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# **The Post-Conflict Reconciliation Process: Truth Commissions**

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**2012/05/10**

Master's Thesis

Submitted in Partial Fulfillment of the Requirements for the Degree of Master's of Arts in  
International Relations at the City College of New York

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## Table of Contents

Abstract.....	2
Chapter 1.....	4
Introduction	
Chapter 2.....	10
Review of the Literature	
Chapter 3.....	21
Restorative Justice vs. Retributive Justice	
Chapter 4.....	29
Case Studies on Truth Commissions in El Salvador, South Africa, Sierra Leone, and Sri Lanka	
Conclusion.....	68
Bibliography.....	72

## **ABSTRACT**

Since the end of the Cold War, our world has seen an increase in intra-state conflict and the emergence of the notion of state accountability for the treatment of their citizens. Furthermore, sovereign states increasingly see that it is in their interest to apply the rule of law and human rights norms beyond their borders. While peace building efforts have been achieved through criminal prosecutions, truth commissions, reparation programs, and vetting, a truth commission, in particular, has been progressively used in the past decade as one aspect of transitional justice measures. This increase in use illustrates its popularity in handling sensitive and fragile post-conflict societies. However, unless a state fulfills its obligations to protect the rights of its citizens by implementing recommendations by a truth commission, there is little room for creating a just and peaceful society. Therefore, how the international community deals with volatile post-conflict situations, i.e., the issue of accountability for human rights abuse and reconciliation, has wider implications for global stability.

Drawing experiences chronologically from the past three different commissions in El Salvador, South Africa, and Sierra Leone, I will analyze tensions between justice and truth and to what extent truth commissions are effective in promoting reconciliation and achieving a durable peace. Then, taking an example of the recently established commission in Sri Lanka as a case study, I will examine what kind of lessons Sri Lanka can (or cannot) draw from truth and reconciliation processes used in similar cases.

For my hypothesis, I will argue that without international pressure or changes within the leadership, institutional reforms or prosecution will not take place. This is especially

true with intra-state armed conflicts because international action on protecting human rights may be essential.

For the time being, there have been no prosecutions in Sri Lanka to address past abuses, nor institutional reforms to protect people from human rights violation in the future, thus, my hypothesis is correct. For these reasons, Sri Lanka poses a new challenge to countrywide reconciliation and the concept of transitional justice mechanisms, i.e., truth commissions and prosecution. To conclude, this thesis calls for further research to respond to a new challenge that truth commissions are facing in dealing with post-conflict countries.

## **Chapter One**

### **Introduction**

**Topic:** The focus of this study is an examination of truth commissions following high-level conflict. I will examine both justice and truth as preconditions for reconciliation in a country emerging from political violence or armed conflict. The thesis analyzes to what extent truth commissions are effective in facilitating reconciliation on the national level and achieving a durable peace, using El Salvador, South Africa, Sierra Leone, and Sri Lanka as case studies.

**Justification/rationale:** Since the end of WWII, national and transnational social movements on human rights have induced states to incorporate norms of universal human rights into their domestic policy. Over the past two decades since the end of the Cold War, our world has seen an increase in power distribution and the notion of state accountability for the treatment of their citizens has emerged. Sovereign states increasingly see that it is in their interest to apply the rule of law beyond their borders. That said, the post-Cold War world is increasingly being tested on how to solve intra-state conflict, while the gap between the protection and promotion of human rights in principle and in practice seems widening. Moreover, human rights issues tend to be more politicized than ever, polarizing the world not only between the Global North and the Global South, but also within the United Nations and the U.N. Security Council.

The end of prolonged armed conflict by military means in Sri Lanka poses a great challenge to the international community. This thesis focuses on how they deal with the

justification of the use of military action to defeat what Sri Lanka terms terrorism. Accountability and the promotion of reconciliation through transitional justice mechanisms will also be examined. Unless a state fulfills its obligations to protect the rights of its citizens by implementing recommendations by a truth commission, there is little room for creating a just and peaceful society. Therefore, how the international community deals with volatile post-conflict situations, i.e., the issue of accountability for human rights abuse and reconciliation, has wider implications for global stability. This poses a major challenge to contemporary policy debates on international relations.

**Hypothesis:** This thesis will argue that without international pressure or changes within the leadership, institutional reforms or prosecution will not take place. This is especially true with intra-state armed conflicts because international action on protecting human rights may be essential.

**Theory:** I will argue that evidence from case studies confirms the applicability of normative theory which proposes that the international community of states assesses and evaluates acceptable standards for behavior in the international system. These standards are set out particularly through international law. Similarly, constructivism explains that the force of ideas, beliefs, and standards of appropriate behavior will influence state behavior and compliance with international law. The importance of norms and obligations of states for human rights violations is increasingly recognized in dealing with the post-Cold War intra-state conflicts. Peace building efforts have been progressively

achieved through transitional justice measures including criminal prosecutions, truth commissions, reparation programs, and vetting. Especially, a truth commission has been increasingly used as one aspect of transitional justice measures. This increase in use illustrates its popularity in handling sensitive and fragile post-conflict societies.

The ongoing process in post-conflict Sri Lanka, however, seems to pose a new challenge to the progress of achieving human rights norms. The current situation in Sri Lanka may demonstrate that forward progress on norm formation on human rights is not linear, but could become stifled or even degenerate. Post-conflict exclusionary policies by the Sri Lankan government do not seem to redress the deep ethnic and political divide that was created during the protracted conflict. This exclusion continues to hamper the restoration of civil society with a common agenda which cuts across ethnic and political lines.

The case of Sri Lanka may also underscore the argument that “the threat of prosecution could cause powerful dictators or insurgents to entrench themselves in power.”<sup>1</sup> In other words, confronted with accusations of crimes against humanity and war crimes, the leadership in Sri Lanka seems to be barricading itself against outside intervention while downplaying the norms upholding respect for human rights. After all, the effectiveness of the normative system depends on states as responsibility bearers to comply with norms and on how well the international community can address its normative concerns.

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<sup>1</sup> Kathryn Sikkink, *The Justice Cascade*, (New York: Norton, 2011), 179.



## **Research Design**

**Methodology:** By employing qualitative methods and a case study approach, this thesis will attempt to test my hypothesis by examining three past commissions and the most recent commission created in Sri Lanka. The case is unique in that the conflict was one of the longest cases addressed by a truth and reconciliation commission (TRC), the longest being the apartheid regime in South Africa, lasting from 1949 to 1994. It is commonly understood that the year 1983 saw the inception of the violent ethnic conflict in Sri Lanka, that later escalated into the protracted civil war until 2009. Furthermore, underlying causes of the conflict are complex, involving domestic (ethno-religious and political-economic divides), regional (the Indian intervention), and international (the Tamil diaspora and the Norwegian-brokered peace talks) dimensions.

What is more, the unique character of this case is untested because no past resolved case perfectly fits the nature of the conflict in Sri Lanka. For instance, in some Latin American countries, violence and human rights abuse took place under military rule, which is not the case in Sri Lanka. The example of the complexity of war, ethnic and group identity and colonialism in Africa<sup>2</sup> might come into play in a similar manner as the Sri Lankan conflict. Yet, most conflicts were resolved through a peace agreement or sponsored by the U.N. or international non-governmental organizations (INGOs), whereas the conflict in Sri Lanka ended with a military victory in the name of defeating terrorism.

Taking account of many other factors, I will compare several cases, where truth

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<sup>2</sup> Priscilla Hayner, "Fifteen Truth Commissions – 1974 to 1994: A Comparative Study," *Human Rights Quarterly*, 16, no.4 (Nov.1994): 654.

commissions, prosecution, and other reconciliation measures contributed to resolving post-conflict tensions and addressing injustice and human rights abuse. I will then analyze what kind of lessons Sri Lanka can (or cannot) draw from truth and reconciliation processes used in similar cases. This thesis examines whether Sri Lanka poses a new challenge to the concept of transitional justice mechanisms, i.e., truth commissions and prosecution.

### **Set of Research Questions**

The following are a series of questions that I will use to drive the research. By focusing on truth commissions which have been increasingly used in post-conflict situations in the last decade, this thesis attempts to answer these questions.

- How to reduce the likelihood of the resurgence of future conflict in transitional society? What mechanisms can be established to assist reconciliation?
- What is the effectiveness of truth commissions and criminal justice prosecutions in finding truths and achieving reconciliation?
- Can one mechanism replace the other or are both necessary?

For the purpose of this thesis, I use the term “reconciliation” to be applied on the national and political level. Reconciliation, however, does not necessarily require forgiveness on the individual level. It means the general public gains a shared understanding of its past and then works together to build a peaceful and stable society. I will also argue that reconciliation does not simply mean concealing wounds and putting aside the past unconditionally. Only after the state and society come to understand the causes of

conflict and acknowledge wrongdoing through the mechanism of truth commissions, can a process of reconciliation begin.

Drawing experiences from past commissions chronologically in El Salvador, South Africa, and Sierra Leone, I will analyze tensions between justice and truth and to what extent truth commissions are effective in promoting reconciliation and achieving a durable peace. Then, I will examine the recently established commission in Sri Lanka as a case study. I will conclude that both justice and truth are preconditions for reconciliation in a country experiencing transition from conflict to peace.

### **Chapter Outline**

- Chapter One: Introduction
- Chapter Two: Review of the literature
- Chapter Three: Restorative justice vs. retributive justice
- Chapter Four: Case studies on truth commissions in El Salvador, South Africa, Sierra Leone, and Sri Lanka.
- Conclusion

## Chapter Two

### Review of the Literature

#### The Definition of Reconciliation

The ultimate purpose of truth commissions is to address the structural causes of conflict and to prevent the repetition of human rights violations. This seems impossible unless a divided society come to agree to work together towards this goal. Then, what is the meaning of reconciliation? Is it possible to make it happen through a truth commission process?

According to James Gibson's interpretation, "tolerance," if not full reconciliation, is the maximal realistic outcome possible, but "not forgiving, nor acceptance, nor even the suspension of hatred."<sup>3</sup> Alternatively, Martha Minow defines reconciliation as "minimum agreement to coexist and cooperate, or a stronger commitment to forgive and unify."<sup>4</sup> In this thesis, I will focus on reconciliation on the national level and use the former definition which excludes forgiveness as a part of reconciliation.

Reconciliation does not necessarily require forgiveness because it is an emotional quality that can only be achieved on an individual level. Rajeev Bhargava notes that forgiveness cannot be enforced because requiring victims to forget and forgive may further damage a person's sense of self-respect and dignity. Forgiving may be possible

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<sup>3</sup> James Gibson, "The Contribution of Truth to Reconciliation: Lessons from South Africa," *Journal of Conflict Resolution*, 50, no. 3 (June 2006): see note 28, 426.

<sup>4</sup> Martha Minow, "The Hope for Healing: What Can Truth Commissions Do?" in Robert Rotberg and Dennis Thompson, eds., *Truth v. Justice: The Morality of Truth Commissions*, (Princeton: Princeton University Press, 2000): 250.

only when perpetrators acknowledge and repent wrongdoing.<sup>5</sup> Bhargava even claims that TRCs must not have an ambitious goal of bringing about reconciliation because commissions can only create “conditions” for reconciliation.<sup>6</sup> In place of calling for forgiveness and amnesia, TRCs can at best facilitate remembrance of wrongdoing as collective memory that signifies an acknowledgement of injustice, thereby preventing the recurrence of human rights violation.<sup>7</sup>

Priscilla Hayner proposes three questions in identifying whether reconciliation exists or is in progress: 1) “How is the past dealt with in the public sphere?” 2) “What are the relationships between former opponents?” 3) “Is there one version of the past, or many?”<sup>8</sup> In brief, her questions ask: Is there an open discussion about past events even with former opponents in search for the possibility of coexistence and of mutual respect, resulting in an agreement on shared past, if not consensus? Considering that it is not possible for the public to hold one truth or reach a consensus especially in a democracy, reconciliation in a post-conflict society that is experiencing transition to democracy seems an impossible task without truth-seeking efforts on the national level.

