

***Transitional Justice in Sri Lanka: Moving Beyond Promises***

Edited by

Bhavani Fonseka

The Centre for Policy Alternatives (CPA) is an independent, non- partisan organisation that focuses primarily on issues of governance and conflict resolution. Formed in 1996 in the firm belief that the vital contribution of civil society to the public policy debate is in need of strengthening, CPA is committed to programmes of research and advocacy through which public policy is critiqued, alternatives identified and disseminated.

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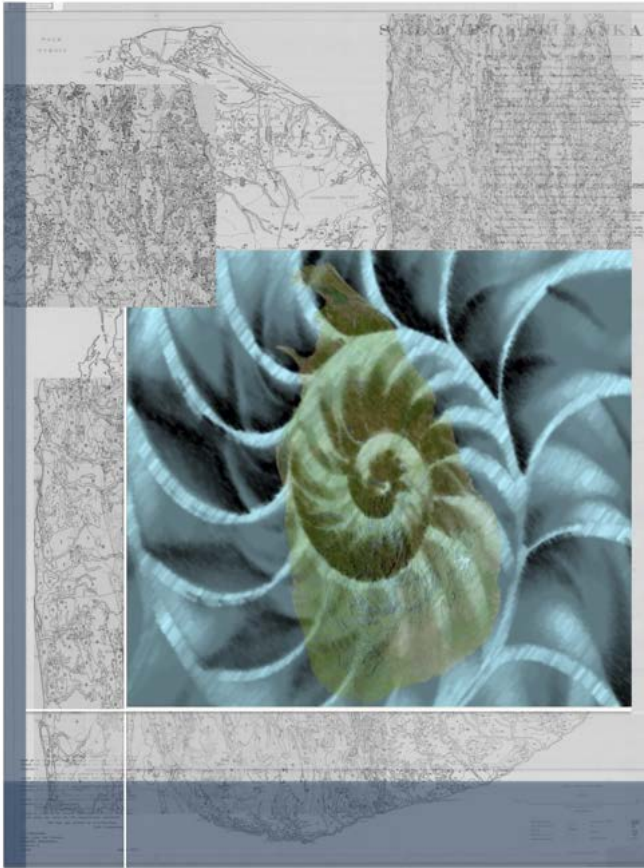
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Positioned at a vital confluence of maritime routes, Sri Lanka has always been influenced by the dynamics of varied peoples. Transition is inherent on this island, which composes in infinitely complex, evolving systems, like a nautilus. The static component of our fractal growth is our attachment to the soil we were born on, that is eternally defined by maps and claims.

*Sunela Jayawardene*

*“How do we keep the past alive without becoming its prisoner? How do we forget it without risking its repetition in the future?”<sup>1</sup>*

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<sup>1</sup> Ariel Dorfman, *Death and the Maiden*, 1991

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# **Preface**

## **Transitional Justice in Sri Lanka**

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*Juan E. Mendez*



In its short history as an independent nation, Sri Lanka has accumulated a terrible legacy of human rights violations of the most serious kind. The most recent armed conflict, between the State and the Liberation Tigers of Tamil Elam (LTTE), ended seven years ago with the complete defeat of that armed insurgency. And yet there has been no attempt to heal the open wounds in the social fabric created by disappearances, torture, prolonged arbitrary detention without trial, forced displacement of civilians, child recruitment and extrajudicial executions. Undoubtedly, it is still also necessary to provide redress to the many victims of LTTE murders and attacks against the civilian population.

In 2009, it appeared that a victorious government and its armed and security forces felt no compulsion to offer any explanation for those crimes. In that sense, the situation in Sri Lanka was and is very different from those peace agreements that are desperately needed to bring resolution to a cruel armed conflict and the urgency of peace supposedly justifies amnesties and policies of oblivion for atrocities committed by all sides. Indeed, perhaps LTTE crimes had rendered Sri Lankan civil society voices advocating for accountability in 2009 unable to gain any momentum. The strength of the State apparatus and its triumphalism drowned those calls; fear of reprisals from the vanquishing security forces and the violence used to silence their critics undoubtedly played a role as well. Seven years on, however, the legitimate demands of victims to see justice done have not gone away. In the last eighteen months, a reform-minded government has arrived through legitimate elections and conditions now exist for policy measures that can effectively make human rights violations a thing of the past and build the foundations of a genuine democracy based on the rule of law.

Despite its very idiosyncratic circumstances, the Sri Lankan effort to deal with the legacy of past human rights violations is clearly a moment of transitional justice. Whether the government has the political will to address that legacy in good faith is hotly disputed among observers and activists. Unquestionably, however, the new government does face objective obstacles in the form of a powerful political opposition with residual power and influence especially in the South, a need to maintain cohesion in the security forces, and the fact that most potential beneficiaries of truth and justice measures are counted among a discreet ethnic, religious and language minority. And yet those factors are also the reason why transitional justice initiatives are necessary.

Sri Lanka must design policies to investigate the truth about all the human rights violations of the past and disclose the findings to the victims, their families and the citizenry. Those investigations must also lead to criminal prosecutions against all perpetrators, including those who ordered or tolerated the offenses, wherever the reliable evidence leads. Sri Lanka must also offer reparations to all victims, and reform the institutions that were the vehicle of the violations or acquiesced in them abdicating their protective role. In that process, the State must vet and exclude those who have abused their authority in those institutions and prevent them from serving in newly reformed agencies under democratic control.

Neither international standards nor experiences from other latitudes suggest that the four components of transitional justice must be pursued simultaneously. But a piecemeal approach can raise legitimate concerns about the depth of the commitment to a comprehensive, holistic approach. In this sense, it bears remembering that the four components constitute obligations of the State under international law when it comes to international crimes; a State may not choose

one of them as in a menu and decide not to implement the others. All four must be pursued in good faith and with due diligence. In this context, due diligence includes the need to proceed without any further delays. Experience shows that, although the demands of justice remain in a society for a long time, the window of opportunity to implement specific plans and mechanisms to realise justice can be short-lived, especially if other pressures for policies also claim attention.

In this regard, the Office of Missing Persons that has recently been enacted by legislation is undoubtedly a welcome step in the right direction; it can begin to fulfil the truth seeking and truth telling component by determining the fate and whereabouts of the thousands of victims of disappearances. By providing families with that information it can bring closure to their plight and constitute a measure of reparation as well. That “individualised” truth is important, but the State must also investigate and disclose the existence of systematic patterns of deliberate atrocities. The information and evidence the Office will gather must eventually be followed by broad disclosure of the truth, reparations to the families, prosecution of those responsible for the fate of the disappeared, and their disqualification from serving in the institutions of a democratic State.

Similarly, it will also be important to legislate a means for relatives of the disappeared to settle the civil consequences of the uncertainty of whether their loved one is dead or alive. But “certificates of absence” must be viewed by society as a piece of the larger puzzle of transitional justice. The government must avoid the impression that they are meant to “close” the issue; when dictatorial regimes in other countries attempted similar certifications, they were repudiated by society because they were a cynical ploy to put a lid on the problem without truth or justice.

Sri Lanka is expected soon to embark on a comprehensive plan to reckon with its legacies of past abuses. Civil society organisations have recovered the initiative and are now well positioned to demand sound programmes, clarity in the attributes and powers of the mechanisms to be created, universality in the designation of beneficiaries of reparations, and – most crucially – the appointment of credible, respected, independent members at the helm of those temporary institutions. If along the way there are attempts that prove less than fruitful, that should not be a reason not to insert corrections or even to begin anew; what would be inexcusable is the deliberate adoption of half-measures that leave every Sri Lankan with a sense of dissatisfaction. The success or failure of transitional justice measures hinges on the degree of active consultation with and participation of representatives of stakeholder communities, including Sri Lankan human rights NGOs. The Government must promote debates and discussions about specific proposals and avail itself of the wisdom and experience accumulated by civil society during the conflict and in the years since its end. Sri Lankans have not only studied the experiences of other countries but have also developed home-grown ideas about what it will take to offer redress to all victims of the armed conflict. The impression must be avoided that transitional justice measures can be developed behind closed doors and simply imposed on the public without promoting and welcoming input from all stakeholders.

It must be understood that reckoning with the past is necessary not only to recognise the plight of victims and give them their due in moral as well as material terms. Confronting the legacy of mass atrocity in Sri Lanka is also necessary as a way to establish the rule of law and to set the country on a path to an inclusive and tolerant democracy, one

in which members of ethnic or religious minorities are no longer treated as second-class citizens. In turn, those objectives require specific measures to promote genuine reconciliation between ethnic and religious components of Sri Lankan society that have long been bitterly divided. Unquestionably, the moment is now: there has never been a better opportunity to promote true reconciliation among all Sri Lankans than that presented by the current political climate.

# **Introduction**

## **What is Transitional Justice?**

*80*

*Bhavani Fonseka*

Since the change of government in 2015 and the promise of reforms, conversations have alluded to different aspects of transitional justice. But what is ‘Transitional Justice’? For many the term is a throwback to the South African Truth and Reconciliation Commission headed by Bishop Desmond Tutu, a mechanism which for the first time allowed victims in South Africa to speak of crimes and be able to confront alleged perpetrators. For some, the term conjures up *Nunca Mas* (Never Again), first seen in Argentina and subsequently spread to other countries in Latin America. For those following international developments, the term resonates with the much-publicised international arrest of Augusto Pinochet in 1998 or the conviction of Hassne Habré in a special court in Senegal in 2016. Within the Asian region, Transitional Justice efforts were evident in countries such as Cambodia, East Timor and Nepal.

Transitional justice is also sometimes referred to as ‘dealing with the past’, a term used for the process of addressing the legacies of massive abuse. The field evolved in the 1980s with the transition from authoritarian regimes to democracies, with victim groups and civil society calling for reforms, investigations and accountability. Transitional justice with its ‘Four Pillars’ -the Right to Truth, Right to Justice, Right to Reparations and Non-recurrence - encompasses a range of objectives including peace building, human rights and democratisation, with a complex and lengthy transformative process that can span years, if not decades. Argentina and Chile, two countries that underwent a transition in the 1980s, continue to still grapple with many issues and challenges. Several other countries also continue to see long drawn out processes.

Since the 1980s, transitional justice has significantly evolved in response to global developments. In 2004 the United Nations

Secretary General in a report<sup>1</sup> referred to transitional justice as follows:

*“The notion of transitional justice discussed in the present report comprises the full range of processes and mechanisms associated with a society’s attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation. These may include both judicial and non-judicial mechanisms, with differing levels of international involvement (or none at all) and individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or a combination thereof.”*

As articulated by the Special Rapporteur Pablo de Greiff, it is meant in “*preventing the recurrence of crises and future violations of human rights, to ensure social cohesion, nation-building, ownership and inclusiveness at the national and local levels and to promote reconciliation*”<sup>2</sup>. Transitional justice therefore is a complex set of processes and mechanisms to support transformations and assist in the strengthening of rule of law and democracy. It is multifaceted and interdisciplinary, not being limited to lawyers and bureaucrats but encompassing different fields of study including history, sociology, anthropology and culture. Moreover, it is also a means of acknowledging past abuses, initiating steps to prevent a relapse into violence and restoring the dignity of victims by providing redress and recognition. Thus, transitional justice should not be seen as a checklist of things to do to satisfy specific actors but as a process aimed at transformation. The objectives are multipronged including

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<sup>1</sup> Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post- Conflict Societies, UN Doc. S/2004/616, 3 August 2004

<sup>2</sup> Statement by Pablo de Greiff, Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, UN Human Rights Council, 15 September 2015



recognising and redressing past abuses and taking steps to prevent a repeat of violence.

Ultimately, the effectiveness of transitional justice will be tested in terms of whether it is able to transform a society with a legacy of abuses to one that respects the rights and dignity of all its citizens. It is a process that should address root causes of violence and inequalities. If the 'four pillars' of transitional justice are addressed in a comprehensive and cohesive manner, ensuring the linkages are maximised and not treated in silos, transitional justice can both address the cycles of violence and introduce much needed reforms aimed at non-recurrence. Transitional justice is also an attempt to defeat structures that contributed towards and sustained impunity. A responsive and flexible transitional justice process that addresses political dynamics and challenges and takes note of grievances of victims and other stakeholders can have a far reaching impact including strengthening structures such as the rule of law and providing the space for a stronger media and civil society.

It is also important to recognise that transitional justice is different to regular criminal justice on the basis of the role of victims and the victim centered approach. Thus, victims have transformed the very idea of what is meant by transitional justice, from a criminal justice system which is state centric to a more victim centered approach which situates victims in broader debates of inequalities and marginalisation. Victimhood though is not linear and there must be recognition, beyond the individual victim, to larger patterns of discrimination and marginalisation that require structural reforms. Care must also be given towards the complexities and nuances of victimhood, acknowledging that *"victims themselves may be internally divided in terms of ideologies and political priorities and a romanticised or homogenised model of victimhood may ignore important*

*politically complex issues*”<sup>3</sup>. In the intricacies of victimhood, one must also take a moment to recognise the blurred roles that emerge, avoiding the clichéd tag of the ‘innocent victim’ but identifying possible links in some instances between a victim and perpetrator and situations that require a context specific focus in determining the politics around this issue.<sup>4</sup>

At the outset it must also be noted that a transitional justice process and mechanisms must also be context specific and cannot be transplanted from one country to another. There must be careful consideration as to what is required for the specific needs and grievances of communities in question. A transitional justice process should be deeply rooted in views and involvement of victims, civil society and other key actors in society, ensuring that the process leads to societal transformation. That said, a transitional justice process will be highly contested and charged, as already evident in Sri Lanka, and will require balancing different dimensions, the political, legal, social to name a few. Thus, the process must be able to respond to and be agile to ground realities and political developments. The test of any process will be to address the polarising views and positions and ensure the rights and grievances of victims are not forgotten. Herein lies a major challenge facing Sri Lanka.

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<sup>3</sup> Vasuki Nesiah, *Transitional Justice Practice: Looking Back, Moving Forward*, Impunity Watch, May 2016

<sup>4</sup> For more information, refer to the work of Kimberly Theidon, ‘Histories of Innocence’, in Rosalind Shaw and Lars Waldorf (eds.), *Localising Transitional Justice: Interventions and Priorities After Mass Violence*, (Stanford University Press 2013)

## **Commitments on Transitional Justice Relevant to Sri Lanka**

The debates around transitional justice are not new to Sri Lanka; conversations took place during the 2002-2006 ceasefire period with limited progress due to the political and security situation at the time. The political transition in 2015 opened the space to explore options for reform. Within the transitional justice realm, many promises were made by the Government of President Maithripala Sirisena, with a framework crystallising in the lead up to the United Nations Human Rights Council (UNHRC) Session in September 2015. The speech by Foreign Minister Mangala Samaraweera at the UNHRC session laid out the new government's proposals, promising numerous reforms including legal and policy changes and the establishment of four mechanisms: a Truth and Reconciliation Commission (TRC); a Special Court with Special Counsel; the Office on Missing Persons (OMP) and the Office for Reparations. The Consensus Resolution 30/1 on 'Promoting reconciliation, accountability and human rights in Sri Lanka' captures this framework, with a timeline ending in March 2017.

Sri Lanka's commitments contained in the Resolution meet basic standards of the Four Pillars: confronting truths, pursuing justice, providing redress and introducing reforms to ensure non-recurrence. Although good on paper, the devil is in the detail and the coming months and years will be a crucial period to monitor progress, dynamics and developments. Critical here is not to limit to the narrow scope of mechanisms and ignore larger structural inequalities and societal issues. While there is no discounting the importance of truth and justice mechanisms, attention must be on all aspects of transitional justice. Areas such as reparations and non-recurrence, if designed and implemented in a transparent and

participatory manner, can have a broad impact. They are crucial to recognising past abuses and can facilitate in the strengthening of institutions and legislation that are responsive to the rights of all citizens, not just a select group.

Transitional justice in most countries will be contested, challenged and debated. Sri Lanka is no different. The divisions since the adoption of the Resolution highlight some of the polarising aspects of transitional justice and reconciliation. But there are also notable improvements since 2015. Firstly, the change in policy positions. With the end of the war in 2009, an official position was taken in terms of the denial of past abuses. This was evident with the then government's position of zero civilian casualties during the last stage of the war. With the election of the present government in 2015, the position has changed to acknowledging past abuses and the need for reform. These have been evident from statements made by President Sirisena and key government actors including symbolic measures such as the Peace Declaration on 4<sup>th</sup> February 2015. There is also a change in position in terms of the nature of mechanisms. The previous government proposed a 'home-grown' solution resulting in the appointment of the Lessons Learnt and Reconciliation Commission (LLRC) within the flawed Commissions of Inquiry Act. The present commitments indicate a shift with provision for international participation and new legislation that meets international standards and, if designed and implemented in a transparent and inclusive manner, should be able to address the legacy of past abuses. Despite different positions taken by key actors of Government on the role of international players in a future accountability mechanism, the mere fact that it is robustly discussed and debated in Sri Lanka is a sign of change. What is vital now is to ensure timely implementation, but recent statements and lack of progress has lead to increasing concerns whether sections of the

Government are able and willing to follow through with their commitments. The delay with the establishment of the OMP is one example where political leadership has been lacking, and a sign that the government may fail to deliver on the promises made.

Secondly, a change is palpable with the actions taken so far. From the triumphalist attitude and gestures in the immediate post war, there has been a marked shift to one where there is recognition of the suffering of diverse communities and the need for reforms. Some key measures since January 2015 include the enactment of the Nineteenth Amendment to the Constitution, the appointment of independent commissions, the release and return of some lands in the North and East and the ratification of the International Convention on Disappearances with the promise of enacting domestic legislation. In 2016 the Government enacted legislation to establish the OMP, thus introducing legislation to create the first permanent office to address enforced disappearances and the missing. Although these are welcome, much more is required and, as already stated, transitional justice should not be merely viewed as checking boxes but a larger process of transformation which requires political will and action in the short, medium and long term.

Thirdly, the top down approach of the past has slightly shifted to becoming one that attempts to engage more with a broader sample of society including victim groups and civil society. The appointment of a civil society lead Consultations Task Force (CTF) in January 2016 is a sign of a more active role for actors outside of politicians and administrators. This said, much more is required for genuine engagement of a diverse group of actors including the critics and those sidelined by previous efforts. Such engagement should also not be tokenistic or ad-hoc, nor only done when there is pressure to

deliver, but be a larger process of involving stakeholders in conversations and designing policy options. With this, a more inclusive and transparent process with a coherent communication strategy must be in place, addressing criticisms including those most recently evidenced with the OMP.

Thus, much more is needed to ensure the Government follows through with its commitments. A genuine fear among victims is of delays and the political negotiations that may compromise what has been promised. Another concern is whether there is genuine political will to see through measures needed for reconciliation or whether the entire exercise of transitional justice is merely a process to superficially tick a check list rather than address structural and other grave issues impeding reconciliation. These must and can be addressed if engagement is robust and genuine and if there is a coherent communication strategy that informs people of key decisions and actions.

## **Challenges and Dilemmas**

The Four Pillars of transitional justice can also have their own particular impacts. The ability to investigate, prosecute and hold perpetrators to account will not just end the culture of impunity but restore faith in the rule of law. Genuine attempts at justice and accountability must entail going beyond cases of past abuses and include the reconstructing of the legal system and linking with non-recurrence. The commitment to establishing a court with a special counsel to investigate violations of human rights and international humanitarian law includes the heavily contested *'participation in a Sri Lankan judicial mechanism, including the special counsel's office, of Commonwealth and other foreign judges, defence lawyers and authorised*

*prosecutors and investigators*'. This has resulted in polarised debates, from sections of the government and Sinhala nationalist elements critiquing it as threatening sovereignty and the honour of heroic security forces. Counter to this is the criticism from some victims and sections of the Tamil polity of the commitment to accountability being too weak compared to their call for an international tribunal. These polarising views will continue to fester, unless the Government with the support of other actors is able to comprehensively address concerns and take demonstrable action to hold perpetrators to account, root out impunity and strengthen the rule of law. In this regard, an initial step is to provide political leadership to fully implement what has been promised. Here it is pertinent to revisit the words of United Nations High Commissioner for Human Rights, Zeid Ra'ad Al Hussein<sup>5</sup>, "*States do not merely have a right to take the lead; it is the duty of States, and of the governments that represent and administer them, to deliver justice to their own people. Rendering criminal justice is not merely an attribute of sovereignty; it is an essential characteristic of sovereignty, one of its constitutive elements.*"

Truth too can be contentious. It can have multiple effects, at the individual level providing answers and more broadly creating a national recognition of past abuses. Truth telling processes, if done properly, provide dignity to victims with answers on past abuses and missing loved ones. But truth can also raise issues from the past and consideration should be given towards how to respond to past abuses, the roles played by particular actors including alleged perpetrators and issues such as the reasons for denial, silence and impunity. There must also be attention to the possibility of competing truths and their impact of raising difficult questions of the past, of the roles played by or the inaction of particular actors and

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<sup>5</sup> Zeid Ra'ad Al Hussein, 'The Long Walk to Accountability' [International Center for Transitional Justice 3 February 2015], <https://www.ictj.org/debate/article/long-walk-accountability>

whether there is a prioritisation of the different narratives. A truth telling process can also connect to the other ‘pillars’- investigations leading to prosecutions, recognition of violence and trends leading to reparations and initiating larger reforms to prevent future violence. In Sri Lanka, attempts have been made by successive governments to address the ‘four pillars’ without genuine political will or coherence. Past efforts also failed to recognise the linkages and the need to sequence. The present moment is a first in the post war context where there is official recognition and commitments made within the four pillars of transitional justice. But commitments must be followed by action. It is now critical to translate ideas and commitments into a comprehensive transitional justice strategy, taking note of expertise and resources needed, identify linkages and sequencing and areas for legal and policy reform, among others.

In the process of design and implementation of strategy, attention should be on a range of issues, recognising their diversity and complexities and avoiding a narrow focus. For example, reforms should go beyond the civil and political rights realm with consideration towards economic, social and cultural rights, ensuring that steps taken address the Sri Lankan context and are feasible, ensuring that reforms are not mere tokenism but are transformational and prevent any future disputes. Moreover, knowledge of what happened in the past and the conviction of a perpetrator may only go so far in addressing the grievances of victims and the challenges faced by them. The devastation and displacement caused by the war cannot simply be remedied by going before a truth telling initiative. Truth and justice must also be accompanied with reparations and reform. There should also be gender-sensitive approaches to transitional justice that include victim participation tailored to the specific needs of victims. There must also be consideration towards ethnicity, religion,



language and a range of issues that are Sri Lanka specific. In this regard, the proposals contained in the Public Representative Committee (PRC) and the CTF and other recommendations by victim groups and civil society are worthy of consideration to ensure a more nuanced approach, though care must also be taken to ensure what is proposed can be fully implemented and not lead to or exacerbate tensions and disputes. This will assist in understanding broader issues including structural issues that lead to discrimination and marginalisation of communities and to avoid reinforcing forms of unjust and arbitrary social norms.

Expectations are high among victim groups and civil society on the range of commitments and their ability to deliver on truth, justice and reparations and to prevent future abuses. The expectations are not surprising. Successive governments promised investigations and inquiries leading to a string of Commissions of Inquiries with limited follow up. Time will tell whether the present government is able to carry through with its commitments and meet expectations. The transitional justice process will be challenging, contested and messy and likely to disappoint some sections of society. This is inevitable. What is critical is that the process meets basic standards and its integrity is not compromised.

It is also essential that victims and affected communities trust a transitional justice process, and that the mechanisms receive broad consensus. This does not by any means suggest unanimous support. The critics and spoilers will be plenty, and to be expected in a country that has experienced years of conflict and authoritarian rule. But for a process and mechanisms to function, there must be acceptance by a cross section of society and here the consultations and other initiatives to engage will help. While there may not be unanimous support, it is important that a significant number

of citizens feel the transitional justice process is meeting its objectives, that it is beneficial for society and for the future. This means addressing power relations, impunity and bringing in broader social justice. Failing to address the structures that sustained impunity defeats the objective of transitional justice, raising questions of legitimacy of the process and mechanisms. This will require some tough questions including why truth, justice, reparations and reforms are needed in Sri Lanka.

Timing and sequencing also requires careful consideration. While there is an argument made by some for truth to be followed by justice and that time is needed for society to confront the full horrors of the war before accountability can commence, these notions must be challenged when designing a process and mechanisms that best addresses the needs of Sri Lanka. While technical details of how mechanisms may need to work together in terms of evidence sharing and competing mandates can be sorted out through agreements, there is the added dimension of victims' expectations and participation, protection issues, momentum and resources, among other criteria, that will also need to be factored in. While things are yet unclear as to when the different mechanisms will be established in Sri Lanka, OMP seems to be the first entity, possibly followed by the Office for Reparations and the TRC with a special court requiring more time to plan and prepare. This though should not be taken as postponing justice indefinitely. The present momentum must be utilised to introduce legal and policy reforms including introducing legislation to establish mechanisms that can investigate, prosecute and provide for international crimes and command responsibility within the domestic legal framework.

Initial markers in the implementation of commitments have been slow. The CTF only commenced work in June 2016 with their report made public in January 2017. The legal and

policy reforms have also been slow, with the Government initially taking the position that nothing can move till consultations were completed. With delays and with the need to demonstrate some progress by the UNHRC session in June 2016, the Government moved speedily with the establishment of the OMP. Though progress is needed and should not be delayed, the example of the OMP process speaks volumes as to the continuing secrecy and top down approach. The fact that there was no consultation or communication until the eve of the Bill going to Cabinet is a worrying sign. The lack of a clear and coherent communication strategy to disseminate plans and proposals is also worrying when the mechanisms and initiatives promised will affect a significant number of individuals. This also speaks to a fundamental issue of paranoia of how sections of society will respond and the inability of the Government to defend and explain their proposals and plans. The lack of coherence and communication begs the question whether the Government is truly aware of the complexities and nuances associated with a transitional justice process or is merely treating it as an exercise to check the boxes and appease sections of the international community.

With delays evident in kick starting mechanisms, there are rumblings in some quarters of the 'Transitional Justice Moment' slipping away. There are others who have rightly critiqued the process so far, highlighting the secrecy around the OMP with limited participation of victims and civil society. The criticisms are likely to grow with possible delays in rolling out the other commitments. While there is pressure due to the UNHRC reporting period, concern is growing whether the government's will and sincerity to follow through will hold post the March 2017 session at which Sri Lanka will be taken up at the UNHRC. With the constitutional reform process and the economy likely to receive priority in the

coming months, questions must be asked whether the political will exists to push through contentious issues such as accountability and security sector reform. Media reports indicate divisions within Government on the UNHRC commitments, especially on the role of international involvement in the accountability mechanism, and time will tell whether political realities and negotiations will water down some/most commitments.

### **Structure of the Publication**

This publication is the first edited volume in post war Sri Lanka that examines key issues relevant to transitional justice. Although many have commented and critiqued in recent years on the need for transitional justice, and subsequently on the gaps and failures of promises and initiatives, no publication to date has covered a broad brush of issues and themes.

I do not attempt to summarise chapters of my fellow authors, for they speak for themselves. This is merely grouping them and adding a brief introduction to chapters that should be read by those who are interested in the range of issues relevant to transitional justice in Sri Lanka.

The first cluster of chapters examine the wider issues relevant to the transitional justice debates, taking note of the intrinsic political nature of the issue and its relevance to post war Sri Lanka.

In chapter 1, Paikiasothy Saravanamuttu deals with the politics of reconciliation and the factors and dilemmas that must be considered when dealing with a transitional justice process and mechanisms in Sri Lanka. The author highlights

the numerous challenges afoot but also the opportunities, providing a glimpse into issues that require attention and that should inform the design and implementation of the transitional justice process.

Next, Sakuntala Kadirgamar discusses the importance of political reconciliation with reference to constitutional reform and transitional justice in Sri Lanka. In this chapter, the author stresses the importance of human interaction and personal engagement for reconciliation, making the case that in the absence of social reconciliation, political reconciliation may falter.

Closely linked to this is the inclusion of specific transitional justice clauses and language in a new Constitution. Chapter 3 by Nabeela Raj discusses how a constitution can be strengthened by the inclusion of clauses that capture benchmarks relevant to transitional justice, highlighting several recent Constitutions that provide for greater respect for transitional justice and related issues.

In chapter 4, Kalana Senaratne examines the role and influence of Buddhism in reconciliation in Sri Lanka, highlighting key Buddhist precepts that should be considered when discussing reforms and its relevance to a country where religion has played and continues to have an influential role.

Chapter 5 by Farzana Haniffa critically examines the meaning of history, heritage, identity and politics, with particular reference to issues faced by the Muslim community. This chapter also examines recent developments in terms of extremist Buddhist forces and ways in which this has shaped debates and developments around transitional justice and reconciliation. The author references the continuing

challenges and tensions and provides some ideas for future action and engagement.

Following this is chapter 6 where Kumaravadivel Guruparan talks of nuances in Tamil politics and transitional justice, raising challenges and dilemmas faced when defining and deciding a transitional justice process and mechanisms. This chapter is a starting point in understanding the multiple issues and layers that can define particular positions on transitional justice

The next cluster of chapters focuses on the four pillars of transitional justice, examining key areas and the potential of promised mechanisms in Sri Lanka.

In chapter 7, I examine the right to truth and the different aspects of truth telling and truth seeking that must be considered when designating and implementing initiatives in Sri Lanka. This chapter examines the complexity of truth and the possibility of multiple and competing narratives, the importance of truth within the larger scheme of transitional justice and how it can be a crucial element in reconciliation.

In the next chapter, Annie O'Reilly and Pubudu Sachithanandan discuss the establishment of an accountability mechanism and the practical challenges that must be faced, providing specific examples from other contexts that are important to take note of when designing an accountability mechanism in Sri Lanka.

In chapter 9 Annie Woodworth discusses judicial accountability dealing with conflict related sexual violence in Sri Lanka. The author examines reported cases of conflict related sexual violence in Sri Lanka and the present legal framework, and examples and best practices from

comparative contexts for reform. Although there is some recognition of action needed in this area, limited literature is available in this area of reform and the author provides specific recommendations that can be useful for the future.

In the next chapter I discuss the issue of reparations and its importance in a transitional justice process. This chapter examines the different aspects of reparations and uses three areas relevant to Sri Lanka to make the case for immediate attention. I also make the case as to why reparations, although not provided the same attention as other areas of transitional justice, can play a critical role in building the trust of victims and addressing the grievances of communities across Sri Lanka.

Mytili Bala deals with the issue of mass graves in chapter 11. She discusses existing cases and the challenges faced, highlighting specific instances where lack of capacity and expertise, as well as structural issues, have led to the undermining of efforts of truth and justice. This chapter provides key recommendations for reform, an important read in the context of establishing the OMP and when designing a process to address the significant caseload of enforced and involuntary disappearances in Sri Lanka.

In chapter 12, Gehan Gunatilleke discusses the right to memory and the politics around it, examining present issues and areas to consider for future initiatives with memorialisation and memory spaces. The author highlights the challenges, including the triumphalism of past efforts, and provides insights into steps that must be taken when designing and implementing initiatives to remember, recognise and acknowledge.

The final cluster looks at comparative cases and lessons for Sri Lanka.

In chapter 13 Vasuki Nesiya discusses the challenges in the field of transitional justice, making the case for careful planning and strategic pressure to ensure past mistakes are not repeated and promises are realised. The author argues that in the absence of careful planning and strategic pressure from the international community, what is embraced may in fact delegitimise and undermine justice in Sri Lanka.

In the next chapter, Beth Van Schaack discusses different issues that must be considered when designing and implementing a hybrid court, providing examples from comparative cases to demonstrate the need for a carefully designed mechanism and the challenges of implementation. This chapter draws out lessons from other contexts that are relevant in on-going discussions and hopefully will factor into the design of accountability mechanisms in Sri Lanka.

Linked to the previous chapter, chapter 15 focuses on the lessons from Cambodia's experience of a hybrid accountability model. John Ciorciari, who has worked for years in Cambodia monitoring accountability efforts, discusses aspects and issues around a hybrid court that have received much attention in the Asian region. The Cambodian example provides many lessons for Sri Lanka including steps that must be taken to ensure justice is not further delayed.

In the next chapter, Rebekka Friedman looks at the holistic and multiple tracks of transitional justice through the lens of Peru and Sierra Leone, drawing lessons from the two countries as to what issues should be considered. In the design of a range of mechanisms and initiatives in Sri Lanka, it is important to include areas that may not receive the same



attention as some others, with this chapter making the case for a broader overview in the design and implementation of a transitional justice process, with specific focus on truth commissions.

In Chapter 17, David Cohen and Leigh-Ashley Lipscomb describe East Timor's and Indonesia's key transitional justice institutions, their outcomes and challenges, highlighting key lessons that transcended the individual institutions and focused on collective lessons learnt. This chapter is relevant for the lessons it can provide when designing and implementing a transitional justice process in Sri Lanka including identifying steps that should be taken by specific actors.

In the last chapter, Naomi Roht-Arriaza examines the issue of reparations in the Latin American region, highlighting important lessons from several countries in the region that are useful when designing and implementing Sri Lanka's own programme.

## **Acknowledgements**

There are many who were involved in the production of this publication and without whose support this publication would not be a reality. Firstly, a big Thank You to all the contributors in this publication. The authors have raised critical issues from politics to process to lessons learnt from comparative examples which are important in Sri Lanka's transitional justice process. The cover designed by Sunela Jayewardene is an artistic perspective on the debates on transitional justice, illustrating the many layers and nuances in such a process. The different facets raised by each of the contributors have enriched this publication and hopefully will

be useful in the future in the design and implementation of reforms and will enrich discussions and debates in Sri Lanka.

My colleagues at the Centre for Policy Alternatives (CPA) supported in different ways to bring this volume to print, and without whose support this endeavour would not have been possible. They include Harshini Amarasinghe, Luwie Ganeshathasan, Zainab Hassan, Thenmozhy Kugamoorthy, Michael Mendis and Krijah Sivakumar. Appreciation is also due to Leana Pieris for patiently proofing an initial draft and to Sanjana Hattotuwa for formatting this publication. Thanks also must go to Dr. Saravanamuttu who has, over the decades, supported many in the pursuit of their interests at CPA and who encouraged my idea of a publication that explores different dimensions of transitional justice in Sri Lanka.

Finally, this publication is representative of numerous conversations and debates had with friends and colleagues in Sri Lanka and outside in recent months and years. They were essential to the realisation of the complexities in a transitional justice process and Sri Lanka's own unique journey. I take this moment to thank them all for the ideas, agreements, disagreements and debates and hope this publication sustains many more in the coming months and years.

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# **Transitional Justice in Sri Lanka: Issues & Challenges**

**1**

**The Politics of Transitional Justice in  
Sri Lanka**

*8*

*Paikiasothy Saravanamuttu*

## **1. Introduction**

With the military defeat of the Liberation Tigers of Tamil Eelam (LTTE) in May 2009, Sri Lanka effectively moved into a post-war phase defined in terms of the guns falling silent. The unfinished business as it were, continues to be the transition to a post-conflict phase in which the roots of conflict are not sustained or reproduced. Whilst not all subscribe to this on the grounds that the military victory was conclusive, even the Rajapaksa regime that won the war acknowledged that a political and constitutional settlement was necessary and introduced into the public debate the possibility of a solution going beyond the existing scheme of devolution effected through the Thirteenth Amendment to the Constitution – Thirteen Plus as it has come to be known in the popular political lexicon. The rhetorical acknowledgement notwithstanding, nothing was done to reach a settlement on this basis, and the attempt at talks with the principal Tamil political party the Tamil National Alliance (TNA), collapsed in deadlock.

Likewise, the then regime's commitment to reconciliation and transitional justice, foreshadowed in the joint communiqué issued by President Rajapaksa and UN Secretary – General Ban-ki- Moon on the latter's visit to Sri Lanka in October 2009.<sup>1</sup> The regime's unwillingness in this respect led to the Secretary General appointing an Advisory Panel of Experts (APE) to report on the last days of the war in Sri Lanka, headed by a former Attorney General of Indonesia,

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<sup>1</sup> Joint Statement by United Nations Secretary-General & the Government of Sri Lanka, 26 May 2009-  
<http://www.un.org/press/en/2009/sg2151.doc.htm>, last accessed September 2016

Darusman.<sup>2</sup> Other members were Yasmin Sooka from South Africa and Stephen Rapp from the USA. The Panel found that there was evidence to further investigate alleged violations of war crimes and violations of international humanitarian law.<sup>3</sup>

Sustained criticism from human rights activists both within Sri Lanka and internationally and the resonance they achieved with international opinion, eventually led to the regime appointing the Lessons Learned and Reconciliation Commission (LLRC). The latter's report dealt with the allegations of war crimes and violations of international human rights and humanitarian law and whilst agreeing with the then government's position that it was not responsible for any crimes or violations of this nature, recommended that the issue be laid to rest through investigations of particular incidents. The LLRC also made a series of recommendations on reconciliation, in the main reiterating positions advanced by liberal civil society over decades.<sup>4</sup>

The Rajapaksa regime's unwillingness to implement the LLRC recommendations and its hostile and confrontational attitude towards what it perceived as the Western –dominated international community's agenda for regime change under the guise of human rights protection initially expressed in

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<sup>2</sup> Secretary-General's Panel of Experts on Sri Lanka, <http://www.un.org/en/rights/srilanka.shtml>, last accessed September 2016

<sup>3</sup> Report of the Secretary General's Panel of Experts on Accountability in Sri Lanka, 31 March 2011

<sup>4</sup> Release of the Lessons Learnt and Reconciliation Commission (LLRC) Report, CPA Statement, 4 January 2012- <http://www.cpalanka.org/release-of-the-lessons-learnt-and-reconciliation-commission-llrc-report/>, last accessed September 2016

response to the UN Secretary General's Advisory Panel of Experts report, led to a series of resolutions on Sri Lanka in the UN Human Rights Council (UNHRC) commencing with the resolution in 2012. This resolution evoked a strong nationalist response from the regime and its supporters, including the abortive fast to death outside the UN compound in Colombo by key cabinet minister Wimal Weerawansa.<sup>5</sup> The 2012 resolution itself was mild – it appealed to the government of Sri Lanka to implement the recommendations of its LLRC. It was seen nevertheless by the Rajapaksa regime as an unwarranted interference in the internal affairs of the country, a violation of its sovereignty, the thin edge of the wedge– putting Sri Lanka on the agenda of a multi-lateral forum with the US in the lead, spelt for them, a determined push for regime change.

Two more resolutions followed. The resolution of 2014 called upon the Office of the High Commissioner to commission a report under its aegis to look into the allegations of war crimes and violations of international human rights and humanitarian law. The report was to be submitted to the Council by March 2015, but with the defeat of Rajapaksa and the election of a new President of Sri Lanka, presentation of the report was postponed to September 2015 on the request of the new government. The argument has been made that Rajapaksa called an early presidential election expecting a renewed and robust mandate from the electorate, which would empower him to dismiss the expected adverse conclusions of the report, known as the OHCHR Investigation on Sri Lanka (OISL) report. It should also be noted that the government that assumed office in Colombo in January 2015,

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<sup>5</sup> 'Sri Lanka minister begins 'fast' outside UN office', BBC, <http://www.bbc.co.uk/news/mobile/10549819>, last accessed September 2016

pledged to dissolve parliament and go to the polls in a 100 days and was therefore keen to keep the OISL report out of the general election campaign.

The September 2015 sessions of the UNHRC saw a statement from Mangala Samaraweera, the Foreign Minister of Sri Lanka, the release of the OISL report<sup>6</sup> and the passage of a resolution on Sri Lanka<sup>7</sup>, which the government of Sri Lanka (GOSL) co-sponsored.

Foreign Minister Samaraweera in his speech signalled the change of attitude of the new government towards the international community and to human rights and transitional justice.<sup>8</sup> Samaraweera expressed the openness of the GOSL to investigate allegations of war crimes and to institute a process of transitional justice outlining four mechanisms in particular corresponding to the conventional pillars of transitional justice – truth, justice, reparations and guarantees of non- recurrence. The mechanisms proposed were a Truth Commission, an accountability mechanism comprising a Special Court and Special Counsel’s office, a permanent Office of Missing Persons and an Office for Reparations.<sup>9</sup>

The OISL report too found that there was a basis for further investigation of the war crimes allegations and those pertaining to the violations of international humanitarian law and called for a hybrid court - made up of both nationals and

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<sup>6</sup> OHCHR Investigation on Sri Lanka, A/HRC/30/61

<sup>7</sup> Promoting reconciliation, accountability and human rights in Sri Lanka, [A/HRC/30/L.29](#), 1 October 2015

<sup>8</sup> UN Human Rights Council Resolution on Sri Lanka: Comments by Foreign Minister Mangala Samaraweera, 14 September 2015- <http://www.mfa.gov.lk/index.php/en/media/media-releases/unhrc2015>, last accessed September 2016

<sup>9</sup> Ibid

internationals - to be set up for this purpose. The resolution that followed in that session, co-sponsored by the US and the GOSL amongst others, echoed this call for the proactive involvement of internationals in the accountability mechanism even as judges from the Commonwealth and elsewhere. The High Commissioner gave the Council an oral report on the implementation of the resolution in June 2016<sup>10</sup> and a final comprehensive report is to be presented to the Council in March 2017.

Following the September 2015 resolution, the GOSL has done a number of things for its implementation. Within the government, the institutional framework for transitional justice has at its apex a Prime Ministerial Action Group, a working Group and a Secretariat for Coordinating Reconciliation Mechanisms (SCRM). A Consultation Task Force (CTF) comprising 11 members from civil society has also been established to ascertain public views of reconciliation mechanisms. The Task Force model is replicated at community level with district and provincial level Zonal Task Forces (ZTFs), over half of the membership of which comprised women.

The CTF report was handed over to the government in early January 2017 and contains chapters recording views expressed on behalf of over 7,000 citizens in public meetings, focused group discussions, national level consultations and through e-mail and the post on mechanisms corresponding to the conventional four pillars of transitional justice as well as other mechanisms and measures that go beyond them. The report also contains recommendation made by the Task Force on

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<sup>10</sup> 'UN Human Rights chief presents report on Sri Lanka to UNHRC', Colombopage, 29 June 2016, [http://www.colombopage.com/archive\\_16B/Jun29\\_1467213855CH.php](http://www.colombopage.com/archive_16B/Jun29_1467213855CH.php), last accessed September 2016



transitional justice mechanisms, which are informed by the submissions made. The CTF recommendation, which called for a hybrid court in respect of accountability, attracted the most amount of attention, despite it being one of a number of recommendations covering the gamut of transitional justice concerns.

Government leaders including the President and the Prime Minister have dismissed this and avoided official acceptance of the Report – the Report was to be handed over to the President but he was indisposed and it was handed over to former President Kumaratunga who heads the Office of National Unity and Reconciliation (ONUR), instead. The demonstrable reluctance of the government to formally and publicly associate itself with the Report reflects current political dynamics and its perceived need to counter the opposition argument that the real objective of a process of transitional justice is to convict war heroes as war criminals! Consequently the prioritisation of constitutional reform will probably be used to put transitional justice on the back burner on the grounds that it will adversely impact the prospects of achieving constitutional reform as the overarching priority.

## **2. Political Dynamics**

The politics of transitional justice has been played out against the backdrop and in response to the APE report initially and subsequently the OISL report and the Geneva resolutions in particular.

The Rajapaksa regime's argument and that of its supporters, as mentioned above, was that the alacrity of the international community for transitional justice in Sri Lanka stemmed from no altruistic impulses but rather from the very political one of regime change. Their argument often has the variants of

jealousy towards Sri Lanka as the first country to have defeated terrorism – war heroes are to be turned into war criminals it is alleged and from Mahinda Rajapaksa to now Field Marshal Sarath Fonseka who was the Army Commander at the end of the war, there have been statements to the effect that no soldier will stand trial, instead they would do so and go to the electric chair if necessary.<sup>11</sup> Another argument is that of making an example of Sri Lanka as a demonstration of renewed US interest in the Human Rights Council after years of disengagement under the Bush Administration. Other variations on this theme include the political and electoral leverage exerted by the Tamil diaspora in North America and Europe on host governments and the application of double standards to Sri Lanka by these governments, citing the treatment of Israel and other western allies in the Middle East in evidence. All of this is subsumed under the defence of national sovereignty and the principal allegation that the Human Rights Council and human rights issues are being used to violate the sovereignty of Sri Lanka,

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<sup>11</sup> ‘Former Sri Lankan President Mahinda Rajapaksa Opposes War Crimes Tribunal’, NDTV, 25 October 2015, <http://www.ndtv.com/world-news/former-sri-lankan-president-mahinda-rajapakse-opposes-war-crimes-tribunal-1236195>, last accessed September 2016; David Corlett, ‘Former Sri Lanka army chief says he would welcome war crime investigation’, 27 May 2015, <https://www.theguardian.com/world/2015/may/27/former-sri-lanka-army-chief-says-he-would-welcome-war-investigation>, last accessed September 2016; Frances Harrison, ‘Who is Mahinda Rajapaksa? Hero or war criminal? Sri Lankan leader stands accused’, 15 November 2013, <http://www.independent.co.uk/news/world/asia/hero-or-war-criminal-sri-lankan-leader-mahinda-rajapaksa-under-pressure-8940591.html>, last accessed September 2016;

employing in effect the deeply interventionist Responsibility to Protect doctrine under the guise of human rights protection.<sup>12</sup>

The counter-argument continues to be that Sri Lanka needs to seriously pursue human rights protection and investigate allegations of war crimes and violations of international humanitarian law because it is integral to the reconciliation and national unity the country needs in moving to a genuinely post-conflict phase. This argument maintains that certain steps in this regard have to be taken not because the international community has so deemed, but rather because it is both necessary and desirable for the country, however unpopular the measures may seem at the outset. With regard to these allegations, the Foreign Minister has repeatedly pointed out that investigation is a sine qua non for weeding out undesirable elements within the forces and for restoring their honour and reputation, in turn a sine qua non for greater participation in activities such as UN peace keeping, which the GOSL is keen on pursuing.

Underpinning the politics of the transitional justice debate are the electoral results of the two national elections in 2015 and the continuing possibility of a return to power by the Rajapaksa group.

Whilst the two national election results constitute rejection of the Rajapaksa group twice within the space of eight months, the election results also register a national constituency in support of them amongst the majority Sinhala community of not inconsiderable proportions. As with the concern about

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<sup>12</sup> Tamara Kunanayakam, 'Geneva: "Responsibility To Protect" Vs Sovereignty Of The people!', 17 April 2013, <http://www.dailymirror.lk/28188/geneva-responsibility-to-protect-or-sovereignty-of-the-people>, last accessed September 2016

Transitional Justice becoming an issue in the general election of 2015 leading to the government requesting the UN High Commissioner for Human Rights to postpone release of the OISL report, the government continues to be politically sensitive and electorally vulnerable with regard to the issue of the accountability mechanism and international representation on it, in particular. It is especially concerned to assure the armed forces that the process of Transitional Justice foreshadowed in the Geneva resolution and now commenced, is not a threat to them as an institution and likewise to the wider majority community. The government has three political objectives in the short-term – to keep the coalition together, to see off the Rajapaksa challenge to the President within his own party, the Sri Lanka Freedom Party (SLFP), and therefore to ensure that the Rajapaksas are not handed additional political ammunition, and finally to ensure that the process of constitutional reform, which entails a two-third majority in the legislature and a simple majority in the country at a referendum thereafter, is not jeopardised.

The frequent focus on the accountability mechanism and international participation in the mechanism is attributable to these factors. At various times the President has opined that there will be no international judges on the accountability mechanism.<sup>13</sup> The Prime Minister has also weighed in echoing the President. The Prime Minister, it should be noted, has made the political point repeatedly that it is precisely because he did not sign up to the Rome Statute when he was last Prime Minister that members of the

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<sup>13</sup> P K Balachandran, Sirisena reiterates opposition to foreign judges In war crimes court, 8<sup>th</sup> July 2016, <http://www.newindianexpress.com/world/Sirisena-reiterates-opposition-to-foreign-judges-In-war-crimes-court/2016/07/08/article3520015.ece>, last accessed September 2016

Rajapaksa regime have not been subjected to international accountability through proceedings before the International Criminal Court. The Foreign Minister on the other hand has maintained that no such decision regarding internationals on the accountability mechanism has been made and that a decision will be made only after discussions with all parties concerned. He also avers that the President is merely voicing a personal opinion.<sup>14</sup> The issue surfaced most recently following the UNHRC sessions in Geneva and the oral statement by the High Commissioner with regard to faster progress on transitional justice in Sri Lanka. Tamil National Alliance MP Sumanthiran whilst in the US also voiced his opinion on internationals, making the point that the UN resolution had to be implemented in full. Media reports, later denied by the TNA, had MP Sumanthiran saying that international participation was agreed upon by the TNA, the GOSL and the US government at the time of the resolution in September 2015.<sup>15</sup>

It is clear that the composition of the accountability mechanism is assuming the proportions of a political acid test. The seriousness of the GOSL's commitment to implement the Geneva resolution in full and accede to the demands for accountability from families of victims in the north and east in particular, on the one hand, and on the other, the patriotism of the government in honouring the historic victory of the armed forces and resisting the pressures and attempts of the western-dominated international community to subvert national sovereignty.

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<sup>14</sup> Ibid

<sup>15</sup> Shamindra Ferdinando, TNA's revelation in Washington as regards foreign judges stuns govt, The Island, 5 July 2016, [http://www.island.lk/index.php?page\\_cat=article-details&page=article-details&code\\_title=148097](http://www.island.lk/index.php?page_cat=article-details&page=article-details&code_title=148097), last accessed September 2016

This dichotomy aside, there are those who hold that there will be no accountability mechanism – parliament will have to legislate international participation as argued by some and this will not come to pass. A variant of this is that the GOSL will make the effort to send up legislation to parliament before the comprehensive report on the resolution is due in Geneva by March 2017 and that the legislation will in effect lie there and die there. Alternatively, if passed, the establishment of the mechanism will be delayed indefinitely or take considerable time if established, to commence work. These concerns are registered in the demands that the Office for Missing Persons (OMP) be charged with the responsibility for investigations and indictments since the adherents of this view believe it may be the only transitional justice mechanism to be established. The government maintains that this is not the case and that the mechanisms should be seen together as constituting a holistic and coherent architecture for reconciliation and transitional justice.

The government has promised that the process through which the legislation on the OMP was sent to Parliament – limited consultation despite the establishment of a Task Force for this purpose –will not be repeated in respect of the other mechanisms and that they will be designed taking into account the report of the Consultation Task Force. OMP legislation was almost certainly expedited to meet the deadline of the June sessions of the UNHRC, although there was no such requirement of having to do so. Convincing the international community of its bona fides notwithstanding, the government has been markedly reticent in instituting a public education and information campaign on transitional justice – likewise on constitutional reform. The inability and/or unwillingness of the government to do this and publicly demonstrate its championship of constitutional reform and transitional justice

will vitiate the arguments for both and allow the opposition the space to make its arguments unchallenged. Civil society advocacy is no substitute for governmental championing of transitional justice.

Indeed within civil society too, differences of opinion are evident along ethnic lines with regard to Transitional Justice and the accountability mechanism in particular. The argument in general about a difference of opinion and even a parting of ways in this regard between liberal Colombo based human rights organisations and activists who lobbied for transitional justice and in support of the Geneva resolutions during the Rajapaksa regime and their counterparts in the north and to a certain extent in the diaspora, is that the former have met their expectations and objectives of regime change and are quite prepared to go along with the government of the day even at the expense of advocacy for serious and meaningful accountability and transitional justice. The counter-argument is that on the one hand, demands for international accountability- be it deliberately or out of a lack of information - ignore the challenges posed in the realisation of this and moreover that constructive and critical engagement with the current government is perfectly legitimate and absolutely crucial in seizing upon a historic opportunity for change, rather than constituting capitulation or co-option.

In the north and east, the argument has strongly been in favour of an international mechanism for accountability, even though the feasibility and likelihood of this happening is little understood and not necessarily spelt out to the families of victims. This invariably also leads to allegations that organisations with a political agenda are organising victims to insist on such a mechanism and deliberately concealing from them the process through which this could conceivably come

about. Political machinations, real or imagined aside, there is no gainsaying the fact that as far as the families of the victims in the north and east are concerned, any mechanism which is exclusively national will not be credible in their eyes. Moreover, the partisan nature of the judicial system over the last decade at least has not instilled confidence and trust with regard to justice, and not just in the north and east alone.

Despite this, the ethnic divide persists and amongst the majority community there is outright rejection of accountability on the grounds outlined above and in some quarters the belief that accountability is intended only for the north and east. Here the argument is made that in any event there are no LTTE leaders to hold to account and therefore accountability of necessity will only be with regard to the security forces. This ignores the existence of LTTE leaders for instance such as Karuna and K.P. Pathmanathan – the former was a government minister under the previous regime and the latter who was designated by the LTTE leader Prabhakaran as his successor, runs an orphanage in the north – set up and sustained with the patronage of the previous regime.

The response of the public as registered in the CTF Report confirms that public expectations with regard to accountability are by no means restricted to allegations against the security forces but encompass the LTTE and allegations of atrocities committed in the insurgencies in the south. Reconciliation mechanisms are not intended to be restricted to the ethnic conflict but will have a wider remit to encompass the violations committed during the insurgencies in the south as well.

Apart from the composition of the accountability mechanism, additional issues can be identified with regard to the other mechanisms. That of a prosecutorial function as far as the



OMP is concerned is one; another is the very nomenclature of such a mechanism. Families of victims in the north and east in the main, insist that the involuntary and enforced nature of disappearances must be registered in the very title of the office. This attests to their overwhelming demand for the acknowledgement of the truth of what happened and firm refusal to abandon their search for it. This is evinced in their lingering suspicion of interim measures such as Certificates of Absence, which would facilitate their access to entitlements.

Insistence on the acknowledgement of the truth focuses attention on the proposed Truth Commission. The latter traces its conceptual antecedents to the South African Truth and Reconciliation Commission (TRC) of over two decades ago. When first mooted in the Sri Lankan context, the issue of amnesty became the subject of debate amidst a general debate on the merits and demerits of restorative justice versus retributive or punitive justice. Arguments were also advanced that in the Sri Lankan context, cultural factors prioritising shame over guilt would ensure that a Sri Lankan TRC would stand in stark contrast to the South African one, which provided for amnesty on the basis of full disclosure of culpability and that in any event, international law has advanced to the point of consensus on the punishment of grave crimes and atrocities. To the extent that a consensus on this can be discerned, it appears to coalesce around such a mechanism recording the truth of what happened, an official repository of collective memory.

### **3. Conclusion**

The process of transitional justice will no doubt be hotly contested even beyond the establishment of mechanisms to facilitate it. It is now seven years after the war and the country has seen three UNHRC resolutions on it, an advisory expert

report commissioned by the Secretary General of the UN, a report under the aegis of the Office of the UN High Commissioner for Human Rights, a new government committed to transitional justice and co-sponsoring a UNHRC resolution to this effect, as well as tentative steps towards its realisation. It is worth noting too that the response to calls for mechanisms for transitional justice domestically, has varied in intensity of opposition amongst the majority community over time and that the response in the main to the last resolution and the OISL report was more in the nature of “how” it should be implemented rather than “whether” it should or “why”. There is no certainty of course that the debate will proceed along lines of linear progression and that the objections of yore will not be revisited, even revitalised depending on political imperatives.

A lot may well depend on sequencing. There is the March 2017 deadline for reporting in Geneva on the 2015 resolution, there is an on-going process of constitutional reform which is to culminate in a new constitution approved by the people in an island-wide referendum and the perennial issues of the cost of living and economic reform. Transitional justice intersects with all of these issues. There is some evidence to indicate that the international community understands this and will not be insistent on pre-determined deadlines as long as they can see the trajectory of progress to be in the desired direction.

Domestically the dynamic may well be different. Constitutional reform requires island-wide support and substantially. In the January 2015 presidential election, whilst the victory of President Sirisena can be presented as a truly national one, it is also the case that his majorities amongst the Tamils, in particular, was substantial, and this in an election in which the issues of direct concern to them were placed on the backburner lest the broad anti- Rajapaksa coalition fractured

on questions of power-sharing and transitional justice. Mahinda Rajapaksa won substantially amongst the majority community and still retains a hold on that vote base. Insufficient progress on transitional justice and on the devolution provisions in the new constitution could keep Tamil voters away in a referendum and detract from the credibility and legitimacy of the government's reform project.

For the Tamil polity, the political and constitutional guarantees of non-recurrence are seen largely in terms of the extent of devolution that would be provided in a new constitution. This has been and continues to be the predominant pre-occupation of Tamil political representation and of the principal Tamil political party the Tamil National Alliance (TNA). It would be no exaggeration to contend that both the TNA and the international community saw transitional justice at the outset as the lever for securing a political and constitutional settlement. The inability of the Rajapaksa regime to comprehend this and its concomitant unwillingness to embark upon meaningful reconciliation, led in no small measure to transitional justice acquiring a life of its own as an issue of pivotal importance, politically. As the processes of transitional justice and constitutional reform unfold, it would be interesting to see as to whether they will be linked in such a relationship and as to which would be given priority in political negotiations, if any.

Ultimately, the responsibility for transitional justice will rest with civil society and the extent of pressure and persuasion it can bring to bear upon political parties and leaders as to the fundamental importance of transitional justice in moving beyond conflict. It should not be seen as separate from constitutional reform and the governance platform on which the current government was elected. It is integral to it. Amnesia and impunity cannot replace truth and

accountability as the foundations for meaningful reconciliation and unity. Nor, one might add, as the Rajapaksa regime also found to its electoral misfortune, notions of economic development employed with the objective of relegating, if not extinguishing, memory.

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# **The Role of Constitution Building Processes in Advancing Transitional Justice and National Reconciliation: Options for Sri Lanka**

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*Sakuntala Kadigamar<sup>1</sup>*

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<sup>1</sup> This paper is written in my personal capacity and does not necessarily reflect the views of the Standby Mediation Support Unit, the United Nations or its member states.

## **The Debate around Transitional Justice in Sri Lanka**

The civil war in Sri Lanka ended in May 2009. However, the manner in which the war was prosecuted and the years of violence that prevailed in the lead up to the war have led to allegations of systemic abuse and violations of human rights by the government, the armed forces, the Liberation Tigers of Tamil Eelam (LTTE) and others. There is today, an acknowledgment by the government, civic groups and the international community that the factors that led to the civil war were rooted in political grievances, which if addressed in a timely manner, through political reforms, could have fostered inclusion and a peaceful co-existence between the majority and minority communities.

Sri Lanka faces a conundrum. How deeply should it delve into the past, how much political energy and financial resources should it expend in probing, prosecuting and compensating for the past when it has many present and future challenges to address? Will prosecuting human rights abuses that occurred during the conflict create deep resentment within the armed forces and ultra nationalist groups and will this threaten the fragile political transition in the country? Will failure to prosecute these abuses and address the past alienate the minority communities and perpetuate the divisions in the country? Will a focus on monetary compensation for the violence and losses experienced by people ever be adequate compensation without it being accompanied by prosecutions, which hold perpetrators accountable? What further damage will such a history of violence and a culture of impunity and silence embed in the country? Can a liberal democracy and national cohesion be built on such shaky foundations?

The country is divided on the approaches to adopt. Nevertheless, the Government of Sri Lanka is under pressure

from the international community, and from within – from human rights organisations and from victims and survivors who insist that there should be accountability and that there should be political and legal reforms to ensure that such events never come to pass again. There have been several episodes of political violence in Sri Lanka<sup>2</sup> and they have not been accompanied by processes of accountability or by political and legal reforms. These failures, it can be argued, have contributed to a culture of impunity and festering grievances that have contributed to the many conflicts and to the erosion of the rule of law.

The present discussions on transitional justice in Sri Lanka are mired in the debate on whether there should be international participation in the transitional justice process.<sup>3</sup> While the government of Sri Lanka has agreed to a transitional justice process, they are reluctant to concede a hybrid process with

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<sup>2</sup> These include the anti-Tamil riots of 1958, 1977 and 1983, the JVP insurrections of 1974 and 1987 and the civil war, which lasted from 1983-2009. See- ‘Timeline of Sri Lanka’, BBC <http://www.bbc.com/news/world-south-asia-12004081>. It also includes more recent attacks on the Muslim community in the early months of 2015, which have not as yet led to any accountability. See- ‘Anti Muslim Sentiment In Sri Lanka: Hate Incidents – January To April 2015’, <https://www.colombotelegraph.com/index.php/anti-muslim-sentiment-in-sri-lanka-hate-incidents-january-to-april-2015/>

<sup>3</sup> Annual report of the United Nations High Commissioner for Human Rights and reports of the Office of the High Commissioner

and the Secretary-General: Report of the OHCHR Investigation on Sri Lanka (OISL)\*, UNHRC Resolution adopted in 2015 ‘Promoting Reconciliation, Accountability and Human Rights in Sri Lanka’; Bhavani Fonseka and Luwie Ganeshathasan, *Hybrid vs. Domestic: Myths, Realities and Options for Transitional Justice in Sri Lanka*, CPA January 2016.

international participation on the grounds that it violates Sri Lanka's sovereignty and may lead to a process and outcomes that are disadvantageous to the armed forces. Human rights organisations however believe that only a hybrid mechanism will give the necessary confidence to victims and survivors, that the process will be fair, transparent and credible.<sup>4</sup> They argue that the Sri Lankan judiciary in recent years, has not demonstrated independence and there are many institutional and capacity constraints to conducting a credible and fair process. The debate is further compounded by the mixed political messages that are relayed – that there will be no undermining of the 'war heroes' (i.e. the military)<sup>5</sup>. If that is to be the settled outcome, where will it leave the victims and survivors?

A hybrid process could mean the participation of international actors including judges, prosecutors, investigators, forensic experts and the reliance on international experiences and human rights norms on which to base the conceptualisation of the process and the legislation and procedures that will give it effect. It could mean a combination of all or some of these measures to create a process that is not only open and transparent in its procedures and fair in its outcomes, but one that is perceived by victims and survivors, to be fair and taking

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4 Bhavani Fonseka and Luwie Ganeshathasan, *Hybrid vs. Domestic: Myths, Realities and Options for Transitional Justice in Sri Lanka*, CPA January 2016.

5 Ibid; 'No compromise on national security – President', <http://www.president.gov.lk/news/no-compromise-on-national-security-president/>, last accessed July 2016; 'We Won't Hunt Down War Heroes, We Will Ensure There Won't Be Another War In Sri Lanka – Sirisena', Colombo Telegraph <https://www.colombotelegraph.com/index.php/we-wont-hunt-down-war-heroes-we-will-ensure-there-wont-be-another-war-in-sri-lanka-sirisena/>, last accessed July 2016



to heart their interests and concerns. The government's refusal to conduct such a process is regarded as reneging on the commitments it has made to the international community. It provides support to arguments that these commitments were made primarily to stave off adverse rulings against Sri Lanka at the United Nations and donors' strictures that may impact aid and preferential tariffs and they did not stem from a desire to transform the country from within.

### **Political Reconciliation as an Aspect of Transitional Justice and Challenges and Opportunities for Sri Lanka**

To move Sri Lanka away from her bleak history, the Government has promised reforms to ensure "good governance". This was a message that resonated with many voters, resulting in the present government's electoral victory in January 2015. However, it is unlikely that good governance can be achieved in a vacuum, devoid of its historical context. It is necessary to ensure, among other transitional justice measures, that the constitution too is reformed to underpin political, social and economic inclusion of all communities and groups, and to ensure that human rights are protected at all times, and that the rule of law is upheld. It calls for re-balancing the relationship between the executive, the legislature and the judiciary to ensure that one branch does not dominate the others and that checks and balances are maintained. It also calls for the dismantling of the "deep state", right sizing the military and bringing it under effective civilian control. It further calls for strengthening institutions of accountability and the independence of institutions such as the Human Rights Commission and the Election Commission among others. Good governance also calls for inclusive government with a de-concentration of power at the centre and the provision for decision-making at local levels to address local problems and to provide effective service delivery and

accountability. It calls for government in which minorities and women participate fully. This is an opportunity for the Government to link these reform measures with the transitional justice mechanisms, engage with the polity to enable them to understand that unless a holistic and comprehensive approach is undertaken over time, change will not take place in Sri Lanka. It calls for both a forward-looking and backward-looking exercise.

To be effective in this endeavour, the Government must speak with a single and concerted voice, and engage consistently and systematically with the people, communicating that such an approach is in the long term interests of the whole country and not only in the interests of a part of the population. The Government must show commitment and leadership in directing this transition. This remains a challenge, given the fractured nature of the present coalition government.

The approach of this paper focuses on political reconciliation through legal and constitutional reforms. However, important as this is, unless there is human interaction and interpersonal engagement leading to reconciliation at the personal and community level, Sri Lanka will remain a divided society. Paradoxically, for the legal and constitutional changes necessary to advance political reconciliation, the voices of the people will have to be engaged (as required by existing laws) in a referendum, and that vote may not be forthcoming unless the parliamentary majority (two-thirds) and the voting public support such measures. So, without social reconciliation, political reconciliation may falter and without political reconciliation there is no confident basis upon which to build social reconciliation.

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## Un-packaging “Transitional Justice”

Both in Sri Lanka and elsewhere, transitional justice mean different things to different people. The words “Transitional Justice” have a ring of optimism to them. “Transition” after all implies movement, a shift from one position to another and in this process the creation of an interregnum, which is not very clearly defined. Transitions by their very nature call for reduced expectations and some leeway and allowance for unclarity, experimental procedures (Rwanda) and some confusion. Transition however does not imply a downward spiral. “Regression” captures that unhappy movement better. Coupled with the word “justice,” the concept “transitional justice” clearly indicates a positive value. Transition has come to mean change in a liberalizing direction but the accuracy of these assumptions is questioned.<sup>6</sup>

The words “Transitional Justice” also come with some additional baggage. The concept “transitional justice” is inextricably linked with the illiberal past. Transition “to”, must co-relate with transition “from”. The memory of the illiberal past cannot be easily shaken away - as it is a past that sears and scars individuals, collectives and the national psyche. It is a past that must be “dealt with” historically and through the legal regime. Some may contest that the past was illiberal or evil. They may justify it on the basis that illiberal measures were justified by the context, invoking doctrines of necessity. Transitional justice then becomes not merely the descriptor

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<sup>6</sup> Ruti G. Teitel, *Transitional Justice* (Oxford University Press 2000), p. 4. Transitional Justice begs the questions: Transition to what? Justice for whom, what kind of justice - by what means and standards? Does democracy and reconciliation inevitably fit into this scheme as the end game of a transition or is it an unwarranted leap of faith to believe that reconciliation and democracy will emerge from a process of transitional justice?

but the very process by which societies deal with their illiberal, even evil pasts.

There is a body of well-established international norms pertaining to transitional justice.<sup>7</sup> Nevertheless, transitional justice has been criticised as the new moral agenda imposed on post-conflict societies by western countries.<sup>8</sup> However, transitional justice also requires to more than punish, deter, compensate and rehabilitate offenders and victims. An overarching goal of countries needing and delivering transitional justice is also to create a framework for moving on, for reforms, for reconciliation through political interactions. Achieving these multiple objectives is not easy and few countries have succeeded in delivering justice in all its

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<sup>7</sup> The international rules governing transitional justice include: Security Council: The rule of law and transitional justice in conflict and post-conflict societies: Report of the Secretary-General, 23 August 2004, S/2004/616; Human Rights Council, General Assembly: Analytical study on human rights and transitional justice, 6 August 2009, A/HRC/12/18; Resolution adopted by the General Assembly on 16 December 2005: Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, 21 March 2006, A/RES/60/147; General Assembly: Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, 29 November 1985, A/RES/40/34; General Assembly, Human Rights Council: Resolution on Human Rights and Transitional Justice, 12 October 2009, A/HRC/RES/12/11; General Assembly, Human Rights Council: Resolution on Right to the Truth, 18 December 2013, A/RES/68/165.

<sup>8</sup> *Dealing with the Past and Transitional Justice: Creating conditions for Peace, Human Rights and the Rule of Law*, Conference paper 1/2006, Dealing with the Past – Series, Federal Department of Foreign Affairs, Switzerland. p. 7

many dimensions effectively while also creating a resilient political community from such ashes.

### **Securing Transitional Justice and National Reconciliation through Political Reconciliation – The Role of Imaginative Constitution Building Processes**

Constitution building process can contribute to the process of securing transitional justice and national reconciliation. While not minimizing the value of approaches that focus on criminal justice, truth telling and reparatory justice, nor suggesting an “either / or” approach towards transitional justice be adopted, this article stresses that transitional justice should go beyond these approaches and contribute to creating a standard for proactive and positive political engagement in the future.

Constitutional processes can and do make a vital contribution to a process of setting standards for justice and reconciliation and should be given more scholarly attention, political thought and commitment. They should be more firmly integrated into national reconciliation processes and if addressed imaginatively, constitutional processes can provide a framework for political reconciliation.

Political reconciliation should be conceptualised in more pragmatic terms and as a long term, infinite work in progress.<sup>9</sup> It should be distinguished from interpersonal reconciliation and the expectations that such processes create. Political reconciliation does not call for the denial of the past or even amnesia about the past. However, it does call for commitment to political interactions and engagement, which recognizes the possibility of creating a political community. Thus it is a

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<sup>9</sup> Andrew Schaap, *Political Reconciliation* (Routledge 2005)

tentative approach, ever a work in progress. This in turns underscores the essentially political dimension to constitutional processes.

Moreover, politics is about the interplay of actors (both leaders and their constituencies), institutions, processes and context. These elements are interconnected and cannot be de-linked. Political reconciliation must to that extent be led and managed. Likewise constitutional processes must be led and managed. Constitutional processes if developed in this way to create spaces for interaction, without foreclosing political imagining, may thus contribute a framework for political interaction between former enemies that may lead to political reconciliation. Clearly there are no definitive blue prints to be implemented but a search for a framework that provides opportunities for political imagining, dialogue and interactions and the creation of a new political future.

It is now recognised that retribution, compensation or knowing the truth goes some way towards bringing closure to victims and survivors<sup>10</sup> but such approaches cannot transform a society.<sup>11</sup> Some academics and practitioners strongly argue

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<sup>10</sup> See- <https://www.ictj.org/sites/default/files/ICTJ-NPL-Relief-to-Reparations-Report-2011-English.pdf>

<sup>11</sup> The soul-searching questions remain: How does the state respond to the past and relate to its future? How can a state transcend the repressions of the past and create a liberal order - by what mechanisms? To whom should the state show this commitment? Does it show this commitment to the victims of its aggressions, to all its nationals, and to the international community? Sixty years and more have passed since World War II and such questions continue to be raised in Japan, which seeks to circumvent constitutional prohibitions against military engagement, and in Germany with its continued bans on illiberal political parties, and restrictions on free speech which may deny the Holocaust. Germany's constitution and

that such efforts that focus on the past, through trials and military and government purges only undermine the peace building efforts, and give too little emphasis to future-oriented forms of justice.<sup>12</sup> Such forms of justice would include the strengthening of the rule of law, and efforts to promote reconciliation.<sup>13</sup> Often there is tension between the promotion of justice and the promotion of peace building. Fundamental to this tension is the question of how peace building is defined.<sup>14</sup>

In the Gacaca system in Rwanda, the attempt was to provide justice and reconciliation.<sup>15</sup> There are mixed views on whether

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indeed other post-war transitional constitutions set limits not only on what the political majority may do to counter the prospect of the emergence of an illiberal polity.

<sup>12</sup> See Jack Snyder and Leslie Vinjamuri, 'Trials and Errors: Principles and Pragmatism in Strategies of International Justice', *International Security*, Vol.28, No.3 (Winter 2003/04), pp 5-44.

<sup>13</sup> Jack Snyder and Leslie Vinjamuri, *Ibid* p. 12

<sup>14</sup> Is peace to be defined by the absence of war or in terms of social and political integration? If peace building is more than the absence of war, peace building must be underscored by the recognition of, and addressing the very issues that led to the conflict and break down of the social order. In this context one may ask how the ends of transitional justice may be achieved, if they are to be bounded by the needs to provide justice, accountability on the one hand, and national reconciliation and peace building on the other hand. One might also ask what instruments may best contribute to such a complex and multi dimensional process?

<sup>15</sup> Under the Gacaca system in Rwanda, communities at the local level elected judges to hear the trials of genocide suspects accused of all crimes except planning of genocide. The courts gave lower sentences if the person was repentant and sought reconciliation with the community. Often, confessing prisoners returned home without further penalty or received community service orders. More than 12,000 community-based courts tried more than 1.2 million cases

this approach has provided the healing and justice for victims and survivors, but in Rwanda it was believed that the criminal justice system was unable to cope with the overload and in any event reliance on the criminal justice mechanism alone would not address the need for social integration.<sup>16</sup>

### **Political Reconciliation through the “Constitution of Spaces”**

However, this view of interpersonal reconciliation is one dimension of a multi-layered process. Andrew Schaap argues that political reconciliation is in the realm of the possible and it is created with the “constitution of a space for politics.”<sup>17</sup> He points to the word “constitution” as having three distinct uses: It has a political sense, a legal sense and an ethical sense. In its political sense it refers to the founding act by which a space for politics is established; in its legal sense it refers to the constitutive law that delimits the space and in the ethical sense it denotes the “we” that both constitutes and is constituted in the founding act. The process overtime creates the political community that characterises itself as the “we”.

Political constitution thus involves both a beginning and a promise. The promise is the commitment to that new

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throughout the country. The Gacaca trials also provided a means for victims to learn the truth about the death of their family members and relatives. They also gave perpetrators the opportunity to confess their crimes, show remorse and ask for forgiveness in front of their community. See [www.unictr.org](http://www.unictr.org), [www.unmict.org](http://www.unmict.org) or [www.un.org/preventgenocide/rwanda](http://www.un.org/preventgenocide/rwanda).

<sup>16</sup> See Bert Ingelaere, ‘The Gacaca courts in Rwanda’ in Luc Huyse & Mark Salter (eds), *Traditional Justice and Reconciliation after Violent Conflict Learning from African Experiences*, International Institute for Democracy and Electoral Assistance (IDEA 2008), pp 25-57



beginning. By interpreting the present as a founding moment or as a point of origin, political constitution implicitly draws a line under the past not by forgetting or suppressing the past but only by committing – in a shared sense to interact and engage with a view to create a new and common future. The focus on the creation of spaces rather than the end product, the very tentative nature of the interactions - its wish rather than its determination, creates opportunities and prospects. In this context, peace accords and agreements, interim constitutional processes moving to consolidate constitutions through constituent assemblies and other such processes have much to contribute towards constructing such spaces. Such an approach begs commitment, patience to be exercised over a long period of time. It requires discarding fixed positions or at any rate reducing them to a bare minimum.

The linkages between political transition, conflict management, and constitution making have caught the public imagination given the spate of post-transition and post - conflict constitution-making processes that emerged after the fall of the Berlin wall, the genocides in Asia (Cambodia) and Africa (Rwanda), the overthrow of military regimes in Latin America, the breakup of Yugoslavia and more recently, the Arab Spring. However, revisiting this opportunity as “constitution of a space for politics” rather than the prescription for conflict management or peace building is useful. It is not a matter of semantics but of perspective.

Distinguishing between “constitution” and “constitutional law,” Schaap points out the paradoxical relationship between them. Constitution as the space for politics is distinguished from constitutional law, which to establish its own legitimacy is seen as representing the identity of the people as already existing. In this way and by such assumptions, law can undercut political reconciliation by over-determining the

terms in which it can be enacted. Thus, while it is not possible to entrust the task of sustaining reconciliation to a legal constitution, the freedom exemplified in the act of constitution must be involved to sustain reconciliatory politics in the future.<sup>18</sup> If a constitution establishes a space for reconciliatory politics, it must be sustained by a willingness to forgive. While it may be difficult for individuals to forgive as an act of will, it is possible to seek and establish the grounds for forgiveness through a process of political reconciliation.<sup>19</sup>

### **Understanding the Many Dimensions of Reconciliation – Political Reconciliation and Constitutional Politics**

Political reconciliation entails not only reconciliatory politics but also the politicisation of the terms within which reconciliation is enacted. This requires affirming reconciliation as an aspiration that sustains politics by providing for the encounters between enemies in which they might debate the possibility and the terms of their association. The logic of reconciliation is the tendency to settle and close what should remain open, incomplete and contestable. Politics must be invoked to resist that logic, the pacifying approach to reconciliation.

In conceiving reconciliation politically, we need to reverse the order of our moral thinking. It is a political mistake to presuppose a moral community that must be restored. Political reconciliation should begin with an understanding that the “we” is not yet formed. It is less than an embryo. Yet it proceeds from a faith in the possibility of creating such a

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<sup>18</sup> Schaap, *Ibid* note at 9 p.7

<sup>19</sup> Schaap, *Ibid* note at 9 p.77

“we” and towards a shared understanding of the events that went before.<sup>20</sup>

Thus, political reconciliation should be conditioned by an awareness of its own impossibility. While the aspiration to reconcile makes politics possible between former enemies in the present, any final reconciliation is a political impossibility, as this would entail overcoming all future eventualities. As the history of inter-state and intra-state negotiations demonstrate, once vital boundary disputes and security issues may get transformed into disputes over water, migration, labour rights. The claims for rights are in effect a call for security. The call for security in its many forms (such as security of identity, resources, and political access through constituencies), calls for a constant re-definition and expansion of rights. To see reconciliation, peace and security as fixed term concepts and the claims for their re-definition as betrayal or renegeing on agreement is counterproductive. It is the ultimate paradox that political reconciliation is a political good so long as it is not realised.<sup>21</sup>

Reconciliation as traditionally conceived, involves the re-integration of the wrongdoer into the moral community once he or she has accepted that he or she has wronged others. However, there are dilemmas in dealing with moral entities such as moral communities upholding moral truths. Politics invariably involves different groups with different versions of the moral truth clashing over the definition of the moral truth. While moral truths must be universal, the process of contextualising these moral truths and applying them within any particular society, may take its own form and dynamics. While establishing a community between the wrong doer and

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<sup>20</sup> Ibid

<sup>21</sup> Ibid

the wronged under these terms is problematic, it is better served to see reconciliation as the provisional outcome of their tentative political interactions. The very provisional nature of it, the ever-present possibilities of disruption, create the incentives for continued engagement.

## **Lessons from Guatemala**

The challenges of drawing a line under the past and securing political reconciliation are well illustrated in the conflict and peace process of Guatemala. The civil war in Guatemala spanned three decades and more, from 1960-1996, and was brought to an end in 1996 through the signing of the Agreement for Firm and Lasting Peace: The Agreement consisted of 13 peace accords negotiated between the government and the Guatemala National Revolutionary Unit (URNG).<sup>22</sup> The accords created human rights obligations to clarify past human rights violations, a United Nations Verification Mission, and addressed the issue of impunity.<sup>23</sup> The accords mandated constitutional amendments, redefining Guatemala as a multi-ethnic, multicultural and multi-lingual nation. Thus the accords provided for the first time, a legal basis for indigenous groups to make claims from the state. By giving legal recognition to the experiences of the indigenous communities throughout the civil war and their claims on the state, the accords were and remain as testaments of the need

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<sup>22</sup> See- *Negotiating rights: The Guatemala peace process 1997*, Conciliation Resources, Issue No: 2; *The Guatemalan Peace Accords*, NACLA Report on the Americas, May/June 1997

<sup>23</sup> The agreement on the strengthening of Civilian Power recognised the need to reform and modernise the administration of justice. The Peace Accords recognised the structural underpinnings of the conflict and required extensive constitutional reforms to re-structure and limit the functions of the army and security forces to protect from future human rights abuses.

for Guatemalans to re-examine their history, and their national character, in the hope that the process would contribute to a process of reconciliation.<sup>24</sup>

To give effect to the Guatemala Peace Accords and implement such constitutional changes would also require additional legal and administrative reforms to recognize indigenous languages, promote their use in schools and the courts, outlaw discrimination against indigenous people, recognize and permit customary law, recognize and validate indigenous beliefs and practices, provide indigenous groups greater role in local governance and provide for equity based land reforms and access to other resources.

The main elements of the accords required ratification in a popular referendum.<sup>25</sup> Conservative forces, sowing confusion and doubts about the accord, apparently manipulated the referendum process in Guatemala. Only 18% eventually turned up to vote and the referendum failed.<sup>26</sup> Since then the government has not prioritized implementing the accords. The succeeding presidents came from parties that were not

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<sup>24</sup> Craig Kauffmann, 'Transitional Justice in Guatemala: Linking the Past and the Future', Paper presented at ISA-South Conference Miami, Florida, November 3-5, 2005, p.15

<sup>25</sup> Referendums are seen as the ultimate participatory device to elicit the popular will but they can be the blunt instruments to cajole the electorate or provide for the sleight of hand of ingenious politicians in determining the popular will. How the referendum question is framed, what Hobson's choices it provides for many become the most crucial determinants. Peace accords subjected to referendums are vulnerable to this risk.

<sup>26</sup> Guatemala's Crippled Peace Process: A Look Back on the 1996 Peace Accords, Council on Hemispheric Affairs Forum, <http://www.coha.org/guatemalas-crippled-peace-process-a-look-back-on-the-1996-peace-accords/>

signatories to the accords and there has been little political will to implement them.<sup>27</sup>

Despite the failure to incorporate constitutional reforms, Guatemala did deliver on some of the provisions within the human rights accords; one of these was a truth commission. The internationally sponsored Historical Clarification Commission (CEH) began its work only after the signing of all the accords (no doubt to prevent the derailment of the accords) and despite its weak mandate played an important role in uncovering Guatemala's collective memory and using it as a tool of social reconstruction.<sup>28</sup> Time will tell if Guatemala will return to conflict to settle the unfinished business of inclusion and of rights promised but not delivered through enabling constitutional, legislative and administrative processes.

### **Lessons Learned from South Africa**

South Africa recognised that constitutional politics of reconciliation must be linked to questions of time and identity. If reconciliation is to be political, it must also be historical. Reconciliation politics must be enacted in the gap between past and the future, between memory of the offences and the anticipation of community. Constitution is “world rupturing” to the extent that it breaks with the past and creates the new. This requires former enemies to establish shared expectations through promising a new and shared political order. This is the world-delimiting moment of constitution.

Such an approach, adopted in South Africa, created the basis for the interim constitution and a settled constitution that

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<sup>27</sup> Craig Kauffmann Ibid note at 26

<sup>28</sup> Ibid note at 26 pp. 21-22

attempted to address the political concerns of members of the former Apartheid regime, and the Black majority. It also attempted to address the concerns of the women, minorities, and rural and traditional communities. Its overarching commitments are to equality, non-discrimination and to human rights and dignity. The South African constitutional process was the most noteworthy in pursuing a process by which to “constitute the spaces”.<sup>29</sup> Through a series of political initiatives and gambles, the South African (White) leadership of that time de-constructed the legal and administrative barriers it had created over time through the Apartheid regime and created the spaces to negotiate with the leadership of the African National Congress (ANC) – itself open and willing to enter into such negotiations. The unbanning of the ANC, release of prisoners, the repeal of racist legislation, and creating conditions of political normalisation established the framework for addressing substantive issues that led to a relatively peaceful transition to democracy.<sup>30</sup>

In the euphoria of applauding what now seems a seamless transition, what is often forgotten is the violence that accompanied it, the years of conflict, the years of negotiations, the disjuncture in the process that periodically brought it to near collapse. Equally, in the constructing of space for reconciliation, the possibilities were enhanced by the parties agreeing to constitutional principles that would be the agreed-upon basis for further negotiations. The ANC was conscious that the White community was anxious that there would be revenge and political vendettas, along with their economic and social marginalisation. The ANC was anxious to maintain a stable transition and wanted to ensure economic stability

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<sup>29</sup> Schaap, *Ibid* note at 9 p. 12 and pp. 77-86

<sup>30</sup> See Eldred De Klerk, *Owning the process: Public participation in peace making*, Conciliation Resources, 2002, Accord issue: 13

and good management as well.<sup>31</sup> Parallel to constitutional discussions was the creation of the Truth and Reconciliation Commission. The Truth Commission provided for truth telling to acknowledge and record the injustices and crimes perpetrated under Apartheid, but also provided for amnesties where such crimes were admitted to and acknowledged. By conducting the parallel processes it did not prevent the constructive constitutional imagination to take place, even as the Truth Commission uncovered and publically revealed the heinous crimes that had taken place in the name of Apartheid and in the name of liberation from Apartheid over decades.<sup>32</sup>

The Interim Constitution of South Africa (1993) set out the terms of this political engagement: “With this constitution and these commitments, we the people of South Africa open a new chapter in the history of our country.” The South African Constitution, described as the “autobiography of the nation,”<sup>33</sup> gives prominence to the protection of human rights and to its commitment to creating "a society based on democratic values, social justice and fundamental human rights."<sup>34</sup> While the constitution recognises the need to derogate certain rights under states of emergency, it creates a presumption against such derogation on the grounds that it must be "reasonable and justifiable in an open and democratic society" and must take several factors into consideration. It also lists a number of rights that may not be derogated under any circumstances.<sup>35</sup>

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<sup>31</sup> Eldred De Klerk, Ibid pp 18-19

<sup>32</sup> Truth and Reconciliation Commission of South Africa Report: Palgrave Macmillan UK, 5 May 2001

<sup>33</sup> Hassen Ebrahim, *The soul of a nation: constitution-making in South Africa*, (Oxford University Press 1998)

<sup>34</sup> See Preamble, Constitution of South Africa 1996

<sup>35</sup> See Chapter 2 Constitution of South Africa 1996



The founding provisions of the Constitution also reaffirm South Africa's commitment to equality, law and democracy.<sup>36</sup> Recognising the pluralism of the country and that language goes to the heart of identity issues, the constitution recognises eleven official languages and beyond the official languages guarantees that everyone has the right to use the language and participate in the cultural life of his or her choice.

South Africa's constitutional process and its reconciliation process were nationally articulated over an extended period of time. By empowering the Constitutional Court to review legislation and executive acts and by making the document a public document through intensive civic education programmes, South Africa has taken pains to ensure that the constitution is a living document, discussed, debated and revisited in constructive terms.<sup>37</sup>

### **Truth and Dignity Commission of Tunisia**

In the aftermath of the Arab Spring, Tunisia enacted a new constitution and was up-front in rooting its genesis in its populist revolution. This is reflected in its Preamble,<sup>38</sup> in

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<sup>36</sup> This requires confirming principles of non-racialism and non-sexism, supremacy of the constitution and the rule of law, and provision that lays down the country's democratic philosophy by stipulating "universal adult suffrage, a national common voters' roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness."

<sup>37</sup> Hassen Ebrahim Ibid note at 33

<sup>38</sup> See Preamble, Tunisia Constitution 2014

In the Name of God, the Merciful, the Compassionate  
We, the representatives of the Tunisian people, members of the  
National Constituent Assembly,  
Taking pride in the struggle of our people for independence, to build  
the state, for freedom from tyranny, responding to its free will, and

provisions relating to human rights,<sup>39</sup> and in specific provisions relating to Transitional Justice, including provisions that denied the statute of limitations and retroactivity in relation to such crimes.<sup>40</sup> A unique and vital feature of Tunisia's transitional justice law was the inclusion of financial corruption and misuse of public funds within the Truth and Dignity Commission's mandate<sup>41</sup>. Champions for this ground breaking provision successfully argued that human rights violations encompassed and were inseparable from corruption and graft, as the Ben Ali regime preyed on ordinary citizens and used financial controls to marginalise and punish its opponents. In this regard, Tunisia's transitional justice process is a crucial experiment – and one that is being closely watched by other countries in which gross human rights violations are

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to achieve the objectives of the revolution for freedom and dignity, the revolution of December 17, 2010 through January 14, 2011, with loyalty to the blood of our virtuous martyrs, to the sacrifices of Tunisian men and women over the course of generations, and breaking with injustice, inequity, and corruption, .....

<sup>39</sup> Article 23- the state protects human dignity and physical integrity, and prohibits mental and physical torture. Crimes of torture are not subject to any statute of limitations.

<sup>40</sup> Title Ten: Transitional Provisions Article 148 (9). The state undertakes to apply the transitional justice system in all its domains and according to the deadlines prescribed by the relevant legislation. In this context the invocation of the non-retroactivity of laws, the existence of previous amnesties, the force of *res judicata*, and the prescription of a crime or a punishment are considered inadmissible.

<sup>41</sup> Organic Act 2013-53 governs the organisation of transitional justice in Tunisia on the establishment and organisation of the transitional justice system. This law was enacted by the National Assembly on 15 December 2013, signed by the President of the Republic on 24 December 2013 and published in the Tunisian Official Gazette on 31 December 2013.

closely linked to widespread corruption.<sup>42</sup> The process in Tunisia is facing its own challenges, and in the aftermath of recent terrorist attacks, the state was tempted to reinstate draconian legislation, reminiscent of the past to combat terrorism.<sup>43</sup> Furthermore, in the face of economic pressures and the need to have the support of the business community, measures are being contemplated to water down the penalties for economic crimes.<sup>44</sup> Human rights activists however contest this approach.

### **The Tensions between Transitional Justice, Law and Politics in Sri Lanka**

Constitutions involve the articulation of the irreconcilable logics of law and politics. The law looks to the past to bring the future under control, while politics can look to the openness of the future, and imports what is not yet formulated as its enabling condition in the present. Yet the institutionalisation of promises within the legal document tends to over-determine the terms within which reconciliatory politics is established and often undermines the prospects of such politics of reconciliation.

There is a danger of reducing constitutions to rules and regulations that discipline conflict and not see them as the act by which people constitute themselves into a body politic. This is the moment when citizens are most alive to the challenge of political construction. This is the moment when they recognise their differences and yet try to establish principles of justice and fairness and equality and equity.

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<sup>42</sup> Shannon Green, *On the Rocks: Tunisia's Transitional Justice Process*, The Center for Strategic and International Studies, 14 October 2015

<sup>43</sup> Also see Rim El Gantri, *Tunisia in Transition*, ICTJ briefing, September 2015

<sup>44</sup> Rim El Gantri, *Ibid*

As the case of Sri Lanka demonstrates, law can also frustrate political reconciliation by representing “community” as the given end of politics rather than as a contingent historical possibility. Entrenched constitutional clauses defining the state in unitary and majoritarian terms (prioritising Buddhism and the Sinhala language) has laid the foundations for a bitter conflict between the majority Sinhala community and the Tamil minority on issues of identity, boundaries, resource allocation and security.<sup>45</sup> The constitutional provisions continue to be the boundaries of both the legal system and of political imagination.

