

Special Issue: Navigating the Complex Terrain of Accountability in Sri Lanka

(Title Image: "Jan. 2009 displacement in the Vanni" | Indi Samarajiva | cc-by-2.0)

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Introduction: Navigating the Complex Terrain of Accountability in Sri Lanka

by Malliha Wilson, Janakan Muthukumar, and Ashwini Vasanthakumar

Sri Lanka's post-war journey remains one of complex and contested narratives, where the memories of a devastating civil conflict continue to shape the politics, law, and social fabric of the country. The war, which spanned from 1983 to 2009, was characterized by extensive human rights violations, including allegations of genocide, crimes against humanity, and war crimes committed by the Sri Lankan government. In the final stages of the conflict, tens of thousands of civilians, primarily Tamil, were killed through indiscriminate shelling, targeted attacks on civilian infrastructure, extrajudicial killings, and enforced disappearances, actions that have been documented as potential war crimes. There are also allegations of violations of international humanitarian law by both the government of Sri Lanka and Liberation Tigers of Tamil Eelam.

The Sri Lankan government's military operations, including the indiscriminate bombardment of "no-fire zones" and the systematic killing of civilians, have been flagged as possible acts of genocide and gross violations of international law. Despite these grave concerns, there has been limited accountability: the government's rejection of international scrutiny and its efforts to suppress investigations have obstructed the pursuit of justice. Today, Sri Lanka remains in a state of profound political, social, and cultural reckoning, struggling to confront these violations and the broader legacy of impunity. The quest for accountability is not merely about retribution for these past crimes but about addressing the systemic issues of impunity, institutional decay, and social fragmentation that continue to hinder the country's progress toward genuine reconciliation and the fulfillment of human rights and dignity for all its citizens.

This special issue explores the complex nature of accountability in Sri Lanka, bringing together perspectives on the legal, political, and societal dimensions of justice. It provides a multifaceted analysis of the ongoing efforts to hold perpetrators accountable for atrocities committed during the war, while also critically examining the challenges in achieving meaningful justice and reconciliation into the future. The articles in this volume highlight the centrality of victims' voices, the roles of international law, the political dynamics that shape the accountability process, and the importance of institutional reforms in ensuring that such atrocities are not repeated. The authors' contributions offer invaluable insights into the complexities of the Sri Lankan context and the broader implications for

justice in post-conflict societies.

The call for this series was made in the fall of 2023, at a time when the Sri Lankan government, led by President Ranil Wickremesinghe, was navigating the aftermath of the economic and political crisis that resulted in the fall of Gotabaya Rajapaksa's regime. This crisis culminated in the 2024 presidential election, won by Anura Kumara Dissanayake in August. Subsequently, the parliamentary elections in November were won by the National People's Power, a political coalition led by Dissanayake. The editorial articles in this volume may not fully reflect the contemporary changes under Dissanayake's administration. However, the longstanding social, political, and institutional challenges identified by different authors remain, and will need to be addressed for the present government to make credible progress on transitional justice, accountability, and political reconciliation.

Legal Accountability: The Role of Law in Addressing Past Crimes

Legal accountability remains a central pillar of the justice process in Sri Lanka. In the aftermath of war crimes, crimes against humanity, and human rights violations, legal mechanisms—both domestic and international—are vital in ensuring that perpetrators are held responsible. However, the legal system in Sri Lanka has often been thwarted by political interference and institutional corruption, which has made it difficult for victims to access justice.

In their contributions, Malliha Wilson and Maxwin Paul Rayen both focus on the legal avenues available for holding perpetrators accountable, particularly through international law. Wilson's article, "*Enhancing Justice for Sub-National Groups: The Role of Universal Jurisdiction in Sri Lanka*," examines how universal jurisdiction can be used to prosecute individuals for grave crimes committed abroad. This legal principle enables national courts to hold perpetrators accountable regardless of where the crimes occurred, offering a potential path for justice when domestic legal systems are either unwilling or unable to act. Rayen's contribution, "*The Politics of Naming and the Costs of Denial: Genocide in Sri Lanka*," extends this argument by critically analyzing the international community's reluctance to recognize the Tamil genocide, despite credible evidence of mass atrocities. His examination of the legal hurdles surrounding the classification of genocide highlights the difficulties in obtaining legal recognition of crimes, which is often the first step in accountability.

The critical question of whether the international community can provide a meaningful legal response to Sri Lanka's violations is central to the ongoing debate. International human rights law and institutions such as the United Nations have called for accountability, but Sri Lanka's reluctance to cooperate with international mechanisms complicates efforts to deliver justice. Nonetheless, legal accountability remains a cornerstone of any transitional justice framework, with the necessity of both domestic reforms and international cooperation underscored by these contributions.

Political Accountability: Government Responsibility and the Role of Power Structures

While legal accountability addresses individual responsibility, political accountability goes beyond individual cases and examines the broader system of governance, which allows or even facilitates atrocities. In Sri Lanka, the political landscape has been deeply shaped by a history of state repression, authoritarianism, and majoritarian politics, where accountability has often been sacrificed in the name of maintaining power. Achieving political accountability involves dismantling these power structures and ensuring that the government is held responsible for enabling or perpetrating violations.

Ambika Satkunanathan's article, "*Ignoring the Political: Studying the Roots of the Failed Quest for Accountability in Sri Lanka*," focuses on the informal political structures that have enabled impunity. She argues that Sri Lanka's failure to hold perpetrators accountable is not simply due to legal dysfunction but is deeply rooted in the socio-political culture that protects state actors from scrutiny. The political patronage systems, entrenched by decades of ethnic conflict and political manipulation, create informal networks of power that subvert formal justice processes. Satkunanathan's work highlights how these informal systems—often based on ethnic and political patronage—sustain the status quo and hinder any meaningful accountability efforts.

The government's reluctance to embrace true accountability can be seen in its repeated failure to investigate past crimes, despite international pressure. Chulani Kodikara points out in her contribution, "*Waiting for International Justice: The Struggle of Tamil Family Members of the Disappeared in Sri Lanka*," that the Sri Lankan state's inaction has led many victims to look to international mechanisms for justice. Kodikara's work draws attention to the demands of Tamil families for an international justice mechanism, as domestic avenues have proven ineffective. The political resistance to justice is further compounded by the Sri Lankan government's denial of responsibility for violations, particularly regarding the Tamil community's grievances. Thus, political accountability is not merely about addressing the actions of individuals but about confronting the systemic failures within the state that enable violence and impunity.

Political accountability also necessitates meaningful political solutions, particularly to the ethnic divisions that fueled the conflict. Ashwini Vasanthakumar, in her piece "*Revisiting SJV Chelvanayakam*," argues that a pluralistic approach to nationalism and national identity remains essential to achieving lasting political peace in Sri Lanka and achieving autonomy for minorities, and minorities within minorities. She emphasizes the multiple trajectories available in Chelvanayakam's vision of progressive Tamil nationalism, which sought to balance Tamil rights with national unity, and which sought to amplify marginalised groups within the Tamil community. Vasanthakumar critiques the failure to recognize the pluralistic nature of Tamil identity by militant nationalisms, which continue to pose significant obstacles to achieving justice, reconciliation, and individual and collective self-determination. Her analysis situates the struggle for accountability within the broader framework of Tamil political thought, offering a lens by which to understand the historical roots and contemporary challenges of Sri Lanka's political conflict.

Transitional Justice and Institutional Reform: Building a Just and Inclusive Society

Transitional justice encompasses a broad range of mechanisms designed to address past human rights violations and promote long-term reconciliation. These mechanisms typically include truth-telling processes, reparations for victims, and institutional reforms to prevent future abuses. In the Sri Lankan context, transitional justice is not just about seeking individual accountability for crimes but also about rebuilding the country's institutions, which have been severely damaged by years of conflict and political repression, and about redistributing political and economic resources.

Bhavani Fonseka's contribution, "*Elusive Justice & Prospects for Reconciliation in Sri Lanka,*" discusses the failures of Sri Lanka's justice system, outlining the numerous ways in which the government has impeded investigations and prosecutions. Fonseka focuses on emblematic cases such as the assassination of journalist Lasantha Wickrematunge and the enforced disappearances of Tamil civilians. Despite the persistence of victims and civil society organizations, she notes, justice remains elusive. Fonseka highlights that while transitional justice requires reforms to the judicial system and law enforcement agencies, it also requires a cultural shift within the state's institutions, which have long been complicit in perpetuating impunity.

Institutional reform is vital to ensuring that future violations do not occur. This includes rebuilding the legal and justice sectors to ensure that they can effectively investigate and prosecute crimes, as well as addressing the militarization of Sri Lanka's state apparatus. As Sujith Xavier argues in his article, "*Harvesting Truth: Transitional Justice in Post-War Sri Lanka*," transitional justice must address not only the immediate aftermath of war crimes but also the broader cultural and institutional changes needed to prevent such atrocities from happening again. Xavier critiques the very concept of transitional justice, arguing that it often fails to address the root causes of violence and does little to challenge the underlying political, social, and economic structures that perpetuate systemic injustice. He contends that the transitional justice framework, while important, cannot fully untangle the complex web of political, social, and historical factors that have fueled Sri Lanka's conflict. Xavier's work is a timely and necessary intervention in the debate on transitional justice, urging policymakers and scholars to rethink the limitations of current models, and speaking directly to broader reforms under discussion in Sri Lanka.

Memorialization, Victims' Voices, and Social Healing

A key element of transitional justice is the recognition of victims and their experiences, which is vital for both healing and ensuring that atrocities are not forgotten. Memorialization and truth-telling serve as powerful tools for justice, offering victims a space to be heard and ensuring that the state's violent actions are not erased from public memory. In Sri Lanka, however, efforts to memorialize the Tamil genocide and other atrocities have been met with resistance from the state, which seeks to control the narrative of the war's history.

Harini Sivalingam's article, "*Transnational Memorialization and Documenting Tamil Genocide: Implications for Justice and Accountability*," explores the crucial role of memory and memorialization in

the post-conflict justice process. Sivalingam argues that memorialization is not just about remembering past atrocities, but is an essential tool for ensuring accountability and preventing future violations. By establishing physical and symbolic spaces to remember victims, memorialization forces societies to confront painful truths and acknowledges the suffering of those affected. It plays a pivotal role in the transitional justice framework by contributing to a shared understanding of the past, thus creating the foundation for collective healing and preventing the recurrence of violence. Memorials act as sites of resistance, pushing back against state-sponsored historical revisionism and providing a counter-narrative that demands recognition of the atrocities committed, particularly the Tamil genocide.

Here, again, Chulani Kodikara's article, "*Waiting for International Justice: The Struggle of Tamil Family Members of the Disappeared in Sri Lanka*," is relevant. Kodikara highlights the importance of memory in the struggle for justice, especially for the families of the disappeared. While the Sri Lankan state has sought to suppress or distort narratives that counter its official history, the Tamil diaspora and local communities continue to document their experiences, asserting their right to memory. Kodikara illustrates how the Tamil families of the disappeared have been at the forefront of this struggle, leading efforts to uncover the truth, despite facing constant threats and violence. These families have not only demanded accountability for the crimes committed but also called for reparations and formal recognition of their suffering. Their activism ensures that the voices of victims are not silenced and that their demands for justice and recognition reach both the Sri Lankan government and the international community. This struggle for memory and recognition remains central to the broader process of accountability, as it forces society to reckon with the past and work toward an inclusive and just future.

International Accountability and the Role of Global Powers

International accountability mechanisms can play a crucial role in ensuring justice when domestic systems are unable or unwilling to act. However, as Janakan Muthukumar highlights in "*Sri Lanka's Accountability Odyssey: Navigating Global Trends in Justice*," the international community's response to Sri Lanka's violations has often been shaped by geopolitical interests, with major powers such as China, India, and Russia shielding Sri Lanka from international scrutiny to protect their strategic alliances. This has led to a fractured approach to international justice, where national interests often take precedence over human rights concerns. While international organizations, particularly the United Nations, have played a key role in documenting violations and calling for action, Muthukumar explores the evolution of international law's engagement with Sri Lanka, detailing how various UN resolutions and the establishment of the OHCHR's Sri Lanka Accountability Project have sought to preserve evidence of war crimes. Despite these efforts, the lack of meaningful enforcement mechanisms has limited the effectiveness of international accountability, and the international community must ensure its justice mechanisms are robust enough to hold Sri Lanka's leaders accountable for past crimes.

In contrast, Sunil Bastian's article, "Accountability in Sri Lanka – Another View," takes a nuanced approach by focusing on the internal political dynamics that have shaped the international response to

Sri Lanka's violations. Bastian critiques the role of international powers in influencing Sri Lanka's post-war trajectory. His paper sheds light on the balancing act between human rights concerns and geopolitical interests that has often undermined meaningful accountability. Bastian argues that foreign powers, while vocal on issues of human rights, have also prioritized strategic alliances with Sri Lanka, complicating efforts to push the government toward genuine reforms. This duality, according to Bastian, has been a major barrier to the effectiveness of international mechanisms like the UNHRC in bringing about accountability.

Conclusion: The Long Road to Justice

The quest for accountability in Sri Lanka remains a long and arduous journey, shaped by political resistance, entrenched power structures, and the deep scars left by decades of conflict. The systematic targeting of the Tamil population and other minorities during periods of violence, coupled with the state's failure to protect them, has left an enduring legacy. This pattern of violence escalated during the final phase of the war in 2009 and continues to cast a shadow in its aftermath. Atrocities committed during this period, including allegations of genocide, remain largely unaddressed by the state. As the authors in this special issue demonstrate, the pursuit of justice in Sri Lanka transcends prosecuting individual perpetrators. It involves addressing the root causes of violence, reforming institutions to sustain justice, and establishing a political framework to ensure such atrocities are never repeated. The articles in this volume underscore the urgent need for systemic change, emphasizing the centrality of victims' voices, the importance of institutional reform, and the critical role of both domestic and international actors in achieving accountability.

Moreover, the role of international law and the international community remains critical in holding states accountable for human rights violations—in principle if not always in practice. The principles of the international rule of law, which protect fundamental human rights and ensure that justice is not subordinated to political or strategic interests, are essential in shaping global responses to Sri Lanka's accountability challenges. International mechanisms, including the United Nations, must continue to play a significant role in ensuring that perpetrators are held responsible, and that Sri Lanka's justice system is reformed to prevent future atrocities. The application of international law potentially serves as a safeguard against impunity, reinforcing the global commitment to human dignity and justice.

The new government under President Dissanayake has promised to continue the constitutional process begun under the Sirisena government, and move Sri Lanka forward in terms of institutional reform, anti-corruption efforts, and socio-economic justice. These efforts can only succeed when they are tied to addressing Sri Lanka's long conflict and its enduring legacies. The international community must continue to advocate for a robust and comprehensive approach to transitional justice, ensuring that human rights are protected, and that accountability remains at the heart of Sri Lanka's political, legal, and social rebuilding. The lessons from this special issue offer further insights into how post-conflict societies can navigate the challenges of justice, reconciliation, and accountability.

Citation: Malliha Wilson, Janakan Muthukumar, and Ashwini Vasanthakumar, “Introduction” in *Navigating the Complex Terrain of Accountability in Sri Lanka: a special issue of the PKI Global Justice Journal* (2025) 9 PKI Global Justice Journal 2

Lady Justice holding a scale (Shutterstock)
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Enhancing Justice for Sub-National Groups: The Role of Universal Jurisdiction in Sri Lanka

by Malliha Wilson

Universal Jurisdiction and International Rule-Based Order

Universal jurisdiction is a legal principle allowing national courts to prosecute individuals for serious crimes regardless of where the crimes were committed or the nationality of the perpetrator or victim. Typically covering offenses such as genocide, war crimes, crimes against humanity, torture, and certain terrorism-related acts, this concept is often grounded in international treaties, customary international law, and national legislation.

Many countries have enacted laws granting their courts jurisdiction over such crimes committed abroad. For example, Belgium passed a law in 1993 granting its courts universal jurisdiction over genocide, crimes against humanity, and war crimes, which led to high-profile cases such as the prosecution of Rwandan genocide suspects. Similarly, Spain's judiciary has utilized universal jurisdiction to investigate and prosecute individuals involved in human rights abuses in countries like Argentina, Chile, and Guatemala. Additionally, Germany has invoked universal jurisdiction to prosecute individuals for crimes committed abroad, including cases related to genocide in Rwanda and Syria. Likewise, Canada also prosecuted individuals for genocide pursuant to its *Crimes against Humanity and War Crimes Act,* S.C. 2000, C.24, in relation to the Rwandan genocide.

These examples highlight the diverse application of universal jurisdiction by national courts in different countries to pursue justice for grave international crimes. However, at times, the application of universal jurisdiction can be politically sensitive and face obstacles such as concerns about sovereignty and diplomatic tensions. Nonetheless, it plays a crucial role in promoting accountability, complementing the work of international criminal tribunals like the International Criminal Court (ICC), and contributing to transitional justice processes in post-conflict or authoritarian contexts.

