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**“JUDICIAL COOPERATION IN CRIMINAL
MATTERS
- A GLOBAL PERSPECTIVE”**

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Judicial Cooperation In Criminal Matters - A Global Perspective
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Judicial Cooperation is an important part of international criminal accountability. In a world that is fast shrinking – the idea of jurisdictional conflict is fast becoming a relic of history. Marshall McLuhan said more than 40 years ago that we are living in a Global Village. Today what he said is a reality – people can transport themselves from one country to another in matter of hours and this includes the perpetrators of serious criminal offences.

There is a dire need for an International Criminal Justice System for the surveillance and apprehension of these offenders. Judicial cooperation therefore is vital now more than ever.

The first issue in Judicial Cooperation is Jurisdictional Solidarity. A person should not be able to escape criminal liability simply by moving out of the jurisdiction in which he perpetrated the offence.

It is therefore necessary to consider what are the different ways in which we can extend judicial co-operation?

1. The current position is that judicial cooperation can only exist between countries where there is a treaty executed between the governments. In the absence of such a treaty, no prosecuting authority can exercise jurisdiction in any criminal matter nor be able to obtain any assistance from the Courts and Judges for the extradition of the criminal offender. There is a necessity therefore for there to be reciprocal treaties

executed between countries and Governments. It is clear that not every country has such treaties in place and where no such treaty exists —

2. judicial cooperation is impossible.
3. I hereby propose that there should be a United Nations sponsored Uniform Treaty for the extradition of serious criminal offenders back to the countries in which they perpetrated these serious criminal offences.

The model that should be adopted be similar to the European Council's decision on the European arrest warrant and surrender procedures between member states. The principle of mutual recognition of judicial decisions should be the keystone of the system. The basic idea is that when the judicial authority of a member state issues a decision according to the rules of its national law requesting the surrender of a person, this decision should henceforth be recognised by the judicial authorities of other member states ipso facto (as a matter of fact).

4. There is also a need for the internationalisation of a code for serious criminal offences outside of War Crimes. For example, the crimes of Drug trafficking, trafficking in women and girls for prostitution and slavery, sale of children, child prostitution and child pornography as well as internet related crimes involving children which is on the rise globally.

These offences are becoming a global problem which has far reaching effects on society and which require our urgent attention and action.

Clearly all of these crimes constitute serious offences under the Domestic Laws of all countries.

However many of these offenders escape to countries where no Extradition Treaties exist and go scot free and enjoy all the wealth they accumulated through these crimes.

It is only through judicial cooperation and Global Treaty arrangements that we can bring to justice these criminals and forfeit their wealth.

4. A vital aspect of increased judicial cooperation is that we will be creating an international Corpus Juris (international consensus of legal thinking). For this aspect to be achieved there must be an independent judiciary free from the influence of executive government. This becomes even more important in countries where there is civil strife.

Let me give you some examples – in particular the experience of Sri Lanka – where the Tamil women have been subjected to various crimes of violence, especially rape by the security forces.

A Report by UN Special Rapporteur on Violence Against Women stated :

"The Sri Lankan security forces have continued to commit serious human rights abuses, sexual violence, in the context of the 17 year armed conflict against the Liberation Tigers of Tamil Eelam. Sri Lankan Police have also repeatedly committed rape and other sexual abuse in the course of the fighting."

Tamil Women have been victims of sexual offences. Are we going to sweep it under the carpet and pretend it never happened? Is forgetting the past a condition for future peace? I don't think so. Redressing past human rights violations is a pre-condition for peace.

The notion of rule of law rests on a canon expounded by **Thomas Fuller** more than 300 years ago, "be you never so high the law is above you".

It is time for Tamils and the world community to understand that demonising the Sinhala people on the whole for this tragedy would not undo the past. These violations are not peculiar to Sri Lanka alone. It is happening worldwide. It is not a unique attribute to the predominantly "Sinhala" Armed Forces or Police either. Violence against women under similar circumstances is a worldwide phenomenon. However what is important is that these crimes must be punished. It has happened in Sri Lanka and those responsible must be held accountable for their heinous crimes, just as it is being done in other jurisdictions.

It is proven that a climate of impunity promotes abuse of authority and in turn sexual violations. The government is perceived as increasingly unwilling or unable to address this problem. Most high-ranking officers of the Armed forces and Police are fully aware of acts committed by their subordinates, should they not have been as a result of superior instructions. There is however no indication of preventing or punishing such acts. They realise that these gruesome acts are a

blemish to the Security forces in its entirety, yet they are not moved.

The best way out is confront these violations in light of the principle of superior or command responsibility. Superiors are to be held accountable for acts committed by their subordinates which they either knew were being committed and/or subsequently failing to prevent or punish its commission. In this way, Superiors would wake up to be more "aware" and careful and enforce disciplinary measures as required.

Sexual Violations have become part and parcel of international crimes. Rape in time of war is specifically prohibited by treaty law: the Geneva Conventions of 1949, 189 Additional Protocol I of 1977 and Additional Protocol II of 1977. The prohibition of rape and serious sexual assault in armed conflict has also evolved in customary international law. While rape and sexual assaults were not specifically prosecuted by the Nuremberg Tribunal, rape was expressly classified as a crime against humanity under article II(1)(c) of Control Council Law No. 10. The Tokyo International Military Tribunal convicted Generals Toyoda and Matsui of command responsibility for violations of the laws or customs of war committed by their soldiers in Nanking, which included widespread rapes and sexual assaults. The former Foreign Minister of Japan, Hirota, was also convicted for these atrocities. This decision and that of the United States Military Commission in Yamashita, along with the ripening of the fundamental prohibition of "outrages upon personal dignity" laid down in common article 3 into customary international law, has contributed to the evolution of

universally accepted norms of international law prohibiting rape as well as serious sexual assault. These norms are applicable in any armed conflict.