However, having said that, constitutions involve the articulation of the irreconcilable logics of law and politics. My assertion begs the question of whether the constitution is required to do more than articulate the irreconcilable. Must it in the final analysis, balance or prioritise conflicting claims to any extent, and if so, how? Does law have the potential in transformative politics to create a rights culture, and if so, how can it be mobilised? Liberal legal systems with a centrality on individual rights focus on a rights culture, but the creation of a collective right may also be called up in post conflict societies. The South African constitutional process is described as one and at the same time as a dis-entrenching constitution and a constituting constitution in that the constitution was a bridge

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<sup>45</sup> Prof. Sarath Amarasinghe, ‘Sri Lanka at Crossroads; Continuity and Change’, 9th International Conference on Sri Lankan Studies, 28th-30th November 2003, University of Ruhuna, <http://www.slageconr.net/slsnet/9thicsls/9thicslsabsfull.pdf>; Nira Wickramasinghe, ‘Understanding ethnic conflict in Sri Lanka, Sri Lanka’s conflict: culture and lineages of the past’, 19 July 2010, Sri Lanka Guardian, <http://cnpublications.net/2010/07/20/understanding-ethnic-conflict-in-sri-lanka/>, last accessed August 2016

from the past in its efforts to create a new political and social order.

Legal processes offer established means of changing public reasoning in the political order, as the legal process presents itself as being grounded on authoritative representations of public knowledge (or knowledge of what is the public good). To the extent that transitional justice implies a focus on the corrective, emphasises political unity, a way of reconstituting the collective across racial, ethnic, and religious divides, it is partial and limited. Its potential lies in its ability to reconstitute the community around the past with the view to committing to a better future. In that sense it is not politically neutral - it is purposeful. A political reconciliation oriented approach on the other hand, encourages an open, future-oriented approach of political imagining. The challenge is to create a bridge, linking the two processes.

The prospects for political reconciliation are greatly undermined where sovereignty is privileged because plurality is seen as a threat to political association (within a pre-conceived constitutional order) rather than as a condition of its constitution. In the case of Sri Lanka, denial of the Tamil minority demands for autonomy within a federal system led to a political struggle for a separate state which has in turn given way to an armed struggle for secession. The armed conflict raged for over twenty-five years costing many thousands of lives in deaths and injuries, internal displacement and economic damages. Thousands more have become refugees in India and other European capitals as asylum seekers. International mediation, primarily through a Norwegian brokered cease-fire created the initial and much needed space

to reconsider the terms of engagement.<sup>46</sup> Tentative indications that the Liberation Tigers of Tamil Eelam (LTTE), the militant group at the forefront of the armed struggle, would consider giving up its cry for a separate state provided that it could secure self-determination for the Tamils within a united country, and the government's acceptance that it would explore a federal solution to the conflict within a united Sri Lanka further indicated the rubrics for political reconciliation through the "constitution of a space for politics." This continues to be the framework that Tamil political parties pursue, in the aftermath of the military defeat of the LTTE in May 2009.

President Sirisena rode into power on a wave of discontent, promising good governance and national harmony. However, his recent statements that the probe into human rights abuses will be done through a national process and that a settlement could only be within the framework of a "unitary" constitution<sup>47</sup> appears to deny the lessons learned from the past and to foreclose spaces for dynamic engagement between the communities.

If reconciliation is to be understood politically, it is better thought of in terms of "revolution" rather than "restoration".<sup>48</sup> Thus reconciliation should not begin with fond collective memories of an idealised past state of harmony in terms of which the present state of alienation might be

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<sup>46</sup> Mark Salter, *To end a civil war: Norway's Peace Engagement in Sri Lanka*, (Hurst Publications 2016)

<sup>47</sup> S. I. Keethaponcalan, 'Constitutional Reform Proposal And Democratisation', Colombo Telegraph 14 February 2015 <https://www.colombotelegraph.com/index.php/constitutional-reform-proposal-and-democratisation/>, last accessed August 2016

<sup>48</sup> Schaap, *Ibid* note at 9 p. 87.

understood.<sup>49</sup> Rather it should begin with the invocation of a “we” (i.e. the political community) that exists only as a potentiality, as the basis of a new political order. Political reconciliation would then be initiated with the constitution of a space for politics, which would make possible a collective reckoning with the past.

### **Can the Karmic Veil of Ignorance be Invoked as a Basis of Dialogue in Sri Lanka?**

John Rawls addressed both the substance and process of constitution making. In substantive terms, he regarded justice as the objective of a constitution and justice was conceptualised in terms of fairness.<sup>50</sup> Does the constitution provide a framework for fairness? John Rawls’ idealised approach to constitution-making supports a gradual construction of political consensus, which is created on the basis of imagining beyond a karmic veil of ignorance. This contributes a dimension to the approach of thinking about constitutions in terms of reconciliation and the role of constitutions in shaping new political entities.<sup>51</sup> His approach recognises that a process of interaction and engagement is the basis of political appreciation and understanding and thereby reconciliation, through understanding, developing consensus and agreeing to future political action. The karmic veil of ignorance recognises that people are situated in unequal and even stratified circumstances. Gender, race, religion, class and physical attributes place people in unequal positions. The adoption of the “karmic veil” encourages some reflections on the possibilities of conflict due to this and it encourages the

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<sup>49</sup> Schaap, *Ibid* note at 9 p. 77

<sup>50</sup> John Rawls, *Theory of Justice* (Belknap Press of Harvard University Press 1971)

<sup>51</sup> *Ibid*.

selection of choices that are future oriented and indeterminate. The adoption of the “karmic veil of ignorance” provides the greatest scope and potential for political imagination – encouraging actors to make political choices with the awareness that they may not be the power holders in the indeterminate future. This approach encourages the constitution makers to devise institutions and processes and allocate resources in such a manner that even as the most disadvantaged community they will be able to live with dignity and secured rights.

In Sri Lanka, the majority of the population follow the principles of Buddhism and claim to be motivated in their personal lives by the laws of karma and karmic justice.<sup>52</sup> In this context, the logic of Rawls theory of justice may resonate. Yet, few politicians or civic groups have engaged in public debate using these terms and ideas. They present the communities of Sri Lanka as fixed and determinate entities with fixed and determinate interests. They further present the world around Sri Lanka, and the international and regional context, in fixed and determinate terms. They do not recognise that religion, class, gender and shared experiences of loss and suffering due to the conflict may have created intersecting linkages and opportunities for constructive dialogue. This rigid view has limited both political imagination and interactions.

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<sup>52</sup> Richard Gombrich and Gananath Obeyesekere, ‘Buddhism Transformed: Religious Change in Sri Lanka’, *V. 42, No. 2 (April 1992)* pp. 375-378 <http://enlight.lib.ntu.edu.tw/FULLTEXT/JR-PHIL/allen.htm>



## **Furthering the Aims of Transitional Justice by Fostering Political Reconciliation through Constitutional Reforms in Sri Lanka - Some Concluding Thoughts**

It is vital that civic groups committed to human rights, political parties, religious leaders, victim groups and the government of Sri Lanka work in concert to foster reconciliation. They each have their roles, their perspectives and points of access to the people.

Recognising the different dimensions of transitional justice, the history of missed opportunities, the scepticism of victims and survivors and drawing from their experiences of the cost of the protracted conflict, these groups should work as stakeholders on these various elements while staying committed to a common, overarching goal. The commitment to transitional justice would require their combined efforts to convince critical opinion makers and their constituencies of the need for reconciliation, the many dimensions of what constitutes reconciliation and what the public at large and the country will gain from such an approach.

It is necessary to “walk the talk”. The language of reconciliation must be matched by concrete actions. These actions include, a supportive policy framework, law reforms, the allocation of resources (human and financial resources), and administrative reforms. The Constitution provides the overarching framework for this, but prior to the constitutional process taking root, as in South Africa, a series of confidence building measures and enabling mechanisms must be put in place. Confidence building measures must go beyond placating rhetoric to address the material and psychosocial needs of the victims, such as the release of political prisoners, the return of occupied lands, the reform of the Prevention of

Terrorism Act and information on the status of the disappeared.

As a first step towards realising this process, The Secretariat for Coordinating Reconciliation Mechanisms was established and tasked with the design and implementation of Sri Lanka's reconciliation mechanisms.<sup>53</sup> Mechanisms under the Secretariat's purview include, the Office of Missing Persons, Truth, Justice, Reconciliation and Non-Recurrence Commission, Judicial Mechanism and the Office of Reparations. The 11-member Consultation Task Force includes six women and five men drawn from the three ethnic communities. The purpose of the Task Force is to ascertain the opinion of stakeholders on institutions and processes for transitional justice, which will in turn guide their design. The Task Force will design and direct the consultation process, recognising that the consultation process is the initial and integral part of the accountability and reconciliation process.

A parallel process on constitutional reforms is also taking place in Sri Lanka. While initial steps were taken to limit the powers of the executive presidency there is a move to transform the governance system from an executive presidency to a parliamentary system. Such a transformation requires bipartisan support. However, it is vital that the constitutional debate be framed around securing human security for individuals and communities, and should focus on securing interests and needs rather than specific positions. The specific political positions in effect reflect underlying needs. This open-ended approach provides greater opportunities to address both the past and the future. The minorities' need for physical security, economic security and security of identity underlie

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<sup>53</sup> The Secretariat comes under the Prime Minister's Office and was formed by the Cabinet of Ministers on 18 December 2015.

their demands for language and religious rights, employment, land, and political and administrative autonomy. These needs are not exclusive to the minorities alone and create the basis for a dialogue with the majority community. Furthermore, all the communities have an interest in establishing the rule of law and good governance. While basic human needs remain the same, other needs may emerge due to changed circumstances and so the negotiation of interests is on going and permanent and this should not be regarded as a threat. It is a fact of life. It calls for the political and civic leadership and the people to recognise this dynamic and engage constructively with this reality. Sri Lankans should seize the opportunity to reframe the debate to make it a political and social dialogue towards reform.

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## **Prospects for Transitional Justice in the Constitutional Reform Process of Sri Lanka**

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*Nabeela Raji*

## **Introduction**

The Transitional Justice discourse in Sri Lanka has fluctuated, with little progress, at different stages during the last 7 years since the end of the civil war. This lack of progress was mainly due to the culture of impunity and triumphalist rhetoric that prevailed during the reign of the previous political regime, which proved to be an impediment to the reconciliation process of Sri Lanka. During the first few months that followed the political transition in January 2015, although the new regime's reform agenda showed promise for initiating a credible process that catered towards reconciliation, the government's plans in the area of transitional justice were vague and fell short of illustrating how it would implement its commitments. However, a much needed boost to the transitional justice discourse occurred at the 30th session of the United Nations Human Rights Council (UNHRC), by the passing of Resolution 30/1 titled "Promoting Reconciliation, Accountability and Human Rights in Sri Lanka" on 1 October 2015<sup>1</sup>. In a historic and unprecedented move, Sri Lanka co-sponsored Resolution 30/1 (hereinafter the Resolution) with a number of other countries signifying that the State was ready to commit to the Resolution in full while taking ownership of its terms. The Resolution coincided with the recommendations in the Report of the Office of the High Commissioner for Human Rights and the commitments that the Sri Lankan government was willing to make towards promoting transitional justice.

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<sup>1</sup> UN Human Rights Council, Resolution 30/1, Promoting Reconciliation, Accountability and Human Rights in Sri Lanka, 1 October 2015, at [http://ap.ohchr.org/documents/dpage\\_e.aspx?si=A/HRC/30/L.29](http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/30/L.29), last accessed 28 May 2016

Several months later, with little progress having been made with regard to the commitments under the Resolution, some entertain the fear that the momentum which entailed the adoption of Resolution 30/1 in October 2015 has died down<sup>2</sup>. Furthermore, with Sri Lanka now contemplating the establishment of a new constitution, the prospects for transitional justice seem in danger of being delayed yet again, as the constitutional reform process will take center stage in the political agenda. However, it is in this respect that this chapter argues that Sri Lanka has yet another unique opportunity at hand to regenerate the conversation. With a new constitution, various stakeholders ranging from the state to civil society have an opportunity to initiate a new wave of action relating to transitional justice mechanisms that have definite, sustainable and long-term implications.

When the Sirisena-Wickramasinghe administration, which came into power in January 2015, initiated a constitution-making process, it was with the aim of achieving a solution to the socio-economic and civil-political problems of the country<sup>3</sup>. While abolishing the executive presidency, effective devolution of power and reforming the electoral process are key constitutional reforms being contemplated<sup>4</sup>, it has also been recognised that it is crucial and imperative to achieve a

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<sup>2</sup> Niran Anketell, 'Questions of Haste, Urgency and Consultations in Transitional Justice', *Groundviews*, 20 April 2016, at:

<http://groundviews.org/2016/04/20/questions-of-haste-urgency-and-consultations-in-transitional-justice/>, last accessed 28 May 2016

<sup>3</sup> 'New Constitution: PM presents resolution', *Ada Derana*, 9 January 2016, at <http://www.adaderana.lk/news/33725/new-constitution-pm-presents-resolution>, last accessed 28 May 2016

<sup>4</sup> Rohan Edirisinha, 'Why Sri Lanka deserves a new constitution', *The Sunday Observer*, 10 January 2016, at <http://www.sundayobserver.lk/2016/01/10/fea05.asp>, last accessed 28 May 2016

permanent solution to the country's ethnic conflict which will result in the establishment of a pluralistic Sri Lankan identity, through a new constitution<sup>5</sup>. This is where incorporating transitional justice mechanisms into the constitution will play a role.

### ***Constitutions and Transitional Justice***

Transitional justice has been defined as “the implementation of a set of judicial and non-judicial measures in order to redress the legacies of massive human rights abuses. These measures include criminal justice, truth commissions, reparations programs and various kinds of institutional reform”<sup>6</sup>. All of these measures together constitute a holistic transitional package that recognises the rights of victims, promotes reconciliation and civic trust and strengthens democratic rule of law.

A brief review of the transitional justice landscape in other countries<sup>7</sup> reveals that, in the post-conflict context, the promulgation of new constitutions have aimed to facilitate the attainment of a ‘just’ society by resolving conflict and maintaining the peace. Further, they attempt to achieve nation building, promotion of reconciliation and national unity. While no comprehensive model can be referred to due

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<sup>5</sup> Mangala Samaraweera, ‘Advancing Reconciliation and Development in Sri Lanka’ (Address by the Sri Lankan Minister of Foreign Affairs at the US Institute of Peace in Washington DC, 25 February 2016), at

<https://www.colombotelegraph.com/index.php/advancing-reconciliation-development-in-sri-lanka/>, last accessed 28 May 2016

<sup>6</sup> “What is Transitional Justice?”, International Center For Transitional Justice, at <https://www.ictj.org/about/transitional-justice>, last accessed 31 May 2016

<sup>7</sup> Namely, Kenya, Tunisia and South Africa.

to there being no “one size fits all” package for implementing transitional justice, it is noteworthy that countries emerging from conflict which engaged in constitution-making were aware of the role that constitutions play in the process of restoring dignity to individuals, communities and the country, and to establishing the equality of all citizen groups.

In Sri Lanka, the civil war that resulted in widespread death, destruction and displacement was rooted in ethnic tensions that still continue to divide Sri Lankan society.<sup>8</sup> Reconciliation and a credible process to address truth and justice is the need of the hour. While the current political context in Sri Lanka has been far more conducive to transitional justice processes than previous experience has shown, progress in terms of implementation has been snail-paced. The delay in effecting the relevant mechanisms will risk the political space that was painstakingly achieved to legitimise the need for transitional justice; further, the unfolding of transitional justice processes typically stretches on for decades and delays in initiating them will result in interminable protraction. While lack of political momentum deters the process of reforms from being brought into fruition, a further cause for setback can arise from the fact that, the transitional justice discourse lacks sufficient anchorage in the socio-political and legal framework of Sri Lanka. This anchorage could be gained by the adoption of a new constitution that addresses the importance of transitional justice. Indeed, in South Africa, which conducted one of the most celebrated transitional justice programs in contemporary times, the promise of a new constitution was perceived as the “glue that held the transitional program together<sup>9</sup>.” As such,

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<sup>8</sup> Ayesha Zuhair, ‘Dynamics of Sinhala Buddhist Ethno-Nationalism in Post War Sri Lanka, Centre For Policy Alternatives 2016

<sup>9</sup> Howard Varney, ‘Breathing Life Into the New Constitution: A new constitutional approach to law and policy in Kenya: lessons from



there is an urgent need to anchor Sri Lanka's transitional justice commitments into its governance framework, through its integration into the constitution.

***Implications for Transitional Justice Through Its Incorporation into the New Constitution***

The constitution is the supreme law of the land, and although constitutions have been subjected to the regretful tendency of being breached more than observed, it reflects and enshrines the fundamental values and principles that govern a particular society. Incorporating principles of transitional justice in the constitution signals that a nation is committed to building a bridge out of an abusive past and into a different future; i.e. to break cycles of violence, combat impunity and denial and acknowledge the suffering of victims, ensuring accountability for their crimes.

In this regard, constitutionalising transitional justice has several advantages. Firstly, due to transitional justice mechanisms obtaining constitutional legitimacy, it will oblige the government of the day to address the past meaningfully. Transitional justice being enshrined as a fundamental value will ensure that the government is prevented from shirking their responsibilities or stalling the process altogether. Lack of political will could be remedied. For example, in Tunisia, where there were concerns that the transitional justice process may face obstacles in its implementation due to the change in government, the constitution provided for the protection of those transitional justice processes and ensured that they were not stalled<sup>10</sup>. The second advantage is that it will empower the

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South Africa', Kenya: International Center for Transitional Justice 2011

<sup>10</sup> 'Tunisia transitional justice faces obstacles', *Al-Jazeera*, 1 January 2015, at

people to hold the state accountable if the transitional justice process is not carried out. In Nepal, for instance, when the president promulgated an ordinance establishing a “Commission on the Investigation of Disappeared, Truth and Reconciliation” which was to merge the functions of two separate bodies, civil society advocates resisted the move due to the mechanism containing significant flaws, and followed through with litigation citing constitutional grounds against its implementation<sup>11</sup>. Thirdly, any transitional justice measures that are enacted can be tested against the constitution. For example, in Colombia<sup>12</sup>, the demand for a truth commission was incorporated into the constitution as a framework for peace. This meant that the parties who were engaged in peace negotiations were aware that standards existed and any attempt to tinker with them could be challenged in courts. The constitution thus sets out the standards for any transitional justice mechanism that is to be adopted. These advantages, which have been experienced in other countries, present a strong case for the inclusion of transitional justice in Sri Lanka’s context. However, it is also necessary to understand the political realities that indicate Sri Lanka’s

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<http://www.aljazeera.com/news/middleeast/2014/12/tunisia-transitional-justice-face-obstacles-20141228112518476386.html>, last accessed 29 May 2016

<sup>11</sup> Elena Naughton, ‘Nepal: Case Study’ in *Challenging the conventional: Can Truth Commissions Strengthen Peace Processes* (New York: International Center for Transitional Justice, 2014), at [https://www.ictj.org/sites/default/files/ICTJ\\_TruthCommPeace\\_English\\_2016.pdf](https://www.ictj.org/sites/default/files/ICTJ_TruthCommPeace_English_2016.pdf), last accessed 01 June 2016

<sup>12</sup> *Challenging the conventional: Can Truth Commissions Strengthen Peace Processes* (New York: International Center For Transitional Justice, 2014), at [https://www.ictj.org/sites/default/files/ICTJ\\_TruthCommPeace\\_English\\_2016.pdf](https://www.ictj.org/sites/default/files/ICTJ_TruthCommPeace_English_2016.pdf), last accessed 01 June 2016

stance and potential in taking such a step in the course of constitutional reform.

The constitutional reform process of Sri Lanka has been in motion<sup>13</sup> since the defeat of the Rajapaksa regime in the 2015 Presidential Election of Sri Lanka. The first phase of the reform process<sup>14</sup> of the new government resulted in the Nineteenth Amendment to the Constitution<sup>15</sup>, which came into being amidst much political chaos. The final text of the amendment, which was produced as a result of much political wrangling, was a diluted and weakened version from that which was originally proposed and fell short of the expectations entertained by those who voted for a change of

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<sup>13</sup> ‘Maithri Proposals On Constitutional Reforms: Full Text’, *Colombo Telegraph*, 9 February 2015, at

<https://www.colombotelegraph.com/index.php/maithri-proposals-on-constitutional-reforms-full-text/>, last accessed 02 June 2016

<sup>14</sup> The reform process was packaged as the “100-day programme”, which was the new government’s manifesto upon taking office after the election. The programme included various measures of institutional reform aimed at realising the objectives of good governance. See: ‘Maithripala Sirisena’s 100-Day Work Programme; Detailed Diary Description’, *Colombo Telegraph*, 20 December 2014, at

<https://www.colombotelegraph.com/index.php/maithripala-sirisenas-100-day-work-programme-detailed-diary-description/>, last accessed 01 June 2016

<sup>15</sup> The principal changes to the constitution that were brought in by the Nineteenth Amendment involved, *inter alia*, changes to the executive presidency, the establishment of the Constitutional Council and independent commissions and changes to the legislature. See: “A Brief Guide to the Nineteenth Amendment to the Constitution” (Centre For Policy Alternatives 2015) at <http://www.cpalanka.org/wp-content/uploads/2015/05/A-Brief-Guide-to-the-Nineteenth-Amendment.pdf>, last accessed 01 June 2016

regime in January 2015. Its adoption brought to the forefront the tensions underlying Sri Lanka's contemporary politics and indicates the messy and burdensome nature of negotiating with competing political interests<sup>16</sup>. Additionally, there is the burden of dealing with rising discontent amongst the electorate, who are incensed by economic distress and renege promises on the part of the government. These tensions have not subsided and one can expect that they will continue to influence the fragile constitutional reform process that is currently underway. As such, the coming months will witness much political conflict and drama in the area of constitutional reform.

The transitional justice framework of Sri Lanka faces similar challenges. While the UNHRC Resolution 30/1 on Sri Lanka provides a useful roadmap to achieve meaningful reconciliation amongst Sri Lankans, the current political context and socio-economic reality of Sri Lanka runs the risk of making the commitments under the Resolution seem too ambitious to be effectively achieved within a limited time frame. Thus far, significant progress with regard to transitional justice processes in Sri Lanka is yet to be realised, as discussions on designing and implementing mechanisms of accountability and reconciliation are contested and remain politically sensitive. President Sirisena's government has repeatedly pledged support for a "credible domestic model" for ensuring reconciliation<sup>17</sup>, a stance that seeks to mollify

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<sup>16</sup> Kalana Senaratne, 'The Politics of Negotiating Competing Interests in promulgating the Nineteenth and Twentieth Amendments' in Asanga Welikala (ed) *The Nineteenth Amendment to the Constitution*, (Centre For Policy Alternatives 2016)

<sup>17</sup> Bhavani Fonseka, 'Exploring International and Domestic Modalities for Truth and Justice in Sri Lanka', *Groundviews*, 2 September 2015, at <http://groundviews.org/2015/02/09/exploring-international-and->

political factions that perpetuate the popular misconception that anything international and not “home-grown” stems from a western conspiracy to undermine the nation’s sovereignty. This paranoia stems from the ideology of Sinhala Buddhist nationalism which has heavily influenced historical and cultural conceptions of the state and has been the bane of many attempts to address the ethnic tensions still prevalent in the country<sup>18</sup>. As a solution of sorts, these political voices have put forward the preference for a domestic model, which may contain inherent flaws, but at the very least, would ensure national sovereignty and sensitivity to local (political) needs. This reality could result in the fact that, what will be implemented as truth and justice mechanisms may be vastly different from the reforms envisaged in the Resolution, and may fall short of the expectations of victims and the minimum standards<sup>19</sup> required in the establishment of these mechanisms.

In such a climate, one may pose a legitimate question: Given the challenges in the Sri Lankan context in the areas of constitutional reform and implementation of transitional justice, how practical is the attempt to consolidate the two processes? This question expresses a valid concern; both constitutional reform and transitional justice are politically sensitive issues and calls to recognise transitional justice processes in the constitution may result in pushback towards the fragile constitutional reform process, which the country

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[domestic-modalities-for-truth-and-justice-in-sri-lanka/](#), last accessed 29 May 2016

<sup>18</sup> Asanga Welikala, ‘*Yahapalanaya* as Republicanism’, in Asanga Welikala (ed) *The Nineteenth Amendment to the Constitution*, (Centre For Policy Alternatives 2016)

<sup>19</sup> For examples of such minimum standards, see section on “Constitutionalising guiding principles for the establishment of transitional justice mechanisms.”

cannot afford at this juncture. In this regard, it is important to consider the context and rationale that is the basis of the constitutional reform process of Sri Lanka. On the one hand, constitutional reform is needed in light of the realities of the previous regime; it is being aimed at creating a constitutional transition from what was becoming an increasingly authoritarian state to a republican constitutional democracy. Furthermore, it is an attempt to safeguard against the breakdown of rule of law and prevent corruption through institutional reform. On the other hand, the constitutional reform process is also aimed at achieving a permanent solution to Sri Lanka's ethnic tensions by establishing a strong Sri Lankan identity which promotes pluralism and social cohesion.

This gives rise to an interesting implication. The Sri Lankan constitutional reform process is essentially trying to create a sound framework for democracy and the rule of law, while also incorporating reforms that appreciate notions of collective identity. The latter is an important component of the transitional justice discourse on institutional reform. It would be difficult to achieve collective identity and social cohesion by ignoring the rights and needs of victims of conflict-related human rights violations. It is easy to connect the dots from this point. Incorporating transitional justice into the constitution is an act that gives constitutional recognition to national reconciliation, and would indicate the government's commitment towards genuine social cohesion that is long-term and sustainable.

Thus, for Sri Lanka, the promulgation of a constitution that recognises and provides for the process of transitional justice indicates the people's attempt to strike a delicate balance between forward and backward looking constitutionalism and establish a society based on democratic values, social justice

and respect for human rights. This in itself would serve to achieve the twin objectives of constitutional reform and reconciliation, which are both priorities in the government's reform agenda. Furthermore, it would appease political factions that perpetuate Sinhala Buddhist paranoia about an imminent conspiracy to undermine the nation's sovereignty by external forces; the adoption of a constitution that addresses transitional justice would satisfy the criteria of being a "home-grown" political solution.

It maybe argued that this is easier said than done. Furthermore, the question highlights another concern; although transitional justice may gain constitutional recognition, political turbulence can result in constitutional safeguards being ignored. Certainly, Sri Lanka is no stranger to this situation. However, this is where robust engagement by Sri Lankan civil society and political leadership that are sympathetic to the cause of transitional justice is essential; to set in motion discourse relating to the need for transitional justice in the constitution, and if the new constitution is promulgated, to ensure that it is used to consolidate democracy.

Given the intertwined nature of constitutional reform and transitional justice, the window of opportunity that has opened by the current constitutional reform process to incorporate principles of transitional justice is extremely valuable, as the success of such an endeavour would provide sufficient anchorage for transitional justice in Sri Lanka's socio-political and legal framework. At this critical juncture, the grievances and sentiments of victims who have long been denied justice should not be forgotten<sup>20</sup>, and their struggles must be

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<sup>20</sup> Nikhil Narayan, 'Sri Lanka's Victims Demand and Deserve Credible Justice', *Groundviews*, 23 February 2016, at

acknowledged if there is indeed a commitment to bring about lasting peace and reconciliation. This window of opportunity should be effectively mobilised by political parties and civil society groups, as such an opportunity may never arise again. Previous experience has shown how arduous and vicious the process of constitutional reform has been, in light of the politics of Sri Lanka. Failing to initiate this crucial step at such a convenient opportunity<sup>21</sup> will result in subjecting the victims of conflict related human rights violations to further delay in realising their rights and a sense of disillusionment about the government's sincerity towards ensuring national reconciliation.

### ***Incorporating Principles of Transitional Justice into a New Constitution***

Typically, a model Transitional Justice clause would take into account the pillars of transitional justice and its objectives. In this respect, the elements of a credible transitional justice policy would center around the Right to Truth, Justice, Reparations and Guarantees of Non-Recurrence. The constitution should include these rights and provide that the

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<http://groundviews.org/2016/02/23/sri-lankas-victims-demand-and-deserve-credible-justice/>, last accessed 28 May 2016

<sup>21</sup> Despite imperfections, the current political context of Sri Lanka has been far more conducive and proactive towards facilitating meaningful and credible reconciliation processes than any other time in political history, since the end of the civil war. For insight into the status quo and challenges ahead in respect of Sri Lanka's on-going transitional justice process, see: Dharisha Bastians, 'Never Again', *Daily FT*, 2 June 2016 <http://www.ft.lk/article/545490/-Never-again->, last accessed 03 June 2016



parliament must give effect to these rights through ensuing national legislation<sup>22</sup>.

An analysis of the constitutions of other countries which have provided for transitional justice shows that the four pillars of transitional justice have been incorporated by a) using language that establishes the importance of addressing the past as a coherent policy or by b) creating provisions that establish various means and mechanisms. Using this dichotomous approach, the following discussion will examine the principles and language used in the constitutions of other countries, when addressing the concept of transitional justice, and how these provide valuable guidance for Sri Lanka's constitution-making process.

### ***a) Addressing the Past as a Coherent Policy***

Language that stresses the importance of transitional justice as a policy principle has gained traction in many countries. What is significant about this approach is that it recognises that the trajectory of the state's governance, including the design and implementation of decisions of state institutions should take into consideration and reflect the principle of transforming legacies of past injustices. For example, the South African constitution states in its preamble that,

**“We the people of South Africa recognise the injustices of our past... believe that South Africa belongs to all who live in it, united in our diversity.**

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<sup>22</sup> Howard Varney, ‘Upholding Transitional Justice Through Constitutionalism, Speech presented at the conference “Promotion du dialogue national: La justice transitionnelle en Tunisie”, Tunis, 7- 9 March 2012

**We therefore ... adopt this Constitution as the supreme law of the Republic so as to heal the divisions of the past and establish a society based on democratic values, social justice, and fundamental human rights<sup>23</sup>.”**

Such language indicates that the nation recognises its historical divisiveness and commits to undo past injustices by establishing a new South Africa that is based on certain values and principles<sup>24</sup>. In the Colombian constitution, the commitment to address the injustices of the past is more direct, as evidenced by the following:

**“Transitional justice instruments shall be exceptional. Their principal objective will be the end of the internal armed conflict facilitation and the achievement of a stable and lasting peace, with the guarantees of non-repetition and security for all Colombians. Such instruments shall ensure at the highest possible level, victims’ rights to truth, justice and reparation<sup>25</sup>.”**

The language used in this instance directly recognises the importance of transitional justice mechanisms and provides

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<sup>23</sup> South African Constitution of 1996, Preamble.

<sup>24</sup> In this regard, broad, sweeping statements such as that of the South African constitution, may not necessarily cater towards dealing effectively with victims’ rights. However, considering the Sri Lankan political context, it would still be a milestone if the need to address the past was constitutionalised through even a preambular paragraph as the establishment of mechanisms to ensure victims’ rights can be extrapolated from such language.

<sup>25</sup> Colombian Constitution of 1991, Transitory Article 66.

for their objectives<sup>26</sup>. Further, the constitution legitimises mechanisms which guarantee victims' rights to truth, justice and reparations, which are the internationally recognised pillars of transitional justice and are the rights of victims<sup>27</sup> in the post-conflict context.

Sri Lanka too, has committed to address the grievances of the past. There is consensus that the rhetoric of triumphalism and culture of impunity that assumed center stage during the political reign of the previous regime must be shed; as such, writing the new constitution from a perspective of historical self consciousness and dedication towards providing redress to the victims of human rights violations, would be a manifestation of the genuineness on the part of Sri Lankan society towards addressing the past.

***b) Establishing mechanisms that address the four pillars of Transitional Justice***

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<sup>26</sup> Similarly, the Tunisian constitution in Article 148(9) provides that, “The state undertakes to apply the system of transitional justice in all its domains and according to the deadlines prescribed by the relevant legislation. In this context the invocation of the non retroactivity of laws, the existence of previous amnesties, the force of res judicata, and the prescription of a crime or a punishment are considered inadmissible.” The Tunisian constitution has enabled transitional justice to hold fort when faced with such inadvertent legal defences.

<sup>27</sup> United Nations Human Rights Council, Resolution 60/147, “Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law”, 16 December 2005, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N05/496/42/PDF/N0549642.pdf?OpenElement> , last accessed 03 June 2016

This approach is based on the four pillars of transitional justice. Thus, this approach provides for specific rights associated with transitional justice and the establishment of mechanisms which give effect to these rights.

### ***Guarantees of Non-Recurrence***

The adoption of a new constitution by a particular state in order to regulate the exercise of power, resolve conflict and maintain peace is in and of itself a powerful commitment to providing guarantees of non-recurrence. There can hardly be a more powerful way of bridging a divide between an abusive past and a future in which such abuses would not recur.

Guaranteeing non-recurrence usually involves a process of legal and institutional reform. Constitutional reforms tend to entrench institutional reform by enhancing the democratic process and strengthening the rights of victims as part of their non-recurrence policy. In this regard, countries which have engaged in constitution-making have grappled with issues such as the removal of discriminatory provisions, incorporating a bill of rights, security sector reform, separation of powers, establishing constitutional courts or the adoption of an altogether new constitution<sup>28</sup>.

These measures are exemplary to the Sri Lankan constitution-making process. Sri Lanka's Foreign Minister, Mangala

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<sup>28</sup> United Nations Human Rights Council (UNHRC), Pablo De Greiff, 'Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of non-recurrence', 7 September 2015, [www.ohchr.org/EN/HRBodies/HRC/RegularSessions/.../A\\_HRC\\_30\\_42\\_ENG.DOCX](http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/.../A_HRC_30_42_ENG.DOCX)

Samaraweera has stated that<sup>29</sup>, “the best guarantee of non - recurrence is of course a political settlement that addresses the grievances of the Tamil people. We hope that we can achieve this through the adoption of a new Constitution.”

The adoption of a new constitution is long overdue, as the current constitution has come under attack many times as flawed and against basic principles of constitutionalism. The strongest criticisms against the constitution<sup>30</sup> are, that it was designed to strengthen the executive branch of the government to the detriment of the other organs of the state, and that it entrenched majoritarianism, as an instrument that catered to the convenience of the political party in power. The bill of rights falls short of international standards and is easily subjected to curtailment by the whims of political branches. The electoral system is in much need of reform as the mixed system in place creates a mismatch between votes received by parties and seats allocated at parliament, which raises the question of whether Sri Lanka’s legislature is truly representative of its people.

Further, Sri Lanka is in much need of institutional reform relating to legal institutions, as evidenced by the inadequacy of the provisions in the constitution which protect the independence of the judiciary. Constitutional and post-enactment review of legislation by the courts, which the current constitution lacks, is imperative in order to uphold the

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<sup>29</sup> ‘Statement by Mangala Samaraweera at the 30th Session of the UNHRC, Geneva’, *News.lk*, 14 September 2015, <http://www.news.lk/features/item/9742-statement-by-mangala-samaraweera-at-the-30th-session-of-the-unhrcgeneva>, last accessed 29 May 2016

<sup>30</sup> Rohan Edirisinha, ‘The Need for a New Constitution for Sri Lanka’ in Asanga Welikala (ed) *The Nineteenth Amendment To the Constitution: Content and Context*, (Center For Policy Alternatives 2016)

supremacy of the constitution. Another reform that is of urgent need is the proper implementation of effective devolution of power, which, under the current constitution remains weak and ineffective. As the root causes of the ethnic conflict lay in calls for equality and devolution, the new constitution should ensure genuine power sharing arrangements<sup>31</sup> that will promote social cohesion and increased public confidence in state institutions.

In this respect, the Kenyan constitution is a case in point. It seeks to prevent recurrence of human rights violations by addressing the root causes of the inter-ethnic conflict which preceded the promulgation of the new constitution. The new constitution of 2010 reinforced national values and principles of governance that seek to dispel the forces that fuel ethnic tensions such as marginalisation and exclusion. Further, important state institutions were reformed; there were electoral reforms which enabled all segments of society to be represented equally in government and reforms of devolution mechanisms and land administration, which sought to entrench fairness and equality, while addressing historical injustices which reinforced discrimination and marginalisation<sup>32</sup>.

For Sri Lanka, this would mean addressing the inadequacies of the current constitution and creating a constitution which recognises human rights values such as equality, non-

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<sup>31</sup> In this respect, Sri Lanka is currently engaged in a constitutional reform process with power-sharing proposals for the Tamil-dominated Northern and Eastern Provinces being contemplated. It is hoped that this will help to demonstrate the government's commitment to guaranteeing non-recurrence in relation to ethnic strife. See note 20, above.

<sup>32</sup> Dr. M. Akech 'Institutional Reform in the New Constitution of Kenya', Kenya: International Center for Transitional Justice 2010

discrimination and freedom and national values such as democracy, the rule of law and social justice. The important principle that needs to be borne in mind is that constitutional reforms must be aimed at appreciating deeper ideas about collective identity and the state; indeed they play an important role in the societal conversation about seeking to prevent the recurrence of conflicts and human rights violations.

### ***The Right to Truth***

Under the right to truth, a typical transitional justice clause would incorporate the principle that every victim has the right to know the truth about the past and to give recognition to multiple narratives of human rights violations. This implies the ability to investigate into violations that still remain unknown and to disclose the truth about its causes and effects to the victims of justice, to their relatives and to the society as a whole. It is also important that an authoritative account of the history of the conflict is dispelled as part of the right to the truth.

Among the available means and mechanisms to ensure this right, the establishment of a truth and reconciliation commission (TRC) remains a popular initiative and has found constitutional recognition in countries such as Colombia, Nepal<sup>33</sup>, Burundi, among others<sup>34</sup>. An example is that of the

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<sup>33</sup> See Article 33 of the Interim Constitution of Nepal 2063 (2007), which obligated the government to set in place a number of transitional justice mechanisms, including a “high-level Truth and Reconciliation Commission.”

<sup>34</sup> Constitutions that require the setting up of commissions for truth and/ or reconciliation include Nepal 2006, Article 33(s); Burundi 1998, Article 150, 151, 152; Burundi 2004, Articles 269-273; Congo, Democratic Republic 2003, Article 154, 155; Rwanda 2003, Article

Colombian constitution, which, in transitional Article 66 sets out as follows:

**“A Truth Commission shall be created by statute. Such statute shall establish its purpose, composition, powers and functions. The Commission powers shall include recommendations for the implementation of transitional justice instruments, including the application of selection criteria.”**

However, even where the Right to Truth has not been specifically anchored in the constitution, a comprehensive bill of rights and principles relating to reconciliation, can be used to extrapolate the right to truth, justice and reparations and to give effect to mechanisms which achieve those rights. For example, in South Africa, the Promotion of National Unity and Reconciliation Act No 34 of 1995 was enacted pursuant to the principle of reconciliation between South African citizens that is emphasised in the constitution. The Act states that, “It is deemed necessary to establish the truth in relation to past events as well as the motives for and circumstances in which gross violations of human rights have occurred, and to make the findings known in order to prevent a repetition of such acts in future.” This statute established the Truth and Reconciliation Commission of South Africa<sup>35</sup>.

Under the Resolution, Sri Lanka is contemplating the establishment of an Office on Missing Persons and a Commission for Truth, Justice, Reconciliation and Non-

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178; East Timor 2002, Article 162; Sudan 2005, Article 21; Zimbabwe, Article 251, 252

<sup>35</sup> Aeyal M. Gross, ‘The Constitution, Reconciliation and Transitional Justice: Lessons from South Africa and Israel’, *Stanford Journal of International Law*, no. 40 (2004): 69



Recurrence as part of fulfilling the Right to Truth and the Right to Know. In light of the significant challenges and institutions and individuals that may derail the process of establishing and operating such processes, securing these mechanisms through the constitution would have far-reaching consequences. Sri Lanka should consider examining and following the example of other countries in this regard.

### ***The Right to Justice***

One of the most important elements of a comprehensive transitional justice clause in a constitution is that of providing for the right to effective accountability inclusive of criminal justice.

The relevant principle in respect of criminal justice is to prosecute and punish the perpetrators of abuses when those abuses can be determined to have been criminal in nature. This can be achieved through strengthening objectivity and accountability in investigations and prosecutions. For example, in Kenya's new constitution, the task of exercising the state's powers of prosecution was vested in the office of an independent Director of Public Prosecutions (DPP)<sup>36</sup>.

Sri Lanka's institutional and legal framework for the administration of justice has been held to be inadequate to address international crimes such as war crimes and crimes against humanity<sup>37</sup> which took place during the civil war. A special court dedicated to hearing these crimes has been

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<sup>36</sup> Kenyan Constitution of 2010, Article 157

<sup>37</sup> Rhadeena de Alwis and Niran Anketell, *A Hybrid Court: Ideas for Sri Lanka*, (South Asian Centre for Legal Studies 2015); Bhavani Fonseka and Luwie Ganeshathasan, *Hybrid VS. Domestic: Myths, Realities and Options for Transitional Justice in Sri Lanka*, (Centre For Policy Alternatives 2016)

committed to under the Resolution. However, the most amount of controversy surrounds this particular commitment, as there remains political opposition towards the purpose, nature and composition of the special judicial mechanism. The political confusion in this regard may be a roadblock to ensuring justice and accountability and incorporating such a mechanism into the constitution will be challenging. However, if such a feat were to be accomplished (which is not impossible, given the constitutional experience of other countries<sup>38</sup>), Sri Lanka will have crossed a historic milestone that has unparalleled implications for its reconciliation process.

### ***The Right to Reparations***

Effective remedies can also be non-judicial and this is where reparations come into play. Forms of reparations can be of a monetary or symbolic nature. Reparations should be adequate, prompt and effective<sup>39</sup>. As such, an obligation should be imposed on the government to grant reparations to victims in a manner that recognises the harms they have suffered, in the constitution. This can be achieved by using language in the constitution that recognises the right to a remedy when a person has been subjected to fundamental human rights violations, from which the right to reparations of victims in the transitional justice context can be extrapolated.

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<sup>38</sup> An example is the Constitution of East Timor of 2002 which provides in Article 163 for a transitional judicial organisation and gives effect to this body in the following manner: “1. The collective judicial instance existing in East Timor, integrated by national and international judges with competences to judge serious crimes committed between the 1st of January and the 25th of October 1999, shall remain in effect for the time deemed strictly necessary to conclude the cases under investigation.”

<sup>39</sup> See note 26 above

Furthermore, the constitution can include language related to addressing the past that would give rise to an obligation to provide for symbolic and monetary reparations for victims. However it is important that the relevant provision for reparations should be on the basis that it is a right of victims and not a discretionary benefit.

Under the Resolution, key aspects of the right to reparations being contemplated by Sri Lanka are, the establishment of an Office for Reparations, the acceleration of the process of returning of land to its rightful civilians and resolving land related issues such as land use and ownership. If these commitments are to be provided in the constitution, especially those related to land issues, the constitution should provide that the relevant measures should be designed to be egalitarian in nature and that care should be taken not to entrench past inequalities.

In this regard, it is pertinent to address the issue of feasibility, given the floundering economic context of Sri Lanka. With political capital poised towards orchestrating a solution to the economic crisis, monetary reparations that take into consideration the needs of victims may be dismissed as impractical. However this does not mean that the responsibility to ensure the right to reparations is dispelled; there are many forms of reparations<sup>40</sup> that do not necessarily involve monetary compensation. In such a situation, incorporating reparations into the constitution should be strategic and strike a balance between recognising and providing symbolic and monetary reparations.

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<sup>40</sup> Ibid

### ***Constitutionalising guiding principles in the establishment of Transitional Justice mechanisms***

In the event that transitional justice gains constitutional recognition, it is key that the constitution should include that national legislation or enabling legislation must be enacted to give effect to the rights ensured under transitional justice. Otherwise, the transitional justice provisions would not be enforceable. A timeline should be given to enact this legislation.

A model clause would incorporate a reasonable time frame for enforcing the relevant transitional justice mechanisms such as an 18 month period. The clause could then provide principles<sup>41</sup> that guide the nature of the mechanisms to be established by legislation. Examples of such principles are as follows.

- a) Fairness and impartiality of bodies such as commissions and judicial mechanisms.
- b) Independence and autonomy of such mechanisms.
- c) The requirement that members and staff of such mechanisms are suitably qualified and representative of society.
- d) The mechanisms have legitimate authority and powers to carry out their functions.
- e) The protection of the dignity and wellbeing of victims and witnesses.
- f) Provisions that disable statute of limitations and amnesties when there are serious violations of law under investigation by the relevant bodies.

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<sup>41</sup> See note 21 above.

Many constitutions, like those of Colombia and Tunisia provide for transitional justice measures as transitory provisions within a permanent constitution. They refer to a particular period within which the provisions are to apply. They include a time frame for the establishment and operation of transitional justice mechanisms; this is beneficial in the case of future mechanisms that may have to be established according to changing circumstances. Examples of such principles can be found in the Kenyan constitution and the interim constitution of Nepal. In the former, Article 261(1) lays down a timetable for adopting the necessary legislation to implement constitutional provisions, by stating that legislation related to judicial reform must be implemented within one year from the constitution taking effect. In the Interim Constitution of Nepal<sup>42</sup>, the National Human Rights Commission is established under Article 131 which deals extensively with the qualifications of the members and chairperson and the scope of the functions, powers and authority of the Commission.

Sri Lanka can apply these principles in its own constitution making process. The inclusion of such provisions would give constitutional legitimacy to the mandates of transitional justice mechanisms established by legislation, thereby ensuring their implementation. This is also the only way in which any enactment relating to transitional justice mechanisms can be assessed as to whether it complies with acceptable standards. As such, any attempt to incorporate transitional justice into the constitution should not be superficial and should ensure the establishment and effective operation of transitional justice mechanisms, by constitutionally compelling the enactment of national legislation in this regard.

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<sup>42</sup> Nepal's Interim Constitution 2063 of 2007

## ***Conclusion***

The preceding discussion focused on the prospects for transitional justice and guiding principles that may be used in the constitutional reform process of Sri Lanka that is currently underway. The key message that can be drawn is that if the government hopes to be genuine in its reconciliation efforts, its focus should be on the victims of past injustices and establishing a democratic society based on fundamental values such as equality, non-discrimination and freedom. In this regard, the enactment of a constitution that aims to address injustices of the past by recognising the rights of victims and to establish a political settlement to the ethnic conflict would be a historic milestone and a powerful manifestation of Sri Lankan society's objectives of reconciliation and lasting peace.

Although Sri Lanka's transitional justice process is far from perfect, a unique opportunity to rejuvenate its prospects has been produced with the promise of a new constitution. Indeed, incorporating transitional justice into the constitution would not only provide valuable anchorage in Sri Lanka's socio-political and legal framework but would also lead to a more sustainable and long term constitution that strengthens the Sri Lankan identity and takes pride in a pluralistic Sri Lanka.

## 4

# **Buddhist Teachings, Ethnic Tensions & the Search for Solutions<sup>1</sup>**



*Kalana Senaratne*

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<sup>1</sup> The chapter is partly based on a presentation titled ‘Buddhism, Politics and the Majority-Minority Question’, delivered at the Conference on *‘Religion and Power: Political, Legal and Economic Perspectives’*, University of Hong Kong, 13-14 Jan, 2014. It is important to note, at the very outset, that the interpretations and explanations offered of certain Buddhist teachings that follow in this chapter are not those of an expert in Buddhism or Buddhist-studies. Therefore, I extend an apology in advance for the misinterpretations, if any, of the Buddha’s teachings.

Religious teachings have often been thought to contain the solutions to many of the problems of human beings, including political conflicts. Confused by the mayhem surrounding them, people often seek comfort and meaning in the religions they follow or subscribe to. The situation in Sri Lanka is no different. With the end of armed hostilities between the Sri Lankan Armed Forces and the Liberation Tigers of Tamil Eelam (LTTE), the search for religious approaches to address issues of political conflict and reconciliation (between the majority and minority communities) has received added importance.<sup>2</sup> This is especially the case at the present historical juncture wherein, with the election of a new political leadership and government in 2015, there is a ‘renewed’ search for transitional justice and reconciliation. Partly due to the fact that the country is comprised of an overwhelmingly Buddhist majority, and partly due to the understanding that most of Sri Lanka’s violence is caused by the activities of the majority Sinhala-Buddhist community, attempts are often made to see how Buddhist teachings could address ethnic and religious tensions in the country.<sup>3</sup>

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<sup>2</sup> The Lessons Learnt and Reconciliation Commission (LLRC) noted: “All religious leaders must unitedly provide leadership, encouraging people of all faiths to act with wisdom and understanding, and to view the conflict and its aftermath from a perspective of tolerance and mutual accommodation. This should be achieved by emphasising religious commonalities, and focusing on factors that contribute to a shared vision and unity of action.” See, *Report of the Lessons Learnt and Reconciliation Commission*, para 8.270, p. 316, available at [http://www.priu.gov.lk/news\\_update/Current\\_Affairs/ca201112/FINAL%20LLRC%20REPORT.pdf](http://www.priu.gov.lk/news_update/Current_Affairs/ca201112/FINAL%20LLRC%20REPORT.pdf), last accessed 27 December 2015

<sup>3</sup> A fact-finding mission stated, in the aftermath of the violence directed at the Muslim population in Southern Sri Lanka in 2014, that: “The Buddhist Clergy must take responsibility to educate and sensitise its members regarding issues relating to reconciliation and the importance of strengthening community relations, especially the



The present chapter will firstly set out some basic Buddhist teachings<sup>4</sup> which can be considered as constituting useful guidelines for rethinking the problem of caste or ethnic superiority that leads to discrimination and exclusion of other groups in society. Secondly, it will discuss some of the implications arising from the application of those teachings to the Sri Lankan context. Thirdly, this chapter will briefly discuss why the radicalism inherent in the Buddha's basic teachings ultimately fails to have any significant impact on society – a failure that is not, however, the fault of the Buddha.

## 1 Some Basic Teachings

Early Buddhist teachings are said to have arisen as a “critical response to the binary opposition between two world-views”: one being ‘spiritual eternalism’ (*sassatavada*), i.e. a metaphysical view of self as distinct from the physical body; the other being ‘materialist annihilationism’ (*ucchedavada*), i.e. a physical view

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role of religion in bridging differences rather than reinforcing differences.” See, ‘*Where Have All the Neighbours Gone? Aluthgama Riots and its Aftermath: A Fact Finding Mission to Aluthgama, Dharga Town, Valipanna and Beruwela*’ available at:

<http://www.lawandsocietytrust.org/images/PDF/Resources/aluthgama%20report%20final.pdf>, last accessed 27 December 2015. See

also, on the International Buddhist Conference on Jurisprudence held in Colombo, in May, 2014: Prashantha Lal De Alwis, ‘Towards a Buddhist Approach in Jurisprudence’, available at:

<http://www.dailymirror.lk/46876/towards-a-buddhist-approach-in-jurisprudence>, last accessed 27 December 2015

<sup>4</sup> For useful introductions, see: Y. Karunadasa, *Early Buddhist Teachings: The Middle Position in Theory and Practice* (Hong Kong: Centre for Buddhist Studies, The University of Hong Kong 2013); Asanga Tilakaratne, *Theravada Buddhism: The View of the Elders* (Honolulu: University of Hawaii Press, 2012); Walpola Rahula, *What the Buddha Taught* (Dehiwala: Buddhist Cultural Centre 1996).

of the self.<sup>5</sup> It was within this context that the Buddha set out the ‘middle position’; a position that transcended the conflict between the above mentioned world views, “without entering either of the two extremes.”<sup>6</sup> It was the Buddhist doctrine of ‘dependent arising’ (*patichhasamuppada*) through which the two worldviews were avoided – a doctrine which therefore came to be known as ‘the doctrine of the middle.’<sup>7</sup>

The fundamental concern of the Buddha was the fact of *dukkha* and the cessation of *dukkha*.<sup>8</sup> The Buddha diagnosed the problem he wanted to address and set out the solution, which came to be enumerated through the Four Noble Truths: suffering; the cause of suffering; the cessation of suffering; and the path leading to the cessation of suffering (i.e. the Noble Eightfold Path or the Middle Path). The final or ultimate goal is the attainment or realisation of *nibbana* (or *nirvana*): i.e. the cessation of the three fires of passion (*raga*), aversion (*dosa*) and delusion (*moha*).<sup>9</sup> These, incidentally, are the roots of all unwholesome action, as well as of all human conflicts.<sup>10</sup>

Given that the Buddha’s primary concern was not political reform, he did not proceed to discuss in any significant detail how complex issues of politics, governance or economics can be addressed or resolved. Furthermore, the Buddha did not

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<sup>5</sup> Karunadasa, *Ibid*, p. x-xi.

<sup>6</sup> *Ibid*, p. 16.

<sup>7</sup> *Ibid*, p. 17. See, more fully, Chapter 3 titled ‘Dependent Arising’ (at p. 21-31).

<sup>8</sup> The Buddha once informed Anuradha: “Both formerly and now also, Anuradha, it is just suffering and the cessation of suffering that I proclaim”; *ibid*, p. 65. Here, *dukkha* is best understood as a reference to all conditioned experiences, which include both pleasant and unpleasant experiences. *Ibid*.

<sup>9</sup> *Ibid*, p. 114.

<sup>10</sup> Peter Harvey, *An Introduction to Buddhist Ethics* (Cambridge: Cambridge University Press 2000), p. 239.

direct his mind to examining the ethnic-question, for during his time it was not prevalent in its present form. Rather, one of the most serious problems his society was enveloped in was the rigid and discriminatory caste-system. Therefore, the Buddha's critical response to the caste-system would be helpful in re-thinking how questions of social hierarchies, discrimination and prejudice that arise in contemporary societies can be approached and addressed.<sup>11</sup>

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During the Buddha's time, the most significant social division in ancient India was based on caste distinctions; largely in the form of the fourfold caste system – of the *Brahman*, *Kshatriya*, *Vaishya* and *Kshudra*. The former was the superior caste, from which the basic rules and values governing the society came to be established. The Buddha was born into such a society. Therefore, both directly and indirectly, the Buddha, or his teachings (the *Dhamma*), rebelled against the social hierarchy which inevitably promoted and sustained discrimination and social exclusion. One of the consequences – though not the principal one – of the Buddha's teachings was the critique of the caste-system.

The caste-system brought to the fore the problems inherent to societies structured on the dominance or hegemony of a particular group; and in doing so, the critique of such a caste-system becomes topical even to contemporary times. On the one hand, society was structured according to a hierarchy,

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<sup>11</sup> See: G.P. Malalasekera and K.N. Jayatilleke, *Buddhism and the Race Question* (Paris: UNESCO 1958); P.D. Premasiri, 'Minorities in Buddhist Doctrine' in K.M. de Silva, Pensri Duke, Ellen S. Goldberg and Nathan Katz (eds), *Ethnic Conflict in Buddhist Societies: Sri Lanka, Thailand and Burma* (London: Pinter Publishers 1988), p 42-58; Karunadasa (note 4 above), p.159-170 (Appendix titled 'Buddhism and the Issue of Religious Fundamentalism').

wherein those on top subjugated those at the bottom. This caste-based division entrenched the superiority of particular groups. On the other hand, and related to the above, such a society was also one wherein all manner of exclusionary ideas, ideologies and narratives were prevalent; policies and practices which effectively excluded certain individuals/groups from societies, territories and governance, in general. The superiority of the Brahman caste was based on an exclusionary policy, wherein through a narrative of special origin, it was able to exclude other caste groups as subservient, lacking in equal dignity, and unworthy of equal respect.

Such exclusion is not unique to caste-based societies; for such prejudices and discrimination are reproduced in different forms in societies based on ethnic or religious dominance. Exclusionary and exclusivist narratives get created due to the deep attachment held towards language and/or territory, by both majority and minority communities. They come to form a key component in ideologies of the respective groups, and get promoted in different ways given the status of those groups, the context and particular historical circumstances in which they are placed. A dogmatic attachment comes to be formed to various concepts and views which can be more dangerous than the “inordinate attachment to material things.”<sup>12</sup>

How then are such issues to be addressed or critiqued, from a Buddhist perspective? Of the many teachings available, the following discussion very briefly and succinctly refers to only a handful of such teachings, which both directly and indirectly critique the caste-system; a critique which can be extended towards any other form of domination based on colour, ethnicity or religion.

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<sup>12</sup> Karunadasa (note 4 above), p. 160.

## 1.1 Personhood

One of the central Buddhist teachings which critiques the rationale underlying the caste system is contained in the Buddha's complex understanding of the human personhood<sup>13</sup> – with the key feature of this understanding being the denial of a permanent soul or self. Rather than an entity with a fixed and never-changing soul, the Buddha perceives a human being as a psychophysical personality (*namarupa*); an entity made of 5 aggregates (*pancakkhanda*).<sup>14</sup> This is in stark contrast to the idea of personhood based on a soul, which was influential in promoting the caste-system and the resulting caste-dominated hierarchical social structure; wherein the self (*atman*) is regarded as a permanent and eternal reality. This permanent self is next presented as a *Brahman*, which is the main source of everything that follows. From this emerges the fourfold caste system, with inviolable and irrevocable values attached to that system.<sup>15</sup> In this way, the idea of a permanent soul legitimises the caste-system which both inspires, and is inspired by, the need to discriminate, dominate, subjugate. The Buddha's conception of personhood was a damning blow to the foundational rationale for cast-based discrimination.

Another way in which the Buddha breaks down the importance attached to certain groups or castes is through his reflection that the final or ultimate goal of *nibbana* is realisable by anyone.<sup>16</sup> Caste or any such distinction was never a material factor affecting the ability of human beings to realise *nibbana*. In other words, both 'Buddhists' and 'non-Buddhists' were equally capable of attaining *nibbhana*; and the *Dhamma*,

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<sup>13</sup> See generally, David J. Kalupahana, *The Principles of Buddhist Psychology* (Delhi: Sri Satguru Publications 1992), especially Chapter 4 titled 'The Buddha's Conception of Personhood', p. 15-21.

<sup>14</sup> *Ibid*, p. 15.

<sup>15</sup> *Ibid*, p. 12-13.

<sup>16</sup> Karunadasa (note 4 above), p. 168.

the Buddha's teachings, is not the sole preserve of any single group. If any superiority is to be placed by the fact that one is Buddhist, the Buddha disputes this by asserting the above. The Buddha's understanding then deals a significant blow to the distinctions that come to be placed on different racial, religious, and ethnic groups in society.

## 1.2 Language

Language is a principal source of conflict in the contemporary world. It is central to the formation of views of superiority. Linguistic nationalism can often transform into a form of nationalism that promotes dominance and discrimination. Language is often something we are attached to and would consider more important than another's. A great many stories and historical narratives get created on the splendours of this language, how it needs to be preserved and protected and if necessary, fought for. To think of language as something meant for a simple purpose – communication – is almost impossible.

However, the Buddha's approach to language was unique. Language was considered necessary for communication purposes but without clinging or deep attachment to it. As he once informed Citta: "These, Citta, are names (*samanna*), expressions (*nirutti*), turns of speech (*voḥara*), and designations (*paññatti*) in common use in the world. And of these the Tathagata (the Buddha) makes use indeed, but is not led astray by them."<sup>17</sup> Thus the Buddha was never attached to language; such attachment was anyway unnecessary given its limited purpose – i.e. communication. As the late Prof Kalupahana explains:

"The most important function of language is communication, the most sophisticated version of which

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<sup>17</sup> Quoted in Karunadasa (note 4 above), p. 7.

makes the humans a unique species. The Buddha was reluctant to let this most valuable tool be used for self-destruction, that is, to generate conflicts among the humans... he was a pragmatist who did not look for universal solutions. As such he was not proposing a universal language. Realising that language of the community to which one is born is one's first and the foremost inheritance, and as such one is emotionally related to it, the Buddha condemned anyone who took a specific language and maintained: "This alone is true; any other is falsehood." He himself was familiar with many languages that made it easy for him to communicate with people as he moved from one part of this vast country to another."<sup>18</sup>

One of the useful lessons emerging from the Buddha here is the humility with which 'language' needs to be approached. A language while being a vehicle which enables communication is not a single, solid, construct. Being man-made, it changes over time. To give prominence to some such language to the detriment of other languages would easily be a discriminatory policy, according to Buddhist-thinking.

### 1.3 Discourses: The *Agganna Sutta*

In the vast body of Buddhist teachings, one comes across a number of discourses which assert that no form of superiority is attributable to any human group on the basis of birth or lineage; discourses which directly critiqued the caste superiority prevalent during the Buddha's time.

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<sup>18</sup> David J. Kalupahana, *Karma and Rebirth: Foundations of the Buddha's Moral Philosophy* (Dehiwala: Buddhist Cultural Centre 2009, 2nd Print), p. 132.

One such is the *Agganna Sutta (Discourse on the Origins)*.<sup>19</sup> In this, the Buddha exposed the “meaninglessness of the Brahmanical caste system as a foundation for society and morals.”<sup>20</sup> The Buddha informs Vasettha about the falsity of the Brahmanic caste’s superiority, purity and origination: reminding him, in a rather sarcastic vein, that like everyone else, the children of Brahmanas were born not from the mouth of the Brahmana (as they claim) but as a consequence of the natural birth process that the pregnant Brahmanic women are subject to. The Buddha pointed out that it was by conduct, by the attainment of knowledge concerning the Four Noble Truths, by the eradication of the fetters, that one became a true Brahman – i.e. a noble being.

The second part of the *Agganna Sutta* is also most useful to help overcome the rigid views and concepts we develop that are central to contemporary conflict. In this, the Buddha gives an account of the origins of the human species in a manner that negated the justifications adduced by proponents of the caste system. According to the Buddha, the world underwent a process of contraction and expansion, and re-evolved based on desire and greed. The Buddha sets out how men and women came to be formed through this natural process, how people came to gradually own land, demarcate boundaries based on personal interests, etc.<sup>21</sup> In short, the Buddha replaced the myth of the divinely ordained hierarchical caste structure with an evolutionary account of society. This was a “critique of the creation theory and a rejection of the static conception of the nature of society.”<sup>22</sup>

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<sup>19</sup> ‘Agganna Sutta: On Knowledge of Beginnings’, available at: <http://www.columbia.edu/itc/religion/f2001/edit/docs/aggannasutta.pdf>, last accessed 27 Dec 2015

<sup>20</sup> David J. Kalupahana, *Ethics in Early Buddhism* (Delhi: Motilal Banarsidass Publishers 2008), p. 56.

<sup>21</sup> Agganna sutta (note 19 above).

<sup>22</sup> Premasiri (note 11 above), p. 44.



One of the most significant implications, then, of the *Agganna Sutta* is its unravelling of the inherent falsity of group-superiority. For the Buddha, caste names were mere “conventional designations signifying occupational differences and, since men were free to change their occupations, these differences had no hereditary or genetical basis.”<sup>23</sup> Another of its serious implications is the critique of the naturalness attributed to certain key modern political concepts central to contemporary conflicts between ethnic groups: such as the state, nation, country, homeland, etc. We are able to understand these as concepts, which people create over time, depending on their own interests.

Like the *Agganna Sutta* there are many other discourses which delegitimise many ethnic and caste based claims to superiority in both ancient and modern societies.<sup>24</sup>

#### 1.4 *Samsara* and Rebirth

The Buddha’s theory of rebirth<sup>25</sup> is also one of the most potent sources that could inspire re-thinking about identity-based conflicts. The *samsaric* process, or the process of rebirth, is without a beginning or an end. As the Buddha mentioned on numerous occasions: “Monks, this *samsara* is without discoverable beginning.”<sup>26</sup> This was meant to stress the

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<sup>23</sup> Malalasekera and Jayatilleke (note 11 above), p. 42.

<sup>24</sup> See, also, in this regard: the ‘Ambattha Sutta’, available at: [http://buddhasutra.com/files/ambattha\\_sutta.htm](http://buddhasutra.com/files/ambattha_sutta.htm), last accessed 27 December 2015

<sup>25</sup> For an interesting and detailed study, see: Kalupahana (note 18 above).

<sup>26</sup> Bhikku Bodhi (ed), *In the Buddha’s Words: An Anthology of Discourses from the Pali Canon* (Boston: Wisdom Publications 2005), p. 37.

eternity of suffering and the need to overcome it; thus, the need to end the cycle of rebirth by the cessation of passion, aversion and delusion – by the attainment of *nibbhana*.

The Buddha's enunciation of the notion of rebirth ideally ought to shake up the attachment to ourselves and the mistaken belief that our identities are static, perpetual. Fundamentally, the possibility of rebirth or the *samsaric* process does not guarantee that in your previous birth you belonged to the same clan/caste/ethnic/religious group that you belong to now. Neither does it guarantee that in your future birth, you would belong to the group that you currently belong to. Furthermore, while it is mentioned that memory relating to previous lives can provide information about a person's name, lineage experiences and life-span, these memories do not guarantee the nature of the future birth. As the late Prof. Kalupahana wrote:

“What is most significant in the Buddha's explanation of the survival of human life is that none of the above memories from the past contributes to the determination of the nature of the present life. One may remember that one was a high priest or a monk in a previous life, but that does not mean that one is going to be in the same station in the next. It is for this reason that the Buddha was able to argue that the memory of being a member of a certain clan (*gotta*) or a certain country (*janapada*) does not mean that one's future is determined by such membership.”<sup>27</sup>

A central lesson here is that if your past identity was uncertain and your future birth/identity is also uncertain, the claim to superiority or the uncritical attachment to the present one is

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<sup>27</sup> David J. Kalupahana, *The Buddha and the Concept of Peace* (Ratmalana: Sarvodaya 1999), p. 92.

meaningless. Rebirth and *samsaric* existence would effectively remind one that the identities over which we fight are unnatural, impermanent. While the present engagement in struggles over identities gives us the sense of eternity, their temporary, impermanent and unstable foundations are brought forth through the concept of rebirth. Today we might belong to a minority, tomorrow to a majority; and vice versa. With this, the very idea of representing any one identity becomes a meaningless exercise. It is meaningful only in a conventional sense (i.e. because conventional practice in society suggests acquiring, representing or promoting an identity is meaningful).

## **2 Implications: Against the Current**

The Buddha's teachings run against predominant thinking, and hence, against the current. The implications of those teachings can be extremely disturbing, discomfoting; not when they are discussed as abstract teachings, but when those teachings are applied to our own lives. Why so, or how?

The Buddha's teachings in effect reveal that the identities we are so deeply attached to – ‘Sinhala’, ‘Tamil’, ‘Buddhist’, ‘Christian’, ‘Muslim’, ‘Sinhala-Buddhist’, ‘Tamil-Hindu’, ‘Sri Lankan’, etc. – are mere labels, constructed by us, flexible, changeable, impermanent. There is nothing natural or inherently stable about these identities. We can have multiple identities, or one, or none; much depends on our interests, likes and dislikes. In short, our identities are our own creations and are merely conventional, reflecting our own desires and prejudices. This is well captured in the statement that: “classifications, when made of human beings, are not absolute ones; they are merely conventional (*voharam ca manusse su samannaya pavuccati*).”<sup>28</sup> The Buddha's basic argument here is a

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<sup>28</sup> Premasiri (note 11 above), p. 45.

persuasive one: if conventional, and not natural, there is no reason to be attached to them, which only causes suffering.

An interesting impact is that just as our contemporary identities are artificial and problematic, the attempt to create new identities would also be fraught with the same problems that current identities confront. For instance, it is a popular post-war attempt to construct a 'Sri Lankan' identity in opposition to the identities that are often considered to be narrow, problematic and discriminatory (i.e. Sinhala-Buddhist, Tamil-Hindu, etc.). Yet, this may not be a solution at all. One can easily broaden the scope of these seemingly narrow identities to mean what the new identity means. The new identity can, if necessary, be as exclusionary, and can reproduce the very problems we seek to address. Thus, rather than inquiring what new identities can be formed and promoted, the Buddhist teachings would question the very notion of acquiring an identity. Importantly, it also helps us understand why this identity gets created in the first place: i.e. to fulfil our motives, aspirations and political interests.

Furthermore, we can observe that the Buddha's views on language, and the discourses such as the *Agganna Sutta*, similarly have a troubling and unsettling effect. For instance, one can come to view more critically the promotion of policies such as the Sinhala-only policy in the 1950s, the laws relating to citizenship, and the Constitutional prominence afforded to Buddhism and the Sinhala language. Also, these teachings tend to have a particularly critical impact on certain dogmatic narratives dominant in the nationalist thought of both the Sinhala and Tamil people. The Buddhist teachings dent the grandeur attached to our nationalities and the respective stories and myths. Through the *Agganna Sutta*, for instance, the Buddha proceeds to show that the histories we often celebrate (as reaching back to a thousand or two thousand years) are unimaginably limited when considered in the backdrop of the vastness of *samsaric* existence.

To take the *Agganna Sutta* seriously is to abandon our uncritical belief in the ‘mythical’ stories of the past. For instance, it has the effect of challenging, even repudiating, the Sinhala-nationalist view that the origin of the Sinhala race dates back to the arrival of Prince Vijaya<sup>29</sup> or to a period preceding Vijaya’s arrival – as well as the Tamil-nationalist view that just like the Sinhala people, the Tamils were also one of the first inhabitants of Sri Lanka, or perhaps the first<sup>30</sup>, and are traditional inhabitants of a certain part of the country. It is not that such narratives are completely false; there could be elements of truth in such narratives. Yet, the critical point is that these stories are often perceived to be accurate reflections of the truth, from which a deep, uncritical, attachment is thereafter developed. The Buddha’s teachings expose the mystery hidden in them, and show how constructed, artificial, they are; hence, unworthy of uncritical attachment or defence. No superiority can be attached to them. Just as the caste or clan one is born to does not guarantee his or her superiority, the country too is not a guarantee of one’s superiority: “Just as much as birth into a caste or clan is dependently arisen, so is birth in a country where the boundaries are determined by geographical factors or by convention.”<sup>31</sup>

Though the above thoughts can be sacrilegious in contemporary society where one is bound to protect the State, its sovereignty and integrity, one’s homeland, religion and

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<sup>29</sup> Wilhelm Geiger (translator), *Mahavamsa: The Great Chronicle of Ceylon* (Dehiwala: Buddhist Cultural Centre 2007, 3rd print).

<sup>30</sup> C.V. Wigneswaran, the Chief Minister of the Northern Provincial Council, once asserted: “... We are the Ceylon country’s original inhabitants. We cannot be compared to minorities living in other countries.” See, *We cannot henceforth be a nation that is deceived – CV Wigneswaran*, available at: <http://www.tamilguardian.com/article.asp?articleid=15357>, last accessed 27 December 2015

<sup>31</sup> Kalupahana (note 27 above), p. 95.

language, etc., early Buddhist teachings consider views about such concepts critically. Essential to note in this regard is the Buddha's reference to three kinds of defilements (*upakkilesa*) – the gross, the middling and the subtle: with the subtle defilements relating to thoughts of birth (*jati*), of country (*janapada*) and thoughts associated with dignity (*anavannatti-sampayutta*); factors which do not contribute to the realisation of incomparable knowledge and conduct (*vijjacarana*).<sup>32</sup> This is perhaps why the Buddha alerted one to the dangers of prejudices based on caste and race; those “bound by racial prejudices” (*jati-vada-vinibbaddha*) and those “bound by caste prejudices” (*gotta-vada-vinibbaddha*) “have strayed far from the way of salvation” (*araka anuttaraya vijjacarana-sampadaya*).<sup>33</sup>

Finally, the notion of rebirth and the *samsaric* process also deals a shattering blow to our general understanding of identity and the imagined solidity attributed to it. What does rebirth mean in more concrete terms? It means that our present identities – ‘Sinhala’, ‘Tamil’, ‘Muslim’, ‘Sri Lankan’ – do not guarantee what we were before and what we will become in the future. For example, a Sinhalese may well have been a Tamil in the previous birth, and could well be a Hindu in the next. A Tamil, may well have been a Sinhala-Buddhist in the previous birth, and be reborn a Muslim in the following birth. The possibilities have been endless (in the past) and remain endless (in the future). Some years ago, such a scenario – of a Tamil girl being reborn as a Sinhala boy – was reported in the papers.<sup>34</sup> In this regard, Prof. H.L. Seneviratne noted that the inability to realise this critical aspect, or even the inter-related nature of different ethnic groups, only proves the blindness

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<sup>32</sup> Ibid, p. 91.

<sup>33</sup> Karunadasa (note 4 above), p. 165.

<sup>34</sup> Walpola Piyananda, ‘Tamil Girl who died in Jaffna was Born Again as Sinhala Boy in Katana’, available at: <http://transcurrents.com/tamiliana/archives/482>, last accessed 27 December 2015

with which these different ethnic communities operated.<sup>35</sup>

The Buddha, in other words, shows us a way of deconstructing seemingly natural, rigid, identities; and in doing so, shows why attachment to them – which leads to suffering – can be avoided. Also importantly, one needs to note that he shows how and why such conceptions, theories, identities get created; how and why they arise, upon what these identities (and the reasons for their construction) are conditioned. It is this complex understanding which explains the remarkable tolerance and compassion that the Buddha showed when confronted by antagonisms that often lead the ordinary human being to conflict. It is not tolerance that emerged out of a vacuum; rather, it was from an understanding of the essentially defiled, helpless and normal character of the human being.

### **3 An elusive radicalism**

It would appear then that the basic teachings of the Buddha, discussed above, provide a radical approach to addressing complex questions concerning identities of ethnic majority and minority groups; and that the solution to many of the problems is within our grasp. Yet, this is not the case. And why is it that the Buddha's teachings remain elusive, and ultimately fail to address issues pertaining to caste, ethnic or religious tensions?

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The main reason for the elusiveness and failure of the

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<sup>35</sup> H.L. Seneviratne, 'Blindness of Sinhala Demagogues and Tamil Liberators', *Transcurrents*, available at: <http://transcurrents.com/tamiliana/archives/493>, last accessed 27 December 2015. This is a universally valid observation.

Buddha's basic teachings lies in the fact that, to take the Buddha's teachings seriously is to commit oneself to the ultimate goal of *nibbhana*: the cessation of passion, aversion and delusion; the goal which effectively marks the end of *samsaric* existence.<sup>36</sup> Yet, laypersons who consider themselves to be 'Buddhists' hardly commit to such a goal. Rather, however attractive the prospect of *nibbhana* is, the *samsaric* existence is a vicious cycle from which man finds himself difficult to escape. Thus, far from being committed to realising *nibbhana*, the regular life of Buddhists is characterised by merit making<sup>37</sup>; whereby such merit will provide for a better, comfortable, and more secure life in your next birth. As Prof. Asanga Tilakaratne in his *Theravada Buddhism* writes:

"The difficulty a layperson faces in attaining nirvana [*nibbhana*] immediately or in the present life has been evident in the discourses. From that early period it seems that aspiring to be born into heaven has been considered the more realistic goal for the layperson. This does not necessarily mean that nirvana as the ultimate goal is totally beyond his reach... What actually happens is that at the conclusion of every meritorious act they make a wish to attain nirvana as a result of having performed that particular good deed. But this is basically an effort to stay in focus."<sup>38</sup>

Interestingly, the 'Buddhists' tend to strike a compromise which effectively results in the postponement of realising the ultimate goal of *nibbhana* (or *nirvana*):

"How exactly an average Buddhist understands nirvana is not very clear... Everyone without exception believes in the desirability of this ultimate goal. However a

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<sup>36</sup> Tilakaratne (note 4 above), p. 93.

<sup>37</sup> Ibid, p. 95.

<sup>38</sup> Ibid, p. 94.



compromise is always made between nirvana, which is ultimate and final, and samsara, which is immediate and contains possible pleasures. This is achieved in two ways: by defining nirvana as the very final stage of a long series of imaginable samsaric pleasures, or by aspiring to realise this final goal at the feet of the future Buddha Metteyya (Maitreya), the next Buddha to appear in the world – but only after a very long time. So nirvana is not forgotten, it has only been postponed to a distant future.”<sup>39</sup>

Importantly, Prof. Tilakaratne goes on to state that it is not only the layperson who appears to have postponed the ultimate goal:

“It is incorrect to understand this compromise between samsara and nirvana as applicable only to laypeople, however. In the very earliest period of Buddhist monastic life it is clear that such a compromise did not exist. Those who entered monkhood strove to attain nirvana in this life. However, with changes in monastic life, monks started to share the same attitude; consequently their life, too, has to be understood as dedicated to the pursuit of merit.”<sup>40</sup>

While there may be a number of reasons for such an absence of commitment, one of the most critical is that our contemporary society, in particular, is structured in such a way that following the Buddha’s teachings – aimed at worldly renunciation – is made an absolutely difficult task. The society to which we are born is founded on conceptions which, according to the basic Buddhist teachings on impermanence and non-self, are empty, lacking in any absolute or solid meaning, impermanent.

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<sup>39</sup> Ibid

<sup>40</sup> Ibid, p. 94-95.

For instance, we are born into a state and acquire citizenship of that state and are meant to defend/protect and come to its rescue; in addition, we inherit religious and other identities at the moment of birth, even without our knowledge or approval. In other words, we conform to the conventional pattern of life. Yet the Buddha's approach was to go against this conventional pattern; to go against the current. What the Buddha showed, in order to end eternal struggle and suffering, is that one's deep attachment to such concepts and identities is unfounded, given their artificial, constructed and impermanent character.

The gap that exists between the Buddhist teachings and the reality of existence (i.e. of how we are supposed to live in this world) then is vast, almost unbridgeable. Given the impossibility of subscribing to the goal set out by the Buddha, this gap is sought to be shortened or bridged by seeking to lead a moral life characterised by merit making – which now becomes the key ethical and moral imperative – not only to the layperson but also to the modern monk. Such merit making, however, can happen on an *ad hoc* basis and will seem perfectly consistent with a life that believes in the need to defend and promote the numerous concepts, identities and conventions (which ultimately lead to suffering).

The Buddha had understood this well enough, which explains why he had been initially reluctant to even preach the *Dhamma* which he had realised with great effort. “The Buddha felt discouraged when he thought about the distance between what he realised and the defiled nature of his prospective listeners.”<sup>41</sup> This defiled nature can hardly be eradicated.

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<sup>41</sup> Asanga Tilakaratne, *Nirvana and Ineffability: A Study of the Buddhist Theory of Reality and Language* (Kelaniya: Postgraduate Institute of Pali and Buddhist Studies 1993), p. 138.

In the absence of a commitment to the ultimate goal set out by the Buddha, arising due to the normal human condition as well as the inherent contradictions man confronts from the moment of his birth, there arises the need to inquire whether the social teachings of the Buddha<sup>42</sup> (as opposed to the more basic teachings discussed above in this chapter) can be of use in addressing complex political conflicts between majority and minority groups. For while the Buddha's basic teachings were largely directed at non-attachment and individual liberation, there is also a body of general teachings or statements more directly related to aspects pertaining to kingship, governance and the economy<sup>43</sup> - which have inspired works on Buddhist approaches to issues of democratic rule, governance and economic management.<sup>44</sup> But would these be of help? While a more detailed examination and critique needs to be developed in this regard, the following observation is set out in the form of a preliminary comment on the matter.

Social teachings, which are generally addressed to laypersons, are bound to be interpreted by laypersons (and monks) according to their own political objectives, aspirations and prejudices. For, who is this layperson or monk? He or she is a person who is unenlightened (and has abandoned the goal of *nibbhana*, at least temporarily), guided by the fires of passion, aversion and delusion, and is now confronted by conflict; wherein his challenge is to protect, preserve and perpetuate things, identities, concepts, with which he has been brought up from his childhood. In addition, this is an individual who

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<sup>42</sup> Tilakaratne (note 4 above), p. 70-78 (Chapter 5 titled 'The Social Teachings of the Buddha')

<sup>43</sup> See: Tilakaratne (note 4 above), especially p.75-78; Kalupahana (note 20 above), especially p. 113-136.

<sup>44</sup> See, for instance: Lily de Silva, *Cakkavatti Monarchy of the Pali Canon as a Democratic Meritocracy* (Dehiwala: Buddhist Cultural Centre 2003); Nandasena Ratnapala, *Buddhist Democratic Political Theory and Practice* (Ratmalana: Sarvodaya Vishva Lekha 1997)

finds himself surrounded by people who while belonging to other faiths, ethnic groups and countries, are driven by similar desires and interests. Not being able to follow the conventional life or defend the conventional identities one inherits now begins to appear as a significant loss; hence the fear of losing one's state, religion or language.

In such a context, two things happen. Either he disregards the Buddhist teachings (especially the basic teachings, but also the social teachings). Or, he proceeds to interpret and read them in a manner that enables him to legitimise his own political prejudices, aspirations and grievances. This latter approach is not difficult, for Buddhist social teachings as well as the numerous stories in the broader Buddhist canon (e.g. of the Buddha's previous births, etc.) are broad and can appear to be vague enough to be so interpreted. Obvious contradictions will pass off unnoticed; creative ways can be developed to legitimise ethnic or religion-based hierarchies and narratives; violence or the use of force may come to be seen as an exceptional method, advocated in the stories of the Buddha's previous births.

To be sure, this is not a result of ignorance of the basic teachings of the Buddha – as many observers tend to believe. On the contrary, such understandings and readings are formed and promoted due to the desire to mend the teachings to suit one's own interests.<sup>45</sup>

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<sup>45</sup> This observation can be extended in relation to all religious teachings which supposedly inspire many fundamentalist movements in the world.

## 4 Conclusion

As recounted elsewhere<sup>46</sup>, once when during a public event, an academic reminded the importance of the *Metta Sutta* (on loving-kindness)<sup>47</sup> to a scholar-monk who was defending the politics of ultra-Sinhala-Buddhist nationalist groups, the monk responded by arguing that it was such teachings as the *Metta Sutta* that made life difficult for the Buddhists. In other words, what this scholar-monk stated was that unconditional loving kindness, tolerance and compassion would not take the Buddhists anywhere in a world in which your state, religion and language need to be protected and promoted.

This response, on further reflection, is understandable.<sup>48</sup> This is for the reason that as discussed above, the teachings of the Buddha (the *Dhamma*) are directly related to non-attachment and the ultimate goal of *nibbhana*. The *Dhamma* does not explain to us how the country, the state, your language or religion is to be protected within a state, and from (correctly or wrongly perceived) threats arising from internal/external sources. So, for those who seek to protect and promote their respective identities and thereby engage in their respective political projects, the teachings of the Buddha would not only be unhelpful, but seem utterly impractical. As a result, either the Buddha's teachings would be wholly neglected, or they would get creatively re-interpreted to suit one's own political

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<sup>46</sup> See: Kalana Senaratne, 'The 'Mad Monk' Phenomenon: BBS as the underside of Sinhala-Buddhism', available at: <http://groundviews.org/2014/04/15/the-mad-monk-phenomenon-bbs-as-the-underside-of-sinhala-buddhism/>, last accessed 27 December 2015

<sup>47</sup> 'Karaniya Metta Sutta: The Discourse on Loving-kindness', available at: <http://www.accesstoinight.org/tipitaka/kn/snp/snp.1.08.piva.html>, last accessed 27 December 2015

<sup>48</sup> This is not to suggest that the response is acceptable.

prejudices.

The Buddha sought for his followers a life without myths. Yet politics is about myth making, and is impossible without myths. Without the great stories that get constructed about their origins, territory, and identity, humans feel they will lose meaning in life. For this exercise, then, religion becomes a vital source of inspiration for many; and for the Buddhists, ironically, the Buddhist-teachings. The resulting conflicts and tensions that arise from different forms of understandings and interpretations of the Buddha's teachings cannot be adequately or satisfactorily resolved given the absence of the 'original' teacher. With the passing away of the Buddha, everything would seem to be in disarray – especially for those who seek an end to such conflicts and tensions, by returning to the teachings of the Buddha.

However, the only consolation lies in realising that things were anyway in disarray even during the Buddha's era. Disinterested in attempting to resolve complex human conflicts during his time, the Buddha would have understood the underlying character of human beings. Understanding an inconvenient truth, he gained the strength to observe the 'world' with equanimity.

# 5

## **Conflict Legacies and Plural Histories: What are the Possibilities for Sri Lanka's Future?**

*80*

*Farzana Haniffa*

Sri Lanka's past, packaged as the country's "National Heritage", has served the anticolonial and nation building projects as well as the entrepreneurial ambitions of both colonial and post-colonial political elites. Sinhala nationalist politics, the Buddhist religious establishment and Sri Lanka's tourist industry fully took on-board the ideas about heritage legitimised by historians, propagated in schools and valorised by a variety of national and regional interest groups. Under the Rajapaksa regime ideas about Heritage were mobilised to bring about virulently racist verbal and physical attacks against all minorities, but the outpouring of anti-Muslim sentiment in public spaces was peculiar to that time. This paper looks critically at the manner in which popular ideas regarding "heritage" were mobilised by the anti Muslim movements in the country transforming ideas of place and belonging through reference to exclusivist notions of the past. This paper argues that a reimagining of "National Heritage" in Sri Lanka is required for the production of a pluralistic and multicultural society. It further argues that histories that emphasise the country's long tradition of diverse religious and cultural groups sharing spaces, food habits family linkages, names and even ethnic and religious categories needs to now be unearthed over that of one monolithic identity.

The idea that history is a process whereby the already existing past is merely recovered by the intervention of the historian is one that has long had currency in Sri Lanka. History is also sometimes thought about as a force that propels us on a journey towards human kind's ultimate redemption either through revolution or by divine intervention. The idea of history that motivates this intervention departs from both of the above. I subscribe to the idea that our histories are stories that we construct to make sense of our present. Following Jean Luc Nancy, I align with the idea that history is mostly about community. As Jean Luc Nancy stated "History, if we can



remove this word from its metaphysical and therefore historical, determination- does not belong primarily to time, nor to succession nor to causality, but to community, or to being-in-common.”<sup>1</sup> History writing, then, is about community, about constructing stories of who “we” are and therefore a profoundly political act of the present. As I will discuss below, in Sri Lanka a particular proclivity towards appreciation of the past and its celebration in the present has been cultivated; but sadly at the exclusion of all non-Sinhala Buddhists. I am arguing for the interruption of that exclusion while celebrating the relationship to a rich past that many call upon through pilgrimage and worship even today. I am urging, that in a context where the politics of history writing hitherto has worked to erase the traces of minorities, that it is time we reintegrate such minorities back in to narratives of a collective past. If not they will forever remain minor players in our country’s future.

This paper also addresses the Muslim religious political and civil society leadership. Muslim religious activists for at least two generations have crafted notions of community determined not by a collective traceable past bolstered by ample material evidence, but on a notion of community determined by adherence to scripture. The war years strained relations between ethnic communities, and as I have argued elsewhere, Muslim prioritising of a religious identity was one of the consequences.<sup>2</sup> Due to the anti Muslim sentiment

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<sup>1</sup> In ‘Finite History’ David Carroll (ed) *The State of “Theory”*: History Art and Critical Discourse (New York Columbia University Press 1990). By way of David Scott’s excellent essay *Dehistoricising History* in Jeganathan and Ismail (eds) *Unmaking the Nation : The Politics of Identity and History in Modern Sri Lanka* (Social Scientists’ Association 1995)

<sup>2</sup> Farzana Haniffa, ‘Believing Women: Piety and Power amongst Muslim Women in Contemporary Sri Lanka’ in Phillippo Ossella

propagated in immediate post-war Sri Lanka, Muslims' status in this country continues to be questioned in the most derogatory terms. Muslims are constantly called upon to symbolically accept their own lesser status. The "resolution" of the halal issue in 2013 was one example.<sup>3</sup> The current controversy over the minaret of the Line Mosque in Kandy being taller than the Dalada Maligawa is another case in point.<sup>4</sup> The Muslims —especially those who participated in the substantial energising of the community through piety-- have been taken aback by this reaction. The entire Muslim community has been further shocked by the manner in which this racism seems to find wide support. Community religious mobilisation emphasised distance from others. The Rajapaksa regime's anti minority stance permitted this distance to be read as a problem and licensed racist forces against Muslims. In response Muslim communities today are struggling to find ways to articulate their connections with the larger Sri Lankan polity while maintaining their religious and cultural specificity.<sup>5</sup> Muslims' appearance in large numbers to show their respect and appreciation of the Ven. Maduluwawe Sobitha, at his funeral, the manner in which Muslims' mosque based mobilisation and organisational capacities were used to carry out flood relief to entire neighbourhoods regardless of

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and Caroline Ossella (eds), *Islamic Reformism in South Asia*, Modern Asian Studies. Vol 42, Issues 2&3 (2008)

<sup>3</sup> The Jamiathul Ulema was compelled to withdraw the halal accreditation service and manufacturers agreed to no longer having the halal label on products. Farzana Haniffa, 'Merit Economies in neoliberal times: Halal troubles in Contemporary Sri Lanka' in D. Rudnyckyj & F. Ossella (eds), *Religion and the Morality of Markets* (Cambridge University Press)

<sup>4</sup> For instance, no one found fault with the fact that the shopping arcade, the Kandy City Center was taller than the Maligawa.

<sup>5</sup> What this might mean in concrete terms is not self evident, but must be discussed elsewhere.

religious affiliation are ways in which Muslim groups' commitment to an expansion of their own ideas of community is manifesting itself. Discovering stories of belonging, and looking to history writing is one form that rebuilding these linkages can take. Stories of a shared past that reverberate at the community level in shared food cultures, family names, and shared spaces should be consolidated through the long neglected practice of history writing.

The creation of “ancient cities” and “ sacred sites” as a part of Sri Lanka’s heritage spaces has been the result of a coming together of multiple processes including colonial aesthetics, history as a discipline and the demands of nascent nationalist ideology. <sup>6</sup>Transforming spaces into heritage spaces for minorities who were systematically ostracised from the national historical narrative and who now choose to imagine themselves as only partially connected to this polity is going to be difficult. This disconnect with the national narrative operates for two large minority communities in Sri Lanka – the Tamils and the Muslims in quite specific ways. Tamil nationalism – long defined as the “other” of Sinhala nationalism--continues to push for a recognition of difference – through a Federal state structure at a minimum. The Muslims – irrelevant to nationalist narratives of Sinhala greatness, reinvented themselves as primarily a faith group during the war.<sup>7</sup> Their wartime commitment to a notion of community valuing their connection to a larger global Ummath rather than those among whom they live is only now

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<sup>6</sup> Nissan, Elizabeth, ‘History in the Making: Anurathapura and the Sinhala Buddhist Nation’, In *Social Analysis*, Vol 25. Pp 64-77 (1989); Pradeep Jeganathan, ‘Authorising History, Ordering Land: The Conquest of Anuradhapura’ in Jeganathan and Ismail (eds) *Unmaking the Nation : The Politics of Identity and History in Modern Sri Lanka* (Social Scientists’ Association 1995)

<sup>7</sup> Haniffa Ibid note at 2

beginning to be questioned. Minority communities' connections to their spaces and places were thought about not in terms of a narrativised past readily available for consumption through history books or the "national heritage" discourse but by other means. Through oral histories, artefacts stored with families, ancient places of worship and a commitment to the preservation of that which was deemed "culture." There has hitherto been no place in the history of the Sinhala nation or even in the post- colonial nation state, for the positive articulation of minority stories.

In such a context how do we attempt to imagine the pluralising of histories and heritage spaces? Will there be a time when such communities can identify themselves as belonging historically to the spaces that they value? Can the spaces that they value in turn, be imagined as part of a larger national polity without – as was being done recently in certain parts of the north—erasing their presence? And how is such an imagining to be fostered? Can history, that has long been something that minority communities were excluded from in this country, be imagined as a possibly unifying discourse?