Embedded within the broader rule-based international order, universal jurisdiction serves as a

mechanism for enforcing international law and promoting justice on a global scale. As the rule-based international order provides a framework for cooperation and adherence to agreed-upon norms and principles, universal jurisdiction ensures that perpetrators of grave crimes are held accountable not only within their own jurisdictions, but also beyond borders where justice might otherwise be elusive. Universal jurisdiction offers platforms not typically provided by traditional international courts and tribunals for investigating grave concerns related to or perpetrated against subnational groups within a state. This mechanism allows for the pursuit of justice in cases where domestic systems may be unwilling or unable to address atrocities committed against marginalized or vulnerable populations.

Accountability and Jurisdiction in the case of Sri Lanka

During the final phase of the civil war in Sri Lanka, which lasted from approximately 2008 to 2009, there were widespread allegations of grave human rights violations, including genocide, and crimes against humanity. As the conflict intensified in its final stages, tens of thousands of civilians, primarily Tamil, were trapped in the conflict zone, facing dire humanitarian conditions and indiscriminate attacks by both sides. Multiple reports from international human rights organizations, UN bodies, and civil society organizations documented allegations of extrajudicial killings, enforced disappearances, sexual violence, arbitrary detention, and the deliberate targeting of civilians and humanitarian facilities. The events culminating in the final months of the war have raised serious concerns about violations of international humanitarian law and human rights law by both parties to the conflict. These allegations have spurred calls for accountability, justice, and reconciliation in Sri Lanka, both domestically and internationally, highlighting the urgent need to address the legacy of violence and ensure accountability for those responsible for atrocities committed during the conflict's final phase.

The pursuit of justice and accountability in Sri Lanka is riddled with daunting challenges and persistent limitations. Despite widespread international recognition of grave human rights violations and calls for accountability, the Sri Lankan government's lack of political will and commitment hampers progress in addressing past atrocities. Reluctance to acknowledge and address the full extent of abuses, coupled with institutional challenges within the justice system, further obstructs accountability efforts. The absence of specialized mechanisms for addressing wartime atrocities exacerbates hurdles in pursuing justice. Concerns over the safety of victims and human rights defenders, alongside intimidation and reprisals, foster a climate of fear, hindering justice-seeking initiatives. Additionally, Sri Lanka's resistance to international involvement and scrutiny undermines transparency and accountability, while the lack of comprehensive reconciliation efforts exacerbates divisions and mistrust between communities. From a victim's perspective, finding justice is compounded by systemic barriers and political dynamics. Moreover, the unsuitability and unacceptability of options such as the hybrid model and models like the South African Truth and Reconciliation process, due to the government's denial of accountability and the absence of power-sharing initiatives, perpetuates marginalization and injustice, leaving victims without viable avenues for redress.

As such, the limitations on addressing accountability in Sri Lanka have been recognized by the

international community, as evidenced by the resolutions passed by the United Nations Human Rights Council (UNHRC). In resolution 46/1, adopted on 23 March 2021, the UNHRC acknowledged the challenges faced in advancing accountability for human rights violations in Sri Lanka and emphasized the importance of preserving and analyzing evidence relating to these abuses. The resolution aimed to strengthen the capacity of the Office of the UN High Commissioner for Human Rights (OHCHR) to collect, consolidate, and analyze information and evidence related to gross violations of human rights and serious violations of international humanitarian law in Sri Lanka. Additionally, the establishment of the Sri Lanka accountability project in Geneva, supported by resolution 51/1, further reinforced the OHCHR's capacity in this regard. Moreover, the resolutions called for enhanced monitoring and reporting on the human rights situation in Sri Lanka, including progress in reconciliation and accountability efforts. The OHCHR is tasked with providing updates to the Human Rights Council, with a written update due at its 54th session and a comprehensive report, including options for advancing accountability, to be presented at the 57th session. These resolutions represent a pathway for addressing accountability through universal jurisdiction, as they aim to strengthen mechanisms for collecting evidence, supporting victims, and advocating for accountability both domestically and in member states with competent jurisdiction.

Challenges in the Pursuit of Accountability for a Sub-National Group and Universal Jurisdiction

There is a scarcity of international dispute resolution forums for sub-national groups (such as the Tamil people) to have access to adjudication for international crimes. As a result, there is an attempt to use universal jurisdiction as a legal mechanism to get around this problem. However, political considerations and diplomatic tensions can hinder the willingness of states to cooperate in universal jurisdiction cases. Powerful states may exert pressure to obstruct or undermine legal proceedings that could implicate their interests or allies. Sri Lanka's geopolitical landscape, characterized by complex power dynamics and historical alliances, plays a crucial role in shaping diplomatic relations and international cooperation. Powerful states, particularly those with strategic interests in the region, such as China, may exert pressure to obstruct or undermine legal proceedings that could implicate their interests or allies. These states may view universal jurisdiction cases related to Sri Lanka as a potential threat to their geopolitical influence or strategic partnerships in the region.

Moreover, the lack of universal acceptance and implementation of legal frameworks supporting universal jurisdiction limits its effectiveness. In some instances, legal systems may lack the necessary robustness to handle complex international crimes, leading to procedural obstacles and delays in seeking justice. Even if legal systems have prescribed laws, the procedural process to bring a case may be challenging. For example, in the case of *Canada's Crimes against Humanity and War Crimes Act*, S.C. 2000, C.24, in relation to the Rwandan genocide, Section 8 outlines the conditions under which a person can be prosecuted for offenses under Sections 6 or 7. These conditions include factors such as the person's citizenship, employment status, or the nationality of the victim at the time of the offense. However, determining jurisdiction under the Canadian act can be complex. Additionally,

pursuant to Section 9, the consent of the Attorney General is required to initiate a prosecution, adding another layer of complexity to the legal process.

Conclusion

Despite the various limitations and challenges faced by universal jurisdiction, it remains one of the best options for serving justice and accountability, while also bolstering the legitimacy and strengthening the international rule-based order. Universal jurisdiction provides a crucial mechanism for holding perpetrators of grave crimes accountable, regardless of where the crimes were committed or the nationality of the individuals involved. By allowing national courts to prosecute such crimes, universal jurisdiction reinforces the principles of international law and human rights, promoting justice on a global scale. Furthermore, universal jurisdiction contributes to increasing the legitimacy of international legal mechanisms and institutions by demonstrating a commitment to upholding universal standards of justice and accountability. Additionally, by holding individuals accountable for their actions, regardless of their status or nationality, universal jurisdiction helps deter future violations and contributes to building a more just and peaceful world. Therefore, despite its challenges, universal jurisdiction remains an indispensable tool in the pursuit of justice and the advancement of the international rule-based order.

Citation: Malliha Wilson, “Enhancing Justice for Sub-National Groups: The Role of Universal Jurisdiction in Sri Lanka” in *Navigating the Complex Terrain of Accountability in Sri Lanka: a special issue of the PKI Global Justice Journal* (2025) 9 PKI Global Justice Journal 2.

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Doll head on the ground

Photo by Priya Tharmaseelan

The Politics of Naming and the Costs of Denial: Genocide in Sri Lanka

by Maxwin Paul Rayen

Navanethem Pillay, the former UN High Commissioner for Human Rights, when addressing the allegations of Tamil Genocide, emphasized that genocide necessitates the crucial element of intent to destroy, either from policy or plans, implying that the usage of genocide terminology would be legally improper, unlike journalists who uses it for evocative purposes. Similarly, the European Center for Constitutional and Human Rights (ECCHR), in its report on Sri Lankan war crimes, acknowledged the presence of actus reus of genocide but emphasized the need for further research to establish genocidal intent. This recurring argument among international lawyers underscores the prevailing belief that genocide is primarily a crime of mens rea. Therefore, unless there is a revelation of confidential military documents clearly outlining an intent to destroy the Tamil population or a confession from a high-ranking military official, the term 'genocide' should be employed cautiously. Even if used, it should be recognized as a journalistic characterization rather than a legally precise description. This argument represents the consensus among international lawyers who have been investigating the allegations of Tamil genocide.

The Canadian legislative assemblies have officially recognized these atrocities as genocide, but the broader international community has remained reluctant to do so. This article critically examines the reasons behind this reluctance and explores why the arguments against recognizing the Tamil genocide are inconsistent with practices observed in the cases of Bosnia and Rwanda. In contrast to the prevailing arguments against recognizing the Tamil genocide, this article presents two key arguments. First, it argues that the recognition of Tamil genocide should precede any determinations of individual culpability for those who participated in the genocide. Second, it argues that the recognition of Tamil genocide is affirming the contextual element of “Collective Tamil Genocide”.

Genocide is a distinct international crime, setting it apart from war crimes and crimes against humanity. In cases of war crimes or crimes against humanity, international courts do not usually establish the occurrence of the criminal event, i.e., whether the legal finding of war crimes has taken place or not, before determining the guilt of a specific defendant. Instead, these courts typically evaluate whether a war crime or crime against humanity has transpired after examining the defendant's conduct.

War crimes and crimes against humanity are also contextual crimes in the sense that they require crime to be part of a large-scale project to be distinguished from domestic crimes. The threshold for these international crimes usually involves an armed conflict or a systematic attack against a civilian

population, denoting events of significant scale. However, the process differs when it comes to genocide.

In the context of genocide, the process varies. Before delving into whether the defendant possesses genocidal intent to destroy, the court first establishes whether genocide itself has been committed. It is possible for a lone perpetrator to commit genocide as long as they possess genocidal intent. The assumption is that the only contextual element in this case is their genocidal intent, and it does not represent a meaningful scale like the other two crimes mentioned. However, it is argued that the destruction must still be substantial, signifying a meaningful scale, and this also constitutes a contextual element.

Some scholars argue that the solo perpetrator of genocide is an extremely unlikely event and this legal construction of genocide has led to confusion. Despite the statute, which mandated only the genocidal intent being the only contextual element, international courts have used the concept of "collective genocide" as a contextual element in their judgments. In *Akayesu*, the chamber, within the section titled 'Genocide in Rwanda in 1994,' firmly established that "genocide was indeed committed in Rwanda in 1994 against the Tutsi as a group." Subsequently, in the section addressing individual culpability determinations, the chamber examined whether the massacres that transpired between April and July 1994 could be accurately characterized as genocide and whether the actions of the accused individuals exhibited genocidal intent. It is crucial to emphasize that the ICTR statute does not have a explicit contextual requirement in the crime definition of genocide. Therefore, despite the absence of any requirement to find any occurrence of overall genocide in Rwanda, the chamber deemed it necessary to answer this crucial question.

The court concluded that it was essential to take into account the broader context of the overall genocidal campaign when assessing individual culpability. Within this context, the occurrence of the 'overall genocide' serves as a contextual element in the crime of genocide. The concept of the overall genocide encompasses an overall genocidal intent or a collective genocidal intent without pinpointing specific perpetrators. This genocidal intent on the part of the perpetrators was inferred from the systematic nature of the massacres, hate speeches, the methods employed in the killings, propaganda promoting the killings, and the horrifying act of severing the victims' Achilles tendons to immobilize them. The subjective mental element of the many perpetrators involved was thus inferred from the objective patterns observed in the campaign of violence. Importantly, these determinations were made prior to delving into individual culpability for genocide.

The departure from the statutory requirement to conduct this analysis was driven by the chamber's intent to counter the argument that the killings were merely wartime massacres. By establishing the presence of an overarching genocidal plan, the chamber sought to challenge the notion that these acts could be solely attributed to the exigencies of wartime. This rationale subsequently exerted influence on the ICTR cases of *Kayishema and Ruzindana*, where the identification of a genocidal plan became a pivotal factor in ascertaining the defendants' genocidal intent. Consequently, the

chamber initially assessed whether the elements of genocide were met in Rwanda, followed by a similar assessment on the massacre in the city of Kibuye, before delving into the question of individual culpability. The chamber reasoned that it was obligated to establish this legal fact, treating it as an integral element of the crime.

Similarly, in *Krstic*, the trial chamber determined that genocide had been perpetrated against the Bosnian Muslims before delving into an examination of the individual intent of the defendant. They noted that genocidal intent must be discernible within the criminal act itself, independently of the intent of the perpetrators. In *Popovi? et al* trial judgment, it was affirmed that "genocide was committed by the members of the Bosnian Serb forces against the Muslims in eastern Bosnia." The intent of the Bosnian Serb forces was inferred from the scale of their operations, patterns of targeting, coordination among the perpetrators, and their indiscriminate killing of both civilians and soldiers, thus underlining the presence of collective genocidal intent.

This raises the question: why did the OISL (Office of the High Commissioner for Human Rights Investigation on Sri Lanka) not thoroughly analyze all the circumstantial facts to determine whether the attacks by the Sri Lankan armed forces against Tamil civilians constituted genocide or not? In accordance with international practice, the establishment of collective genocide typically relies on objective evidence, such as the systematic nature of the killings and the scale of the violence, specifically considering whether the killings were significant enough to present a concrete threat to the entire targeted group. Importantly, it is worth emphasizing that any international or national body tasked with determining whether genocide occurred in Sri Lanka need not wait for access to classified military documents or minutes from the perpetrators' internal conferences to draw conclusions about the premeditated nature of the killings. Such a determination can be inferred from the characteristics of the criminal acts themselves.

The dropping of pamphlets urging civilians to assemble in unilaterally declared no-fire zones on multiple occasions from January to May 2009, the utilization of aerial assets for continuous monitoring, the existence of a command structure for target assessments before and after attacks, the bombing of hospitals, food distribution centers, schools, ambulances, UN relief convoys, and no-fire zones, along with the killing of war prisoners, all collectively raise the question of whether these attacks indeed constitute genocide. Making a finding on this question serves two purposes, first it affirms or negate the contextual element of the crime of genocide, second it engages with the right to memory and truth telling of the victims, as Jelena Suboti? writes, “Denial causes renewed suffering. It denies victims the right to their own memory, to their own experiences of their past. It undermines individual victims’ and victim groups’ sense of identity, as genocide and the memory of genocide is often the formative trauma that underpins that identity”.[1]

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[1]Jelena Suboti? “Regional Political Implications of Bosnian Genocide Denial” in Bedross Der Motossian’s *Denial of Genocides in the Twenty-First Century* (Nebraska; University of Nebraska Press, 2023)

Citation: Maxwin Paul Rayen, “The Politics of Naming and the Costs of Denial: Genocide in Sri Lanka” in *Navigating the Complex Terrain of Accountability in Sri Lanka: a special issue of the PKI Global Justice Journal* (2025) 9 PKI Global Justice Journal 2.

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Anti-Government protesters gathering stage a protest in Colombo against the government of Sri Lanka and v
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Ignoring the Political: Studying the Roots of the Failed Quest for Accountability in Sri Lanka

by Ambika Satkunanathan

Historically, Sri Lanka has failed to hold perpetrators of human rights violations accountable. Despite this, successive state reform initiatives have never delved into the reasons for this failure. Decades-long discussions on state reform have produced scores of recommendations, mainly to enact laws and establish institutions and systems to address impunity. While not dismissing the importance of these strategies, the socio-cultural and political elements, particularly the socio-political cultures and practices that impact reform and drive, and shape Sri Lanka’s failure to hold human rights violators accountable, have rarely been considered.

The Parallel Informal World

Particularly in a post-war context plagued by ethno-nationalist politics, institutional reform must consider regimes of discrimination and marginalisation that have become entrenched, but are not visible when examined within a purely legal framework, which prima facie contains the required protections. For instance, various unofficial and informal repressive measures that were imposed in the North and East by the security forces during the war violated fundamental rights; rights which are enshrined in the Constitution. Despite this, these rules were not challenged even by civil society.

Yet, reform efforts, including initiatives to address human rights violations, have focused solely on formal and legal structures and processes, and have ignored the often-invisible, informal inequitable and abusive power structures and processes embedded within formal structures. Elements such as patronage that create power bases which sustain informal structures and processes that perpetuate systemic inequalities and prevent accountability, have been ignored during reform processes.

Such informal institutional systems and processes emerge when formal institutions are weak, dysfunctional and the public are unable to access these institutions even to seek non-war related redress or obtain services. Dismantling these structures and processes, which create and sustain power inequities, is challenging because they are likely to be so deeply embedded within formal structures that they are assumed to be formal, which explains their resilience. At times they have even taken precedence over formal processes, thereby impacting and shaping institutional culture, such as the normalization of the complete disregard for due process during arrests and the use of violence. Another example is the weaponization of laws meant to protect civic rights, like the *International Covenant and Civil and Political Rights* (ICCPR), to curtail rights.

The Power of Patronage

Patronage, like informal systems and processes, emerges when formal institutions are weak, not transparent and accessing resources is difficult and personal connections are required to get things done. This creates space for the abuse of power. Informal systems/process and patronage have a co-dependent relationship because one cannot survive without the other, since the existence of informal systems hinges on dispensing patronage and patronage cannot be dispensed without informal systems.

In Sri Lanka, the 1972 and 1978 Constitutions contributed to the erosion of the independence of the public service and the politicization of the bureaucracy by making the cabinet responsible for heads of ministries and departments[1] as the politician became the “central figure of the body politic” after the promulgation of the 1972 Constitution.[2] This placed the Member of Parliament in a position to dispense favours in the form of jobs, contracts etc., and set in motion the politicization of the public sector. The need to create a public service that was responsive to the needs of the public and was within the control of the executive, who would work for the good of the people, was the justification for increased political interference. In practice, this enabled the creation of power bases, including ethicized bases, within public institutions, and these power bases in turn sustained informal structures

and processes that subverted formal processes and reform attempts.

