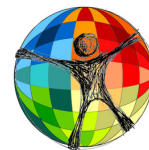# Expanding Notions of Transitional Justice in Sri Lanka through Grassroots Memorialization Initiatives

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Human Rights
and Legal Pluralism

Centre sur les droits de la
personne et le pluralisme
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ABSTRACT

In the Spring and Summer of 2022, protests in Sri Lanka attracted global attention to the economic and political crisis happening in the country. Media around the worlds hared images of the streets of Colombo, where people gathered to demand the resignation of their president, Gotabaya Rajapaksa. The source for this public unrest has been described as mainly economic, and driven by public debt, high inflation, and a lack of essential resources. Yet both national and international advocates have argued that the root causes of this crisis are linked to the failure of the government to implement transitional justice mechanisms after the end of the war in 2009. This essay will first explore what obstacles have impeded transitional justice in Sri Lanka, and how they might have led to the economic and political crisis of 2022. It will then argue that inclusive grassroot memorialization initiatives from national and transnational actors can help circumvent these obstacles and lay foundations for a resilient process of reconciliation in the country.

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I.   Introduction

In the Spring and Summer of 2022, protests in Sri Lanka attracted global attention to the economic and political crisis happening in the country. Media around the world shared images of the streets of Colombo, where people gathered to demand the resignation of their president, Gotabaya Rajapaksa. The source for this public unrest has been described as economic and driven by public debt, high inflation, and a lack of essential resources.[1] Yet both national [2] and international [3] advocates have also suggested that the root causes of this crisis are linked to the failure of the government to implement transitional justice mechanisms after the end of the war in 2009. This essay will first explore what obstacles have impeded transitional justice in Sri Lanka, and how they might have led to the crisis of last summer. It will then argue that inclusive memorialization initiatives from national and transnational actors can help circumvent these obstacles and lay foundations for a resilient process of reconciliation in the country.

The dialogue between stakeholders of transitional justice in Sri Lanka illustrates the tensions between the international and domestic discourse around reconciliation. In 2004, transitional justice was defined by the UN General Assembly and UN Security Council as "the full range of processes and mechanisms associated with a society's attempts to come to terms with a legacy

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[1] See e.g. The Associated Press, "Sri Lankan protesters remain at leaders' residences as politicians wrangle over new government", CBC (11 July 2022), online: <cbc.ca/news/world/sri-lanka-crisis-1.6516588>.

[2] See Ambika Satkunanathan, "Expert Roundtable: Transformation in Sri Lanka - Opportunities for Transitional Justice" (5 August 2022), online: *Public International Law & Policy Group* <publicinternationallawandpolicygroup.org/expert-roundtable-sri-lanka-transitional-justice>.

[3] In September 2022, the UNHCR published its latest report on Sri Lanka, in which it directly links the current crisis to a lack of implementation of transitional justice mechanisms. See United Nations, "Sri Lanka at critical juncture: UN report urges progress on accountability, institutional and security sector reforms", *OHCHR Press Release* (6 September 2022), online: <ohchr.org/en/press-releases/2022/09/sri-lanka-critical-juncture-un-report-urges-progress-accountability>.

of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation."[4] It is in the 1980s that the idea of transitional justice started gaining traction following a number of democratic transitions in Latin America. [5] The concept encapsulates the different legal mechanisms that are needed to ensure a transition between a situation of large-scale human rights violations and a peaceful, stable society – often understood to be a liberal democracy.[6] The term distinguishes itself from simply 'justice' as it emphasizes that situations of mass violence can occur or result in fragile state conditions, in which regular civil and criminal remedies are not equipped to address large-scale violations.[7] While the goals of transitional justice are usually phrased as peace, reconciliation, and non-recurrence, the protection of human rights and the promotion of democracy have often been understood as normative aims of transitional justice.[8]

Since the 1990s, international organizations and scholars have published academic literature, guidelines, and monitoring mechanisms that have increasingly developed what is now understood as a transitional justice process. Scholar Line Gissel argues that there has been a standardization of the transitional justice framework through this normative literature and its inscription in international legal mechanisms.[9] The result has been a classification of transitional justice into two tiers. The first consists of four core elements that are tied to international legal obligations, namely criminal justice, truth seeking, offering

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[4] UN Security Council (2004) *The rule of law and transitional justice in conflict and post-conflict societies* (Report of the Secretary-general). S/2004/606, 23 August. New York: United Nations.

[5] See Line Engbo Gissel, "The standardisation of transitional justice" (2022) 28:4 Eur J Intl Relations 859 at 860.

[6] See generally Colleen Murphy, *The conceptual foundations of transitional justice* (Cambridge: Cambridge University Press, 2018). See also Amy Gutmann & Dennis Thompson, "II. The Moral Foundations of Truth Commissions" in Robert I Rotberg & Dennis Thompson, eds, *Truth v Justice: The Morality of Truth Commissions* (Princeton University Press, 2000) at 22.

[7] See Paul Seils, "The Place of Reconciliation in Transitional Justice: Conceptions and Misconceptions" (2017) International Center for Transitional Justice 1 at 2.

[8] See Valentina Gentile & Megan Foster, "Towards a minimal conception of Transitional Justice" (2022) 14:3 Intl Theory 503 at 509.

[9] Gissel, *supra* note 5.

reparations to victims, and institutional reforms.[10] The second tier
contains all other activities that are not necessarily linked to
fulfilling a legal duty, encompassing amnesties, apologies, artistic
expression, curriculum development, memorialization, and
more.[11]

Each of these elements carry with them moral assumptions
about what is required for a transition. For example, the
requirement of criminal justice points to an understanding of
reconciliation as needing retributive mechanisms and strong
accountability. The values underpinning this framework and the
ways in which it has been applied to post-conflict situations have
been critiqued on a number of points. Sarah Maddison and Laura
Shepherd point out that transitional justice is rooted in post-
colonial dynamics, and that it should also be applied to redressing
colonial harms.[12] Indeed, the current understanding of transitional
justice does not include inter-generational harm (such as
addressing the trans-Atlantic slave trade), nor is it redistributive (in
most cases, it does not argue for the redistribution of seized lands
for example).[13]

Others have noted that this normative literature led to a
technocratic turn in understanding transitions from war to peace,[14]
by which external actors are given credibility to impose complex
legal mechanisms deemed necessary for a peace process.
International organizations participate in this technocratic
governance by requiring states to fulfil transitional justice
mechanisms via self-reporting, monitoring reviews and
conditionalities, which often have implications for "the transfer of
symbolic and/or material resources."[15]

Gissel further criticizes the standardization of transitional
justice as a model that "directs attention to some solution, and

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[10] See *ibid* at 6.

[11] See *ibid* at 7.

[12] See generally Sarah Maddison & Laura J Shepherd, "Peacebuilding and the
postcolonial politics of transitional justice" (2014) 2:3 Peacebuilding 253.

[13] See Gissel, *supra* note 5 at 11.

[14] See generally Anna Macdonald, "'Somehow This Whole Process Became so
Artificial': Exploring the Transitional Justice Implementation Gap in Uganda"
(2019) 13:2 Intl J Transitional Justice 225.

[15] Gissel, *supra* note 5 at 4.

away from others", [16] and that can be understood as social
regulation through the ways it "channels agency in particular
directions and into particular pursuits."[17] There are little ways of
measuring if those mechanisms really lead to reconciliation, to a
more stable society, or if they fulfill the aim of non-recurrence.[18]
Indeed, projecting this framework and its values can be
detrimental to local contexts where more culturally-specific
solutions are needed for reconciliation. It establishes norms that
posit certain values or concepts as universal, such as reconciliation,
peace, and justice. While proponents of this model will argue that
it is always localized in its application, the simple existence of this
framework points to normative standards that shape the outcomes
of these mechanisms.

