

The background of the cover is an abstract, textured surface with warm, earthy tones of yellow, orange, and red. A thin, vertical white line runs down the center of the image, slightly to the right of the main title. The overall effect is one of depth and complexity, suggesting a long and intricate process.

ADVANCING TRUTH & JUSTICE IN SRI LANKA

A REPORT OF SIX
DIALOGUES

Advancing Truth & Justice

in

Sri Lanka

A Report of Six Dialogues

International Centre for Ethnic Studies

&

South Asian Centre for Legal Studies

2015

Advancing Truth & Justice in Sri Lanka –A Report of Six Dialogues
Colombo, 2015

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Advancing Truth & Justice in Sri Lanka

A Report of Six Dialogues

by

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Foreword

Pursuing Truth, Justice and Healing in a Divided Society

The political transformation that occurred in January 2015 provided a window for a serious dialogue around transitional justice. The sustainability of this political transition will depend, among other things, on how the state responds to claims from the past. The International Centre for Ethnic Studies (ICES) saw 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.

The report documents the discussions of six dialogues on transitional justice that were held in different parts of the country during 2015. These discussions provided space for a broad group of stakeholders from 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 was to contribute to the generation of an organic and relevant transitional justice process in Sri Lanka. This initiative sought 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 politically feasible and sensitive to the peculiarities of the Sri Lankan conflict.

Three experts, Bina D'Costa, Eduardo Gonzalez and Albie Sachs, enriched the discussions with perspectives from other post-conflict and post-war societies.

Our thanks to Niran Anketell, Aruni Jayakody, Isabelle Lassee, and the South Asian Centre for Legal Studies for their contribution to this process and to the writing of this report. Our thanks to Bina D'Costa, Eduardo Gonzalez and Albie Sachs, for their contribution.

We hope this report will contribute to the public discussion on transitional justice that has only recently begun.

Mario Gomez
Executive Director
International Centre for Ethnic Studies

December 2015

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Acronyms

ANC	African National Congress
FARC	Revolutionary Armed Forces of Colombia – People’s Army
HRC	Human Rights Council
ICES	International Centre for Ethnic Studies
ICC	International Criminal Court
JVP	Janatha Vimukthi Peramuna
LLRC	Lessons Learnt and Reconciliation Commission
NP	National Party (South Africa)
OHCHR	Office of the High Commissioner for Human Rights
OISL	Office of the High Commissioner for Human Rights Investigation on Sri Lanka
OMP	Office of Missing Persons
PSO	Public Security Ordinance
PTA	Prevention of Terrorism Act
TDC	Truth and Dignity Commission (Tunisia)
UN	United Nations

Executive Summary

In the first six years following the end of the civil war the Sri Lankan government focused on development and economic growth. There were no serious efforts to establish the truth about past abuses, archive memory or respond to the multiple claims for justice. However, the presidential and parliamentary elections of 2015 presented an opportunity for serious dialogue around transitional justice. Following the presidential election in January 2015, the Sirisena Administration committed itself to implementing a “credible domestic process” to address past abuses.¹ Even by May 2015, the Government had not announced any details concerning a “credible domestic process”. There was little discussion in civil society on what a domestic transitional justice process would entail.

In June 2015, with the aim of generating a robust discussion around transitional justice options for Sri Lanka, the International Centre for Ethnic Studies (ICES) initiated a series of dialogues in five regional cities across the country. Given that there was only limited knowledge among civil society stakeholders on how other societies have engaged with their past, ICES invited three international experts to lead the dialogues and create awareness of comparative experiences in implementing transitional justice. The first round dialogues was held between 15 and 18 June 2015, in Trincomalee, Jaffna and Colombo. The second round was held between 30 October and 3 November 2015 in Colombo, Galle and Nuwara Eliya.

The first round of dialogues was led by Mr. Albie Sachs, former Justice of the Constitutional Court of South Africa and Mr. Eduardo Gonzales, Director of the

¹ Senior members of the Government, including the President, the Foreign Minister and the Minister for Justice, have at various points announced that the Government intends to implement a “credible domestic mechanism” to address human rights violations, including war crimes, during the last stages of the war. See, Kelum Bandara, “Our foreign policy is based on practical realities, not on ideological fantasies”, *Daily Mirror* (24 April 2015) <<http://www.dailymirror.lk/70191/our-foreign-policy-is-based-on-practical-realities-not-on-ideological-fantasies>> 31 August 2015; Sandun A Jayasekara, “Wijedasa: Domestic inquiry will be credible”, *Daily Mirror* (17 June 2015) <<http://www.dailymirror.lk/76525/wijeyadasa-domestic-inquiry-will-be-credible>> accessed 31 August 2015; Presidential Media Unit, “President assures of domestic mechanism to probe alleged human rights violations during conflict”, *The Official Government News Portal of Sri Lanka* (15 February 2015) <<http://www.news.lk/news/politics/item/6194-president-assures-of-domestic-mechanism-to-probe-alleged-rights-violations-during-conflict>> accessed 31 August 2015.

Truth and Memory Program at the International Center for Transitional Justice. The second round of dialogues was led by Mr. Gonzales and Dr. Bina D'Costa, Researcher at the Australian National University. Mr. Sachs, as a former member of the National Executive Committee of the ANC, shared insights into the competing pressures faced by a government in transition, and the successes of the South African Truth and Reconciliation Commission. Mr. Gonzales, a former member of the Peruvian Truth Commission, shared experiences of Peru's transition, which had many similarities to Sri Lanka's recent past, as well as relevant lessons from the transitions in Chile and Argentina. Dr. D'Costa, an expert witness on sexual and reproductive crimes at the International Crimes Tribunal in Bangladesh, shared the successes and pitfalls of Bangladesh's efforts at responding to demands for justice.

ICES selected participants from among members of civil society to attend the dialogues. Most of them were from the non-government sector and worked on a range of issues including human rights monitoring, gender based violence, poverty alleviation, communal integration and reconciliation. Each of the dialogues was also attended by a mix of lawyers, members of academia and religious leaders. The Trincomalee dialogue included two Members of Parliament, and several members of the Eastern Provincial Council. The two Colombo dialogues included representatives from diplomatic missions as well as donor agencies.

Each dialogue opened with introductory remarks from the experts who explained the comparative experiences of Latin America, South Africa, Tunisia and Bangladesh in implementing transitional justice policies. The participants then questioned the experts and presented their views on a range of grievances and issues that should be addressed by a Sri Lankan transitional justice process.

The dialogues revealed that there are significant opportunities as well as challenges for implementing transitional justice in Sri Lanka. Across the country, participants articulated a clear need for dealing with the country's past, and expressed strong support for the implementation of transitional justice policies. In particular, participants across all six dialogues expressed a strong desire to see

a truth telling mechanism, an accountability mechanism, and institutional and policy reforms that include a reparative component.

Participants demonstrated a strong knowledge of the human rights situation within the country, as well as political obstacles to implementing transitional justice in Sri Lanka. Yet, outside of Colombo, knowledge of specific transitional justice concepts and the comparative experiences of other post-conflict societies was low. Most participants expressed grievances which they wished to see addressed through transitional justice policies. In contrast to current mainstream discussions around transitional justice, which seek to respond to abuses that occurred during the last stages of the war, the participants articulated grievances against the state, as well as non-state actors, ranging far beyond the last stages of the war, even to events that occurred in the immediate aftermath of independence.

The grievances expressed were specific to each region, and were often viewed through the lens of each ethnic community. For example, participants in Jaffna and Trincomalee expressed grievances related to the last stages of the war, including shelling, denial of humanitarian assistance, sexual violence, as well as on-going violations relating to land grabbing and detainees. In contrast, in Nuwara Eliya, the discussion centred on the oppression experienced by Indian origin Tamils since independence. There was a clear view that the discrimination experienced by Indian origin Tamils was distinct to that experienced by Tamils in the North and the East. In Galle, the discussion centred on the rise of communalism, racism, as well as historical grievances inflicted during the JVP uprisings, the 1983 riots, as well as the student uprisings of the 1970s.

Additionally, there was significant scepticism about the Government's willingness and ability to implement credible domestic mechanisms. There was much discussion around the lack of political leadership for transitional justice issues, and the failure of political leaders to articulate the grievances of the electorate. The participants were acutely aware of the failure of previous state interventions, especially in terms of failure to prosecute human rights violations committed by state officials; reprisals against victims and witnesses who participate in the

criminal justice process; as well as of numerous commissions of inquiry that produced reports that have not been publicly released, and recommendations that have not been implemented.

As the Government embarks on implementing transitional justice in Sri Lanka, a number of matters must be directly addressed. Immediate steps must be taken to instil confidence and restore trust in the Government's commitment to implement transitional justice policies. In this regard, the Government should undertake immediate steps to demilitarize, release lands, release detainees, as well as implement legislative changes such as reforms to the PTA and Victim and Witness Protection Act. Further, in order to demonstrate that they are fully committed to a transitional justice process, the Government must lead a dialogue across all regions, ensuring people's grievances are heard. When designing transitional justice policies, the Government must strike a careful balance to address the grievances of all regions and communities, including abuses that took place outside the conflict-affected areas. The Government must undertake significant outreach and sensitization to ensure that the public are informed as to what transitional justice is, as well as the content of current Government proposals. Immediate steps must be taken to build capacity among civil society, as well as government, to implement, monitor and disseminate information relating to transitional justice policies. In the medium term, the Government will also have to focus on training and capacity building to ensure that the personnel who will staff the transitional justice mechanisms have adequate skills and technical capacity.

Introduction

In June 2015, with the aim of generating a robust discussion on transitional justice options for Sri Lanka, ICES initiated a series of six dialogues across five regional cities in Sri Lanka: two in Colombo, and one each in Trincomalee, Jaffna, Galle and Nuwara Eliya. Given the limited knowledge among civil society stakeholders on how other societies have engaged with their past, ICES invited three international experts to lead the dialogues and create awareness of comparative experiences in implementing transitional justice. The first round of dialogues was held between 15 and 18 June 2015, in Trincomalee, Jaffna and Colombo. The second round was held between 30 October and 3 November 2015 in Colombo, Galle and Nuwara Eliya.

The dialogues revealed the concerns of regional stakeholders, their shared views as well as issues of disagreement. The first round of dialogues was held prior to the release of the Office of the High Commissioner for Human Rights Investigation on Sri Lanka (OISL) report and the passing of the United Nations Human Rights Council Resolution. Thus participant responses in the first round of dialogues were mostly focused on expressing grievances, rather than responding to any of the policy measures that are currently being discussed in mainstream political discourse. The latter three dialogues produced a more detailed discussion on specific aspects of the Government's current proposals, including foreign participation in a judicial mechanism.

All the dialogues revealed a high degree of awareness of the political context as well as shortcomings of previous state interventions. Stakeholders articulated common grievances which they wished to see addressed through a truth commission, a judicial mechanism as well as legal and institutional reforms which include a reparative component. All six dialogues expressed concern about the willingness and ability of a new government to deliver a credible mechanism which has the confidence of affected communities.

This report captures salient remarks that were made at each regional dialogue, and provides an overall analysis of key themes.

Part I of the report presents the comparative experiences discussed by the experts, and highlights the lessons that could be distilled for the Sri Lankan context.

Part II presents a summary of the main interventions made at each regional dialogue.

Part III provides an analysis of all six dialogues, highlighting similarities as well as regional differences in participant responses.

Part IV lays out possible policy responses to the grievances articulated by participants.

Part V presents conclusions and recommendations for key stakeholders including civil society, the Government and the international community.

Methodology

This report captures salient remarks made at a series of dialogues on transitional justice held in five cities across Sri Lanka. Six dialogues were held in total, two in Colombo and one each in four regional cities: Trincomalee, Jaffna, Galle and Nuwara Eliya. The first round of dialogues was held in Trincomalee, Jaffna and Colombo from 15 to 18 June 2015. A second round of dialogues was held in Colombo, Galle and Nuwara Eliya from 30 October to 3 November 2015.