Patronage has never been viewed as an element with the ability to destabilize reform processes, particularly those financially supported by international actors. Elites who control these reform initiatives will resist progressive change, most often through subversive and passive-aggressive ways either by allowing minimal changes to shape institutional processes or incorporate changes in ways that do not undermine existing patronage supported informal systems. Since they will do so while obtaining the benefit of the provided financial support, the ways in which donor funds impact patronage and the ways in which they shape reform processes needs to be understood.

The culture produced by patronage can range from the lack of respect for the rule of law, to the normalization of abuse of power, nepotism and corruption, as Brinkerhoff & Brinkerhoff explain. A recent example is Acting IGP Deshabandu Tennakoon remaining in office even after the Supreme Court ruled he had violated a citizen's fundamental right to be protected from torture. He does so because he has the protection of the President and the Minister of Public Security. Another example is state patronage bestowed upon the armed forces which allows them to escape accountability, not only for war time violations, but also matters such as financial mismanagement and possible misappropriation amounting to hundreds of millions of rupees.

Institutionalized Violence

Violence is normalized in Sri Lankan society and has seeped into public institutions, including those that are mandated to provide protection and remedies for rights violations, such as the police and the justice sector. Institutions in which violence and abuse are embedded will not be able to stem impunity or hold perpetrators accountable. Instead, they have become enablers and perpetrators of the continuum of abuse to which citizens in general and victims of war time violations in particular are subjected.

Despite the institutionalization of violence, violence is not viewed as part of a continuum and elicits public outrage only when it is particularly horrific. However, not all instances of horrific violence evoke empathy or sympathy. The civilian casualties and gross violations perpetrated against Tamils during the last stages of the war, for instance, were viewed as acceptable collateral damage not only by the state but also the Sinhala public. Therefore, accountability for war time violations does not have popular support because the violence is believed to have been necessary to eradicate the Liberation Tigers of Tamil Eelam (LTTE). Society is hence complicit to some extent in normalizing violence against certain groups and thereby enabling the state to escape accountability. This in turn has entrenched impunity further and made it difficult for even the Sinhala public to obtain remedies for violations or hold the state accountable.

Ignore Politics at Your Peril

To hold perpetrators accountable, we must be able to hold public institutions that are mandated to provide remedies accountable. This has been virtually impossible in Sri Lanka for many reasons, one of which is the lack of realization that reform/transformation is not merely a technical exercise but also a political process.

An integral part of the political process is acknowledging the root causes and dynamics of the ethnic conflict, which have become institutionalized and undermined reform attempts in the past. The inaction of the Attorney-General's Department regarding the prosecution of war time violations by the state, while overzealously prosecuting Tamils, and after the Easter Sunday attacks in 2019, Muslims, under the *Prevention of Terrorism Act*, often with scant evidence, point to ethnic prejudices that have been institutionalized.

It is however not possible to reform only one public institution and expect transformation as there are mutually reinforcing institutional dependencies that will undermine whatever progress that has been made. For instance, reforming the judicial sector is not adequate without also reforming law enforcement, the prosecutorial entity, and the prison system.

What then are the options for transformation when beliefs could be impervious to change either because the proposed new systems or changes are counter to the current belief/value system and/or threaten those in positions of power and privilege? A possible short to medium term strategy would be to identify and attempt to reform institutions that are independent or semi-autonomous and to some extent can be de-linked from the broader mutually reinforcing institutional matrix.

Repairing the Social Contract: The Long Haul

In Sri Lanka, the relationship between the citizen and the state, as well as constitutive elements of a political relationship, such as political trust and capabilities, have been damaged by the armed conflict and decades of repressive rule. This is particularly acute where Tamils and later Muslims are concerned. The erosion of the rule of law too has damaged political relationships as it adversely impacts social order, which, as Colleen Murphy states is based on reciprocity between citizens and state officials and respect for individual agency that restricts the abuse of political power.

Paradoxically, a strong social contract is imperative for successful institutional transformation, yet one of the aims of institutional transformation is the rebuilding of this social contract and trust, which ideally should be the outcome of the transformation process. Hence, if reform efforts are to succeed, both structural reforms as well as an ideational shift are required. This isn't an easy process that will yield immediate change, but a long and painful one. It is however a necessary process and the only one that has any possibility of affecting long term, substantive change.

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[1] M.C.M. Iqbal, 'The Public Service of Sri Lanka', *Sri Lanka: State of Human Rights*, (Colombo: Law & Society Trust, 2002). 172.
[2] Radhika Coomaraswamy, *Ideology and the Constitution: Essays on Constitutional Jurisprudence*, International Centre for Ethnic Studies, 1997, p 22.

Citation: Ambika Satkunanathan, "Ignoring the Political: Studying the Roots of the Failed Quest for Accountability in Sri Lanka" in *Navigating the Complex Terrain of Accountability in Sri Lanka: a special issue of the PKI Global Justice Journal* (2025) 9 PKI Global Justice Journal 2.

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Sit-In Protest
Photo by Priya Tharmaseelan

Waiting for International Justice: The Struggle of Tamil Family Members of the Disappeared in Sri Lanka

by Chulani Kodikara

On 30th August 2023, to mark The International Day of the Victims of Enforced Disappearances in Sri Lanka, Tamil relatives of the disappeared and their allies staged multiple protest marches in the north and east of the country, as they have done for many years since the end of the civil war between the state and the Liberation Tigers of Tamil Eelam (LTTE) (1983 – 2009). The largest march this year took place in Batticaloa in the east, organized by the Association for Relatives of Enforced Disappearances (ARED), the most organized and visible network of family members, with chapters in eight districts of the north and east. As they marched from Kallady Bridge to Gandhi Park in Batticaloa, the marchers chanted: "Want, want, justice want! (V???um, v???um, n?ti v???um). Where, where relatives where! (E?k?, e?k? u?avuhal e?k?)). At a press conference given at the end of the march, they reiterated their demand for truth, justice and an "international justice mechanism" (carvat?ca n?ti po?imu?ai)—a demand which they have been making since 2017 when they first formed as an association. It is a demand they have now articulated in a myriad of protest marchers and forums and written down in countless posters and letters. As they explained in a letter addressed to Michele Bachelet, the UN

High Commissioner for Human Rights (UNHRC) in 2022, they have concluded that “fair justice will not be meted out from (sic) the Sri Lankan government”. Therefore, they have decided “to focus (their) struggle towards the international world. . .”

Indeed, the increasing and insistent demand by Tamil family members of the disappeared in Sri Lanka for an international justice mechanism has to be traced to the repeated failures of the Sri Lankan state to address their demands for truth, justice and reparations for forced disappearances during the civil war and particularly during the last phase of the war (2006 – 2009). In the immediate aftermath of the war, the government of President Rajapaksa, which presided over the military defeat of the LTTE, (who fought for a separate state for Tamils in the north and east of Sri Lanka), denied war crimes including forced disappearances, constructed soldiers as heroes, and those demanding justice as traitors. Even though in 2015, a new government which came to power headed by President Maithripala Sirisena and Prime Minister Ranil Wickremesinghe inaugurated a transitional justice process at the UN Human Rights Council in Geneva and established an Office on Missing Persons (OMP) with a mandate to search for and trace missing persons, this process ultimately failed without delivering truth or justice for victim survivors. It is on the failure of the OMP to make any headway in investigating at least a few cases relating to forced disappearances, that ARED shifted its struggle entirely to the international arena.

International law: a site of empowerment or “false hope”?

The invocation of international law by subaltern subjects in the global south (even if mediated by nationalist diasporas and constituencies within Sri Lanka with their own political agendas) forces us to see how those who are denied equality and justice within the nation-state claim and deploy international law in their struggles. Following scholars such as Seyla Benhabib, Toby Kelly, and Kathryn McNeilly, it is possible to argue that international law and norms open up a space for subaltern subjects—women at the margins of the state such as the women next of kin of the disappeared in Sri Lanka— in several different ways. International law can facilitate new subjectivities and new vocabularies of claims making; help form new alliances to engage with and contest the state; help address the asymmetries of power at the national level, and; remake the meaning, content, and remit of universal human rights in specific local strugglers.

Yet beyond the subjective empowerment of victim survivors, what can international law objectively do for subaltern subjects? Can it deliver truth and justice or is it simply a site of “false hope”? In a *History of False Hope*, Lori Allen tackles a string of UN-appointed investigative commissions of inquiry into Palestine to make the case that even though international law makes great promises, ultimately it achieves nothing.[1] In Allen’s analysis, such commissions give victim survivors and their advocates hope with little change on the ground. Moreover, in her view, the hope offered diverts attention and energy away from the work required for political change. Thus, Allen is dismissive of those who argue that international law is more than just a tool of imperial domination and that it can be a “site of resistance.” But it is perhaps too soon to call the jury out on the UN’s involvement in the postwar justice process in Sri Lanka.

The internationalization of the justice struggle in Sri Lanka

Local and international human rights activists internationalized the struggle for justice for war-related atrocities committed by the Sri Lankan state even before the war ended and long before family members of the disappeared mobilized and organized to demand international justice. Sri Lanka was placed on the agenda of the UNHCR in Geneva in 2011, the main UN body responsible for monitoring and protecting Human Rights across the world. More than a decade later, Sri Lanka remains on the agenda. Between 2011 and 2023, the council passed several country-specific resolutions against Sri Lanka urging successive governments to address the demand for justice for war-related atrocities, while also giving authority to the Office of the High Commissioner for Human Rights (OHCHR) to take unilateral action on the question of war-related atrocities committed by the Sri Lankan state. The resolution adopted in 2014 tasked the OHCHR to investigate 'alleged serious violations and abuses of human rights and related crimes by both parties in Sri Lanka.' The OHCHR investigation resulted in a nearly 300-page report titled The Report of the Office of the High Commissioner for Human Rights Investigation on Sri Lanka (OISL) released in September 2015.

However, the most significant resolution passed by the UNHRC to date is Res. 46/1 of 2021. In substance, it commits to retain Sri Lanka, on the agenda of the council, and to strengthen the capacity of the OHCHR to collect, consolidate, analyze and preserve information and evidence relating to gross violations of human rights or serious violations of international humanitarian law committed during the war by the Sri Lankan state; to develop possible strategies for future accountability processes for such atrocities; to advocate for victims and survivors, and; to support relevant judicial and other proceedings, including in Member States, with competent jurisdiction (Op para 6 of Res. 46/1 of 2021). In doing so the resolution noted the persistent lack of accountability at the domestic level, the importance of preserving and analyzing evidence to advance accountability; and emerging trends within the country following the 2019 elections, which represent "a clear early warning sign of a deteriorating situation of human rights in Sri Lanka" (Op para 8 of Res. 46/1 of 2021). The council also allocated 2.8 million dollars to implement this commitment. In UN parlance, this is known as the OHCHR Sri Lanka Accountability Project. This is an unprecedented and untested initiative.

In the most recent report submitted by the UN High Commissioner for Human Rights to the UNHRC (A/HRC/54/20, September 2023), the High Commissioner (HC) reports that the repository is prioritizing four thematic areas: i) unlawful killings; ii) sexual and gender-based violence and torture in detention settings; iii) enforced disappearances; and iv) violations against and affecting children. The report further states that the repository has been populated with data from i) earlier OHCHR investigations into Sri Lanka; ii) other material collected by OHCHR over the years; iii) material from the archives of nine non-governmental organizations; and iv) academic sources. The HC also reports that the OHCHR is in the process of refining the data management capacity of the repository to provide timely responses to requests from state authorities. According to the report, an initial analysis of available data has "highlighted that further investigations would be necessary to address outstanding gaps in the factual basis of some violations, as well as in material linking violations and related crimes to specific individuals whether those directly involved or bearing command responsibility" (see

A/HRC/54/20, p. 11). Moreover, the report remains vague about the forum or forums where this evidence will be ultimately presented and adjudicated. Sri Lanka is not a party to the Rome statute establishing the International Criminal Court (ICC). Therefore, prosecution of perpetrators in the ICC is out of the question, unless the UN Security Council decides to refer a case. Such a referral is, however, unlikely given that China and Russia are strong allies of Sri Lanka. The report of the HC alludes to prosecutions under the principle of universal jurisdiction, which provides for a state's jurisdiction over crimes against international law even when the crimes did not occur on that state's territory, and neither the victim nor perpetrator is a national of that state. The principle allows national courts in third countries to address international crimes occurring abroad, to hold perpetrators criminally liable, and to prevent impunity.

The principle of universal jurisdiction was first used in the 1990s against Chilean President Augusto Pinochet, who was arrested during a visit to London, for war crimes committed in Chile. Since then, it has been used in several cases including against military personnel. For instance, in 2013, police in the UK arrested a vacationing Nepal army colonel under the principle of universal jurisdiction and charged him with torture in Nepal, although he was later acquitted because of a lack of sufficient evidence. The plaintiffs were unable to collect evidence in Nepal due to lack of cooperation from the Nepali government.

In the case of Sri Lanka, the High Commissioner's report of September 2023 refers to "jurisdictions that are investigating and prosecuting crimes committed in Sri Lanka" (and that "requests have been received . . . in relation to 10 named individuals." The report also states that the "project has briefed representatives from 29 States . . . " (p.12). The report concludes that:

> "While it remains the responsibility of the Sri Lankan authorities to acknowledge past violations and undertake credible investigations and prosecutions, the international community can play an important complementary role, including through supporting relevant criminal justice investigations and prosecutions, the use of universal jurisdiction, and consideration of appropriate targeted sanctions against credibly implicated in serious human rights violations" (p.13)

As Peter Gill suggests, the threat of prosecution under the principle of universal jurisdiction can also put pressure on recalcitrant states to address allegations of war crimes. Gill states that the UK case against the Nepali colonel acted as a catalyst in the establishment of two transitional justice bodies in Nepal – A Truth and Reconciliation Commission (TRC) and a Commission for the Investigation of Enforced Disappeared Persons (CIEDP). However, both these mechanisms have left victim survivors deeply unsatisfied. This is no surprise because South Asian states are adept at establishing institutions that mimic transitional justice mechanisms without in fact advancing the goals of truth or justice. Sri Lanka has a long history of attempting to blunt the edge of UN pressure in this manner.

Government of Sri Lanka's Responses to UN Intervention

When Res. 46/1 was adopted in 2021, most local and international and human rights organizations, unreservedly welcomed the resolution. For instance, Amnesty International called it a “landmark,” which represented a crucial turning point or shift in the approach of the international community to justice and accountability in Sri Lanka. The government predictably rejected the resolution. The Foreign Minister described the resolution as “unwarranted,” “unjustified”, “illegal”, “unhelpful”, “divisive”, “polarising”, “intrusive of sovereignty”, and “in violation of the core values of the UN Charter.” Moreover, he argued that the resolution was pushed forward at the behest of a few countries, with “no moral right to interfere into affairs of a sovereign country in this manner” representing one part of the world, without the consent of Sri Lanka; that it would have an “adverse effect on the ongoing efforts to maintain peace, reconciliation and economic development;” and “no country has a greater interest in bringing about reconciliation among its peoples than Sri Lanka” President Gotabaya Rajapaksa assured the country that “(w)e will face the Geneva challenge without fear. We will never succumb to pressures. We are a free nation. We will not be a victim of big power rivalry in the Indian Ocean.”

However, Gotabaya Rajapaksa was ousted from the Presidency in the midst of Sri Lanka’s economic crisis in July 2021. While the new President Ranil Wickremesinghe has also refused to cooperate with the Sri Lanka Accountability Project, he is now seeking to establish a truth and reconciliation commission. This is an attempt to deflect international pressure and delegitimize the Sri Lanka Accountability Project.

Waiting for Justice

And so, the wheels of justice turn in the case of Sri Lanka. If these wheels turn slowly in cases of ordinary crime, they turn exceedingly slowly in the case of war crimes. We know that these struggles for justice must be waged in the long duree if they are to have any chance of success, and even then, they rarely grind fine. At this moment in time, it is impossible to predict the outcome and effects of the Sri Lanka Accountability Project. But family members of the disappeared in Sri Lanka want answers now, in their lifetime. Almost, in every protest staged by them and in every letter that they write, they remember the mothers and fathers, wives and husbands who were part of the struggle, but who are no more; who have passed away without learning what happened to their disappeared loved ones. Women who are part of ARED are acutely aware of the inexorable march of time as they continue to struggle for justice, without knowing whether they will live to see the day.

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[1] Lori Allen, *A History of False Hope: Investigative Commissions in Palestine* (Stanford University Press, 2020).

Citation: Chulani Kodikara, “Waiting for International Justice: The Struggle of Tamil Family Members of the Disappeared in Sri Lanka” in *Navigating the Complex Terrain of Accountability in Sri Lanka: a special issue of the PKI Global Justice Journal* (2025) 9 PKI Global Justice Journal 2.