Many of these criticisms have played a role in the Sri Lankan
discussion about transitional justice. Looking at the relationship
between the international community and the government of Sri
Lanka helps outline one example of the localization of this model,
as well as its negotiation, rejection, and co-optation. By examining
the contradictions that arise when applying a standard of
transitional justice in Sri Lanka, I aim to better understand the
pitfalls of the model.

This essay is divided into two main sections. The first will
assess how the transitional justice model has been received in Sri
Lanka since the end of the civil war in 2009. Three different
phases of governmental responses will be examined, based on
the three presidential terms that elapsed since 2009: Mahinda
Rajapaksa's term from 2009 to 2015, Maithripala Sirisena's from
2015 to 2019, and Gotabaya Rajapaksa's from 2019 to 2022.
The second section will argue that memorialization projects in civil
society are not only integral parts of transitional justice, but can
remedy some of the issues created by the rigidity of the model.
Two examples of memorialization will be featured: one from civil
society groups in Sri Lanka, the other from transnational diaspora
communities. The research for this paper was based on an
extensive review of official UN and government documents,
scholarly papers, press articles, and was informed by discussions

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[16] *Ibid* at 3.

[17] *Ibid* at 4.

[18] See Macdonald, *supra* note 14 at 247.

with activists and lawyers during a summer internship at the *International Centre for Ethnic Studies* in Colombo, Sri Lanka.

The protests last summer culminated in Gotabaya Rajapaksa's flight from the country. This event was celebrated as a victory for civil society. Ranil Wrickemesinghe stepped in as president, but given his close relationship with the former president, human rights advocates have been cautious in their optimism towards his capacities to address the root causes of this crisis. In November 2022, Wrickemesinghe met with South Africa's president Cyril Ramaphosa to discuss economic cooperation, and to "learn from the South African experience of its *Truth and Reconciliation Commission*." [19] Since the new government signals its desire to renew its engagement in accountability mechanisms, it is especially important to look at past mistakes, and if they could be avoided. The next section will thus explore what has impeded accountability mechanisms in post-war Sri Lanka, by taking a closer look at the three presidential terms since the end of the war.

II.   Applying the Transitional Justice Model to Sri Lanka

The Sri Lankan civil war lasted 26 years from 1983 to 2009. It opposed the Sinhalese-dominated Sri Lankan government to the Liberation Tigers of Tamil Eelam (LTTE) insurgent group, who campaigned to establish an independent state for the Tamil minority.[20] The Tamil independentist movement was sparked in reaction to a series of laws discriminating against the Tamil language, most notably the *Sinhala Only Bill* passed in 1956,

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[19] See Presidential Secretariat, "Sri Lanka – South Africa to strengthen bilateral relationship based on economic cooperation and investment – Presidential Secretariat of Sri Lanka" (17 November 2022), online: <presidentsoffice.gov.lk/index.php/2022/11/17/sri-lanka-south-africa-to-strengthen-bilateral-relationship-based-on-economic-cooperation-and-investment/>.

[20] For more on the colonial roots of the Sri Lankan conflict, see generally Paul Castañeda Dower, Victor Ginsburgh & Shlomo Weber, "Colonial legacy, polarization and linguistic disenfranchisement: The case of the Sri Lankan War" (2017) 127 J Development Econ 440.

forbidding the use of the Tamil language for administrative purposes.[21] The conflict officially began in July 1983 when violent riots targeting Tamils in Colombo erupted. The fighting ended in May 2009 when government security forces announced having killed the LTTE leader. While the opposition between the LTTE and the Sri Lankan government is the main framework of the conflict, there were several other violent clashes that do not fit this framework but marked the history of the country during those years. This included fighting between Tamil political groups, the persecution of the Muslim minority, and the violent government crackdown on Sinhala Marxist insurrections in the 1980s.[22] The complexity of interactions between and within each community should not be subsumed in the larger dichotomy opposing the LTTE to the Sri Lankan government.

While the 26-year civil war saw periods of relative peace where discussions of transitional justice started taking place, this essay will focus on accountability initiatives after the end of the war in 2009. There have been three post-war presidential terms, which can be loosely equated to three phases of negotiation of transitional justice mechanisms in the country, each shaped by the political, economic, and legal obstacles to implementation.

i.   2009 – 2015: Performative transitional justice

The immediate aftermath of the war was characterized by an openly defensive response to international demands for transitional justice mechanisms.[23] Shortly after the military victory in May 2009, then president Mahinda Rajapaksa gave an address expressing a political commitment towards transitional justice.[24] This was reflected in a joint statement issued by the president and the Secretary General of the UN at the time, in which the government affirmed that it would address issues of

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[21] See Nithyani Anandakugan, "The Sri Lankan Civil War and Its History, Revisited in 2020" (31 August 2020), online: *Harvard International Review* <hir.harvard.edu/sri-lankan-civil-war/>.

[22] See generally Nira Wickramasinghe, *Sri Lanka in the modern age: a history*, 2nd ed (New York: Oxford University Press, 2014).

[23] See Dinesha Samararatne, *The Quest for Transitional Justice in Sri Lanka* (Harvard Human Rights Journal, 2017) 1 at 2.

[24] *Ibid*.

violations of international humanitarian and human rights law.[25] In the two years that followed, these commitments were not followed by any concrete action. Consequently, the UN Secretary General appointed a Panel of Experts on matters of allegations against the Sri Lankan government.[26]

In reaction, the Sri Lankan government appointed its own presidential commission, the *Lessons Learnt and Reconciliation Commission* (hereafter, LLRC). The reports of these two bodies, one international, the other domestic, were published in 2011. The UN report established that there were "credible allegations of war crimes and crimes against humanity" committed by both the government and the LTTE.[27] The LLRC stated that violations of human rights were "individual and isolated acts only,"[28] and emphasized the importance of a stable transition for the rule of law and democracy in the country.

The years that followed these reports saw an intensification of the monitoring of transitional justice in Sri Lanka by the UN Human Rights Council. The latter issued resolutions in 2012,[29] 2013,[30] 2014,[31] and 2015,[32] repeatedly pointing out the lack of implementation of the recommendations of the LLRC. The impunity of the victors led commentators to suggest that the LLRC and transitional justice in Sri Lanka were used performatively both to avoid external pressure from the international community for

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[25] See UN Secretary-General, Joint Statement by United Nations Secretary-General, Government of Sri Lanka (SG/2151) (26 May 2009), online: <un.org/press/en/2009/sg2151.doc.htm>. International human rights law applies to States during both peace time and war times, but international humanitarian law (consisting mainly of the Geneva Conventions and Customary Rules) applies only during wartime.

[26] See Samararatne, *supra* note 23; see also Secretary General's Panel of Experts on Accountability in Sri Lanka, *Report of the Secretary General's Panel of Experts on Accountability in Sri Lanka*, ii (31 March 2011), online (pdf): <un.org/News/dh/infocus/Sri_Lanka/POE_Report_Full.pdf.>.

[27] *Ibid* at ii.

[28] Samaratne, *supra* note 23.

[29] See UNHRC, 2012, Res. 19/2, U.N. Doc. A/HRC/19/2.

[30] See UNHRC, 2013, Res. 22/1, U.N. Doc. A/HRC/22/1.

[31] See UNHRC, 2014, Res. 25/1, U.N. Doc. A/HRC/25/1.

[32] See UNHRC, 2015, Res. 30/29, U.N. Doc. A/HRC/30/29.

accountability, and to consolidate and legitimize the regime.[33] This echoes observations by scholars such as Andrew Iliff, who points out that transitional justice can also be deployed as a "tool of disciplinary power, producing the subjects and subjectivities that best serve the interests of the transitional state, particularly [in terms of] the consolidation of authority."[34] The growing place of Sinhala Buddhist nationalism in the electorate of the Rajapaksa regime sheds light on this phenomenon.

