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Transitional Justice in Sri Lanka: Rethinking Post-War Diaspora Advocacy for Accountability

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Cover Page Footnote

Mytili Bala is the Robert L. Bernstein International Human Rights Fellow at the Center for Justice and Accountability. Mytili received her B.A. from the University of Chicago, and her J.D. from Yale Law School. The author thanks the Bernstein program at Yale Law School, the Center for Justice and Accountability, and brave colleagues working for accountability and post-conflict transformation in Sri Lanka. The views expressed in this article are those of the author and do not necessarily represent the views of, and should not be attributed to, the Center for Justice and Accountability.

Abstract

Sri Lanka's 26-year civil war against the Liberation Tigers of Tamil Eelam came to a bloody end in May 2009, amidst allegations of war crimes and crimes against humanity on both sides. Since then, Tamils in the diaspora, long accused of funding the war, have become vocal proponents for war crimes accountability. Some might label certain forms of diaspora advocacy as "lawfare" or "long-distance nationalism." However, these labels fail to account for the complex memories and identities that shape diaspora advocacy for accountability today. In order for Sri Lanka to move forward from decades of conflict, transitional justice mechanisms to seek truth, pursue justice, and provide redress will need to address collective memories of violence. Inclusive transitional justice mechanisms could incorporate a diaspora component to vindicate the rights of diaspora Tamils as victims to truth and redress under international law. Ultimately, opening the door to diverse narratives, including competing narratives within the Tamil diaspora, could serve as a starting point to come to terms with the past and explore hopes for a shared future.

I. Introduction

Accountability for mass violence is political, even for societies decades removed from conflict.¹ Political dimensions become more pronounced in a globalized world as non-state actors increasingly lobby international organizations for accountability. Conflict-generated diasporas, including Tamils, Irish, Kurds, Armenians, Liberians, and others, are now able to serve as vocal transnational advocates, shaping post-conflict transitional justice agendas. While these new roles may help broker peace, scholars have also questioned whether conflict-generated diaspora groups, motivated by identity politics, may play a destabilizing role.

This article takes a closer look at Tamil diaspora advocacy for war crimes accountability in Sri Lanka to explore *why* certain diaspora voices for accountability seem to diverge from international human rights organizations also pursuing accountability. While some would conclude that certain diaspora actors engage in "lawfare" or "long-distance nationalism," this article argues that such assessments fail to evaluate the complex memories, collective identities, and myths that shape diaspora advocacy today. Rather than exclude diaspora Tamils with "separatist" views, it may be worth considering whether their narratives could be incorporated within an inclusive transitional justice framework. Truth commissions, commemorations, reparations, public

¹ Case in point: the recent trial of General José Efraín Ríos Montt in Guatemala pitched those who insisted that there had been genocide against those who denied it. Lisa J. Laplante, *Memory Battles: Guatemala's Public Debates and the Genocide Trial of Jose Efrain Rios Montt*, 32 *Quinnipiac L. Rev.* 621, 646 (2014). The genocide-deniers (*¡No hubo genocidio!*) asserted that the Guatemalan government was fighting "terrorist" guerrillas in the early 1980s. *Id.* at 649-52. Their opponents (*¡Sí, hubo genocidio!*) cited massacres of Mayan villages and military policy manuals as evidence of a government campaign to target and eliminate Mayan civilians. *Id.* at 647-49.

apologies, and prosecutions of historic crimes could serve to acknowledge the trauma and legitimate grievances that led a quarter of Sri Lanka's Tamils to seek refuge abroad. While this effort is not without challenges, the Sri Lankan government could evaluate creative approaches to acknowledge diverse diaspora memories of violence, marginalization, and displacement as it comes to terms with its past.

This article is divided into six parts. **Section II** provides background on the post-war push for accountability in Sri Lanka, with an extended discussion of advocacy by "hardline" diaspora Tamil groups before the UNHRC in March 2014. This section also highlights diversity among diaspora groups in pursuing accountability. **Section III** asks whether accountability lobbying by hardline groups should be interpreted as "lawfare" or "long-distance nationalism." Concluding that both of these labels dehumanize diaspora experiences and fail to provide a path forward, **Section IV** argues that a deeper analysis is necessary to understand the unique trauma and identities that shape diaspora Tamil advocacy today. **Section V** outlines possibilities and challenges for incorporating diaspora Tamil narratives into an inclusive transitional justice framework, exploring ways in which diverse diaspora voices can be incorporated in mechanisms to seek truth, provide redress, and pursue justice. **Section VI** concludes by suggesting that diaspora engagement will be important for Sri Lanka to come to terms with the past, though such an undertaking is not without challenges.

Without advocating a particular course of action, this article suggests that it may be possible to develop an inclusive transitional justice framework that acknowledges diverse narratives, including those advocating a "political" accountability agenda, without whitewashing serious human rights violations by any one side of the conflict.

II. Background

In May 2009, Sri Lankan government forces defeated the Liberation Tigers of Tamil Eelam (LTTE, sometimes called the "Tamil Tigers"), ending twenty-six years of civil war. In the years since the war's end, many diaspora Tamils, alongside human rights organizations and several states, have advocated for war crimes accountability. Citing a lack of domestic progress, accountability proponents called for an international investigation of the last stages of the war. In March 2014, these calls were answered when the United Nations Human Rights Council (UNHRC) passed a resolution creating a U.N. inquiry to investigate crimes on both sides of the conflict.²

During UNHRC negotiations in Geneva, interesting divisions emerged *among* those on the same side of the accountability debate. Some diaspora Tamils objected to the resolution drafted by the United States and the United Kingdom. They argued that addressing impunity and strengthening the rule of law island-wide, as the resolution sought to do, would merely legitimize a racist Sri Lankan state without alleviating problems faced by Tamils. Some diaspora Tamils sought a resolution that would recognize claims to Tamil nationhood, while many human rights organizations and the U.S. and U.K. distanced themselves from such views.

² U.N. Human Rights Council, Res. 25/1, A/HRC/25/L.1/Rev.1, (Mar. 27, 2014).

A. Post-War Push for Accountability in Sri Lanka

In May 2009, President Mahinda Rajapaksa declared victory over the LTTE, framing the war as a “Humanitarian Operation” that followed a “zero-civilian casualty” policy that aimed to “liberate” Tamils from the clutches of “terrorism.”³ The powerful Rajapaksa clan⁴ maintained power for five-and-a-half years after the war ended, until Maithripala Sirisena defeated Mahinda Rajapaksa in presidential elections on January 8, 2015. During President Rajapaksa’s tenure, those who sought accountability or questioned his administration’s narrative of the war were labeled “terrorists” or members of the “LTTE rump.”⁵

The government’s defeat of the LTTE came at a tremendous human cost. In March 2011, a Panel of Experts commissioned by the U.N. Secretary General found credible allegations that both LTTE and government forces committed international crimes during the final months of the war.⁶ Their report cited allegations that Sri Lankan government forces “shelled on a large scale in three consecutive No Fire Zones where it had encouraged the civilian population to congregate,” deprived humanitarian aid to trapped civilians, summarily executed suspected LTTE members, and tortured and harshly interrogated internally displaced persons in refugee camps. The Panel of Experts also reported alleged atrocities by the LTTE, including forced conscription of children as young as 14, locating military equipment in densely populated areas, and shooting civilians who attempted escape. The report did not estimate casualties but suggested that

³ See, e.g., See, e.g., *Humanitarian Operation: Factual Analysis July 2006-May 2009*, Ministry of Defence and Urban Development ¶ 9 (Jul. 31, 2011), available at <http://slembassyusa.org/wp-content/uploads/2011/08/Sri-Lankan-Humanitarian-Operation-Factual-Analysis.pdf> (last visited Oct. 21, 2014).

⁴ Mahinda Rajapaksa’s brother, Gotabhaya Rajapaksa, served as the Secretary to the Ministry of Defence. Another brother, Basil Rajapaksa, served as Minister for Economic Development, overseeing all aspects of post-war reconstruction in the north and east. A third brother, Chamal Rajapaksa, served as Speaker of Parliament and Minister for Ports and Aviation. See, e.g., *Infographics: Rajapaksa Family And Nepotism*, Colombo Telegraph, Mar. 20, 2013, <https://www.colombotelegraph.com/index.php/infographic-rajapaksa-family-and-nepotism/> (last visited Feb. 23, 2015).

⁵ U.N. High Commissioner for Human Rights Navi Pillay, Opening Remarks at a Press Conference During her Visit to Sri Lanka Colombo (Aug. 31, 2013), <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=13673&LangID=E> (last visited Oct. 19, 2014); *The Sri Lankan Government retaliates to the proposed Human Rights Council resolution by arresting activists and witnesses*, Asian Human Rights Comm’n (Mar. 17, 2014), <http://www.humanrights.asia/news/ahrc-news/AHRC-STM-045-2014> (last visited Oct. 19, 2014).

⁶ The Secretary-General, *Report of the Secretary-General’s Panel of Experts on Accountability in Sri Lanka*, ¶ 258 (Mar. 31, 2011), available at http://www.un.org/News/dh/infocus/Sri_Lanka/POE_Report_Full.pdf (last visited Oct. 14, 2014).

as many as 40,000 civilians may have died, mostly as a result of shelling by government forces.⁷

The U.N.'s failure to step in or speak publicly about the violence in Sri Lanka in 2009 led to a complete rethink of U.N. policy during humanitarian crises. An independent review panel concluded that the U.N.'s inaction in Sri Lanka reflected "systemic failure."⁸ The U.N. Secretary-General, with assistance from the High Commissioner for Human Rights, responded by introducing the "Rights Up Front" plan that prioritized human rights protection as a core purpose of all organs of the United Nations.⁹ In presenting the Rights Up Front plan, the Deputy Secretary General noted that systemic human rights violations often precede mass atrocities, and the challenges faced by the U.N. in Sri Lanka in 2009 were not new.¹⁰

Having failed to step in and stop the bloodshed in 2009, the international community pressed for credible investigations and accountability in subsequent years. Human rights groups and civil society organizations pointed to Sri Lanka's lack of domestic progress in pursuing justice: No one has been held accountable for even the most publicized and emblematic cases.¹¹ In 2013, a commission on disappearances in the

⁷ The number of civilian casualties remains highly contested. A subsequent report to the U.N. Panel of Experts Report suggested that as many as 70,000 civilians may have died in the final stages of the war. See The Secretary-General, *Report of the Secretary-General's Internal Review Panel of United Nations Action in Sri Lanka*, ¶ 34 (Nov. 10, 2012), available at http://www.un.org/News/dh/infocus/Sri_Lanka/The_Internal_Review_Panel_report_on_Sri_Lanka.pdf ("Petrie Report") (last visited Dec. 13, 2014). By contrast, the Sri Lankan government, which initially clung to a "zero civilian casualties" narrative, admitted in 2013 that some civilians died in the crossfire as a result of wartime actions by the LTTE. See Sri Lanka Ministry of Defence, *Full Report of the Army Board on LLRC Observations*, ¶¶ 57-61 (Jan. 25, 2013), available at http://www.army.lk/docimages/image/LLRC_2013.pdf (last visited Jan. 28, 2015); see also Report of the Commission of Inquiry on Lessons Learnt and Reconciliation (hereinafter, "LLRC Report") ¶ 4.112 (Nov. 2011), available at http://www.priu.gov.lk/news_update/Current_Affairs/ca201112/FINAL%20LLRC%20REPORT.pdf (last visited Feb. 25, 2015) ("The Army too had returned fire, using small arms and during the exchanges of fire, civilians were caught in the cross fire and casualties did occur.").

⁸ Petrie Report, *supra* note 7.

⁹ The Secretary-General, *Rights Up Front* (May 2014), available at <http://www.refworld.org/docid/549141f84.html> (last visited Apr. 2, 2015).

¹⁰ Deputy Secretary-General Jan Eliasson, Press Conference on Rights up Front Action Plan (Dec. 19, 2013), <http://www.un.org/sg/dsg/dsgoffthecuff.asp?nid=270> (last visited Nov. 25, 2014).