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<sup>5</sup> Rajeev Bhargava, “Restoring Decency to Barbaric Societies,” in Robert Rotberg and Dennis Thompson, eds., *Truth v. Justice: The Morality of Truth Commissions*, (Princeton: Princeton University Press, 2000), 52.

<sup>6</sup> *Ibid.*, 61.

<sup>7</sup> *Ibid.*, 54.

<sup>8</sup> Priscilla Hayner, *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions*, (New York: Routledge, 2011), 189.

### *Under what conditions truth contributes to reconciliation?*

Reconciliation requires two conditions: first, accountability for past violations and second, the creation of a political culture that respects human dignity and the rule of law.<sup>9</sup> Accordingly, truth commissions and prosecution aim to fulfill these two conditions. As important as international pressure, civil society is also crucial in determining the success of TRCs by applying public pressure to create effective domestic institutions.<sup>10</sup>

### Overview of Truth Commissions

The purpose of Priscilla Hayner's writing is to understand the role of truth commissions as one of many tools available for transitional justice in a country emerging from war to peace or from authoritarian rule to democracy. Criminal justice aims at bringing perpetrators to justice by evaluating "evidence of criminal wrongdoing and violation of international law."<sup>11</sup> In comparison, a truth commission is a victim-focused approach by probing "overall patterns, causes, and consequences of political violence."<sup>12</sup> Specifically, Hayner summarizes five aims of a truth commission: first, establish truth through fact-finding; second, assist victims by hearing, respecting, and responding to the needs of victims and survivors; third, promote justice - help counter impunity, and make clear recommendations to advance criminal accountability; fourth, advance reforms -

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<sup>9</sup> Ronald Slye, "Amnesty, Truth, and Reconciliation: Reflection on the South African Amnesty Process," in Robert Rotberg and Dennis Thompson. eds., *Truth v. Justice: The Morality of Truth Commissions*, (Princeton: Princeton University Press, 2000), 170.

<sup>10</sup> Hayner (2011), 205.

<sup>11</sup> *Ibid.*, 16.

<sup>12</sup> *Ibid.*, 13.

evaluate the institutional responsibility for abuses, to outline the reforms needed to prevent further abuses; and fifth, promote and facilitate reconciliation.<sup>13</sup>

### Strengths of Truth Commissions

The striking difference between criminal justice and a truth-seeking approach is that a successful truth commission will encourage public awareness about the needs and experiences of victims, resulting in motivating people across society to change their views and reconcile with each other. Heyner finds a truth commission more appropriate in a fragile and divided society because truth-seeking would not upset peace, whereas the criminal justice approach could further widen existing political and social cleavages especially when perpetrators remain in power and resist change.

While prosecutions might give consolation to victims, the author throws out a question; “how can victims forgive without knowing who to forgive and what to forgive them for?”<sup>14</sup> In her observation, prosecutions have little success on the national level because perpetrators are given amnesty in many cases, thus, deterrent effects of trials in international courts are mixed.<sup>15</sup>

### Limitations of Truth Commissions:

In the meantime, Hayner acknowledges inherent limitations of a truth commission in terms of time frame, resources, and resistance from people in power who committed

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<sup>13</sup> Ibid., 20-22.

<sup>14</sup> Ibid., 23.

<sup>15</sup> Ibid., 8-9.

human rights violations. At the same time, she cautions against overstated assumptions that truth-seeking gives psychological catharsis of knowing the truth to all victims. The impact of a truth commission on victims who suffered from political violence differs from person to person. The aim of a truth commission is not to give therapy to victims, but to “gather as much detailed information from the greatest number of victims as possible to allow an accurate analysis of abuses over a period of time”<sup>16</sup> in order to establish “a broad and specific truth that will be accepted across society.”<sup>17</sup>

With regard to reconciliation on the national level, Hayner is cautious about having too high expectations of the efficacy of TRCs. While a truth commission does promote the process of reconciliation, a truth-seeking process may not be a universal remedy.

Joanna Quinn and Mark Freeman<sup>18</sup> reveal methodological and operational challenges that commissioners and staff faced during the South African TRC process. In line with Hayner’s research conducted in 2011, the article reminds us of misperceptions about the TRC as being a panacea for victims and warns that commissions could have negative effects such as traumatizing people involved or sharpening political and societal cleavages. It emphasizes the importance of learning from mistakes and sharing experiences to improve the effectiveness of future commissions.

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<sup>16</sup> Ibid., 151.

<sup>17</sup> Ibid., 84.

<sup>18</sup> Joanna Quinn and Mark Freeman, “Lessons Learnt: Practical Lessons Gleaned from Inside the Truth Commissions of Guatemala and South Africa,” *Human Rights Quarterly*, 25, no. 4 (Nov. 2003).



### Justice and Accountability vs. Reconciliation

Hayner suggests that truth-seeking and criminal justice mechanisms are not necessarily mutually exclusive, but rather, a truth commission could play a role in advancing prosecutions by providing evidence collected from victims and perpetrators to the courts. Finding the truth can also place responsibility for a crime by naming names of perpetrators.

While Hayner's study illustrates the evolving nature of a truth commission, there are no standard procedures or a model for strong and effective truth commissions. Each commission should incorporate national preferences and historical context to address local needs. In her observation, however, weak implementations of recommendations by commissions and declining international pressure on national governments are diluting the efforts made by a truth commission. Truth commissions are gaining popularity around the world, yet little attention is paid to it compared to criminal justice. Given these facts, Hayner calls for further research on country case studies to improve the effectiveness of a commission.

Similarly, both Carsten Stahn and Darryl Robinson describe the possibility of striking the balance between prosecution and national reconciliation mechanisms. Stahn describes changes in the United Nations peace-building efforts to combine justice and reconciliation models by treating truth commissions and prosecution as complementary. This is exemplified by the establishment of two parallel mechanisms in Sierra Leone, one by the government of Sierra Leone and the other by the United Nations. The Truth and Reconciliation Commission for Sierra Leone was established by the government while

the Special Court for Sierra Leone was created as a result of the agreement between the government and the U.N. The latter is a mixed international and domestic court to prosecute persons responsible for violations of human rights and international humanitarian law committed during Sierra Leone's civil war.

This carrot and stick approach of targeted prosecution (prosecuting only the persons most responsible) and conditional amnesties (granting amnesties to lower-level perpetrators on a case-by-case basis) allowed for alternative forms of justice such as truth-telling and individualized amnesty or prosecution. Further, Stahn maintains that mixed national-international prosecution bodies such as the Special Court even offer forms of justice alternatives to the ad hoc international criminal tribunals by involving domestic citizens in the process of investigating the past and helping restore legal system and local capacity-building.<sup>19</sup>

Darryl Robinson further examines how to uphold the goal of punishing international crimes, while leaving room for national reconciliation programs that grant amnesties and ultimately function as an alternative form of justice. The author explains that there are exceptional situations where the International Criminal Court (the ICC) can defer to non-prosecutorial reconciliation measures. The ICC could only prosecute those most responsible, whereas a truth commission could deal with lower-level offenders. The ICC could also respect national programs that grant amnesties even to the most responsible, provided that the ICC deems that accountability objectives are met through genuine and democratic proceedings and efforts on the national level.

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<sup>19</sup> Carsten Stahn, "United Nations Peace-Building, Amnesties and Alternative Forms of Justice: A Change in Practice?" *IRRC*, 84, no. 845 (Mar., 2002): 204.

Beyond the discussion about tensions between truths versus justice, Pablo de Grieff underscores the importance of reinstating norms in a post-conflict society. Both truth-telling and prosecution measures have common goals of affirming norms and promoting recognition, civic trust, and the democratic rule of law.<sup>20</sup> The nature of norms and values are weakened or broken during war, affecting not only victims, but also non-victims who often feel that no one is safe as a result of spill-over effects. Whatever changes may be made, people would not feel secure unless expectations are fulfilled that others share norms and follow a certain pattern of behavior.<sup>21</sup>

### The Impact of Prosecutions

In contrast to the above literature on victim-oriented restorative (truth) justice, Kathryn Sikkink examines the impact of retributive justice (prosecutions) on the protection of human rights. By referring the term “justice” to legal accountability for crimes,<sup>22</sup> she primarily focuses on the individual criminal accountability as an emerging justice norm since the 1990s. Her empirical studies demonstrate how the human rights movement created the impetus for a change in domestic legal systems and helped the diffusion of the justice norm across regions and worldwide, albeit unevenly.

Her findings suggest that human rights prosecutions as well as truth commissions can contribute to reducing repression and improving human rights norms on the national and international level. She contends, however, while restorative and retributive justice is a

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<sup>20</sup> Pablo de Greiff, “Transitional Justice, Security, and Development,” World Development Report 2011, International Center for Transitional Justice, (October 29, 2010): 10-11.

<sup>21</sup> Ibid., 11.

<sup>22</sup> Sikkink, 12.

complementary mechanism, a truth commission that does not employ material punishment is unlikely to have independent effects on human rights practices.<sup>23</sup> Hence, any system should include the possibility of punishment, such as the South African Truth and Reconciliation Commission, to deter future political leaders from committing human rights violations. Yet, she claims that prosecutions should not be held merely in the light of ethical or rule-based concerns. Instead, possible consequences or the impact of prosecutions on the protection of human rights need to be taken into consideration. For this reason, prosecutions can be held only when the political conditions become ripe.<sup>24</sup>

In brief, based on the quantitative and qualitative comparison of outcomes observed, the literature attempts to prove that trials have lessened repression and contributed to successful transitions in many countries. Indeed, human rights trials contributed to the diffusion of human rights norms and cultural change, resulting in the improvement of human rights practices and institutional mechanisms around the world.

Yet, one limitation to her research is that “transitional countries” are limited to those “moving from an undemocratic to a more democratic regime.”<sup>25</sup> Unsurprisingly, her focus is mainly on Latin America where enough time elapsed to evaluate the impact of trials and consequently major improvements in human rights took place in the recent past. Nevertheless, her findings do not entirely support my hypothesis because it leaves out the question of whether the prosecution of high-level figures contributes to the reconciliation process, or whether the same mechanisms would be effective in resolving more complex

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<sup>23</sup> Ibid., 174.

<sup>24</sup> Ibid., 228-229.

<sup>25</sup> Ibid., 21.

cases involving ethnic or group identity and a legacy of colonialism in other geographic areas.

The efficacy of prosecutorial measures in promoting reconciliation is an open question. Martti Koskenniemi<sup>26</sup> reveals the difficulty of ending the culture of impunity by means of individual criminal responsibility. By taking an example of the Milosevic trial at the International Criminal Tribunal for the former Yugoslavia (ICTY), the author asserts that judging a person under the international criminal justice system does not necessarily contribute to establishing the truth of events. Instead, it could end up as a show trial, exacerbating political and ethnic divide without addressing collective guilt and responsibility to atrocities committed during the war. It is of interest to future scholars to examine the impact of trials on reconciliation on a societal level in other cases where only prosecution was conducted.

### Conclusion

A TRC is a useful national reconciliation measure that respects the dignity of victims as well as incorporating society as a whole in the process of achieving sustainable peace. Especially, in handling the after-effect of intra-state conflict, scholars are increasingly recognizing the importance of prioritizing national preferences over international mechanisms. Furthermore, with inherent weaknesses of both TRCs and criminal prosecution in mind, it would seem that scholars are growingly in favor of taking a holistic approach of combining truth-seeking and prosecution measures to address

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<sup>26</sup> Martti Koskenniemi, "Between Impunity and Show Trials," *Max Planck Yearbook of United Nations Law*, Volume 6, (2002).

violation of human rights, while overruling blanket amnesties. In the next chapter, I will look into two types of justice: restorative and retributive justice.

## Chapter Three

### Restorative and Retributive Justice

What kind of method(s) would be appropriate in dealing with tensions between justice and peace and facilitating reconciliation in a post-conflict society? This chapter examines two different types of measures to address justice and accountability: judicial (retributive) and non-judicial (restorative). Retributive justice is achieved through trials and prosecutions, whereas restorative justice uses non-judicial measures which include truth commissions, reparation programs for victims, administrative sanctions such as vetting, and traditional or local justice measures.<sup>27</sup> For the purpose of my research, I refer the meaning of “justice” primarily to the rule of law rather than socio-economic justice, even though remedial measures including reparations fall into the latter category.