Selection of Experts

The dialogues were organised by ICES with the aim of raising awareness among stakeholders and stimulating discussion on transitional justice issues in Sri Lanka. Given that there was relatively little discussion in Sri Lanka about what lessons could be distilled from other post-conflict societies grappling with transitional justice policies, three international experts were selected to lead the dialogues. In selecting the experts, emphasis was placed on regional variation, as well as the personal experiences the experts had working within transitioning societies. Additional considerations such as the availability of experts and their ability to travel to Sri Lanka also played a factor in the selection of experts.

Given that in recent times Latin America has led the development of transitional justice norms, an expert from the region was sought to provide insight on what lessons could be learned for the Sri Lankan context. As the South African model has been much touted in both political and media circles in Sri Lanka, an expert was identified to elucidate the background, functioning and long-term implications of that experience. Further, an expert with knowledge of transitional justice in the South Asian context was also included, to see what lessons could be distilled for Sri Lanka.

With these considerations in mind the following experts were identified:

Mr. Albie Sachs, former Justice of the Constitutional Court of South Africa. Justice Sachs was a former member of the National Executive Committee of the ANC, and

had been part of discussions that resulted in the establishment of the South African Truth and Reconciliation Commission (TRC). He had shaped the discussions that led to the decision to allow amnesties to be granted in exchange of full disclosure of political crimes committed during the apartheid regime.

Mr. Eduardo Gonzales, Director of the Truth and Memory Program at the International Centre for Transitional Justice (ICTJ). Mr. Gonzales had been a member of the Peruvian Truth Commission, and had studied in detail the modalities of the truth seeking and accountability mechanisms in Argentina and Chile. Additionally, in his capacity as a Director at ICTJ he had advised several national transitional justice processes, including the Tunisian Truth and Dignity Commission (TDC).

Dr. Bina D'Costa, Researcher at the Australian National University. Dr. D'Costa is a long-standing researcher of gender-based violence in Bangladesh, and most recently had participated as an expert witness on gender and sexual violence in the International Crimes Tribunal for Bangladesh.

Given that the second round of dialogues was held after the release of the OISL report and the passing of the Government co-sponsored Human Rights Council Resolution, Mr. Niran Anketell was invited to make short explanatory remarks and respond to participant questions about the Geneva process. Mr. Anketell is a director and a co-founder of the South Asian Centre for Legal Studies, a Colombo based organisation that conducts research and advocacy on transitional justice issues. Mr. Anketell participated in the second round of dialogues held in Colombo, Galle and Nuwara Eliya.

Each dialogue opened with introductory remarks from the experts, sharing their views on different truth seeking and accountability processes, as well as how to counter the challenges faced by societies and governments in transition. The comparative experiences discussed by the experts are presented below under the following themes: nature and type of transitions; motivations for examining the past; truth telling; relationship between truth telling and accountability; amnesties.

Participants

ICES invited a mix of civil society members to the dialogues. The participants overwhelmingly represented the non-government sector, working on a range of issues including human rights monitoring and documentation, poverty alleviation, economic and social rights as well as social integration, reconciliation and community building. Each dialogue was also attended by religious leaders, lawyers, and academics. Two Members of Parliament, and several members of the Eastern Provincial Council attended the Trincomalee dialogue. Representatives from donor agencies and diplomatic missions attended the two dialogues held in Colombo.

Following the opening remarks, participants were invited to raise questions and express their views on the expert contributions. Often the participants also responded to the contributions made by fellow participants. The participant contributions were free-flowing, and included a mixture of personal opinion, sharing of personal experiences, venting of political frustrations and general observations. Part II of the Report reproduces highlights from participant interventions from each regional dialogue and presents salient remarks from each dialogue grouped along specific sets of grievances. At every stage of the dialogues, the participants were informed that their interventions will be kept anonymous, thus the report below does not attribute any of the interventions to any individual or organisation.

Additional Research

Additional research was conducted to provide contextual background information to the report. A limited desk review of local newspapers was conducted to gain a sense of how transitional justice policies have been discussed in the mainstream media. Several interviews were also conducted with community leaders in each city, to gain insight into where the fault lines are in regional debates about transitional justice.

Part I

Contributions by the Experts: Comparative Experiences

This section reproduces remarks made by the three experts on the experiences of how societies emerging from conflict and authoritarian rule implemented transitional justice policies. All three stressed that, similar to Sri Lanka, societies in transition pursue transitional justice in extremely challenging contexts. At the end of a conflict or a period of authoritarian rule, state institutions are weak, victim communities have little faith in the state to provide credible avenues for redress, and both resources and political will are scarce. In South Africa, the system of apartheid had been in place for more than four decades, and the larger history of white oppression of black South Africans spanned centuries. Similarly, in Latin America, state institutions had been weakened through decades of military rule, and much of society was in denial about the nature and extent of abuse that had been perpetrated.

This section outlines the nature and type of transitions experienced by post-conflict societies, and discusses their experiences in implementing truth commissions and conducting prosecutions. At the outset of a transition there are questions as to why a society should revisit its past. The experiences of Germany, Spain, and Japan illustrate that there are number of ethical, political and legal reasons why revisiting the past can facilitate social cohesion and strengthen the democratic process in countries emerging from conflict. In Latin America, South Africa and Tunisia societies have first opted to establish a truth commission to establish facts about the nature and pattern of past abuses. At times there is perceived tension between the work of a truth commission and that of an accountability mechanism. However, experiences in Latin America and South Africa illustrate that the relationship between truth and justice can often be complementary. In Latin America, where broad amnesties had been in place, the work of truth commissions enabled social and political conditions that fuelled demands for justice. In South Africa, the threat of prosecutions allowed the truth commission to uncover a more holistic truth, including that of perpetrator accounts of how abuses were carried out.

Nature and Type of Transitions

Transitions themselves come in many forms. As in Sri Lanka, a transition could be the complete military defeat of one party to a conflict, or the election of a new government, such as in Argentina. Alternatively, there could be a negotiated end to a conflict, such as in Colombia or the gradual handing over of power, such as in Chile. The terms and conditions under which transitions takes place have a direct impact on the space available to pursue transitional justice policies. In particular, the presence or absence of one or more parties to a conflict in the post-transition political and military power structure has a direct correlation to the amount of space available for civil society and policy makers.

Where there has been a complete transfer of power, there are obviously less constraints on the new administration. When the government of Fujimori fell in Peru, civil society was able to impose direct pressure on the new government and implement legal and institutional reforms that complied with international human rights standards. However, in many other instances, transitions are incomplete: those who perpetrated the abuses continue to have a strong hold on political or military power for many years after a transition. In South Africa, even after a formal end to apartheid was negotiated, apartheid era security and intelligent forces, who had perpetrated systematic abuses, continued to stay in power. In Argentina, despite the formal end of military rule, the military's stronghold over other state institutions cast a shadow over the subsequent democratically elected civilian governments.

Within this constrained space, it is up to the stakeholders, especially civil society, to make an assessment of the limitations of a transition. Civil society must assess a) the opportunity to make a meaningful intervention? b) the extent of that opportunity and c) when the window of opportunity will close. When assessing the limitations of the political space, it is necessary to identify the stakeholders that could be negotiated with, and engage them early on in order to counter opposition. Similarly, in making these calculations, it is imperative that there is recognition that the time afforded by a window of opportunity is limited.

At times transitional justice mechanisms are established too late into the process of transition, when the political will is on the decline. For example, in Tunisia, by the time the Tunisian government completed national consultations and sent the transitional justice law to parliament, the traditional tensions among secularists and Islamists were rising within the legislature and parliament was already under significant pressure over several other highly sensitive issues, including economic and constitutional reforms. In the interests of coherence, all the transitional justice mechanisms were established via one law. The government also created a Transitional Justice Ministry to coordinate all the transitional justice policies. However, despite having a broad mandate, the 'super ministry' lacked the flexibility to adequately coordinate all the various transitional justice mechanisms. Though the transitional justice law was approved largely in its original form, it took more than a year to set up the mechanism. By the time the Tunisian Truth and Dignity Commission (TDC) commenced work, a member of the former regime had been elected president. From the outset of President Essebsi's campaign, he disavowed any support for the transitional justice process in Tunisia. Thus, the TDC was undermined by the lack of political support from the new administration.

Why Examine the Past?

There are number of legal, ethical and political motivations for dealing with the past. It makes sound political sense to deal with the past, as it gives more resilience to a society undergoing a transition. There is often the view that because generations have passed since historic abuses occurred, a society has moved on. However, the tragic conflicts in the former Yugoslavia, Northern Ireland, and Spain illustrate otherwise. In all of these countries the political elites were determined not to touch the past. However, this strategy only succeeded in creating mistrust and suppressing grievances.

Similarly, there are strong moral imperatives to address the past. It is difficult to establish a democratic, peaceful society if democracy is held hostage to perpetrators. From the perspective of victims, if the peaceful aftermath of conflict looks largely similar to the past – where perpetrators of grave human rights abuses roam free – then democracy is weakened. Victims and the public at

large will be unwilling to trust the government. The seeds of mistrust could grow, pitting neighbours against one another, and one region against another.

Few could imagine that the urbane, cosmopolitan Yugoslavia of the 1980s would descend into a tragic cycle of violence, the way it did in the 1990s. Repeated perpetrator narratives that emerged from the International Criminal Tribunal for the former Yugoslavia, revealed that perpetrators often inflicted violence in retaliation to offences committed decades and centuries earlier.

It is only when a country is willing to examine its past that it can genuinely hope to move on from that past. Germany stands out as a country that has made unique progress on addressing the savagery of its own past. In the aftermath of World War II, Germany made a concerted effort to examine past abuses, as well as to keep alive the memory of its violent past. In fact, despite the fact that half a century has lapsed since the end of World War II, every German student continues to be informed about the horrors of the holocaust.

Germany's efforts to face its past have had a transformative impact on its relationship with its neighbours and the wider region. Europe is currently facing multiple challenges in the form of trans-national terrorist threats, fiscal crises, and fundamental questions about the future direction of its union. Yet, few could imagine that Germany and France or Germany and Poland would ever wage war against one another. In dramatic contrast to half a century ago, Germany and France are at the heart of the European Union.

In contrast, Japan has never apologized or acknowledged the full range of its conduct during World War II. Despite protests from Japan's neighbours, successive Japanese Prime Ministers have paid their respects at the memorials of alleged war criminals. Calls for justice and reparations from women recruited into sexual service by the Japanese military remain unaddressed. As a result, Japan's neighbours, as well as the broader East Asian region, remain suspicious and mistrustful of Japan's rise and strategic reach in East Asia.

Once a decision has been made to examine the past, questions then emerge about *how*. Transitional justice encapsulates key legal concepts that have been developed on how to address the past. An important focus is victims: victims' right to truth, victims' rights to justice and victims' right to reparations. Using a language of rights could unify victims across religious, ethnic or regional divides, as all are entitled to the same set of remedies. Whether a victim has been abused by a state agent, or whether a victim has a claim against the state for failing to prevent a terrorist attack, all victims have the same rights.

Truth Telling

In terms of sequencing transitional justice mechanisms, many countries have opted to implement a truth telling mechanism first. Official (state-led) truth telling mechanisms generally take the form of truth commissions, which are temporary, non-judicial mechanisms. Their purpose is to establish the facts about human rights abuses and crimes, as well as their causes and consequences.

When establishing a truth commission, decisions must be made relating to its mandate, composition, resources, and powers. Historically, in Latin America truth commissions have had narrow mandates to investigate a set of particularly egregious crimes.² The South African truth commission and more recent innovations such as Tunisia's TDC were given broader mandates to cover historical abuses, as well as violations relating to social and economic rights. An appropriate balance must be struck between crafting a mandate that adequately covers grievances that are representative of a broader set of violations, yet also ensuring the mandate does not result in an unwieldy situation where there is insufficient time and resources to address all matter set out in the mandate.

The funding and human resources available to a truth commission can be determinative of its success. The Tunisia's TDC has a broad mandate, and a budget of USD 10 million annually. The Peruvian truth commission, in

² For example the Chilean Truth Commission was mandated to only investigate human rights abuses that resulted in death or disappearance. This formulation excluded torture and other abuses that did not result in death. Similarly, Argentina's Truth Commission's mandate was limited to investigate disappearances between 1976 and 1983.

comparison, had a limited mandate but operated for three years within a budget of USD 12 million.