¹¹ This includes the 2006 killings of five Tamil high school students in Trincomalee and seventeen aid workers from *Action Contre La Faim*. The Office of the U.N. High Commissioner for Human Rights, *Report of the Office of the United Nations High Commissioner for Human Rights on advice and technical assistance for the Government of Sri Lanka on promoting reconciliation and accountability in Sri Lanka*, ¶¶ 33, 48-55, U.N. Doc. A/HRC/25/23 (Feb. 24, 2013).

North and East experienced witness tampering by government agents.¹² A national commission on torture was shelved one month after its announcement.¹³

Troublingly, credible allegations began to emerge of *post-war* human rights abuses and international crimes against Tamils.¹⁴ Buddhist extremism against Sri Lanka's Muslim and Christian minorities also increased, punctuated by violent anti-Muslim riots in four southern towns in June 2014.¹⁵ The international community maintained that Sri Lanka's shortcomings signaled broader failures of governance and rule of law.¹⁶ In a 2014 report to the Human Rights Council, the U.N. High Commissioner for Human Rights stated that Sri Lanka's lack of domestic progress could "no longer be explained as a function of time or technical capacity" but rather was "fundamentally a question of political will."¹⁷

By contrast, the Rajapaksa administration maintained that international accountability efforts were a threat to Sri Lanka's sovereignty. The government harassed and intimidated human rights advocates and victims.¹⁸ It purported to pursue a

¹²See, e.g., Joint Civil Society Memorandum to the Human Rights Council and the International Community, Centre for Policy Alternatives (Mar. 4, 2014), *available at* <http://www.cpalanka.org/joint-civil-society-memorandum-to-the-human-rights-council-and-the-international-community/> (last visited Oct. 19, 2014).

¹³*Id.* Responding to international pressure, President Rajapaksa expanded the mandate of the commission in 2014 to investigate civilian deaths during the end of the war, but it remains unclear whether the commission received such evidence or whether the change in government in 2015 has halted this investigation. See Gazette No. 1871/18 (Jul. 15, 2014) (Sri Lanka) (expanding mandate of the disappearances commission and appointing Sir Desmond de Silva, Sir Geoffrey Nice, and David Crane to the newly formed Advisory Council); Gazette No. 1876/40 (Aug. 22, 2014) (Sri Lanka) (appointing additional members Advash Kaushal and Ahmer Bilal Soofi to the Advisory Council).

¹⁴*An Unfinished War: Torture and Sexual Violence in Sri Lanka 2009-2014*, The Bar Human Rights Committee of England & Wales, and the International Truth & Justice Project, *available at* <http://www.stop-torture.com/> (last visited Oct. 19, 2014); *Crimes Against Humanity in Sri Lanka's Northern Province: A Legal Analysis of Post-War Human Rights Violations*, Sri Lanka Campaign for Peace & Justice (Mar. 4, 2014), *available at* <http://www.srilankacampaign.org/about-us/library/> (last visited Apr. 2, 2015).

¹⁵ Press Release, Office of the High Commissioner for Human Rights, Stop the promotion of hatred and faith-based violence, UN rights experts urge Sri Lanka (Jul. 2, 2014), *available at* <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14812&LangID=E> (last visited Oct. 19, 2014).

¹⁶ See *A Crisis of Legitimacy: The Impeachment of Chief Justice Bandaranayake and the Erosion of the Rule of Law in Sri Lanka*, Int'l Bar Ass'n (Apr. 2013), *available at* <http://www.ibanet.org/Article/Detail.aspx?ArticleUid=C90B7A2F-5EE2-4E5B-BE6C-F7FCB9864E81> (last visited Oct. 19, 2014). Shirani Bandaranayake was reinstated to the Supreme Court on January 28, 2015, after Maithripala Sirisena's defeat of Mahinda Rajapaksa in January 2015 presidential elections. See *Sri Lanka reinstates Chief Justice Shirani Bandaranayake*, BBC News, Jan. 28, 2015, <http://www.bbc.com/news/world-asia-31021540> (last visited Jan. 28, 2015). She retired immediately after her reinstatement, her name having been cleared.

¹⁷ U.N. Doc. A/HRC/25/23, *supra* note 11, at ¶ 72.

¹⁸ *Tamil Activist Detained in Sri Lanka*, BBC News, Mar. 14, 2014, <http://www.bbc.com/news/world-asia-26577956> (last visited Jan. 20, 2014).

homegrown ‘reconciliation through economic development’ strategy, investing in infrastructure projects in Sri Lanka’s underdeveloped and Tamil-majority North.¹⁹

On March 27, 2014, the UNHRC passed a resolution, co-sponsored by the U.S. and U.K., to promote reconciliation, accountability, and human rights in Sri Lanka.²⁰ This resolution was the third of its kind.²¹ The 2014 resolution was significantly stronger than those in prior years because it established an international U.N. investigation into alleged crimes by both sides to the conflict, whereas the 2012 and 2013 resolutions only asked the Sri Lankan government to make greater domestic progress toward accountability.²²

B. Accountability Advocacy by “Hardline” Diaspora Groups

In the weeks leading up to the March 2014 resolution, differences emerged between different groups seeking accountability. Although Tamil diaspora organizations, human rights groups, and many state actors supported an international investigation, groups diverged on how to get there. Sri Lankan civil society organizations emphasized the need to end systemic impunity and strengthen the rule of law, while some diaspora groups advocated for accountability from the standpoint of state atrocities against Tamil people as members of a “Tamil Nation.”²³

The role of diaspora Tamils in funding the LTTE’s war for a “Tamil Eelam,” or an independent Tamil state, is well documented.²⁴ However, the connection between the diaspora and the LTTE is complex and often misunderstood. There are Tamil diaspora

¹⁹ See, e.g., U.N. High Commissioner for Human Rights, Oral Update of the High Commissioner for Human Rights on promoting reconciliation and accountability in Sri Lanka, *delivered to the Human Rights Council*, U.N. Doc. A/HRC/24/CRP.3/Rev.1; *Sri Lanka’s North II, Rebuilding Under the Military*, Int’l Crisis Group 2-3 (Mar. 16, 2012), available at <http://www.crisisgroup.org/en/regions/asia/south-asia/sri-lanka/220-sri-lankas-north-ii-rebuilding-under-the-military.aspx> (last visited Feb. 24, 2015); Anonymous, *Against the Grain: Pursuing a Transitional Justice Agenda in Postwar Sri Lanka*, Int’l J. Transitional Justice 31, 31-32 (Feb. 17, 2011) (“The state appears to be working on the assumption that the economic recovery combined with the reestablishment of subnational democratic institutions in the north and east of the country will take care of all remaining minority grievances.”).

²⁰ U.N. Human Rights Council Res. 25/1, U.N. Doc. A/HRC/25/L.1.Rev.1 (Mar. 27, 2014).

²¹ U.N. Human Rights Council Res. 19/2, U.N. Doc. A/HRC/RES/19/2 (Apr. 3, 2012); U.N. Human Rights Council Res. 22/1, U.N. Doc. A/HRC/22.L.1/Rev.1 (Mar. 19, 2013).

²² See Res. 25/1, *supra* note 20 (Operative paragraph 10 calls on the Office of the High Commissioner for Human Rights to “undertake a comprehensive investigation” into human rights violations and crimes by both sides to the Sri Lankan conflict and “monitor” and “continue to assess” the human rights situation and domestic processes.”). The OHCHR Investigation on Sri Lanka (OISL) interpreted its mandate to cover abuses that occurred from 2002 to November 2011.

²³ See, e.g., *Dormant diaspora rises up against US draft, demands genocide investigation, plebiscite*, TamilNet, Mar. 10, 2014, <http://tamilnet.com/art.html?catid=13&artid=37091> (last visited Feb. 23, 2014).

²⁴ See, e.g., *The Sri Lankan Tamil Diaspora After the LTTE*, Int’l Crisis Group *i* (Feb. 23, 2010), available at <http://www.crisisgroup.org/en/regions/asia/south-asia/sri-lanka/186-the-sri-lankan-tamil-diaspora-after-the-ltte.aspx> (last visited Jan. 28, 2015); see also Peter Chalk, *The Tiger’s Abroad: How the LTTE Diaspora Supports the Conflict in Sri Lanka*, 9 *Geo. J. Int’l Aff.* 97, 101 (2008); *Funding the “Final War,” LTTE Intimidation and Extortion in the Tamil Diaspora*, Human Rights Watch (Mar. 16, 2006), available at <http://www.hrw.org/reports/2006/03/14/funding-final-war-2> (last visited Feb. 25, 2015).

organizations all over the world, and diaspora Tamils hold diverse political views. As the International Crisis Group notes, “[n]ot every diaspora Tamil donated funds to the Tigers, not everyone supported them politically, and countless people were their victims.”²⁵ Likewise, those who support “Tamil Eelam” do not necessarily support the LTTE or advocate the use of violence. Still, an apparent divide emerged in March 2014 between human rights groups and certain diaspora groups, despite their shared accountability goal.

On March 20, 2014, a few diaspora Tamils and “hardline” Tamil politicians from Sri Lanka held a press conference at the Geneva Press Club titled, “Is the Sri Lanka resolution at the UNHRC part of the problem or part of the solution?”²⁶ Diaspora members and certain politicians from Tamil parties in Sri Lanka criticized the draft U.S. and U.K. resolution on grounds that it failed to recognize Eelam Tamils’ claims to sovereignty.²⁷ While citing a 66-year genocide of Tamil peoples, the speakers rejected grievances of other minorities, thus seeming to whitewash the LTTE’s ethnic cleansing of Muslims from the North and massacres in the East in the 1990s. The views expressed seemed unapologetically separatist (in favor of Tamil Eelam) and in some cases, pro-LTTE. Recounting Sri Lanka’s past, one diaspora speaker stated that the LTTE became the “sole representative” of the Tamil people.²⁸ Throughout the three weeks of UNHRC

²⁵ *The Sri Lankan Tamil Diaspora After the LTTE*, *supra* note 24, at 4.

²⁶ Press Conference, *Is the Sri Lanka resolution at the UNHRC part of the problem or part of the solution?* (hereinafter, “Geneva Press Club meeting”) (Mar. 21, 2014), <http://www.youtube.com/watch?v=IcegKPYrILM> (last visited Oct. 14, 2014).

²⁷ The speakers at the press conference criticized the U.S. and U.K.’s draft resolution on Sri Lanka, arguing that any resolution that worked to legitimize the Sri Lankan state would not improve ground realities for Tamils in Sri Lanka. The speakers stated that by singling out human rights abuses against religious minorities without using the word “Tamil,” the draft resolution whitewashed a six-decade structural genocide against Tamils in Sri Lanka. To those who spoke, any UNHRC resolution, including one that called for an international commission of inquiry, would not bring about accountability or reconciliation because it would be premised on the functioning of a racist Sinhalese state. *Id.*; *see also UNHRC resolution with weak mandate will not help Tamils, says Gajendrakumar*, TamilNet, Mar. 24, 2014, <http://tamilnet.com/art.html?catid=13&artid=37131> (last visited Feb. 24, 2015); *Guruparan addresses de-Tamilization, dichotomization in Geneva narrative*, TamilNet, Mar. 25, 2014, <http://tamilnet.com/art.html?catid=13&artid=37132> (last visited Feb. 25, 2015); *Activists from homeland, diaspora address UNHRC*, TamilNet, Mar. 25, 2014, <http://tamilnet.com/art.html?catid=13&artid=37134> (last visited Feb. 24, 2015). One speaker explained that the draft resolution distorted relevant issues by framing Sri Lanka’s problems as human rights violations or religious problems. Geneva Press Club meeting, *supra* note 26. Such issues could be solved through increased democracy, he explained, whereas Tamil survival and nationhood could not. The speaker asserted that true peace and regional security required addressing Tamils’ rights to nationhood, homeland, and self-determination. Although he did not advocate a return to violence, he told the audience that the LTTE took to arms because of systematic problems that continue to present. *Id.*; *see also* Krisna Saravanamuttu, *The UNHRC Resolution: A Critical Interrogation*, <http://tamilyouth.ca/the-unhrc-resolution-a-critical-interrogation/> (last visited Feb. 27, 2015) (“Human rights problems can be rectified in a more liberal-democratic Sri Lanka.... But, human rights law cannot deal with the structural nature of Sri Lanka that privileges the Sinhala nation to violently subjugate the Tamils.”).