There are divergent views on retributive and restorative justice. Priscilla Hayner argues that justice needs to be dealt with separately from truth because in “achieving legal accountability through the prosecutions of individuals who committed crimes, decisions are often political due to limited time frame and mandate of TRC.”<sup>28</sup> Conversely, one can counter-argue that TRCs may have little impact unless political and judicial institutions are reformed and perpetrators are held accountable for wrongdoing in the first place. Victims of human rights abuses often live in fear unless perpetrators are brought to justice.

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<sup>27</sup> “World Development Report 2011: Conflict, Security, and Development.” *The World Bank*. Washington, D.C.: 2011. 167.

<sup>28</sup> Priscilla Hayner, “Fifteen Truth Commissions – 1974 to 1994: A Comparative Study,” *Human Rights Quarterly*, 16, no.4 (Nov.1994): 605.

### Restorative Justice - applying truth and fairness

One may ask, “What constitutes truth?” or “What is the importance of truth?” Truth is subjective, relative and changeable depending on basic assumptions that people hold at the time. However, in a country emerging from political violence or armed conflict, finding and agreeing to an official version of facts: who did what to whom, when and why, are essential for states and citizens to come to terms with the past, learn to live with fundamental differences, and move forward.

The benefits of TRCs are that they examine structural causes of human rights violations and systematic patterns of accountability. Elizabeth Kiss claims that conducting a TRC is an important means of restoring human dignity and “doing justice” to victims,<sup>29</sup> if not full justice, at least a limited form of justice.

Restorative justice was promoted by the South African TRC which privileged reconciliation over retribution by using conditional amnesty<sup>30</sup> and mandating that the process had to reveal an understanding of the motives of perpetrators. An amnesty hearing process proved that the revelation of “truth” provided accountability and allowed the possibility of reconciliation in South Africa. Through truth seeking processes, amnesty applicants were compelled to accept responsibility for their actions, while the mechanism of conditional amnesty encouraged amnesty applicants to reveal the full truth in exchange for amnesty.

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<sup>29</sup> Elizabeth Kiss, “Moral Ambition Within and Beyond Political Constraints: Reflections on Restorative Justice,” in Robert Rotberg and Dennis Thompson. eds., *Truth v. Justice: The Morality of Truth Commissions*, (Princeton: Princeton University Press, 2000), 73.

<sup>30</sup> *Ibid.* 79.



Alternatively, David Mendeloff asserts that the effectiveness of TRCs is not yet clear because no evidence shows that there is a causal logic between truth-telling and peace building. Since concepts of justice and reconciliation and the positive and negative definition of peace are unclear, he points to the importance of examining assumptions that support TRCs. For instance, the author argues that there is no obvious causality between justice and peace because there is little likelihood of the resumption of war in countries following transitional justice measures - whether TRCs or trials, were used.<sup>31</sup> This argument may serve as a warning against having over-expectations of TRCs and applying one-sided and simplistic assumptions or beliefs in pursuing TRCs. However, this line of reasoning is based on the negative definition of peace, i.e., mere physical security or “the absence of large-scale, organized violence or war and the extremely low probability of the resumption of war.”<sup>32</sup> A superficial peace short of violent conflict is out of the scope of my thesis. The focus would be on a sustainable peace that removes the original causes of war, such as human rights violation and lack of economic equity.

#### Retributive Justice - prosecution of perpetrators

Is psychological catharsis of knowing the truth enough? If not, how necessary is criminal prosecution by sending perpetrators to prisons and removing them from positions of power? What role does a trial play, if TRCs are not effective enough to do justice? If a state is unwilling or unable to perform its responsibility to protect its own

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<sup>31</sup> David Mendeloff, “Truth-Seeking, Truth-Telling, and Postconflict Peacebuilding: Curb the Enthusiasm?” *International Studies Review*, 6, no.3 (Sep., 2004): 367.

<sup>32</sup> *Ibid.*, 363.

citizens from human rights violation, does the responsibility fall to the international community? How effective are international justice mechanisms such as the International Criminal Court (ICC) in facilitating reconciliation?

The positive aspect of prosecution is that victims have a constitutional right to trial and “to have their complaints heard in court.”<sup>33</sup> Criminal prosecution is needed for promoting either the reintegration or incarceration of perpetrators because the willingness of the community to accept them is crucial. Fear of living side by side with perpetrators remains within the community unless those who carried out grave human rights violations are found guilty or exonerated. Incarceration will also prevent them from becoming spoilers of reform.

Conversely, the nature of criminal trials implies the downside of retributive justice vis-à-vis TRCs. First, in contrast to TRCs that examine structural causes of human rights violations and systematic patterns of accountability, criminal prosecutions probe individual guilt, not acknowledging the causalities of collective violence.<sup>34</sup> Second, because of due process and the norms of an adversarial legal system involving a vigorous cross-examination, victims are not treated with respect, thus, failing to restore their dignity or deliver justice to victims.<sup>35</sup> Technically, it is not possible to bring all those implicated in human rights violations before trials because “most countries cannot afford costly and time-consuming trials, so relatively few will be prosecuted, the majority of

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<sup>33</sup> Priscilla Hayner, “Negotiating Peace in Sierra Leone: Confronting the Justice Challenge,” *Centre for Humanitarian Dialogue*, (December 2007): 16.

<sup>34</sup> Minow, 239.

<sup>35</sup> Kiss, 74.

offenders will go free.”<sup>36</sup> Considering that “the final word of trials is punishment,” Alex Braine asks, “Is it possible to facilitate reconciliation in a deeply divided society?”<sup>37</sup>

Third, in trials, “the state or the victims initiate the process that demands the presence of the accused,” while “the accused are placed in a defensive position because their goal is to escape liability.”<sup>38</sup> What is more, being a defendant in a criminal or civil trial, the accused is not required to testify. Instead, they are represented by their lawyers as the purpose of trials is “to minimize the probability that we may be about to punish an innocent defendant.”<sup>39</sup> On the contrary, the amnesty hearing process in TRCs demonstrates that “information comes from the accused, which is then evaluated and challenged by the victims and the state” and applicants for amnesty “initiate the proceeding, for they are affirmatively seeking a benefit.”<sup>40</sup>

Fourth, because there are many kinds of truths, the assumptions and interpretations of facts are based on the prosecutor’s position. Truths are often represented by an “international community,” i.e., Western interpretations of the political and historical context that “the international ‘truth’ is one in the same way as domestic truth.”<sup>41</sup> Further, the author sees no deterrent effects of trials because “the atrocities of the 20<sup>th</sup> century have not emerged from criminal intent but as offshoots from a desire to do

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<sup>36</sup> Alex Boraine, “Truth and Reconciliation in South Africa: The Third Way,” in Robert Rotberg and Dennis Thompson, eds., *Truth v. Justice: The Morality of Truth Commissions*, (Princeton: Princeton University Press, 2000), 147.

<sup>37</sup> Ibid.

<sup>38</sup> Slye, 173.

<sup>39</sup> Ibid.

<sup>40</sup> Ibid.

<sup>41</sup> Koskenniemi, 19.

good,”<sup>42</sup> thereby warning against the danger of prosecuting few individual leaders that could, as a consequence, absolve the population at large from taking responsibility.<sup>43</sup> Presumably, the author means to say that perpetrators often used whatever justification they could use to retain sympathy, terrorize people, and ultimately to seize power. Meanwhile, applying blame to people as a collective entity could perpetuate conflict because it is often the case that most people do not commit human rights abuses and remain as bystanders. This requires mounting tasks of applying fairness and rebuilding a just society to prevent the recurrence of violence.

Relating to the assumptions and interpretations of facts, Martti Koskenniemi analyzes the issue from the perspective of historical truth versus legal truth. Historical truth refers to establishing the truth of the events, whereas legal truth pursues the punishment of the individual. The author does not argue which truth overrides the other, i.e., focusing on individual guilt or larger structures - functional and structural causalities, but concludes that the latter may provide better interpretation of events by studying “structures within which the conditions for individual criminality have been created” and understanding intentions or actions of particular individuals.<sup>44</sup> At TRC hearings, for instance, people within the system such as police and military officers can reveal vertical structures that civilians cannot.<sup>45</sup>

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<sup>42</sup> Ibid., 8.

<sup>43</sup> Ibid., 14.

<sup>44</sup> Ibid., 15.

<sup>45</sup> Henry Steiner, ed. *Truth Commissions: A Comparative Assessment*, no.16. (Cambridge: World Peace Foundation, 1997). see the comment by Manouri Muttetuwegama, 51.

After all, what matters most in assessing the impact of prosecution is people's perception. Considering that one of the aims of international criminal courts is "to contribute to the consolidation of democracy and the triumph of the rule of law over the instinct for revenge after prolonged periods of communal violence," "perception of their legitimacy by the local population is a crucial factor."<sup>46</sup>

### *Common Denominator*

Despite the above mentioned differences, both of these justice measures are not mutually exclusive but are overlapping to some extent. Based on the same core belief that public accounting for human rights abuses is necessary for peace and stability,<sup>47</sup> both measures seek a "stable alternative to vengeance and of constructing a legitimate moral order."<sup>48</sup>

Similarly, judging from the fact that "a number of trials and prosecutions took place simultaneously with the work of a TRC,"<sup>49</sup> a TRC is not a substitute for criminal justice. Rather, restorative justice appears to allow leeway in dealing with accountability and justice in a fragile post-conflict society in preference to an absolute legal human rights approach.

To sum up, this thesis is not meant to discount the usefulness of criminal prosecution in general, but considers both measures as an aspect of transitional justice. By all means, "legal punishment of rights violators remains a powerful way of affirming the dignity of

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<sup>46</sup> Donna Arzt, "The Local Perception of International Criminal Tribunals in the Former Yugoslavia and Sierra Leone," *Annals of the American Academy of Political and Social Science*, 603, Law, Society, and Democracy: Comparative Perspectives (Jan., 2006): 227.

<sup>47</sup> Mendeloff, 357.

<sup>48</sup> Kiss, 82.

<sup>49</sup> Ibid.

victims,<sup>50</sup> ridding communities of the fear of living together with perpetrators, and promoting reintegration of lower-level offenders. In practice, the two procedures can complement each other or be kept separately as in the case of Sierra Leone, which will be examined in the next chapter.

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<sup>50</sup> Kiss, 79.

## Chapter Four

### Case Studies

In this chapter, I examine three different truth commissions in El Salvador, South Africa, and Sierra Leone to compare and contrast processes and outcomes. These examples are followed by a case study on a recently established truth commission in Sri Lanka. In view of the differences in the presence of international sponsorship and the scale of violence among the three cases, the thesis will explore whether there is hope for reconciliation in Sri Lanka based on the ongoing process.

The methodology used in this chapter is underscored by Todd Landman who describes the usefulness of comparative politics in the field of human rights in explaining and understanding global variations. The study will establish rational (the actions of powerful actors and groups), structural (socio-economic and institutional factors), cultural (ideological and ethical dimensions) foundations to explain the outcomes that are observed. In examining the role of truth and reconciliation commissions, all country cases are different. However, case studies are effective in the following four areas: developing new classifications for political events and outcomes not yet observed in other parts of the world; generating hypotheses that can be tested in other countries; confirming proving or disproving existing theories by providing crucial tests; and explaining the presence of deviant cases identified through cross-national comparison.<sup>51</sup>

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<sup>51</sup> Todd Landman, "Comparative Politics and Human Rights," *Human Rights Quarterly*, 24, no. 4 (Nov. 2002): 912.