Giving centrality to the testimony of victims has been a key strength of truth commissions, as it helps to give voice and restore dignity to victims. In Argentina, the truth commission did not hold public hearings; however it collected over 1500 statements from survivors. In contrast, the South African truth and reconciliation commission conducted public hearings even in remote parts of the country, and the testimony was broadcast once a week via radio and television.

In terms of composition, it is critical that persons of the highest integrity are appointed, who have the trust and confidence of all communities, especially the victim communities. The commissioners as a team should represent ethnic as well as gender differences. Ideally, the various traits of individual commissioners should balance out strengths and weaknesses among commissioners. In South Africa, Archbishop Tutu played an important role as a charismatic and empathetic Chair that established a direct, visceral relationship with victims during public ceremonies. Equally important, the Chair was supported by Deputies who had a methodological approach in coordinating the work of the committees.

Alternatives to state led truth commissions include civil society led truth commissions. These have been established in Colombia, Guatemala and Brazil. The work of these civil society truth commissions have made important contributions towards state led initiatives, and in some instance laid the groundwork for the state appointed truth commissions.

Relationship between Truth Telling and Justice

Across Latin America, including in Peru, Chile and Argentina, truth commissions facilitated social and political conditions that enabled prosecutions. In all three countries, the truth commissions were implemented as a first measure by the new successor regimes. They established a powerful narrative about the nature, pattern and extent of human rights abuses, provoked outrage among the wider public and fuelled demands for justice. In all three countries, the outgoing

regimes had implemented comprehensive amnesty laws preventing not only prosecutions but also the investigation of human rights abuses. Thus, the truth telling mechanisms were particularly powerful at lifting the veil of silence and denial that pervaded over state abuses.

In South Africa, the threat of prosecutions encouraged a more holistic truth to emerge about apartheid era crimes. As the African National Congress (ANC) and the National Party were negotiating an end to apartheid, the National Party insisted on providing blanket amnesties to apartheid era public officials, including security forces. The ANC on the other hand wanted to pursue prosecutions. However, it was held back by two considerations: first it was concerned about the potential prosecution of members of the ANC; second, as the first post-apartheid election drew near, it became apparent that the support of the security institutions was critical to the success of the elections. In order to secure their support, and guarantee peaceful elections, the ANC came to believe it was necessary to grant them a conditional amnesty. As a measure of compromise, the ANC offered amnesties for those individuals that had committed political crimes, provided they came before the Truth and Reconciliation Commission (TRC), and confessed their crimes in full. Those that lied to or did not come before the TRC were liable to be prosecuted. At the first instance, faced with the threat of prosecutions, the TRC received a large number of amnesty applications from many low-level perpetrators. Critical to incentivizing perpetrators to come forward was the actual commencement of investigations and prosecutions against their fellow perpetrators. In this way, the TRC was able to capture narratives that are lost to many other truth commissions, as perpetrators came forward and publicly shared details of their crimes.

However, in the long run, the conditional amnesties did not yield the full results that were expected. It failed to wield the threat of prosecutions effectively against high-level perpetrators so as to lure them to tell the truth about their participation. The government also failed to prosecute the overwhelming majority of the perpetrators that were either denied amnesty or did not come before the South African TRC. In a sense, the perpetrators that came before the TRC were ultimately undermined, as their counterparts effectively enjoyed

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amnesty without having to tell the truth at all. Similarly, the victims and survivors were also ill-served. Many victims did not have the opportunity to hear the truth about what happened to them or their loved ones, and many victims did not see the perpetrators that harmed them held accountable for their wrongdoings.

International law has dramatically evolved since the South African conditional amnesties were conceived of in 1991. Today, it is no longer permissible to give amnesties for those who commit international crimes, including war crimes, crimes against humanity and genocide. Nonetheless, the South African model stands out as a dynamic example of the interplay between truth and justice, demonstrating that the measures are not mutually exclusive and instead need to be used to reinforce each other.

Corruption and Transitional Justice

Entrenched corruption can play a determining role in bring to an end authoritarian regimes. In Peru, President Fujimori enjoyed much approval and prestige for his decisive defeat of the Shining Path, a brutal terrorist organisation. This was despite the fact that under the goal of combatting terrorism, the Fujimori regime employed brutal tactics that crushed many political opponents and dissidents. In the immediate aftermath of the defeat of the Shining Path, Fujimori was able to use his new-found approval to spearhead legal and constitutional reforms that undermined many of Peru's constitutional protections, and concentrated power around Fujimori and his inner circle. The public exposure of the ensuing spread of corruption and nepotism, was a critical factor that led to the downfall of the Fujimori government. Subsequent Peruvian governments were able to generate significant political support for the transitional justice process by successfully investigating and prosecuting Fujimori for both human rights abuses as well as corruption related charges.

Amnesties

Political elites often attempt to advance the argument that punishment of perpetrators is either not necessary or not politically feasible. However, as the purpose of an amnesty law is to, in effect ‘forget’ past criminal acts, in so far as preventing criminal action, a discussion around whether or not to provide amnesty is not a productive way to advance discussions around how to deal with egregious human rights abuses. Countries such as Colombia are employing sophisticated policy tools that seek to incentivize perpetrators to participate in the transitional justice process, without resorting to granting blanket amnesties. In Colombia, it was imperative that an assurance be granted to the Revolutionary Armed Forces of Colombia (FARC) rebels, that upon entering into a peace agreement, they will not immediately be prosecuted and sentenced to jail. Instead, the overarching goal was to demobilize paramilitary groups, and incentivize them to participate in the political process.

The Agreement between FARC and the Government of Colombia, announced in September 2015, promises to create a new tribunal in the form of a “Special Jurisdiction for Peace”. Those who cooperate with the tribunal and provide full disclosure of their conduct would receive a minimum sentence of five years, and a maximum of eight years, under special conditions that would ‘restrain their liberty’. Importantly, the sentences would not have to be served in prison. Those who come before the tribunal, and confess their crimes during the court process will receive a sentence that has to be served in prison from five to eight years. Those who do not cooperate with the tribunal at all, but are convicted, could end up receiving a maximum prison sentence of twenty years.

There have been limited discussions around amnesties in the Sri Lankan context. A few commentators have suggested the merits of the amnesties in the context of the South African TRC. However, as noted above, the conditional amnesties in South Africa operated in conjunction with a clear prosecutorial strategy. Sri Lanka's Foreign Minister, Mangala Samaraweera, on a number of occasions has ruled out the possibility of amnesties. Recent media reports relating to the issue of a truth commission suggest that the Government could be considering pardons

for those who confess their crimes, but with pardons granted only after an accused has been convicted. It is unclear if the Government is proposing to grant amnesty to those who come before a truth commission, or to grant pardons to them once they have been convicted of a crime. As Sri Lanka grapples with questions relating to amnesty, it is important that it moves beyond a discussion around blanket amnesties, and develop a prosecutorial strategy in light of the rights of victims and the requirements of criminal justice.

Part II

Highlights from the Regional Dialogues

Following the introductory remarks by the experts, reproduced in section one, participants were invited to ask questions or provide comments. As noted above participant responses were free-flowing and ranged from personal experiences, articulating grievances experienced by his or her community, venting political frustrations to expressing general observations.

Most participants did not discuss transitional justice concepts, but instead expressed grievances they wished to see addressed through transitional justice policies. Outside of Colombo, knowledge of specific transitional justice concepts, as well as comparative experiences, was low. In the second round of the dialogues held in November 2015, which occurred after the Human Rights Council session in Geneva, participants asked more substantive questions, seeking clarifications and explanations to some of the policy options outlined by the Government in Geneva, as well as those contained in the Human Rights Council Resolution.

The section below reproduces remarks made by participants at each regional dialogue, grouped according to grievance specific sub-themes. At the regional dialogues the grievances that were articulated were specific to that region. There was little discussion around the experiences of other regions. For example, the participants at the Jaffna and Trincomalee dialogues articulated grievances relating to the last stages of the war, specifically shelling, sexual violence and the denial of humanitarian assistance. There was also a strong sense that there are multiple and competing narratives about the causes of the war. Similarly, in Galle, there was discussion around missing persons and a range of historical grievances. In Nuwara Eliya, the discussion was centred almost exclusively on the oppression experienced by Indian-origin Tamils.

In Galle, the participants sought clarification on foreign participation in a Sri Lankan mechanism, and largely expressed support for such participation. At both Colombo dialogues, where the participants were mostly members of civil society and a few members of the diplomatic and donor community, a number of detailed policy questions were raised. Participants asked questions relating to the

possible relationship between a truth commission and a prosecutor, as well as whether foreign participation in a Sri Lankan mechanism would undermine the sovereignty of the people.

Participants were assured that their interventions would be kept anonymous and none of the comments below are attributed to any specific individual or organisation. Quotation marks are used to acknowledge statements and phrases used by the participants.

Trincomalee (8 June 2015)

What is Transitional Justice?

The session opened with questions from a senior member of the legal profession as to what transitional justice is, and how it differs from ordinary justice. The participants raised the important question of what transitional justice offers to the individual, and to society at large. The experts responded by explaining that transitional justice is a descriptive term that describes the specific challenges of achieving justice in a society that has undergone radical social and political change. The ordinary demands of justice, such as compliance with the law, prosecutions, and punishment, do not change in such a context. However, the scale of justice could change. At the end of a conflict the number of victims could be in the thousands, and the crimes are of a much larger scale and gravity than ordinary crimes. Similarly, society at all levels could be implicated in perpetrating abuses, for example, from the soldier who pulled the trigger, to the journalist who spread misinformation and the manufacturer who supplied weapons.

Historical Abuses

A number of participants raised the subject of the 1989 eviction of Muslims from Jaffna. It was noted that both Velupillai Prabhakaran, leader of the Liberation Tigers of Tamil Eelam (LTTE), and the democratic leadership of the Tamil people, represented by Mr. Sampanthan, had apologized to the Muslim community. Yet,

it was acknowledged that an apology alone was insufficient. Those responsible for the suffering of victims must be brought before a court of law and held accountable for their actions. A number of other historical grievances were also raised, including post-independence era violence suffered by minority communities, settling Sinhala communities in predominantly Tamil areas, discriminatory language policies that adversely affected minorities, and widespread abuses that occurred during the 1980-89 JVP struggle. Participants noted that historical discriminatory practices, such as land grabbing and settling Sinhala communities in the Eastern Province, have had a profound effect in undermining the historical ties of Tamil communities to that part of the country. Specific incidents of violence, such as the Kattankudy Mosque attack, were also raised.

Wartime abuses and on-going violations

Specific wartime incidents were also raised. Violence in border villages and the last stages of the war were also highlighted, including the death of an estimated 40,000 civilians. One participant observed that the Government had deliberately expelled humanitarian actors, including the United Nations, from the war zone. It was noted that the Government had only sought to provide humanitarian assistance to less than 70,000 civilians trapped in the Vanni, when the real figure was in excess of 300,000. As a result, civilians lost their lives not just from artillery attacks but also from the lack of food and water. One participant stated that individual soldiers should not be held responsible for such crimes; instead those who planned and ordered the war must be held responsible.

Women living both in the war zone and in border villages were identified as suffering from specific types of harm, including sexual violence. In the aftermath of the war, women were left in a particularly vulnerable position. A number of participants, both male and female, noted that the female population continues to suffer physically, psychologically, and economically. Many have lost access to their properties, especially properties owned by their husbands who had either died or are missing.

The subject of enforced disappearances was also raised. One participant noted that, “thousands of families have lost their sons.” The participant asked what these families can expect in terms of redress and whether the victims of the war will ever receive compensation.

A number of participants referred to ongoing violations and asked, “Could we really consider the past to be behind us?” Ongoing practices relating to the appropriation of land by state actors have served as an “effective way of breaking [the] society”. A number of participants observed that “land grabbing of Tamils and Muslims” is a significant concern in the Eastern Province.

Ethnic Identity and Political Representation

A number of interventions related to ethnic identity and political representation. A participant acknowledged that the “main problems in this country have an ethnic dimension”. Another participant observed that, as Sri Lankans, “we don’t have a common identity”. Yet another objected to referring to Tamils as ‘minorities’. It was argued that the “Tamil people constitute a nation” instead of a minority within Sri Lanka. Many of the participants were of the view that, in addition to telling the truth about human rights abuses and holding those responsible accountable, Sri Lanka must also reach a political solution to the ethnic conflict.