### **History Writing for Transitional Justice**

Transitional justice is understood as "a response to systematic or widespread violations of human rights. It seeks recognition for victims and promotion of possibilities for peace, reconciliation and democracy." Emerging in response to transitions in Latin America in the 1980s and 1990s the field continues to grow in keeping with the different global conflicts in response to which societies have mobilised such measures. As the field now stands, transitional justice measures include criminal prosecutions, truth commissions, reparations programs, gender justice, security system reform and

memorialisation efforts. In Sri Lanka today the government has committed to a process that at a minimum includes four reconciliation mechanisms, namely:

1. An accountability mechanism with a special prosecutor.
2. A truth, justice, reconciliation and non recurrence commission
3. An Office on Missing Persons
4. An Office for Reparations

In addition to the proposed four mechanisms many ministries and offices of the government are engaged in processes of “national unity and reconciliation,” “national integration,” and “national coexistence and dialogue.” From meetings attended at these various groupings, I find them to be exploring measures to ensure long-term peaceful coexistence for all Sri Lankans. There is a welcome recognition here that recovery from decades of enmity and war require challenging the ideological underpinnings of conflicts.

The international discourse on transitional justice is mobilised for the prevention of grave human rights abuses. Structural issues are generally understood as the enabling environments for human rights abuses such as the problem of corrupt security services, a weak judiciary and a dysfunctional police. Memorialisation is encouraged to “preserve public memory of victims and raise moral consciousness about past abuse, in order to build a bulwark against its recurrence.”<sup>8</sup> Arguably, deeper structural issues that underlie conflicts such as those of economic inequality and problems of political participation are not prioritised in the first instance in discussions of

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<sup>8</sup> *What is Transitional Justice?* (ICTJ briefing note)  
<https://www.ictj.org/sites/default/files/ICTJ-Global-Transitional-Justice-2009-English.pdf>

transitional justice. Arguably the reinforcing of states' judicial apparatus and a restoration of faith in the systems of law and order for instance, are imagined as sufficient to shore up the nation state in crisis. There is a strong case to be made for prioritising both victim centered justice and reparations measures in the pursuit of transitional justice. However, the principle of non- recurrence as well as the requirement for positively imagining the polity's future necessitates looking at political and ideological issues that also inform how the state apparatus functions. The current regime seems to have a fairly broad understanding of the requirements of the time for imagining a future for the country (beyond the negative transitional justice pillar of non-recurrence alone) that will prevent future crisis.<sup>9</sup> Thus, in this paper I take the challenge of addressing at least one area where greater attention is necessary. I will argue here that Sri Lanka needs a new approach to the past if it is to imagine a better future for itself.

### **Sri Lanka's Exclusionary Past**

In the book *Pluralising Pasts*, Ashworth et al define heritage as “the use of the past as a cultural political and economic resource for the present.”<sup>10</sup> They further state that “material artefacts, mythologies, memories and traditions” become resources for the present in very selective and specific ways.<sup>11</sup> In the case of Sri Lanka I would add the teaching and writing of history as a central means by which the past is utilised as a resource for the present.

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<sup>9</sup> This is not to say that implementing such measures will remain a political priority.

<sup>10</sup> Ashworth, G.J, Brian Graham and J.E Tunbridge, *Pluralising Pasts. Heritage Identity and Place in Multicultural Societies* (London and Ann Arbor: Pluto Press 2007)

<sup>11</sup> Ashworth et al Ibid p.3

The Sinhala public's relationship to the past has been the subject of many anthropological explorations. Daniel claimed from fieldwork in the 1980s that the Tamil and Sinhala relationship to the past were quite distinct.<sup>12</sup> He in fact used the term Heritage to describe Tamil understanding of the past as drawing from traditions of music dance and literature. Daniel described Sinhala understandings of the past as actualised in the present through the many material artefacts that are mobilised as signs of its existence. Kapferer described Sinhala people's relationship to the past as follows "for Sinhala the past is always in the present and the person is inseparable from history, the person and history [forming] a cosmic unity."<sup>13</sup> Neither Kapferer nor Daniel make the perhaps more obvious point that the absence of a historical sensibility among the minorities has also been politically cultivated by a history discourse that has chosen to see only an exclusively Sinhala past and a more recent colonial "heritage."<sup>14</sup>

In his discussion of heritage and history Daniel describes a tour guide at the "heritage" sites in the country. The tour guide describes the greatness of the Sinhala past and its monuments as well as the fact that they were "destroyed by the Tamil invaders." In his narrative this tour guide also constantly references "the great historian Prof. K. M. De

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<sup>12</sup> V. Daniel, *Charred Lullabies: Chapters in an Anthropology of Violence* (Princeton: Princeton University Press 1996).

<sup>13</sup> Bruce Kapferer, *Legends of People Myths of State: violence intolerance and political culture in Sri Lanka and Australia*. Smithsonian Series in Ethnographic Inquiry (1998) .p. 213

<sup>14</sup> Celebrating "our colonial heritage" has become big business in post war Colombo. See *Colombo: the fastest growing city destination in the world*.

<https://www.youtube.com/watch?v=4COeTrjB6hA&feature=youtu.be>

Silva.” Therefore history as written by historians, taught in schools and reappraised in Television programs directly influences popular perceptions regarding “heritage.” There is a belief in the facticity of such a past endorsed by the authority of History as a discipline. Moreover the idea that *political claims can be made on the basis of such a history* remains entrenched in the country. In fact more and more complex claims are made of history to justify contemporary political practices.

Wickramasinghe traces Sri Lankan historians’ preoccupation with heritage as emerging from the anti colonial stirrings of late 19<sup>th</sup> Century where historical “authenticity” was sought to bolster resistance to the Colonial administration.<sup>15</sup> The “authenticity” of the earliest proponents of heritage Wickramasinghe states were grounded in the ancient hydraulic civilisations of the Rajarata and the material culture and symbols of the Kandyan Kingdom, framed within the textual discourse of the Mahavamsa. Colonial historians like Knighton and Caldwell<sup>16</sup> were also familiar with the Pali Chronicles and took their expositions literally. Later in the 1930s Sri Lankans trained in modern historiography engaged with the abundant materials using the methods and protocols of the academic discipline of history. Scholars like G. C. Mendis, for instance, were critical of the manner in which the chronicles were used as “evidence” to write Sri Lankan history.<sup>17</sup>

What has been emphasised about history – Sinhala Buddhist history—has varied in the service of a variety of political and economic projects. As Devasiri recounted recently, history

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<sup>15</sup> Nira Wickramasinghe, *Producing the present: History as Heritage in Post War Patriotic Sri Lanka*, Economic and Political Weekly Vol. XLVIII No. 43 (2013) Page 92

<sup>16</sup> Ibid at p 93

<sup>17</sup> Ibid



remains a pivotal factor in the Jathika Chinthana ideologues' claims about the Sinhala nation's greater political entitlement.<sup>18</sup> Additionally the development discourse mobilised the idea of the ancient agrarian civilisation of the Sinhala peasantry to justify the great irrigation projects of the modern state.<sup>19</sup> And the Gam Udawa village reawakening schemes of the Premadasa era were justified using the heritage discourse of the peasant farmland.<sup>20</sup> The BBS, as I will show, invoked the heroisms of past historic individuals (as similar to the BBS) in the service of a nation under threat in order to demonise Muslims and mobilise against them. The narratives that have been called upon for the above project had already created the image of the nation in terms that aggrandised the supremacy of one monolithic community, the Sinhalese—regardless of the many divisions of class caste region and political affiliation that divide them.

When Sinhala and Tamil nationalism turned violent in the 1970s the entrenchment of a Sinhala nationalist sensibility among history writers and the masses of the people had already occurred. That political claims could be made on the basis of greater historical entitlement was institutionalised in Sri Lankan politics.<sup>21</sup> Assertions of Tamil dissatisfaction with

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<sup>18</sup> Nirmal Ranjith Devasiri, 'Demalage Prashnaya: an analytical critic of the Sinhala-Buddhist Nationalist Discourse on the Political Aspirations of Tamil People in Sri Lanka' (2015)

<sup>19</sup> N Serena Tennekoon, 'Rituals of Development: The Accelerated Mahavāli Development Programme of Sri Lanka' in *American Ethnologist*, Vol 15, No 2, (1988) pp 294-310

<sup>20</sup> N. Perera-Rajasingham, 'The Factory is like the Paddy-field: Gam Udawa Performances, Ethnicity and Neoliberalism in Sri Lanka', *South Asian Review* 33 (3): (2012) pp 275-292.

<sup>21</sup> See Nirmal Ranjith Devasiri's recent critique of the use of history in the nationalist discourse spearheaded by Jathika Chinthana stalwart Dr. Nalin De Silva. Nirmal Ranjith Devasiri Ibid note at 18.

the treatment of minorities by the state were responded to by removing minority rights safeguards in the constitution and introducing symbols of Sinhala Buddhist entitlement such as enshrining the foremost place for Buddhism in the 1972 Constitution. Calls for greater self determination, inclusion of more minority rights safeguards in the constitution etc. were defeated on the grounds of the Sinhala majority's historical entitlement to design the contours of the polity in its own image.<sup>22</sup>

The production of History by professional historians as well as the stories written by amateur historians and text book writers has inculcated a sensibility in the vast majority of Sinhalese that the minorities in this country are relevant only as the "other" to the narratives of past Sinhala greatness and the framing of an equally wondrous future.<sup>23</sup> It is time that this is changed.

The problematic preoccupations of history writing in Sri Lanka has long been recognised by both academics and

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<sup>22</sup> As myself and others have documented, the Muslim political elite were also not shy about supporting and sometimes endorsing the Sinhala ideologues claims to greater entitlement. See- Farzana Haniffa 'Conflicted Solidarities? Muslims and the Constitution-making Process of 1970-72' in Asanga Welikala (ed) *In The Sri Lankan Republic at Forty: Reflections on Constitutional history, theory and practice* (Centre for Policy Alternatives 2012); David Scott, 'Dehistoricising History' in Jeganathan and Ismail (eds) *Unmaking the Nation: The Politics of Identity and History in Modern Sri Lanka* (Social Scientists' Association 1995)

<sup>23</sup> Nira Wickramasinghe and Sasanka Perera, 'Assessment of Ethno-Cultural and Religious Bias in Social Studies and History Texts of Years 7,8,10, and 11' (Colombo: World Bank 1999); R Siriwardena, S Bastian, K Indrapala and S Kottegoda, *School Textbooks and Communal Relations in Sri Lanka*, Part I, Council for Communal Harmony through the Media, Colombo (1980)

activists in the country and a variety of strategies have been used to address the issue. Generations of academics have in fact taken on the task of critiquing how history writing and category construction have endorsed the excesses of the state against the Tamil minority. In the 1980s the Social Scientists Association attempted to address the issue in the book “Ethnicity and Social Change” by calling attention to the fact that there was no rational historical basis for the Sinhalese claims of being the first legitimate inhabitants of the Island, and that many of the bases of ethnic animosity were groundless in terms of historical “fact”.<sup>24</sup> In later writings, Gananath Obeyesekere questioning the use of the Vijaya myth pointed out that what Sinhala ideologues claimed to be the founding myth of the Sinhala race was in fact one of patricide and incest.<sup>25</sup> R.A.L.H. Goonewardene offered a sophisticated analysis of the evolution of the term “Sinhala” and claimed controversially that the word signified a large grouping only at a very late historical stage in its usage.<sup>26</sup> In later years the question of whether the facticity of historical claims was really essential to the understanding of community – or disproving such claims would in anyway undermine the political salience of claims to community in the present, was raised by David

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<sup>24</sup> *Ethnicity and Social Change*, Social Scientists Association (1984)

<sup>25</sup> Richard Gombrich & Gananath Obeyesekere, *Buddhism Transformed: Religious Change in Sri Lanka*, (Motilal Banarsidass Publishers 1988)

<sup>26</sup> Nira Wickramasinghe & Sasanka Perera, ‘Assessment of Ethno-Cultural and Religious Bias in Social Studies and History Texts of Years 7,8,10, and 11’ (Colombo: World Bank 1999). He was of course challenged by the work of K.N.O Dharmadasa and others who questioned both his politics and what they claimed was his selective use and problematic interpretation of sources. David Scott, ‘Dehistoricising History’ in Jeganathan and Ismail (eds) *Unmaking the Nation: The Politics of Identity and History in Modern Sri Lanka* (Social Scientists’ Association 1995)

Scott.<sup>27</sup> Scott points to a then emergent critical scholarship about history as a craft of the present that had very little to do with the past.

Those trying to question or reverse history teaching and writings' complicity in taking forward the ethnic conflict have had modest success. Regardless of the academic rigour and political commitment of two generation of academics, the story of Sinhala supremacy and entitlement is now entrenched in the popular imagination. This has much to do with the escalation of the conflict, and also with the heritage discourse through which the material artefacts and ancient ruins have been mobilised as evidence of past greatness of the Sinhalese and also aestheticized and commoditised for tourist consumption. Many Sri Lankan historical sites have UNESCO world heritage status. As Wickramasinghe points out, they also continue to be in use as sites of pilgrimage and worship and have an on-going importance in excess of the globally sanctioned historic preservation discourse.<sup>28</sup> The Military defeat of the LTTE in 2009, and the states mobilisation of the rhetoric of the victor have further legitimised Sinhala supremacist sensibilities.

History continues to exist in our school curricular today in a manner that reflects the preoccupations of the 1980s. Today history is taught as a compulsory subject in secondary schools until the Ordinary Level Exam and according to Wickramasinghe “offer children a narrative of the glorious days before invaders from India and colonial powers shattered

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<sup>27</sup> David Scott, ‘Dehistoricising History’ in Jeganathan and Ismail (eds) *Unmaking the Nation: The Politics of Identity and History in Modern Sri Lanka* (Social Scientists’ Association 1995)

<sup>28</sup> Nira Wickramasinghe & Sasanka Perera, ‘Assessment of Ethno-Cultural and Religious Bias in Social Studies and History Texts of Years 7,8,10, and 11’ (Colombo: World Bank 1999).

the equilibrium of society ushering in modernity”.<sup>29</sup> She states further that History as a subject that interprets the past rather than glorifies it is unrecognisable in these textbooks.

### **Writing Muslims’ History in Sri Lanka**

In discussing heritage and history’s role in providing a fiction of authenticity to contemporary notions of community, Nira Wickramasinghe calls attention to the fact that people’s preoccupation with the “authentic” past can take many and varied forms. She states “Christians’ and Muslims’ sense of the authentic past was deeply embedded in the history of their own faiths, a history external to the Island in which they lived”.<sup>30</sup> While religious Muslims are undoubtedly committed to the authenticity of the prophetic past, Sri Lankan Muslim leaders have constantly struggled to articulate community in relation to a Sri Lankan past as well. During the long and troubled conflict years, ideas about community endorsed by faith triumphed other ways of imagining community. Many Muslims today identify more as a faith community and find that to be of greater succour while living out the social and political reality of being a national minority. Therefore, it is fair to speak of them as drawing on an authentic past to the time of the prophet.

However, at different points in post colonial Sri Lanka the Muslim leadership saw that the authenticity of the Islamic past needed to be invoked together with the Muslims long historical connections in Sri Lanka. Community leaders have attempted at various times to integrate a narrative of Muslims’ ancient Sri Lankan past into the history of Sinhala greatness. Many well recognised the political salience of history writing

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<sup>29</sup> Wickramasinghe Ibid note 15 at p 94.

<sup>30</sup> Wickramasinghe Ibid note 15

in the Sri Lankan context. At particular moments in time this need to articulate Muslims' belonging in terms of those adopted by academic historians and the heritage industry have been identified by Muslims as well. The establishment of the Moors Islamic Cultural Home in the 1940s called for a recognition of Islamic cultural greatness—through reference to the mathematical and scientific discoveries of the early Islamic civilisation-- as well as Muslims ancient history on the island.<sup>31</sup> In the 1980s the International Center for Ethnic Studies brought together a group of scholars to write about the Muslims, and produced a volume of essays edited by renowned Sri Lankan Muslim scholar and long time head of the Naleemia Institute Dr. M.A.M Shukri. The volume was titled “Muslims of Sri Lanka: Avenues to Antiquity” and several of the essays speak to Muslims' long history on the Island. In 1993 historian Lorna Devarajah wrote a book about Muslims' “Structural Assimilation” into the Kandyan Kingdom also interestingly titled “The Muslims of Sri Lanka: 1000 of years of ethnic harmony”.<sup>32</sup> The work was commissioned by A.C.S. Hameed, the then foreign minister in the United National Party (UNP) regime of the 1980s and

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<sup>31</sup> The Moors Islamic Cultural Home established prior to independence attempted to document various aspects of Muslim history in the “souvenir” produced every five years. The MICH souvenirs are an interesting study in the many ways in which the Muslims attempted to preserve the knowledge regarding their long history in the Island. They were however written not by professional historians but concerned amateurs. Some attempts were made to have commentaries written by representatives of the archaeological department. (MICH Golden Jubilee Souvenir featured an article entitled ‘The Moors’ by S. Sanmuganathan former Assistant Archaeological Commissioner. p.128) One of the souvenirs also carried an excerpt from Lorna Devarajah’s book. (MICH Golden Jubilee Souvenir.)

<sup>32</sup> Lorna Devarajah, *The Muslims of Sri Lanka: One Thousand Years of Ethnic Harmony, 900-1915* (Lanka Islamic Foundation 1994)

1990s who saw the need for writing Muslims' history and the greater integration of the story of the Muslims into the story of the Sinhalese.

More recently journalist Asif Hussein, has attempted the herculean task of writing a social history and ethnography based on extensive fieldwork and has produced a compendium that attempts to single-handedly address the dearth of historical information regarding the Muslims.<sup>33</sup> Hussein's ambitious work documents a great variety of existing textual and material sources about Sri Lanka's Muslim communities' ancient past.

Compared to the writings on Sinhala Buddhist Sri Lankan history, this list however, is quite short.<sup>34</sup> The lack of attention to the Muslim community by mainstream historians of Sri Lanka, the lack of any inclusion of Muslim history in school text books and the lack of any public conversation regarding Muslims' claims to an ancient past in the country marks the irrelevance of Muslims to the grand narratives of the Sinhala Buddhist past. The structure of these narratives makes possible a place for the Tamil as "other" and the Muslim as peripheral.

## **History: Its Contemporary Uses and Abuses**

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<sup>33</sup> Asif Hussein, *Sarandib: An Ethnological Study of the Muslims of Sri Lanka*, (Neptune Publications 2007)

<sup>34</sup> My list does not include efforts to document Muslims' more recent history like the 1915 riots, the expulsion of Muslim from the north by the LTTE and the extensive documentation of Muslims in the east. Further The Muslim Women's Research and Action Forum had two publications, one in 1990 and one in 1997 that attempted to document both the history of Muslims as well as more contemporary concerns.

The absence and irrelevance of Muslims in history writing and heritage making has very material consequences. At the height of the Sinhala nationalist campaign against the Muslims of Sri Lanka in 2012-2015, the extremist monks group, the Bodu Bala Sena (BBS) deployed references to the historical legacy of Sinhalese freedom fighters and claimed they were continuing this legacy. In a large meeting in Kandy in early 2013 the BBS invoked certain Kandyan aristocrats' opposition to the British and called on the gathering to think of the BBS campaign against Muslims as similar to the dissent of these "heroes" against the colonial regime.<sup>35</sup> In this story the BBS were the Kandyan Aristocracy that opposed the British and the Muslims were the alien, hated, invaders.

In 2013, "halal" (the Muslim practice of only eating food deemed to be permitted) and the All Ceylon Jamiathul Ulema running an agency for halal accreditation became a burning issue in Sri Lanka.<sup>36</sup> The BBS introduced it as a problem and it preoccupied people across the country. It was finally resolved by the intervention of the Chamber of Commerce. The All Ceylon Jamiathul Ulema was persuaded to withdraw from the accreditation program and the Muslim business elite took on the task of appointing a body to establish a new entity, a professional organisation to carry out the task. The diffusing process did not engage the BBS. However, the BBS, still in its ascendancy speedily came up with a rhetorical move by which

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<sup>35</sup> Kapil Komireddi, '[Saffron Robed Buddhist Monks Sniff the Air Each Morning for the Scent of a Fresh Offence by one Minority Community or Another](http://dbsjeyaraj.com/dbsj/page/49?page_cat=article-detailshello)' (2013)

[http://dbsjeyaraj.com/dbsj/page/49?page\\_cat=article-detailshello](http://dbsjeyaraj.com/dbsj/page/49?page_cat=article-detailshello)

<sup>36</sup> *BBS announces launch of 'Anti-Halal' agitation*, February 2013

OmLanka Sri Lankan News Website

<http://www.omlanka.com/BBS-160113.html>



to incorporate the resolution of the issue into its own narrative of saving the country from the Muslim threat.

In a February 2013 public meeting in Kandy, the Ven. Gnanasara claimed that the resolution of the halal issue was an ideological victory (mathavadi jayagrahanayak) for the BBS.<sup>37</sup> It was a victory that was won without casting a single stone, without hurting a single hair on a single head. He compared BBS' position in the halal issue to the Panadura debate of 1873 between Miggetuwatte Gunananda and father David De Silva where the monk and the priest debated the relative merits of their respective religions. The Ven. Gunananda was considered to have won the debate. Gnanasara claimed that the BBS too was able to win another war of ideas through the victory over the halal issue and that they would continue to win their battles in a similar manner. In his speech Gnanasara referenced a variety of Kandyan national heroes and the status of Kandy – Senkadagala --as the final bastion to fall to the British. He claimed that the BBS was powered by the spirit, *aathmaya* of Kappetipola whose blood was shed in the Senkadagala Nuwara,<sup>38</sup> and he compared little children who told parents not to buy halal to Madduma Bandara, the nephew of Kappetipola who was also executed for his family's part in inciting a rebellion against the British. They were named as the future leaders of the Sinhala race. At one point he states – “*until these Madduma Bandara's are turned into Kappetipolas*”, we will continue our fight.

The following is a verbatim translation of another of Ven. Gnanasara's rhetorical flourishes:

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<sup>37</sup> Bodu Bala Sena Kandy Meeting, February, 2013, Hiru FM report <https://www.youtube.com/watch?v=cpmr4mWBICk>

<sup>38</sup> Kappetipola was a Kandyan nobleman who joined forces with those rebelling against the British in 1817. The rebellion was crushed and Kappetipola was executed.

*“On that day in 1818 they killed Kappetipola and cut off his head and took it to Britain...But Keppetipola’s bravery, his determination and his commitment remain alive today. We can hear his message in the leaves on the trees, in the breezes that blow through the town of Senkadagala. His spirit speaks to us. Even today when we visit the Dalada Maligawa we hear the voices of Kappetipola, Gongale Goda Bandara, Veera Puran Appu and Madduma Bandara. Even today when we pray to the tooth relic, we hear their spirits talking to us and telling us, Hamuduruwaney the city is destroyed, the priesthood has been robbed, the property of the temples have been sold off, Hamuduruwane, protect these things, they tell us. For 443 years this soil has been wet with the blood of these martyrs. (Veeravaru). These trees have grown from that spilt blood. Even the water that we drink comes from the transformation of that blood. How can we turn our back on the legacy of those martyrs? We cannot turn our backs. We cannot! If anyone speaks ill of the Buddha Shasanaya or the jathiya, we have to fight them ideologically. We have taken on the responsibility of defeating these forces, and we have come to ask for the blessings of the tooth relic in order to do so”<sup>39</sup>*

What is striking in reading this impassioned account is not just the fact that it is used to validate BBS racism. It is also regretful given the manner in which history is ethnicised in the country that no Muslim child is permitted to aspire to be a Madduma Bandara. The Muslim students cannot look to the anti colonial heroism of the Keppetipolas and the Ehelepolas (Madduma Bandara’s family) as being “their” heroes. The “Sinhaleseness” of such heroes always precludes their identification as heroes for anyone else in the country. And

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<sup>39</sup> And finally in a flourish he recounts the story of the sick Kappetipola who was finally caught by the British he says that the person who informed the British was a Muslim!

herein lies the greatest tragedy of this country's heritage discourse. It is created in such a way that the country's minorities are forever banished from its annals. In fact the story is written in such a way that it can easily be mobilised to constantly re-establish the marginality of the non-Sinhalese.

During that time of the anti Muslim movement there were other claims too that were made on the basis of historical entitlement. The Secretariat for Muslims documented four contexts within which anti Muslim sentiment was rampant and tensions were high.<sup>40</sup> In some of these contexts violence seemed imminent and the papers were an attempt to understand the trigger factors and thereby mitigate such violence erupting.

The four contexts covered were Dambulla, Devanagala, Kuragala/Jailani and Deegavaapi. In all of these instances there were claims to historical entitlement on the part of the Buddhist protagonists. In the Dambulla case, Muslims, Tamils and Sinhalese were displaced on the claim that the land belonged to the sacred area surrounding the Dambulla Rajamahaviharaya and ultimately moved out to enable the building of a parking lot for the temple. In Deegavaapi, there is longstanding animosity between different ethnic communities. The temple is at the center of land disputes with Muslim villages. In this case the temple authorities and Sinhala families in the area claim the Muslim villages are living on temple lands. Sinhala villages placed at a similar distance from the temple are not affected. In the dispute over the villages surrounding the Devanagala Raja Mahaviharaya in the Kegalle district, some Sinhala residents of the area claimed that the Muslims have no rights to their homes

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<sup>40</sup> *Of Sacred Sites and Profane Politics: tensions over religious sites and ethnic relations*, Secretariat for Muslims Vol. 1&2 (2015)

regardless of their colonial era land deeds. The area representatives of the Department of Archaeology were complicit in exacerbating mistrust. The historical status of Sinhala Buddhists as the sole claimants of the country's Buddhist heritage is mobilised in all these instances to debilitating effect. In the case of Kuragala/Jailani the issue of entitlement is quite stark. The Mosque under the rock is under threat due to the fact that archaeological remains of ancient humans have been found there and further, that some historic artefacts there speak to an ancient Buddhist presence. Historic artefacts that Muslims claimed to speak to the legend that the Sufi saint Abdul Quadir Jilani meditated in the cave have held no importance for an archaeological department preoccupied with only a limited historical narrative. Recently when the Ravana Balaya group stormed the site they destroyed one of the rocks with an ancient Kufic inscription.<sup>41</sup> The lack of respect for a site sacred to anyone other than Buddhists, and the prevailing lack of regard even by the archaeological department for artefacts and sites considered important by non- Buddhists is a sad comment on the ethnicisation of the disciplines studying the country's history.

This paper does not claim that the writing of an inclusive history will solve all problems. Our research in to the flashpoint areas cited above revealed that the heritage and history discourse was held captive by political & economic preoccupations and the ambitions and aspirations of

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<sup>41</sup> The Kufic script was used in the earliest Arabic writings of the Quran and is the oldest form of writing used in Islamic literature. It was used on tombstones and coins as well as for inscriptions on buildings. The script was called Kufic since it was believed to have been developed in the Iraqi city of Kufah. The many traces left by early Arabs and Muslims in Sri Lanka are not recorded in any systematic fashion and the knowledge contained in them may already be lost. <https://global.britannica.com/art/Kufic-script>

charismatic monks. The complications on the ground are important to take note of particularly the manner in which the complexity of everyday ethnic tensions in turn inform national level politics. However the fact that the context does operate in the absence of an alternative historical narrative must be noted. The historical discourse that is utilised consistently renders Muslims as outsider – the perennial itinerant who has no entitlements either to history or to heritage.

We are not equipped with other narratives through which to counter this line of argument. We have no stories of a collective Sri Lankan consciousness. Details of interconnected lives where ethno religious identity was perhaps not uppermost in persons' engagement with one another are not readily available to us. For instance we have no detailed accounts of ancient Arab and later Muslim communities roots in Sri Lanka due to the one thousand year old Arab trade connections in South Asia. How they played out in relation to the well-researched tales of local Sinhala kingdoms is yet to be written. What we have instead is a professional history writing industry that has concentrated on bolstering a narrative of Sinhala greatness that has in turn named and created its minority others with the support of chronicles written by monks. We also have history and myths taught as facts. Therefore the groundwork for narratives where the BBS can position itself as similar to the hero Keppetipola and where the Muslims are like the invaders is already laid.

The investigation and establishment of alternative historical narratives is important. It is not suggested however, that these narratives be formulated along yet another ethnically homogenous linear trajectory mirroring the mono ethnic narrative of Sinhala history. Such a narrative of the founding and evolution of a now minoritised ethnic group can only be a further instantiation of the sorry state of intercommunity

relations in the country. There are many celebratory narratives emerging globally of fractious communities coexisting at earlier times. One example is the Muslim trading communities of South Asia and their close relationships with their Hindu neighbours as featured in the film *Yaadhum* of South Indian film director Kombai Anwar.<sup>42</sup> Another, the rule of Moors in medieval Spain in a 2005 documentary directed by Timothy Copestake.<sup>43</sup> This film attempts to historicise Europe's Muslim heritage in an accessible format. In Sri Lanka, where multiple religious communities have lived for years there is sure to be a rich compendium of as yet untapped materials to be drawn upon to tell such a story.

Knowledge production in Sri Lanka has been rather over determined by narratives of the formation of single ethnic communities and later in mapping the development of ethnic animosity and its institutionalisation. A question of peaceful coexistence and valuing of many cultural influences has not been a narrative that has preoccupied local academics. It is unsure what riches such investigations might unearth. One such possible area of further investigation is to build upon Devaraja's work on the Sinhala *Ge* names of Kandyan Muslims. Muslim minority self -identification in Sri Lanka is varied. But especially among families in the Kandyan countryside Sinhala *Ge* names among Muslims are preserved, and stories of the Muslims being the physicians or the "Hakim" to the Kandyan kings abound and are documented.<sup>44</sup> Another possible avenue is the story of Saradiel. The story of Saradiel is part of folklore but the legendary friendship between Saradiel (the Sinhala Robin

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<sup>42</sup> Anwar Khombai. 2013. "Yaadhum" Chennai : Media Kombai, <http://yaadhum.com/>

<sup>43</sup> Timothy Copestake 2005 "[When the Moors Ruled in Europe](https://www.youtube.com/watch?v=PM8HnvuKbAo)" <https://www.youtube.com/watch?v=PM8HnvuKbAo>

<sup>44</sup> Ibid note at 32

Hood) and Maumalay Marikkar (a Muslim) and the story that Marikkar's sister was Saradiel's lover/wife remain alive. This information that lives among Muslim communities especially in the Kandyan hill country areas is barely chronicled by scholars – the one volume by Lorna Devarajah remains the only resource.<sup>45</sup> This material requires extraction, processing and preservation. If not it may soon be lost forever.

### **Conclusion: Nationalism Today**

We recently saw on social media and on the backs of cars and three wheelers a square with a royal blue background, on it in yellow lettering is the word *Sinha* (lion), and in red lettering with no space to demarcate a different word there is the letter *le* or blood. The phenomenon was very active on social media where both proponents and opponents had their say. Its presence on southern roads continues (while the initial furore around it has abated somewhat) and is yet to meet with any organised opposition. *Sinha le* or *Sinhale* that is being celebrated in car stickers and Facebook posts is galling to minorities at a variety of levels. What is galling for minorities – especially Muslims is the fact that it references the Sinhala “greatness” described above. The blood of the Lion but also the political entity is being evoked in a manner that excludes everyone else sending the clear message that the time of the BBS ascendancy is not as far behind us as some of us may have wished.

According to history books as well as song lyrics praising Sinhala heritage, there were historical moments when the country itself was known as the Thun Sinhale.<sup>46</sup> Additionally,

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<sup>45</sup> Ibid note at 32

<sup>46</sup> The Thun Sinhale was a reference to a historical spatial demarcation of the island in keeping with the major river basins. The names for the three areas – three kingdoms were Ruhunu Maya

as a member of the political party Pivithuru Hela Urumaya, Madhu Madhava Aravinda often stated that the campaign references the Sinhala-ness of the country but also then names minorities as *Sinhala* Muslims, *Sinhala* Tamils and so on.<sup>47</sup> In this discourse minority identity is second order; we are all mostly Sinhala. This was an oft-repeated claim of the BBS in pre 2015 Sri Lanka. The story of why the nomenclature gives prominence to Sinhala-ness over Sri Lankanness remains unaddressed.

It is a relief that the government's commitment to overturn racism has been stated several times by the president and that the institutions tasked with various aspects of coexistence-reconciliation, integration etc. have all been mindful of the Muslim question as well. Perhaps as a reference to this prevailing mood we saw many on social media responding to the *le* phrase using '*Ekama le*', '*Marakka le*', and in some instances quite humorously as '*Botha le*', and '*Manta le*' referring to inebriation and mental illness of those espousing the idea. However the campaign is also a startling reminder that those for whom minority othering is a preferred political tool can very easily mobilise these corrosive sensibilities even in a context where those in power are not predominantly in support of it. It is also a reminder that the country's legacy of war and attendant racism has become entrenched (and long supported by the writing of and teaching of history and heritage in the country).

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and Pihiti. See Lorna Devarajah, *The Kandyan Kingdom of Sri Lanka. 1707-1782* (Lake House Investments 1988)

<sup>47</sup>Please see the following link for a speech that is illustrative of this minor politician's platform. The Pivithuru Hela Urumaya continues to maintain a racist understanding of non-Buddhist groups as their preferred position. They self-consciously embrace the Sinhale Le project in its most exclusivist form.

<https://www.youtube.com/watch?v=naTrMj87vpo>



The challenges of history writing and teaching for the future that we face today are many. For instance what is the nature of the story that our school children will learn about the more than thirty years of war? The recounting can take many frames – it can be one that is from the perspective of the victor, one from that of the vanquished or it could be from the perspective of a collective that regrets the short-sightedness of the leadership of all sides in bringing about such enormous destruction and death. President Sirisena’s speeches are replete with ideas that refuse to glorify the war. Those who are currently working on shaping our students’ textbooks must creatively use these ideas to discuss the conflict in terms that look to the future.

Today, when we are looking towards dismantling Sinhala supremacy and ethnic enclave politics, it is important that we properly understand the place that history and heritage discourses continue to play in minoritising those who are not Sinhala Buddhist in the country. (And perhaps also recognise that this dismantling will forever be an incomplete project.) This paper, in arguing for greater scholarly engagement with the country’s multiple historical narratives does not claim that history writing is the solution to all the ills of the Sri Lankan polity. It is claiming nevertheless that there are some things that we, at an important political turning point can work to institutionalise. Academic writing is one such thing. Historical, anthropological and other social science writing that consciously attempts to write the story of our collective past, that recognises the many ways in which we have historically organised that collectivity, is a great need. Institutional support for such writing that will attempt to pluralise the past will go a long way in opening us up to novel narratives of our past that can positively impact our future.

# 6

## **The Difficulties and Probable Impossibility of a Coherent Conception of Transitional Justice in Sri Lanka**

*§*

*Kumaravadivel Guruparan*

## **Introduction**

Similar to the pride of place that ‘Federalism’ enjoyed during the Norwegian mediated peace process in Sri Lanka between 2002 and 2005, ‘Transitional Justice’ is the buzzword of the civil society and think tank fraternity in post- 8 January 2015, Colombo, Sri Lanka. What was spoken about in ‘accountability’ and ‘justice’ language notably took the ‘Transitional Justice’ turn following the defeat of President Mahinda Rajapaksa, suggesting that the transition had begun. This article seeks to problematize this new and emerging discourse for Transitional Justice in Sri Lanka by posing some fundamental questions about what constitutes as ‘transition’ in the discourse on ‘transitional justice’. The first section points to the need for a socio-political conception of Transitional Justice. The second section argues that there is no one singular narrative of what constitutes transition in Sri Lanka and the third section seeks to identify how the divergent narratives on what constitutes a transition affects the accountability debate among Sri Lanka’s divergent political communities. The sober conclusion of the paper points to the impossibility of a coherent transitional justice discourse in Sri Lanka.

### **1. The Need to Rescue the Transitional Justice Discourse from Lawyers**

The International Centre for Transitional Justice (ICTJ) defines Transitional Justice as ‘a set of judicial and non-judicial measures that have been implemented by different countries in order to redress the legacies of massive human rights abuses’<sup>1</sup>. These measures, the definition adds, include

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<sup>1</sup> ICTJ, *What is Transitional Justice*, <https://www.ictj.org/about/transitional-justice>, last accessed on 01 February 2016

criminal prosecutions, reparations programmes and various kinds of institutional reforms. The ICTJ is keen to emphasise that Transitional Justice is ‘not a ‘special’ kind of justice, but an approach to achieving justice in times of transition from conflict and/or state repression’.

The discourse on Transitional Justice as noted previously is new but in its short span has been abundantly legalised with lawyers taking the lead in framing the discourse. The framing of this debate to date largely follows the definitional parameters laid out in the above definition by the ICTJ and focuses on the four pillars of Transitional Justice – Criminal Prosecutions, Reparations, Institutional Reform (in particular security sector reform) and Truth Commissions. The Government of President Sirisena and Prime Minister Wickramasinghe’s official articulation of their approach to these questions also exhibits attitude and knowledge of the framework and terminology of Transitional Justice.

Legalisation of the Transitional Justice discourse like the legalisation of most social and political issues tends to narrow the debate. It reduces the debate into a technical debate with only those who have the technical knowhow acting as gatekeepers to the debate. But Transitional Justice is hardly a legal matter. In fact transitional justice has more to do with politics and is in reality a bargain about what the best trade-offs are for justice in a post-war context. As Christine Bell points out:

‘Transitional justice does not constitute a coherent ‘field’ but rather is a label or cloak that aims to rationalise a set of diverse bargains in relation to the past as an integrated endeavour, so as to obscure the

quite different normative, moral and political implications of the bargains<sup>2</sup>.

Bell quotes from a 2004 UN Secretary General report on Transitional Justice to make her point wherein Transitional Justice is defined as “the full range of processes and mechanisms associated with a society's attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation”<sup>3</sup>. This definition of Transitional Justice, Bell says, is a paradigm shift in the manner in which transitional justice issues were approached previously in that the words ‘achieve reconciliation’ involved a more explicit recognition of transitional justice ‘as a tool for a range of political and social goals beyond accountability’. Ruti Teitel also comes close to such an approach in her exposition of transitional justice as a broader label to describe ‘the conception of justice in periods of political transition’.<sup>4</sup> The emphasis of the ICTJ’s definition on accountability and the broader political and social goals approach to Transitional Justice that Bell and Teitel draw our attention to in the United Nations (UN) report is key to a broader contextual understanding of Transitional Justice issues.

Such a broad conception of Transitional Justice that is open about the political and social goals of the process, I think, is important to having an open and honest conversation about

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<sup>2</sup> Christine Bell, *Transitional Justice, Interdisciplinarity and the State of the "Field" or "Non-field"* (2009) International Journal of Transitional Justice 1-23

<sup>3</sup> *Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, UN Doc. S/2004/616, 3 August 2004. Para 8

<sup>4</sup> Ruti G. Teitel, *Transitional Justice* (Oxford: Oxford University Press 2000), p. 3.

post-war issues of justice and transition in Sri Lanka. It is important that we do not relegate the Transitional Justice issues to lawyers but instead take a more inter-disciplinary approach to the field that I believe will help us unravel the conflicting narratives behind the divergent narratives for accountability and justice in Sri Lanka. Claims heard often in activist circles that the Transitional Justice debate should not be politicised makes no sense. Such calls and claims are typical representations of Sri Lankan civil society's refusal to be open about their own political leanings.

## **2. Transition from and to?**

I would suggest that an important starting point for such a broad conversation would be to engage in a debate about identifying the 'transition' in Transitional Justice. The wider question that is being raised herein is as to whether there can be a particular approach to Transitional Justice when there is no one way in which political transition is conceived and understood by Sri Lanka's divergent political communities. I suggest that broadly speaking there are three visions of transition in Sri Lanka: firstly the one shared by liberal sections of the Southern polity, of the democratic transition of the rule of law, good governance variety, secondly the one shared by the majority Tamil community of deep democratisation - transition to a pluri-national Sri Lanka, and thirdly the one shared by the majority Sinhala Buddhist community that no transition whatsoever is required.

18 May 2009 constitutes a significant moment of transition in the history of post-independence of Sri Lanka. The moment has had an immense impact on many aspects of public life in Sri Lanka but obviously its impact is most felt in the way in which the National Question is perceived and understood. To put it summarily, the moment is interpreted by many as a defeat of not just the Tamil separatist project but also, more

importantly, as a defeat of the more widely conceived self-determination project. The idea that is shared by many actors including the liberal Colombo-based civil society and Western diplomats is that what constitutes transition is democratisation of Sri Lanka, *simpliciter* – the reestablishment of ‘good governance’ and ‘rule of law’. This understanding of transition puts the issue with regard to the character of the state (by which I mean the project to reconfigure the current Sri Lankan state from a Sinhala Buddhist nation-state into a pluri-national state) on to the back burner or that it can be addressed incrementally by this project for democratisation. Given that the LTTE is no more, the armed actor that put the issue of the character of the state at the forefront of the debates about the national question, there is no pressure to deal with the national question with a sense of urgency in this conception of the transition. The Tamil side in this analysis requires management. The ‘moderates’ who agree to this vision of transition, have to be promoted and the ‘extremists’, who criticise this narrow vision of regime change as transition, have to be side-lined - thus making sure that the Tamil side does not disturb this idea of regime change as transition. Hence the regime change of January 2015 in which the wartime President Mahinda Rajapaksa was defeated and his former Minister Maithripala Sirisena was elected with support from a wide variety of opposition parties, was hailed as a moment of peaceful democratic transition. While it is acknowledged that this transition is not complete, much focus has been on protecting the transition and not about making it complete. Hence insisting on real and immediate reforms in this analysis are rubbished as unrealistic and not pragmatic. A more sympathetic approach to delayed real reforms has been adopted and justified as being necessary to protect the ‘revolution’ of January 08, 2015 from being jeopardised by the former President’s counter revolution, a man who still enjoys a majority of the support of the Sinhala-Buddhist electorate.

Sections of the Tamil polity have disagreed with this approach to the post-May 2009 politics. The Tamil Civil Society Forum, of which this author is part of, in its statement on the Presidential elections of 2015<sup>5</sup> at which President Sirisena was elected, noted that the democratisation of Sri Lanka will not be possible without addressing the National Question. The statement pointed that a number of the anti-democratic practices prevalent and institutionalised in the South in the past several decades were justified as measures that were necessary to respond to the secessionist threat posed by the Tamils. Hence it argued a resolution of the National Question would create a better atmosphere for deep democratisation.

The statement particularly pointed out that Presidential Candidate Sirisena's manifesto despite being mounted on the promise for good governance was silent on a solution to the National Question and that he had in an agreement signed with the JHU pledged to not deviate from the age-old position of Sinhala Buddhist majoritarianism. It further pointed out that candidate Sirisena repeatedly promised not to withdraw troops from the North-East and that he would safeguard the armed forces and its commander in chief, then President Mahinda Rajapaksa, under whom he served during the war and after until a few months of the election, from international demands seeking accountability<sup>6</sup>. Critiques of this approach do not disagree with the central arguments offered by TCSF

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<sup>5</sup> (In Tamil) Available here:

<https://www.scribd.com/doc/250856951/TCSF-on-Presidential-Elections-23-Dec-2014-Tamil>, 23 December 2014

<sup>6</sup> Also see further, Kumaravadivel Guruparan, 'Why Sirisena's victory is not a victory for Tamils' (Caravan India, 13 January 2015) <http://www.caravanmagazine.in/vantage/why-sirisena%E2%80%99s-victory-not-victory-sri-lanka%E2%80%99s-tamils>



apart from criticism that its authors weren't pragmatic in that they didn't understand the realities of the choices. The Tamil National Alliance, the largest Tamil political formation, *contra* TCSF in fact did endorse Sirisena openly but also had an interesting paragraph on democratisation which was not far from the sentiments expressed by the TCSF:

“The TNA believes that genuine restoration of democracy to the country will only be meaningfully achieved when the Sri Lankan state is structured to accommodate the aspirations of all its diverse peoples to meaningfully access state power, and when all Sri Lanka's citizens are treated equally”<sup>7</sup>.

It must be noted here that the TNA leadership in the post-war context, as opposed to the majority in the party, is in ideology proximate to the liberal sections of the Southern polity. However given electoral pressures, particularly emanating from its break away section now under the banner of a new political party, the Tamil National People's Front, the party has been forced to stick with the fundamentals of the Tamil self-determination movement at the least during election times. The TNA seems to have so far successfully managed a split personality at elections and between elections oscillating between these positions as and when it sees fit<sup>8</sup>.

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<sup>7</sup> Statement of the Tamil National Alliance on the Presidential Elections of 2015 (released 30 December 2014) available here: <https://www.colombotelegraph.com/index.php/tna-supports-maithri/>

<sup>8</sup> See further, Indhiraa, TNA, TNPF, DBS Jeyaraj and Objective Journalism, <http://tamildiplomat.com/tna-tnpf-d-b-s-jeyaraj-and-objective-journalism/>

The Tamil polity to be sure is not monolithic. While there is an overwhelming majority of the population that believes that Tamil self-determination politics needs to continue, there is confusion as to how best to pursue this. There is probably an expansion among those who think that pragmatism requires that the self-determination aspect of the politics be de-emphasised and that the community focus on economic and societal re-building. The reason offered for this is because of the perception that to insist on the former leads to loss of opportunities with the latter. This state of transition is a period that is built with anxieties about the political future.

The differences between the Tamil polity and the liberal sections of the South as to what constitutes the transition is however not one of mere strategy or a discussion of means versus ends. While undoubtedly regime change is a necessary component and a means to the kind of transition that the Tamil polity wants Sri Lanka to move towards, the difference between them and the liberals is that the latter seems to consider regime change as an end of its own. The doubt that regime change is an end goal of the transition is fuelled by the fact that the new regime that they promoted and brought into existence, except for a few glossy changes on the surface, remains unchanged on the fundamental root causes that led to the armed conflict. The main accusation from the Tamil activists here is that what is being promoted as transition is not even showing early signs of deep and structural change.

But the differences between these constituencies, the Tamil polity and the liberal sections of the Southern polity while significant are nothing compared to the differences that they have with the larger Sinhala Buddhist electorate on the interpretation of the post-18 May 2009 context. This constituency, which by size is the largest, believes that there is no such problem as the National Question that needs

resolving; the problem that existed was a problem of terrorism and that what is now required is rapid economic development. Sections of this polity that are more politically savvy regard that there is a measure of a political reforms that may be necessary for instrumental reasons (for example for restoring Sri Lanka as a 'respected member of the International Community) but believe that these reforms should not affect the state as it is presently conceived – unitary and placing Sinhala Buddhist interests at the helm of public affairs.<sup>9</sup> The Muslim community and the Up Country Tamil community while being similarly placed and affected as the Tamils by the majoritarian state have articulated their interests short of self-governmental rights and continue to do so in the post-war context. But these interests and issues are equally important in their own right and do not fit within any of these typologies presented above thus further complicating the political landscape.

In conclusion, the main point that I have canvassed in this section is the existence of conflicting and diverse narratives of what would constitute 'political transition' in Sri Lanka. My own conception for sake of disclosure is that regime change or democratic transition simpliciter cannot constitute political transition and that in the absence of a move to addressing the structural causes of the conflict there can be no political

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<sup>9</sup> A good example of the deep seated opposition to state reforms is seen by the fact that a majority of Sinhalese, even on an issue that is merely symbolic, believe that the National Anthem should be sung only in Sinhala 53.9 % of the Sinhalese believe that the National Anthem should be sung only in Sinhala. CPA, Democracy in Post-War Sri Lanka, Top Line Report, June 2015  
[http://www.cpalanka.org/wp-content/uploads/2015/06/Democracy-survey-June-2015\\_Final-Report.pdf](http://www.cpalanka.org/wp-content/uploads/2015/06/Democracy-survey-June-2015_Final-Report.pdf) p. 18

transition. The Transitional Justice debate in Sri Lanka has to first have an honest debate about its political and social goals. It needs to be openly acknowledged that this is a political question that we need to be able to debate openly now. For the civil society in Sri Lanka to have real impact it needs to take the difficult questions head on. A depoliticised approach to these questions will make no impactful change.

### **3. Competing Visions of the Desired Political Transition and the Accountability Project**

How does the debate on accountability then fit within and feed into this terrain of diverse visions of the transition from war to peace? In this section I will argue that the debate on accountability and justice maps out and feeds into the fault lines on the competing visions of what is the desired political transition.

#### ***3.1. The majority Sinhala Buddhist narrative on accountability and justice***

A large majority of the Sinhala Buddhist majority in the country supported the war against the LTTE and perceive that the war fought was a just war. It was a just war because the demand for self-determination and separation was perceived as an unjust demand from the Tamil people. The wartime commander Sarath Fonseka articulated this line of dominant nationalist thinking when he said that the Tamils are welcome to live in the country as long as they don't make 'undue demands'<sup>10</sup>. In other words co-existence was possible

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<sup>10</sup> National Post, 'Inside Lanka: A Life Given Over to War', 23 September 2008

<http://www.nationalpost.com/Inside+Lanka+life+given+over/832374/story.html>

on the condition that the Sinhala Buddhist nation-state was accepted by the 'other' inhabitants of the island. Hence at best the Sinhala Buddhist ideology is agreeable to provide space to the numerically smaller groups in a permissive tolerant model that does not challenge its preeminent status in the island. Hence any investigation of those armed forces personnel for crimes committed during the war is understood as disputing with the just-war theory as understood above.

The legal distinction made between *jus ad bellum* and *jus in bellum* i.e that the legality for the conduct of the war should not be confused with the justifiability of the reasons for the resort to war is not drawn in everyday life nor ordinary political discourse. Hence not just Tamils but all those who took up the issue of the crimes committed - human rights organisations, international or local, the UN and foreign governments - were and are seen as LTTE sympathisers and as persons supporting the goals of separatism and self-determination. This remains the primary reason for why there is a lack of political will for accountability and not necessarily because the majority is unaware of the crimes committed as is sometimes suggested. (This may in fact be a contributor for the denial but I do not think it is the main reason). Both the main political parties in the South share this view and so do the war time President Rajapaksa and the champion of the transition President Sirisena. The former during his tenure as President denied any wrong-doing or violations and tried to further strengthen his image among his Sinhala Buddhist constituency by claiming that he is willing to face the electric chair if necessary for his heroic deeds. The latter, President Sirisena during the Presidential election campaign, campaigned that he alone can save Rajapaksa from the electric chair. In fact, following the United Nations Human Rights Council (UNHRC) resolution of October 2015, where the UN recommended the establishment of a hybrid tribunal, Sirisena's supporters

claimed that Sirisena had in fact managed to help avert an international accountability process. Not very long after Sirisena publicly washed his hands off the UNHRC resolution saying there will be no foreign participation in the accountability process.

The UNP which under the leadership of Prime Minister Ranil Wickramasinghe has been promoted by its Western allies as the liberal democratic alternative to the nationalist SLFP led by Rajapaksa, has always viewed the issue of accountability as a foreign policy management issue. Its arguments are that Rajapaksa was not to be faulted with the conduct of the war but that he mismanaged the aftermath. The reason for this mismanagement in the UNP's assessment was not because he didn't do well in accommodating the estranged Tamil community but because he developed relationships with China and Iran at the expense of US and India and that this backfired<sup>11</sup>. The UNP's view is that as long as transition is made in the foreign policy domain that favours the US and India coupled with the strategic use of the transitional justice norms in Governmental policy, this would suffice to save Sri Lanka from the accountability problem. The appropriation of international human rights norms by domestic actors with the intent of boosting their international image is not new to Sri Lanka and has been studied in other similar contexts as well<sup>12</sup>.

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<sup>11</sup> For an example of West's interest in regime change in Sri Lanka see Fredric Grape, *What Sri Lanka's Presidential Election means for Foreign Policy* <http://carnegieendowment.org/2015/01/16/what-sri-lanka-s-presidential-election-means-for-foreign-policy>

<sup>12</sup> See for example: Jelena Subotic, *Hijacked Justice: Dealing with the Past in Balkans*, (Cornell University Press, 2009). Subotic in this book shows that instead of 'adopting international norms and institutions of transitional justice because they serve a desirable social purpose - truth seeking, justice, and reconciliation - domestic political elites have used these models to pursue quite localised political agendas'.

The transitional justice strategy of the Government in part unlike the previous regime's policy includes accepting that certain individual war crimes took place while denying that systemic crimes (such as crimes against humanity) ever took place. Addressing these individual violations and removing those few rotten apples from the Sri Lankan Army, it is being publicly argued, will help restore its international image<sup>13</sup>. This is promoted as the smart thing to do to the Sinhala Buddhist electorate and the adjustment required to protect its continuing dominance in Sri Lankan politics.

There is a lack of political will on the part of the political leadership in Colombo to engage with the Sinhala Buddhist base to convince them on the need for genuine accountability based reconciliation. As Kalana Senaratne puts it, even if some in the anti-Rajapaksa camp want to abandon the Sinhala Buddhist project, the project will not abandon them<sup>14</sup>.

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This she argues has 'cheaped the very idea of transitional justice'. At pp 166-167

<sup>13</sup> ITJP in a report in January 2016 providing evidence that violations continue under the newly elected regime in Colombo argued that: 'These cases reveal not only that torture and repression continue in Sri Lanka but that they remain widespread and systematic. They are the work of a well organised machine which continues to thrive within the Sri Lankan police and military fuelled by extortion. It is responsible for terrorising and oppressing Tamils. This is therefore not a question of a few rotten apples in the system, as the new government so often suggests, but rather the result of structures that have long been corrupted'. ITJP: *Silenced: Survivors of Torture and Sexual Violence in Sri Lanka 2015* available at [http://www.itjpsl.com/wp-content/uploads/2015/07/Silenced\\_jan%202016.pdf](http://www.itjpsl.com/wp-content/uploads/2015/07/Silenced_jan%202016.pdf) (p. 38)

<sup>14</sup> Kalana Senaratne, 'The Morning after the Political Honeymoon: President Sirisena's future', <http://groundviews.org/2016/02/04/the-morning-after-the-political-honeymoon-president-sirisenas-future/>, 04 February 2016.

The supposedly liberal-democratic variant of the Southern political leadership uses the nationalist opposition as an excuse to side step their obligations towards accountability while espousing the same nationalist rhetoric (possibly a milder version) when engaging with their Sinhala Buddhist voter base. This supposedly liberal democratic bloc in Southern politics further believes that the answer to reconciliation lies in a model of (neo-liberal) economic development promoted in the language of equality and opportunity for all. A symbolic dealing of the issues of accountability and political solution would suffice according to this version of politics<sup>15</sup>. In the final analysis then both the main parties in the South have very similar positions on the questions of accountability (and finding political solution) the difference being only in the level of sophistication and subtleness with which they appear to deal with them.

### ***3.2. The Tamil narrative on accountability and justice***

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<sup>15</sup> One example of this symbolic approach to reconciliation is the issue of the National Anthem in Tamil. My take on this can be found here: <https://rkguruparan.wordpress.com/2015/03/19/my-take-on-being-allowed-to-sing-the-national-anthem-in-tamil/> and here: <http://www.ceylonews.com/2016/02/04/tna-welcomes-national-anthem-in-tamil-as-sampanthan-attends-state-function/>:

“Being allowed to sing the national anthem is an example of what is known as permissive tolerance- the Sinhala Buddhist establishment is exhibiting ‘tolerance’ by permitting us to sing an anthem in praise of a Sinhala Buddhist state. By allowing us to sing the anthem in Tamil they are confirming the hierarchy of the relationship between the Sinhala Buddhists and the ‘others’ in Sri Lanka. This hierarchical tolerance, particularly in light of no real change in issues such as accountability and political solution exposes lack of depth in our political discourse.”



The majority of the Tamil populous saw the war efforts of the Liberation Tigers of Tamil Eelam (LTTE) as a just war in terms of the stated objectives of its ends. The war was and continues to be regarded as one for self-determination. The support for the means did not mean that there wasn't criticism towards the LTTE for the means that they employed. This (muted) criticism of the means employed by the LTTE was for the most part not in opposition to the ends or even the choice of the armed struggle as a mode of struggle. Hence the defeat of the LTTE and the armed struggle has undeniably set in a defeatist mentality among the Tamils as to their political future. However Tamils have voted decisively for the continuation of Tamil self-determination politics in the representative democratic sphere as successive Local Government, Provincial and Parliamentary elections bear witness to.

The Tamils for long have self-understood the ethnic pogroms that took place frequently through the post-independence history of Ceylon/ Sri Lanka as 'Genocidal', in Tamil '*Ina Azhippu*'. While there has been much energy spent on whether this self-understanding fits the definition of Genocide in International Law, what this self-understanding essentially means in the discourse within Tamil polity is that the crimes committed against the Tamil people have the purpose and intention of denying their collective political existence as a nation entitled to self-determination. It is noteworthy that these attacks against the Tamil people with support from the State apparatus was mounted after the Tamils started making claims to nationhood, self-determination and federalism in the late 1940s. The armed struggle was both a response to this genocidal programme and in furtherance of the cause of self-determination. The last phase of the war that ended in Mullivaaykkaal was the pinnacle of this genocidal war against the Tamil people and the heavy cost that was inflicted on the

Tamils deliberately by the state was intended to serve as a punishment for daring to challenge the Sinhala Buddhist nation-state. This narrative that I have outlined above is not to be seen as an attempt to exempt the LTTE and the other Tamil militant movements from criticism. It is my argument that irrespective of the criticisms that may be made of the Tamil armed groups that this narrative of the Sri Lankan state's approach to Tamil politics holds water.

How does this relate to the accountability question? My argument is that given the Tamil just war narrative summarised above, the Tamils will and do find it difficult to come to terms with the crimes committed in their names. This is not to say that this self-searching criticism is not to be found within the Tamil community. In fact, I do think that there is much criticism beneath the observable eyes of the outsider that has been existent all the time within the Tamil community. But there is fear that this criticism will be exploited and instrumentalised if publicly made - that the criticism of the *jus in bellum* of the LTTE might affect the *jus ad bellum*. This writer believes that one can engage in a criticism of the *jus in bellum* while being supportive and defending of the Tamil just war narrative. But this will take time. Until the reasons for going to war are addressed, it will always be difficult for the Tamil community to introspect the crimes committed by those who waged their war for liberation.

The yearning for accountability and justice is high on the Tamil community's post-war priorities. The reasons for this are diverse. The primary urge is the basic desire for justice and accountability and a search for their loved ones who have gone missing and are behind bars- wanting those responsible for the crimes committed to be brought to justice and wanting those who surrendered and disappeared to be found or accounted for. The urge is also because of a collective sense of

anger at what befell the community (to interpret this as revenge would be a mistake). Undeniably the urge is also because it is hoped that the search for justice will also have a remedial impact politically in that it would help in furthering the cause of self-determination. More specifically Tamil activists hope that a realisation and acceptance of the nature of the systemic crimes committed and their causes will lead to the realisation that the state structure and the way state power is organised in Sri Lanka will need to change for non-recurrence<sup>16</sup>. It is the latter that raises eyebrows among 'human rights activists' who stand for keeping politics out of the transitional justice agenda and accuse Tamil activists for working on a political agenda<sup>17</sup>. But this is naivety at best and at worst a refusal to identify issues in their holistic sense.

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<sup>16</sup> See for example, Tamil Civil Society Forum, Memo to the UN Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence, 01 April 2015, available here: <https://www.scribd.com/doc/260580929/Memo-to-UNSR-on-TJ>

'A holistic transitional justice programme should include institutional reforms that will ensure non-recurrence of mass atrocities. This is traditionally defined as institutional reforms of the security sector and the law enforcement authorities including the court system. We believe that in the Sri Lankan context that this has to go even deeper. Unless the unitary character of the Sri Lankan State imagined and constructed around a Sinhala Buddhist Nation-State is abandoned Tamils will not feel secure in this island. This necessarily means an internationally mediated process towards finding a sustainable and just political solution.

<sup>17</sup> Frances Harrison recently wrote about this unspoken divide between civil society actors in the South and the North-East: 'Already some north-eastern human rights activists complain their colleagues in the south have just used the accountability issue to effect regime change and now they've got it they're no longer interested in justice for Tamils'. Sri Lanka at Cross Roads,

Tamils have also been consistent in their views that only an international form of accountability will provide justice. This is not necessarily because they trust the international legal/political order to deliver on accountability but rather because their lack of trust in the domestic mechanisms is relatively higher. Many within the Tamil community have indeed warned about over reliance on the international process while at the same time continuing to campaign for international justice. This is not to be read as a contradiction but rather as an inevitable paradox in the struggle for accountability and justice.

In concluding this section I will highlight what I believe to be the driving factor that leads to divergent agendas that inspire the accountability debate in the Tamil and Sinhala communities – the conflicting just war theories of the two communities. One may hence provisionally conclude that until such time as the reasons for these just war narratives are publicly explicated and reconciled the accountability narrative will remain extremely polarised.

#### **4. Conclusion**

A comparison of the Sinhala and Tamil narrative on accountability bring to light the irreconcilable agendas at play making the possibility of a domestic transitional justice process highly unlikely. These divergent narratives can only be reconciled if there is at least a base line agreement as to the kind of transition that Sri Lanka in its diversity wants to achieve. If not Transitional Justice will merely remain a lofty set of norms and practices that seem attractive in Government policies and civil society programmes.

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<http://www.jdslanka.org/index.php/analysis-reviews/human-rights/562-sri-lanka-at-a-crossroads> (October 2015)

**Key Areas in the Design and  
Implementation of  
Transitional Justice  
Mechanisms and Initiatives**

7

**Truth Telling in Sri Lanka: Past  
Experiences and Options for the  
Future**

*80*

*Bhavani Fonseka*

## **Introduction**

The search for the truth is a critical component in the four pillars of transitional justice. The right to truth guarantees to victims of grievous violations the right to know the facts of what happened in the past. Over forty truth commissions have been established since the first of its kind was appointed in Uganda in 1974. Spanning from Argentina and El Salvador to Sierra Leone and Sri Lanka, the breadth of their emergence signifies the global reach enjoyed by the search for answers in relation to past abuses. Many of these countries incorporated truth commissions in their respective reform agendas to ensure that their transition from a violent past included the search for the truth.<sup>1</sup>

An official truth telling or seeking project such as a truth commission can, if independent and with an adequate mandate, give dignity to victims, since the recognition of past abuses is a necessary first step in affording victims symbolic as well as material reparations—such as public apologies and compensation. A truth commission can also provide perpetrators with a platform to speak in the process of recognising past abuses, creating the space for a fuller narrative of past events to emerge. Correspondingly, truth can provide answers to families, respecting their right to know and assisting in their process of healing. Truth can also have a larger impact in terms of structural change, with evidence of past abuses resulting in reforms that recognise the need for preventing future recurrence.

Moreover, knowledge of the past can drive accountability processes—the truth and the recognition of the past provide

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<sup>1</sup> See Priscilla B. Hayner, *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions* (Routledge 2011)

incentives to pursue investigations of abuses, holding perpetrators to account and addressing impunity. Truth is a critical element in reconciliation, at one level providing answers to victims and recognising past abuses, and at a larger level constituting an essential element of reforms guaranteeing non-recurrence. Though truth alone is insufficient for reconciliation, a robust process of seeking truth nevertheless can create the necessary momentum for the other pillars of transitional justice to be designed, sequenced and implemented. In Sri Lanka, we have had several initiatives to investigate and inquire into past abuses, although many were created within flawed structures and with limited resources. In such a context, it is vital not to focus solely on truth but to examine how it is linked to justice and reparations and how it can ensure structural reforms. This chapter, while recognising the need to address all four pillars of transitional justice, examines the need for an independent truth-telling<sup>2</sup> process vis-à-vis its importance in the current context in Sri Lanka.

## **The Right to Truth**

The right to truth is recognised in both international and comparative contexts. Internationally, it has evolved under international humanitarian law as well as international human rights law. The right of families, under international humanitarian law, to know the fate of their loved ones including those missing or disappeared is historically linked with the right to truth<sup>3</sup>, and applies to both international and

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<sup>2</sup> The search for the truth and the ability to narrate events from the past are necessary components of the right to truth pillar. I will be using the terms ‘truth telling’ and ‘truth seeking’ interchangeably throughout the chapter.

<sup>3</sup> Rule of Law Tools for Post Conflict States: Truth Commissions, OHCHR 2006



non-international armed conflicts.<sup>4</sup> At domestic levels, state practice has firmly established the right with some examples discussed below from a comparative perspective. Thus, the right to truth is now considered an inalienable and autonomous right, linked to the general duty of states to protect and promote human rights.<sup>5</sup>

Advocacy around the issue of enforced disappearances in the 1970s and '80s by victim groups and civil society focused attention on the issue and the need for a stronger framework and mechanism for accountability, resulting in the creation of the United Nations Working Group on Enforced or Involuntary Disappearances (UNGWEID) in 1980.<sup>6</sup> In 2010, the UNWGEID adopted two general comments: on enforced disappearance as a continuous crime and on the Right to the Truth in relation to enforced disappearance.<sup>7</sup> At the

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<sup>4</sup> Ibid

<sup>5</sup> Study on the right to the truth: Report of the Office of the United Nations High Commissioner for Human Rights, E/CN.4/2006/91 8 February 2006; Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, A/68/362 (2013)

<sup>6</sup> The UNWGEID was the first United Nations human rights thematic mechanism to be established with a universal mandate. The original mandate derives from Commission on Human Rights resolution 20 (XXXVI) of 29 February 1980. This resolution followed General Assembly resolution 33/173 of 20 December 1978, in which the Assembly expressed concern at reports from various parts of the world relating to enforced disappearances and requested the Commission on Human Rights to consider the question of missing or disappeared persons. The mandate was most recently extended by Human Rights Council resolution 7/12 of 27 March 2008.

<sup>7</sup> Available at:

[http://www.ohchr.org/Documents/Issues/Disappearances/GC-right\\_to\\_the\\_truth.pdf](http://www.ohchr.org/Documents/Issues/Disappearances/GC-right_to_the_truth.pdf). Last visited 5 May 2016

international level, the right to the truth relating to enforced disappearances is recognised in a number of instruments. Article 32 of Protocol I to the Geneva Conventions establishes “the right of families to know the fate of their [disappeared] relative”.<sup>8</sup> Article 24 of the International Convention for the Protection of All Persons from Enforced Disappearance states, “*Each victim has the right to know the truth regarding the circumstances of the enforced disappearance, the progress and results of the investigation and the fate of the disappeared person. Each State Party shall take appropriate measures in this regard*”. The preamble to the Convention provides that, “*.the right of any victim to know the truth about the circumstances of an enforced disappearance and the fate of the disappeared person, and the right to freedom to seek, receive and impart information to this end.*”<sup>9</sup>

Through the years, the case law, activism and establishment of truth commissions in the regions of Central and South America, Africa, Asia and Europe resulted in the wide recognition and acceptance of the right to know.<sup>10</sup> This resulted in the “Declaration on the Protection of All Persons from Enforced Disappearance” being adopted by the UN General Assembly. The Declaration, in turn, culminated in the adoption of the International Convention for the Protection of All Persons from Enforced Disappearance, which came into force on 23 December 2010.<sup>11</sup> On 10 December 2015, the Government of Sri Lanka signed the Convention with ratification on 25 May 2016, with a promise

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<sup>8</sup> Ibid

<sup>9</sup> Ibid

<sup>10</sup> Ibid

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[https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg\\_no=IV-16&chapter=4&lang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-16&chapter=4&lang=en), last accessed 5 May 2016

to enact enabling legislation domestically.<sup>12</sup>

The right to know the fate of the disappeared is an absolute right, subject to no limitations. This means that a State cannot restrict the right to know the truth of the fate of the disappeared.<sup>13</sup> Instances may arise where the right to truth would need to be balanced with the right to justice<sup>14</sup>; yet, no limitations are possible when the enforced disappearance amounts to a crime against humanity.

The right to truth is both a collective and individual right. Each victim has the right to know the truth about violations that affected him or her, but the truth has to be told at the level of society as a ‘vital safeguard against the recurrence of violations’, as stated in Principle 2 of the Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity.<sup>15</sup> Principle 3 of this document specifies that the State has a correlative ‘duty to preserve....the collective memory’.<sup>16</sup> Principle 4 establishes

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<sup>12</sup> Recent signatures and ratifications, OHCHR, <http://www.ohchr.org/EN/HRBodies/CED/Pages/RecentSignaturesRatifications.aspx>, last accessed August 2016

<sup>13</sup> The State’s obligations include: to investigate the fate and the whereabouts of the disappeared, to communicate results of these investigations, to provide full access to archives and to provide full protection to witnesses and other participants in any investigation.

<sup>14</sup> The UNWGEID stated that a “Pardon should only be granted after a genuine peace process or bona fide negotiations with the victims have been carried out, resulting in apologies and expressions of regret from the State or the perpetrators, and guarantees to prevent disappearances in the future” (general comment on Article 18).

<sup>15</sup> E/CN.4/2005/102/Add.1 (2005)

<sup>16</sup> “A people’s knowledge of the history of its oppression is part of its heritage and, as such, must be ensured by appropriate measures in fulfilment of the State’s duty to preserve archives and other evidence

the “victim’s right to know” as an individual right: “*Irrespective of any legal proceedings, victims and their families have the imprescriptible right to know the truth about the circumstances in which violations took place and, in the event of death or disappearance, the victims’ fate.*”

The advocacy of the 1980s witnessed regional bodies such as the Inter-American Commission for Human Rights and the Inter-American Court of Human Rights (Inter American Court) articulating the right to know in connection with disappearances and the corresponding obligation on states to disclose information to relatives.<sup>17</sup> In the recent jurisprudence of the Inter American Court, the right to truth was framed as a positive obligation of the State with the next of kin of the victim and society needing to be informed of the violation.<sup>18</sup> The right to truth has been recognised in several reports to the United Nations, resulting in a framework that has evolved with time. Louis Joinet, in his Final Report on Impunity, provided that every person has the inalienable right to know the truth about past events and that the right is essential to avoid any recurrence of such acts in the future.<sup>19</sup>

Currently, several countries have incorporated the right of

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concerning violations of human rights and humanitarian law and to facilitate knowledge of those violations. Such measures shall be aimed at preserving the collective memory from extinction and, in particular, at guarding against the development of revisionist and negationist arguments.”

<sup>17</sup> *Elena Quinteros vs. Uruguay* of 21 July 1983 (Communication 107/1981) (OHCHR, 2006); *Velásquez-Rodríguez* case of 1988

<sup>18</sup> Inter-American Court of Human Rights, *Myrna Mack Chang vs. Guatemala*, 25 November 2013

<sup>19</sup> ‘Question of the impunity of perpetrators of human rights violations (civil and political)’, final report prepared by Mr Joinet pursuant to Sub-Commission decision 1996/119, UN Doc. E/CN.4/Sub.2/1997/ 20/Rev.1., Annex I, Principle 1.

families to know the fate of their missing relatives into domestic legislation or policies. Colombia enacted legislation in July 2005 recognising the right to truth of victims of human rights violations and crimes under international law, and of society in general.<sup>20</sup> The right to truth is captured in several constitutional provisions, as discussed elsewhere in this book.<sup>21</sup> It remains to be seen whether Sri Lanka's currently on-going process of constitutional reform, will recognise specific rights related to transitional justice.<sup>22</sup> Relatedly, the Right to Information Act was recently enacted in Sri Lanka, enabling interested parties to seek information although with certain restrictions including potentially accessing information from the Office of Missing Persons (OMP).<sup>23</sup> The constitutional reform processes taking place at the same time as initiatives to secure transitional justice highlight the need to articulate a right to truth and to implement it within the same agenda of reform. This moment should be seized, providing legal and policy status for victims to know the truth and for the public to

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<sup>20</sup> For more information, refer to the Centre for Justice and Accountability site- <http://cja.org/where-we-work/colombia/related-resources/colombia-the-justice-and-peace-law/>, last accessed on 5 May 2016

<sup>21</sup> Written Submissions by the Centre for Policy Alternatives (CPA) to the Subcommittee of the Constitutional Assembly on Fundamental Rights, [www.cpalanka.org](http://www.cpalanka.org) last accessed June 2016

<sup>22</sup> The report by the Public Representative Committee provides for a several suggestions for a future Fundamental Rights Chapter in a new Constitution including the right to life, human dignity, right to return, right to land and property, right for non- disappearances, access to information and access to justice. Report on Public Representations on Constitutional Reform, May 2016, pp 94-128.

<sup>23</sup> The Office on Missing Persons Act No.14 of 2016; The OMP Act has a very specific confidentiality clause which has been discussed and debated in recent weeks. For more information, read- Bhavani Fonseka, 'A New Chapter or Another Empty Promise?' 11 August 2016, [www.groundviews.org](http://www.groundviews.org) last accessed September 2016

acknowledge and lift the veil of silence shrouding past abuses.

### **The Multifaceted Nature of Truth**

Truth has multiple dimensions. At an individual level, truth involves finding facts on what happened to victims, including details on violations, location, perpetrators and circumstances of specific cases. Especially in cases of enforced disappearances, families of the disappeared are entitled to such details, in addition to their right to know the circumstances of the disappearances in question. At the level of collective truth, on the other hand, the concerns relate more to general patterns of violations and questions of responsibility that arise from such patterns.

There is an inherent multiplicity and complexity to events, making them susceptible to contestation by different actors, depending on whether they are victims, perpetrators, etc. The resulting conflict among narratives and histories, where individualised truths differ from collective knowledge and more than one “truth” competes for acceptance, renders the right to truth a challenge to address.

What is considered the truth can be linked to several sources: historical events, personal narratives, facts and forensics<sup>24</sup>. It is possible, based on these differences, that competing “truths” are subjected to a process of prioritisation or—as Professor

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<sup>24</sup> The forensic truth is what is uncovered as material evidence by physical anthropologists. This was established by Clyde Snow and the many physical anthropologists he has trained and supported over the years such as the Argentine Forensic Anthropology Team or the Foundation for Forensic Anthropology of Guatemala. See- Adam Rosenblatt, ‘Digging for the Disappeared: Forensic Science after Atrocity’ (Stanford Studies in Human Rights 2015)

Kimberly Theidon terms it—a hierarchy of truths and ‘politics of victimhood’<sup>25</sup>. Some truth-seeking mechanisms have had the tendency to create binary identities of ‘victim’ versus ‘perpetrator’, homogenising them with no consideration to past relationships and their inherent complexities. A truth-seeking project must factor in political and historical aspects, examining different sources, while being aware of the nuances and complexities surrounding what the truth may hold, including non-linear and “messy” elements.

There are many positive aspects of a truth telling project, from the establishment of a historical record beyond manipulation (based on the assumption the truth telling project is independent, sufficiently resourced and has an adequately broad mandate) to the affirmation of the truth to victims of past abuses and even the whereabouts of their disappeared loved ones. A truth telling project is an attempt to formally acknowledge events from the past which may be known but not formerly recognised. The recognition of past abuses is an essential element in transitioning to a democratic society. Juan Mendez refers to the reach of truth as follows: “*Knowledge that is officially sanctioned, and thereby made ‘part of the public cognitive scene’...acquires a mysterious quality that is not there when it is merely ‘truth’. Official acknowledgement at least begins to heal the wounds*”.<sup>26</sup>

A truth telling project can unveil ‘new truths’ or lift the veil over years (and possibly decades) of denials; it is a means of setting the record straight against a backdrop of many

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<sup>25</sup> Kimberly Theidon, ‘Histories of Innocence: Postwar Stories in Peru’, in Rosalind Shaw and Lars Waldorf with Pierre Hazan (eds), *Localising Transitional Justice: Interventions and Priorities after Mass Violence* (Stanford University Press 2010)

<sup>26</sup> Juan Mendez, review of *A Miracle, A Universe*, by Lawrence Weschler, in *New York Law School Journal of Human Rights* 8 (1991) 8

manipulated versions of history. Michael Ignatieff alludes to this in noting how truth commissions can “*reduce the number of lies that can be circulated unchallenged in public discourse.*”<sup>27</sup> Thus, in societies where past authoritarian regimes have attempted to rewrite history and manipulate facts, a truth telling project allows citizens to contest and counter such narratives. While truth telling projects provide a platform for diverse and multiple actors to come forward and contribute their lived narratives, a truth commission should have the mandate to investigate their submissions, allowing such a commission to transform historic truths into matters of official record.

High expectations of a truth telling project may arise, particularly the hope that such a project would unearth the *entire* past. Lisa J. Laplante & Kimberly Theidon<sup>28</sup> highlights these expectations: “*Truth tellers make an implicit contract with their interlocutors to respond through acknowledgement and redress*”<sup>29</sup> and “*survivors of political violence come forth in part to reclaim their history, as well as to demand a different sort of future*”<sup>30</sup>. Thus, there is a responsibility to respond, but these expectations must be managed carefully and realistically. Furthermore, authoritarian regimes tend to destroy evidence in the pursuit of manipulating historical narratives, denying abuses and glorifying their own acts. With time, victims’ memories will diminish. These are some practical challenges that will be faced in the search for the truth. However, one must be careful not to confuse a truth-seeking process with an accountability mechanism: the latter will operate under a

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<sup>27</sup> M. Ignatieff, *Articles of Faith*, Index on Censorship, Vol. 25, No. 5, 1996, p. 113

<sup>28</sup> Lisa J. Laplante & Kimberly Theidon, ‘Truth with Consequences: Justice and Reparations in Post-Truth Commission Peru’, (2007) *Human Rights Quarterly* 29, 228-250

<sup>29</sup> *Ibid* p. 229

<sup>30</sup> *Ibid* p. 231



different and higher threshold of evidence. Thus, truth telling projects are meant to unearth the past and are therefore seen as an essential step towards justice. Their scope of impact is broader, as they serve a wider range of people than mechanisms of criminal justice, where not all perpetrators or past abuses are prosecuted—due to several limitations including evidence and resources.

### **Truth within the Four Pillars of Transitional Justice**

The differences between truth-seeking mechanisms and accountability mechanisms should not lead to a choice of one over the other. As the Inter-American Commission on Human Rights highlighted, “*The value of truth commissions is that they are created, not with the presumption that there will be no trials, but to constitute a step towards knowing the truth and, ultimately, making justice prevail*”<sup>31</sup>. Accordingly, a truth telling project alone is insufficient to have a long-term impact on preventing recurrence and sustainable reconciliation. As discussed in several chapters in this volume, truth, justice, reparations and reform support and complement each other. Different pillars of transitional justice must be designed and implemented to ensure that they comprehend the links between each other, sequenced to ensure that the objectives of each of the four pillars are met. For instance, without establishing the truth, the prospects for justice are limited. Similarly, victims may be frustrated with merely knowing what happened and may want to see perpetrators brought to account. Thus, both truth and justice are important. The truth and reparations aspects are also linked, insofar as knowing the truth alone may not be

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<sup>31</sup> Inter-American Commission on Human Rights (IACHR), *Ignacio Ellacuría et al.* (El Salvador), Case 10.488, Report no 136/99, 22 December 1999 [229]

sufficient to victims of abuse. Reparations can provide assistance and recognition of past wrongs but reparations are not possible without knowing the truth. Finally, truth relates importantly to reforms guaranteeing non-recurrence. Without establishing the truth, there can be no acknowledgement of the past, which is the important first step to preventing future recurrences. Thus, real reform for reconciliation is impossible if victims are unaware of the truth of what happened to them and their loved ones.

Another important aspect with truth telling projects is the issue of incentives, amnesties and pardons. With the South African Truth and Reconciliation Commission, the granting of amnesty is considered one of the most controversial aspects with Bishop Tutu arguing that “freedom was exchanged for truth”.<sup>32</sup> The trade offs must be considered at the outset of any transitional justice process. Can there be trade offs for truth? For justice? And at what price? These questions bring out the tensions between restorative and retributive justice into sharp focus. Offering an amnesty may facilitate the truth but it may close the door on accountability. The balance between truth and justice is a delicate one, requiring considerable attention—especially to avoid its use as a tool to serve vested political interests. Although there continues to be discussion around the Amnesty Committee of the South African Truth and Reconciliation Commission, documentation indicates that only 1160 of the 7094 applications for amnesties were granted, at a rate just over 15%.<sup>33</sup> The high threshold that had to be met in terms of the information provided and the sincerity of the applicant determined whether an amnesty was granted.

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<sup>32</sup> ‘Freedom in Exchange for Truth’, Washington Post, 1 November 1998

<sup>33</sup> Tyler Giannini, Susan Farbstein, Samantha Bent and Miles Jackson, *Prosecuting Apartheid-Era Crimes? A South African Dialogue on Justice* (Harvard 2009)

While there are now limits with the granting of amnesties, there needs to be greater thinking and debate on incentives and options for truth and justice.

### **Aspects for Consideration in Designing a Truth Telling Project**

A truth telling project can have different aspects including investigations and inquiries, collecting information, declassification of information, compiling archives and the establishment of commissions of inquiry or truth commissions. They can publish information and produce reports and recommendations, providing a formal narrative thereby acknowledging the past and recognising patterns of abuse. The nature and form of a truth telling project, be it a truth commission or any other process, will define the truth that is generated. The scope of the mandate, the actors involved, temporal limits, resources available and reach, are all factors that can define the work of any mechanism and the truth that is unveiled. Therefore these must be given due attention, ensuring that the mandate is both sufficiently broad while remaining feasible, with a range of powers, including the ability to investigate, archive and summon a range of actors. It is important that the commissioners and staff who are part of a truth commission garner the trust and confidence of a cross-section of people and not be seen as partial to any actor. In this regard, it is important to bring in individuals with competency and expertise in a range of issues including anthropology, history, law and sociology.

Each truth telling/seeking initiative should be designed to suit the different contexts and its impact assessed in terms of its specific terms and needs. In some contexts such as Argentina and Chile, it was important to see the findings of the

respective commissions and recognise past abuses.<sup>34</sup> For South Africa, the process was critical, providing a space for victims to speak and publicly acknowledge past abuses.<sup>35</sup> South Africa was the first country to ensure there was wide publicity of the TRC sittings, with broadcasts taking place of sittings and testimonies, ensuring the public was aware of and involved in the process. A future initiative should also factor in the role social media can play to raise awareness of sittings and issues raised, disseminate findings and facilitate a dialogue.

Moreover, while truth telling projects provide for immediate relief in terms of providing a space for victims to share their experiences and establish past abuses, there is no guarantee there will be follow up of its own recommendations. As stated by Laplante and Theidon, there maybe a temporary cathartic effect of giving testimony, but there can be disappointment and distrust towards the state if there is no follow up.<sup>36</sup> In many instances, the follow up will be beyond the scope of a truth commission and with priorities changing with others in terms of what requires further attention. This must be noted when designing and implementing a truth telling project, ensuring that there is consideration given towards follow-up action, since doing so is pivotal for justice, reparations and non-recurrence.

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<sup>34</sup> Ibid note 1

<sup>35</sup> Ibid note 1; Martha Minow, 'Between Vengeance and Forgiveness: South Africa's Truth and Reconciliation Commission' (1998) *Negotiation Journal*. October: 319-355.

<sup>36</sup> Lisa J. Laplante & Kimberly Theidon, 'Truth with Consequences: Justice and Reparations in Post-Truth Commission Peru', (2007) *Human Rights Quarterly* 29, 228-250

## Prospects for Truth in Sri Lanka

Truth telling has been experienced to some degree in Sri Lanka through a string of commissions of inquiry appointed by successive governments, many of them suffering criticism for their structural flaws.<sup>37</sup> The commissions of inquiry (COIs)<sup>38</sup> have had the mandate to investigate and inquire into past incidents, the mandates of the respective commissions providing the scope of its powers. Although multiple commissions of inquiry were established, only a few of their reports were made public. The limited scope of the commissions and the general secrecy that surrounded them raise questions of their suitability as a truth telling initiative aimed at reconciliation. Another factor that must be addressed is the political will to have the truth established officially. Many of the COIs established in the past were established under external pressure and as a delaying tactic to genuine truth and justice.<sup>39</sup>

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<sup>37</sup> See Kishali Pinto-Jayawardena, *Post-War Justice in Sri Lanka: Rule of Law, the Criminal Justice System, and Commissions of Inquiry*, ICJ (2010); A List of Commissions of Inquiry and Committees Appointed by the Government of Sri Lanka (2006-2012), CPA (2012)

<sup>38</sup> Appointed in accordance with the Commissions of Inquiry Act No 17 of 1948 as amended

<sup>39</sup> The Lessons Learnt and Reconciliation Commission (LLRC) came about as a result of such pressure and as a counter to the appointment of the Panel of Experts by the United Nations Secretary General to advise him on possible war crimes and crimes against humanity during the last stage of the war. The LLRC was flawed from the outset, with both structural and system flaws. Regardless of flaws, this was the only initiative introduced by the then government to address past abuses in the immediate post war, resulting in an overwhelming interest by victims and affected communities who were desperate in their search for loved ones. The range of issues raised by complainants resulted in the LLRC issuing both an interim and final report, highlighting areas that required

The UNHRC resolution titled “Promoting Reconciliation, Accountability and Human Rights in Sri Lanka”<sup>40</sup> provides for the establishment of a Truth and Reconciliation Commission (TRC) and an Office on Missing Persons (OMP), both seemingly within the ‘right to know’ pillar. These two proposals are welcome, considering the past abuses and the need for independent and impartial mechanisms to address the range of crimes and the desire of families to know. What is important now is to ensure that the mechanisms established in the future meet international standards and ensure victims their right to truth. In doing so, some key issues highlighted in this chapter will need to be addressed.

The track record of previous commissions and the lack of information on progress with many of the past investigations raise a fundamental issue in Sri Lanka whether another truth telling initiative is needed, and whether it will be able to sustain the trust of the people to unearth the past in an impartial manner. As discussed above, contestable and multiple narratives may only emerge if the process is open and without biases. Because such narratives may implicate powerful actors within the ruling government as well as previous governments, a future TRC and OMP must be independent in its functions and analysis, with a mandate that facilitates the establishment of the truth in spite of these potential obstacles. The mechanisms will need to be grounded in legislation that provides a broad mandate and adequate powers to investigate, free of threats of interference.

There must also be attention on how the TRC is linked with the other mechanisms of transitional justice, addressing issues

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urgent attention as well as long term. Some follow up of recommendations have taken place, but much more work is required.

<sup>40</sup> A/HRC/RES/30/1 adopted on 1 October 2015

of sequencing and ensuring that any truth telling project is not a narrow initiative but one that is holistic and addresses the complexity of past abuses and challenges with transitions.

The most well known truth commissions such as the South African Truth and Reconciliation Commission and those from Latin America are from countries with a strong Christian faith, with the church playing a key role in the respective transitions.<sup>41</sup> The concepts of healing and forgiveness played a role in these processes. For Desmond Tutu, who headed the South African Truth and Reconciliation Commission, restorative justice reflected an African value of healing at the expense of vengeance known as ‘ubuntu’.<sup>42</sup> In Sri Lanka, the multi-ethnic and multi-religious identities must be taken into cognisance, exploring reasons for why a truth telling project is important. There must be attention to ethnic, gender, geographic, religious and other dimensions, local and national tensions, as well as grievances and vulnerabilities. Any truth telling/seeking initiative must therefore be designed to recognise the diversity in Sri Lanka, taking note of historical and political developments and lessons learnt from previous initiatives appointed in the pursuit of truth and justice.

Although Sri Lanka’s identity is different to many of the comparative models, what cannot be denied is the need to establish the truth, for victims to know of past abuses and obtain justice. The thousands who continue to go before numerous state investigations, despite the delays, threats and other practical issues, embodies the search by many for details of their loved ones. The most recent COIs witnessed significant numbers of women coming forward in search of

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<sup>41</sup> Kathryn Sikkink, *The Justice Cascade: How Human Rights Prosecutions Are Changing World Politics* (Norton 2011)

<sup>42</sup> B. Nussbaum, ‘African Culture and Ubuntu Reflections of a South African in America’, (2003) *PERSPECTIVES* 17

loved ones, highlighting the specific challenges faced by many women as a result of the war.<sup>43</sup> This gendered dimension of the search for the truth must also be noted when considering the thousands who have come before numerous truth telling projects to share their testimonies.<sup>44</sup> A future truth initiative must also factor in children and youth, and their role and impact in transitional justice and reconciliation in Sri Lanka.<sup>45</sup>

The establishment of the proposed TRC and OMP<sup>46</sup> must

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<sup>43</sup> See- Accountability and Reparations for Victims of Conflict Related Sexual Violence in Sri Lanka, CPA 2016, Sri Lanka's War Affected Women Call For Genuine Accountability Initiatives, February 2015, <http://sangam.org/sri-lankas-war-affected-women-call-genuine-accountability-initiatives/> last accessed June 2016; Sithara Shreen, 'Gender Justice in Truth Seeking', OPTIONS Magazine, Issue 51 (2016);

<sup>44</sup> See- *The Disappeared and Invisible: Revealing the Enduring Impact of Enforced Disappearances on Women*, ICTJ, March 2015

<sup>45</sup> See- Sharanjeet Parma, Mindy Jane Roseman, Saudamini Siegrist and Theo Sowa (eds), *Children and Transitional Justice: Truth telling, Accountability and Reconciliation*, (Harvard University Press 2010)

<sup>46</sup> The OMP was enacted into law in August 2016 but the office at the time of writing is yet to be established. The OMP is likely to be the first mechanism within the transitional justice realm to be established. There has been much debate with the process of enactment and the OMP Act itself. See- Bhavani Fonseka, 'A New Chapter or Another Empty Promise?', 11 August 2016, [www.groundviews.org](http://www.groundviews.org) last accessed September 2016; M.C.M Iqbal, 'Is OMP running low on justice for disappearances?', 18 September 2016, Sunday Times, <http://www.sundaytimes.lk/160918/sunday-times-2/is-omp-running-low-on-justice-for-disappearances-208918.html>, last accessed September 2016. More information explaining the OMP can be found in 'Brief Guide on the Draft Legislation to Enact an Office on Missing Persons', CPA, July 2016. Subsequently material has also been produced by the Secretariat for Coordinating Reconciliation Mechanisms, <http://www.scrm.gov.lk/omp>, last accessed September 2016.



meet basic standards. Thus, key areas such as the appointing authority of the commissioners, the scope of the mandate, sources and extent of financial resources are some of the areas that must be specified at the outset, with safeguards in place to prevent interference from the State or any other actor. If done properly, such a process can provide a platform for victims to know the truth of past abuses, for society to recognise past abuses and violations faced by a cross-section of society and to unveil the denials and concealment surrounding many of the dark secrets of Sri Lanka. Fundamentally, it is to acknowledge the wrongs faced by victims and for citizens to come together to reconcile. As indicated earlier in the chapter, a truth telling/seeking project can lead to other processes within the transitional justice pillars.