### The Commission of Truth for El Salvador (1992~1993)

The reconciliation process in El Salvador is characterized by the behind the-scenes assistance of the U.N. in setting up three commissions: the Ad Hoc Commission, the Commission of the Truth, and the Joint Group for the Investigation of Politically Motivated Illegal Armed Groups. Following the deployment of the United Nations Observer Mission in El Salvador (ONUSAL) in 1991 as the first UN peacekeeping mission, the U.N. brokered peace accords were signed between the executive branch of the El Salvadoran government and the insurgent group, Frente Farabundo Martí de Liberación Nacional (the FMLN). In the same year, the National Commission for the Consolidation of Peace (COPAZ) was created as a consultation body to “oversee and facilitate execution of the accords, parallel to the UN.”<sup>52</sup> It is noteworthy that COPAZ was comprised of all political parties, including FMLN that was given a chance to participate in the overseeing mechanism before becoming a political party.<sup>53</sup>

#### *Ad-hoc commission*

To strike the balance between the demands of the FMLN to prosecute human rights abusers and the government’ desire to create its own military commission, the Ad Hoc Commission was established with the purpose of purging military. For fear of a military backlash, the report of the ad hoc commission was kept confidential and the implementation was delayed. Notwithstanding, the ad hoc commission recommended

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<sup>52</sup> Ian Johnstone, *Rights and reconciliation: UN strategies in El Salvador*, (Boulder: Lynne Rienner Publishers, 1995), 50.

<sup>53</sup> *Ibid.*, 13



the dismissal or transfer of 103 officers<sup>54</sup> and as a result, achieved unprecedented success in forcing the military to agree to having its officers removed by civilians.<sup>55</sup>

### *The truth commission*

In parallel with the ad hoc commission, the truth commission was created to uncover the truth of past abuses committed both by the military and the FMLN during twelve years of civil war from 1980 to 1991, but not to prosecute or punish wrongdoers.<sup>56</sup> Again, the compromise was made between the two parties through the intermediation of the U.N. The government accepted foreigners as commissioners,<sup>57</sup> while the FMLN agreed not to prosecute offenders.<sup>58</sup>

The commission employed the methodology of gathering information confidentially to protect the victims and witnesses from a potential counterattack by the military, thus, the accused did not have to confront the accusers.<sup>59</sup> Furthermore, based on the two-source rule which requires two credible and independent sources of evidence to back up a finding,<sup>60</sup> only some perpetrators were recognized.

### *Joint Group for the Investigation of Politically Motivated Illegal Armed Groups*

The third commission was created in 1993 to investigate illegal armed groups, i.e., the death squads. The report, which was issued in the following year, pointed out the

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<sup>54</sup> World Development Report 2011, 173.

<sup>55</sup> Ibid.

<sup>56</sup> Johnstone, 34.

<sup>57</sup> Ibid.

<sup>58</sup> Ibid.

<sup>59</sup> Johnstone, 35.

<sup>60</sup> Ibid., 141.

implication of “the military or police, the judicial organ or the municipal body” in the operation, but did not name individuals due to the lack of evidence.<sup>61</sup>

### *Assessment*

First, the most controversial outcome of the truth commission was the application of a blanket amnesty. Despite the fact that recommendations of the truth commission were binding,<sup>62</sup> the government was dissatisfied with the recommendation on the removal of named perpetrators from office. In particular, regarding the recommendation on the reform of the Supreme Court, the government claimed that the commission was exceeding its authority because the issue would require constitutional amendment. Five short days after the report was published, the national assembly swiftly granted absolute amnesty to all who were named in the report.

As a result, the report was made public, but the public did not have a chance to debate the amnesty, let alone the content of the report.<sup>63</sup> Coupled with the inability of the joint group (the third commission) to identify names linked to the death squads, Ian Johnstone opines that lack of national debate on amnesty may have undermined the main purpose of the commission “not to punish but to produce a ‘catharsis’ in which Salvadoran society as a whole would come to terms with its past.”<sup>64</sup>

To a large extent, the government’s awarding of a blanket amnesty diluted efforts of the truth commission to limit impunity. Indeed, parties in the peace accords initially

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<sup>61</sup> Ibid., 42.

<sup>62</sup> Ibid.

<sup>63</sup> Ibid., 39.

<sup>64</sup> Ibid., 82.

agreed not to prosecute wrongdoers. Nonetheless, the government's decision to grant unconditional amnesty without political or public debate caught stakeholders off-guard. Hayner points to the fact that the peace accords left the issue of amnesty unresolved, only agreeing that the matter would be considered six months after the completion of the truth commission.<sup>65</sup>

Second, naming human rights violators, including those associated with the death squads, proved to be a sensitive and difficult task under the close scrutiny of the ruling government. Following the vetting conducted by the ad hoc commission, naming individuals in the truth commission report contributed to the removal of additional human rights violators.<sup>66</sup> Notwithstanding, those who were purged from the military did not suffer and some even retired with honors.<sup>67</sup>

Third, the truth commission failed to report some aspects of violence, relating to abuses committed by the death squads and the US involvement in the conflict.<sup>68</sup> Given that ninety five percent of the human rights abuses were found to be committed by the government,<sup>69</sup> a full report on the government responsibility on wrongdoings backed by the external force would have dampened widespread denial by the government and armed forces. What is more, commissioners did not recommend prosecution or punishment of those named in the report. Neither was any suggestion made relating to conducting an independent investigation due to the perceived inability and impartiality of the judiciary

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<sup>65</sup> Ibid., 104.

<sup>66</sup> Ibid., 51.

<sup>67</sup> Ibid., 131.

<sup>68</sup> Ibid.

<sup>69</sup> Ibid., 50.

system.<sup>70</sup> Yet, it can be argued that there was a positive outcome. As a product of the recommendation by the truth commission, the third commission was subsequently established to investigate illegal armed groups, which as a result, were disbanded.

Fourth, with regards to the implementation of recommendations by the truth commission, little progress has been made on justice, reparations, and official acknowledgement until the president pleaded for forgiveness in 2009,<sup>71</sup> 16 years after the publication of the commission report. Both negotiating parties showed ambivalence towards the recommendation for fear of a backlash and of risking the peace process, if implemented.<sup>72</sup> Yet, the truth commission provided an opportunity for judicial reform in later years.

Lastly, using foreigners in the truth commission justified the government's claim against the report as interference of sovereignty. The appointment of three foreign commissioners by U.N. Secretary-General, as required under the agreement by the two parties, seems to have backfired even though the decision was based on the principle of international accountability of human rights.<sup>73</sup> As with commissioners, no Salvadorians were employed as staff because of objectivity concerns.<sup>74</sup>

On balance, the truth commission attempted to strike the balance between two conflicting goals: achieving "pure" justice by punishing those responsible and by achieving social peace by revealing the truth and not burying the past. In this way, the

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<sup>70</sup> Ibid., 36.

<sup>71</sup> Ibid., 51.

<sup>72</sup> Johnstone, 44.

<sup>73</sup> Ibid., 44.

<sup>74</sup> Hayner (2011), 50.

truth commission demonstrated that the goal of reinforcing the principle of accountability can be achieved not only through judicial proceedings to prosecute offenders, but also by the acknowledgement of the wrongdoing by those responsible.<sup>75</sup>

In retrospect, Johnstone makes general observations from the experience in El Salvador. Where international criminal prosecutions are not possible, the commissions in general illustrate that there are alternatives to avoid dwelling in the past because “the systematic denial of a history of human rights abuses is a continuing source of tension.”<sup>76</sup> Furthermore, “though short of criminal accountability, commissions provide a measure of justice *if* (italic original) accompanied by a public acknowledgement of the wrong-doing, removal from power of those responsible for the wrong-doings, and institutional reforms to prevent or deter a recurrence.”<sup>77</sup>

#### The South African Truth and Reconciliation Commission (1995-2002)

The South African TRC is generally acknowledged as a success in uncovering truths during the apartheid era and in promoting reconciliation. Under the new multi-racial democracy, parliamentary legislation authorized the TRC-Act in 1995 with a broad mandate, vesting powers of granting amnesty, subpoena, and of search and seizure with the commission.<sup>78</sup> The TRC devised its own procedures, objectives, and methodologies, while ensuring transparency through nation-wide broadcasting of public and private hearings and a close collaboration with civil society.

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<sup>75</sup> Ibid., 43.

<sup>76</sup> Johnstone, 82

<sup>77</sup> Ibid., 82.

<sup>78</sup> Boraine, 145.

Most importantly, the TRC rejected a blanket amnesty to limit impunity and applied conditional amnesty. Applicants for amnesty were required to disclose the full truth of their past in public hearings and to prove that acts of human rights violations were politically motivated.<sup>79</sup> And, as opposed to TRCs prior to the South African TRC, amnesty was applied to individuals in place of collective entities such as a class of people or a class of acts. Consequently, this individualized amnesty promoted individual moral accountability without resorting to criminal prosecutions immediately.

Unexpectedly, amnesty hearings also brought about a positive result by requiring “full-disclosure” by applicants. There was “no clear guidance on what would have constituted a failure to make full disclosure. Uncertainty created “an incentive to disclose as much damaging material about themselves and their colleagues as they believed the commission’s investigative team had been able to uncover.”<sup>80</sup> The procedure of demanding “full” truth without a clear definition had an unintended psychological impact on the applicants for amnesty and provided them incentives to disclose full truth of their past.

From a pragmatic point of view, the “truth for amnesty” was a necessary political compromise<sup>81</sup> or the third way between a blanket amnesty and a radical notion of justice.<sup>82</sup> “Amnesty was a price that South Africa and many victims had to pay for a

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<sup>79</sup> Ibid., 148.

<sup>80</sup> Slye, 175.

<sup>81</sup> Amy Gutmann, and Dennis Thompson, “The Moral Foundations of Truth Commissions,” in Robert Rotberg and Dennis Thompson. eds., *Truth v. Justice: The Morality of Truth Commissions*, (Princeton: Princeton University Press, 2000), 24.

<sup>82</sup> Boraine, 156.

relatively peaceful transition and to know the truth”<sup>83</sup> in order to encourage perpetrators to come forward voluntarily and to disclose truth about past abuses. Otherwise, no one would have come forward to testify for fear of prosecution. Limited amnesty was the leverage that encouraged others to come forward.

### *Impact of the TRC on Reconciliation*

#### *How can the retributive justice deficit created by amnesties be overcome?*

Amnesty, if applied indiscriminately, will allow perpetrators to remain unpunished and increase the culture of impunity. With the use of sophisticated amnesty, however, the South African TRC effectively reduced the retributive justice deficit. As mentioned before, the model of “truth for amnesty” was conditional on credible evidence that crimes had been committed on political grounds during the testimony taking in the TRC. While conditional amnesty indemnified perpetrators from prosecution and civil liability as inducement, perpetrators who did not confess were later brought to trial. In fact, a sub-committee of the commission, in charge of granting and denying amnesty, declined most applications for amnesty submitted by those who provided testimony to the TRC.<sup>84</sup>

In addition to conditional amnesty, the TRC maintained its effectiveness as an institution, specifically, independence, transparency, impartiality, and legitimacy. As opposed to prevailing negative views on amnesty among scholars, Darryl Robinson contends that amnesty did not undermine institutions. Instead, the retributive justice deficit was covered by the effective TRC. The TRC was also blessed with strong

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<sup>83</sup> Ibid., 150.

<sup>84</sup> de Grieff: 5, see note 18.

leadership in politics, namely the TRC Chair Desmond Tutu and President Nelson Mandela. By publicizing the process across nations, the TRC gained legitimacy among ordinary people and educated the public incrementally through the media rather than “comprehensively by polished summary.”<sup>85</sup>

*What specific processes lead to reconciliation?*

First, accountability in a TRC mechanism contributes to reconciliation between victims and perpetrators – commissions not only address a sense of injustice felt by victims, but also “perpetrators are justified in claiming that they have paid their dues to society and to the victims”<sup>86</sup> by showing repentance and remorse. This will then facilitate perpetrators to be incorporated into society. At the same time, media coverage of public hearings led the society at large, including those who colluded with the apartheid regime as well as passive bystanders who failed to prevent violence, to rethink their views about the contentious past and acknowledge accountability and a common memory.<sup>87</sup>

The second condition for promoting reconciliation is that the truth-finding process itself played a part in changing the culture in the society without legalistic processes to provide justice to victims and perpetrators. James Gibson asserts that the South African TRC may be an exceptional case that effectively achieved the primary goal of changing culture or “societal transformation,” in that it prompted people to acknowledge the

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<sup>85</sup> Robert Rotberg, “Truth Commissions and the Provision of Truth Justice, and Reconciliation,” in Robert Rotberg and Dennis Thompson. eds., *Truth v. Justice: The Morality of Truth Commissions*, (Princeton: Princeton University Press, 2000), 6.

