of the dominant class.

The materialist analysis adopted by Pashukanis relies on the base and superstructure construct whereby law is conceived of as a reflection of the economic base; the form and content of law corresponding to the mode of production. This form of analysis has been termed "economism" or "crude materialism" because of the extreme emphasis placed upon the determining influence of the material base of the society. By attempting to explain all legal rules as reflections of commodity exchange, Pashukanis's accounts are open to the criticism that many laws cannot be readily characterised as ideological manifestations of social practices found in the process of production. Such examples include laws controlling relationships such as marriage or in cases of victimless crimes, such as the offences concerning the taking of drugs, where a purely economic perspective seems inadequate. However, Pashukanis's defence is that the universality of the legal form in no way dissociates it from the relations on which it is actually based. To illustrate the point he takes the value form as an example which becomes universal under the conditions of developed commodity production and assumes, besides its primary forms, various derived and artificial forms of expression. Thus it appears as the price of things which are not the products of labour (such as land), or even of things which have nothing to do with the production process (e.g. military secrets purchased by a spy). Nevertheless, this does not alter the fact that value as an economic category can be comprehended only from the standpoint of the socially necessary expenditure of labour required in the production of a given commodity.

Another, and more important criticism of Pashukanis's analysis is that it lacks an account of the mechanisms by which social practices are transformed into legal systems. He fails to describe the nature of the link between the material base and conscious action. Class instrumentalism gets over this problem by the conscious role it allocates to the dominant class. Laws are not reflections of the mode of production in any mechanical sense, but are deliberately constructed by the ruling class to serve their own interests.

According to the Marxist theory of ideology, ordinary social practices and experiences are breeding ground for ideologies which in turn determine the content of law¹¹. Thus despite the State, the ruling class maintains its hold on the reins of power indirectly both through the use of economic coercion and by ideological manipulation. As a result of the predominant style of ideological legitimation, importance is attached to concepts such as formal justice and autonomous legal reasoning. These aspects are reinforced by the background ideology which legitimates the exercise of power, the Rule of Law.

This sophisticated class instrumentalist explanation of the form of law avoids attempts to establish direct links between the material base and all aspects of law. Distinctive attributes, such as formal justice and autonomy of legal reasoning are seen to depend on complex legitimating ideologies which are themselves derived from political practices within the relatively autonomous State, not directly concerned with the capitalist relations of production.

The gaps in Pashukanis's theory, however, do not detract from the value of his analysis of abstract legal categories, in demonstrating their true significance and laying bare the historically limited nature of the legal form. In this respect the brilliant insights contained in his General Theory of Law and Marxism, although published over sixty years ago remains to this day a highly significant Marxist work on the subject.

Foot-Notes

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The Tamil National Question

Introduction

The Tamil National Question in Sri Lanka is being agitated on the basis of that nation's right to self-determination. The right of nations to self-determination in Lenin's formulation is a revolutionary theory which upholds the universal socialist principle of the fundamental right of a nation to secede and form a State of its own. This principle is aimed at protecting a small nation from the oppression generating from the national chauvinism of a big nation and is designed to preserve a nation's culture and its identity. When articulated in the sphere of democratic struggle and proletarian revolution the national liberation struggle of any oppressed nation can only create the necessary objective and subjective conditions for proletarian internationalism.

For the last forty years the Tamil nation of Eelam has been subjected to severe oppression. The national chauvinism of the Sinhala ruling elite dictated a persistent policy aimed at destroying the Tamil nation. The consequences of this disastrous policy were such that a revolutionary rupture from joint existence became the inevitable alternative.

Even as the dynamics of the Sinhala nation-Tamil nation

contradictions were being played out, with the Tamil national struggle for liberation gaining momentum in both subjective and objective arenas, a new force was unleashed into the scene with devastating impact. It took the form of direct military intervention by the neighbouring state of India in October 1987, a rank outsider to the conflict until then.

While recent developments have been such that the oppression of the Tamil nation has been greatly escalated and the combined strength of the oppressors greatly multiplied, the fundamental basis for the Tamil national struggle for liberation has also been enforced. Having been conceived in the womb of national oppression it is impossible for the struggle for Tamil national liberation to be aborted by that very same oppression.

Historical Background

For centuries before the advent of colonial domination, the Tamils and Sinhalese lived in Sri Lanka as distinct entities. This was confirmed by various chronicles. The island was ruled by the Tamil kings at times and then by the Sinhalese kings and the intermittent wars forced the Sinhalese kings to move their capital southwards. From the 13th century onwards until the advent of foreign colonialism the Tamils lived as a stable entity, in their own kingdom ruled by their own kings, within a specified territory of their traditional homelands embracing the Northern and Eastern provinces. Both the Portuguese who colonised the island in the 16th century and the Dutch who came after them governed the Tamil entity as a separate state entity until the British, in the 19th century, brought about a unified administration forcefully linking both the nations into a single state.

For centuries before the colonial penetration the island had a traditional self-sustaining economy with a reputation of being the granary of the East. The mode of production in the pre-colonial epoch was pre-capitalist in character. The most significant historical event of British imperial rule, that brought about catastrophic changes in the economic life of the island, was the superimposition of an exploitative plantation economy

on a traditional self-sustaining peasant economy that transformed the rich fertile hill lands of the island into pockets of tea and rubber plantations. This task was performed by conscripting a massive army of cheap labourers drawn from South India, who, partly by their own poverty and partly by coercion, moved into this promised land to be condemned to an appalling form of slave labour. Thus, an economic structure was built by this impoverished mass, whose sweat and blood generated the surplus to feed British imperialism. This plantation economy expanded with British entrepreneurial investments, export markets and consolidated companies, transforming the structure of production and effectively changing the economic foundation of the old pre-capitalist mode and created a basis for the development of the capitalist mode of production.

However, colonial mode bred neither a modern capitalist class that out of sheer economic compulsion was dying to break its colonial bondage nor a proletariat that could see beyond national and religious interests to its own class interests. Power for the bourgeoisie and the proletariat lay not in economic hegemony or in class struggle but in finding a favourable niche within the colonial state. Thus the different social formations that for centuries had co-existed side by side were brought into direct competition under the central administration of the British colonial government which skilfully played the game of divide and rule, in order to retain overall political control.

The relatively deprived Tamil area which was inhospitable to colonial enterprise was however, effectively penetrated by missionary zeal and foreign education. The Tamils, inhabiting the not so fertile under-developed regions of the dry-zone, where the prospects for agriculture and industry were limited, sought through the English education system their only way to economic salvation. From amongst the so called high caste and privileged sections emerged a new class of English educated professional and white collar workers who became a part of the bureaucratic structure of the civil service. Those who did well rose in prestige and position and took their place beside their English educated Sinhala counterparts in their common quest for political office.