Although the promises to establish these truth telling initiatives were made in 2015, limited progress has been made so far. Consultations on reconciliation mechanisms commenced in June 2016 with the report being made public in January 2017, findings of which will need to be factored in when designing future mechanisms, from the accountability to truth telling to reparations.<sup>47</sup> Lessons from previous initiatives and the status of their findings and recommendations must also be taken note of. The veil of secrecy must be reversed, with victims and the public being informed of state initiatives established with the promise to unearth past abuses. Any future process must ensure it is transparent and accessible, not seen as an effort limited to Colombo but one with a broad reach and presence. This is key as recent COIs have been based in Colombo with occasional sittings held outside of Colombo, limited in its frequency and number of sittings. The short durations spent in

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<sup>47</sup> For more information, visit <http://www.scrm.gov.lk/consultations>, last accessed December 2016.

particular areas has raised issues of how communities in those areas were deprived of the necessary time and attention to issues faced by those communities.<sup>48</sup>

Parallel to a TRC and OMP, there should be attention to other processes that can assist in establishing the truth. These may be dependent on specific issues or geographic areas, ensuring non-state initiatives are able to document, verify and publicise aspects that may need to be in the public discourse or that may not otherwise receive the necessary attention of the public. Several civil society-driven initiatives in this regard were seen during the war in Sri Lanka. These were able to provide a space for victims to narrate their experiences and grievances and create counter-narratives. An initiative that documented the grievances of the Northern Muslims was led by civil society publishing a report that was able to identify the problems faced by a specific segment of society.<sup>49</sup> Internationally, too, non-state actors have played a critical role in truth telling. One well-known initiative was that of the Catholic Church in Guatemala, the Recovery of Historical Memory Project (REMHI)<sup>50</sup>, followed by the Centro Internacional para Investigaciones en Derechos Humanos (CIDH).<sup>51</sup> This civil society effort brought together historians,

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<sup>48</sup> See- Letter dated 8 June 2015 sent to the Paranagama Commission by the Centre for Policy Alternatives found on [www.cpalanka.org](http://www.cpalanka.org), last accessed June 2016

<sup>49</sup> The Quest for Redemption: The Story of the Northern Muslims (Final Report of the Citizens' Commission on the Expulsion of Muslims from the Northern Province by the LTTE in October 1990), Law and Society Trust (2012)

<sup>50</sup> The report exposed the brutality in Guatemala but the resistance to the initiative was evident throughout the process, best captured when the project's 75-year-old leader, Bishop Juan Gerardi, was assassinated two days after handing over the report.

<sup>51</sup> Ibid note 1

lawyers, sociologists and anthropologists, and trained field researchers who collected over 6000 testimonies.

### **Next Steps**

Sri Lanka's flawed attempts in the past at establishing the truth should not deter in fulfilling the commitments made in 2015. There are high expectations with a future TRC and OMP and care must be taken in the design and linkages with the different mechanisms. This chapter highlights some lessons that can be learnt from comparative cases and Sri Lanka's own past but future mechanisms must also note the current context and political developments. While many challenges await in the search for truth and justice, there is no denying that there is a great necessity to address what happened in the past and provide victims with information of their loved ones. Many victims across Sri Lanka were robbed of the dignity to mourn their loved ones due to a lack of political will and resources by successive governments. Truth is a crucial element in reform processes, in ending impunity and non-recurrence. The opportunity must not be lost.

# 8

## **A Post-Conflict Criminal Justice Mechanism for Sri Lanka: Practical Challenges and Next Steps**

*80*

*Annie O'Reilly & Pubudu Sachithanandan*

## 1. Introduction

The war in Sri Lanka took place from 23 July 1983 to May 2009, with intermittent breaks in hostilities, and with sporadic violence also occurring before and after these dates. Despite the protracted nature of the war, successive governments failed to systematically investigate and prosecute the perpetrators of crimes associated with the war, grant sufficient compensation to victims, and take necessary measures to prevent the recurrence of violence.<sup>1</sup> Very few criminal prosecutions have taken place in connection with the war, especially where the actors were associated with state authorities. Any prosecutions that did take place generally pertained to low-level state actors.<sup>2</sup> Endemic delays also plague the prosecution of persons suspected of having committed crimes while being members of the LTTE. Commissions of enquiry related to the war have also “...systematically failed to deliver results.”<sup>3</sup>

Despite the above, the advent of a new government in January 2015 raised hopes. Early in 2015, several ministers made public statements about reopening investigations into other cases.<sup>4</sup> The new government pledged to deal with

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<sup>1</sup> See, generally, Impunity Watch, *A Study of Impunity in Postcolonial Sri Lanka*, January 2013.

<sup>2</sup> Examples include the Krishanthi Kumaraswamy, case, as well as a recent conviction on 15 June 2015 of a former army staff sergeant for the murder of eight Tamil civilians at Mirusuvil, Jaffna District, in 2000. (See A/HRC/30/61, para 67)

<sup>3</sup> A/HRC/30/61, para 81.

<sup>4</sup> A/HRC/30/61, para 69. Additionally, in August 2015, police announced that they had arrested several military personnel and two former LTTE cadres in relation to the disappearance of journalist and cartoonist Prageeth Ekneligoda. (A/HRC/30/61, para 70.)

accountability issues “within the country’s legal framework”<sup>5</sup> and made several references to the creation of a mechanism for accountability.<sup>6</sup> This raises a number of questions. What type of approach to combating impunity? Criminal prosecutions? A truth and reconciliation commission? Or a combination of mechanisms? A combination is preferable since, as observed by the OHCHR, “combining criminal justice with other transitional justice processes – such as truth-seeking, reparations programme, and institutional reforms – is essential to fill the “impunity gap” by addressing crimes with large numbers of victims, perpetrators and initiating deeper systematic change.”<sup>7</sup>

Currently, a judicial mechanism appears to be under consideration. On 1 December 2015, the head of the government’s reconciliation unit, Chandrika Kumaratunga, stated that a “special court” would start work either in late December 2015, or early January 2016.<sup>8</sup> This too raises a number of questions. What type of court? A purely international court? A hybrid court? A purely domestic court? As observed by Beth Van Schaack recently, Sri Lanka “...has the benefit of a well-developed legal system and skilful local bar” but lacks a “shared confidence in the system”.<sup>9</sup> What does this entail for the envisaged institution? What objectives should it have? What organs and sub-units should it feature? Which types of crimes, and what period of time should be

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<sup>5</sup> A/HRC/30/61, para 74.

<sup>6</sup> See further resolution, A/HRC/30/L.29, co-sponsored by Sri Lanka.

<sup>7</sup> A/HRC/30/CRP.2, para. 1247.

<sup>8</sup> <http://www.voanews.com/content/sri-lanka-establish-war-crimes-court/3083388.html>

<sup>9</sup> Beth Van Schaack, ‘More than a Domestic Mechanism: Options for Hybrid Justice in Sri Lanka’, 19 December 2015, Electronic copy available at: <http://ssrn.com/abstract=2705097>.

within its purview? What system of procedural law should apply? We seek to explore these issues in this paper.

## **2. Challenges**

### **A. What type of model?**

In the last twenty years, international criminal law has developed rapidly and multifariously. At first, there were the *ad hoc* tribunals for Yugoslavia and Rwanda, set up by Security Council Resolution in 1993 and 1994 respectively.<sup>10</sup> These courts, which were staffed with international prosecutors and judges, had primary jurisdiction over crimes committed in the wars in those territories. Next came the hybrid courts such as the Special Court for Sierra Leone (SCSL) in 2002, the Extraordinary Chambers in the Courts of Cambodia (ECCC) 2003/2004, the Bosnian War Crimes Chamber in 2004/2005, and the Special Tribunal for Lebanon (STL) in 2007, which were set up pursuant to agreements between the governments, or in the case of Bosnia the governing authorities, of those States and the UN.<sup>11</sup> And, in the midst of

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<sup>10</sup> S/RES/827, Resolution 827 (1993) Adopted by the Security Council at its 3127<sup>th</sup> meeting on 25 May 1993; S/RES/955, Resolution 955 (1994) Adopted by the Security Council at its 3453<sup>rd</sup> meeting on 8 November 1994.

<sup>11</sup> See Agreement between the United Nations and the Government of Sierra Leone and the Statute of the Special Court for Sierra Leone, 16 January 2002; Agreement between the United Nations and the Royal Government of Cambodia concerning the prosecution under Cambodian law of crimes committed during the period of Democratic Kampuchea (ECCC Agreement), 6 June 2003 (ratified on 19 October 2004); Law on the Amendments to the Law on the Court of Bosnia and Herzegovina, “Official Gazette” of Bosnia and Herzegovina, No. 61/04; Agreement between the

all this, the first permanent court was set up, the International Criminal Court (ICC), in 2002. It has residual jurisdiction which can be activated where States are unable or unwilling to prosecute crimes themselves (and other jurisdictional requirements are met).<sup>12</sup> These are just some of the experiments in international criminal justice that have been undertaken in the last quarter of a century.

Each of these models has struck a different power balance between the international community and the State(s) whose jurisdiction is at issue – with the exception of the Bangladesh court, which is a purely domestic court. The ICTY and ICTR were effectively imposed on those States by the Security Council, acting under Chapter VII (actions with respect to peace and security). Those courts had primacy over the domestic courts, meaning that they could require domestic courts to cede to their jurisdiction.<sup>13</sup>

Subsequently, the international community moved away from the imposed model of international justice towards more consent-based models, such as the SCSL, ECCC, and STL. Even the ICC's jurisdiction generally requires the State's consent to jurisdiction, either explicitly or by the State having ratified the Rome Statute (the notable exceptions being Security Council referral, and the exercise of jurisdiction over nationals of non-state parties where the alleged crimes are committed on the territory of a state party). One might assume that having the consent of the affected State helps to

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United Nations and the Lebanese Republic on the establishment of a Special Tribunal for Lebanon (with Statute) Beirut, 22 January 2007 and New York, 6 February 2007 (entry into force 10 June 2007).

<sup>12</sup> See Rome Statute of the International Criminal Court, Done at Rome on 17 July 1998, (in force on 1 July 2002).

<sup>13</sup> ICTY Statute, Article 9.



bolster the credibility of such courts, and perhaps it does to an extent - but the reality is that these courts can find themselves very unwelcome, despite initial willingness on the part of government.<sup>14</sup>

There is also the purely domestic option: in 2009, the International Crimes Tribunal (ICT) was set up in Bangladesh under domestic law staffed with domestic judges and prosecutors, to prosecute international crimes committed during the Bangladesh liberation war.<sup>15</sup> Unfortunately, for proponents of the domestic approach, it is widely agreed that the Bangladesh tribunal is an example of what *not* to do, when prosecuting international crimes. This is explored in greater detail below.

It should be unsurprising that the international community appears to prefer some form of a hybrid court for Sri Lanka. ICG's recommendations include "significant international participation in all stages of the domestic accountability processes."<sup>16</sup> The OHCHR report concludes that "Sri Lanka should draw on the lessons learnt and good practices of other countries that have succeeded with hybrid special courts, integrating international judges, prosecutors, lawyers and investigators, that will be essential to give confidence to all Sri

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<sup>14</sup> See, e.g., OSJI's July 2010 report on the ECCC, *Political Interference at the Extraordinary Chambers in the Courts of Cambodia*, in which it details, *inter alia*, the government's attempts to block Cases 003 and 004 from going forward, pp. 16-22.

<sup>15</sup> The International Crimes (Tribunal) Act, 1973 (Act No. XIX of 1973) as amended by the International Crimes (Tribunals) (Amendment) Act, 2009 (Act No. LV of 2009).

<sup>16</sup> International Crisis Group (ICG), Statement on the UN Sri Lanka Investigation Report, 18 September 2015; Alan Keenan for ICG, 'Impunity and Justice: Why the UN Human Rights Council Must Stay Engaged in Sri Lanka', 17 June 2016.

Lanka, in particular the victims, in the independence and impartiality of the process, particularly given the politicisation and highly polarised environment in Sri Lanka.<sup>17</sup> Similarly, the UNHRC resolution observes that “a credible justice process should include independent judicial and prosecutorial institutions led by individuals known for their integrity and impartiality; and also affirms in this regard the importance of participation in a Sri Lankan judicial mechanism, including the special counsel’s office, of Commonwealth and other foreign judges, defence lawyers and authorised prosecutors and investigators.”<sup>18</sup>

From these recommendations, we can conclude that the international community at least -though it is worth noting that Sri Lanka was also one of the sponsors of the UNHRC resolution- envisages a hybrid justice mechanism with international participation. Despite this, President Sirisena, in January 2016, told the BBC that he would “never agree to international involvement in this matter.”<sup>19</sup> This statement came weeks after Kumaratunga indicated that the court may rely on “technical assistance” from international experts.<sup>20</sup>

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<sup>17</sup> A/HRC.30.CRP.2, para. 1246.

<sup>18</sup> A/HRC/30/L.29, para. 6.

<sup>19</sup> Azzam Ameen for BBC, ‘Sri Lanka Wants ‘Internal’ War Crimes Court,’ 21 January 2016, available at <http://www.bbc.com/news/world-asia-35376719>.

<sup>20</sup> Reuters, ‘Sri Lanka to Establish War Crimes Court’, 1 December 2015, <http://www.voanews.com/content/sri-lanka-establish-war-crimes-court/3083388.html>. Technical assistance can be wide-ranging, see, e.g., the Cambodian model which involves international personnel in all organs including the judiciary, so it is difficult to determine what Kumaratunga had in mind, based on this statement alone.

Ultimately, there is no “right way” of delivering transitional justice. Sri Lanka will need to decide for itself what it wants to get out of the undertaking and how best to get there, given the very specific circumstances it faces. As Rupert Skilbeck succinctly instructs:

[T]here is no ‘one size’ that fits all. There must be a full analysis of the domestic legal order and of the comparative strengths and weaknesses of the system. Local traditions must be taken into account, and full consultations undertaken with all the relevant actors.<sup>21</sup>

Consultation is important because it promotes buy-in and provides an important opportunity to draw on the expertise from inside and outside Sri Lanka. This process commenced recently<sup>22</sup> and the government recently published an online questionnaire for this purpose, in order to solicit the views of Sri Lankans from various communities.<sup>23</sup> Currently the questionnaire is unaccompanied by a policy paper or other informational note which would help the intended audience to understand the meaning and import of the questions contained therein, or the type of information sought. To be successful, the barriers to participation in a consultative exercise must be low. This means actively seeking out and facilitating the participation of relevant stakeholders.

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<sup>21</sup> Rupert Skilbeck, *Ensuring Effective Defence at Hybrid Tribunals*, Societe Quebecoise de Droit International, available at [http://www.sqdi.org/wp-content/uploads/AIAD\\_06\\_Skilbeck.pdf](http://www.sqdi.org/wp-content/uploads/AIAD_06_Skilbeck.pdf).

<sup>22</sup> <http://www.scrm.gov.lk/#!consultations/cjg9>

<sup>23</sup> The questionnaire can be accessed here: [https://docs.google.com/forms/d/1FFD0zWmR-TFO37ec\\_GIHOF77fAfC87JaZipWSAZOtxY/viewform](https://docs.google.com/forms/d/1FFD0zWmR-TFO37ec_GIHOF77fAfC87JaZipWSAZOtxY/viewform).

## B. Which Objectives?

Whatever the model, it should be supported by clear, measurable objectives that can be used to ensure the court stays on track, and does not become another failure in Sri Lanka's post-war justice efforts. In order to properly frame these objectives, the government will need to consult widely with experts and affected interests.

Regrettably, the absence of clear objectives has been a marked feature of international criminal law.<sup>24</sup> Instead, transitional justice projects have been built on widely held beliefs, such as there being no real prospect of peace without justice, or the need to establish the truth, without first carrying out empirical research to validate those propositions. The ICC is only now embarking on the implementation of performance indicators.<sup>25</sup>

Vinck and Pham have offered some particularly pertinent

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<sup>24</sup> Note, for example, the preamble of the Rome Statutes implies - without ever explicitly confirming - that the Court's objectives are to end impunity, contributing to crime prevention, guaranteeing lasting respect for, and the enforcement of international justice and promoting international peace and security. Little is said about *how* these objectives are to be fulfilled, still less about how they are *not* to be achieved.

<sup>25</sup> Judge Silvia Fernandez de Gurmendi, President of the International Criminal Court: Remarks to the Assembly of States Parties in Relation to Cluster I: Increasing the Efficiency of the Criminal Process, 24 November 2015, available at [https://www.icc-cpi.int/iccdocs/asp\\_docs/ASP14/ASP14-PD-EFEC-President-ENG.pdf#search=%22PERFORMANCE%20INDICATORS%22](https://www.icc-cpi.int/iccdocs/asp_docs/ASP14/ASP14-PD-EFEC-President-ENG.pdf#search=%22PERFORMANCE%20INDICATORS%22) ; see also OSJI Briefing Paper: Establishing Performance Indicators for the International Criminal Court, November 2015, available at <https://www.opensocietyfoundations.org/sites/default/files/briefing-icc-performamnce-indicators-20151208.pdf>.

observations regarding the design of transitional justice mechanisms.<sup>26</sup> They advocate for an evidence-based approach, comprised of three main stages:

At the conceptualisation and planning stage, the central question for decision makers is: ‘What justice for whom and when?’ During implementation, the main question is: ‘Is the project working?’ Finally, upon completion, the question is: ‘What is the impact?’<sup>27</sup>

In accordance with this model, they conducted a survey with 2,620 adult residents from eastern DRC,<sup>28</sup> which led them to the conclusion that if transitional justice were to meet basic expectations in the DRC, national courts would need to be involved.<sup>29</sup> The same might be true in Sri Lanka – or it might not. The only way to find out will be to carry out consultations with the relevant stakeholders.

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<sup>26</sup> Patrick Vinck and Phuong Pham, ‘Ownership and Participation in Transitional Justice Mechanisms: A Sustainable Human Development Perspective from Eastern DRC’, (2008) *IJTJ*, 398-411; Patrick Vinck and Phuong Pham, ‘Empirical Research and the Development and Assessment of Transitional Justice Mechanisms’, (2007) *IJTJ*, 231-248.

<sup>27</sup> Vinck and Pham, *Empirical Research*, Ibid p. 236.

<sup>28</sup> The results of their survey indicated that truth and justice were not high on the list of their interviewees concerns, particularly when needs of peace and security needs were not being met. That being said, most respondents did believe that holding perpetrators accountable was necessary for peace, and most respondents favoured peace with trials as opposed to peace with forgiveness and, interestingly, when asked whether they wanted international or domestic trials, 84.6 percent opted for trials in the DRC, whether those trials be domestic or international in nature. Vinck and Pham, *Ownership and Participation*, pp. 405-410.

<sup>29</sup> *Ibid*, p. 410.

Two final points on objective setting are key. First, prosecutions alone will never fix the justice deficit, strengthen the rule of law, provide answers to victims, and prevent the recurrence of similar crimes in the future. A part of the objective setting process is to manage expectations. This will help the court to weather the storms of criticism that it will inevitably be subjected to from those whose interests it threatens.

Second, any metrics that are used will need to be carefully crafted, to avoid unintended consequences. For instance, cost-efficient trials at the expense of proper investigations would be worthless. A 100% conviction rate at the expense of an accused's right to confront witnesses against him or her would defeat the very purpose of having trials in the first place. Objective setting for criminal justice is not easy, but it is possible through research, consultation and dialogue.

### **C. Organs of the Court**

International and hybrid courts are made up of different organs, or pillars, that represent different interests and perform different functions.<sup>30</sup> Sri Lanka has options when it

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<sup>30</sup> For instance, the ICC has four organs: (i) the Presidency, which has some judicial/legal functions but, as distinct from Chambers, also has administrative and external relations functions; (ii) Chambers, which are primarily responsible for the judicial functions of the Court; (iii) the Office of the Prosecutor, which is responsible for investigating and prosecuting crimes; and (iv) the Registry, which has a range of administrative functions in addition to specific functions relating to, among other things, translations, defence, detention, and victims and witnesses. The STL is also comprised of four organs – but the Presidency exists as part of Chambers and is

comes to how it chooses to constitute this court, however, in doing so there are certain core functions for which provisions will need to be made, and certain fundamental legal principles that will need to be reflected in that structure. These are outlined in the following section.

i. Investigation and Prosecution

Any eventual judicial mechanism will require a prosecutorial and investigative arm that initiates and carries out criminal prosecutions. The work of this arm will be inevitably controversial. It will have to work in a politically charged environment, and be able to maintain integrity and credibility in the face of criticism, political interference and non-cooperation. Hence it is crucial that the prosecutorial and investigative arm is, and is seen to be, independent, impartial, and transparent, with predictable and non-arbitrary working methods.

There are a number of options for where the prosecutorial arm can be located. One option would be to rely directly on the personnel and structure of the Attorney General's Department of Sri Lanka. Another would be to create an independent, temporary prosecutor's office staffed with local personnel, such as the United States Office of the Independent Counsel,<sup>31</sup> protected from interference from the executive.

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not an independent organ, whereas the Defence, which is not a part of the official court structure at the ICC, exists as an organ of the court, on par with the Prosecution.

<sup>31</sup> The now defunct United States Office of the Independent Counsel was an independent prosecutor, distinct from the Attorney General of the United States Department of Justice created by the Ethics in Government Act of 1978 passed in the aftermath of the Watergate scandal. The Act allowed for the appointment of an "independent counsel" to investigate and, where appropriate, prosecute certain

Alternatively, the prosecutorial arm could be an entirely separate institution, comprising one of the organs of any eventual freestanding judicial mechanism.

Similarly, the requisite investigative work could be carried out by a unit of the Sri Lanka Police Service, by a separate body such as the Sri Lankan bribery commission, or by specially hired investigators within any eventual freestanding judicial mechanism. The authors take no firm position on where the investigative and prosecutorial organs of the judicial mechanism should be located. Rather, we focus on *how* it should function, the scope of its mandate and powers and the protections that it should be afforded. These should be clear from the start when setting up a judicial mechanism.

Independence from the government will be absolutely essential for the credibility of any criminal process addressing crimes committed during the war. Although the Sri Lankan constitution makes extensive provision for judicial independence from the government<sup>32</sup> it does not provide similarly extensive protection for investigative or prosecution authorities.<sup>33</sup> This may be one reason for the scarcity of

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high ranking Government officials for violations of federal criminal laws. The independent counsel could only be removed, other than by impeachment and conviction, by the personal action of the Attorney General and only for good cause, physical disability, mental incapacity, or any other condition that substantially impairs the performance of the independent counsel's duties. (See the Ethics in Government Act of 1978, Pub.L. 95-521, 92 Stat. 1867, at Title VI)

<sup>32</sup> See, for example, the section titled “Independence of the Judiciary”, including Articles 107-111 of the Constitution of Sri Lanka.

<sup>33</sup> See however the provisions relating to the Constitutional Council set out in the 19<sup>th</sup> Amendment to the Constitution, which provides



investigations and prosecutions related to the war in the past few decades. The 19<sup>th</sup> Amendment to the constitution<sup>34</sup> has gone some distance towards restoring the independence of the National Police Commission and other commissions,<sup>35</sup> but, as noted by the OHCHR, "...the criminal justice system remains vulnerable to interference and influence by powerful political, security and military actors".<sup>36</sup> This is a lacuna that deserves to be addressed in detail when setting up an eventual judicial mechanism and in the forthcoming constitutional reform process.

It is important that the prosecutorial and investigative arms have the discretion to make investigative and prosecutorial choices without fear of interference or repercussions. This should include decisions on which persons to investigate, which persons to charge, which charges to bring, and which sentences to request. These decisions should not be subject to a government veto or influence. The prosecutorial and investigative arm should also have independence and full control over the management and administration of itself, including the staff, facilities and other resources thereof. It should not be possible for the executive to derail an

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for a new "CHAPTER VIIA" to the constitution. This chapter provides, among a number of other issues, for checks and balances relating to the appointment of the Attorney General.

<sup>34</sup> The 19<sup>th</sup> Amendment to the Sri Lanka constitution, certified on 15th May 2015, establishes a Constitutional Council to recommend to the President appropriate persons for appointment as chairpersons or members of the National Police Commission, the Public Service Commission, the Commission to Investigate Allegations of Bribery or Corruption as well as a number of other bodies. (See article 8 of the Amendment.). See further the discussion of the amendment at <https://www.hrw.org/node/282320>

<sup>35</sup> <https://www.hrw.org/node/282320>

<sup>36</sup> A/HRC/30/61, para.79.

investigation or prosecution by removing, transferring, or influencing the remuneration of any member of the prosecutorial or investigative arms.<sup>37</sup>

The prosecutorial and investigative arm should also be impartial in terms of mandate and function. The mandate should not weigh it against or for either party to the war. The body must apply consistent methods and criteria, irrespective of whether a particular case concerns the LTTE, government actors, or any other entity. Any evidence of partiality, or even perception of partiality, will damage the credibility of the institution and reduce its useful impact.

Transparency, too, is crucial. Decision-making and functioning should be transparent and predictable. Guiding principles, policies and standard operating procedures should be written, and easily accessible to the public. For example, prosecuting authorities at the national<sup>38</sup> and sub-national<sup>39</sup> level have public regulations or operating procedures that guide their work, which set out publicly the role and duties of the prosecutor, the principles guiding the decision to prosecute, discontinuing prosecutions, issuance of reasons for

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<sup>37</sup> See, for example, analogous provisions in Act No. 19 of 1994 which created the Commission to Investigate Allegations of Bribery or Corruption in Sri Lanka.

<sup>38</sup> See, for example, the publicly available Code for Crown Prosecutors of the UK Crown Prosecutors of the UK Crown Prosecution Service (Available at [http://www.cps.gov.uk/publications/docs/code\\_2013\\_accessible\\_english.pdf](http://www.cps.gov.uk/publications/docs/code_2013_accessible_english.pdf))

<sup>39</sup> See, for example, the publicly available Prosecution Guidelines of the Office of the Director of Public Prosecutions for New South Wales (Available at <http://www.odpp.nsw.au/docs/default-source/default-document-library/prosecution-guidelines.pdf?sfvrsn=2>)

decisions etc. Reasons for proceeding with a case, dropping a case, etc., should be explainable and made evident to the public.

Finally, and perhaps most importantly, the prosecutorial and investigative arms must be effective. Hence their mandate should be sufficiently broad and comprehensive for them to carry out effective, independent, impartial investigations and prosecutions. They should have the coercive power and authority to obtain full cooperation from state organs including, for example, local authorities, the police and the military. Such authority is vital, especially in the context of investigating and prosecuting current or former government / military officials, where investigators may encounter opposition or a reluctance to cooperate.<sup>40</sup>

## ii. Defence

An adequately resourced, professional defence is a non-derogable requirement for any criminal trial. At the international level, the manner in which the Defence is organised varies from court to court,<sup>41</sup> although uniformly all

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<sup>40</sup> For example, media reports refer to Defence officials being “vehemently opposed” to the arrest of two Lieutenant Colonels in connection with the disappearance of journalist Prageeth Ekneligoda. Note however that the two officers were, reportedly, later questioned and taken into custody by the CID. See <http://www.asiantribune.com/node/87738>, last accessed 31 January 2016.

<sup>41</sup> For example, at the ICTY, defence lawyers were required to become fee-paying members of the Association of Defence Counsel (ADC) as a pre-requisite to defending a client before that court. The ADC was not part of the court and was established under Dutch law. At the ICC, an Office of Public Counsel for Defence exists

courts provide legal aid for defendants who do not have the resources to pay for their own defence. Only at the STL is the Defence organised as an official organ of the Court, as opposed to existing as a division within the Registry or having some other subsidiary status. This was regarded as a significant victory for the rights of the Accused in international criminal law, where the Defence has typically struggled to make its voice heard. Even if it is not feasible for the Defence to be established as an organ, thought should be given to the establishment of a defence office, capable of bearing some of the administrative burden for the defence teams, providing training, and acting as a central repository for certain resources, such as legal research materials.

Other matters that will need to be decided include: the qualification criteria for appearing before the court (most courts require a minimum number of years' practice); the disciplinary framework to which counsel would be subject; and the sorts of training that may be required to best support counsel, whether domestic or international. These matters ought to be decided in close consultation with the Sri Lankan Bar Association, which has the advantage of knowing the local legal profession and its needs.

On a practical level, decisions will need to be made about how many lawyers each accused should be entitled to, and how much each ought to be paid – the risk being that if it is set too low, it could impact negatively on the quality of representation. Furthermore, if the Prosecution organ is to be staffed with international personnel with expertise in international criminal law, then as a matter of equality of arms, so ought the Defence. There is currently no

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within the Registry, which provides duty counsel for initial appearances, and support services to all Defence teams.

constitutional bar to foreign lawyers appearing before a specially constituted Sri Lankan court: it will be for Parliament to design the legal framework to facilitate this.<sup>42</sup>

Finally, consideration will also need to be given to cooperation agreements with the government and other entities, to ensure that the Defence is able to access information necessary to prepare its case. Without the relevant legal and material guarantees, the Defence will be no more than window dressing, which will render hollow the entire project of criminal trials.

### iii. Judiciary

Judicial independence, which is guaranteed by the Sri Lankan constitution, will be another fundamental criterion for any court set up to try crimes committed during the war.

A common feature of international judiciaries is the use of nationality as a selection criterion to achieve a balance between judicial independence and local ownership.<sup>43</sup> The

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<sup>42</sup> Bhavani Fonseka and Luwie Ganeshathasan for Centre for Policy Alternatives, *Hybrid vs. Domestic: Myths, Realities and Options for Transitional Justice in Sri Lanka*, January 2016, p. 8, available at <http://www.cpalanka.org/wp-content/uploads/2016/01/Hybrid-vs.-Domestic-Myths-Realities-and-Options-for-Transitional-Justice-in-Sri-Lanka.pdf>

<sup>43</sup> At the ECCC the Trial Chamber must be comprised of three Cambodian judges and two foreign judges, with a Cambodian judge acting as president, and the Appeals Chamber must be comprised of four Cambodian judges and three foreign judges, also with a Cambodian judge acting as president. See- The Law on the Establishment of the ECCC, Chapter III, Article 9. The judiciaries of the SCSL and STL were weighted in the other direction. At the

constitution of Sri Lanka does not require Sri Lankan citizenship as a criterion for appointment, nor does there appear to be any other legal impediment to appointing foreign judges.<sup>44</sup> The way appears to be clear for Parliament to enact legislation allowing for foreign judges to participate in the adjudication of cases before a special court.

One model that may be of particular interest to Sri Lanka is the Bosnian model, whereby international participation in the judiciary (and other organs of the court) was gradually phased out over the years as competences were transferred to Bosnian nationals. However, as distinct from the Bosnian model, which set a somewhat arbitrary and ultimately unachievable timeline

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STL, each panel was made up of a majority of international judges with a minority of Lebanese judges, with an international judge presiding. See STL Statute, Article 8. At the SCSL, a majority of judges was to be appointed by the UN Secretary General, and a minority appointed by the government of Sierra Leone. See SCSL Statute, Article 12. At the ICC, no two judges may be nationals of the same State.<sup>43</sup> See Rome Statute, Article 36(7). The Special Court for Kosovo, which is not yet functional, will somewhat anachronistically have only international judges, despite there having previously been mixed war crimes panels under both the UNMiK and EULEX regimes to deal with the same time period. Human Rights Watch, *Kosovo: Special Court Step Toward Justice*, 4 August 2015. The Bangladesh International Crimes Tribunal is made up solely of Bangladeshi judges, a fact that probably contributed to its perceived lack of legitimacy in the eyes of the international community.

<sup>44</sup> Fonseca and Ganeshathasan, *Hybrid vs. Domestic*, Ibid note 42 p. 6 (noting that “a Supreme Court judgment, which specifically considered the issue of qualifications and disqualifications of superior court judges, held that no such criteria can be read into the Constitution; the Court held that the natural, logical and plain language interpretation of the Constitution would not permit such an interpolation.”)

for phasing out international involvement, it would be preferable to tie domestication of the court to benchmarks reflecting the ability to manage cases successfully.<sup>45</sup>

What has typically not been required of judges appointed to serve at international courts, although it ought to be, is a demonstrated capacity to preside over complex criminal cases. The ICC, for example, requires that judges have an “established competence” in relevant areas of criminal law and international law – but does not require litigation – or trial experience. Sri Lanka should avoid this approach, and focus on developing selection criteria for its judiciary that will promote efficient trials and reliable, consistent results.

#### iv. Administrative Pillar

The 2015 UHHRC resolution calls for the involvement of foreign judges, defence lawyers, prosecutors and investigators in the criminal justice mechanism, but omitted any reference to the involvement of foreign personnel in the administrative pillar, usually referred to in international criminal law institutions as the “Registry.” The Registry is responsible for key functions, such as facilitating the appointment of counsel to the accused, the provision of interpretation and translation services, liaising with States regarding the transfer of witnesses and defendants, and delivering support services to witnesses. In order for the Court to function effectively and efficiently, it will need an independent administrative pillar that both Parties – the Prosecution and Defence – and the judiciary can rely upon.

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<sup>45</sup> Human Rights Watch, *Justice for Atrocity Crimes: Lessons of International Support for Trials Before the State Court of Bosnia and Herzegovina*, 2012, p. 3, available at [https://www.hrw.org/sites/default/files/reports/bosnia0312\\_0.pdf](https://www.hrw.org/sites/default/files/reports/bosnia0312_0.pdf).

### *Victims and Witnesses*

One of the key services that the administrative pillar of international courts typically provides is victim and witness protection. Sri Lanka passed the Assistance to and Protection of Victims of Crime and Witnesses Act in 2015.<sup>46</sup>

The Act is ambitious and far-reaching, allowing for any protective measures deemed necessary, including but not limited to re-identification and relocation. It effectively delegates the promulgation and enforcement of measures for witness assistance, protection, rehabilitation, etc., to a National Authority for the Protection of Victims of Crime and Witnesses, the board of which is comprised of representatives from various ministries and departments,<sup>47</sup> and a division within the police force entitled the Victims of Crime and Witnesses Assistance and Protection Division.<sup>48</sup> Because so much is left to the discretion of these two bodies, which have yet to be set up, it is impossible to assess, at this point, whether the initiative will actually lead to meaningful reform in victim and witness protection in Sri Lanka. What can be said, however, is that in their current form, neither mechanism will be acceptable for the purposes of international crimes trials, because both lack structural and/or formal independence from the government. Even in the most propitious of post-conflict situations, it may be asking a little too much of former adversaries to entrust the safety of their families to, what are effectively, departments of the government. Under the circumstances, it would be preferable for an independent, purpose-designed unit to be established to provide victim and

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<sup>46</sup> A/HRC/30/CRP.2, para. 1183.

<sup>47</sup> See part IV of the Act.

<sup>48</sup> See part V of the Act.



witness support for any eventual judicial mechanism dealing with crimes committed during the war.

Another aspect of the Act that is interesting is its attitude towards victim participation. Historically, victims of crime had no role in criminal proceedings in Sri Lanka, beyond making an initial complaint and perhaps testifying as a witness. The 2015 Act grants victims the right of legal representation at criminal proceedings and the right to “attend and participate at judicial or quasi-judicial proceedings pertaining to the offence committed against him.”<sup>49</sup> Victim participation in criminal proceedings is permitted at some international criminal courts, such as the ICC, STL and the ECCC, but was not provided for at other courts, such as the ICTY and the ICTR. Victim participation is undoubtedly a complicating factor in criminal proceedings, which requires additional resources and results in more litigation and lengthier proceedings. That is not to say that it is not worthwhile, but that in determining whether victim participation in the criminal process would be appropriate, Sri Lanka ought to consider what is achievable in terms of the resources available for the court, in addition to whether and how victim participation should be effected, given Sri Lanka’s legal traditions, both old and new.

### *Translations*

Sri Lanka has two official languages: Tamil and Sinhalese, whereas English is the “link language”, commonly used in government and law. As a matter of human rights law, it is required that proceedings are carried out in a language understood by the accused. As a matter of pragmatism, it would be extremely unwise not to have proceedings in all

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<sup>49</sup> Part II, para 4(1).

three languages, given how central the issue of language has been in Sri Lanka since independence. Consequently, it is very likely that proceedings will need to be conducted in all three languages. That means ensuring an adequate number of translators and interpreters who are certified to a high standard *before* the proceedings commence. This will be a significant cost for the court – but one that has to be borne. High quality translation and interpretation takes on even greater significance in criminal law than it does in other arenas, primarily because of the Accused’s right to follow the proceedings in a language he or she understands. Moreover, if guilt is to be proved beyond reasonable doubt, as it must for a conviction, linguistic precision cannot be compromised, as the Prosecution cannot prove its case, nor can the Defence defend against any allegations effectively, if language is unreliable.

One court that faced serious difficulties with translation and interpretation was the ECCC, with significant implications for the Court’s legitimacy.<sup>50</sup> Similarly, at the Presidential Commission to Investigate into Complaints Regarding Missing Persons (Paranagama COI), translation proved, reportedly, to be a significant challenge, due to understaffing and lack of professionalism.<sup>51</sup>

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<sup>50</sup> In the first four years of the ECCC’s existence, there were just two native English speakers who could read documents in their original Khmer, and not a single French speaker who could do so. The lack of language skills created much delay and confusion during hearings, as questions were sometimes translated not once but twice before being received by the witness, it also created delays between hearings, as the Defence awaited translations of documents in languages it could understand. See *Transitional Justice in Cambodia: Analytical Report*, October 2010, para. 53.

<sup>51</sup> The CPA reported that, at a hearing held in Vavuniya, one of the translators began questioning those making submissions, without waiting for the Commissioner. Despite having raised concerns

## D. Subject Matter Jurisdiction

There is also the question of whether Sri Lanka's domestic legal framework is adequate to deal with crimes resulting from the war.

Sri Lanka has not acceded to the Additional Protocols to the Geneva Conventions, in particular Additional Protocol II which governs non-international armed conflicts,<sup>52</sup> and the Rome Statute of the International Criminal Court<sup>53</sup>. Neither does it have laws criminalising war crimes, crimes against humanity or genocide.<sup>54</sup> While the Torture Convention has been ratified and implementing legislation passed<sup>55</sup> this does not criminalise torture as a crime against humanity or a war crime. Sri Lanka signed the International Convention for the Protection of All Persons from Enforced Disappearances on

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about the quality of translations on several occasions, the CPA noted that no remedial action was taken. See- *The Presidential Commission to Investigate into Complaints Regarding Missing Persons: Trends, Practices and Implications*, CPA, December 2014, available at <http://www.cpalanka.org/wp-content/uploads/2014/12/Dissappearances-COI-Dec-2014-FINAL.pdf>.

<sup>52</sup> List of signatories accessible at [https://www.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp\\_viewStates=XPages\\_NORMStatesParties&xp\\_treatySelected=475](https://www.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=475)

<sup>53</sup> List of signatories accessible at [https://www.icc-cpi.int/en\\_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx#S](https://www.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx#S)

<sup>54</sup> A/HRC/30/61, para.77.

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[http://hrcls.lk/PFF/Library/Domestic\\_Laws/Legislations\\_related\\_to\\_Torture/Convention%20against%20Torture%201994%20of%2022.pdf](http://hrcls.lk/PFF/Library/Domestic_Laws/Legislations_related_to_Torture/Convention%20against%20Torture%201994%20of%2022.pdf)

10 December 2015<sup>56</sup> but the crime against humanity of enforced disappearance of persons<sup>57</sup> has not been criminalised in Sri Lanka. Hence, under the status quo, mass criminality that may have taken place during the war would have to be dealt with under the Penal Code and related legislation, and prosecuted as ordinary crimes.

Notably in this context, the OHCHR concludes that “acts amounting to international crimes should be tried as such, and not merely as ordinary crimes, so as to adequately meet the objectives of combating impunity, realising the rights of victims to a remedy and reparations, and guaranteeing non-repetition.”<sup>58</sup> The authors of this chapter agree with this position. It is not just that, by declaring a crime to be a violation of international law, something important is said about the fundamental and universal nature of the norm violated. It is also that, in order for a crime to qualify as an offence under international law, certain additional elements must be met, which relate to the broader context of the conflict or campaign of violence.

War crimes, as the name suggests, can only occur where the relevant conduct took place in the context of and was associated with an armed conflict<sup>59</sup>. For an act to constitute a crime against humanity it must be committed as part of a widespread or systematic attack against a civilian population, though it is not necessary for the relevant acts to constitute a

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<sup>56</sup> List of signatories accessible at [https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtmsg\\_no=IV-16&chapter=4&lang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtmsg_no=IV-16&chapter=4&lang=en)

<sup>57</sup> See, for example, article 7(1)(i) of the Rome Statute of the International Criminal Court.

<sup>58</sup> A/HRC/30/CRP.2, para. 1242.

<sup>59</sup> See, for example, ICC, Elements of crimes, p.13.

military attack.<sup>60</sup> For an act to constitute genocide, similarly, the relevant conduct must take place in the context of a manifest pattern of similar conduct directed against a particular national, ethnical, racial or religious group or must be conduct that could itself effect such destruction.<sup>61</sup> These contextual elements serve an important purpose in properly representing the nature of mass crimes. i.e. They are not isolated incidents, and are often a component part of a broader criminal episode, or pattern of conduct. To treat thousands of disappearances as random, unconnected occurrences, for example, would be disingenuous. Hence these crimes should be prosecuted as international crimes.

The Sri Lankan legal framework also does not explicitly envision individuals being charged with forms of liability common in international criminal law, such as command/superior responsibility, indirect perpetration, ordering or contribution to a common purpose. This may make it difficult, for example, to charge a military commander in connection with crimes committed by forces under his or her effective command and control as a result of his or her failure to exercise control properly over such forces<sup>62</sup>, or to charge a person who, while being in a position of authority, orders his or her subordinates to commit a crime.<sup>63</sup>

Since Sri Lankan law does not contain provisions proscribing the core international crimes – genocide, crimes against humanity, and war crimes - it will be necessary to legislate for these crimes, and possibly others, prior to the establishment of

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<sup>60</sup> See, for example, ICC, Elements of crimes, p.15.

<sup>61</sup> See, for example, ICC, Elements of crimes, p.2.

<sup>62</sup> See the formulation of command responsibility under article 28 of the Rome Statute, which provides for such liability.

<sup>63</sup> See the formulation of “ordering” under article 25(3)(b) of the Rome Statute, which provides for such liability.

a court. The fact that such offences did not exist under Sri Lankan law at the time of their commission will likely give rise to *nullem crimen* challenges – but, judging from the practice of other international / internationalised tribunals such challenges are unlikely to be fatal, at least where *jus cogens* prohibitions are at issue.

## **E. Temporal Jurisdiction**

Although international outcry was probably greatest following the end of the war in 2009, limiting jurisdiction to just these last few months of the war would not allow for a fair accounting of the conflict. The 2015 report by the Office of the High Commissioner for Human Rights recommends that the period be extended, observing that “the scale and timeframe of the alleged crimes spans a much wider period which needs to be addressed particularly on account of the systemic nature of any of the crimes. Limiting prosecutions or other transitional justice mechanisms to a small period – for example the end of the war, or the period covered by the LLRC’s mandate – risks presenting an incomplete picture of the patterns, perpetrators and institutions involved in the abuse.”<sup>64</sup>

Several options exist regarding the scope of temporal jurisdiction. If one were to rely on various phases of the war, one could extend jurisdiction to, for example,

- Immediately prior to July 23, 1983 – the date on which a Sri Lankan army patrol was ambushed by the LTTE, triggering the Black July riots and the start of the war proper.

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<sup>64</sup> A/HRC/30/CRP.2, para. 1246.

- Immediately prior to the initiation of “Eelam War II” in mid-1990.
- Immediately prior to the initiation of “Eelam War III” on 19 April 1995.
- Immediately prior to the initiation of “Eelam War IV” on 26 July 2006.

One advantage of focusing on the period after July 2002 would be the fact that one could rely on the date of the coming into force of the Rome Statute – i.e. 1 July 2002. The advantage of this latter approach would be the existence of a detailed codification of substantive law, with each crime disaggregated into its elements, that can be used to inspire domestic legislation. Admittedly, this is not a common method of deciding on the temporal scope of jurisdiction. However, it would go some distance towards addressing the inevitable allegations of retroactive application of criminal law. The obvious disadvantage would be that crimes committed during phases prior to July 2002 would not be investigated.

By contrast, extending jurisdiction back to immediately prior to 23 July 1983 would allow for a comprehensive investigation of crimes committed during and in connection with the war. One disadvantage with this approach would be that it would require an assessment of the content of international customary law at that time: Since the charged crimes would not have been crimes within the Sri Lankan legal system in the 80s and 90s, any eventual judicial mechanism would have to assess whether the charged crimes existed in customary law at that time, in order to avoid the retroactive application of criminal law. Notably in this context, the rich vein of case law regarding the content of customary law in the *ad hoc* international tribunals only came into existence in the mid-90s. Another disadvantage would be the difficulties faced in obtaining evidence in light of the physical deterioration of

crime scenes, and the fading memory of witnesses. However, neither of these are insurmountable challenges.

Having considered the pros and cons above the authors believe that it would be best to extend temporal jurisdiction to the ostensible beginning of the war – July 1983. The technical concerns relating to extending jurisdiction are outweighed by the necessity to comprehensively and even-handedly investigate crimes committed during the war.

## **F. Procedural Matters**

### *Rules of Evidence*

Another question that needs to be answered is whether a court would apply Sri Lankan rules of evidence and procedure, or a specially formulated set of rules designed specifically for the court and, perhaps, drawing on the rules of procedure and evidence that have been developed in international law. The latter maybe useful regarding procedural innovations in the context of sexual and gender based crimes<sup>65</sup> and unique investigative opportunities.<sup>66</sup> However, wholesale adoption of rules of international courts could cause discomfort within the Sri Lankan criminal law community, as it is heavily influenced by the English common law tradition which takes a more rigorous approach to admissibility than that taken at

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<sup>65</sup> See, for example, rule 63(4) (regarding corroboration) and rule 71 (regarding non-admissibility of the prior or subsequent sexual conduct of a victim or witness) of the ICC rules of procedure and evidence.

<sup>66</sup> See, for example, Article 56 of the Rome Statute



international courts.<sup>67</sup> Some compromise regarding the stringency of rules may ultimately be inevitable, given the difficulties associated with prosecuting crimes where witnesses are particularly reluctant to come forward and the lapse in time between the execution of crimes and their subsequent prosecution means that the “best evidence” cannot be obtained.<sup>68</sup>

It goes without saying that any compromises that are made ought to stop far short of the practices that have been allowed to operate at the Bangladesh tribunal, which exhibits procedural oddities that are – for good reason - unprecedented in international criminal law. For instance, there are no rules of evidence.<sup>69</sup> Judges may question the Accused at any stage in the proceedings and although the Accused need not answer, the Court is entitled to draw negative inferences from his silence.<sup>70</sup> These types of practices are well beyond the pale of what is acceptable in international criminal law.

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<sup>67</sup> See, e.g., Navaneetham Pillay, ‘Standing Justice on its Head,’ available at [http://www.island.lk/index.php?page\\_cat=article-details&page=article-details&code\\_title=86062](http://www.island.lk/index.php?page_cat=article-details&page=article-details&code_title=86062).

<sup>68</sup> For instance, special rules governing the conduct of witness interviews, and the provision of assurances against self-incrimination may be necessary in order to encourage witnesses to come forward, and provisions for the admission of statements or prior testimony of now-unavailable witnesses may need to be considered. The Hague Institute for the Internationalisation of Law has issued a restatement of general principles of international criminal procedure which may be useful to consider, see ‘General Rules and Principles of International Criminal Procedure and Recommendations of the International Expert Framework,’ October 2011.

<sup>69</sup> Bar Human Rights Committee Report, p. 58 (citing ICTA Section 19).

<sup>70</sup> Bar Human Rights Committee Report, p. 58 (citing section 11(2) of the ICTA).

## *Sentencing*

Whatever the range of sentences imposed by the court, their application must be: (a) predictable, in the sense of being guided by readily identifiable factors,<sup>71</sup> (b) proportionate, in

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<sup>71</sup> Under international criminal law, the Trial Chamber typically enjoys broad discretion in determining an appropriate sentence. As stated by the ICC Appeals Chamber in the *Lubanga* sentencing appeal “The sentence must be determined by weighing and balancing all the relevant factors. The weight given to an individual factor and the balancing of all relevant factors in arriving at the sentence is at the core of a Trial Chamber’s exercise of discretion. However, a Trial Chamber’s failure to consider one of the mandatory factors listed in rule 145 (1) (b) of the Rules of Procedure and Evidence can amount to a legal error in the context of challenging the Trial Chamber’s discretionary decision on sentencing.” *Prosecutor v. Thomas Lubanga*, ICC-01/04-01/06, Judgment of the Appeals of the Prosecutor and Mr Thomas Lubanga Dyilo Against the “Decision on Sentence Pursuant to Article 76 of the Statute,” 1 December 2014, para. 1. Rule 145(1)(b) refers to “any mitigating and aggravating factors,” non-exhaustive lists of which are set out in Rule 145(2)(a)-(b), which states that “the Court shall take into account, as appropriate, (a) Mitigating Circumstances such as: (i) The circumstances falling short of constituting grounds for exclusion of criminal responsibility, such as substantially diminished mental capacity or duress; (ii) The convicted person’s conduct after the act, including any efforts by the person to compensate the victims and any cooperation with the Court; (b) As aggravating circumstances: (i) Any relevant prior criminal convictions for crimes under the jurisdiction of the court or of a similar nature; (ii) Abuse of power or official capacity; (iii) Commission of the crime where the victim is particularly defenceless; (iv) Commission of the crime with particular cruelty or where there were multiple victims; (v) Commission of the crime for any motive involving discrimination on any of the grounds referred to in article 21, paragraph 3; (vi) Other circumstances which,

terms of bearing a fair relation to the crime committed; and (c) subject to appellate review. Overall, sentences in international law have tended to be quite low, which has led to the criticism that sentences do not comport with the “moral and legal gravity of the offences involved.”<sup>72</sup> It will be for Sri Lanka to determine what it regards as a fair range of sentences, based on its own legal culture and following consultation with relevant stakeholders and experts. The authors would urge, however, that capital punishment is not made available as a penalty for any crimes over which the court has jurisdiction. There are numerous arguments for abolishing the death penalty permanently and universally that will not be repeated here,<sup>73</sup> except to say that in cases relating to the war, there is a particularly acute risk that the imposition of the death penalty could be perceived as a political tool, which could have a destabilising effect on Sri Lanka.

Notably, Sri Lanka has not imposed the death penalty since 1976.<sup>74</sup> Hence the authors hope that there is no appetite for such a punishment to be imposed.

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although not enumerated above, by virtue of their nature are similar to those mentioned.

<sup>72</sup> See, e.g., Jens David Ohlin, *Towards a Unique Theory of International Criminal Sentencing*, Cornell Law Library: Scholarship@Cornell Law: A Digital Repository, available at <http://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1022&context=facpub>

<sup>73</sup> For an overview of these arguments, see, e.g., OHCHR, *Moving Away from the Death Penalty: Arguments, Trends and Perspectives*, New York 2014, available at <http://www.ohchr.org/Lists/MeetingsNY/Attachments/52/Moving-Away-from-the-Death-Penalty.pdf>.

<sup>74</sup> Cornell Law School, *Death Penalty Worldwide*, available at <http://www.deathpenaltyworldwide.org/country-search-post.cfm?country=Sri+Lanka>.

### **3. Conclusion**

Currently, the authors can only make educated guesses about the nature of the judicial mechanism that may eventually address the crimes committed during the war in Sri Lanka. However, the brief survey above suggests some ground rules that should not be breached, regardless of the precise contours of the mechanism. It should

- Be developed through a consultative process
- Have clear, measurable objectives
- Be independent of and protected from government and other interference
- Be impartial, transparent and predictable
- Be sufficiently resourced to be effective
- Have the mandate and sufficient coercive power to obtain cooperation
- Make adequate provision for the rights of the accused and equality of arms
- Make adequate provision for victim and witness protection
- Have jurisdiction over war crimes, crimes against humanity and genocide as provided for in international law
- Extend its temporal jurisdiction to the beginning of the Sri Lankan war
- Not feature the death penalty

It is obvious that criminal prosecutions alone will not single-handedly heal the wounds of thirty years of war. However, an institution developed along the above lines will be a small step in the right direction.

# 9

## **Judicial Accountability for Conflict Related Sexual Violence in Sri Lanka**

*80*

*Annie Woodworth*

## Introduction

In the years since the formal end of the civil war in Sri Lanka in 2009, the human rights abuses perpetrated by both sides during the conflict have gained increasing attention. Enforced disappearances, use of child soldiers, and sexual violence among other crimes have been highlighted.<sup>1</sup> Although acknowledgement in the domestic and international communities of wartime violations in Sri Lanka has grown, concrete steps towards transitional justice have been limited.<sup>2</sup> Effective transitional justice utilises four pillars - criminal prosecution, comprehensive reparations, institutional reform, and truth telling, which together work to provide redress and rehabilitation for victims and ensure the non-recurrence of human rights violations.<sup>3</sup>

The government of Sri Lanka has promised to facilitate transitional justice by establishing an office of reparations, judicial mechanism, and a truth and reconciliation

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<sup>1</sup> *Transitional Justice and Ways Forward*, Centre for Policy Alternatives, (July 2015), available at <http://www.cpalanka.org/wp-content/uploads/2015/07/Transitional-Justice-in-Sri-Lanka-and-Ways-Forward.pdf>; UN Human Rights Council, Report of the Office of the United Nations High Commissioner for Human Rights on Promoting Reconciliation, Accountability and Human Rights in Sri Lanka, 16 September 2015, A/HRC/30/61, available at: <http://www.refworld.org/docid/55ffb1854.html>, last accessed on 9 June 2016; United Nations Report of the Secretary General's Panel of Experts on Accountability in Sri Lanka, March 31, 2011.4.[http://www.un.org/News/dh/infocus/Sri\\_Lanka/POE\\_Report\\_Full.pdf](http://www.un.org/News/dh/infocus/Sri_Lanka/POE_Report_Full.pdf), last accessed 10 June 2016

<sup>2</sup> *Transitional Justice in Sri Lanka*, World News, 9 April 2016, available at <http://intpolicydigest.org/2016/04/09/transitional-justice-in-sri-lanka/>

<sup>3</sup> <https://www.ictj.org/about/transitional-justice>

commission, but implementation has yet to take place.<sup>4</sup> In order for Sri Lanka to move forward and communities to rebuild, it is imperative that the myriad of past abuses are addressed through a complete set of mechanisms. This chapter will only cover crimes of sexual violence, and will focus solely on judicial accountability as a form of redress.<sup>5</sup> But it is vital to remember the multitude of other abuses that must be tackled and the importance of utilising all four pillars of transitional justice to ensure comprehensive redress for victims and communities.

This chapter will begin with an overview of the problem of conflict-related sexual violence (CRSV) in Sri Lanka and an explanation of the major challenges to judicial accountability. I will then discuss both the domestic and international legal frameworks for prosecuting sexual violence and areas for reform. I focus mainly on the international framework here because prosecution under international law can better serve the purposes of transitional justice and is becoming increasingly more successful as a means of ending impunity for perpetrators of CRSV. Finally, I will discuss recommended legal reforms and strategies for prosecution.

## **The Problem of Conflict-Related Sexual Violence in Sri Lanka**

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<sup>4</sup> UN Human Rights Council, Promoting reconciliation, accountability and human rights in Sri Lanka: resolution / adopted by the Human Rights Council, 1 October 2015

<sup>5</sup> Most information and recommendations for reparations and other forms of redress for CRSV in Sri Lanka can be found in the discussion paper on *Judicial Accountability and Reparations for CRSV* from the Centre for Policy Alternatives, available at <http://www.cpalanka.org/>

Concerns with regards to CRSV in Sri Lanka have been present for decades. Reports indicate that sexual violence was prevalent throughout the country's almost thirty-year war, particularly in the last years leading up to the official end in 2009, as well as in the war's immediate aftermath. Documented and corroborated accounts imply wide-ranging sexual violence, frequently perpetrated by military and police officials, and often involving Tamil victims, both civilian and affiliated with the Liberation Tigers of Tamil Eelam (LTTE).<sup>6</sup> These accounts describe rape, and other methods of sexual violence such as injury to the genitals, often perpetrated in connection with torture and interrogation.<sup>7</sup> Locations of the reported violence range from internally displaced persons (IDP) camps to interrogation centers to the homes of victims.<sup>8</sup> Some reports have emphasised the similarity between individual cases and the systematic nature of the violence, which suggests that sexual violence was used by the military

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<sup>6</sup> International Truth and Justice Project Sri Lanka, *Silenced-Survivors of Sexual Violence and Torture in 2015* (January 2016); UN Human Rights Council, Report of the Office of the United Nations High Commissioner for Human Rights on Promoting Reconciliation, Accountability and Human Rights in Sri Lanka, 16 September 2015, A/HRC/30/61, available at: <http://www.refworld.org/docid/55ffb1854.html>, last accessed on 25 January 2016; International Truth and Justice Project Sri Lanka, *A Still Unfinished War: Sri Lanka's Survivors of Torture And Sexual Violence 2009-2015* (July 2015); Human Rights Watch, *We will teach you a lesson - Sexual violence against Tamils by Sri Lankan security forces* (February 2013)

<sup>7</sup> Report of the Office of the United Nations High Commissioner for Human Rights, Ibid note 6

<sup>8</sup> International Truth and Justice Project Sri Lanka, *Silenced*, Ibid note 6; [https://www.hrw.org/sites/default/files/reports/srilanka0213webwcover\\_0.pdf](https://www.hrw.org/sites/default/files/reports/srilanka0213webwcover_0.pdf)



and police as a torture tactic to degrade and intimidate victims and as a method of control.

Though the war ended in 2009, reports of conflict-related sexual violence have continued to surface.<sup>9</sup> Sexual violence unrelated to the conflict is pervasive.<sup>10</sup> The number of cases of reported sexual violence is growing “particularly from the former conflict zones of North and East, although increasing trends are being observed across the country.”<sup>11</sup> Increasingly, children are the victims.<sup>12</sup>

To combat the trend of rising sexual violence and ensure justice for those who have already been victimised, it is necessary to improve the judicial system to facilitate prosecution and end the culture of impunity. Though sexual abuse and harassment unrelated to the conflict are a growing problem in Sri Lanka, this chapter specifically focuses on judicial accountability for conflict-related sexual violence. However, many of the findings, and the intended effect on

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<sup>9</sup> UN Security Council, *Conflict-related sexual violence: report of the Secretary-General*, 23 March 2015, S/2015/203, available at: <http://www.refworld.org/docid/5536100a4.html> [accessed 26 January 2016]; International Truth and Justice Project Sri Lanka, “Silenced”, *Ibid* note 6 at 13

<sup>10</sup> Dinouk Colombage, ‘Rapes Surge in Sri Lanka Amid Weak Martial laws’, *Aljazeera*, 17 August 2014, <http://www.aljazeera.com/indepth/features/2014/08/rapes-surge-sri-lanka-amid-weak-marital-laws-201481772359790802.html> (nation-wide sexual violence increased 20% between 2012 and 2014)

<sup>11</sup> *Ibid*

<sup>12</sup> Feizal Samath, ‘Child Rape on the Rise in Sri Lanka’, *Colombo Telegraph*, 23 July 2012, <https://www.colombotelegraph.com/index.php/child-rape-on-the-rise-in-sri-lanka/>

impunity, are imperative to tackling the problem of sexual violence in Sri Lanka as a whole.

### **Impunity and other Challenges to Judicial Accountability**

The challenges to judicial accountability are far-reaching. Impunity, congested courts, absent victim and witness protection, ineffective investigation, and social factors such as stigma, all operate to impede justice.<sup>13</sup> The extent of impunity for government, military, and police actors is particularly troubling. The Government of Sri Lanka has declared that it has a zero-tolerance policy on sexual violence,<sup>14</sup> but concerns remain on adherence to this statement. Where cases are reported, there is seldom an effective investigation and subsequent indictments and prosecutions.

The Sri Lankan court system is extremely slow, with several cases of sexual violence sitting in the courts for many years.<sup>15</sup> In several instances, proper initial investigations are often weak or lacking. There are also credible fears that the

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<sup>13</sup> Report of the Office of the United Nations High Commissioner for Human Rights, *Ibid* note 6; World Against Torture Organisation, *Sri Lanka State Terrorism Rape & Murder of Eelam Tamil Women* (November 2002), available at <http://tamilnation.co/indictment/rape/0211omct.htm>

<sup>14</sup> Right of Reply of Sri Lanka, 26th Session of the Human Rights Council, Agenda Item 4, 23 June 2014, available at <http://www.news.lk/news/sri-lanka/item/1325-sri-lanka-rejects-inference-that-the-presence-of-the-military-contributes-to-the-insecurity-of-women-and-girls-in-the-former-conflict-affected-areas>

<sup>15</sup> Waruni Karunarathne, “Women Under Siege”, *The Sunday Leader*, 20 September 2015, available at <http://www.thesundayleader.lk/2015/09/20/women-under-siege/>

investigators may impede the process, especially when the alleged perpetrator has links to the investigators. Victims generally do not seek medical care and if they do, medical professionals may not be properly trained to collect medico-legal evidence, or may be reluctant to do so because of a fear of reprisal or other pressures by perpetrators.<sup>16</sup> There have also been instances where victims who are willing to testify in court face humiliating treatment.<sup>17</sup>

The futile nature of the court system in conjunction with the extreme stigma surrounding sexual violence discourages victims from seeking justice. Given the lack of effective victim and witness protection, victims face intense pressure and retaliation from perpetrators. They are also likely to be stigmatised or ostracised within their communities and sometimes their own families.<sup>18</sup> These challenges make the

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<sup>16</sup> International Truth and Justice Project Sri Lanka, *Silenced*, Ibid note 6 at 12 (In one 2015 case where the victim needed stitches he experienced considerable difficulty finding any doctor who would treat him, such was the level of fear among the medical profession in Sri Lanka regarding treating a torture survivor); World Against Torture Organisation, Sri Lanka State Terrorism Rape & Murder of Eelam Tamil Women (November 2002), available at <http://tamilnation.co/indictment/rape/0211omct.htm> (“Even in cases where District Medical Officers are willing to examine alleged victims of rape and other forms of torture, these officers and the victims themselves may be subjected to pressure or threats by police in order to keep the evidence from reaching the magistrate”)

<sup>17</sup> Interview in Colombo, January 2016; *see also* Shyamala and Mario Gomez, *Sri Lanka: The Law’s Response to Women Victims, Violence, Law and Women’s Rights in South Asia*, at 243

<sup>18</sup> International Truth and Justice Project Sri Lanka, *Silenced-Survivors of Sexual Violence and Torture in 2015* (January 2016); International Truth and Justice Project Sri Lanka, *A Still Unfinished War: Sri Lanka’s Survivors of Torture And Sexual Violence 2009-2015* (July 2015); Human

current judicial system wholly ineffective to tackle conflict-related sexual violence in Sri Lanka.

### **The Legal Framework for Prosecutions**

Conflict-related sexual violence in Sri Lanka constitutes multiple domestic and international crimes. Individual acts of sexual violence can be prosecuted under the Penal Code as rape, more serious forms of rape including custodial and gang rape, or grave sexual abuse. Custodial rape occurs when the act is perpetrated by a “public officer or person in a position of authority . . . on a woman in his official custody or wrongfully restrain[ed]”.<sup>19</sup> This provision is relevant to many of the accounts of sexual violence which occurred in police, military, or government custody. It is also important that the Sri Lankan Penal Code defines rape to occur even with consent if the woman is in detention or ‘consent is obtained through intimidation, threat, or force’.<sup>20</sup> Grave sexual abuse addresses forms of sexual abuse not amounting to rape, and could be used to prosecute the various non-rape acts of sexual violence that have been widely reported by victims.<sup>21</sup>

Judges have discretion in sentencing and in ordering perpetrators to pay compensation to victims. Unfortunately, there appears to be a recent trend of suspending sentences in sexual violence cases.<sup>22</sup> As discussed in the section on reforms

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Rights Watch, *We will teach you a lesson - Sexual violence against Tamils by Sri Lankan security forces* (February 2013)

<sup>19</sup> Sri Lanka Penal Code Section 364

<sup>20</sup> Sri Lanka Penal Code Section 363

<sup>21</sup> Sri Lanka Penal Code Section 365

<sup>22</sup> Sri Lanka Shadow Report to the Committee on the Elimination of All Forms of Discrimination Against Women (July 2010)

36, available at

[http://www2.ohchr.org/english/bodies/cedaw/docs/ngo/WMD\\_](http://www2.ohchr.org/english/bodies/cedaw/docs/ngo/WMD_)

below, it is important that judges are properly trained to handle sexual violence cases and that discretion is limited, so that the acknowledged harm of sexual violence is not minimised by the court and victims are not deprived of the redress that is due to them.

Sexual violence cases can also be brought as fundamental rights cases, meaning the victim can allege violations of fundamental rights provided in the Constitution. The best example is that of Yogalingam Vijitha, who successfully brought a fundamental rights case after she was tortured and raped by police officers while in detention. The Supreme Court awarded compensation, but the perpetrators were never prosecuted for the crimes.<sup>23</sup>

Cases can also be brought under Sri Lanka's law covering torture which has been dictated in the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment Or Punishment Act No. 22 of 1994 (CAT Act).<sup>24</sup> Use of the Convention Against Torture Act, which implements the Convention Against Torture and Other Degrading Treatment (CAT), has been extremely limited.<sup>25</sup> "Since 1994, there have

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SriLanka48.pdf; Roshantha N. de Alwis-Seneviratne, 'Rape: A Human Issue', Colombo Telegraph, 3 June 2015, available at <https://www.colombotelegraph.com/index.php/rape-a-human-issue/>

<sup>23</sup> Human Rights Watch, *We will teach you a lesson*, Ibid note 6 at 18,19; Yogalingam Vijitha v. Wijesekara, Reserve Sub.Inspector of Police, S.C. (FR) No. 186/2001, SCM 23.8.2002.

<sup>24</sup> Yogalingam Vijitha v. Wijesekara, Reserve Sub.Inspector of Police, S.C. (FR) No. 186/2001, SCM 23.8.2002.

<sup>25</sup> Submission from Lawyers' Rights Watch Canada to the Committee Against Torture, Sri Lanka: 3rd and 4th Periodic

only been five or six prosecutions, but not a single conviction yet under the Torture Act.”<sup>26</sup> Implementation of the CAT Act has been impeded due to poor investigation by police who are sometimes perpetrators and by medical professionals who have limited resources and face pressure from the police and military. The lack of adequate witness and victim protections prevents victims, witnesses, and professionals such as doctors, from reporting, investigating, and testifying regarding torture.<sup>27</sup> United Nations Special Rapporteur, Juan E. Mendez, visited Sri Lanka in April 2016 and noted numerous problems with implementation of the CAT Act. For example, the Prevention of Terrorism Act contradicts the CAT requirement to exclude declarations made under torture, detainees don't have access to lawyers or an effective complaint system, and police are entrusted with management of victim and witness protections.<sup>28</sup> It has also been noted that the Act fails to prohibit inhuman and degrading treatment, in

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Report on the Implementation of the Convention Against Torture, (October 2011), available at [http://tbinternet.ohchr.org/Treaties/CAT/Shared%20Documents/LKA/INT\\_CAT\\_NGO\\_LKA\\_47\\_9518\\_E.pdf](http://tbinternet.ohchr.org/Treaties/CAT/Shared%20Documents/LKA/INT_CAT_NGO_LKA_47_9518_E.pdf)

<sup>26</sup> United Nations Human Rights Office of the High Commissioner, Preliminary observations and recommendations of the Special Rapporteur on torture and other cruel, inhuman and degrading treatment or punishment, Mr. Juan E. Mendez on the Official joint visit to Sri Lanka – 29 April to 7 May 2016, *available at* <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=19943&LangID=E#sthash.Ji6rAM3o.dpuf>

<sup>27</sup> Janasansadaya and Asian Human Rights Commission, Review of Medico-legal Examination & Documentation of Torture in Sri Lanka (December 2008)

<sup>28</sup> United Nations Human Rights Office of the High Commissioner, *Ibid* note 26

contrast with the CAT.<sup>29</sup> The CAT Act could be a useful mechanism for prosecuting conflict-related sexual violence, but in order for it to become effective it is necessary that adequate victim and witness protection and proper procedures during investigation and trial be implemented.

Conflict-related sexual violence in Sri Lanka can also be prosecuted as an international crime, for example as a war crime, crime against humanity, or torture under international law.<sup>30</sup> Prosecuting acts of sexual violence as international crimes is important in recognising and addressing the widespread and conflict-related nature of the violence that occurred. Prosecution of international crimes can serve as a type of acknowledgment to the many affected victims who will not see their case in court, and for the country as a whole. These crimes and the need for legal reform are discussed in detail below.

### **Prosecution of CRSV under International Law**

International efforts to combat CRSV have increased in recent decades, beginning in response to the widespread sexual atrocities committed in the Former Yugoslavia and Rwanda, and the resulting prosecution of sexual crimes in the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR).<sup>31</sup> Most recently, on 30 May 2016, former president of Chad, Hissène Habré, was convicted by the Extraordinary

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<sup>29</sup> Janasansadaya and Asian Human Rights Commission, Ibid note 27

<sup>30</sup> (International Law encompasses the universe of rules established by custom and instruments such as treaties and conventions, which govern the behaviour of nations) *See* [https://www.law.cornell.edu/wex/international\\_law](https://www.law.cornell.edu/wex/international_law)

<sup>31</sup> United Nations, Ibid note 9

African Chambers of torture, rape, and sexual slavery under international law.<sup>32</sup> Advocates worked to ensure that Habré's commission of sexual crimes was not overlooked. Legal experts filed an amicus brief with the court outlining the violations of international law perpetrated through sexual violence.<sup>33</sup> Jurisprudence from international and hybrid courts can provide useful lessons for Sri Lanka. The Habré case in particular creates recent precedent establishing sexual violence as an international crime, and may yield guidance in setting up a special court, litigation strategy, and court procedures.

It is well established that sexual violence is a war crime, which is defined as a serious violation of international law.<sup>34</sup> For example, sexual violence is a violation of the Geneva Conventions. CRSV stemming from the conflict in Sri Lanka would fall under Common Article 3 to the 1949 Geneva Conventions and of Additional Protocol II, which applies to non-international armed conflict, and prohibits "outrages upon personal dignity, in particular humiliating and degrading treatment" in the context of conflict.

The International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) provide useful examples of successful prosecutions of sexual violence as a war crime. Anto Furundžija was convicted in the ICTY in 1998 of war crimes

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<sup>32</sup> *Chads Ex-Dictator Convicted of Atrocities*, HRW, 30 May 2016, available at <https://www.hrw.org/news/2016/05/30/chads-ex-dictator-convicted-atrocities>

<sup>33</sup> Amicus Curiae Brief of The Human Rights Center at the University of California, Berkeley, School of Law, Rape and Other Forms of Sexual Violence as Crimes Against Humanity, War Crimes, and Torture Under Customary International Law, Filing Before the Extraordinary African Chambers, 8 December 2015

<sup>34</sup> Ibid



based on charges of sexual violence.<sup>35</sup> He did not personally commit rape or sexual violence, but was present and encouraged the perpetration, and was thus found guilty as an aider and abettor.<sup>36</sup> In the *Furundžija* case another prisoner witnessed the attacks and was able to act as a witness.<sup>37</sup> The ICTR case of *Prosecutor vs Akayesu* is somewhat similar to *Furundžija*. In *Akayesu*, a town mayor who was aware of and encouraged acts of sexual violence was convicted of war crimes. Akayesu witnessed women being taken away to be abused and in at least one instance, encouraged the perpetrator to rape the victim.<sup>38</sup> The *Akayesu* case was strong in part because significant sexual violence was occurring publically in the town, which made it clear that Akayesu was allowing the abuse to happen.<sup>39</sup> Reports of sexual violence in Sri Lanka have referenced IDPs and detainees being dragged

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<sup>35</sup> *Prosecutor v. Anto Furundžija (Trial Judgement)*, IT-95-17/1-T, International Criminal Tribunal for the former Yugoslavia (ICTY 10 December 1998; see also Akayesu, ICTR 96-4-T, Judgment at p. 686 (noting that sexual violence is “within the scope” of “outrages upon the personal dignity” of the war crime provisions of the Statute. (Note that courts in both Furundzija and Akayesu stated that rape may also qualify as genocide, where the appropriate elements are met)

<sup>36</sup> Ibid

<sup>37</sup>

[http://www.icty.org/x/cases/furundzija/cis/en/cis\\_furundzija.pdf](http://www.icty.org/x/cases/furundzija/cis/en/cis_furundzija.pdf)

<sup>38</sup> United Nations Department of Peacekeeping Operations, *Review of the Sexual Violence Elements of the Judgements of the International Criminal Tribunal for the Former Yugoslavia, The International Criminal Tribunal for Rwanda, And the Special Court for Sierra Leone in the Light of Security Council Resolution 1820*, available at [http://www.icty.org/x/file/Outreach/sv\\_files/DPKO\\_report\\_sexual\\_violence.pdf](http://www.icty.org/x/file/Outreach/sv_files/DPKO_report_sexual_violence.pdf) at 28

<sup>39</sup> Ibid

into the jungle, screaming and pleading.<sup>40</sup> This type of evidence could be used to identify and prosecute perpetrators similar to Akayesu who were involved in on-going sexual violence at particular locations in Sri Lanka. The availability of witnesses to individual acts of sexual violence, or witnesses to public or rampant sexual violence in certain camps or locations, could provide helpful evidence in prosecuting sexual violence as a war crime in Sri Lanka.

Rape is also a crime against humanity,<sup>41</sup> defined in the Rome Statute of the International Criminal Court as an act “committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack”, including “rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation, or any other form of sexual violence of comparable gravity”.<sup>42</sup> Crimes against humanity are established under customary international law and rape is a well-known crime against humanity.<sup>43</sup> Reports highlight the widespread and systematic nature of sexual violence against civilians in Sri Lanka, suggesting that

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<sup>40</sup> Report of the Office of the United Nations High Commissioner for Human Rights, Ibid note 6

<sup>41</sup> Amicus Curiae Brief of The Human Rights Center at the University of California, Berkeley, School of Law, at17-19

<sup>42</sup> [https://www.icc-cpi.int/nr/rdonlyres/ea9aef7-5752-4f84-be94-0a655eb30e16/0/rome\\_statute\\_english.pdf](https://www.icc-cpi.int/nr/rdonlyres/ea9aef7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf)

<sup>43</sup> Report Presented to the Preliminary Peace Conference by the Commission on the Responsibilities of the Authors of the War and on Enforcement of Penalties (Carnegie Endowment for International Peace, Division of International Law Pamphlet No 3, 1919), reprinted in 14 American Journal of International Law 95 (1920), at 114, 127 (including rape on a list of violations of the laws of humanity)

prosecuting perpetrators for crimes against humanity would be appropriate.

In charging crimes against humanity, the nature of the civilian population that the violence is inflicted upon is sometimes relevant. For example, the ICTR statute requires that the widespread and systematic attack is perpetrated on “national, political, ethnic, racial or religious grounds”.<sup>44</sup> In the ICTY case *Kunarac et al.*, the defendants who were commanders in the Bosnia Serb army had helped establish and run the rape camps where many Muslim women were sexually abused.<sup>45</sup> The court emphasised the use of rape to “assert superiority” over the Muslim population, and found the defendants guilty of crimes against humanity.<sup>46</sup> Many Sri Lankan victims recall their perpetrators mentioning their Tamil ethnicity or suspected LTTE connection and using ethnic slurs.<sup>47</sup> This further supports the argument that conflict-related sexual violence in Sri Lanka may constitute a crime against humanity.

As discussed in more detail below, both war crimes and crimes against humanity are not encompassed by Sri Lanka’s legal framework. These crimes will need to be incorporated into the domestic framework so that they can be prosecuted domestically, not just in an international court.

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<sup>44</sup> Ibid

<sup>45</sup> United Nations International Criminal Tribunal for the Former Yugoslavia, “Landmark Cases”, available at <http://www.icty.org/en/in-focus/crimes-sexual-violence/landmark-cases>

<sup>46</sup> United Nations International Criminal Tribunal for the Former Yugoslavia, “Landmark Cases”, available at <http://www.icty.org/en/in-focus/crimes-sexual-violence/landmark-cases>

<sup>47</sup> Human Rights Watch, *We will teach you a lesson*, Ibid note 6

Acts of rape and sexual violence are also torture and could be prosecuted as violations of the CAT Act discussed above.<sup>48</sup> The Act defines an act of torture as one done by or with the consent of a person acting in official capacity “which causes severe pain, whether physical or mental” in order to obtain information, punish or intimidate, or done based on discrimination.<sup>49</sup> Outside of the CAT, torture also qualifies as a crime against humanity, war crime, and an independent crime under customary international law.<sup>50</sup> Numerous reports recount acts of rape and brutal sexual violence in Sri Lanka perpetrated in police or military custody, in connection with interrogation or as punishment for perceived or real LTTE involvement. These acts undoubtedly could be prosecuted as torture. Here, the Habré conviction may establish useful precedent given that prisoners during Habrés regime faced sexualised torture similar to those alleged to have been perpetrated in Sri Lanka, such as the rubbing of spice on victims’ genitals.<sup>51</sup>

## **Recommended Reforms and Strategies**

### **A Special Court**

Although crimes of sexual violence could be prosecuted in domestic courts, Sri Lanka has been urged to create a special court. The UN’s Report of the OHCHR Investigation on Sri Lanka encouraged the country to establish a hybrid court

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<sup>48</sup> Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment Or Punishment Act No. 22 of 1994

<sup>49</sup> Ibid

<sup>50</sup> Amicus Curiae Brief, Ibid note 41 at 22

<sup>51</sup> ‘Deposed Chad dictator Hissène Habré gets life for war crimes’, The Australian, available at <http://www.theaustralian.com.au/news/world/deposed-chad-dictator-hissene-habre-gets-life-for-war-crimes/news-story/ede224ff04e65885d1fa67a92108ac65>

integrating international actors, stating that “Sri Lanka’s criminal justice system is not yet ready or fully equipped to promptly conduct the ‘independent and credible investigation’ into the allegations contained in this report, or ‘to hold accountable those responsible for such violations’, as requested by the Human Rights Council”.<sup>52</sup> The landmark conviction of Hissène Habré for international sex crimes exemplifies the importance of advocating for a special court which utilises international participation, despite political unpopularity and criticism.<sup>53</sup> The establishment of the Extraordinary African Chambers and trial and conviction of Hissène Habré, addressed decades of impunity for the dictator, and will hopefully deliver a message that CRSV will no longer be overlooked.<sup>54</sup>

A special court is undoubtedly preferable in the context of sexual violence. Domestic courts in Sri Lanka are ill equipped to address cases of sexual violence including issues of expertise and protection.<sup>55</sup> Though it is important that reforms take place to address these issues in the domestic judicial system, this process will take time. Thus, a special court employing personnel who are experienced and with a statute that specifically provides for victim-sensitive procedures will make

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<sup>52</sup> Human Rights Council, Report of the OHCHR Investigation on Sri Lanka (OISL), A/HRC/30/CRP.2, 1 December 2015 at p.1278 (citing A/HRC/RES/25/1, preamble)

<sup>53</sup> The Guardian view on the conviction of Hissène Habré: Africa points the way, *The Guardian*, 31 May 2016, <http://www.theguardian.com/commentisfree/2016/may/31/the-guardian-view-on-the-conviction-of-hissene-habre-africa-points-the-way>

<sup>54</sup> Ibid

<sup>55</sup> Victims often face humiliating treatment by judges, prosecutors, and other court personnel who are not trained to understand the nature of sexual crimes or to interact appropriately with victims.

it much easier for sexual violence to be prosecuted in the near future. In this regard, it is also critical to ensure international crimes including war crimes and crimes against humanity are enacted into domestic legislation with retrospective effect.

Court procedures that are appropriate for sexual violence must be clearly outlined in the court's statute. Victim sensitive procedures include out of court testimony and other methods of anonymity such as voice distortion. It is also important to utilise international participants with experience in sexual violence prosecution wherever possible. All court personnel should be trained with regard to sexual violence, and court personnel of the same gender of the victim should be utilised when possible.

Sri Lanka could choose to establish a separate court focused solely on prosecuting sexual violence, following the model of Liberia's Criminal Court E.<sup>56</sup> It is arguable whether creating a separate court would make it easier to implement victim-sensitive procedures, but it would make it more difficult for prosecution of sexual violence to be abandoned as a goal. Lastly, it is worth repeating that adequate victim and witness protections are also necessary to the functioning of the special court and the judicial system as a whole. Victim-sensitive procedures are not enough to protect survivors and encourage them to seek accountability if they face retaliation and harassment outside of court.

The statute of the court must also define appropriate evidence standards. Sexual violence poses unique evidentiary challenges. Rape and other sexual crimes are difficult to

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<sup>56</sup> Liberian Leader Dedicates Criminal Court 'E' (3 December 2008), available at [http://www.emansion.gov.lr/2press.php?news\\_id=972&related=7&pg=sp](http://www.emansion.gov.lr/2press.php?news_id=972&related=7&pg=sp)

prove, particularly when perpetrated during conflict periods where victims are less likely to receive medical treatment or report the crime. Poorly designed evidentiary rules make successful prosecution even more difficult. In particular, it is imperative that the rules of evidence of the special court clearly establish the elements of each sexual crime, do not require the victim to prove a lack of consent, and allow for the use of pattern-based evidence and expert testimony as discussed below. In developing the evidentiary rules, as well as the rules of procedure, Sri Lanka should consult expert advice and examples from abroad. The procedural and evidentiary rules of other special courts such as the ICC, ICTY, and ICTR can be consulted for guidance.

There are challenges to creating a special court. In particular, there has been political pushback to the idea, especially with regard to international participation.<sup>57</sup> Despite resistance on the political and legal fronts, it has been shown that a special court is legally permissible, and fewer protests on the issue suggest it is also politically possible.<sup>58</sup> Practical constraints also threaten the establishment of an effective special court. Special courts are important to transitional justice because they can facilitate judicial accountability on a quicker timeframe and larger scale, restore confidence in the judicial system, and utilise international expertise for prosecuting conflict-related

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<sup>57</sup> Beth Van Schaack, 'More Than a Domestic Mechanism: Options for Hybrid Justice in Sri Lanka', 18 February, 2016, available at <https://www.justsecurity.org/29396/options-hybrid-justice-sri-lanka/>; Bhavani Fonseka and Luwие Ganeshathasan, *Hybrid vs Domestic: myths, realities, and options for transitional justice in Sri Lanka* (January 2016), available at <http://www.cpalanka.org/hybrid-vs-domestic-myths-realities-and-options-for-transitional-justice-in-sri-lanka/>

<sup>58</sup> Fonseka and Ganeshathasan, *Hybrid vs Domestic: myths, realities, and options for transitional justice in Sri Lanka* (January 2016), Ibid

crimes. However, these benefits are only possible if the court has adequate resources and expertise. It will be important that international experts with past experience in CRSV prosecution are involved at all stages, including drafting of the rules and statute of the court, design and implementation of victim and witness protections, and strategy and prosecution. Establishing an effective court will require both expert manpower and monetary resources. As a result, donor support will be vital. Although it is a significant undertaking, a special court that is carefully established and draws on international expertise is imperative in the transitional justice process. For Sri Lanka to move forward, it must send the message that sexual violence will not go unpunished and will not be tolerated in the future. This will require confidence in the judicial system and an end to impunity.<sup>59</sup> Sri Lanka's current court system does not have the faith of the people, or the capability to hold perpetrators accountable. Prosecution in a special court will help the country achieve a sense of justice and establish the message that human rights abuses will not be tolerated in Sri Lanka.

### **Legal Reforms**

First, it is important that Sri Lanka adopts the language of international law into the domestic framework and criminalises international crimes including war crimes and crimes against humanity. Prosecuting war crimes, torture, and crimes against humanity through a mechanism that labels them as such, recognises the gravity and systematic nature of the violations perpetrated on a wide scale. It forces the government to acknowledge the breadth of the abuses that took place, and can have symbolic meaning to the many victims whose individual cases will not go to court. It is important to note that the legislative changes must be made

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<sup>59</sup> Van Schaack, *Ibid* note 57



retroactive in order for crimes committed during the conflict to be prosecuted under them.

It is imperative that Sri Lanka amends its law to establish command responsibility. Command responsibility allows military officers and other commanders to be held responsible for crimes committed under their command when they knew or should have known they were being committed and did not take reasonable measures to prevent or report them.<sup>60</sup> Command responsibility is particularly important for Sri Lanka since there have been numerous reports of sexual violence perpetrated by military and police personnel, often in groups.<sup>61</sup> Prosecution through command responsibility is an especially practical mechanism for accountability since many victims are unable to identify the perpetrators but know the military, police, or camp affiliation from the uniforms or location. Command responsibility has been heavily utilised in sexual violence cases in the ICTY, ICTR, and the Special Court for Sierra Leone (SCSL).<sup>62</sup> Later in the chapter, I will discuss the importance of mapping reports of sexual violence crimes so that evidence of extensive sexual violence occurring under particular commanders can be uncovered.

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<sup>60</sup> Ibid

<sup>61</sup> International Truth and Justice Project Sri Lanka, *Silenced*, Ibid note 6; Human Rights Watch, *We will teach you a lesson*, Ibid note 6

<sup>62</sup> United Nations Department of Peacekeeping Operations, *Review of the Sexual Violence Elements of the Judgements of the International Criminal Tribunal for the Former Yugoslavia, The International Criminal Tribunal for Rwanda, And the Special Court for Sierra Leone in the Light of Security Council Resolution 1820*, available at [http://www.icty.org/x/file/Outreach/sv\\_files/DPKO\\_report\\_sexual\\_violence.pdf](http://www.icty.org/x/file/Outreach/sv_files/DPKO_report_sexual_violence.pdf) at 28

It is critical that Sri Lanka amend the penal code to establish rape of men as a crime. Many men have been and may continue to be victims of sexual violence related to the conflict in Sri Lanka.<sup>63</sup> The lack of penal code protection prevents men from seeking accountability and rehabilitative services. Male victims face stigmatisation which is bolstered by the law's current refusal to acknowledge rape of men as a crime. Inclusion of men in the definition of rape will allow for the large number of such crimes to be prosecuted, increase social recognition of sexual violence against men, and hopefully spur the provision of rehabilitative services to male victims.

Judicial accountability and the success of other transitional justice mechanisms are not possible without strong witness and victim protections. Victims of sexual violence in Sri Lanka face extensive retaliation and harassment.<sup>64</sup> They may be detained and suffer additional abuse after reporting the crime, or be pressured into silence.<sup>65</sup> As a result, many victims and witnesses are afraid to discuss the crimes, let alone participate in the judicial process. A National Authority for the Protection of Victims and Witnesses of Crime (National Authority) has been appointed to make non-binding recommendations to other departments and agencies on victim and witness protections.<sup>66</sup> However, this action will not be enough to protect witnesses. The National Authority includes numerous past ministry officials and the division responsible for

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<sup>63</sup> Report of the Office of the United Nations High Commissioner for Human Rights, *Ibid* note 6

<sup>64</sup> International Truth and Justice Project Sri Lanka, "Silenced", *Ibid* note 6

<sup>65</sup> International Truth and Justice Project Sri Lanka, "Silenced", *Ibid* note 6

<sup>66</sup> Ceylon Today, 'NA for protecting victims and witnesses set up', 8 January 2016, available at, <http://www.ceylontoday.lk/51-114488-news-detail-na-for-protecting-victims-and-witnesses-set-up.html>

designing protections and investigating violations is headed by the Senior Superintendent of Police.<sup>67</sup> Since government officials and police officers will be subject to investigation, this lack of independence means the current structure cannot effectively protect victims and witnesses. It is imperative that victim and witness protections for anyone participating in the judicial process are implemented and overseen by independent staff.<sup>68</sup> Each transitional justice mechanism should have its own independent body responsible for designing and implementing victim and witness protections to protect participants in the process.

### **Prosecution**

It is important that civil society and the government begin laying the groundwork for prosecution now. Policy thinkers, advocates, and government officials should consider possible prosecutors who will be capable of and willing to tackle sexual violence. It is vital that stakeholders advocate for the appointment of a prosecutor who will target sexual violence and it is crucial that the prosecutor have a thought-out prosecution strategy with regard to sexual violence.<sup>69</sup> Given

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<sup>67</sup> Sri Lanka Mirror, 'Victim and Witness Protection and Transitional Justice: The Imperative Need for Urgent Reform', 20 January 2016, <http://www.srilankamirror.com/news/item/8432-victim-and-witness-protection-and-transitional-justice-the-imperative-need-for-urgent-reform>

<sup>68</sup> Ibid

<sup>69</sup> The Office of the Prosecutor of the International Criminal Tribunal for Rwanda, *BEST PRACTICES MANUAL For the Investigation and Prosecution of Sexual Violence Crimes in Situations of Armed Conflict Lessons from the International Criminal Tribunal for Rwanda 2008*, available at <http://www.endvawnow.org/uploads/browser/files/Best%20Practices%20Manual%20Sexual%20Vio%20Int%20Criminal%20Manual%20Rwanda.pdf>

the lack of reporting and proper collection of medico-legal evidence, prosecution strategies may include reliance on pattern-based evidence and expert testimony.

As mentioned above, the special court's evidentiary rules should clearly allow for pattern-based evidence. Pattern evidence has been successfully used in the prosecution of international crimes in the past. The use of "evidence of a consistent pattern of conduct relevant to serious violations of international humanitarian law under the Statute" was specifically identified as admissible in both the ICTY and ICTR Rules of Procedure and Evidence.<sup>70</sup> It is helpful to establish a pattern of perpetrators, victims, location of perpetration, or motive.<sup>71</sup> For example reports of conflict-related sexual violence in Sri Lanka suggest that it may be possible to establish patterns of military or police officers perpetrating sexual violence against internally displaced persons or detainees, in IDP camps or police stations, in order to elicit information, punish detainees, or in response to ethnicity or political allegiances.<sup>72</sup>

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<sup>70</sup> ICTY Rules of Procedure and Evidence, available at [http://www.icty.org/x/file/Legal%20Library/Rules\\_procedure\\_evidence/IT032Rev50\\_en.pdf](http://www.icty.org/x/file/Legal%20Library/Rules_procedure_evidence/IT032Rev50_en.pdf); ICTR Rules of Procedure and Evidence, available at <http://www1.umn.edu/humanrts/africa/RWANDA1.htm>

<sup>71</sup> Xabier Agirre Aranburu, *Sexual Violence beyond Reasonable Doubt: Using Pattern Evidence and Analysis for International Cases*, Leiden Journal of International Law, 610 (2010), pp. 609–627 C Foundation of the Leiden Journal of International Law, available at <http://www.usip.org/sites/default/files/missing-peace/Xabier%20Aranburu.pdf>

<sup>72</sup> International Truth and Justice Project Sri Lanka, *Silenced-Survivors of Sexual Violence and Torture in 2015* (January 2016); UN Human Rights Council, Report of the Office of the United Nations High

It is helpful to have expert testimony, particularly to help establish this type of pattern evidence.<sup>73</sup> Expert witnesses have special knowledge that allows them to provide testimony on the crimes at hand. In this context, possible experts would include medical providers who have treated multiple victims, psychologists with expertise regarding behaviour of survivors, and social workers who witnessed the impact of sexual violence on communities. Professionals who have provided services to large numbers of victims, or were able to witness sexual violence in a community over a period of time are generally suitable expert witnesses.