Even prior to the end of the war in 2009, the Mahinda Rajapaksa government was the first Sri Lankan government to fully embrace the Sinhalese Buddhist nationalist ideology and came to depend on it to satisfy its electorate.[35] Sinhala Buddhist nationalists repeatedly "vilified international efforts to provide humanitarian relief during the civil war,"[36] claiming that the latter were anti-Sinhala. After 2009, Sinhalese Buddhist monks protested against UN interventions, arguing that investigating concerns over war crimes was anti-Sri Lankan, and Western imperialism. [37] Mahinda Rajapaksa's nationalist rhetoric portrayed the UN's demands similarly.[38] This reinforced a revised and glorified narrative of Sinhala governmental security forces as heroic, and Tamil soldiers as terrorists, at the expense of other perspectives. [39] The government placed a ban on Tamil

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[33] See Richard Gowing, *War by Other Means? An Analysis of the Contested Terrain of Transitional Justice under the 'Victor's Peace' in Sri Lanka*, Working Paper Series No.13-138 (LSE Development Studies Insitute, 2013) 1 at 11.

[34] See AR Iliff, "Root and Branch: Discourses of 'Tradition' in Grassroots Transitional Justice" (2012) 6:2 Intl J Transitional Justice 253 at 255.

[35] See Neil DeVotta, "Sinhalese Buddhist Nationalist Ideology: Implications for Politics and Conflict Resolution in Sri Lanka" (2007) 40 Pol'y Stud at 24. See also Gowing, *supra* note 33 at 16.

[36] See Isha Gupta, "Buddhist Nationalism and Burgeoning Alignments: Sri Lanka's Transitional Justice Dilemma", *Stimson Center* (12 November 2021), online: <stimson.org/2021/buddhist-nationalism-and-burgeoning-alignments-sri-lankas-transitional-justice-dilemma/>.

[37] See *ibid*.

[38] See Samararatne, *supra* note 23.

[39] See Selective Memory: Erasure & Memorialisation in Sri Lanka's North, Center for Policy Alternatives (23 November 2017), online: <cpalanka.org/selective-memory-erasure-memorialisation-in-sri-lankas-north/>.

memorials, [40] and actively destroyed mourning places and cemeteries, [41] under pretext that the latter would promote a culture of martyrdom that could fuel Tamil military nationalism.[42] Simultaneously, the military built a number of monuments in the North to the glory of the Sri Lankan army.[43] In light of this dualistic state narrative of heroes versus terrorists, Dinesha Samararatne suggested that transitional justice issues at the national level have become ethnicised, whereby UN demands are seen as pro-Tamil by some members of the Sinhala community. For Samararatne, too few interventions attempted to bridge the gap between narratives.[44]

The political demands of the Sinhala Buddhist electorate were not the only obstacle to transitional justice mechanisms. The perception of a trade-off between economic development and inclusive democratic institutions also shaped the peace process in Sri Lanka. After the war, the Rajapaksa-led government promised rapid economic development, and framed Sri Lanka's post-war challenge as an economic one, [45] downplaying the need for political reform and reconciliation. Rajapaksa's development strategy was based on increased militarism in the North,[46] and in infrastructure development. Large-scale construction and infrastructure projects drove post-war GDP growth rates, but the

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[40] See "Sri Lanka blocks Tamil memorials amid war parade", *BBC News* (18 May 2014), online: <bbc.com/news/world-asia-27462326>.

[41] The latest of these destruction occurred in January 2021 (though the memorial was rebuilt following student protests), see "Against the Memory Police: War and Remembrance in Sri Lanka", online: <thediplomat.com/2021/01/against-the-memory-police-war-and-remembrance-in-sri-lanka/>.

[42] See Duncan McCargo & Dishani Senaratne, "Victor's memory: Sri Lanka's post-war memoryscape in comparative perspective" (2020) 20:1 Conflict, Security & Development 97 at 103.

[43] See Ruki Fernando, *Memory and Transitional Justice* (Jaffna Public Library, 2015).

[44] Samararatne, *supra* note 23.

[45] See Oliver Walton, "Timing and sequencing of post-conflict reconstruction and peacebuilding in Sri Lanka" in *Building sustainable peace: timing and sequencing of post-conflict reconstruction and peacebuilding* (New York, NY: Oxford University Press, 2016) 1 at 4.

[46] Paradoxically, there was an expansion in military spending after the end of the war, with an increased military presence in the North and the East. See *ibid* at 18.

results of this were concentrated in the South and Western provinces and amongst elites, with very little job creation in the conflict-affected Northern and Eastern province.[47] Furthermore, this infrastructure development created inflationary pressure and a rise in public debt. Many projects relied on loans from Chinese state companies, and relations between Sri Lanka and China became closer as the government turned away from Western institutions and their demands for accountability.[48] To some extent, China's diplomatic and economic support enabled Sri Lanka's ability to circumvent international pressure to implement transitional justice mechanisms.[49]

Oliver Walton further argues that the development of large infrastructure projects encouraged patronage and corruption during Rajapaksa's term. Such projects also eroded the trust of the electorate since they rarely led to overall improvement of living standards, and did not create more jobs in the North and East.[50] In 2018, large regional disparities still existed in employment rates between the Northern and Eastern provinces, and the South.[51] In January 2015, Mahinda Rajapaksa lost the presidential race to Maithripala Sirisena, ushering the country in a new phase of relations between the international community and Sri Lanka. Still, many of the political and economic dynamics that shaped Mahinda Rajapaksa's attitude towards transitional justice would be present in Sirisena's term as well.

ii.   2015 – 2019: Cautious hopes and legal barriers

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[47] See *ibid* at 4.

[48] See Patrick Hein, "The Patterns of Chinese Authoritarian Patronage and Implications for Foreign Policy: Lessons from Sri Lanka, Myanmar and Cambodia" (2020) 5:4 Asian J Comp Pol 385.

[49] See Thurka Brabaharan, *The Sino-Lankan Relationship: Challenging Liberal Foundations of Transitional Justice,* MA Major Research Papers (University of Western Ontario, 2020) [unpublished] at 6.

[50] See Walton, *supra* note 45 at 4.

[51] See "For Sri Lanka, More and Better Jobs Are Critical to Reach Upper-Middle Income Status" *World Bank* (27 June 2018), online: <worldbank.org/en/news/feature/2018/06/26/For-sri-lanka-more-and-better-jobs-are-critical-to-reach-upper-middle-income-status>.

Sirisena's political victory in 2015 blew a hopeful wind on Sri Lankan politics. After his election, the Sri Lankan government co-sponsored the UN Human Rights Council Resolution 30/1,[52] committing the administration to establishing a judicial mechanism with international judges to investigate human rights and international humanitarian law violations.[53] The new presidency also established a Consultation Task Force to engage with the public on the topic of reconciliation. The resulting report, published in 2016, recommended setting up a truth commission and reparation mechanisms.[54]

Following this report, the government engaged in a series of institutional changes, including a constitutional reform process. Laws such as *The Right to Information Act* and the *Act to Establish an Office of Missing Persons*[55] were introduced, two bills aiming at creating the institution and tools necessary for survivors to seek answers concerning enforced disappearances. The *Office of the Missing Persons* further allowed for the consolidation of disparate laws around the issue of enforced disappearances and mass graves. This generated a new wave of enthusiasm for possibilities of reconciliation in Sri Lanka.

Yet while these initiatives were saluted by the international community, the Sirisena government attempted to not antagonize the Sinhala Buddhist electorate,[56] leading to contradictory actions. For example, in 2017, the government rejected the idea of an international hybrid court, arguing it was not feasible with the Sri Lankan constitution,[57] in spite of having agreed to it in the 2015 UN Resolution 30/1. In 2018, *the Office of the United Nations*

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[52] See Samararatne, *supra* note 23 at 2.