Below them was another tier of Tamil and Sinhala servants, who did the clerical work or went about helping the British to open up railway stations and post offices in the malaria-infested interior. These Tamils who were to leave their families at home in the Northern province became a rootless migrant labour force with only their religion and their language and their culture to hold on to. For the vast majority of the Tamil people in the Northern Province, however, and especially for the oppressed caste people very little had changed. The oppressor caste still owned the fragmented land and the oppressed castes were dependent on the oppressor caste for their survival.

Perceived disproportionate representation of Tamils in the state administrative structure, the privileges enjoyed by the English educated elites and the spread of Christianity are factors that propelled the emergence of Sinhala nationalism. In the early stages, Sinhala nationalist tendencies took the form of Buddhist revivalism which gradually assumed a powerful political dominance. Under the slogan of Buddhist religious renaissance, a national chauvinistic ideology emerged with strong sediments of Tamil antagonism. The religious leadership attacked the Tamils and spoke of the greatness of the Sinhalese "Aryan" race.

Tamil National Oppression

Having firmly entrenched a section of the bourgeoisie in a global neo-colonial structure, British imperialism granted "independence" to the people of Sri Lanka with the British Queen as their sovereign head. Motivated by their class interest this section of the bourgeoisie collaborated with the British, accepted their constitution and assumed power. Soon after the so-called national independence, conflicts arose between the Tamil and Sinhala bourgeoisie over the share of political power. Sinhala chauvinists dominated the scene and gained control over the State machinery.

The first act of an independent Ceylonese government was the inhuman Citizenship Act of 1948 which robbed 1.2 million

Tamil plantation workers of their basic human rights and reduced them to an appalling condition of statelessness. In one stroke, this Act deprived almost fifty percent of the Tamil population of its basic fundamental rights. The direct consequence of this was to reduce the Parliamentary Representation of the Tamils by almost half. Over the years nearly three hundred thousand of the plantation Tamils have been compulsorily repatriated to India, a mere one hundred and twenty five thousand have been granted citizenship and the remaining substantial majority have continued to remain voteless and stateless to this day.

The Tamil language which represented an aspect of the identity of the Tamil nation was another target for attack. Prior to independence, it had been the State council resolution that Sinhala and Tamil should both be the official languages, which then formed the foundation of the constitutional settlement between the Sinhalese and the Tamils. But in 1956 the Sinhala language was declared as the only official language of the country and with it began the era of establishing Sri Lanka as a state for the Sinhalese only. The Sinhala Only Act directly resulted in thousands of Tamil government servants immediately losing their employment, due to their non-proficiency in the Sinhala language.

A good illustration of the policy of the Sri Lankan state towards Tamil culture is the tragedy that occurred during the Fourth International Tamil Research Conference held in Jaffna (in the Northern province) in 1974. It was during this great cultural event, when nearly a hundred thousand people were spellbound, listening to the eloquent speech of a great Tamil scholar, that the Sinhala police decided to unleash a totally unprovoked attack on the spectators. Using tear gas bombs, batons and rifle butts they caused a commotion resulting in the tragic loss of nine lives and hundreds sustaining severe injuries. The Prime Minister neither expressed a word of concern nor sympathy nor acknowledged the requests for an Inquiry.

In 1981, in another act of Police barbarism the Jaffna Public

library, with its collection of rare and irreplaceable archives, was burnt to the ground. Again no Inquiry was ever held.

Even after Sinhala had been made the only official language, another official policy was that all children would be educated in their mother tongue - Sinhala for Sinhalese children and Tamil for Tamil children. The Tamil educated population, however, could find no work within the public sector which required proficiency in the Sinhala language. This blatant disadvantage, coupled with open discrimination is such that today Tamils who constitute almost thirty percent of the population, make up less than five percent of the public sector. In the Police Force and Armed Forces there are almost no Tamils at all.

In addition, admission to universities and institutions of higher education on the basis of merit has been abandoned since 1970. Instead, discriminatory selective devices in the form of various "standardisation" schemes have been adopted under which a Tamil student is required to obtain higher marks than a Sinhalese counterpart to become eligible for admission to the same course. This discriminatory device seriously affects the prospects of higher education for Tamil youth.

The most sinister threat to Tamil nationhood has been posed by the state-aided colonisation schemes that have been vigorously carried out since independence. Aimed at destroying the geographical entity of the Tamil nation, it is also used to reduce the Tamils to a minority in their own homelands. Already such colonisation schemes have created two new Sinhala electorates. Almost one third of the land area in the Eastern province has now been lost through state-aided colonisation to the Sinhalese. Colonisation of the Tamil areas by Sinhalese also brings with it frequent racial violence designed primarily to drive away the indigenous Tamils, thus making room for further colonisation.

The single major field of government investment from 1948 to the present day has been irrigation, dry zone land development and the resettlement of the Sinhalese peasant. Of the total

money spent, less than 0.01% has been for the benefit of the Tamil people. In spite of various irrigation projects financed by Western donors, not a single project has been carried out for the benefit of the Tamil peasants. Similarly, all the industrial development projects have been sited in the Sinhala areas. As a result while the rest of Sri Lanka prospered, the Tamil nation has been impoverished and made dependent on the Sinhalese master nation.

Periodic pogroms occur in which thousands of innocent lives have been brutally sacrificed at the altar of racial hatred. Violent anti-Tamil riots exploded in 1956, 1958, 1961, 1977, 1979, twice in 1981 and 1983. On every occasion the State and the armed forces colluded with thugs and vandals in their sadistic orgy of arson, rape and mass murder.

Various laws have been rushed through parliament aimed at crushing Tamil resistance. The Prevention of Terrorism Act (PTA) passed in 1979 denies trial by jury, enables the detention of people for a period of eighteen months without being charged and allows confessions extracted under torture as admissible evidence. Human rights violations in Sri Lanka have been condemned internationally and in special reports prepared by Amnesty International and the International Commission of Jurists.

Struggle for Right of Self-Determination

In response to the implementation of the "Sinhala Only Act" in 1956 the Federal Party headed by the Tamil bourgeois nationalists organised mass agitational campaigns demanding a federal form of autonomy for the Tamil speaking people. The Sinhala ruling class, threatened by the emerging Tamil nationalism, agreed to give concessions and a pact was signed providing some elements of political autonomy under regional councils with a promise to stop Sinhala colonisation in Tamil areas. This, however, sparked off a Sinhalese chauvinistic upsurge which led to the abandoning of the pact. The betrayal by the Sinhala bourgeoisie intensified the national aspirations of the Tamils

and the relations between the two nations became hostile. The national friction became intense and exploded in a violent national pogrom in 1958 in which hundreds of Tamil speaking people were massacred and their property destroyed.

