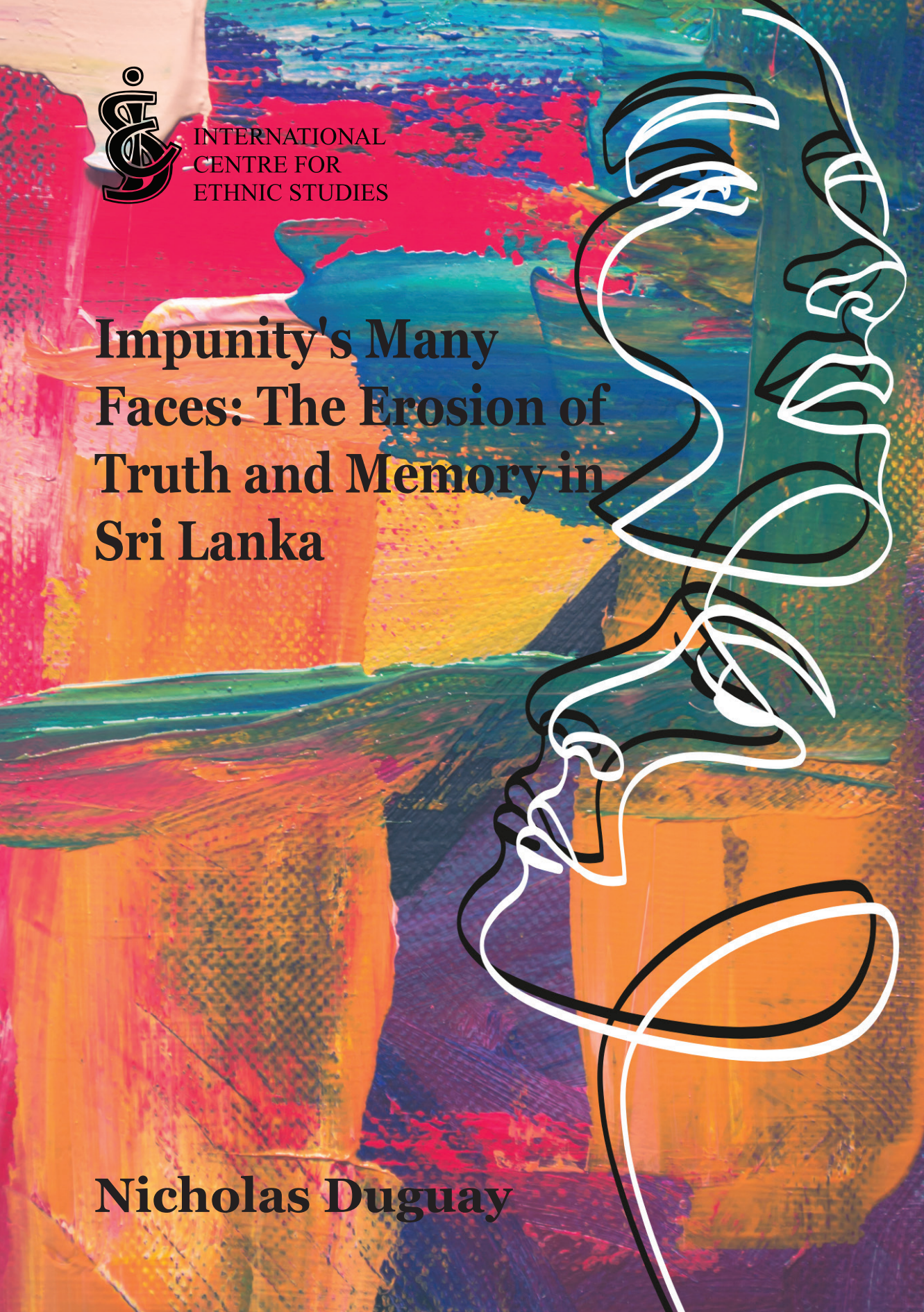

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Impunity's Many Faces: The Erosion of Truth and Memory in Sri Lanka

Nicholas Duguay

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International Centre for Ethnic Studies
2024

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I. Introduction

In a scathing 2022 report on the situation of human rights in Sri Lanka, the United Nations Human Rights Council concluded that "[i]mpunity remains a central obstacle to the rule of law, reconciliation and Sri Lanka's sustainable peace and development, and remains the core risk factor for recurrence of further violations"[1]. The UNHRC has reported a lack of progress on 'emblematic cases' and a rise in acquittals and presidential pardons; an absence of convictions of the Easter bombings perpetrators; discontinuations of economic crises cases; and more[2]. Impunity has deep roots in Sri Lankan history and its branches are far-reaching.

But what is impunity? The *United Nations Principles to Combat Impunity* [*Impunity Principles*] offers a long-winded definition: impunity is "the impossibility, *de jure* or *de facto*, of bringing the perpetrators of violations to account — whether in criminal, civil, administrative or disciplinary proceedings — since they are not subject to any inquiry that might lead to their being accused, arrested, tried and, if found guilty, sentenced to appropriate penalties, and to making reparations to their victims"[3]. This definition reflects common understandings of impunity as, simply, the lack of accountability for actions.

However, impunity is also deeply entwined with themes of truth, memory and knowledge. Indeed, three of the first four *Impunity Principles* concern, respectively, 'the inalienable right to the truth', 'the duty to preserve memory', and 'the victims' right to know'[4]. To act with impunity thus means not only to act without (legal) consequences, but also to deny truth, memory and knowledge to those to whom it is owed.

In the *Impunity Principles*, the right to the truth is justified as a "vital safeguard against the recurrence of violations", while the duty to preserve memory is seen as both a means of preserving a victimized group's "heritage" and of preventing the

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1 United Nations High Commissioner for Human Rights, *Situation of human rights in Sri Lanka– Comprehensive report of the United Nations High Commissioner for Human Rights*, A/HRC/51/5 (04 October 2022), para. 67.

2 *Ibid*., paras. 48-50

3 United Nations, Economic and Social Council, *Updated Set of principles for the protection and promotion of human rights through action to combat impunity*, E/CN.4/2005/102/Add.1 (8 February 2005), 6.

4 *Ibid*., 7

development of "revisionist" and "negationist" arguments against history[5]. On the other hand, the victims' right to know is simply described as an "imprescriptible right" and provided with no further justification[6]. The intuition, as captured in this text, is that leaving victims in the dark and depriving them of knowledge (about the circumstances in which violations, especially extrajudicial killings and disappearances, took place) is an affront to human dignity.

In this sense, then, Principle 4 ('The Victims' Right to Know') does more than provide a means of combating impunity; it defines a way — distinct from the evasion of accountability — in which one can act with impunity. In this report, I treat the right to know and the right to the truth as synonymous, since what victims have the right to know is *the truth*. Hence, the *Impunity Principles*, in their articulation of the right to know (the truth) define a distinct way in which one can act with impunity. While not as explicit, the same can be said for how memory is articulated. Indeed, duties to preserve memory are highlighted not necessarily (or, not only) for their role in combatting a culture of impunity but also — simply — because memory of human rights violations is part of peoples' heritage (and is thus linked, like truth, to human dignity). In short, the *Impunity Principles* do not merely articulate truth and memory as instrumental means of combatting impunity, but also suggest a more multifaceted understanding of what constitutes impunity, one which transcends the understanding of impunity as merely the lack of accountability.

This report pursues the suggestions in the *Impunity Principles* and examines how impunity in Sri Lanka operates not only as the lack of accountability, but also as the denial of truth and memory. Importantly, this report should not be interpreted as an argument that truth and memory — as part of a transitional justice programme — are more valuable and/or feasible to pursue than prosecutions. As has been noted during a meeting at the International Centre for Ethnic Studies on the relationship between truth-seeking and prosecution, while truth is of primary importance to some individuals, ensuring that perpetrators face justice is *also* of primary importance (and perhaps *more* important for other individuals)[7].

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5 *Ibid.*

6 *Ibid.*

7 Conor Hartnett, *The Relationship Between Truth-seeking and Prosecution: Report of a Dialogue* (Colombo: International Centre for Ethnic Studies), 29.

Much has been written about impunity as the lack of accountability in Sri Lanka. This report thus seeks to supplement that literature with more explicit explorations of how impunity manifests in other manners (as the denial of truth and memory). In other words, this report seeks to paint a more multifaceted picture of impunity and to show how it intersects with other phenomena, such as nationalism, identity and reconciliation. While it is beyond the scope of this report to make explicit claims about these intersections, it is hoped that the report will suggest avenues of research for thinkers in Sri Lanka and beyond. This more multifaceted account of impunity is rooted in both A) how impunity is articulated in international norms (in particular, the *Impunity Principles*) and B) an understanding of impunity as a violation of equality (which will be exposed in Part II.III.II of the report).

Part II of the report provides a short account of the right to the truth and the duty to preserve memory, as these are articulated in international law. This part of the report also gestures at some of the historical reasons behind the development of these concepts, as well as some of the moral intuitions underlying them. Then, the relationship between both truth and memory and the fight against impunity is discussed. The aim of this part of the report is to contextualize the discussion of impunity in Sri Lanka within a framework of international obligations, as well as to situate the idea of the denial of truth and memory as standalone wrongs (i.e., as distinct 'kinds' of impunity).

Part III of the report examines impunity as the denial of truth and knowledge; it situates a theoretical discussion of truth-seeking in the context of various commissions of inquiry (COIs) which have been established in Sri Lanka to address widespread enforced disappearances. This part of the report contends that the repeated failures of the COIs — and other factors — constitute impunity as the denial of truth. The section ends with reflections on the effects this kind of impunity has on different communities in Sri Lanka and on the achievement of transitional justice goals.

Part IV of the report examines impunity as the denial of memory; it situates a theoretical discussion of memories in post-war transitions in the context of a rise in arbitrary state action in Sri Lanka which has been oriented towards the denial of memory, heritage and diversity. This part of the report contends that this arbitrary state action — and other factors — constitute impunity as the denial of memory. The

section ends with reflections on the effects this kind of impunity has on different communities in Sri Lanka and on the achievement of transitional justice goals. Then, the report concludes.

It should be noted here that it is beyond the scope of this report to address all the so-called 'fault lines' at play before, during, and after the Sri Lankan civil war. An emphasis on actions committed by one group towards another should not be interpreted as a claim that one group is more or less at fault than another. Indeed, as is well established, gross human rights violations were committed by both the LTTE and the Sri Lankan State during the civil war. As reported by Human Rights Watch, "[t]he LTTE carried out frequent suicide bombings and other indiscriminate killings of civilians, torture, use of child soldiers, forced evictions of ethnic populations, massacres, targeted killings, summary executions, and the use of human shields"[8]. If the report focuses on wrongs committed by Sinhalese to Tamils, this is only because of the nature of impunity. That is, impunity is something which states engage in. Since Sri Lanka is a majoritarian Sinhala state, acts which are committed with impunity typically serve majoritarian (i.e., Sinhalese) interests at the cost of minoritarian (i.e., mainly Tamil) interests.

The methodology of this report consists of research in international law and transitional justice sources, as well as interviews with key figures involved in these domains — in particular, in the Sri Lankan context.

[8] Human Rights Watch, "*Why Can't We Go Home?": Military Occupation of Land in Sri Lanka* (October 9 2018).

2. Truth and Memory in International Law

Before delving into how impunity in Sri Lanka manifests as both the denial of truth and the denial of memory, I will contextualize the report with a brief account of the right to truth and duties to preserve memory, as these figure in international law. Then, I will discuss how truth and memory are related to impunity, both in the traditional sense of lack of accountability, and in the sense of denial of truth and memory suggested in the *Impunity Principles*. This context will help us situate the Sri Lankan State's denial of truth and memory within international obligations and provide a nuanced understanding of impunity.

2.1 The Right to the Truth: Genesis and Content

There is no consensus in the literature on the genesis of the right to the truth. While some scholars have identified Articles 32-33 of the First Additional Protocol to the Geneva Conventions of 1949 as the first articulation of the right to the truth, others point to the International Convention for the Protection of All Persons from Enforced Disappearances (2010)[9]. Other scholars have identified the aforementioned *Impunity Principles* as the first international instrument to "extensively crystallize the right to the truth"[10]. Still others point to the first and second International Conferences of the Red Cross and Red Crescent, which occurred in Paris in 1867 and Berlin in 1869 respectively, as the source of the right to the truth[11].

There are several reasons for this disparity in opinion. First, for most of its evolution, the right to the truth hovered ambivalently between being a customary norm, a humanitarian principle, and a right with legally binding force. Second, in its articulations, it is often unclear whether what is being referred to is the right to the truth as an autonomous right or in the guise of another right. For example, the scholars who identify the International Convention for the Protection of All Persons

[9] Natasha Stamenkovikj, *The Right to Know the Truth in Transitional Justice Processes: Perspectives from International Law and European Governance* (Leiden, the Netherlands: Koninklijke Brill NV, 2022), 77; Dermot Groome, "Part II The Right to Know, A General Principles, Principle 2 The Inalienable Right to the Truth," in *The United Nations Principles to Combat Impunity: A Commentary*, eds. Frank Haldemann and Thomas Unger (Oxford, United Kingdom: Oxford University Press, 2018), 59.

[10] Federico Andreu-Guzmán, *International Law and The Fight Against Impunity* (Geneva, Switzerland: International Commission of Jurists, 2015), 258.

[11] *Ibid*., 230.

from Enforced Disappearances (2010) as the source of the right to truth draw a sharp distinction between 'the right to know' and 'the right to truth'. They claim that the right to the truth *arises out of* the right to know, and that all articulations up until the International Convention (2010) were mere articulations of the right to know[12]. Indeed, these same scholars argue that the right to the truth is a "meta right" which emanates from other rights; its evolution from "a humanitarian principle to customary norm is intertwined not only with the right to know, but also with rights related to the access to justice and information, the equal protection of law, and the right to family life"[13]. For the sake of this report, the right to the truth encompasses both the right to the truth as an 'autonomous right' and rights with which it is entwined (in particular, the right to know).

Something on which all scholars agree regarding the genesis of the right to the truth is that it emerged in the context of disappearances during combat — i.e., it was a right for relatives of the disappeared to know the truth about the disappearance of their loved one(s). An early codification of the right to the truth can be found in Articles 32-33 of the First Additional Protocol to the Geneva Conventions of 1949. While the Protocol does not establish the right to the truth as an autonomous right, it nonetheless states that families of persons gone missing during combat have a right "to know the fate of their relatives"[14]. The right was further developed by Inter-American jurisprudence on Human Rights, in the context of widespread enforced disappearances in Latin America. In the *Velasquez Rodriguez* case, considered to be a landmark decision in the establishment of the right to truth, the court elaborated on states' duty to undertake "adequate and effective mechanisms to determine the whereabouts of missing persons"[15].