It is vital that organisations and government officials interested in judicial accountability for sexual violence in Sri Lanka begin preparing for prosecution now. If strong cases have not been identified and developed when prosecution in a special court begins, sexual violence may be overlooked and abandoned as a prosecution goal. To ensure that victims of sexual violence have the opportunity to pursue justice, civil society organisations, medical professionals, and other interested parties should work to collect and maintain evidence of sexual violence cases. It will be immensely helpful if strong individual cases are identified and patterns of crimes have been mapped so that pattern-based evidence may be

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Commissioner for Human Rights on Promoting Reconciliation, Accountability and Human Rights in Sri Lanka, 16 September 2015, A/HRC/30/61, available at: <http://www.refworld.org/docid/55ffb1854.html>, last accessed on 25 January 2016; International Truth and Justice Project Sri Lanka, *A Still Unfinished War: Sri Lanka's Survivors of Torture And Sexual Violence 2009-2015* (July 2015); Human Rights Watch, *We will teach you a lesson - Sexual violence against Tamils by Sri Lankan security forces* (February 2013)

<sup>73</sup> Xabier Agirre Aranburu, *Ibid* note 71

introduced. Advocates should also be cognisant of people who may have special knowledge of sexual violence in Sri Lanka and would be qualified to serve as expert witnesses during prosecution.

### **Other Mechanisms of Redress**

It is important to reiterate that judicial reforms are only one of the mechanisms necessary to adequately address the problem of conflict-related sexual violence. It is imperative that sexual violence is not ignored in other aspects of the transitional justice process. Even a vastly improved judicial mechanism is unlikely to reach most victims of sexual violence, many who may not wish to pursue their justice within the court system. Reparations programmes appropriately tailored to the unique harms and challenges of sexual violence, an inclusive and accessible truth-seeking process, and institutional reform that ensures government forces do not perpetrate abuse, will be critical in providing the psychological, physical, and economic assistance that is greatly needed by victims of conflict-related sexual violence in Sri Lanka.<sup>74</sup>

### **Conclusion**

Conflict-related sexual violence during and after Sri Lanka's civil war appears to have been widespread. Acts of rape and sexual violence amounting to domestic crimes and violations of international law were perpetrated against civilians and LTTE members. Sexual violence and harassment related to militarisation and unrelated to the conflict continue to impact communities on a large scale. Sadly, systematic problems including poor investigations, ineffective courts, limited victim and witness protection, and impunity prevents victims from

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<sup>74</sup> Accountability and Reparations for Victims of Conflict Related Sexual Violence in Sri Lanka, CPA, June 2016

seeking or obtaining judicial accountability. The Sri Lankan government has committed to establishing a judicial mechanism as part of their commitments towards reconciliation, but there is a risk that sexual violence will be ignored or poorly handled in the process.

Action by a cross section of stakeholders including the parliament, government officials, civil society, and international participants is needed to ensure that victims have the option of pursuing justice in court. This chapter discusses the range of steps needed including planning, preparations and legislative reforms. It is also vital that an independent special court, utilising international participation, is created. This call is largely due to addressing the levels of impunity and being able to competently handle the cases that will arise. The rules of procedure and evidence must be victim sensitive and provide a framework for sexual violence cases by defining rape and related crimes and allowing for relevant and unique forms of evidence such as pattern-based evidence and expert testimony.

Sri Lanka is in a critical period of reconciliation, where policy-makers must design and prepare for the transitional justice process. It is important that proper steps are taken now to ensure that sexual violence is no longer overlooked. Policy makers should continue advocating for the necessary legislative reforms and the establishment of a special hybrid court. As decisions are made, it is key that judicial accountability for sexual violence remains part of the conversation, and a focus of action.

# 10

## **The Importance of Reparations within Sri Lanka's Reform Agenda**

*80*

*Bhavani Fonseka*



Transitional justice has with time evolved from its focus on truth and justice to embrace a four-pillared approach that involves, in addition to truth and justice, reparations and non-recurrence. Of these, reparations are considered to have the most tangible impact on victims. Encompassing forms of restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition,<sup>1</sup> reparations may be deployed either as part of a larger comprehensive transitional justice response or as a stand-alone initiative. Though reparations may involve either individual or collective approaches, in any society that has undergone years or decades of systematic discrimination and human rights violations, reparations must go beyond the individual, to comprehend the social and structural contexts in which the abuses took place. For instance, while compensation would be limited in scope to the individual, restitution of land and rehabilitation would broach both the individual and collective aspects of reparations. These distinctions are also informed by the symbolic dimensions of reparations (such as those afforded by public apologies and commemorations), which contrast with the material dimensions involved such as financial compensation and restitution of land. These multiple dimensions of reparations indicate how a reparations project must take place within the larger aims of recognising the past and building reconciliation.

A society transitioning from a violent past must take steps to ensure all its citizens are treated equally. Citizens should also have the confidence that their government is capable of moving past abusive practices, taking steps to recognise and redress them, and to bring about reforms. Reparations come

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<sup>1</sup> Basic Principles on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, A/RES/60/147 (2005)

closest, among all the pillars of transitional justice, to addressing these areas, providing tangible and specific forms of redress that resonate with victims. In this regard, a fundamental question to pose is whether repair and remedy is possible and who is able to best provide for reparations. This chapter deals with some key issues relevant in this area.

## **Reparations as a Right**

An important characteristic of reparations is their ability to empower communities, transforming them from victims to citizens with equal rights—especially when reparations are conceived as entitlements vindicated by victims as rights-holders, as opposed to mere assistance passively obtained by them.

International law recognises the victim’s right to reparations. In 2005, the United Nations adopted “Basic Principles on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law” (Basic Principles), which provided a framework for reparations. Within this framework, a victim has the right to equal access to justice, adequate, effective, and prompt reparation for harm suffered and access to relevant information concerning violations and reparation mechanisms. It also requires that reparations are “proportional to the gravity of the violations and the harm suffered”. Several international instruments and conventions provide reparations, including the Rome Statute of the International Criminal Court (ICC)<sup>2</sup>, the International Covenant on Civil and Political Rights<sup>3</sup>, the Convention

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<sup>2</sup> Article 75 and 79

<sup>3</sup> Article 3

against Torture<sup>4</sup> and the Inter-American Convention on Human Rights<sup>5</sup>. Reparations have also evolved with the work of treaty bodies and the jurisprudence of the Inter-American Court of Human Rights.<sup>6</sup>

These developments have elevated reparations as a crucial element in dealing with past abuses and identifying remedies. In Sri Lanka, there must be attention within the reform agenda currently underway to address reparations as part of the transitional justice process and to ensure a framework is in place for a comprehensive reparations policy and package.

### **The Need for Reparations**

The impact of reparations can be multifaceted. On one level, reparations build confidence among affected persons and communities of the government's ability to move past abuses and act upon remedying them. On another, reparations build trust within and among communities. For certain groups, such as women, displaced persons and single-headed households, reparations can provide much needed assistance to rebuild lives and livelihoods, and to reaffirm their dignity.

While Sri Lanka has committed to establishing an Office of Reparations<sup>7</sup>, the mandate of such an office is yet unclear and

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<sup>4</sup> Article 14

<sup>5</sup> Article 25 and 63

<sup>6</sup> See Alexandra Huneeus, 'Courts Resisting Courts: Lessons from the Inter-American Court's Struggle to Enforce Human Rights', (2011) 44 Cornell International Law Journal: Vol. 493; Pablo de Greiff, *The Handbook of Reparations* (ed), (Oxford University Press 2006)

<sup>7</sup> UNHRC Resolution on Sri Lanka 1 October 2015; Report of the Office of the United Nations High Commissioner for Human Rights

discussions need to take place on the criteria of a reparations policy and programme, as well as the scope of the abuses to be considered. Both civil and political rights as well as socio-economic and cultural rights can be focused on, touching on extrajudicial killings, arbitrary arrests and detention, disappearances, torture, displacement, sexual and gender-based violence, forced recruitment of children, arbitrary land grabs and others. In the past, reparations projects have focused more on civil and political rights, restricting their scope to indisputable issues. However, there is a growing global consensus now that other areas must also be considered, making the case for a comprehensive and complete reparations programme. In the Sri Lankan context, it is critical to examine areas that have impacted people the most, going beyond civil and political rights to issues around displacement and the devastation caused by the war and other crises. Furthermore, attention will also need to be on the provision of reparations and whether it is to be devolved, an area requiring further study within the constitutional reform process presently underway in Sri Lanka and its links to the proposed Office of Reparations.

The design and planning of a reparations programme must learn from past programmes, incorporating successes and challenges, considering resources and capacities, as well as connecting with other reconciliatory programmes. In dealing with these issues, views of the victims, civil society, government entities and other stakeholders must be included, ensuring that the scope is not too narrow that it would discourage victims and not be too broad that it would render the programme unworkable. Rebalancing power is critical here, empowering victims and survivors to take ownership of

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the process. It is important to balance what is fair and just and victim's expectations on reparations and its impact. Moreover, attention must also be on mitigating any tensions and problems that may arise in terms of equity connected to providing reparations.

The *Basic Principles* mentioned above provide five forms of reparations: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition. The process to be followed when providing reparations can be important to victims, sending a message to the victims and the larger public of the past, and acknowledging the suffering therein. A process that involves victims, consults them and provides them a space to participate in decision-making can also indicate the value of their voices, recognising them as citizens. Hamber suggests that this fosters “*social belonging...[and] helps counter...the consequences of 'extreme' political trauma*”.<sup>8</sup> It is also essential to ensure the process is transparent and impartial, that it goes beyond mere symbolism and wins the confidence of victims and the public at large of its legitimacy.

### **Elements Requiring Attention when Designing a Comprehensive Reparations Programme**

Reparations can be either judicial or administrative.<sup>9</sup> Judicial reparations, which are more individual than collective in scope, are based on the principle of *restitutio in integrum*, which seeks to revert an affected individual to the position they

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<sup>8</sup> Brandon Hamber, ‘The dilemmas of reparations: In search of a process-driven approach’ in K. De Feyter, S. Parmnetier, M. Bossuyt and P. Lemmens (eds.), *Out of the Ashes: Reparation for Victims of Gross and Systematic Human Rights Violations* (Intersentia 2005), at 141.

<sup>9</sup> See Pablo De Greiff, *The Handbook of Reparation* (ed), (Oxford University Press 2006)

would have been in, absent the violation. Reparations designed at an administrative level can be both individual and collective, reaching out to a larger number of people, recognising and remedying a wrong experienced by them, regardless of their background, context, identity or other reason.

Individual reparations treat the harms endured by each individual person as a separate case, and afford recognition to the individual's experiences, providing remedies specific to their circumstances. In this, they contrast with collective reparations. When collective reparations have failed and greater attention is required to ensure the specific abuse is recognised, individual reparations may play a crucial role in building confidence in victims of being treated as equal citizens. Individual reparations may take the form of compensation, rehabilitation and restitution. The return of land and property, physical and mental rehabilitation, as well as financial compensation are all forms of individual reparations. Symbolic individual reparations may include reburials, apologies to individuals or publicising the status of a specific case and its facts.

The scale of violations seen in contexts of massive abuse make individual reparations difficult as they depend on the specific needs of the individual. Collective reparations on the other hand are designed for a larger number of people, bypassing some of the administrative requirements involved in individual reparations and including both material and symbolic measures. It is more a measure to recognise the abuses of the past and provide a platform for solidarity and social cohesion. Generally speaking, collective reparations are instances of reconstructing community buildings, hospitals, roads or schools destroyed due to a war or natural disaster, aimed at a larger group. Collective reparations can also be based on

specific common links such as on ethnic or religious lines like, for instance, the restitution of a place of worship or communal property. It can also include assurances and actions by the state to bring about language parity. At a symbolic level, collective reparations can include a public apology, a day of remembrance, memorials or a public acknowledgement of specific abuses. The Declaration of Peace read out on 4<sup>th</sup> February 2015 at the Independence Parade in Sri Lanka is one such symbolic collective reparation.<sup>10</sup> While these are welcome steps, symbolic steps must be followed by material reparations as well as other aspects of transitional justice including justice, truth and non-recurrence.

In contexts where massive violations have occurred, there may be a preference for collective reparations due to the scale of abuses, limited resources and challenges with administrative delays. Collective reparations also involve a broader impact on society, as opposed to seemingly benefiting only victims. While there are positive aspects to collective reparations, there are also concerns whether the state will opt for this over individual reparations if it is considered 'easier' than individual reparations. Both individual and collective reparations have their pros and cons and must be examined

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<sup>10</sup> 'Sri Lanka marks Independence Day with a special Declaration of Peace', The Official Government News Portal of Sri Lanka 2016, <http://www.news.lk/news/politics/item/6046-sri-lanka-marks-independence-day-with-a-special-declaration-of-peace>, last accessed June 2016; Kasun Warakapitiya, 'Let us correct failures and move ahead', Sunday Times, 8 February 2015, <http://www.sundaytimes.lk/150208/news/let-us-correct-failures-and-move-ahead-134935.html> last accessed June 2016; 'President reiterates promise to empower Parliament', Ada Derana, <http://www.adaderana.lk/news/29671/president-reiterates-promise-to-empower-parliament-> 4 February 2015, last accessed June 2016.

depending on the needs, resources available and context. In Sri Lanka, a combination of individual, collective, material and symbolic reparations is required. This combination needs to be the product of careful planning and consultations, ensuring that the process is inclusive and transparent. The design process must also consider who is to provide reparations, the role of the proposed Office of Reparations and whether the subject is to be devolved, and it must ensure there is attention given to issues such as equity.

The criteria for deciding who is most in need of an individual reparations package gives rise to many issues. Kimberly Theidon refers to the ‘contentious politics of victimhood’<sup>11</sup>, arising more often than not in contexts where it is unclear how reparations packages will be designed, what criteria will be chosen for reparations and how much resources will be allocated. There must also be consideration of how to measure past abuses and how it corresponds with what is appropriate in terms of reparations. Should it be the ‘worst affected’ or based on the lines of dignity, the latter ensuring a broader group of affected communities will be eligible. This though will need to be carefully considered, examining victimhood within the scope of human rights and international humanitarian law. While a framework is essential, the design of a reparations programme must also ensure it reaches the vulnerable and marginalised communities.

Another question to contemplate is whether perpetrators should be considered. Violence can be complex, with instances where it is difficult to have a linear distinction as to who is a victim and who a perpetrator. Luke Moffet discusses

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<sup>11</sup> Kimberly Theidon, *Intimate Enemies: Violence & Reconciliation in Peru*, (University of Pennsylvania Press 2012); Kimberly Theidon, ‘Justice in Transition: The Micropolitics of Reconciliation in Postwar Peru’, (2006) *Journal of Conflict Resolution* 50, No 3



the messy realities and the complex identities of victimised-perpetrators, such as child soldiers.<sup>12</sup> The complexity of victimhood must be carefully considered.<sup>13</sup> Society at large will invariably come to its own conclusion as to who is a victim and perpetrator, based on political, ethnic, ideological and other reasons, resulting in a hierarchy of victims. Transitional justice processes provide an opportunity to examine these critical issues and identify ways forward.

There is also a gender dimension that requires consideration, e.g., instances where female-heads of households are not able to participate in a reparations programme due to administrative gaps in the concept of “Heads of Household”, or when male relatives take control of the compensation that is due to women.<sup>14</sup> The design and implementation of reparations provides an opportunity to bring in gendered perspectives to ensure such initiatives do not reproduce gender inequalities and unjust practices. Such administrative issues must be attended to, informing and training staff as well as introducing mechanisms such as pension schemes and providing a long-term support system and security to the victim.

The design of a reparations programme is critical. The design stage should be inclusive and involve the participation of relevant government actors, at the national and provincial levels, victim groups, civil society, healthcare professionals and

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<sup>12</sup> Luke Moffett, ‘A Pension for Injured Victims of the Troubles: Reparations or Reifying Victim Hierarchy’, (2015) *Northern Ireland Legal Quarterly* 66(4) 297–319

<sup>13</sup> See Kieran McEvoy and Kristen McConnachie, ‘Victimology in transitional justice: Victimhood, innocence and hierarchy’, (2012) *European Journal of Criminology*, 9(5)

<sup>14</sup> Interviews with civil society groups in the North and East of Sri Lanka, January & February 2016

others. Administrative challenges can also arise in compiling victim registries.<sup>15</sup> An integrated reparations programme which includes a combination of areas including documentation, education, finance, gender, health, housing, irrigation and land, to name a few, will include a host of government entities and require coordination and planning. There must also be publically available information in the design programme, ensuring that victims and affected communities are aware of progress and are able to engage with them. Such involvement, if done sincerely and not as a mere token, will further the trust in the state. There may also be instances where the receiving of reparations is the first time victims come to interact with the state. Thus, it is critical to have the appropriate level of engagement to ensure that the design and implementation is in a manner that is inclusive and provides ownership to victims and civil society. A positive interaction can facilitate a successful reparations programme as well as bring about long-term reconciliation and social cohesion. It can also impact other initiatives such as truth-telling, justice and reform projects.

Finances must also be factored in when designing and implementing a reparations programme. While a programme should aim to be comprehensive and address the complexities, practical issues must also be considered. Would a special trust<sup>16</sup> be created or a dedicated line in the national budget suffice? The latter will demonstrate a national commitment but it will need to be weighed up in the existing political

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<sup>15</sup> The lack of insufficient documentation and information are issues that prevent people from coming forward. Furthermore, the need for verification of documents and facts is time consuming, leading to time lags and delays in providing for reparations.

<sup>16</sup> The ICC has its own trust fund for victims which maybe an option to consider- Article 79 of the Rome Statute of the International Criminal Court

terrain. In countries such as the Philippines reparations were supported by the recovery of illegal assets of the former Marcos regime<sup>17</sup>, though this issue will need to be carefully thought through within the Sri Lankan context, and the feasibility of whether assets of previous regimes/armed groups can be traced.

Reparations are an essential element in transitional justice and should be seen as supporting and complementing the other pillars of transitional justice, all of which are interlinked to the extent that one without the other can lead to additional problems. For example, without knowing the truth of what happened, reparations for victims will be an empty exercise. Reparations could also be seen as ‘blood money’, an attempt to buy their silence, if it is not accompanied by genuine efforts to address the other pillars of transitional justice. Reparations must also support justice efforts; there may be larger concerns as to whether the lack of accountability measures will lead to greater impunity and the perception of not holding perpetrators accountable. At the same time, accountability efforts should not be seen as only prosecuting perpetrators but also as addressing the grievances of victims. Pablo de Greiff captures the need for a holistic approach: “[in] order for something to count as reparation, as a justice measure, it has to be accompanied by an acknowledgment of responsibility and it has to be linked, precisely, with truth, justice, and guarantees of non-recurrence. Second, and as a consequence, recognising the distinctive contribution that reparations can make to victims does not justify, either legally or morally, asking them –or anyone else—to trade off amongst the different justice initiatives”.<sup>18</sup>

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<sup>17</sup> Rule of Law Tools for Post Conflict States: Reparations Programmes, OHCHR (2008)

<sup>18</sup> Report on Reparations by the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Pablo de Greiff, A/69/518, 8 October 2014.

Similarly, the link between reparations and reform must be understood. Reparations introduced without reform, ignoring fundamental structural failures that resulted in violence in the first place, will lead to recurrence and continue a culture of impunity. On the other hand, democratic reform without reparations can ignore the harm suffered by citizens and ignore the experiences of victims, rendering the reforms hollow if they do not recognise the impact the past has had on the people. Therefore, as noted by Pablo de Greiff, there must be both “external and internal coherence” in reparations programmes: external coherence ensuring close relationship with other transitional justice processes and internal coherence to ensure that different benefits are distributed to distinct categories, both individual and collective.<sup>19</sup>

## **Reparations & Their Relevance to Sri Lanka**

In Sri Lanka, several attempts have been made in the past to provide for compensation and restitution.<sup>20</sup> These attempts included programmes and structures that were established, though many were ad-hoc with no comprehensive policy to

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<sup>19</sup> Rule of Law Tools for Post Conflict States: Reparations Programmes, OHCHR (2008); See Pablo de Greiff, ‘Addressing the Past: Reparations for Gross Human Rights Abuses’, in Agnes Hurwits & Reyko Huang (eds) *Civil War and the Rule of Law: Secularity, Development, Human Rights* (Boulder, Lynne Rienner Publishers 2007)

<sup>20</sup> These include initiatives introduced during the war, riots, tsunami and post war period. See Bhavani Fonseka & Mirak Raheem, *Land in the Northern Province: Post War Politics, Policy and Practices*, CPA 2011; Bhavani Fonseka & Mirak Raheem, *Land in the Eastern Province: Politics, Policy & Conflict*, CPA 2010; Memorandum on Land Issues Arising from the Ethnic Conflict and the Tsunami Disaster, CPA 2005; *Land and Property Rights of Internally Displaced Persons*, CPA 2003.

meet basic international standards. Past commissions of inquiry (COIs) including the All Island Commission of Inquiry into Involuntary Removal and Disappearance of Certain Persons of 1998 (Disappearances COI)<sup>21</sup> and the more recent Lessons Learnt Reconciliation Commission (LLRC)<sup>22</sup> recognised the need for reparations and made some useful recommendations including legal and policy reform and assistance to victims. There have also been government circulars<sup>23</sup>, programmes to award compensation<sup>24</sup> and the issuance of death certificates, as well as the work of the Rehabilitation of Persons, Properties and Industries Authority (REPIIA).<sup>25</sup>

With the promise of reforms for transitional justice, there is a need for a comprehensive reparations policy and package in Sri Lanka, including both symbolic and material reparations, and both in individual and collective terms. There should also be consideration whether interim reparations should be introduced, recognising that the proposed Office for

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<sup>21</sup> Appointed by Warrant No: SP/6/N/214/97, 30 April 1998

<sup>22</sup> More information on the LLRC including report, submissions can be accessed at [www.llrcarchive.org/about](http://www.llrcarchive.org/about), last accessed on 25 January 2016

<sup>23</sup> Namini Wijedasa 'LARCs to decide on land acquisition compensation', Sunday Times, <http://www.sundaytimes.lk/131201/news/larcs-to-decide-on-land-acquisition-compensation-75131.html>, last accessed in June 2016

<sup>24</sup> National Plan of Action for the Implementation of LLRC Recommendations – Responsibilities by Agency (January, 2015) Ministry of Lands [http://www.landmin.gov.lk/web/upload/llrc\\_report/47/LLRC%20Progress%20-%20November.pdf](http://www.landmin.gov.lk/web/upload/llrc_report/47/LLRC%20Progress%20-%20November.pdf)

<sup>25</sup> The Rehabilitation of Persons, Properties and Industries Authority Act No. 29 of 1987

Reparations may take time to be established, despite the fact that some remedies cannot be delayed any further.<sup>26</sup>

In designing a reparations programme, the scope of a reparations programme is critical. A narrow scope can lead to frustration among victims and others that sections of society are being ignored and marginalised. A broad scope may lead to practical issues of implementation. The criteria for reparations are vital, and should take note of the practical issues faced by victims and ensure steps are taken to be inclusive, bearing in mind that a stringent set of criteria for eligibility in a reparations programme may lead to further marginalisation. It is imperative here to consider a registry of victims: a comprehensive database that verifies victims' claims and is available as a resource to decide on reparations. In Colombia, the registry includes millions of applicants, demonstrating the significant numbers affected by the violence.<sup>27</sup> Consideration will also be needed for the provision of payments, whether it is a one-off payment or something on the lines of a pension scheme. The budget, staffing and structures of a reparations programme are also critical areas. A bureaucratic programme or a tight budget will impose limitations on the potential reach of the program, leaving many victims unable to obtain reparations. In terms of the Sri Lankan context, attention will also need to be on who is to provide reparations and the role and linkages between the central and provincial governments.

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<sup>26</sup> Interim reparations can include numerous areas including certificates of absence, assistance to clear one's land that was previously under occupation etc.

<sup>27</sup> Truth, Justice and Reparation: Fourth Report on Human Rights Situation in Colombia, Inter American Commission on Human Rights, 31<sup>st</sup> December 2013

The details of the reparations programme will be dependent on the government's will to follow through with its commitments. A government that is genuine in its commitments to non-recurrence and reform will take steps towards a comprehensive reparations programme. The Sirisena government has committed itself to establishing a mechanism, but there are no indications of the parameters of the mechanism being conceived.

The rest of the chapter examines three areas within the Sri Lankan context – Disappearances, Displacement & Sexual Violence – that require attention when discussing reparations. These areas should not be considered exhaustive but only as areas for consideration, to be part of the analysis of deciding what areas should be included in a future reparations programme.

### **Disappearances & Reparations**

Sri Lanka has had several Commissions of Inquiry (COIs) to investigate and inquire into disappearances.<sup>28</sup> The thousands that come before the numerous state initiatives are indicative of a significant number of victims that are waiting for answers of what happened to their missing loved ones. The Office of Missing Persons (OMP)<sup>29</sup> will be the first permanent entity

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<sup>28</sup> The Presidential Commission to Investigate into Complaints Regarding Missing Persons headed by Maxwell Paranagama (Maxwell COI) just concluded its mandate, with over 25,000 complaints received from across Sri Lanka.

<sup>29</sup> 'Cabinet approval to establish Office of Missing Persons', Daily News, <http://www.dailynews.lk/?q=2016/05/26/political/82851>, last accessed June 2016; 'SL to establish truth & reconciliation commission, missing persons office', Daily FT, <http://www.ft.lk/article/470361/SL-to-establish-truth---reconciliation-commission--missing-persons-office#sthash.XEgcGbx6.dpuf> last accessed June 2016

with the sole focus being on missing persons.<sup>30</sup> In a welcome move, the government in December 2015 announced it would ratify the International Convention for the Protection of All Persons from Enforced Disappearance and introduce enabling legislation, formally recognising the need to take action in this area.<sup>31</sup> The government has most recently agreed to issue Certificates of Absence, a process that can be used to provide interim reparations.<sup>32</sup>

Past COIs on disappearances and related issues made several useful recommendations including payment of compensation and rehabilitation.<sup>33</sup> It is worthwhile revisiting the findings and recommendations of the Disappearances COI and other such entities that continue to have relevance today. In the area of compensation, a recommendation was made for the compensation to be paid in identified monetary amounts to the next of kin, depending on their relationship to the victim.<sup>34</sup>

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<sup>30</sup> For more information, visit [www.cpalanka.org](http://www.cpalanka.org) and [www.tjsrilanka.org](http://www.tjsrilanka.org) for more information

<sup>31</sup> *Keep the Promise: Monitoring the Government of Sri Lanka's Commitments in Achieving Justice and Reconciliation*, Sri Lanka Campaign for Peace and Justice, <https://www.srilankacampaign.org/take-action/keep-the-promise/>, last accessed June 2016

<sup>32</sup> 'Sri Lanka to issue certificates of absence for missing persons', Lanka Business Online, <http://www.lankabusinessonline.com/sri-lankas-to-issue-certificates-of-absence-for-missing-persons/>, last accessed June 2016

<sup>33</sup> See- *Recurring Nightmare State Responsibility for Disappearances and Abductions in Sri Lanka*, HRW 2008; M.C.M Iqbal, 'Enforced Disappearances in Sri Lanka: Legacy and ongoing challenges', May 2016, <http://sangam.org/enforced-disappearances-sri-lanka/> last accessed June 2016; Bhavani Fonseka, *The Need for a Comprehensive Reparations Policy and Package*, CPA, April 2015;

<sup>34</sup> Final Report of the Presidential Commission on Disappearance, Sessional Paper No.1-2001 Vol-1. A recommendation was made to pay an amount of Rs.25,000 to those who were involuntarily



There have also been recommendations to assist families of victims including scholarships to children of disappeared persons and the provision of vocational training.<sup>35</sup>

Internationally, there has been considerable work done over the years to provide a legal status for the disappeared and provide reparations.<sup>36</sup> The legal status of the disappeared was first seen in Argentina when legislation was enacted in 1994 to create a new legal status titled “absent by enforced disappearance”.<sup>37</sup> In 2004, the Law on Missing Persons was enacted in Bosnia, enabling family members to avail themselves of temporary measures including the use of property.<sup>38</sup> Peru also created the legal status “absence by reason of forced disappearance”.<sup>39</sup> Chile has also enacted legislation in 2009 in the area of disappearances including assisting families of the disappeared with inheritance and divorce.<sup>40</sup> In several of the Latin American countries such as Argentina, Brazil, Chile, Guatemala and Peru, reparations were provided for families of the disappeared.<sup>41</sup> In Sri Lanka, the present government has agreed to criminalise disappearances, and recently enacted legislation to introduce

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removed, tortured and were released or managed to escape. There was also a finding that compensation should be paid without distinction of whether the victim was a public servant or a member of public.

<sup>35</sup> Ibid

<sup>36</sup> For more information, refer to ICJ, *Enforced Disappearance and Extrajudicial Execution: The Right of Family Members*, 2016

<sup>37</sup> Law of Absence by Forced Disappearance, Art. 1

<sup>38</sup> Law No. 109/04 of Bosnia and Herzegovina on the Law on Missing Persons, Art. 18

<sup>39</sup> Law No. 28.413 of Peru, Art. 2

<sup>40</sup> Law No. 20377 of Chile on the Disappearance of People

<sup>41</sup> Pablo De Greiff, *The Handbook of Reparations* (ed) (Oxford University Press 2006)

Certificates of Absence and establish the OMP, although implementation has been delayed. It is to be seen how the government proceeds in this regard. The OMP, is proposed as addressing the victim's right to know. In terms of reparations linked to disappearances, it seems the Office for Reparations will oversee this area though things were still not clear at the time of writing this chapter. Questions also arise on whether the OMP and the Office for Reparations will have any links. Delays in introducing an Office for Reparations should not be a reason to stall reparations. While the establishment of OMP and a future TRC receives attention, there must also be consideration on interim reparations and the sequencing of truth, justice and reparations initiatives. These should take note of some important recommendations made by previous entities, including recognising different categories of victims, compensation, assistance and issuing of administrative documentation.

### **Displacement & Land**

Sri Lanka has experienced waves of displacement of communities across Sri Lanka, due to the war, natural disasters, development and other man made crises, such as riots and pogroms. Linked to displacement is the devastation, destruction and losing of one's land, homes and livelihoods and the absence of a comprehensive system or programme to provide compensation, restitution and rehabilitation. Regardless of the politics around transitional justice and its recognition, there has been a surge in humanitarian responses during particular moments in Sri Lanka's history. With these moments (the ceasefire period, post-tsunami and post-war), there has been some ad-hoc attention paid to reparations from a humanitarian focus. As suggested by Roger Duthie, one contribution of transitional justice thinking in relation to displacement might be to strengthen a rights-based

framework, rather than one simply based on humanitarian concerns.<sup>42</sup> This has been lacking in Sri Lanka, with the humanitarian imperative taking precedence over a rights-based response in most instances.<sup>43</sup>

Land issues require considerable attention, from governance related issues to rights and claims over land. In the post war period, it is also crucial to explore options of resolving land and property disputes and rethink ownership and control of land and property. In this regard, it is critical to examine other comparative contexts to understand what has already been tried when designing and implementing something feasible for Sri Lanka. The Dayton Peace Agreement looked into land and property issues with the establishment of the Bosnia-Herzegovina's Commission on Real Property Claims.<sup>44</sup> The Dayton Peace Agreement provided for transfers of property made under threat or duress or otherwise connected to ethnic cleansing to be undone, and provided for restitution of such property after the commission received proof of lawful ownership. In South Africa, The Restitution of Land Rights Act 22 of 1994 was passed, taking note of a key demand of the

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<sup>42</sup> Roger Duthie, 'Transitional Justice and Displacement', (2011) *International Journal of Transitional Justice* 5, No 2; Roger Duthie, 'Contributing to Durable Solutions: Transitional Justice and the Integration and Reintegration of Displaced Persons', *Brookings-LSE Project on Internal Displacement & The International Centre for Transitional Justice* (2013)

<sup>43</sup> Most evident was during the last stage of the war when numerous challenges prevented donors and aid agencies taking a principled stand in terms of humanitarian assistance. See Sarah Collinson & Samir Elhawary, 'Humanitarian space: a review of trends and issues', ODI 2012.

<sup>44</sup> Catherine Phuong, 'At the heart of the return process: solving property issues in Bosnia and Herzegovina', (2000) *Forced Migration Review* 7

African National Congress (ANC) related to property rights.<sup>45</sup> The Commission on Restitution of Land Rights (CRLR) was established to investigate and settle claims. The Land Claims Court was appointed to grant restitution orders and adjudicate disputes. Colombia is a more recent case study where millions of internally displaced people were registered in a victim registry.<sup>46</sup> The Justice and Peace Law (Law 975 of 2005) was introduced to demobilise paramilitary groups and provide for them to return property which was forcibly taken. Law 975 also created a National Commission on Reparations and Reconciliation, which developed an administrative reparations scheme. The administrative scheme was enacted into law as part of the Victims' Law (Law 1448 of 2011). This law covers a range of areas including reparations and land restitution. The law creates a Registry of Dispossessed or Forcibly Abandoned Land, and of those who claim to have been dispossessed. Once both the claimant and the land are registered, an administrative process follows.

In Sri Lanka, some work has been done in terms of land documentation and dispute resolution, attempting to resolve issues related to the war and natural disasters.<sup>47</sup> These

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<sup>45</sup> The law limited claims to persons or communities who were dispossessed after the 1913 Land Act, “as a result of racially discriminatory laws or practices,” and who were not adequately compensated, nor their descendants.

<sup>46</sup> See Nicole Summers, ‘Colombia’s Victims’ Law: Transitional Justice in a Time of Violent Conflict?’, (2012) 25 *Harvard Human Rights Journal*, 219; Knut Andreas O. Lid, *Land Restitution in Transitional Justice: Challenges and Experiences - The case of Colombia*, Norwegian Centre for Human Rights (2009)

<sup>47</sup> See- ‘*Land Occupation in the Northern Province: A Commentary on Ground Realities and Recommendations on Reform*’, CPA (2016); *Land, Housing and Property: Proposals to the Parties for Comprehensively Addressing Land, Housing and Property Rights in the Context of Refugee and IDP Return within and to Sri*

initiatives have been ad-hoc and in some instances come about out of mere political necessity. A comprehensive land-mapping exercise, documenting ownership and control of state and private lands and compiling a list of potential owners or those in control, are clear requirements yet to be comprehensively pursued by the state. A thorough assessment of land occupied by the military, police and others will need to be done to compile a list of lands and affected individuals and entities.<sup>48</sup> Land that can be returned to the legal owner and areas where alternative lands will have to be substituted need to be identified. Moreover, there must be political will to fully implement constitutional obligations including the Thirteenth Amendment, which devolves land powers to Provincial Councils and requires the establishment of a National Land Commission.<sup>49</sup> It is also pertinent to examine state policies and programmes that provide for compensation and are effective such as the National Involuntary Resettlement Policy<sup>50</sup>. While recognising the work already done in this area, there must be steps taken to verify and establish legal ownership and to design a reparations programme that addresses grievances and disputes.

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*Lanka*, UNHCR and Human Rights Commission of Sri Lanka (2003); S. Sriskandarajah, R.C. Karunakaran, R.C. and M.A Sumanthiran, *Legal Analysis of Property Issues Affecting Internally Displaced Persons and Refugees in Sri Lanka*, UNHCR (2003).

<sup>48</sup> CPA land report issued in March 2016 attempted to map occupation patterns in the Northern Province but noted the many challenges in collecting information from the areas including the lack of data in some areas and the reluctance of government officials to share information. Such an assessment should ideally be lead by the government, working closely with the UN, I/NGOs and civil society. See- '*Land Occupation in the Northern Province: A Commentary on Ground Realities and Recommendations on Reform*', CPA (2016)

<sup>49</sup> Thirteenth Amendment to the Constitution

<sup>50</sup> National Involuntary Resettlement Policy (NIRP) 2001

## **Sexual Violence and Reparations**

Several reports in recent times have documented on-going sexual violence in Sri Lanka, raising concerns of urgent action required to address this issue.<sup>51</sup> Due to the fear of reporting and stigma involved, many cases are unknown and therefore it is difficult to identify patterns and reparations.<sup>52</sup> Taking note of the urgency of medical and psychosocial care, and the stigma involved, consideration needs to be both on interim and long term reparations as well as individual and collective. This will also entail both material and symbolic reparations. Lessons from other contexts that introduced reparations for sexual violence such as Sierra Leone and Uganda should be examined to identify initiatives including the introduction of interim reparations.<sup>53</sup>

Reparations for sexual violence should include compensation, rehabilitation and should prevent non-recurrence, as well as be accompanied by other transitional justice initiatives including truth and justice. Otherwise victims and their communities are likely to interpret compensation as payment for sexual services or buying the silence of victims. Confidentiality and sensitivity in the distribution of compensation and restitution are essential. Assessing economic damage for sexual violence is difficult but some

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<sup>51</sup> UN Human Rights Council, Report of the Office of the United Nations High Commissioner for Human Rights on Promoting Reconciliation, Accountability and Human Rights in Sri Lanka, 16 September 2015, A/HRC/30/61; International Truth and Justice Project Sri Lanka, “A Still Unfinished War: Sri Lanka’s Survivors of Torture And Sexual Violence 2009-2015” (July 2015)

<sup>52</sup> Ibid

<sup>53</sup> See- “*Transitional Justice in Sri Lanka and Ways Forward*,” CPA July 2015; <http://www.cpalanka.org/wp-content/uploads/2015/07/Transitional-Justice-in-Sri-Lanka-and-Ways-Forward.pdf>

guidance can be taken, including on the gender of the victim and on the unique impact on victims within the culture. The stigma and marginalisation within the community resulting from being identified as sexually abused affect the victim's earning and marriage potential. Women victims in particular, who are given lump sum payments are likely to be pressured to give up the payments to relatives or to pay off family debts. Monthly payments may be a preferred model, depending on the context and specific case.

Victims living in militarised areas in the North and East of the country continue to face sexual harassment by the military and live in fear of further detainment and abuse.<sup>54</sup> Thus, it is critical to examine this issue in the broader context of reconciliation, ensuring there is return of lands, livelihood support and security sector reform. Rehabilitation is essential including access to physical and mental health services, education and job training, and housing. Male and female victims of sexual violence who may not report the violence perpetrated on them have no way of receiving much needed rehabilitation assistance. Providing psychosocial support, treatment for alcoholism, and other rehabilitative services are important to counter individual and community-wide effects. Rehabilitation should be available and tailored for both men and women, with attention also on psychological and counselling services.

A policy to prevent future sexual violence and ensure continuing accountability must be implemented. The Sri Lankan government has repeatedly stated that it has a “well established, zero tolerance policy” on sexual violence and

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<sup>54</sup> Nimmi Gowrinathan and Kate Cronin-Furman, ‘The Forever Victims? Tamil Women in Post-War Sri Lanka’ [http://sangam.org/wp-content/uploads/2015/09/8-28-15-nimmi\\_whitepaper\\_NE.pdf](http://sangam.org/wp-content/uploads/2015/09/8-28-15-nimmi_whitepaper_NE.pdf), City College of New York, August 2015

“continues to take strong action against reported cases”.<sup>55</sup> It should adhere to these statements through education and accountability for military, police personal and others. Furthermore, timing and sequencing of reparations are critical. While there may be a time lag due to delays in the establishment of the Office for Reparations, this should not be a reason to delay in interim reparations. The existing entities such as relevant ministries, REPPIA and the Office of National Unity and Reconciliation should work together to design interim reparations and when established, work with future initiatives such as a TRC and Office for Reparations, ensuring there is a well-designed reparations programme that is devised to take note of the grievances and sensitivities faced by victims. Linked to this is the need to address non-recurrence with consideration given towards a range of reforms including security sector reform.

## **Conclusion**

Sri Lanka is presently in a unique position to design several mechanisms to meet its commitments towards transitional justice. This chapter highlights why reparations should be given attention in the present moment and their importance within Sri Lanka’s reform agenda. Reparations are an essential element in transforming a country where citizens are treated as equals. They provide recognition of past abuses, solidarity with victims and they encourage equal citizenship, critical areas in efforts at rebuilding and reform in any transition.

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<sup>55</sup> Information by the Government of Sri Lanka to questions raised by the Human Rights Committee, Consideration of Sri Lanka’s 5<sup>th</sup> Periodic Report under the International Covenant on Civil and Political Rights, 7-8 October 2014



It is imperative that reparations receive their due attention, ensuring that the government and other stakeholders examine the necessary framework for a comprehensive reparations policy and package. Attention should also be on practical issues, including the possibility of interim reparations and long term schemes. The design phase of reparations is crucial as it entails the scope of reparations and its impact. It will also be important to think through possible trade offs that may need to be made when deciding on specific models. Ultimately the success or failure of a reparations programme is dependent on the political will and resources of the government to see through with its promises. 2017 and beyond hold much promise for the present government to get it right and recognise the importance of key areas including reparations and their impact on reform and reconciliation.

**11**

**Transitional Justice & the Right to  
Know: Investigating Sri Lanka's Mass  
Graves**

*80*

*Mytili Bala*

*“Matale and Mullivaikkal are inextricably linked, just as Black July and Pepiliyana are linked. They are all characterised by the unwillingness and inability of the state’s institutions to protect its own citizens.... To expect mothers and wives to forget their sons and husbands who never came home is to perpetuate the cruel apathy that enabled those atrocities in the first place.”*

*-- Member of Parliament, M.A. Sumanthiran (15 April 2013)<sup>1</sup>*

## **Introduction**

Sri Lanka’s 26-year internal armed conflict pitted Liberation Tigers of Tamil Eelam (LTTE) fighters against Sri Lankan security forces, but disappearances cut across ethnic divides. Two failed Marxist insurrections in the south and decades of armed conflict against the LTTE in the north and east have adversely affected Sinhalese, Tamil, and Muslim communities alike. In 2013, the U.N. Working Group on Disappearances reported that Sri Lanka had the second highest number of unsolved disappearance cases in the world, second only to post-war Iraq.<sup>2</sup> The Presidential Commission of Inquiry on Missing Persons, appointed by President Mahinda Rajapaksa in 2013, received over 24,000 complaints from the north and east alone, a figure that speaks more to the magnitude of the disappearances problem than the credibility of the local mechanism.<sup>3</sup>

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<sup>1</sup> M.A. Sumanthiran, ‘Skeletons in the Closet’, Colombo Telegraph, 15 April 2013, available at <https://www.colombotelegraph.com/index.php/skeletons-in-the-closet/>, last visited 12 November 2015

<sup>2</sup> Report of the Working Group on Enforced or Involuntary Disappearances, U.N. Human Rights Council Doc. No. A/HRC/22/45, 28 January 2013, pp. 17-18.

<sup>3</sup> Website of the Presidential Commission of Inquiry on Missing Persons, <http://www.pcicmp.lk/>

Numbers like these are hard to comprehend. People do not simply “disappear”; the crime of enforced disappearance “is a well-planned practice designed to provoke anguish in the population and relatives of the missing person, as well as a sense of a relentless and unstoppable process”.<sup>4</sup> Each disappearance leaves a wife, husband, parent or child to navigate the present without knowing if their loved ones are dead or alive. Disappearances deny the right of communities to bury or cremate their dead in keeping with their religious traditions and customs.

The previous administration of President Mahinda Rajapaksa denounced international calls for truth, justice, and redress. In a marked departure from the past, the coalition government of President Maithripala Sirisena and Prime Minister Ranil Wickramasinghe co-sponsored the 2015 U.N. Human Rights Council (UNHRC) resolution on Sri Lanka and committed to implementing a broad transitional justice framework.<sup>5</sup> Among other things, the government promised to create a new mechanism to trace missing persons and provide families of the disappeared with truth, justice, and reparations.<sup>6</sup> The government made progress in this regard in August 2016 and legislation to establish an Office of Missing Persons (OMP) was passed in Parliament.<sup>7</sup>

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<sup>4</sup> José Pablo Baraybar, ‘When DNA is Not Available, Can We Still Identify People? Recommendations for Best Practice’, *Journal of Forensic Science* 53:3, pp. 533-540 (2008).

<sup>5</sup> U.N. Doc. A/HRC/30/L.29, 29 September 2015.

<sup>6</sup> *Statement by Mangala Samaraweera, at the 30th Session of the UNHRC, Geneva*, 14 September 2015, available at <http://www.news.lk/fetures/item/9742-statement-by-mangala-samaraweera-at-the-30th-session-of-the-unhrc-geneva>, last visited 6 December 2015.

<sup>7</sup> Gazette of the Democratic Socialist Republic of Sri Lanka, Office of Missing Persons (Establishment, Administration and Discharge of

The proper investigation of Sri Lanka's mass graves is an essential part of any effort to trace the missing. Since 2012, three mass graves have been discovered in different parts of Sri Lanka. These mass graves relate to distinct episodes of violence since the late 1980s and cut across ethnic divides. However, similar to past failed attempts to investigate mass graves in Sri Lanka, investigations currently underway raise serious concerns and call for a new approach.

Sri Lanka should integrate a forensics approach in its efforts to trace the missing, including a dedicated team with adequate expertise to investigate mass graves. In his September 2015 report to the UNHRC, U.N. High Commissioner for Human Rights Zeid Ra'ad al Hussein emphasised Sri Lanka's need for "international technical assistance in the forensic field, particularly forensic anthropology and archaeology" to ensure proper preservation and investigation of the mass graves and to help families trace the missing.<sup>8</sup> In November 2015, the U.N. Working Group on Enforced or Involuntary Disappearances likewise recommended a "professionally skilled special unit" to identify new graves and adequate resources for judges overseeing the investigations to retain experts for "DNA testing, forensic anthropology and archaeology."<sup>9</sup>

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Functions): A Bill, 27 May 2016, [http://documents.gov.lk/files/bill/2016/5/65-2016\\_E.pdf](http://documents.gov.lk/files/bill/2016/5/65-2016_E.pdf), last visited 8 June 2016.

<sup>8</sup> Report of the Office of the United Nations High Commissioner for Human Rights on Promoting Reconciliation, Accountability and Human Rights in Sri Lanka, at pp 72-73, U.N. Doc. No. A/HRC/30/61, 16 September 2015.

<sup>9</sup> Preliminary observations of the Working Group on Enforced or Involuntary Disappearances at the conclusion of its visit to Sri Lanka, 9-18 November 2015, available at

There is much at stake. A credible investigation of all mass graves grounded in the universal right of families of the disappeared to know the truth could start to break down ethnocentric narratives and challenge divisive labels like “war hero” and “terrorist.” Such an investigation could also build technical capacity of forensic scientists within Sri Lanka, allow families to perform religious rites or find closure, and place families of the disappeared and civil society at the center of a ground-up process of memory and healing.

This chapter proceeds in four parts. Part I recalls two mishandled high-profile mass grave investigations in the 1990s to provide context and underscore the urgency of credibly investigating the recently discovered mass graves. Part II describes the discovery of three mass graves in Sri Lanka since 2012, each pertaining to a different episode of violence in Sri Lankan history. The Matale mass grave in central Sri Lanka dates to the late 1980s, when Sri Lankan security forces suppressed a second coup attempt by the JVP. The Mannar mass grave in northern Sri Lanka has not been dated but likely relates to the three-decade ethnic conflict between the Sri Lankan Armed Forces and the LTTE. The Kalavanchikudy mass grave in eastern Sri Lanka has not been exhumed or dated but is believed to contain Muslim victims of LTTE violence in the east.

Part III evaluates past and present mass grave investigations to identify current obstacles to truth. Part IV draws lessons from previous mass grave investigations in Latin America and the Balkans. This chapter concludes by recommending that Sri

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<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16771&LangID=E#sthash.mVg4dEyy.dpuf>, last visited 6 December 2015.

Lanka's OMP include a dedicated forensics component, to integrate the investigation of mass graves into a comprehensive, credible mechanism to trace Sri Lanka's missing.

## **I. Mass Graves in Sri Lanka: Past Failures**

Mass graves are not new to Sri Lanka. A 2014 publication by the Asian Human Rights Commission mapped 28 mass graves across the island, noting that many remain undiscovered.<sup>10</sup> Until 2012, only two high profile mass graves were ever exhumed, both after significant political pressure. One mass grave contained Sinhalese remains in the south (Sooriyakanda), and the other contained Tamil remains in the war-torn north (Chemmani). As discussed below, despite significant publicity and pressure, neither investigation left families of the disappeared closer to the truth.

### **Sooriyakanda (1994)**

The Marxist insurrections by the Janatha Vimukthi Peramuna (JVP, now a mainstream political party) in the south and the government's counterinsurgency response reflect a less publicised, but no less brutal, aspect of Sri Lanka's decades of conflict. In 1971, JVP militants led an unsuccessful attempt to overthrow the Sri Lankan government: 15,000 were killed. The JVP attempted a second coup in the late 1980s in response to India's intervention in the north and the signing of the Indo-Sri Lanka Accord. The second insurgency was far more violent; the JVP terrorised civilians and families of Sri Lankan armed forces in targeted killings.<sup>11</sup> As before, Sri

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<sup>10</sup> Torture: Asian and Global Perspectives, Exclusive: The Island of Mass Graves, AHRC (Feb.-Apr. 2014), p. 49.

<sup>11</sup> *Recurring Nightmare: State Responsibility for "Disappearances" and Abductions in Sri Lanka*, Human Rights Watch, at p. 19 (March 2008), available at

Lankan security forces brutally crushed the insurgency. Sri Lankan security forces completely wiped out the JVP's political leadership by 1989 and forcibly disappeared and killed at least 23,000 in the process.<sup>12</sup> Responding to JVP threats to kill relatives of security forces, posters appeared all over the country announcing a dirty war: "Twelve of yours for one of ours!" Government-sponsored death squads killed thousands, claiming authorship for killings through notes attached to corpses.<sup>13</sup>

Following a political transition, in 1994, President Chandrika Kumaratunga's government launched a high-profile investigation into the Sooriyakanda mass grave in southern Sri Lanka. The grave was believed to contain over 300 bodies from the second JVP uprising, including the bodies of 24 schoolboys from Embilipitiya, who were abducted, disappeared, and murdered by a school principal with Army

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<http://www.hrw.org/reports/2008/srilanka0308/srilanka0308web.pdf>, last visited 16 November 2014.

<sup>12</sup> See, e.g., Caitrin Lynch, 'Economic Liberalisation, Nationalism, and Women's Morality', in Deborah Winslow, Michael D. Woost (eds), *ECONOMY, CULTURE, AND CIVIL WAR IN SRI LANKA*, 168, 188 (2004) (describing consensus that while both government forces and the JVP committed atrocities during 1980s counterinsurgency efforts, government forces committed the bulk: "Amnesty International (1990) quotes some observers who hold the government responsible for 30,000 and quotes the government holding the JVP responsible for 6,517. Chandraprema (1991) breaks it down as 23,000 killed by the government and 17,000 by the JVP.").

<sup>13</sup> For a blog containing pictures of corpses, posters, and threats and summarises key scholarly works on this period, see "Search, Interrogate and Destroy" – *Hard COIN for Hard Times*, 26 February 2013, <https://thecarthaginiansolution.wordpress.com/2013/02/26/search-interrogate-and-destroy-hard-coin-for-hard-times/#more-1753>, last visited 16 November 2014.



connections. Forensic investigations reportedly took place, but no progress was reported in 1995, 1996, 1997, 1998, or 1999, and the case stagnated thereafter.<sup>14</sup>

### **Chemmani (1996)**

The last stages of the internal armed conflict have garnered significant attention: a 2015 U.N. investigation (OISL) documented serious human rights violations and potential international crimes by both the security forces and the LTTE.<sup>15</sup> Thousands of Tamils also disappeared during earlier stages of the conflict, including during occupation by the Indian Peacekeeping Forces in the late 1980s and during the Sri Lankan Army's 1996 push to retake the Jaffna peninsula. In addition, during the 1990s, the LTTE forcibly evicted 100,000 Muslims from the north and massacred thousands of Muslims in the east in an attempt to claim a Tamil homeland in those parts of Sri Lanka.

Against this backdrop, the gang rape and murder of a teenage Tamil girl in Jaffna in 1996 by Army soldiers generated widespread attention. In one of the few cases to result in

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<sup>14</sup>Archived U.S. State Department Human Rights Reports are available at <http://dosfan.lib.uic.edu/ERC/democracy.html> (1993-1998) and <http://www.state.gov/j/drl/rls/hrrpt/> (1999-2013).

<sup>15</sup> In 2015, the U.N. OHCHR Investigation on Sri Lanka (OISL) concluded that government security forces and associated paramilitary groups committed unlawful killings, enforced disappearances, arbitrary detentions, sexual violence, and torture on a systematic and widespread scale. *See* Report of the OHCHR Investigation on Sri Lanka (OISL), U.N. Doc. No. A\_HRC\_30\_CRP\_2, 16 September 2015, pp 1116, 1117, 1119, 1120-1123, 1127, 1128, 1129-1130, 1131-1135, 1172-1174. The OISL also concluded that the LTTE was involved in unlawful killings of civilians, abductions and forced recruitment, child conscription, and interference with civilians' freedom of movement. *Ibid.* pp 1118, 1136, 1139, 1140, 1141, 1161.

convictions, defendant Lance Corporal Somaratne Rajapaksa and his indicted co-defendants testified to the existence of 27 mass graves in the area containing over 300 bodies. Excavations took place in June and September 1999, under the supervision of the late forensic pathologist Niriallage Chandrasiri. The Attorney General's (AG's) Department signed a Memorandum of Understanding inviting foreign forensics experts William Haglund (a forensic anthropologist), Melissa Connors (a forensic archaeologist), Kevin Lee (a forensic pathologist), and R.D. Stair (a coroner) to offer 'technical assistance.' Only 15 bodies were recovered, all declared homicides, mostly by blunt force trauma to the head and chest. Bone samples were sent for DNA testing in the early 2000s, first to India and then to the U.K., but the local case ends there, and the results of DNA testing are unknown. There were no further attempts to trace the missing or investigate their deaths.

## **II. Recent Mass Grave Discoveries**

### **Matale (2012)**

Matale was the epicenter of the second JVP insurgency during the late 1980s. On 24 November 2012, during construction work at the Matale General Hospital, workers uncovered skeletal remains. In the excavations that followed, remains from more than 154 individuals were recovered from the Matale mass grave.

Following discovery of the grave, Magistrate Judge Chathurika De Silva initiated an inquiry on 26 November 2012. On 10 December 2012, the Judicial Medical Officer Ajith Jayasena asked forensic archaeologist Raj Somadeva to

survey the site.<sup>16</sup> After making three site visits, Professor Somadeva identified physical artefacts that reliably dated the site “not earlier than the year 1986 and not later than the year 1990,” that is, precisely during the second JVP insurrection.<sup>17</sup> Professor Somadeva identified signs of torture on several skeletons, including iron nails through the phalanges (fingers) of one skeleton and a metal noose around the leg of another. A third skeleton showed signs of “conscious” cutting of the skull with a “sharp tool.” Based on the placement of the skeletons, he concluded that the site was a mass grave, not an ordinary cemetery or a mass burial following an endemic.

In March 2013, Judge De Silva found that the remains appeared to date to the late 1980s. Witnesses came forward, claiming that during that period, the Sri Lankan Army’s Gajaba Regiment ran a torture center near the Matale General Hospital, where the mass grave was found. Lawyers for the JVP represented 13 families who claimed they might have relatives buried in the grave. The Bar Association of Sri Lanka intervened as an interested party, seeking to represent all families of the disappeared. Judge De Silva directed CID officers to place ads in all three languages in the newspapers to ask families of the disappeared from the 1980s insurrection to come forward.

It was at this point that the case became political. Reports emerged that the commanding officer of the Gajaba Regiment in Matale during the late 1980s was none other than

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<sup>16</sup> Darshanie Ratnawalli, ‘Matale Mass Grave: Skeletons in Closets as Well?’, 21 December 2014, available at <http://www.colombotelegraph.com/index.php/matale-mass-grave-skeletons-in-closets-as-well/>, last visited 12 November 2015.

<sup>17</sup> Human Skeletal Remains found at the District General Hospital Premises in Matale: The Report on Forensic Archaeology (2013), at 47.

Gotabhaya Rajapaksa, the former President's brother and the former powerful Defence Secretary (who faced pressure for his handling of the last stage of the civil war). Then President Rajapaksa announced a Commission of Inquiry to investigate the Matale grave, over objections by the Bar Association and lawyers for the JVP that there was already a pending magisterial inquiry. Judge De Silva was abruptly transferred to Colombo and replaced by Judge Sampath Gamage, who refused to accept additional affidavits by families of the disappeared and deferred to the Presidential Commission of Inquiry.

Despite having pinpointed a timeframe with physical artefacts and other evidence, Professor Somadeva's report recommended undertaking Radiocarbon Bomb-pulse Method (RBM) testing with a lab called Beta Analytic, Inc. in the United States. This recommendation became the investigation's undoing.

The samples were sent, without Professor Somadeva's supervision, to Beta Analytic. There was no chain-of-custody documentation or evidence to prove that the bone sample actually came from the Matale grave. There was also no evidence that the persons gathering the samples followed Beta Analytic's specific guidelines for collection or submission. This is not merely an academic point: with bone tissue decomposing at different rates, sending a tooth instead of a femur sample could dramatically affect test results.

In November 2014, the CID informed the court that Beta Analytic had dated the skeletons to the pre-1950 era. The CID offered no explanation for what pre-1950 event in Sri Lankan history could explain the signs of torture observed on the skeletons. Professor Douglas H. Ubelaker of the Smithsonian Institute was asked to interpret the test results

submitted by Beta Analytic. He confirmed that the lab results showed that the skeletons dated to pre-1950.<sup>18</sup> However, Professor Ubelaker did not oversee the sampling process and has since expressed that he had no way to assess the integrity of the samples sent for testing.

Professor Somadeva stood by his dating of the grave to the late 1980s based on physical specimens. He testified before the Presidential Commission of Inquiry that the samples may have been contaminated, as he twice saw the excavated pit submerged in rainwater. The Presidential Commission of Inquiry discounted Professor Somadeva's testimony, and in 2015, the Matale Magistrate Court transferred the case to the Attorney General's (AG's) office to decide whether to close the case given the Beta Analytics results. Although the Presidential Commission submitted its report to President Sirisena, it has not been made public.

There has been no progress in the case since, and families are no closer to the truth. International experts with experience in the Balkans and Latin America have agreed with Professor Somadeva's assessment dating the grave to the late 1980s and believe that the exhumed remains should be further analysed to determine the cause of death and to trace the missing.

### **Mannar (2013)**

The Mannar mass grave was the first to be discovered in the embattled north after the end of the war. On 20 December 2013, construction workers of the National Water Supply and

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<sup>18</sup> Darshanie Ratnawalli, 'Matale Mass Grave: Skeletons in Closets as Well?', 21 December 2014, available at <http://www.colombotelegraph.com/index.php/matale-mass-grave-skeletons-in-closets-as-well/>, last visited 12 November 2015.

Drainage Board were digging trenches to lay water pipes adjacent to a road in the Manthai division of Thiruketheeswaram village, Mannar, when they discovered skeletal remains. The workers informed Mannar Police, who launched an investigation alongside a magisterial inquiry.<sup>19</sup> In the excavations that followed, remains from more than 83 individuals were recovered from the mass grave.

On 22 December 2013, Mannar Magistrate Judge Ananthi Kanagaratnam opened an inquiry. Judge Kanagaratnam made a preliminary visit to the site with Judicial Medical Officer D.L. Waidyaratne, the same JMO involved in the Chemmani investigation in 1999. She ordered the investigation to proceed in two phases. The first phase would consist of excavation, recovery of remains, preservation, transportation, and safe storage for further examination. The second phase would consist of forensic anthropological and forensic pathological examination of the recovered remains and further investigation by the court.<sup>20</sup>

Excavation commenced on 28 December 2013 and occurred in stages through March 2014. On 18 January 2014, Dr. Waidyaratne told BBC News that he was “very much worried” that no signs of clothing or human-made artefacts

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<sup>19</sup> ‘Sri Lanka to probe mass grave in former war zone’, The Hindu, 23 December 2013,

<http://www.thehindu.com/news/international/south-asia/sri-lanka-to-probe-mass-grave-in-former-war-zone/article5490464.ece>, last visited 10 November 2014; ‘Sri Lanka Police commence investigation into human skeletal remains unearthed in Mannar’, Colombo Page, 21 December 2013, [http://www.colombopage.com/archive\\_13B/Dec21\\_1387640318\[V\].php](http://www.colombopage.com/archive_13B/Dec21_1387640318[V].php), last visited 10 November 2014.

<sup>20</sup> Dr. D.L. Waidyaratne, *Report on the Excavation of the Suspected Mass Grave in Manthai, Mannar*, Case No. B 768/2013, 23 October 2014.

had been found in the grave.<sup>21</sup> Dr. Waidyaratne packed more than 80 boxes of skeletonised remains for preservation, labelled and sealed them, and transported them under court order to the medico-legal morgue of the Teaching Hospital in Anuradhapura for storage and further examination.<sup>22</sup>

To date, the inquiry has not progressed to the second stage, and there has been no effort to date the grave. Although Judge Kanagaratnam ordered members of the national Department of Archaeology to lead the excavation, the department sent two junior members who merely assisted Dr. Waidyaratne and the CID officials in their excavation and were not asked to date the grave. This is unusual and concerning: by this stage of the investigation, the Matale grave had been dated using traditional archaeological means. It is particularly unusual that a geologist and atomics expert have submitted reports in the Mannar case before a forensic archaeologist/anthropologist has dated the grave.<sup>23</sup>

Beyond the lack of dating, several other concerning trends have emerged.

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<sup>21</sup> Charles Haviland, 'Sri Lanka mass grave yields more skeletons', BBC News, 18 January 2014, available at <http://www.bbc.com/news/world-asia-25782902>, last visited 10 November 2014.

<sup>22</sup> Dr. D.L. Waidyaratne, *Report on the Excavation of the Suspected Mass Grave in Manthai, Mannar*, Case No. B 768/2013, 23 October 2014; Dr. D.L. Waidyaratne, *Application with regard to the forensic examination of skeletal remains recovered from the excavation of suspected mass grave at Manthai, Mannar*, Case No. B 768/2013, 23 May 2014.

<sup>23</sup> Test Report of Professor Nawaratne, Acting Head, Department of Geology, University of Peradeniya, Case No. B 768/2013, 18 June 2015.

First, state officials have stymied the investigation by suggesting that the gravesite is an “ancient cemetery” rather than a mass grave. On 7 March 2014, Director General of the state-run Department of Archaeology, Senerath Dissanayake, reported that the bodies had been “buried systematically,” indicating that the site was in fact a graveyard that was about 50 years old.<sup>24</sup> Police spokesman SSP Ajith Rohana stated on 9 March 2014: “We decided to halt the excavations as we were uncertain whether there was a grave site prior to the road being constructed.”<sup>25</sup> On 10 March 2014, the state-run English Daily News quoted Dissanayake as stating that a cemetery had existed at that site between 1940 and 1953.<sup>26</sup>

However, official survey plans for the village from 1954, 1955, and 1961 do not support the existence of any cemetery.<sup>27</sup> Instead, the area was recorded as featuring “high jungle and a masonry well.” Residents who have resided for a long time likewise did not recall the existence of a cemetery in that area. On 21 May 2014, S. Martin Dias, Chairman of the Mannar Pradeshiya Sabha (local council) submitted a letter to the

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<sup>24</sup> Shihar Aneez, ‘Sri Lanka says suspected wartime mass grave is an old cemetery’, 7 March 2014,

<http://www.reuters.com/article/2014/03/07/us-srilanka-rights-grave-idUSBREA261FT20140307>, last visited 10 November 2014.

<sup>25</sup> ‘Mass Graves raise suspicions’, Sunday Leader, 9 March 2014, <http://www.thesundayleader.lk/2014/03/09/mass-graves-raise-mass-suspicions/>, last visited 21 August 2015.

<sup>26</sup> Chaminda Perera & S. Kathiragamathamby, ‘Mass Grave? No, Graveyard – Archaeologists’, Daily News, 10 March 2014, <http://www.dailynews.lk/local/mass-grave-no-graveyard-archaeologists>, last visited 10 November 2014.

<sup>27</sup> ‘From mass grave to cemetery: Questioning the claims in Mannar’, Groundviews, 12 March 2014, <http://groundviews.org/2014/03/12/from-mass-grave-to-cemetery-questioning-the-claims-in-mannar/>, last visited 10 November 2014 (survey plans enclosed).



Magistrate Court, confirming that there were no local government records of a cemetery in that area. In response, on 20 July 2014, the CID asked Dias to come in for questioning at the notorious ‘Fourth Floor’—i.e., CID headquarters in Colombo. After human rights lawyers at the Centre for Human Rights and Development (CHRD) complained, the court ordered the CID to record Dias’ statement in Mannar. Dias was afraid but provided a statement denying any village records of a cemetery in that area. The land records and Dias’ statement are now part of the court record.

Indeed, there are other reasons to question the ‘ancient cemetery’ hypothesis. The gravesite is situated down the road from the ancient Thiruketheeswaram temple. As Magistrate Judge Alex Rajah noted in his 7 August 2015 order, Hindu custom would prevent a cemetery or burial ground being built so close to the temple. Given the age of the temple and the condition of the bones, it is also not possible that the cemetery pre-dated the Thiruketheeswaram temple.

Another concern emerged with regard to a sealed well near the gravesite, alleged by locals to contain additional skeletal remains. On 27 October 2014, Judge Kanagaratnam ordered CID officers to excavate the well, but the CID stated at the January 2015 hearing that they could not locate any well. After Magistrate Judge Alex Rajah took over the case in early 2015, he again ordered excavation of the well. However, excavation was repeatedly delayed due to heavy rains and stalling tactics by the CID. On 26 August 2015, Judge Rajah finally rejected the CID’s request for additional time. Later that day, the Survey Department located the ‘missing well’ precisely where the land records had suggested. Excavation was scheduled for February 2016 but has yet to commence.

Learning from the Matale experience, the legal team in Mannar grew concerned that any samples sent for testing abroad would face the same chain-of-custody and contamination concerns as the samples in Matale. The CID's proposal at the 26 August 2015 hearing to handle the samples in the same manner as in the Matale case did not inspire confidence in this regard. Accordingly, CHRDR lawyers filed motions in August and October 2015, asking the court to invite a forensics team of international repute, with expertise in forensic archaeology and forensic anthropology, to lead and oversee all aspects of the mass grave investigation. CHRDR argued in their motions that the international team should be based in Sri Lanka and work with local experts to oversee excavation of the well and all aspects of sample collection, preparation, preservation, transmission, and testing. This is a welcome proposal, as I argue in this chapter.

In October 2015, Judge Rajah issued an order prohibiting the CID or any other entity from removing the remains currently housed in Anuradhapura Teaching Hospital without court order. He also ordered the CID to consult with the AG's Department and identify outside experts in forensic archaeology and forensic anthropology to assist in the investigation. At the 4 December 2015 hearing, the CID agreed to 'send the samples' to the Argentine, Peruvian, or Guatemalan forensic anthropology teams referenced in CHRDR's motions. However, the CID officer could offer no specifics when asked in court how samples would be collected or transmitted to these institutions. Needless to say, the Latin American forensic anthropology teams assist at all levels of investigation and are not mere laboratories for sending samples. After several months of delay, the CID contacted the Guatemalan forensic anthropology team but has not contacted the others.

In April 2016, Dr. Waidyaratne proposed developing a standard operating procedure for JMOs to investigate mass graves throughout Sri Lanka. While this may be welcome as a general matter, there is no transparency as to the procedures being proposed and no indication the approach would learn from past mistakes. Troublingly, the CID and other government actors involved in the Mannar case continue to argue that no international assistance is required.

### **Kalavanchikudy (2014)**

In 2014, a resident from Kalavanchikudy in the Batticaloa District of the Eastern Province petitioned the local court to order the exhumation of a suspected mass burial site containing 100 Muslims killed by the LTTE. The resident was a young Muslim in his 20s, who claimed that his father had been killed and buried in a mass grave. He testified before the LLRC and the Presidential Commission on Disappearances and later filed a petition before Judge Gafoor. The Presidential Commission on Disappearances received testimony from local Muslims, who claimed that they could identify the place where 167 Muslims were killed by the LTTE on 12 July 1990.

Investigations and exhumations have yet to begin. Because this mass grave implicates the LTTE, the Rajapaksa government initially investigated this site more expeditiously than the Mannar and Matale sites. However, the process stalled when it became clear that the site might implicate Col. Karuna of the LTTE, who joined the Rajapaksa government in 2008. The mass grave is believed to be located in a Tamil area. Community organisers are working to foster dialogue across Tamil and Muslim communities to encourage Tamils to come forward to identify the grave. Judge Gafoor, who is overseeing the case, has postponed exhumations and further investigation until this dialogue moves forward.

### **III. Evaluating Mass Grave Investigations, Past and Present**

In each mass grave investigation in Sri Lanka to date, the process has been left to the discretion of individual magistrate judges. These judges have followed the normal criminal investigation process, allowing the CID and AG's Department to lead investigations and retain necessary experts. But mass grave investigations are not ordinary criminal investigations. They require complex knowledge of international law, forensic anthropology, forensic archaeology, and forensic pathology.

Unsurprisingly, there is a lack of coherence between different mass grave investigations. Mannar has yet to reach the stage reached in Matale: inexplicably, there has yet to be a forensic archaeologist or forensic anthropologist retained to date the grave. After the Matale case became political, the former President appointed an ad hoc Presidential Commission of Inquiry, effectively terminating the magisterial inquiry.

Magistrate judges face significant political pressure in these sensitive cases and risk being removed from the case or transferred if they push too hard for the truth. In the Matale case, for example, Judge De Silva ordered the CID to place notices in all three languages in newspapers to identify families of the missing whose kin might be among the 153 individuals exhumed from the Matale mass grave. This was a bold, proactive step for a magistrate judge, and she was immediately transferred off the case and replaced with someone more deferential to the CID.

Perhaps in order to avoid the risk of transfer, many judges are deferential to the CID and AG's Department, even while recognising their shortcomings. For example, although Judge

Rajah criticised the CID in the 26 August 2015 hearing in the Mannar case for failing to suggest competent international forensics experts, he granted the CID two additional months to consult with the AG's Department on the matter. At the subsequent October 2015 hearing, the CID asked for more time to consult the AG's Department on appropriate forensics expertise, and Judge Rajah again gave more time despite not seeing any demonstrable progress on the issue.

Moreover, disappearances in Sri Lanka implicate state actors, calling into question the wisdom of leaving the process to the state. Attempts by state officials to declare the Mannar grave an “ancient cemetery” or to conclude the Matale grave dates to the pre-1950 era reflect badly politicised efforts to distort and further conceal the truth. Indeed, the Presidential Commission of Inquiry on Matale discredited Professor Somadeva's testimony questioning the Beta Analytics lab results despite lacking a basic understanding of forensic science. Even where there is significant international attention, mass grave investigations have stagnated and left families no closer to the truth. Thus, there is real concern that Matale and Mannar will merely repeat past failures in Sooriyakanda and Chemmani.

Separate and apart from these issues are questions of technical competence and transparency. In November 2015, the U.N. Working Group on Enforced or Involuntary Disappearances visited both Matale and Mannar gravesites and reported “evident problems in the way the mass grave sites [in Sri Lanka] have been secured and the samples and evidence handled.”<sup>28</sup> These concerns are systemic and cannot be

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<sup>28</sup> Preliminary observations of the Working Group on Enforced or Involuntary Disappearances at the conclusion of its visit to Sri Lanka, 9-18 November 2015, available at <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?>

addressed by merely adding foreign experts to the existing process. In Chemmani, foreign forensics experts observed exhumations and testing and were asked to provide a report to the AG's Department; even presuming they did, their report was never publicly released. In addition, bone samples were sent to India and the U.K. for DNA testing, but it is unknown what happened to those samples thereafter.

Likewise, in Matale, samples were sent to Beta Analytic, Inc. in the U.S. for radiocarbon testing, but there was no transparency as to the chain of custody of the samples sent. Learning from Chemmani and Matale, it is clear that credibility will not come through merely inviting foreign experts to provide a confidential report—or by sending samples abroad with little transparency to ensure proper chain of custody. Instead, there must be a cohesive approach that engages international and local experts and takes place outside the present magisterial inquiry process.

#### **IV. Where to from Here? Lessons Learned from Latin America and the Balkans**

Efforts to investigate mass graves in Sri Lanka have universally failed to bring families closer to the truth. A new approach is needed that prioritises the right of families of the disappeared to know the truth about their missing loved ones.

In his speech to the UNHRC in September 2015, Foreign Minister Mangala Samaraweera promised that the Sirisena administration would create “an Office on Missing Persons based on the principle of the families’ right to know, to be set up by Statute with expertise from the ICRC, and in line with

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[NewsID=16771&LangID=E#sthash.mVg4dEyv.dpuf](#), last visited 6 December 2015.

internationally accepted standards.”<sup>29</sup> In August 2016, Sri Lanka moved a step closer, when legislation to establish the OMP was enacted in Parliament.

Building on these steps, Sri Lanka should create a forensics unit within the OMP to remove mass grave investigations from the regular criminal justice system and adopt a cohesive approach that employs internationally accepted best practices to investigate all mass graves. As U.N. High Commissioner for Human Rights Zeid Ra’ad al Hussein emphasised, Sri Lanka will need “international technical assistance in the forensic field, particularly forensic anthropology and archaeology” to ensure proper preservation and investigation of the mass graves and to help families trace the missing.<sup>30</sup> Encouragingly, the proposed OMP allows precisely such an approach.

Sri Lanka is not the only country to have investigated mass graves. A subfield of forensic anthropology and archaeology has emerged out of lessons learned in Latin America and the Balkans. It is beyond the scope of this chapter to discuss each of these case studies in detail, but there are a few key lessons for Sri Lanka to consider.

**As learned in Guatemala, bones challenge official narratives.** In Guatemala, where an estimated 200,000 people were killed or disappeared in a 36-year civil war (1960-

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<sup>29</sup> *Statement by Mangala Samaraweera, at the 30th Session of the UNHRC, Geneva, 14 September 2015, available at <http://www.news.lk/fetures/item/9742-statement-by-mangala-samaraweera-at-the-30th-session-of-the-unhrc-geneva>, last visited 11 October 2015.*

<sup>30</sup> Report of the Office of the United Nations High Commissioner for Human Rights on Promoting Reconciliation, Accountability and Human Rights in Sri Lanka, at pp 72-73, U.N. Doc. No. A/HRC/30/61, 16 September 2015.

1996), the Foundation for Forensic Anthropology in Guatemala (FAFG) has led efforts to investigate numerous mass graves. In 1994, FAFG exhumed a clandestine cemetery in Plan de Sánchez, where the Army claimed to have battled guerrillas. Exhumations revealed that the vast majority of victims were women, children, and the elderly, and forensic evidence showed that the gravesite contained victims of a massacre, not civilians caught in crossfire. A police officer guarding the site brought his fellow officers to watch. “Look at this. It is a woman with a baby on her back. They told us these were pure guerrillas. These aren’t guerrillas. That’s a mother and a baby. That’s a crime.”<sup>31</sup> Similarly, in Sri Lanka, skeletal remains in Matale and Mannar showed signs of torture that cannot be reconciled with official narratives of an ancient cemetery or pre-1950s event.

**However, learning from Peru, it is important not to privilege one narrative of loss over others.** In 2000, Peru emerged from 20 years of internal armed conflict between the Shining Path, MTRA, and government forces (including self-defence groups) that left in total 15,000 disappeared, 60,000 dead, and over 6,000 clandestine graves.<sup>32</sup> Peru’s Truth and Reconciliation Commission (CVR) recommended mass grave exhumations and commemorations as an attempt to find common narratives of loss. In practice, however, the Chuschi and Totos mass graves, which involved Quechua-speaking peasants killed by the Peruvian military, were commemorated very differently from the Lucanamarca grave, which involved victims of the Shining Path militant group. Victims of Lucanamarca asked then-President Toledo

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<sup>31</sup> W. John Green, *A History of Political Murder in Latin America: Killing the Messengers of Change* (2015) at p. 108.

<sup>32</sup> José Pablo Baraybar and Rebecca Blackwell, ‘Where are They? Missing, Forensics, and Memory’, *Annals of Anthropological Practice* 38:1, pp. 22-37, at p. 28 (2014).



to inaugurate a special mausoleum to acknowledge their contribution to the community and the nation. President Toledo travelled to Lucanamarca weeks later to inaugurate the mausoleum, in the only ceremonial reburial to be attended by a Peruvian president. As Isaias Rojas-Perez writes, state-sponsored programmes to commemorate victims of violence can produce “a discursive site for the (re)emergence of discourses of heroism and nationalism that deepen the divide between perceived defenders and attackers of the nation.”<sup>33</sup> Moreover, in Peru, the state has improperly focused on exhumation, at the expense of prioritising identification. As José Pablo Baraybar, Director of the Peruvian Team of Forensic Anthropology (EPAF) explains: “By exhuming remains without any information regarding who the exhumed may be, the chances of identifying them becomes negligible. . . . [W]hen there is not a clear notion of who the victims that are being looked for are, identification becomes an incredibly difficult task.”<sup>34</sup>

Applied to Sri Lanka, the investigation of mass graves must focus on a universal right of Sinhalese, Tamil, and Muslim families to know the truth about their disappeared loved ones. The effort must not privilege one group of victims over another or entrench polarising narratives of hero and terrorist. Recognising that state-sponsored commemorations may be hard-pressed to achieve this balance, the forensics unit of the OMP should strive for independence and autonomy from

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<sup>33</sup> Isaias Rojas-Perez, ‘Death in Transition: The Truth Commission and the Politics of Reburial in Postconflict Peru’, in Francisco Ferrándiz and Antonius C.G.M. Robben (eds) *Necropolitics: Mass Graves and Exhumations in the Age of Human Rights* (2015), pp. 185-212, at pp. 201-203, 206.

<sup>34</sup> José Pablo Baraybar and Rebecca Blackwell, ‘Where are They? Missing, Forensics, and Memory’, *Annals of Anthropological Practice* 38:1, pp. 22-37, at p. 28 (2014).

other government-led initiatives. In addition, as Baraybar notes, Sri Lanka should not exhume remains in haste, without first undertaking a coherent investigation into who the victims may be. This is a key reason why forensics must be integrated into Sri Lanka's OMP.

**As learned in Kosovo, the investigation of mass graves should be centralised and not left to the normal criminal justice process.** In 1988-1999, Serbian forces fought ethnic Albanian rebels in Kosovo resulting in an estimated 11,000 deaths (mostly ethnic Albanians). After a NATO bombing campaign in 1999, the area was put under U.N. control. In the initial years, the ICTY invited any volunteer forensics team to investigate mass graves, regardless of expertise and without clear operating guidelines or effective communication or coordination between them. The teams operated under a strictly judicial mandate: the ICTY's focus was on the 'numbers' and establishing elements of crimes (e.g., that crimes were systematic or widespread). Less than half of the bodies were identified, and most bodies exhumed in 1999 were reburied in locations still unknown to the ICTY. Families were denied information about their kin because the investigations were not handled properly with an eye toward resolving the whereabouts of missing persons. Moreover, the lack of coordination meant that families had to give the same information to multiple organisations resulting in additional frustration and distress. As a result, a wealth of critical information on missing persons, events of disappearances, and potential gravesites was scattered across disparate organisations.<sup>35</sup>

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<sup>35</sup> Valerie Brasey, 'Dealing with the Past: The Forensic-Led Approach to the Missing Persons Issue in Kosovo', *Politorbis* 50:3, pp. 161-169, at p. 163 (2010); José Pablo Baraybar, Valerie Brasey, and Andrew Zadel, 'The Need for a Centralised and Humanitarian-Based Approach to Missing Persons in Iraq: An Example from

The ICTY stopped large-scale forensics operations in Kosovo by 2000, and the disorganised legacy of past forensics teams called for a new approach. In June 2002, the U.N. Mission in Kosovo created the Office of Missing Persons and Forensics (OMPF), led by Peruvian forensic anthropologist José Pablo Baraybar, to address the issue of missing persons in a more coherent way. Its success is attributable to four core strategies: centralising information, information management and sharing with other organisations, local capacity building, and open communication with families of victims.

Applied to Sri Lanka, Kosovo teaches that the best approach is to have an autonomous and centralised organisation with a clear mandate to lead the search for the missing. While forensic evidence can, and should, ultimately be used for prosecution, “focusing on the collection of forensic evidence for criminal investigations tends to preclude sustainable humanitarian solutions.”<sup>36</sup> Hence, the mandate of the forensics unit should be to identify victims and return their remains to families, considering all related issues like death certificates, compensation, and psychosocial support at the outset. It should be led by international experts such as José Pablo Baraybar—who established the OMPF from the ground-up—or by the Argentine, Peruvian, or Guatemalan forensic anthropology teams (EAAF, EPAF, and FAFG) that

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Kosovo’, *The International Journal of Human Rights* 11:3, pp. 265-274 (2007).

<sup>36</sup> Valerie Brasey, ‘Dealing with the Past: The Forensic-Led Approach to the Missing Persons Issue in Kosovo’, *Politorbis* 50:3, pp. 161-169, at p. 163; José Pablo Baraybar, Valerie Brasey, and Andrew Zadel, ‘The Need for a Centralised and Humanitarian-Based Approach to Missing Persons in Iraq: An Example from Kosovo’, *The International Journal of Human Rights* 11:3, pp. 265-274 (2007), at p. 269.

pioneered this field. At the same time, it must develop local capacity and resources through close partnerships with in-country forensics experts like Professor Raj Somadeva, who led the Matale investigation.

**As learned the hard way in Bosnia, families of the disappeared must be at the center of the forensic process.**

Across Latin America, countries transitioning to democracy had to grapple with mass graves and the disappearance of hundreds of thousands of civilians at the hands of military regimes during the 1970s and 1980s. Beginning with the Argentine Forensic Anthropology Team (EAAF), which pioneered the field, scientists learned that proper investigation requires mutual trust with the community and understanding of the complex political implications of the work. In many countries, the lack of state support for exhumations required organisations like EAAF, EPAF, and FAFG to put the families at the center of the investigation process. As Luis Fondebrider, an inaugural member of EAAF recalled: “We could not ask the police or criminal investigators for assistance. They were in many cases part of the same system that had carried out the disappearances.” Thus, EAAF, EPAF, and FAFG developed a model wherein they would start by spending hours with relatives to not only describe the exhumation process and explain difficulties with identification, but also to listen to their life histories and try to piece together the story of the disappearance.<sup>37</sup>

This lesson was learned the hard way in the Balkans. The ICTY asked U.S.-based Physicians for Human Rights (PHR)

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<sup>37</sup> Luis Fondebrider, ‘Forensic Anthropology and the Investigation of Political Violence: Lessons Learned from Latin America and the Balkans’, in Francisco Ferrándiz and Antonius C.G.M. Robben (eds) *Necropolitics: Mass Graves and Exhumations in the Age of Human Rights* (2015), pp. 41-52, at p.45.

to investigate mass graves to build evidence for criminal investigations. Unlike the Latin American organisations, PHR does not employ a permanent forensics team and retains professionals to work as consultants on a project basis. U.S. and British forensic anthropologists who first went to Bosnia with PHR in 1996 lacked experience building trust with families of the disappeared and were not accustomed to dealing with the political complexities of exhumations in post-conflict societies. As Fondebrider recounts: “In contrast to what Clyde Snow [founder of EAAF] had emphasised in Latin America since 1984, these first years in Bosnia were characterised by a very technical approach, almost without cultivating contacts between practitioners and families.”<sup>38</sup> Realising the problems with this approach, the ICTY ultimately decided to contract its own forensic specialist, José Pablo Baraybar from Peru. In later years, the International Commission on Missing Persons (ICMP) partnered with key civil society organisations like Women of Srebrenica to establish trust with families of the disappeared and exchange information about the forensic process. The Women of Srebrenica became key partners in building support for and sharing information about ICMP’s work. They also served as important watchdogs, criticising ICMP at various points.

Similarly in Kosovo, after initial missteps by the ICTY teams, the OMPF did extensive outreach with families to build an ante mortem database containing the circumstances and identities of disappearances and possible locations of gravesites. Anthropologists trained in ethnographic interview methods built this database based on repeated interviews with families or groups of families over an extended time period. OMPF explained the limitations of recovery and identification processes to obtain informed consent, and families were

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<sup>38</sup> Ibid

assured that gathering ante mortem data and other information was a critical part of the investigation. OMPF also maintained open communication with families about progress and challenges as the investigation progressed. Working with families was not always seamless: initially, some did not want to hear about forensics because they believed their loved ones were alive. More families accepted OMPF's work over time, as exhumed remains from Serbia were repatriated.

One question for Sri Lanka is whether to follow Bosnia's DNA-led approach or Kosovo's investigative-led approach. In Bosnia, the ICMP focused on a DNA-led approach because of the phenomenon of secondary mass graves. In Srebrenica, for example, where Serbian forces killed 8,000 Bosniak Muslims (mainly men) in July 1995, Serbian forces had exhumed and reburied bodies into secondary graves. A DNA-led approach was warranted there because of the nature of the commingled and partial remains. This approach is expensive: in 2011 and 2012 alone, the ICMP spent roughly US\$20 million.<sup>39</sup> Where there are competing demands such as education, social services, infrastructure, and development, as there are in Sri Lanka and much of the Global South, a DNA-led approach may be cost prohibitive. Unlike Bosnia, in Kosovo, the OMPF used an investigative-led approach, gathering and comparing ante-mortem and post-mortem data to make a presumptive match to narrow the scope of DNA testing, achieving accurate results at a lower cost.<sup>40</sup>

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<sup>39</sup> José Pablo Baraybar and Rebecca Blackwell, 'Where are They? Missing, Forensics, and Memory', *Annals of Anthropological Practice* 38:1, pp. 22-37, at p. 33 (2014).

<sup>40</sup> José Pablo Baraybar, 'When DNA Is Not Available, Can We Still Identify People? Recommendations For Best Practice', *Journal of Forensic Science* 53:3 (2008), pp. 533-540.

There are other reasons besides cost to consider an investigative-led approach. In Argentina, after so many years of searching for the missing, it has become clear that DNA is only one among many necessary tools: amassing a collection of DNA profiles is not enough to establish a positive identification. In short, an investigative-led approach may be preferable in Sri Lanka, using DNA to complement a comprehensive investigation: whereas such an approach incorporates DNA testing and necessary technical and scientific techniques, the reverse is not always the case.

There are many lessons from Bosnia and Kosovo. Families in Mannar and Matale have thus far been relegated to the sidelines of a criminal proceeding, wherein identification is of secondary concern. Exhumations have occurred before a forensic anthropology team has constructed an ante-mortem database to help identify who the potential victims might be. Regardless of whether Sri Lanka adopts an investigative-led or DNA-led approach, families must be at the center of the process, and there must be constant outreach to inform families of progress made and challenges that remain. It is abundantly clear from Latin America and the Balkans that any forensics unit will not succeed in gathering information or projecting credibility without community support.

### **Conclusion and Reflections on the Proposed OMP**

Sri Lanka's government has promised to deal with the past to build a better future. It agreed to establish an Office of Missing Persons (OMP), grounded in the right of victims to know the truth. The legislation envisions an OMP that will search for and trace the missing and clarify the circumstances of their disappearances and fates. Guided by these important objectives, any OMP in Sri Lanka must include a forensics component.

A useful model is the Office of Missing Persons and Forensics in Kosovo (OMPF). OMPF was launched to overcome precisely the problems of coordination and transparency associated with a decentralised criminal justice approach that are readily apparent in Sri Lanka's mass grave cases. OMPF was led by international experts with experience investigating mass graves in Latin America and the Balkans, who worked in close partnership with local experts and families of the disappeared. Learning from this approach, Sri Lanka's OMP should have a specialised forensics unit that is wholly independent from the AG's Department; employs international experts; works closely with affected communities; builds local technical capacity; and is grounded in a humanitarian mandate to identify victims and repatriate their remains.

Significantly, the OMP legislation facilitates such an approach. Section 11(a) bestows the OMP with authority to enter agreements for "technical support and training (forensic or otherwise) and collaboration." Section 17(2) requires the OMP's Tracing Unit to be staffed by "competent, experienced and qualified investigators, including those with relevant technical and forensic expertise." Given the scale of disappearances in Guatemala, Peru, and Argentina, forensics experts from those countries (at FAFG, EPAF, and EAAF) are uniquely positioned to help investigate Sri Lanka's mass graves as part of a broader comprehensive approach to trace the missing. The OMP would be wise to invite José Pablo Baraybar, Director of EPAF and former Chief Forensic Scientist for the ICTY, who launched Kosovo's OMPF from the ground-up, to develop and lead Sri Lanka's forensic efforts.

Sri Lanka is at a critical juncture. With Matale, Mannar, and Kalavanchikudy investigations pending, the state has a unique



opportunity to address the universal right of Sinhalese, Tamil, and Muslim victims of violence to know the truth about their disappeared loved ones. It is essential for Sri Lanka to avoid past mistakes of Sooriyakanda and Chemmani and learn from best practices developed from decades of mass graves investigations in Latin America and the Balkans. A credible investigation grounded in victims' *universal* right to truth may challenge ethnocentric, divisive narratives or develop new understandings of historical violence.

**12**

**The Right to Memory: The Forgotten  
Facet of Transitional Justice**

*80*

*Gehan Gunatilleke*

*The struggle of man against power is the struggle of memory against forgetting.*

Milan Kundera, *The Book of Laughter and Forgetting* (1979)

## **Introduction**

Memory does not explicitly feature among the four pillars of transitional justice: truth, justice, reparations and guarantees of non-recurrence. Hence the precise role memory plays within a transitional justice process is often left to those negotiating the contours of the process. Memory is a vital ingredient in ascertaining the truth and in securing evidence to ensure justice for victims and survivors. Moreover, memorialisation of loss has a place in the symbolic initiatives owed to victims and survivors under the reparations pillar. Meanwhile, public memorials commemorating man-made tragedies contribute towards a society's collective commitment to non-recurrence. Thus memory often becomes the lifeblood that preserves and binds the traditional pillars of transitional justice.

This chapter asks the question: is the preservation of memory adequately prioritised in Sri Lanka's transitional justice discourse? The chapter is presented in three sections. The first briefly explores the basis for recognising a right to memory, particularly in the context of transitional justice. The second discusses the role states play in the denial of memory. The third section attempts to grapple with some of the challenges faced in Sri Lanka in terms of preserving memory. It also discusses the extent to which memory features within Sri Lanka's transitional justice discourse. The chapter accordingly argues that Sri Lankans have not been offered adequate public space to commemorate their individual and collective loss, and that such space must be provided—as a right—for transitional justice in the country to be meaningful.