²⁸ Geneva Press Club meeting, *supra* note 26.

sessions in March 2014, LTTE sympathizers among the Tamil diaspora held large public rallies waving hundreds of Tiger flags.²⁹

The differences that emerged in Geneva in March 2014 between human rights groups and certain diaspora Tamil organizations raised broader questions about the role of diaspora advocacy for accountability. Framing differences with the Sri Lankan government were to be expected, given the Rajapaksa administration's labeling of the war as a "Humanitarian Operation" to defeat "terrorism" and its outright hostility to war crimes accountability. However, what emerged in Geneva were differences between those supposedly on the same side of the accountability debate. A human rights group could profess to be neutral on the question of separate statehood for Sri Lanka's Tamils. However, by supporting a resolution that aimed to strengthen the rule of law throughout the island nation, these groups implicitly supported the territorial integrity of the Sri Lankan state.³⁰

Many human rights groups maintain distance from pro-Tiger and pro-Eelam diaspora groups and caution them to moderate their tone.³¹ Some distance may be understandable, given the Tamil diaspora's role in funding the war. Many human rights and civil society organizations express deep discomfort with affiliating with groups linked to the LTTE and want to avoid any appearance of whitewashing LTTE crimes, which included suicide bombings, disappearances, child conscription, ethnic cleansing, and targeted killings. International Non-Governmental Organizations (INGOs) in particular may feel concern that they would compromise their commitment to other human rights causes in partnering with perceived 'radicalized' diaspora Tamils.³²

From a strategic standpoint, certain forms of diaspora advocacy, such as "pro-Eelam" advocacy, may also make the "pitch" for accountability harder for human rights groups and "pragmatic" diaspora groups committed to a united Sri Lanka.³³ Human rights groups, civil society organizations, and more moderate diaspora groups may

²⁹ See, e.g., *Dormant diaspora rises up against US draft*, *supra* note 23.

³⁰ Sri Lanka expert Alan Keenan makes a similar point: "imposing a balanced framework on a conflict that is certain to be unbalanced in multiple and incommensurable ways threatens to impose a particular vision of what the conflict is about and what its settlement should look like, precisely those issues that should be open for debate and discussion by all parties." See Alan Keenan, *The Trouble with Even-handedness: On the Politics of Human Rights and Peace Advocacy in Sri Lanka*, in *Nongovernment Politics*, 88-117 (M. Fehner ed. 2007). State actors like the United States are less conflicted: they "do[] not endorse the establishment of another independent state on the island." K. Alan Kronstadt and Bruce Vaughn, *Sri Lanka: Background and U.S. Relations*, Congressional Research Service 14 (Jun. 4, 2009), available at <http://fpc.state.gov/documents/organization/125940.pdf> (last visited Oct. 21, 2014).

³¹ Author's conversations with researchers at international NGOs; *The Sri Lankan Tamil Diaspora after the LTTE*, *supra* note 24, at i ("[U]ntil it moves on from its separatist, pro-LTTE ideology, the diaspora is unlikely to play a useful role in supporting a just and sustainable peace in Sri Lanka.").

³² For example, Amnesty International faced a very public controversy in choosing to partner with former Guantanamo inmate Moazzam Begg, a U.K. citizen with alleged Taliban ties. Diana Hortsch, *The Paradox of Partnership: Amnesty International, Responsible Advocacy, and NGO Accountability*, 42 *Colum. Hum. Rts. L. Rev.* 119, 155 (2010).

³³ Some have privately remarked that diaspora advocacy in Geneva may have influenced certain countries to vote against the 2014 UNHRC resolution or abstain from voting. Author's interview with anonymous (April 29, 2014).

choose to keep a distance from groups that espouse separatism because they believe that such advocacy will not strategically help their push for accountability. These concerns merit consideration and are discussed in Section II.C.

However, alienating pro-Tiger and pro-Eelam groups may not be the best approach. Over the past few years, some diaspora Tamil groups have become more strident in their protests, advocating for a framing of the ethnic conflict as “genocide,” arguing for recognition of Tamil nationhood, and waving LTTE flags before the U.N. and government capitals.³⁴ These voices have grown louder and more organized over the past few years and are unlikely to dissipate entirely with the change in government or other new developments. To the extent that these Tamils are viewed as “spoilers” to the accountability process, it may be more effective to engage than to ignore.

From a less cynical perspective, the growing magnitude of these protests and the disconnect in messaging may suggest that some diaspora Tamils feel marginalized and disillusioned with the broader push for accountability.³⁵ As one diaspora writer stated:

A section of the International Community once saw the LTTE as the problem to resolving the conflict, believing the Sri Lanka state that elimination of the LTTE would create a space for a political solution and national reconciliation. However, evolving developments are clear evidence that past assumptions were incorrect. The same section of the International Community and the Sri Lankan state now see the Tamil Diaspora as trouble-makers.³⁶

In light of the apparent distance between human rights groups and certain “hardline” diaspora groups in the push for accountability, the bulk of this article aims to take a step back to understand *why* certain diaspora voices for accountability seem to diverge from the “mainstream” and whether divergent narratives can nevertheless be included in Sri Lanka’s transitional justice framework.

C. Competing Diaspora Advocacy for Accountability

Not all diaspora Tamils shared the views of the Geneva Press Club speakers. There were, and continue to be, deep divisions between diaspora groups engaged in

³⁴ See, e.g., Oliver Walton, *Framing disputes and organizational legitimation: UK-based Sri Lankan Tamil diaspora groups’ use of the ‘genocide’ frame since 2009*, *Ethnic & Racial Studies*, 1 (2014) (arguing that while at first pass the increasing use of the ‘genocide’ frame appears counterproductive in bolstering international legitimacy, its use may serve complex goals, including demonstrating independence from international agendas by replacing frames of reconciliation, war crimes, and crimes against humanity with frames of self-determination, statehood, and genocide).

³⁵ One speaker at the Geneva Press Club meeting stated his view that Western countries and international NGOs had silenced pro-Eelam groups in Geneva, thereby denying Tamils a voice in their own affairs just as the Sri Lankan government had done for decades. Geneva Press Club meeting, *supra* note 26.

³⁶ Nirmanusan Balasundaram, *Is the Tamil Diaspora Against Unity in Sri Lanka?*, Groundviews, May 4, 2013, <http://groundviews.org/2013/05/04/is-the-tamil-diaspora-against-unity-in-sri-lanka/> (last visited Oct. 21, 2014).

accountability advocacy. This section highlights some of those differences to emphasize the diversity among diaspora groups seeking accountability.

In early March 2014, the U.S. and U.K. released their first draft of the UNHRC resolution. Diaspora groups uniformly criticized the draft on grounds that it fell short of creating an international commission of inquiry.³⁷ Shortly after, the U.S. and U.K. released a second draft, clarifying the U.N.'s investigative mandate. Some diaspora groups welcomed the revisions, stating that it addressed prior concerns. Others, however, continued to express disappointment. The divergent responses to the revised draft typify the deep divisions and ideological battles between competing diaspora groups.

³⁷ See, e.g., *Strong calls for international investigation on first day of HRC session*, Tamil Guardian, Mar. 3, 2014, <http://www.tamilguardian.com/article.asp?articleid=10130> (last visited Feb. 23, 2015) (citing positions of Tamils Against Genocide, Canadian Tamil Congress, British Tamils Forum, and US Tamil Political Action Council).

For example, Canadian Tamil Congress (CTC) and British Tamils Forum (BTF) both criticized the first draft, but CTC, unlike BTF, welcomed the revised second draft:

	Canadian Tamil Congress (CTC)	British Tamils Forum (BTF)
First Draft	<p>“[A] proposed draft of a new resolution on Sri Lanka, revealed on Monday, fails to offer any meaningful progress towards accountability, let alone reconciliation. The proposed resolution effectively mutes the chorus of calls for an International Commission of Inquiry, and instead continues to give Sri Lanka time and space. The proposal appears to seek the High Commissioner’s assistance in undertaking an investigation, however, it does not give her the mandate, resources, or direction to investigate and make a legal finding of fact.”³⁸</p>	<p>“The insubstantial draft resolution on Sri Lanka that was released yesterday at the United Nations Human Rights council (UNHRC) has greatly disappointed and shocked the Tamil people, who are the primary victims of the ongoing conflict in the Island of Sri Lanka. The resolution text effectively calls for more of the same: it requests another update by the Human Rights Commissioner in a year’s time and makes another call on Sri Lanka to launch a credible domestic inquiry – despite the Human Rights Commissioner herself declaring that Sri Lanka has no political will to investigate itself.”³⁹</p>
Second Draft	<p>“United Nations Human Rights Council draft resolution 25/1 (revised), if adopted, would finally serve as a meaningful step towards accountability and justice in Sri Lanka, in line with recommendations by many previous UN bodies. The clarification and strengthened language in the latest revision addresses many of the concerns previously raised by the Canadian Tamil Congress (CTC).”⁴⁰</p>	<p>“As far as Tamils are concerned, the resolution in its current form has a number of serious defects. It fails to recognise the ethnocentric dimension of the conflict in the island of Sri Lanka.... There is a common theme to the draft resolution’s shortcomings; we appeal to Member States to understand the pattern behind the violence and oppression – to perceive the underlying theme of a structural genocide of the Tamils.”⁴¹</p>

³⁸ Canadian Tamil Congress Press Release, *New Resolution on Sri Lanka Falls Short: Time for UNHRC to Take Decisive Action*, Mar. 3, 2014,

<http://www.canadiantamilcongress.ca/article.php?lan=eng&cat=pr&id=124> (last visited Feb. 23, 2015).

³⁹ British Tamils Forum Press Release, *Sri Lanka’s victims dismayed by draft resolution at UNHRC*, Mar. 4, 2014, <http://tamilsforum.co.uk/2014/03/sri-lanka%E2%80%99s-victims-dismayed-by-draft-resolution-at-unhrc/> (last visited Feb. 23, 2015).

⁴⁰ Canadian Tamil Congress Press Release, *Canadian Tamil Congress appreciates Revised Draft Resolution on Promoting reconciliation, accountability, and human rights in Sri Lanka*, Mar. 17, 2014, <http://www.canadiantamilcongress.ca/article.php?lan=eng&cat=pr&id=125> (last visited Feb. 23, 2015).

In recent years, some groups, such as CTC and Australian Tamil Congress (ATC) have opted for what seems to be a pragmatic approach, welcoming incremental international progress toward accountability and using caution with words like “Eelam” or “genocide.” Others, such as the BTF, International Council of Eelam Tamils (ICET), and the Transnational Government of Tamil Eelam (TGTE) have opted for what I will call a more hardline stance (or a more principled one, depending on perspective).⁴² Deep fissures between diaspora Tamil groups post-2009 “reflect[] different strands of thinking and ideology.”⁴³ To further complicate the analysis, approaches to accountability can also evolve over time *within* a diaspora organization.⁴⁴

Ideological differences extend beyond accountability advocacy. In January 2015, as voters turned to the polls in Sri Lanka, the Tamil National Alliance, the major Tamil party, decided to support opposition candidate Maithripala Sirisena over Mahinda Rajapaksa.⁴⁵ ICET argued that regime change would do nothing for “Eelam Tamils,” as “[t]he continuing genocide of the Tamil Nation is the direct consequence of the anti-Tamil stance of the Sinhala-Buddhist hegemony.”⁴⁶ BTF stated that Sirisena’s victory “will not still resolve the immediate issues faced by the Tamil people nor address the fundamental issue that has affected the Tamils in Sri Lanka for a very long time.”⁴⁷ TGTE’s leader stated that Sirisena’s victory “enabled only a face change such that the very same [Sinhala-Buddhist] chauvinist structure could reassert itself further.”⁴⁸

By contrast, CTC welcomed the election results, stating: “Mr. Sirisena’s election marks the end of a decade-long dynastic dictatorship of the Rajapakse family, and hails

⁴¹ British Tamils Forum Press Release, *BTF welcomes explicit call for investigation but proposed resolution still has far to go*, Mar. 18, 2014, <http://tamilsforum.co.uk/2014/03/btf-welcomes-explicit-call-for-investigation-but-proposed-resolution-still-has-far-to-go/> (last visited Feb. 23, 2015).