It is indisputable that rape and other serious sexual assaults in armed conflict entail the criminal liability of the perpetrators.

Other serious sexual assaults are expressly or implicitly prohibited in various provisions of the same treaties. The right to physical integrity is a fundamental one, and is undeniably part of customary international law. Jurisprudence in this regard is in abundance. In redressing human rights violations in Rwanda, the Former Yugoslavia and in East Timor, sexual violence against women is an enumerated offence be it for commission of war crimes, genocide or crimes against humanity. This includes situations where rapes and other sexual violations are charged as torture and even inhumane acts.

No definition of rape can be found in international law. However, some general indications can be discerned from the provisions of international treaties. In particular, attention must be drawn to the fact that there is prohibition of both rape and "any form of indecent assault" on women in article 27 of Geneva Convention IV, article 76(1) of Additional Protocol I and article 4(2)(e) of Additional Protocol II. The inference is warranted that international law, by specifically prohibiting rape as well as, in general terms, other forms of sexual abuse, regards rape as the most serious manifestation of sexual assault. This is, *inter alia*, confirmed by Article 5 of the International Tribunal's Statute, which explicitly provides for

the prosecution of rape while it implicitly covers other less grave forms of serious sexual assault through Article 5(i) as "other inhuman acts".

In the Tribunal in Rwanda in the case of *Prosecutor v Akayesu*, it was the first time sexual offences were punished as part of genocide. The trial chamber in Akayesu held that to formulate a definition of rape in international law one should start from the assumption that "the central elements of the crime of rape cannot be captured in a mechanical description of objects or body parts". According to the Trial Chamber, in international law it is more useful to focus "on the conceptual framework of State sanctioned violence". The Trial Chamber accordingly stated "Like torture, rape is used for such purposes as intimidation, degradation, humiliation, discrimination, punishment, control or destruction of a person. Like torture, rape is a violation of personal dignity, and rape in fact constitutes torture when inflicted by or at the instigation of or with the consent or acquiescence of a public official or others person acting in an official capacity. The Chamber defines rape as a physical invasion of a sexual nature, committed on a person under circumstances which are coercive". This definition of rape has been referred to and upheld by the International Tribunal at the the Hague (ICTY) in the cases of *The Prosecutor v Delalic*, *The Prosecutor v Furundzija*, and *The Prosecutor v Blaskic*.

The judgement of the Trial Chamber in *The Prosecutor v Kunarac* delves into a analysis of various penal provisions from countries including India, Bangladesh and South Africa

and deliberated that the actus reus of the crime of rape in international law is constituted by the sexual penetration, however slight: (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or (b) of the mouth of the victim by the penis of the perpetrator; where such sexual penetration occurs without the consent of the victim. Consent for this purpose must be consent given voluntarily, as a result of the victim's free will, assessed in the context of the surrounding circumstances. The mens rea is the intention to effect this sexual penetration, and the knowledge that it occurs without the consent of the victim.

It is no secret that Tamil women have been victims of gruesome violations of human rights. It is a known fact that Tamil women have been tortured and subjected to inhumane and degrading treatment whilst in custody. "The recent furore over General Janaka Perera's appointment in Canberra suggests that International awareness is growing of the way in which the war against the LTTE is being fought in Sri Lanka. So these offenders ought to be weary of the possibility of condemnation and redress against them.

The setting up of International Tribunals in Rwanda and the Hague and the Special Panel in East Timor are models of instances where violations of human rights including sexual violence are being prosecuted and past offenders punished.

The Statute of the International Criminal Court will be another landmark step in the prosecution of human rights abuses and violations. This statute has specifically defined rapes and other gender based violence as constituent acts of crime against

humanity and war crimes. The statute also addresses procedural requirements of witness protection etc which are pre-requisites to effective prosecution of especially gender crimes.

The government of Sri Lanka perhaps ought to take the initiative to ratify the ICC statute and met out justice to Tamil women who have suffered such violence in the hands of the Police and Army. It is clear that any effort to do justice for past abuses of this nature will be futile in light of the structural and functional inadequacies of the present system in Sri Lanka. Convincing initiatives must be taken to prevent and punish sexual violence committed by Security Forces. Especially so when the upholders and protectors of the rule of law are the very violators of it.

Because these violations against Tamil Women are committed by perpetrators who are in authority the only plausible redress would be through a demonstration of political will by the state. There is ample precedent in recent times, of international efforts to redress past human rights abuses. It's time Sri Lanka took heed of the calling to follow suit.

The absence of the political will to bring the culprits to justice will indeed undermine the Rule of Law. Perhaps the greater concern in Sri Lanka today is that even if such prosecutions were brought, there will be difficulty in obtaining a conviction owing to the absence of the victims – many of whom have been murdered. Furthermore certain police and military personnel continue to impede other witnesses who would want to testify.

Judicial co-operation to this extent can be extended to ensuring proper accountability in these circumstances. The support of the international judicial community in upholding the rule of law becomes vital.

In conclusion I would like to reiterate that increased judicial cooperation is important to create a more just and equitable world community, in particular:

1. To create uniformity in the extradition laws – to enhance and facilitate the proper arrest, detention and extradition of serious criminal offenders.
2. To promote an international criminal code for serious criminal offences, and
3. To develop and international judicial fraternity to uphold the Rule of Law.