## **Memory as a Right**

Some scholars assert the existence of a human right to memory. A proponent of such a view, Anna Reading, defines the right to memory as encapsulating ‘an acknowledgement of the otherness of the past made present and future through various symbolic and cultural acts, gestures, utterances and expression.’<sup>1</sup> Phillip Lee meanwhile defines ‘memory’ as ‘both the ability to recover and the process of recovering information and knowledge’.<sup>2</sup>

The claim to a right to memory often relies on its connection to other more established rights, such as the freedom of expression. The International Covenant on Civil and Political Rights (ICCPR) stipulates that the freedom of expression includes the ‘freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of...choice.’<sup>3</sup> The inclusion of such a broad range of media—including art—as forms of expression, is certainly consistent with the notion that the expression of memory and remembrance is protected under the ICCPR. Meanwhile, acts of remembrance or what Astrid Erll calls ‘collective memory’,<sup>4</sup>

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<sup>1</sup> Anna Reading, ‘Identity, Memory and Cosmopolitanism: The Otherness of the Past and a Right to Memory?’ (2011) 14(4) *European Journal of Cultural Studies* 379, at 380.

<sup>2</sup> Phillip Lee, ‘Towards a right to memory’ (2010) 57(2) *Media Development* 3, at 3.

<sup>3</sup> UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171 (ICCPR), art.19. Also see Reading, *op. cit.* at 385; Lee, *op. cit.* at 8.

<sup>4</sup> Astrid Erll, ‘Cultural Memory Studies: An Introduction’ in Astrid Erll and Ansgar Nünning (Eds.), *Cultural Memory Studies: An International and Interdisciplinary Handbook* (2008), at 2. Erll defines collective memory as ‘The interplay of present and past in sociocultural contexts’.

over time, have become infused with cultural practices. The Jewish festival of Passover is perhaps the quintessential example of a religious festival being based on remembering a proclaimed historical event—the liberation of Israelites from Egypt. Similarly, Tamils in the Northern Province commemorate fallen ‘martyrs’ of the struggle for a separate state by lighting lamps during *Maaveerar Naal*. The event often coincides with a Hindu festival of *Karthikai Vilakkeedu*, which also involves the lighting of candles, thereby infusing the act of remembrance with pre-existing Hindu cultural practices. If the right to memory is acknowledged for its relationship to and eventual contribution to culture, the claim to such a right is also located within the religious and cultural rights paradigm. The ICCPR clearly recognises a person’s freedom ‘either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice or teaching.’<sup>5</sup> Acts of remembrance for lost relatives could thus perceivably fall within the parameters of religious manifestation.

However, as noted by Lee, international law still fails to link collective memory to the ‘cultural heritage of humanity’.<sup>6</sup> For instance, Article 15(1)(a) of the International Covenant on Economic, Social and Cultural Rights (ICESCR) only provides a basic right to ‘take part in cultural life’.<sup>7</sup> Moreover,

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<sup>5</sup> ICCPR, art.18.

<sup>6</sup> Lee, *Ibid* note 2 at 9.

<sup>7</sup> UN General Assembly, International Covenant on Economic, Social and Cultural Rights, 16 December 1966, United Nations, Treaty Series, vol. 993, at 3. It is noted that General Comment No.21 of the Committee on Economic, Social and Cultural Rights does not explicitly refer to the preservation of memory. However, it observes: ‘States parties, in implementing the right enshrined in article 15, paragraph 1 (a), of the Covenant, should go beyond the material aspects of culture (such as museums, libraries, theatres,

the Convention on the Protection and Promotion of the Diversity of Cultural Expressions also fails to make this link.<sup>8</sup> Hence, while the right to memory may find support within the existing international rights framework, the claim to the right still relies on a purposive—perhaps creative—interpretation of that framework.

Despite the absence of a right to memory *simpliciter* in international human rights law, a right to both individual and collective memory may have a strong basis in the realm of transitional justice. At least four clear state obligations have been recognised in relation to the four pillars of transitional justice: (1) to disclose to victims, their families, and society all that can be reliably established about past events; (2) to investigate, prosecute, and punish perpetrators; (3) to offer victims and survivors adequate reparations; and (4) to remove known perpetrators from positions of authority.<sup>9</sup> These obligations have corresponding rights that are held by victims and survivors: (1) a right to know the truth;<sup>10</sup> (2) a right to see

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cinemas, monuments and heritage sites) and adopt policies, programmes and proactive measures that also promote effective access by all to intangible cultural goods (such as language, knowledge and traditions).<sup>7</sup> See Committee on Economic, Social and Cultural Rights, *General comment No. 21: Right of everyone to take part in cultural life (art. 15, para. 1 (a) of the International Covenant on Economic, Social and Cultural Rights)*, 21 December 2009, E/C.12/GC/21.

<sup>8</sup> Lee, *Ibid* note 2 at 9. See United Nations Educational, Scientific and Cultural Organisation (UNESCO), *Convention on the Protection and Promotion of the Diversity of Cultural Expressions*, 20 October 2005.

<sup>9</sup> Juan E. Méndez, 'Accountability for Past Abuses' (1997) 19 *Human Rights Quarterly* 255, at 261.

<sup>10</sup> The right to truth is explicitly recognised in international treaty law even outside the context of transitional justice. For example, Article 24 of the International Convention for the Protection of All Persons from Enforced Disappearance explicitly recognises the right to truth 'regarding the circumstances of the enforced disappearance,

justice done; (3) an entitlement to compensation and to ‘nonmonetary forms’ of reparation; and (4) a right to non-recurrence, which includes ‘new, reorganised, and accountable institutions’.<sup>11</sup> In this context, individual and collective memory interacts with and could be linked to each of the pillars of transitional justice.

First, the fulfilment of the right to truth and the success of truth-seeking exercises are often dependent on the preservation of a witness’s memory. Thus the individual memory of victims and survivors—and perhaps perpetrators—is vital to establishing credible truth-seeking mechanisms. This is precisely why numerous oral history projects have often preceded truth-seeking and prosecutorial mechanisms as a means of retaining the memory of victims and survivors until a formal mechanism is established.<sup>12</sup> Second, transitional justice requires highly sophisticated data gathering and retention systems to ensure that evidence is stored for future prosecutions. Thousands of witness depositions are recorded for the purpose of establishing individual culpability and patterns of violations. Hence memory is also vital to eventually securing justice for victims and survivors. The prosecutorial burden of proof cannot be discharged without the memory of witnesses being left in tact. Third, memory, and specifically memorialisation, plays an important role in reparations policy.<sup>13</sup> As pointed out by

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the progress and results of the investigation and the fate of the disappeared person.’

<sup>11</sup> Méndez, *Ibid* at 261.

<sup>12</sup> See Kathryn Sikkink & Carrie Booth Walling, ‘The Impact of Human Rights Trials in Latin America’ (2007) 44(4) *Journal of Peace Research* 427.

<sup>13</sup> See U.N. High Commissioner for Human Rights, *Rule of Law Tools for Post-Conflict States: Reparations Programmes*, HR/PUB/08/1 (2008), at 23. Also see Pablo de Greiff (ed.), *The Handbook of Reparations*



Bhavani Fonseka, a holistic definition of reparations necessarily includes ‘satisfaction’, which entails memorials, museums and other forms of remembering the past.<sup>14</sup> She observes the importance of creating ‘memory spaces’ in Sri Lanka, which recognise ‘multiple narratives and provides the space for victims, families and others to grieve [and] remember’.<sup>15</sup> Finally, it is argued that memory is central to guarantees of non-recurrence. Lisa Laplante for instance argues that transitional justice projects preserve knowledge of the past, and that that knowledge facilitates protection from the recurrence of violence and conflict.<sup>16</sup> Such projects contribute towards the establishment of collective memory<sup>17</sup> and could eventually lead to reconciliation.<sup>18</sup> Thus collective memory is vital to fostering a clearer understanding of the root causes of conflict, and to recognising the need to collectively prevent recurrence.

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(Oxford University Press 2006).

<sup>14</sup> Bhavani Fonseka, *The Need for a Comprehensive Reparations Policy and Package*, Centre for Policy Alternatives (March 2015), at 4. Also see Report of Diane Orentlicher, Independent Expert to update the Set of Principles to Combat Impunity, *The Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*, 8 February 2005, E/CN.4/2005/102/Add.1.

<sup>15</sup> Fonseka, *Ibid* at 11.

<sup>16</sup> Lisa Laplante, ‘The Peruvian Truth Commission’s Historical Memory Project: Empowering Truth-tellers to Confront Truth Deniers’ (2007) 6(4) *Journal of Human Rights* 436, at 437; Kristiana Eleftheria Papi, *The Role of Transitional Justice Processes in Building Peace in Latin America*, E-International Relations (*E-IR*), 23 January 2015, at <http://www.e-ir.info/2015/01/23/the-role-of-transitional-justice-processes-in-building-peace-in-latin-america>, last accessed 9 June 2016.

<sup>17</sup> Gil Eyal, ‘Identity and Trauma: Two Forms of the Will to Memory’ (2004) 16(1) *History & Memory* 5.

<sup>18</sup> Laplante, *Ibid* note 16 at 437.

States of course often attempt to undermine meaningful transitional justice. The reasons that motivate a state's resistance are perhaps beyond the scope of this chapter. Briefly put, transitional justice places a cost on state actors—in personal, financial and reputational terms—and therefore prompts the state to hamper its progress. This motivation to resist transitional justice is at the heart of state initiatives to thwart individual and collective memory. Such initiatives are no doubt deeply harmful to victims and survivors. But they also demonstrate the state's acute understanding of the centrality of memory to transitional justice. This is precisely why the argument must be made for the recognition and inclusion of an explicit right to memory. For such a right appears to be vital to the fulfilment of the rights of victims and survivors to each of the traditional pillars of transitional justice.

### **Repressive Erasure and Prescriptive Forgetting**

In the absence of a clear rights regime that guarantees individual and collective rights to memory, the discourse on memory is largely determined by state practice. In this context, it is worth understanding the state's motivations for and methods of denying memory. A state motivated to undermine transitional justice may adopt one of two approaches to deny individual and collective memory.

First, the state may engage in 'repressive erasure' of memory. Paul Connerton offers an interesting typology for forgetting, and lists 'repressive erasure' as a 'type of forgetting'.<sup>19</sup> Repressive erasure involves the obliteration, destruction or the editing out of memory as part of a concerted policy. Such

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<sup>19</sup> Paul Connerton, 'Seven types of forgetting' (2008) 1(1) *Memory Studies* 59, cited in Lee, *Ibid* note 2 at 4.

erasure often takes on an aggressive form—as a means employed to ‘deny the fact of a historical rupture as well as to bring about a historical break’.<sup>20</sup>

The Sri Lankan state has in the past deployed a policy of repressive erasure. Such a policy was initially adopted by the state immediately following the conclusion of the civil war between the state security forces and the Liberation Tigers of Tamil Eelam (LTTE). When hostilities ended with the defeat of the LTTE in 2009, certain state officials insisted that no civilian casualties occurred during the final stages of the war. For example, on 17 August 2010, the former Defence Secretary Gotabaya Rajapaksa testified before the Lessons Learnt and Reconciliation Commission (LLRC) that the ‘civilians’ who were reported to have died during the final stages of the war were most likely LTTE combatants. He claimed that LTTE combatants removed their uniforms and wore civilian clothes, and that the LTTE must have suffered at least 6,000 casualties. At the time, this casualty figure corresponded to the initial United Nations figure of civilian casualties.<sup>21</sup>

Repressive erasure, however, can also come in non-violent forms and can be ‘encrypted covertly’.<sup>22</sup> For example, the Sinhala-Buddhist nationalist project of establishing a historical claim to dominance in Sri Lanka may be properly described

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<sup>20</sup> Connerton, *Ibid* at 60.

<sup>21</sup> Testimony of Gotabhaya Rajapaksa before the LLRC, 17 August 2010, available at <http://www.llrcarchive.org/2010/08/gotabaya-rajapaksa>, last accessed 8 June 2016. Also see, Peter Bouckaert, ‘Sri Lanka is still denying civilian deaths’, *The Guardian*, 5 September 2010, at: <http://www.theguardian.com/commentisfree/2010/sep/05/sri-lanka-still-denying-civilian-deaths>, last accessed 9 June 2016.

<sup>22</sup> Connerton, *Ibid* note 19 at 60.

as a project that aims to erase the historical claim other communities might have to the country. Sasanka Perera observes that the Mahāvamsa deliberately characterised wars waged by ‘Sinhalese’ rulers—such as the war waged by King Dutugemunu—as campaigns undertaken to ‘protect Buddhism and the Sinhalese nation’ from ‘foreign’ rulers—such as King Elara.<sup>23</sup> This narrative eventually dominated the consciousness of the Sinhalese majority and formed ‘an important aspect of...socialisation in contemporary Sri Lanka’.<sup>24</sup> This narrative is now firmly embedded in the current education system and can be found in history syllabi taught in schools.<sup>25</sup> Yet according to R.A.L.H. Gunawardana, who closely examines the original Mahāvamsa text and alternative historical sources, Dutugemunu’s campaign was unlikely to have been a ‘Sinhala-Tamil confrontation’.<sup>26</sup> He argues that the campaign merely aimed to capture territory and that it probably predated race consciousness. Hence the cosmopolitan claim to Sri Lanka as the historical homeland of *many* communities including Tamils has been systematically suppressed and replaced with a single dominant narrative on how the country belongs to the Sinhala-Buddhist community. While this narrative has evolved to accommodate other groups, it consciously projects a ‘host-guest’ dynamic. This projection casts the Sinhala-Buddhist community as the ‘host’ of the country, and all other groups as ‘guests’, and often

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<sup>23</sup> Sasanka Perera, *The Ethnic Conflict in Sri Lanka: A Historical and Sociopolitical Outline*, World Bank (February 2001), at 4.

<sup>24</sup> Ibid at 8. Also see Gehan Gunatilleke, *The Chronic and the Acute: Post-war Religious Violence in Sri Lanka*, International Centre for Ethnic Studies & Equitas (2015), at 35.

<sup>25</sup> Gunatilleke, *The Chronic and the Acute*, Ibid note 24 at 35-36.

<sup>26</sup> R.A.L.H. Gunawardana, ‘The People of the Lion: The Sinhala Identity and Ideology in History and Historiography’ (1979) 5(1) & (2), *The Sri Lanka Journal of the Humanities* 1.

explains the dominant mind-set of Sinhala-Buddhist nationalism.<sup>27</sup>

The two examples of repressive erasure cited in this section are intrinsically connected and mutually reinforcing. Gotabaya Rajapaksa refused to recognise the dead as ‘civilians’ by characterising them as ‘terrorists’. He therefore claims that no Tamil ‘civilians’ died. Incidentally, according to the Mahāvamsa, when King Dutugemunu laments the slaughter of ‘millions’ during his military campaign against Elara, a group of Buddhist monks console him, claiming: ‘Only one and a half human beings have been slain here’.<sup>28</sup> This claim dehumanised Elara’s troops—who according to the Mahāvamsa were Tamils—and justified indifference towards the final death toll. Though Rajapaksa attempts to make a factual claim and the monks attempt to make a philosophical claim, both claims emanate from the desire to erase the agency and legitimacy of the ‘other’. Thus both claims attempt to repressively erase the collective memory of Tamils—by ‘othering’ them in history and by editing out their recent victimhood.

Such claims also underpin the direct comparison of former President Mahinda Rajapaksa (Gotabaya Rajapaksa’s brother) to King Dutugemunu. Soon after the war, posters and monuments throughout the country likened Rajapaksa to

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<sup>27</sup> Gunatilleke, *The Chronic and the Acute*, Ibid note 24 at 50. This idea has been explored by Verité Research in its weekly publication ‘The Media Analysis’. See for example, Verité Research, *The Media Analysis*, Vol.3 Issue No.4 (4 to 10 February 2013).

<sup>28</sup> See Farzana Haniffa, Harini Amarasuriya & Vishakha Wijenayake, *Where Have All the Neighbours Gone? Aluthgama Riots and its Aftermath: A Fact Finding Mission to Aluthgama, Dharga Town, Valipanna and Beruwela*, Law & Society Trust (2015), at 7.

Dutugemunu.<sup>29</sup> Eranda Jayawickreme *et al* argue that this ‘juxtaposition’ is an example of a ‘ritualistic recollection of events and heroes whose mental representations include a shared feeling of success and triumph among group members’.<sup>30</sup> Moreover, these ‘glorifying myths’ and the ‘selective recounting of a group’s history’ underscore the Sinhalese majority’s sense of entitlement to land and power, which was vindicated through the defeat of the LTTE in 2009. It is in this context that the LTTE’s defeat and the state’s reclamation of territory in the North and East of Sri Lanka were met with widespread triumphalism in Southern parts of the country.<sup>31</sup> Such triumphalism formed a fundamental part of the state’s agenda of repressive erasure.

Second, the state may engage in ‘prescriptive forgetting’. Connerton describes this type of forgetting as an erasure that is believed to be ‘in the interests of all parties to the previous dispute and...can therefore be acknowledged publicly.’<sup>32</sup> A typical rhetoric that flows from this approach is that all must not only be forgiven, but also forgotten. A good example of this approach is the Treaty of Westphalia, which brought the Thirty Years’ War to an end in 1648. As recalled by Connerton, the Treaty ‘contained the injunction that both

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<sup>29</sup> Eranda Jayawickreme, Nuwan Jayawickreme & Elise Miller, ‘Triumphalism, fear and humiliation: The psychological legacy of Sri Lanka’s civil war’ (2010) 3(3) *Dynamics of Asymmetric Conflict* 208, at 214.

<sup>30</sup> Ibid. The authors cite V. Volkan, ‘Psychoanalysis and diplomacy: Part I. Individual and large group identity’ (1999) 1 *Journal of Applied Psychoanalytic Studies* 29, at 45.

<sup>31</sup> See International Crisis Group, *Sri Lanka: A bitter peace* (2010) International Crisis Group Asia briefing No. 99, at <http://www.crisisgroup.org/en/regions/asia/south-asia/sri-lanka/B099-sri-lanka-a-bitter-peace.aspx>, last accessed 8 June 2016.

<sup>32</sup> Connerton, *Ibid* note 19 at 61.

sides should forgive and forget forever all the violence, injuries and damage that each had inflicted upon the other.’<sup>33</sup> He also offers an interesting example of how implicit forgetting was seen as a necessary part of a transition from war to peacetime. In post-Second World War West Germany, it became clear that the country could not be returned to self-rule if the ‘purge of Nazis’ continued. Hence in the 1950s, the identification and punishment of former Nazis was progressively de-prioritised.<sup>34</sup>

Prescriptive forgetting is clearly evident in Sri Lanka’s post-war transitional justice discourse. In fact, initial attempts at repressive erasure later evolved into a strategy of prescriptive forgetting. At various points since the end of the war, state actors have advanced the need for ‘forgiving and forgetting’ to ensure national reconciliation. The project has two distinct but mutually reinforcing limbs.

The first involves the cultural legitimisation of ‘forgiveness’ as part of the so-called ‘Sri Lankan’ approach to dealing with injustice. Following the end of the war in 2009, state officials including then Minister of External Affairs, G.L. Peiris suggested that the Sri Lankan approach to justice was uniquely ‘restorative’ in its goals.<sup>35</sup> This position was then elaborated upon by former Attorney General and advisor to the Cabinet, Mohan Peiris, who in a speech titled ‘Sri Lanka’s Approach: Restorative Justice vs. Retributive Justice’, claimed that the Sri Lankan philosophy of transitional justice

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<sup>33</sup> Ibid at 62.

<sup>34</sup> Ibid

<sup>35</sup> See speech by Prof. G.L. Peiris, then Minister of External Affairs at the 9<sup>th</sup> IISS Asia Security Summit, The Shangri-La Dialogue, Singapore on 6 June 2010, at <http://www.mea.gov.lk/index.php/en/media/ministers-speeches?start=15>, last accessed 8 June 2016.

‘[f]avours restorative justice rather than retributive justice’.<sup>36</sup> He also claimed that this approach resonates with Sri Lanka’s own Buddhist tradition of ‘tolerance’ and ‘compassion’. Former High Commissioner to the United Kingdom, Chris Nonis also canvassed the cultural legitimacy of forgiveness. In an interview with CNN, he claimed that the LLRC’s approach was not to focus on ‘punitive justice where you punish people’ but on restorative justice.<sup>37</sup> The repeated references to a culture of forgiveness soon morphed into a quasi-official view on transitional justice in Sri Lanka.<sup>38</sup>

The second limb of the state project on prescriptive forgetting relates to the proposition that future reconciliation requires ‘moving on’ from the past. This idea does not seek to find legitimacy in cultural peculiarities, but rather in pragmatism. Just as West Germany saw the pragmatic value of de-prioritising the punishment of former Nazis, the Sri Lankan state advanced the idea that prosecutions of military personnel would undermine reconciliation.

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<sup>36</sup> See Mohan Peiris, *Sri Lanka’s Approach: Restorative Justice vs. Retributive Justice*, 24 November 2011, at <http://www.kadiringamarinstitute.lk/events/video.htm>, last accessed 8 June 2016.

<sup>37</sup> See ‘CNN interview with H.E. Dr. Chris Nonis, Sri Lankan High Commissioner to the United Kingdom’, *Official Website of the Sri Lankan High Commission to the United Kingdom* (November 2013), at [http://www.srilankahighcommission.co.uk/index.php?option=com\\_content&view=article&id=409:cnn-interview-with-he-dr-chris-nonis-sri-lankan-high-commissioner-to-the-united-kingdom-&catid=1:news&Itemid=95](http://www.srilankahighcommission.co.uk/index.php?option=com_content&view=article&id=409:cnn-interview-with-he-dr-chris-nonis-sri-lankan-high-commissioner-to-the-united-kingdom-&catid=1:news&Itemid=95), last accessed 8 June 2016.

<sup>38</sup> For a critique of this view, see Gehan Gunatilleke, *Confronting the Complexity of Loss: Perspectives on Truth, Memory and Justice in Sri Lanka*, Law & Society Trust (2015), at 90-97.



A pragmatic and ‘consequentialist’ argument against remembrance has also been presented by scholars such as David Rieff. Rieff argues ‘historical memory is rarely as hospitable to peace and reconciliation as it is to grudge-keeping, duelling martyrologies and enduring enmity’.<sup>39</sup> Similarly, in Sri Lanka ‘not dwelling on the past’ but ‘focusing on the future’ is often prescribed as the medicine that will eventually heal the wounds of the war.

Rieff’s concerns with respect to the dangers of manipulative and one-sided remembrance need to be taken seriously. Yet, as pointed out by Pablo de Greiff, such concerns should not justify a generalised antipathy towards remembrance.<sup>40</sup> He explains that the state’s duty to preserve memory is subject to a process of ‘examination, contestation, contextualisation, and verification characteristic of both historical methodologies and the work of, for example, truth commissions.’<sup>41</sup> While de

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<sup>39</sup> David Rieff, *Against Remembrance* (2011), at 55-56, cited in Pablo de Greiff, ‘The Duty to Remember’ in International Centre for Transitional Justice, *Does Collective Remembrance of a Troubled Past Impede Reconciliation?* (Online Debate), 16 May 2016, at <https://www.ictj.org/debate/article/duty-remember>, last accessed 8 June 2016.

<sup>40</sup> Pablo de Greiff, *Ibid.* However, Rieff offers an important caveat in David Rieff, ‘Collective Remembrance is Ideological, Not Impartial’ in International Centre for Transitional Justice, *Does Collective Remembrance of a Troubled Past Impede Reconciliation?* (Online Debate), 16 May 2016, at <https://www.ictj.org/debate/article/collective-remembrance-ideological-not-impartial>, last accessed 8 June 2016. He explains he and de Greiff are talking at cross-purposes, as de Greiff is ‘talking about societies in the immediate aftermath of war or murderous dictatorships’ while he is ‘talking about historical memory over a much longer timeframe.’ He clarifies that he certainly does not disagree with de Greiff about ‘what is owed to victims of atrocity’.

<sup>41</sup> Pablo de Greiff, *Ibid*

Greiff appears to stop short of recognising an explicit right to memory, he calls for the recognition of a ‘duty to remember’, which safeguards ‘accounts of the past that are sufficient to set inquiry in directions that have been previously kept hidden’.<sup>42</sup>

The present government does not hold a consensus view on prescriptive forgetting, possibly due to the multiple ideological positions accommodated within the current government coalition. The government’s decision to co-sponsor a resolution—which included commitments on the establishment of mechanisms for truth seeking and accountability for crimes—at the 30<sup>th</sup> Session of the UN Human Rights Council (UNHRC), is certainly commendable in this context.<sup>43</sup> Yet many key actors within the present administration appear to maintain the view that truth and justice could undermine reconciliation. For example, government Minister Champika Ranawaka, in his critique of the resolution, argued ‘the resolution, if implemented, could only result in a nationwide crisis, the end of which, if ever, would be furthest from national reconciliation’.<sup>44</sup> Ranawaka is a key ideologue among the Sinhala-Buddhist polity. His argument related to Sri Lanka’s commitment in the UNHRC resolution to prosecuting those accused of committing war crimes and crimes against humanity. Meanwhile, the government announced that a ‘Compassionate Council’ comprising religious leaders would be established as an

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<sup>42</sup> Ibid

<sup>43</sup> UN Human Rights Council Resolution, ‘Promoting reconciliation, accountability and human rights in Sri Lanka’, adopted at the 30<sup>th</sup> Session of the UN Human Rights Council, 29 September 2015, A/HRC/30/L.29

<sup>44</sup> Patali Champika Ranawaka, ‘From Puthumathalan to Geneva...’, *The Daily Mirror*, 23 September 2015, <http://www.dailymirror.lk/88597/from-puthumathalan-to-geneva>, last accessed 8 June 2016.

adjunct to the proposed Commission for Truth, Justice, Reconciliation and Non-recurrence.<sup>45</sup> Such developments betray the state's continuing willingness to prescribe 'forgiving and forgetting' as a central path to recovering from the past.

### **Sri Lanka's Memory Deficit**

The state's post-war strategy of prescriptive forgetting has led to a distinct gap in the memorialisation of past atrocities. In the study, *Confronting the Complexity of Loss*, I invited several participants (all of whom were victims or survivors of certain major violent events in Sri Lanka's recent history) to reflect on the importance of memorialising past events. It was explained that memorialising could take various forms. Such forms could be 'public' in nature, such as monuments or special dates set aside for the purpose of remembrance, or 'private', such as an almsgiving. Interestingly, the participants remained divided on the issue. Some insisted that memorialising was important—even indispensable, while others felt that closure depended on forgetting.<sup>46</sup> Three distinct attitudes to memorialisation could be detected among the views of these participants.

First, certain participants saw no benefit in memorialising their loss. One participant who lost a sibling during the Janatha Vimukthi Peramuna (JVP) insurrection, which took

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<sup>45</sup> 'What Ranil Didn't Say', Daily Mirror, 29 September 2015, at <http://www.ceylontoday.lk/52-105139-news-detail-what-ranil-didnt-say.html>, last accessed 8 June 2016; 'Arrangements in place to set up a Compassionate Council – PM', 13 October, News.lk (The Official Government News Portal of Sri Lanka), at <http://www.news.lk/news/politics/item/10256-arrangements-in-place-to-set-up-a-compassionate-council-pm>, last accessed 8 June 2016.

<sup>46</sup> Gunatilleke, *Confronting the Complexity of Loss*, Ibid note at 38 at 69-70.

place in the late 1980s in Southern parts of Sri Lanka, stated that remembering his brother was too painful and that he saw no point in memorialisation. For such individuals, the act of memorialisation amounted to a painful resurfacing of old wounds.<sup>47</sup>

Second, certain participants pointed to the ‘inevitability’ of commemoration. These participants claimed that an emotional—even existential—need to memorialise their loss arose even though there was no conscious attempt to seek such memorialisation. For many victims and survivors, there is often no option but to remember. It is not merely that they *will not* forget. It is that they *cannot* forget. Such inevitability of memory is observed in the work of Jorge Luis Borges, who according to Phillip Lee uncovers the inescapability of memory.<sup>48</sup> A participant of the above-mentioned study, whose husband disappeared after surrendering to the Army in 2009, observed:

How could I forget? Even if someone claims that they are trying to forget, it is a lie. If my husband comes back, then I may be able to forget it. If more sorrow keeps piling up, then it is hard to forget.<sup>49</sup>

Finally, certain participants considered memorialisation as necessary both for their personal benefit and for the benefit of others who endured similar loss. These participants emphasised the need for events and memorials that could facilitate collective remembrance. One participant whose son was abducted during the JVP insurrection argued that

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<sup>47</sup> Ibid at 69.

<sup>48</sup> Jorge Luis Borges, *Funes el Memorioso* (1942), cited in Lee, Ibid note 2 at 3-4.

<sup>49</sup> Gunatilleke, *Confronting the Complexity of Loss*, Ibid note 38 at 70.

memorialising was important because ‘we must tell our children and the future generations about the damage that was done.’<sup>50</sup> Similarly, a participant who lost his home during the July 1983 anti-Tamil pogrom observed: ‘the truth about what happened must be told and never forgotten’.<sup>51</sup>

Thus, for many victims and survivors, remembering the past can have both personal and public value. On the one hand, it can help maintain the memory of lost family members and facilitate truth, justice and reparations. On the other, it can prompt a society to reflect on its past and work towards the non-recurrence of violence in the future. In this context, victims and survivors will look to the state to acknowledge the inevitability and value of memory, and to facilitate memorialisation.

Despite the expectations of victims and survivors, the Sri Lankan state has failed to provide public spaces for memorialisation. There are very few public monuments or memorials in Sri Lanka that commemorate victims and survivors of man-made tragedies. While the last three and a half decades alone have seen a number of egregious tragedies, none of them are memorialised in a state-sponsored initiative. One of the only state sponsored memory sites existed in a location close to the Diyawanna Oya in Battaramulla, Colombo. The site—named the ‘Shrine of the Innocents’—was commissioned in 1996 by former President Chandrika Bandaranaike Kumaratunga on the behest of the Mothers’ Front, an organisation comprising families of those who disappeared during the JVP insurrection.<sup>52</sup> The memorial was

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<sup>50</sup> Ibid

<sup>51</sup> Ibid at 67.

<sup>52</sup> Jagath Weerasinghe, ‘Shrine of the Innocents: [Dis/Re]appearance of a memorial’, *Colombo Telegraph*, 15 December 2011, at <https://www.colombotelegraph.com/index.php/shrine-of->

designed by artist Jagath Weerasinghe to specifically commemorate the tragic abduction and murder of 33 school children of Embilipitiya Maha Vidyalaya located in the South of Sri Lanka.<sup>53</sup> Yet, in 2012, the government under Mahinda Rajapaksa seized the site and demolished the monument to make room for a market centre.<sup>54</sup>

In this context, it is unsurprising that the capital city, Colombo—the venue of recurring violence, including the 1983 anti-Tamil pogrom, civilian bombings by the LTTE and countless disappearances of youth during the JVP insurrection—does not have a single monument commemorating victims and survivors of recent atrocities. By contrast, Colombo has witnessed a proliferation of monuments dedicated to the military. At least three war memorials commemorating military casualties of war exist in Colombo. The first is a British War Memorial located in Victoria Park. The second is a memorial at Sri Jayawardanapura Kotte for the Indian Peace Keeping Forces. Finally, a memorial for Sri Lankan servicemen lost during the civil war that ended in May 2009 is located at the Parliament grounds in Sri Jayawardanapura Kotte. Thus the state, in defining war and post-war narratives, has emphasised the soldier's valour at the expense of the victim's grief. The

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[the-innocents-disre-appearance-of-a-memorial](#), last accessed 8 June 2016.

<sup>53</sup> Basil Fernando, 'Tales of two Sri Lankan massacres: The relevance of Embilipitiya to Bindunuwewa', (2005) 4(3) *Article 2* (Asian Human Rights Commission), at <http://www.humanrights.asia/resources/journals-magazines/article2/0403/tales-of-two-sri-lankan-massacres-the-relevance-of-embilipitiya-to-bindunuwewa>, last accessed 8 June 2016.

<sup>54</sup> Weerasinghe, *Ibid* note at 52; Gunatilleke, *Confronting the Complexity of Loss*, *Ibid* note at 38 at 70.

prescription appears to be clear: remember the soldiers who freed society from terrorism, not the victims and survivors who suffered in the process.

In the absence of state-sponsored memorials, civil society actors have created their own memory spaces. Such spaces exist in both the North and other parts of the country, and have been erected by victims and survivors of the war, and families of those killed or disappeared.

In the Northern Province, a memorial pillar for slain journalists and media workers was constructed and unveiled in March 2016 in Jaffna.<sup>55</sup> In fact, the eleventh anniversary of the assassination of journalist Dharmaratnam Sivaram was commemorated at this site in April 2016.<sup>56</sup> A number of journalists and political representatives attended the event. Another such memorial in the North exists in Uruthirapuram, Kilinochchi on a property owned by the Catholic Church. The memorial was built in 2010, and commemorates victims including Rev. Mariampillai Sarathjeevan, a priest who died during the last stages of the war.<sup>57</sup>

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<sup>55</sup> 'Memorial Pillar for slain journalists in Jaffna', omlanka, at 30 March 2016, <http://www.omlanka.net/news/4717-memorial-pillar-for-slain-journalists-in-jaffna.html>, last accessed 8 June 2016.

<sup>56</sup> 'Murdered journalist Sivaram remembered in Jaffna', Tamil Guardian, 29 April 2016, at <http://www.tamilguardian.com/article.asp?articleid=17821>, last accessed 8 June 2016.

<sup>57</sup> 'In the north, Tamils defy government to remember Fr. Sara, who died during the Civil War', 27 May 2014, at <http://www.asianews.it/news-en/In-the-north,-Tamils-defy-government-to-remember-Fr-Sara,-who-died-during-the-Civil-War-31197.html>, last accessed 8 June 2016.

Meanwhile, a monument dedicated to disappeared persons exists in Raddoluwa, Seeduwa, located in the Western coast of the country. Families of the disappeared from all parts of Sri Lanka visit the monument, and also hold an annual event every year on 27 October.<sup>58</sup> The event is attended by families who lost relatives during the JVP insurrection and during the war in a demonstration of solidarity. 27 October is significant in the area of Seeduwa, as the bodies of abducted labour activists Ranjith Herath and M. Lionel were found on the same date in 1989 at the Raddoluwa junction.

While the state has generally denied victims and survivors public spaces for memorialisation, the present government has offered one important concession. Since 2015, the Independence Day celebration on 4 February has included a moment of silence for all those who perished during the war. The gesture, first recommended by the LLRC,<sup>59</sup> is a break from the triumphalism of the past. Yet the gesture is at risk of becoming tokenistic if it is not followed by meaningful memorialisation that offers a permanent space for victims and survivors to commemorate their loss—on their own terms. Thus there is a continuing need to build public memory spaces in Sri Lanka.

## **Conclusion**

Memory has two personas. One is a fragile creature that is constantly at risk of extinction, and must be carefully restored to health. When victims and survivors are prevented from recalling their stories, the memory of a violent history may be

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<sup>58</sup> Gunatilleke, *Confronting the Complexity of Loss*, Ibid note 38at 71.

<sup>59</sup> Report of the Commission of Inquiry on Lessons Learnt and Reconciliation (November 2011) [LLRC Report], at para.8.303.



lost, and with it, any real hope of discovering the truth or securing justice. As Lee aptly explains: ‘The first step on the road to restitution is to resurrect or rehabilitate a people’s memory.’<sup>60</sup> A state has a duty to preserve this memory and facilitate such restitution. Thus a principled state committed to transitional justice ought to accept its duty to fulfil the right to individual and collective memory. On the contrary, a state’s attempts to repressively erase memory or prescribe ‘political, social, or cultural amnesia’ are ‘deliberately injurious’, and from a human rights perspective, deeply unjust.<sup>61</sup> Any meaningful transitional justice project must actively resist such attempts.

The other persona of memory is that of an obstinate animal that refuses to die. In her ground breaking book, *When the Soldiers Came*, Miriam Gebhardt demonstrated this remarkable side to memory.<sup>62</sup> She claimed that American soldiers raped thousands of German women during the Allied occupation of Germany following the Second World War. Her claim was based on certain records meticulously kept by Bavarian priests. Gebhardt’s book was published in 2015—seven decades after these atrocities allegedly took place. And thus the extraordinary and unrelenting stamina of memory can be understood through such work. While Gebhardt offers a sensational example, the Latin American experience perhaps demonstrates the futility of a state’s attempt to whitewash a history of violence. Thus a state in the aftermath of conflict must eventually grow to recognise and fear the stamina of memory. Instead of exerting energy to suppress memory, the state ought to embrace it as inevitable—just as victims and

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<sup>60</sup> Lee, *Ibid* note 2 at 6.

<sup>61</sup> *Ibid* at 4.

<sup>62</sup> Miriam Gebhardt, *When the Soldiers Came* (2015).

survivors often do. Thus even a pragmatic state should understand the value of facilitating memory.

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This chapter attempted to explore contemporary discourses on memory and to offer a case for the recognition of the right to memory, particularly in the context of transitional justice. However, the forgoing analysis reveals that developments in international human rights law and transitional justice have yet to result in a clear articulation of such a right. Meanwhile, states will continue to suppress memory either through openly repressive projects or passive initiatives that prescribe forgetting. In this context, state-sponsored denial of remembrance must be strongly resisted until it is transformed into state-sponsored promotion of memory. And in the process, arguments concerning principles and pragmatism must be offered in defence of the human right to individual, and eventually, collective memory. The fulfilment of this right perhaps reflects the final outcome of meaningful transitional justice. For it is through the transition of memory—from its fragmented form as individual recollections to its holistic form as collective remembrance—that we understand the true journey of transitional justice.

# **Comparative Cases and Lessons for Sri Lanka**

# 13

## **‘Saviours, Victims and Savages’ on the Post-Conflict Circuit: The Field of Transitional Justice<sup>1</sup>**



*Vasuki Nesiah*

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<sup>1</sup> This chapter draws on a report developed by the author on the current state of the field; the study argues that the field of TJ is facing a crisis of legitimacy and effectiveness at the current conjuncture and that this crisis has been fed by the failure of TJ to open up the hierarchies of power to accountability in most contexts where it has been applied. Often, TJ processes left perpetrators untouched, the structures of impunity intact and root causes of violence unaddressed. In part, this has occurred because the field has operated as if it were a sphere of technical engagement rather than a political intervention grappling with contextual imperatives. See Vasuki Nesiah, *Scoping Study: TJ Practice: Looking Back, Moving Forward* (Impunity Watch 2016). My thanks to *Impunity Watch* for assistance, collaboration and feedback through the development of the scoping study. Thanks to Bhavani Fonseka for the opportunity to revisit that report with a focus on what may be helpful to highlight, revisit and extend further in the context of the current debate about international participation in Sri Lanka. The title references Makau Mutua, ‘Savages, Victims, and Saviours: The Metaphor of Human Rights’, 42 *Harvard Int'l Law Journal* 201 (Winter, 2001)

## Introduction

“American movies, English books - remember how they all end?” Gemini asked that night. “The American or the Englishman gets on a plane and leaves. That's it. The camera leaves with him. He looks out of the window at Mombasa or Vietnam or Jakarta, someplace now he can look at through the clouds. The tired hero. A couple of words to the girl beside him. He's going home. So the war, to all purposes, is over. That's enough reality for the West. It's probably the history of the last two hundred years of Western political writing. Go home. Write a book. Hit the circuit.”

*Anil's Ghost*

Michael Ondaatje

On 1<sup>st</sup> October 2015, the United Nations Human Rights Council (UNHRC) passed a resolution supporting the establishment of post-war Transitional Justice (TJ) initiatives in Sri Lanka, with some measure of international participation. The human rights community, nationally and internationally, have been preoccupied with concerns that the government may seek to dilute or obstruct robust international participation in ways that would delegitimise and undermine the TJ process as a whole. In turn, there have been others in Sri Lanka concerned with the role of international actors and the worry that international agendas and priorities will be advanced at the expense of local priorities for reconciliation and development. Thus, both proponents and opponents of the resolution have focused attention on the roles that international actors may take in a TJ process.

This chapter addresses a related but different preoccupation from both these worries – it focuses on the field of TJ itself. It reflects a concern that a TJ orthodoxy is part of the ambient

climate within which the Sri Lankan TJ initiative is envisioned and advanced; indeed, in some ways the focus on the official role of international actors has distracted from subjecting the field's privileged agendas and canonical approaches to critical scrutiny. It is concerned that without careful planning and strategic pressure on the international community, international engagement can embrace a TJ orthodoxy that may delegitimise and undermine justice struggles in Sri Lanka. The 2015 UNHRC Resolution was passed at a moment when international initiatives in the TJ field are facing a crisis of legitimacy in a diverse range of contexts.<sup>2</sup> The legitimacy crisis is most acute in situations where TJ initiatives have been embedded in military conquest such as the US initiated Iraqi High Tribunal that convicted Saddam Hussein for Crimes Against Humanity in the aftermath of the US invasion of Iraq.<sup>3</sup> However, the legitimacy issues have dogged the field in other contexts too. For instance, the TJ processes that were initiated after the Arab spring have been condemned as misdirected and ineffective – a superimposition of an international paradigm that did not address local context.<sup>4</sup> Similarly, the International Criminal Court, the most prominent TJ institution in the international public sphere, has faced criticism for imperial hubris<sup>5</sup>, the neglect of local priorities<sup>6</sup> and systematic bias. It has been accused of anti-

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<sup>2</sup> <http://www.impunitywatch.org/html/index.php?alineID=273>

<sup>3</sup> Arguably, this sequence of events not only raised questions about the local legitimacy of the tribunal, it also compromised the actions of the Iraqi parliament.

<sup>4</sup> See unpublished manuscript of Noha Aboueldahad, *Re-thinking Tj: The Prosecution of Political Leaders in the Arab Region: A comparative case study of Egypt, Libya, Tunisia and Yemen* [Referenced in email to author on 28 January 2016]

<sup>5</sup> Stephanie Vieille, *Transitional Justice: A Colonising Field?*, Amsterdam Law Forum 4:3;

<sup>6</sup> For a criticism along these lines of its work in Uganda see Adam

African bias and there have been moves from the African Union to withdraw from the Court.<sup>7</sup> South Africa, Burundi and Gambia have already initiated steps for such a withdrawal. In some contexts internationally driven TJ initiatives have appeared to echo colonial logics of ‘civilizing’ missions that have displaced and denigrated local justice traditions in the name of universal laws and norms that have little or no purchase in holding powerful northern states accountable.<sup>8</sup> In others, they have been linked to ideological biases or what Bali has termed “market-friendly HR”<sup>9</sup>. In yet others, they have been seen to generate new modalities of global governance through depoliticised, bureaucratised regimes of expertise and decontextualized TJ blue prints.<sup>10</sup> The issues are even more fraught when situated in relation to the power and politics of donor funding dynamics in the TJ field. In many contexts the post-conflict industry contributes to channelling policy-making and institutional development into funding driven bubbles that are increasingly removed from grassroots influence and democratic legitimacy.

Many of these criticisms have emerged from activists and scholars invested in struggles against impunity who advance

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Branch, ‘Uganda’s Civil War and the Politics of ICC Intervention’, *Ethics and International Affairs*, 21 (2) p.179-198 (2007)

<sup>7</sup> <http://www.theguardian.com/world/2016/feb/01/african-union-kenyan-plan-leave-international-criminal-court>

<sup>8</sup> Rosemary Nagy, TJ as Global Project: Critical Reflections

<sup>9</sup> Upendra Baxi, *The Future of Human Rights* (New Delhi: Oxford University Press 2002)

<sup>10</sup> Sandra Rubli, *Transitional Justice: Justice by Bureaucratic Means?*, *Swisspeace* 4 (2012)

([http://www.swisspeace.ch/fileadmin/user\\_upload/Media/Publications/WP4\\_2012.pdf](http://www.swisspeace.ch/fileadmin/user_upload/Media/Publications/WP4_2012.pdf)) and David Kennedy, ‘The Politics of the Invisible College: International Governance and the Politics of Expertise’, 5 *European Human Rights Law Review* 2001.

these criticisms not to defeat justice struggles but to further them. These are not criticisms that can be dismissed merely as the cynical recourse of repressive states or the misguided articulation of extremist nationalism. Undoubtedly such currents exist but even if we bracket the claims of repressive states and extremist nationalism, we will still need to confront the persistent and profound legitimacy questions regarding the TJ orthodoxy. Not grappling with the legitimacy challenges only compounds them and sharpens the dissonance between justice perceptions in the global North and the global South. Indeed, in cases where powerful countries of the global North have been vocal advocates for a TJ mechanism in a country in the global South (such as Sri Lanka<sup>11</sup>), this role and these mechanisms have been particularly vulnerable to legitimacy challenges with charges of double standards and imperial hubris.<sup>12</sup> Moreover, questions of local ownership remain troubled when TJ processes are initiated, shaped and controlled by the global North. From Burundi to Bosnia, TJ processes have been compromised because they were established “under international pressure”.<sup>13</sup> Thus analysing the approaches that have contributed to these ‘persistent and

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<sup>11</sup> The core group of countries who drafted the initial resolution on Sri Lanka included US, Britain, Montenegro and Macedonia

<sup>12</sup> See also David Bosco, *Rough Justice: The International Criminal Court in a World of Power Politics* (Oxford 2014)

<sup>13</sup> Peter Uvin discusses this in relation to the fact the 2000 Arusha Peace and Reconciliation Agreement that brought an end to a 12-year civil war in Burundi had provisions for transitional justice that were seen to be the result of international pressure; This includes a call for the government to get the assistance of the Security Council to establish an “International Judicial Commission of Inquiry into Genocide, War Crimes and other Crimes against Humanity” (Article 6) and a National Truth and Reconciliation Commission (Article 8). See Uvin in Rosalind Shaw and Lars Waldorf, with Pierre Hazan (eds.), *Localising Transitional Justice: Interventions and Priorities after Mass Violence* (Stanford University Press 2010)



profound legitimacy questions' becomes particularly urgent in the current conjuncture.

This chapter is driven by a focus on interrogating the dominant orthodoxy within the TJ field; it is not focused on international actors as such. I believe the two issues should not be collapsed into each other. In some cases international actors are carriers of the orthodoxy, in some cases international actors can be particularly powerful allies in challenging that orthodoxy and working in solidarity with heterodox approaches. Over the last few decades the growth of the TJ field has been a transnational process with international actors playing a particularly significant and paradoxical role – central to the field's consolidation and prominence, but also central to the crisis of effectiveness and legitimacy. How we assess the pros and cons of the role of 'international actors' and 'national actors' depends on political context and the specific actors involved. For instance, a number of TJ initiatives have been advanced in both Sierra Leone and Argentina in collaboration with international actors. International actors played a dominant role in Sierra Leone and determined questions of priority and strategy in a number of pivotal situations. In contrast, local justice activists were behind the wheel in Argentina and groups like CELS were the ones making political judgments about transitional justice goals, agendas and strategies. Dominant approaches in the field of TJ may travel via international actors and the engagement of international organisations, but they also travel through national actors. The reach of the TJ field is global and many national actors have encountered the field through trainings, project proposals and best practice manuals that have helped school their own approaches and disseminated the dominant orthodoxy and its privileged agendas and canonical approaches as the transnational post-conflict 'common sense'. This dissemination is also enacted through

the constellation of different mechanisms that consolidate and embed laws, norms, policies and practices within the structures and discourses of global governance. It is equally plausible for local actors to be ‘carriers’ of the TJ orthodoxy and a focus on the identity of the TJ actors alone can distract from other dimensions of politics and policy that are at stake in justice struggles. Thus this chapter brackets the specific official role of international actors and seeks to shift the focus to how the TJ field functions as a carrier of the biases embedded in the norms, laws, policies and practices that constitute the dominant orthodoxy, with particular attention to dimensions that have diluted or obstructed struggles against structures of impunity. The conclusion briefly looks at how hybrid processes have addressed these struggles.

### **The Transitional Justice Orthodoxy: Privileged Agendas and Canonical Approaches**

The last two and half decades have seen the TJ field grow exponentially on many fronts – from legal and policy developments, to increased financial and institutional investment to an expanded network of activists/practitioners/scholars working in the field. Most significantly this period has seen the development and maturation of TJ mechanisms such as truth commissions, reparation programmes and internationalised prosecutions. This growth has been accompanied by consolidation and institutionalisation within the UN, regional organisations including the European Union (EU) and African Union (AU), multilateral and donor agencies, government departments, INGOs, NGOs and many other arenas. The consolidation of the field has involved anchoring privileged agendas and canonical approaches. The rest of this chapter seeks to scrutinise dominant approaches to the field and will identify

and analyse three dimensions that warrant particular examination because they carry the risk of diluting or obstructing struggles against structures of impunity: 1. Technocracy, 2. The neglect of structures and systems and 3. Prioritising governance.

### *1. Faithocrats and Technical Assistance Models*

In the early years of the development of the TJ field, the field grew and thrived through a process of comparative learning. Now that the field has consolidated, 'learning' is too frequently translated to mean 'dissemination' of pre-honed methodologies and models. These methodologies and models travel as expert technical assistance through UN offices, foreign government agencies or INGOs. This work has pushed for TJ to become not only an arena of human rights activism but also an area of 'technique'. Engaging with the field of TJ through the policies and practices framed through the notion of 'technical assistance' has undermined attention to the fundamentally political nature of challenging impunity. Comparative learning and transnational solidarities have been a critical dimension of the human rights field; however, when channelled through a depoliticising 'technical assistance' lens, it has often hindered learning about context, defeated innovation and significantly weakened the effectiveness of such engagements. With the consolidation of the TJ field within international institutions and the development of a globally mobile community of professionals, TJ has become not only an arena of human rights activism but also an area of 'technical expertise'.

Much of the literature on TJ from within the field is focused on how to establish TJ institutions in a range of contexts; indeed conflict itself is seen as an adequate catalyst for the relevance of TJ processes (with allowance for variation in

timing and sequence). Thus often post-conflict human rights interventions travel in the form of a menu of TJ institutions, understood by the field as universally relevant but with local context determining timing and sequencing. In short, TJ is seen as a pragmatic process of engineering well functioning institutions and the relevant knowledge is framed as technical assistance – namely, neutral, apolitical and professionalised. The resultant ‘how to’ literature that dominates the field includes lists of recommendations that are said to enhance TJ processes, and, concomitantly, lists of warnings regarding obstacles that may jeopardise TJ processes. The professionalization of the field has also meant that there are privileged approaches to advancing norms and policies of justice, truth and reparations that have become designated as the ‘knowledge’ shared through technical assistance and capacity building.<sup>14</sup>

It is worth highlighting a few different concerns with the predominance of a technical assistance model where TJ is approached as a matter of apolitical expertise and issues of political context, local relevance, legitimacy and effectiveness get subordinated. When a technical assistance framework

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<sup>14</sup> For instance, the EU policy document emphasises its equation of TJ with “legacies of war crimes, genocide, crimes against humanity and other gross violations of human rights” – this understanding of TJ is dominant but not exclusive and arguably different communities may choose different priorities. For instance, there is increased focus in many contexts of economic exploitation, including those intertwined with human rights abuse (such as the actions of Shell in Ogoni land, Nigeria) and a contextually oriented TJ policy will be able to accommodate multiple and diverse visions of TJ. This possibility is recognised in the AU framework for TJ which suggests that we may “Expand the Mandate of Transitional Bodies to include Socio- Economic and Cultural Rights”. p.20 of African Union Transitional Justice Framework (AUTJF), Draft (April 2014).

interprets recommendations for an inclusive process as a context-free operationalisable checklist of best practices, it may defeat democratisation more than it advances it. A recurrent concern is that while the field presents itself as decrying blue prints for TJ, the technical assistance model engenders precisely such a de-contextualised approach.<sup>15</sup> The very proliferation of best practice lists, TJ tools and handbooks have tended towards establishing a canonical approach to the field and a coterie of ‘faithocrats’ (to borrow Paul Krugman’s term for anti-political technical idolatry).<sup>16</sup> It is an approach that can (and arguably has) narrowed the potential of TJ processes by privileging models that are legible to the field. In this way dominant approaches get naturalised as technique, advocates with agendas bear the mantle of technocrats with professional purpose, and those professionalised human rights experts get valued over activists grounded in local justice struggles.

In some cases this has been the route for inhibiting innovation and context specific approaches. Indeed it can deter

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<sup>15</sup> Significantly, even when there is recognition of the need to pay attention to context, the field is so deeply habituated to the claim to apolitical neutrality that it is often caught in internally contradictory calls for apolitical contextual analysis. For instance, Makau Mutua rightly calls for ICC to pay more attention to the political context of Kenya, Uganda, Sudan, and the Central African Republic; yet the very same article that calls for political analysis of the internal dynamics in each of these countries to inform the ICC’s work also advocates for the ICC to depoliticise its decision making process. See Makau Mutua, ‘The International Criminal Court in Africa: Challenges and Opportunities’, NOREF Working Paper,

<http://www.ciaonet.org/attachments/17119/uploads>

<sup>16</sup> Paul Krugman, ‘Faithocrats’, New York Times (14 July 2015) available at

[http://krugman.blogs.nytimes.com/2015/07/14/faithocrats/?\\_r=0](http://krugman.blogs.nytimes.com/2015/07/14/faithocrats/?_r=0), accessed 13 March, 2016

innovation, marginalise alternative ‘knowledges’ and displace local activists and local capacity. For instance, best practice lists regarding legalistic approaches to due process have rendered the international TJ community suspicious of unconventional approaches that may not fit dominant due process norms even if they have other virtues specific to the local context. In the past, such suspicion of the unconventional has been directed at large-scale *sui generis* innovations like Gacaca in Rwanda, as well as small-scale efforts to modify local traditions like explorations of community based accountability processes by the Acholi in Uganda.<sup>17</sup> The privileging of state action (such as prosecutions and official commissions) may have distracted from, and marginalised, community-based institutional experiments that are more creative, if incremental, investments in long-term anti-impunity momentum. Another instructive example can be found in the international response to the transitions in the MENA region where TJ was approached as if it were part of a post-conflict checklist of activities for human rights professionals and the international post-conflict industry. Big international comparative TJ conferences were held in Tunisia and Egypt in 2011, to “introduce” the canonical concept of TJ to the region, and a range of international actors, including the UN and NGOs, sprang into action to advise the new authorities, without much preceding analysis on whether the political context was ripe for TJ or whether there were alternative methods to advancing the struggle against impunity that were not captured by the TJ syllabus. Even if reproducing the blue

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<sup>17</sup> Rosalind Shaw and Lars Waldorf, *Localising Tj: Interventions and Priorities After Mass Violence*; Allen and MacDonald, *Post-Conflict Traditional Justice: A Critical Overview*, [http://eprints.lse.ac.uk/56357/1/JSRP\\_Paper3\\_Post-conflict\\_traditional\\_justice\\_Allen\\_Macdonald\\_2013.pdf](http://eprints.lse.ac.uk/56357/1/JSRP_Paper3_Post-conflict_traditional_justice_Allen_Macdonald_2013.pdf)

print is faster, it is often more important to focus on the path to the goal, however slow moving.

Combating impunity entails complex, political engagement that need to take seriously the opportunities and constraints of local political contexts. The technical assistance model treats TJ institutions as paths to a goal rather than themselves being opportunities for socially transformative action against the structure of impunity. Rendering the family of TJ institutions into technical blue prints that need to be faithfully reproduced neglects how combating impunity necessarily entails nuanced political analysis of local context, and an informed reading of the political climate. For instance, in countries as diverse as the Philippines, Peru, Tunisia and Guatemala, revelations of corruption by the political leadership gave momentum to TJ initiatives.<sup>18</sup> In all of these contexts, when politically engaged anti-impunity activists saw vulnerabilities in the dominant structure of impunity they were able to change strategies and be responsive to political opportunities in ways that were agile and creative. They advanced political analysis that drew connections between accountability for corruption and accountability for human rights abuse. These examples of local activist led, politically engaged approaches to TJ stand in contrast to the dominance of a technical assistance framework.

When TJ processes have functioned like mechanical exercises for the international post-conflict industry, TJ actors have been ill prepared to respond to efforts by powerful actors to protect impunity through campaigns to discredit, stall and

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<sup>18</sup> For instance, note reparations campaigns against the estate of Ferdinand Marcos in the Philippines, criminal prosecutions against Fujimori in Peru, and the public protests calling for political reform and the resignation of Molina and other leading political figures in Guatemala.

defeat anti-impunity efforts.<sup>19</sup> In some countries activists refashioned themselves as ‘experts’ who could speak an internationalised discourse and engage in international human rights fora; these dynamics exacerbated inequalities within civil society in a number of contexts, while also narrowing agendas to those that would fit within the terms of a TJ discourse privileged by the UN or powerful international NGOs. In sum, the technical assistance approach to TJ encourages de-politicised and de-contextualised engagements; it defines expertise as professionalised and internationally mobile knowledge rather than knowledge that is situated in activist commitments and knowledge of local context; it favours models that are already legible to the field and its ‘best practices’, rather than innovations that may extend or challenge the field as we know it.

## *2. The Neglect of Structural Impunity and Systemic Vulnerability: Individualisation, Moralisation and Legalisation*

In 2001 Makau Mutua published an article arguing that a metaphoric triad of Saviour-Victim-Savage captured the dominant framework of the human rights movement.<sup>20</sup> Arguably this framework speaks with particular acuity to the way the field describes TJ institutions as crusading into post-conflict zones as human rights saviours vindicating victims’ right to redress against the savagery of perpetrators. TJ institutions are scripted into a heroic role as “the victim’s bulwark against tyranny”. The simple yet complex promise of

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<sup>19</sup> For instance, these limitations characterised the work of the ICTY in the Balkans and of the ICC outreach office in Kenya and contributed respectively to the legitimacy crisis of the Special Tribunal in the Balkans and the defeat of the ICC’s case against Kenyatta. I am indebted to Marlies Strappers for both these examples.

<sup>20</sup> Mutua 2001 Ibid.



the saviour is freedom: freedom from the tyrannies of the state, tradition, and culture. But it is also the freedom to create a better society.” This ‘simple yet complex promise’ articulates in ways that reflect and refract an underlying frame-narrative that individualises both victim and perpetrator. Individualisation makes it easier to then render the former an innocent, and the latter, a savage.

TJ institutions have been structured to prioritise individuals responsible for or victimised by gross human rights abuses, commonly defined to include killings, disappearances and torture. These priorities have often shaped the agendas of prosecutors and other actors involved with post-conflict criminal justice. The Rome Statute’s focus on individual responsibility for war crimes, crimes against humanity and genocide reflect a further narrowing of prosecutorial priorities to individuals involved in large-scale violence. Truth commission mandates also often focus on individuals responsible for or victimised by gross human rights violations even when histories of killings, disappearances and torture may be intertwined with other serious human rights violations such as economic exploitation or racial injustice or aimed at crushing dissent against systemic injustices. Similarly, even while recognising that many people have been victimised by a long-standing conflict in numerous and complex ways, reparations programmes have defined beneficiaries as those who have suffered gross human rights violations.

In most cases a focus on gross violations of civil and political rights alone has proved inadequate in capturing the historical record because it neglects the structural factors that enabled and shaped human rights abuse in a particular context, i.e. the architecture of impunity. In this vein the South African TRC has been criticised for how its individualising focus fundamentally distorted the historical record of systemic racial

crimes that constituted apartheid, including the benefits that accrued to whites from that system's exploitation and oppression of blacks and other people of colour.<sup>21</sup> Race and race referenced calculations of collective debt and collective grievances were systematically de-emphasised. As the TRC emerged in the liminal space between apartheid and 'the future', it is the international human rights framework that shaped the notion of a de-racialised human that could stand as talisman for the transition. Through an SVS channelled individualisation, the TRC established continuities, not with the anti-apartheid struggle, but with the international human rights framework.<sup>22</sup> In most contexts there is a need to develop

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<sup>21</sup> See Madeline Fullard, *Dis-placing Race: The South African Truth and Reconciliation Commission (TRC) and Interpretations of Violence* (CSVN 2004); Fiona Ross, *Bearing Witness* (Pluto 2003); Mahmoud Mamdani, *Amnesty or Impunity? A Preliminary Critique of the Report of the Truth and Reconciliation Commission of South Africa (TRC)*, *Diacritics*, Volume 32, Number 3-4, Fall-Winter 2002.

<sup>22</sup> SVS is the short hand for the Saviour-Victim-Savage triad (as referenced earlier) that Makau Mutua described as a metaphor for the human rights movement in his now famous essay, "Savages, Victims, and Saviours: The Metaphor of Human Rights" (Mutua 2001 *Ibid.*). He argued that the dominant dynamics of the human rights movement can be captured through "a subtext that depicts an epochal contest pitting savages, on the one hand, against victims and saviours, on the other". Makua argues that the human rights movement sees itself as a saviour ("the good angel who protects, vindicates, civilizes, restrains, and safeguards ... against tyranny") rescuing non-European victims ("powerless, helpless innocent") from non-European savages ("the state is depicted as the operational instrument of savagery ... implementing the project of the savage culture."). Makua is concerned that without an honest reckoning with this legacy of Western bias, the human rights movement is likely to fail and intends his essay as a wake up call to rethink, revise and renew the human rights framework; in particular to "to create a new multicultural human rights corpus" (p. 201-4, 245).

a broader understanding of serious human rights violations; there is a need to grapple with, not only individual crimes, but collective ones, not only with specific abuses but systemic abuses that can be investigated in context. Indeed, in a country such as South Africa, where race was a systemic fault line that shaped every dimension of its history, the focus on the individual abstracted from race and context was a basic distortion of the human rights record. Yet, that distortion was itself a symptom of the biases carried forward by the international human rights movement. A narrowly legalistic focus on incidents that are human rights violations against individuals ignores the very structures that enabled them, including ones that empowered the beneficiaries of human rights abuse and reproduced the vulnerability of human rights victims. Even when the commission was functioning, civil society groups criticised the commission for not addressing the structural dimensions of apartheid. They argued that focusing on individual victims and perpetrators neglected the larger story about life under apartheid for all South Africans – namely, that it was a racialised system that rendered some as structural beneficiaries while others were structurally vulnerable; a story focused on individual violations ignored larger patterns of human rights violations and institutional complicities that helped reproduce and entrench the system. In response to these criticisms, the South African TRC introduced thematic and institutional hearings that proved a novel window into the structural dimensions of apartheid. These hearings were able to offer a complex window into how apartheid impacted particular groups (such as women or youth, for instance), as well as into how different social institutions (such as the church or political parties, for instance) functioned in the context of apartheid. The introduction of these hearings offer one small effort in an institution and in a field that tended to neglect structural factors but its significance must not be underestimated. These

hearings are interesting and important because they offer an instructive example of a home-grown innovation to respond to the specifics of their context; they also evidence how even the most established institutions can be open and responsive to civil society criticisms. The institutional and thematic hearings highlighted historically specific structural dimensions of apartheid and offered a basis for shaping institutional reform and making recommendations for social change. That said, some would argue that this was ‘too little too late’ and it was individualisation that fundamentally shaped the commission’s work and its legacy.

In her analysis of the Eichman trial, Hannah Arendt famously argued that what was extraordinary about Eichman was his banality<sup>23</sup>; monstrous outcomes such as the holocaust can

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<sup>23</sup> Adolf Eichmann, a member of the SS, gradually rose in the ranks of the Nazi hierarchy where he ended up having a pivotal role overseeing forced deportations of Jews. Initially these were deportations out of the country but eventually he oversaw operations transporting people to their death in Auschwitz. At the end of the war Eichmann fled to Argentina but in 1960 he was captured by Israel and brought back to Jerusalem for trial. Arendt who like many other Jewish academics had fled to teach in the New School travelled to Israel to cover the trial on an assignment from the New Yorker. Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil*, (London-New York, Penguin Books, 1994). Arendt argued that what was remarkable about the Eichmann she encountered at the trial was not his anti-Semitism but his opportunism, not extraordinary evil, but ordinary conformism ‘willing to undertake horrific responsibilities for career success.’ Arendt argues that it is Eichmann, not Hitler, who exposes the historical truth of the Holocaust.” Namely, “the more important, terrible fact that banal, commonplace conformism can enable and implement genocide.” Mass atrocity requires many actors; actors driven not by monstrous intent but by ambitions and ideologies which insidiously integrate governance and atrocity. In this way, Arendt pushes us towards

result from the banal complicities of bureaucratic conformity and the seductions of belonging. In contrast, the focus on the savagery of individual perpetrators deters attention from how the architecture of the system enables abuse. For instance, it could be argued that the focus on the monstrosity of Charles Taylor's responsibility in the war in Liberia and Sierra Leone, and the attendant sensationalism of the trial, distracted from the much wider problem of corrupt party politics in Liberia and the support that system (and Taylor) enjoyed through alliance with powerful Western nations; it distracted from the political economy of violence in West Africa, including the feeding of that violence through the international trade in timber, diamonds and such that fuelled those conflicts, engendered vulnerabilities and generated profits<sup>24</sup>; trade that was itself located in systemic patterns of power and exploitation at a national and international level. Challenging the impunity that Taylor had enjoyed was important but arguably, the individualisation, moralisation and legalisation of that project by the Special Court for Sierra Leone worked to shield the socio-political systems that anchored and shaped those violations from challenge; thus many pillars in the architecture of that system remain strong today.

The focus on individual cases of human rights violations, and the individual perpetrators and victims involved in the particularities of that case, neglects the structural nature of human rights abuse but it also has many companion biases.

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complex explanations for the complex regimes that have spawned mass atrocity. In contrast, a focus on monstrous acts shifts our gaze away from how the enabling conditions of abuse become institutionalised." *Transitional Justice and the Trials of History*" in Ruth Buchanan and Peer Zumbansen (eds), *Law in Transition*, (Hart 2014)

<sup>24</sup> <http://business-humanrights.org/en/dlh-lawsuit-re-liberian-civil-war> and <http://mondediplo.com/2004/01/15timber>

For instance, the field is largely oriented towards a focus on incidents of extraordinary violence rather than more systemic violations that are enabled by and reproduce power relations that render some communities routinely vulnerable to human rights violations and benefits others with routinized impunity for those violations. Thus the scale of incidents of violence that enter the territory of war crimes and crimes against humanity garner international attention, while more routine and quotidian abuses that constitute the formative backdrop to those incidents are not addressed. Yet socio-political analysis of the architecture of both abuse and impunity – the granular analysis of the how the system works in its localised details, as well as macro analysis of the wider historical and global arc - is a critical starting point. In some cases commission reports move in that direction. For instance, the Sierra Leone Commission did important work linking details of gendered dimensions of property law with the political economy of the diamond trade as part of the “truth” regarding the drivers of vulnerability, abuse and impunity. This is an instance of the powerful potential of TJ institutions to make these connections and expose how established hierarchies of power and abuses are enabled and reproduced through those structures. However, if the focus of TJ institutions remains trained on the symptoms rather than the underlying systems, we fail to launch a more fundamental challenge against impunity and vulnerable communities will remain vulnerable. Indeed in some cases they may even demobilise victim organisations and human rights movements by domesticating their energies into prosecution and commission processes that do not go beyond the symptoms of abuse.

Another companion bias to individualisation is a focus on the body and notions of catastrophic violence on the body as a *cause celebre* that elides systemic patterns of violations, and abuses that do not fit that picture of bodily catastrophe. For

instance, arguably, sexual violence has become just such a *cause celebre* for the TJ field, and that focus has become mainstreamed within TJ institutions through a range of initiatives including security council policy commitments<sup>25</sup>, jurisprudence on sexual violence in international courts<sup>26</sup>, outreach and collaboration with those working on sexual violence and funding streams supporting work on sexual violence. At the same time we haven't seen systematic engagement with other historically marginalised communities; indeed, there has been little attention to the systemic nature of factors such as indigeneity, race, religion and class in mapping vulnerability to human rights abuse or impunity viz a viz responsibility for human rights abuse. In some cases, the focus on victims of sexual violence has itself crowded out other issues by absorbing institutional resources. This has been particularly significant when sexual violence was treated as the least controversial issue to tackle; an issue that can help to distract from more politically contentious issues.<sup>27</sup> This has been the case, even in relation to other (non-sexual violence) dimensions of gendered abuse. For instance, the Peruvian commission report paid attention to sexual violence and the need for accountability for acts of sexual violence with Peruvian TJ processes; however Peruvian women's groups also criticise the report for neglecting a host of other gendered

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<sup>25</sup> Note Security Council Resolutions 1325 (2000), 1820 (2008), 1888 (2009), 1889 (2009), 1960 (2010), 2106 (2013) and 2122 (2013).

<sup>26</sup> See the ICC's policy paper on sexual violence in conflict: <http://www.icc-cpi.int/iccdocs/otp/OTP-Policy-Paper-on-Sexual-and-Gender-Based-Crimes--June-2014.pdf>; For a broader summary of international jurisprudence on sexual violence see <http://justiceinconflict.org/2014/03/10/prosecuting-sexual-violence-some-steps-forward-but-still-a-long-way-to-go/>

<sup>27</sup> This is partly for sexist reasons that depoliticise gender issues as ones of humanitarian moralism or see rape and other bodily violations as being the terrain of innocent victims.

dimensions of the Peruvian human rights record (such as conflict related displacement) that may not itself capture attention as an act of extraordinary violence on the body.<sup>28</sup> The focus on events entailing extraordinary violence, rather than the continuities with contexts of ordinary violence, can narrow the remit of accountability processes.

For TJ policies and practices to better address the priorities of local communities in ways that are sustainable and effective would require attending to the relationship between structural marginalisation and vulnerability to human rights abuse. In the Sri Lankan case it would require focusing not just on the ‘monstrosity’ of particular individuals such as Prabhakaran or Gotabaya but looking instead at the system that produced them. It may require a focus on patterns of continuity and discontinuity regarding systemic abuse over a period of time, rather than a narrow focus on instances of extraordinary physical violence. Thus rather than focus solely, or even primarily, on the last phase of the war in Sri Lanka, it would require situating that phase in many decades of conflict that rendered certain lives dispensable. It was a ‘conflict’ that was fought not only with bombs and guns, but also laws and votes, nationalism and public policy, discourses (domestic and international) of terrorism and national security. A more complex approach to a victim centered orientation may also require strategies that go beyond legalistic, monolithic and individualised notions of victimhood to situate victims in patterns of collective discrimination and social marginalisation on account of factors such as class, race, indigeneity, religion etc. Thus not abstracting someone like Krishanthi Kumaraswamy from her context, but tracing the dimensions of ethnicity, region and gender that rendered her vulnerable. The particular factors that shape such vulnerability will vary

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<sup>28</sup> Interviews conducted by the author with Peruvian feminists.



from context to context and to this extent the human rights priorities that any particular TJ process engages with will also be defined contextually – thus for any Sri Lankan TJ initiative addressing the three decade long war it may be particularly significant to look at ethnicity, language and region, and their intersection with class, caste and gender. Concomitantly, shaping TJ agendas to attend to the relationship between structures of power and patterns of human rights abuse also requires going beyond a focus on perpetrators alone to look also at beneficiaries of human rights violations and develop anti-impunity initiatives that aim at the nexus between beneficiary and perpetrator. It would require going beyond limited temporal mandates that restrict the focus on the human rights violation to look also at the preconditions or enabling conditions of the violation and impunity.

### *3. Governance for a Neo-liberal Peace*

The field of TJ has got traction in international law and policy circles in an era that has seen the emergence of conflict zones as an arena for normative theorising, socio-economic policy interventions and legal projects. As both an instance of this process, and as a symbiotic adjunct to this process, we have seen the rise of humanitarian intervention (sometimes explicit and often implicit) and new initiatives focused on the post-conflict space that have been charted through notions of ‘failed states’ and ‘governance’ failures. These notions have been critical in legitimising the role of international actors in such spaces. Even as the field of TJ has developed and thrived, related fields, such as development and humanitarian assistance, have been co-travellers in engaging with these contexts. These fields have included humanitarian intervention, conflict resolution/peace-building, democratisation/rule of law/nation building (human rights, basic freedoms, civil society promotion), development,

women's rights in conflict etc. These allied fields of intervention have sometimes been in tension and sometimes been complementary but they have impacted each other. In particular, these fields have had a mutually reinforcing dynamic in emphasising the 'conflict'/'post-conflict' context as an arena of intervention. The emergence of the 'conflict'/'post-conflict' context as an anchor for various allied policy interventions has sometimes tended to catalyse valuable comparative learning. However, it has also given rise to a problematic tendency to treat these diverse contexts as functionally similar with little attention to socio-political specificity and the way this may generate diverse and complex TJ priorities that may resist imposition of a universal blue print. The emergence of contexts of conflict and post-conflict as arenas for external intervention has particular sensitivity when the root causes of conflict are themselves historical and transnational.<sup>29</sup> These issues have been compounded because the field of TJ continues to be dominated by the geographic and historical boundaries of nation states. In fact, the focus on violence and emergence from violence may have also encouraged problematic treatment of 'conflict'/'post-conflict' environments as *pre*-political or ones where politics is crowded out by violence and humanitarian crisis - an approach that exacerbates the significant political legitimacy considerations that accompany intervention, including international human rights interventions. In this sense it not only encourages a

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<sup>29</sup> For instance, investigating human right violations emerging in contexts of conflict may require more historical understanding of the conflict – and frequently conflicts are the long term legacies of colonialism (such as the legacies of Belgian colonialism in shaping the Rwandan genocide), the cold war's proxy wars (such as the dynamics that shaped the conflicts in Central America), or the consequences of more contemporary resource wars with mining companies and other transnational actors playing a significant role in the political economy of conflict (such as the conflict in the DRC).

depoliticised understanding of the TJ environment, it also depoliticises international intervention.

Policy initiatives by the Security Council and other powerful actors have implications for the strength of civil society across the globe. The health and vibrancy of civil society is often spoken of as vulnerable to authoritarian governments and domestic considerations and divorced from the international dimensions. Yet there are at least three elements of international policy orientations that have had adverse impacts on civil society in many countries over the last couple of decades. Firstly, counter terrorism policies led by the Security Council and powerful states from the global North have had ripple effects across the world. When governments were able to frame opposition in the language of terrorism, this background counterterrorism policy framework empowered measures that monitored, controlled and weakened independent civil society. Secondly, structural adjustment policies advanced by the IMF, the World Bank and sometimes UNDP, often functioned to weaken unions who were otherwise the most powerful critical voices in a robust civil society. In some cases, structural adjustment packages included a push for countries to dismantle strong labour laws that sustained unions and in other cases the effect of structural adjustment policies weakened unions, and concomitantly, weakened critical scrutiny and contestation of structures of impunity. Finally, the political economy of funding and the broader approach of international funding agencies to work “as patrons not partners” also served to weaken civil society and discourage independence. Funding is not only a process of writing cheques; often it is also used as a path through which the donor imposes conditionalities (explicitly or implicitly) and exercises oversight. In Liberia for instance, the UNDP served as a vehicle for donors to channel funds and sought to ensure that the running of the commission

was accountable to international actors. In this case, the international community in general, and UNDP in particular, were accused of birthing alternative civil society groups when the existing ones did not comply with donor priorities and their indicators for success. In similar ways, many communities experience pressure towards pre-planned policies by state actors or international actors with outreach programmes, and civil society consultations are established to get civil society buy-in for those pre-planned policies of the post-conflict industry.<sup>30</sup>

The dynamics of donor-civil society relations are a big part of how the post –conflict industry emerges as a governance project. Donor governments and agencies have not shied away from the instrumentalisation of funding to leverage their own agendas and priorities. The political economy of aid structures the background conditions within which questions of distribution are shaped and this has significant consequences for political space and the dynamics of state-civil society relations, and for which civil society actors and for which human rights agenda thrive. In many cases international actors have had a significant role because they have controlled the purse strings in ways that allow top-down accountability greater leverage than bottom-up accountability. Darren Walker, the Director of the Ford Foundation has recently reflected that too often donors function “as patrons not partners”; privileging top-down accountability to those paying the bills over bottom-up accountability to those most affected; focusing on “short term initiatives not long term

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<sup>30</sup> In some cases unofficial processes contesting “official collective memory discourse” may allow greater community ownership than state sponsored TJ initiatives. p. 2 of Impunity Watch, *Memory for Change: Discussion Paper*, [http://www.impunitywatch.org/docs/Discussion\\_document\\_Memory\\_for\\_Change-Nov\\_2014.pdf](http://www.impunitywatch.org/docs/Discussion_document_Memory_for_Change-Nov_2014.pdf).

institutional health”.<sup>31</sup> Walker acknowledges the significant role that funders have occupied in the “eco-system” in which civil society works, and in particular, how dominant donor modalities have engendered pathologies in that eco-system such that CBOs compete with each other for scarce funding on isolated projects rather than on solidaristic social movements; survival has often required that CBOs tailor their work to fit the funder’s pet projects rather than being “loyal” to their “mission and principles”.<sup>32</sup> Yet survival on these terms has also reproduced the vulnerability of CBOs and compromised their ability to contribute to TJ process. Even in contexts where there is a diverse and vibrant civil society, in resource scarce environments, the influx of significant external funds markedly augments the distorting effect of top-down indicators and impacts which of the civil society groups are sustainable in the long run. In some cases, international engagement via funding has (inadvertently) served to amplify inequalities within local civil society by allowing elite, westernised urban NGOs to play an outsized role because they speak in an internationalised language of TJ that is adroit in engaging with the international community and submitting funding applications responsive to donor agendas.<sup>33</sup> This has further marginalised radical social movements or less cosmopolitan, grassroots organisations who advance justice

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<sup>31</sup> Darren Walker, *How Can We Help?*, State of Civil Society Report 2015, Civicus - accessible @ [http://civicus.org/images/SOCS2015\\_ESSAY27\\_HowCanWeHelp.pdf](http://civicus.org/images/SOCS2015_ESSAY27_HowCanWeHelp.pdf)

<sup>32</sup> The language of ‘eco-system’ is valuable because it conveys the multiplicity of factors (political economy, the strength of social movements, institutional histories, bureaucratic capacities etc.) and their inter-dependence.

<sup>33</sup> Seira Tamang, ‘Civilising Civil Society: Donors and democratic space in Nepal’, In *Himal South Asia*, Vol. 16, No. 7 (2003) pp.14-24. [http://www.martinchautari.org.np/files/seira\\_tamang\\_7\(2\).pdf](http://www.martinchautari.org.np/files/seira_tamang_7(2).pdf)

agendas and priorities that do not translate into the dominant TJ idiom. In some cases this refusal to adopt the dominant vocabulary and adapt to its attendant agendas is driven by alternative epistemologies, in other cases the refusal arises from goals and approaches that challenge the dominant discourse. In both cases such groups will be increasingly marginalised or scripted as speaking to local interests and agendas rather than ones that we may see as foundational to justice.<sup>34</sup> This of course has a snowball effect in exacerbating inequalities within local civil society because funding becomes critical in post-conflict policy making.

Even bracketing donor agendas, the quotidian practices and professional modalities of the funding industry, such as success indicators and reporting log frames, are technologies of governance that exacerbate these dynamics. Definitions of success are political questions so how we measure impact and develop indicators of success is a high stakes endeavour. The field of TJ has relied on what I refer to as ‘top-down’ indicators of success – i.e. indicators of success that are visible and quantifiable from the outside, and concomitantly, conditionalities that can be imposed from the outside. In any particular context there are multiple and diverging priorities,

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<sup>34</sup> For instance, see Sally Merry’s discussion of the homogenising dynamics of women’s organising on the international plane in engineering a shared sense of “the importance of the international domain, universal standards, and procedures for decision making” For instance she notes that a women’s group is more likely to get consultative status and a seat at the table in discussions regarding international documents if it can show that “it is promoting the goals of the UN.” This, in turn, “improves their ability to fundraise” because “participating in these meetings” will “provide information on donor agendas. Sally Merry, *Human Rights and Gender Violence: Translating International Law into Local Justice*, (University of Chicago 2006), pp 31, 48 and 53.

nationally and internationally, but the TJ NGO sector has to respond to donor friendly indicators that are visible from 30,000 feet above the ground through best practice lists and due process norms. TJ processes are fraught and complicated making it difficult to identify short-term indicators of long-term processes. The theory of change entailed by that longer view is difficult to adapt to the quick turn around of donor funding cycles which is more geared towards project funding than the much longer term questions of fundamental transformation of the society. The problem is compounded given that the issues TJ processes seek to address are non-quantifiable – not just the abstractions of truth or justice, but also accompanying goals such as the empowerment of victims or the weakening of a political establishment that drove a civil war. This may require analysis of power relations and ideologies that exceed the categories of perpetrator/victim and of violation/compliance with human rights laws and norms. The dynamics of social change are also difficult to programme or predict.<sup>35</sup> Thus the goals, strategies and indicators that were contained in funding applications may be rendered moot as political circumstances change. Yet the dominant logic in assessing funding applications rewards initiatives that entail detailed plans outlining goals, strategies and indicators for advancing TJ, when it may be much more important to reward initiatives that are agile, creative and responsive to changing dynamics. Indeed the linear log frames for monitoring and evaluating programmes may “stifle innovation and penalise adaptation”<sup>36</sup>. Thus another

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<sup>35</sup> Reina C. Neufeldt, *‘Frameworkers’ and ‘Circlers’ - Exploring Assumptions in Peace and Conflict*

*Impact Assessment*, Berghof Research Center for Constructive Conflict Management, August 2007.

<http://www.berghoff-handbook.net>, last accessed 7 October 2007.

<sup>36</sup> Colleen Duggan, *“Show me your impact”: Challenges and Prospects for Evaluating TJ*; <http://www.cpsa-acsp.ca/papers-2009/Duggan.pdf>

dimension of the ‘empirics gap’ that I referenced earlier is that we measure projects and organisations rather than the eco-system itself. To measure impact in ways that take the long and complex view of TJ’s transformative potential would require that we develop approaches to measure more sustainable and less sustainable eco-systems and the contributions that donors, multi-lateral organisations, powerful countries and others at the apex of the eco-system have on the dynamics of the system as a whole.

Ironically, even efforts to emphasise local ownership have been compromised by the need for enhanced visibility at the 30,000 feet level – thus a cottage industry of consultations, polls, surveys and such has been mainstreamed within the TJ field that often replicate rather than contest power asymmetries and top-down control. Too often these are used to ‘perform’ certain established ‘tropes’ of local ownership while countering or managing pressures for more genuine local ownership. For instance, the relationship between TJ initiatives and social movements may be a better indicator of local ownership than an NGO consultation workshop but the former requires more complex analysis and is less amenable to a donor log frame while a ‘consultation workshop’ is a recognisable trope in the NGO repertoire. The idea of donors supporting a ‘political strategy rather than a project’ has now become a familiar mantra. If taken seriously it can be another way to articulate the radical rethinking called for in grounding our approach to TJ in a political analysis of the structural architecture of impunity. A focus on transformative social change that connects the dots between human rights abuses, their root causes and structures of impunity would require that donors use a longer time frame in assessing the work of different strategies. It also requires more openness to unexpected consequences, positive and negative. Indeed all of these questions regarding the relationship between norms,



practices and policy frameworks emphasise the importance of on-going socio-political analysis in assessing what is desirable and feasible, and from whose perspective. Abstract normative analysis or politically neutral technical analyses do not permit us to get in the trenches of what is at stake with different strategies.

A final dimension of 'top-down' indicators is that too often in the field of TJ there has been a conflation of TJ with transition, and a concomitant slippage from anti-impunity work to post-conflict governance work. There is a tension between promoting post-conflict governance and smooth transitions on the one hand, and the more complicated, political, bottom-up accountability oriented, local civil society led, human rights focused TJ processes on the other. For instance these agendas may have diverging approaches to whether they see social contradictions and contested agendas as a problem to be overcome or as indicating the importance of nurturing democratic space for dissenting and marginalised groups. Indeed, anti-impunity work may help make visible differences in the interests of victims and civil society groups on the one hand, and the interests of structural beneficiaries/those embedded in the architecture of impunity on the other- thus these differences may ensure continued tensions that trouble and complicate the transition. On the one hand, TJ has gained particular prominence as the 'conflict'/'post-conflict' space has gained increased policy attention and resources, on the other hand, it is precisely the focus on conflict as the central dimension of context that has cramped the anti-impunity agenda (understood as structures of impunity rather than narrowly as individual criminal accountability) that could accompany TJ. If TJ processes are anchored to this anti-impunity agenda (rather than a governance agenda) they could help tilt the scales in favour of vulnerable groups and civil society activists as societies negate

these differences during the transition. However, often TJ is promoted as if the task is to manage and control these differences by channelling those legitimate differences so that they are domesticated (one may say depoliticised) into institutions and procedures that smoothen the transition, and facilitate governance in ways that tilt the scales in the other direction. For these reasons, it may be important to not conflate TJ and the governance of transition. Like the language of reconciliation, the language of ‘good governance’ is often invoked as if the interests of accountability and governance are always aligned. However, in considering the issues opened up by TJ, it is important to be particularly alert to the divergent stakes in emphasising accountability vs. governance. It is surprising how easy it is to lose site of the fact that the central goal of justice struggles is to challenge structures of impunity.

## **Conclusion**

This chapter has focused on the TJ field, and the macro and micro practices that have become sedimented into the operationalization of the field as part of the machinery of the post-conflict industry. One response to the concerns with the governance technologies outlined in the preceding pages has been the evolution of hybrid TJ institutions that integrate global and local law and staff.<sup>37</sup> On the surface hybridity

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<sup>37</sup> Hybrid processes have had different formulas for hybridity. For instance, in an early experiment with hybridity in Guatemala, the chair of the Commission for Historical Clarification was appointed by the UN Secretary General, with Guatemalans playing other roles in the Commission; it was a complex hybrid approach with an international structure partially embedded in a domestic structure. In El Salvador the peace agreement provided for all the

seems like the most salubrious balancing of respect for universal norms and laws, and respect for contextual imperatives. The Sierra Leone Special Court (SCSL) is the most commonly cited hybrid structure<sup>38</sup> and was formally the product of an agreement between the government and the United Nations at the request of President Kabbah but observers note that the request “was not seen to be Kabbah acting entirely on his own volition”; Rather, it was described euphemistically as a request “with strong international backing”.<sup>39</sup> Indeed when making the request for the court the late Sierra Leonean president Ahmed Tejan Kabbah had wanted a national court with “a strong international component because “the Sierra Leonean lawyers and judges that were consulted suggested that the local justice system was capable of holding fair trials.” However, the UN preferred “an international Court with strong national elements”.<sup>40</sup> The Special Court that was eventually agreed to was seen as much more the latter than the former.<sup>41</sup> The “hybridity” of the court’s quotidian functioning was channelled and constrained by the nexus between funding and management that was built

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commissioners to be international actors appointed by the Secretary General.

<sup>38</sup> The Cambodian Extraordinary Chambers and the Timor Leste process were birthed in the same period. The former is ongoing but continued dependency dynamics with Indonesia (where most perpetrators were located) prevented the latter from gaining momentum.

<sup>39</sup> Hayner, ‘Negotiating Peace in Sierra Leone: Confronting the Justice Challenge’, ICTJ Report, p. 26. In fact, rather than developments grounded in the experience of Sierra Leoneans, the fact that UN peace keepers were taken hostage may have been the more important catalyst for these actions.

<sup>40</sup> Charles C. Jalloh, ‘Special Court for Sierra Leone: Achieving Justice?’ Michigan Journal of International Law 32 (3) p.401 (2011).

<sup>41</sup> Sara Kendall, ‘Hybrid Justice at the Special Court for Sierra Leone,’ Studies in Law, Politics and Society 5 p.11-27 (2010).

into the court structure. The management committee of the Sierra Leone Court was dominated by the biggest funders; namely, the United States, the UK, Canada, and the Netherlands. Eventually other regional powers such as Nigeria (Nigeria that had a leadership role in peace keeping) were included. However the most striking dimension of this process was that it took extensive lobbying for the Government of Sierra Leone itself to be included.<sup>42</sup> In fact, the biggest donor by far was the USA and accordingly the US had an outside role in determining prosecution policy; indeed for many it was the American prosecutor David Crane who was the face of the court and there were signs of US attempts to influence the Court in terms of steering it towards investigating Colonel Qadhafi or Al-Qaeda activity in the region.<sup>43</sup> Thus in this case, the combination of funding and hybrid design ensured that American interests were reflected in the work of the court and “the perceived Americanisation of the Court” raised

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<sup>42</sup> “The Management Committee was originally meant to be composed of “important contributors,” including the United States, the UK, Canada, and the Netherlands, but this was interpreted broadly to include Lesotho and Nigeria. Finally, after lobbying, the Government of Sierra Leone was allowed onto the Committee, and the UN Secretariat was also included.” P. 19 of Tom Periello and Marieke Wierda, *The Special Court of Sierra Leone Under Scrutiny*, ICTJ, March 2006 at <https://www1.umn.edu/humanrts/instree/SCSL/Case-studies-ICTJ.pdf>

<sup>43</sup> For instance, the ICG notes that “While the subtle links alleged on several occasions by Prosecutor Crane between diamonds and al-Qaeda terrorist networks can be interpreted as an attempt to increase U.S. interest, they are also seen by many in Sierra Leone as examples of the Court being used to promote U.S. foreign policy interests.” <http://www.crisisgroup.org/en/regions/africa/west-africa/sierra-leone/B016-the-special-court-for-sierra-leone-promises-and-pitfalls-of-a-new-model.aspx>.

significant legitimacy concerns.<sup>44</sup> Against the backdrop of the Bush administration's campaign against the ICC (in which the SCSL model was presented as an alternative), US investment in the Sierra Leone Special Court and the goals it was advancing by funding the Court went beyond (and were often in tension) with objectives related to the Sierra Leone context. Indeed, arguably those local objectives became co-opted, as the work of the court became a tool in the larger US effort to undermine the ICC. Thus not only was the Sierra Leone government displaced, local justice priorities were also overshadowed by the battle the US was waging on the shape of international justice institutions on the global stage. Arguably, even against this backdrop, local civil society actors in Sierra Leone sought to find space to advance local justice priorities, but they had to do so within the boundaries established by US agendas. Thus in many ways, the Sierra Leone process reflected many of the concerns we have flagged with the TJ orthodoxy and Court's hybridity was not an adequate bulwark against those dynamics.

A more political and context centered approach to TJ will require a fundamental reorientation of many of the assumptions that have become part of the policy common sense in the field. For instance, it may see comparative learning not as a road map of best practices regarding TJ paths but simply a resource that may or may not be helpful to local activists anchored in contextual analysis of political opportunities and constraints. Similarly, while there is much verbal deference to claims about the need for civil society and victim consultation, too often surveys and consultation workshops have become procedures for managing victim

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<sup>44</sup> ICG Ibid. This does not mean that all the court's activities were led by US interests - for instance, Crane's indictment of Taylor went against American priorities at that time.

expectations and shaping civil society agendas. Further, if the whole country is treated as a homogenous space or reduced to a conflict space interchangeable with other conflict spaces, TJ interventions will not confront the complicated, dynamic heterogeneity of local and regional context, and attendant constraints and opportunities. Moreover, given the transnational context within which TJ operates, it would be a mistake to not confront the actions of powerful states, and take account of the current and historic relationship between international and national actors in terms of responsibility for human rights abuse and the need to develop TJ initiatives that seek to address those layers of responsibility.