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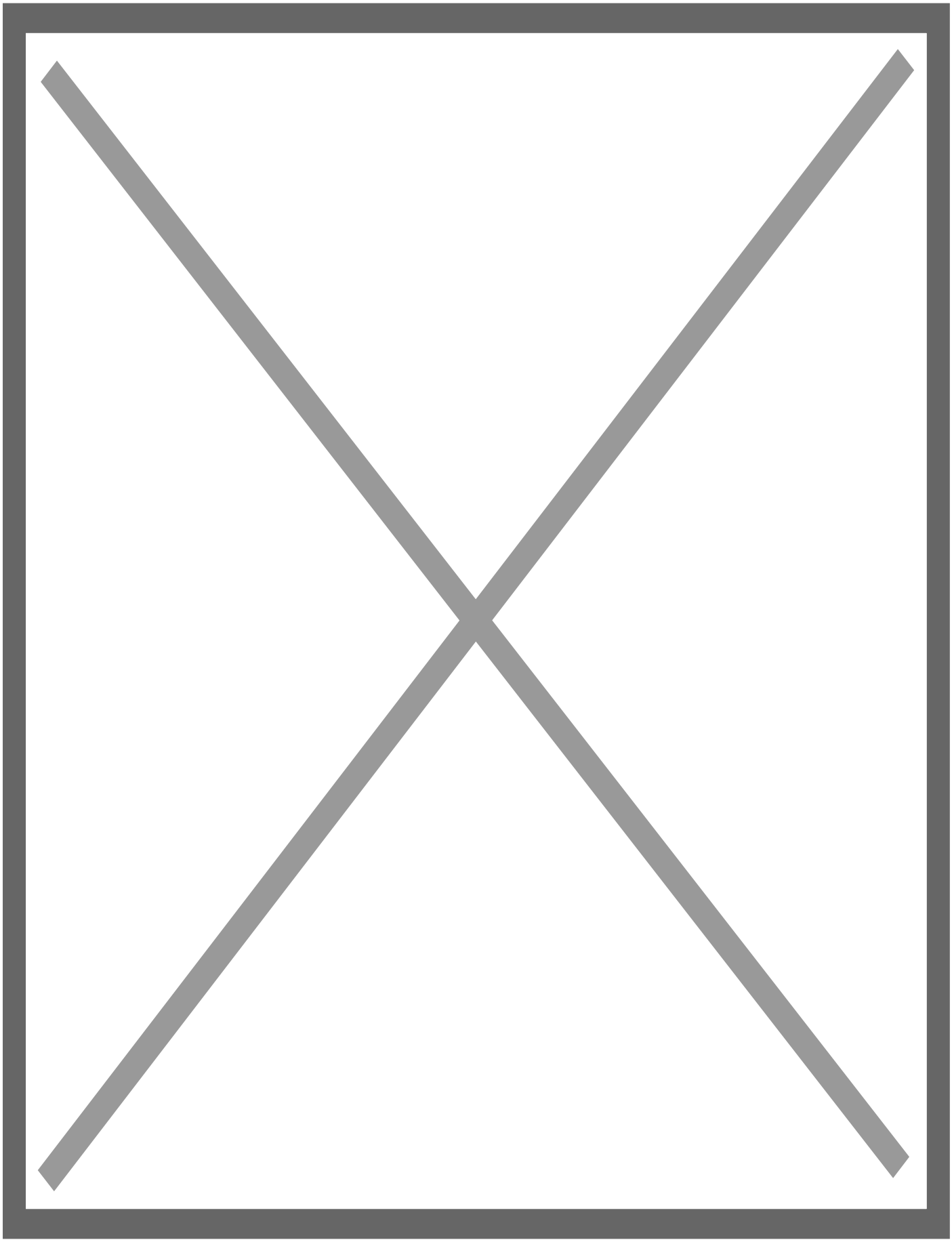


Photo by Priya Tharmaseelan

Revisiting SJV Chelvanayakam

by Ashwini Vashanthakumar

When I was invited to deliver some remarks at the S.J.V Chelvanayakam Memorial Lecture at the University of Toronto April 2023, I went back to read some of Chelvanayakam's early speeches and other political writings. Born in 1898 in what was then British-ruled Malaya, Chelvanayakam would become a key figure in Tamil politics in Sri Lanka, championing minority rights within Parliament for several decades, and articulating Tamil aspirations for self-determination and equality through Gandhian civil disobedience. Two key themes from his political thought strike me as especially salient today: his vision of a progressive and pluralistic Tamil nationalism, and his method of principled pragmatism.

Chelvanayakam had an enduring commitment to Tamil self-determination and helped to give voice to a growing political consciousness. He repeatedly re-affirmed that Tamil people had a distinct political identity and aspired to self-determination. But Chelvanayakam's nationalism was not exclusionary or chauvinistic. If Tamil nationalism partly arose as a reaction to Sinhala Buddhist chauvinism, then Chelvanayakam made it clear that Tamil nationalism need not *mirror* this chauvinism. Instead, Chelvanayakam embraced what might be considered a progressive and pluralistic nationalism. First, Chelvanayakam recognised the right to self-determination of other communities, especially Muslims and Hill-Country Tamils. He repeatedly urged that these were distinct and equal communities with whom Tamils could make common cause and should act in solidarity *against* the majoritarianism of the Sinhala Buddhist politicians. Second, Chelvanayakam also recognised the inherent pluralism within the Tamil community—that Tamils could be from different religious communities, or embrace different political ideologies, but still be part of the Tamil political community committed to Tamil self-determination and Tamil rights. After all, Chelvanayakam was a devout Protestant. Dissenting Tamils are still Tamils. And finally, Chelvanayakam recognised that freedom for Tamil people required what he called "social freedom" for all Tamils, especially for those communities and groups oppressed or marginalized *within* the Tamil community.

To be clear, this is not to paint Chelvanayakam as some progressive vanguard—he was very much a man of his time and social position. But Chelvanayakam's principles of nationalism tell us two things: first, there are many forms that Tamil nationalism can take, and second, these alternative nationalisms have *always* been there.

This pluralism has a few implications. It cautions us to be skeptical of claims about one authentic nationalism—and the people who claim to be its sole representative. It encourages us to recognize the wide range of cultural and religious practices, including changing practices, that are compatible with nationalism and are integral to a vital collective identity. Nationalism, including Tamil nationalism, often

is associated with cultural conservatism, but cultural conservatives too often are committed to preserving *some* cultural values and practices over others, denying that there even is a multiplicity of cultural practices within any national community, and denying that some of these practices are marginalised and oppressed in service of others. And finally, appreciating that any national community contains multiple communities requires a commitment not only to pluralism but also to equality—that is, to achieving "social freedom", including economic freedom.

Second, Chelvanayakam's politics were guided by a method of principled pragmatism. Chelvanayakam is well-known for his commitment to non-violence and the use of collective protest, strike, and defiance. Chelvanayakam embraced Gandhian *satyagraha*, which saw non-violence not only as a moral ideal, but also as a political strategy. As a political strategy, non-violent protest was important for building a large, collective movement, for calling attention and sympathy to a political cause, and for sustaining long-term resistance. And it was also important as a political strategy because it avoided some of the dangers of turning to violence. Echoing Gandhi, Chelvanayakam was wary of the use of violence for political ends. Violence is a force that cannot be controlled once it is unleashed. And violence can easily be turned inwards to tear at the very people on whose behalf it is being used, eliminating critics and political opponents rather than arguing with them. This is not to say that violent resistance is never permitted, but only that it comes with costs, some of which cannot be anticipated in advance and cannot easily be remedied afterwards.

It is important to note that this broadly pragmatic approach to politics—Chelvanayakam is famous for saying "a little now and more later"—is not necessarily in tension with political ideals, since political trade-offs can be made in a principled manner.

Sri Lanka Since 2009

What also becomes clear when you revisit some of Chelvanayakam's earlier speeches is how little has changed. In the 1940s and 1950s, Tamils were worried about the seizure and colonization of Tamil lands; this is ongoing today. In fact, many things have become worse.

Far from decentralizing power, which Chelvanayakam sought through federalism, Sri Lanka has a unitary constitution with an executive presidency, whose powers only seem to keep expanding—even when the office holders have used these powers to commit grave human rights abuses or make disastrous economic decisions that ground the country to a halt. And far from using the end of the civil war to pursue a fundamental transformation, the government only delivers more of the same. In 2023, the government proposed a new anti-terrorism bill that only compounds the problems of the Prevention of Terrorism Act and has been criticized as a thinly veiled attempt to quash all protests and strikes, including those initiated under the *aralagaya movement*. Many of the state's failings were blamed on the war, but Sri Lanka's political elites show little interest in change. A state whose institutions have been shaped to fight a war must find new enemies to target.

Nowhere is this more apparent, perhaps, than in accountability for war crimes committed during the war between the Government of Sri Lanka (GOSL) and the Liberation Tigers of Tamil Eelam (LTTE).

From the nearly three decades of war, countless violations remain in need of investigation; in the final months of the war, during which the LTTE was decisively defeated, as many as 40,000 civilians were killed, mostly through the GOSL's indiscriminate shelling. International experts agree there are credible allegations of war crimes committed by both the GOSL and LTTE, and have consistently criticised the GOSL's unwillingness to address these through thorough and impartial investigations. In September 2023, Human Rights Watch released a report on transitional justice in Sri Lanka. Based on eighty interviews, the report was critical of the GOSL's latest initiative: a hastily announced National Unity and Reconciliation Commission (NURC), that was conceived without meaningful consultation with minority communities in Sri Lanka, and that has been rejected by a wide range of community and human rights organisations. Although President Wickremesinghe promised to pass legislation establishing the NURC by August 2023, the proposed bill was only gazetted in December 2023, and as of this writing, awaits parliamentary discussion.

The timing of Wickremesinghe's announcement suggests that the NURC, like many initiatives that preceded it, is an attempt to placate international critics, in particular the UN Human Rights Council and the OHCHR Sri Lanka accountability project. It is no small irony that the GOSL invokes transitional justice as a way to *avoid* accountability, providing a veneer of truth and reconciliation that allows perpetrators of atrocities to remain in power, the status quo to go unchanged, and victims to languish in limbo. Indeed, the very invocation of transitional justice is political gaslighting: it implies a society that is in transition, that a period of large-scale violence is over and that there is now some effort to create a more just society. But the end of armed conflict has not meant the end of violence and conflict. And it is unclear that there is any recognition amongst Sri Lanka's political and economic elites that there is a *need* for political and social transformation.

Transitional Justice and the Roles of the Diaspora

Sri Lanka is not a society in transition, although it badly needs to be. What would transitional justice look like in Sri Lanka? And how can diaspora actors be involved?

Transitional justice refers to the judicial and non-judicial processes by which a society confronts past large-scale violence, from authoritarian rule or civil conflict, in order to bring about social and political transformation. Commemorative events and plaques, truth commissions, criminal trials, public hearings, reparations and property restitution—these varied processes are united by two aims: to secure accountability for past violence *in order to* bring about a more just future. Transitional justice is therefore both backwards and forwards looking.

These two goals often are mutually reinforcing. Accountability for past violations helps to combat a climate of impunity, addresses victims' legitimate demands, restores trust, and enables necessary institutional reform. After all, without accountability, why would perpetrators change their ways? But it is crucial to recognise that there are tensions between addressing the past and looking to the future—and that looking to the future constrains *how* to address the past. Accountability often is associated with criminal punishment. But the possibility of criminal punishment can deter perpetrators

from cooperating with transitional justice efforts—refusing, for example, to tell families of the disappeared what happened to their loved ones, delaying transitional justice processes, or denying the need for them. In addition, criminal punishment is not always appropriate. Large-scale violence involves the complicity of many ordinary citizens, each of whom contributed in small, not always intentional, ways to political violence. And creating a more just society in which all communities feel invested requires accountability for all violations, irrespective of the identities of the perpetrators or the victims.

The need for inclusion extends to diaspora communities—which, it is important to emphasize, are ideologically, culturally, and religiously heterogeneous. Sri Lanka's various diaspora communities have long been involved in Sri Lanka's political life, and have important roles to play in transitional justice processes. As a general matter, diasporas are key actors in transitional justice processes: the contexts of large-scale political violence that require transitional justice are also often the contexts that force many to flee. Transitional justice often is a matter of transnational justice. Diaspora communities contain victims of persecution and forced displacement; witnesses whose testimony is essential for holding perpetrators to account and for building a collective narrative that fully confronts the wrongdoing of the past; perpetrators who were complicit in human rights violations and have since fled; advocates who can use their presence abroad to ensure international scrutiny; and donors whose individual remittances can help with post-conflict reconstruction.

As I have argued elsewhere, these roles are politically crucial and morally complex. They are not captured fully by the caricature of diasporas as "armchair revolutionaries" who foment violence from a safe distance. It is true that diaspora politics is inherently morally hazardous because of the fact of physical distance: no matter how connected diaspora communities are to the homeland, they are *less* affected by events there. This can lead to a politics of nostalgia and to a politics of risk-taking: it is easy to champion and fund a war that someone else's children will fight. And these roles often are instrumentalised by policymakers who see diaspora communities as either enablers or spoilers of processes that others should decide upon. But even if diaspora communities are less affected, they are not *unaffected*: they remain constituencies that transitional justice processes should serve, and they are entitled to *some say* in how these processes are structured, including in decisions about the sequencing, priorities, and trade-offs that are unavoidable in transitional justice.

These roles also introduce constraints on diaspora actors. If diaspora activists want to further *transitional* justice, then their pursuit of accountability for past violence must also aim at securing future change. Among other things, this means working with other groups, across different ethnic and religious communities, in the diaspora and especially on the ground in Sri Lanka, to envision a transformed Sri Lanka. It calls for reimagining Tamil nationalism, or at least exploring the different forms such nationalism might take. The dominant narrative of Tamil nationalism crowds out alternative histories and occludes the different paths they generate, which are all the more urgent now. Heeding marginalised perspectives can provide alternative ways forward. In addition, pursuing transitional justice requires trade-offs: pragmatism and a willingness to compromise—to accept a little now and pursue more later—is a virtue in the politically fragile context of transitional justice. And finally,

pursuing transitional justice means pursuing accountability for all wrongdoing and against all wrongdoers, which includes government officials, the armed forces, paramilitary organisations affiliated with the GOSL, the LTTE, and other armed groups. Anything less diminishes diaspora actors' credibility with other stakeholders and diminishes how effectively they can push for accountability.

This would be a shame. Actors in the diaspora can criticise the powerful and commemorate the dead, free from the GOSL's retaliation and suppression; they have readier access to international actors and forums; and they can more easily challenge the cultural hierarchies of gender, caste, and sexuality that hold back many communities in Sri Lanka and abroad. While diasporas certainly include "armchair revolutionaries" and "spoilers", they also include critics, witnesses, and advocates who can insist on the truth, in Sri Lanka and in the diaspora, and forge solidaristic ties that link international actors with communities on the ground. They are crucial both for securing accountability, truth, and justice in Sri Lanka for past and ongoing violence, and for shaping, with others, the social and political transformations Sri Lanka so badly needs.

Citation: Ashwini Vasanthakumar, "Revisiting SJV Chelvanayakam" in *Navigating the Complex Terrain of Accountability in Sri Lanka: a special issue of the PKI Global Justice Journal* (2025) 9 PKI Global Justice Journal 2.

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Lasantha Wickrematunge funeral banner
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Elusive Justice & Prospects for Reconciliation in Sri Lanka

by Bhavani Fonseka

The recent documentary by Channel 4, aired in September 2023, and which re-examined the devastating Easter Sunday attacks and the assassination of Lasantha Wickramatunge, yet again reminded of the multiple factors that facilitate violence and entrench impunity in Sri Lanka. The revelations from the documentary are not new. Prior investigations, official documents from commissions, committees and court documents pointed to some of what was reported. Yet, the documentary visually captured clips in the lead up to the incidents, the fateful day, and statements of those who were once close to the security apparatus and political establishment. These, coupled with victim testimony, shocked the viewer, reminding of the murky world of power, politics and violence in Sri Lanka.

Nearly 15 years after the end of the war, questions continue to loom in relation to reckoning with Sri Lanka's past violence. Victims and civil society in Sri Lanka and outside continue to demand for truth and justice. As this article highlights, despite the brave and persistent calls, with many facing threats and indignities in the process, there has been no real progress with truth and justice in Sri Lanka. This article examines the numerous setbacks with transitional justice in Sri Lanka, the impact on victim communities and the further entrenching of impunity. Yet, despite the numerous setbacks, the article highlights the perseverance of several in Sri Lanka and the rare victories that remind of why sustaining efforts at accountability and reform are important for democracy and reconciliation.

Setbacks with Justice

Sri Lanka's justice system has endured and continues to endure numerous setbacks, resulting in a long list of emblematic cases. This includes delays with investigations, filing indictments, and prosecutions, with many cases dragging on for decades at the different stages of the criminal justice system. Cases such as the investigations in the assassination of Lasantha Wickramatunge and the assault on Keith Noyahr are examples of the multiple ways investigations get delayed. These are two well-known cases due to media publicity and pressure by the victim families, with many other cases getting lost and forgotten.

Lasantha Wickramatunge's case also highlighted the issue of tampering of evidence, another aspect that impacts investigations and prosecutions. Cases also see cover ups by the Sri Lankan state, with some state entities using their office to impede justice. This was evident in the Murder of Wasim Thajudeen, where evidence came to light of steps taken by state entities to tamper with evidence and the cover up.

Threats to victims and witnesses, and challenges with providing them adequate protection, has been a long challenge in Sri Lanka. The cases of the killing of the Five Tamil Students in Trincomalee, 2006, and Killing of Workers for Action Against Hunger in the same year, highlight how threats and violence is faced by victim families, eye witnesses, and those who report on the incident. The first case saw

victims threatened, with several victims having to leave the country. A local journalist who reported on the murder of the five students and exposed evidence of the killings was subsequently shot dead by unknown gunmen. In the ACF case too, victims faced threats and had to flee the country. Both of these cases also saw investigations dragging on for years, with no justice achieved yet in either case.