[53] See Joint Statement by United Nations Secretary-General, *supra* note 25.

[54] See Final Report of the Consultation Task Force on Reconciliation Mechanisms, (17 November 2016), at 4, online (pdf): <sangam.org/wp-content/uploads/2021/07/CTF-Final-Report-Volume-I-Nov-16.pdf>.

[55] See Constance Johnson, Sri Lanka: Constitutional Reform Planned, LIBR. CONGRESS (28 November 2017), online: <loc.gov/law/foreign-news/article/sri-lanka-constitutional-reform-planned/.>.

[56] See Samararatne, *supra* note 23 at 5.

[57] See Raisa Wickrematunge, "UPDATED: Flip-flopping on Accountability – A Timeline", *Groundviews* (27 March 2017), online: <groundviews.org/2017/03/27/updated-flip-flopping-on-accountability-a-timeline/>.

High Commissioner for Human Rights (OHCHR) published a report deploring the fact that no concrete results had been delivered. It posited that Sri Lanka had not fulfilled its commitments, since international crimes had not been incorporated into domestic law,[58] and that the capacity to investigate and prosecute them had not been strengthened.[59]

For Danisha Samararatne, these contradictory actions can be explained by the lack of convergence between the international and national perception of transitional justice mechanisms.[60] The national conversation has developed along ethnic lines during the previous president's terms, while the international community's demands are framed by a liberal ideology[61] and the vocabulary of human rights. Academic and policy literature on transitional justice constructively assert that confronting the past is necessary for a transition towards a liberal democracy, and project a desire for reconciliation on societies that are often deeply divided. For Samararatne, transitional justice processes in Sri Lanka should focus on a re-democratisation of the country. Instead of supporting and strengthening the state apparatus, transitional justice could mean a devolution of power to the provinces, as well as a consolidation of active citizenship as an alternative to ethno-nationalism.

Beyond this divergence between the international and the national conversations, there are also difficulties in the legal implementation of international conventions in Sri Lanka. These conventions contain more robust remedies for survivors of the conflict and play a key part in the "institutional reform" pillar of transitional justice. Sirisena's presidency showed a willingness to integrate international human rights law instruments, and Sri Lanka is a signatory of several UN human rights treaties.[62]

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[58] See UNHRC, 2017, *Report of the Special Rapporteur on the independence of judges on lawyers on her mission to Sri Lanka*, A/HRC/35/31/Add.1.

[59] See UNHRC, 2018, A/HRC/37/23.

[60] See Samararatne, *supra* note 23 at 4.

[61] For more on the liberal normativity of transitional justice discussions, see Sarah Maddison & Laura J Shepherd, "Peacebuilding and the Postcolonial Politics of Transitional Justice" (2014) 2:3 Peacebuilding 253 at 262.

[62] See "Ratification Status for Sri Lanka" (last visited 21 June 2023), online: *UN Treaty Body Database*

However, those treaties become binding in domestic law only through the passing of national legislation. As such, Sri Lanka is categorised as a dualist country. This was confirmed in 2006 through the case of *Singarasa v. Attorney General*,[63] where the Supreme Court ruled that although Sri Lanka had ratified the *International Covenant on Civil and Political Rights* in 1980, the rights protected in the treaty could not be directly invoked domestically because of a lack of domestic instruments. [64] Therefore, while the state itself could be held accountable if it is found to violate its treaty obligations, citizens cannot raise a similar claim domestically against their own government if there is no equivalent domestic law that has been passed. This entails a slower integration of human rights conventions into the domestic system. For example, Sri Lanka ratified the *International Convention for the Protection of All Persons from Enforced Disappearance* in 2016 but passed implementing domestic legislation in 2018.[65]

Furthermore, Sri Lanka is not party to the International Criminal Court, which has jurisdiction to investigate and prosecute individuals responsible for committing genocide, crimes against humanity, war crimes, and crimes of aggression. Thus, except in the unlikely case that the United Nations Security Council votes to refer the situation of Sri Lanka to the ICC, this recourse in international human rights law remains rather inaccessible. Concerning the prosecution of war crimes, scholar Danushka Medawatte has argued that international humanitarian law should still apply after the conflict in cases of crimes occurring during the conflict, especially concerning enforced disappearances.[66] Yet while scholars and lawyers call for the

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<tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=164&Lang=en>.

[63] See *Singarasa (Nallaratnam) v Attorney General*, [2006] Supreme Court Spl No 182/99 ILDC 518 (Sri Lanka) [*Singarasa*].

[64] See Nigel Rodley, "The Singarasa Case: Quis custodiet...? A Test for the Bangalore Principles of Judicial Conduct" (2008) 41:3 Israel LR 500 at 501.

[65] See International Convention for the Protection of All Persons from Enforced Disappearance Act, No. 5 of 2018.

[66] See Danushka Medawatte, "Implementation of IHL Obligations with Regard to Missing Persons in Post-Armed Conflict Sri Lanka," *International Committee of the Red Cross* (2019).

application of international humanitarian law to apply in the post-conflict period, there is no binding rule forcing States to do so.

In spite of the good will of the Sirisena administration and the renewed interest in transitional justice mechanisms, the difficulty of implementing institutional reforms while still appealing to the Sinhala Buddhist electorate were obstacles to the pursuit of accountability and reconciliation in Sri Lanka, and led to general disappointment in the international community.[67]

iii.   2019 – 2022: Dismissal and erosion of structures

While President Sirisena's term had led to some cautious hope, he did not seek re-election and Gotabaya Rajapaksa became president in November 2019. Gotabaya Rajapaksa was Minister of Defense during the civil war, and has been accused of war crimes himself.[68] He campaigned to repeal his predecessor's commitments to transitional justice, and announced that the government would be withdrawing from all UN resolutions concerning transitional justice in February 2020.[69] The Rajapaksa administration announced that it would not comply with a hybrid court with an international presence, but would focus on a "domestic process" to address issues of transitional justice, raising concerns in the international community.[70] Under Gotabaya Rajapaksa as president, the legitimacy of Sirisena's institutional reforms was gradually eroded. Several of the activists and scholars interviewed over the course of my internship at the International Center for Ethnic Studies pointed out that the Office

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[67] See Amnesty International, "Flickering Hope: Truth, Justice, Reparations and Guarantees of Non-Recurrence in Sri Lanka", *Amnesty International Index* (24 January 2019) at 10–22.

[68] See Beth Van Schaack, "Sri Lankan War Criminal Gotabaya Rajapaksa May Escape Accountability Yet Again, This Time by Running for President", *Just Security* (9 October 2019), online: <justsecurity.org/66530/sri-lankan-war-criminal-gotabaya-rajapaksa-may-escape-accountability-yet-again-this-time-by-running-for-president/>.

[69] See Gupta, *supra* note 36.

[70] See "Sri Lanka has missed a 'historic opportunity' for transitional justice and holds a 'dismal record' on accountability - UN Special Rapporteur", *Tamil Guardian* (18 September 2020), online: <tamilguardian.com/content/sri-lanka-has-missed-%E2%80%98historic-opportunity%E2%80%99-transitional-justice-and-holds-%E2%80%98dismal-record%E2%80%99>.

of Missing Persons lost credibility after the new government imposed a change in its leadership and imposed severe budget cuts.