The *Impunity Principles* further fill in the gaps of the Protocol by explicitly imposing on states an obligation to "take appropriate action" to give effect to the right to the truth[16]. In short, the right to the truth developed in the context of the needs of families to know the truth about the circumstances of their relatives who disappeared in combat. While international legal sources define the content and scope of this right in different ways, there is nonetheless a "minimum standard"

12 Groome, "The Inalienable Right to the Truth," 59.
13 *Ibid*., 61.
14 Stamenkovikj, *The Right to Know the Truth*, 77.
15 *Ibid*., 78.
16 *Ibid*., 128.

for giving effect to the right to the truth: "the requirement that the relatives of missing persons be given access to the truth about the fate and whereabouts of their missing relatives"[17].

The right to the truth has expanded beyond cases of disappearances to apply to cases of, more broadly, gross human rights violations[18]. Principle 2 of the *Impunity Principles*, for instance, clarifies that "every people" has a right to the truth about "past events concerning the perpetration of heinous crimes"[19]. The nature of the heinous crime in question will affect the specific content of the right to the truth. For instance, in cases of enforced disappearances, secret executions, and clandestine burials, the right to the truth gives rise to — as mentioned — the right to know the fate and whereabouts of the victim. In cases where children of the disappeared are abducted, the right to the truth gives rise to the right of children to know their true identity[20]. As commentators on the *Impunity Principles* have noted, "while the precise contours of the right to truth are still being delineated, it has achieved customary status to the extent that individuals have the right to know the truth about grave violations of human rights affecting them"[21]. The obligation of states has, in almost all cases, been articulated as the obligation to investigate events and circumstances surrounding gross violations of human rights[22].

The normative underpinning of the right to the truth can be described at two levels: at the individual level and at the public level. As Melanie Klinkner and Howard Davis put it, "[t]he key reason behind a 'right to the truth' at an individual level is that it seeks to answer existential questions" — i.e., questions which must be answered to secure "the continued existence of the survivors"[23]. The deep and continuous effects of not knowing where a disappeared relative is are devastating; indeed, the need of families to know the truth sometimes takes precedence over the need for justice[24]. The normative underpinning of the right to the truth is not limited to the needs of individuals, but also to notions of dignity. The right to the

17 *Ibid.*, 166.
18 Andreu-Guzmán, *International Law and the Fight Against Impunity*, 260.
19 United Nations, *Impunity Principles*, Principle 2.
20 Andreu-Guzmán, *International Law and the Fight Against Impunity*, 260.
21 Groome, "The Inalienable Right to the Truth," 59.
22 Stamenkovikj, *The Right to Know the Truth*, 125.
23 Melanie Klinkner and Howard Davis, *The Right to the Truth in International Law: Victims' Rights in Human Rights and International Criminal Law* (New York, New York: Routledge, 2020), 9.
24 Klinkner and Davis, *The Right to the Truth in International Law*, 9.

truth has been described as being "fundamental to the inherent dignity of the human person"[25].

On the public level, the right to the truth finds normative force in its relationship to transparency, the fight against impunity, and the protection of human rights[26]. That is, the public, in this sense, has a right to the truth because truth is central to a polity which seeks to respect and uphold human rights. Moreover, the equality of citizens is denied by "lack of knowledge" and the "inactivity of the state"; hence, if a polity wants to be a just and democratic society, then it must secure the right to the truth[27]. Indeed, the right to the truth is seen by some scholars as a necessary component for post-conflict transition to a democratic and peaceful society, fulfilling both the needs and rights of victims of war-related crimes, and fostering public trust in institutions[28].

The development of the right to the truth can be ascribed to the growing interest in values and standards for cultivating post-conflict protection[29]. Commentators on the *Impunity Principles* have noted that the right to the truth is part of a greater wave in international law — i.e., the growing attention on concrete realization, implementation, and consequences of human rights violations (rather than mere abstract proclamation)[30]. As the authors write, the basic assumption behind this movement is as follows: "if human rights matter, they must not only be respected (by not unduly interfering with them) but they must also be actively secured and implemented"[31].

The right to the truth can be seen as worth respecting both for the sake of other rights and interests as well as for its own sake. More will be said on this in Part II.III.I. In sum, the right to the truth has evolved in the context of disappearances during combat and has also expanded to include truth regarding all gross human rights violations. The development of jurisprudence on the right to the truth, as

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25 Brianne McGerigle Leigh, "The Right to the Truth in International Criminal Proceedings: An Indeterminate Concept from Human Rights Law," cited in Stamenkovikj, *The Right to Know the Truth*, 38.

26 Klinkner and Davis, *The Right to the Truth in International Law*, 12.

27 *Ibid*., 73.

28 Stamenkovikj, *The Right to Know the Truth*, 75.

29 *Ibid*., 15.

30 Frank Haldemann and Thomas Unger, "Introduction," in *The United Nations Principles to Combat Impunity: A Commentary*, eds. Frank Haldemann and Thomas Unger (Oxford, United Kingdom: Oxford University Press, 2018), 16.

31 *Ibid*.

well as its prominent role in human rights discourse, sheds light on how the denial of truth is a standalone wrong. Indeed, to deny truth and to not face consequences for this constitutes impunity. Moreover, as will be discussed in Part II.III.II, to deny truth is also a distinct 'way' of acting with impunity.

2.2 Duties to Preserve Memory: Genesis and Content

While Principle 3 of the *Impunity Principles* stipulates that states have a 'duty to preserve memory' of human rights violations, there exists neither such a duty nor an autonomous 'right to memory' in international law. As commentators on the *Impunity Principles* note, the duty to preserve memory is best construed as a moral (rather than a legal) obligation[32]. Nonetheless, the value of memorialization is deeply embedded in the human rights ethos and is a centrepiece of transitional justice processes[33]. Several judicial and non-judicial means exist to fulfill — whether directly or indirectly — the duty to preserve memory.

For example, several judgments issued by the Inter-American Court of Human Rights address memorial practices[34]. In numerous cases, states found guilty of committing or authorizing human rights violations have been ordered to erect memorial monuments, establish national holidays of remembrance, or even to establish scholarship funds in the name of specific victims[35]. The rationales of these judgments are grounded in aims of non-recidivism, but also in memory for its own sake. For example, in *Trujillo Oroza*, the Court ordered a state to name a school after its victim "as a way of preserving his memory", while in *Moiwana Village v Suriname*, the Court instructed a state to engage in "public acts or works that seek… to commemorate and dignify victims, as well as to avoid the repetition of human rights violations"[36]. In sum, while duties to preserve memory and rights to memory are not encoded in 'hard' international law, they are nonetheless substantiated through other judicial means — in this case, reparations for human rights violations[37].

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32 Julia Viebach, "Part II The Right to Know, A General Principles, Principle 3 The Duty to Preserve Memory," in *The United Nations Principles to Combat Impunity: A Commentary*, eds. Frank Haldemann and Thomas Unger (Oxford, United Kingdom: Oxford University Press, 2018), 73.

33 *Ibid.*, 71.

34 *Ibid.*, 74.

35 Jeffrey Blustein, *Forgiveness and Remembrance: Remembering Wrongdoing in Personal and Public Life* (New York: Oxford University Press, 2014), 324.

36 *Ibid.*

37 *Ibid.*

There are multiple non-judicial instruments that appeal to duties to preserve memory — i.e., "conventions, protocols, and declarations that discursively express a concern for the protection of different kinds of public pasts and forms of heritage"[38]. The United Nations, for example, engages in "norm articulation" which underlines the importance of memory following gross human rights violations[39]. Both the aforementioned *Impunity Principles* and the long-titled *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* underscore the centrality of memorialization in transitional justice processes[40]. As Blustein remarks, "[t]hough these principles are not legal standards in the strict sense, but only guiding principles, and though practice has lagged behind them, they still have considerable potential to influence both international jurisprudence and state policy"[41].

Duties to preserve memory — which are, in essence, rooted in the assumption that we have an obligation to remember the past and/or that we owe a debt to predecessors —are a typical feature of human societies everywhere. While these duties have been (and, in some instances, continue to be) grounded in religious injunctions, ancestor-worship, and glorification of military service, it is only after the horrors of World War II and (in particular) the Holocaust, that duties to preserve memory were tied to a human rights project[42]. As the commentators on the *Impunity Principles* note, "Holocaust commemoration has been the driving force behind the impetus to address and *remember* serious international crimes"[43]. One author has even labelled the Universal Declaration of Human Rights of 1948 as a "memory document", arguing that "the human rights revolution of the period following World War II [was] an affirmation of the humanity of the innocent victims of that conflict *by honouring their memory*"[44].

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38 Anna Reading, "Framing Memory Rights in International Law," in *The Right to Memory: History, Media, Law, and Ethics*, eds. Noam Tirosh and Anna Reading (New York: Berghahn, 2023), 34.

39 Blustein, *Forgiveness and Remembrance*, 325.

40 *Ibid*., 325–26.

41 *Ibid*., 326.

42 Rebecca Kook, "'The Memory Belongs to No One and It Belongs to Everyone': An Analysis of a Grassroots Claim to the Right to Memory," in *The Right to Memory: History, Media, Law, Ethics*, eds. Noam Tirosh and Anna Reading (New York: Berghahn, 2023), 93.

43 Viebach, "The Duty to Preserve Memory", 71.

44 Jay Winter, "Antigone's Shadow: Human Rights, Memory, and the Two World Wars," in *The Right to Memory: History, Media, Law, Ethics,* eds. Noam Tirosh and Anna Reading (New York: Berghahn, 2023), 18–19. Emphasis added.

In sum, the existence of various judicial and non-judicial instruments indicates that memory is an integral part of the human rights ethos and an implicit 'value', so to speak, in international law. To breach a duty to preserve memory or to actively undermine memory can thus be characterized as a standalone wrong in the context of international obligations. To commit this wrong and face no consequences constitutes impunity. Moreover, as will be discussed in Part II.III.II, to deny memory is also a distinct way of acting with impunity.

2.3 Truth, Memory, and the Fight Against Impunity

How are the right to truth and duties to preserve memory related to impunity? As I have mentioned in the Introduction, the *Impunity Principles* suggest not only that truth and memory are *instrumentally* valuable (in the sense that they help combat impunity as lack of accountability) but also that truth and memory are *intrinsically* valuable. In framing truth and memory as values to pursue irrespective of their impact on accountability, the *Impunity Principles* suggest that denying truth and denying memory are 'distinct manners' in which impunity can manifest.

What justifies conceptualizing the denial of truth and of memory as 'distinct kinds' of impunity is an analysis of the wrong of impunity. As will be discussed below, impunity (as the lack of accountability) is wrong because it is a violation of the presumption of legal equality. Impunity is thus the kind of wrong which violates equality and human dignity. Just as the lack of accountability violates legal equality, so does the denial of truth and of memory violate equality—in this case, moral equality.

2.3.1 Truth and Memory Against Impunity as the Lack of Accountability (Instrumentally Valuable)

First, I will discuss how truth and memory can fight against impunity as the lack of accountability — i.e., how they are instrumentally valuable. As Priscilla Hayner has noted in her seminal work on truth commissions, it is not uncommon for truth commissions to be directed to counter impunity, whether by passing on their files to prosecuting authorities or naming perpetrators[45]. When truth commissions are not

[45] Priscilla Hayner, *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions* (New York: Routledge, 2010), 22–23.

able to contribute to criminal trials, they can nonetheless impose other sanctions aimed at accountability, such as removing perpetrators from positions of power and making recommendations to foster criminal accountability[46]. In these cases, truth-seeking becomes intimately linked to criminal prosecution, playing the role of fact-finding. Giving effect to the right to truth, in this sense, has the possibility of advancing criminal prosecution and thereby countering impunity (as the lack of accountability) in a direct manner.

Truth is also seen to help combat impunity by creating a robust public record which resists negationist and revisionist arguments against history. Indeed, this is how the *Impunity Principles*, in large part, justify the right to the truth. This is where truth and memory intertwine, as far as lack of accountability is concerned. A robust public record makes it more difficult — if not impossible—for perpetrators or participants in gross human rights violations to deny their implication in and/or the existence of past events. Whether or not this public record contributes to prosecutions, the truth-seeking initiative itself helps disintegrate a culture of impunity where individuals can hide themselves and their actions from public view. In a similar vein, a robust public record makes it more difficult — if not impossible — for individuals to reframe or reinterpret their role in gross human rights violations and/or to instrumentalize the past to justify further human rights violations. Again, whether or not the public record contributes to prosecutions, it is important not to underestimate the role which a civil society with access to truth and information plays in the fight against impunity and its culture.

Duties to preserve memory function, in this sense, as a means of protecting the public record which truth-seeking has established. Principle 3 of the *Impunity Principles* states that measures to preserve memory "shall be aimed at preserving the collective memory from extinction and, in particular, at guarding against the development of revisionist and negationist arguments"[47]. In sum, truth and memory are instrumentally valuable in fighting against impunity as the lack of accountability; while truth can both contribute to prosecutions and create a robust historical record, memory can integrate that historical record into collective memory and guard against revisionist and negationist arguments.

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46 *Ibid.*

47 United Nations, *Impunity Principles,* Principle 3.

2.3.2 Truth and Memory as Distinct 'Kinds' of Impunity (Intrinsically Valuable)

Since the denial of truth and the denial of memory are distinct 'kinds' of impunity, it is also worth substantiating the right to the truth and duties to preserve memory for their own sake, regardless of whether these initiatives contribute to the fight against impunity as the lack of accountability. Principle 1 of the *Impunity Principles* makes it clear that impunity arises not only out of states' failure to investigate and prosecute violations, but also from their failure to "provide victims with effective remedies and to ensure that they receive reparation for the injuries suffered", to "ensure the inalienable right to know the truth about violations", and to "take other necessary steps [e.g., preserving memory] to prevent a recurrence of violations"[48]. To deny truth and to deny memory are thus distinct manners of acting with impunity[49].

The *Impunity Principles*, in their articulation of the right to know (the truth) and the duty to preserve memory, define distinct ways in which one can act with impunity. While the right to know (the truth) is described as 'imprescriptible', duties to preserve memory are highlighted not necessarily (or, not only) for their role in combatting a culture of impunity but also — simply — because memory of human rights violations is part of peoples' heritage (and is thus linked, like truth, to human dignity). In short, the *Impunity Principles* do not merely articulate truth and memory as instrumental means of combatting impunity, but also suggest a more multifaceted understanding of what constitutes impunity, transcending the understanding of impunity as merely the lack of accountability.