⁴² See, e.g., Walton, *supra* note 34, at 8 (“GTF, for example, has not used the term [genocide] frequently based on the calculation that using the term might undermine their access at the UN.”); Samuel Oakford, *Genocide Replaces Separatism in Tamil Diaspora Vocabulary*, Inter Press Service, Oct. 26, 2013, <http://www.ipsnews.net/2013/10/genocide-replaces-separatism-in-tamil-diaspora-vocabulary/> (last visited Feb. 23, 2015) (contrasting “tone” of CTC’s advocacy with that of TGTE).

⁴³ Cathrine Brun and Nicholas Van Hear, *Between the local and the diasporic: the shifting centre of gravity in war-torn Sri Lankan transnational politics*, 20 *Contemporary South Asia* 61, 70 (2012).

⁴⁴ For example, the BTF “largely avoided using the term ‘genocide’ in press releases, until 2012, when it began to use the term frequently.” Walton, *supra* note 34, at 9.

⁴⁵ See, e.g., *TNA Supports Maithri: Full Statement Issued By The TNA*, Colombo Telegraph, Dec. 30, 2014, <http://www.colombotelegraph.com/index.php/tna-supports-maithri/> (last visited Feb. 23, 2015).

⁴⁶ Sri Ranjan, *Neither Mahinda Nor Maithri Is Fit To Be The Choice Of Eelam Tamils: ICET*, Colombo Telegraph, Jan. 1, 2015, <https://www.colombotelegraph.com/index.php/neither-mahinda-nor-maithri-is-fit-to-be-the-choice-of-eelam-tamils-icet/comment-page-1/> (last visited Feb. 23, 2015).

⁴⁷ British Tamils Forum Press Release, *British Tamil Forum response to the election results and the new government in Sri Lanka*, Jan. 9, 2015, <http://tamilsforum.co.uk/2015/01/british-tamil-forum-response-to-the-election-results-and-the-new-government-in-sri-lanka/> (last visited Feb. 23, 2015).

⁴⁸ Visuvanathan Rudrakumaran, *Tamil Votes Amounted Not An Endorsement of Sirisena*, Colombo Telegraph, Jan. 21, 2015, <https://www.colombotelegraph.com/index.php/tamil-votes-amounted-not-an-endorsement-of-sirisena/> (last visited Feb. 23, 2015).

the possibility and hope for a new democratic era.”⁴⁹ Global Tamil Forum expressed “hope that the new administration will engage the Diaspora in good faith and in a meaningful way.”⁵⁰

As this discussion shows, diaspora Tamil advocacy is not monolithic. Different groups strongly disagree on how to frame calls for accountability and chart the appropriate political course for Tamils in Sri Lanka. These differences have persisted since 2009, and there is no reason to believe they will ease as Sri Lanka moves forward.

The Sirisena administration and the international community may find it easier to engage with some diaspora groups over others.⁵¹ There may be greater room to engage with groups like CTC than with groups like ICET in making incremental progress toward accountability, insofar as international will for a U.N. Security Council referral to the International Criminal Court or appetite for an independent Tamil Eelam are lacking. However, this article avoids mapping capacities for strategic engagement across diaspora groups, choosing instead to explore possible ways to include diverse diaspora narratives within an inclusive transitional justice framework for Sri Lanka. As discussed in Section V, diaspora Tamils, whether hardline or pragmatic, may have a stake as victims in transitional justice mechanisms that seek truth, pursue justice, and provide redress.

III. Diaspora Accountability Advocacy: “Lawfare” or “Long-Distance Nationalism”?

Recently, legal scholars have started to ask whether the political use of international humanitarian law results in illegitimate “lawfare,” or the use of law as a tool of war. Likewise, some political science and international relations scholars focus on whether conflict-generated diasporas behave as peace-promoters or peace-wreckers. As discussed below, both analyses fall short. Diaspora Tamils have pushed for justice in Sri Lanka for decades, and they will continue to do so regardless of whether they are viewed as engaging in lawfare or peace-wrecking behavior. The real question, discussed in Sections IV and V, is how to understand the motivations behind diaspora advocacy and whether diverse diaspora narratives can be incorporated in an inclusive transitional justice framework.

⁴⁹ Canadian Tamil Congress Press Release, *Canadian Tamil Congress Congratulates Maitrhipala Sirisena*, Jan. 9, 2015, <http://www.canadiantamilcongress.ca/article.php?lan=eng&cat=pr&id=154> (last visited Feb. 23, 2015).

⁵⁰ Global Tamil Forum Press Release, *GTF eager for talks between new SL government and Tamil Diaspora groups*, Jan. 11, 2015, <http://www.globaltamilforum.org/media/news/gtf-eager-for-talks-between-new-sl-government-and-tamil-diaspora-groups-gtf-eager-for-talks-between-new-sl-government-and-tamil-diaspora-groups.aspx> (last visited Feb. 23, 2015).

⁵¹ The International Crisis Group suggests that Sri Lanka and other governments “should do their best to support moderate, non-separatist voices within the diaspora.” *The Sri Lankan Tamil Diaspora after the LTTE*, *supra* note 24, at 24. A U.S. government cable likewise recognized that the diaspora Tamil community was not “homogeneous” and recommended “a redoubled effort to reach out to Tamil groups in the U.S.” See Classified Cable from Ambassador Blake, *Sri Lanka, Engaging the Tamil Diaspora*, Wikileaks, Mar. 20, 2009, https://www.wikileaks.org/plusd/cables/09COLOMBO314_a.html (last visited Feb. 27, 2015).

A. Lawfare?

Lawfare has become a buzzword. Though its meaning is contested, it is commonly used to refer to the “strategy of using—or misusing—law as a substitute for traditional means to achieve an operational objective.”⁵² The term was coined in 2001 by American military lawyer Charles Dunlap, who argued that “the use of law as a weapon of war is the [newest] feature of twenty-first century combat.”⁵³

Proponents of the lawfare critique argue that the use of lawfare is “illegitimate and untenable” to the extent it risks politicizing and undermining respect for international law.⁵⁴ Opponents argue that the lawfare critique misses the mark and impermissibly seeks to limit or stigmatize the pursuit of legal recourse, particularly through international law.⁵⁵ For example, military lawyer Gregory Noone argues that “[a]lthough there are real and important harms that can be caused by those who abuse the law and have no interest in justice, the harm would be greater if access to the courts is limited.”⁵⁶ The lawfare critique is criticized for “fail[ing] to recognize that the central purpose of any legal system is to offer a viable alternative to the use of force.”⁵⁷ Indeed, Dunlap himself suggests that “rather than warring over semantics, we should enthusiastically embrace the

⁵² Charles J. Dunlap, Jr., *Lawfare Today: A Perspective*, 3 Yale J. Int’l Aff. 146, 156 (2008).

⁵³ Charles J. Dunlap, Jr., *Law and Military Interventions: Preserving Humanitarian Values in 21st Century Conflicts* (Carr Center for Human Rights, John F. Kennedy Sch. of Gov’t, Harvard U., Working Paper, 2001), available at <http://www.hks.harvard.edu/cchrp/Web%20Working%20Papers/Use%20of%20Force/Dunlap2001.pdf> (last visited Oct. 17, 2014). Commonly cited examples of lawfare include: Bush Administration officials accusing private attorneys representing Guantanamo inmates of engaging in “lawfare.” Scott Horton, *The Dangers of Lawfare*, 43 Case W. Res. J. Int’l L. 163 (2010); Israel’s defenders criticizing The Goldstone Report on Israeli military action in Gaza from 2008-2009 as “lawfare.” Michael Newton, *Illustrating Illegitimate Lawfare*, 43 Case W. Res. J. Int’l L. 255 (2010); critics claiming Serbia engaged in “lawfare” by filing suit before the International Court of Justice challenging Kosovo’s declaration of independence following Serbia’s military defeat. Paul R. Williams, *Lawfare: A War Worth Fighting*, 43 Case W. Res. J. Int’l L. 145, 149 (2010); and Israeli and Palestinian attempts to document war crimes by the other side after the 2014 Gaza War, again prompting cries of “lawfare.” See, e.g., Kevin Connolly, *Israeli-Palestinian conflict: How ‘lawfare’ has become a weapon*, BBC News, Oct. 8, 2014, <http://www.bbc.com/news/world-middle-east-29423784> (last visited Oct. 17, 2014).

⁵⁴ Newton, *supra* note 53, at 255 (“Illegitimate exploitation of the law in turn permits the legal structure to be portrayed as a mass of indeterminate subjectivity that is nothing more than another weapon in the moral domain of conflict at the behest of the side with the best cameras, biggest microphones, and most compliant media accomplices.”).

⁵⁵ William J. Aceves, *Litigating the Arab-Israeli Conflict in U.S. Courts: Critiquing the Lawfare Critique*, 43 Case W. Res. J. Int’l L. 313, 318 (2010); William A. Schabas, *Gaza, Goldstone, and Lawfare*, 43 Case W. Res. J. Int’l L. 307, 308-09 (2010); Gregory P. Noone, *Lawfare or Strategic Communications?*, 43 Case W. Res. J. Int’l L. 73, 75-76 (2010); see also Neve Gordon, *Human Rights as a Security Threat: Lawfare and the Campaign against Human Rights NGOs*, 48 Law & Soc’y Rev. 311, 313 (2014) (“The construction of human rights as a security threat, it should be emphasized, is carried out *not* in order to reject human rights *tout court*, but in order to curb what neoconservative groups define as a particular ‘political’ application of human rights.”).

⁵⁶ Noone, *supra* note 55, at 85.

⁵⁷ Aceves, *supra* note 55, at 318.

extent to which lawfare may facilitate courtroom combat replacing conventional combat as the situs of many 21st century conflicts.”⁵⁸

Applied to the Sri Lankan context, accountability efforts by some diaspora Tamils could be viewed as “lawfare” to the extent these efforts are grounded in the pursuit for a separatist Tamil homeland. For example, attempts by some diaspora members to ignore or minimize human rights abuses faced by other minorities in Sri Lanka—or to oppose solutions that would strengthen the rule of law throughout Sri Lanka—could be seen as acts of lawfare through U.N. mechanisms.

Although human rights groups have yet to apply the “lawfare” label, some human rights advocates have made similar types of arguments about diaspora accountability advocacy. In a paper titled, “War by Other Means?” Richard Gowing argued that despite employing the universal language of human rights, the rhetoric used by some accountability advocates in the Tamil diaspora reveals an underlying political agenda.⁵⁹ Similarly, the International Crisis Group stated that post-war “diaspora initiatives attempt to carry forward the struggle for an independent state in more transparent and democratic ways, but they are still pursuing the LTTE’s agenda, just without its guns.”⁶⁰

The problem with this type of analysis is that it fails to suggest an appropriate response. Assuming that certain diaspora Tamils engage in lawfare in pursuit of accountability, responding with the “lawfare” label accomplishes little. Diaspora activists will push for accountability for what they view as violations of international criminal law whether or not their advocacy is deemed lawfare. As some practitioners note, “lawfare exists and is used every day by both those seeking to achieve legitimate ends and those seeking to achieve illegitimate ends,” and it would be “naïve” to fail to adequately consider the political ramifications of international criminal justice.⁶¹

Moreover, accusing Tamil diaspora groups of lawfare is exactly what the Rajapaksa administration did to tarnish international accountability efforts. The lawfare critique is criticized for relying on the term as a code that connotes an entire argument for conservatives (neoconservatives and right-wing ideologues, in particular) to stigmatize all arguments drawn from international law, particularly as to those who represent alleged terrorists.⁶² Former President Rajapaksa framed the decades-long ethnic conflict in Sri Lanka as a “terrorism” problem, resolved by the government’s military defeat of the Tigers in 2009. His administration branded diaspora accountability efforts as an attempt

⁵⁸ Charles J. Dunlap, Jr., *Does Lawfare Need an Apologia?*, 43 Case W. Res. J. Int’l L., 142-43 (2010).

