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# **ADVANCING TRUTH AND JUSTICE IN SRI LANKA**

**An Introduction to Transitional Justice**

**INTERNATIONAL CENTRE FOR ETHNIC STUDIES**

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# **ADVANCING TRUTH AND JUSTICE IN SRI LANKA**

by

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# **Advancing Truth and Justice in Sri Lanka**

## **Summary**

The International Centre for Ethnic Studies (ICES) will conduct a series of dialogues in different parts of the country, to provide space for civil and political society to explore the complexities of pursuing justice in a complex and volatile, post-war context. The long-term objective of this initiative is to contribute to the generation of an organic and relevant transitional justice process in Sri Lanka. This initiative seeks to do this by providing space for key decision-makers from different communities to dialogue and debate the variety of different options that may be available, in order to forge a transitional justice process that is sensitive to the peculiarities of the Sri Lankan conflict.

The dialogues will focus on the relevance of a range of transitional justice mechanisms to respond to claims ‘from the past’. Transitional justice experts and activists from post-conflict societies will be invited as key resource persons to stimulate the dialogues. One of the key objectives of the process will be to enhance the knowledge levels and intellectual understanding of key decision-makers about the range of transitional justice mechanisms that are available. A summary of the discussion will be captured both audio-visually and in printed form.

The dialogues will take place in a political environment that has transformed significantly after the 2015 January Presidential Election. The space has now emerged for a serious, candid and sophisticated discussion about transitional justice processes in Sri Lanka. The moment is ripe, for civil society to lead the debates on transitional justice and to provide intellectual and other forms of support to government and other key actors to implement a transitional justice process that is relevant in Sri Lanka.

## **Background**

Almost six years since the end of the war, Sri Lanka’s reconciliation process remains deeply problematic. The state’s focus during these past years has been on development and economic growth. Little emphasis has been given to social healing, integrating communities, archiving memory, memorializing, and responding to the multiple claims for justice. Sri Lanka’s transition from war to peace has been marked by a centralization

of state power in a strong executive, little participation and transparency, and a waning respect for the rule of law.

Societies emerging from violent conflict have struggled to come to terms with their past. Some have chosen to ignore the past while others have used a variety of mechanisms such as Tribunals, Truth Commissions, Memorials, and institutional reform to respond to legacies of human rights abuse or authoritarian governance. Sri Lanka has chosen the former route in the hope that the traumas and violations of the past will disappear with economic growth and a return to stability.

The political transformation that occurred in January 2015 has provided a window for a serious dialogue around transitional justice. One of the gaps in the new regime's political agenda is the absence of a concrete mechanism to deal with justice claims from the past. The sustainability of this transition will also depend to some degree on how the state responds to claims from the past. There is a need for civil society to take the lead and initiate a serious, intellectually sophisticated and candid dialogue on the shape and sequencing of a relevant transitional justice process in Sri Lanka.

It is unclear at this stage how the state will engage with the international efforts that have sought to push for a credible accountability process. In August 2013, a Commission to Investigate Missing Persons was set up and tasked with investigating cases of persons from the Northern and Eastern Provinces who went missing during the war. Here too, it is not clear if the mandate of this Commission will be extended and modified so as to enable credible findings to emerge.

At the level of civil and political society there has been inadequate discussion on the range of possible transitional justice mechanisms that Sri Lanka could potentially adopt. There is also an inadequate understanding within civil society on how other societies have engaged with their past. There have been few serious attempts to think through options that will respond to the particularities of Sri Lanka's past and present. This initiative aims to contribute to that deficit.

### **Advancing Truth and Justice through Dialogue**

This initiative envisions dialogues that will provide a space for civil and political society to explore the complexities of pursuing justice in a complex and volatile, post-war context. The dialogues will provide an alternative space for key decision-makers, civil society, academia, members of the clergy and resource persons from other post-war and

post-conflict societies, to dialogue and debate on how claims for justice may be advanced in this new political environment.

More specifically the initiative will provide space for key decision-makers to learn about and enhance their understanding about the relevance of a range of transitional justice measures including Truth Commissions; Tribunals and Commissions of Inquiry; Prosecutions; Memorials; Museums, Institutional Reform; and Vetting, as a response to Sri Lanka's past. How may these mechanisms respond to the past while charting a future that is imbued with the rule of law and a respect for the human rights of all peoples?