There is also growing evidence of conflict of interest and interference from the state, which impede investigations. The case of the Navy 11 is one example where state entities colluded to delay justice. Evidence in the case shows that numerous actors, including political leaders and state officials, interfered with investigations. In the Murder of Joseph Pararajasingham, a Member of Parliament was gunned down at a religious place of worship. Despite charges being filed against the accused by Sri Lanka's Attorney General Department, the same Department decided to discontinue the prosecution following a ruling from the Court of Appeal, in which the confessions made by two suspects against the accused were found inadmissible as evidence, and with the acquittal of the accused in 2021. Recent revelations expose interference from multiple actors that has impeded justice and entrenched impunity.

There are also other ways by which executive action has undermined judicial proceedings. In the Disappearance of Prageeth Eknaligoda, the trial was impacted by the appointment of a Commission of Inquiry, the latest tool to undermine investigations and prosecutions. In addition, recent years also saw the targeting of some investigators and others who were pursued with some cases. The setting up of the *Presidential Commission on Political Victimization and the Special Presidential Commission of Inquiry*, and the demotion, transfer and arrests of investigators, saw a witch hunt against several who dared to investigate and build a case against alleged perpetrators. This resulted in some having to flee the country, while others were arrested and vilified for doing their job.

The rarest of cases, which proceed to trial and see a conviction, face subsequent setbacks, such as the use of the presidential pardon post-conviction. In March 2020, then president Gotabaya Rajapaksa granted a presidential pardon to a murderer who had been convicted for the Mirusuvil massacre that occurred in 2000 in the Jaffna District, where civilians, including children, were killed. The conviction had been upheld by the country's Supreme Court in 2019, a rare case in postwar Sri Lanka of a member of the military being held accountable for an atrocity.

These, and other cases, demonstrate the varied methods of undermining of the criminal justice system and of the hope of obtaining justice in Sri Lanka. Even the few cases that proceed to trial see challenges with delays, interference, protection issues and acquittals. And the rarest case, which proceeds to see a conviction, continues to face challenges, particularly with the executive president using the power of the pardon. These setbacks are against a backdrop of harassment and other methods to silence victims, witnesses, activists and officials who genuinely try to pursue justice. Despite this, several have continued with their struggle and in the process, exposing the mounting challenges confronted in their quest for justice.

Continuing Denial, Complicity, and Impunity

The setbacks discussed in the previous section are in a context where the erosion to the rule of law and threats to independent institutions are on the rise, with recent months seeing threats and intimidation towards the judiciary and other offices in the criminal justice system. Most recently, the resignation of the magistrate in Mullaitivu due to threats and harassment, is an indicator of the deteriorating context in Sri Lanka. This incident speaks to the heightened ethno-nationalism and land appropriation evident in the North and East of Sri Lanka, with minorities facing the brunt of threats and violence. In this instance, a judge who was carrying out his official duties had to face a barrage of threats from politicians and others, culminating in his resignation and fleeing of the country. This is against the backdrop of other tactics used to target investigators, lawyers and others who worked on key cases.

The numerous setbacks with justice in Sri Lanka are coupled with public pronouncements by the government, some politicians, and others, that deflect and deny the occurrence of serious human rights violations and the need for accountability. In the face of persistent demands by victims and civil society, deflection and denial has been the norm.

The conduct of the *Presidential Commission of Inquiry into Political Victimization*, and other methods used to target individuals and undo the limited work done with key cases, is an indicator of the varied methods at entrenching a political culture that protects perpetrators and impunity.

The context is further exacerbated by the heavy militarization and securitization in Sri Lanka, with a narrative of national security and public order often informing laws, policies and action taken. Recent proposed laws such as the Anti-Terrorism Bill and the Broadcasting Regulatory Commission Bill attempts to further entrench the military role in policing and governance. The revelations from the investigations into the Easter Sunday attacks including the *Presidential Commission of Inquiry*, the Parliament Select Committee and the recent Channel 4 documentary, all expose the expansive role of the security and military apparatus that is used for political gain with deep implications for human rights and democracy.

Sri Lanka has continued to see heightened ethno-nationalism that continues to perpetuate threats and intimidation against minorities, most recently manifested in land appropriation in the guise of archaeology and heritage. The cycles of violence over the decades are also a reminder of the uncertainty and apprehension faced by minorities, the postwar period alone seeing a spate of attacks against Muslim communities, as seen with several incidents including Aluthgama (2014), Kandy (2018) and post Easter Sunday attacks (2019), among others. The more recent instances of ethno-religious tension and violence in the North and East, perpetuated by hardline Buddhist clergy, politicians, and their supporters, is in the context of a state that is complicit in ethno-nationalism. Despite evidence of certain leading Buddhist clergy and politicians inciting violence, there is to date no action taken against them, a reminder of the protection enjoyed by some in Sri Lanka. At the same

time, the state had targeted bloggers and comedians for inciting violence, resulting in a a chilling effect on expression and dissent as well.

All these developments are in the context where the Government of Sri Lanka is actively pushing for the establishment of what has been termed the “National Unity and Reconciliation Commission”, which is the proposed truth commission influenced by South Africa’s experience with apartheid. Despite the clear calls by victims and civil society for accountability and confidence-building measures, the proposal is pushed by the Government. This is also in the context where Sri Lanka has a legacy of commissions, resulting in limited trust among victims and civil society that the present proposal is any different from past exercises. Rather than punish perpetrators and hold them accountable, Sri Lanka sees them pardoned, promoted, and protected.

This all contributes to an environment that speaks to a justice system that is broken and has continuously failed victims. The continuous delays, denials and setbacks with accountability in Sri Lanka has also contributed to many looking internationally for recourse, demanding for accountability at the United Nations and with the use of universal jurisdiction. Such action not only exposes the failures with justice in Sri Lanka, but a reminder that, in the face of mounting failures and impunity, reckoning may only be available elsewhere.

Conclusion

The decades of violence and the demand for truth and justice have been met by successive governments in diverse ways – from promises to take action and the appointment of state investigations and inquiries, to political interference in investigations, the denial of the existence of violence and discrimination, and instances where some actively protect perpetrators. Only in the rarest case has political leadership seen genuine steps taken to address the calls for truth and justice. as seen with the steps taken with the Krishanti Kumaraswamy rape and murder case that subsequently resulted in a conviction. It was during this period that steps were also taken to appoint the all-island disappearances commission that exposed the high numbers of enforced disappearances across Sri Lanka. These moments of reckoning are rare for a country that has seen numerous setbacks in the pursuit of justice, resulting in victims losing confidence in the system.

Yet, despite the countless challenges and political culture of impunity, the work of brave victims, civil society, investigators, lawyers, judges, media and others, demonstrate that hope is not entirely lost. The perseverance has shown that justice has a chance if a conducive political culture, encompassing legal and structural reforms, is in place. These necessary reforms, including the establishment of an independent prosecutor’s office and independent special court to criminalize international crimes, among others, are not easy, but essential if Sri Lanka is to break from its legacy of impunity and usher in reconciliation and democracy.

The *Aragalaya* – the massive citizen movement of 2022 – showed that breaking from past practices

that perpetuate violence and impunity and ushering in a new political culture and a change in governance has the potential to unite communities. Many of the issues that are often ignored or sidelined came to the fore in the face of an unprecedented economic and governance crisis, forcing people to acknowledge that a fundamental change in governance is required if Sri Lanka is to break from its past. Yes, despite this awareness among sections of society, the challenges remain in the attempt to usher in change and address accountability. It is in such a context that the pursuit for accountability, both nationally and internationally, must continue, with the ultimate goal of achieving justice and reconciliation in Sri Lanka.

Citation: Bhavani Foneska, “Elusive Justice & Prospects for Reconciliation in Sri Lanka” in *Navigating the Complex Terrain of Accountability in Sri Lanka: a special issue of the PKI Global Justice Journal* (2025) 9 PKI Global Justice Journal 2.

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Word "Truth" being highlighted
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Harvesting Truth: Transitional Justice in Post War Sri Lanka

by Sujith Xavier

Transitional justice is a “lens” that encompasses various approaches to past, and sometimes ongoing violence. Often inflicted by state or non-state actors, the violence is usually precipitated by a hatred towards difference in political opinion or animosity towards a group, based on for example race, ethnicity or religion.

There is a concerted effort by various domestic and international stakeholders to move away from a violent past to a stable future through theories and practices of transitional justice. While there are

clear, identifiable elements within transitional justice, there are also contested understandings of this field. These elements, or "lenses" as suggested by Tshepo Madlingozi, can be located in international, regional, and national registers. These lenses then encompass various legal, political, and institutional techniques to grapple with a violent past. These techniques primarily rely on law, by drawing heavily from public international law and domestic public law (including criminal law).

Taking a bird's-eye view of this field, the perspectives and practices of transitional justice can be articulated as: reconciliation, truth-telling, accountability, reparations, and reform (including institutional commitments for non-recurrence).[1] Such a framing enables political and legal actors to achieve justice via their respective mechanisms. For instance, there are several national and international truth commissions that have sought to determine the truth about human rights violations and violence in specific instances. With this framing of transitional justice, it is important to reflect on whether transitional justice can untangle and address the root causes of Sri Lanka's culture of violence and impunity. Even after some contextualization, my response as a survivor of war, a former practitioner of transitional justice and now, an academic studying this field remains a steadfast no. Transitional justice cannot untangle and address the root causes of Sri Lanka's culture of violence and impunity.

The purpose of this short intervention is to offer a critical account of the background norms that animate the impossibility of justice after acute violence. In this instance, I am conceptualizing justice in the traditional western sense, mediated through forms of truth telling, adjudication, and punishment. I suggest that transitional justice is in fact part of the problem. In the wake of the Nuremberg precedent, the crisis of accountability helped forge the field of transitional justice. More importantly, the field of transitional justice was created during the legal decolonization of former colonies. This field is thus part of the processes of capital accumulation that Sri Lanka (and almost all developing, "post-colonial" countries like it) are now entangled in.

By focusing on truth-telling within transitional justice theory and practice, I hope to open up several new windows into our understanding of how this field reifies existing inequities within the global legal and political order. In what follows, I focus on the truth of what happened during the 27 year long conflict ("Truth in the Present") and the truth of how we ended up in this predicament ("Historical Truth"). I suggest that transitional justice entrenches inequities within the fragile "peace" that Sri Lanka now enjoys with the defeat of the Liberation Tigers of Tamil Eelam ("LTTE" or "Tamil Tiger").

1. Determining Truth: International and National Experiences

Truth in transitional justice is determined by asking, "who did what to whom". By framing it this way, one can view the importance of truth to move forward. Several national and international inquiries and commissions have been established thus far to pursue the truth in the aftermath of acute violence. From a cursory review, there are over ninety international truth commissions that were created using several approaches. Within national jurisdictions, some states have specific public law statutes that allow for public inquiries to determine what happened. National and international truth-seeking projects have their respective opportunities and challenges. Archbishop Desmond Tutu's reflections in 1998

captured some of the opportunities when he noted: “[…] the wounds of the past must not be allowed to fester. They must be opened. They must be cleansed. And balm must be poured […] [to] heal. It is to take care that the past is properly dealt with for the sake of the future”.

While these expectations may drive the search for truth, established national and international mechanisms have struggled to bring about the healing, and more broadly, reconciliation that is often associated with truth commissions. I explore these tensions within the existing national and international truth-seeking mechanisms for Sri Lanka in this section.

1.1 International Truth-Seeking Mechanisms in the Context of Sri Lanka

There are several examples of international investigatory bodies that were created to study the causes of conflicts around the globe. For example, there was a commission established to investigate the root causes of World War I and to determine if war crimes were committed during World War II. There are more recent examples where the UN deployed international commissions of inquiries to make determinations about the scope and severity of violence in specific places. These types of investigative bodies were created, for instance, by the UN Security Council for the former Yugoslavia and Rwanda. Their findings were then relied on to create the two ad hoc tribunals. These tribunals have successfully prosecuted those that bear the gravest responsibility for the genocide in Rwanda and the former Yugoslavia. In a similar manner, there are other instances where commissions were created to determine what happened within a particular territory, like Darfur. The findings of the Darfur Inquiry precipitated the UN Security Council to refer the situation to the International Criminal Court (“ICC”). Since the referral, there has been very little movement in delivering justice to the victims of violence in Darfur. In a similar manner, albeit outside the purview of the UN Security Council, a fact finding commission was created to examine the violence in Sri Lanka.

With the end of the civil war between the LTTE and the Sinhala Buddhist state, there was an urgent need to determine whether international crimes were committed by the parties to the civil war. The UN Secretary General Ban Ki-moon was able to convince the then Sri Lankan President, Mahinda Rajapaka, of the importance of accountability, if only for a brief moment during his visit to the island at the end of the war. As part of this commitment, Ban Ki-moon set up the UN Secretary-General’s Panel of Experts on Accountability in Sri Lanka (“Panel”). The Panel was tasked with advising the UN Secretary-General on whether Sri Lanka had taken, and should take measures with regard to “accountability, in light of the actual nature and scope of all allegations”. The Panel focused on “the modalities, standards and comparative experiences regarding accountability for violations of international humanitarian and human rights law, including for distinct violations against groups with particular vulnerabilities, such as women and children”. The UN Secretary General appointed Marzuki Darusman as Chair (Indonesia), Steven Ratner (United States), and Yasmin Sooka (South Africa) and they formally started their mandate on September 16th, 2010.

Given the Panel’s mandate to focus on events between September 2008 to May 2009, the commissioners received information (both public and confidential) from various sources. Human

rights organizations collecting victim testimonies were able to share the evidence with the Panel. The Panel consulted with public institutions, and international and civil society actors. They also made repeated efforts to engage with the government of Sri Lanka during the first phase of their mandate. They were not successful. Then the Panel drafted the almost 200-page report, with significant recommendations that would help Sri Lanka move forward. In the assessment of the last stages of the war, the Panel found credible evidence that the parties to the conflict had in fact committed several "serious violations" and these violations amounted to breaches of international humanitarian law, international human rights law, and international criminal law. In 2011, the Panel recommended a special mechanism to bring about accountability and justice.

Once the report was released, there was little to no progress in achieving accountability for the victims. From their perspective, the report continues to collect dust on the annals of the internet. Subsequently, there were several United Nations Human Rights Council resolutions that attempted to promote reconciliation and accountability. The Sri Lankan state promised to implement these resolutions by creating transitional justice mechanisms. These promises remain unfulfilled.

The report and the search for accountability, framed by the Panel as "the achievement of truth, justice, and reparations" in the hopes of ushering in "sustainable peace in a State after conflict" remains a lofty goal. Notably, the creation of this panel of experts led the Tamil victims to believe that some form of justice was possible. The incalculable amount of energy spent in getting the evidence to the Panel, especially by the victims, is a point of contention and bitterness.

1.2 Domestic Measures to Determine Truth

Post-war Sri Lanka can be viewed as the traditional transitional justice example: ready and able for the international community to shape the delivery of justice. There were significant civilian casualties as a result of the military conduct in defeating the Tamil Tigers in May 2009. The abhorrent military conduct created demands for accountability and justice for the victims of the war. Given the international pressure —however fleeting it may have been— President Rajapaksa, acting under the auspices of The Presidential Inquiry Act 1947, created the Commission of Inquiry on Lessons Learnt and Reconciliation ("LLRC") on May 15, 2010. The Commission was tasked with looking back at the conflict and "ahead for an era of healing and peace building in the country".

Like all the other presidential commissions, the LLRC avoided some of the central thorny issues. Once it had heard from the witnesses, the Commission problematically determined that the Sri Lankan military acted in a manner "consistent with the position that protection of civilian life was a key factor in the formulation of a policy for carrying out military operations".

In the wake of these suspect findings, the United Nations investigations discussed earlier alongside another national Consultation Task Force called for the creation of transitional justice mechanisms in Sri Lanka. A United Nations Human Rights Council resolution also urgently requested Sri Lanka to create a transitional justice mechanisms to deal with the war time atrocities. While the Sirisena government (2015-2019) complied with the international demands for accountability through

transitional justice mechanisms, Gotabaya Rajapaksa's government elected in 2019, took a different position. With the national protests and the near economic collapse of Sri Lanka a few months later, along with the more recent ousting of President Gotabaya, transitional justice conversations have stalled even further. More recently, a commission focusing on truth, unity and reconciliation was set up by the current Sri Lankan government. We will have to wait to determine whether it can overcome the challenges chronicled in the earlier discussion.

The search for truth in Sri Lanka has either failed or stalled. While a nuanced analysis that examines the anatomy of these truth commissions from a Third World perspective may yield important insights about procedure and process, what remains clear and true is that global North-global South dynamics have an impact on the discovery of the truth. Importantly, the premise that the determination of truth will yield some form of accountability and/or justice and will foster reconciliation needs to be further problematized. On the one hand, once the victims provide their respective evidence and have been re-traumatized, they are left with nothing else. They are expected to carry on. On the other, once these commissions deliver their findings, international and domestic politics of the day dictate the possibility of what may happen next.