<sup>86</sup> Slye, 180.

<sup>87</sup> Rotberg, 6.



suffering of one's opponents, accept the commission's version of the truth, and build consensus among the general public about the past human rights abuses under the apartheid regime.<sup>88</sup> The goal was achieved without employing the extensive formal legal proceedings (trials) or prosecution method, while granting amnesty to perpetrators to reintegrate them into a new democratic process.

#### The Sierra Leone Truth and Reconciliation Commission (2002-2003)

Transitional justice system in Sierra Leone is characterized by the concurrent operation of two bodies: a truth commission and a hybrid court which rejected amnesty for serious crimes. As a result of a peace agreement (the Lomé Accord), the commission was created in 2000. Due to the resumption of conflict, it became operational only after two years to look into the brutal violence from 1991 to 2002.

The conflict has an international dimension as the Liberian civil war spilled over into the territory of Sierra Leone. A group from the Revolutionary United Front (RUF), headed by the Liberian warlord, Charles Taylor, who later became the president of Liberia from 1997 to 2003, invaded the territory of Sierra Leone in 1991. At that time, the Nigerian-led Economic Community of West African States Monitoring Group (ECOMOG) was obstructing the Taylor's Liberian political faction, National Patriotic Front of Liberia (NPFL), from taking control of the Liberian capital, Monrovia. Infuriated by a double role that the government of Sierra Leone was playing as a mediator as well as a collaborator by allowing ECOMOG forces to use its airport to bomb

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<sup>88</sup> James Gibson, "The Contribution of Truth to Reconciliation: Lessons from South Africa," *Journal of Conflict Resolution*, 50, no. 3 (June 2006): 427.

territories under the NPFL's control, Taylor mobilized the RUF, a rebel force, to attack Sierra Leone.<sup>89</sup>

Zack-Williams attributes various causal factors of the civil war to the post-independence political economy in Sierra Leone. The period between 1991 and 1997 saw the emergence of a social movement to counter the incapability of the governing ruler to distribute wealth. Compounded by the conflict, the structural adjustment programs by the international financial institutions made the country increasingly dependent on loans and foreign aid and reduced employment. In particular, the programs had a devastating effect on a vulnerable group including women and children.<sup>90</sup> The deteriorating situation drove politically, socially, and economically alienated intellectuals of Sierra Leone into exile, while others joined rebel forces to achieve political legitimization.

#### *The U.N. role in the peace agreement*

Hayner, who engaged in the making of the commission, explores the U.N. involvement in the peace negotiation process between the government of Sierra Leone and the Revolutionary United Front (RUF) and its impact on justice and accountability. She contends that two factors may have weakened the national justice system. First, unconditional amnesty was awarded in the peace agreement in 1999. Second, there was no debate among negotiating parties and civil society on alternatives to address justice

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<sup>89</sup> Alfred Zack-Williams, "Sierra Leone: the Political Economy of Civil War, 1991-98," *Third World Quarterly*, 20, no.1 (1999): 147.

<sup>90</sup> *Ibid.*, 151.

and accountability. This resulted in the creation of a costly judicial mechanism, the Special Court of Sierra Leone in 2002.

There still exists consensus among stakeholders and civil society that a peace agreement was not possible without amnesty. A blanket amnesty was awarded by the peace agreement to all sides of the war, namely, the Revolutionary United Front (RUF), the Former Armed Forces Ruling Council (AFRC) and the pro-government Civil Defense Forces (CDF). To stop the violence immediately and bring peace to the country, a negotiated solution was deemed as the only option available for the military weak government and for rebels who feared prosecutions. In the meantime, some people demanded forgiveness rather than punishing ex-combatants.

The U.N., in signing the agreement, exempted itself from granting amnesty by attaching a reservation disclaimer in the amnesty provision, stating that amnesty does not apply to international crimes such as crimes against humanity. However, the disclaimer was not available publicly, thus, creating confusion in the public.<sup>91</sup> Nevertheless, this left an opening for establishing the Special Court.

Hayner questions whether unconditional amnesty was unavoidable. She points to the absence of further discussions among stakeholders about alternatives to address accountability in light of obligations of the state in relation to serious international crimes<sup>92</sup> under international law. The “all-or-nothing approach to the question of

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<sup>91</sup> Priscilla Hayner, “Negotiating Peace in Sierra Leone: Confronting the Justice Challenge,” *Centre for Humanitarian Dialogue*, (December 2007): 33.

<sup>92</sup> *Ibid.*, 32.

amnesty”<sup>93</sup> prevailed instead of linking amnesty with truth-telling as the South African TRC demonstrated. In hindsight, she suggests that “community service schemes or other symbolic repayment or apology requirements might have helped to reduce displacement of former rebels...and have advanced reconciliation at the community level.”<sup>94</sup>

*Adaptation to local practices of reconciliation*

Contrary to Hayner who approaches the issue from the perspective of international and states obligations of international human rights law, Rosalind Shaw takes an entirely different approach to reconciliation. She examines negative reactions of local people towards the TRC and questions its universal applicability as part of post-conflict mechanisms. Truth-telling is useful for uncovering covert and state-sponsored violence to establish accountability, and acknowledge and compensate for the suffering of victims. Yet, the same method does not necessarily apply to post-conflict countries like Sierra Leone where a massive scale of violence took place among neighbors.

Shaw asserts that the Sierra Leone’s TRC unquestionably applied Western values of verbally recounting the violence - “truth-telling” - as the only path to reconciliation, healing, and peace, instead of building on established local practices of healing and social coexistence by forgiving and forgetting the violence. Besides, driven by the assumption that people need to open their wounds and heal by speaking of violence, the aim of the

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<sup>93</sup> Ibid.

<sup>94</sup> Ibid., 29.

TRC was to transform people and society through a “sensitization campaign” into recognizing their needs and telling truth.

Based on her study on the ethnography, there was little support among ordinary people for the commission. This is due to the fact that people place more importance on reintegrating perpetrators in post-conflict society rather than escalating social tensions by talking publicly about their memory of violence and trauma. This attitude of forgiving and forgetting the violence derives not only from the pragmatic needs to end violence immediately, get on with their lives, and move forward. But also “social” forgetting and not speaking publicly of violence was a local practice,<sup>95</sup> in place of an impossible task of individual forgetting as memories of violence cannot be erased.

### The Impact of the TRC

In contradiction with Shaw’s assertion, some scholars claim otherwise. People were eager to participate in public and private hearings<sup>96</sup> and the TRC took almost 8,000 witness accounts and held numerous group hearings.<sup>97</sup>

Unprecedentedly, the TRC mandated the recognition of the needs of women and children as both victims and perpetrators<sup>98</sup> and paid special attention to other vulnerable groups such as amputees and ex-combatants.<sup>99</sup> Remarkably, the TRC was the first commission to involve children as victims and set a precedent as a model for child

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<sup>95</sup> Rosalind Shaw, “Rethinking Truth and Reconciliation Commissions: Lessons from Sierra Leone,” *United States Institute of Peace*. Special Report 130, (February 2005): 9.

<sup>96</sup> Beth Dougherty, “Searching for Answers: Sierra Leone’s Truth & Reconciliation Commission,” *African Studies Quarterly*, 8, Issue 1 (Fall 2004): 43.

<sup>97</sup> Hayner (2011), 59.

<sup>98</sup> Dougherty, 41.

<sup>99</sup> *Ibid.*, 47.

protection and participation in a truth commission. It developed policies and procedures to protect the rights of children.<sup>100</sup> It additionally published a child-friendly version of the Commission report in 2004.<sup>101</sup> Cook and Heykoop stress immediate basic, economic, and the protection needs of children with an emphasis on the social and economic rights of children. However, I will not discuss this further as economic justice is beyond the scope of my thesis.

For all the above positive impacts achieved within the limited time and funds that solely relied on voluntary contributions, the effectiveness of the TRC was watered down to some extent. Since ex-combatants had already been granted amnesty by the peace agreement before the creation of the TRC, no incentive was given to perpetrators to testify.<sup>102</sup> In addition, the DDR (disarmament, demobilization and reintegration) process to reintegrate ex-child soldiers in their communities was provided by the peace agreement and was progressing under the United Nations Mission in Sierra Leone (UNAMSIL) without the TRC. The program had already involved nearly 7,000 children and was nearly complete by the time the TRC commenced. As a result, this diluted the impact of the TRC.<sup>103</sup> On the community level, people's understanding of the process was low because of high illiteracy rates and the confusion of two separate concurrent transitional justice institutions,<sup>104</sup> which will be discussed later.

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<sup>100</sup> Philip Cook, and Cheryl Heykoop, "Child Participation in the Sierra Leonean Truth and Reconciliation Commission," in Parmar, Sharanjeet, et al. ed., *Children and Transitional Justice: Truth Telling, Accountability and Reconciliation*, (Cambridge: UNICEF, 2010), 161.

<sup>101</sup> Ibid.

<sup>102</sup> Dougherty, 47.

<sup>103</sup> Ibid., 48.

<sup>104</sup> Ibid., 46.

*The Special Court for Sierra Leone: The Taylor Trial*

In the midst of the reversion to political violence, the Special Court was created by a 2002 treaty at the request of the government to prosecute those most responsible for mass crimes. In spite of its political, legal, and logistical challenges, the Special Court produced significant rulings. It demonstrated that heads of states are not immune from criminal prosecution while criminalizing the conscription of child soldiers and providing defense to the arrestees.<sup>105</sup>

Unlike other international tribunals that were created by the U.N. Security Council, the Special Court was created by a treaty between the government of Sierra Leone and the U.N. Hence, its jurisdiction was confined to crimes committed in the territory of Sierra Leone. This meant that the TRC and the Court are dependent on “the tolerance of foreign governments” to collect evidence available abroad.<sup>106</sup> The Security Council later mandated the decision by the Appeals Chamber that granted the Special Court an international character to hold trials of heads of foreign states, namely Charles Taylor. Subsequently, the Special Court indicted and transferred Charles Taylor, a former president of Liberia, from Freetown to The Hague in 2006 because he posed a security threat to the region, the Court, and witnesses.<sup>107</sup> Yet, the transfer of the trial remains controversial. Even though efforts have been made to reach out to the public through media, some Sierra Leoneans question whether or not a security threat was valid. The

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<sup>105</sup> Arzt, 229.

<sup>106</sup> William Schabas, “The Relationship between Truth Commissions and International Courts: The Case of Sierra Leone,” *Human Rights Quarterly*, 25, no.4 (Nov., 2003): 1043.

<sup>107</sup> Jennifer Easterday, “The Trial of Charles Taylor Part I: Prosecuting Persons who bear the Greatest Responsibility,” UC Berkeley War Crimes Studies Center, (June 2010): 8.

physical distance might undermine the goal of the Special Court to deepen the understanding of victims and the public about the conflict.<sup>108</sup>

*Concurrent operation of two forms of transitional justice - the TRC and the Special Court: complementary or conflicting?*

Shaw argues that the simultaneous operation of the two mechanisms was not a success as various issues undermined its legitimacy. The TRC and the Court were not operating independently from each other and were suspected of partiality.<sup>109</sup> In addition to overlapping jurisdiction, there was no explicit agreement on information sharing between the two entities in the beginning.<sup>110</sup> On the one hand, the TRC was in a dilemma of whether to prioritize confidentiality of information given by victims and perpetrators or to require perpetrators to tell the truth publicly as mandated.<sup>111</sup> On the other hand, the Court did not face such a problem as it is only concerned with prosecution and even refused to allow the accused to testify before the TRC.<sup>112</sup> This initially created confusion among the public and discouraged participation by civilians who feared retaliation from ex-combatants. Meanwhile, ex-combatants were reluctant to cooperate to testify for fear that the TRC would leak information to the tribunal<sup>113</sup> and that their statement may be used against them in a criminal prosecution at the Court.<sup>114</sup> Artz

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<sup>108</sup> Ibid., 10.

<sup>109</sup> Shaw, 5.

<sup>110</sup> Hayner (2011), 116.

<sup>111</sup> Schabas, 1050.