Perspectives from other post-war and post-conflict societies will be infused into the dialogues by inviting activists and resource persons from other societies that have gone through similar processes. These comparative perspectives will contribute to generating new knowledge and provide points of inspiration. These comparative experiences will help build new knowledge, discuss strategies and issues of sequencing and cultural appropriateness. The dialogues will focus on generating ideas for an organic model that is sensitive to Sri Lanka's peculiarities and history. It will explore models that are possible in the current political context, and seek to generate alternative processes that civil society and community leaders may pursue outside of state-led processes.

The dialogue process and the summary of the discussions will be captured as part of a documentary film. A printed report will analyse the discussions of the dialogues and be published in Sinhala, Tamil and English.

The initiative will not seek to advocate for any single one approach, but rather provide inputs that will enrich discussion and facilitate a more nuanced understanding of transitional justice initiatives within civil and political society, while encouraging the generation of an organic model that can be used in Sri Lanka. It will specifically explore how gender may be integrated into the transitional justice process.

This background note, written by Isabelle Lassez and the South Asian Centre for Legal Studies, provides an overview of fundamental aspects and key issues in the field of Transitional Justice. It explores some of the options available in terms of truth-seeking, prosecutions, reparations for victims of mass-scale abuses as well as guarantees of non-recurrence. This note has been prepared with a view of informing a serious and candid discussion on these options and the complex questions involved in the design of an appropriate and sustainable Transitional Justice process for Sri Lanka.

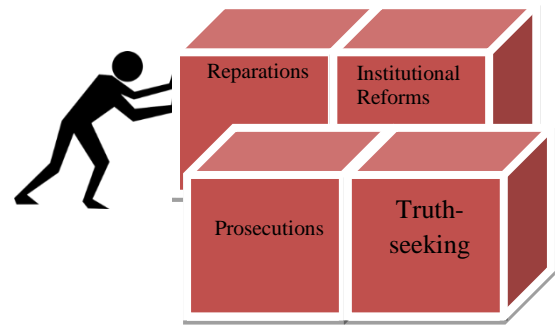
## **WHAT IS TRANSITIONAL JUSTICE (TJ)?**

Transitional Justice refers to the way in which societies come to term with the legacy of gross violations of human rights.

The United Nations defines Transitional Justice as follows:

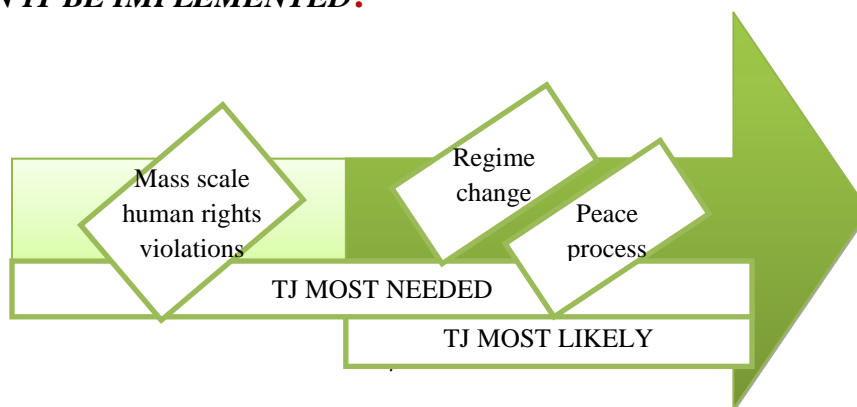
The full range of processes and mechanisms associated with a society's attempt to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation.

Transitional Justice measures may include judicial and non-judicial responses. The building blocks of Transitional Justice are:



- 1) **Truth-seeking**: establishing the fate and whereabouts of victims and the identity of perpetrators; and identifying the causes and circumstances of abuses.
- 2) **Prosecutions**: holding people criminally accountable for the crimes that they have committed.
- 3) **Reparations and memorialization**: officially acknowledging the ways and extent to which victims have been affected; and providing material or financial assistance to victims who have suffered gross violations of human rights.
- 4) **Institutional reforms** also referred to as guarantees of non-repetition: efforts to reform institutions that were responsible for abuses.

## **WHEN IS TRANSITIONAL JUSTICE NEEDED AND WHEN CAN IT BE IMPLEMENTED?**



## **WHY TRANSITIONAL JUSTICE?**

“The promise of transitional justice is that peace is going to be more than the cessation of hostilities, that the causes of war are going to be squarely faced and squarely dealt with. Transitional measures hold a promise of authentic sustainable democracy and sustainable peace.”