2. Historical Truth as Root Causes

The Sri Lankan example illustrates the challenges faced by national and international truth commissions. The traditional transitional justice literature presents commissions of inquiry/truth commissions as offering a space for truth, where victims are centered.[2] Notwithstanding these promises, the victims' testimonies are deployed to achieve the goal of potentially determining truth, as seen in the example of the UN Panel of Experts Report. Broadly, these types of reports promote progress by valuing human rights. As evidenced by the above discussion however, this was not possible in Sri Lanka because of global and domestic politics.

At the global register, a UN Security Council referral to the ICC was not possible for Sri Lanka, given the prominent role of Sri Lankan allies like China, the United States, and the UK. Similarly, the use of Chapter VII of the United Nations Charter to create an *ad hoc* mechanism, like the one set up for Rwanda and former Yugoslavia, was not possible given the veto of the permanent members of the UN Security Council. Even with a hybrid mechanism, the UN Secretary General would need the consent of the state in question, similar to how the hybrid tribunals of Sierra Leone and Cambodia were set up. Accountability for war crimes was impossible domestically. The majority Sinhala people would not accept the prosecution of their war heroes, especially because of the way the media and politicians had spun the defeat of the Tamil Tigers. Additionally, there is a long history of impunity that is deeply entrenched within the Sri Lankan legal system, which can be traced back to the Island's history of colonialism and imperialism.

In this context the interventions by Third World Approaches to International Law (TWAIL) scholars become somewhat salient from one vantage point. TWAIL scholar, Obiora Okafor, powerfully suggests that fact-finding processes are problematic for several reasons. Okafor poignantly argues

that the Third World is conceptualized by truth-seeking inquiries as horrific places, akin to hell. This type of perspective poses challenges for how victims and the violence are viewed and described. Okafor moreover identifies the "one way traffic paradigm" of the fact-finding inquiries, that follows from this binary logic of heaven and hell:

> "In this paradigm, human rights knowledge, scrutiny, and supervision tends to flow from those parts of the world that supposedly invented human rights (i.e., the West) and that observe it almost perfectly, to those regions of the world that tend to know very little—if anything—about it (i.e., the Third World), and that hardly ever observe it."

This argument is astutely reflective of how the UN Panel of Experts were set up for Sri Lanka. Several months before the Panel took on its task, a secretariat was created to facilitate the work of the Commissioners and to organize the data gathering. The secretariat was made of up transitional justice experts that facilitated the flow of the raw data from the periphery where the violations occurred. In this well-known framework, human rights knowledge flows to Sri Lanka via the Panel that brings the tools of the saviour to the savage victims. Yet, what is missing from Okafor's framework is the inclusion of the raw data that must be extracted from the local space, so that the law can be applied to the facts by the experts. The application of the law to the fact then forms the basis of the report. While Okafor's "one way traffic paradigm" holds true, it does not account for the experiences of the victims, which need to be calibrated to fit into this binary. The victims come forward in search of Western forms of justice and provide testimony in the hopes that they may receive some type of reparations. Yet, once their stories are extracted, the potential reparations or justice are never forthcoming. Rather, the victims and their families are left with a form of re-traumatization that they must now contend with, as they try to rebuild their lives.

The flow of human rights knowledge to Sri Lanka and extraction of the testimonies is part of the market-friendly "conveyer belt" that Ambalavaner Sivanandan theorized in his highly influential essay focusing on the "New Circuits of Imperialism", first published in 1989. Sivanandan, a Tamil refugee that fled the Island during the 1958 riots, critically explored the shift in labour practices and globalization that restructured imperial capitalist formations in the early 1990s. In developing his argument, Sivanandan suggests that the ability of underdeveloped countries to shift their status to industrialized nation states continues to be highly difficult. Sivanandan thus notes: "If there is movement, it is no more than the movement of a conveyor belt that runs on fixed stations. It is the belt that moves, not the stations; if they did, the whole system would collapse". The stations in this instance are the nation states, which have a pre-determined role as part of the larger project of resource extraction, racialization and free flow of capital from the periphery to the centre. Transitional justice and truth commissions cannot be severed from these processes of capital accumulation that the determination of truth is part of.

Sri Lanka (or Ceylon before 1972) has a particular position on the conveyor belt because of the world-making that the British Empire had embarked on when they took over the Island. With the fall of the

Dutch empire and Napoleon's takeover of the Netherlands in 1796, the British empire marched into Dutch territories of Ceylon. What they found were fragmented "social formations", without a clear and unified forms of sovereignty in the Westphalian nation state sense, as theorized by Sinavandan. This is the starting point from which the Island was re-made to facilitate colonial governance from the centre (Colombo/London). This re-making begins with the ousting of the Nayakkar King of Kandy, that had ruled for over 100 years[3] and the ceding of sovereignty by the Kandyan Buddhist aristocrats. They relinquished their sovereignty in exchange for the constitutional protection of Buddhism throughout the entire Island, even though other "social formations" practiced different faiths for centuries. The adoption of the Kandyan Convention in 1815 then set in motion the modernization of Ceylon, culminating in the reforms precipitated by the Colebrooke Cameron Commission in March 1832.

The commission's reforms ushered in the creation of ethno-racial categories that previously existed as "social formations", and these categories would then solidify, and be continually reinforced by a perverse form of ethno-national Buddhism. With the legal decolonization of the Sri Lanka in 1948, these solid ethno-racial categories would further separate social formations into communities with majoritarian political will and the remaining ethnic and religious "minority" communities. The ensuing struggle for dominance would eventually trigger the civil war, starting with the Black July massacres.

Of course, global and domestic financial systems were deeply implicated in funding the civil war. Some have suggested that the Sri Lankan Government spent close to 6% of its gross domestic product on military expenditures during specific periods of the conflict with the Tamil Tigers. Once Sri Lanka became a middle-income country, it had to rely heavily on loans from other nations like China and the United States. By 2008, Sri Lanka was borrowing close to 2 billion USD to fund the war and maintain its expenses. Once the war was over, Sri Lanka continued to borrow, thus bringing it to the brink of bankruptcy, necessitating further debt.[4] This larger context is not part of the search for truth, as encapsulated within the transitional justice discourse on Sri Lanka. In fact, transitional justice tends to ignore and at times obscure the root causes of the past violence.

Conclusion

In the making of the Sri Lankan civil war, there is a broader narrative that is often ignored. I argue that the missing elements are the colonial and imperial history of the Island. This history illuminates how Sri Lanka ended up in its current "fragile" state, in need of both finances (through debt) and justice. In both international and national truth-seeking processes, the historical realities of how the Island ended up in its current situation are nowhere to be found. Rather, transitional justice experts focus on the elements of international and domestic crimes, without a single thought to what Kamari Clarke has suggested as the "root economic causes" of the conflict.

Returning to the question I started with, how "might transitional justice untangle and address the root causes of Sri Lanka's culture of violence and impunity", then requires a socio-political, economic, and historical account of the Island. As Sivanandan suggests, a materialist account is needed. This type of

approach sadly is not possible within the liberal framework that transitional justice adopts as means to achieve justice for past violence.

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[1] I draw this formulation from José E Alvarez, “Alternatives to International Criminal Justice” in Antonio Cassese, ed, *The Oxford Companion to International Criminal Justice* (Oxford: Oxford University Press, 2009) at 25-38;
[2] Jeff Corntassel & Cindy Holder, "Who’s Sorry Now? Government Apologies, Truth Commissions, and Indigenous Self-Determination in Australia, Canada, Guatemala, and Peru" (2008) 9:4 Human Rights Rev 465.
[3] Sujit Sivasundaram, *Islanded: Britain, Sri Lanka & the Bounds of an Indian Ocean Colony* (Chicago: University of Chicago Press, 2013).
[4] Xavier et al, “Indebted Impunity and Violence in a Lesser State: Ethno-Racial Capitalism in Sri Lanka” (2022) 25:2 J Intl Econ L 277; see also Nimanthi Perera-Rajasingham, *Assembling Ethnicities in Neoliberal Times: Ethnographic Fictions and Sri Lanka’s War* (Evanston USA: Northwestern University Press, 2019) at 1-23.

Citation: Sujith Xavier, “Harvesting Truth: Transitional Justice in Post War Sri Lanka” in *Navigating the Complex Terrain of Accountability in Sri Lanka: a special issue of the PKI Global Justice Journal* (2025) 9 PKI Global Justice Journal 2.

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Mullivaikkal Remembrance Day 2016
Vikalpa | Groundviews | Maatram | CPA |cc-by-2.0

Transnational Memorialization and Documenting Tamil Genocide in the Diaspora: Implications for Justice and

Accountability

by Harini Sivalingam

A. Sivanandan stressed the importance of memory to the preservation of culture and identity in *When Memory Dies*. Sivanandan argues that memory serves as a repository of culture, tradition, and personal narratives, preserving the essence of a community's past even as it faces the challenges of displacement and conflict. In the context of memory and war, one cannot overstate the importance of memorialization as a form of documenting mass atrocities and the profound implications for justice and accountability for victims and survivors of state violence. While memorialization is a contested and political process that is largely shaped by those in power, there are also spaces of resistance to dominant narratives of the state. Diasporas are a living testament of mass atrocities and provide a strong and powerful counter narrative to efforts by state perpetrators to suppress memorialization and remembrance in official versions of histories. Such counter narratives not only challenge the official state narratives, but also mount a direct challenge to state power and authority.

The Tamil Genocide in Sri Lanka is an example of how the Government of Sri Lanka restricts memorialization by Tamil victims and survivors (Hyndman and Amarasingam, 2014) in an effort to impede the documentation of genocide and the impact of this technique of governance on justice and accountability. As is evident in the case of Sri Lanka, governing memorialization and restricting documentation are acts that suppress justice and accountability in an attempt to control the juridical paths available to victims and survivors of genocide. However, at the same time, resistance and contestation from local Tamil communities in the North and East of Sri Lanka and the global Tamil diaspora helps to fill this void through their efforts to memorialize and document their trauma and lived experiences as victims and survivors of genocide.

While memorialization is a contested and political process that is largely shaped by those in power, there are also spaces of resistance to dominant narratives of the state, in particular within diaspora communities. This is especially the case in places such as Sri Lanka, where the governing regime that perpetuated mass atrocities such as war crimes, crimes against humanity and genocide continue to rule over their victims and lack accountability for their crimes. Often in such spaces, remembrance, memorialization and documenting genocide can be a difficult if not impossible task. Despite the attempts by government forces to suppress their narratives, Tamils in Sri Lanka have continued, at great risk to their lives and those of their loved ones, to assert their experiences as genocide through various forms of memorialization and commemoration. However, in large part, the discourses on Justice, Accountability and Memorialization in post-war Sri Lanka are framed around Sri Lankan Nationalism and military victory, with little space for alternative or counter discourses by Tamil victims and survivors.

The Tamil Diaspora plays an important role in memorializing and documenting their experiences of

mass atrocities committed by the Sri Lankan state. Diasporas are a living testament of mass atrocities and provide a strong and powerful counter narrative to efforts by state perpetrators to suppress memorialization and remembrance in official versions of histories. Such counter narratives not only challenge the official state narratives, but also mount a direct challenge to state power and authority. The Diaspora has the privilege of being removed from the daily threat of state suppression by their perpetrators. Diaspora and exiled community members face threats to the safety of their loved ones, and also face increased scrutiny upon their return to their countries of origin. Vocal and critical Diaspora members and groups also face political repercussions, both in their countries of origin and their host countries. In the case of Sri Lanka, we saw the Sri Lankan government retaliate against Diaspora members and organizations who were critical of the regime, by designating them on their Anti-Terrorism list. For example, a British Tamil who was critical of the Sri Lankan state was detained and tortured when he returned to Sri Lanka. While Diasporas members may face some risks, being outside of their countries of origins, places them in a unique and powerful position to memorialize and document their experiences of genocide.

Contextualizing the Tamil Genocide

Like many of the Genocides that have historically taken place around the globe, Tamil Genocide, did not take place in one particular moment in time. Genocide of Tamils was a process that traces it roots to European colonization of the island, subsequent the independence of Sri Lanka from British colonial rule, and into the present day. One of the first state-sponsored acts of violence against Tamils took place in 1958, just a decade after Sri Lanka gained independence. As Tamils expressed their grievances, marginalization and aspirations for political autonomy, over the next few decades, the Sri Lankan state intensified its campaign of violent suppression against Tamils. Tamil youth, frustrated with decades of failed political processes to meet the aspirations of the Tamil people, took up arms in the 1970s seeking the independent state of Tamil Eelam. Over the next several decades, the armed conflict between Tamil groups and the Sri Lankan state, resulted in many state sponsored massacres of Tamils, some of which I will discuss later in my paper. The last phase of the armed conflict between the Sri Lankan government and LTTE took place in the months leading up to May 2009. In these last few months, hundreds of thousands of Tamil civilians were trapped in a 30 sq. kilometer area in the North East, as the Sri Lankan government carpet bombed civilians and the LTTE in an effort to violently end the armed conflict once and for all. Recalling this brief historical summary, is to illustrate that Tamil Genocide did not take place only in the horrific final phase of the armed conflict alone. Tamil Genocide is a longer continuous process that took place in the decades before the armed conflict began and continues to this day through the SL government’s denial of genocide and continuous violations against Tamils in the island.

Memorializing Genocide

Memorializing atrocities have been prioritized as one of the most important aspects of reparations outside of monetary compensation. Memorials can take on many forms: including formalized and institutionalized spaces such as monuments and museums, to spontaneous memorials at sites of

atrocities. While there is recognition that remembering atrocities of the past is an important endeavor, yet there are also those who advocate and engage in efforts to suppress memory in order to “move on” or “leave the past in the past” by some segments of society. As Barsalou and Baxter point out, memorialization is a highly politicized process that reflects the will of those in power. What is memorialized and how is often determined by the victors of conflicts at the expense of those who were defeated. In the case of Sri Lanka, memorialization of the final phase of the armed conflict is governed, controlled and managed by the Sri Lankan state. Any and all attempts by marginalized communities to commemorate their experiences that counter the official and dominant narrative of how the final phase of the conflict concluded are actively suppressed by government forces.

In their study of the relationship between war and tourism in post-war Sri Lanka, Jennifer Hyndman and Amarnath Amarasingam, noted that in what eventually became memorialized was specifically done so to serve the majoritarian state’s nationalist project. Nowhere is this more true and apparent than in the case of how the Sri Lankan government has curated memorialization of not only the final phase of the armed conflict, but the entire conflict itself.

Memorialization studies have traditionally focused on post-conflict states and not on states where conflict is continuing, such as in the case of Sri Lanka. Sri Lanka may very well be a post-war society, but it is certainly not a post-conflict society, as the political, securitized and militarized climate for Tamils has not changed much since the end of the armed conflict.

The Sri Lankan government has not only dominated the narratives of how the conflict is remembered and recalled, but has also erased all remnants of Tamil memorialization by destroying existing monuments, cemeteries in traditional Tamil areas of the island, and recasting these sites as war museums dedicated to a triumphant Sri Lankan nationalist account of “victors justice” that ignores the Tamil accounts of violence and trauma perpetrated against them by the Sri Lankan state.

As the Sri Lankan state has suppressed memorialization, remembrance and documentation of Tamil atrocities in Sri Lanka, the Diaspora plays an important role in ensuring that Tamil narratives are heard.

Memorialization and Seeking Justice and Accountability for Genocide

Traditional research on memorialization studies, cast memorialization as symbolic reparations. Memorialization not only plays an important symbolic role, but also has important practical links to achieving justice. Memorialization is an important tool to document and collect narratives of atrocities. Traditionally memorialization at the national level follows truth-seeking and legal accountability processes and is linked to educational efforts around atrocity prevention. However, in the case of Sri Lanka, such national and international recognition of the mass atrocities perpetrated against Tamils is lacking, and therefore memorialization is an important *a priori* aspect to justice and accountability.

As survivors of genocides, Diasporas as survivors of Genocide. Being a member of the Diaspora and having fled state persecution in their homelands, entails a sense of survivorship. Diasporas, as a nation of exiles and the descendants of refugees, are in essence living embodiments and testaments of genocides. In the shadow of genocide, those who fled and survived are keepers of knowledge and truth.

Based on this framework, I will examine the Memorialization of Genocide in the Tamil Diaspora. These are just a few of the significant atrocities against Tamils that are commemorated, some more elaborately than others. There are many not on this list, such as the death of martyrs (i.e. death of first female carder) and other massacres (such as orphanages, school, religious institutions that were bombed by the Sri Lankan government) that are significant atrocities for Tamils and are important parts of the narrative of Genocide of Tamils. However, for the purposes of this paper, I will just be discussing a few: Black July, Maaveerar Naal and Mullaivaikkal.

Black July

The Anti-Tamil pogroms instigated by the Sri Lankan government in 1983, known as Black July, is one of the most significant atrocities that Tamils collectively remember. For several days in July 1983, mobs of Sri Lankans in Colombo armed with lists of Tamil homes, attacked Tamils in the streets and destroyed their homes and businesses. An estimated 3000 Tamils were killed between July 24th and July 29th, and over 1 billion dollars in damage to their properties. Black July massacre is very similar to the 1984 Sikh genocides, where mobs of attackers were armed with voters lists to locate Sikh homes and businesses and carry out brutal massacres.