What moral arguments ground this 'multifaceted' understanding of impunity? I contend that the claims of the *Impunity Principles* are grounded in an analysis of impunity as a wrong which violates moral equality and human dignity. Impunity, as a lack of accountability, is a violation of a presumptive legal equality among

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[48] United Nations, *Impunity Principles,* Principle 1.

[49] The *Impunity Principles* are not explicit on whether memory is on the same level as truth — i.e., 'inalienable' and 'imprescriptible'. Principle 1 seems to suggest that memory is a means of ensuring non-recurrence and preventing impunity as the lack of accountability. However, Principle 3 articulates the duty to preserve memory in relation to both these instrumental values and notions like 'heritage' and prevention of the 'extinction of collective memory'. As commentators on the *Impunity Principles* have noted, what is missing in Principle 3 is "an acknowledgment that memory, in and of itself, must be an integral part of the fight against impunity" (Viebach, "The Duty to Preserve Memory", 77). I treat it as if it is.

persons[50]. In a similar vein, impunity, as the denial of truth and memory, is also a violation of equality. To deny truth and/or memory to another individual is to treat them as less than equal. Indeed, Impunity Watch "sees impunity not as a problem confined purely to legal systems or to the administration of justice", but also as something which "extends to the influences of non-state actors and societal factors"[51]. In other words, impunity includes not only a lack of accountability but also distinct manners in which the state and non-state actors relate to one another. It is beyond the scope of this paper to dig deeper into the philosophical foundations of impunity. Suffice it to say that 1) impunity is more than a mere lack of accountability and 2) truth and memory can therefore be conceived as being both of instrumental importance (i.e., insofar as they help combat impunity as lack of accountability) and as being of intrinsic importance (i.e., insofar as their denial itself constitutes a 'kind' of impunity).

50 Max Pensky, "Two Cheers for the Impunity Norm," *Philosophy & Social Criticism* 42, no. 4–5 (2016): 488.

51 Impunity Watch, *Understanding the Role of Memory Initiatives in Communities Struggling with Impunity* (Impunity Watch, 2011), https://www.impunitywatch.org/publications/understanding-the-role-of-memory-initiatives-in-communities-struggling-with-impunity/, 33.

3. Impunity as the Denial of Truth

One variation on impunity is the denial of truth to those seeking it. Such a denial on the part of the state communicates a message to the population that the state need not account for its actions because the actions did not occur. Impunity, in this sense, does not merely entail the evasion of legal accountability. To deny truth in this manner is to erase one's actions from the historical record and from the scope of human judgment. It is, in short, a denial of the other's moral equality. It is also a distinct wrong towards truth-seekers, since the denial of truth communicates that the persons are not worthy of truth.

This report grounds its analysis of impunity as the denial of truth in cases of enforced disappearances in Sri Lanka. Not only are enforced disappearances themselves a kind of 'truth crime' (since their desired effect is to plunge families and communities into a sea of unresolved questions), they also tend to be followed by silence, secrecy and denial in the long-term[52]. Enforced disappearances have a dual aim: 1) to render a particular person "invisible" and 2) to disorient citizens by spreading "uncertainty and fear of an all-powerful state"[53]. Enforced disappearances are therefore fertile ground in which impunity as the denial of truth can ferment. This is reflected in the fact, mentioned above, that the right to the truth has developed in the context of disappearances.

In this section, I discuss the relationship between truth and justice in post-war societies. Then, I discuss the historical context of enforced disappearances in Sri Lanka and the culture of impunity it has given rise to. Then, I discuss COIs and various truth-seeking mechanisms which have been established to address enforced disappearances in Sri Lanka. I articulate how the consistent failures of COIs to deliver truth to victims constitutes denial of truth and thus impunity as the denial of truth. I end with reflections on the effects of this 'kind' of impunity on various communities in Sri Lanka and on transitional justice goals.

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52 For an in-depth account of the psychological effects of disappearances on some individuals in Sri Lanka, see Jeevasuthan Subramaniam, *War and Recovery: Psychosocial Challenges in Northern Sri Lanka* (Colombo: International Centre for Ethnic Studies, 2017), 28-31.

53 Ilias Bantekas and Lutz Oette, *International Human Rights Law and Practice* (Cambridge: Cambridge University Press, 2013), 351.1st ed. (Cambridge University Press, 2013

3.1 Truth and Justice in Post-war Societies

3.1.1 The Case for Forgetting (Or, Not Digging Into the Past)

In a recent publication, Jack Volpe Rotondi and Nir Eisikovits invite readers to question what they refer to as the 'memory assumption'[54] — i.e., the idea that, following widespread conflict, the past must be dealt with in a backward-looking manner[55]. While the authors agree that there are strong grounds for dealing with and remembering the past, they nonetheless hold that remembering cannot and should not be treated as an "article of faith"[56].

For one thing, public processes of truth-telling may be at odds with how different cultures deal with the past. In Sierra Leone and Mozambique, for example, it appears that social amnesia was the chosen path to reconciliation by those in charge of the reconciliation process[57]. To impose a truth-telling approach to reconciliation in these cases would be both a moral wrong and a destabilizing force. As Priscilla Hayner has noted, the particular set-up of truth commissions in large part depends on the specific needs and context of the community in question[58]. In the same vein, the specific needs and context of communities call for a questioning of the 'memory assumption' itself and an analysis of whether a truth commission would be appropriate in the first place.

Second, truth-seeking may be inappropriate in cases where it is impossible — or almost impossible — to apportion guilt[59]. Although rare, there are instances where countries delve into conflict to such an extent that notions of 'guilt', 'perpetrator', and 'victim' dissolve into one another. As Eisikovits and Rotondi note, to engage in truth-seeking in these scenarios would require a tremendous amount of resources, would strain social relations even further, and would unlikely render "a legally

54 Memory and truth-seeking are often discussed synonymously in the literature. This is because truth-seeking is often accompanied, of course, by the objective to retain (to memorialize) the truth which has been unearthed. I therefore understand Rotondi and Eisikovits's use of the term 'memory' to designate more broadly 'facing the past' or 'digging into the past' (i.e., truth-seeking).

55 Jack Volpe Rotondi and Nir Eisikovits, "Forgetting after War: A Qualified Defense," in *Theorizing Transitional Justice,* eds. Claudio Corradetti, Nir Eisikovits, and Jack Volpe Rotondi (London: Routledge, 2016), 15.

56 *Ibid*., 13.

57 *Ibid*., 17–18.

58 Hayner, *Unspeakable Truths*, 5.

59 Rotondi and Eisikovits, "Forgetting After War," 18–20.

or historically coherent narrative", given the sheer complexity and chaos of the conflict[60]. As Priscilla Hayner has noted, truth commissions are often provided with guidelines and mandates which, necessarily, narrow the scope of the 'truth' being investigated[61]. In this sense, truth commissions must engage in a process of selection and sifting. To select and sift in contexts where the distinction between perpetrator and victim is almost non-existent, however, would likely skew the truth-seeking process towards one particular group. This would undermine reconciliation.

The aforementioned feature of truth commissions — i.e., that they are necessarily engaged in a process of selection — raises aspects of the nature of truth-seeking and remembering which should not be cast aside. Just as all truth-seeking involves a degree of selection, so does all remembering involve a degree of forgetting[62]. Memories depend, for their coherence, on a balance between omission and inclusion; it is both impossible and undesirable to contain every detail of an event in our remembrance of it. In the words of Rotondi and Eisikovits, "national identities were built on selective historiography"[63]. It is thus misguiding to construe remembering and forgetting as mutually exclusive categories. The question, instead, should not be formulated as a choice between remembering and forgetting, but rather as a choice about the degrees of remembering and of forgetting. Communities attempting to transition out of conflict must interrogate themselves on how they wish to balance remembering and forgetting.

While it is important to avoid treating memory as an article of faith, there are at least two reasons to treat forgetting as an alternative to truth-seeking with suspicion. First, calls for forgetting often emanate from those who are guilty and/or in power. 'Forgetting for the sake of reconciliation' may therefore often be a smokescreen for guilty 'victors' to wash their hands and erase their victims' suffering. This can hardly be said to respect the dignity of victims. Therefore, for forgetting to be a legitimate path to reconciliation, it should be grounded in consensus and not merely the will of the victors. More particularly, those who have experienced the direct effects of violence — i.e., the victims — should, in an ideal world (for reasons of fairness), have a say in whether the community opts for social amnesia or truth-seeking.

60 *Ibid.*, 19.
61 Hayner, *Unspeakable Truths*, 75.
62 Rotondi and Eisikovits, "Forgetting After War," 24.
63 *Ibid.*

Second, there are important distinctions to draw between truth-seeking and remembering. While many truth-seeking mechanisms are designed around a commitment to remember (often in the form of a non-recurrence commitment) and notions of 'truth' and 'remembering' are often mixed up, it is conceivable to think that truth-seeking mechanisms can also be limited to historical and investigative aims. In other words, a truth commission could be tasked with building a robust historical record with minimal public fanfare. This kind of commission would likely sidestep the arguments raised in favour of forgetting. To seek the truth, in this sense, is thus to seek to know; it is not necessarily to seek to remember. With respect to enforced disappearances, the families of victims most often want to know where their loved ones are and what happened to them. This is not necessarily a question of remembering.

3.1.2 What Good Is the Truth?

In societies transitioning out of violent conflict, truth-seeking can have impacts at both the individual and the national levels. On the individual level, it is often assumed that truth-seeking is healing. As Priscilla Hayner notes, truth commissions are often viewed as forums where victims can have their stories heard and, in the process, move beyond their trauma[64]. While speaking about trauma (instead of repressing it) may indeed lead to positive outcomes in mental health, this typically happens in the context of long-term psychological treatment. Truth commissions do not (and should not) replicate the conditions of therapy[65]. As an individual reacting to the brief passage of the truth commission in his or her South African town put it, "The circus comes to town and the circus leaves — and then what?"[66] Indeed, truth commissions can retraumatize[67].

Perhaps the most transformative effect of truth-seeking on individuals is the translation of a private experience into a public one[68]. By sharing and having their stories acknowledged in a public forum, victims of gross political violence can (begin to) leave the isolation of private suffering. As Martha Minow puts it,

64 Hayner, *Unspeakable Truths*, 4–5.
65 *Ibid.*, 146–47.
66 *Ibid.*, 153.
67 *Ibid.*, 151.
68 Martha Minow, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence* (Boston: Beacon Press, 1998), 67.

they may come to see their experience as an "indictment of a social cataclysm" rather than a private misfortune[69]. With the help of other truth-seekers, they can situate their experience within a broader web of political violence and understand how their suffering is related to that of others, including (hopefully) those in other communities. Indeed, in Sri Lanka, in multiple communities, there is a strong desire for the establishment of "a formal and authoritative record" of historical discriminatory practices and human rights violations[70]. Hence, a robust historical record is not only beneficial for the political community (as will be discussed below) but is also important to individuals.

Despite these potential therapeutic effects on individuals and the fact that truth-seeking mechanisms tend to be more victim-focused than prosecutions[71], truth-seeking mechanisms are perhaps best understood as a public enterprise — i.e., an enterprise which benefits the nation and the communities within that nation. As Priscilla Hayner notes, the central aim of truth commissions is "to gather as much detailed information from the greatest number of victims as possible to allow an accurate analysis of abuses over a period of time"[72]. Truth-seeking is, at its core, an attempt to establish a public record of what has happened.

Elucidating past wrongs and establishing a basic, public understanding of what has happened can set the foundation for reconciliation between communities emerging from conflict. As Joanna Quinn has argued, acknowledgement of the other's experience is a necessary condition for reconciliation[73]. Acknowledgment itself requires, at a bare minimum, what Quinn calls 'thin sympathy' — i.e., knowledge and recognition of the other's experience. Truth and education are, of course, central to the process of cultivating thin sympathy; by elucidating past wrongs and centralizing various experiences of suffering in a public report, individuals in various communities can begin to acknowledge the other's reality[74].

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69 *Ibid.*

70 Aruni Jayakody, *Advancing Truth & Justice in Sri Lanka: A Report of Six Dialogues* (Colombo: International Centre for Ethnic Studies, 2015), 47.

71 See e.g. *Ibid.,* 60.

72 Hayner, *Unspeakable Truths*, 151.

73 Joanna R. Quinn, *Thin Sympathy: A Strategy to Thicken Transitional Justice* (Philadelphia, Pennsylvania: University of Pennsylvania Press, 2021), 1.

74 *Ibid.*, 61.

Indeed, in a 2015 report on ethno-religious violence in Sri Lanka, Gehan Gunatilleke highlighted the importance of, among other interventions, education initiatives which promote equal citizenship and religious tolerance[75]. This intervention was re-emphasized in the follow-up 2018 report with even more importance, with the author specifying that education is key to altering discourses (such as the 'host-guest' discourse of Sinhala nationalism) that fuel ethnic conflict. As Gunatilleke writes, "[d]iscourse transformation is at the heart of any genuine effort to end ethno-religious violence and establish a climate of coexistence and equal citizenship"[76]. At a seminar on history education hosted by the International Centre for Ethnic Studies in May 2023, many history teachers who had been invited from various parts of Sri Lanka expressed concern over the lack of nuanced historical accounts in state-sponsored history textbooks[77]. Gunatilleke reported that, in 2015, history textbooks still drew heavily and uncritically on the *Mahāvamsa* as a historical source. The *Mahāvamsa* is also the source of multiple Sinhala nationalistic ideologies[78]. As Gunatilleke writes, "Mahāvamsian historical narratives disseminated through formal and informal education channels have entrenched the Sinhala-Buddhist sense of entitlement as the 'hosts' of the country"[79].

Truth-seeking and building a robust historical record are also a means of, as Michael Ignatieff famously put it, narrowing "the range of permissible lies"[80]. When the historical record is robust, it is much more difficult for an individual or group to hijack and exploit past events in their favour. Truth-seeking mechanisms are a means of resisting the political instrumentalization of the past[81]. Indeed, these more 'public' relationships between truth and justice are used to justify the development of the right to the truth, as has been mentioned above.

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75 Gehan Gunatilleke, *The Chronic and the Acute: Post-War Religious Violence in Sri Lanka* (Colombo: International Centre for Ethnic Studies, 2015), 54-55.

76 Gehan Gunatilleke, *The Chronic and the Entrenched: Ethno-Religious Violence in Sri Lanka* (Colombo: International Centre for Ethnic Studies, 2018), 88.

77 For more on the relationship between history education and ethno-religious violence in Sri Lanka, see Gunatilleke, *The Chronic and the Entrenched*, 92. See also Natasha Karunaratne, *The Battleground of Sri Lankan History Education: Barriers to Teaching Inclusive Histories* (Colombo: International Centre for Ethnic Studies, 2021).