*Eduardo González,*

Director of the Truth and Memory Program, ICTJ

<p><b>ENSURING SUSTAINED PEACE</b></p>	<p>Studies show that 50 % of civil wars relapse into conflict in the first five years after they have been concluded. This is often due to a sense of grievance experienced by communities affected by war-time or state violence. Members of these communities often feel that the injustices they suffered during or prior to the conflict have not been sufficiently taken into account in the post-war era or by the new regime.</p> <p>Transitional Justice measures—including reparations and institutional reform—address the root causes of conflicts as well as the consequences of the crimes that were committed during an armed conflict or a period of state repression.</p> <p>Transitional Justice also encourages society’s acknowledgment of crimes committed and the recognition of victims’ suffering and needs.</p> <p>Therefore, Transitional Justice can play an important role in preventing the recurrence of violence.</p>
<p><b>REINFORCING RULE OF LAW</b></p>	<p>Transitional Justice—including prosecutions and the vetting of state institutions from those who committed crimes—is an important way of reaffirming the criminal nature of acts that went unpunished and reestablishing the most fundamental rules of a civilized society.</p> <p>Transitional Justice helps restore the trust of ordinary citizens in state institutions and the confidence that there will be a clear break from the past; that society will henceforth be governed by rules the breaking of which has consequences; and that fundamental rights will be protected.</p>
<p><b>ESTABLISHING A HISTORICAL RECORD OF WHAT HAPPENED</b></p>	<p>Transitional Justice measures—including truth-seeking and memorialization—are important tools to establish a historical record of the conflict’s root causes, of the crimes committed and of the consequences of violence for victims and the rest of the society.</p> <p>The construction of a historical record, the building of museums, monuments and memorials ensure that society will never forget the crimes committed in the name of extremist or totalitarian ideologies. This will serve as a warning of the consequences of mass-scale human rights abuses.</p>
<p><b>PROMOTING RECONCILIATION</b></p>	<p>Transitional Justice measures aim at fostering reconciliation. They incite society to embark on a process of deep introspection; they facilitate dialogue based on established facts; they challenge extremist ideologies and shift the blame from communities to individuals.</p>



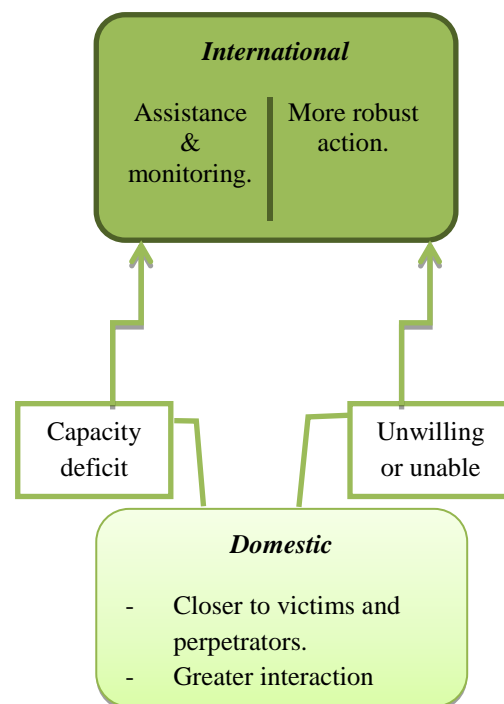
## WHO ARE TRANSITIONAL JUSTICE ACTORS?

### International vs. domestic

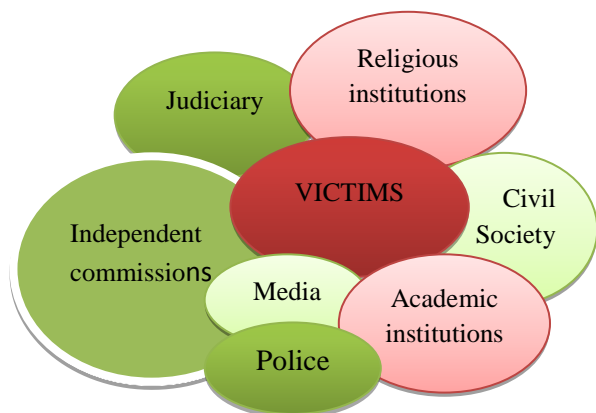
International law recognizes that justice is better achieved at the domestic level where victims and perpetrators are present and where the law can be more easily enforced. In addition, some TJ measures—such as reparations, truth-telling and institutional reforms—require by nature some degree of implementation at the domestic level.

The international community of States through the United Nations may assist in the design and implementation of Transitional Justice policies, if the State lacks capacity in this respect. For instance, the UN may provide technical input and training. The UN may also monitor Transitional Justice efforts to ensure that they are genuine and in line with international standards.