In June 2020, Pablo de Greiff, the *UN Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence*, issued a report describing the increased ethnicization of transitional justice processes.[71] The report argued that delaying transitional justice processes had grave economic consequences, and that the Sri Lankan government missed a historical opportunity when not following through with the commitments taken by the previous administration.[72]

With the eruption of the pandemic and the worsening of the economic crisis, transitional justice discussions receded from the center of public discourse. However, the latest UN report from the Human Rights Council, issued in September 2022, reaffirms the causal link between Sri Lanka's lack of transitional justice enforcement and its economic and political crisis.[73] Yet this claim fails to contextualise this lack of implementation in the Sri Lankan context. A more accurate assessment might be that the crisis *and* the lack of implementation are caused by political and economic decisions in post-war Sri Lanka.

As the new president Ranil Wickremesinghe announced a desire to create a *Truth and Reconciliation Commission*, it is crucial to critically assess the ways in which this new administration could overcome these barriers. Assessing the obstacles to a successful peace process allows us to challenge the standardized model of transitional justice, with its four pillars of criminal justice, institutional reform, truth-seeking, and reparations. There is still a high degree of impunity considering the accusations of war crimes against high-ranking officials in Sri Lanka, and the institutional reforms that were put in place lacked legitimacy. Singular narratives of the government's heroic victory prevail,

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[71] See UNHRC, 2020, A/HRC/45/45/Add.1 at 6.

[72] See "Sri Lanka has missed a 'historic opportunity' for transitional justice and holds a 'dismal record' on accountability - UN Special Rapporteur", *Tamil Guardian* (18 September 2020), online: <tamilguardian.com/content/sri-lanka-has-missed-%E2%80%98historic-opportunity%E2%80%99-transitional-justice-and-holds-%E2%80%98dismal-record%E2%80%99>.

[73] See United Nations, *supra* note 3.

actively erasing the issue of enforced disappearances despite calls for more truth-seeking. Lastly, reparations to victims have not been featured in governmental actions. While the transitional justice model can be useful, in the Sri Lankan context it has failed to adapt to local obstacles to implementation. UN demands did not lead to a constructive dialogue between international organizations and state authorities. It is thus especially important to consider other actors who can play an important role in fostering reconciliation. Memorialization initiatives from civil society actors can offer a more contextualized transitional justice. The next section will explore how memory initiatives from national and transnational civil society groups offer an avenue for redress when state-led transitional justice mechanisms fall short of their goals of peace, reconciliation, and non-deterrence.

III. Grassroots Memorialization Projects as an Answer to the Gaps of the Transitional Justice Model

i.   *Situating memory initiatives in transitional justice*

Alongside the popularization of the transitional justice framework, the concept of a duty to remember and an awareness of memorialization gradually started appearing in UN reports throughout the 1990s.[74] In the context of transitional justice, memorialization and memory initiatives have been defined as any "deliberate action to preserve the memory of a violent past, rather than ad hoc, spontaneous acts of memorialisation that emerge after violence."[75] This includes creating monuments, museums and exhibits, traditional ceremonies, art performances, awareness-raising and educational programs, and the gathering and preservation of information.

Memory initiatives are rarely given an important place when considering the legal focus of transitional justice and rather

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[74] See Lea David, "Against Standardization of Memory" (2017) 39:2 Hum Rts Q 296 at 304.

[75] Impunity Watch, *Guiding Principles of Memorialisation*, Policy Brief, Perspectives Series Policy Brief (Impunity Watch, 2013) at 3.

appear as secondary to the other avenues of criminal justice, institutional reform, truth-seeking, and reparations. These four elements can include practices that participate in building a collective memory and an understanding of mass violence events. For example, criminal justice often involves Truth and Reconciliation Commissions that allow people affected by a conflict to share their experiences, thereby also bringing people's lived memory into the public discourse. Alongside these elements, memorialization has increasingly been understood as its own branch of transitional justice.

Throughout the 2010s, memorialization has been increasingly perceived as part of the cultural rights owed to the victims of a conflict.[76] In 2013 and 2014, reports on history textbooks and memorialization were presented to the UN General Assembly as an integral part of the promotion and protection of human rights.[77] In 2017, the Netherlands-based NGO *Impunity Watch* issued an official report on *Guidelines for Memorialization*.[78] The increase of literature on the topic has led the *UN Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence* to suggest memorialization as "a fifth 'stand-alone and (...) cross-cutting pillar"[79] of transitional justice in 2020. This is premised on the idea that recalling events and preserving stories is part of the healing process that will prevent further violence in the long run.[80]

Scholars such as David Rieff and Lea David critically engage with the assumption that memorialization practices directly link to healing and non-recurrence of violence. Rieff points out that there is no evidence showing that an increase of commemoration

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[76] See David, *supra* note 74 at 305.

[77] See *ibid*.

[78] See Impunity Watch, *supra* note 76.

[79] Fabián Salvioli, *Memorialization processes in the context of serious violations of human rights and international humanitarian law: the fifth pillar of transitional justice*, Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, A/HRC/45/45 (United Nations General Assembly, 2020) at 5.

[80] See Salvioli, *ibid*.

prevents recurrence of atrocities. [81] David criticizes the standardization of memory policies along similar lines as Line Gissel does with the standardization of transitional justice. For Lea David, one outcome of the popularization of the transitional justice paradigm was the promotion of Western memorial models as "a template for the representation of past mass crimes"[82] which ultimately de-historicizes and de-contextualizes local knowledge. David's criticism centers around the way in which these models can worsen pre-existing social divides by imposing fixed identities on specific groups, and identifying them as victim, bystander, or perpetrators.

Another critique is that memorialization initiatives conflate individual and collective reckoning with trauma. [83] Jeffrey Alexander has argued that nations are not like individuals, and that conceptions of collective trauma can homogenizes identities in narratives that neglect individual needs. [84] In light of these critiques, it is important to critically assess the assumptions underlying these projects. Especially if they are inspired by international normative frameworks, they should ensure that they do not perpetuate divisions on the ground or create inflated expectations of non-recurrence.

Beyond the normative framework created by international organizations, evaluating memorialization in Sri Lanka necessitates looking at the different actors that have a stake in memory initiatives. David points out that international frameworks are often co-opted by local actors who have the power to participate in debates about memory and who can use it for specific goals.[85] In Sri Lanka, this is the case of the governmental forces, who have had the power to dictate memory since the end of the war.

Authors Duncan McCargo and Dishani Senaratne argue that Sri Lanka has been in a state of "illiberal peace" since the

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[81] See David Rieff, *In praise of forgetting: historical memory and its ironies* (New Haven: Yale University Press, 2016) at 83.

[82] David, *supra* note 74 at 296.

[83] See David, *supra* note 81 at 74.

[84] See generally Jeffrey C Alexander, "Toward a Theory of Cultural Trauma" in *Cultural Trauma and Collective Identity* (University of California Press, 2004).

[85] See David, *supra* note 74 at 303.

war ended in 2009. A "liberal peace" would allow for a plurality of memories to be embraced.[86] By contrast, in the Sri Lankan context, the victor's justice dictates policies that continuously exclude and suppress the identity of the defeated 'other'.[87] Comparing Sri Lanka with Thailand, they argue that states of illiberal peace create challenges for memorialisation, as it blurs the boundaries between remembrance and the valorisation of a conflict. It also opens the door to memorials that actively exclude the experience of the 'other' from the national narrative, thus furthering exclusion of their identities. Since the end of the war, many monuments have been built in the North by the army to celebrate war heroes.[88] These memorials are a constant reminder to the Tamil population that militarization and land occupation are still lived realities in the North, as the military has been extremely slow in giving back land that was seized from Tamil owners.[89] While external observers have put faith in an abstract ideal of "civil society" to remedy the exclusionary policies of the government, Sri Lankan authors dispute this ideal. Before turning to this section's focus on grassroots memorialization projects, it is necessary to critically assess the civil society context in which these projects took place.