Black July affected every Tamil in Sri Lanka, from Jaffna to Colombo and everywhere in between. Every member of the Tamil Diaspora has a story to tell of his or her family's experience of Black July. Although it wasn't the first or last government-sponsored pogrom against the Tamil community, each year in July for several decades, members of the Tamil community marked Black July as the starting point of the armed conflict. In Canada, Tamils began to mark Black July each year through protest marches and large-scale rallies attracting thousands of members of the Tamil community. Candle light vigils, hunger strikes, and fasting, also marked Black July remembrances. In Sri Lanka, however, Black July commemorations are prohibited, even forty years later.

Maaveerar Naal

One of the most contested and resisted memorialization efforts center around Maaveerar Naal, a day for Tamils to commemorate the lives of fallen cadres, called Maaveerars. Similar to remembrance day celebrations, each year on November 27th, commemorate the sacrifices made by those who gave up their lives during the armed conflict. November 27th, was the date the first LTTE cadre, Lt. Shankar lost his life in 1982. The first Maveerar Naal was held in the jungles of Mulaitivu 1989. Over the years, the commemorations became more formalized and ritualized and elaborate with exhibitions, performances, rows of photos, flowers, and processions.

In the Diaspora, Tamil businesses are typically closed for the day and many members of the Diaspora took time out of their day to pay their observances to the Maaveerars at large scale exhibition halls. From dawn 'til dusk, members of the Tamil Diaspora line up to place flowers at a shrine lined with portraits of fallen Maveerars. At the end of the armed conflict, in May 2009, the Sri Lankan government clamped down attempts by Tamils to commemorate Maaveerar Naal, and bulldozed all of the LTTE cemeteries. In effect such commemorations in Sri Lanka have been banned. Despite the Sri Lankan government's suppression of Tamil remembrance of Maaveerar Naal, Tamils continue to pay their observances to fallen cadres. In the Diaspora, Maaveerar Naal also continues to be observed.

Mullivaikkal – Tamil Genocide

Since May 2009, Mullivaikkal has become the most significant memorialization of the Tamil Genocide. The Tamil Diaspora was deeply and profoundly impacted by what was taking place in their homeland during the final phase of the armed conflict in Sri Lanka. Many members of the Diaspora were glued to the internet or Tamil television stations airing video footage and radio commentary on the war crimes, crimes against humanity and genocidal acts. In some instances, members of the Diaspora had access to more horrific and gruesome footage of what was happening to Tamils caught up in the war zone than others outside the war zone in Sri Lanka.

The months leading up to May 2009 were a defining moment for the global Tamil Diaspora. Members of the Tamil Diaspora engaged in months of demonstrations, vigils, and protests in capital cities and other major cities across the world. Here in Ottawa, thousands of Tamils descended onto Parliament Hill to plead for international attention to the plight of Tamils. Their pleas fell on deaf ears as the international community stood by and watched hundreds of thousands of Tamils be slaughtered by the Sri Lankan government's military offensive.

Post 2009, Mullaivaikkal Remembrance during the month of May has become a significant remembrance of the culmination of decades of Genocidal acts of the Sri Lankan government. Once again, the Sri Lankan government and security forced suppress any attempts by Tamils to commemorate Mullivaikkal. Yet again Tamils have resisted these efforts by the Sri Lankan government to control the narrative of how the war ended. In May this year, a statute commemorating the lives lost during the final phase of the war was erected on the beaches of Mullivaikkal.

In the Diaspora, Mullivaikkal, is remembered in many ways. May 18th, known as Tamil Genocide Day, is often marked by a large gathering of members of the Tamil Diaspora at a vigil. In addition, the Canadian Tamil Students Association has created a mobile Tamil Genocide Museum that was on exhibit at various locations last year depicting images leading up to and including the final phase of the war and its aftermath. In Tamil Nadu, a monument dedicated to Mullivaikkal was erected in 2013 to pay tribute to those who lost their lives in the final phases of the war, but also includes sculptures of other massacres that took place during the decades-long war.

In 2021, Ontario passed the *Tamil Genocide Education Week Act*, that was subject to a legal challenge. And in 2022, the Canadian parliament passed a unanimous motion declaring the May 18th Tamil Genocide Remembrance Day.

Conclusion

The existing research on memorialization and justice tends to focus on transitional justice and reconciliation. In such cases, the importance of incorporating memorialization as a form of reparation for atrocities is the focus of analysis. Memorialization then becomes a by-product of reconciliation efforts in transitional justice initiatives. The monument, museum or other reconciliatory memorialization is an attempt to document and preserve the victims' and survivors' accounts and narratives of genocide. Research that links memorialization and documentation of Genocide to justice and accountability mechanisms tends to view justice and accountability mechanisms as occurring a priori to the memorialization efforts. However, in cases such as the Tamil Genocide in Sri Lanka, institutionalizing memories and narratives of survivors are important precursors to documenting experiences of genocide where no accountability or justice mechanisms have been put into place, in the hopes of establishing evidentiary trails for future prosecutions. An important source of such evidence lies in the Diaspora, who have fled their homelands and are now distant in space, but not necessarily trauma, from the oppression and suppression of the persecuting state authority. The Tamil Diaspora has been vocal and active in ensuring their narratives and identity of persecution, oppression and survivors of Genocide by the Sri Lankan state are heard. As Sivanandan reminds us, it is only when memories die that the perpetrators of war and violence have truly won by erasing the past, the present and the future.

Citation: Harini Sivalingam, “Transnational Memorialization and Documenting Tamil Genocide in the Diaspora: Implications for Justice and Accountability” in *Navigating the Complex Terrain of Accountability in Sri Lanka: a special issue of the PKI Global Justice Journal* (2025) 9 PKI Global Justice Journal 2

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For over two decades Harini has been involved in anti-racism activism and community organizing on domestic and international human rights issues. She was an intern at the International Service for

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Country flag symbols on the chessboard with figures on the background of the political map of the world. Con
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Sri Lanka's Accountability Odyssey: Navigating Global Trends in Justice

by Janakan Muthukumar

The context of Sri Lanka's accountability for human rights violations following the civil war is rooted in a protracted and brutal conflict that spanned over a quarter of a century. The final stages of the war (2008-2009) were marked by intense military offensives by the Sri Lankan government, drawing international concern due to reports of indiscriminate shelling, including in the 'no-fire zone', violations of international human rights and humanitarian law, and large-scale civilian casualties. The Sri Lankan government has faced international pressure to conduct credible investigations into alleged war crimes and crimes against humanity. Yet, the interplay between geopolitical considerations reflects challenges that arise when navigating the delicate balance between state interests and the pursuit of global justice.

This essay seeks to dissect the multifaceted factors contributing to the erosion of international law, including power dynamics among states that reveal the prioritization of strategic alliances, the role of major powers wielding influence on the international stage shaping responses to accountability issues based on their geopolitical considerations, and regional complexities reflecting on the appropriate response to accountability. However, despite these challenges, the article reflects current trends in fostering justice and contends that upholding accountability is crucial to sustaining the international rule-based order i.e., a shared commitment of upholding established rules in conducting international affairs.

Law and Justice

The role of international law in global justice poses challenges in addressing accountability issues, impacts the international rule of law, and the broader rule-based order. The principle of national sovereignty often clashes with the interventionist nature of international law, creating tension in international accountability efforts and hindering the effectiveness of legal mechanisms. Apart from limited jurisdictions and a lack of enforcement mechanisms, domestic political will and compliance,

along with selective enforcement, undermine the credibility of international legal institutions and contribute to a perception of impunity. The complexities surrounding concerns about Sri Lankan accountability underscore the ongoing challenges in balancing justice, reconciliation, and geopolitical considerations within the framework of international law.

During the last phase of the war, the UN Security Council expressed concerns regarding the humanitarian crisis in Sri Lanka and called for action by all parties to ensure the protection of civilians. In March 2009, the UN Secretary-General recommended establishing an accountability process and appointed a Panel of Experts, which delivered a report in 2011 concluding serious violations attributable to war crimes and crimes against humanity. These findings warranted accountability under international law, suggesting the establishment of an international mechanism to investigate alleged violations. However, the Sri Lankan government rejected the findings. In 2013, then-Prime Minister of the UK, David Cameron, urged Sri Lanka to conduct an independent inquiry. In March 2014, the UK, along with 22 other countries, voted to adopt Resolution 25/1 at the United Nations Human Rights Commission (UNHRC). As part of the resolution, the Office of the High Commissioner for Human Rights (OHCHR) undertook an investigation into alleged war crimes and urged the Sri Lankan government to "conduct independent investigations and to hold accountable those responsible." The OHCHR Report (2015) reported findings of grave violations of human rights and violations of Common Article 3 to the four Geneva Conventions, amounting to war crimes and crimes against humanity. The report recommended establishing hybrid accountability mechanisms, including "international judges, prosecutors, lawyers, and investigators," to provide legitimacy, combat impunity, and instill confidence. In October 2015, a further Resolution 30/1 reiterated the findings, and the UN High Commissioner for Human Rights called for Sri Lanka to "establish a transitional justice mechanism." In March 2021, Resolution 46/1 was adopted to strengthen the capacity of the OHCHR to "collect, consolidate, analyze, and preserve information and evidence and to develop possible strategies for future accountability processes for gross violations of human rights or serious violations of international humanitarian law in Sri Lanka." In October 2022, Resolution 55/1 was adopted to extend and reinforce the capacity of OHCHR in this regard.

Despite these calls and preparatory works, limited actions have materialized in Sri Lanka in the pursuit of accountability. Given Sri Lanka is not part of the *Rome Statute*, at present, the law prescribes two options for investigations: either through a self-referral based on Article 12(3), where Sri Lanka lodges a declaration at the International Criminal Court (ICC) Registrar, or through a UN Security Council referral. However, both options seem impossible due to Sri Lanka’s rejection of any international inquiry and support from China and Russia. This brings to light the particular issues with regards to international politics and geopolitical considerations.

Geopolitical Considerations

Strategic Alliances

In international relations, states seek to establish strategic alliances to enhance their geopolitical position, security, economic opportunities, and overall influence on the global stage. Prioritizing such alliances involves making deliberate choices in foreign policy to strengthen relationships with specific states based on shared interests, mutual benefits, geopolitical considerations, diplomatic and security cooperation, and economic ties. During the last phase of the civil war, the Sri Lankan government rejected a humanitarian ceasefire. Regardless of campaigns against 'genocide' and calls for 'humanitarian intervention,' the international community exhibited nuanced responses and varied levels of engagement. States took different stances based on their geopolitical interests and diplomatic considerations. For instance, the US expressed concerns about human rights violations but stopped short of advocating for direct military intervention. The US Congress halted military aid to Sri Lanka in 2007 over human rights records, yet it did not stop supplying intelligence during the war. India, given its regional proximity, pursued a diplomatic approach, emphasizing a political solution and shared concerns regarding the protection of civilians. However, the Wikileaks cables reveal that India was not opposed to the operation. India's stance was particularly confined due to the Rajapaksa government's special connection with China, a strategic economic partner for Sri Lanka, which emphasized non-interference in internal affairs and supported the government's efforts at international organizations.

However, following the end of the civil war, the US, Canada, the European Union, and the United Nations called on the Sri Lankan government to address post-war issues, including the alleged war crimes, which the Sri Lankan government dismissed. As the global order shifted from the 'war against terrorism' to seeking 'accountability,' these states took hardlines regarding Sri Lanka's human rights violations that created a rift between Sri Lanka and Western states, leading countries such as Iran, Pakistan, and Russia to intervene and offer support to Sri Lanka against any international inquiry into potential war crimes. Further, these countries undermined utilizing multilateral diplomatic responses, including passing resolutions at the UNHRC, authorizing an international investigation into alleged war crimes, and mainstreaming advocacy by international and civil society organizations, including the media, to collect evidence and report violence to add legitimacy to the call for an inquiry, solely to advance their interests. For example, at the 11th special session at the UNHRC in May 2009, although seventeen states put forward a draft resolution to investigate alleged war crimes in Sri Lanka and urged the government to fully cooperate with humanitarian organizations, the resolution was thwarted after the Sri Lankan government received support from China, Russia, Japan, and India. Japan and India, in particular, chose not to address accountability but rather focused on the language of political solutions to maintain diplomatic alliances with Sri Lanka. This decision was influenced by their historical ties, and particularly for India, to maintain its maritime security, regional hegemony, and to keep Sri Lanka neutral in the conflict against Pakistan and China.

The role of major powers

Major powers assert their influence on the international stage by leveraging a combination of military, diplomatic, and soft power capabilities. In the Sri Lankan context, the role of major powers in shaping

responses to accountability issues was influenced by geopolitical considerations. Yet, at times, Sri Lanka's trilateral approach (US, India, and China) has also impacted the reach of major powers in affirming their priorities for accountability. For instance, during the last phase of the war, the US expressed concerns about human rights violations but did not take an aggressive stance due to its strategic interests in the region. The US sought to maintain diplomatic relations with the Sri Lankan government, particularly in the context of countering Chinese influence – 'rebalancing' Asia, as well as future U.S. Navy operations in the Indian Ocean. For instance, as part of the strategy, US–Sri Lanka defense programs were framed and proposed to increase coordination and include regional partners such as India and Japan to sideline China.

However, being part of the Core Group, the US continuously raised concerns regarding Sri Lanka's human rights accountability, causing fractured relations between Sri Lanka and the US, the development of anti-Western rhetoric, and criticisms over 'foreign powers applying double standards' when it comes to human rights and the war against terrorism. On the other hand, China, as a strategic partner, consistently opposed external interference in Sri Lanka's internal affairs, offering both political cover and economic support during the last phase of the civil war. As such, irrespective of various claims by Sri Lankan politicians, China's investment in the Hambantota port became part of China's " string of pearls" military strategy, making Sri Lanka an "unsinkable aircraft carrier" for China. Although following the fall of the Gotabaya regime in Sri Lanka, and the current Sri Lankan government vowing to negotiate with the International Monetary Fund (IMF) and the World Bank to address the economic crisis in Sri Lanka, possibilities have just emerged for the West to influence Sri Lanka's foreign policy decision-making. Sri Lanka's latest decision to establish criteria for joining the China-led *Regional Comprehensive Economic Partnership* and the *Comprehensive and Progressive Trans-Pacific Partnership* against the *Indo-Pacific Economic Framework for Prosperity* is disappointing to the US and its strategy in the region, particularly at a time when China expands its investment in Sri Lankan ports. Yet, Sri Lanka's mindfulness of its maintenance of non-alignment has continuously reflected in its exports, with 26 percent of Sri Lanka's total export earnings coming from the US. Yet, this dilemma continuously affects the US and the West to further press Sri Lanka to proceed with accountability.

Regional Complexities

India's influence in Sri Lanka's last phase of the war was inevitable, as the civil war threatened India's unity, national interests, and foreign policy priorities. Otherwise, it would have opened opportunities for external powers to exploit, potentially undermining India's security. Additionally, India was concerned that the separatist push for an independent Tamil state in Sri Lanka would pose a threat to unity within India. This concern stemmed from the sizable Tamil population in Tamil Nadu, which shares cultural and linguistic ties with the Sri Lankan Tamils. Historically, India's interventions in Sri Lanka were counter-productive. This involved a policy of arming Tamil militants in the 1980s, India's decision to send peacekeepers to enforce the *1987 Indo-Lanka Accord*, providing military support in the final phase of the war, and initially opposing the investigation of war crimes by the UNHRC. These interventions have left a mark on Sri Lankans of all communities. While the Sinhalese view India as

favouring Tamils and attempting to divide Sri Lanka, Tamils, on the other hand, feel discouraged by India's broken pledges to defend their rights, thereby limiting India's room for influence.

India's reluctance to exert diplomatic pressure on Sri Lanka's accountability maneuvers is also part of its strategic considerations to counter Chinese influence in the region. China played a decisive role in ending the war directly through the supply of offensive weapons and generous aid. China also coordinated with Pakistan, India's regional adversary, to actively assist the Sri Lankan government in war strategy. Moreover, China provided diplomatic cover and vetoed a UN Security Council resolution, preventing the Council from even debating the issue. Similarly, India's historical reluctance to work with international organizations, stemming from its fear of international scrutiny of its own interests in Kashmir, weakened its ability to influence Sri Lanka in multilateral forums.

Fostering Justice: Current Trends

As Sri Lanka continuously takes advantage of geopolitics, current trends demonstrate alternative efforts put forward to address accountability. Extraterritorial prosecutions, civil actions, and sanctions have gathered international attention.

Extraterritorial Prosecution

As a response to the absence of credible action by the Sri Lankan government to address accountability, the UN High Commissioner for Human Rights in September 2017 called for the use of universal jurisdiction. Subsequently, in February 2021, the Commissioner pointed out that UN members can "actively pursue investigations and prosecutions of international crimes committed by all parties in Sri Lanka before their own national courts, including under accepted principles of extraterritorial or universal jurisdiction …[to] advance criminal accountability." This shed light on the idea of universal jurisdiction, i.e., the responsibility of every state to bring perpetrators of international crime to justice. However, universal jurisdiction in the context of Sri Lanka has been only partially successful. For example, in 2012, a US court rejected a lawsuit against then Sri Lankan President Mahinda Rajapakse based on his immunity from prosecution as a head of state. Likewise, attempts to seek an arrest warrant against Mahinda Rajapakse in the UK in 2010 and Australia in 2011 were halted due to similar reasons. However, it is worth noting that in the case of the *Democratic Republic of the Congo v Belgium*, the International Court of Justice determined that there is no exception under customary international law that removes the immunity from criminal jurisdiction provided to current government ministers accused of war crimes or crimes against humanity. Yet, the likelihood of a second state arresting and prosecuting senior Sri Lankan former government officials, through the exercise of universal jurisdiction, remains low due to diplomatic sensitivities and potential complexities.