78 Gunatilleke, *The Chronic and the Acute*, 35.

79 Gunatilleke, *The Chronic and the Entrenched*, 8-9.

80 Hayner, *Unspeakable Truths*, 21.

81 Agatha Fijalkowski, "Truth and reconciliation commissions," in *An Introduction to Transitional Justice*, ed. Olivera Simić (London, United Kingdom: Routledge, 2021), 108.

3.2 Historical Context: Enforced Disappearances in Sri Lanka and Truth-seeking Initiatives

Sri Lanka has the second highest number of enforced disappearance cases before the Working Group on Enforced or Involuntary Disappearances[82]. As the Working Group acknowledges, this represents only the tip of the iceberg, given the extent of cases investigated by various public inquiries and commissions over the years[83]. Enforced disappearances have been practiced in "a massive and systematic way" in Sri Lanka in the context of various conflicts and for a number of reasons[84]. They have been practiced in the context of internal armed conflict and counter-terrorist activities, as well as with the specific purposes of suppressing political dissent and even extortion[85].

The majority of cases can be traced to two "waves" of widespread and systematic disappearances[86]. The first 'wave' occurred during the violent suppression in the 1980s and 1990s of Sinhalese youth deemed to be involved with the Janatha Vimukti Peramuna (JVP) or People's Liberation Front. The second 'wave' occurred during the prolonged war between government forces and the Liberation Tigers of Tamil Eelam (LTTE), which ended in 2009. It is important to note that enforced disappearances were also practiced by groups targeted by the state (in this case, the JVP and the LTTE), but the majority of enforced disappearances were state-sponsored acts, bolstered by (among other factors) anti-terrorism legislation and a culture of impunity which allowed military and police personnel to use whatever means necessary to achieve their ends[87].

For example, during the Second JVP Uprising of 1985-1995 — or, the 'period of terror', as it is known in the South —, the government gave *carte blanche* to the police and security forces to use whatever means necessary to subdue the JVP rebels. State personnel resorted to medievalesque tactics of terror, including displaying the severed heads of JVP members in public spaces. Countless youth

82 United Nations, Human Rights Council, *Report of the Working Group on Enforced or Involuntary Disappearances on its mission to Sri Lanka,* A/HRC/33/51/Add.2 (8 July 2016), 4.

83 *Ibid.*

84 *Ibid.*, 3.

85 *Ibid.*

86 *Ibid.*, 4.

87 MCM Iqbal. Interview with Nicholas Duguay. Zoom, 12 June 2023.

vanished into thin air, as the line between JVP member and young man became blurred[88]. It is estimated that more than 60,000 Sinhala youth were murdered during this period[89].

The Sri Lankan state has, over the years, established a number of COIs to investigate human rights violations. These commissions have, in general, acted as smokescreens for state actors to evade accountability[90]. Nonetheless, these commissions can be characterized as truth-seeking mechanisms. This section of the report examines the extent to which the COIs established to investigate enforced disappearances have succeeded in delivering truth and information to the public.

In 1994, a political party known as the People's Alliance ran for election on a campaign of commitment to investigating human rights abuses. Following their election, the new government established COIs to investigate cases of disappeared persons since January 1, 1988[91]. The focus of these commissions was thus on disappearances which occurred during the second JVP uprising, between 1987 and 1989[92]. 30,000 complaints were filed with the COI, with approximately 20,000 of these complaints investigated. The COIs found evidence of extrajudicial killings, disappearances and abductions, and in many cases identified potential perpetrators. However, the COIs were shut down in the middle of 1997.[93]

Another COI — this time with a nationwide territorial mandate — was created in 1998 and tasked with investigating the 10,000 'leftover' complaints from the previous commission. Although a further 16,000 complaints were filed, none of these cases could be investigated. By the end of 2000, 500 prosecutions against members of the armed forces and the police were initiated, but it is not known how many of these legal proceedings resulted in convictions. Few prosecutions resulted from the COIs' work, but the state was able to compensate approximately 12,000 survivors of the disappeared victims.[94]

88 *Ibid.*

89 MCM Iqbal, "Impunity in Sri Lanka and the Commissions of Inquiry into Disappearances," *Groundviews* (blog), July 26, 2018, https://groundviews.org/2018/07/26/impunity-in-sri-lanka-and-the-commissions-of-inquiry-into-disappearances/.

90 Mario Gomez, "Sri Lanka: Restoring the Rule of Law", 7.

91 *Ibid.*, 8.

92 *Ibid.*, 9.

93 *Ibid.*

94 *Ibid.*

These COIs did not exercise judicial powers; rather, the commissions were designed as 'fact-finding bodies' that would base their conclusions on a balance of probabilities. The standard of proof required for criminal convictions is proof beyond a reasonable doubt. Hence, it was up to the Attorney General's Office to determine whether the findings of the COIs would form the basis of a criminal proceeding. While this symbiotic relationship between the COIs and the Attorney General's Office appears, at first glance, to open the door to accountability, it must be noted that—at the time—the Attorney General's Office was staffed with supporters or participants of the regime which had committed forced disappearances. Hence, the possibility for accountability was skewed towards the perpetrators, to say the least.[95]

In 2015, Sri Lanka stood at the cusp of what could have been a political transformation, when the newly-elected government of Maithripala Sirisena vowed to put in place four mechanisms of transitional justice which would address accountability, non-recurrence, reparations and truth[96]. The state promised that these mechanisms would not repeat the failures of the past COIs. These promises came alongside the co-sponsoring of a resolution stating extensive commitments to accountability, reparations, and truth-seeking[97]. One of these commitments was fulfilled in the form of the Office on Missing Persons (OMP), established through the OMP Act No. 14 of 2016. Unlike the COIs, the OMP was established without a specific time frame. It was tasked with searching for missing persons and clarifying the circumstances under which they disappeared[98]. Given the history of COIs in Sri Lanka, the OMP was met with suspicion from both Sinhala and Tamil communities.

Before the OMP Act was passed, a memorandum was submitted to the Consultation Task Force by victims' organizations such as the Affected Families Forum and civil society groups[99]. This memorandum contained a number of demands, including (but not limited to) the following: 1) that enforced disappearances be made a crime

95 MCM Iqbal, "Enforced Disappearances in Sri Lanka: Legacy and Ongoing Challenges," *Groundviews* (blog), May 19, 2016, https://groundviews.org/2016/05/19/enforced-disappearances-in-sri-lanka-legacy-and-ongoing-challenges/.

96 Mario Gomez, "The Politics of Dealing with the Past in Deeply Divided Sri Lanka."

97 *Ibid.*, 2-3.

98 Parliament of Sri Lanka, *Office on Missing Persons (Establishment, Administration and Discharge of Functions) Act*, No. 14 (2016), sec. 10(1)(a).

99 MCM Iqbal, "The OMP and the Aspirations of Families of the Missing and Disappeared," *Groundviews* (blog), May 17, 2018, https://groundviews.org/2018/05/17/the-office-of-missing-persons-and-the-aspirations-of-affected-families-in-sri-lanka/.

before the OMP Act is enacted, 2) that OMP proceedings should not hinder the victims' right to justice, and 3) that all evidence obtained by the OMP be transferred to the prosecuting authorities[100]. In other words, the victims' demands reflect a strong desire for accountability in the form of prosecutions.

These demands were met with strong resistance in the form of a nationalist 'war hero' discourse — i.e., it was deemed unacceptable to put 'war heroes' on trial after all they had done to save the nation from LTTE terrorists[101]. As Crisis Group reported, "[d]ue to the [Sirisena] government's failure to explain the connection between transitional justice and rule-of-law reforms, many Sinhalese view justice for war-era abuses as a pro-Tamil, anti-military demand, rather than part of a programme to protect all communities' rights"[102]. As Section 13(2) of the Act explicitly states that "[t]he findings of the OMP shall not give rise to any criminal or civil liability"[103], the OMP goes even further than previous COIs in assuring the police and security forces personnel that their actions are outside the scope of liability, thus perpetuating a culture of impunity[104]. The OMP's explicit evasion of accountability is likely to deepen the suspicions of public institutions of many relatives of the disappeared, and reinforce their sense of despair. It has, indeed, undermined trust in domestic institutions; many Tamil families of the disappeared call for an international justice mechanism to investigate enforced disappearances and cases of missing persons[105]. More broadly, the effects of broken promises and failed transitional justice mechanisms can be profound. As Quinn has written, "a kind of slow decay gradually eats away at the dignity of the affected population"[106].

It is important to note at this point that criminal prosecutions following widespread internal conflict can destabilize a society in transition and undo whatever has

100 *Ibid.*

101 *Ibid.*

102 International Crisis Group, *Sri Lanka's Transition to Nowhere* (International Crisis Group, 2017), https://www.crisisgroup.org/asia/south-asia/sri-lanka/286-sri-lanka-s-transition-nowhere.

103 Parliament of Sri Lanka, *Office on Missing Persons (Establishment, Administration and Discharge of Functions) Act*, No. 14 (2016), sec. 13(2).

104 MCM Iqbal, "The OMP – A Flawed Attempt To Deal With Complaints Of Disappearances And/Or Missing Persons In Sri Lanka," *Colombo Telegraph,* September 19, 2016, https://www.colombotelegraph.com/index.php/the-omp-a-flawed-attempt-to-deal-with-complaints-of-disappearances-andor-missing-persons-in-sri-lanka/.

105 See e.g. "'We need an international justice mechanism!' – Tamil families of the disappeared," *Tamil Guardian,* April 02, 2023, https://www.tamilguardian.com/content/we-need-international-justice-mechanism-tamil-families-disappeared.

106 Quinn, *Thin Sympathy*, 35.

been achieved in the name of reconciliation[107]. Transitional justice mechanisms like truth-seeking bodies can thus act as a bridge towards a restored democratic order, reestablishing faith in public institutions and paving the path towards more robust justice- and truth-seeking mechanisms[108]. The establishment of the OMP, even though it precludes criminal and civil liability, should thus nonetheless be welcomed as, at minimum, a bridge towards accountability. The OMP can thus also be evaluated in terms of whether it has restored confidence in public institutions through an impartial, honest and inclusive pursuit of truth. Unfortunately, it is doubtful that the OMP has succeeded in achieving even these more modest goals.

The UN reported in 2022 that confidence and trust in the OMP as "an independent and credible national mechanism" was rapidly eroding[109]. There have been a number of problematic appointments of chairperson and commissioners, reflecting political pressure to narrow the scope of investigation. Moreover, the OMP has failed to trace a single disappeared person or clarify the circumstances of disappearance[110]. As the report indicates, it has become clear that the orientation of the OMP is to "expedite the closure of files"[111]. There is thus little evidence that the OMP is delivering on its promises to produce truth on cases of missing persons. It is also certainly the case that the OMP is perceived as a failure by many communities in Sri Lanka and thus falls short of its role in promoting trust in public institutions.

In late 2022, Mahesh Katundala, the OMP chairman, told international media that there was no evidence that those who surrendered at the end of the civil war in 2009 had gone missing. The chairman further claimed that the majority of those who had disappeared were abducted by the LTTE[112]. It is certainly true that the LTTE carried out a large number of abductions, often in the context of forced recruitments, but it is farfetched, to say the least, to claim that these abductions constituted the majority of disappearance cases in Sri Lanka[113]. Such a statement

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107 For more on this as well as on the rationales for pursuing (or not pursuing) prosecutions in post-war contexts, see Colleen Murphy, "Transitional Justice, Retributive Justice and Accountability for Wrongdoing," in *Theorizing Transitional Justice*, eds. Claudio Corradetti, Nir Eisikovits, and Jack Volpe Rotondi (London: Routledge, 2016), esp. 64.

108 Gomez, "The Politics of Dealing with the Past", 5.

109 United Nations, *Situation of human rights*, para. 42.

110 *Ibid.*

111 *Ibid.*

112 "Credibility Missing from OMP", *Daily FT,* November 14, 2022, https://www.ft.lk/ft_view__editorial/Credibility-missing-from-OMP/58-741912.

113 United Nations, *Report of the working group*, para. 8.

from the head of a truth-seeking body reflects a political orientation which is likely — to put it mildly — to distort the kind of truth the OMP produces.

The failure of the OMP to gain the trust of relatives of the disappeared is likely to have devastating effects on reconciliation. Trust in public institutions was weak before the establishment of the OMP, due to the aforementioned raised and dashed hopes (i.e., the COIs). Moreover, many relatives of the disappeared have had (and continue to have) problematic encounters with the state when it comes to investigating disappearances. The Working Group on Enforced or Involuntary Disappearances has reported that relatives of the disappeared have, on numerous occasions, been harassed or intimated by police, military and intelligence personnel[114]. During Gotabaya Rajapaksa's administration, police repeatedly tried to obstruct peaceful protests organized by families of the disappeared[115]. These obstructions of protests and commemoration events continue to this day, as will be addressed in Part IV.II.I of the report.

Moreover, there are detailed allegations that personnel of the Criminal Investigation Department have sexually harassed and/or violated mothers and wives of the disappeared. Sexual exploitation has allegedly been used as a 'trading chip' for information on the disappeared relatives' cases[116]. Unidentified individuals have also offered to return the disappeared relatives in exchange for money, which, of course, almost never happens[117].

More generally, the act of repeating, over and over again, the same stories to various state actors can have a retraumatizing effect[118]. Indeed, the denial of truth itself can "compound" trauma which already weighs down individuals and communities[119]. Amnesty International has reported that some families of the disappeared have received what are perceived as "suspicious" letters seeking information that has already been provided; some relatives even feared the information was being

114 United Nations, *Report of the working group*, para. 53.

115 Amnesty International, *Sri Lanka: Old ghosts in new garb: Sri Lanka's return to fear* (Amnesty International, 2021), *https://www.amnesty.org/en/documents/asa37/3659/2021/en/#:~:text=The%20Sri%20Lankan%20ggovernmen%20has,to%20operate%20freely%20and%20safely*, 27.

116 United Nations, *Report of the working group*, para. 55.

117 *Ibid.*

118 *Ibid.*, para. 54.

119 Chulani Kodikara. Interview with Nicholas Duguay. Zoom, 03 July 2023.

issued to produce death certificates against their will[120]. Given the combined effects of harassment, re-traumatization, and the Kafkaesque lack of answers from the various COIs and investigatory bodies, trust in public institutions — from the perspective of the affected communities — is fragile, to say the least. It remains to be seen what the long-term effects of the OMP's — and other COIs' —failure are.