The 1958 holocaust cut a deep wedge in the relations between the Tamil and Sinhala nations. Tamil national sentiments ran high and erupted in massive agitational campaigns on the Tamil political scene. In 1961 the Federal Party launched a non-violent civil disobedience campaign and demanded equal rights for the Tamil language. The State oppressive machinery reacted swiftly, unleashing a barbarous military violence against the peaceful agitators. The Tamil nationalist leaders were arrested and kept in detention for six months.

In 1972 a new Republican constitution was adopted which not only removed the fundamental rights accorded to the national minorities in the previous constitution, but also categorically rejected all amendments and resolutions proposed on behalf of the Tamil speaking people. Sinhala national chauvinism reigned supreme in the deliberations of the Constituent Assembly which resulted in the Tamil Members of Parliament walking out in utter frustration and hopelessness.

The adoption of this constitution created a condition of political alienation of a nation of people and set a deep crisis in the Tamil-Sinhala relationship. The constitution legalised national oppression and the State apparatus delegated limitless powers to the police to dominate and suppress the Tamil nation. The police practised excessive violence indiscriminately against innocent Tamil people and the Tamil youth in particular. The victimised youth grew militant and reacted with acts of violence.

At the peak of national oppression, when secession became the inevitable political destiny of the Eelam nation, the Tamil bourgeois nationalist parties converged into a single movement (the Tamil United Liberation Front, formed in 1976) and asked for a clear mandate from the people to wage a national struggle

for secession. The Front, at the general elections of 1978, explicitly stated in its manifesto:

"The Tamil Nation must take the decision to establish its sovereignty in its homeland on the basis of its right to self-determination. The only way to announce this decision to the Sinhalese government and to the world is to vote for the Tamil United Liberation Front"

In reference to the Tamil National question the verdict at the elections was crucial. In a political sense, it assumed the character of a plebiscite, a public expression of a nation's will. The Tamil speaking people voted overwhelmingly in favour of secession.

Once elected into parliament, however, the impotency of the Tamil bourgeois leadership was fully exposed. They had simply invoked the flames of Tamil nationalism but never found any concrete practical programme of political action to liberate the oppressed nation. A profound disillusionment struck the militant Tamil youth who became disenchanted with the political strategy of nonviolence which the leadership had advocated for the last thirty years and which had produced no political fruits. Caught up in a revolutionary situation generated by the contradictions of national oppression and constantly victimised by police brutality, the youth were forced to abandon the Gandhian doctrine of "ahimsa" which they realised was irreconcilable with revolutionary politics, and chose the path of armed resistance.

The armed struggle started in the early 1970's with isolated attacks of selected targets, primarily aimed at senior police officers who had a notorious reputation for tyranny and Tamil political opportunists who betrayed the Tamil cause. The Sri Lankan State responded by sending large contingents of armed forces to Tamil areas and by passing repressive legislation. Increasing oppression produced increasing resistance. The 1983 riots in particular, in which thousands of innocent Tamils had

been massacred, produced an explosive increase in the number of youths joining the various liberation organisations and vastly increased their strength. Over the past five years the Tamil resistance has been able to engage with and counter the Sri Lankan armed forces on an equal footing. State terrorism and Sinhala chauvanism which had already imposed a de facto separation of Sri Lanka had the effect of polarising the heterogenous masses of the oppressed Tamil nation, with class elements of peasantry, proletariat and petty-bourgeoisie and the various stratum of castes into a unified whole, providing a solid and extensive base of support for the liberation movement engaged in the struggle for national independence.

Indian Hegemony

The Indian bourgeoisie, having consolidated its hold on the socio-economic-political infra and super structure of its own country, developed external ambitions especially after the break up of Pakistan in 1971. It gradually began to exert its influence upon its small neighbours. Sikkim was annexed in 1974, Bhutan turned into a client state and a powerful destabilising influence established within Bangladesh. In its emerging capacity and ambition as a regional power, when the Sinhala ultra nationalist JVP (People's Liberation Front) with a semblance of anti-imperialist and progressive slogans launched an armed uprising against the Sri Lankan state in 1971, India was amongst the countries that sent arms and ammunition to quell the insurrection.

Before Bangladesh, India's strategic perspective was fixed on land borders-the main theatres of conflict being the borders with Pakistan and with China. The Bangladesh war awakened India to the existence of another flank, the southern, and to sea power. The southern front, the Indian Ocean, with all its deepening tension and big power rivalries has long been regarded as an "exposed flank". The establishment of a southern command at Trivandrum not so long ago was a reflection of India's own threat perception.

Sri Lanka was no threat per se. However, certain

developments within Sri Lanka were perceived as such by India. In particular, the steady shift in Sri Lankan foreign policy from its traditional, non-aligned middle course, closely paralleled, in Indian eyes, with Delhi's own approach to international and regional issues was one important factor. From that basic change specific issues arose which increasingly became major irritants to Indian hegemony. The agreement to establish a Voice of America Station in Sri Lanka to broadcast in regional languages with transmitters powerful enough to cover the whole subcontinent, the Arab world, parts of China, Soviet Central Asia, Afghanistan, Iran and east Africa is a case in point.

The Sri Lankan regime's strong links with Pakistan is another. In its efforts to crush the Tamil liberation struggle Sri Lanka relied heavily on Pakistan for military training of its service personnel and para-military groups. Pakistani officers had a high profile presence in Sri Lankan military circles, particularly after the visit of a top-level military mission in 1986. This was of concern to Delhi, especially when another close ally of the USA, Israel was beginning to advise Sri Lanka on all intelligence matters and MOSSAD was actively engaged in the Sri Lankan war against the Tamils. The previously closed Israeli Mission in Sri Lanka was reopened under the UNP regime of Jeyawardene in the form of an "Israeli Interests" section located within the American embassy.

In the aftermath of the pogrom of 1983 in which thousands of Tamils had been slaughtered in Sri Lanka and which became a major landmark in the Tamil struggle both in terms of the subsequent increase in the strength of Tamil resistance and the fleeing of large numbers of Tamil refugees out of Sri Lanka, a golden opportunity was provided for Indian intervention. India provided refuge for the large number of Tamils fleeing from Sri Lanka. At the same time India provided a base for the Tamil militant organisations, thereby gaining leverage within the Sri Lankan crisis. While assuming the role of the "mediator" between the Tamil liberation movement and the Sri Lankan State, the Indian State carefully maintained the balance of

power between the two sides so as to ensure its own dominance. When the liberation organisations grew too powerful India blocked their arms supply (procured privately in the international arms market) and manoeuvred internally, and when the balance shifted in Sri Lanka's favour, India issued veiled threats. The main forces of the Tamil resistance, however, never accepted their position as Indian pawns. While being forced to accept the status quo, which could not be altered, their commitment to total Tamil national liberation never wavered. Unable to use the Tamil national movement any further, the Indian state decided to bypass it entirely when it took the initiative in consolidating its hegemony over Sri Lanka by imposing the Indo-Sri Lankan Peace Accord of July 1987.