⁵⁹ Richard Gowing, *War by Other Means? An analysis of the contested terrain of transitional justice under the ‘Victor’s Peace’ in Sri Lanka* (London School of Economics Working Paper No. 13-138) 23-24, 31 (Jan. 2013) (also arguing that the Rajapaksa government’s constructed narrative of transitional justice revealed a hidden political agenda). *Note:* This paper was published before Gowing joined Sri Lanka Campaign for Peace and Justice as its Deputy Director and does not necessarily reflect the views of that organization.

⁶⁰ *The Sri Lankan Tamil Diaspora after the LTTE*, *supra* note 24.

⁶¹ Williams, *supra* note 53, at 145; David Crane, *The Take Down: Case Studies Regarding “Lawfare” in International Criminal Justice: The West African Experience*, 43 Case W. Res. J. Int’l L. 201, 212 (2011).

⁶² See Schabas, *supra* note 55, at 308-309; Noone, *supra* note 55, at 75-76; Horton, *supra* note 53.

to achieve could not be obtained on the battlefield: an independent homeland for Tamils.⁶³

It is in this spirit that in March 2014, the Rajapaksa administration proscribed 16 Tamil diaspora organizations and 424 individuals as “terrorism” financiers.⁶⁴ This was followed by a blanket ban barring *all* foreign passport holders from visiting the north.⁶⁵ Then-Defense Secretary Gotabhaya Rajapaksa accused diaspora Tamils of misusing tourist visas to engage in political activities, “projecting false propaganda on human right violations.”⁶⁶ Parliamentary discussion regarding the travel ban underscored the administration’s narrative frame, in which diaspora Tamils were equated with Tiger terrorists:

The Hon. M.A. Sumanthiran [Tamil politician from the TNA party]:
“Why is the North being treated as a separate country?” is the question that I am posing. People who come into this country can freely get about anywhere else but not to the North. You have to get a special permit to go to the North. [...]

An Hon. Member: There can be LTTEers going to Jaffna.

The Hon. M.A. Sumanthiran: Where is the LTTE? I thought you destroyed them fully.

An Hon. Member: A diaspora.⁶⁷

⁶³ See, e.g., Udeshi Amarasinghe, *Modus Operandi: Tamil Diaspora and LTTE Organizations*, Jun. 5, 2014,

http://www.defence.lk/new.asp?fname=Modus_Operandi_Tamil_Diaspora_and_LTTE_Organisations_20140605_05 (last visited Oct. 19, 2014); *TNA Says Un-Ban Ban*, Apr. 30, 2014,

http://www.defence.lk/new.asp?fname=TNA_Says_UN_BAN_BAN_20140430_01 (government minister declared Tamil National Alliance politicians, who form the majority in the Tamil-dominated North, “terrorists” for calling on Sri Lanka to retract the ban on diaspora organizations).

⁶⁴ Gazette No. 1854/41 (Mar. 21, 2014) (Sri Lanka), available at https://www.colombotelegraph.com/wp-content/uploads/2014/04/sl_banned_names.pdf (last visited Oct. 19, 2014). As peace activist Jehan Perera writes, the Sri Lankan government takes a hard stance against the UNHRC war crimes investigation, describing it as “an international conspiracy to punish the country’s leaders who defeated the LTTE and ... eventually seek the division of the country.” Jehan Perera, *Shift In Priority From Ethno-Nationalism To Good Governance*, Colombo Telegraph, Oct. 20, 2014,

<https://www.colombotelegraph.com/index.php/shift-in-priority-from-ethno-nationalism-to-good-governance/> (last visited Oct. 20, 2014).

⁶⁵ *Prior approval for foreign nationals visiting the north*, Ministry of Defence and Urban Development, Oct. 16, 2014,

http://www.defence.lk/new.asp?fname=Prior_approval_for_foreigners_visiting_the_North_20141016_02 (last visited Nov. 4, 2014).

⁶⁶ *Some tourists engage in politics*, Ministry of Defence and Urban Development, Jan. 4, 2014,

http://www.defence.lk/new.asp?fname=Some_tourists_engage_in_politics_20140104_02 (last visited Jan. 25, 2015).

⁶⁷ M.A. Sumanthiran, *Tamils Were Not Fooled By Any Of The Roads, The Bridges, The Mega Projects Govt Gave*, Colombo Telegraph, Nov. 3, 2014, <https://www.colombotelegraph.com/index.php/tamils-were-not-fooled-by-any-of-the-roads-the-bridges-the-mega-projects-govt-gave/> (last visited Nov. 4, 2014).

The Rajapaksa administration declared the Tamil Diaspora as the new enemy in the state's war on terror. In September 2009, the Secretary to the Ministry of Defense stated that allegations of war crimes by the diaspora constituted a threat "as serious as the one posed by the LTTE."⁶⁸ In May 2010, military spokesperson Major General Samarasinghe stated:

[W]e have won the war in Sri Lanka but internationally the second phase of the war has started. Not only the forces, but the whole nation, including the people living overseas must get together and stop this international LTTE propaganda and activities. We will have to conduct a separate operation on that which the government has already started.⁶⁹

The Minister of External Affairs declared in 2010 that "boycott Sri Lanka" campaigns were undertaken by "[diaspora] groups close to the LTTE, knowing very well that they cannot unleash violence the way they did with impunity in the past."⁷⁰

It would be less than satisfying to adopt the Rajapaksa government's framework to further diminish and marginalize diaspora views. An Israeli scholar notes that accusations by neoconservatives that "human rights work is lawfare" aims to silence and obstruct this type of work.⁷¹ Moreover, some argue that applying a counter-terrorism framework to diaspora Tamil advocacy effectively "negates the role of the Sri Lankan state in establishing the conditions of conflict."⁷² As discussed in Sections IV and V, an inclusive transitional justice program for Sri Lanka may require a more nuanced approach.

⁶⁸ *Sri Lanka targeted for defeating LTTE terror-Defence Sec.*, Sept. 18, 2009, http://www.priu.gov.lk/news_update/Current_Affairs/ca200909/20090918sl_targeted_defeating_ltte_terror.htm (last visited Nov. 7, 2014).

⁶⁹ *Second phase of war begun*, Daily Mirror, May 12, 2010, <http://www.dailymirror.lk/news/3710-tiger-propaganda-crackdown.html> (last visited Nov. 7, 2014).

⁷⁰ *Minister Peiris refutes LTTE Propaganda in London*, President Media Unit, Oct. 21, 2010, http://www.priu.gov.lk/news_update/Current_Affairs/ca201010/20101021minister_peiris_refutes_ltte_propaganda_london.htm (last visited Nov. 7, 2014); see also Vicki Sentas, *One more successful war? Tamil diaspora and counter-terrorism after the LTTE*, in *Counter-Terrorism and State Political Violence: The 'War on Terror' as Terror 97* (Scott Poynting and David Whyte, eds., 2012) (arguing that "terrorism" framing on the part of the Sri Lankan government before and after the war masks state violence). Post-regime change, the Sirisena administration appears to have softened the narrative, canceling the travel ban for foreign passport holders; Venkat Narayan, *Mangala promises demilitarisation of North, domestic war crimes probe... calls upon TNA to join govt*, The Island, Jan. 20, 2015, http://www.island.lk/index.php?page_cat=article-details&page=article-details&code_title=118038 (last visited Jan. 21, 2015); *Sri Lanka Scraps Ban on Foreigners Visiting Northern Former War Zone*, N.Y. Times, Jan. 16, 2015, <http://www.nytimes.com/reuters/2015/01/16/world/asia/16reuters-sri-lanka-north-ban.html> (last visited Jan. 21, 2015). However, as of the time of this article, targeted bans on 424 diaspora individuals and 16 organizations remain in place.

⁷¹ Gordon, *supra* note 55, at 318.

⁷² Sentas, *supra* note 70, at 107.

B. Long-Distance Nationalism?

There is a growing body of literature on the role of conflict-generated diasporas in promoting peace or fueling conflict. The term “conflict-generated diasporas” refers to groups, such as Tamils, “who have fled their country due to large-scale violence and abuses.”⁷³ At the risk of oversimplification, the bulk of literature in this genre evaluates whether conflict-generated diasporas are good or bad actors by assessing whether they help secure peace or prolong homeland conflict.⁷⁴

A 2004 study by World Bank economists concluded that “a large diaspora considerably increases the risk of repeat conflict.”⁷⁵ Benedict Anderson coined the phrase “long-distance nationalists” to characterize the role of conflict-generated diasporas in prolonging homeland conflicts. He argued that diaspora groups pursue identity politics and fuel exclusionary movements in their home countries because they do not have to face the consequences—in effect, engaging in politics without accountability.⁷⁶ This analysis frames diaspora advocacy as “hate from a distance”⁷⁷ by “distant warriors”⁷⁸ who can take out their “frustrations and fantasies”⁷⁹ without having to face political consequences. Some scholars assert that diaspora politicking is motivated by “guilt of departure” from leaving fellow compatriots behind in a war zone.⁸⁰ Along the same vein, a World Bank policy paper concluded that “diasporas tend to be more extreme than the population remaining in the country of origin: supporting extremism is a simple way of

⁷³ Huma Haider, *Transnational Transitional Justice and Reconciliation: The Participation of Conflict-Generated Diasporas in Addressing the Legacies of Mass Violence*, 27 *J. of Refugee Studies* 207, 211 (2014).

⁷⁴ See, e.g., Eva Ostergaard-Nielsen, *Diasporas and Conflict Resolution – Part of the Problem or Part of the Solution?* (Seminar on Diaspora and Conflict, Danish Institute for International Studies, Copenhagen, Den.), Dec. 8, 2005, at 12, available at <http://subweb.diis.dk/sw20879.asp> (last visited Nov. 7, 2014); Steven Vertovec, *Diasporas good? Diasporas bad?* (Centre on Migration, Policy and Society, Univ. of Oxford, Oxford, U.K.), 2006, available at https://www.compas.ox.ac.uk/fileadmin/files/Publications/working_papers/WP_2006/WP0641-Vertovec.pdf (last visited Feb. 24, 2015).

⁷⁵ Paul Collier and Anne Hoeffler, *Greed and Grievances in Civil War*, 56 *Oxford Economic Papers* 563, 575 (2004).

⁷⁶ Benedict Anderson, *Long Distance Nationalism*, *The Spectre of Comparisons: Nationalism, Southeast Asia and the World* 58, 74 (Benedict Anderson ed. 1998) (“The participant rarely pays taxes in the country in which he does his politics; he is not answerable to its judicial system; he probably does not cast even an absentee ballot in its elections because he is a citizen in a different place; he need not fear prison, torture, or death, nor need his immediate family. But, well and safely positioned in the First World, he can send money and guns, circulate propaganda, and build intercontinental computer information circuits, all of which can have incalculable consequences in the zones of their ultimate destinations.”).

⁷⁷ Michael Ignatieff, *The hate stops here*, *Globe & Mail*, Oct. 25, 2001 at A17 (“Diaspora nationalism is a dangerous phenomenon because it is easier to hate from a distance: You don't have to live with the consequences—or the reprisals.”).

⁷⁸ Camilla Orjuela, *Distant Warriors, Distant Peace Workers? Multiple Diaspora Roles in Sri Lanka's Violent Conflict*, 8 *Global Networks* 436, 441 (2008).

⁷⁹ Mary Kaldor, *New and Old Wars: Organized Violence in a Global Era* 1951 (2013); *Anderson*, supra note 76, at 75.