As the Working Group on Enforced or Involuntary Disappearances reported on its mission to Sri Lanka: "The extensive use of enforced disappearance and the almost complete lack of judicial accountability and of decisive and sustained efforts to secure the truth about the disappeared, in addition to the absence of a comprehensive reparation programme and social, psychological and economic support for the victims have left profound wounds on society and a deep sense of mistrust among relatives. This mistrust has been exacerbated by the continued and extensive presence of the military in the north and east of the country"[121].

As Chulani Kodikara has argued, the reception of the OMP in Sri Lanka undermines the assumption held by many in the international community that truth-seeking may be easier (or more feasible) than prosecutions[122]. In fact, truth is highly contested. As she writes, the case of Sri Lanka "shows that in ethnonationalist, deeply divided contexts such as [this], truth is not just a second-best option to justice but is an equally radically destabilizing and unsettling commodity"[123]. Truth-seeking is deeply entwined with national identity; as such, truth in political contexts like Sri Lanka is not only a matter of guilt or innocence, but also a matter of "history, memory and national identity"[124]. This explains the reticence from the state to acknowledge truths that undermine the majoritarian discourse about what Sri Lanka is. It is in this sense that the Mothers of the Disappeared — and other groups who strive for a transparent truth-seeking process — can be understood as "disrupting the boundaries of the nation"[125]. Truth has the power to reshape a nation. Just as efforts at accountability for crimes are portrayed by the state and nationalist

120 Amnesty International, *Sri Lanka: Still no answers: An update on the rights of victims of enforced disappearances in Sri Lanka* (Amnesty International, 2022), https://www.amnesty.org/en/documents/asa37/5278/2022/en/, 18.

121 United Nations, *Report of the working group*, 3-4.

122 Chulani Kodikara, "The Office on Missing Persons in Sri Lanka: Why Truth Is a Radical Proposition," *International Journal of Transitional Justice* 17, no. 1: 157-172.the Sri Lanka Parliament passed the Office on Missing Persons Act (OMP

123 *Ibid.,* 16.

124 *Ibid.,* 6.

125 *Ibid.,* 15.

forces as threats to 'sovereignty', the 'motherland', and 'war heroes', so are efforts at truth felt as forces that have the power to undermine and undo national identity[126]. There may also be cultural factors contributing to the resistance to truth-seeking mechanisms. Indeed, in conversation, Dr. Saravanamuttu Paikiasothy mentioned that there may be cultural reasons for the resistance to truth and accountability; in short, in a society permeated with an ethos of shame (as opposed to a Christian ethos of guilt), it is simply untenable to claim that some war heroes — i.e., the sons and fathers of the nation — are, in fact, war criminals[127].

In sum, the COIs' and OMP's failure to deliver answers to relatives of the disappeared — and to the public at large — constitutes impunity as the denial of truth. To recall, impunity has been characterized as a wrong which denies the equality of the other — not only the other's legal equality, but also his or her moral equality. The persistent denial of truth on the part of the state communicates a message to the population that the state need not account for its actions because the actions did not occur. To deny truth in this manner is to erase one's actions from the scope of human judgment. It is, in short, a denial of the other's moral equality. As mentioned above, the *Impunity Principles* suggest truth and memory can be conceived as both instrumentally and intrinsically valuable. While denying truth, in itself, therefore constitutes impunity, it also contributes to impunity as a lack of accountability by inhibiting truth-seeking processes which could contribute (directly or indirectly) to criminal prosecutions.

126 Bhavani Fonseka, "Introduction," in *Elusive Justice & Emblematic Cases in Sri Lanka*, ed. Bhavani Fonseka (Colombo: The Centre for Policy Alternatives, 2023), 14.

127 Saravanamuttu Paikiasothy. Interview with Nicholas Duguay. Zoom, 01 August 2023.

4. Impunity as the Denial of Memory

Another variation of impunity is the denial of memory. Such a denial, on the part of the state, erodes individuals' and communities' identities and constitutes an affront to human dignity. Impunity, in this sense, does not merely entail the evasion of legal accountability. To deny memory in this manner is to practice a form of erasure of the other and, in the process, to demean them and treat them as unequal.

This report grounds its analysis of impunity as the denial of memory in three different forms of state-sponsored actions: 1) the prevention of Tamil commemoration, 2) the rise in archaeological land grabs, and 3) the monopolizing of public space and public memorials. These three state-sponsored actions are related to memory in different ways and are included to demonstrate how impunity as the denial of memory can operate in both explicit and implicit manners. For instance, in the case of the prevention of Tamil commemoration, the state explicitly attempts to quell Tamil memories of the civil war, while in the case of archaeological land grabs, the state (in effect) denies memory through a process of dislocation of communities from land.

In this section, I discuss the relationship between memory and justice in post-war societies. Then, I discuss the three manners in which impunity as the denial of memory operate in Sri Lanka. It should be noted at this point that the Tamil community is, of course, not homogenous. Indeed, it may not be accurate to even speak of 'the' Tamil community, since there are multiple communities and identities which cut across Tamil ethnicity. For instance, the up-country Tamils may differ vastly in their identity, narratives and memories from Tamils in the Jaffna area[128]. Within sub-communities of Tamil people, there are, of course, differing perspectives. In short, this report should not be interpreted as claiming that Tamil identity is homogenous. If anything, it is the state that assumes this homogeneity in how it interacts with Tamil peoples.

[128] Daniel Bass and B. Skanthakumar, *Up-Country Tamils: Charting A New Future in Sri Lanka* (Colombo: International Centre for Ethnic Studies, 2019).

4.1 Memory and Justice in Post-war Societies

In Parts II.II and II.III of this report, I discussed how duties to preserve memory are articulated in international human rights norms and jurisprudence. I touched on some of the normative (as well as practical) justifications for including duties to preserve memory in international law and transitional justice contexts. In this part of the report, I discuss, more specifically, what kinds of needs memory fulfills in post-war contexts. That is, I address why memory is important in post-war contexts.

As in the analysis of the good of truth, the good of memory in post-war contexts can be evaluated at both the individual and the communal levels. Put in another way, memory in post-war contexts can fulfill both psychological (i.e., individual) and political (i.e., communal) needs. It can be understood as both "a human response to the death and suffering that war engenders" and as "a practice bound up with rituals of national identification"[129]. Of course, as has been pointed out, the psychological and the political intertwine; the politics of post-war memories has to engage with private mourning, and the tasks of mourning and reparation themselves are always laden with politics[130]. Nonetheless, the dichotomy is a good heuristic to understand the kinds of needs memory fulfills in post-war contexts.

On the individual level, memory is significant in post-war contexts because of its link to identity. Neuroscientific research indicates that some aspects of memory are linked to identity and personhood; as such, some writers have argued that memory may thus relate to human dignity and require heightened legal protection[131]. Memory sustains, as it were, the composites of personal identity — i.e., the narratives we form from beliefs, self-image, expectations, aspirations for the future, etc.[132]. These arguments underscore the importance of memory in all contexts (whether post-war or not), but are particularly significant to post-war contexts, since experiences during war times can have profound impacts on personal identity. In sum,

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129 T.G. Ashplant, Graham Dawson, and Michael Roper, "The Politics of War Memory and Commemoration: Contexts, Structures, and Dynamics," in *Commemorating War: The Politics of Memory,* eds. T.G. Ashplant, Graham Dawson, and Michael Roper (New York: Routledge, 2017), 7.

130 *Ibid*., 9.

131 Lea David, "The 'Duty to Remember' and the 'Right to Memory': Memory Politics and Neoliberal Logic," in *The Right to Memory: History, Media, Law, and Ethics,* eds. Noam Tirosh and Anna Reading (New York: Berghahn, 2023), 57.

132 *Ibid.*

memory, in this sense, is important in post-war contexts because it sustains the sense of identity which has been transformed through the war experience. The connection between identity and memory in post-war contexts is echoed in the *Impunity Principles*, which, it will be recalled, state that "[a] people's knowledge of the history of its oppression is part of its heritage"[133]. As Jeremy Waldron has written, "[t]o neglect the historical record is to do violence to… identity and thus to the community that it sustains… [and] since communities help generate a deeper sense of identity for the individuals they comprise, neglecting or expunging the historical record is a way of undermining and insulting individuals as well"[134].

Memory is also important on the individual level because it can promote healing. Commemorating the dead is a common aspect of the mourning process, but memory may play an even more important role in post-war contexts because, in many cases, the relatives of wartime casualties cannot centre their grieving rites around the corpse of their loved ones. In these scenarios, memory practices can provide a symbolic substitute (albeit an imperfect one) for the physical presence of the deceased. As Jeffrey Blustein, in his writing on the symbolic significance of memorials, put it : "By turning victims into flesh-and-blood people, memorials help meet a basic human need of the living to be left with some concrete remnant of the dead in their particularity, and they provide a measure of compensation to these survivors who will never have the corpse itself to bury. The very concreteness of memorials serves as a symbol of the concrete human being who was lost and in some limited way repairs the harm caused by his wrongful death. They also provide a kind of lifeline for the living that helps them to keep faith with the dead"[135].

It should be noted here that healing and forgiveness should not be expected from victims of atrocities as part of a transitional justice process. Indeed, transitional justice operates within a temporal frame which is, by definition, forward-looking — i.e., its values and objectives are oriented towards moving forward to a more peaceful future. However, the types of emotions which tend to accompany memories of mass atrocities — e.g., anger, resentment, fear, etc. — may not be compatible with this temporal framework. In short, while memory may be important for individuals in that it can help them heal and recover from experiences survived in

133 United Nations, *Impunity Principles,* Principle 3.

134 Jeremy Waldron, "Superseding Historic Injustice", *Ethics* 103, no 1 (1992): 6.

135 Blustein, *Forgiveness and Remembrance,* 302.

times of conflict, memory programmes should (perhaps) not be implemented with the explicit goals to heal and lead to forgiveness[136].

On the communal level, memory is significant in post-war contexts because it forms the backbone of what we may call 'national identity'. Just as memory, for the individual, is a key factor in the constitution of identity, so is collective memory, for the community, a key factor in the constitution of national identity. Memory functions as "a source of collective identification" by including and omitting certain past experiences in and from a national narrative[137]. The survival of a nation as something with "continuity through time" is, in part, secured through war commemoration; as one author has argued, memories in post-war contexts help create "an imagined community which transcends death" and interpolates individuals as members of that community[138]. In sum, memory, in this sense, fulfills for the community — as it does for the individual — the need to sustain identity. This explains, in part, why truth-seeking processes can be so controversial in certain contexts. As Chulani Kodikara has noted with respect to the controversies surrounding the OMP in Sri Lanka, "[w]hat is at stake in the debates and contestations about truth and justice processes is not merely guilt or innocence or punishment or amnesty, but history, memory and *national identity*"[139]. The contested nature of national identities is reflected, in part, in the extent to which there is a struggle over the inclusion of specific memories in the 'national memory'.

Given the relationship between post-war memories and national identity, it goes without saying that memories in post-war contexts have a significant impact on reconciliation. As one author has pointed out, "[t]he manner in which the past is remembered may either help in the endeavour of reconciliation or serve as a catalyst for additional aggression"[140]. National memories which exclude or demean a particular group (i.e., a particular set of memories) to a large extent are unlikely

136 For an interesting exploration of transitional justice and negative emotions (in this case, resentment), see Grace Hunt, "Reconcilable Resentments? Jean Amery's Critique of Forgiveness in the Aftermath of Atrocity," in *Theorizing Transitional Justice*, eds. Claudio Corradetti, Nir Eisikovits, and Jack Volpe Rotondi (London: Routledge, 2016).

137 Maria Mälksoo, "Politics of Memory: A Conceptual Introduction," in *Handbook on the Politics of Memory,* ed. Maria Mälksoo (Cheltenham, United Kingdom: Edward Elgar Publishing Limited, 2023), 19.

138 Ashplant et al., "The Politics of War Memory", 22.

139 Kodikara, "The Office on Missing Persons", 6. Emphasis added.

140 Prateek Raj, "Remembrance and Reconciliation: One Can't Happen Without the Other," *Groundviews* (blog), May 18, 2023, https://groundviews.org/2023/05/18/remembrance-and-reconciliation-one-cant-happen-without-the-other/.

to foster the kind of intergroup relations required for reconciliation. Reconciliation requires a harmonization of different perspectives on conflict, rather than a suppression of discourses which challenge the majoritarian view. As one author notes, "[a]n excluded group which feels completely alienated from official memory may, if strong and cohesive enough, seek to mobilize its counter-memories into an oppositional narrative, mounting a full-scale challenge for political power"[141]. A society which is able to confront a shared history which incorporates multiple realities is more likely to achieve reconciliation than one which allows only one group to come to terms with a past which does not include other groups[142].

Collective memories also tend towards the fictive — to a greater or lesser extent — and must therefore be counterbalanced with sound history, which in post-war contexts may implicate the work of a truth-seeking mechanism. As Avishai Margalit has pointed out, history differs from shared (or collective) memory "in its commitment to looking for alternative lines that connect a past event to its present historical descriptions"[143]. History therefore plays a key role in regulating what we might call the 'health' of collective memories, immunizing them — to a certain extent — from parasites like (bad) nationalism. Indeed, at a workshop on teaching history hosted by the International Centre for Ethnic Studies in May 2023, history teachers from around the country stressed the importance of teaching a multifaceted history to children as a key ingredient in reconciliation[144].

Moreover, states which forbid memorialization *tout court* are likely to have catastrophic impacts on reconciliation. Before reconciliation is even brought to the table, individuals must feel like they can be human in their own societies — i.e., the need for memory at the individual level must be met. An individual interviewed in an article on the prevention of Tamil commemoration put it this way: "I do not care for those big words [i.e., reconciliation]; they have lost all their meaning… At the very core of it, what I want is to be able to remember in peace. Cry my heart out in peace. All I ask is a very basic thing: tolerance and acceptance"[145]. It is clear from

141 Ashplant et al., "The Politics of War Memory", 21.

142 Minna Thaheer, Pradeep Peiris, and Kasun Pathiraja, *Reconciliation in Sri Lanka: Voices from the Former War Zones* (Colombo: International Centre for Ethnic Studies, 2013), 131.

143 Avishai Margalit, *The Ethics of Memory* (Cambridge: Harvard University Press, 2021), 61.

144 For more on this topic as it concerns Sri Lanka, see Natasha Karunaratne, *The Battleground of Sri Lankan History Education: Barriers to Teaching Inclusive Histories* (Colombo: International Centre for Ethnic Studies, 2021).

145 Raj, "Remembrance and Reconciliation".

these words that reconciliation requires, at a bare minimum, that states tolerate different communities' commemoration of their dead (i.e., that they allow people to fulfill the psychological needs of memory).