Sri Lankan Capitulation

The Sri Lankan state continuously and consistently adopted the tools of force and repression in response to the problems of the Tamil people. The chauvinists within the ruling class were convinced that a military victory was possible. Even those who did not share that honest delusion, encouraged the chauvinists since they had a vested interest in continuing the war. It had become the sole growth industry. The militarisation process produced a new clique of big businessmen turned arms dealers or middle-men enjoying intimate contact with decision makers and the power elite. A mutually supportive group was the foreign "advisers" and the counter-insurgency experts (including mercenary forces from Britain), with special status if not diplomatic cover, and the agents of the big-time international arms bazaar. All of them had a common interest in the war. Within the state apparatus itself there were structural changes reflecting the militarisation process. Recent years have seen massive multiplication of "security" ministries and the proliferation of security-related ministerial posts with the creation of new departments for "defence", "internal security", "national security", "commercial security", and "manpower mobilisation".

Nonetheless, the fact that a military solution was not possible

gradually became an unavoidable reality. After five years of concerted military efforts, the Sri Lankan army was still bogged down in the north. Its final onslaught, "Operation Liberation" expected to bring rapid military victory, had been effectively rebuffed by the Liberation Tigers of Tamil Eelam (LTTE) which had developed into a highly sophisticated fighting machine, establishing new standards in military capability by far outstripping those previously set in the history of guerrilla movements internationally. Besides the very effective military resistance and even more importantly, the determination of the Tamil people as a whole to win their freedom proved to be unbreakable.

The spiraling defence cost set the Sri Lankan economy on a course to certain disaster. External pressures too were increasing as the aid donor countries who account for fifty per cent of the budget wanted peace and economic stability. The World Bank and IMF worried by rising defence costs and debt-servicing demanded the same.

The outlook for the ruling UNP regime under President Jeyawardene was grim. The opposition was showing signs of unity and the proscribed Sinhala militants were vocal and carrying out agitational activity and Mrs. Bandaranaiyaka (leader of the SLFP) was launching a national cum international campaign for "the restoration of democracy". Indian pressure was mounting and the unions were stirring. The points and sites of confrontation between people and regime were multiplying. The regime's capacity to control events was rapidly diminishing, indeed each step it took exposed more of its weakness. The regime was trapped, engaged in two-and-a-half wars: in the north and east an armed conflict with the Tamils; in the south a democratic challenge to power; and an emerging half-a war with the JVP.

Another signal to Jeyawardene was India's airdrop of relief supplies in the Northern province while the Sri Lankan army was at the height of its "Operation Liberation" marking a change in India's role from "honest broker" to semi-partisan negotiator. It was a modest demonstration of Delhi's deterrent power. The

Mirage jets that escorted the military cargo planes during the early part of 1987 flew menacingly over air fields and harbours. Within this context Jeyawardene decided to abandon the unwinnable war with the Tamils, close the northern front and defend his main Sinhalese base. Thus was set the stage for the signing of the Indo-Sri Lankan Peace Accord of July 1987 and through it the opening of the doors to direct Indian involvement and control.

The Indo-Sri Lankan Peace Accord

A war that had arisen out of Tamil people's oppression by the Sri-Lankan state, and one that had been fought with increasing ferocity for over five years at the cost of thousands of lives in order to gain the national liberation of Tamil people, - was a war, it had been decided, that would be ended by an agreement concluded between the Indian and Sri Lankan States. Accordingly, Prime Minister Rajiv Gandhi of India and President Jeyawardene of Sri Lanka signed the Indo-Sri Lankan Peace Accord on 29 July 1987 and peace was declared.

As to the Liberation Tigers of Tamil Eelam (LTTE), the major force conducting the military resistance, nothing more was required of them other than to abide by the agreement, the implementation of which was under written and guaranteed by India. No dotted lines had even been offered for their signature.

What the Peace Accord offered was:

- 1) The combining of the Northern and Eastern provinces into a single administrative unit until such time that a referendum is held to enable the people of the eastern province to decide whether to remain linked with or separated from the northern province.
- 2) The setting up of an interim government to cover the period until the referendum in the form of a single elected provincial council.

- 3) The lifting of the state of emergency in the eastern and northern provinces.
- 4) The cessation of hostilities.
- 5) The surrendering of all arms held by the Tamil militant groups.
- 6) The Sri Lankan army and other security personnel to be confined to barracks in camps while at the same time the government of Sri Lanka retaining the powers and mechanisms for law enforcement and maintenance of security in the northern and eastern provinces.
- 7) The granting of a general amnesty to political prisoners.
- 8) The underwriting and guaranteeing by the government of India of the resolutions and the agreement to afford military assistance to implement the proposals.

The gist of what was offered, apart from the cessation of hostilities, was actually very little. Even the powers of the provincial council was not stated except to say that law and order and security matters lay outside its remit. It was to be worked out later by the Sri Lankan government. It was indeed a far cry from national liberation. Nonetheless, taken by surprise as it was and unable to withstand Indian pressure, the LTTE had no option other than to fall into line.

More interesting than the agreement itself were the annexures to the agreement which included:

- 1) An "early understanding" about the employment of foreign military and intelligence personnel with a view to ensuring that such presence will not "prejudice Indo-Sri Lankan relations"
- 2) An undertaking that Trincomalee or any other port in Sri Lanka will not be made available for military use by any country in a manner prejudicial to India's interests.

- 3) Agreement for the work of restoring and operating the Trincomalee Oil Tank Farm to be undertaken as a joint venture between India and Sri Lanka.
- 4) An undertaking that Sri Lanka would "review" its agreement with foreign broadcasting organisations to ensure that any facilities set up by them in Sri Lanka are used solely as public broadcasting facilities and not for any military or intelligence purposes.