<sup>112</sup> Ibid., 1051.

<sup>113</sup> Shaw, 4; Schabas, 1049.

<sup>114</sup> Dougherty, 48.



observes that it was unfortunate that the Court's indictments coincided with hearings and testimony taken by the TRC, which may have exacerbated their confusion.<sup>115</sup>

Consequently, the two bodies operated independently and agreed not to share information. There was a clear indication by the chief prosecutor that the Special Court does not take testimony from the TRC.<sup>116</sup> William Schabas observes the operation of two bodies as a success rather than failure. As a result of a sensitization campaign, the people in Sierra Leone came to understand the existence of the two bodies which share objectives of pursuing accountability for human rights violations.<sup>117</sup> According to statistics by a local NGO, a sensitization campaign also increased ex-combatants' support for the Special Court and the TRC,<sup>118</sup> which demonstrated changes in ex-combatants' knowledge, views, expectations, and fear about the TRC and the Court.

### Sri Lanka as a Case Study

*What kind of inferences can be drawn from the previous three case studies?*

The final military offensive by the Sri Lankan government against the Liberation Tigers of Tamil Eelam (the LTTE) marked the end of the protracted armed conflict in May 2009 at the cost of massive civilian casualties.<sup>119</sup> Shortly after the end of the war, the U.N.

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<sup>115</sup> Artz, 234.

<sup>116</sup> Ibid., 231.

<sup>117</sup> Schabas, 1065.

<sup>118</sup> Artz, 231.

<sup>119</sup> Since no census was ever conducted in formerly LTTE controlled areas, the figures of civilian casualties during the final stage of war are disputed, ranging from zero civilian casualties claimed by the Government to the UN estimate of 40,000. However, the Government recently published the number of deaths and untraceable persons in the north in 2009 as 9,000. "Enumeration of Vital Events 2011- Northern Province, Sri Lanka," Department of Census and Statistics, Ministry of Finance and Planning. [http://www.statistics.gov.lk/PopHouSat/VitalStatistics/EVE2011\\_FinalReport.pdf](http://www.statistics.gov.lk/PopHouSat/VitalStatistics/EVE2011_FinalReport.pdf)

Panel of experts proposed the creation of an independent investigative body to determine the facts and identify those responsible for human rights abuses during the final stage of war. In response to this, the government established a Commission on Lessons Learnt and Reconciliation Commission (LLRC) in May 2010 and its report was submitted to the president in November 2011. While nearly three years have passed since the end of the conflict, however, the government continues to resist international independent investigations into the final phase of the war. Is a genuine attempt being made to rebuild trust and create an environment of reconciliation? I will analyze legal disputes by all sides, followed by the study of root causes in the historical context. Then, I will examine the commission report in comparison with a report by the U.N.

*Contentious Issues: Humanitarian Law*

The sudden closure of the protracted armed conflict remains highly controversial in terms of the violation of International Humanitarian Law (IHL), universal human rights, and accountability for heavy civilian casualties. As a result of the annihilation of the LTTE, only the government is left to face the allegations for human rights abuses. Unwillingness on the part of the government to open international independent investigations on what really transpired during the final months is hampering the truth-seeking and reconciliation process.

In the absence of sufficient witnesses and evidence to support allegations that laws of war and human rights were breached by both sides, disputes persist over the legality of the use of force against “civilians” who were used as human shields by the LTTE,

surrendered individuals, and places protected by IHL. The government is alleged to have “deliberately” shelled civilians in No Fire Zones (NFZs) that were unilaterally declared by the government. Some soldiers are also charged with engaging in “systematic” abuses and violence. Hence, these would constitute crimes against humanity and war crimes.<sup>120</sup> The government, on the contrary, disputes casualty figures estimated by the U.N. and defends its policy as a humanitarian operation.<sup>121</sup> These opposing arguments are not verifiable because of the difficulty in distinguishing civilians from combatants as well as in determining the proportionality of civilian casualties accepted in IHL. It is disputable whether IHL, which governs state responsibility in times of war, applies to non-state actors who are unaccountable under international law,<sup>122</sup> thus, absolving the state from fulfilling its obligation to protect such an entity.

### *The Background of the Conflict*

The examination of deep rooted ethnic and political rifts provides an understanding of the stalemate in the reconciliation process. The conflict cannot be simply analyzed as an issue of domestic ethno-religious divide between the majority Sinhalese and the minority Sri Lankan Tamils since this would ignore domestic realities; the majority of the Tamils

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<sup>120</sup> “Sri Lanka’s Killing Fields,” Channel Four Television, London. 14 June 2011.

<http://www.channel4.com/programmes/sri-lankas-killing-fields/4od> ; “Sri Lanka’s Killing Fields: War Crimes Unpunished,” March 14, 2012. A follow-up to the original film.

<sup>121</sup> Ministry of Defense Sri Lanka, “Lies Agreed Upon: Sri Lanka Counters Channel 4.” 8 August 2011. <http://transcurrents.com/news-views/archives/2810>;

Ministry of Defense, the Democratic Social Republic of Sri Lanka. “Humanitarian Operation Factual Analysis July 2006 – May 2009.” July 2011.

<sup>122</sup> Reuben Brigety. “Human Rights in Armed Conflict.” in *Conflict and Human Security: A Search for New Approaches of Peace-Building*, Shinoda Hideki and Ho-Won Jeong, eds., (Hiroshima: The Institute of Peace Science, 2004), 146.

who are currently living among numerous ethnic groups and the Muslim communities who bore the brunt of the conflict have been displaced from their original habitats for many years. The confluence of underlying factors have changed the dynamics of the conflict: socio-economic inequalities and political divide within each group, elite-led popular democracy,<sup>123</sup> secessionism, terrorism and counterinsurgency.<sup>124</sup> International dimensions also played the role, including the diaspora, and outside interference by the Indian military and the Norwegian-backed peace talks.

The root causes date back to British colonial rule under which a classic divide and rule policy intensified ethnic distinctions and aggravated cleavages.<sup>125</sup> The minority Sri Lankan Tamils were given favorable treatment in education and civil employment to suppress the majority Sinhalese. After Sri Lanka (then called Ceylon) gained the dominion status from a crown colony of the British in 1948,<sup>126</sup> the Sinhalese majority attempted to reverse the balance of power that favored the Tamils and to control politics by establishing a predominantly Sinhalese government. The enactment of the Sinhala Only Act in 1956, which made Sinhalese the only official language, marked the beginning of the violent era of ethnic tensions. The government further widened ethnic

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<sup>123</sup> Universal suffrage was conferred by the UK in 1931 followed by the liberal democratic institutions at independence in 1948. However, the replacement of Westminster system with the Presidential Constitution in 1978, the enactment of Prevention terrorist act in 1984, and the abolishment of Presidential term limit in 2010 further weakened checks and balances.

<sup>124</sup> Lack of consensus on the definition of terrorism hampers establishing an international treaty banning terrorism and divides the international community on how to respond to the threat. Brian Jenkins describes terrorism as “violence or the threat of violence calculated to create an atmosphere of fear and alarm- in a word, to terrorize-and thereby bring about some social or political change.” Brian Jenkins, “International Terrorism: The Other World War” in *The New Global Terrorism: Characteristic, Causes, Controls* by Charles Kegley Jr. New Jersey: Pearson Education. 2003. 16.

<sup>125</sup> Neil DeVotta, “The Liberation Tigers of Tamil Eelam and the Lost Quest for Separatism in Sri Lanka.” *Asian Survey*, 49, no. 6:1025.

<sup>126</sup> The country achieved the full independence in 1972.

cleavages by institutionally sanctioning discrimination against the minority group. Opportunistic leaders capitalized on historical hostility and the affiliations of domestic constituents to shore up support and preserve unity.

The Tamil separatism, which had developed in the 1970s to express perceived injustice and grievances, intensified with the emergence of the Tamil Tigers (the LTTE). Instigated by the Sinhalese Buddhist ideology and the irredentist claim of a Tamil homeland, youths on both sides became radicalized. Ethnic tensions between the government and the Tamil youth culminated in the 1983 pogrom, driving a large number of Sri Lankan Tamils to migrate to Western countries. They formed a network of diaspora to support the Tamil cause by funding the LTTE, oftentimes by extortion, even well after the LTTE eliminated all Tamil dissents and lost its legitimacy as the sole representative of the Sri Lankan Tamils.<sup>127</sup> Asoka Bandarage attributes the responsibility for the rise of the brutal separatist conflict to “elites from both the Sinhala and Tamil communities – their political opportunism, hunger for power, refusal to curb violence at the outset, and collusion with external interests at the expense of the masses of people of all communities.”<sup>128</sup> Meanwhile, the LTTE leader, Velupillai Prabhakaran, originally from a low-caste Christian family, cultivated perceptions of alienation among Tamil youths and began to send them as suicide bombers in 1987.

India, on the other hand, covertly trained Tamil militants from Sri Lanka to appease its domestic political base in Tamil Nadu. The Indian military intervention in the north

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<sup>127</sup> Narayan Swamy, *Inside an Elusive Mind Prabhakaran*, (Vijitha Yapa Publications: Colombo, 2003), 270.

<sup>128</sup> Asoka Bandarage, *The Separatist Conflict in Sri Lanka - Terrorism, Ethnicity, Political Economy*. (iUniverse: Bloomington, 2009), 220.

between 1987 and 1990 was met with strong resistance from the very guerrilla force that India had trained, resulting in the withdrawal of the Indian Peacekeeping Force.

In addition to the botched Indian intervention, the de-facto Tamil state in the north and the east of Sri Lanka and international sympathy for the Tamil's liberation struggle deepened the government's suspicion of the international community.<sup>129</sup> The Indian Ocean Tsunami in 2004 intensified anti-Western sentiments by the government when some foreign aid agencies were found to be functioning as a cover to smuggle weapons to the LTTE.<sup>130</sup> This further polarized the public and weakened civil society.

In the last two decades, the government wavered between military solutions and negotiated settlement until the ceasefire agreement went into force in 2002. As the LTTE increasingly breached the truce by mounting terrorist tactics, the government finally resorted to military solutions to bring the conflict to an end.

### *The U.N. Panel Report*

The U.N. Panel of experts was appointed by U.N. Secretary-General and had completed its report in March 2011 before the LLRC report became available in November the same year. The Panel found that both the government and the LTTE had breached IHL and human rights law during the final stage of civil war. It also examined the conduct of the U.N. and NGOs when they ceased operations for security reasons during the conflict. As the Panel was barred from entering Sri Lanka, it was unable to have direct contact

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<sup>129</sup> Gordon Weiss, *The Cage: The Fight for Sri Lanka & the Last Days of the Tamil Tigers*. (Bodley Head: London, 2010), 9.

<sup>130</sup> *Ibid.*, 85.

with the LLRC commissioners. Thus, its findings are based on sources from correspondence with the government, the LLRC related information available in public domain, media, and NGOs.<sup>131</sup>

Despite that the LLRC report was not yet available at the time of the publication of the Report, the Panel regards the LLRC mechanism as “deeply flawed” from its inception<sup>132</sup> and severely criticizes the effectiveness and genuineness of the government’s truth-seeking approach. The Panel condemns the LLRC mandate, arguing that it is not explicit enough to investigate gross human rights violation and the patterns of violence, but merely focuses on the political responsibility of past governments in failing to protect its citizens.<sup>133</sup> And it questions methodological and operational deficiencies that do not meet international standards of independence and impartiality of the commissioners, inadequate measures to protect victims and witnesses, and lack of transparency with little access provided to media and civil society.<sup>134</sup>

With regard to the government’s approach to accountability, the Panel contends that the government’s stance to choose restorative justice over retributive justice is “a false dichotomy” and that the government inaccurately equates criminal justice with retributive justice, whereas criminal justice has many goals beyond retribution.<sup>135</sup> Hence, the commission’s decision to not hold individuals accountable is “a clear violation of Sri Lanka’s international obligations and is not a permissible transitional justice option.”<sup>136</sup>

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<sup>131</sup> Report of the Secretary-General’s Panel of Experts on Accountability in Sri Lanka. 31 March 2011. 81.

<sup>132</sup> Ibid., 96.

<sup>133</sup> Ibid., 95.