The concept itself of civil society has been critiqued as an invention that idealizes certain social organizations like NGOs, obfuscating that these groups were often "dominated by elite-run groups."[90] Similar debates about the legitimacy of civil society efforts in Sri Lanka have been taking place since the 1990s, when an increasing number of NGOs started to become active in Sri

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[86] McCargo & Senaratne, *supra* note 42 at 99.

[87] *Ibid.*

[88] See *ibid* at 101.

[89] See "Selective Memory: Erasure & memorialisation in Sri Lanka's North" (23 November 2017), online: *Centre for Policy Alternatives* <www.cpalanka.org/selective-memory-erasure-memorialisation-in-sri-lankas-north/>.

[90] Thomas Carothers & William Barndt, "Civil Society" (1999–2000) 117 Foreign Pol'y 18 at 20. More recent scholarship has outlined the various ways in which civil society organizations can gain or lose legitimacy, see e.g. Thomas Carothers & Saskia Brechenmacher, "Examining Civil Society Legitimacy" (May 2018), online: *Carnegie Endowment for International Peace* <carnegieendowment.org/2018/05/02/examining-civil-society-legitimacy-pub-76211>.

Lanka to promote peace processes.[91] Before the end of the war in 2005, Camilla Orjuela argued that the civil society sphere in Sri Lanka should be understood with nuance. It is a space that is ethnically and geographically divided, shaped by colonial heritage and post-colonial structures of patronage, including NGOs that often depend on foreign funding.[92] Indeed, the umbrella term "civil society" includes ethno-nationalist groups as well as more moderate actors. Civic engagement during the war was mobilized along racial and sectarian lives, with some civil society groups working against peace processes and vilifying international aid as partisan towards one group.[93] Furthermore, she outlines that the civic peace organizations before the war have rarely worked in a bottom-up manner and move from one project to the next with little critical assessment of the outcomes of small-scale activities.[94]

In the post-war landscape, these concerns should still be kept in mind. Nonetheless, the relative political stabilization has allowed for grassroots initiatives that work towards reconciliation to offer examples of how memory initiatives can play an important role when official transitional justice mechanisms fail. Specific projects have been shown to provide the population with avenues for redress, while being critically conscious of their limits, and of their potential position of power. McCargo and Senaratne argue that in countries such as Sri Lanka, the landscape of an illiberal peace reduces the possible modes of inclusive memorialization, given the triumphalism and overt exclusionary character of state commemorations.[95] This opens the door to other possibilities of memorialisation such as localized community projects, transnational communities, and online memorialization projects. It is to such avenues that we now turn.

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[91] See generally Neil Devotta, "Civil Society and Non-Governmental Organizations in Sri Lanka: Peacemakers or Parasites?" (2005) 7:2 Civil Wars 171.

[92] See Camilla Orjuela, "Civil Society in Civil War: The Case of Sri Lanka" (2005) 7:2 Civil Wars 120 at 120.

[93] See *ibid*.

[94] See *ibid*.

[95] See McCargo & Senaratne, *supra* note 42 at 108.

ii.   Grassroots initiatives: HerStory and the Community Memorialization Project

From 2012 and 2019, two correlated grassroots projects of memorialization took place in Sri Lanka. The first is entitled *HerStory*, and was the inspiration for the second, entitled the *Community Memorialization Project*. Both projects consisted of gathering testimonies from people across the country and building a collective archive of stories and maps. This material was then curated as a travelling exhibition and taken to villages across the country to hold local dialogues among community members on memories of the conflict, current needs of survivors, and avenues for redress. The main goal of *HerStory* was to become a "repository for a shared history and shared hopes for Sri Lanka."[96] The *Community Memorialization Project* more clearly situates itself as part of transitional justice, describing its objective as "facilitating an environment that acknowledges and preserves multiple histories in order to create the conditions for reconciliation, justice and non-recurrence of violence."[97] The results of both projects are part of a permanent collection at the National Archives of Sri Lanka.[98] After laying out the methodology and results of these initiatives, this section will assess how they come to answer gaps left by more conventional transitional justice mechanisms.

The first project was premised on the idea that the stories of women, and mothers in particular, who are often obfuscated from war narratives.[99] In Sri Lanka, mothers have been vocal activists protesting against the impunity of the government regarding enforced disappearances.[100] Starting in 2012, a small team of

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[96] "Herstories | 'Herstories' of Resilience and Hope" (2013), online: *The HerStory Archive* <theherstoryarchive.org/about-us/>.

[97] Radhika Hettiarachchi, "Memory Map Sri Lanka - Additional Information" (last visited 21 June 2023), online: *Memory Map Sri Lanka* <about.memorymap.lk/>.

[98] See *ibid.*

[99] See *ibid.*

[100] Sri Lanka has the world's second highest number of cases registered with the United Nations Working Group on Enforced or Involuntary Disappearances: it is estimated that between 60,000 to 100,000 people "disappeared" since the 1980s. It is an issue that touches all communities in the country. See Meenakshi Ganguly, "Families of Sri Lanka's Forcibly Disappeared Denied Justice", *Human*

female artists, historians, and entrepreneurs decided to launch the project *HerStory*. Over the course of several years, the team members reached out to women from Tamil, Muslim, Sinhala, Burgher, and mixed communities, explaining the goal and scope of the project. To get in touch with various communities, the project's team contacted local community-based organisations. Together with local partners, each community was visited, and meetings were held with women who volunteered for the project. They could participate through audio interviews, photo-essays, video stories, letters, memory mapping in groups, and drawings. Both individuals and groups could stay anonymous if desired and were always free to withdraw their contributions from the public archive. The results of the *HerStory* project are publicly available on its website and have been featured in several exhibitions around the world.

The participants were not compensated but were put in touch with other organisations that provided socio-economic help, psycho-social work, and a network of donors for support.[101] Reflecting on the project, the main curator Radhika Hettiarachchi relates that women agreed to volunteer "because they wanted to share and preserve their life stories, request support and empathy from those who read it and because it is cathartic to reflect upon and share their lives with others."[102] For many women, sharing their stories was a "testament to their own strength" and allowed them to show "the resilience and courage with which, for a time, ordinary people lived extraordinary lives."[103] Despite being at the forefront of demanding truth and justice, women have long been excluded from the peace-processes in Sri Lanka,[104] and have also

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Rights Watch (25 August 2021), online: <hrw.org/news/2021/08/25/families-sri-lankas-forcibly-disappeared-denied-justice>.

[101] See Hettiarachchi, *supra* note 97.

[102] *Ibid*.

[103] HerStories, *supra* note 96.

[104] See generally Taryn Wilkie, "Peace by Meaningful Inclusion: The Impact of Women on Peacebuilding in Sri Lanka, Liberia, and Afghanistan" (2021) 10:1 Intl Hum Rts Internship Program Working Paper 1 at 14–23.

been excluded from meaningful participation in transitional justice mechanisms.[105]

Inspired by *HerStory*, the *Community Memorialization Project* began in 2015 with a similar methodology, though including men, women, children, youth, and elders. Participants again came from Sinhala, Tamil, Muslim, and Burgher communities, cutting across ethnic divides. The *HerStory* project archived 285 women's histories, and the Community Memorialisation Project over 350 people's histories. Rhadika Hettiarachchi argues that these stories contrast with testimonies taken from official public consultations, in which people can feel disempowered, categorized, and not in control of their own story.[106] These two projects have an aim to help individual trauma, as they offer an opportunity to participants to control their narrative and contribute their unique perspective to a collective understanding of the past. The grouping of these stories can show how unique experiences of the past sometimes contrast with official narratives.

With the gathering of testimonies, the *Community Memorialization Project* also curated a travelling exhibition that was hosted at various villages across the country. Each exhibition was accompanied by local activities that attempted to foster dialogue and provide the opportunity to share personal experiences. The focus of these events was also to create inter-generational dialogue and emotional connections among similar groups.[107] The project included a media campaign to raise awareness on the importance of the inclusivity of memorialization and aimed to engage policy makers by sharing case studies and documentation within the community of practitioners of transitional justice.