Lastly, recalling the idea of impunity as being a wrong which, at its core, denies the equality of the other, another aspect of memory in post-war contexts is important to both individuals and communities: that of validation and restoration of equality. Victims of gross human rights violations often suffer the harm of being deemed a less-than-equal member of the community, or, at its worst, a non-human. Indeed, it is often this kind of discourse which perpetrators use to justify human rights violations. As Blustein has noted, public memorials (including monuments, museums, commemorations, etc.) can contribute — in a limited way — to restoring the equal status of victims of human rights violations[146]. This occurs along two lines: through the state's public acknowledgement of victims' right for redress and through the content of public memorials which communicates the wrongfulness of how victims were treated[147].

4.2 Historical Context and Current Events

4.2.1 The Forbidding of Memorialization

In its 2022 report on the situation of human rights in Sri Lanka, the United Nations Human Rights Council reported that the "OHCHR continues to receive reports of surveillance, intimidation, harassment of journalists, human rights defenders, families of the disappeared and persons involved in memorialization initiatives, by intelligence services, military and police, particularly in the North and East"[148]. One of the primary means by which the state has disrupted memorialization it deems problematic is by the power accorded through anti-terrorism legislation, in particular, the Prevention of Terrorism Act (PTA) and its replacement, the Anti-Terrorism Bill (ATB). Before proceeding with an account of the forbidding of memorialization, a brief account of anti-terrorism legislation in Sri Lanka is in order.

146 Blustein, *Forgiveness and Remembrance,* 298.

147 *Ibid.*

148 United Nations, *Situation of human rights*, para. 30.

The PTA was first introduced in 1979 as a temporary measure against LTTE insurgency, but was not repealed until 2021. In short, the PTA allows for arrests to be made without warrants and for individuals to be detained for up to eighteen months without a court appearance, following which they can be remanded to pre-trial detention, where they can wait years before a trial[149]. The PTA also reverses the burden of proof and has contributed to convictions based on confessions obtained under torture[150]. The sweeping powers granted by the PTA hinge on a broad definition of 'terrorism'; as noted by Human Rights Watch, "[s]ection 2 of the act defines terrorism offenses so broadly as to include, for example, causing or intending to cause 'racial or communal disharmony or feelings of ill-will,' or interfering with 'any board or other fixture on, upon or adjacent to, any highway, street, road or any other public place'"[151]. The PTA has thus been used to control dissidence and to intimidate persons who are deemed (with little evidence required) as dangerous to the state.

When the Sirisena administration signed on to Resolution 30/1 in 2015, the government pledged to, among other things, repeal the PTA and replace it with anti-terrorism legislation in line with international norms. The act was not repealed and abuses continued. It was not until 2017 that the first draft of a new counterterrorism law, the Counter Terrorism Act (CTA), was approved by cabinet, but the draft did not ease the worries which had prompted the international community to pressure Sri Lanka to repeal the PTA. In particular, the draft law maintained a broad definition of terrorism and raised worries that the act would be used in circumstances "far removed from acts of real terrorism"[152].

When Gotabaya Rajapaksa took office in November 2019, one of the first accomplishments of his administration was to drop the draft of the CTA (which itself was problematic) and reinstate the PTA in 2020[153]. In response to growing international pressure, the administration announced in early 2021 it would review and amend the PTA in accordance with human rights norms. Despite this, the government continued to undermine its commitments. One month after

149 Human Rights Watch, *"In a Legal Black Hole": Sri Lanka's Failure to Reform the Prevention of Terrorism Act* (Human Rights Watch, 2022), https://www.hrw.org/report/2022/02/07/legal-black-hole/sri-lankas-failure-reform-prevention-terrorism-act, 14.

150 *Ibid.*, 19.

151 *Ibid.*, 18.

152 *Ibid.*, 20-21.

153 *Ibid.*, 28-29.

making the announcement, the Sri Lankan government published a list of terrorist organizations and individuals, which included several diaspora groups which were advocating at the Human Rights Council for accountability for past violations[154]. In March of 2021, President Rajapaksa expanded PTA powers by issuing the Prevention of Terrorism (De-radicalization from holding violent extremist religious ideology) Regulations No. 01; this regulation allowed authorities to not only detain but also "rehabilitate" anyone who "by words either spoken or intended to be read or by signs or by visible representations" causes the commission of violence or "religious, racial or communal disharmony or feelings of ill will or hostility between different communities or racial or religious groups"[155]. Under the Rajapaksa administration, authorities have continued to arrest and detain people under the PTA without evidence of terrorism[156].

A lawyer who works with PTA cases informed me of the following case[157]. While it is not related to the prevention of commemoration, it nonetheless gives a sense of how the PTA can be and has been used as a weapon against dissent and/or persons who challenge the state. A Tamil doctor in the North was ordered to conduct on autopsy on a young girl who had been raped and murdered by army officials. The doctor was told to produce a favourable report. After refusing to do so, the doctor was interpolated at an army checkpoint; the officers inspecting his vehicle 'discovered' weapons which had been planted there. The doctor was detained for over four years.

At the time of writing, there were proposals floating around for reformed anti-terrorism legislation. However, these proposals, like others in the past, do little to address the main concerns directed at the PTA, namely, the broad definition of terrorism and the power to detain without charge[158]. Although the ATB, published in March of 2023, contains some improvements on the PTA, it includes provisions which can facilitate abuse. As reported by Human Rights Watch, "[t]he bill appears designed to give the president, police, and military broad powers to detain people without evidence, to make vaguely defined forms of speech a criminal offense,

154 *Ibid.*, 29.

155 *Ibid.*, 29-30.

156 *Ibid.*, 38.

157 K.S. Ratnavale. Interview with Nicholas Duguay. 13 July 2023.

158 Centre for Policy Alternatives, *Proposed Anti-Terrorism Act (ATA)—Key Concerns: Centre for Policy Alternatives (CPA) May 2023* (Centre for Policy Alternatives, 2023), https://www.cpalanka.org/proposed-anti-terrorism-act-ata-key-concerns-centre-for-policy-alternatives-cpa-may-2023/.

and to arbitrarily ban gatherings and organizations without meaningful judicial oversight"[159]. In particular, the vague definition of terrorism gives the executive "wide leeway" in determining who can be accused of terrorism and arrested; it is not farfetched to assume that this wide definition will be exploited for the sake of dampening dissidence and civil society activities which run counter to the government agenda[160].

As has been reported that most of the people detained under the PTA are members of either the Tamil or Muslim minority community. Members of the government have, in recent times, stigmatized these minorities and associated them with terrorism[161]. The following excerpt from a speech given by President Rajapaksa in November 2020 sheds light on some of the nationalistic sentiments that are — in all likelihood — underlying abuses committed under anti-terrorism legislation: there are "legitimate fears that the Sinhala race, our religion, national resources and the heritage would be threatened with destruction in the face of various local and foreign forces and ideologies that support separatism, extremism, and terrorism"[162]. These fears are in all likelihood the motivating factor behind the use of the PTA and other anti-terrorism legislation to prevent the commemoration of Tamil civilians and combatants. While there have been multiple kinds of abuses committed under anti-terrorism legislation in Sri Lanka (which have been directed at different communities), this report focuses in particular on how the PTA has been used to quell memory. The Sri Lankan state has acted with impunity by denying memory to Tamil communities.

The PTA has been used to suppress memorialization events organized by members of the Tamil community to commemorate casualties during the civil war. These memorialization events have been described as 'glorifying' the LTTE, which is an offense under the PTA. According to Human Rights Watch, 10 people were arrested in Kalkudah in May of 2021 for organizing a memorial event[163]. The PTA has also been used to detain people who commemorated Tamil victims of the civil war on social media[164]. The COVID-19 pandemic has also been cited as a reason for

159 Human Rights Watch, *Sri Lanka: Reject New Counterterrorism Bill* (Human Rights Watch, 2023), https://www.hrw.org/news/2023/04/07/sri-lanka-reject-new-counterterrorism-bill.

160 Centre for Policy Alternatives, *Key Concerns,* 2.

161 Human Rights Watch, *In A Legal Black Hole*, 39.

162 *Ibid.,* 38-39.

163 *Ibid.,* 47.

164 Human Rights Watch, *Reject New Counterterrorism Bill.*

disrupting memorialization events[165]. In July 2020, police attempted to obstruct a memorial event commemorating victims of the Navalay church bombing and have also — at other times — obstructed peaceful protests organized by families of the disappeared[166]. COVID-19 justifications for the obstruction of these events are suspicious, given how Sri Lankan authorities were selective, to say the least, in their application of restrictions on public gatherings[167].

In 2021, a Tamil member of parliament was arrested after commemorating the life of a separatist rebel, hours after the president had called for reconciliation between ethnic groups at the UN[168]. A lawyer who works with PTA cases informed me of a situation where a small group of Tamil people were detained for lighting a candle and laying flowers in commemoration of their dead relatives. They were detained under suspicion of 'regrouping the LTTE' and were released only a full year after their detention[169]. The lawyer has confirmed that anti-terrorism legislation is, in large part, used as a means of suppressing individuals and communities who oppose the majoritarian discourse on the war and/or, more broadly, those who are deemed a 'threat' to Buddhism[170].

The Sri Lankan state's prevention of Tamil commemoration constitutes impunity as the denial of memory. To recall, impunity has been characterized as a wrong which denies the equality of the other — not only the other's legal equality, but also his or her moral equality. By preventing Tamil individuals from commemorating the death of their loved ones in combat — or, more generally, the death of combatants —, the state is eroding individual and communal identity. As mentioned above, memory in post-war contexts is an important facet of the constitution of both individual and communal identity; by preventing the Tamil community from constituting their identity in this way (while the Sinhala majority is free to commemorate their dead), the state is treating them as less than equal. The exclusion of Tamil memories from official war commemoration also communicates the message that Tamils are not equal members in the political community. Indeed, the characterization of Tamil

165 A lawyer who works on PTA cases informed me that, while there was no dramatic increase in PTA cases during the COVID-19 pandemic, there were fewer opportunities to seek legal remedy, due to the closure of courts and the decrease in public monitoring.

166 Amnesty International, *Old Ghosts in New Garb*, 27.

167 *Ibid.,* 28.

168 Raj, "Remembrance and Reconciliation".

169 K.S. Ratnavale. Interview with Nicholas Duguay. 13 July 2023.

170 *Ibid.*

commemoration as a terrorist activity — i.e., as something antithetical to the Sri Lankan state — further underscores the exclusion of Tamils from the state.

4.2.2 The Erasure of Memory Through 'Archaeological' Land Grabs

Since the end of the civil war in Sri Lanka, the state has eroded memory by displacing communities from their lands. The erosion of memory is particularly pertinent when it comes to what is known as 'archaeological' land grabs — i.e., when the state confiscates land on the basis that it is of archaeological value and engages, what is in essence, a process of historical rewriting or cultural 'cleansing'. Before delving into these issues, a short historical account of land grabs is in order.

During the civil war, the LTTE, to fulfill its separatist agenda to create an independent state (Eelam), claimed administrative control of large swaths of land in the North and East. As the Sri Lankan army battled the LTTE and drove them out of these controlled regions, they established militarized zones referred to as High Security Zones (HSZs) which were barred to civilians. At the end of the war in 2009, these military-occupied lands could be grouped into three categories: 1) previously LTTE-controlled areas which became depopulated after the army secured control and the LTTE (and Tamil civilians) withdrew; 2) areas which bordered LTTE-controlled lands which were heavily mined and had no or few civilian settlements; and 3) areas which were controlled by the army for years (or decades) and in which civilian settlement and access were prohibited[171].

Following the civil war, the government gradually released some military-controlled land for civilian resettlement but made "no substantive effort" to address land ownership claims of civilians whose land was still under military control[172]. Indeed, as reported by Human Rights Watch, even after the war had ended, security forces and police forcibly occupied new land, displacing more citizens and preventing them from accessing it[173]. At the time, the Sri Lankan military was expanding (rather than demobilizing) and the increased demand for land was justified by the increasing number of military personnel. Many of the new camps and bases

171 Human Rights Watch, *Why Can't We Go Home,* 11-12.
172 *Ibid.,* 12.
173 *Ibid.,* 13.

were established in the North, where, three years after the war, the military-to-civilian ratio was estimated by one study to be higher than in any of the world's other conflict areas[174]. Not much progress was made on the issue of land under the Sirisena administration[175].

As noted by Human Rights Watch, the confiscation of land for military purposes has catastrophic impacts on reconciliation: "Military occupation of land… represents a challenge to long-term peace. Many affected individuals and communities see the continuing military presence and the extent of land still occupied almost 10 years after the war as a sign of a permanent militarization. The release of land is thus seen not merely as an issue of relocating troops and camps but also reducing military presence in the region. The failure to effectively settle grievances over military control of land will adversely impact reconciliation efforts because land is also commonly viewed as an underlying cause of the conflict, alongside discrimination based on language, religion, and ethnicity"[176].

It has also been reported that the military had confiscated lands for the sake of profit-making. In the North and East, the military has established business ranging from farms, to restaurants, and even tourist hotels[177]. It has also been reported that, in some cases, the military has willfully destroyed property[178]. In short, land confiscation has an undeniable economic aspect. Indeed, even when the land is not occupied explicitly for economic purposes, the confiscation of land can have drastic economic impacts on the original occupants, especially when these depend on the land for agricultural activities.

Land is intertwined with identity. Land is also intertwined with the kind of memory which sustains identity, serving as a landmark for who we are and as a means of passing down identity through generations in a given place. As such, any kind of dislocation from land — whether self-imposed or not — has an impact on memory and as such is relevant in this report. The People's Alliance for Right to Land (PARL), in commission hearings around the country, met people who "vividly

174 *Ibid.*, 13-14.
175 *Ibid.*, 14-17.
176 *Ibid.*, 18.
177 *Ibid.*, 44.
178 *Ibid.,* 49.

described the different ways in which they connect and relate to land and how this shapes their identity and community"[179].

However, a specific kind of land issue in Sri Lanka touches on memory to an even greater extent than military-related land confiscations. These are the so-called 'archaeological' land grabs. In its 2022 report on the situation of human rights in Sri Lanka, the United Nations Human Rights Council reported that "there has… been a more recent trend of land disputes in relation to construction of Buddhist heritage conservation…, mainly in the Northern and Eastern provinces"[180]. Archaeological land grabs occur when a section of land is set apart for archaeological purposes, with civilians living on that land being forced to relocate and, often, give up their livelihoods. In Sri Lanka, archaeological land grabs have also involved the construction of new Buddhist structures, as well as the settling of Sinhala Buddhist monks in regions which are predominantly Tamil or Muslim.