Transitional Justice Policy Options

The need for multiple transitional justice mechanisms was evident from the reactions of the participants. First, the participants articulated the need for a truth telling and accountability mechanism. There was recognition that all three communities, Tamil, Muslim and Sinhala, had suffered abuses. However, there was also a recognition that the three communities shared multiple and competing narratives about the causes and consequences of the conflict. In particular, a number of participants expressed the view that there must be an accurate understanding of the causes of the war. One participant observed that all

communities need to understand, “Why was the war conducted? Why was the [LTTE] struggle conducted? The Sinhalese people must know the truth.”

In terms of justice, there was recognition that Tamils, both as a community and individually, demand justice. At the same time, it was stressed that this demand for justice was separate from revenge. Acknowledgement, as well as accountability for abuses suffered, was deemed a precondition to reconciliation. Similarly, it was emphasized that any accountability measure must not merely target the low ranking trigger pullers; rather those who planned and gave orders to conduct hostilities, especially the last stages of the war, must be held accountable.

Willingness and Ability to Provide Transitional Justice

Significant scepticism was expressed over the capacity of the current Government to deliver credible policies. Past failures of commissions of inquiry were particularly highlighted. Previous governments had failed to implement the recommendations of previous committees and other commissions. One participant asked, “Have any of these reports and commissions brought about any justice or changes in the lives of the people affected?” Participants noted that even the much discussed recent LLRC recommendations were yet to be implemented and stressed that in a proposed truth commission, the selection of commissioners is especially important to win the confidence of stakeholders, and that they must be ethnically diverse, and have the confidence of minority communities.

Participants doubted the political will and the genuineness of the intentions of policymakers when pursuing transitional justice policy measures. A number of participants expressed dismay at the inability or unwillingness of political parties to adequately represent the demands of the electorate. One participant likened the relationship between the electorate and the representative as follows: “People are in an aircraft. Half way through the journey the pilot jumps out – abandoning the plane.” This disenchantment with political representatives was expressed with reference to both majority and minority political parties. The

commitment of the Government to pursue transitional justice was especially questioned, given that a number of violations were ongoing.

The experts did not make specific interventions relating to reparations or guarantees of non-recurrence. However, it was noted that acknowledgement and official apologies alone were insufficient. It was noted that future law reform processes need to ensure that minorities, including women, are adequately represented in the law making process, including in Parliament. Reform of the Prevention of Terrorism Act (PTA) and resolving land issues were deemed priority issues for law reform.

Jaffna (9 June 2015)

The Jaffna dialogue participants were mostly Tamil civil society members, and to a lesser extent some Muslim members. They expressed a strong desire to see a truth telling and accountability mechanism. The majority of participants lamented that there was a failure to tell the truth about past abuses. One participant stated that, “Most people in the country don’t speak the truth. Our society is one that is deeply hurt.” Another participant noted that, “In Sri Lanka the truth has not been found.” Some questioned whether there had been a meaningful transition in Sri Lanka. Some participants referred to ongoing violations, and argued that little had changed. Others argued that, “Individuals have changed, but the structure remains the same.”

There was a desire to establish facts and set an authoritative record of both historical and on-going abuses. Historical grievances included discriminatory practices of the state since independence, abuses committed in the 1970s at the outset of the conflict, and the eviction of Muslims from Jaffna. More recent violations such as the status of internally displaced persons, ongoing land grabbing, and the last stages of the war were also raised. One participant raised the need to address discriminatory practices across and within communities, including inter-caste violence and violence against women.

Some Muslim participants expressed concern that since it has been decades since their eviction from Jaffna, there is a real danger that they will not be able to reassert their identity in the places from which they were evicted. The participant noted that the Muslim community still struggles to reassert itself since its eviction. Given that there has been no public discussion as to why Muslims were evicted, he noted that, “We still don’t know why they were evicted [or] why they were considered suspicious... there must be truth, justice and reparations as to the Muslims that were evicted. The idea that Tamils and Muslims now live in a reconciled way – I think is misleading and seeks to cover up reality.”

Last stages of the war

There was also significant discussion about abuses that took place during the last stages of the war. One participant noted that 2009 was the culmination of structural violence against Tamils since 1948. A number of participants acknowledged that, although most of the abuses had been committed by state forces, it was important to acknowledge that non-state actors had also committed violations. It was noted that external actors, including international organizations, were deliberately expelled from areas where the last stages of the war were conducted. One participant referred to the Government’s shelling strategy and stated that, “There are youngsters in the Vanni who have pieces of shell embedded in their skin.” Another participant noted that, “Banned weapons were used.” Another stated that, “The rape of children, the rape of women was systemic.”

Militarization

Continuing military occupation of the Northern Province was a related concern. One participant lamented that, “Generals are still behaving the same way today.” In this regard, the continued practice of appointing military officials to civilian posts was discussed. A participant noted that “General Fonseka [had been given] field marshal status – for his meritorious performance and gallantry during the humanitarian operation ... Jagath Dias was recently reappointed [to another diplomatic post].”

Disappearances

Another common theme was enforced disappearances. Participants noted that, “Thousands have disappeared.” “Problems of disappearances have not been addressed. We have proof where they were taken, [and] by whom.” “Disappearances were conducted in a 'systemic' manner.” “Thousands have disappeared.” “Lots of atrocities were intensified by the PTA.”

Land Grabbing

Land and property issues were similarly highlighted. One participant noted that, “More than 9900 families continue to live as refugees in their own country ... People must return to their own lands”.

Institutional Capacity and Political Will

Participants questioned the capacity and willingness of existing state actors and institutions to implement transitional justice policies. They did not refer to any specific mechanisms when discussing problems related to institutional capacity. Rather, they expressed general concerns which they felt applied across the board, and must be addressed in all future mechanisms. First, it was noted that there is a legal framework in the country that is not implemented. For example, a participant stated that, “We have laws relating to fundamental rights, but they are not implemented.”

Participants were mindful of the failures of previous Commissions of Inquiry and insisted that these be addressed in any future mechanism addressing accountability. International participation in any mechanism was deemed essential. Some were of the view that an international body should administer the entire mechanism. A number of participants expressed a specific desire to see an international criminal tribunal. One participant stated that any tribunal that is set up for Sri Lanka should have a link to the ICC. It was clear that the composition of a mechanism must be addressed in such a way as to both be representative of

diversity, as well as include persons who are viewed to be independent, impartial and have the confidence of minority communities.

Truth Telling

As the wide range of grievances was being discussed, a number of participants expressed concern as to the ability of a truth telling mechanism to handle such a broad mandate. It was argued that some violations must be prioritized over others, and that the last stages of the war be among those. However, participants also stressed that the “truth itself is not enough”. In terms of procedures, there must be women’s participation, and the process must be led by the victims.

Women’s participation

The Jaffna dialogue included the participation of a number of women’s civil society groups, and two of them raised the concern that women need to be included at all stages of the decision making process, not just when a particular issue related to women arose. They questioned the experts as to the role played by women in other post-conflict societies. The experts responded that women have in many instances taken a visible role, as the men were either missing, in detention or participating in the conflict. In Argentina, the mothers and relatives of the disappeared made an iconic contribution to the search for the missing through their regular protests at Plaza de Mayo, in central Buenos Aeries. In Colombia, women’s groups initiated truth commissions of their own. In South Africa, one-third of the staff of the TRC were women. In the context of a truth commission it is particularly important to have women play an active role, as experience has suggested that although women participate, additional effort is required to get them to move beyond what happened to their male relatives, to share their own personal experiences.

Colombo (17 June 2015)

In Colombo, the participants comprised the donor community, civil society organizations, academia, and the general public. There was a high degree of awareness of transitional justice concepts and policy options. The participants questioned the experts about the relevance of Tunisia's TDC to the Sri Lankan context, and whether there are any lessons to be learned from the link between corruption and accountability for human rights abuses in Peru. The South African amnesty framework was discussed at length, with participants wanting to know whether the offer of amnesty had the impact initially intended. Similar to the other dialogues, there were concerns about the lack of political will and the failures of past state interventions. There was a particular concern that there would be little support among the Sinhala public for transitional justice mechanisms.

Colombo (3 November 2015)

The second Colombo dialogue generated a detailed discussion on policy options for transitional justice in Sri Lanka.

Conducting National Consultations

The experts were asked for guidance on how to conduct consultations within a limited timeframe. They responded that it is important that consultations are conducted in a time sensitive manner, so that the window of opportunity to design and implement transitional justice policies is not curtailed. One of the primary challenges to be overcome when implementing a consultation process is that often the affected communities are not familiar with transitional justice concepts. For example, in Tunisia, the consultation process was more of an information giving process, where the government first had to 'sensitize' the public to transitional justice concepts. However, the Tunisian process did have important features, such as having a working group consisting of both government and members of civil society draft the final report on national consultations.

Links between a Truth Commission and a Prosecutor

An audience member noted that the Tunisian TDC had a mandate to forward cases for prosecution, and asked how they determined which cases would be dealt with by a prosecutor and which by the Truth Commission. Mr. Gonzalez responded that it is important that the competencies of the two mechanisms do not overlap. A truth commission reconstructs historical patterns of abuse, and the information gathered by a commission should be available to a prosecutor and a court of law. Similarly, the findings of the truth commission can help to inform prosecutorial policy. However, the Tunisian law gives the capacity to directly forward cases to the prosecutor's office, and in such cases the prosecutor does not have the discretion to decline a prosecution. As a result, this imposes a heavy onus on the TDC to operate according to the principles of criminal law, including due process. In effect the truth commission becomes 'prosecutorialized', and creates a strain in the function of the commission.

Foreign Participation and Sovereignty

There was a detailed discussion of whether having foreign participation in a domestic mechanism would undermine the 'judicial power of the people'. The experts claimed that it is first important to understand the concept of sovereignty as a function of the state. Mr. Gonzalez explained that, "It refers to the capacity to do the thing the state is created for – a state is created to satisfy the rights of the people." He stated that since the Declaration of Independence, states were created not because the people wanted a master, but because citizens wanted to create a servant. He added that under modern concepts of statehood, states exist to satisfy the rights of citizens, which necessarily includes the rights of victims. He argued that if a state requires assistance to fulfil its basic functions, then international assistance should be welcomed.

Similarly, Dr. D'Costa stressed that at times foreign judges may be required to strike a gender balance in a domestic mechanism. Given that any mechanism will be required to address gender-based violence, it is important that judges are

gender-sensitive and have experience in addressing similar specialized crimes. She further observed that the presence of female judges in the International Criminal Trial for the Former Yugoslavia was critical in recognizing that rape was an element of a crime against humanity.

Permanent Judicial Mechanism

A participant questioned whether a judicial mechanism should be a permanent institution. The experts responded that it would depend on the political environment, and that a permanent court could deal with future crimes as well as past crimes. It was noted that at least two previous commissions of inquiry on disappearances have recommended that a permanent special prosecutor be established to deal with human rights abuses.

Galle (4 November 2015)

The Galle Dialogue was attended by members of civil society, as well as members of the Buddhist, Catholic, Muslim and Hindu clergy.

Current conditions

The first participant to open the discussions observing that Sri Lanka faces a rare window of political opportunity, and that we need to use this opportunity to reflect on our past as well as the present. The participants noted that with the end of the war new phrases, such as 'rana viruvan',³ have entered the mainstream discourse. However, they noted that, "We must pause to examine the meaning behind such phrases. Is there really such a thing as a 'rana viruvan'? After all, they are merely soldiers, they are not heroes." It was pointed out that these words had been created to advance 'extremist causes' and to advance 'propaganda'. Mr. Gonzalez noted that this was an excellent observation, and that it is important that Sri Lanka revisit the terminology it uses to describe the past. He stressed that

³ 'War heroes' in Sinhala.

it is important to understand that terms such as 'victim' and 'perpetrator' are subjective.

It was recognized that there is a need to create trust with the communities that were most affected by the war. It was noted that there are extremist groups opposing the Sri Lankan Government proposals, and that such opposition must be countered, and greater efforts need to be made to prevent the rise of racism and facilitate reconciliation. One participant suggested that we should consider alternative means of promoting reconciliation, for example through the Arts, including film, drama, poetry and songs.