While Tamil people had not been granted the national independence that they wanted through the Accord, the island of Sri Lanka as a whole had actually lost the sovereignty it once had as a direct result of the Accord. The military, territorial and economic decisions of the sovereign state of Sri Lanka is henceforth to be officially dictated to by Indian interests. It is little wonder that the days leading to the signing of the Accord were marked in the south of Sri Lanka by wide spread riots. Members of the Sinhalese public were on the streets, not attacking Tamil people as in the past, but state-owned vehicles and public property as well as UNP politicians. The State that had betrayed them was clearly conceived as the target. Colombo was under curfew when the Accord was signed and its streets littered with the charred bodies of public buses and state owned vehicles. When Rajiv Gandhi carried out an inspection of the Guard of Honour after the signing of the Accord, a 22 year old Sinhala naval rating hammered him smartly on the neck (narrowly missing the head) with the butt of his rifle in a symbolic gesture (though no doubt painful as well) which epitomised the feeling of Sri Lankan people towards India and what it had done. Expression of Tamil anger at Indian betrayal was yet to come and when it did it was not merely Rajiv Gandhi's dignity that would be lost but the actual lives of Indian soldiers.

The Indian Invasion of Eelam

In keeping with the Accord Indian troops were dispatched to the Northern and Eastern Provinces of Sri Lanka in the form of the Indian Peace keeping Force (IPKF). Their initial presence, seen as ensuring the physical safety and security of the people of

those areas, was welcomed by the general public. After five years of war and the devastation that it entailed, and the memory of their direct experience of Sri Lankan army atrocities still fresh in their minds, these people who had borne the brunt of the war were happy at the prospect of peace. It was, however, not to last long. The shaky foundations upon which it was built soon collapsed.

From the outset, implementation of the Accord was ridden with problems. One of the factors causing great alarm was the accelerated programme of colonisation undertaken by the Sri Lankan State in the Eastern province immediately after the Accord. This coupled with the delay in setting up an interim government clearly indicated the Sri Lankan government's intention of altering the ethnic balance of the region in favour of the Sinhalese so that the result of the referendum, when it is held, would be against a merger with the Northern province. The temporary merger of the Northern and Eastern provinces was the only clause within the whole Accord which addressed, however inadequately, the Tamil National question by partially recognising the territorial integrity of the Tamil homelands. The blatant sabotaging of even this sole concession by the Sri Lankan State made a complete mockery of the Accord.

As to the release of the thousands of Tamil people who had been rounded up and taken into custody under the Prevention of Terrorism Act and the various other Emergency Laws, apart from token gestures, very little was actually happening. Besides, many who had been taken to military camps were simply recorded as "missing" and so the question of their release could not even be raised.

The final straw was the capture of a large group of Tamil militants including important members of the LTTE leadership exposing the amnesty agreement as a sham. While they were being kept in an army camp in Jaffna under Indian Army protection, and even as negotiations were taking place for their release the Sri Lankan army made a swift decision to take control of the captives and transport them out to Colombo to their own camp. The militants resisted the move, knowing well

the traditional pattern of torture and certain murder that awaited them in a Sri Lankan army camp. In the struggle that ensued the unarmed fighters, unable to overcome the well equipped thuggery of the Sri Lankan forces resorted to their final act of defiance by committing suicide (through cyanide ingestion) rather than being taken alive. The tragic drama was enacted under the very eyes of the Indian armed forces which simply stood aside and watched, because as they later stated, they did not have orders to intervene.

Thus it became clear, that not only was Sri Lanka sabotaging the Accord but also that India would, far from honouring its agreement to protect Tamil people, act in accordance with the Sri Lankan State.

The cease-fire was broken and the LTTE demanded foreign troops of both the Sri Lankan and Indian varieties to be confined to their barracks. That was the signal that heralded a new epoch, and a new chapter was opened in the history of Tamil oppression more bloody and gruesome than ever before.

The IPKF unleashed the mighty force of its full fire power. Not on a conventional battle field against a targeted enemy for there were no conventional battle fields to fight on and no conventional armies to fight against. Instead the entire Northern province became its battle field and the Tamil civilian inhabitants, its sitting targets.

The war, or to be more accurate, the slaughter which the IPKF undertook began on 10 October 1987 and is still continuing today. The full horrors of what happened and what is continuing to happen is still unknown since India has taken the precaution of entirely sealing off the Northern province preventing the movement of people and denying access to journalists and outside observers. In the absence of telephone connections and a postal service, coupled with curfews and road blocks the only details to emerge are those carried by the very few who managed to escape alive, and the even fewer journalists smuggled into the Northern province by the LTTE for brief periods. From such sources the following facts have

emerged although the exact situation at present is unknown.

Indiscriminate shelling had been carried out continuously and no area had been safe from its impact. Helicopter gunships and bombers had been frequently used, often manned by Sinhalese pilots (intercepted radio messages revealed conversations in Sinhalese). The electricity supply was cut. Hospitals were closed. All official and public activities were brought to a standstill. The seige meant the cutting off of all supply lines including those for food, medicines and other essentials. In house to house operations innocent civilians had been shot dead at point blank range, including the elderly and young children. Wide scale raping of women has also been reported.

The exact extent of these atrocities is yet to emerge and is certain to be on a very large scale and still continuing behind the cloak of secrecy. In the absence of food and medical supplies, those not directly killed by the Indian army are being gradually killed by starvation and diseases. The Northern province is now officially under IPKF control. The Eastern province too is being increasingly devastated by the IPKF in its effort to subjugate the entire Tamil nation. Tamil resistance however has not been broken.

Conclusion

In spite of India's massive military advantage, in its war against revolutionary justice and freedom the strength resides with the Tamil people of Eelam and in their struggle for national liberation. The glorious example of Vietnam illustrated well the fact that a people united and determined to win justice, dignity and freedom can never be defeated.

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Notes and Commentary

M. Mahauthaman

International War Crimes Tribunal

Introduction

The blatant discrimination faced by the Tamil speaking people of Sri Lanka in the spheres of employment, education, land allocation, development projects, language, culture and religion have been well documented by domestic as well as international bodies. Violence perpetrated on Tamils by state organised or state encouraged mobs in 1956, 1958, 1977 and 1983, also have been publicised widely in the international arena. However, there has never been any systematic inquiry carried out on the allegation that the war policies pursued by the Sri Lankan government since 1983 and the atrocities perpetrated by the Indian government since 1987 are violations of International law. Among the war policies that might be found illegal are: (1) aerial and naval bombardment and shelling of undefended villages (2) "search-and destroy" missions (3) harassment and interdiction fire (4) forcible removal of civilian population (5) reliance on a variety of weapons prohibited by international treaties (6) hostage taking (7) disappearance and torture of prisoners (8) murder, mutilation and maiming of civilians by direct action. These illegal acts fall into four broad categories of crimes¹. They are, crimes against the peace and wars of aggression, crimes against humanity, war

crimes and genocide. There is a growing belief and there is very strong evidence that the Sri Lankan and Indian regimes committed such war crimes and as such those responsible for the policy and its execution should be prosecuted as war criminals by appropriate tribunals. Discussions have taken place with eminent international jurists and others of international stature and the formation of an International Tribunal on war crimes in Sri Lanka is already underway. A support committee consisting of Tamils as well as others have been formed.