<sup>134</sup> Ibid., 95-96.

<sup>135</sup> Ibid., 80.

<sup>136</sup> Ibid., 79.

The Panel finds that some allegations of rights violations, that would constitute crimes against humanity and war crimes, credible. Allegations include the government's shelling of NFZs, causing most of the civilian victims<sup>137</sup> and "systematic" abuse and violence by soldiers.

Referring to the statement by the government that the LLRC draws on the experiences of the South African TRC, the Panel reminds the government that the South African TRC conducted a full investigation into both institutional and individual responsibilities.<sup>138</sup> To sum up, the Panel observes that the LLRC is not an adequate accountability mechanism and demands investigation and prosecution of those responsible for alleged abuses. The U.N. Panel of experts further appealed to the U.N. to establish "an independent international mechanism to monitor progress on accountability, act as a repository of information, and conduct its own investigations," to which U.N. Secretary-General Ban Ki Moon declined without obtaining Sri Lanka's consent.<sup>139</sup>

#### *A Commission on Lessons Learnt and Reconciliation Commission (LLRC)*

In response to the proposal made by the U.N. to investigate the military operation during the final phase of war, the government established the LLRC in May 2010, exactly a year after the termination of war. The final report, which was submitted in November 2011, examines the time period from 2002, when the interim ceasefire agreement became operational, to the end of the conflict in 2009. To handle overwhelming requests from

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<sup>137</sup> Ibid., ii.

<sup>138</sup> Ibid., 79.

<sup>139</sup> Jonathan Goodhand. "Sri Lanka 2011: Consolidation and Militarization of the Post-War Regime." *Asian Survey*, 52, no. 1, (2012): 136



the public to participate in hearings and a large volume of documents collected, the commission explains that the time limit for completing the final Report of the commission as specified in the original warrant had to be extended three times.<sup>140</sup>

The mandate notes that it conducted hearings throughout the country which were open to the public and media unless a person requested confidentiality. This resulted in the increase of public awareness and interest in its work. Those who made presentations included not only the general public, but also representatives of the armed forces, political leaders, journalists, local civil society, academics, and former LTTE cadres. Through this process, the commission was able to provide victims an opportunity to tell their stories while acknowledging the suffering of all victims of the conflict. And, to provide a remedy for grievances of the affected people, it referred some matters to the Attorney General for further investigation and action.<sup>141</sup>

Recommendations and observations by the commission regarding contentious issues include:

- Primary evidence of the parties responsible for the shelling of hospitals in and out of NFZs is unavailable.<sup>142</sup> The loss of civilians is mainly attributed to the LTTE. The security forces, on the other hand, tried to minimize civilian casualties, therefore, they did not deliberately target the civilians in NFZs.<sup>143</sup> Alleged disappearances after surrender or arrest may have been done by the actions of a few,<sup>144</sup> indicating

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<sup>140</sup> Report of the Commission of Inquiry on Lessons Learnt and Reconciliation, 9.

<sup>141</sup> Ibid., 6-9.

<sup>142</sup> Ibid., 330.

<sup>143</sup> Ibid., 328.

<sup>144</sup> Ibid., 332.

that there was no systematic abuse.

- As for the possible implication of the security forces in the death or injuries of civilians, the state is responsible to prosecute and punish the wrongdoers.<sup>145</sup>
- The commission recommends that “a special commissioner of investigation be appointed to investigate alleged disappearances and provide material to the Attorney General to initiate criminal proceedings as appropriate.”<sup>146</sup>

As the U.N. Panel alleges in its report, there are major setbacks in the commission. Among the many flaws is the lack of description of the structural cause of violence observed throughout the conflict. While the commission attempted to analyze root causes of the war dating back to the post-independence era and calls for reconciliation and forgiveness, it simply states that “the root cause of the ethnic conflict lies in the failure of successive Governments to address the genuine grievances of minorities.”<sup>147</sup> Second, other than the LTTE, it does not identify those responsible for the past events. The LLRC acknowledges that victims and survivors have a right to know the truth<sup>148</sup> by stressing on state responsibility to resolve many issues including the resettlement of internally displaced persons (IDPs) and devolution of power.<sup>149</sup> But it dodges the contentious issue on the violation of IHL and human rights law during the final stage of war. Hayner’s question comes back in: without knowing the truth of who did what to whom, who can a person forgive and what for?

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<sup>145</sup> Ibid., 329.

<sup>146</sup> Ibid., 340.

<sup>147</sup> Ibid., 369.

<sup>148</sup> Ibid., 339.

<sup>149</sup> Ibid., 377.

Third, the commission lacks independence and impartiality because all eight commissioners were Sri Lankan nationals appointed by the president.<sup>150</sup> Fourth, even though there were a large number of participants from local community and civil society in and out of the country, major human rights INGOs, namely Human Rights Watch, Amnesty International, and the International Crisis Group, turned down the commission's invitation to hearings.<sup>151</sup> This undermined the credibility and legitimacy of the commission domestically and internationally. Fifth, the dissemination of the report is not sufficient. While the commission acknowledges the importance of learning of each others' languages,<sup>152</sup> the report is written only in English. It needs to be translated into both Tamil and Sinhalese languages to raise public awareness of the issue and understandings of the truth-seeking process.

*Can Sri Lanka learn from its past commissions?*

Prior to the LLRC, some commissions were created under the Commissions of Inquiry Act in 1948. According to the U.N. Panel Report, however, the commission lacks independence as the Act vests the president with broad powers. The result is abysmal in terms of addressing accountability. No follow-up actions were taken to implement the commission's recommendations due to a lack of political will.<sup>153</sup>

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<sup>150</sup> The UN Panel Report, 86. Six commissioners were comprised of four Sinhalese, one Tamil, and one Muslim.

<sup>151</sup> Report of the Commission of Inquiry on Lessons Learnt and Reconciliation, 7.

<sup>152</sup> Ibid., 380.

<sup>153</sup> Report of the Secretary-General's Panel of Experts on Accountability in Sri Lanka, 82.

For example, “Commissions of Inquiry into the Involuntary Removal or Disappearance of Persons” were created by presidential action and was conducted between 1994 and 1997 to investigate abuses both by state forces and the armed opposition. The Commissions were divided into three geographical regions and implemented the mandate independently and differently.<sup>154</sup> While the commissions had subpoena powers and conducted public hearings, they did not conduct in-depth investigations. As families and parliament refused to accept amnesty for truth, the commissions received limited answers regarding disappearances.<sup>155</sup> Not surprisingly, none of perpetrators came forward to acknowledge their responsibility.<sup>156</sup> The final report of the commissions<sup>157</sup> does not call for forgiveness or reconciliation, but simply documented disappearance and recommended that reparations be made. Although the report refers to the complicity of the political leadership in abductions and disappearances as well as the liability of armed groups, there is no mention of individual responsibility. Instead, names of individuals were submitted to the president in confidential lists.

Judging from the fact that 150 perpetrators were charged in the High Court,<sup>158</sup> however, it would seem that there were genuine efforts made by the president and commissioners to address impunity in coordination with the judicial system. Unfortunately, the war disrupted the commissions’ work and limited their access to parts of the country. In the end, those charged by the Court were never prosecuted because

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<sup>154</sup> Hayner (2011), 77.

<sup>155</sup> Rotberg, 15.

<sup>156</sup> Hayner (2011), 188.

<sup>157</sup> Final Report of the Commission of Inquiry into Involuntary Removal and Disappearance of Certain Persons (All Island). 2001.

<sup>158</sup> Hayner (2011), 247.

then President Kumaratunga desisted from alienating the military whose support was crucial in fighting the ongoing war.<sup>159</sup> The failure of the president in implementing the recommendation by the commissions may have enhanced the culture of impunity.

### *Regional and International Response to the LLRC*

Internationally, Sri Lanka is growingly facing external pressure. The U.N. Human Rights Council (UNHRC) resolution in 2009<sup>160</sup> highlighted the polarization of the human rights issue. The resolution praised Sri Lanka for its success in eradicating terrorism, whereas major Western countries and INGOs widely condemned the government's "excessive" use of force and its reluctance to admit wrongdoing or address impunity through the LLRC.<sup>161</sup> In contrast to the 2009 resolution, however, the UNHRC recently passed a U.S.-initiated resolution, urging Sri Lanka to implement recommendations by the commission.<sup>162</sup> The UNHRC states that the LLRC does "not adequately address serious allegations of violations of international law," thereby requesting "the Government to present a comprehensive action plan detailing the steps implementing the recommendations made in the Commission's report and to address alleged violations of international law."<sup>163</sup> It also encourages the Office of the United Nations High

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<sup>159</sup> Ibid., 247-248.

<sup>160</sup> 11<sup>th</sup> special session of the Human Rights Council: "The human rights situation in Sri Lanka" – 26/27 May 2009.

<sup>161</sup> In 2009, the U.S. showed ambivalence toward Sri Lanka by stating, "The United States cannot afford to 'lose' Sri Lanka." Committee on Foreign Relations, United States Senate, "Sri Lanka: Recharting U.S. Strategy after the War," (December 7, 2009): 3. <http://www.foreign.senate.gov/imo/media/doc/SRI.pdf>

<sup>162</sup> UN Human Rights Council, "Human Rights Council adopts seven texts on Sri Lanka, Adequate Housing, Right to Food, and extends the mandate on Cultural Rights." 22 March 2012.

<http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=12001&LangID=E>

<sup>163</sup> Ibid.

Commissioner for Human Rights and other mandate holders to provide advice and technical assistance with the government on implementing the above steps.

In defiance of the resolution, Sri Lanka expressed that the resolution was a detriment to the implementation process in the country because a local mechanism must fulfill their mandate according to international law and that time and space is necessary to investigate further. The government even denounced the resolution, stating that it exposes politicization and employs a double standard on human rights applied elsewhere and a parochial attitude of the Western powers.<sup>164</sup>

Regionally, neighboring countries are divided on the issue of Sri Lanka. Notably, India voted for the final resolution at the UNHRC, whereas China, Indonesia, Thailand, Bangladesh, the Philippines, and Maldives voted against and Malaysia abstained. Since the failure of the military intervention and assassination of former Indian Prime Minister Rajiv Gandhi by the LTTE in 1991, India had maintained a low profile in relation to Sri Lanka's conflict. Now faced with a demand from anti-Sri Lankan elements in Tamil Nadu to mount pressure on the government of Sri Lanka,<sup>165</sup> India seems to be taking an assertive position against delayed national reconciliation. By cultivating regional rivalry between India versus China and Pakistan, the government conveniently relies on China's political support within the U.N. Security Council as well as its economic assistance and investments. These allow the government to deny allegations of abuses and pursue

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<sup>164</sup> Ibid.

<sup>165</sup> R. Hariharan, "Impact of UNHRC Resolution on India-Sri Lanka Relations," South Asia Analysis Group. Paper no. 4979, 26 March 2012. <http://www.southasiaanalysis.org/papers50/paper4979.html>

development-oriented reconciliation in place of granting political concessions to the Tamils.<sup>166</sup>

To date, Tamil resentment against continued repression by the government remains unabated even after the demise of the LTTE. *The Economist*<sup>167</sup> reports on the concentration of political power in president's family. Given that three brothers are commanding major political institutions, institutional changes are stifled by the judiciary's lack of independence, transparency, and impartiality. Post-conflict policies and an atmosphere, ranging from the heavy military presence in the former conflict zones to political and social divisions, and resentment among people, suggest persisting fragile conditions. This was further illustrated by the fact that the Tamil National Alliance won the majority of seats on local councils in the north in the 2011 elections, signifying that the Tamils are increasingly questioning the government's reconstruction and reconciliation efforts centered on economic development, implemented mainly through large-scale infrastructure projects.<sup>168</sup>

Thus far, the domestic political and social situation in Sri Lanka is a far cry from initiating changes in "political culture (the beliefs, values, attitudes and behaviors that predominate in a political system),"<sup>169</sup> reaching acceptable versions of truth across society, and coming to terms with its past on the national and individual levels. On top of the absence of strong opposition parties to put pressure for change, the majority of people seem numbed by emergency laws enacted by the governments throughout the

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<sup>166</sup> Goodhand, 131.