A female participant identified language barriers among communities as the basis for “all other problems”. She stated that the North and the East, and the South are unable to articulate their complaints in a common language. She further observed that the current Government has established a Ministry of National Dialogue – yet it is not engaging in an active dialogue with the country.

The Role of Religion and Transitional Justice

A Buddhist monk questioned whether mere discussions such as these are sufficient to facilitate reconciliation. Another monk reiterated that none of the religious leaders wanted to promote ‘communalism’ or ‘racism’. He noted that Galle is a peaceful multi-religious city where religious leaders play an active role in fostering cooperation, and often intervene in potential conflicts, even before the police. He further noted that the intervention of religious leaders was able to prevent the violence in Aluthgama from spreading to Galle.

Another monk noted that according to Buddhist values, “We can’t cover up sins, we have to open it, [and only] then can we dissolve it.” He stated that, “There is a lot of dirt from the past”, and that we must learn from the past, and develop solutions so that the past doesn’t repeat itself. There was a similar acknowledgement from a member of the Catholic clergy that all religions promote reconciliation. A retired army officer reiterated that, “In every religion

there is justice”, and that “If there is real religion there should not be so much conflict”.

The experts welcomed the interventions by the religious leaders, and noted that, “The role of religion and religious leaders in a reconciliation process can’t be emphasized enough.” Mr. Gonzalez noted that issues of justice, human suffering, and compassion are within the purview of every religion. Religious leaders could play an important role in discussing human suffering and empathy, and “How to feel as our own the suffering of others”.

Historical Grievances

There was general acknowledgement that any attempts at dealing with the past must go beyond the last stages of the war to examine historical abuses, including abuses during the JVP uprising, and various riots in the 1950s as well as 1971. A member of the Buddhist clergy suggested that any investigation must go as far back as the independence movement.

Notably, a former civil servant discussed his experiences during the 1983 riots. He recalled an incident where he was instructed by Gamini Dissanayake to burn the Jaffna Bazaar, in order to prevent individuals from voting. Decades later, when the participant had tried to submit details of his personal experiences to the LLRC, the LLRC had said the submission could not be considered, as it referred to events that were outside its terms of reference.

The Missing

A female participant noted that although there is much discussion about missing civilians, there is little discussion around military personnel who have disappeared. She lamented that her son, a member of the Sri Lankan Army, had disappeared, and his fate had never been clarified.

One participant noted that the demands to search for the missing have come from the North and the East. However, large numbers of disappearances were

reported from the South in the 1980s and 1990s. Thus, she questioned whether there should be a similar demand for justice from among relatives of the disappeared in the South.

Abuses against women

A female participant noted that addressing discrimination against women must be an important aspect of any transitional justice policy. It was noted that there are a number of ongoing violations against women, and in particular that “Justice is not enjoyed by women in the estate sector”. Dr. D’Costa responded that participants should refer to Security Council Resolution 1325, which is binding on Sri Lanka, when developing ways to address the grievances of women. In particular, women’s groups around the world have developed action plans on how to implement Resolution 1325, and these documents may be instructive to Sri Lankan activists.

Discussion around current policy proposals

Foreign Participation in a Domestic Judicial Mechanism

One participant questioned whether there will be foreign participation in a domestic mechanism. Mr. Anketell replied that there is indeed a lack of clarity as to what the Government is saying to the international community and to its own people. It was acknowledged that international participation in domestic trials was the most controversial issue negotiated in Geneva.

Mr. Anketell explained that the HRC Resolution, co-sponsored by Sri Lanka, affirms the importance of foreign participation in the Sri Lankan judicial mechanism by way of Commonwealth and other foreign judges, defence lawyers, and authorised prosecutors and investigators. He noted that the resolution refers to ‘foreign participation’ in a ‘Sri Lankan judicial mechanism’. Mr. Anketell stated that therefore this mechanism will be set up by the Sri Lankan Government, and it will not have any connections with an international tribunal or the International Criminal Court. He stressed that the Sri Lankan judicial

mechanism needs to have foreign judges, prosecutors, lawyers, and investigators, who must participate in that capacity. These foreign professionals will work alongside their Sri Lankan counterparts. For example, the Resolution doesn't call for a majority of foreign judges; therefore it is entirely possible that one foreign judge sits alongside two Sri Lankan judges.

Mr. Gonzalez explained that other countries have resorted to international participation in transitional justice mechanisms not merely to ensure their credibility, but also for both technical and political reasons. At times there is need for international participation because there is a lack of sufficient expertise within the country in dealing with international crimes. Further, international participation is often sought as a means of projecting an image of fairness and equality, particularly in contexts where there are concerns of overrepresentation or underrepresentation of communities within the judicial mechanism.

Mr. Gonzalez further added that, when selecting individuals to head transitional justice mechanisms, two considerations are paramount. First, the process must be transparent and understood by all stakeholders; second, the individual nominees must have a proven track record of expertise in their relevant field and be of unquestionable independence.

Among the participants there was general agreement that there should be international participation in a domestic mechanism, "Otherwise it will not bring [the] required results." There was further agreement that previous state interventions, especially in the form of commissions of inquiry, had yielded very little to no positive results, and their recommendations remained largely unimplemented. One participant noted that those who were directly affected are demanding an international inquiry, and in order to ensure their trust in a domestic mechanism, the Government needs to provide for some form of international participation.

Temporal mandate of mechanisms

Given that a wide range of grievances, covering a wide timespan, had been raised by the participants, there was doubt as to whether all grievances could be addressed. Could transitional justice mechanisms cover historical grievances as well as allegations concerning ongoing abuses? The experts responded that it is possible for the mechanisms to cover all grievances. However, much depends on how each mechanism is structured. For example, under paragraph seven of the Human Rights Council Resolution, the Government is required to try and punish those responsible for international crimes, including during the period covered by the LLRC. Given that the LLRC's temporal mandate covered the period from 2002 to 2009, the temporal mandate of a Special Court could be limited to crimes committed after 2002. The experts explained that if the victims or the public at large wishes to see specific crimes or events investigated, it is very important that they lobby the Government to have these concerns included in the mandate of the judicial mechanism. If there is a strong push from the ground to include specific events or periods of history, then it would be difficult for the Government to ignore these demands. It is important that these lobbying efforts are advanced now, while the design of the mechanism has not been finalized.

With respect to a missing persons' office, there is a strong demand to go back as far as 1971, when disappearances first started to be reported as occurring in Sri Lanka. The Government may argue that it is easier to investigate recent cases. However, the office of missing persons, as currently proposed by the Government, is to exist permanently. Mr. Gonzalez noted that in any transitional context the search for the missing is a fundamental task, as all cultures demand that respect be shown for the dead. For example, in Spain even sixty years after the end of the conflict, bodies are still being recovered and exhumed. Thus, there are strong arguments to be made that the office of the missing persons should have a broad mandate above any political, ethnic or regional distinction.

Nuwara Eliya (5 November 2015)

The Nuwara Eliya dialogue was attended by members of civil society, including a few members of the clergy. The discussion largely centred on the specific grievances of Up-country Tamils.

Specific Grievances of Up-country Tamils

A participant opened the dialogue observing that Indian-origin Tamils (Up-country Tamils) in the Central Province have had a distinct experience of the war separate to that of Tamils in the Northern and Eastern Provinces. Indian origin Tamils are fighting for “language, land and social dignity”. He noted that Indian-origin Tamils were living as minorities under the British, as well as in the post-independent era. He stated that Sri Lanka has had many opportunities in the past, for example the Indo-Lanka Accord, the Thimpu talks, the Norwegian brokered peace talks – yet these opportunities were lost and Sri Lanka ended up with the Rajapaksa regime and mechanisms such as the LLRC. Indian-origin Tamils were particularly marginalized as they have not had a leader to take forward their grievances.

One participant similarly observed that even though Sri Lankan governments have established a number of commissions of inquiry in the past, they have not paid sufficient attention to the grievances of the Up-country Tamils. In particular, he observed that the LLRC report ran over four hundred pages, yet only four lines were dedicated to discussing the situation in the Central Province. He added that there was only a cursory reference to problems related to health and housing, and no reference at all to the Central Province citizens who had suffered from the war. The participant argued that if a truth commission is to be established, it must go beyond the war, to cover the period since independence.

A number of participants raised historical grievances, such as when fifty per cent of the Indian-origin Tamils were deported to India, instances where children were forcefully aborted, and the 3000 Tamils who were killed during the 1983 riots. Another participant referred to the 1956 and 1958 riots, and the fact that as many

as 60,000 lives were lost during the JVP uprising. In particular, he referred to the Bindunuwewa massacre, and expressed concern that to date, no state mechanism has provided justice in relation to these historical grievances. Another participant referred to ongoing detention of youth by the state. Yet another participant noted that for the past two hundred years, Tamil people have been marginalized because of population control and the livelihoods of Up-country Tamils have been severely undermined. Even where the Government has sought to intervene and provide, for example, vocational training – such training has been of limited assistance as it is provided exclusively in Sinhala. Similarly, a number of other participants reiterated concerns that even after the war many are still being deprived of their properties. He further lamented that, “In the Central Province there are no leaders. There is no one to show the way forward.”

Concerns about the next steps

There were a number of concerns about whether the Human Rights Council Resolution could actually be implemented in Sri Lanka. If the recommendations of the OISL Report are not implemented, then what steps could be taken? There was also some confusion over the national consultation process, and how participants could make submissions to the design of the consultation process.

There was support for foreign participation in a domestic judicial mechanism, as a purely domestic judicial mechanism could not be trusted. One participant expressed strong opposition to the idea of amnesties – “Those who supported the war or participated in it, to be given amnesty? How can that be fair? How can that be justice?”

Part III

Analysis of Audience Responses and Policy Implications

Participant interventions revealed a number of common themes as well as contrasting perspectives relating to the state of transitional justice discourse across the five regional cities. There was consensus that Sri Lanka needs to implement a truth telling and an accountability mechanism, as well as to undertake institutional reforms. Through the general discussion, as well as by the questions raised, a number of policy considerations and options were suggested that would be relevant for any future in-country transitional justice process. The section below outlines specific policy considerations that flow from the concerns raised by the participants.

Implications for National Consultations

As noted at the outset, the dialogues were not intended to supplant or complement a national consultation process but was intended as a forum for interested stakeholders to convene and discuss transitional justice options for Sri Lanka. Nonetheless, a number of issues raised during the seminars have important implications for any future national consultation process.

Participants in all six dialogues demonstrated a high degree of awareness of the political context as well as the state of the lack of human rights protection in Sri Lanka. However, outside of Colombo, there was a low degree of awareness about transitional justice concepts, specific policy options and relevant comparative experiences.

At the outset of a national consultation process the public must be 'sensitized' to transitional justice discourse.⁴ In particular, the public must be informed as to what transitional justice is, as well as specific policy measures. Members of civil society, community leaders, and religious leaders as well as members of academia attended the dialogues, but even among these participants, who were familiar with concepts relating to international human rights, the understanding of

⁴ Office of the High Commissioner for Human Rights, *Rule of Law Tools for Post-Conflict States National Consultations on Transitional Justice* (2009), 12-14.

transitional justice terminology was poor. Thus, if the Government were to reach out to the public at large, especially victim communities, it is likely that they too will have a poor knowledge and understanding of transitional justice concepts.

Moreover, the dialogues attracted very little female participation, although those who attended did make a number of meaningful contributions. However, overall, the male participants dominated the discussions. Therefore, any national consultation process must reach out to specific groups of persons including women, children and the elderly. It would be advisable to conduct at least a few of the discussions among homogenous groups, such as only women, or only children, as it could encourage women and children to speak more candidly about their views and experiences.

Addressing Grievances

Rather than identifying specific transitional justice policy options, the participants chose to speak about grievances. The nature and the type of concerns raised suggests certain transitional justice mechanisms.

Truth Telling

All five communities expressed a desire to see a truth telling and an accountability mechanism. There was a clear desire to see a formal and authoritative record established about historical discriminatory practices; specific periods of human rights abuses, such as the JVP uprising; the eviction of Muslims from Jaffna; the last stages of the war; on-going abuses relating to land grabbing, violence against women, and the state of internally displaced persons; and the structural oppression of Indian-origin Tamils.