In June 2020, President Gotabaya Rajapaksa established a Presidential Task Force for Archaeological Heritage Management in the Eastern Province, headed by a Buddhist monk. No Tamil or Muslim members were appointed to the Task Force. Its mandate was, among other things, to identify sites of archaeological importance, engage in restoration efforts, identify land that should be allocated to archaeological investigation or preservation, and preserve the cultural value of archaeological sites as a promotion of Sri Lanka's heritage[181]. The establishment of this Task Force indicates a desire to assert the majoritarian ethno-religious identity and to undermine the claims of other identities through the historical claims of archaeology. As one author has remarked, regarding the politics of archaeology in the Eastern Province and the establishment of the Task Force, "[w]eaponizing archaeology is a favourite tactic of extremists"[182]. Referring to the practice of seizing land and settling it with a new 'identity', Saravanamuttu Paikiasothy mentioned

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179 People's Alliance for Right to Land (PARL), *"Our Land, Our Life": People's Land Commission Report 2019-2020* (People's Alliance for Right to Land, 2020), 51.

180 United Nations, *Situation of human rights*, para. 47.

181 Paikiasothy Saravanamuttu, "Victory Celebration and the Unmaking of Diversity in Post-War Sri Lanka," in *In the Shadow of Transitional Justice: Cross-National Perspectives on the Transformative Potential of Remembrance*, eds. Guy Elcheroth and Neloufer de Mel (New York: Routledge, 2022), 58.

182 Tisaranee Gunasekara, "Politicizing Archaeology, Militarizing Virtue, Gaslighting the Electorate," *Groundviews* (blog), June 14, 2020, https://groundviews.org/2020/06/14/politicising-archaeology-militarising-virtue-gaslighting-the-electorate/.

in conversation that there is "some weight" to the argument that this constitutes cultural genocide[183].

When Gotabaya Rajapaksa fled in 2022, the Task Force ceased to function. However, efforts to claim land in the North and East — in large part guided by politically-motivated Buddhist monks — continued under the guise of archaeology. In November 2022, a Federation of Organisations for Protection of National Heritage was launched under the patronage of Medagoda Abayatissa Thero, with several attempts made to set up new Buddhist temples near military camps (with military involvement)[184]. Since then, it has been reported that — with the collaboration of the Department of Archaeology — Hindu religious sites were being damaged and/or renamed as Buddhist temples, with relics being removed and replaced with Buddhist statues[185].

The activities of the Department of Archaeology in the North and East follow a similar pattern: personnel claim a particular site as having archaeological significance, declare it a security zone, deprive locals of their right to worship on the site, and invite Buddhist monks (alongside military personnel) to conduct religious activities and various construction and/or excavation projects[186]. As Maatram Mahendran Thiruvarangan, Senior Lecturer at the University of Jaffna, points out in an interview for Groundviews, archaeological land grabs are not only a cultural but also an economic issue: "There have been instances where [the Department of Archaeology] take[s] over land and prevent[s] people from doing agriculture activities. One such incident was reported from Kurunthurmalai"[187].

It will be noted here that the question of whether the archaeological claims (i.e., of historical Buddhist presence in the North and East) underlying these land grabs are accurate or not is beyond the scope of this report. The veracity of these claims does not take away from the wrong of the land grabs. For one thing, it is clear that the Department of Archaeology is invested in only one facet of archaeological

183 Saravanamuttu Paikiasothy. Interview with Nicholas Duguay. 01 August 2023.

184 Tisaranee Gunasekara, "Kurundi: A Runway to '56?", *Colombo Telegraph*, June 18, 2023, https://www.colombotelegraph.com/index.php/kurundi-a-runway-to-56/.

185 Maatram, "The Politics of Archaeology Spreads Discord in the North and East," *Groundviews* (blog), May 23, 2023, https://groundviews.org/2023/05/23/the-politics-of-archaeology-spreads-discord-in-the-north-and-east/.

186 *Ibid.*

187 *Ibid.*

research, i.e., that pertaining to Sinhala Buddhism[188]. If the historical claims are true, then truth is being advanced in a bad faith effort to reinforce a homogenous identity in the North and East, to engage in something which may approximate 'cultural genocide'. Moreover, even if the historical claims are true, it is not clear that the moral claims of archaeology outweigh those of the civilians who have been living on these lands for generations and whose livelihoods depend on land-based commerce. That is, it is not immediately clear that archaeology has moral claims over the present.

In any case, in an area of cultural and religious intermixing like Sri Lanka, it is often difficult — if not impossible — to make an authoritative statement on archaeological heritage. Ancient Hindu temples can be difficult to distinguish from Buddhist temples. Moreover, while it may be true that some archaeological sites constitute Buddhist sites, the Department of Archaeology seems more interested in designating it as a Sinhala — rather than Tamil — Buddhist site[189].

One case in particular — that of the Kurundi temple in Mullaitivu — has been (and continues to be) the source of much controversy and media coverage. Some of the disputed area (around 78 acres) near the Kurundi temple was first set apart as an archaeological site in 1933 by the then British-run Department of Archaeology. The region was inhabited by around 30 families and was filled with paddy lands, livestock farms and agrarian tanks, until 1983, when the families were displaced because of the conflict afflicting the region at the time. The land was resettled after the civil war, in around 2013, with farmers clearing their paddylands which were overgrown with bushes and trees[190]. However, the land was resurveyed in 2020 and 78 acres were designated as 'Kurandhava Vihara' by Colombo officials[191].

This designation in 2020 paved the way for a series of archaeological activities on the land. These activities were carried out by the Department of Archaeology, with help from the military. A couple of months after the 2020 designation, the Department requested an additional 400 acres of land surrounding Kurunthoormalai to be

188 *Ibid.*

189 Sandun Thudugala. Interview with Nicholas Duguay. 03 August 2023.

190 Sandun Jayawardana and S. Rubatheesan, "Heat over archaeological site or people's", *Sunday Times*, June 18, 2023, https://www.sundaytimes.lk/230618/news/heat-over-archaeological-site-or-peoples-523242.html.

191 People's Alliance for Right to Land (PARL), https://www.parlsl.com/land-disputes#.

handed over for archaeological purposes. About 150 acres of this land belong to Tamils, while the remainder falls within the region of the Nagancholai forest[192]. As reported by the People's Alliance for Right to Land (PARL), Tamil farmers alleged that Buddhist monks had threatened and intimidated them as they attempted to return to their lands[193]. Concerns about 'Sinhala Buddhisation' were heightened at the time because Vidura Wickramanayaka, the Sri Lankan Minister for National Heritage, had led the consecration of a Buddha statue at the site of a Tamil temple several months before the Department's request for additional acreage[194]. The request for the 400 acres of land was rejected[195].

The land is now again being claimed by the Department of Archaeology. In 2023, the then Director General of Archaeology, Anura Manatunga, had filed a request to survey 229 acres surrounding Kurundi temple (i.e., part of the 400 acres which had previously been requested) and declare it as an archaeological site, on the basis that artefacts had been found in the area. Locals in Mullaitivu alleged that Hindu artefacts had been removed and replaced with Buddhist artefacts[196]. Despite a court order issued against the illegal construction of a new Buddhist vihara, the work persisted with the support of armed forces and individuals brought in from the Southern provinces[197]. These events — and other land grab attempts in the North and East — led to President Wickremesinghe's rebuke of Anura Manatunga, who resigned days later[198]. At the time of writing, the request for the 229 acres had yet to be revoked.

Some authors commenting on archaeological land grabs have drawn parallels between these events and other efforts to shift demographics in Tamil-dominated districts towards an increase in Sinhala population, such as the irrigation schemes of the Gal Oya project in the 50s and the Accelerated Mahaveli project in the 70s[199]. As one author comments, archaeological land grabs have "nothing to do with Buddhism or the teachings of the sublime Gautama, but everything to

192 *Ibid.*

193 *Ibid.*

194 *Ibid.*

195 Sandun Thudugala. Interview with Nicholas Duguay. 03 August 2023.

196 Jayawardana and Rubatheesan, "Heat over archaeological site or people's".

197 *Ibid.*

198 Newswire, "Archaeology DG resigns days after President's criticism", https://www.newswire.lk/2023/06/12/archaeology-dg-resigns-days-after-presidents-criticism/.

199 Ameer Ali, "Saboteurs & Charlatans of Reconciliation", *Colombo Telegraph*, June 16, 2023, https://www.colombotelegraph.com/index.php/saboteurs-charlatans-of-reconciliation/.

do with political Buddhism and its hegemonic ideals"[200]. Indeed, soon after the 2019 presidential elections, Panamure Thilakawansa Thero, a Buddhist monk, expressed the following in a speech: "In the decade of 1980, Mr. Cyril Mathew identified ancient Buddhist temple ruins, developed them, and set up Sinhala farming communities. If these Sinhala farming communities continued in the North-East, these provinces would have been secure and free of crises and not in the grip of extremists"[201]. This, and the fact that the Department of Archaeology's projects in the North-East were shown to be funded by Buddhist monks, indicate a religious-nationalistic agenda behind these archaeological land grabs[202].

The settlement of Sinhala farmers around newly-claimed archeological sites (and Buddhist temples built on those sites) is justified as necessary to sustain the Buddhist monks who work at the temple through almsgiving. In effect, a Sinhala 'colony' in the Tamil-dominated area grows around the temple. First, with the help of military personnel, a Buddhist structure is either built from scratch or renovated out of an archaeological site. Then, Sinhala farmers settle around the area to sustain the monks. Finally, military encampments are built to aid the activities and to protect the Buddhist monks and settlers[203].

The Department of Archaeology's participation in archaeological land grabs constitute impunity as the denial of memory. Since 2019, archaeological land grabs have been increasing in frequency[204]. As mentioned above, land loss itself, along with the phenomenon of being dislocated from one's land, inhibits memory (as something which sustains identity) by removing an individual from the landmarks and community which help transmit his or her identity. This is even more so the case when it comes to land loss which is motivated by the explicit desire to undermine one identity (i.e., Tamil Hinduism) to the benefit of another (i.e., Sinhala Buddhism). Archaeological land grabs diminish the physical spaces wherein important aspects of one's identity — e.g., religious practices, language, and relationship to land — can be sustained and transmitted. The long-term effect of this is to dim the collective memories of one's origins. To deny memory in this

200 Jayawardana and Rubatheesan, "Heat over archaeological site or people's".
201 Gunasekara, "Kurundi".
202 *Ibid.*
203 Sandun Thudugala. Interview with Nicholas Duguay. 03 August 2023.
204 *Ibid.*

sense — and to erode another's identity — is to deny their moral equality and, therefore, to act with impunity.

Lastly, it goes without saying that archaeological land grabs have disastrous effects on reconciliation. As Tisaranee Gunasekara puts it, "[o]rdinary Tamils and Muslims of North and East, victimised by the depredations of land-hungry political monks, have no such escape routes. Born here, poor and unconnected, they have nowhere else to go. What else can they do but suffer, resent, and hate? Desperation is a dangerous condition. With their geographical Sinhala-Only programme, political monks of today are seeing the next conflagration, just as their ancestors did with linguistic Sinhala Only in 1956"[205].

4.2.3 The Manipulation of Memory Through Public Spaces and Memorials

Since the end of the civil war in Sri Lanka, the state has manipulated post-war memory through the means of public memorials. This has occurred in two ways: 1) by directly interfering with the construction and maintenance of Tamil memorials and 2) by constructing public memorials which represent exclusionary memories of the war. Before delving into these issues, a short conceptual account of memorials — and how they figure in transitional justice processes — is in order.

Memorials differ from memory because of their 'material' nature, but not all memorials are constructed artefacts (like statues, for example). There are three kinds of memorials: authentic sites, constructed sites, and activities[206]. Authentic sites refer to the physical spaces where the object of commemoration occurred; for example, an authentic site can be a battlefield, the site of a massacre, or even a government building where, say, genocidal plans were hatched. On the other hand, constructed sites refer to monuments (e.g., statues) or spaces (e.g., squares) built to commemorate an event. Activities include, among other things, commemoration events, protests and peace marches. While this report addresses state manipulation of authentic sites and constructed sites, much of what is said in

[205] Gunasekara, "Kurundi".

[206] Susanne Buckley-Zistel and Annika Björkdahl, "Memorials and Transitional Justice," in *An Introduction to Transitional Justice*, ed. Olivera Simić (New York: Routledge, 2021), 270.

this section would apply to interference with commemoration events discussed in the previous section.

Some of the goals of memorials include "providing an adequate site for mourning, holding perpetrators accountable, vindicating the dignity of victims, putting past wrongs right and contributing to reconciliation"[207]. Of course, given the political nature of post-war memory, memorials also become sites of contestation over national identity. Indeed, certain memorials can become — as one author put it — "flagships of national identity"[208]. Typically, given the costs associated with the construction and maintenance of public memorials, only memories, testimonies and events which are part of the 'official' narrative are commemorated. Memorials — at least, large-scale and public ones — thus "tend to provide the victors or power holders with a mechanism of imagining a new nation through the narratives of the past that they disseminate"[209]. The extent to which this occurs of course depends on the particular state undertaking the establishment of memorials; some states are more willing to confront the past than others, and some states are more willing to integrate marginalized perspectives than others. Where memorials express a one-sided view of past events, 'counter-memorials' typically emerge to challenge "uniform" and "hegemonic" interpretations of the past[210]. In these contexts, counter-memorials can serve as sites of resistance to "a culture of impunity" and draw attention to marginalized perspectives[211].

Since the end of the Second World War, there have been two main shifts in the nature of post-war/post-conflict memorials: 1) a focus on victims and 2) an aesthetic change. Memorials have become more victim-centred in the sense that they tend to commemorate the suffering of individuals caught up in war and conflict, rather than the achievements of war heroes[212]. These memorials recognize victims as the "chief carriers of the moral weight regarding the atrocities committed"[213]. On the aesthetic front, one author has observed that memorials are, in general, moving away from figurative depictions of specific events to more abstract and conceptual

207 *Ibid*., 270.

208 Ljiljana Radonić, "The Politics of Commemoration and Memorialisation" in *Handbook on the Politics of Memory*, ed. Maria Mälksoo (Cheltenham, United Kingdom: Edward Elgar Publishing Limited, 2023), 140.

209 Buckley-Zistel and Björkdahl, "Memorials and Transitional Justice", 283.

210 *Ibid*., 284.

211 *Ibid*., 274-275.

212 *Ibid*., 272-273.

213 *Ibid*., 272.

representations of these events[214]. These memorials tend to encourage onlookers to "think and reflect" rather than impose a specific narrative; the invitation of onlookers into the memorial itself encourages multifaceted perspectives on wars and conflicts[215]. See Annex 2 for an example of an 'abstract' — as opposed to 'figurative' — memorial. With this brief conceptual account of memorials, we can begin to delve into the specific issues in Sri Lanka.