<sup>167</sup> *The Economist*, *Banyan: My Brothers' Keepers*, (February 11th, 2012), 46.

<sup>168</sup> Goodhand, 131.

<sup>169</sup> Gibson, 420.

conflict, during which human rights have been trumped in preference to national security. This weakened the rule of law and the rights of individuals.<sup>170</sup>

There is little to suggest in Gibson's findings on the South African TRC, that the LLRC's approach of understanding the past is likely to contribute to reconciliation in Sri Lanka. The success of the South African TRC was dependent on a strong commitment to the rule of law and legal universalism, in which blame was shared by all sides irrespective of ideology or party. Moreover, the fact that South Africa was not involved in an outright civil war and that there were many bystanders facilitated reconciliation processes. Primarily, the difference was that the whole South African political structure had changed, while this has not happened in Sri Lanka.

In this regard, the nature of conflict in Sri Lanka appears to be on the opposite end of the spectrum. Gibson's view is that "when security concerns or wars against terrorism ..... are allowed to trump equal and universal applications of human rights principles, then whatever truth might be produced is unlikely to have legitimacy with all parties."<sup>171</sup> In addition, in light of the extent of injuries inflicted during the struggle, "truth and reconciliation processes may not be very effective in polities in which historical grievances are commonplace."<sup>172</sup> In other words, reconciliation seems harder to achieve in a situation where the just war thesis tends to be used as an excuse to use force against terrorism and IHL is widely ignored, trumping condemnation of gross human rights

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<sup>170</sup> Weiss, 167-168.

<sup>171</sup> Gibson, 417.

<sup>172</sup> Ibid., 426.



abuses.<sup>173</sup> In this scenario, with the end of the outright military victory of one side over the other in Sri Lanka, the “victors” are unlikely to put blame on themselves or share blame for the suffering of victims. This will discourage the community at large from empathizing with the “losers,” thus, deflecting a reconciliation process.

It remains to be seen whether the government is intent on implementing recommendations by the LLRC including devolution of power that gave rise to the conflict, let alone following the recent resolution adopted at the UNHRC. After all, by implementing recommendations of the commission that was set up by the president himself, the country can show to the outside world that it is pursuing a genuine home-grown solution to protect the human rights of its people.

In summary, given the present circumstances, reconciliation seems a long way from recovering human rights norms that were severely weakened through the protracted conflict. Current exclusionary policies of the government may be insulating the public from discovering the truth. As reported by an INGO,<sup>174</sup> the post-conflict society is experiencing the same pattern of violence. With the Prevention of Terrorism Act (PTA) still in effect since 1979, any dissent or popular protest risks being considered terrorism by the government. Media is censored and abductions and disappearances of journalists and activists continue. Deprived of freedom of speech that underpins democracy, fear and anxiety appear to be driving the general public to impose self-censorship. If that is

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<sup>173</sup> Ibid., 430.

<sup>174</sup> International Crisis Group. “Sri Lanka’s North II: Rebuilding under the Military” Asia Report N°220, 16 March 2012. <http://www.crisisgroup.org/~media/Files/asia/south-asia/sri-lanka/220-sri-lankas-north-ii-rebuilding-under-the-military.pdf>

the case, how can we expect victims to know the truth? Meanwhile, unresolved root causes may reactivate a sense of injustice among the Tamil survivors and a feeling of revenge among the Tamil diaspora who are still living in the memory of the 1983 pogrom. Taking into account that justice signifies the establishment of a Tamil homeland for the diaspora, this might lead to the resurgence of violent ethnic tensions.

Furthermore, the case challenges the efficacy of a theory of constructivism in changing state behavior. Bandarage points to the “Boomerang Pattern”<sup>175</sup> which illustrates how local interest groups “mobilize international support and then turn that pressure back on their own local governments in order to further their causes. In effect, international organizations then become allies of one side in a conflict, not neutral participants.”<sup>176</sup> In case of Sri Lanka, she argues that global civil society served to propagate the Tamil cause by the West, while making the government, with little international leverage, feel unfairly targeted, thereby denouncing outside interference. As this argument exemplifies, mistrust of the U.N., intergovernmental organizations, and civil society, especially foreign funded NGOs, seems deep-seated. Is there a possibility of changing these negative perceptions held by leaders of the country and initiate changes in the future? Whether or not Sri Lanka can reverse this trend depends heavily on political leaders who recognize that “Sri Lanka should do what is right because it is right, not because of pressure from outside,” instead of paradoxically following the so-called

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<sup>175</sup> Conceptualized by Margaret Keck and Kathryn Sikkink in *Activist Beyond Borders: Advocacy Networks in International Politics*, (Ithaca: Cornell University Press, 1998), 12-13.

<sup>176</sup> Bandarage, 202.

hypocrisy of Western states that accept “the inevitability of collateral damage in the war against ‘terrorist groups.’”<sup>177</sup>

### Summary of the Four Cases

Evidence from case studies shows that there is no template of TRCs that are applicable to all situations, because the dynamics of participating actors as well as socio-economic and cultural factors influence the process and outcome. The El Salvador TRC was met with denial by actors who eventually ignored recommendations by the commission by granting a blanket amnesty. The South African case may be an exceptional case where, under the new democratic government led by inspiring political leaders, a nationally conceived truth for amnesty policy and procedures served to a greater extent in promoting reconciliation. The fact that “the resolution of conflict was through negotiation, not through victory on the field of battle, nor through the collapse of a former regime” contributed to the successes of the South African TRC because “negotiation politics involved a search for consensus and this included compromise.”<sup>178</sup>

Accordingly, why did the Sierra Leone TRC, which was equally created through peace negotiations, fail to follow the South African processes of conditional and individualized amnesty, at the same time as punishing politically motivated crimes? This occurred because the government of Sierra Leone granted amnesty in the peace agreement, and only allowed an international court to conduct prosecution. Even though

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<sup>177</sup> Nira Wickramasinghe, “After the War: A New Patriotism in Sri Lanka?” *The Journal of Asian Studies*, 68, no.4, (November 2009): 1053.

<sup>178</sup> Boraine, 147.

the issue of power-sharing between the government of Sierra Leone and the military strong-rebels allowed for compromise of the peace agreement in the end, the government needed to live up to the accord and meet immediate political needs of negotiating peace. In the meantime, the U.N. was aware of the terms of the peace accords and intended to create the court.

Above all, the scale of brutality and the number of children involved in Sierra Leone's war cannot be equated with the state-sanctioned apartheid in South Africa. In Sierra Leone where a huge number of children were used as a tool of violence, the issue of reintegration into society and reconciliation becomes all the more important in preventing future violence. This may require a less stringent approach in order to absorb displaced children back to community and the Court exempted children from prosecution.

The context of the Sri Lankan case appears distinct from any precedents. First, in El Salvador and South Africa, civil society played an important role in pressuring governments into establishing TRCs, whereas Sierra Leone sought international involvement. Conversely, Sri Lanka is deeply suspicious of civil society and outside interference, while the public has always been highly politicized under the messy democracy. Second, the conflict in El Salvador and Sierra Leone ended in stalemate, thereby stakeholders had to compromise on power sharing to achieve peace process. In comparison, after the failure of outside interference and rounds of peace negotiations, the conflict in Sri Lanka ended with outright military victory, requiring the government little concession while politically being shielded by China. Third, the nature of the conflict is dissimilar in all cases. In particular, the society in Sri Lanka seems more divided

politically and ideologically compared to a class war in El Salvador, the state sanctioned racial segregation in South Africa, and a rebel movement without a clear political agenda in Sierra Leone. Taken together, a truth commission in Sri Lanka poses a new challenge to transitional justice mechanisms.

## Conclusion

A truth commission is an effective measure in a post-conflict society to promote reconciliation by acknowledging the dignity of victims, while simultaneously encouraging the society as a whole to know the truth, to recognize structural causes of violence, and to bring those who committed human rights abuses to account. Nonetheless, TRCs will remain ineffective without a thriving civil society and/or an international framework to monitor transitions and to pressure states to respect the principles of human rights of their citizens. The cost of inaction by states and the international community could result in the resurgence of violence and instability.

This thesis recognizes that the capability to assess the impact of TRCs is limited since evidence is incomplete or inaccessible and oftentimes lost. This is compounded by weak implementation of recommendations by TRCs without follow-up mechanisms, such as an independent oversight body, to monitor and oversee the progress on transforming recommendations to actions by states. Furthermore, perceptions of individuals are relevant in order to find out the extent to which justice and reconciliation are achieved. In spite of the above limitations, however, this thesis has advanced the argument that the degree of national reconciliation is measured by the implementation of recommendations by TRCs, thereby creating a rule based and transparent society where people learn to live with others on the basis of fundamental differences in historical interpretations with mutual respect, even if it may fall short of full reconciliation.

For all these constraints faced by states, including weak implementation and limited time and resources, the case studies illustrate important findings on TRCs. Most

significant is the fact that TRCs evolved over time to respond to local context and preferences and facilitate reconciliation in keeping with international standards. Naturally, variations exist in terms of the structure, size, capacity, mandate (a given time period and types of violations to examine), powers, and the scope of recommendations. It is, therefore, not pragmatic to transpose one model of TRC to another, but TRCs can learn from one another to enhance the effectiveness as one of transitional justice mechanisms.

As demonstrated by case studies in El Salvador and Sierra Leone, the international community played a crucial role in increasing the impact of TRCs as well as launching complementary mechanisms. In particular, international or hybrid systems tend to enhance impartiality of TRCs and outreach to the public in collaboration with civil society. Yet, foreign participation may not necessarily guarantee positive effects on reconciliation. Johnstone notes that joint groups comprising both locals and foreigners may be ideal, but the individuals chosen carry some weight after all.<sup>179</sup> Likewise, Hayner recommends prioritizing national preferences by using domestic qualified persons, if available, because foreigners may find it too complex to handle some situations.<sup>180</sup>

The thesis also examined the relationship between TRCs and other justice mechanisms such as criminal prosecution. A dominant theme that runs throughout the selected case studies is that prosecution and amnesty can be applied on a case by case basis. Conditional amnesty is at times necessary to induce offenders to come forward and testify at hearings. In view of the impracticality of prosecuting all responsible,

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<sup>179</sup> Johnstone, 44.

<sup>180</sup> Hayner (2011), 215.

exemplary prosecution of the few most flagrant offenders or responsible parties may have a deterrent effect. However, this could pose a risk of being perceived as nothing more than a show, resulting in more social division. In short, it is important to limit the politics of compromise to address justice and accountability, while adjusting processes to local needs and realities on ground.

#### Policy recommendation

At present, it is too soon to tell whether Sri Lanka will fall back into violence and instability. Nevertheless, following my hypothesis, there has been no prosecution to address past abuses, nor institutional reforms to prevent human rights violation in the future. Therefore, an environment of impunity still seems to exist.

Given that the existing mechanism in Sri Lanka may be insufficient for achieving reconciliation, are there other mechanisms that the country could use? Reflecting upon the El Salvador case, the post-conflict situation is similar in terms of strong resistance by ruling governments to finding truths and accounting for human rights abuses. Although it may be premature to conclude that the LLRC is a failure, the Sri Lankan government could establish additional commissions, similar to those in El Salvador, to vet and investigate the conduct of the security forces during the final stage of war and those who are allegedly involved in abductions and disappearances during and after the conflict. Meanwhile, in line with the DDR program used in Sierra Leone, the downsizing of security forces in former conflict zones and the ultimate nationwide demilitarization would generate additional resources for social programs, such as education and skills



training, in order to rehabilitate and reintegrate war-affected populations, thus, making them productive parts of society. This will, in turn, diminish perceived and real threats posed by the Tamils militancy and the diaspora of reigniting conflict.

Despite the usefulness of a TRC, its effectiveness is subject to objections and reservations by states to respect human rights norms and a double standard relating to human rights among the international community. Whether the Sri Lankan government will defer to international pressure and/or initiate political reconciliation early enough to prevent the recurrence of conflict still remains open to question. To this end, this study calls for more research to respond to a new challenge that TRCs are facing in dealing with post-conflict countries with divergent political, economic, and social aspects.

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