There was a willingness to see some abuses prioritized over others. For the North and the East, the last stages of the war were deemed critical and there was a desire to establish facts about the conduct of all parties, including non-state actors and political parties. Similarly, for the Nuwara Eliya participants, historical abuses suffered by Indian-origin Tamils were deemed critical. There was also a

strong sense that any truth telling or accountability mechanism must be presented not as a mechanism to exact revenge, but as a pre-condition to reconciliation.

These concerns have important implications for the design and implementation of any truth telling mechanism. In terms of the mandate, there was a clear desire to have a broad mandate that covers decades of abuse, covering the entire country, and addressing abuses conducted by all parties including the state as well as non-state actors. However, as the discussion evolved, there was a willingness to see certain abuses prioritized over others. Indeed, a mandate covering all type of violations, spanning decades, may prove unwieldy for a truth commission with limited resources and time. One approach might be to limit the temporal mandate to a specific period, but this may risk the legitimacy of the mechanism in the eyes of some groups. Alternatively, the mandate could be designed to cover specific types of violations or incidents that are representative of broader violations that span a longer time span. In particular, based on the participant interventions, there was a desire to see an investigation into the eviction of Muslims from Jaffna, the JVP uprising, enforced disappearances, the last stages of the war, structural violence against Indian origin Tamils, as well as post 2009 violations such as sexual violence and land grabbing.

In the context of Sri Lanka, Mr. Gonzalez noted that, given the variation in concerns among the five regional dialogues, there could be a strong argument to conduct a historical examination about how historical caste, class and colonial processes have affected post-independent Sri Lanka. He noted that the up-country participants expressed specific concerns relating to economic and political violence and the denial of their rights. He suggested that one way to address these historical abuses is by employing professionals to analyze data in archives and other historical sources.

Additionally, there was significant distrust of any government interventions. Specific failures relating to the composition of previous commissions of inquiry, the failure to publish findings, and failure to follow up recommendations were identified. In particular, it must be made clear from the outset that a truth

commission must be credible and independent, and different to commissions of inquiry from the past. One of the most meaningful ways the Government could signal this to the public is by appointing commissioners who are independent, professionally skilled, and also have the trust and confidence of minority communities. There must be significant public outreach raising awareness of the mandate and work of the proposed truth commission.

The work of the truth commission must be guided by a rights-based approach. Unlike in the past, there must be processes in place to ensure that victims and any other interested persons could access the work of the commission, without going through any onerous procedures or prohibitive expenses. All individuals who come into contact with the commissioners or staff must be treated with respect and courtesy. In particular, there must be a strong victim and witness protection framework that ensures the safety of individuals who engage with the truth commission. Further, it is important to avoid the re-traumatization of victims and to ensure victims and their families have access to the necessary psycho-social services. These are basic and fundamental aspects necessary to ensure the proper functioning of a truth commission. In the past, all too often, commissions of inquiry in Sri Lanka have failed to adequately address these matters.

A specific concern raised was that the personnel of the truth commission must be acceptable to, and have the confidence of, the minority communities. The Government's appointment process must be transparent and the composition of the final team of commissioners, as well as operational staff, must be, and be perceived to be, independent and impartial. Past efforts by successive Sri Lankan governments saw the inclusion of personnel widely considered as political appointments with clear biases. A truth commission has a crucial role to play, and a significant part of that role is predicated on the calibre and capacity of those who will lead it. Further, there was scepticism that the truth commission will merely produce a report with no further action, akin to previous commissions of inquiry. The report produced by the truth commission will have to have specific 'buy-in' from all stakeholders and be followed up by the Government if the commission is to actually fulfil its role.

Accountability

Across all six dialogues, participants expressed a strong desire to see an accountability mechanism that could provide justice for both historical and ongoing crimes. Yet, at the same time, participants also expressed significant scepticism about both the willingness and ability of the Government to deliver a credible domestic accountability mechanism. This related to the failures of past state interventions. Specific failures included the lack of independence and the poor record of past prosecutions of human rights abuses, especially abuses committed by state officials. There was a difference of opinion on the extent of international participation that was deemed essential for an accountability mechanism to be successful. Some were of the view that international participation was a pre-condition, without specifying the extent of required participation. Others were of the view that any such mechanism must be exclusively led and administered by an international organization.

Historically, the UN Security Council has intervened, exercising its powers under Chapter VII of the UN Charter, to establish ad hoc international criminal tribunals, such as the International Criminal Tribunal for Rwanda and the International Criminal Tribunal for the Former Yugoslavia. However, since the establishment of the International Criminal Court (ICC), it has become the primary international venue for hearing international criminal trials. Sri Lanka is not a party to the Rome Statute for the International Criminal Court (ICC), thus the ICC does not have jurisdiction to investigate or prosecute any crimes committed in Sri Lanka. However, as a non-state party, there are two ways in which the ICC could be given jurisdiction for the alleged crimes committed in Sri Lanka: (1) The UN Security Council could refer the situation in Sri Lanka to the ICC Prosecutor, exercising its powers under Chapter VII of the UN Charter⁵ and (2) Sri Lanka could accept the jurisdiction of the ICC by lodging a declaration under article 12(3) of the Rome Statute.⁶ In terms of a Security Council referral, it is unclear whether the situation in Sri Lanka would be classified as a threat to international peace and security, as required if the Security Council is to exercise its Chapter VII powers under the UN

⁵ For example, as in the cases of Darfur, Sudan and Libya.

⁶ For example, as in the cases of Cote d'Ivoire, Ukraine, and Palestine.

Charter. Further, it is expected that Russia and China would veto such a resolution. The second avenue, however, that of accepting jurisdiction under article 12(3) of the Rome Statute, is still an avenue that is open to Sri Lanka. Nevertheless, given the current political situation in Sri Lanka, it is probably extremely unlikely that the Sri Lankan Government would voluntarily accept the jurisdiction of the ICC.

The current shape of the debate suggests that Sri Lanka is likely to have a domestic judicial mechanism with international participation. The OISL report recommended that Sri Lanka establish “an ad hoc hybrid special court”.⁷ Under the Human Rights Council Resolution, which the Government co-sponsored, Sri Lanka agreed to establish a “Judicial mechanism with a Special Counsel”, and affirmed that a “credible justice process includes independent judicial and prosecutorial institutions led by individuals known for integrity and impartiality”.⁸ In particular, the Government affirmed “the importance of participation of Commonwealth and other foreign judges, defence lawyers, and authorized prosecutors and investigators” in a Sri Lankan judicial mechanism.⁹ The resolution encourages the government to try and punish “those most responsible for the full range of crimes under the general principles of law recognized by the community of nations relevant to violations and abuses of human rights and violations of international humanitarian law”.¹⁰ In effect, through the adoption of the HRC Resolution, the Government has agreed to incorporate international crimes into Sri Lankan domestic law and prosecute individuals for international crimes, including war crimes, crimes against humanity and genocide.

The resolution does not use the word 'hybrid' and there is no one definition of a hybrid court.¹¹ What is important is that any mechanism is independent, credible and has the acceptance of all stakeholders, especially the victim communities.

⁷ Human Rights Council, Report of the OHCHR Investigation on Sri Lanka (OISL) (16 September 2015), UN Doc. A/HRC/30/CRP.2, p 250. (**OISL Report**)

⁸ Human Rights Council, *Promoting Reconciliation, Accountability and Human Rights in Sri Lanka* (29 September 2015), UN Doc. A/HRC/30/L.20, para 6. (**Human Rights Council Resolution**)

⁹ Human Rights Council Resolution, above n 7, para 7.

¹⁰ Human Rights Council Resolution, above n 7, para 7.

¹¹ Niran Anketell, “The Geneva Resolution and Politics”, *Groundviews* (10 October 2015)

<<http://groundviews.org/2015/10/10/the-geneva-resolution-and-politics-a-note-of-caution/>> accessed 27 October 2015.

Whether a mechanism is known as a 'hybrid court' or simply as a 'domestic judicial mechanism' is a matter of semantics. Labelling a judicial mechanism as a 'Sri Lankan judicial mechanism' allows the Government to assuage the concerns of the Southern electorate by claiming that any accountability mechanism as 'purely Sri Lankan'.¹² However, similar messaging has the opposite effect in the North and the East, where there is a clear expectation that there be an 'international' accountability mechanism. Thus, the Government must change current strategy, and engage in a more meaningful dialogue with the electorate, beyond seeking to only appease extremist voices on either side.

Certain political leaders have suggested that the resolution only requires foreign experts to participate as advisors.¹³ While this issue is being negotiated, what will be expected of the Government is that since it agreed to the resolution in good faith, an illustration of that good faith will be genuinely giving effect to the agreement to include foreign participation. Quibbling over semantics, or attempting to dilute this agreement, is undesirable, as it raises the question of whether the Government is committed to addressing accountability.

Finally, a judicial mechanism must have a carefully considered, balanced, and well articulated prosecutorial policy.¹⁴ Conveying this early on in the transitional justice process, would also be highly effective in ensuring early support for a judicial mechanism. It is unrealistic to expect *all* crimes that have allegedly been committed to be investigated and prosecuted. Considerations of capacity and resources need to be addressed, as most international crimes take years to investigate, and many more years to prosecute. To be effective, the prosecutorial policy must indicate that it will target all parties to the conflict, and also investigate a range of crimes that are representative of the broader set of crimes that were perpetrated during the relevant period. In particular, in the Sri Lankan

¹² Times Online, "Lanka's accountability process would be purely domestic: FM", *Sunday Times* (24 October 2015) < <http://www.sundaytimes.lk/news-online/lankas-accountability-process-purely-domestic-fm.html> > accessed 27 October 2015.

¹³ "Local judges only for local mechanism: Ranil" *Lankaenews* (27 September 2015) < <http://lankaenews.com/news/807/en> > accessed 11 November 2015.

¹⁴ Special Rapporteur on Truth, Justice, Reparations and Non Repetition, "Prosecutorial Prioritisation Strategies" (2014) <<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G14/148/98/PDF/G1414898.pdf?OpenElement>> accessed 25 December 2015.

context, it is important that individuals associated with the LTTE are investigated and prosecuted. Otherwise, any judicial mechanism will be at risk of being viewed merely as an instrument that targets Sinhalese military actors. A prosecutorial policy that seeks to target those most responsible could help to reduce anxiety among low-level security agents and facilitate their co-operation, and also garner broader political support. However, an appropriate balance must be struck between prosecuting those most responsible, while still ensuring a representative pool of those responsible are held accountable.

In the design and implementation of a judicial mechanism, careful consideration must be paid to victim participation, as well as both victim and witness protection. In compliance with international standards, a court should allow victims to make submissions to the office of the prosecutor, as well as to make submissions in court via a legal representation. Resources must be allocated so that victims can have access to court funded legal representatives. Similarly, though Sri Lanka has made important steps by enacting a victim and witness protection law, further reforms must take place to ensure that any new agencies that are established to administer the protection scheme are credible and independent, including enabling individuals located outside the country to be able to provide testimony via an audio-visual connection.

Office of Missing Persons

At all the dialogues participants raised concerns related to the fate of the missing. Under the Human Rights Council Resolution, the Government agreed to establish an Office of Missing Persons (OMP).¹⁵ To date, the Government has not announced any further details about the OMP, other than to suggest that it could be a ‘permanent’ office.¹⁶ Under the Human Rights Council Resolution, the Government specifically agreed to begin issuing Certificates of Absence to the

¹⁵ See, Human Rights Council Resolution, above n 7, preambular paragraph 4; “Statement made by Foreign Minister Mangala Samaraweera at UNHRC, Geneva”, *News.lk* (14 September 2015) <<http://www.news.lk/fetures/item/9742-statement-by-mangala-samaraweera-at-the-30th-session-of-the-unhrc-geneva>> accessed 11 November 2015. (*Foreign Minister’s Statement to the Human Rights Council*)

¹⁶ T. Ramakrishnan, “No More Secret Prisons”, *The Hindu* (11 December 2015) <<http://www.thehindu.com/news/international/south-asia/no-more-secret-prisons/article7972630.ece>> accessed 20 December 2015.

families of the missing as a temporary measure of relief.¹⁷ The OMP could be given this function in order to facilitate administrative difficulties faced by the relatives of the missing, including for example, pension claims, livelihood assistance as well as reparations.