When the State lacks willingness or is unable to deliver on Transitional Justice, the United Nations may take more robust action. This could take the form of a UN investigation, Security Council Resolutions, or in extreme situations a referral of the situation to the International Criminal Court.



### Domestic actors



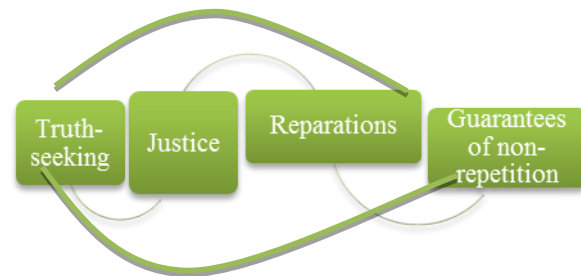
Transitional Justice involves a wide range of actors who must engage in effective partnerships. It requires specialist expertise in social sciences, the law, forensic investigations, gender rights, child protection etc...

**Victims** are central to Transitional Justice processes. They must be consulted directly and regularly for the design of TJ policies. In particular, special attention ought to be given to the needs of **women and children** for the design and implementation of TJ policies. Victims must also be able to participate meaningfully in TJ mechanisms.

## ***HOW TO ACHIEVE TRANSITIONAL JUSTICE?***

Transitional Justice measures are complementary and mutually reinforcing.

Transitional Justice policies should be holistic. This means that the various TJ initiatives must complement and reinforce each other. If not, the entire TJ policy may appear weak and disingenuous. For instance, if a TJ policy is limited to truth-telling efforts, it can be viewed as an attempt to divert domestic and international pressure while avoiding to address victims' rights to justice, reparations and guarantees of non-repetition. Similarly, if prosecutions are not complemented by a comprehensive TJ policy, they may be perceived as scapegoating or a form of political revenge, especially if they are limited to a few alleged offenders. Finally, reparations, in isolation from other TJ measures may be offensive to victims and viewed as "blood money" or as payment for their silence. Therefore, TJ measures should be ***conceived in relation to each other***. The implementation of the TJ plan may however be ***sequenced in time***, taking into account political realities.



Transitional Justice measures may be sequenced in time.

In a post-conflict situation, democracy and peace are often fragile. In particular, the political balance of power is often delicate. Thus, successor governments may be reluctant to put their own stability at risk by pursuing broad TJ initiatives.

Taking this reality into account practitioners and scholars have recognized the value of sequencing Transitional Justice measures in time.

Thus, TJ measures should ideally be sequenced in a way that does jeopardize democracy and peace, which are necessary conditions for a sustained transition and for the implementation of a comprehensive TJ policy.

### ***Case study: Argentina***

Between 1976 and 1983, a series of military juntas exercised power in Argentina and unleashed state terror. Torture was common place and disappearances happened on a systematic basis.

After democracy was restored in Argentina, the political situation was far too fragile for many prosecutions of human rights crimes. Save for a few convictions, even the prosecutions that were commenced were discontinued. In addition, the strong military had ensured that amnesty laws were written in to protect the leaders of junta.

But through patient activism and participation in the Truth Commission, the crimes of the junta were eventually exposed. Decades after the majority of crimes were committed, Argentina was eventually able to conduct prosecutions of many of the junta's leaders in the 1990's and 2000's.