In order to get the concept of international tribunal on war crimes into correct perspective a brief outline of the historical precedence, legal and moral basis and its political ramification is given below.

Memories of Nuremberg and Tokyo

Before the second world war there had been few international agreements, for instance the Paris Pact of 27 August 1928 (popularly known as Briand Kellogg Pact) which were aimed at limiting the Jus ad bellum. There were no other institutions created to implement them.

In 1945, something absolutely new in history appeared at Nuremberg with the first International Tribunal formed to pass Judgement on crimes committed by the Nazi leaders of Germany. Alarmed at the magnitude of Nazi crimes, the decision to set up an International Tribunal was made in early 1940's by Allied powers especially by the leaders of the U.K. the U.S.A, and France². Allied powers decided, since they were to be the victor, to judge and condemn the wars of aggression and conquest, the maltreatment of prisoners and the tortures, as well as the racist practices known as genocide. At Nuremberg and subsequently at Tokyo high ranking government party officials were sentenced to death or long imprisonment.

Our concern here is not the procedural outcome of the Nuremberg and Tokyo Tribunals. It is the principles established

at Nuremberg that is of direct relevance to the proposed Tribunal on Tamils. They are:

- (1) The explicit insistence of the US prosecutor, Robert Jackson, that **the principles of Nuremberg are to be regarded as universal** in their applicability. After the trials, he wrote:

"If certain acts and violations of treaties are crimes, they are crimes whether the United States does them or whether Germany does them. We are not prepared to lay down a rule of criminal conduct against others which we would not be willing to have invoked against us."

- (2) **It is the fundamental duty of the citizen to resist and to restrain the violence of the state.** Those who choose to disregard this responsibility can justly be accused of complicity in war crimes, which is itself designated as "a crime under international law" in the principles of the Charter of Nuremberg.
- (3) **Those who are responsible for "illegal" policy and its execution should be prosecuted as war criminals by appropriate tribunals.** The majority judgement of the Tokyo Tribunal held as follows:

"A leader must take affirmative acts to prevent war crimes or dissociate himself from the government. If he fails to do one or the other, then by the very act of remaining in a government or a state guilty of war crimes, he becomes a war criminal".

- (4) Nuremberg statutes defined war crimes: "violations of the laws and customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation of civilian population, murder, ill-treatment of prisoners of war or persons on the seas, killing hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity"

- (5) (a) Nuremberg statutes defined crimes against humanity: "murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian before or during the war; or prosecutions on political, racial or religious grounds in execution of or in connection with any crimes within the Jurisdiction of the Tribunal, whether or not in violation, of the domestic law of the country where perpetrated."
- (b) Discussion of crimes against humanity committed outside of a state of war and those which could be committed in the course of war was taken up before the Nuremberg Tribunal.
- (c) Crimes against humanity are characterised by the extent of the affected populations, and by the motives for these crimes.

The other relevant sections of the Nuremberg charter are being examined by a panel of international Jurists and will be discussed in detail at the beginning of the International Tribunal on War Crimes in Sri Lanka.

While evoking the principles of Nuremberg Tribunal it is imperative to look into the criticisms levelled against it. It is argued that the verdict of Nuremberg and Tokyo was merely the judgement of victors, who sought vengeance and retribution rather than justice. Lord Bertrand Russell in his speech to the first meeting of members of the War Crimes Tribunal held in London on 13th November 1966 mentioned:

The Nuremberg Tribunal, although concerned with designated war crimes, was possible because the victorious allied powers compelled the vanquished to present their leaders for trial. Inevitably, the Nuremberg trials, supported as they were by state power, contained a strong element of real politik."

Also, Russell felt that it was morally necessary to record the full horror. Another Nobel Laureate Jean-Paul Sartre echoed Russell's criticisms. He said

"It has been said that it was a diktat of the victors to the vanquished and, which comes to the same thing, that it was not really being international: one group of nations was judging, anotherAlso, it has been declared that if the fortunes of war had been otherwise, a tribunal of the Axis could have condemned the Allies for the bombing of Dresden or for that of Hiroshima".

Questions were raised about the moral right of the Allied powers to set up Nuremberg and Tokyo Tribunals. These nations which had built their wealth upon the conquest of colonial empires and committed similar crimes against the people of Asia, Australia and Africa passed judgements on Nazi leaders of Germany and the Generals of Japanese Army, unaware that they were condemning themselves, in this way, for their own actions in the colonies.

However, such criticisms do not affect the broader question of the legitimacy of the principles that were recognized in the charter of the Nuremberg war crimes tribunal. Also, the Nuremberg tribunal, in a more universal sense, opened the way to a real jurisdiction for the denunciation and condemnation of war crimes wherever committed, and whoever the culprits. The Nuremberg Tribunal is still the main station of a change of capital importance; the substitution of Jus ad bellum by Jus contra bellum.

THE INTERNATIONAL WAR CRIMES TRIBUNAL — 1967

The Nuremberg Tribunal did not consolidate itself into a permanent tribunal, empowered to investigate and to judge all accusations of war crimes. Hardly had the last guilty German been sentenced, the tribunal vanished and no one ever heard of it again.

However, war crimes continued to be committed in Africa and Asia. The decolonization process that began in Africa in 1960s was a painful one for Africans. Belgians in Congo and the French in Algeria committed atrocities that shocked the world and made people aware of the need for a permanent international war crimes tribunal.

Even worse atrocities were being committed by the U.S. in Vietnam. By late 1960s four and a half million tons of bombs had been dropped in Vietnam. This is nine times the tonnage of bombing in the entire Pacific theatre in the second world war, including Hiroshima and Nagasaki-over 70 tons of bombs for every square mile of Vietnam, about 500 lbs of bomb for every man, woman and child in Vietnam. The total of ordnance expended is over 10 million tons when ground and naval attack are taken into consideration. Moreover, news about atrocities committed in Song My, forced expulsion of people, chemical and other experimental war fare carried out by the Americans started pouring into the west. Yet a deadly silence was maintained by the world.

Lord Bertrand Russell and Jean-Paul Sartre decided to break this crime of silence. Both were well known not only for their long opposition to wars but also for their extraordinary contribution to the theory of knowledge. They had the commitment and the necessary international stature to fill the void left by the absence of a permanent International Tribunal on war crimes.

In 1967 the International War Crimes Tribunal was formed with Bertrand Russell as its Honorary President and Jean-Paul Sartre as executive president. The first tribunal was to seek answers and to make pronouncements on the following questions?