Participants in the dialogues revealed a strong desire to see a broad mandate for an Office of Missing Persons. In particular, across all the regional dialogues, participants wished to see investigations relating to the missing go beyond the last stages of the war, and the mandate of the LLRC, to include the JVP uprising as well as youth uprisings from the 1970s. As highlighted by the experts, there are strong moral and ethical reasons to have a broad mandate for the OMP, as regardless of ethnicity, all relatives of the missing wish to clarify the fate of their loved ones, and where possible show appropriate respect to their remains.

In order to avoid families having to make repeated tracing requests, information collected by other commissions of inquiry, as well as state agencies on detainees and the missing, should be forwarded to the OMP. The OISL report recommended that the Government establish a central database of all detainees, and allow relatives to access to such information.¹⁸ The OMP would be well placed to maintain such a database, as it would enable it to clarify the identities, locations and circumstances of the missing.

The OMP should have a strong mandate to conduct comprehensive investigations to clarify the fate of the missing, including through desk based analysis, forensic analysis, and on-site investigations. The OMP should also have the authority to conduct exhumations, under the supervision of trained forensic specialists. In order to function properly, the OMP should have broad powers of investigation, including the power to summon any individual or organization to provide evidence and share information.

The issue of disappearances is significant in Sri Lanka, in particular the lack of criminal accountability for those responsible for committing or enabling

¹⁷ Human Rights Council Resolution, above n 7, para 13.

¹⁸ OISL Report, above n 6, 230.

disappearances to occur. To that end, the Government has agreed to ratify the International Convention for the Protection of All Persons from Enforced Disappearances, and to criminalize enforced disappearances under Sri Lanka's domestic law.¹⁹ Once this law reform takes effect, enforced disappearance will exist both as an ordinary crime and as an international crime; the issue of which institution will have jurisdiction to investigate and prosecute the crime must be addressed. Moreover, the issue of the crime of enforced disappearance and the working of the OMP is inextricably linked. While the OMP is proposed to have a humanitarian function of merely tracing the missing, the fact that it will house information and evidence relevant to the crime of enforced disappearance cannot be overlooked. Therefore, the OMP should also have the authority to share its findings and evidence with a Special Prosecutor (from the judicial mechanism) and/or the Attorney General's Department in order to enable criminal investigations and prosecutions to occur. Similar to a judicial mechanism and a truth commission, the OMP should have the capacity to provide psychosocial support to relatives of the missing as well as witnesses and informants who participate in the work of the OMP.

Given that the OMP will be the depository to a large amount of personal information about the missing, as well as their relatives, it is important to have a strong legal and policy framework for the protection of personal data. Such a data policy should protect victims and their relatives from unintended use of their data, either by state authorities or other private entities. Further, such a data policy is imperative to protect informants and witnesses who will provide information to the OMP. Additionally, given that the OMP will likely have broad powers, there should be a strong accountability mechanism, in the form of a Review Board, that could investigate complaints against the OMP, including instances where the OMP has failed to discharge its obligations in a fair and reasonable manner.

¹⁹ Ibid.

Reparations

Participants identified a number of measures that had a reparative component. Reparations aim to repair the harm suffered by victims, and aims to restore them to the position they would have been in had the human rights violation not occurred. Reparations could include financial measures as well as symbolic measures, such as apologies and memorials.

A consistent theme that emerged in relation to reparations was the desire to see the return of lost lands. The inability to access, possess and control one's own land in the North and the East is a challenge that requires immediate legal, policy and institutional reform to provide restitution to victims. Not merely viewed as a financial or material loss, lack of access to their lands, especially ancestral lands, represented an issue of identity. It is important to note that the Government has taken important initial steps towards returning lands to affected communities.²⁰ However, the Government must continue to take aggressive steps to release lands held by state actors, especially the military. Such measures will also serve to build confidence in the Government, and ensure broader support for a transitional justice process.

Throughout the discussions none of the participants discussed financial compensation as a measure of reparations. This is not to suggest that individual or collective financial reparations are not important. The OISL report recommended that the Government develop a national reparations policy, considering the specific needs of victims.²¹ However, in order for them to be considered reparations all financial compensation must include a proper reparative component. In particular, development assistance to the Northern and Eastern provinces cannot be passed off as reparations, unless they are accompanied by an acknowledgement of the human rights abuses suffered by these communities.

²⁰ In October 2015, President Sirisena returned 613 acres in Killinochchi and Mullaitivu districts, to both individual owners as well as institutions. Earlier in the year 818 acres of land were returned in Sampur as well as 1013 acres were released in Jaffna. See T. Ramakrishnan, "President Sirisena launches another land return drive" *The Hindu* (5 October 2015) < <http://www.thehindu.com/news/international/president-sirisenalaunchesanother-land-return-drive/article7727284.ece>> accessed 27 October 2015.

²¹ OISL Report, above n 6, 262.

When designing a reparations program careful consideration needs to be given to how to identify individual victims. Requirements must be sufficiently meaningful to avoid false claims, yet not too rigid as to prevent genuine victims from receiving compensation. In particular, given that sexual violence has been perpetrated on a wide scale, many victims may be unwilling to come forward to identify themselves as victims. Thus, any requirements must be both gender and culturally sensitive.

The responses of the participants throughout the dialogues reflected a deep sense of grievance against the state as well as against different communities. It is important that a transitional justice process seeks to symbolically acknowledge the suffering inflicted on victims. As noted above, there was a strong desire to set an authoritative record of history. However, such truth telling efforts need to be complemented by reparations in the form of an apology and memorialization. For example, participants noted that the apology offered by Mr. Sampanthan concerning the eviction of Muslims from Jaffna in 1990, was important. Similarly, when President Chandrika Bandaranaike Kumaratunga in 2004, offered an apology on behalf of the state and the Government for the events related to Black July, it marked an important symbolic acknowledgement of the plight of victims.²² Thus, as the Government explores transitional justice policy options, it should also explore the possibility of an apology as well a memorial for all victims of gross human rights abuses.

Guarantees of Non-recurrence

Guarantees of non-recurrence refer to long-term measures, such as legal and institutional reforms, that seek to transform members of public into rights holders and enable them to hold public institutions accountable. Guarantees of non-recurrence could also include vetting programs that remove individuals associated with perpetrating human rights abuses from public office.

²² Daily News, “We must search for unity in diversity”, *Daily News* (26 July 2004) <<http://archives.dailynews.lk/2004/07/26/fea01.html>> accessed 29 July 2015.

Participants in all the dialogues expressed a strong desire to see a number of legal and institutional reforms. Participants in Jaffna identified the re-appointment of high-ranking military personnel and civil servants who were strongly associated with human rights abuses to other key government positions as a regressive measure. The Government has made inroads in this area, for example, by removing military figures from the position of Governor in the Northern and Eastern provinces, and replacing them with civilian figures.²³ However, as the OISL report recommends, it is important to implement a wider vetting program that seeks to prevent individuals closely associated with human rights abuses from retaining or being reappointed to government positions.²⁴ Any vetting program must closely scrutinize individuals serving in the military, intelligence services and prisons as these institutions have been implicated in committing large-scale abuses.

Specific legal reforms were also highlighted as requiring immediate attention. In particular, reform of the PTA and the Public Security Ordinance were highlighted. The Government has agreed to review the PTA and the Public Security Ordinance and to ensure Sri Lanka's anti-terrorism laws comply with international best practice.²⁵ A number of studies have identified problematic provisions of the PTA, including provisions that allow for arbitrary detention of individuals, provisions that prevent those detained from informing family members of their fate, and provisions that allow involuntary confessions and statements to be used against the accused during the judicial process.²⁶ To date, the Government has not announced a review of the PTA; however, it has promised to release most

²³ Early on in his term, President Sirisena replaced Major General Chandrasiri, former commander of security forces – Jaffna, with H.M.G.S. Palihakkara, former diplomat and senior civil servant to the position of Northern Province Governor. See “New Northern Province Governor Appointed”, *Adaderana.lk* (15 January 2015) <<http://www.adaderana.lk/news/29433/new-northern-province-governor-appointed>> accessed 27 October 2015. Similarly, former Governor of the Eastern Province, Admiral Mohan Wijewickrama, Chief of Staff of the Navy, was replaced by Austin Fernando, a senior civil servant. See “Sri Lanka: Eastern Province Military Governor Removed”, *Sri Lanka Brief* (27 January 2015) <<http://srilankabrief.org/2015/01/sri-lanka-eastern-province-military-governor-removed/>> accessed 27 October 2015.

²⁴ OISL Report, above n 6, 261.

²⁵ Human Rights Council Resolution, above n 7, para 12. See also Foreign Minister's Statement to the Human Rights Council, above n 12.

²⁶ Centre for Policy Alternatives, *Recommendations for Law Reform* (2015) <<http://www.cpalanka.org/wp-content/uploads/2015/05/CPA-Submission-to-Sri-Lanka-Law-Commission.pdf>> accessed 27 October 2015; International Commission of Jurists, *Authority without Accountability: The Crisis of Impunity in Sri Lanka* (2012) <<http://www.refworld.org/pdfid/50ae365b2.pdf>> accessed 27 October 2015, 31-36, 145.

detainees held under the PTA, except those charged with the most serious offences.²⁷

Finally, a number of participants expressed a desire to see a political solution to the ethnic conflict. In his speech to the Human Rights Council, Sri Lanka's Foreign Minister, Mangala Samaraweera stated that, "the best guarantee of non-recurrence is of course a political settlement that addresses the grievances of the Tamil people. We hope that we can achieve this through the adoption of a new Constitution."²⁸ Constitutional reforms that enhance the democratic process, and strengthen the rights of citizens, are common measures of institutional reform that have been adopted, for example, in South Africa and Argentina. In the Sri Lankan context, meaningful devolution of power, a strong fundamental rights framework, as well as limitations on presidential and other immunities, would all serve as important measures of institutional reform.

Sequencing

Sri Lanka faces a unique situation; it has committed to establishing multiple transitional justice mechanisms in the form of a truth commission, a judicial mechanism with foreign participation, a reparations office, and missing persons' office, within the next eighteen months.²⁹ Sri Lanka is expected to provide an oral update to the Human Rights Council by June 2016, and a progress report is to be presented to the HRC in March 2017.³⁰ This undoubtedly places the Government in a challenging situation, and requires a careful assessment as to in which order each of these mechanisms should be implemented. It is important that mechanisms are designed in a way that generates political capital for the transitional justice process.

²⁷ Yohan Perera, "Possible Release for some Tamil prisoners", *Daily Mirror* (17 October 2015) < <http://www.dailymirror.lk/91647/possible-release-for-some-tamil-prisoners>> accessed 27 October 2015.

²⁸ "Statement by Mangala Samaraweera at the 30th Session of the UNHRC, Geneva", *News.lk* (14 September 2015) < <http://www.news.lk/fetures/item/9742-statement-by-mangala-samaraweera-at-the-30th-session-of-the-unhrc-geneva>> accessed 27 October 2015.

²⁹ Human Rights Council Resolution, above n 7, para 18.

³⁰ The Office of the High Commissioner is expected to provide an update to the Human Rights Council at its thirty-second session, which is expected to fall in June 2016. The High Commissioner must present a comprehensive report on the implementation of the resolution, followed by a discussion at the thirty fourth session, which is expected to be held in March 2017. See Human Rights Council Resolution, above n 7, para 18.

When determining which mechanism to implement first, the nature of the results it could produce is important to consider. For example, the work of a truth commission is likely to take two to five years to complete. If the work of a truth commission is widely disseminated, it could help decisively shape the narrative about the transitional justice process in a country. In contrast, a court process is highly legalistic, and could take much longer to deliver any results. The public at large and victims are not in a position to easily understand the progress made inside a courtroom. Thus, it could have limited impact in terms of generating political capital for a transitional justice process.

In countries such as Peru, Chile, and Argentina, the new regimes first established a truth commission. The findings of the truth commissions helped to uncover the nature and extent of abuses. The truth commissions in these three countries were particularly important, as the outgoing regimes had implemented amnesty laws, not only preventing prosecutions against state officials, but also preventing investigation and documentation of human rights abuses. Thus, the findings of the truth commissions helped to lift the veil of silence surrounding past abuses, and mobilized social and political pressure to initiate prosecutions.