## **TRUTH**

### ***Which truth is TJ attempting to establish?***

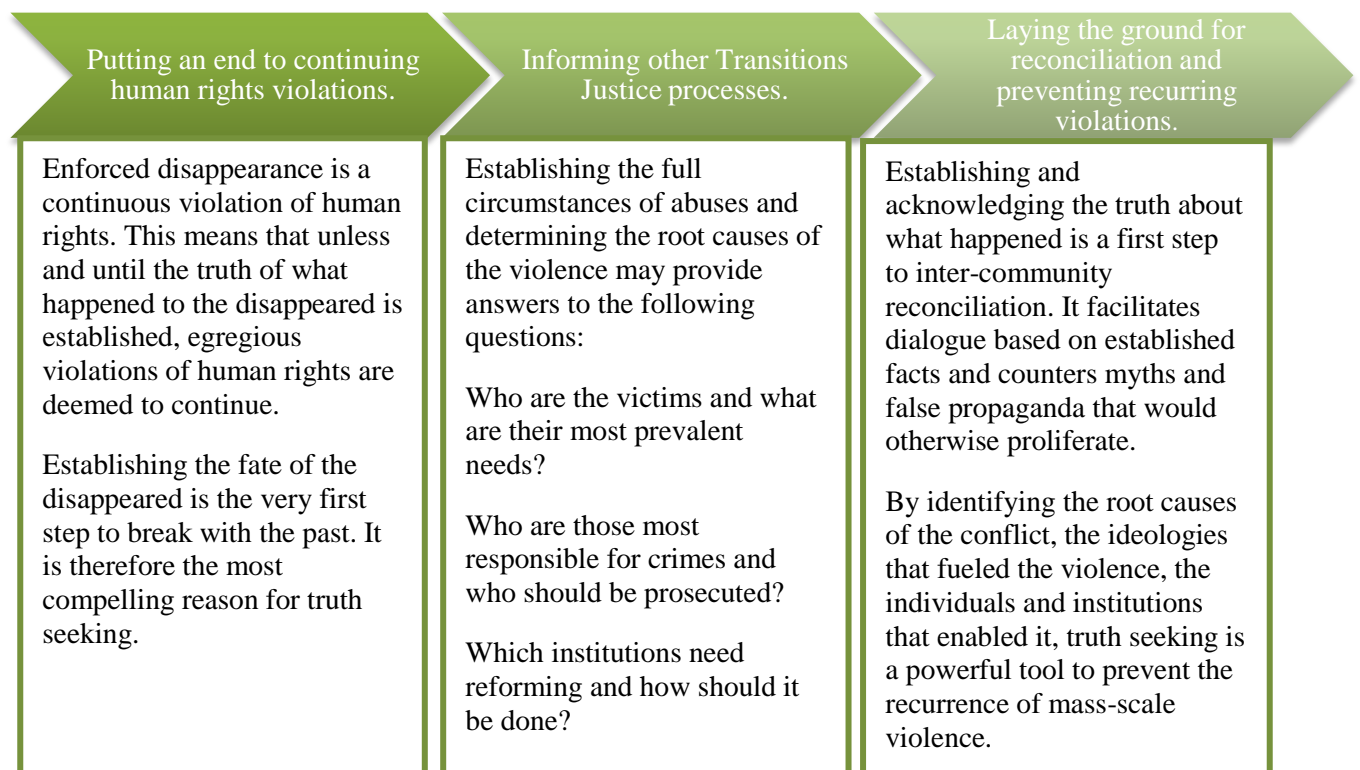
According to the United Nations, knowing the truth “to the fullest extent possible” includes attempting to establish:

- The identity of perpetrators;
- The causes that led to abuses;
- The circumstances and facts of violations;
- The ultimate fate and whereabouts of victims in the event of enforced disappearances.

### ***Whose truth and why is it important to adopt a *gender-sensitive* approach?***

Women’s experience of conflict-related violence often differs quite significantly from that of men. This is because conflicts exacerbate existing conditions of inequality and increase the economic and physical vulnerability of women. Armed conflicts therefore lead to the proliferation of gender-based and sexual violence. In addition, the breakdown of the social fabric and dire economic conditions in a post-conflict context often lead to increased violence against women, including domestic violence. In order to uncover the whole truth and design gender-specific TJ measures, women’s unique experiences must be documented specifically. To this end, their participation to truth-seeking mechanisms must be encouraged and facilitated. In particular, the opportunity cost of women’s time must be appropriately compensated for in order to encourage their participation. In addition, women must be specifically protected from risks of retaliation and stigmatization.

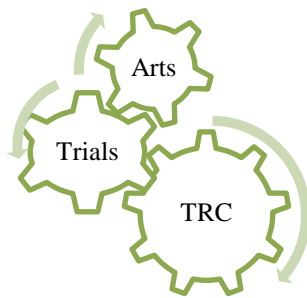
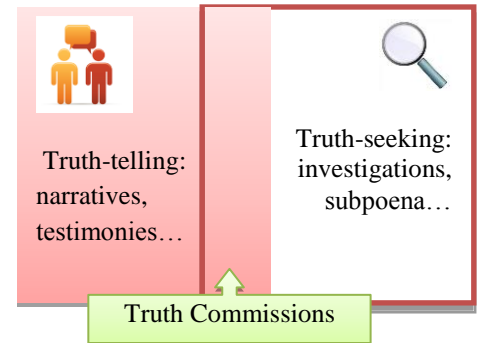
### ***Why is truth important?***



## How can TJ unveil the truth?

Transitional Justice policies generally involve the setting up of truth-telling and truth-seeking mechanisms. Truth-telling techniques focus on victims' experiences and narratives. Truth-seeking mechanisms require investigative powers.

Truth Commissions often combine truth-seeking as well as truth-telling dimensions.