⁸⁰ Ignatieff, supra note 77.

asserting continued identity with the place that has been left.”⁸¹ Conflict-generated diasporas, it is argued, may resist conflict resolution because homeland conflict may sustain diaspora identities in a foreign land.⁸²

By contrast, other studies note the potentially positive role that diaspora groups can play in negotiating and maintaining peace after a period of conflict.⁸³ Some note the potential ability of diasporas “to transmit the values of pluralism and democracy” to their home countries.⁸⁴ Other studies conclude that conflict-generated diasporas support violence in certain political circumstances in their home countries but promote peace in other circumstances.⁸⁵

In the context of Sri Lanka, diaspora Tamils are generally classified as peace-wreckers with regard to their support for the LTTE.⁸⁶ As one author concludes:

Since 2009, the Tamil diaspora community—those Tamils who fled the country during the course of the war—have been, by all accounts, absolutely instrumental in egging on remnants of the LTTE. From the sidelines and with no stakes in the consequences, they spew ‘racist vitriol’ through avenues like TamilNet to encourage a rekindling of the war in the pursuit of a Tamil homeland.⁸⁷

⁸¹ Paul Collier, *et. al.*, *Breaking the Conflict Trap: civil war and development policy, Volume 1*, (World Bank Research Report 74) (May 2003), available at http://econ.worldbank.org/external/default/main?pagePK=64165259&theSitePK=544849&piPK=64165421&menuPK=64166093&entityID=000094946_0306190405396 (last visited Feb. 24, 2015).

⁸² Yossi Shain, *The Role of Diasporas in Conflict Perpetuation and Resolution*, 22 *Sais Rev.* 115, 129 (2002) (“Since the threat to the homeland is a powerful tool to mobilize diaspora community members to fund diaspora organizations and engage in political activity in the host state, peace itself can threaten diasporic identity.”); *see also* Ostergaard-Nielsen, *supra* note 74, at 12 (Diaspora Tamils, along with Irish, Ethiopians, and Kurds, are “depicted as hardliners who are unwilling to accept compromises because the conflict is of low cost to them and may have become an integral part of the exile identity.”).

⁸³ Shain, *supra* note 82, at 126 (“Just as far-off diasporas play important roles in supporting violent conflicts involving their homeland states, they may also play a critical role in conflict resolution.”); *see also* Bahar Baser and Ashok Swain, *Diasporas as Peacemakers: Third Party Mediation in Homeland Conflicts*, 25 *Int’l J. on World Peace* 7 (2008).

⁸⁴ Yossi Shain and Aharon Barth, *Diasporas and International Relations Theory*, 57 *Int’l Org.* 449, 450 (2003).

⁸⁵ *See, e.g.*, Maria Koinova, *Can conflict-generated diasporas be moderate actors during episodes of contested sovereignty? Lebanese and Albanian diasporas compared*, 36 *Rev. Of Int’l Studies* 437 (2011); Feargal Cochrane, Bahar Baser & Ashok Swain, *Home Thoughts from Abroad: Diasporas and Peace-Building in Northern Ireland and Sri Lanka*, 23 *Studies In Conflict and Terrorism* 681 (2009).

⁸⁶ Sarah Wayland, *Nationalist Networks and Transnational Opportunities: The Sri Lankan Tamil Diaspora*, 30 *Rev. of Int’l Studies* 405 (2004); Christine Fair, *Diaspora Involvement in Insurgencies: Insights from the Khalistan and Tamil Eelam Movements*, 11 *Nationalism and Ethnic Politics*, 125 (2005); Christine Fair, *The Sri Lankan Tamil Diaspora: Sustaining Conflict and Pushing for Peace*, in *Diasporas in Conflict, Peace-Makers or Peace-Wreckers?* 172, 174 (Hazel Smith and Paul Stares, eds., 2007).

⁸⁷ Elizabeth Leman, *Litmus Test of Our Resolve: War Crimes and International Humanitarian Law in Sri Lanka*, 5 *Elon L. Rev.* 301, 311-12 (2013).

Other studies acknowledge diaspora Tamils as potential peace-promoters, particularly with regard to their efforts in securing the 2002 ceasefire agreement between the Sri Lankan government and the LTTE.⁸⁸

In the post-war context, some have suggested a growing disconnect between Tamils in Sri Lanka and in the diaspora on the issue of Tamil nationalism.⁸⁹ It is argued that post-war initiatives, such as ‘transnational’ diaspora organizations and referenda on the question of Tamil Eelam, “had very little purchase among the Tamils in Sri Lanka whose cause they claimed to espouse, underlining the apparently now large disconnect between the Tamil diaspora and those back home.”⁹⁰ Others disagree, noting that the “dichotomy of ‘insider-outsider’ seldom exists in the self-conception of the diaspora,” whose advocacy is driven both by the intransigence of the Sri Lankan state in addressing Tamil grievances and “the physical threat faced by their friends and families on the island.”⁹¹ As Vimalarajah and Cheran argue, “[t]o say that the Tamil Diaspora does not have to carry the costs of its long-distance politics ... trivializes the pain and trauma of thousands of diaspora Tamils whose family members and relatives have perished in large numbers in the last few months of the war.”⁹²

Ultimately, theories of long-distance nationalism appear to place labels on diaspora behavior in the same vein as the lawfare critique, by deciding whether diaspora Tamils are peace-promoters, peace-wreckers, or something in between. These labels tend to instrumentalize conflict-generated diasporas, suggesting that the international community engage with these groups when they moderate their demands and keep a distance when they do not. This may ultimately hamper conflict transformation: Vimalarajah and Cheran assert that “[t]he classification of [diaspora] actors into extremist or moderate, into good or bad and into legitimate or illegitimate will not only contribute to a further polarization and marginalization but also close the door for any constructive engagement toward any sustainable peace in Sri Lanka.”⁹³

Diaspora Tamils have engaged in transnational advocacy long before 2009, and advocacy continues among second- and third-generation Tamils post-war.⁹⁴ Given this fact, it may be more prudent to move past labels to assess *why* diaspora Tamil voices

⁸⁸ Cochrane, Baser, and Swain, *supra* note 85.

⁸⁹ See, e.g., Ahilan Kadirgamar, *Sri Lanka’s Post-War Political Economy and the Question of Minorities*, Econ. & Pol. Wkly., Jun. 13, 2009, at 72, 72-73; *The Sri Lankan Tamil Diaspora after the LTTE*, *supra* note 24, at 17 (noting a “gap between Tamils overseas and those on the island”).

⁹⁰ Brun and Van Hear, *supra* note 43, at 71.

⁹¹ Luxshi Vimalarajah & R. Cheran, *Empowering Diasporas: The Dynamics of Post-war Transnational Tamil Politics* (Berghof Conflict Research, Berlin, F.R.G.), 2010, at 16-17, available at http://image.berghoffoundation.org/fileadmin/redaktion/Publications/Papers/Occasional_Papers/boc31eBP S.pdf (last visited Nov. 7, 2014).

⁹² *Id.* at 16.

⁹³ *Id.* at 34.

⁹⁴ See, e.g., Luxshi Vimalarajah, et al., *Engaging Tamil Diaspora for Peace and Development: January 2009 – March 2011* (Berghof Peace Support, Berlin, F.R.G.), 2011, at 29, available at http://www.berghof-foundation.org/fileadmin/redaktion/Publications/Other_Resources/SL_Diaspora_Project_Report.pdf (last visited Feb. 26, 2015) (“Tamils will continue to be politically active in the UK until their objectives are achieved.”); *Id.* at 26 (whereas in the 1980s, diaspora members protested before the Sri Lankan High Commission, current diaspora protests target British Parliament and international organizations).

differ and *how* they should be included within transitional justice processes.⁹⁵ Section IV explores collective histories and memories that shape diaspora Tamil advocacy, and Section V explores various means by which the government of Sri Lanka could incorporate a diaspora component into transitional justice mechanisms to seek truth, provide redress, and pursue justice.

IV. Unpacking Diaspora Calls for Justice

Shared memories and histories shape modern narratives. In the case of Sri Lanka's diaspora Tamils, collective memories of violence, marginalization, and impunity shape current narratives for accountability, including among hardline diaspora groups.

A. Transitional Justice and Identity (Re)construction

In the 1980s, as Latin American dictatorships became democracies, the field of transitional justice developed as a set of judicial processes to address human rights violations during democratic transition from repressive regimes.⁹⁶ Since then, the field has expanded broadly to encompass a holistic set of approaches to help achieve accountability, justice, and reconciliation following war crimes and massive human rights abuses.⁹⁷ The United Nations has incorporated transitional justice in its post-conflict toolkit, defining it as “the full range of processes and mechanisms associated with a society’s attempt to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation.”⁹⁸

Broadly speaking, transitional justice encompasses a justice process (to hold perpetrators accountable), a reparation process (to redress victims), a truth process (to

⁹⁵ Vimalarajah and Cheran make the same critique: “The inadequacies in both aforementioned strands of thinking—diaspora as peace promoter or spoiler—partly result from a descriptive analysis of the diaspora. We suggest looking at the Tamil diaspora from a different angle: not by what it is doing but by why it’s doing what it is doing.” Vimalarajah & Cheran, *supra* note 91, at 17.

⁹⁶ See, e.g., Paige Arthur, *How “Transitions” Reshaped Human Rights: A Conceptual History of Transitional Justice*, 31 Hum. Rts. Q. 321 (2009) (describing how transitions from authoritarian regimes to democracy in countries like Argentina shaped initial rule of law and accountability approaches to transitional justice methods); Martina Fischer, *Transitional Justice and Reconciliation: Theory and Practice*, in *Advancing Conflict Transformation: The Berghof Handbook II*, 405, 407 (Beatrix Austin, Martina Fischer, and Hans J. Gießmann, eds. 2011), available at http://www.berghof-handbook.net/documents/publications/fischer_tj_and_rec_handbook.pdf (last visited Oct. 26, 2014) (describing evolution of transitional justice theory and practice).

⁹⁷ See generally, Ruti G. Teitel, *Transitional Justice Genealogy*, 16 Harv. Hum. Rts. J. 69 (2003) (describing three generations of transitional justice: “victor’s justice” at Nuremberg (phase I), 1980s/1990s debates of truth versus justice and peace versus justice (phase II), and the mainstreaming of transitional justice in post-conflict societies (phase III)); Martha Minow, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence* (1998) (exploring contours of restorative justice versus retributive or punitive justice in the wake of mass atrocities).

⁹⁸ The Secretary-General, *Guidance Note of the Secretary-General on the United Nations Approach to Transitional Justice*, 3 (March 10, 2010), available at http://www.unrol.org/files/TJ_Guidance_Note_March_2010FINAL.pdf (last visited Feb. 25, 2014).

fully investigate what happened during the conflict and identify perpetrators and victims), and an institutional reform process (to ensure that atrocities do not happen again). As stated by the *Chicago Principles on Post-Conflict Justice*, “[a]n appropriate post-conflict justice strategy will reveal as much truth as possible; achieve as much reconciliation as is feasible; provide as full and complete reparations as are affordable; and, address past violence in an open, transparent, and truthful manner.”⁹⁹

The field of transitional justice has recently started to consider “fourth generation concerns,” including “the need to account for the underlying politics of transitional justice work, the need to balance local and international agency, and the need for greater economic justice.”¹⁰⁰ One fourth-generation concern is how to address collective identities in formulating transitional justice processes:

In order for [transnational justice] to deal adequately with the factors at work in conflicts with an identity dimension, it must first acknowledge and assess the relative weight of those factors in any particular context. Concretely, this means taking stock of the role that fear of domination, a pervasive sense of threat, ethnic entrepreneurs, dehumanizing myths and narratives, etc., played in the past and continue to play in the present.¹⁰¹

Societies exposed to protracted violent conflict require more than the signing of a peace treaty—they “also require adjustments at a more fundamental psychological level.”¹⁰² “A generic inquiry that does not account for the varying experiences of specific sectors of the population cannot appropriately recognize victims, fully understand the abuses and violations that occurred, or make effective policy recommendations to prevent their recurrence.”¹⁰³ At a minimum, “much more contextual analysis is needed—of nationalist

⁹⁹ *Chicago Principles on Post-Conflict Justice* (2008), at 10, available at http://law.depaul.edu/about/centers-and-institutes/international-human-rights-law-institute/projects/Documents/chicago_principles.pdf (last visited Feb. 26, 2015). The *Chicago Principles*, developed by M. Cherif Bassiouni and a team of 180 scholars and practitioners, provide guiding principles for a diverse range of transitional justice mechanisms.