In contrast, in South Africa, the TRC and initial set of prosecutions commenced concurrently. The commencement of prosecutions was particularly successful at incentivizing low-level perpetrators to come forward before the TRC and seek amnesty. In fact, the final report of the South African TRC acknowledged that the mere offer of amnesty was not sufficient to encourage perpetrators to come forward. The final report acknowledged that the trial of Eugene De Kock, commander of the counter-insurgency unit of the South African Police, shed light on abuses perpetrated by many other security members. Evidence revealed during the trial was a powerful motivator for other low-level security agents to come forward and seek amnesty.

In contrast, in Cambodia, the Government proceeded to set up a hybrid court to prosecute former Khmer Rouge officials, and decided not to proceed with a truth commission, either during or after the first round of trials. Given that significant

media and scholarly attention had been paid to the nature and extent of Khmer Rouge abuses, there was not as an urgent demand to establish an authoritative record of past abuses. There was also a view that social and cultural norms in Cambodia would have prevented any meaningful public participation in a truth commission.

In the context of Sri Lanka, the most urgent transitional justice issue requiring immediate attention is the issue of disappearances. As the OISL report notes, Sri Lanka has the second highest rate of enforced disappearances in the world.³¹ The Government has stated that it will ratify the Enforced Disappearance Convention “without delay”.³² Ensuring that enforced disappearance is prohibited, by immediately ratifying the Enforced Disappearance Convention and criminalizing enforced disappearance, is of primary importance.

The issue of enforced disappearances is closely related to the issue of the missing persons. Missing persons are broadly defined to include individuals who on the basis of reliable information have been reported missing according to national legislation.³³ Missing persons could include those who are unaccounted for as a result of armed conflict and natural disasters. Those who are forcibly disappeared are also identified as missing persons. Similarly, those who are kept in detention without informing their relatives could also have been persons who have been reported as missing.

Following the criminalization of enforced disappearances, the Government should proceed to establish the OMP in order to begin the process of investigating the thousands of individuals who have been reported as missing. The OMP should have a strong outreach role that communicates its work in all three languages to all parts of the country. Where possible, the OMP should have a regional presence in the North, East, and the South. In all of the dialogues, the fate of the missing was a prominent recurring issue. The nature of enforced disappearances in Sri Lanka is such that it cuts across historical as well as more recent grievances,

³¹ The OISL Report, above n 6, 81.

³² Speech by Hon Mangala Samaraweera, Minister of Foreign Affairs, Human Rights Council, 14 September 2015.

³³ See for example, International Committee of the Red Cross, “Guiding Principles/ Model Law on the Missing”, p. 7.

from all stages of the war, JVP uprisings and student uprisings in the 1970s. A well-articulated outreach effort by the OMP, has the capacity to decisively set a unifying narrative about the need for transitional justice in Sri Lanka.

Among the several questions that must be determined when creating the OMP is whether information gathered by the OMP could or should be linked to a prosecutorial process. Some claim that the pressing humanitarian need to clarify the fate of the missing be prioritized over all other demands, including the demand to bringing those responsible for disappearances to justice. Conversely, a blanket prohibition on the use of information gathered by the OMP for the purposes of criminal investigations and prosecutions may serve to be a significant obstacle for future prosecutions, and could in the long term promote impunity. Any limitations placed on how information gathered in the course of investigations by the OMP can be used must strike a careful balance between the 'right to know' of the relatives, as well as the demands of justice.

Placing broad limitations on how information is used could in some situations be tantamount to offering amnesty to perpetrators. However, a perpetrator may be willing to provide information relating to the fate of one or more missing persons, provided there is sufficient incentive in the form of a guarantee of non-prosecution. In such situations it would greatly assist an investigator or a prosecutor if they could incentivize the informant, and at the same time prevent closing the door on all future prosecutions. Prosecutors and investigators are faced with similar dilemmas even in the course of the normal criminal justice process. In such situations, it is not uncommon for prosecutors to enter a 'plea bargain' or offer a guarantee of 'non-prosecution' in exchange for credible information that could advance an investigation or a prosecution.

Given that there is potentially a close link between the office of missing persons, and a judicial mechanism established to prosecute international crimes, there is a strong case to establish both concurrently. Additionally, given that establishing a judicial mechanism with foreign participation is likely to be met with significant political opposition, it is important that the current momentum towards reform

be utilized to enact the necessary legal reforms as well as to set up the institutional architecture.

The Government has also proposed to establish a separate reparations office. It is unclear at this stage what the relationship would be between the reparations office and the other mechanisms. Some courts, for example the ICC, has its own reparations fund. Similarly, the OMP could also have its own reparations fund. A reparations office cannot meaningfully carry out its work without significant progress in the work of a truth commission or a court. Otherwise the work of a reparations office, especially in terms of offering financial compensation to individuals and communities, could be perceived as an effort to purchase the silence of victims. Thus, it follows that a reparations office is better established after the OMP and the judicial mechanism is set up.

Finally, a truth commission could be established once the initial three mechanisms have been established. Given that there is significant public scepticism around previous Commissions of Inquiry, a truth commission could be misunderstood by the public as a repeat of past efforts. Given that there is significant variation between what could be covered by a truth commission, its mandate could be informed by the work of the other mechanisms. For example, it is unlikely that the prosecutorial policy of a judicial mechanism will seek to cover any crimes before 2002, thus a truth commission could be given a mandate to investigate specific events or a pattern of abuses prior to 2002.³⁴ Similarly, the work of the truth commission could help identify types of violations, and individual victims that could inform the work of the office of reparations.

³⁴ As noted above, under paragraph seven of the Human Rights Council Resolution, the Government is committed to prosecuting those most responsible for committing human rights abuses and international crimes, including during the period covered by the LLRC.

Part IV

Conclusion

The dialogues were a first attempt to have a national dialogue on the key transitional justice issues facing Sri Lanka. The majority of the participants were members of civil society. Across the board there was a strong demand to see a truth telling and an accountability mechanism, as well as a number of legal, policy and institutional reforms with reparative components.

Among civil society stakeholders there is strong support for a truth telling mechanism with a broad mandate that covers historical abuses as well as ongoing human rights abuses. There is a desire to see a clean break from the past, and the Government engage in a genuine transitional justice mechanism, that is independent, impartial, and has the confidence and trust of victim communities. There are very real concerns about the ability of the Government to deliver a successful mechanism without strong participation from international stakeholders.

In addition to the strong support in favour of truth telling, there were also clear statements, that acknowledgement and apologies are not sufficient. Stakeholders expressed a desire to see perpetrators held accountable via a judicial process. Once again there was doubt as to the capacity and the willingness of a purely domestic mechanism to deliver independent, impartial and technically sound legal proceedings.

Despite having a high degree of awareness of the political context and the challenges to human rights abuses in Sri Lanka, there was a poor level of knowledge, especially in regional areas, about transitional justice principles and policy options. Transitional justice discourse is a relatively new phenomenon in Sri Lanka, and mainstream media, policymakers and other opinion makers have not yet demonstrated a sophisticated understanding of transitional justice mechanisms.

As the Government prepares to design and implement transitional justice policy measures, a number of key considerations follow: Given the general lack of awareness, what is the level of awareness among government officials and decision makers about transitional justice? It is imperative that key institutions such as the Ministry of Justice, the Attorney General's Department, the Foreign Ministry and the Office of the Prime Minister, are well informed and have a nuanced understanding of transitional justice policy options.

Civil society is a bridge that could connect victims and survivors with transitional justice mechanisms. Comparative experiences demonstrate that civil society has played a key role in lobbying and building momentum towards policy formulation, as well as monitoring and disseminating information about the implementation of transitional justice policies. In order to ensure the successful participation of the public in the design and implementation of a mechanism, civil society must be equipped with the knowledge and skills to rigorously engage in transitional justice mechanisms.

Recommendations

To Civil Society

Build greater awareness and facilitate training on transitional justice concepts and policy options among civil society groups.

Develop transitional justice measures, including truth telling, an office of missing persons, reparations, memorialization, and guarantees of non-recurrence among civil society.

Develop research on the religious and cultural context to transitional justice policies in Sri Lanka.

To Government

In consultation with civil society and victims, design and implement credible transitional justice policies, including a truth commission, a judicial

mechanism with foreign participation, a reparations office and an office of missing persons.

Ensure that all mechanism are credible, independent and impartial. Special attention must be paid to the individuals who will lead and administer any transitional justice policy measure to ensure they are representative of ethnic minorities, and are acceptable to victim communities.

Conduct a needs assessment of the level of transitional justice expertise among the ranks of government, and facilitate appropriate learning.

Implement the recommendations of the OISL Report, as well as the Human Rights Council Resolution.

To All Political Parties

Engage actively with their electorates to discuss appropriate options for transitional justice measures in Sri Lanka.

To the International Community

Continue to monitor the implementation of transitional justice policies in Sri Lanka.

Monitor the Sri Lankan Government's progress on implementing the recommendations of the OISL Report, the Human Rights Council Resolution, as well as Sri Lanka's commitments under its human rights treaty obligations, through future Human Rights Council sessions, the Universal Period Review, and the Treaty Body mechanisms.

Fund efforts that seek to build knowledge of transitional concepts among all stakeholders in Sri Lanka including public servants, civil society and the legal profession. Support surveys of transitional justice perceptions among the public, especially affected communities.

Further reading

Principles

Updated set of principles for the protection and promotion of human rights through action to combat impunity (2005) UN Doc: E/CN.4/2005/102/Add.1

Basic Principles and Guidelines on the Right to Remedy and Reparations for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (2006) UN Doc: A/RES/60.147

Independent study on best practices, including recommendations to assist states in strengthening their domestic capacity to combat all aspects of impunity, by Professor Diane Orientlicher (2004) UN Doc: E/CN.4/2004/88

Set of principles for the protection and promotion of human rights through action to combat impunity (1997) UN Doc. E/CN.4/Sub.2/1997/20/Rev.1

Human Rights Committee, *General Comment No. 31 Right to an Effective Remedy*, UN Doc: CCPR/C/21/Rev.1/Add.1.3

Reports

Report of the Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies* (2011) UN Doc. S/2011/634

Report of the Special Rapporteur in the field of cultural rights, *Memorialisation processes* (2014) UN Doc. A/HRC/25/49

Report of the Special Rapporteur on Truth, Justice, Reparations, and Non-repetition, *Reparations* (2014) UN Doc. A/69/518

Books

Hayner, Priscillia, *Unspeakable Truths: Transitional Justice and the Challenges of Truth Commissions* (Routledge: 2011) (2nd Ed)

Roht-Arriaza N. and Marriezcurena J. (eds), *Transitional Justice in the Twenty-First Century: Beyond Truth Versus Justice* (Cambridge: 2006)

Minnow Martha, *Breaking the Cycles of Hatred: Memory, Law and Repair* (Princeton: 2002)

Aptel Cecile and Ladisch Virgine, *Through a New Lens: A Child-Sensitive Approach to Transitional Justice* (ICTJ: 2011)

Teitel Ruti, *Transitional Justice* (Oxford: 2000)

Rimmer Harris Susan, *Gender and Transitional Justice The Women of East Timore* (Routledge: 2010)

Shaw Rosalind, Waldorf Lars with Hazan Pierre (eds)., *Localising Transitional Justice: Interventions and Priorities After Mass Violence* (Routledge: 2010)

Advancing Truth & Justice in Sri Lanka

A REPORT OF SIX DIALOGUES

The report documents the discussions of six dialogues on transitional justice that were held in different parts of the country during 2015.

The discussions provided space for a broad group of stakeholders from civil and political society to explore the complexities of pursuing justice in a complex and volatile, post-war context. The aim of this series of dialogues was to enhance the quality of the public debate on transitional justice.

The long-term objective of this initiative was to contribute to the generation of an organic and relevant transitional justice process in Sri Lanka. This initiative sought 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 political feasible and sensitive to the peculiarities of the Sri Lankan conflict. Three independent experts from Bangladesh, Peru and South Africa, enriched the dialogues with global perspectives.