Some have argued that this alternative approach will overburden TJ institutions such as truth commissions, courts and reparation programmes. Yet, these institutions are not ends in themselves – they are valuable tools only in so far as they advance the goals and priorities of those struggling for justice. Too often institutional fetishism and a depoliticised model of technocratic engagement has distracted from and defeated the political focus on fighting structures of impunity and strengthening movements for accountability. This challenging of TJ orthodoxies is a first step if we are engaging with TJ processes in Sri Lanka with a broader interest in confronting hierarchies of power, rather than being just another stop-over on the post-conflict circuit: Take a flight. Convene a civil society workshop. ‘Train’ an NGO. Highlight gender sensitivity. Commission the ‘truth’. Prosecute a bad guy. Write a cheque to a few victims. Hit the circuit again.

# 14

## **“More than a Domestic Mechanism”: Options for Hybrid Justice in Sri Lanka\***

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*Beth Van Schaack*

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\* The quoted phrase comes from the remarks of the High Commissioner for Human Rights, who “remains convinced that, for accountability to be achieved in Sri Lanka, it will require more than a domestic mechanism.” Human Rights Council, *Comprehensive Report of the Office of the United Nations High Commissioner for Human Rights on Sri Lanka*, U.N. Doc. A/HRC/30/61, para. 88 (Sept. 28, 2015).

## Introduction

After years of resistance, the new government of Sri Lanka has now committed to launching a genuine transitional justice programme to address, and redress, the grave international crimes committed by all sides in the almost 30-year conflict with the Liberation Tigers of Tamil Eelam (LTTE).<sup>1</sup> In addition to comprehensive political reforms focused on good governance, the devolution of power, security sector reform, and the rule of law, the future transitional justice process will reportedly involve four main pillars: a truth and reconciliation commission; a reparations process; an office to investigate and resolve disappearances; and an accountability mechanism. These building blocks find expression in a landmark consensus resolution by the Human Rights Council issued in September 2015 with Sri Lanka as a co-sponsor.<sup>2</sup> Although this will be a Sri Lankan process, the resolution calls upon government actors to take advantage of “expert advice from those with relevant international and domestic experience” and to draw

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<sup>1</sup> In the absence of a genuine domestic accountability process, the Human Rights Council authorised a comprehensive investigation into international crimes committed in Sri Lanka from February 2002, when the two sides signed a Ceasefire Agreement, to November 2011, when the results of the country’s own Lessons Learnt and Reconciliation Commission were presented to the then-President. See Human Rights Council, *Promoting Reconciliation, Accountability and Human Rights in Sri Lanka*, U.N. Doc. A/HRC/25/1, 27 March 2014). The report exhaustively documented the commission of a wide range of international crimes and advanced a number of cogent transitional justice recommendations. See Report of the OHCHR Investigation on Sri Lanka, U.N. Doc. A/HRC/30/CRP.2, 16 September 2015, (“OISL Report”).

<sup>2</sup> Human Rights Council, *Promoting Reconciliation, Accountability and Human Rights in Sri Lanka*, U.N. Doc. A/HRC/30/L.29, 29 September 2015.



upon “international expertise, assistance and best practices.”<sup>3</sup> In joining the resolution, Sri Lanka has affirmed the importance of including foreign personnel—including judges, defence counsel, prosecutors, and investigators, potentially drawn from among the Commonwealth states—in any judicial mechanism.<sup>4</sup> The resolution thus embodies one of the key recommendations emerging from the Human Rights Council’s engagement in Sri Lanka: the imperative of establishing a hybrid tribunal of some sort to ensure an independent, impartial, and credible criminal process free of intimidation and political interference.<sup>5</sup> Notwithstanding this

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<sup>3</sup> Ibid at preamble para 16 and OP 3.

<sup>4</sup> The Resolution indicates that the Council:

*Welcomes* the recognition by the Government of Sri Lanka that accountability is essential to uphold the rule of law and to build confidence in the people of all communities of Sri Lanka in the justice system; notes with appreciation the proposal of the Government of Sri Lanka to establish a judicial mechanism with a special counsel to investigate allegations of violations and abuses of human rights and violations of international humanitarian law, as applicable; affirms that a credible justice process should include independent judicial and prosecutorial institutions led by individuals known for their integrity and impartiality; and also affirms in this regard the importance of participation in a Sri Lankan judicial mechanism, including the special counsel’s office, of Commonwealth and other foreign judges, defence lawyers and authorised prosecutors and investigators...

Ibid at OP 6.

<sup>5</sup> See OISL Report, Ibid note 1, at para. 1246:

In these circumstances, OISL believes that for an accountability mechanism to succeed in Sri Lanka, it will require more than a domestic mechanism. Sri Lanka

pledge, government representatives, journalists, and others have since expressed reticence about inviting international interference in, or ceding too much control over, the administration of justice for the crimes of the civil war.<sup>6</sup> In

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should draw on the lessons learnt and good practices of other countries that have succeeded with hybrid special courts, integrating international judges, prosecutors, lawyers and investigators, that will be essential to give confidence to all Sri Lankans, in particular the victims, in the independence and impartiality of the process, particularly given the politicisation and highly polarised environment in Sri Lanka.

*See also* Ibid at Recommendation 20 (calling on Sri Lanka to “[a]dopt specific legislation establishing an *ad hoc* hybrid special court, integrating international judges, prosecutors, lawyers and investigators, mandated to try war crimes and crimes against humanity, including sexual crimes and crimes committed against children, with its own independent investigative and prosecuting organ, defence office, and witness and victims protection programme.”).

<sup>6</sup> Jason Burke & Amantha Perera, ‘UN Calls For Sri Lanka War Crimes Court To Investigate Atrocities’, THE GUARDIAN (quoting Namal Rajapaksa, the former President’s son and a member of Parliament, as describing the proposal to create a hybrid court as “a complete insult to the entire legal system in this country”); K.T. Rajasingham, A Hybrid Court in Sri Lanka: A Non-Starter ...?, ASIAN TRIBUNAL, 21 September 2015, (“the establishment of a hybrid special court with a compliment of international judges, prosecutors, lawyers and investigators, is something unthinkable in a country, where everyone—this writer including—is mad about the sovereignty and independence of the nation, and dead set against any interference in any form.”); Shenali D Waduge, ‘Sri Lanka Does Not Need Hybrid Courts When The Culprits Sit In Judgement’, LANKAWEB, 10 October 2015; Azzam Ameen, ‘Sri Lanka President Wants “Internal” War Crimes Court’, BBC News, January 2016, <http://www.bbc.com/news/world-asia-35376719>.

response, members of civil society have urged the government to stay the course, resist nationalist rhetoric rejecting any international involvement, adhere to its prior commitments, and work with the international community to ensure a genuine accountability process.<sup>7</sup> The term “hybrid tribunal” has emerged as a particular flashpoint in this discourse, with commentators rejecting the concept out of hand as somehow inherently violative of Sri Lanka’s sovereignty. This chapter hopes to demonstrate that there are multiple ways that domestic judicial processes can be “internationalised” in order to bolster the perceived domestic and international legitimacy of a judicial process, take advantage of investigative, forensic, and legal expertise developed in other societies facing similar transitional justice dilemmas or in the various international courts, and benefit from material assistance from the international community whose members are committed to

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<sup>7</sup> See the statement from activists and organisations within Sri Lanka:

In the context of wide-scale impunity and the alleged collusion of state functionaries in systemic criminal conduct, robust participation of foreign personnel in trials is a necessary starting point to redeeming the trust of victims in the state, and ensuring the confidence and participation of all stakeholders in Sri Lankan transitional justice processes. ... We also recognise the expertise and skills required to investigate and prosecute serious abuses of international human rights and humanitarian law, and note the vacuum in this regard within Sri Lanka.

*See also*, Bhavani Fonseka and Luwie Ganeshathasan, *Hybrid vs. Domestic: Myths, Realities and Options for Transitional Justice in Sri Lanka* (January 2016), <http://www.cpalanka.org/wp-content/uploads/2016/01/Hybrid-vs.-Domestic-Myths-Realities-and-Options-for-Transitional-Justice-in-Sri-Lanka.pdf>.

investing in the new Sri Lanka—all without sacrificing judicial sovereignty over the penal process.

## **Background**

A number of states emerging from periods of armed conflict or mass violence have created national institutions dedicated to prosecuting international crimes and have invited the involvement of international experts in various capacities. Included within these internationalised institutions are special chambers and investigative units that are deeply ensconced within the relevant domestic system but that benefit from international support and expertise through seconded personnel and the provision of technical assistance. These institutions have been called “hybrid” or “mixed” tribunals simply because they possess qualities of both domestic and international courts.<sup>8</sup> For example, past models have been staffed by international and domestic personnel (judges, prosecutors, investigators, defence counsel, administrators, and support staff) working in tandem with their local counterparts, and have applied a mixture of international and domestic criminal law and procedures.<sup>9</sup> The involvement of

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<sup>8</sup> Although this chapter focuses on personnel, there are many ways to hybridise transitional justice mechanisms, including with respect to substantive and procedural law. *See generally* Project on International Courts and Tribunals, *Hybrid Courts*, available at <http://www.pict-pcti.org/courts/hybrid.html>; Beth Van Schaack, ‘The Building Blocks of Hybrid Justice’, 44 *DENV. J. INT’L L. & POL’Y* 169 (2016).

<sup>9</sup> Laura Dickinson, ‘The Promise of Hybrid Courts’, 97 *AM. J. INT’L L.* 295 (2003); Etelle R. Higonnet, ‘Restructuring Hybrid Courts: Local Empowerment and National Criminal Justice Reform’, 23 *ARIZONA J. INT’L & COMP. L.* 347 (2006). For an extensive bibliography, see Sarah Williams, *Hybrid International Criminal*

local personnel has been crucial to the success of these efforts, from the perspective of perceived domestic legitimacy, technology and knowledge transfer, and cultural and legal literacy.

The rationales for internationalising elements of the domestic judicial system in the wake of mass violence are multi-fold. Most importantly, the inclusion of international personnel serves to restore legitimacy and popular faith in domestic institutions that may have suffered a loss of confidence in the eyes of victim groups and perpetrators.<sup>10</sup> Indeed, many victims and human rights advocates see the judicial sector as having been blind to, or even complicit in, the crimes of the state during the war, including through a biased application of the Prevention of Terrorism Act.<sup>11</sup> Mixed institutions may be

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*Tribunals*, OXFORD BIBLIOGRAPHIES, available at <http://www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0069.xml>.

<sup>10</sup> Office of the High Commissioner for Human Rights, *High Commissioner Urges Creation of Hybrid Court for Sri Lanka*, 17 September 2015, available at

<http://www.ohchr.org/EN/NewsEvents/Pages/SriLanka.aspx#sth.ash.OZ8dfyMU.dpuf> (“‘The levels of mistrust in State authorities and institutions by broad segments of Sri Lankan society should not be underestimated,’ the High Commissioner said. ‘It is for this reason that the establishment of a hybrid special court, integrating international judges, prosecutors, lawyers and investigators, is so essential. A purely domestic court procedure will have no chance of overcoming widespread and justifiable suspicions fuelled by decades of violations, malpractice and broken promises.’”).

<sup>11</sup> See Basil Fernando, *Sense and Nonsense on Judicial Matters*, Asian Human Rights Commission, 2 October 2015, <http://www.humanrights.asia/news/ahrc-news/AHRC-STM-168-2015>; Statement by United Nations High Commissioner for Human Rights Zeid Ra’ad Al Hussein at the End of his Mission to Sri Lanka, U.N. Doc. HC/16/13, 9 February 2016,

better equipped to advance the rule of law in keeping with international principles and to protect against over-zealous, one-sided, or unfair prosecutions. Transitional societies often must deal with a wealth of legal claims, including property and probate issues; as such, there are practical advantages to relying on a cadre of foreign experts with experience investigating and prosecuting cases involving international crimes (and defending against such charges). Integrating international experts may also allow these institutions to operate more economically, because such personnel are often seconded from their home systems and compensated from foreign or international coffers. These experts—who should be identified by way of a rigorous selection process—bring experience investigating and prosecuting complex crimes, enabling the domestic system to begin operations more quickly and to magnify its impact. Attention should be paid to gender and ethnic parity and to appointing personnel with experience in international criminal law, human rights, and gender.<sup>12</sup> In addition to being chosen for their expertise, individuals should be known internationally for their professionalism, humility, adaptability, impartiality, and integrity.<sup>13</sup> For judicial processes to contribute to

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<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=17025&LangID=E> (“Sri Lanka has many excellent judges, lawyers, and law enforcement officials. But over the years the system they depended on, and which depends on them, became highly politicised, unbalanced, unreliable.”)

<sup>12</sup> Nienke Grossman, ‘Sex Representation on the Bench: Legitimacy and International Criminal Tribunals’, 11 INT’L CRIM. L. REV. 453 (2011).

<sup>13</sup> For a discussion of the recruitment and remuneration of international staff, see Office of the United Nations High Commissioner for Human Rights, *Rule of Law Tools for Post Conflict States: Maximising the Legacy of Hybrid Courts* 23-27 (2008), available at

reconciliation and to respond to felt needs for justice, it is vitally important that all stakeholders have faith in the integrity and fairness of both the process and the actors involved.<sup>14</sup>

The concept of the hybrid or mixed tribunal emerged as a response to perceived shortcomings of prior efforts at international justice that necessitated the extensive involvement of the international community working through the United Nations Security Council, General Assembly, and/or Secretary General. As it turned out, these standalone international, or quasi-international institutions were slow to reach their stride and proved to be quite expensive in terms of start-up and maintenance expenses. Many were located far from the events in question, which hindered their accessibility, undermined local ownership within the constituencies they were designed to serve, and limited the degree of technology and knowledge transfer available to help rebuild or strengthen national judicial systems. As compared to these predecessors, some of the more recent hybrid institutions have proven to be more agile in operation, better anchored in local and even regional norms, and more attuned to “the complex domestic and social causes that led to the crimes” in the first place.<sup>15</sup> They are usually designed and established following “a collaborative process between the post-conflict state and the international community, and can be tailored to best suit each

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[www.ohchr.org/Documents/Publications/HybridCourts.pdf](http://www.ohchr.org/Documents/Publications/HybridCourts.pdf). IHCHR (“OHCHR, *Legacy*”).

<sup>14</sup> For a useful discussion of how to maximise the legacy of hybrid courts, *see* *Ibid.*

<sup>15</sup> Frédéric Mégret, ‘In Defence of Hybridity: Towards a Representational Theory of International Criminal Justice’, 38 *CORNELL INT’L L. J.* 725, 730 (2005).

individual conflict.”<sup>16</sup> As such, hybrid entities have the potential to enjoy greater cultural and procedural legitimacy than either purely domestic or fully international institutions.

There are many ways to internationalise an otherwise domestic accountability mechanism. All told, a number of key decisions must be made. In terms of staffing, tribunal architects must determine how to appoint domestic and international staff positions and in what ratio. If panels of judges are contemplated, ensuring a majority of internationals generally lends legitimacy to the process and potentially enhances the fairness of proceedings, assuming that the international personnel are of high quality. Such personnel can be phased out over time as domestic capacity for addressing these complex crimes develops. If the relevant system employs single judges, it is possible to appoint foreign judicial advisers, professional clerks, or *greffiers* to inject international expertise into the adjudicative process. A more comprehensive plan to integrate foreign experts into prosecution and defence offices as well as the courts’ administrative body will ensure that all elements of the process enjoy an infusion of international expertise. Although states often want their nationals to occupy top posts in hybrid institutions, international personnel may be better positioned to withstand domestic political pressures, particularly during the early phase of a justice process.<sup>17</sup> They may also be less

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<sup>16</sup> Public International Law & Policy Group, *Hybrid Tribunals: Core Elements* (June 2013), available at [http://syriaaccountability.org/wp-content/uploads/PILPG-Syria-Hybrid-Tribunals-Memo-2013\\_EN.pdf](http://syriaaccountability.org/wp-content/uploads/PILPG-Syria-Hybrid-Tribunals-Memo-2013_EN.pdf).

<sup>17</sup> International Center for Transitional Justice, Caitlin Reiger & Marieke Wierda, *The Serious Crime Process in Timor-Leste: In Retrospect* 15 (March 2006), available at <https://www.ictj.org/sites/default/files/ICTJ-TimorLeste-Criminal-Process-2006-English.pdf> (“ICTJ, *Timor-Leste*”) noting that



vulnerable to security threats. At the same time, many states may resist the inclusion of foreign personnel in certain posts; resorting to experts drawn from the country's diaspora or from partner states in regional or political organisations may mitigate these concerns.<sup>18</sup> In any case, domestic legislation and changes to local bar rules may be required to enable foreign personnel to occupy certain positions although some Commonwealth states (such as the Seychelles) grant reciprocal rights to lawyers hailing from other Commonwealth jurisdictions. The interoperability of Commonwealth judges could prove to be useful as the actors consider accountability options for Sri Lanka, as anticipated by the Human Rights Council.<sup>19</sup>

### **Models for Integrating International Personnel**

International, internationalised, and hybrid justice mechanisms have been created through a number of different

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in East Timor, “the appointment of international judges was rejected on the basis that it would undermine local ownership of the judges system,” minimise the need for translation, and “encourage the participation of local jurists, which would have political and symbolic significance.”

<sup>18</sup> For example, it was contemplated that members of the Somali diaspora could be included if a specialised piracy court were established for the Horn of Africa. See Report of the Special Advisor to the Secretary-General on Legal Issues Related to Piracy off the Coast of Somalia, Annex to the letter dated 24 January 2011 from the Secretary-General to the President of the Security Council, U.N. Doc. S/2011/30 (25 January 2011), available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N11/206/21/PDF/N1120621.pdf?OpenElement>.

<sup>19</sup> ‘UN Calls for Sri Lanka War Crimes Court to Investigate Atrocities’, THE GUARDIAN (16 September 2015). See also Fonseka and Ganeshathasan, *Ibid* note 7, at 14-16 (noting prior precedent of integrating Commonwealth personnel into Sri Lankan commissions).

legal routes.<sup>20</sup> That said, it is anticipated that any accountability mechanism in Sri Lanka will be the product of domestic legislation, although this may be accompanied by a bilateral treaty with some element of the United Nations to address staffing, funding, or legal issues, such as the definition of actionable crimes.<sup>21</sup> Recent research confirms that notwithstanding recent protests to the contrary,<sup>22</sup> there is no constitutional or statutory impediment to creating specialised chambers in Sri Lanka or staffing them with international experts.

In particular, it has been observed that

a fully functional hybrid court could be structured within Sri Lanka's legal system in a way that is entirely compatible with the existing constitution. A legislative package passed by a simple majority of Parliament along with incidental regulatory changes could establish a uniquely Sri Lankan hybrid mode.<sup>23</sup>

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<sup>20</sup> See Van Schaack, *Ibid* note 8 (comparing the origins of international and mixed tribunals).

<sup>21</sup> The Special Court for Sierra Leone, the Extraordinary Chambers in the Courts of Cambodia, the Special Tribunal for Lebanon, and the Special Criminal Chambers in the Central African Republic were all established through a mix of international instruments and domestic legislation.

<sup>22</sup> 'Foreign Judges Politically Unacceptable, Unconstitutional', DAILY NEWS, 6 November 2015,

<http://www.dailynews.lk/?q=2015/10/21/local/foreign-judges-politically-unacceptable-unconstitutional-mr>.

<sup>23</sup> See South Asia Centre for Legal Studies, Rhadeena de Alwis & Niran Anketell, *A Hybrid Court: Ideas for Sri Lanka* 2 (2015); Fonseka and Ganeshathasan, *Ibid* note 7, at 5-9 (concluding that there are no

A number of different systems in other post-conflict states provide exemplars for the process underway in Sri Lanka. Some of these involved the creation of a standalone domestic tribunal with dedicated staff, an autonomous appellate body, and bespoke rules;<sup>24</sup> by contrast, other states embedded special chambers within, or sprinkled international personnel throughout, the extant domestic penal system. The latter models inevitably inherit or reflect elements of the underlying system, subject to occasional adjustments.<sup>25</sup> By contrast, autonomous *ad hoc* tribunals that enjoy a separate legal personality have been the subject of greater structural and procedural innovation. The creation of a stand-alone institution also cabins international involvement to certain cases, although there may be benefits to having international personnel participate in the adjudication of a broader range of matters as part of the ordinary court system, including other complex or politically sensitive cases dealing with terrorism, corruption, or organised crime.<sup>26</sup> A less centralised approach

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constitutional bars to the participation of foreign nationals in the judicial process).

<sup>24</sup> The War Crime Chambers in Bosnia-Herzegovina, for example, were independent of the domestic judicial system and contained their own dedicated appellate panels. See Bogdan Ivanišević, *The War Crimes Chamber in Bosnia and Herzegovina: From Hybrid to Domestic Court* 5 (2008), available at <https://www.ictj.org/sites/default/files/ICTJ-FormerYugoslavia-Domestic-Court-2008-English.pdf>.

<sup>25</sup> So, for example, the Iraqi High Tribunal (IHT) reflected many standard features of the ordinary Iraqi courts, including a role for investigating judges. See Article 8, Law of the Supreme Iraqi Criminal Tribunal, Al-Waqa’I Al-Iraqiya—No. 4006 (18 October 2005), available at <http://giji.org/wp-content/uploads/2009/02/iraqstatuteengtrans.pdf> (“IHT Statute”). See generally Guénaél Mettraux, ‘The 2005 Revision of the Statute of the Iraqi Special Tribunal’, 5 J. INT’L CRIM. JUSTICE 287 (2007).

<sup>26</sup> In Kosovo, for example, mixed panels of local and foreign judges heard a range of cases featuring allegations of war crimes, ethnically

avoids the creation of a two-tiered justice system, enables more interactions between local and international personnel, and may increase the impact of hybridity on the system as a whole. That said, a more integrated model may be less appealing in situations, such as Sri Lanka, where there is resistance to admitting foreign personnel.

An early and under-explored example of embedding international expertise into a domestic process for the purpose of enhancing judicial capacity and procedural legitimacy is found in the 1981 trials of would-be coup leaders in the Gambia.<sup>27</sup> This effort traces its provenance to a coup staged by local actors that was rumoured to be part of a Pan-African Marxist conspiracy spearheaded by Muammar Gaddafi—a theory that was later debunked.<sup>28</sup> In response, the Gambia invoked a mutual defence pact with Senegal, whose troops helped to quickly oust the rebels. Thousands of people were detained in connection with the uprising. Fearing that key members of the government and judiciary had been somehow involved in the coup attempt, the Gambia established special tribunals staffed by lawyers and judges from the Commonwealth association of states—including British

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motivated violence, and organised crime involving government officials and former Kosovo Liberation Army members. *See generally* OSCE, Department of Human Rights and Rule of Law, Legal Systems Monitoring Section, *Kosovo's War Crimes Trials: A Review* (Sept. 2002), available at <http://www.osce.org/kosovo/documents/reports/justice/>.

<sup>27</sup> The best treatment of this history, and a first-hand account, is found in HASSAN B. JALLOW, *JOURNEY FOR JUSTICE* (2012).

<sup>28</sup> Arnold Hughes, *The Attempted Gambian Coup d'état of 30 July 1981*, available at <http://www.mybasse.org/news/analysis-the-july-30-1981-gambian-coup/>.

subject Sir Desmond Da Silva<sup>29</sup> who was an expert on the 1351 English Treason Act and went on to serve as Chief Prosecutor of the Special Court for Sierra Leone—to assess the legality of the detentions and prosecute those who were deemed most responsible. All told, 45 people were tried in 4 years. Also involved were Hassan Jallow (the former Chief Prosecutor of the International Criminal Tribunal for Rwanda and the Mechanism on International Tribunals) and Fatou Bensouda (now the Chief Prosecutor of the International Criminal Court (ICC)), who were young professionals working in the judicial system at the time.<sup>30</sup>

A similar arrangement was implemented in the former Yugoslavia to complement the work of the International Criminal Tribunal for the Former Yugoslavia (ICTY) sitting in The Hague. Once it became clear that the ICTY would not be able to manage all, or even a solid percentage, of war crimes cases generated by the dissolution of Yugoslavia, policymakers in the newly independent states began to

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<sup>29</sup> Da Silva later served as a highly paid “expert” to the Rajapaksa government. Various reports attributed to him and leaked to the press proved to be highly controversial, because they seemed to justify the harsh tactics employed by the government or otherwise lay blame on the LTTE for civilian casualties previously attributed by other credible investigations to the government. See Dharisha Bastians, ‘Changing Course’, COLOMBO TELEGRAPH, 24 July 2014, <https://www.colombotelegraph.com/index.php/changing-course/comment-page-1/#comment-1406154>; ‘The Maxwell Paranagama Report: Transiting from Rajapaksa Palanaya to Yahapalanaya’, THE ISLAND ONLINE, 24 October 2015, [http://island.lk/index.php?page\\_cat=article-details&page=article-details&code\\_title=134098](http://island.lk/index.php?page_cat=article-details&page=article-details&code_title=134098).

<sup>30</sup> Beth Van Schaack, ‘IHL Dialogs: Prosecutors’ International Criminal Law Round-Up’, IntLawGrrls, 4 September 2014, available at <http://ilg2.org/2014/09/04/ihl-dialogs-prosecutors-international-criminal-law-round-up/>.

consider local options. Eventually, special war crimes chambers were established in Bosnia-Herzegovina (BiH), Serbia and Montenegro, and Croatia.<sup>31</sup> The system in BiH was composed of a War Crimes Chamber (WCC) and a Special Department for War Crimes in the Prosecutor's Office.<sup>32</sup> The WCC heard cases referred from the ICTY as well as cases resulting from the prosecutors' own investigations. The WCC legislation allowed for the injection of international staff—administrators (including the Registrar), judges at the trial and appellate levels, and prosecutors working alongside national staff—who were gradually phased out over the years.<sup>33</sup> The President and Chief Prosecutor, however, were always Bosnian nationals. Controversially, there were no prospects for the provision of international defence counsel.<sup>34</sup> Internationals were paid out of a pool of

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<sup>31</sup> Human Rights Watch, *Justice at Risk: War Crimes Trials in Croatia, Bosnia and Herzegovina, and Serbia and Montenegro* (Oct. 2004); MLADEN OSTOJIĆ, BETWEEN JUSTICE & STABILITY: THE POLITICS OF WAR CRIME PROSECUTIONS IN POST-MILOŠEVIĆ SERBIA 165-215 (2014) (discussing domestic War Crimes Chamber in Serbia).

<sup>32</sup> Law on Court of Bosnia And Herzegovina, Official Gazette of Bosnia and Herzegovina, 49/09, available at [http://www.sudbih.gov.ba/files/docs/zakoni/en/Law\\_on\\_Court\\_BiH\\_-\\_Consolidated\\_text\\_-\\_49\\_09.pdf](http://www.sudbih.gov.ba/files/docs/zakoni/en/Law_on_Court_BiH_-_Consolidated_text_-_49_09.pdf) ("WCC Law"). A similar Special Chamber (Chamber II) exists for Organised Crime, Economic Crimes, and Corruption. See *Ibid* at Article 14. Chamber III is dedicated to general crimes. For background, see David Schwendiman, 'Prosecuting Atrocity Crimes in National Courts: Looking Back on 2009 in Bosnia and Herzegovina', 8 NORTHWESTERN J. INT'L HUM. RTS. 269 (2010).

<sup>33</sup> WCC Law, *Ibid* note 32, at Article 24. See also Schwendiman, *Ibid*, at 280-1 (noting that delays in reappointing and extending the mandate of international staff slowed down cases and led to the loss of expertise).

<sup>34</sup> David Tolbert & Aleksandar Kontić, *Final Report of the International Criminal Law Services (ICLS) Experts on the Sustainable Transition of the*

donor funds. The ICTY, the U.S. Department of Homeland Security's Human Rights Violators Unit, and other outside organisations provided professional advice and technical assistance to various elements of the WCC, particularly when it came to the reform of national legislation and the training of staff, defence counsel, and judges.<sup>35</sup> The WCC, which have become a permanent addition to the court system, continue to receive international support but are largely self-sufficient.

Following post-referendum violence in East Timor, the United Nations launched the Transitional Administration in East Timor (UNTAET), a peacekeeping operation organised to exercise Timorese legislative and executive authority, including the administration of justice, during the fledgling country's transition to self-government.<sup>36</sup> Early UNTAET regulations created both an ordinary court system and a system of Special Panels to address the commission of international crimes.<sup>37</sup> The UNTAET administrator appointed the Special Panel judges upon the recommendation of a mixed Timorese-foreign commission, which enabled local

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*Registry and International Donor Support to the Court of Bosnia and Herzegovina and the Prosecutor's Office of Bosnia and Herzegovina in 2009*, 23-4, 15 December 2008, available at <http://www.iclsfoundation.org/wp-content/uploads/2012/02/icls-bih-finalreportwebsitecorrected.pdf> (raising equality of arms concerns).

<sup>35</sup> Ivanišević, *Ibid* note 24, at 40-41; Lilian A. Barria & Steven D. Roper, 'Judicial Capacity Building in Bosnia and Herzegovina: Understanding Legal Reform Beyond the Completion Strategy of the ICTY', 9 HUMAN RIGHTS REVIEW 317 (2008).

<sup>36</sup> For details on the many U.N. operations in Timor Leste, see <http://www.un.org/en/peacekeeping/missions/past/unmit/backgrund.shtml>.

<sup>37</sup> Sections 9-10, Regulation No. 2000/11 on the Organisation of Courts in East Timor, U.N. Doc. UNTAET/REG/2000/11, 6 March 2000.

input into staffing.<sup>38</sup> It was envisioned that the Dili District Court would house several Special Panels, but hiring delays meant that it took years to establish a second panel.<sup>39</sup> The Court of Appeals, which included two international judges, was to assert jurisdiction over appeals from ordinary panels in the District Court in addition to Special Panel cases.<sup>40</sup> Other international positions within Timor-Leste's Special Panels were identified through standard U.N. recruitment processes for peacekeeping missions,<sup>41</sup> which contributed to delays because such missions do not often contain a judicial component. Staffing the Special Panels remained a challenge given the lack of qualified international candidates for what amounted to a hardship post and the weak domestic capacity. In these institutions, delays in the appointment of personnel, and especially international judges who were subject to U.N. hiring procedures, slowed the judicial proceedings and left many appeals pending.<sup>42</sup> Such delays could easily be avoided for institutions not governed by the at-times cumbersome U.N. hiring process.

The structure of the Extraordinary Chambers in the Courts of Cambodia (ECCC) is unique and, in certain notable respects, not worthy of emulation. In particular, every key position at the ECCC is shared by a Cambodian and an international appointee. So, there are Co-Investigating Judges (CIJs), Co-Prosecutors (CPs), Co-Civil Party Representatives, etc.; even the Office of Administration is bifurcated into two distinct components that service the national and international "sides"

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<sup>38</sup> Ibid at Sections 9-10, 15; Regulation 2000/3 on the Establishment of a Public Service Commission, U.N. Doc. UNTAET/REG/2000/3, 20 January 2000.

<sup>39</sup> ICTJ, *Timor-Leste* Ibid note 17, at 15.

<sup>40</sup> Ibid at 14, 25.

<sup>41</sup> Ibid at 14.

<sup>42</sup> Ibid at 14-15.



of the ECCC. Coordination and communication problems abound. Unlike the other *ad hoc* tribunals, the ECCC also includes a Pre-Trial Chamber that is supposed to resolve conflicts between the CIJs and CPs during the investigation stage and hear “appeals” against CIJ orders.<sup>43</sup> The PTC’s rulings, however, are not binding or subject to an appeal; as a result, the Trial and Appeal Chambers have considered many of the same issues *de novo*.<sup>44</sup> In principle, this arrangement respects the prevailing legal architecture more than a common-law style process would have given Cambodia’s civil law tradition, but in practice, it has resulted in repetitive proceedings at every step along the way.<sup>45</sup>

Cambodian negotiators also succeeded in ensuring that each Chamber has a majority of Cambodian judges; however, a super-majority is necessary to render any important ruling.<sup>46</sup> As such, the tribunal is considered only as strong as its weakest international judge. A longstanding dispute between the CPs and CIJs over whether to move forward with charges in Cases 003 and 004 has led to pointed criticism that the government is interfering in the judicial process and the Cambodian

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<sup>43</sup> See Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, with the inclusion of amendments as promulgated on Oct. 27, 2004, NS/RKM/1004/006 (“ECCC Statute”), available at <http://www.cambodia.gov.kh/krt/pdfs/KR%20Law%20as%20amended%2027%20Oct%202004%20Eng.pdf> (“ECCC Law”).

<sup>44</sup> John Giorciari & Anne Heindel, ‘Experiments in International Criminal Justice: Lessons from the Khmer Rouge Tribunal’, 35 MICH. J. INT’L L. 369, 378 (2014).

<sup>45</sup> Ibid at 374-7.

<sup>46</sup> ECCC Law, Ibid note 43, at Article 14 new.

personnel are failing to fulfil their mandate.<sup>47</sup> Multiple international CIJs have resigned amidst complaints that they had either been “captured” by the Cambodian side or prevented from functioning independently.<sup>48</sup> At the moment, these cases are proceeding without the blessing of the Cambodian CIJ or CP because the PTC did not achieve the super-majority required to halt the investigation.<sup>49</sup> Wisely, no other hybrid court has adopted this strict hybrid formula for staffing.

The Extraordinary African Chambers (EAC), established by the African Union in Senegal to prosecute Hissène Habré of Chad and several of his confederates, are minimally international: they are staffed by a sprinkling of international judges (who do not comprise a majority) applying international criminal law and domestic procedural law.<sup>50</sup> Although technically comprising an international court, the EAC exists within the ordinary Senegalese district and appeals

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<sup>47</sup> Open Society Justice Initiative, *The Future of Cases 003/004 at the Extraordinary Chambers in the Courts of Cambodia* (Oct. 2012), available at [https://www.opensocietyfoundations.org/sites/default/files/eccc-report-cases3and4-100112\\_0.pdf](https://www.opensocietyfoundations.org/sites/default/files/eccc-report-cases3and4-100112_0.pdf).

<sup>48</sup> Human Rights Watch, *Cambodia: Judges Investigating Khmer Rouge Crimes Should Resign* (3 October 2011), available at <https://www.hrw.org/news/2011/10/03/cambodia-judges-investigating-khmer-rouge-crimes-should-resign>.

<sup>49</sup> Open Society Justice Initiative, *Recent Developments at the Extraordinary Chambers in the Courts of Cambodia: March 2015* 3-4, available at <https://www.opensocietyfoundations.org/sites/default/files/eccc-march-2015-20150323.pdf>.

<sup>50</sup> Article 11, Statut des Chambres Africaines Extraordinaires au sein des Juridictions Sénégalaises pour la Poursuite des Crimes Internationaux Commis au Tchad durant la Période du 7 Juin 1982 au 1er Décembre 1990, available at <http://www.hrw.org/node/248651> (“EAC Statute”).

court structure in Dakar. In keeping with local law, there are four chambers: an investigative chamber, an indicting chamber, a trial chamber, and an appeals chamber.<sup>51</sup> The presiding judges of the latter two chambers hail from another AU member state.<sup>52</sup> Individuals are nominated by the Senegalese Justice Minister and appointed by the African Union Commission Chair, although there is no requirement that they be experts in international criminal law as has been required for other international and internationalised tribunals.<sup>53</sup> The African Union wisely established an independent Defence Office to protect the rights of the defence and otherwise support defence counsel.<sup>54</sup> The EAC offer a minimally hybrid model, but one that will still benefit from international expertise in prosecuting complex international crimes.

The latest effort in this tradition is found in the nascent Special Criminal Court (SCC) for the Central African

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<sup>51</sup> EAC Statute, *Ibid* at Article 2.

<sup>52</sup> *Ibid* Article 11.

<sup>53</sup> *Ibid.* Compare Article 13, Statute of the Special Court for Sierra Leone, 2178 U.N.T.S. 145, *available at* <http://rscsl.org/Documents/scsl-statute.pdf> (“SCSL Statute”) (“The judges shall be persons of high moral character, impartiality and integrity who possess the qualifications required in their respective countries for appointment to the highest judicial offices. They shall be independent in the performance of their functions, and shall not accept or seek instructions from any Government or any other source. ... In the overall composition of the Chambers, due account shall be taken of the experience of the judges in international law, including international humanitarian law and human rights law, criminal law and juvenile justice.”).

<sup>54</sup> See Human Rights Watch, *The Case of Hissène Habré before the Extraordinary African Chambers in Senegal*, 27 April 2015, *available at* [https://www.hrw.org/sites/default/files/related\\_material/2015\\_Senegal\\_Chad\\_Habr%C3%A9\\_case\\_Q%26A\\_2.pdf](https://www.hrw.org/sites/default/files/related_material/2015_Senegal_Chad_Habr%C3%A9_case_Q%26A_2.pdf)

Republic (CAR).<sup>55</sup> The SCC is the product of newly-passed legislation,<sup>56</sup> which follows on the heels of a U.N. commission of inquiry recommendation,<sup>57</sup> an August 2014 agreement between CAR and the United Nations that contemplates the establishment of the SCC,<sup>58</sup> and a Special Investigation Cell formed by presidential decree to begin investigations.<sup>59</sup> The legislation envisions a mixed bench composed of international and domestic judges in roughly equal numbers.<sup>60</sup> The Prosecutor will be a foreign national, but the Chief Justice will hail from CAR.<sup>61</sup> It is anticipated that the SCC will be in existence for 5 years, subject to renewal at the initiative of the government in consultation with the United Nations.<sup>62</sup> The

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<sup>55</sup> *Géraldine Mattioli-Zeltner, Taking Justice to a New Level: The Special Criminal Court in the Central African Republic (July 13, 2015)*, available at <https://www.hrw.org/news/2015/07/13/taking-justice-new-level-special-criminal-court-central-african-republic>.

<sup>56</sup> Loi Organique No. 15.003 Portant Création, Organisation et Fonctionnement de la Cour Pénale Spéciale (2015), available at <https://rongdhrca.wordpress.com/2015/07/22/loi-organique-n15-003-portant-creation-organisation-et-fonctionnement-de-la-cour-penale-speciale/> (“CAR *Loi Organique*”).

<sup>57</sup> The International Commission of Inquiry on the Central African Republic, *Final Report*, U.N. Doc. S/2041/928, available at <http://reliefweb.int/sites/reliefweb.int/files/resources/N1471229.pdf>. The COI was established by UNSCR 2127 (2013).

<sup>58</sup> See U.N. Secretary-General, *Report of the Secretary-General on the Situation in the Central African Republic*, U.N. Doc. S/2014/857, 28 November 2014.

<sup>59</sup> Parliamentarians for Global Action, *Parliament of the Central African Republic Adopts the Law Establishing a Special Criminal Court*, 29 April 2015, available at <http://www.pgaction.org/car-centralafricanrepublic-criminalcourt.html>; Human Rights Watch, *Taking Justice to a New Level: The Special Criminal Court in the Central African Republic*, 13 July 2015.

<sup>60</sup> CAR *Loi Organique*, *Ibid* note 56, at Articles 11-14.

<sup>61</sup> *Ibid* at Article 18.

<sup>62</sup> *Ibid* at Article 70.

SCC's jurisdiction will overlap with that of the ICC, which is undertaking investigations into two sets of international crimes, including crimes committed since 2012 by the Séléka Alliance and their anti-Balaka foes that will be heard by the SCC.<sup>63</sup>

The DRC offers a microcosm of internationalised justice mechanisms. According to one long-standing proposal,<sup>64</sup> draft legislation would create specialised mixed chambers with jurisdiction over the range of international crimes.<sup>65</sup> Although this proposal remains in flux, the basic structure involves three five-member Trial Chambers (including two foreign advisor judges) and one five-person Appeals Chamber. These special

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<sup>63</sup> FIDH, *Central African Republic: The ICC Opens an Investigation on International Crimes Committed Since 2012*, 24 September 2014, available at <https://www.fidh.org/en/region/Africa/16116-central-african-republic-the-icc-opens-an-investigation-on-international>.

<sup>64</sup> Human Rights Watch, *DR Congo: Establishment of a Specialised Mixed Court for the Prosecution of Serious International Crimes*, 15 April 2011. Another statute enacted in January 2016 incorporated ICC crimes into domestic penal law and provides a legal framework for cooperation. See *La Proposition de Loi de Mise en Oeuvre du Statut de Rome dans la Législation Congolaise*, available at [http://www.pgaction.org/pdf/pre/Comoros\\_Adubango.pdf](http://www.pgaction.org/pdf/pre/Comoros_Adubango.pdf). See Patryk Labuda, *The Democratic Republic of Congo's Failure to Address Impunity for International Crimes: A View from Inside the Legislative Process 2010-2011*, INTERNATIONAL JUSTICE MONITOR, 8 November 2011, available at <http://www.ijmonitor.org/2011/11/the-democratic-republic-of-congos-failure-to-address-impunity-for-international-crimes-a-view-from-inside-the-legislative-process-2010-2011/>.

<sup>65</sup> A 2013 Peace, Security and Cooperation Framework signed by all major parties involved in stabilisation efforts in the Great Lakes region called for an end to the long-standing impunity for grave international crimes in the DRC. See generally David Zounmenou & Naomi Kok, *Peace, Security and Cooperation Framework for the DRC: Hopes and Challenges*, 8 March 2013.

chambers would be housed within provincial appeals courts and staffed with a mix of national and international personnel, including judges, prosecutors, administrators, investigators, and defence counsel. A special mixed chamber in the national *Cour de Cassation* would be empowered to review judgments from the Appeals Chamber, which will be co-located in Kinshasa.<sup>66</sup> Investigative and Prosecutorial Units for each Chamber will be made up of a blend of foreign and Congolese staff appointed by the President and other officials.<sup>67</sup> Nationals of states that border the DRC would be excluded from consideration given the involvement of neighbouring states in perpetrating and perpetuating the violence. Military and police defendants would be entitled to have career military magistrates serve on their panels, a preference of the Ministry of Defence and a function of Congolese military law, which incorporates the international crimes and vests jurisdiction in military courts during a state of war. Military courts in the DRC have amassed ten years' worth of experience prosecuting international crimes arising out of the various armed conflicts within the country. In this way, the DRC tribunals would be mixed, incorporating domestic and international elements as well as civilian and military personnel. Under current proposals, international judges

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<sup>66</sup> Human Rights Watch, *Accountability for Atrocities Committed in the Democratic Republic of Congo* (Apr. 1, 2014), available at [http://www.hrw.org/news/2014/04/01/accountability-atrocities-committed-democratic-republic-congo#\\_ftnref3](http://www.hrw.org/news/2014/04/01/accountability-atrocities-committed-democratic-republic-congo#_ftnref3).

<sup>67</sup> Specifically, the Congolese President would appoint the Congolese judges and senior prosecutorial staff, including a Congolese chief prosecutor. All foreign members would be appointed by the Prime Minister, with recommendations from the Justice and Foreign Ministers.

would be in the minority of each panel and would gradually be phased out.<sup>68</sup>

Another important innovation in the DRC is found in the mobile courts that were developed to bring justice to remote areas in eastern DRC that have been ravaged by war but are far from any formal justice institutions.<sup>69</sup> These courts are creatures of domestic law and come in both civilian and military varieties. They rely heavily on international assistance. In particular, the United Nations Development Programme,<sup>70</sup> the American Bar Association's Rule of Law Initiative (ABA ROLI),<sup>71</sup> and other donors provide training

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<sup>68</sup> For a discussion of this proposal and other transitional justice developments in the DRC, see International Center for Transitional Justice, *The Accountability Landscape in Eastern DRC* 13-15 (July 2015), available at [https://www.ictj.org/sites/default/files/ICTJ-Report-DRC-Accountability-Landscape-2015\\_0.pdf](https://www.ictj.org/sites/default/files/ICTJ-Report-DRC-Accountability-Landscape-2015_0.pdf) ("ICTJ, DRC").

<sup>69</sup> The mobile courts are convened on an *ad hoc* basis as needed, particularly where serious international crimes have been committed in remote areas. An international coordination forum verifies the need and authorises funding. Lawyers and judges (including military judges if the defendant is a member of the military) are then deployed to the location where the hearing will be held, usually in a temporary structure. International monitors ensure that trials are held in accordance with international standards.

<sup>70</sup> Monica Rispo, *Evaluation of UNDP's Support to Mobile Courts* 9 (May 2014), [http://www.undp.org/content/dam/undp/library/crisis%20prevention/UNDP\\_ROL\\_Mobile%20CourtsEvaluation\\_Nov2014.pdf](http://www.undp.org/content/dam/undp/library/crisis%20prevention/UNDP_ROL_Mobile%20CourtsEvaluation_Nov2014.pdf).

<sup>71</sup> ABA ROLI has received funds from the Dutch, Norwegian and United States Governments, the MacArthur Foundation, the Open Society Justice Initiative for Southern Africa, and other donors. United States Government funding has come from the Bureau of Democracy, Human Rights, and Labor (DRL), the Bureau of International Narcotics and Law Enforcement (INL), and the Agency for International Development (USAID). ABA ROLI has

for court staff, help to secure lodging and transportation for witnesses (which diminishes adjournment rates), and offer *pro bono* legal assistance to victims and defendants. The mobile courts, which also work with the U.N. Stabilisation Mission (MONUSCO) and other partners, offer a high degree of local access and ownership while helping to build legal capacity. MONUSCO also provides transportation and, in partnership with the Congolese authorities, security. The mobile courts coordinate with legal clinics to ensure cases are trial-ready; provide appropriate referrals to non-legal organisations that can provide medical, social, and economic assistance to victims; and engage in community education and outreach.<sup>72</sup> So far, evaluations of the mobile courts have been cautiously optimistic, although their dependency on international funding hampers sustainability, and concerns about victim and witness protection persist.<sup>73</sup>

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also helped create a network of legal aid clinics. See American Bar Association, *Rule of Law Programs in the Democratic Republic of Congo*, available at

[http://www.americanbar.org/advocacy/rule\\_of\\_law/where\\_we\\_work/africa/democratic\\_republic\\_congo/programs.html](http://www.americanbar.org/advocacy/rule_of_law/where_we_work/africa/democratic_republic_congo/programs.html).

<sup>72</sup> Tessa Khan & Jim Wormington, 'Mobile Courts in the DRC: Lessons from Development for International Criminal Justice', Oxford Transitional Justice Research Working Paper Series 19, 27, available at

<http://otjr.crim.ox.ac.uk/materials/papers/178/mobile%20courts%20DRC.pdf>.

<sup>73</sup> Rispo, *Ibid* note 70, at 11. See generally Milli Lake, 'Organising Hypocrisy: Providing Legal Accountability for Human Rights Violations in Areas of Limited Statehood', 58 INT'L STUDIES Q. 515 (2014); Michael Maya, *Mobile Courts in the Democratic Republic of Congo: Complementarity in Action?*, available at

[http://worldjusticeproject.org/sites/default/files/mobile\\_courts\\_in\\_the\\_democratic\\_republic\\_of\\_congo\\_maya.pdf](http://worldjusticeproject.org/sites/default/files/mobile_courts_in_the_democratic_republic_of_congo_maya.pdf).



As an alternative to the creation of a stand-alone tribunal, specialised court, or mixed judicial chambers, states have also sought assistance from the United Nations and donor countries to strengthen domestic investigative and prosecutorial authorities through a range of rule-of-law initiatives that include the secondment of international experts to dedicated international crimes units. The Commission Against Impunity in Guatemala (CICIG),<sup>74</sup> for example, embeds international experts in the Guatemalan Attorney General's office and the National Police to help investigate and disband criminal organisations with ties to the security forces and other corrupt state structures that are threatening the enjoyment of human rights in Guatemala.<sup>75</sup> CICIG has its origins in civil society demands and a 2002 request from the Government of Guatemala to the United Nations for assistance in dealing with the high levels of post war violence and entrenched impunity.<sup>76</sup> The U.N. Department of Political Affairs originally proposed a hybrid commission that would enjoy both investigative and prosecutorial powers (to be called the Commission for the Investigation of Illegal Groups and Clandestine Security Organisations (CICIACS)).<sup>77</sup> The

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<sup>74</sup> <http://www.cicig.org/index.php?page=home>.

<sup>75</sup> See generally Open Society Justice Initiative, *Unfinished Business: Guatemala's International Commission Against Impunity (CISIG)* (March 2015); Andrew Hudson & Alexander Taylor, 'The International Commission Against Impunity in Guatemala: A New Model for International Criminal Justice Mechanisms', 8 J. INT'L CRIM. JUSTICE 53 (2010).

<sup>76</sup> Activities of the International Commission Against Impunity in Guatemala: Report of the Secretary-General, U.N. Doc. A/64/370 (Sept. 23, 2009), available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N09/523/86/PDF/N0952386.pdf?OpenElement> ("CICIG Report").

<sup>77</sup> Washington Office on Latin America, *A Brief Background on the UN Commission Against Impunity In Guatemala*, 26 April 2007, available at <http://www.wola.org/es/node/337>.

Guatemalan Constitutional Court in a consultative opinion raised concerns that such a delegation of prosecutorial authority might be unconstitutional, attesting to the importance of sorting such legal issues out in advance.<sup>78</sup> Accordingly, the final bilateral agreement between Guatemala and the United Nations established special investigative cells of embedded international experts who provide technical assistance to local actors and undertake direct investigations.<sup>79</sup> Although dependent on Guatemalan officials to pursue charges, CICIG is entitled to present potential criminal charges to the Public Prosecutor (*Ministerio Público*) and join proceedings as a private prosecutor (*querrelante adhesivo*).<sup>80</sup> It can also seek sanctions against Guatemalan officials who hinder on-going investigations or prosecutions.<sup>81</sup> On a structural level, CICIG has been instrumental in proposing legal reforms (including the establishment of a witness protection

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<sup>78</sup> Corte de Constitucionalidad, Guatemala, Opinión Consultiva, Expediente No. 1250-2004, 5 August 2004.

<sup>79</sup> See Agreement Related to the Creation of an International Commission Against Impunity in Guatemala (“CICIG”), 12 December 2006, *available at* [http://www.wola.org/publications/cicig\\_text\\_of\\_the\\_agreement\\_between\\_the\\_united\\_nations\\_and\\_the\\_state\\_of\\_guatemala\\_on\\_th](http://www.wola.org/publications/cicig_text_of_the_agreement_between_the_united_nations_and_the_state_of_guatemala_on_th).

The agreement was ratified by the Guatemalan legislature on Aug. 1, 2007. Beyond this agreement, the UN General Assembly also endorsed CICIG in Resolution 63/19, 16 December 2008 and called upon states to support CICIG through voluntary contributions, financial and in kind.

<sup>80</sup> CICIG, *Ibid* note 79, at Article 3; *see generally* Tove Nyberg, *Smoking the Rats Out: CICIG's Effort to Strengthen the Justice System in Guatemala*, *available at* <http://www.diva-portal.org/smash/get/diva2:730171/FULLTEXT01.pdf>.

<sup>81</sup> *Ibid* at Article 3; Hudson & Taylor, *Ibid* note 75, at 61; Human Rights Watch, *World Report 2014: Guatemala*, *available at* <http://www.hrw.org/world-report/2014/country-chapters/guatemala?page=1>.

programme), capacitating domestic actors, and establishing a merit-based judicial appointment system. In this way, CICIG's contributions go beyond the provision of technical assistance to investigations and prosecutions.<sup>82</sup>

There may also be a role for the United Nations to provide assistance and advice on foreign appointments, even for a purely domestic institution. For example, a majority of the judges and the Chief Prosecutor of the Special Court for Sierra Leone were appointed by the U.N. Secretary-General; the Government of Sierra Leone appointed the others as well as a Sierra Leonean Deputy Prosecutor.<sup>83</sup> In actuality, there were very few Sierra Leoneans in professional positions at first given the lack of local capacity. This asymmetry was accentuated by the fact that the government appointed some internationals to fill posts that were designated for local personnel.<sup>84</sup> In the early days, and notwithstanding this multilateral appointment process, many top posts went to lawyers from the United States, which was a major supporter—financial and otherwise—of the SCSL.<sup>85</sup> This did raise some concerns that the United States might exert undue influence over the tribunal.

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<sup>82</sup> Hudson & Taylor, *Ibid* note 75, at 6.

<sup>83</sup> SCSL Statute, *Ibid* note 53, at Article 12; OHCHR, *Legacy*, *Ibid* note 13, at 10 n.19. Judicial nominations came from states, particularly the member states of the Economic Community of West African States (ECOWAS) as well as the Commonwealth.

<sup>84</sup> International Center for Transitional Justice, Tom Perriello & Marieke Wierda, *The Special Court for Sierra Leone Under Scrutiny*, (March 2006), <https://www.ictj.org/sites/default/files/ICTJ-SierraLeone-Special-Court-2006-English.pdf>.

<sup>85</sup> Wayne Sandholtz, *Creating Authority by the Council: The International Criminal Tribunals*, in *THE UN SECURITY COUNCIL AND THE POLITICS OF INTERNATIONAL AUTHORITY* 131, 148 (Bruce Cronin et al, (eds.) 2008).

Likewise, in the Special Tribunal for Lebanon, the international prosecutor, head of the Defence Office, and all the judges were appointed by the U.N. Secretary-General; the judges were chosen from among those recommended by the Lebanese government and member states.<sup>86</sup> Under the U.N. Agreement with Cambodia, the Supreme Council of the Magistracy selected the Cambodian judges from amongst the local judicial ranks, with mixed results in terms of skill and capacity.<sup>87</sup> The U.N. Secretary-General nominated potential international judges, but these too were subject to approval by the Supreme Council of the Magistracy, which drew criticism for trying to manipulate the process through unjustified delays.<sup>88</sup> Whatever the role of the international community in helping to staff mixed courts, the process should involve consultations with key national stakeholders, be based upon rigorous standards in terms of subject matter expertise and experience with other successful transitional justice efforts (international or domestic), and avoid the appearance of excessive influence by any one entity, local or foreign.<sup>89</sup>

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<sup>86</sup> S.C. Res. 1757, Annex, May 30, 2007, Article 9.

<sup>87</sup> ECCC Law, Ibid note 43, at Article 11 new.

<sup>88</sup> Douglas Gillison, *Cambodia Rejects UN Genocide Judge*, THE INVESTIGATIVE FUND, 15 January 2012, available at [http://www.theinvestigativefund.org/blog/1601/cambodia\\_rejects\\_un\\_genocide\\_judge/Most%20Emailed](http://www.theinvestigativefund.org/blog/1601/cambodia_rejects_un_genocide_judge/Most%20Emailed).

<sup>89</sup> See OHCHR, *Legacy*, Ibid note 13, at 10-11 (noting criticism around the failure of international transitional administrations to consult adequately in Timor-Leste and Kosovo with domestic actors in recruiting and integrating foreign personnel).

## Potential Pitfalls

Despite their advantages over earlier models of international justice, these newer hybrid and internationalised institutions raise questions of their own when it comes to the imperatives of legitimacy, competency, and fairness, particularly when local personnel may be susceptible to political manipulation, where the rule of law is not fully established, or when domestic actors insist on certain concessions, such as the availability of *in absentia* proceedings or the death penalty. Moreover, as they become more idiosyncratic, these institutions risk undermining the universalist ethos that undergirds the entire human rights edifice. Likewise, legitimacy and efficiency deficits have plagued excessively hybridised institutions, such as the ECCC, as compared to the Bosnia-Herzegovina model, which pairs international and local personnel operating under international standards of due process. As Sri Lankan actors embark upon their own efforts at institution building, they should not lose sight of these potential pitfalls.

At the same time, leaving the prosecution of international crimes entirely to domestic systems can enable parochial forms of victor's justice and give expression to illiberal impulses that the international community should not endorse through the provision of financial, technical, diplomatic, or other forms of support. For example, although international advisors played a role in the work of the Iraqi High Tribunal (IHT), that justice process remained controversial.<sup>90</sup> The IHT was by all

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<sup>90</sup> Coalition Provisional Authority Order No. 48: Delegation of Authority Regarding an Iraqi Special Tribunal, *available at* [http://www.loc.gov/law/help/hussein/docs/20031210\\_CPAORD\\_48\\_IST\\_and\\_Appendix\\_A.pdf](http://www.loc.gov/law/help/hussein/docs/20031210_CPAORD_48_IST_and_Appendix_A.pdf) ("CPA Order No. 48"). The order delegated to the Interim Governing Council, which had been appointed by the CPA, authorisation to establish the tribunal; a draft Statute purporting to be the result of extensive consultations

measures a domestic court—staffed by Iraqi personnel applying Iraqi law—that was internationalised by the presence of international advisors selected by the International Bar Association and others and by the training and administrative support provided by the U.S. Department of Justice’s Regime Crimes Liaison Office (RCLO).<sup>91</sup> Although the Coalition Provision Authority and the original Statute envisioned the appointment of non-Iraqi judges, this did not come to pass.<sup>92</sup> Instead, foreign lawyers (mostly from the United States) were relegated to an advisory role.<sup>93</sup> The pool of qualified advisors

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between the CPA and the Governing Council appeared as an appendix to this order. *See* Law of the Supreme Iraqi Criminal Tribunal, Al-Waqa’I Al-Iraqiya—No. 4006, 18 October 2005, available at <http://gipi.org/wp-content/uploads/2009/02/iraqstatuteengtrans.pdf> (“IHT Statute”); Guénaél Mettraux, ‘The 2005 Revision of the Statute of the Iraqi Special Tribunal’, 5 J. INT’L CRIM. JUSTICE 287, 288 (2007) (noting the “Iraqisation” of the new Statute, which diminished the role of international personnel and weakened certain procedural guarantees).

<sup>91</sup> Michael P. Scharf, ‘The Iraqi High Tribunal: A Viable Experiment in International Justice?’, 5 J. INT’L CRIM. JUSTICE 258, 259 (2007) (“the [IHT] merits the characterisation of an internationalised domestic tribunal... [It] is not fully international or even international enough to be dubbed a hybrid court”). On the RCLO, see Eric Stover et al., ‘Bremer’s Gordian Knot: Transitional Justice and the US Occupation of Iraq’, 27 HUM. RTS. Q. 830, 841 (2005).

<sup>92</sup> Coalition Provisional Authority Order No. 48: Delegation of Authority Regarding an Iraqi Special Tribunal, available at [http://www.loc.gov/law/help/hussein/docs/20031210\\_CPAORD\\_48\\_IST\\_and\\_Appendix\\_A.pdf](http://www.loc.gov/law/help/hussein/docs/20031210_CPAORD_48_IST_and_Appendix_A.pdf) (“CPA Order No. 48”). The order authorised the Interim Governing Council, which had been appointed by the CPA, to establish the IHT.

<sup>93</sup> Iraqi High Tribunal, Revised Version Iraqi Special Tribunal Rules of Procedure and Evidence, available at <http://law.case.edu/Academics/AcademicCenters/Cox/WarCrime>

was limited, however, by the fact that the U.N. Secretary-General prohibited senior personnel from the *ad hoc* tribunals to participate in any training programmes given the controversy around the legality of the invasion of Iraq and the subsequent occupation.<sup>94</sup> The availability of the death penalty was also an impediment to direct U.N. involvement. As an exercise of lustration, Article 33 of the IHT Statute prohibited the appointment of anyone who had been a member of the Ba’ath party, which may have “dilute[d] the pool of qualified jurists significantly.”<sup>95</sup> The IHT was plagued by allegations of political interference (on the part of the new Iraqi authorities and the United States) as well as threats to judges and defence counsel.<sup>96</sup> In part due to its controversial origins and in part due to perceived procedural flaws, the IHT never earned the support, or respect, of the international community.<sup>97</sup>

In the absence of international assistance and involvement, domestic criminal prosecutions can become co-opted by political forces in ways that undermine the laudable goals sought to be achieved. Nowhere is this more in evidence than in Bangladesh. The Bangladesh International Crimes

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[sResearchPortal/pdf/IST\\_Rules\\_of\\_Procedure\\_and\\_Evidence.pdf](#)  
 (“IHT RPE”).

<sup>94</sup> Stover, *Ibid* note 91, at 843.

<sup>95</sup> Michael Newton, ‘The Iraqi High Criminal Court: Controversy and Contributions’, 862 INT’L REVIEW OF THE RED CROSS 399, 406 (June 2006).

<sup>96</sup> Chatham House, *The Iraqi Tribunal: The Post-Saddam Cases* 6 (4 December 2008), *available at*

[http://www.chathamhouse.org/sites/files/chathamhouse/field/field\\_document/Discussion%20Group%20Summary%20The%20Iraqi%20Tribunal.pdf](http://www.chathamhouse.org/sites/files/chathamhouse/field/field_document/Discussion%20Group%20Summary%20The%20Iraqi%20Tribunal.pdf) (“Chatham House, *Post-Saddam*”).

<sup>97</sup> *See* M. Cherif Bassiouni, ‘Post-Conflict Justice in Iraq: An Appraisal of the Iraq Special Tribunal’, 38 CORNELL INT’L L.J. 327 (2005).

Tribunal (BICT) is “international” in name and subject matter only. Tracing its roots to the War of Liberation that gave rise to modern-day Bangladesh, the BICT is dedicated to prosecuting alleged collaborators with the Pakistani Army (then West Pakistan) for atrocities committed when East Pakistan (now Bangladesh) sought to secede in March 1971.<sup>98</sup> A creature of domestic law with virtually no international involvement, the BICT is asserting jurisdiction over acts of genocide, crimes against humanity, war crimes, and “other crimes under international law” pursuant to a law that dates from the independence period.<sup>99</sup> The Bangladeshi government has barred, or erected impenetrable barriers to, the involvement of any international personnel, including defence counsel chosen by the accused to represent them and advisors who might have positively influenced the proceedings.

The BICT was inspired by principled objectives that have been betrayed by implementation. Any international support once enjoyed soon soured when it was clear that the process had been corrupted and would be more political than legal. Today, the international community is engaged largely as a

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<sup>98</sup> See generally Beth Van Schaack, ‘The Bangladesh International Crimes Tribunal (BICT): Complementarity Gone Bad’, INTLAWGRRLS, 8 October 2014, <http://ilg2.org/2014/10/08/the-bangladesh-international-crimes-tribunal-bict-complementarity-gone-bad/>; Stephen Kay, *Bangladesh War Crime Tribunal: A Wolf in Sheep’s Clothing?*, available at <http://www.internationallawbureau.com/blog/wp-content/uploads/2010/11/Bangladesh-International-War-Crimes-Tribunal.pdf>.

<sup>99</sup> The International Crimes (Tribunals) Act 1973 (Bangladesh), art. 3, available at [http://bdlaws.minlaw.gov.bd/print\\_sections\\_all.php?id=435](http://bdlaws.minlaw.gov.bd/print_sections_all.php?id=435) (“1973 Act”).



critic, having failed in its efforts to bring the proceedings closer in line with international standards.<sup>100</sup> Indeed, the BICT has become an object lesson for how international criminal law can be manipulated for political ends, particularly given that the only individuals being prosecuted are associated with the opposition parties—Jamaat-e-Islami (JeI) and the Bangladesh Nationalist Party (BNP)—who are opposed to the governing Awami League.<sup>101</sup> Not a single so-called freedom fighter (*mukti bahani*) or Pakistani national has been prosecuted, suggesting that the BICT is part of a byzantine political vendetta rather than a genuine, and long-overdue, effort at historical justice.<sup>102</sup> The BICT might have garnered more respect had its principals been willing to allow for the involvement of international experts, as advisors or participants, to ensure the proceedings' fairness and legitimacy.

## Conclusion

The emergence of a new regime in Sri Lanka—and a newfound willingness to engage with the international community on transitional justice issues—offers all Sri Lankans the opportunity to put their country's divisive history behind it and lay the foundation for a more inclusive, just, and prosperous society. How the country tackles entrenched impunity and the imperative of ensuring some accountability for the commission of grave international crimes will be central to this process. Fortunately, Sri Lanka is not in the

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<sup>100</sup> See Stephen J. Rapp, *Press Roundtable, Dhaka, Bangladesh*, 5 August 2014, *available at*

[Http://Photos.State.Gov/Libraries/Bangladesh/621750/Speeches\\_Remarks\\_2014/Amb\\_Rapp\\_Press\\_Roundtable\\_Aug\\_5\\_2014.Pdf](http://Photos.State.Gov/Libraries/Bangladesh/621750/Speeches_Remarks_2014/Amb_Rapp_Press_Roundtable_Aug_5_2014.Pdf).

<sup>101</sup> Geoffrey Robertson, *Report on the International Crimes Tribunal for Bangladesh* 10-12 (2015).

<sup>102</sup> *Ibid* at 70.

situation faced by many post-conflict societies in which its judicial system has been destroyed, or must be built from scratch; rather, Sri Lanka has the benefit of a well-developed legal system and skilful local bar. What is lacking, however, is a shared confidence in the system and a uniform capacity to address complex international crimes. Involving international expertise offers a solution to these problems. Once these two priorities are achieved, international involvement can be gradually phased out and the domestic system will be left stronger for it.

Involving the international community in the process of post-conflict justice will be crucial to enhancing the credibility and impact of any trials and to contributing to long-term societal stability through the instantiation of a fair and effective justice system. Victims and defendants alike deserve a fair and legitimate process that adheres to internationally recognized due process principles. International involvement will cement Sri Lanka's new-found good standing and respectability within the community of nations,<sup>103</sup> offer the opportunity for Sri Lanka to make its own contribution to the field of transitional justice, and provide opportunities to build a world-class judicial sector. All that said, any trials must be part of a diversified transitional justice programme focused not only on the deployment of prosecutorial tools but also on truth telling exercises and the formation of an accurate collective memory; the rehabilitation and reparation of victims; the promotion of

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<sup>103</sup> Jared Ferrie, *Sri Lanka War Crimes in the Spotlight as UN Rights Chief Visits*, 10 February 2016,

<http://www.justiceinfo.net/en/component/k2/25927-sri-lanka-war-crimes-in-the-spotlight-as-un-rights-chief-visits.html> (noting that enacting transitional justice reforms and proposals could bring economic benefits to Sri Lanka, including restored access to the European Union's Generalised Scheme of Preferences and the United States' Millennium Challenge Corporation).

reconciliation among communities; an accounting for missing persons; and the development of new institutions and policies.<sup>104</sup> By launching a genuine transitional process, Sri Lanka will make a demonstrable international commitment to the rule of law and to universal principles of justice.

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<sup>104</sup> Miriam J. Aukerman, 'Extraordinary Evil, Ordinary Crime: A Framework for Understanding Transitional Justice', 15 HARV. HUM. RTS. J. 39 (2002).

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**Designing Sri Lanka's Special Court:  
Cautionary Considerations from the  
Cambodian Experience**

*§*

*John D. Ciorciari*

The Sri Lankan government has committed to launch a special war crimes court to probe atrocities committed during the country's civil war. One of the key debates surrounding the court's creation is the level of involvement that international personnel will have in the process. Many human rights and justice advocates contend that robust international involvement is needed to buttress domestic capacity, insulate the court against political interference, and contribute to a credible judicial process.<sup>1</sup> These were the reasons why UN High Commissioner for Human Rights Zeid Ra'ad Al Hussein called on Sri Lankan authorities in September 2015 to "draw on the lessons learnt and good practices of other countries that have succeeded with hybrid special courts" integrating national and international personnel.<sup>2</sup> One of the most important to examine is the Extraordinary Chambers in the Courts of Cambodia (ECCC), a hybrid special tribunal established within the Cambodian judiciary to address Khmer Rouge atrocities. The ECCC features a mix of Cambodian and UN-appointed personnel and thus sheds light on the benefits and hazards of international engagement in a preponderantly domestic criminal process.

The administration of President Maithripala Sirisena indicated an intent to engage international personnel by co-sponsoring a September 2015 UN Human Rights Council resolution that called explicitly for inclusion of foreign judges

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<sup>1</sup> See, e.g., Human Rights Watch, *Sri Lanka: Fulfil Rights Council Call for Justice* (25 January 2016); Sri Lanka Campaign for Peace and Justice, *A hybrid court, but how strong will it be?* (27 September 2015); Bhavani Fonseka and Luwie Ganeshathasan, *Hybrid vs. Domestic: Myths, Realities and Options for Transitional Justice in Sri Lanka*, Centre for Policy Alternatives (January 2016).

<sup>2</sup> *Report of the OHCHR Investigation on Sri Lanka (OISL)*, U.N. Doc. A/HRC/30/CRP.2 (16 September 2015), p 1246.

and lawyers.<sup>3</sup> Sinhalese nationalists and some in the security forces objected, however, and the Sirisena administration has since backtracked. Sirisena later announced that the mechanism would be “completely domestic”<sup>4</sup> and would “follow the constitution—a reassurance to domestic critics who argued that including foreign personnel would violate Sri Lankan sovereignty.”<sup>5</sup> It is thus unclear whether the special court will include significant roles for international personnel or other hybrid features.

Regardless of the specific form the special court takes, a key question is how to achieve the goals a hybrid mechanism is meant to help achieve—including adherence to international best practices and judicial independence. Despite its distinct features, the ECCC furnishes a number of useful lessons. This chapter will argue that the ECCC’s experience validates the view that strong international involvement can enhance the credibility and effectiveness of a domestically constituted mass crimes court. The ECCC proceedings also demonstrate, however, that substantial international roles are not enough to safeguard judicial efficacy and independence. Domestic measures to uphold those aims are also necessary. The ECCC thus carries useful lessons for the design of Sri Lanka’s special court even if it does not feature the same degree of hybridity.

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<sup>3</sup> *Promoting reconciliation, accountability and human rights in Sri Lanka*, U.N. Doc. A/HRC/30/L.29 (29 September 2015), p 6 (affirming “the importance of participation in a Sri Lankan judicial mechanism, including the special counsel’s office, of Commonwealth and other foreign judges, defence lawyers and authorised prosecutors and investigators”).

<sup>4</sup> ‘Lanka rights abuse probe to be ‘completely domestic’: Sirisena’, *The Tribune*, 3 October 2015.

<sup>5</sup> ‘Sirisena Rejects Claims Of Hybrid Court’, TTN News, 4 October 2015.

## **Drawing on International Technical Expertise**

The ECCC proceedings furnish several takeaways on ways in which international involvement can enhance domestic judicial and administrative capacity. At the ECCC, that need was strikingly apparent. The woeful incapacity of Cambodia’s judicial system—due in significant part to the Khmer Rouge purges of intellectuals and professionals—made international technical assistance imperative in all major phases of the accountability process. Sri Lanka’s domestic judicial system is much more sophisticated than the Cambodian judiciary was in the late 1990s, and Sri Lankan leaders have objected to the notion that the special court needs international technical support. After UN High Commissioner Zeid recommended that Sri Lanka study other states’ experiences with hybrid courts, Prime Minister Ranil Wickramasinghe said testily: “There is nothing to be got from abroad.”<sup>6</sup> President Sirisena also asserted recently: “We have more than enough specialists, experts and knowledgeable people in our country to solve our internal issues.”<sup>7</sup>

Although Sri Lanka does have many qualified judges and legal professionals, relatively few have experience in conducting complex mass crimes proceedings. The special court will need to put in place rules and procedures to deal with voluminous evidence, myriad potential witnesses, and other special challenges of trials featuring myriad alleged abuses. Former president Chandrika Kumaratunga, who leads the Sirisena administration’s reconciliation unit titled the Office of National Unity and Reconciliation, suggested in late 2015 that

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<sup>6</sup> ‘Sri Lanka rejects international war crimes probe’, *Channel News Asia*, 22 September 2015.

<sup>7</sup> Azzam Ameen, ‘Sri Lanka president wants ‘internal’ war crimes court’, *BBC News*, 21 January 2016. Sirisena added that that he would “never agree to international involvement.”

international forensic experts may assist Sri Lankan war crimes investigators.<sup>8</sup> The ECCC's experience suggests several other areas in which international technical assistance can boost the special court's efficacy and public legitimacy.

### **Tailoring the Rules of Procedure and Evidence**

One area for technical assistance concerns the rules of evidence and procedure. The ECCC illustrates the difficulty of conducting mass crimes trials within a domestic judicial system accustomed to handling "normal" criminal cases. Under its constitutive documents, the ECCC applies domestic procedures unless lacunae exist requiring reference to international procedures.<sup>9</sup> This has proven highly problematic, because Cambodian rules were ill equipped to apply in a mass crimes context. For example, they contained little guidance on how to question large numbers of witnesses efficiently, establish special courtroom protections when necessary, and manage voluminous documentary evidence. The ECCC judges decided to draft a set of special Internal Rules in 2007—despite lacking explicit authority to do so—and have adapted the rules periodically as criminal trials

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<sup>8</sup> Zacki Jabbar, 'Main line of command to be investigated by Special Court – CBK', *The Island*, 1 December 2015; Shihar Aneez, 'Sri Lanka to start up special court on alleged war crimes', *Reuters*, 1 December 2015.

<sup>9</sup> Agreement between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea, U.N.-Cambodia, June 6, 2003, 2329 U.N.T.S. 117, art. 12(1); Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, as amended and promulgated on 27 October 2004, arts. 20 new, 23 new, 33 new (NS/RKM/1004/006) (Cambodia).



proceed and new challenges are encountered. This strategy, while difficult to avoid in the Cambodian context, has led to defence challenges that the Court's rules are inconsistent and unpredictable and that the judges sometimes cherry-pick rules to favour desired outcomes.<sup>10</sup>

Over the past two decades, international criminal tribunals have developed extensive rules tailored for mass crimes cases. Sri Lanka's special court will rightly use domestic rules of evidence and procedure as starting points, but judges need not re-create the wheel to incorporate mass crimes provisions. They should do so promptly when the court is established, and retaining the services of international experts in such rules should be an early priority.<sup>11</sup> Importing international rules is a sensitive matter for Sri Lankans wary of incorporating hybrid features, but the overriding consideration must be to conduct fair and effective trials, which can build public trust in the process and the judicial system more generally.

### **Managing Victim Participation**

One of the most distinctive features of a mass crimes process is that it involves numerous potential victims and witnesses. Their inputs are often essential to find the truth and deliver well-founded verdicts, and their perceptions of the judicial process are crucial in determining its social and political impact. The ECCC's experience reveals the danger of

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<sup>10</sup> John D. Ciorciari and Anne Heindel, 'Experiments in International Criminal Justice: Lessons from the Khmer Rouge Tribunal', *Michigan Journal of International Law* 35:2 (2014), pp. 391-93.

<sup>11</sup> The ECCC's Internal Rules are not always the most suitable source, since they contain more prominent civil law features than the rules for other tribunals, in line with Cambodia's domestic legal system.

launching mass crimes trials without adequate advance planning for victim participation. The ECCC's evolving practice also shows some of the positive potential of including prominent roles for victims in the process.

The ECCC was established with the aim of providing justice to victims of the Khmer Rouge regime but without a well-developed architecture for enfranchising victims in the process. The ECCC includes an unprecedented civil party scheme allowing certain victims to seek collective and moral reparations for harms they suffered. That scheme rightly reflects the importance of including victims in the process, but it was designed by the Court's judges as they drafted the Internal Rules and has lacked the requisite funding to offer strong reparative remedies to victims. In the ECCC's first case, the civil party scheme raised and dashed some victim expectations for redress, prompting the judges to devise a new scheme for approving NGO reparations projects in subsequent cases. The inclusion of civil parties also slowed the trial proceedings, raised defence challenges relating to equality of arms and the right to a speedy trial, and led the ECCC to curtail the mechanism in its second case.<sup>12</sup> The lessons for Sri Lanka's special court are to manage reparative expectations carefully, plan for the requisite financing, and learn from the ECCC's experience on the special challenges of involving large numbers of witnesses in the proceedings.

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<sup>12</sup> John D. Ciorciari and Anne Heindel, *Hybrid Justice: The Extraordinary Chambers in the Courts of Cambodia* (Ann Arbor, MI: University of Michigan Press, 2014), chapter 7. Christoph Sperfeldt, 'From the Margins of Internationalised Criminal Justice: Lessons Learned at the Extraordinary Chambers of the Courts of Cambodia', *Journal of International Criminal Justice* 11:5 (2013), pp. 1118-1120.

It is unlikely that victims will be able to join the trials as civil parties in Sri Lanka's common law system. Nevertheless, the special court will have to address victims' interests in seeking redress and telling their stories beside the requirements of a fair and efficient judicial process. The ECCC has developed innovative opportunities for certain victims to share "statements of suffering" akin to victim impact statements.<sup>13</sup> Sri Lanka's special court should not allow such statements before judgment, as the ECCC has done, but should consider victim impact statements afterward to give voice to victims and inform sentencing decisions. This practice, which has parallels in other common law jurisdictions, is precisely the type of procedural matter that international technical experts can help the Sri Lankan special chambers address.

### **Administering a Mass Crimes Process**

The ECCC also demonstrates the challenges of administering high profile, complex criminal trials. Administering a mass crimes process requires a substantial bureaucracy to conduct public outreach, support the numerous victims and witnesses often involved in the proceedings, and manage large volumes of evidence. When the ECCC began its work, it lacked a dedicated unit to provide support to victims, had small and underfunded administrative offices for public affairs and witness support, and possessed only a rudimentary system for managing voluminous documentary materials. Some of the requisite institutional practices emerged during the first few years of the ECCC's operations, such as a system to catalogue, store, and manage millions of pages of documents. Others remained underdeveloped, such as a small Victim Support

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<sup>13</sup> See John D. Ciorciari and Anne Heindel, 'Victim Testimony in International and Hybrid Courts: Narrative Opportunities, Challenges, and Fair Trial Demands', *Virginia Journal of International Law* 56:2 (2016).

Section responsible for processing thousands of victim complaints filed with the court but ill-equipped to provide outreach and support. Technical advisors can help Sri Lanka's special court build the necessary system as efficiently and effectively as possible.

The ECCC proceedings also carry an important cautionary note about the importance of administrative integrity. Early in the tribunal's life, multiple reports surfaced of a kickback scheme on the Cambodian side of the court, whereby court appointees were required to transfer part of their salaries to their superiors in exchange for getting jobs at the ECCC.<sup>14</sup> Although there is no evidence that corruption tainted the judicial proceedings, the scandal captured media and public attention, created serious strain between UN and Cambodian officials, and put the court's first trial in jeopardy before the government took some modest remedial steps.<sup>15</sup> Sri Lankan officials should learn from that experience and institute a credible mechanism for reporting and investigating administrative malfeasance, perhaps involving international personnel to provide confidence that the mechanism is independent.

On a more positive note, the ECCC also carries lessons on how Sri Lanka's special court can administer effective outreach programs, which are crucial to linking justice and social reconciliation. Despite weak initial funding for public affairs, the ECCC forged partnerships with NGOs and other actors to conduct outreach and capitalise on its in-country location—one of the purported advantages of in-country

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<sup>14</sup> See, e.g., Open Society Justice Initiative, Press release, *Corruption Allegations at Khmer Rouge Court Must be Investigated Thoroughly*, 14 February 2007.

<sup>15</sup> See Ciorciari and Heindel, *Hybrid Justice*, chapter 3.

hybrid courts.<sup>16</sup> Hundreds of thousands of Cambodians have visited the ECCC or participated in study tours, lectures, and village forums.<sup>17</sup> Many others have learned about its work through village forums, media programs, and published materials.<sup>18</sup> As a result, the Khmer Rouge trials have helped catalyse public discussion of human rights principles and created space for educational reform, including a nationwide genocide education initiative led by the Ministry of Education and Documentation Center of Cambodia, an NGO. Those efforts are among the most promising paths to reconciliation in Cambodia and have been facilitated, to a significant degree, by the official pursuit of justice at the ECCC. Sri Lanka's special court should work similarly with civil society to prioritise this catalytic function.

Sri Lanka's special court will have some distinct advantages vis-à-vis the ECCC, which has been hampered by an unusually complex and bifurcated hybrid structure. Its system of co-prosecutors and co-investigating judges leaves the court with two pairs of investigators and a cumbersome set of procedures to manage conflicts among them. The ECCC's management, staff, and finances are all split, with national and international staff working, often literally, on "opposite sides of the hall." These measures were devised largely to

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<sup>16</sup> Laura Dickinson, *The Promise of Hybrid Courts*, *American Journal of International Law* 97:2 (2003), pp. 295, 302-03 (2003); Antonio Cassese, *International Criminal Law* (Oxford: Oxford University Press, 2d edn., 2008), pp. 332-33.

<sup>17</sup> See ECCC, *Proposed Budget for 2016-2017*, Annex C: ECCC Outreach and Public Hearing Attendance Data, <http://www.eccc.gov.kh/sites/default/files/ECCC%20Budget%202016-17.pdf>.

<sup>18</sup> Christoph Sperfeldt, 'Broadcasting Justice: Media Outreach at the Khmer Rouge Trials', *Asia-Pacific Issues* no. 115 (July 2014), pp. 5-11.

accommodate Cambodian sovereignty concerns but have impaired the court's efficiency, contributed to gridlock and mixed messaging on sensitive issues, and led to ownership gaps.<sup>19</sup> Indeed, the courtroom itself was not ready for roughly one year while the two sides debated who was responsible for furnishing it. By contrast, Sri Lanka's domestically led process may be more conducive to cost efficiency, and there is no doubt where overall ownership and responsibility for the process will reside.

### **Promoting Judicial Independence and Prosecutorial Discretion**

While clear Sri Lankan ownership will likely have benefits in terms of organisational unity and efficiency, it also leaves the special court more exposed to government control and the risk of executive interference. Zeid's recommendation of a hybrid court therefore drew applause from human rights groups and many Tamil leaders, who believe a strong international role is imperative to prevent the government from exercising undue control.<sup>20</sup>

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<sup>19</sup> Among other things, the ECCC has been much more costly than expected, spending over \$200 million by the end of 2014 compared to an initial cost estimate of \$56 million. ECCC, *ECCC Financial Outlook*, 31 January 2015, [http://www.eccc.gov.kh/sites/default/files/Financial\\_Outlook\\_31%20\\_January\\_%202015.pdf](http://www.eccc.gov.kh/sites/default/files/Financial_Outlook_31%20_January_%202015.pdf).

<sup>20</sup> See, e.g., 'Hybrid court, the correct mechanism—GTF', Global Tamil Forum (28 September 2015). Human Rights Watch advocated for an international prosecutor and majority on the bench. 'Sri Lanka war crimes probe should be led by foreigners: HRW', Agence France Presse, 17 September 2015.

Similar concerns existed in the lead-up to the creation of the ECCC. Prime Minister Hun Sen and other senior officials in the governing Cambodian People's Party (CPP) had been Khmer Rouge members before defecting and helping to overthrow Pol Pot in 1979. The CPP also made deals to quell the ensuing Khmer Rouge insurgency, sometimes promising amnesty or other protections to Khmer Rouge defectors. Many human rights groups and key UN and foreign government officials argued that international leadership was essential to keep CPP leaders from stage-managing trials to serve their political interests.

Hun Sen resisted UN demands for a majority-international court, successfully asserting primary sovereign control over the process.<sup>21</sup> Unlike the tribunals for Sierra Leone and Lebanon, which have international majorities on the bench and UN-appointed prosecutors and chief administrators, the ECCC is preponderantly domestic. It has a majority of Cambodian judges and a split institutional structure including Cambodian and international co-prosecutors, co-investigating judges, and other features that limit international influence. Critics feared that this would leave the court too exposed to executive

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<sup>21</sup> The threat of a Chinese veto prevented a Chapter VII Security Council resolution that might have forced his hand, and when negotiations stalled, key UN member states including France, Japan and the United States pushed Secretary-General Kofi Annan and his negotiating team to compromise. See David Scheffer, *All the Missing Souls: A Personal History of the War Crimes Tribunals* (Princeton, NJ: Princeton University Press, 2011), chapter 12; Tom Fawthrop and Helen Jarvis, *Getting Away with Genocide? Elusive Justice and the Khmer Rouge Tribunal* (London: Pluto Press, 2004), chapters 8-10; Ciorciari and Heindel, *Hybrid Justice*, chapter 1.

meddling,<sup>22</sup> which has indeed plagued the proceedings. The ECCC’s experience shows that even a major international role in the proceedings is no perfect shield against political interference; several lines of defence are likely to be necessary to uphold judicial independence and prosecutorial discretion at any domestically-led mass crimes trial.

## **The Question of Personal Jurisdiction**

One lesson from the ECCC concerns a challenge the Sri Lankan special court must confront even before it opens its doors: the question of personal jurisdiction. The ECCC’s experience shows the importance of setting a reasonable and relatively clear agreed framework for personal jurisdiction and allowing the prosecutor to exercise discretion within that frame. This constitutes a core challenge for any mass crimes process and is obviously easier said than done.

The ECCC’s constitutive documents give it authority to try “senior leaders” and others deemed “most responsible” for crimes of the Pol Pot era. However, Cambodian and UN officials never reached a genuine meeting of the minds on who or roughly how many suspects would stand trial.<sup>23</sup> The ECCC co-prosecutors originally charged five people in the court’s

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<sup>22</sup> See, e.g., Human Rights Watch, Briefing paper, *Serious Flaws: Why the U.N. General Assembly Should Require Changes to the Draft Khmer Rouge Tribunal Agreement* (April 2003).

<sup>23</sup> For an in-depth discussion, see Steve Heder, *A Review of the Negotiations Leading to the Establishment of the Personal Jurisdiction of the Extraordinary Chambers in the Courts of Cambodia*, Cambodia Tribunal Monitor (1 August 2011), <http://www.cambodiatribunal.org/sites/default/files/A%20Review%20of%20the%20Negotiations%20Leading%20to%20the%20Establishment%20of%20the%20Personal%20Jurisdiction%20of%20the%20ECCC.pdf>.



first two cases (Cases 001 and 002). Three have been convicted, one died, and one was severed from her case due to dementia.<sup>24</sup> Successive international co-prosecutors have sought to prosecute several additional suspects, including a former Khmer Rouge military commander (Case 003) and two former provincial officials in the Pol Pot regime (Case 004), but the Cambodian co-prosecutor and Cambodian judges have resisted, arguing that these individuals were neither “senior leaders” nor among those “most responsible” for atrocities.<sup>25</sup> Worse, heavy-handed public pronouncements by Hun Sen and other Cambodian officials have made clear that the matter is not for Cambodian court personnel to decide.<sup>26</sup> The imbroglio over Cases 003 and 004 has marred the apparent integrity of the process and sapped the ECCC of popular legitimacy.

The Sirisena administration has yet to issue a clear pronouncement on the special court’s jurisdictional scope. In announcing plans for the court, Chandrika Kumaratunga said

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<sup>24</sup> Duch, the former head of the infamous S-21 security center in Phnom Penh, was convicted in Case 001. A pair of former senior leaders, Nuon Chea and Khieu Samphan, were convicted of crimes related to the 1975 evacuation of Phnom Penh and are now on trial for additional crimes. Former Foreign Minister Ieng Sary was part of Case 002 until he died in 2013, as was his wife, former Social Affairs Minister Ieng Thirith, before she was severed due to dementia in 2011.

<sup>25</sup> Randle C. DeFalco, ‘Cases 003 and 004 at the Khmer Rouge Tribunal: The Definition of ‘Most Responsible’ Individuals According to International Law’, *Genocide Studies and Prevention* 8:2 (2014), pp. 46-47.

<sup>26</sup> Hun Sen has said publicly, for example, that cases 003 and 004 would “not be allowed,” and Information Minister Kheiu Kanharith said UN officials who insisted on moving the cases forward could “pack their bags and leave.” See Lak Chansok, ‘Can Khmer Rouge Survivors Get Justice?’, *The Diplomat*, 30 May 2014.

only that it “will not be chasing behind every soldier, but the main line of command” and that former Tamil rebel leaders would answer for allegations of “horrendous crimes.”<sup>27</sup> Without a clear framework for personal jurisdiction, the court will be subject to charges that it is merely shopping for politically expedient cases. The framework adopted needs to subject serious offenders on all sides of the conflict to possible prosecution. Once those standards are set, if the process is to be seen as legitimate at home and abroad, executive officials must allow the prosecutor to follow the evidence, and the prosecutor must use his or her discretion even-handedly.

The Cambodian case offers a useful illustration of how challenging those steps may be. For years, Hun Sen has argued that expanding ECCC prosecutions will risk renewed war. His arguments are generally unconvincing, as the Khmer Rouge movement has been largely defunct for more than 15 years, but the prime minister has relied on that contention to justify repeated interventions to stall Cases 003 and 004. The risk of similar intervention in Sri Lanka’s accountability process is clear. The Sirisena administration has powerful incentives to control the process and cherry-pick a small number of politically palatable cases. The conflict is relatively fresh, and many of the most egregious alleged crimes occurred toward the end of the country’s civil war in 2009. Some alleged perpetrators continue to occupy positions of power, and casting a wide prosecutorial net could trigger a backlash ranging from political attacks against the Sirisena administration to more violent resistance.

These pressures cannot be ignored, as Sri Lanka’s war crimes trials do not exist in isolation from other elements of the peace

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<sup>27</sup> ‘Sri Lanka to launch special court to probe war crimes’, Channel News Asia, 1 December 2015.

building process. Yet the Cambodian example highlights the risk that threats of conflict will be used to stall or block prosecutions for other, less legitimate reasons. An unspoken rationale for limiting the trials has been to prevent an international co-prosecutor from charging former Khmers Rouges who now occupy positions within the CPP—conceivably even Hun Sen himself. Sri Lanka’s process needs to be designed and monitored in a manner that reduces the scope for narrowly self-serving executive interventions.

### **The Limits of Formal Institutional Checks**

The ECCC proceedings show plainly that even substantial international involvement does not necessarily provide a strong check on domestic political control.<sup>28</sup> UN officials involved in crafting the ECCC were cognisant of that possibility and tried to construct meaningful institutional checks. Perhaps the clearest of these is a supermajority voting provision that requires at least one international judge to support any affirmative decision by the chambers. For example, decisions on the five-member Trial Chamber require support from four judges, preventing the three Cambodian judges from deciding issues alone. Another obvious check on domestic control is the existence of international co-prosecutors and co-investigating judges (CIJs) to act unilaterally in some instances when they disagree with their Cambodian counterparts (and vice versa). UN personnel also occupy lead roles in a number of the ECCC’s administrative units, including the Defence Support Section. Moreover, the UN Secretary-General nominates all international personnel, who with few possible exceptions

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<sup>28</sup> For a similar conclusion, see Tomas Hamilton and Michael Ramsden, ‘The Politicisation of Hybrid Courts: Observations from the Extraordinary Chambers in the Courts of Cambodia’, *International Criminal Law Review* 14:1 (2014).

have shown that they are willing to resist the expressed preferences of the Cambodian government. The ECCC's international side certainly is not stacked with Hun Sen sympathisers.

When disputes between the ECCC's national and international sides have arisen, however, these institutional checks have not been sufficient to prevent the Cambodian authorities from interfering and exercising ultimate control over the proceedings.<sup>29</sup> This has been most evident in the heated dispute surrounding Cases 003 and 004. Hun Sen and other senior Cambodian officials have resisted the cases loudly and publicly. Cambodian personnel at the ECCC—including judges, the Cambodian co-prosecutor, and staff investigators—have fallen into line. While the ECCC's rules have allowed successive international co-prosecutors and CIJs to charge suspects and commence investigations, opposition from Cambodian investigators and judges make it unlikely that the cases will come to fruition in trials. In early 2015, Hun Sen said that the investigations had gone “almost beyond the limit” of his tolerance,<sup>30</sup> and Cambodian police have refused to execute multiple arrest warrants for the Case 003 suspect, former Khmer navy commander Meas Muth.<sup>31</sup>

The Cambodian government's ability to control the process and largely resist international pressure has also been evident in other instances. When a former international CIJ called some Cambodian officials to testify, they simply refused. When credible allegations of a kickback scheme arose on the

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<sup>29</sup> Ciorciari and Heindel, “Experiments,” pp. 402-06.