In the Sri Lankan context, where the government maintains tight control of the war narrative, initiatives such as *HerStory* and

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[105] See International Commission of Jurists, *Implementation of Transitional Justice Mechanisms in Sri Lanka: the role of the OHCHR* (Office of the United Nations High Commissioner for Human Rights, 2019).

[106] See Radhika Hettiarachchi, "Embracing Liminality: Challenges and Opportunities of Practicing Memorialization in Sri Lanka" (2019) 11 Drexel L Rev 859 at 868.

[107] See Hettiarachchi, *supra* note 97.

the *Community Memorialization Project* allows the population to experience important steps of the transition between conflict and peace. Both projects used methods of gathering histories in formats that allow for non-linear, auto-ethnographic verbal and non-verbal narratives (such as drawings, collective mappings of events in a group, photo essays, and conversational interviews).[108] For Hettiarachchi, this offers an avenue for truth-telling, as opposed to truth-seeking. Truth-seeking, when construed as part of post-conflict transitional justice, posits the existence of one linear truth that can supplement calls for accountability. By contrast, truth-telling allows for multiple narratives to coexist. This is essential to break the homogenous identities that are created by the state narrative, and by the standard framework of transitional justice.

International organizations often advocate for a "victim-centered" approach in truth-seeking and accountability mechanisms.[109] The emphasis on the victim as an identity can lead to a competition for the status of victims, both between, and within groups themselves. Furthermore, the tendency to homogenize this identity can "depoliticize victims and define them as ahistorical, universal humanitarian subjects."[110] While critical literature has gone beyond the fixed identities of victims, perpetrators, and bystanders, human rights organizations still rely on these categories to demand funds, and to understand which group involved in a conflict should be prioritised.

Processes of truth-telling allow each individual to be present with their complex identities. By encouraging empathy through inter-generational knowledge transfer, and inter-regional sharing of memories, these projects diversify what the common understanding of victim and perpetrators are. These narratives, including those of families of LTTE Cadres and ex-combatants, allow to create a space where each person affected by the war is seen and heard while maintaining the moral complexity necessary to provide accountability mechanisms that do not reinforce divides. Indeed, a schematic understanding of mutually exclusive

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[108] See Hettiarachchi, *supra* note 106 at 869.

[109] See e.g. *Situation of human rights in Sri Lanka*, UNHCR, 51th Sess, UN Doc A/HRC/51/5 (2022), 1 at 12.

[110] David, *supra* note 74 at 315.

categories of victim, bystander, and perpetrator runs the risk of reinforcing negative stereotypes between groups. For Lea David, this hinders the ability to move beyond a contested past, and instead transmits the past's legacies to future generations who will grow up thinking of their group as identified with one of these labels.[111] Changing the terminology from "victim-centered" to "survivor-centered" might help shift the focus on the impacts of the war on each community.

The individual approach featured in *HerStory* and in the *Community Memorialization Project* honours the dignity of each participant by offering the space to share their stories, regardless of their belonging to a group or another. It creates a space for the moral complexity of reckoning with both what one has suffered, and what one has done during a civil war. This multi-layered process can address grievances that are "not captured fully by the structures promised by the government."[112] These testimonies can also provide evidence for future accountability mechanisms. Without using these testimonies as criminal evidence, they can give details on the ways in which governmental impunity still affects some population. This can in turn ground the call for more governmental accountability for communities across the Sinhala / Tamil divide. It can also serve as basis to demand reparations.[113]

According to the participants' reflections on the project, sharing their experience was self-empowering, as they could exercise their agency and inscribe their personal histories within the mosaic of narratives collected.[114] The choice to remember or to forget should both be available. In the Sri Lankan contexts, many perpetrators of human rights violations occupy governmental positions and have the power to determine the narrative. This impunity is contrasted by projects that feature ordinary people, and that do not revere political leaders nor

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[111] See David, *supra* note 74 at 317.

[112] Thyagi Ruwanpathirana, *Memorialisation for Transitional Justice in Sri Lanka: A Discussion Paper*, Discussion Paper (Centre for Policy Alternatives, 2016) 1 at 5.

[113] See Lydia Gitanjali Thiagarajah, *Memorialisation and Reparations: A Report of Four Dialogues*, Report (International Centre for Ethnic Studies, 2016) 1 at 1.

[114] See Hettiarachchi, *supra* note 106.

demonize insurgents. Lydia Thiagarajah has argued for the importance of featuring the "experiences of the common man in state memorialisation initiatives"[115] in order to foster empathy between groups. Before hosting meetings with different members of the community, participants in each village were brought together within their own group where they could safely share their potential stereotypes of the other groups based on their experience.[116] It was crucial for the organizers to foster the feeling that they were being heard, and that it was safe to express their concerns. They conducted group and individual interviews with a trauma-informed approach and attempted to be mindful of the risks of re-traumatization in the telling of events.[117] These initiatives did not profess that their projects would lead to either individual or collective healing from these traumas. The overarching goal was to record and provide a common space for the multiplicity of lived experiences of the conflict, and to ensure that these perspectives would not be erased with time and governmental policies.

Using online servers as repositories for the gathering of these testimonies points to the use of the cyberspace as a realm for memorialization. Especially when the establishment of physical monuments is difficult or even prohibited, online avenues are often used. For example, the Asian Human Rights Commission upholds a server with an 'online graveyard' for the families to mourn loved ones that have been forcibly disappeared.[118]

While *HerStory* and the *Community Memorialization Project* help lay the ground for a more sustainable reconciliation, it is important to recognize that there is an unequal access to memorialization in Sri Lanka. Official memorials allow survivors in the South to commemorate their losses, but Tamil populations in the North and East have not been allowed to do so, as events of remembrance and mourning have been banned in Jaffna in

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[115] *Ibid* at 6.

[116] See Search for Common Ground, "Community Memorialization Project, Sri Lanka" (2021) 11 Hum Rts Educ Asia-Pacific 71 at 83.

[117] See *ibid* at 90.

[118] See "Cyberspace Graveyard for Disappeared Persons" (last visited 21 June 2023), online: *Disappearances.org* <disappearances.org/graveyard/>.

2014.[119] At the end of the war, a graveyard entitled "Thuyilum Illam" was destroyed and replaced by army camps.[120] It was officially for LTTE soldiers but served the community as a place to mourn their lost ones, regardless of their participation in the LTTE.[121] This inequality in memorialization creates a need for acknowledgement in the Tamil community, which has partially been filled by actors in the diaspora.

iii.   Transnational actors

Communities in the Tamil diaspora have been active around the world in response to the Sri Lankan government's memorialization policies. In the Canadian context, the Ontario Legislature passed *Bill 104, The Tamil Genocide Education Week Act* in 2021. While this bill does not entail any international criminal responsibility, it encourages all Ontarians "to educate themselves about, and maintain their awareness of, the Tamil genocide and other genocides that have occurred in world history."[122] This Bill is a testimony to the large Tamil diaspora in Canada, and points to the complex political aspects of transnational memorialization.

Diasporas that have been generated by conflicts often become vocal advocates for accountability. Similar to the concept of "civil society", one should be wary to homogenize the identity of a diaspora. Given its role in funding the civil war,[123] the Tamil diaspora has been portrayed as a destabilizing force that reinforces identity politics. This has at times discredited the calls for war crimes accountability from diasporic groups around the world. Keeping in mind the multi-faceted identities of diasporic communities, and their potential to play a destabilizing role,

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[119] See Thiagarajah, *supra* note 113 at 6.

[120] See *ibid* at 8.

[121] See *ibid*.