¹⁰⁰ Dustin N. Sharp, *Interrogating the Peripheries: The Preoccupations of Fourth Generation Transitional Justice*, 26 Harv. Hum. Rts. J. 148 (2013).

¹⁰¹ Paige Arthur, *Identities in Transition: Developing Better Transitional Justice Initiatives in Divided Societies*, Int’l Ctr. For Transitional Justice 10 (Nov. 2009), <http://ictj.org/sites/default/files/ICTJ-Global-Divided-Societies-2009-English.pdf> (last visited Feb. 25, 2015).

¹⁰² Judy Barsalou, *Trauma and Transitional Justice in Divided Societies* (United States Institute of Peace, Washington, D.C.), (Apr. 2005), <http://www.usip.org/sites/default/files/sr135.pdf> (last visited Feb. 25, 2015); see also Paige Arthur, *Introduction: Identities in Transition*, in *Identities in Transition: Challenges for Transitional Justice in Divided Societies* 1, 8 (Paige Arthur ed., 2010) (“Collective victimization and collective guilt are common outcomes of conflict and systematic domination, making recognition of victimhood on the other “side” difficult, if not impossible.... Victim identities are thorny things, especially when they become entrenched across generations. At the same time, if they help humanize the suffering of those in another group, they can be valuable.”).

¹⁰³ *Truth Seeking: Elements of Creating an Effective Truth Commission*, Int’l Ctr. for Transitional Justice 57 (Mar. 18, 2013), <http://www.ictj.org/sites/default/files/ICTJ-Book-Truth-Seeking-2013-English.pdf> (last visited Feb. 25, 2015).

myths, of the role of elites, and of fault lines of mistrust, among other things—than is typically undertaken by transitional justice actors.”¹⁰⁴ Put differently, reconciliation requires deeper introspection into the memories, identities, myths, and collective narratives that sustained the conflict.¹⁰⁵

Applied to the Sri Lankan Tamil diaspora, it is vital to understand the context of the ethnic conflict underlying Sri Lanka’s civil war, as diaspora Tamils view it, in order to understand why present-day diaspora narratives may take a certain tone. Where the long distance nationalism and lawfare analyses fall short is in failing to look at the specific motivations underlying diaspora positions. In so doing, these approaches fail to unearth the “experiences, vulnerability and hence the deprivation felt by those who live in the diaspora because of conflict” and thus “marginalize[] the actual human being who is the object of the study.”¹⁰⁶

Sri Lanka’s post-war Lessons Learnt and Reconciliation Commission (LLRC) emphasized the need to “constructively engage those groups that still harbor adversarial attitudes and the LTTE approach of separation,” recommending that the government create

[a multi-disciplinary task force] to propose a programme of action to harness the untapped potential of the expatriate community, and to respond to the concerns of the so-called ‘hostile diaspora groups,’ and to engage them constructively with the Government and other stakeholders involved in the reconciliation process.¹⁰⁷

¹⁰⁴ Paige Arthur, *Introduction: Identities in Transition*, *supra* note 102, at 13.

¹⁰⁵ Social psychology literature regarding trauma and violence suggests that transitional justice requires individuals to transform their collective identity “by removing the negation of the other from it.” Herbert Kelman, *Reconciliation as identity change: A social-psychological perspective*, in *From Conflict Resolution to Reconciliation* 111, 119 (Y. Bar-Simon-Tov ed. 2004). As Robben and Orozco-Suarez note, collective violence affects more than individual psychological functioning; the “traumatized self” intersects notions of self, society, and culture. Antonius C.G.M. Robben & Marcelo Suarez-Orozco, *Interdisciplinary Perspectives on Violence and Trauma*, in *Cultures under Siege: Collective Violence and Trauma* 1 (Antonius C.G.M. Robben & Marcelo Suarez-Orozco eds., 2000). Drawing from social psychologists’ research on pain and trauma, Kevin Avruch writes that pain “silences one’s voice, constricts one’s vision, and effaces the existence of others.” A victim’s self and identity are “unmade,” such that “healing” of self and identity require identity reconstruction in order for a victim to regain enough agency to recognize and forgive a perpetrator. Kevin Avruch, *Truth and Reconciliation Commissions: Problems in Transitional Justice and the Reconstruction of Identity*, 47 *Transcultural Psychiatry* 33, 45 (2010).

¹⁰⁶ Nirad Pragasam, *Tigers on the mind: an interrogation of conflict diasporas and long-distance nationalism: A study of the Sri Lankan Tamil diaspora in London* (2012) (unpublished Ph.D. dissertation, London School of Economics and Political Science), at 239, available at <http://etheses.lse.ac.uk/460> (last visited Feb. 25, 2015).

¹⁰⁷ LLRC Report, *supra* note 7, at ¶¶ 8.262, 8.265, 9.261. To date, the Sri Lankan government claims it has met this objective by holding a workshop for diplomatic missions in July 2012 and updating the database of diaspora organizations and individuals. See National Plan of Action for the Implementation of LLRC Recommendations §§ 9.261, 9.263 (June 2014), available at <http://www.llrcaction.gov.lk/en/npoa/reconciliation.html> (last visited Feb. 25, 2015). In March 2014, on the heels of diaspora advocacy in Geneva, the Sri Lankan government proscribed 16 diaspora organizations and 424 individuals in a blanket ban, further calling into question the government’s commitment to

The LLRC noted the urgency of diaspora engagement:

If such a comprehensive approach is not adopted urgently, the Commission feels that the current momentum towards creating a hostile external atmosphere could grow, and those groups that advocate such a process would continue to promote polarization that will significantly impair the genuine efforts of others who espouse reconciliation back home in Sri Lanka.¹⁰⁸

Scholars and commentators have echoed this call.¹⁰⁹

A first step in understanding the motivations behind diaspora advocacy is to investigate how diaspora Tamils view “the repercussions of exile on their lives, their paths and their histories.”¹¹⁰ There is a need to move beyond the “single narrative” and recognize diverse, if conflicting, stories.¹¹¹ As Pragasam notes:

[R]ather than just essentializing diaspora opinion and support for bellicose action based on functional ideas of coercion, hate or guilt, in a somewhat instrumental, reductionist and opportunistic sense, it is necessary to interrogate the existence and motivations of such communities within a more subjective, political, and historicized context.¹¹²

The point of this inquiry is neither to elevate a diaspora Tamil narrative nor to subvert other narratives—in the same way that diaspora Tamils must be given a chance to tell their (diverse) stories, so too must Sri Lanka’s Sinhalese, Muslims, Christians, and other groups. The goal instead is to explore how transitional justice processes will need to work at the individual level for individuals to transition from decades of conflict.

constructively engage with the diaspora. Despite the change in government in January 2016 and some overtures to diaspora communities, the Sirisena administration has not delisted the proscribed groups.

¹⁰⁸ LLRC Report, *supra* note 7, at ¶¶ 8.262, 8.265, 9.261.

¹⁰⁹ Salma Yusuf, *Sri Lanka: Engaging the Diaspora*, *The Diplomat*, Nov. 16, 2013, <http://thediplomat.com/2013/11/sri-lanka-engaging-the-diaspora/> (last visited Oct. 22, 2014) (“[Diaspora disillusionment] must be taken seriously. The anguish and grievances of the diaspora community must be addressed quickly and seriously, not only because of its impact on foreign relations, but also because of its implications for domestic stability.”). Yusuf suggests that Sri Lanka create an Office of Diaspora Affairs to educate diaspora Tamils on ground realities and “more importantly,” to make them feel “part of the country’s plans and future.”

¹¹⁰ See, e.g., M. Cornejo, *Political Exile and the Construction of Identity: A Life Stories Approach*, 18 *J. of Cmty. & Applied Social Psych.*, 333, 336 (2008).

¹¹¹ Roxanne Krystalli, Lecture at TEDxGuatemala City (Jan. 14, 2014), <https://www.youtube.com/watch?v=9FMmCopYrn4> (last visited Nov. 7, 2014). Krystalli, a researcher of wartime sexual violence and enforced disappearance in Latin America, asked the audience whether it is possible to tell a story that fundamentally does not belong to you. “Who really owns a narrative,” she asked. “That narrative is not mine, and you should be hearing from direct victims and survivors of violence. It is *their* experience that should be at the center of the story.” Krystalli cautioned the audience that “storytelling is messy,” and any narrative that makes it look easy is likely an oversimplification.

¹¹² See, e.g., Pragasam, *supra* note 106, at 23.

Ultimately, there may not be common ground among divergent actors on whether genocide occurred or whether Tamil Eelam is the desired end-game. The truth-seeking component of transitional justice may ultimately reflect competing truths. Still, without recognizing the role of collective memories and identities in shaping present diaspora narratives, it is unrealistic to expect groups to moderate their tone or to reconcile. Calls for diaspora Tamils to condemn LTTE abuses or moderate their calls for Eelam¹¹³ may require members of the diaspora to revisit their constructed identities—no easy task.¹¹⁴

B. Collective Memories and Identities Among Diaspora Tamils

Researcher Nirad Pragasam interviewed dozens of Sri Lankan Tamils in London over the course of three years to understand their motivations and identity-perceptions. He found that for many, “the Sri Lanka they have ‘left behind,’ a Sri Lanka that they nonetheless ‘live within,’ is a place defined by the consequences of oppression, violence and conflict, a conflict that they themselves still feel presently engaged in and hence, it is a conflict that informs their sense of self on various levels.”¹¹⁵ Pragasam concluded that collective identity among diaspora Tamils was not merely shaped by the trauma of the past, but also by the present existentialist condition of being a member of the diaspora.¹¹⁶ Likewise, a survey of diaspora Tamils in the U.K. revealed that “rather than creating a victim complex—although feelings of anger, grief, and frustration were mentioned—this feeling of being an oppressed people assisted in strengthening the will to resist and led to clear statements that to be ‘Tamil’ was to be ‘not Sri Lankan.’”¹¹⁷ Similarly, a health worker treating Tamil asylum seekers in London observed that the Tamils’ suffering continued after leaving Sri Lanka.¹¹⁸

Pragasam found that Tamils he met had become radicalized both as a result of personal experiences of marginalization and victimization and as a result of frustration

¹¹³ See, e.g., *The Sri Lankan Tamil Diaspora after the LTTE*, *supra* note 24, at i (“[U]ntil it moves on from its separatist, pro-LTTE ideology, the diaspora is unlikely to play a useful role in supporting a just and sustainable peace in Sri Lanka.”); Kadirgamar, *supra* note 89 (calling for pro-LTTE diaspora to drop calls for a separate state).

¹¹⁴ While evaluating victim participation in Cambodia’s ECCC trials, researcher Kjetil Grødum concluded: “[t]ransitional justice narratives require the victims to think differently about the stories and narratives of the past that they have used to configure their identity. Doing this one must be conscious of the fact that to question these stories and the truth value of their memories is to question a fundamental part of their identity.” Kjetil Grødum, *Narrative Justice: A study of transitional justice in Cambodia discussed on the basis of elements from Paul Ricoeur’s philosophy*, at 146 (2012) (unpublished Ph.D. dissertation, Univ. of Agder), available at http://www.stiftelsen-arkivet.no/files/Phd_Kjetil_Grodum_160102012_red.pdf.

¹¹⁵ Pragasam, *supra* note 106, at 110.

¹¹⁶ *Id.* at 66.

¹¹⁷ Vimalarajah, et al., *supra* note 91, at 24.