- (1) Has the United States Government committed acts of aggression according to international law?
- (2) Has the American Army made use of or experimented with new weapons or weapons forbidden by the laws of war?

- (3) Has there been bombardment of targets of a purely civilian character, for example hospitals, schools, sanatoria, dams, etc and on what scale has this occurred?
- (4) Have Vietnamese prisoners been subjected to inhuman treatment forbidden by the laws of war, in particular to torture or mutilation? Have there been unjustified reprisals against the civilian population, in particular, execution of hostages?
- (5) Have forced labour camps been created? Has there been deportation of the population or other acts tending to the extermination of the population which can be characterised juridically as acts of genocide?

Since the Government of the United Kingdom and France refused to allow the Tribunal to be held in their territories, the first session was held in Stockholm, Sweden from 2 to 10 May, 1967 and the second session was held in Roskilde, Denmark from 20 November to 1 December 1967. Members of the Tribunal included such eminent persons as Vladimir Dedijer who acted as the Chairman and President of sessions, Wolfgang Abendroth (Professor of Political Science, Marburg University) Gunther Anders (Philosopher), James Baldwin (Novelist and essayist) Lelio Basso (Professor, Rome University and member of the Italian Commission of Foreign Affairs), Simone de Beauvoir (philosopher), Loizaro Cardenas (Former President of Mexico), Isaac Deutcher (Historian), Amado Hernandez (Poet Laureate of the Philippines), Shach Sabata (Professor of Physics), Laurent Schwartz (Professor of Mathematics, Paris University) etc.. Reporters and witnesses included Leon Matarasso (Member of French legal panel at Nuremberg), Gabriel Kolko (Professor of History, University of Pennsylvania), Jean-Pierre Vigier (Physicist, Director of Research at CNAS), Malcolm Caldwell (Lecturer, University of London), Martin Birnstingl (Consultant Surgeon, St Bartholomew's hospital, London), Henrick Forss (Director of Medicine, Finnish Institute for Hygiene), John Takman (Director, Child Welfare Board, Stockholm), Alex Hojer (Swedish delegate to UN World Health Organisation), Fujio Yamazadi (Professor of Agriculture, Tokyo University), Edgar Lederer (Professor of Science, Paris-Orsay), Charles Fourniau (Historian) etc..

The deliberations of the two sessions which lasted for twenty days heard evidence and reports on the scale and extent of war

crimes committed by the United States in Vietnam. Lyndon B. Johnson, then President of the United States, was invited to defend himself against the charges levelled against the US government, but he declined to appear before the Tribunal.

The verdict of the first session of the Tribunal rendered the US government guilty of war crimes and committing crimes against humanity. The Tribunal found the US government guilty of committing acts of aggression against Vietnam under the terms of international law and acts of deliberate, systematic and large-scale bombardment of civilian targets, including civilian populations, dwellings, villages, dams, dikes, churches, schools, pagodas, historical and cultural monuments. The second session found the US government guilty of experimenting with weapons prohibited by the laws of war, subjecting prisoners to treatment prohibited by the laws of war, subjecting the civilian population to inhuman treatment prohibited by international law and above all the tribunal found the US government guilty of genocide against the people of Vietnam.

Although, the Tribunal lacked force majeure to implement the procedures of the trial, it carried out a solemn and historic investigation, unimpeded by reasons of state or other such obligations. The impact of the Tribunal had a far reaching effect all over the world and provided the moral basis for the indignation expressed by the masses of the world that caused the defeat of the US on the second front.

If the Nuremberg Tribunal created a precedent, the embryo of a tradition, the International War Crimes Tribunal in 1967 took it to a logical end. It opened the way for the creation of a Permanent International Tribunal on War Crimes.

Human Rights:

Positive International Law and Conventions

Historical Evolution of the Concept

The concept of human rights was embedded in the liberal English tradition for over eight centuries. The first text which must be cited is the Magna Carta imposed on King John in 1215 by the

barons in revolt against him. The list of English texts continues with the petition of Rights (1627), the acts of habeas corpus (1679) -effectively protecting subjects against arbitrary detention -the bill of Rights (1689), and the Act of Establishment (1701).

Then there were the American documents, inspired by 18th century philosophy ie the Declaration of Independence (1776) and the amended federal constitution of the U.S.A. However, the first complete body of legal principles in the sphere of civil rights was the French Declaration of the Rights of Man and Citizen, of 26 August 1789, which figured at the head of the French Constitution of 1791. Numerous constitutions of other nations were inspired by the French Declaration and often even reproduced.

While the concept of the 1789 constitution was spreading through the world, the progress of Marxist ideas had an important role in broadening the concept of human rights. Marxists argued that the man designated in the 1789 French Declaration was only an abstraction. Concrete principles could not be proclaimed in the name of this abstract man. In fact, man must be envisaged historically, and principles of law can only relate to men according to as they compose a given society. Principles of law are only a reflection of this society, and laws come to be passed in the interests of the social class in power. The constitutions of the USSR and the People's Republic of China thus are characterised not only by the will to give a concrete context to formal freedoms but also by the recognition of rights to economic provisions -in addition to the classic freedoms of earlier national constitutions. It must be admitted that under the influence of socialist ideas, the constitutions of capitalist nations have been amended to recognise, along with classic freedoms, certain forms of economic and social freedoms. The content of human rights has thus been enlarged.

The 1948 Universal Declaration of Human Rights

Reaction to the Second World War, by reason of the acts of methodical barbarity and of the unprecedented massacres on non-combatants perpetrated under Hitler, took on the character of a veritable crusade for human rights. After the

restoration of peace came the signing in San Francisco, April 1945, of the Charter of the United Nations Organization. This Charter established among the essential goals of the UN "respect for human rights and for the basic freedoms for all, without distinction as to race, language or religion"

In January 1947 the UN Human Rights Commission was established and the draft of the International declaration prepared by it was adopted by the United Nations plenary Assembly on 10 December 1948. This was the famous text of the Universal Declaration of Human Rights.

We must now briefly examine the content of human rights. According to Prof. Cassin, who drafted the Universal Declaration of Human Rights, public freedoms are classified into four categories:

- 1) *Personal security*, which condemns all forms of arbitrary detention.
- 2) *Freedom of the physical person*: free disposition as to one's physical and immediate extension of one's physical person.
- 3) *Freedoms of the intellectual and moral person*, or freedom of thought, freedom of opinion, of the press etc.,
- 4) *Social and economic freedoms*

What concerns the content of the body of the declaration, according to Prof. Cassin, is as follows:

Articles 1 and 2 treat of general principles.