However, other truth-seeking or truth-telling techniques and devices could be used alongside or in lieu of Truth Commissions. These include other types of official investigations, trials, arts, historical narratives, investigative journalism etc... The choice of these devices and the features of a Truth Commission depend on the goals that society sets for itself and their hierarchy.

Thus the truth-telling or truth-seeking dimensions may be prioritized depending on whether the mechanism seeks to achieve any of the following : catharsis, finding missing persons, countering extremist ideologies, providing a platform for inter-community dialogue, laying the ground for historical narratives, addressing the impunity gap by imposing blame and some form of sanction to those who committed crimes etc...

**Truth Commissions:** official, temporary, non-judicial fact-finding bodies that investigate a pattern of abuses of human rights or humanitarian law, usually committed over a number of years.

### *Different commissions = Different approaches*

	<b>South Africa</b>	<b>Peru</b>
Mandate	To determine the truth; historical context; human rights violations; motives of perpetrators.	To clarify the human rights violations; investigate disappearances; address context of violence.
Period covered	1960–1994	1980–2000
Judicial powers	Yes	No
Naming names	Yes	Yes
Amnesties	Conditional amnesties.	Blanket amnesties subsequently repealed.
Recommendations for prosecutions	Yes	Yes
Recommendations for reparation	Yes	Yes

## **PROSECUTIONS**

### ***Why prosecuting?***

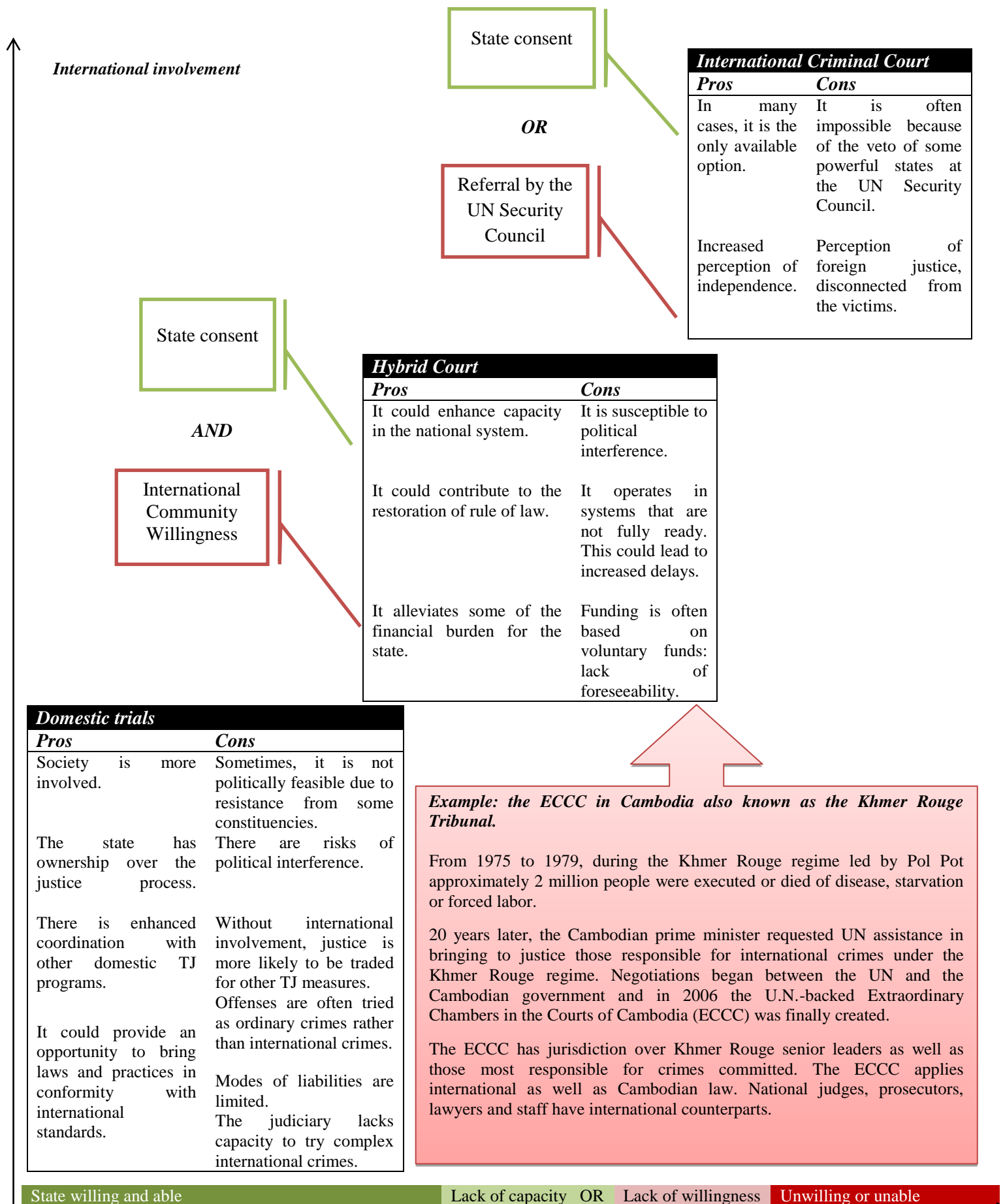
Prosecutions are a useful way for a society to reaffirm its condemnation of egregious crimes. In addition, prosecutions are also a vetting tool. They ensure that those most responsible are no longer able to commit crimes. Prosecuting genocide, war crimes, crimes against humanity and other serious violations of human rights is an obligation under international law. This is why the UN considers amnesties for these crimes to be illegal. Amnesties are measures that have the effect of barring future criminal prosecution or nullifying criminal sentences. Amnesties are believed by some to be useful to encourage truth-telling or induce parties to give up violence and enter peace talk. However, there are increasingly recognized by states as impermissible under international law. Thus, truth-commissions—except that of South-Africa—generally refrain from granting amnesties for international crimes. Amnesties for international crimes have also been successfully challenged in international and domestic courts including in Chile and Argentina.