The military victory of government forces over LTTE rebel forces in 2009 was so swift and drastic that it not only signalled the end of the almost three-decades-long civil war, but also, as one author put it, "opened a boulevard for a triumphalist, state-led narrative on the war, which left little space to mourn losses, especially among the Tamil minority"[216]. Constructing and maintaining memorials to commemorate Tamil losses, no matter how informal and private, has become "a risky operation" and the preservation of post-war memory has largely been relegated to the Tamil diaspora[217]. The Sri Lankan state has manipulated memory by means of interference with memorials in two ways: 1) by inhibiting the construction and maintenance of Tamil memorials and 2) by constructing public memorials which represent exclusionary memories of the war.

The activist Ruki Fernando, writing shortly after the conclusion of the civil war, mentioned witnessing the military destroying memorials built to commemorate LTTE casualties in the Vanni and in Jaffna, as well as instances where family members of the deceased were prevented from lighting a candle or laying a flower. At a destroyed memorial site, Ruki Fernando was asked not to take photographs and informed that the site was being converted into an army camp[218]. The destruction of memorials continued up to as recently as 2021, when the government demolished a monument at Jaffna University which commemorated thousands of Tamil civilians killed at Mullivaikkal in 2009. As reported by Human Rights Watch, the Public

214 Buckley-Zistel and Björkdahl, "Memorials and Transitional Justice", 273.

215 *Ibid.*

216 Guy Elcheroth and Neloufer de Mel, "Spotlights and Shadows: Revisiting the Scope of Transitional Justice," in *In the Shadow of Transitional Justice: Cross-National Perspectives on the Transformative Potential of Remembrance*, eds. Guy Elcheroth and Neloufer de Mel (New York: Routledge, 2022), 5.

217 *Ibid.*

218 Ruki Fernando, "Celebrating war victory and banning commemoration of dead civilians: this is a home grown & indigenous reconciliation and freedom in Sri Lanka?", *Groundviews* (blog), June 18, 2010, https://groundviews.org/2010/06/18/celebrating-war-victory-and-banning-commemoration-of-dead-civilians-this-is-"home-grown-indigenous"-reconciliation-and-freedom-in-sri-lanka/.

Security Minister at the time justified the action by saying that "no one will and should be allowed to commemorate dead terrorists", even though the memorial was commemorating civilian casualties[219].

During — and especially, following — the civil war, the Sri Lankan army bulldozed many cemeteries built by the LTTE to commemorate dead combatants[220]. It is not clear how many cemeteries were destroyed. A Tamil newspaper reported that "not a single site remains standing", but this information cannot be verified[221]. Some of the destroyed cemeteries have been paved over, with one — in Koppay — even being used as the foundation for the Sri Lankan military's 51 Division base[222]. In response, the Tamil community has turned some of these destroyed authentic sites into constructed sites, using pieces of destroyed gravestones to build monuments which, in effect, now serve a double commemorative purpose[223]. See Annex 1 for an example of such a monument. Of course, these commemorative activities remain a risky endeavour. In a 2020 report, People for Equality and Relief in Lanka (PEARL) reported that COVID-19 restrictions were being used as a smokescreen to ban Maaveerar Naal (Tamil National Remembrance Day) ceremonies. Despite respecting social distancing measures, organizers preparing for ceremonies near cemeteries were obstructed by police and security forces set up checkpoints to dissuade people from approaching these locations[224].

Of course, the military's and police's roles in these processes add another layer to the issue. The North is still heavily militarized and more so than other regions of the country. The degree of militarization creates "sub classes of suffering that calls for different kinds of relief and at different degrees of intensity"[225]. Militarization is, therefore, another way in which the state treats classes of citizens as less than

219 Human Rights Watch, *Open Wounds and Mounting Dangers: Blocking Accountability for Grave Abuses in Sri Lanka* (Human Rights Watch, 2021), https://www.hrw.org/report/2021/02/01/open-wounds-and-mounting-dangers/blocking-accountability-grave-abuses-sri-lanka, 26.

220 International Crisis Group, *Picturing Sri Lanka's Undead War* (International Crisis Group, 2019), https://www.crisisgroup.org/asia/south-asia/sri-lanka/picturing-sri-lankas-undead-war.

221 "Rebuilding Resting Places: The Continued Struggle for Remembrance," *Tamil Guardian*, November 25, 2017, https://www.tamilguardian.com/content/rebuilding-resting-places-continued-struggle-remembrance.

222 *Ibid.*

223 *Ibid.*

224 People for Equality and Relief in Lanka, *Tamil Right to Remember Must be Respected* (People for Equality and Relief in Lanka, 2020), https://pearlaction.org/publications/#reports.

225 Thaheer, Peiris, and Pathiraja, *Reconciliation in Sri Lanka*, 38.

equal and therefore, perhaps, another 'kind' of impunity. It is beyond the scope of this report to address militarization in depth[226].

Another instance of government forces prohibiting Tamils from constructing, maintaining and commemorating at memorial sites occurred around 2016. A statue had been built in Mullivaikkal to commemorate victims and survivors of the final battles of the civil war. A year later, a local Catholic priest organized a project to carve the names of the deceased on the rocks surrounding the statue, but the project was blocked by police. It was argued that some of the names were of LTTE combatants[227]. As reported by Alan Keenan, "[w]hile the state has gradually eased restrictions on commemoration, its surveillance and frequent harassment of those organizing ceremonies remain barriers to public mourning"[228]. These examples (which only scratch the surface) demonstrate how the Sri Lankan state was and is actively involved in inhibiting the construction, maintenance, and indeed mere existence of Tamil memorials. However, it is important to look not only at the memorials which are being destroyed but also at those which have and are being built.

The first thing that can be noticed about state-sponsored war memorials in Sri Lanka is that they tend to be figurative (as opposed to abstract), either replicating scenes of suffering or glorifying war heroes. One memorial in particular is striking (see Annex 3 for a photograph). In 1987, LTTE members ambushed a bus transporting young Sinhalese Buddhist monks on a pilgrimage as it was passing through the village of Aranthalawa, in the Ampara District. The LTTE militants murdered 33 monks. To commemorate this horrific massacre, the bus in which the murder occurred was anchored in concrete and filled with statues of young monks "cry[ing] out in pain and terror amid splatters of red paint"[229]. The aesthetics of this memorial is reflective of a particular approach to post-war memories — i.e., instead of commemorating an event in the broader context of a national narrative of conflict and suffering, the memory itself is immortalized, as if to play it over and over again before the eyes of passersby. While the construction of a figurative

[226] For a fascinating study on militarization in Sri Lanka (and its link to memory and ideology, among other things), see Neloufer de Mel, *Militarizing Sri Lanka: Popular Culture, Memory and Narrative in the Armed Conflict* (Colombo: International Centre for Ethnic Studies, 2007).

[227] International Crisis Group, "Picturing Sri Lanka's Undead War."

[228] *Ibid.*

[229] *Ibid.*

memorial commemorating a traumatic event is, of course, not in itself wrong, the aesthetics of memorials such as these, coupled with the prohibition of memorials which express Tamil experiences of the conflict, have the cumulative effect of denying memory.

Second, many state-sponsored war memorials, such as the Victory Monument overlooking the A35 highway just outside Puthukkudiyiruppu (see Annex 4 for a photograph), express the aforementioned triumphalist narrative of the state — i.e., the civil war is represented as the victory of a strong army over the treachery of terrorists. Again, constructing a war memorial which glorifies war heroes and which expresses triumph over an enemy is (perhaps) not wrong in and of itself. However, this particular memorial was constructed in an area close to where the final fighting occurred in the closing stages of the civil war, i.e., a predominantly Tamil area. In other words, this memorial did not emerge from the community but was rather imposed on the community. When coupled with the prohibition of memorials which express Tamil experiences of the conflict, war memorials such as these (and those placed in areas such as these) have the effect of denying memory.

The Sri Lankan state's inhibition of memorials which express Tamil perspectives, coupled with the proliferation of war memorials which emphasize and impose a singular view of the conflict, constitutes impunity as the denial of memory. To recall, impunity has been characterized as a wrong which denies the equality of the other — not only the other's legal equality, but also his or her moral equality. By preventing Tamil communities from constructing memorials which allow them to commemorate the death of combatants and express their perspectives on the civil war, the state is eroding individual and communal identity, as well as qualifying freedom of expression on the basis of ethnicity. As mentioned in the analysis regarding the prevention of commemoration, memory in post-war contexts is an important facet of the constitution of both individual and communal identity; by preventing the Tamil community from constituting their identity in this way (while the Sinhala majority is free to commemorate their dead), the state is treating them as less than equal. The exclusion of Tamil memories from official war memorials also communicates the message that Tamils are not equal members of the political community.

The politics of memorials in Sri Lanka is likely to have catastrophic effects on reconciliation. As one individual interviewed by the Tamil Guardian expressed: "The army that had encroached on the LTTE cemeteries are standing there with shoes over the faces of our children who lie buried there. How can we ever consider rapprochement while the army stands over the faces of our children with their shoes?"[230].

[230] "Rebuilding Resting Places," *Tamil Guardian*.

5. Conclusion

To conclude, this report has made two claims: 1) impunity constitutes more than merely the lack of accountability and 2) impunity in Sri Lanka manifests not only as the lack of accountability but also as the denial of truth and of memory (two other faces of impunity which appear in international norms and in an analysis of the moral wrong of impunity). As was shown in the analyses of the different case studies, when impunity is conceptualized in this multifaceted way, we notice how it is intertwined with other phenomena such as nationalism, identity and reconciliation, to name a few. It was beyond the scope of this report to make explicit claims about these connections. Nonetheless, I hope that the report suggests avenues of research to be pursued by thinkers in Sri Lanka and beyond. Does impunity function as a tool for nationalistic projects? If so, in what ways? What are the psychological underpinnings of impunity, beyond the avoidance of guilt? What factors, other than the persistent lack of accountability, lead to the development of a culture of impunity, and what means can societies take to inhibit these factors?

In Part II of the report, I provided a short account of the right to the truth and the duty to preserve memory as these feature in international law and human rights norms. I also touched on some of the normative underpinnings of truth and memory, as well as a historical account. Then, I discussed how truth and memory are both instrumentally valuable in the fight against impunity as lack of accountability and intrinsically valuable. The purpose of Part II was to posit the discussion of impunity in Sri Lanka within a context of international obligations and to articulate a conceptual framework of impunity to be used throughout the report.

In Part III of the report, I discussed how impunity operates as the denial of truth in Sri Lanka. I opened with a discussion of the relationship between truth and justice in post-war contexts, as well as different views on facing the past after atrocities. Then, I provided an account of COIs in Sri Lanka, with a focus on the newly-created OMP. I showed how the consistent failures of these mechanisms harm efforts at reconciliation, undermine trust in public institutions, and tie up with nationalist projects. Moreover, I provided an analysis of how the denial of truth constitutes impunity.

In Part IV of the report, I discussed how impunity operates as the denial of memory in Sri Lanka. I opened with a discussion of the relationship between memory and justice in post-war contexts, as well as the ways in which memory is important for both individuals and communities. I also discussed how post-war memories are linked with reconciliation. Then, I provided accounts of three ways in which the denial of memory operates in Sri Lanka: as 1) the forbidding of memorialization, 2) the erasure of memory through archaeological land grabs, and 3) the manipulation of memory through public spaces and memorials. All these three phenomena constitute impunity as the denial of memory.

It is difficult not to think of these manifestations of impunity in the context of three influences which Gehan Gunatilleke identified as driving factors of entrenched violence in Sri Lanka, namely, 1) the entitlement complex of the Sinhala-Buddhist majority, 2) the existential fears of the Sinhala-Buddhist majority, and 3) the exceptionalism afforded to the Buddhist clergy[231]. One can see how the idea that Sri Lanka is a Sinhala-Buddhist land and that the Sinhala-Buddhists are "divinely protected at the request of the Buddha himself" — an idea which has its roots in the ancient historical-mythological *Mahāvamsa* — is intertwined with the nationalistic resistance to acknowledging diversity and to incorporating truths and memories which could challenge national identity[232].

Impunity has deep roots in Sri Lankan history and its branches are far-reaching, but there is hope that the multiple communities in this country can rally together under a vision of peace and stability. As the United Nations Human Rights Council suggested in its report on the situation of human rights in Sri Lanka, it is possible that "the protest movement [in 2022] has offered a sense of Sri Lankans from all communities coming together around a vision of greater equality, participation and democracy"[233]. Impunity is a disease which eats away the core of the country and against which all citizens, regardless of ethnicity and religion, can rally.

231 Gunatilleke, *The Chronic and the Entrenched*, 3.

232 *Ibid.*, 65.

233 United Nations, *Situation of human rights*, para. 29.

Annex 1: Memorial in Kanakapuram, Kilinochchi

Source: de Lossy, Julie David. “Picturing Sri Lanka’s Undead War”, *International Crisis Group*, 17 May 2019, https://www.crisisgroup.org/asia/south-asia/sri-lanka/picturing-sri-lankas-undead-war.

Annex 2: Memorial to the Murdered Jews of Europe

Source: https://en.wikipedia.org/wiki/Memorial_to_the_Murdered_Jews_of_Europe#Public_reception_and_criticism

Annex 3: Memorial to Bus Massacre in Aranthalawa

Source: de Lossy, Julie David. “Picturing Sri Lanka’s Undead War”, *International Crisis Group*, 17 May 2019, https://www.crisisgroup.org/asia/south-asia/sri-lanka/picturing-sri-lankas-undead-war.

Annex 4: Victory Monument at A35 Highway near Puthukkudiyiruppu

Source: de Lossy, Julie David. "Picturing Sri Lanka's Undead War", *International Crisis Group*, 17 May 2019, https://www.crisisgroup.org/asia/south-asia/sri-lanka/picturing-sri-lankas-undead-war.

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Impunity's Many Faces: The Erosion of Truth and Memory in Sri Lanka

Nicholas Duguay

Impunity is a perennial problem in Sri Lanka. The lack of accountability for crimes has eroded the social fabric of the country. However, impunity is not only a lack of accountability. This report discusses how impunity is also intertwined with themes of truth, memory and knowledge. Drawing on diverse sources, from international treaties to private interviews, the author argues that to act with impunity means not only to act without legal consequences, but also to deny truth, memory and knowledge to those to whom it is owed. Conceptualizing the many faces of impunity enables us to see how it is connected with other phenomena, such as nationalism, identity and reconciliation.

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