Articles 3 to 11 treat of human rights of the personal order.

Articles 12 to 17 treat of the rights of the individual in his family and territorial relationships, and with the exterior world.

Articles 18 to 21 treat of intellectual freedoms and basic political rights

Articles 22 to 27 treat of economic, social and cultural rights.

Finally, articles 28 to 30 demarcate the lines between the individual and the national and international communities within which these freedoms are exercised.

Article I takes up the notions of freedom, equality and fraternity proclaimed in 1789;

All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience, should act towards one another in a spirit of brotherhood.

Article II recalls that all the rights and freedoms proclaimed in the Declaration apply to all persons "without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status". The same Article stipulates that political or juridical status of the territory from which a person comes is of no influence on the rights of that person to the basic freedoms incorporated in the Declaration.

Besides the 1948 Universal Declaration of Human rights there exists other international documents and proceedings related to human rights and war crimes.

1949 Convention on Genocide

Genocide, as it is denounced by the international convention of 9 December 1948, consists of the destruction or the persecution of human groups conceived of as national, ethnic, racial or religious entities.

The crime of genocide can be committed by the following acts: murder of members of the group, serious attack on the physical or mental integrity of members of the group, international submission of the group to conditions of existence which, by their very nature, will lead to its partial or total physical destruction, measures designed to prevent births within the group, forced transference of children from the group to another group.

International Covenants on Civil and Political Rights, 1966

According to Article I of the International covenant on civil and political rights, 1966, all peoples have the right of self-determination. By virtue of that right, they freely determine their

political status and freely pursue their economic social and cultural development

Article II makes it obligatory for each state party to the covenant to ensure to all individuals within its territory and subject to its Jurisdiction the rights recognized in the present covenant, without distinction of any kind, such as race, colour, sex, language, social origin, property birth or other status.

Articles 6,7,8,9,10,12,14,17,18,26 and 27 are relevant to the proposed tribunal, especially Article 27 which states: "In those states in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language".

International Convention on the Elimination of All Forms of Racial Discrimination 1965

In this convention, the term racial discrimination means: any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

Article 2 requires States to condemn racial discrimination and to undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms.

The principles emanating from the UN General Assembly Resolution 1803 of 1962, Declaration on the Granting of Independence of Colonial Countries and Peoples, 1960, American convention on Human Rights, 1969, Helsinki Final Act 1975, Geneva Protocol of 1925, Geneva Conventions of 1949, and many other charters and conventions are applicable to the proposed tribunal.

Moral Authority

Discussion will immediately arise as to the right of individuals to set themselves up as Judges. The discussion will be made all the more lively by the fact that the proposed tribunal is to give itself the name "International War Crimes Tribunal". The constituent declaration of the first international War crimes Tribunal replied:

Although, this task has not been entrusted to us by any constituted authority, we have taken up the responsibility for it in defence of civilisation. Our action is based on our own understanding of the situation. We are totally independent of any government whatsoever and of whatsoever official or semi-official organisation. We firmly believe that we are giving voice to the profound anxiety and grief of all who, in diverse nations, are our brothers. We firmly believe that our action will help to reawaken the world's conscience.

In the introductory discourse at the first session in Stockholm in 1967 Jean-Paul Sartre said in this regard:

We are perfectly well aware that we have not received any mandate from anyone; if we have taken the initiative in coming together, we have done so because we knew that no one else could give us this mandate. To be sure, our tribunal is not an institutional body; it has arisen rather from an absence and an appeal.

The legitimacy of an International Tribunal was established beyond doubt subsequent to the first International War crimes Tribunal. Numerous legal texts written after 1967, including the now famous treatise on International Criminal Law by Prof. Claude Lombois, proved that state power cannot halt the advance of new Juridical principles. Dialectically speaking, if the Tribunals convened in Nuremberg and Tokyo legitimized the principles of international trials of war criminals, the international tribunal held in 1967 overcame the weaknesses of the earlier tribunals and created new historical precedents. The legitimacy of Nuremberg and Tokyo tribunals could be challenged precisely because of their official status and because the principles they applied were the law of the victorious. The Posteriori legitimation of the International War Crimes Tribunal of 1967 was established precisely, for opposite reasons.

Even if one wished to discard the historical precedents and focus on the existing legal principles, one may find innumerable references to the effect of public conscience on the development of law.

Moreover, it may be said that the United Nations itself was founded on the appeal to the conscience of peoples. In the preamble to its Charter we read that the peoples of the United Nations had "resolved to reaffirm their faith in the fundamental rights of man, in the dignity and value of the human person, in equality of rights of men and women and of large and small nations". The statement that it is "the peoples" of the United Nations who have proclaimed "their faith in the fundamental rights of man" is taken up again in the 1948 Charter of Human Rights.

Article 38 of the statutes of the International Court of Justice takes the same line. It states "Principles accepted by the International community are truly and properly Juridical norms, independent of the existence or non-existence of an international or national organ which may have formulated them.

Conclusion

The historical precedents especially the principles emanating from Nuremburg Charter and the International Tribunal on war crimes in Vietnam, positive international Law and conventions and above all the moral authority derived from public conscience would provide a sound basis for the creation of an International Tribunal on War Crimes in Sri Lanka. However, its legitimacy will be a posteriori legitimacy. It will depend on how seriously it does its work on the principles of right, its affirmation of the law, the proofs it will adduce, the conclusions that it reaches and especially the support that it accrues from public opinion.

Foot-Notes

1. 'The circle of responsibility', The Nation, 26 January 1970. Falk is Milbank Professor of International Law and Practice, Princeton University.
2. Although France was occupied by Nazi Germany de Gaulle was leading the Government in exile in London.
3. Falk's paraphrase of the majority Judgement of the Tokyo Tribunal.
4. Jean Paur Sartre, Inaugural statement at the first session of the Tribunal held in Stockholm 2-10 1967.
5. Edward S.Herman, Atrocities in Vietnam: Myths and Realities, Pilgrim Press, 1970. In a careful analysis, he estimates South Vietnamese civilian casualties at over a million dead and over two million wounded.
6. Bertrand Russell and Jean-Paul Sartre were Nobel Prize Winners. They were in Prison in their respective countries for opposing wars their countries were involved in. Bertrand Russell's writings in Mathematics and Logic and Sartre's work in philosophy and literature are considered to be indispensable parts of the theory of knowledge.
7. These questions were formulated by Leon Matarasso who was the President of the Juridical Commission of the Tribunal and a member of French Legal panel at Nuremberg.
8. For detailed account of the history of the formulation of human rights see Leo Matatosso's report to the first session of the Second Russell Tribunal, Rome, April 1974.