### ***Whom to prosecute?***

When mass atrocity crimes are committed, it is virtually impossible to prosecute all the offenders. This is because prosecutions of international crimes are very resource intensive and prison capacity is limited. In addition, overly ambitious prosecutorial strategies are likely to trigger resistance from constituencies and risk jeopardizing the entire Transitional Justice process. Therefore, a prosecutorial strategy must be adopted to decide which crimes and types of offenders to prosecute. This strategy must be well defined, well justified and transparent. For instance, a prosecutor may choose to prosecute most representative crimes and indict those most responsible for those crimes.

### ***Where to prosecute?***

- 1) Domestic trials.
- 2) Hybrid Courts: Ad hoc institutions, created specifically to address crimes that occurred as the result of singular political and historical circumstances. They are called hybrid because they encompass both national and international aspects. They are often of mixed composition, comprising both international and domestic staff. They apply international law exclusively or alongside national law.
- 3) International Criminal Court: The International Criminal Court was established in 1998 by the Rome Statute. It is competent to try those most responsible for crimes of aggression, war crimes, crimes against humanity and genocide. When a State, like Sri Lanka, has not ratified the Rome Statute, the International Criminal Court may only look into allegations of international crimes if it is asked to do so by the UN Security Council. However, this is very rare and has only happened twice so far, in respect of Sudan and Libya. This is because the threshold for such a request is very high: the situation must be seen as endangering international peace and security. In addition, powerful countries including China and Russia may veto a decision by the UN Security Council to refer situation to the ICC.



## **REPARATIONS**

### ***What are reparations?***

- Restitution: e.g. restoration of liberty, return to one's place of residence, restoration of employment and return of property.
- Compensation: Material or financial assistance aimed at “compensating” the damage suffered as a result of the human rights violation.
- Rehabilitation: e.g. medical and psychological care as well as legal and social services.
- Satisfaction: e.g. public apology, including acknowledgement of the facts and acceptance of responsibility; and commemorations and tributes to the victims.



### ***Reparations ≠ Development programmes.***

Development programmes concentrate on the production and provision of basic goods, which *all* citizens are entitled to *as citizens* and not necessarily *as victims*.

### ***Who is entitled to reparations?***

**Victims:** persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law. Where appropriate, and in accordance with domestic law, the term “victim” also includes the immediate family or dependents of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.

### ***How to design reparation programmes?***

International law takes cognizance of the fact that the State may not always have the resources to compensate for the entire damage suffered by victims. Reparations must nonetheless be ***fair*** and ***appropriate***. This means that reparations must be distributed without discrimination among groups or categories of beneficiaries. The forms and modalities of reparation should also be suitable, taking into account the harm suffered the categories of victims, the types of violations, and the needs and resources of the broader society.

Special attention should be given to the need of ***women*** and ***children*** when designing reparation programmes. Reparations for violations suffered by women and children must benefit them specifically. Sometimes, women may prefer individual rather than community-based reparations. Reparations for women could also take the form of skills training for income-generating activities. Reparations for sexual violence survivors require additional care to ensure confidentiality and security as well as non-stigmatizing operational practices.