<sup>30</sup> Kuch Naren, ‘Hun Sen Warns of Civil War if ECCC Goes Beyond Limit’, Cambodia Daily, 27 February 2015.

<sup>31</sup> Holly Robertson and Khuon Narim, ‘Gov’t Ignored Arrest Warrant For Accused War Criminal’, Cambodia Daily, 18 June 2015.

Cambodian side of the Court, UN officials were able to convince Cambodian authorities to remove a key administrator implicated in the scheme, but he was not otherwise held accountable, and the measures taken to address the problem were weak.<sup>32</sup> These are worrying precedents, as formal international checks on the process will almost certainly be much weaker in Sri Lanka. If the Sirisena administration is responsible for selecting and appointing international personnel as well, foreign advisors could become little more than window-dressing from the standpoint of guarding the court's political independence.

### **The Need for Independent Domestic Personnel**

If international checks on government control are insufficient, domestic judges must bear more of the burden of asserting independence. At the ECCC, the Cambodian government appoints all domestic judges, lawyers and staff, most of who are members of the ruling CPP or have strong ties to the party. The ECCC judges have at times shown a willingness to challenge or criticise the executive. For example, the Trial Chamber found that the government's prolonged detention of the Court's first defendant, Duch, violated his human rights. Cambodian judges also have allowed defence lawyers to criticise the government in court. However, when Hun Sen and other senior officials have made their views clear, most notably in the dispute over Cases 003 and 004, national staff and judges have dutifully complied.

Sri Lanka's judicial system is not Cambodia's, but it will be equally essential to appoint judges with indicia of independence if the special court is to be deemed more than

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<sup>32</sup> See Giorciari and Heindel, *Hybrid Justice*, pp. 87-92, 147-51.

an instrument of executive power. That is much easier said than done in trials of such political sensitivity and magnitude and will likely necessitate inclusion of judges, prosecutors, and staff from diverse political and ethnic backgrounds, as well as track records of personal integrity and independence. Much of the public appeal and credibility of a domestically led judicial process will hinge on who it appoints and how it appoints them. The government should heed calls to adhere to the Latimer House Principles, which among other provisions call for judicial appointments to be made “on the basis of clearly defined criteria and by a publicly declared process” and with due regard to merit and equal opportunity.<sup>33</sup> The mechanism for selecting judges and prosecutors must indeed be transparent and accountable, ideally involving a role for the parliament or special commission composed of eminent persons from diverse political parties and ethnic backgrounds.

### **External Accountability Mechanisms**

Of course, potential checks on executive influence also exist beyond the courtroom walls. The ECCC’s experience suggests that foreign donors and civil society groups may be even more important than intramural mechanisms for promoting accountability and reasonably “balanced,” credible investigations and trials.

In Cambodia, foreign donors have often fallen short of their potential to enforce standards of judicial and administrative integrity. The ECCC has relied heavily on voluntary contributions from foreign states, which have accounted for a large majority of the court’s overall funding. That support has

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<sup>33</sup> Commonwealth Principles on the Accountability of and the Relationship between the Three Branches of Government, agreed Dec. 2003, Abuja, Nigeria, §IV(a).

been essential to carry out complex judicial and outreach functions. However, donor states did not establish a strong coordinating mechanism, and when push has come to shove, most have put their interests in a positive relationship with the Cambodian government over their interests in a sound and independent judicial process. Major donors to the ECCC have too easily granted Hun Sen what he has sought for the ECCC—financing and an implicit seal of international legitimacy—and demanded too little in return.

Sri Lanka’s special court will need substantial funding, and foreign assistance may be necessary to ensure that adequate financing is available. At the ECCC, government loathness to contribute and vacillating foreign interest have contributed to delays and uncertainty.<sup>34</sup> Strong survivor participation and outreach in particular require sound funding, because as the ECCC’s experience suggests, functions beyond a tribunal’s core judicial functions tend to be the first to suffer from funding shortfalls. Yet the ECCC’s experience suggests that funding is not enough: donors must also be prepared to hold the process to high standards.

The challenge may be even greater in Sri Lanka. The governments most likely to be engaged in supporting accountability—the United States and United Kingdom—all have powerful reasons to support Sirisena and cultivate strong ties with Sri Lanka generally in the context of rising Chinese influence in the Indian Ocean. These are the very reasons why the same governments sought to take pressure off of

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<sup>34</sup> The SCSL likewise relies on voluntary support and has faced uncertainty and funding shortfalls requiring it to approach the United Nations on multiple occasions for special subventions when voluntary pledges have not met its budgetary needs. See Marieke Wirnda and Anthony Triolo, “Resources,” in *International Prosecutors* (Luc Reydamas et al., eds., 2012), pp. 125-27.

Sirisena through compromise language in the September 2015 UN Human Rights Council resolution.

Where donor states fail to exercise strong collective leverage to help advance a credible process, civil society becomes an ever more important aspect of both local and international participation. From the outset, some civil society groups took the view that the ECCC was flawed beyond repair; others sought to monitor and buttress the process. Groups such as the Open Society Justice Initiative (OSJI) and Documentation Center of Cambodia worked to monitor the trial process and publicise their findings. Cambodian and international media also have played vital roles in airing problems at the ECCC and providing information to both elite audiences and the general public to enable them to develop their own conclusions.

Civil society groups will likely need to play a major role in the Sri Lankan process if the government is to be held to account. Opposing the court and shunning it from the outset would risk a self-fulfilling prophecy; a more productive path will be to engage with the special court, putting spotlights on both its strengths and failings. Even if donor states are unwilling to play the role of “bad cop” themselves and take a critical approach to the process, they must insist upon allowing media and civil society groups access to the proceedings and freedom to publish both good news and bad.

Ultimately, these civil society channels may represent the best hope for a successful process. Public and international accountability provide incentives for both the Hun Sen and Sirisena governments to be seen as pursuing justice. Domestically, Hun Sen and the ruling CPP have long built their public legitimacy around the narrative of ousting and defeating the Khmer Rouges and now have a stake in being



seen to advance justice. Internationally, the Cambodian government relies on extensive foreign aid and has sought to improve an image tarnished by its own past abuses. The Sirisena administration also has reasons to be regarded as pursuing credible justice as it works to repair Sri Lanka's international image, rebuild aid relationships, and deliver on its pledges to address war crimes and promote reconciliation.

## **Conclusion**

The Cambodian accountability process suggests that international engagement in Sri Lanka's special court has potentially significant benefits to both the efficacy and public legitimacy of the process. The architects of Sri Lanka's special court should not seek to emulate the ECCC's institutional design, which has been problematic in many respects, but should carefully consider the positive contributions that foreign experts have made on the bench, in key legal roles, and in administration. At the same time, the ECCC's example offers ample reasons for caution. International support is no guarantee of independence or integrity, especially when the executive leadership has strong political stakes in the outcome and thus incentives to interfere. Parallel measures must be taken domestically and outside of official channels for Sri Lanka's special court to achieve its positive potential for victims and for a government that has pledged to provide meaningful redress for crimes of the past.

**16**

**Transitional Justice, Popular  
Participation, and Civil Society:  
Lessons from Sierra Leone and Peru**

*8*

*Rebekka Friedman*

In the last two decades, civil society engagement and popular participation have become cornerstones in transitional justice theory and practice. Holistic justice, as put by the International Center for Transitional Justice and the UN, builds on the strengths of multiple transitional justice mechanisms, emphasises global-local partnership, addresses and seeks to transform root causes of conflict, and encourages civil society and popular engagement and civic trust.<sup>1</sup> Global interest in civil society and popular participation has gone hand in hand with an emphasis on victims' engagement and legacy. These principles are broadly evident in hybrid practices in the early 2000's. Unlike the International Criminal Tribunal for Rwanda and the International Criminal Tribunal for the former Yugoslavia, established in Tanzania and The Hague respectively and run by internationals, UN-established hybrid courts in Sierra Leone and East Timor were established on site, employed a mix of international and domestic personnel, and put increased emphasis on "sensitisation," and outreach. Emphasis on popular engagement, particularly of victims, is also manifest at the ICC, which has invested greater resources into witness protection and victims' attendance in court proceedings.

What an effective policy of civil society and popular engagement means in practice, however, particularly one suited to meet specific contextual demands and values, is, of course, far less straightforward. In this chapter, I will draw lessons from Sierra Leone and Peru as two significant recent

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<sup>1</sup> United Nations, "What is Transitional Justice? A Backgrounder," 20 February 2008. Available at: [http://www.un.org/en/peacebuilding/pdf/doc\\_wgll/justice\\_times\\_transition/26\\_02\\_2008\\_background\\_note.pdf](http://www.un.org/en/peacebuilding/pdf/doc_wgll/justice_times_transition/26_02_2008_background_note.pdf). See also UN Secretary General, "The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies – Report of the Secretary General," UN Security Council (2011).

attempts by global and local agents to operationalize a broadly holistic and participatory orientation. I will focus especially on truth commissions. Truth commissions tend to have more flexible mandates, giving them potentially wider possibilities for civil society engagement.<sup>2</sup> They also often rely on popular participation, particularly in the case of participatory commissions, which utilise public hearings.

Close scrutiny of recent practices is also important to draw out lessons for presently unfolding Sri Lankan transitional justice processes. Institutions in Sierra Leone and Peru took distinct paths in their relationships with local civil society and their approaches to popular participation. Through empirical illustrations, I will highlight the risk of insufficient ownership and legitimacy on the one extreme, and domestic politicisation and destabilisation, on the other. I will also stress what I see as inherent trade-offs between an inclusive orientation versus one that engages the greatest number of stakeholders.

### **Civil Society: Legitimacy and Representation**

In both Sierra Leone and Peru, early deliberations over the forms and objectives of transitional justice put strong emphasis on civil society involvement and global and local partnership. Both commissions had important although varying and at times strained relationships with civil society yet each followed distinct trajectories over time.

*Sustainability and legitimacy in globalized justice in Sierra Leone*

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<sup>2</sup> Eric Brahm, “Uncovering the Truth: Examining Truth Commissions Success and Impact,” *International Studies Perspectives* 8 (2007).

From 1991-2002, the Sierra Leonean civil war killed over 50,000 people and displaced over 500,000.<sup>3</sup> An estimated 5,000-7,000 children fought in the war, many of whom were recruited from refugee populations displaced by the fighting.<sup>4</sup> The main protagonists were the Sierra Leonean military, the Revolutionary United Front (RUF), and civil defence forces. After a prolonged set of international interventions, the Lomé Peace Accord, signed on 7 July 1999, called for a Truth and Reconciliation Commission (TRC) in exchange for a general amnesty promised during the ceasefire. Where the Accord contained few details of the TRC's mandate and methodology, the UN High Commissioner for Human Rights Mary Robinson and Sierra Leonean civil society organisations, especially the Interreligious Council, carried out much of the planning. In January 2002, the Special Court for Sierra Leone (SCSL) was set up by UN decree, making Sierra Leone an early site of a “two-track” approach.<sup>5</sup>

The TRC was headed by the Head of Interreligious Council, Bishop Dr. Joseph Humper, and employed a mixture of international and domestic staff. While internationals were heavily involved in its management and establishment, members of Sierra Leonean civil society, particularly in Freetown, played a significant role in campaigning for a truth commission. Many had actively called for a peace process and took part in UN negotiations to set up a commission, notably the Interreligious Council, who had gained visibility through

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<sup>3</sup> Lansana Gberie, *A Dirty War in West Africa* (Bloomington, IN: Indiana University Press 2005), p. 6.

<sup>4</sup> A.B. Zack-Williams, “Child Soldiers in the Civil War in Sierra Leone,” *Review of African Political Economy* 87 (2001), p. 73.

<sup>5</sup> William Schabas, “Conjoined Twins of Transitional Justice: the Sierra Leone Truth and Reconciliation Commission and the Special Court,” *Journal of International Criminal Justice*, 2 (2004)

their earlier travels to war-affected areas to urge the RUF to release children in custody.<sup>6</sup>

Manifestations of a complex and shifting relationship between the TRC and Sierra Leonean civil society appeared early on during the initial planning of the TRC. In August 1999, the TRC Working Group was created as a coalition of human rights NGOs, professional groups, and development organisations under the direction of the National Forum for Human Rights. Sierra Leonean human rights organisation, Forum of Conscience, founded by activist, John Caulker, in 1996, was the organising point of the Forum, whose purpose was to “involve Sierra Leonean civil society in the TRC process and to ensure that civil society’s concerns would be addressed in the design of the TRC Act and in the ways in which the Commission was going to undertake its task.”<sup>7</sup> While the resumption of violence after the Lomé Accord initially stalled meetings, the Forum and the Human Rights Section of the United Nations Mission in *Sierra Leone* met again in the early 2000s to conduct sensitisation and public education on the TRC.

Tensions surfaced between the Working Group and the TRC. The TRC attributed inadequate public awareness of its work and objectives to the “poor management” of the Working Group.<sup>8</sup> Key members of the Working Group expressed concern over the international influence over the TRC, the side lining of Sierra Leonean civil society, and the TRC’s overall level of popular engagement, especially in rural areas. Despite - or because of - this at times strained relationship, however, the TRC would come to offer an important platform

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<sup>6</sup> Bishop Joseph Humper, interview by author, Freetown, Sierra Leone, July 28, 2009.

<sup>7</sup> The Sierra Leonean TRC Report, Volume One, Chapter Five.

<sup>8</sup> Ibid

for victims' groups and civil society campaigns. Already during the TRC's operation, amputees in Sierra Leone drew international headlines, boycotting the TRC until the Commission set out provisions to guarantee their demands.<sup>9</sup>

Rifts between the TRC and segments of civil society grew stronger as the TRC carried out its work. A heavy-handed international intervention in the country's post-conflict reconstruction and a long history of colonial rule and external interference further politicised external involvement, unleashing a politics of legitimacy and debate over the appropriate ends, means, and agents of post-conflict peace building. Although some worked in support of the TRC and SCSL, sectors of civil society also distanced themselves from global justice, emphasising localism and a decentralisation of politics. While community reintegration preceded the TRC, criticisms that internationally supported justice had sidelined local culture and practices, civil society, and authority structures also mobilised local actors and grassroots processes. The emergence of the community-based reconciliation project, Fambul Tok, established by Forum of Conscience, illustrates a complex interplay between global and local accountability processes. Maintaining that the TRC had not generated ownership and insufficiently engaged war-affected communities, Fambul Tok, meaning "family talk" in Krio, advances a locally driven restorative agenda, plugging into communities' own traditions and working through community authorities and representatives. While the project situates itself as a Sierra Leonean alternative to globalised transitional justice, it is also an outgrowth of formal mechanisms, plugging

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<sup>9</sup> These included housing, a monthly allowance in cash, rice, education for children, a reintegration allowance, medical treatment and assistance with transport.

into an expectations' crisis, resulting from a loss of momentum and legitimacy surrounding global means.

*Memory politics and politicization in Peru*

The Peruvian conflict witnessed highly concentrated violence at the hands of the military, Shining Path, and the Movimiento Revolucionario Túpac Amaru (MRTA). An estimated 69,280 individuals died.<sup>10</sup> Political violence internally displaced over 600,000 people, mainly indigenous rural civilians, and destroyed more than 400 peasant communities. Interim president, Valentín Paniagua, established the CVR by executive decree in 2001, alongside war crimes trials. The CVR initially had seven commissioners, but enlarged into a twelve-person body in September 2001 after President Toledo took office. Philosophy professor and later President of the Andean Region of the Union of Universities for Latin America, Dr. Salomón Lerner Febres, chaired the Commission. The remaining eleven commissioners were Peruvian nationals. Although the CVR was a domestic institution, international actors had a strong influence in the planning stages for the Commission. For one year prior to its establishment, Lerner and his wife, Rosemary Lerner Rizo Patron, both philosophy professors, held workshops to define various terms and objectives of the Commission, during which they studied transitional justice in other contexts and consulted external representatives.<sup>11</sup> A special prosecutor responsible for investigating human rights crimes under Fujimori filed the first charges against members of a government death squad, the La Colina group. The Inter

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<sup>10</sup> CVR Report, Volume 1, Chapter 3.

<sup>11</sup> Dr. Salomón Lerner Febres, interview by author, Lima, Peru, February 10, 2011; Enrique Bernal, CVR Commissioner, interview by author, Lima, Peru, March 1, 2011.



American Court also took up criminal cases.

The CVR was established following longer-term domestic civil society activism in favour of democratisation and accountability. A more open political climate enabled the CVR's establishment, particularly the discovery of corruption under the Fujimori regime. However, the CVR also had a complex and shifting relationship with civil society and activist groups.<sup>12</sup> On the one hand, the post-CVR period saw a rise in civil society and advocacy groups, particularly in affected regions. The CVR provided a direct conduit for victims' rights and memory work and was tied to the creation of new organisations and activism. Former CVR officials work in some of these organisations, especially in the fields of human rights, transitional justice, and forensic anthropology. The CVR consciously built in plans for follow up work as part of its reparations programmes, for instance in mental health and symbolic reparations.<sup>13</sup> The CVR also tied itself to symbolic reparations, setting up memory projects in Ayacucho and Huancavelica, which local organisations, specifically SER (*Asociación de Servicios Educativos Rurales*), have continued.<sup>14</sup>

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<sup>12</sup> Ponciano Del Pino, 'Introducción: Memorias para el reconocimiento' [Introduction: Memories for acknowledgment] in Carlos Iván Degregori, Tamia Portugal, Renzo Aroni & Gabriel Salazar (eds). *No hay mañana sin ayer. Batallas por la memoria y consolidación democrática en el Perú* [There is no tomorrow without yesterday. Battles for memory and democratic consolidation in Peru] (Lima, Perú, IEP 2015).

<sup>13</sup> For instance, psychiatric nurse and Carmelite nun, Sister Anne Carbon, founded COSMA in 2003, to treat victims of political violence and their families as part of the CVR's mental health reparations.

<sup>14</sup> Cynthia, E. Milton, ed., *Art from a Fractured Past: Memory and Truth-telling in Post-Shining Path Peru* (Durham and London: Duke University Press 2014), pp. 37–38

While the CVR opened space for alternative memories in the public sphere, it drew on and embedded itself in previous activism and communal modes of expression and memorialisation.<sup>15</sup> While popular commemoration processes preceded the CVR, social memory in rural areas has taken on a national orientation in the post-CVR period, linking into present campaigns related to political violence, particularly surrounding reparations and disappearances.

However, sections of civil society also distanced themselves from the Commission. Some have questioned the domestic composition of CVR staff and its representativeness. In affected areas, the CVR was sometimes considered too “academic” and “intellectual,” as most commissioners were educated, left-leaning white and non-Quechua speaking males from Lima. Criticisms of the composition of its staff have also filtered into criticisms of its findings. Throughout its operation, various groups disputed the CVR’s findings and accused it of bias, including victims’ organisations, particularly in affected areas, and a coalition of military and conservative sectors.

Nevertheless, the CVR played an important role in increasing the public prominence of memory and fostering a language of rights and obligations. Significantly, memory politics have reinforced democratic norms and mechanisms and a language

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<sup>15</sup> María Eugenia Ulfe. ‘Narrating Stories, Representing Memories: *Retablos* and Violence in Peru’, in Cynthia Milton (ed.). *Art from a Fractured Past: Memory and Truth-telling in Post-Shining Past Peru* (Durham and London: Duke University Press 2014); Del Pino, “Introducción.”

of rights and obligations, which groups who did not participate in the CVR have also taken up.<sup>16</sup>

## **Popular Participation**

### *Incentivizing participation, managing expectations*

Truth commissions in Sierra Leone and Peru also sought to engage civil society and have a public impact by eliciting widespread popular participation. While truth commissions in many contexts seek to generate popular participation, how they justify and legitimise this mandate has varied markedly. The South African TRC often legitimised hearings as a form of healing, justifying testimony as potentially cathartic for victims.<sup>17</sup>

The Sierra Leone and Peruvian commissions often promoted hearings in relation to broader collective goals, particularly civic nation-building.<sup>18</sup> In Sierra Leone, TRC officials presented the Commission as a people's forum, which would provide a voice and opportunity to articulate recommendations for post-conflict reconstruction. The TRC's self-conception as an instrument of democratisation took on additional meaning in the context of the war and the suspension of civil liberties. Commissioners promoted the

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<sup>16</sup> In February 2011, the military released a direct counter-report to the CVR, entitled, *En Honor a la Verdad* [In Honor of the Truth].

<sup>17</sup> Richard A. Wilson, *The Politics of Truth and Reconciliation in South Africa: Legitimising the Post-Apartheid State* (Cambridge, UK: Cambridge University Press 2001).

<sup>18</sup> Josephine Thompson-Shaw, TRC Statement Taker, interview by author, Freetown, Sierra Leone, Sierra Leone, 6 August 2009, See also *Witness to Truth*.

TRC as a return to peaceful politics and a rejection of the war. In this process, the TRC put emphasis on giving a voice to marginalised groups, particularly women and youth.<sup>19</sup> The TRC collected a total of 7,706 statements; of these, 36% were collected from women and 5% from children.

Likewise, the CVR sought to generate civic trust and empower marginalised stakeholders as citizens and to generate social solidarity. To this end, the CVR collected 16,917 testimonials, and held additional focus groups and public hearings. The CVR held its first hearing in Ayacucho in the south central Peruvian Andes, given its symbolic significance as the birthplace of the Shining Path and home to the majority of victims in the conflict. Ayacuchan victims' rights activist, Mamá Angelica, whose campaigns on behalf of her missing son had made her a well-known domestic and international figure, gave the first testimony. Holding thirteen public audiences and hearings, commissioners emphasised the symbolic meaning of hearings - for many participants from rural backgrounds this testimony was their first opportunity to receive official and public acknowledgment.

Participants in both Sierra Leone and Peru acted on this civic nation-building mandate. While victims tended to share personal experiences of atrocities at hearings, most testimonies went beyond sharing a personal story, and demanded redress. Both commissions made recommendations in their final reports, which drew on popular testimonies, especially the Sierra Leonean TRC, whose final report was officially binding.

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<sup>19</sup> Thompson-Shaw, interview. Michael Charley, UNICEF Youth Programme Officer, who also worked on the Children's TRC, interview by author, Freetown, Sierra Leone, 24 July 2009.

While both commissions generated significant momentum, the same incentive structures that mobilised participants also weakened both commissions' public impact over time. Frustrated expectations over insufficient progress in reparatory justice were by far the biggest grievance of stakeholders in both contexts. The impoverished background of many victims magnified disappointment and distress.<sup>20</sup> The symbolic nature of public participation augmented disappointment – where commissions had presented testimony as a chance for marginalised stakeholders to have a voice and be treated as citizens, lack of follow up sent a message that participants had not been heard and that they continued to be invisible and not worthy.<sup>21</sup> In Sierra Leone, this expectations crisis further motivated the mobilisation of community reconciliation efforts as an alternative to global formal justice. Fambul Tok, notably, has taken a strong stance that incentivising reconciliation by tying it to material expectations can impair reconciliation. In their view, the TRC's tying of testimony to incentives – reparations for victims and reintegration for ex-combatants - not only frustrated and disappointed poor and marginalised stakeholders but also sent a message to the broader population that victims' and ex-combatants' participation is strategically motivated and decreased the emotive significance of testimonies.

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<sup>20</sup> See Rama Mani on the intersections of victimhood and class in developing countries. Rama Mani, *Beyond Retribution: Seeking Justice in the Shadows of War* (Cambridge and Maldon, MA: Polity Press 2007)

<sup>21</sup> Lisa J. Laplante and Kimberly Susan Theidon refer to testimony as a “contract.” ‘Truth with Consequences: Justice and Reparations in Post-Truth Commission Peru’, *Human Rights Quarterly* 29 (2007), p. 243.

### ***Inclusivity versus Reach***

Methodologically, both the Sierra Leonean and Peruvian commissions utilised participatory proceedings. Both held hearings in different parts of the country, particularly in war-affected areas. Reflecting unequal experiences of and legacies of violence, both commissions identified middle classes in the capital cities as their primary target audiences.<sup>22</sup> Along this vein, each commission took a pedagogical methodology. Both sought to use hearings and disseminate their findings to raise awareness and generate solidarity and responsibility for “invisible” victims. The CVR is noteworthy in this regard as the first Latin American commission to use public hearings.<sup>23</sup>

Both commissions split ways, however, in the extent to which they engaged protagonists. Although both initially took an inclusive position, seeking to provide a platform for individuals on all sides of the conflict to speak, as each commission began operation, they decided to scale down priorities.

#### **Sierra Leone: a restorative inclusive approach**

Relative to other commissions, the Sierra Leonean TRC put emphasis on engaging ex-combatants as well as youth. In the initial planning for a TRC, Article 9 of the Lomé Accord granted “absolute and free pardon” to the RUF leadership and to all combatants and collaborators in respect of “anything done by them in pursuit of their objectives up to the

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<sup>22</sup> These populations were relatively sheltered from the war and its legacies, having only experienced violence towards the latter stages of the conflict.

<sup>23</sup> Lerner referred to the CVR’s “moral” mandate as a form of consciousness-raising. Lerner, interview.

time of the signing of the present agreement.”<sup>24</sup> It also recognised the RUF as a political actor, promising that the “Government of Sierra Leone shall accord every facility to the RUF to transform itself into a political party and enter the mainstream of the democratic process.”<sup>25</sup> The TRC recommended skills training and education programmes and community service for ex-combatants, e.g. rebuilding schools and hospitals, to prove themselves and “win the hearts and minds.”<sup>26</sup> The Commission also held a series of focus groups to target different stakeholders, especially on gender-related violence and issues related to youth engagement. Perpetrators gave more than 13% of testimonies, higher than at any other TRC.<sup>27</sup> The TRC took a strong interest in the role of youth during the war, becoming the first Commission in which separate hearings were set up, under the auspices of UNICEF, just for children.

The TRC’s emphasis on engaging ex-combatants is also embodied in its historical narration. Although the TRC examined the role of senior actors, it made clear that its role was not to judge the legitimacy of the RUF.<sup>28</sup> The TRC’s training of staff also reflects its purposefully neutral stance. The Commission instructed statement takers to let perpetrators “speak freely” and not to ask “leading questions” or “judge.”<sup>29</sup> It urged staff to remember that perpetrators were

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<sup>24</sup> The Lomé Peace Accord, 1999. Available at: <http://www.sierra-leone.org/lomeaccord.html>.

<sup>25</sup> *Witness to Truth*, Chapter 1, p. 25.

<sup>26</sup> *Witness to Truth*, Chapter 5, pp. 184-186.

<sup>27</sup> Priscilla B. Hayner, ‘The Sierra Leone Truth and Reconciliation Commission: Reviewing the First Year,’ *The International Center for Transitional Justice* (2004).

<sup>28</sup> Bishop Joseph Humper, personal interview, Freetown, Sierra Leone, 28 July 2009.

<sup>29</sup> *Witness to Truth*, Chapter 5, pp. 184-186.

also victims and acknowledged the many “grey areas” of war, reiterating that perpetrators should also be free to talk and give recommendations as future stakeholders.<sup>30</sup>

***Peru: a punitive victim-centered agenda***

The CVR, in contrast to the Sierra Leonean TRC, took a victim-oriented approach and engaged relatively little with ex-combatants. Although the CVR provided an opportunity for individuals on all sides to testify, militants generally spoke to the Commission in confidence, for instance, during focus groups with ex-combatants in prisons. To make it acceptable to the public in a context where militants remained highly stigmatised, the CVR required ex-militants to “auto-criticise” as a condition to testify, in other words, ex-Shining Path and the MRTA had to renounce the movement and their role in it before speaking.<sup>31</sup> Unlike the Sierra Leonean TRC, the CVR did not offer confidentiality to ex-combatants. The CVR’s position on how to deal with crimes committed by the military remained unresolved until the end of its operation. After disagreements between CVR staff over the extent to which information gleaned during testimonies should be used to make recommendations for prosecutions, eventually, the Commission decided that it would list the names of perpetrators and the details of crimes, but that it would not relate specific abuses to individuals.<sup>32</sup> While the CVR held hearings with the police and *rondas campesinas* (“peasant

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<sup>30</sup> Ibid

<sup>31</sup> Dr. Rolando Ames Cobán, interview by author, Lima, Peru, 7 February 2011.

<sup>32</sup> For more on the CVR’s contribution to prosecutions, see Eduardo Gonzales Cueva, ‘The Peruvian Truth and Reconciliation Commission and the Challenge of Impunity’, in Naomi Roht-Arriaza (ed) *Transitional Justice in the Twenty-first Century*, (Cambridge: Cambridge University Press 2006).



patrols”) and the MRTA, the main protagonists - the military and the Shining Path - did not participate in public hearings. Unlike the Sierra Leonean TRC, which suspends judgment on the legitimacy of the RUF, the CVR condemned the Shining Path as a terrorist organisation throughout its report.

### *Endogeneity and context*

Peace building and reconciliation were active fields in post-conflict Sierra Leone and Peru, yet the contribution of formal justice to these efforts has been dynamic and complex. Peacebuilding and transitional justice must be recognised as endogenous to their broader contexts.

Both the Sierra Leonean and Peruvian commissions’ orientations towards popular participation reflected political and social feasibility as well as their interpretations of root causes of conflicts. In Sierra Leone, normative concern with the exploitation of youth before and after the war and fears about their potential to destabilise the country enabled a more pragmatic approach towards reintegration. Eleven years of war and prolonged social displacement had resulted in severe poverty and underdevelopment, particularly for youth who lacked skills and social support structures.<sup>33</sup> The war had also destroyed the judicial system. While ethnic tensions existed, the conflict generally did not follow ethnic lines.<sup>34</sup> In this

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<sup>33</sup> Since the end of the war, Sierra Leone has ranked as one of the most underdeveloped countries on the UN Human Development Index, facing severe unemployment. Immediately after the war, Sierra Leone was the lowest. The UNDP Human Development Index, released on November 2011, put the country at 180. Available at:

<http://hdrstats.undp.org/en/countries/profiles/slc.html>.

<sup>34</sup> For some interviewees, the cross-cutting nature of the conflict was the only positive legacy emerging from the war, making it easier, in

context, activists embedded calls for a TRC within domestic traditions of restorative justice and cited the South African TRC as a familiar reference point for civil society.<sup>35</sup> The establishment of the SCSL reinforced the TRC's inclusive stance. Given widespread fear among ex-combatants that testimony at the TRC would incriminate them at the SCSK, the TRC took an increasingly strong stance to protect confidentiality at its proceedings.<sup>36</sup>

As in Sierra Leone, normative contextually defined aims as well as social and political pressures drove the CVR's orientation. Early on, the CVR identified the marginalisation of rural areas and indigenous populations to be root causes of the conflict – and raising awareness and furthering social justice as key parts of its mandate.

The nature of the Peruvian conflict reinforced its punitive victim-centered normative inclination. The CVR was established retrospectively after a military victory against the Shining Path and state agents involved in the conflict and the military remained powerful and retained middle class support. In consequence, the military had fewer incentives to cooperate

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their view, to move forward, in contrast to more “intractable” intergroup conflicts. For example, Osman Gbla, professor of political science at Fourah Bay University, interview by author, Freetown, Sierra Leone, 24 July 2009.

<sup>35</sup> Humper, interview.

<sup>36</sup> Schabas, “Conjoined.” A number of TRC commissioners and civil society organisations argued that the international community favoured and bestowed more authority on the SCSL, arguing that the Kabbah administration had been pressured to request a court and that a South African (amnesty) model would have been better. The Sierra Leone TRC Working Group reveals tensions between international and Sierra Leonean civil society members on both issues. ‘Searching for Truth and Justice in Sierra Leone’, p. 7.

with the Commission and tended to see it as a threat and violation of the military's prestige. Political violence had also affected Peruvian society very differently. Prolonged political violence in marginalised rural regions increased inequality between rural and urban areas and within urban areas. While in affected areas, the effects of political violence and military disappearances have been wide ranging, including mental health problems, female headed households and wearing down of the social fabric, and fatalism and lack of trust in authority and institutions, Peru's capital experienced a striking post-conflict economic recovery. These varying experiences polarised transitional justice from the start and increased suspicions of the CVR. As Peru's economic recovery gradually eased the traumatic memory of political violence, the human rights community's emphasis on investigating the past and establishing accountability ran against the discourse of government officials and elites that it is time to "*voltear la página*" (turn the page), and move on to a more peaceful future.

The CVR's strained relationship with the military went both ways. As the CVR spoke out about military abuses, the armed forces became increasingly vocal in criticising the Commission. The CVR generated social and political backlash, particularly in reference to its dealings with the Shining Path.<sup>37</sup> The Commission's discovery of the magnitude of crimes was also important and surprised many even within the CVR and entrenched its commitment to victims.<sup>38</sup>

In both contexts, truth commissions' orientations towards public participation were controversial. In Sierra Leone, there

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<sup>37</sup> For more on this, see Kimberly Susan Theidon, 'Justice in Transition: the Micropolitics of Reconciliation in Postwar Peru', *The Journal of Conflict Resolution* 50 (2006).

<sup>38</sup> CVR Report, Volume 1, Chapter 3.

is a criticism that transitional justice and reconciliation have targeted lower level ex-combatants at the expense of victims. In addition, some have argued that the TRC did not go far enough in its efforts to include ex-combatants— that its limited time frame and scarce engagement with local culture and authority structures meant many ex-combatants did not participate or only superficially took part.<sup>39</sup> Another criticism is that individual narratives disproportionately focused on explanation over responsibility.<sup>40</sup>

In Peru, some have criticised the CVR’s limited engagement with protagonists and the lack of a critical and open forum to understand militants’ motivations.<sup>41</sup> While the CVR helped disseminate a wider interest in collective memory and public awareness, it also exposed – and generated - strong social divisions.

## **Implications**

### ***Recalibrating success***

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<sup>39</sup> Tim Kelsall, ‘Truth, Lies, Ritual: Preliminary Reflections on the TRC in Sierra Leone,’ *Human Rights Quarterly* 27, no. 2 (2005),

<sup>40</sup> Rebekka Friedman, ‘Restorative Justice: Promises and Limitations’, in Kirsten Ainley, Rebekka Friedman and Christopher Mahony, (eds) *Evaluating Transitional Justice: Accountability and Peacebuilding in Post-Conflict Sierra Leone*, (Basingstoke: Palgrave Macmillan 2015). See also Catherine Bolten, “‘We Have Been Sensitised’: Ex-Combatants, Marginalisation, and Youth in Postwar Sierra Leone’, *American Anthropologist*, 114, 3 (2012).

<sup>41</sup> Kimberly Susan Theidon, *Entre Prójimos: Violencia y La Política de la Reconciliación en el Perú* (Lima, Perú: Instituto de Estudios Peruanos 2004).

Despite the aforementioned contention surrounding formal justice in Sierra Leone and Peru, it is also vital to think critically about what transitional justice and peace-building processes can and should achieve in divided and fragile post-conflict environments. In Sierra Leone and Peru, I charted a complex and dynamic set of processes in which formal justice mobilised local actors, sometimes in agreement, but often in criticism and resistance. While advocacy groups often used formal mechanisms as platforms to pursue their aims, dynamics between civil society and formal justice have been complex and often strained. Taking a broader long-term view, however, the politics surrounding transitional justice have had distinct cumulative effects over time.<sup>42</sup> By putting collective memory into the public eye and stimulating debate about responsibility and guilt, the CVR was an important catalyst for alternative memories, both within affected communities and among marginalised groups. While memory politics in Peru are indicative of deep-rooted societal divisions, they also represent a larger discursive shift about the claims generated by the past and who has a responsibility to address them. Importantly, advocacy organisations now often direct their campaigns towards Lima, thereby working through and strengthening the democratic process.

Historical memory in Sierra Leone has generated fewer disputes. Instead, the TRC helped propagate a normative discourse and politics of reconciliation. Criticisms that the TRC sidelined local civil society and Sierra Leonean culture and traditions reinforced a larger interest in communal reconciliation and tradition-based practices. While grassroots

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<sup>42</sup> This stands in contrast to recent comparative impact assessment literature that has found that, compared to trials, truth commissions have little effect on democracy. See Tricia D Olsen, Leigh A Payne, and Andrew G Reiter, *Transitional Justice in Balance: Comparing Processes, Weighing Efficacy* (USIP Press 2010).

initiatives, notably Fambul Tok, strengthened communal reconciliation and peace building, they have had less of an impact on national integration, reinforcing instead a turn towards localism and decentralisation of authority structures. In both instances, however, formal processes reinforced and helped mobilise grassroots and local processes.

### ***Lessons***

What lessons can this chapter's comparative analysis yield, particularly for current and future sites of transitional justice? A first is that there are trade offs in transitional justice, which practitioners should address and balance early on. In the realm of management and popular engagement, while some argue that the global management of transitional justice provides a critical layer of impartiality and political independence,<sup>43</sup> the external management of transitional justice has often seen a major shortfall in public engagement and ownership. "Closed" UN-established truth commissions in El Salvador and Guatemala are extreme examples. Staffed mainly by external social scientists and conducting fact-finding largely in confidence and behind closed doors, both generated little public involvement.<sup>44</sup> The Central American commissions, as others point out, also put less pressure on perpetrators to acknowledge wrongdoing.<sup>45</sup> On the other end

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<sup>43</sup> Jeremy Sarkin, 'The Necessity and Challenges of Establishing a Truth and Reconciliation Commission in Rwanda', *Human Rights Quarterly* 21 (1999), 808-809.

<sup>44</sup> Margaret Popkin, 'The Salvadoran Truth Commission and the Search for Justice', in William Schabas and Shane Darcy (eds), *Truth Commissions and Courts: the Tensions between Criminal Justice and the Search for Truth* (Dordrecht, Netherlands: Kluwer Academic Publishers 2004), p. 8.

<sup>45</sup> Priscilla B. Hayner, *Unspeakable Truths: Facing the Challenge of Truth Commissions* (New York, NY: Routledge 2002).

of the spectrum, while domestically run processes are likely to generate more attention, in highly divided societies, as the CVR illustrates, they can generate contentious and even dangerous politicisation.

In a politicised and ethnically divided context, such as Sri Lanka, a hybrid approach may avoid both extremes, however, learning from Sierra Leone, it will need to be based on genuine partnership.<sup>46</sup> This means ensuring the longer-term commitment of internationals both with regards to presence on the ground and funding, and working through a representative and diverse staff structure who represent a range of constituencies rather than just elites. It is also important that women and minorities are on board and that institutions have enough planning time to work out jurisdictions, objectives, and a division of labour particularly where multiple mechanisms are being established.

Second, I wish to highlight the importance of follow up. The Sierra Leonean and Peruvian experiences reveal the fragile nature of transitional justice, where interventions raise hopes and expectations and lose momentum and legitimacy. Without careful planning and communication transitional justice processes run the risk of engendering suspicion, marginalisation, and the disengagement of actors whose commitment is needed for success. Securing long-term commitment, is, of course, frequently beyond the control of institutions and difficult in fragile and often economically

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<sup>46</sup> See Tim Kelsall, *Culture Under Cross Examination: International Justice and the Special Court for Sierra Leone* (Cambridge University Press 2013). See also Sierra Leone Working Group on Truth and Reconciliation. 'Searching for Truth and Justice in Sierra Leone: An Initial Study of the Performance and Impact of the Truth and Reconciliation Commission.' February 2006. Available at: [www.fambultok.org/TRCStudy-FinalVersion.pdf](http://www.fambultok.org/TRCStudy-FinalVersion.pdf).

impoverished post-conflict contexts. It is important that institutions are clear as to what can be delivered. Internal and external actors should hold early deliberations before starting proceedings over long-term support and follow up. It is also vital that they carefully consider financial sources of support particularly vis-à-vis sensitive and symbolic measures, such as reparations. Domestic government funding for reparations may be important to reinforce civic trust and accountability. At the same time, voluntary donations from citizens is another avenue, which in divided societies and conflicts along ethnic lines, such as Sri Lanka, may be an important way to demonstrate goodwill and social solidarity.<sup>47</sup>

Third, it is worth thinking carefully about the risk of institutional overstretch. Where transitional justice mechanisms have increasingly expanded their mandates, more critical scrutiny is warranted of tensions between objectives and methods. The increasingly ambitious mandates of transitional justice mechanisms, particularly truth commissions, have often augmented popular disappointment. The widening of mandates and tying of transitional justice to peace-building more generally also risks undermining first order objectives of formal mechanisms; in the case of truth commissions, the provision of voice and the generation of a critical historical record. One way forward is to downsize institutional mandates and separate other measures, such as reparations and the assignation of criminal responsibility, from truth commissions. While this may raise confusion among stakeholders over the demarcation of institutions' jurisdictional authority, the onus will be on practitioners to clearly communicate mandates and objectives. Greater

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<sup>47</sup> This suggestion came up at the Radcliffe 2015 conference in Boston, Massachusetts, which the author put together with Kirsten Ainley and Thrishantha Nanayakkara.



transparency and an interactive iterative process are, in any case, are welcome and vital components of sustainable and meaningful peace building, reconciliation, and justice.

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**Truth and Justice in East Timor and  
Indonesia: Lessons Learnt**

*80*

*David Cohen and Leigh-Ashley Lipscomb*

## I. Introduction

In 1999, mass atrocities were committed in East Timor in the context of an UN-sponsored popular referendum, which determined its independence after centuries of Portuguese colonial rule and invasion by Indonesia in 1975. Armed conflict from 1975 - 1999 resulted in an estimated minimum of 102,800 deaths and displacement of 55 percent of households.<sup>1</sup> The 1999 violence involved widespread and systematic murder, sexual violence, torture, forced deportation, and property destruction, which rose to the level of international crimes. In response, national and internationally organised transitional justice institutions attempted to develop a range of judicial and non-judicial measures, including the first multi-lateral hybrid trials and the first bilateral truth commission. Nowhere else has such an intense and overlapping transitional justice process been deployed.

For Sri Lanka, the experience of transitional justice in East Timor and Indonesia is relevant not merely because it is a case study in this volume from Asia. The legacy of the 1999 violence and its roots in the years of Indonesian occupation resulted in a multilateral effort that combined trials with truth commissions, integrated international involvement, and incorporated the work of previous transitional justice mechanisms into new ones. UN Human Rights Council resolution A/HRC/30/L.29 of 1 October 2015 indicates that there is the intention to replicate a similar “comprehensive” approach in Sri Lanka.

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<sup>1</sup> ‘Profile of Human Rights Violations in Timor-Leste, 1974-1999’, in *Chega!*, *Final Report of the Commission of Reception, Truth and Reconciliation (CAVR)* (Dili, CAVR, 2005) 3.

This article describes East Timor's and Indonesia's key transitional justice institutions, their outcomes and challenges. It highlights issues that transcended the individual institutions and focuses on collective lessons learnt.

## **II. Transitional Justice Institutions and Outcomes**

The transitional justice institutions spanned two countries undergoing fundamental political transitions away from an authoritarian past. International and national initiatives resulted in three main types of institutions: 1) inquiries/investigations; 2) trials; and 3) truth commissions.

The inquiries and investigations (one national and two by the United Nations) focused on accountability for acts committed in 1999, and were conducted sequentially and independently from one another. Two courts were established independently without coordination or an agreement for cooperation. Consequently, the UN "hybrid" court in Dili and the Indonesian Ad Hoc Human Rights Court in Jakarta had overlapping jurisdictions and operated at the same time. Both courts prosecuted crimes committed in 1999, though with different access to accused persons and evidence. The two truth commissions operated sequentially but not deliberately. The later bilateral truth commission incorporated some of the work of the first national truth commission held in East Timor. The coordination mechanisms between the UN trials and the truth commission operating in East Timor and the human rights investigation and trials conducted in Indonesia will be discussed below.

The chart below summarises these core institutions. Their “follow-on” institutions are referenced, but detailed discussion is beyond the scope of this article. The two UN inquiries will not be discussed because of their limited scope and influence.

<b>Years of Operation</b>	<b>Name of Institution (English Translation)</b>	<b>Acronym</b>	<b>Type of Institution</b>	<b>Temporal Scope of Inquiries</b>	<b>Established by</b>	<b>Based In</b>
Nov. 1999- Jan. 2000	Commission on Violations of Human Rights in East Timor	KPP-HAM	Inquiry	1999	National Human Rights Commission	Indonesia
Nov. 1999- Jan. 2000	International Commission of Inquiry	CIET	Inquiry	1999	UN Commission of Human Rights	New York
2000-2003	Jakarta Ad Hoc Human Rights Court	Ad Hoc Court	Court	1999	Presidential Decree	Indonesia
2000-2005	Dili District Court – Special Panels for Serious Crimes	SPSC	Hybrid Court	1999	UN Regulation	East Timor
2001-2005	Commission for Truth, Reception and Reconciliation	CAVR	Truth Commission	1974-1999	UN Regulation with endorsement	East Timor
2005	Commission of Experts	COE	Inquiry	1999	UN Secretar	New York

					y General	
2005-2008	Commission of Truth and Friendship of East Timor and Indonesia	CTF	Truth Commission	1999	Diplomatic Agreement between two states	Indonesia (Bali)
2008-2013	Serious Crimes Investigation Team	SCIT	Inquiry	1999	UN Mission with Security Council Endorsement	East Timor
2005-present	Dili District Court (Can convene ad hoc panels to hear case of 1999 serious crimes if international judge available)	None	National Court	1999	UN Regulation	East Timor

*Human Rights Commission Inquiry – KPP-HAM*

Under Indonesian human rights law 26/2000 a special ad hoc human rights court may be constituted in Jakarta to deal retroactively with crimes committed prior to the enactment of the law. Pertinent for present purposes is the requirement that the national human rights commission (Komnas HAM) conduct an initial investigation for the purposes of making a

recommendation for prosecution to the Attorney General of Indonesia, if the investigation indicates a prima facie case of gross human rights violations as defined by the statute.<sup>2</sup>

Under this legal framework, a commission (KPP-HAM), established by the national human rights commission (Komnas HAM), undertook an investigation. It was co-chaired by two leading Indonesian human rights advocates. Despite the limited time allowed for the investigation, the commission collected a massive amount of evidence in East Timor and Indonesia and prepared a detailed report recommending prosecution of a range of Indonesian military and political figures, up to the highest command levels of the Indonesian armed forces (TNI). The report was accompanied by an evidentiary database of significant scope.

There are two striking features of the KPP-HAM process. The first is that the evidentiary database was never used by the Attorney General's Office (AGO). Although a reformist headed the AGO, the overall personnel (some 8000 strong) of the public prosecution service remained largely intact from the previous regime. The result was that despite a strong and independent investigation by the outside body, KPP-HAM, there was no political will within the AGO to prosecute with vigour and integrity.

The second important feature of the KPP-HAM process was that contrary to expectation, it had the most significant impact in the UN trial process in East Timor. Because the depth and documentation of the KPP-HAM report exceeded the UN's own commission of inquiry, the KPP-HAM report provided

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<sup>2</sup> Law 26/2000 incorporates, though not with complete accuracy, language of the Rome Statute of the International Criminal Court (ICC) on crimes against humanity and genocide.



the basis for the prosecution to establish the legal requirements for their crimes against humanity prosecutions before the UN Special Panels for Serious Crimes (see below). The KPP-HAM report was introduced by the prosecution and accepted by the Special Panels as providing proof of the widespread and systematic nature of the 1999 attacks against the civilian population of East Timor (the “chapeau elements” of crimes against humanity).

Despite the foundation provided by the KPP-HAM investigation, however, the ensuing trials before the Jakarta Ad Hoc Human Rights Court were less than satisfactory.

#### *Trials in Indonesia*

Twelve trials were conducted before the Jakarta Ad Hoc Human Rights Court, involving some 18 accused persons. Most of these were military personnel, including three generals. It was the first time in the history of the Republic of Indonesia that military officers submitted to the jurisdiction of a civilian court.

Whatever successes were achieved at these trials were largely due to the presence of “ad hoc judges”, law professors drawn from outside the career judiciary, whose role was to ensure the independence and legitimacy of the proceedings. It was the incorruptibility and courage of several of these judges, in the face of threats and continuous intimidation, which produced convictions against a two star general (Adam Damiri), the leader of the notorious Aitarak militia (Eurico Gutteres), and several other military officers and a civilian official. All of the convictions were, however, eventually overturned either at the High Court or Supreme Court level and the only accused who

served any time in prison was a Timorese defendant (Eurico Gutteres).<sup>3</sup>

These trials are instructive for transitional processes relying solely upon a domestic judiciary where the composition of the police and justice institutions has not changed. The trials were hampered by a combination of incompetence, unpreparedness to deal with complex crimes against humanity cases, and deliberate interference and intimidation. The most serious shortcomings arose from the profound, but sometimes feigned, incompetence of the prosecutors and the lack of political will of the AGO.

One manifestation of this lack of seriousness was the failure of the prosecution to produce in court physical or documentary evidence seized by the police, which was listed in the case dossiers. Even when judges demanded such evidence or the appearance of particular witnesses, prosecutors either ignored the repeated requests or brought physical evidence in a manner that precluded its use. Numerous Indonesian military witnesses recanted the testimony they gave in the pre-trial phase. Even more glaringly, the prosecutors conducted direct and cross-examination in a manner intended to benefit the defence rather than the prosecution case. Tellingly, the prosecutor who was the most competent and effective was assigned to the case against Eurico Gutteres.

While some of the judges were hostile to the proceedings and openly favoured the defence, a handful of ad hoc judges did their utmost to ensure a legitimate trial and were responsible for most of the convictions of senior officers. The decisions

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<sup>3</sup> Gutteres' appeal against conviction had been denied by the Supreme Court but was later overturned by that same court through the process known as "judicial review."

rendered at appeal levels were mostly of dubious quality, ill-informed of the relevant law and flawed in their legal reasoning. The reversals of convictions were universally condemned by national and international NGOs, but in some cases the judges, in an understandable effort to correct the shortcomings of the prosecution, convicted in spite of the evidence presented to them rather than because of it. Where the prosecution for whatever reason has not proved its case beyond a reasonable doubt an acquittal upholds the rule of law rather than denies it. The flaws in the appeals process, on the other hand, indicate both incompetence and the influence of extraneous forces. Extraneous forces as a factor was made clear where every day the court was in session the first two rows in the courtroom were filled with uniformed red beret special forces' personnel, many of whom were bearing sidearms.

In the end, despite the high quality of the initial KPP HAM investigation, despite the creation of a special court designed to try such cases, and despite the participation of independent judges in the trials, the Jakarta justice process failed to produce credible results. The factors most responsible for this failure were the lack of political will and sufficient reforms within the justice institutions. To what extent international assistance could have had a positive influence is an open question at best. The multi-year training program conducted for human rights prosecutors does not provide grounds for optimism that international advisors would have had a significant impact.

### *Trials in East Timor*

The trial mechanism consisted of three components: the court (Special Panels within the Dili District Court); the prosecution (the Serious Crimes Unit – SCU) and defence (Defence Legal

Unit – DLU). All operated with some mix of national and international personnel. The court used judge panels of two internationals and one national. The Attorney General of East Timor led the prosecution unit with a deputy international prosecutor. The Special Panels' jurisdiction encompassed genocide, crimes against humanity, war crimes, murder, torture and sexual offenses, which were incorporated into East Timor's domestic legal framework. The definitions of these crimes were adopted verbatim from the Rome Statute of the International Criminal Court to comply with international standards.

Although there was no consistent prosecution strategy, efforts focused on ten priority cases. The prosecutions prioritised the crime of murder as a crime against humanity, with the indictments covering 572 of the estimated 1400 murders committed in 1999.

From June 2000 to 20 May 2005, the Special Panels completed 55 trials, with 84 convictions and three acquittals. All tried were mid- to low-level East Timorese perpetrators. Despite their indictment, no high-ranking Indonesian or East Timorese were brought to trial in East Timor: the majority live in Indonesia. For example, the court issued an arrest warrant for the highest-ranking Indonesian military officer believed to be responsible for the atrocities (General Wiranto). East Timorese leaders (with high-level UN complicity) prevented the enforcement of the arrest warrant. The perpetrator was never brought to trial. The prosecution chose to indict many people knowing they would not be apprehended.

Since the Special Panels closed in 2005, a handful of indictees re-entered East Timor and were prosecuted in national courts. Through political interventions, some have been arrested but

not tried or left the country without serving their sentence. Presidential pardons released some East Timorese convicted by the Special Panels before the end of their sentence.

The Special Panels trials did not comply fully with international or fair trial standards, compromising their legitimacy. Most significant was the lack of adequate defence. The Defence Legal Unit received no funding initially and even after marginal resources were provided, it remained under-staffed and under-funded. The poor quality of and limited access to court judgments also compromised the credibility of the proceedings. Victim protection and security were under-funded, and over-looked. No professional counsellor or psychiatrist was employed by the Special Panels or affiliate institutions to assist victims and witnesses; their identities were not protected; and the procedures followed by the court permitted them to be subjected to intimidation.

The majority of cases referred to the trial mechanism were not investigated. In 2005, 514 investigative files remained open and investigation had not begun in 50 cases. None of the cases referred by the national truth commission (see below) were pursued due to a lack of resources and time.

In 2007, after the establishment of a new UN peacekeeping mission in East Timor, the United Nations established an investigation team (Serious Crimes Investigation Team) with international prosecutors to complete this back-log of serious crimes cases. They were limited to investigation of the pending cases, and could only recommend (not file) indictments. It closed in 2013 without publishing a final account of its work.

*Commission for Reception, Truth, and Reconciliation (CAVR)*

Following consultation seminars with East Timorese, the UN Transitional Authority created East Timor's first truth commission, CAVR, with a mandate to establish: 1) truth; 2) reconciliation and 3) healing for violations of human rights committed from 1974-1999 in East Timor. East Timorese commissioners led the commission, but a significant proportion of management staff was international. International consultants provided technical expertise for databases and surveys. It operated from 2001 to 2005, extending its mandate three times. Its successor institution (STP-CAVR), under the Office of the President, maintains the CAVR site as a memorial and conducts dissemination activities.

The commission dedicated the majority of its efforts to truth seeking. Methods included: 1) statement-taking; 2) statistical research (i.e. grave surveys to establish death tolls); 3) public thematic hearings; and 4) document analysis. More than 7700 statements were collected from all districts of East Timor and abroad, targeting the highest levels of political leadership as well as local communities and individual victims. The truth-seeking process generated a multi-media archive that became the source of research for the commission's 2,000 + page Final Report, supporting publications, a film and school curriculum. It did not have powers to compel evidence or provide legal representation.

The focus of reconciliation activities was "community reconciliation processes" (CRPs), modelled on indigenous, non-judicial mediation practices. 1,371 low-level perpetrators of "non-serious" crimes (outside the jurisdiction of the Special Panels), such as arson, theft and beatings, voluntarily gave confessions to panels composed of truth commissioners and traditional elders from their community. Panellists and public audience members (including victims) could ask questions

from the perpetrator. The panels could impose symbolic punishments in accordance with local traditions, such as payments of alcohol or cows to victims, or community service. These “reconciliation agreements” were registered with district courts. If the perpetrator complied with the agreement (frequently negotiated with victims), they would receive immunity from prosecution. This program aimed to minimise popular retribution at the lowest level of perpetration.

There were flaws in its implementation. The Office of the Prosecutor-General vetted the perpetrators’ applications before the CRPs to prevent interference with the trial process. Nonetheless, there was occasional testimony and mediation of “serious crimes”, particularly for serious crimes committed before 1999 that were outside of the court’s temporal mandate. Conversely, the CAVR halted 35 CRPs to refer incidents of suspected serious crimes to the Prosecutor-General for investigation, but these were not investigated (see above). Finally, due to weaknesses in the young judicial system and the absence of a follow-up mechanism, the reconciliation agreements have not been monitored. Some perpetrators received *de facto* immunity without providing compensation.

The healing aspect of the commission’s work fluctuated in interpretation, mixing with a political “reception” function of encouraging East Timorese in Indonesia to return. A small group of victims at public hearings received accompaniment from hastily trained East Timorese staff. 156 victims from remote areas were brought for small group healing workshops in the capital city. The CAVR also ran a short-term reparations program for 200 victims, including torture survivors, widows, children and persons with disabilities. Services included one-time USD \$200 grants; health care; training for employment; physical rehabilitation; tombstones; and commemoration services.

While most assessments of the commission's work are positive, it has been criticised for not sufficiently incorporating the views of East Timorese who supported integration with Indonesia. Others raised concerns that information about crimes by high-ranking East Timorese Resistance members was suppressed. In contrast, the Final Report annexed lists of names of Indonesian military and civilian perpetrators suspected of crimes against humanity, leading to charges of bias. The truth commission's lengthy list of recommendations was not well received by some senior leaders because they were considered unrealistic. The lack of widespread access to its publications (many have not been translated into the most prevalent local languages) and archival records has further jeopardised its legacy.

*Bilateral truth commission between Indonesia and East Timor*

As a follow-on institution to the CAVR and both sets of trials, East Timor and Indonesia created a bilateral truth commission to establish the "conclusive truth" about and "institutional responsibility" for human rights violations in East Timor in 1999. The commission operated from 2005-2008, after two mandate extensions. It was funded by the two nations without any donor assistance.

Its main achievements were: 1) production of a Final Report, which is the "official history" for diplomatic relations; 2) a research and documentation process that resulted in a comprehensive account of crimes against humanity committed by Indonesian forces and Timorese militias and the inclusion of those findings in the Final Report; 3) An official apology and acceptance of "institutional responsibility" by the President of Indonesia for the full range of gross human rights violations and crimes against humanity committed by members of its military, civilian government and the East



Timorese militias they supported; 4) recommendations for collective reparations. Some of these recommendations have been implemented related to economic relations and missing persons, while others have been ignored.

Based primarily on its public hearings, the Commission was criticised for insensitivity to victims and bias in favour of Indonesia. However, the majority of its work was spent out of the public eye weighing testimony it received in closed sessions from witnesses who did not want to appear publicly; reviewing confidential statements from East Timorese militia leaders who had not previously provided testimony; and analysing documentation and testimony from previous transitional justice institutions. Contrary to public perceptions and expectations, it was several Indonesian commissioners who pressed for a report that would accurately document Indonesia's accountability for crimes against humanity in East Timor, while some Timorese commissioners repeatedly pressed for a blanket amnesty. The Indonesian commissioners succeeded in defeating the proposals for limited or blanket amnesty. These positions must be understood in the context of the political reforms and stances of the highest levels of political leadership in each country.

The mandate required a "document review" of all previous trials, investigations, and truth commissions, which became one of the most innovative aspects of the commission's work. After the initial failure of its "in house" research team to produce acceptable results, the commission designed a mechanism of using an external independent research team led by its international legal advisor to compile and analyse the voluminous record and to provide the commission with reports and recommendations. The team's reports benefited from the cooperation of justice institutions in both countries and the CAVR and conveyed their findings in redacted and

summarised formats to protect witnesses, victims and other sources. The document review process also prevented traumatising victims who had previously given testimony, and allowed the commission to crosscheck information. The two internal reports were made public.

Although this truth commission achieved what was once thought impossible (public recognition of responsibility by Indonesia for some of the most serious international crimes), its results are virtually unknown. Dissemination was limited, and mostly undertaken by Indonesia. Victims received no support.

#### *Summary*

The greatest achievement of the transitional justice system in East Timor and Indonesia was the production of credible historical records of the events of 1999, and to a much lesser degree the period from 1974-1998. The “truth” generated collectively by these mechanisms was relatively inclusive, considering differences in gender, geography, political orientation and timeframe. Their greatest shortcoming is the failure to hold accountable any of the senior leaders or even mid-level commanders “most responsible” for the international crimes that were documented in the various processes. The national leadership in Indonesia and Timor-Leste, and the international community, bear responsibility for this outcome, due to their lack of political will to pursue accountability through a credible justice process.

### **III. Thematic Considerations and Lessons Learned**

#### *A. Hybridity*

There were different approaches to “hybridity” (combining national and international authority and staff in an institution or system). Indonesia implemented national mechanisms with

no international involvement except in the bilateral truth commission, whereas East Timor's institutions were conducted with significant international influence.<sup>4</sup> In both countries, the transitional justice institutions were part of larger legal reform processes that sought to improve the quality of the national judicial institutions, including through increased incorporation of and adherence to international standards.

After East Timor gained independence in 2002, its institutions gradually shifted towards more national staff and control. The tension between national and international leadership and their differing approaches became a persistent challenge. Indonesia initially pursued a fully national approach, but it had to increasingly incorporate international standards and advice to gain the legitimacy needed to achieve its goals for transitional justice and diplomacy. International involvement did not ensure credible accountability processes or non-partisan, inclusive truth processes. Yet, both countries ultimately needed some degree of international involvement to accomplish national political objectives.

The value of international presence within transitional justice institutions is highly dependent on the receptivity of national actors and institutions; the quality of international staff; their commitment to neutrality; their prior knowledge and experience gained in transitional justice contexts, or in the locality; and their degree of independence from political interference.

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<sup>4</sup> The deep level of international engagement in East Timor's system was because it was operating under the executive authority of the United Nations when the institutions were established, and there were not sufficient numbers of East Timorese legal professionals to staff the judiciary on its own.

Clearly defined ownership of each institution implementing transitional justice initiatives is also critical: hybridity should not be a mechanism that excuses a host country or the UN from accepting responsibility for difficult decisions. The inability of the courts in East Timor to enforce the arrest warrants against perpetrators in Indonesia exemplifies the limits of transitional justice when there is not political will, even when there is competent international technical involvement.

### *B. Adaptability and “Capacity building”*

Each of the institutions adapted, devising ad-hoc solutions to resource shortages, revolving staff and political interference. None of the institutions met international standards in all areas; but each triaged to target issues, such as lack of equality of arms and victim support. As a positive feature, institutional mandates were flexible enough to allow for these changes. However, these areas should not have been left out of planning, or resolved through emergency “capacity building”. Minimum standards need to be set at the beginning of processes, with training implemented for staff before work begins and continuing as work proceeds based on evaluation systems, which include accountability for failures of any international staff. Experienced international staff can be used to supplement in areas where there is not enough time or staff to meet basic standards, or the institution may need to curtail that area of work or share resources with others. Transitional justice institutions are not the place to subject vulnerable victims and witnesses to probationary learners and experimentation.

### *C. Competition for Resources and Recognition*

If a comprehensive approach is to be successful, there needs to be an over-arching coordination and monitoring mechanism that, 1) ensures equitable distribution of resources across the

institutions; 2) upholds the distinct roles of different institutions; 3) sets and enforces minimum common standards, so victims do not receive “better” or “more” attention from different institutions; and 3) unifies outreach to promote the system as a whole, instead of each institution recruiting individually for participation and endorsement. It should also ensure a common understanding among all transitional justice actors that they fail or succeed as a collective.

#### *D. Sliding scales of accountability*

The big fish versus little fish accountability debate is inevitable at all phases of a transitional justice process. Although there were consultations with East Timorese political caucuses that identified “justice” as a priority, there was not deeper exploration of what that meant, or a more meaningful process (such as a referendum) for the populace to choose levels or means of accountability. Consequently, public expectations were raised that justice would be served to all perpetrators, without sufficient outreach to explain what the limitations would be, resulting in entrenched cynicism that negatively affects popular confidence and understanding of the judicial system today. It is the abominable nature of mass atrocity that not every perpetrator and not every victim will obtain justice. Inevitably, choices must be made about prosecutorial resources. If those fundamental choices are made in the design and planning phases and explained through outreach programs, then there will be less emphasis on the numbers, and more resources and time available to focus on the quality of the justice served.

Another question raised is whether different levels of perpetration require different responses. If judicial systems focus on the “most responsible” then there could be value in using traditional mediation processes, as in East Timor, to help process lower level offences. However, as demonstrated,

this will only work if sufficient systems are in place to guide them – so they are complementary and not contradictory to trials. If local, non-judicial systems occur “on the cheap” solely to minimise investment in accountability, they are more likely to entrench resentment against the justice sector and muddy the truth, because their outcomes will not be sustainable. Immunities may be granted based on un-tested and partial truths.

*E. Short-term outcomes versus long-term process-driven reforms*

All the institutional experiences above demonstrate that the integrity of the processes is as important as outcomes, particularly when long-term judicial and political reforms are goals. If due process standards are not upheld, or if truth processes are imbalanced or inaccessible, the tangible outputs and gains are quickly forgotten after institutional mandates end. As the case studies demonstrate, there is always the desire for more justice and more truth: the pursuit can be never-ending and evolutionary. What has the most potential to endure is the expertise and values cultivated in the fight for the small measures of truth and justice won.

*F. Legacy planning*

All the transitional processes in this study needed follow-up institutions to achieve their mandates, but none were planned with foresight. Even where there are multiple institutions and actors conducting an intensive level of activities, the time frame for transitional justice initiatives must always be long term. Transitional justice institutions with specific, short and clear mandates help stop the process from stalling and prevent popular cynicism. However, if these institutions achieve their mandates even marginally, they will generate historical records, recommendations and lessons learned that need further work. Using successor institutions can provide phases of implementation for one track of work, as well as be used to

integrate the work across the different types of institutions. They should not become expensive, dumping grounds for incomplete work.

If legacy planning is part of the transitional justice process design at the beginning, it will help the core institutions maximise their resources and deepen the impact of their outcomes. Key areas that may be part of legacy planning include:

- Outreach to disseminate and explain institutional outcomes and limitations
- Archives
- Memorials (structures and upkeep)
- Victim and witness follow-up, including protection monitoring, referrals, deepening the level or adapting the types of services provided
- Curriculum development for schools
- Protection monitoring and career development for staff of institutions
- Professional and human rights training for targeted groups (judicial actors, military, police)

#### **IV. Conclusion**

There was no grand plan for transitional justice in East Timor or Indonesia. Similar “comprehensive” justice systems are often the product of political compromise and dissatisfaction with previous attempts to secure truth and justice. Given the magnitude of the crimes that trigger a transitional justice response and the divided constituencies that characterise any post-conflict environment, perhaps there can never be a single satisfactory approach. However, the case study of East Timor and Indonesia shows us that more is not necessarily more; and that it is impossible to escape difficult choices about where to

place prosecutorial and truth telling resources. Comprehensive transitional justice systems require realism – about what is possible and achievable with the resources and time at hand. Any transitional justice process and each institution will have shortcomings and experience failures. However, if the collective achievements of institutions are cultivated and preserved, their value is likely to increase with time, allowing for new opportunities to develop for better outcomes if there are shifts in resources, political will or security.



**18**

**Reparations in Latin American  
Countries: Lessons for Sri Lanka?**

*8*

*Naomi Roht-Arriaza*

As Sri Lanka emerges from years of political and regional conflict, the question of how to deal with the scars that war and repression leave on the victims is emerging as well. Latin America has perhaps the longest and richest set of experiences dealing with demands for an end to impunity, for truth telling, reparations and institutional reform after dictatorship and/or civil conflict. Truth commissions in Latin America have been important precursors – but generally not substitutes – for criminal investigations and prosecutions. Those prosecutions have yielded important insights on the legal and political issues that might arise in Sri Lanka should prosecutions within national law be undertaken.<sup>1</sup>

Alongside demands for justice and truth-telling, reparations is a key part of the post-conflict and post-repression agenda, a way of making concrete to victims the commitment of the state to do things differently. Reparations serve a number of goals: according to UN Special Rapporteur Pablo de Grieff, they are important to recognise the suffering of victims, to show social solidarity with those who suffered, and to allow the reincorporation of victims as full citizens. Although reparations in Latin America have often come about through access to the Inter-American Commission and Court of Human Rights, several countries in the region have established complex administrative reparations programmes. These programmes are necessary because neither the regular court system nor the regional human rights court could possibly deal with the tens of thousands of victims. This article will describe aspects of the administrative reparations programmes of Chile, Peru, Guatemala and Colombia, and point out aspects that are either models to adapt to local realities, or pitfalls to avoid.

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<sup>1</sup> For example, amnesty laws, statutes of limitation, the lack of international crimes in the penal code, principles of legality, modes of indirect liability, *ne bis in idem*, and others. For a discussion, see Naomi Roht-Arriaza, 'After Amnesties Are Gone: Latin American National Courts and the new Contours of the Fight Against Impunity', 37 *Human Rights Quarterly* 341 (2015). There is also a helpful *Digest of Latin*

## **Individual Reparations**

Individual reparations can take the form of monetary compensation, either a single lump-sum payment or a periodic pension. They can also take the form of restitution – of land, other property, jobs, pensions, civil rights, or a declaration of innocence or good name – and rehabilitation, which can be physical, mental, and socio-legal. Publicly reversing an unjust criminal conviction, for example, might constitute socio-legal rehabilitation. Individual reparations may be symbolic as well as material: for example, the Chilean government’s delivery of a personalised copy of the Truth and Reconciliation Commission’s report with a letter indicating where the name of each individual victim could be found had a profound reparative value to the individuals involved. Other individual reparations may include the exhumation and appropriate reburial of those killed, apologies to individual survivors or next-of-kin, or the publication of the facts of an individual case. Individual reparations can also take the form of government service packages: enrolment in government health plans, or preferential access to medical services, scholarships, and the like.

Awarding individual payments requires the creation of victim registries, which can be time-consuming and difficult where people do not have personal identification or death certificates for their loved ones. In many post-war settings, municipal archives have been destroyed, and alternative methods must be devised to balance the need to avoid large-scale fraud in applications against the obligation to avoid re-traumatising potential applicants. There is also a tension, present in all reparations programmes but especially acute where individual compensation is involved, between addressing the harm and addressing the need. That is, should reparations programmes focus on the neediest victims – the disabled, the elderly, children and widows – or on those who are legally entitled to reparations because they suffered the worst violations? Of course, in some cases the categories will overlap, but not in all. Most programmes either try to use interim reparations to handle the most urgent cases, and/or prioritise on the basis of a combination of factors, including need, the type of violation, the geographical area, and (unofficially) the political

Guatemala's National Reparations Programme (*Programa Nacional de Resarcimiento, PNR*) exemplifies a programme centered around a lump-sum payment. Guatemala's 36-year war resulted in 200,000 dead, some 40,000 disappeared, and over 600 villages destroyed. The bulk of the victims were Mayan indigenous people, and 93% of the violations were committed by security forces, including genocidal attacks in 1981-83. The PNR originally had a ten-year mandate starting in 2004, with a planned annual budget of three hundred million *Quetzales* (about US\$37.5 million). The mandate has been extended for another ten years, but 2014's annual budget was less than half the amount planned.<sup>2</sup> The categories of violations to be repaired include forced disappearances, summary executions, physical or mental torture, forced displacement, forced recruiting of child soldiers, sexual violence and crimes against children, and massacres; massacres and forced displacement can give rise to collective victims who can claim reparations as such.<sup>3</sup> The PNR also in theory proposed to approach reparations from five integrated angles: material restitution, individual economic reparations, cultural restitution, victim dignification and psychosocial reparation.

In practice, difficulties arose. First, the reparations issue became conflated with the question of payments to former paramilitary members (known as PACs) for services rendered to the military. Organised and vocal groups of ex-PACs claimed that the state owed them millions of dollars in unpaid wages and reparations. With the creation of the PNR, many ex-PACs saw an opportunity to pressure the government to include them as a subject of reparations. This outraged the victims' groups, and the government finally agreed to exclude PACs, as well as ex-guerrilla fighters, from the PNR, but pay PACs from a separate fund. From a ground's-eye view, it looked to many people like the government was distributing cheques right and left; all efforts to

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<sup>2</sup> Programa Nacional de Resarcimiento, Memoria de Labores 2013-14, p.p. 19-20.

<sup>3</sup> Acuerdo Gubernativo 258-2003, May 7, 2003; Acuerdo Gubernativo 188-2004. July 7, 2004 contain the basic structure and definitions of the

use reparations as a means of dignification of victims rather than a simple hand-out were lost in the infighting, strategic opportunism and confusion over who constitutes a ‘victim’ and why. Moreover, many of the PAC members had been forced to join, and their families had been attacked and killed, yet once they were on a register as PAC members they were excluded from the PNR despite their losses. This created a sense of unfairness.<sup>4</sup>

In 2006 the Executive opened sixteen regional field offices and nine mobile teams throughout the country to gather and receive applications for reparations from individual survivors. The focus has remained on individual economic compensation. Compensation for loss of a loved one comes to about US \$3,000, with the maximum for an individual’s losses capped at US \$6,800. At first, cheques were distributed in part in areas where either the government party or intermediary NGOs had a constituency, leading to charges of patronage in the programme. While individual compensation continues as a mainstay of the programme, in recent years there has been a turn to housing and development projects as forms of reparations, which have been similarly critiqued.

Despite the problems exemplified by the Guatemalan programme, a one-off payment has the advantage of relative speed and simplicity – it requires only a temporary budget allocation, and a temporary bureaucracy to administer payment. For victims who have immediate needs or are elderly or destitute, quick money can be a godsend. Where communities are at odds or disagree on other forms of redress, one-off compensation may also be the only realistic option. One-off payments also most resemble the tort damages available in courts for personal injury. However, the amounts of money involved are almost always far less than what a court would grant for equivalent harms. They are

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<sup>4</sup> Viaene, Lieselotte, ‘Dealing with the Legacy of Gross Human Rights Violations in Guatemala: Grasping the Mismatch Between Post-Conflict Macro Level Policies and Micro Level Processes’, 15 *International Journal of Human Rights* 1160 (2011). In Peru, those who were members of insurgent groups were excluded from reparations, even though they had often suffered the loss of non-combatant family

rarely large enough to be life changing and are often granted long after the harms occurred. Studies have shown that most one-off payments are used to pay off debts, for medical expenses or school fees, or are simply consumed without creating any real long-term change in the recipient's standard of living.<sup>5</sup> They are too small to have much impact on local markets or to allow people to set up micro-enterprises, especially without any additional training in finances, banking, or business management. They also create issues around how they should be distributed within the family to avoid injustice: for this reason, for example, the Peruvian programme of individual reparations provided a lump sum to the spouse and a smaller sum to each child or parent, no matter how many children there were. This avoids redistribution of awards if additional family members later become aware of the programme.

Individual reparations can create other types of difficulties. Payments can provoke community dislocations: families divided, towns flooded with hucksters promising fast cheques, long-lost and unknown family members suddenly appearing, and some recipients assaulted or threatened into turning over the proceeds of their cheque. Intra-family dynamics can also be impacted: while in some cases women can be empowered by receiving disposable cash in their name, in others male relatives will quickly lay claim to the compensation paid their wives and mothers, which may not then serve its intended purposes.<sup>6</sup> At their worst, such individual payment programmes are prone to clientelism, patronage politics, and corruption. They can become the antithesis of reparatory.

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<sup>5</sup> Viaene Liselotte, 'Voices From the Shadows: The Role of Cultural Contexts in Transitional Justice Processes', Doct. Law diss. (Universiteit Gent, 2010); Paul Gready, *The Era of Transitional Justice: The Aftermath of the Truth and Reconciliation Commission in South Africa and Beyond* (London: Routledge, 2011).

<sup>6</sup> Viaene, *Voices From the Shadows*; Ruth Rubio Marin, *The Gender of Reparations* (Cambridge: Cambridge University Press, 2009). See also Mersky and Roht-Arriaza, 'Guatemala' in *Victims Unsilenced: the Inter-American Human Rights System and Transitional Justice in Latin America*

Pensions or periodic payments may do better. Such payments can act as a kind of social security, and can provide minimum economic subsistence. In Chile, for example, reparations included a lump-sum payment equal to a years' pension (approximately \$530 in 1996 currency) and a monthly pension, based on the average wage, for spouses, parents and children of those killed or disappeared, to be paid according to a fixed percentage of the total for each type of relationship. Pensions do need to be tied to inflation, and require a new or existing capable bureaucracy (for example, one that already deals with pensions for the elderly or for veterans) in order to disburse the funds. In places where the state has no existing structures for periodic distribution of funds, especially in remote areas, a pension system will take longer to set up. Pensions also require a longer-term budgetary commitment, and so may be problematic where reparations do not have a legislative mandate but are creatures of the executive branch. This is the problem today in El Salvador, which is in the process of setting up a modest pension system for victims of that country's eleven-year civil war.

Service provision – for health care, education, or housing – is often a part of reparations schemes. Such provision requires coordination and financing agreements among several government ministries and several levels of government (central, provincial, municipal) and may not serve its goals without a change in how existing government ministries deal with poor and marginalised populations more generally. Where services in general are poor, granting access to them may only be a reminder of the callousness and ineffectiveness of government.

Health care and education are the most common services provided. As noted above, these can take the form of individual entitlements to medical services or scholarships. Many reparations programmes have focused on psychosocial services to allow survivors to cope with the mental harms caused by the violations. Such services have proven successful where they are tailored to the specific needs of, for example, torture victims. An example is the Programme of Reparation and Integral Health Services, known by its Spanish acronym as PRAIS, which used specifically

trained therapists.<sup>7</sup> In Guatemala, specialised NGOs were contracted to provide these services after it became clear that government psychologists had neither the specialised training nor the empathy necessary to succeed with largely indigenous victims.

Medical care has been a part of reparations “packages” in Chile, Peru, Guatemala, Colombia, and elsewhere. Usually, this entails access for victims and their immediate family to the state-run medical service at little or no cost. But these clinics offer indifferent or poor quality care, and often do not have the specialised services required, for example for victims of sexual violence. At times, racist, sexist or stigmatising attitudes towards victims among medical personnel can discourage them from using existing services.

In victim surveys around the world, education of children ranks high on the list of what people want from a reparations programme. Education can be an especially important form of reparation because those who spent their childhoods running and hiding will have missed out on formal schooling; adults may be illiterate and adult education may be an important component of economic betterment. Moreover, because reparations programmes have tended to take a long time to establish and fund, education becomes a multigenerational goal, able to respond to the intergenerational aspects of the harm. Reparations programmes have often provided scholarships, money for school fees, and the like. For example, in Chile the reparations body provided free schooling for victims and their descendants until age 35, including post-secondary education. Plans in Guatemala for integral reparations included a focus on bilingual education and Mayan heritage studies, although neither were widely put into practice. A number of reparations programmes have included small vocational training projects, but these have been only modestly successful in leading to permanent employment.

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<sup>7</sup> Lira, ‘The Reparations Policy for Human Rights Violations in Chile’ in Pablo de Greiff (ed) *The Handbook of Reparations* (Oxford University



## Collective Reparations

Collective reparations mean different things in different contexts. “Collective” may refer to the *beneficiaries* of the reparation, as when religious, ethnic, or geographically defined communities have suffered harm to their institutions, property, or social fabric and social cohesion as groups and therefore need to be repaired as such. The easiest example of this meaning is the restitution or compensation for places of worship damaged during the period in question, but it could also involve restitution of communal land, preferential credit or development fund access for hard-hit regions, or measures to end discrimination on the basis of language. Collective reparations also refer to the *type* of reparation: public goods provided to a specific community, but open to all. While individual or family access to scholarships or hospital privileges would constitute individual reparation, the building of schools or health clinics in affected communities, open to all residents, would be collective reparation. This of course raises the difficulty of dealing with assigning victims to groups or communities for reparations purposes, a problem magnified by demographic and social shifts during the course of an armed conflict.

Governments often prefer collective reparations because they are perceived as less expensive to fund and administer and because beneficiaries tend to understand them as a form of government largesse. For the latter reason, human rights advocates tend to be suspicious of collective reparations, seeing them as an attempt to pass off infrastructure development that is already part of government’s responsibility as reparations, thus in effect “double-counting.”

Having collective reparations supplement, rather than replace, existing government responsibilities in the area of education, health, or infrastructure development, most easily solves this dilemma. For example, health programmes could focus on counselling, supporting traditional medicine, or training new community-based health providers. It is also important to consider the long-term sustainability of such projects, especially infrastructure projects. Who will maintain them over time? Will

reparations funding is short-term, how will maintenance and operation be factored into regular ministerial or agency budgets? These practical considerations can make or break a collective reparations endeavour.

Collective reparations promise to benefit all members of a community, not just victims. In areas where entire communities were victimised this may be appropriate, but in others such reparations will be overbroad and thus need to be combined with individualised components. Even if collective reparations have characteristics of public goods, they may still serve a reparatory purpose if it is clear that it was victims' agency, not just condition, which brought them to the locality. Thus, collective reparations should respond to a process by which the community is involved in choosing priorities and the victims play a prominent role. This allows victims to underline their worth as productive citizens and ensures that whatever reparations are provided respond to the perceived needs of the putative beneficiaries. Such reparations should also be combined with symbolic and commemorative aspects to differentiate them from other development projects.

Peru's reparations programme has emphasised collective reparations. The Peruvian Truth Commission found that there had been some 70,000 victims of the armed conflict there, more than half of them killed by non-governmental groups like Shining Path, and most of them concentrated in the poor, indigenous highland and Amazon areas. The reparations programme's original regulations called for four components: legal strengthening, including local authorities, human rights and dispute resolution training; productive and economic infrastructure support; projects aimed at the return of the displaced and dispossessed; and support for educational, health, water, and cultural heritage support projects. Eventually, the government focused only on the economic and service provision infrastructure components. The collective reparations component was decentralised to the municipal level, with funds assigned to those regions most affected by violence as well as to communities formed by those forcibly displaced from their original homes. To date different localities have responded differently to the challenge of implementing a reparations programme. Some quickly finished

other areas lagged behind. Local governments were given funds to implement small (up to \$30,000 USD) collective projects, according to priorities that were negotiated between communities and the state through the creation of local implementation councils.<sup>8</sup> Most of these projects involved irrigation or productive infrastructure projects, although some also built community centers. While communities were supposed to decide for themselves what they wanted, the strongest voices (i.e. old, male, richer) tended to predominate; women were much less active in choosing projects.

The Peruvian effort highlights the importance of locally or regionally-distinctive reparations efforts and of involving municipal and other sub-national authorities in reparations efforts. Conflicts took different forms in different regions (or even sub-regions) of any country, and social reconstruction needs to happen locally as well as nationally. In Guatemala and Peru, local communities engaged in their own processes of mapping the conflict, transmitting to new generations both the culture and strength of the pre-conflict communities and what happened to them during the conflict. They built local museums, engaged in community reburials, created religiously tinged monuments, and in some cases employed customary justice mechanisms to deal with reintegration of former fighters into the community.<sup>9</sup>

The Colombian government has embarked on an ambitious restitution and reparations programme aimed at “integral reparations” that encompass forced displacement as well as physical integrity violations. Colombia has some 3.6 million internally displaced people, one of the highest levels in the world.

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<sup>8</sup> The International Center for Transitional Justice (ICTJ) and Asociación Pro Derechos Humanos (APRODEH), *Perú: ¿Cuánto se ha Reparado en Nuestras Comunidades: Avances, Percepciones y Recomendaciones sobre Reparaciones Colectivas en Peru 2007-2011* (2011), available at: <http://ictj.org/sites/default/files/ICTJ-Peru-Reparaciones-2011-Español.pdf>.

<sup>9</sup> For more on local efforts, See- *Weaving a Braid of Histories: Local Post-Armed Conflict Initiatives in Guatemala* in Rosalind Shaw, Lars Waldorf & Pierre Hazan (eds) *Localizing Transitional Justice: Interventions and Priorities*

Despite a diminution of violence in some areas and the advance of peace talks with the major insurgent group (a peace accord was signed in September 2016), people continue to be forcibly displaced and armed actors continue to operate with impunity in some areas.

The Victims' Law defines victims as "people, or the close family members of people, who individually or collectively suffered harm due to events happening after 1 January 1985 that constituted grave violations of human rights or of international humanitarian law in the context of the internal armed conflict."<sup>10</sup>

It has components similar to those of other reparations programmes, including a lump sum payment, free burial services or reimbursement and emergency aid, if needed. Access to education is to be free through secondary school, and post-secondary education is to be made accessible through special admissions requirements as well as loans and subsidies, including guaranteed access to state-run training programmes. Access to medical care is contemplated through free government health insurance. It also provides for housing subsidies, specialised psychosocial assistance, exemption from military service, tax relief, and symbolic measures, including a day of remembrance for victims.

The heart of the Victims' Law is the scheme for land restitution. Land grabs were a prominent feature of the Colombian conflict, as is true in many places; sometimes paramilitaries took over lands, in other places insurgents cleared areas of civilians, and in others security forces' actions led to displacement of the local

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<sup>10</sup> Law 1448 of 2011 ("Victims and Land Restitution Law"), June 2011, Art. 3, [http://www.secretariassenado.gov.co/senado/basedoc/ley/2011/ley\\_1448\\_2011.html](http://www.secretariassenado.gov.co/senado/basedoc/ley/2011/ley_1448_2011.html), last accessed 6 October 2012. Under the statute, the definition of family includes the spouse, permanent companion, or member of a same-sex couple as well as immediate relatives. Indigenous and Afro-Colombian populations are not covered by the law due to the longer time-frame necessary to carry out proper consultations with communities and their authorities to decide on appropriate reparations

populations. The restitution scheme applies to land lost after 1 January 1991 (not 1985 as with other forms of reparation). The law states, at Article 72, that legal and actual return of the land that was dispossessed, along with post-restitution support, is the goal; only when that goal cannot be met (for example, because of continued lack of security) then equivalent land, or compensation, is to be provided. Land is to be returned to owners, occupiers, or possessors, even if they do not have formal title; tenants, however, are excluded. The definition of dispossession is “an action by which, taking advantage of the situation of violence, a person is arbitrarily deprived of their property, possession or occupation, either in fact, through contract, administrative acts, judicial decision, or through the commission of crimes associated with the situation of violence.” The law also applies to those who were forced to abandon their land. It only applies to land, not to improvements, livestock, crops, or sub-soil rights.

The law creates a Registry of Dispossessed or Forcibly Abandoned Land, and of those who claim to have been dispossessed. Once both the claimant and the land are registered, an administrative process ensues. Rather than make the claimant prove that they fit within the definition above, the law reverses the burden of proof through the use of presumptions. Once the claimant shows that they lost their land during the relevant time period, there is a presumption that any contract, title transfer or other document, signed by the claimant or his family, with those who have been convicted of belonging to or financing illegal armed groups or drug traffickers or persons extradited on trafficking charges, directly or through intermediaries, was completed under coercion and is therefore void *ab initio*. This is also true when the transaction, even if ratified by administrative act or by the courts, took place in an area where at the time of dispossession or abandonment there were generalised acts of violence, collective forced displacement, or grave human rights violations, or where those involved had asked the state for protection. A similar presumption of illegality applies to lands bordering those in which, subsequent to acts of violence, there were changes in ownership or in land use. A third set of circumstances raising the presumption applies to lands that were sold for less than half their actual value. Any subsequent judicial

reopen the sale. Thus, lawmakers tried to take into account the prevailing patterns of illegality, whether or not subsequently formalised.

The law allows for alternative land to be granted instead of restitution where the land in question is in the path of a natural disaster, where the house has been destroyed, where there were multiple displacements and the land has already been given back to someone else, or where it is too dangerous for the claimant to go back. Compensation can also be paid; compensation both to victims and to good-faith subsequent purchasers is to be paid by the government.

One of the most controversial provisions of the law concerns areas where the dispossessed lands have been turned into agribusiness projects. Article 99 of the law allows the deciding magistrate to recognise the legal rights of claimants, but also authorises the current owner to lease the land for the duration of the project, so long as he or she was a good faith buyer and not found responsible for the dispossession. If the current owner was responsible, the land reverts to the state agency to be used for collective reparations of the area or to be given to others. In an attempt to avoid having recently returned lands sold under new economic or security pressures, the law forbids the sale of newly restituted land for two years, and requires court approval for leases during that period.

A major potential problem arises from the need to adjudicate these cases before specialised magistrates of the local civil courts. This involves a huge amount of preparation and training of new judges. Finding adequate competent personnel is difficult given the persistent insecurity in the countryside, which has already given rise to threats against judges. Where judges are not threatened, they are likely to be part of local elites who passively supported the work of the paramilitary groups. Moreover, the work of surveying and defining the exact property boundaries in many areas is likely to be time-consuming and contested.

The land restitution programme is an ambitious attempt to solve one of the underlying causes as well as consequences of the long-

development law that will provide post-restitution support for small farmers, including credit, improved seeds and technical assistance that will be needed for restitution to have a chance at providing an adequate standard of living. However, its biggest challenge comes from continuing insecurity and armed conflict. Some areas are safe for restitution, while others are clearly not. The law includes elaborate provisions on security, and ties restitution into Colombia's early warning system for human rights violations. However, as of 2015 few eligible claimants had brought claims, and even fewer had actually returned to their land despite favourable rulings. Dozens of claimants, advocates and judges have been threatened or killed, risking the sustainability of the process. Many people may be already settled elsewhere or too frightened to return, and may therefore choose to take alternative land or compensation. If that is the outcome, the restitution programme will have served to legalise violent dispossession, even as it leaves the dispossessed with little to show.<sup>11</sup>

## **Conclusions**

As Sri Lanka moves towards dealing with the past, it will need to consider not only the timing, sequencing and interrelationship of prosecutions, truth-telling, reparations and institutional reform, but also how these measures intersect with larger debates over inequality, marginalisation and development. Administrative reparations programmes can be a down payment for other redress of past wrongs and a gesture towards a new concern for the poor and marginalised, but they are necessarily limited, targeted, and incomplete. As several scholars have pointed out: "In cases where economic exploitation has been systemic and institutionalised, individual reparations are inadequate. In fact, reparations, by individuating compensation, may impede systemic change by

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<sup>11</sup> For a critical view of implementation to date, see Amnesty International, *A Land Title is Not Enough: Ensuring Sustainable Land Restitution in Colombia*, (2015) available at [https://www.amnestv.nl/sites/default/files/public/land\\_restitution\\_eng](https://www.amnestv.nl/sites/default/files/public/land_restitution_eng).

surrogating redistribution”<sup>12</sup>. Moreover, using a reparations programme to try to get at deeper structural inequalities is fraught with difficulties, from the astronomical sums needed to difficulties in adequately determining the beneficiary class.<sup>13</sup> And conversely, attempting to provide reparations for too broad a category of violations will not only be prohibitively expensive, but risks turning reparations into a “theory of everything” expected to create broad social change – a load that no reparations effort can bear.

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<sup>12</sup> Ismael Muvingi, ‘Sitting on Powder Kegs: Socioeconomic Rights in Transitional Societies’, *International Journal of Transitional Justice* 3, no. 2 (2009): 180.

<sup>13</sup> For an account of the evolution of Peru’s reparations program in light of these concerns, see Jemima Garcia-Godos, ‘Victims Participation in the Peruvian Truth Commission and the Challenge of Historical Interpretation’. *International Journal of Transitional Justice* 2. no. 1



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*“The arc of the moral universe is long, but it bends  
towards justice”<sup>1</sup>*