However, in January 2021, the former Major General of the 57th division of the Sri Lankan Army, Jagath Dias, who was appointed as the Deputy Ambassador of Sri Lanka to Switzerland, the Holy See, and Germany, was dismissed from his post following a criminal claim filed with the Office of the

Attorney General of Switzerland in August 2011. Advocated by the European Center for Constitutional and Human Rights, the Attorney General of Switzerland noted that Jagath Dias would be prosecuted if he ever re-entered Swiss territory. This is the closest that universal jurisdiction has come in the Sri Lankan case. Likewise, criminal charges were filed against former Sri Lankan Military General Jagath Jayasuriya, who was alleged to have attacked hospitals and caused harm to masses of civilians. He was appointed as Sri Lanka's ambassador to Brazil, Colombia, Peru, Chile, Argentina, and Surinam but subsequently returned to Sri Lanka and vacated his position. In his case, the court held that he would not be arrested due to diplomatic immunity. These cases indicate that functional and diplomatic immunity prevents the exercise of universal jurisdiction by other states in bringing alleged war criminals to justice.

Under Article 9 of the *Vienna Convention on Diplomatic Relations*, a state can label a diplomat as *persona non grata*, providing the sending state with two choices: recalling the diplomat or terminating their functions for the specific mission. Diplomatic immunity shields a diplomat from personal liability but is a right linked to the sending state, not the diplomat directly. This means that if a receiving state aims to prosecute a Sri Lankan diplomat for alleged international crimes, it can request Sri Lanka to waive the diplomat's immunity. However, the likelihood of Sri Lanka agreeing to such a waiver is highly unlikely.

Civil Prosecution

Civil prosecutions were also initiated as part of seeking accountability against perpetrators. The former Sri Lankan Army General Shavendra Silva was prosecuted for his alleged involvement in extrajudicial killings and torture during the final stages of the war under the *Alien Torts Claim Act* in the US. However, the claim was refused based on diplomatic immunity as he was Sri Lanka's Deputy Permanent Representative to the United Nations. Likewise, the cases filed to prosecute former Defense Secretary Gotabaya Rajapakse, as a naturalized US citizen, under the US War Crimes Act, were dropped following his denunciation of US citizenship to become the President of Sri Lanka.

Sanctions

Despite allegations, when Sri Lankan President Gotabaya Rajapakse appointed former Sri Lankan Army General Shavendra Silva as the Commander of the Sri Lankan Army in August 2019, the US imposed sanctions against him – a travel ban, preventing him from travelling to the US under Section 7031(c) of the *Department of State, Foreign Operations, and Related Programs Appropriations Act*, due to his involvement, through command responsibility, in alleged war crimes, including extrajudicial killings. The US also sanctioned Lieutenant Commander Chandana Prasad Hettiarachchi and Army Sergeant Sunil Ratnayake over human rights violations. In 2023, Canada sanctioned these military leaders and former presidents Mahinda and Gotabaya Rajapakse under the *Special Economic Measures Act* in response to the gross and systematic violations of human rights. This was followed following the UN High Commissioner for Human Rights' call for states to consider imposing sanctions against 'credible alleged perpetrators of grave human rights violations and abuses in Sri Lanka.

Currently, advocacy continues by civil society organizations, public and government officials to follow this trend to sanction alleged war criminals in Europe and elsewhere. Although one could argue that sanctions do not amount to the prosecutorial process of accountability, it highlights both the Sri Lankan government's inaction to address post-conflict accountability and the international community's willingness to take steps against gross and systematic human rights violations amidst geopolitical priorities.

Conclusion

Despite geopolitical considerations and limited legal avenues available to conduct independent inquiries, fostering justice remains a priority to uphold trust and confidence in the international rule-based order. It requires both innovative thinking within the existing legal framework and continuous advocacy to influence states' positions embedded in strategic interests and advancements toward universal righteousness. While prosecution against alleged war crimes is not possible at the ICC and in any form of hybrid court, the above cases demonstrate that states and private citizens utilize various legal forums and avenues to bring perpetrators to justice. Sanctions, such as those imposed by the US and Canada, also reflect possible avenues to apply diplomatic pressure against Sri Lanka to abide by resolutions. Although each prosecution is painstaking and often unsuccessful due to diplomatic immunity and other procedural aspects, and advocating states to impose sanctions takes time due to political and strategic reasons, the process echoes the significance of accountability and human rights protection in the rule-based international order. As such, finding legitimacy in upholding justice through every means requires prioritizing accountability in post-war Sri Lanka.

Citation: Janakan Muthukumar, "Sri Lanka's Accountability Odyssey: Navigating Global Trends in Justice" in *Navigating the Complex Terrain of Accountability in Sri Lanka: a special issue of the PKI Global Justice Journal* (2025) 9 PKI Global Justice Journal 2.

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Freedom beyond barbed wire, Sri Lanka, September 24 , 2015
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Accountability in Sri Lanka – Another view

by Sunil Bastian

This article focuses on the politics of the United Nations Human Rights Council (UNHRC) resolution, which was first passed in March 2014. It has been ten years since this event. It is necessary to understand both the reasons for state repression on the side of the Sri Lankan state and the interests of foreign powers in intervening in this situation, in order to unpack the politics of the UNHRC resolution.

The analysis in this article begins with a particular understanding of state. The conventional approach treats a state as a concrete, self-contained entity that has attained a final status. The geographic space occupied by the state is given a political interpretation, and it is securitised. A map showing boundaries demarcate this geographic space. The legal notion of sovereignty strengthens this idea.

In contrast, a state has to be seen as a product of historical processes like any other social phenomena. State formation involves developing mechanisms to control territory and manage state-society relations. These processes take place in a specific historical context, where certain state-society relations become more strategic. These strategic state-society relations can be maintained either through consent, or use of the coercive power of the state. In addition, state formation always takes place in a global context – the study of state formation is the study of an individual state in a global context. Key relevant factors in the global context for this discussion are global capitalism, a system of states and organisations formed by these states.

Two strategic state-society relations became important in the post-colonial history of Sri Lankan state formation. First, relations between the centralised state and minority ethnic groups. The failure to manage this relation led to violence and state repression. The second was relations between the centralised state and the Sinhala majority in the context of the politics of capitalist transition. Capitalist transition is a political process. Conflicts and struggles are always a part of this. The entire Sinhala majority did not benefit equally from the process of capitalist transition. The politics of this contradiction has led to violence and state repression.

The post-1977 period of Sri Lankan state formation is a qualitatively new period, for three reasons. First, it shifted the capitalist transition to a new period which gave prominence to the private sector, markets and openness to global capitalism. This resulted in new challenges to managing relations with the state and the Sinhala majority. Second, deteriorating relations between the state and the Tamil minority led to a separatist demand, armed conflict and state repression. Third, the changes that took place at a global level. This led to the development of what can be called a global neoliberal political

project supported by US hegemony. The ideology behind this project presented global capitalism as a benevolent system, which incorporates more and more people into a market economy, brings about an interconnected world, and spreads prosperity and freedom to all corners of the world. The political agenda was to establish liberal democracy, and reform states based on liberal principles. It was also believed that liberalism in economics and politics would lead to a more peaceful world. This is the security dimension of this project, often called liberal peace.

Liberal principles in economics, politics and security added up to a vision of the total transformation of the world based on liberal principles – or a liberal utopia. The ideology of liberal triumphalism, led by hegemonic power of the US, was at its peak in the aftermath of the socialist bloc of states which had been led by the Soviet Union. With the final break-up of the Soviet Union in 1991, this process was complete. But how the world has evolved since then, and whether expectations of the liberal utopia have come true, is a different matter. It is also necessary to remember that this was only an ideology which tried to legitimise a Western hegemony led by the US. The actual behaviour of Western states was determined by their strategic interests, which sometimes had been far from liberal ideals.

Due to the beginning of the new period of capitalist transition, the Sri Lankan state was integrated to a greater degree into this global neoliberal project. As a result, the Sri Lankan state received much more foreign aid from developed capitalist countries of the West, Japan and multilaterals. On one side, this strengthened the economic security of the state. It allowed the state to continue with an armed response to the Tamil demand, a war that was becoming increasingly expensive. But, since the availability of foreign aid helped to cover normal functions of the state, the Sri Lankan state could use its own resources for the war effort. On the other side, the foreign policy agenda of donor countries began to have a significant impact on Sri Lanka. Their ideological impact was seen both at the level of the state and society.

In order to implement the economic agenda, the ruling political elite brought about significant changes to political institutions. The establishment of a presidential system and the proportional representation of elections were key. The other strategy was to use organised violence and state repression against opponents of reforms. This violence reached a very high level in 1989/90, when the state sought to eliminate sources of armed challenges to the state. A delegation of European parliamentarians, who visited Sri Lanka in October 1990, estimated the number of killed and disappeared on all sides, in south and central Sri Lanka alone, to be at least 60,000 in 1989 and 1990 (Human Rights Watch World Report 1990 - Sri Lanka).

For the subject of this article, it is important to point out that, although there were numerous statements of concern pointing out human rights violations, there was no initiative to scrutinize the actions of the Sri Lankan state through an international body. This was in contrast to what happened after military operations to consolidate territory which ended in 2009. Western states that were influential with the Sri Lankan state, and were providing foreign aid support, did not see this as necessary. In addition, this violence did not have an impact on the flow of foreign aid to the Sri Lankan state. In fact, during the high point of state repression in 1989/90, the Sri Lankan state received a

relatively higher level of assistance. This was because the regime in power entered into new agreements with the International Monetary Fund (IMF) and World Bank to carry out new economic reforms. In short, as long as the Sri Lankan state did not undermine the foreign policy interests of developed capitalist countries of the West, there were no repercussions on the state.

Given this history, the question is what had changed when the Sri Lankan state undertook the military operation to eliminate the Liberation Tigers of Tamil Eelam (LTTE) and consolidate the territory of the Sri Lanka state. One of the important differences was that the global context had undergone significant changes, compared to the period when a global neoliberal political project supported by the hegemonic power of the US dominated. One of the biggest conceptual flaws in the ideology of global neoliberalism was the zero-sum approach to the relation between state and global capitalism. With the expansion of capitalism globally, the importance of states was expected to diminish. Some propagated this idea with the notion of the coming of a ‘flat earth’. The liberal internationalists' belief in a rule-based international system was also based on these assumptions.

In contrast to what liberal internationalists believed, the growth of global capitalism has not made states less important. Capitalist development under neoliberalism has had a diverse impact on states. Due to the growth of capitalism, some states have become stronger, and are able to challenge the balance of power at regional and global levels.

The emergence of new centres of capitalist growth, and these states becoming stronger and challenging existing power relations at global level, has happened in the past. We are seeing a new phase of this. It is better to understand the current global context within a framework of global capitalism and competing states, some of which are stronger. The term major powers can be used to identify them. A key outcome of the period of neoliberal capitalism has been capitalist growth in China, and China becoming a strong state. With these developments China has begun to challenge the hegemony of the US, especially in the Asia-Pacific region. The US has constructed a new regional strategic space called the Indo-Pacific to meet this challenge.

There is a lot of evidence to show that, by the time the Rajapakse regime undertook military operations against the LTTE, the key international actors influential with the Sri Lankan state were not averse to seeing the end of the LTTE. The LTTE had lost support from India, the only power that had intervened in the past to stop military operations of the Sri Lankan state. The fall-out of the armed conflict in Sri Lanka had become a security issue for the global neoliberal political project. The US and EU had designated the LTTE as a terrorist organisation. The flow of Tamil refugees was becoming a political problem in European countries. By 2001, five European countries, Switzerland, Netherlands, Denmark, Norway and Italy- managed to secure agreements with the Sri Lankan state to repatriate rejected asylum seekers. These factors, and the impact of the war on capitalist growth, were the main reasons for the Norwegian effort to bring about a negotiated settlement, backed by an ideology of liberal peace.

However, the most important development during the 2009 military operations was that an economically stronger China became an ally of the regime in power in Sri Lanka. This revived an old relationship between China and Sri Lanka. The post-colonial Sri Lankan state accepted the One-China Policy right from the beginning. The 1952 Rubber-Rice Agreement between Sri Lanka and China, when Sri Lanka faced an economic crisis, was a significant event. Through this agreement Sri Lankan sold rubber, which was designated as a strategic good by the UN because of the Korean war, to China in exchange for rice below global market price. From the mid-1950s, relations between China and Sri Lanka expanded. Chinese support to build a conference hall to hold the non-aligned summit in Sri Lanka is a symbol of these links. When the US cut off foreign aid because of the state take-over of petroleum distribution in 1962, China became an important donor. There was always a political current within the Sinhala majority that favoured better links with China. The political parties that combined to form the United People's Freedom Alliance (UPFA) under the leadership of Mahinda Rajapakse included these political currents that supported China.

A major factor in the US decision to give leadership to the March 2014 UNHRC resolution was concern about its own strategic interests, because of the growing influence of China with the Sri Lankan state. There is always a difference when human rights are advocated by states, and non-state actors. In the case of the former, the strategic interests of states play an important role. This was the case when the US sponsored the UNHRC resolution. The title of the resolution, 'Promoting reconciliation, accountability and human rights in Sri Lanka', showed that this was an attempt to use liberal principles to consolidate the post-war state. The most challenging element in the resolution for the political elite that controlled the Sri Lankan state was the call for an international inquiry into what happened during the last stages of war.

In addition to this action by the US, the EU suspended the GSP+ benefits that the Sri Lankan state enjoyed. The Generalised Scheme of Preferences (GSP) is a concession provided by the EU that allowed export of goods with less, or sometimes no duty to EU countries. GSP+ is a special component of GSP that provides additional benefits to countries that are already part of the GSP scheme. The Sri Lankan state benefitted from GSP+ from July 2005. But in August 2010, the EU suspended Sri Lanka's GSP+ status.

The politics of the post-war Sri Lankan state towards the UNHRC resolution depended on the regime in power, and its relations with other states. The strategy of the regime that came into power in 2015 was to improve relations with the US and cooperate with the UNHRC. In September 2015 the regime co-sponsored a new version of the UNHRC resolution, together with the US government. The content was almost the same as the 2014 resolution with one key change. The section on having a war crimes investigation by international judges was replaced by a Sri Lankan one with technical support from international sources. Under the same regime the EU also restored GSP+ in March 2017. Subsequent political developments resulted in the Sri Lankan state withdrawing co-sponsorship of the resolution in February 2020. At present a mechanism established by the UNHRC regularly reports on the status of implementation of the resolution by the Sri Lanka state. But it is not clear whether this will ever lead to punishing those responsible for civilian casualties.

In considering the current situation, it is also important to take into account the recent crisis in the process of capitalist transition, major power struggles within the Indian ocean and how they are having an impact on the Sri Lankan state. The Sri Lankan state's inability to fulfil the demands of global financial capital led to defaulting on loan repayments, leading to a severe foreign exchange crisis. The economic fall-out gave rise to a protest movement. The ruling political elite's response had the following elements. First, state repression to put down the protest movement. Second, the coming together of two political currents to stabilise the situation – the one that gave political leadership to consolidating the territory of the centralised state in 2009, and the other that has always favoured undiluted neoliberalism. Third, implementing further reforms to promote capitalist transition, supported by the IMF. Now the interest of Western powers who were champions of accountability is to stabilise the state and ensure capitalist growth. There can be statements about human rights issues, but it is difficult to foresee any major steps on the economic front to bring pressure on the Sri Lankan state.

This approach is also dictated by the greater strategic importance of the Indian ocean at present, due changes in patterns of economic growth within global capitalism. In this context, the particular location of the Sri Lankan state in the Indian ocean seems to have an impact on how major powers relate to the Sri Lanka state. What is noticeable is the involvement of these three major powers, China and India and the US in developing Sri Lankan harbours - Colombo, Trincomalee and Hambantota. The agreements between the Sri Lankan state and these powers on each of these locations differ. But, as happened during the colonial period, the Indian ocean has begun to play a bigger role in relations between the Sri Lankan state and other states.

To end this short article, let me be clear that I am a supporter of the efforts to ensure accountability of the Sri Lankan state for human rights violations resulting from state repressive policies. The objective of this article is to show the limitations of current efforts.

Citation: Sunil Bastian, "Accountability in Sri Lanka – Another view" in *Navigating the Complex Terrain of Accountability in Sri Lanka: a special issue of the PKI Global Justice Journal* (2025) 9 PKI Global Justice Journal 2.

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Sunil Bastian is a political economist whose research highlights the politics of state formation and development of capitalism in Sri Lanka. He has authored and edited several works exploring democracy and participation in South Asia, the politics of foreign aid in Sri Lanka, and the relationship between promoting markets and peace. Currently he is finalising a book on state formation and conflicts in Sri Lanka. He has been a consultant to many donors. He has been a Senior Research Fellow at the International Centre for Ethnic Studies, Colombo.