[122] *An Act to proclaim Tamil Genocide Education Week*, Chapter 11 of the Statutes of Ontario, 2021.

[123] See Jo Becker, "Funding the 'Final War': LTTE Intimidation and Extortion in the Tamil Diaspora" (2006), online: *Human Rights Watch* <hrw.org/report/2006/03/14/funding-final-war/ltte-intimidation-and-extortion-tamil-diaspora>.

scholar Mytili Bala has argued that an inclusive transitional justice in Sri Lanka should nonetheless strive to include the diaspora.[124]

Diaspora groups hold diverse political views, that have at time converged or diverged with the demands of the UN Human Rights Council to the Sri Lankan government.[125] In spite of their involvement in the war, voices from the diaspora that are willing to work towards reconciliation should be heard. Discrediting them from the onset would participate in the Sri Lankan government's blanket categorization of Sinhalese war heroes versus Tamil terrorists. In the last years of the war, Rajapaksa's government claimed that the war was a humanitarian operation meant to liberate the North from the terrorist groups of the LTTE.[126] This vision still stands in the way of reconciliation, and it is also the narrative that legitimized the government in front of international organizations despite their suspected war crimes. This legitimacy continues to allow for a high level of impunity from governmental officials who were involved in human rights abuses during the war. Moving past this narrative could include consultation and outreach with the diaspora. Indeed, even the LLRC, a commission established during the Rajapaksa government, noted the importance of diaspora engagement. [127] Transnational memorialization efforts such as Ontario's Bill 104 could be brought in dialogue with the needs of the communities still in the country.

Engagement with a conflict-driven diaspora in transitional justice is not unheard of. State officials in Libera recognized the role of the diaspora in funding the country's civil war, and the 2006 *Truth and Reconciliation Commission* "made efforts to systematically engage the fractured Liberian diaspora in its truth-

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[124] See Mytili Bala, "Transitional Justice in Sri Lanka: Rethinking Post-War Diaspora Advocacy for Accountability" (2015) 1 DePaul Intl Hum Rts J [i] at 1.

[125] For example, the 2015 United Nations Human Rights Council draft resolution 25/1 was approved by the Canadian Tamil Congress. See "Canadian Tamil Congress appreciates Revised Draft Resolution on Promoting reconciliation, accountability, and human rights in Sri Lanka", Canadian Tamil Congress Press Release (17 March 2014), online: <canadiantamilcongress.ca/article.php?lan=eng&cat=pr&id=125>.

[126] See Bala, *supra* note 124 at 11.

[127] See *ibid* at 24.

seeking process."[128] For Bala, it is best to recognize displaced survivors of the conflict as persons with political agency, who may be both victims and also responsible for funding the civil war.[129] Including these perspectives might bridge the gap in unequal access to memorialization in Sri Lanka, and help provide a sense of perceived justice among communities. Both grassroot memory initiatives and transnational memorialization can be integrated to create an inclusive understanding of the multiple truths coexisting about the civil war.

IV. Towards a Minimal View of Transitional Justice in Sri Lanka

Grassroot memorialization initiatives will not solve the political, economic, and legal obstacles to implementation of transitional justice in Sri Lanka. However, observing these obstacles in juxtaposition to the potential benefits of projects such as *HerStory* and the *Community Memorialization Project* show the gaps that are created by the adoption of the transitional justice model as framed by UN agencies. These initiatives also come as responses to the insufficiency of this model. Indeed, although the framework of transitional justice can be helpful to tie in different aspects of redress in a post-conflict context, looking at the obstacles that its implementation faced points the need to question the coherence of transitional justice as a category. In the Sri Lankan context, using this framework might lead to its co-optation by the government to gain international legitimacy. In gathering individual testimonies, community memorialization projects can refocus the issues that are most prevalent for the population in link with their experience of the conflict.

These initiatives allow for a culturally specific understanding of reconciliation. They subvert the transitional justice framework that usually aims at strengthening a singular and stable state without necessarily challenging its systemic role in the conflict. While it is important to offer counter-narratives, these are not aiming to destabilize the society. Authors Valentina Gentile and

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[128] *Ibid* at 40.

[129] See *ibid* at 42.

Megan Foster argue that "the trade-off between stability and justice is a false dilemma."[130] Indeed, the capacity for the Sri Lankan state to build legitimacy with its various communities can include justice mechanisms that foster stability. This societal stability will in turn shape the forms that justice will take domestically and internationally.[131] Gentile and Foster suggest that a minimal understanding of transitional justice might be necessary for deeply divided societies, and making institutions capable of affirming basic human rights should be balanced with respecting international law standards. International organizations, rather than calling on the Sri Lankan government to answer their call for accountability, should not undermine the local transitional justice efforts. Socio-economically, this could take the form of making loans simultaneously, rather than sequentially to reforms, in order to deter the performative reforms that were seen under both the Mahinda and Gotabaya Rajapaksa terms in office.

While memorialization can help establish the groundwork for reconciliation, the ongoing economic hardships of the countries remain an important obstacle. The inclusivity of the protests in 2022 gave rise to new hopes for inclusive memorialization,[132] but they also showed that all communities suffer from the economic crisis. Balancing economic and political interests for the new government will be especially important in light of its future cooperation with South Africa and Sri Lanka on a potential *Truth and Reconciliation Commission*.

Memorialization can also play a role in redressing socio-economic harms, by showing how the current needs of the population are linked to the conflict. The *Community Memorialization Project* revealed how population in the North and East were suffering from poverty, unemployment, and lack of access to land as a result of the militarization of the area.[133]

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[130] Gentile & Foster, *supra* note 8 at 512.

[131] See *ibid* at 515.

[132] In May 2022, protesters of different groups participated in a ceremony to commemorate victims of the civil war. See "Sri Lankan protesters include Tamil victims in war memorial", *CTVNews* (18 May 2022), online: <ctvnews.ca/world/sri-lankan-protesters-include-tamil-victims-in-war-memorial-1.5909914>.

[133] See Ruwanpathirana, *supra* note 112.

Author and activist Thyagi Ruwanpathirana has suggested that memorialization initiatives can address these issues. Collecting individual accounts shines a light on the intersections of loss, poverty, and capability to seek redress. Many of the women who call for justice concerning forced disappearances highlighted not only their grief, but the loss of the main bread-winner of their family and the consequent difficulty of sustaining their families.[134] Ruwanpathirana suggests that memorials can also serve a social utility. He gives the example of water-pumps in Nepal, built both as memorials and to address immediate needs of the community.[135]

Furthermore, a growing number of scholars have started including socio-economic concern as part of transitional justice, as "social injustices and economic oppression cannot be easily disentangled from other forms of civil and political violence."[136] Sri Lankan officials could learn from the *Commission for Reception, Truth and Reconciliation* in East Timor, which included socio-economic justice as part of its mandate. This took the form of a chapter on the link between forced displacement and famine, and of a list of violations of socio-economic rights, such as the degradation of the education system.[137]

These examples show that the current government should learn from a variety of case studies in order to gain legitimacy in its intentions to implement transitional justice mechanisms in Sri Lanka and avoid the barriers that have heretofore precluded many communities from benefitting from transitional justice. To gain this legitimacy one needs to engage with multiple, sometimes contradictory narratives, that are offered by memorialization processes like the *HerStory* and *Community Memorialization Project*. Supporting these projects and expanding the understanding of transitional justice framework beyond the

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[134] See HerStories, *supra* note 96.

[135] *Ibid*.

[136] Gentile & Foster, *supra* note 8.

[137] See "Final Report of the Commission for Reception, Truth and Reconciliation in East Timor" (last visited 21 June 2023), online: <etan.org/news/2006/cavr.htm>. See also Gentile & Foster, *supra* note 8 at 521.

current UN model is necessary to address the "root causes" of the
crisis of summer 2022.

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