## **MEMORIALISATION**

### ***What is memorialization?***

Memorialization refers to the process of preserving memories of people or events. It can be achieved through ceremonies of remembrance or commemorations; the building of museums, monuments and memorials.

### ***Why memorialization?***

At an individual and community level, memorialization responds to a fundamental human need of remembering those who lost their life or suffered hardship during a period of armed conflict or state repression.

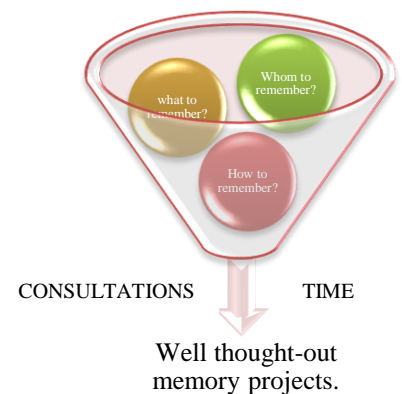
Memorialization also plays a crucial role for society both in terms of non-recurrence as well as reconciliation. First, with respect to non-recurrence, the building of monuments and memorials ensures that society does not forget the violence that was unleashed and its root causes. It also encourages all citizens—especially bystanders who were neither perpetrators nor victims of abuses—to reflect on their role and responsibility in the violence. Second, with respect to reconciliation, memory projects often contribute to building a bridge between divided communities. To this end, memory sites may celebrate values that were negated during a period of violence, despite being shared across communities.

### ***When to undertake memorialization projects?***

The types of events and individuals that a community chooses to remember are likely to vary over time. In addition, the passage of time enables a reflective approach on the past.

### ***Who should undertake memorialization projects?***

Memorialization projects should not be imposed by “outsiders”. Memorials are more likely to be well-received by communities, and to contribute to healing and reconciliation if they are designed based on broad consultations.



### ***How to advance the goals of Transitional Justice through memorialization?***



Memory projects may either contribute or hinder progress on Transitional Justice. They may delay reconciliation efforts if they are one –sided, if they fuel controversies or celebrate extremist or totalitarian ideologies. This is why it is important to ensure that memorialization projects are part of a comprehensive effort of remembering victims of all sides, that they are gender and culturally sensitive and serve educational purposes.



## **INSTITUTIONAL REFORMS: VETTING**

### ***What is vetting?***

Vetting can be defined as assessing integrity to determine suitability for public employment. Public employees who are personally responsible for gross violations of human rights or serious crimes under international law revealed a basic lack of integrity and may therefore be removed from employment on this ground.

### ***Why institutional reform and vetting?***

- Restoring the trust of civilians in public institutions.
- Preventing future abuses through the creation of institutions that protect human rights and impartially serve the public.
- Enabling the implementation of Transitional Justice processes: ensuring integrity and independence of the security and justice sectors is often a precondition to truth-seeking and prosecutions.
- Addressing the impunity gap: in a post-conflict or post-authoritarian context, only a limited number of criminal prosecutions are possible; vetting ensures that those who committed crimes are nonetheless held accountable to the society.

### ***How to proceed?***

#### ***Option 1 : Review process***

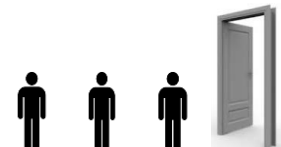


The first option is to screen members of existing institutions. These institutions will be gradually reformed, in part through personnel changes.

#### ***Option 2: Reappointment process***



The second option is to disband the entire institution and establish a new one.



Employees of the former institution may apply for their old positions, along with new applicants. The screening process takes place at this stage.

The vetting process should comply with constitutional and international norms, and be ***clear*** and ***precise*** in order to establish legal certainty and avoid political interference. The process must also be ***transparent*** to ensure public confidence.



Although, vetting is a crucial component of a successful transition, it is also very challenging and politically sensitive. In particular, the removal of a large number of civil servants and security personnel from office may result in crime upsurge and trigger other security risks. Therefore, the timing and scale of vetting policies ought to be carefully thought-through.

## **ADVANCING TRUTH AND JUSTICE IN SRI LANKA**

This background note, was written for a series of dialogues on Transitional Justice, and provides an overview of fundamental aspects and key issues in the field of Transitional Justice. It explores some of the options available in terms of truth-seeking, prosecutions, reparations for victims of mass-scale abuses as well as guarantees of non-recurrence. This note was prepared with a view of informing a serious and candid discussion on these options and the complex questions involved in the design of an appropriate and sustainable Transitional Justice process for Sri Lanka.

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