¹¹⁸ The reason for their continued suffering was “[n]ot because now they are fearful of the Sinhalese, but their own issues, their own stuff is coming out, depression, anger, domestic violence, a sense of not belonging, you know, being in a place, but wanting to be in a place which is not there anymore.” Race on the Agenda, Through the Generations Diaspora Project: Interview of Ambica Selvaraj, <http://tamilgenerations.rota.org.uk/i-wanted-to-be-free/> (last visited Oct. 21, 2014).

that moderate Tamil leaders could not protect Tamils in Sri Lanka.¹¹⁹ Pragasam found that many he interviewed “viewed the LTTE as a necessary and acceptable evil in the face of a history of oppression, discrimination, human rights abuses, and war crimes.”¹²⁰

Sri Lanka at independence in 1948 was seen as a model for growth and development in the region. The country experienced relative harmony among its ethnic communities.¹²¹ Almost 70 years later, Sri Lanka is marked by bitter ethnic polarization, increased authoritarianism, and diminished rule of law.¹²² This did not happen overnight—instead, a series of ethnocentric policies by the majority Sinhalese government were met with ruthless terrorism by the LTTE:

- Sinhala replaced English as the country’s sole official language in 1956, forcing thousands of Tamils to resign from government service due to lack of fluency in Sinhala. The 1972 Constitution further consolidated the ‘Sinhala Only’ policy, removing provisions that protected minorities from discrimination.¹²³
- Mass riots and state-sponsored pogroms targeting Tamil civilians occurred in 1956, 1958, 1977, and 1983, causing a mass exodus of Tamils from the island. Nonviolent Tamil protests, including those led by Tamil politicians, were brutally suppressed.¹²⁴
- Successive Sri Lankan governments abrogated political agreements with Tamil leaders, causing many Tamils to lose faith in the political process.¹²⁵
- In the 1960s and 1970s, the government implemented standardization policies and quotas, restricting university admissions for Tamils.¹²⁶
- In 1979, the Sri Lankan government passed the Prevention of Terrorism Act, which allowed the police to arrest anyone suspected of terrorism for up to 18 months without charge. Many Tamils were arbitrarily detained under this controversial law, which remains in effect today.
- In 1981, mobs burned the Jaffna Public Library, which housed rare Tamil manuscripts and held a place of cultural significance for the local Tamil community.¹²⁷

¹¹⁹ Pragasam, *supra* note 106, at 120.

¹²⁰ *Id.* at 145.

¹²¹ See, e.g., Neil Devotta, *Sri Lanka at Sixty: A Legacy of Ethnocentrism and Degeneration*, ECON. & POL. WKLY., Jan. 31, 2009, at 46-53.

¹²² *Id.*

¹²³ A.R.M. Imitiyaz, *Ethnic Conflict in Sri Lanka: The Dilemma of Building a Unitary State*, in *Conflict and Peace in South Asia* 125, 134 (Manas Chatterji & B.M. Jain eds., 2008); K.M. de Silva, *Sri Lanka and the Defeat of the LTTE* (Kindle book), Ch. 7.

¹²⁴ See, e.g., Imitiyaz, *supra* note 123, at 131-36.

¹²⁵ Prime Minister S.W.R.D. Bandaranayake (SLFP Party) signed a pact with Tamil leader S.J.V. Chelvanayakam in 1957 but abrogated it in 1958. Prime Minister Dudley Senanayake (UNP Party) signed a pact with Chelvanayakam in 1965, but Tamil parties withdrew support in 1969 after the government failed to implement most of its provisions.

¹²⁶ See, e.g., Devotta, *supra* note 121; Silva, *supra* note 123, at Ch. 6 (“For the Tamils, this district quota system was a heavy blow: the percentage of university seats they held in the science-based disciplines fell from 35.3 in 1970 to 20.9 in 1974, and 19 in 1975.”).

¹²⁷ See, e.g., Devotta, *supra* note 121.

- In July 1983, in response to the LTTE killing 13 soldiers, anti-Tamil riots broke out throughout the island. The state did nothing to stop the looting and mayhem over a seven-day period now referred to as “Black July,” in which upwards of 3,000 were killed and tens of thousands displaced.¹²⁸ Two weeks before the riots, President Jayawardene told press: “I am not worried about the opinion of Jaffna people...now we cannot think of them, not about their lives or their opinion... the more you put pressure in the north, the happier the Sinhala people will be here.... Really if I starve the Tamils out, the Sinhala people will be happy.”¹²⁹

Jayawardene’s government did little in response to Black July, and waves of refugees fled to Tamil-dominated areas of the north and east and to India, the U.K., Canada, and other countries.¹³⁰ After the 1983 riots, Tamil militant groups (not limited to the LTTE) suddenly swelled in recruits, as Tamils decided that the state would never protect them. In response, the Sri Lankan government heavily militarized the north and east, and there was virtual impunity for torture, disappearances, extrajudicial killings, and rape by Sri Lankan security forces.¹³¹

The LLRC concluded that “the root cause of the ethnic conflict in Sri Lanka lies in the failure of successive Governments to address the genuine grievances of the Tamil people.”¹³² As a consequence of their history, one quarter of Sri Lanka’s Tamils, numbering over one million today, fled their country as refugees.¹³³ History—both personal and collective—shapes diaspora narratives:

For every major account of atrocity in the public consciousness of the Tamil community, most Tamils also have a list of incidents ‘closer to home,’ within their own towns and villages, where they themselves or

¹²⁸ Sharika Thiraganama, *In my Mother’s House: Civil War in Sri Lanka* 80 (2011).

¹²⁹ Suthaharan Nadarajah and Dhananjayan Sriskandarajah, 26 *Third World Q.* 87, 92 (2008) (citing Daily Telegraph interview of J.R. Jayawardene, Jul. 11, 1983).

¹³⁰ See, e.g., *Remembering Sri Lanka’s Black July*, BBC News, Jul. 22, 2013, <http://www.bbc.com/news/world-asia-23402727> (last visited Oct. 21, 2014).

¹³¹ See, e.g., U.S. Department of State, *Human Rights Report: Sri Lanka* (1999), available at <http://www.state.gov/j/drl/rls/hrrpt/1999/442.htm> (last visited Nov. 16, 2014) (“Impunity remains a serious problem. Since April 1995 at least 761 persons have been killed extrajudicially by the security forces or have disappeared after being taken into security force custody and are presumed dead. With the exception of the six security force personnel convicted in the 1996 killing of Krishanthi Kumaraswamy, no member of the security forces has been convicted for any of these crimes. In the vast majority of cases where military personnel may have committed human rights violations, the Government has not identified those responsible and brought them to justice.”).

¹³² LLRC Report, *supra* note 7, at ¶¶ 8.150, 9.184; see *id.* at ¶ 9.191 (“The decisive rift in the inter-ethnic relationship came first with the riots of 1958, then in 1977, and culminating in what is known as ‘Black July’ of 1983, and the heinous failure of the then Government to provide adequate protection to Tamil citizens.”).

¹³³ *The Sri Lankan Tamil Diaspora after the LTTE*, *supra* note 24, at 2; Asoka Banderage, *The Separatist Conflict in Sri Lanka: Terrorism, Ethnicity, Political Economy* 219 (2008); Thiraganama, *supra* note 128, at 81 (describing the 1983 riots as “the cataclysmic event of the ethnic conflict,” which “comprehensively transformed Tamil public support for newly emergent Tamil militancy”).

their friends and relatives were exposed to the everyday violence of war.”¹³⁴

Pragasam explains that “[t]he Tamil diaspora was created in response to ethno-nationalist policies of the Sri Lankan state—consequently, this is the frame through which diaspora members perceive current events.”¹³⁵ Pragasam concludes that experiences with violence went beyond “a collection of brutal events” and formed “a psychological and existentialist landscape of violence which forced individuals to reconfigure the very manner in which they saw themselves”—experiences with violence “robbed them of their sense of self and sense of ‘home’, sending them into a journey of ‘exile’ while still in Sri Lanka itself.”¹³⁶ The very pursuit of “Eelam” (or separate Tamil statehood) by some diaspora Tamils reflects a search for “something to believe in, a subjective belief that shapes their own sense of identity, legitimacy as refugees from violence, coherence as a ‘nation-in-exile’ and reality as part of a wider transnational Tamil community, striving for a sense of recognition, justice and dignity in the face of an oppressive ethno-nationalist state.”¹³⁷

Sri Lanka’s former Defense Secretary advised those pressing for accountability to recognize that “past is past.”¹³⁸ Yet, for many, including in the diaspora, the past is far from past.¹³⁹ Interestingly, diaspora narratives continue to be shaped by historic

¹³⁴ Pragasam, *supra* note 106, at 84.

¹³⁵ *Id.* at 170. For example, Pragasam recounts the story of “Raj” in London. Raj remains haunted by the memory of witnessing an army unit enter his home and take his two elder brothers, who were never heard from again. Although his family sent him abroad for his safety, Raj’s narrative frame was set. *Id.* at 82. Another diaspora Tamil in London told Pragasam that his turning point came during the 1983 riots—he went to bed a Sri Lankan and woke up a Tamil. *Id.* at 195. Tamil leader and former Supreme Court judge C.V. Wigneswaran remarked: “The diaspora today still cannot forget the death, damage, destruction that took place in 1983 because of which they had to leave Sri Lanka and go abroad.” *Remembering Sri Lanka’s Black July*, BBC NEWS, Jul. 22, 2013, <http://www.bbc.com/news/world-asia-23402727>.

This collective framing is not unique to the Tamil diaspora experience. Hip hop artist Talib Kweli remarked on black youth burning flags in Ferguson after the police shooting of an unarmed black teen: “[I]t’s that frustration of knowing that you’re part of something [this country] that shuts you out, that shuts you down, and attempts to treat you like you don’t exist.” *Mid-Term Blues: Hip hop, race and protests in Ferguson*, BBC News, Oct. 13, 2014, <http://www.bbc.com/news/world-us-canada-29573718> (last visited Feb. 25, 2015).

¹³⁶ Pragasam, *supra* note 106, at 204.

¹³⁷ *Id.*, at 224-25; *see also* Grødum, *supra* note 115, at 148 (noting that common ideology among diaspora Cambodians serves to help individuals within that community “feel a part of something in relation to a bigger society”).

¹³⁸ Interview by Al Jazeera with Gotabhaya Rajapaksa, Secretary to the Ministry of Defence and Urban Development, Apr. 22, 2010, *available at* http://www.defence.lk/videos/20100422_DecSecAl.wmv.

¹³⁹ D.B.S. Jeyaraj, ‘Black July’ 1983: *Remembering the Horrors of a Pogrom*, DBSJEYARAJ.COM (Jul. 24, 2012, 3:36 PM), <http://dbsjeyaraj.com/dbsj/archives/8439> (Every July after the 1983 pogrom, Sri Lankan “security forces were geared up to face threats to the nation because the Tigers wanted to take revenge for Black July.... This annual “black July” scare helped each year to divert focus away from the remembering of the Black July 1983 pogrom against Tamils. Instead of letting the Nation recall this terrible act with remorse, the spotlight on an imaginary threat from the LTTE and helped reverse roles.”) *Against the Grain*, *supra* note 19, at 31, 36. (State recognition for the most emblematic events in Tamil consciousness has

grievances like language policies, university admissions policies, and state sector hiring policies even as ground realities change.¹⁴⁰

This narrative is not the full story of Sri Lanka, nor the full story of the diverse Tamil diaspora.¹⁴¹ In its quest to become the sole representative of Sri Lankan Tamils, the LTTE killed moderate Tamil politicians and human rights defenders and eliminated rival militant groups.¹⁴² Tamils in LTTE-controlled areas “were frightened to talk in public spaces and as public people, for fear of being called a traitor and thus potentially arrested, taxed, or murdered by the LTTE, or of being taken for LTTE by the Sri Lankan army.”¹⁴³ Many Tamils fled Sri Lanka to escape the LTTE’s reach only to find themselves silenced within diaspora communities.¹⁴⁴

been limited. Official apology for Black July came only in 2004—21 years after the event, following a Presidential Truth Commission on Ethnic Violence. The Sri Lankan government began to rebuild the Jaffna Public Library in 1997 but without local community involvement. When it reopened in 2003, the state missed a key opportunity to apologize.)

¹⁴⁰ For example, “Sinhala Only” policies of 1956 (enshrined in the 1972 Constitution) were scaled back in the 1978 Constitution and Thirteenth Amendment of 1987 (yet to be fully implemented). See Silva, *supra* note 123, at Ch. 7.

¹⁴¹ See Rajiva Wijesinha, *Did Gotabhaya Precipitate the Crisis with Chris Nonis*, Colombo Telegraph (Oct. 26, 2014), <https://www.colombotelegraph.com/index.php/did-gotabaya-precipitate-the-crisis-with-chris-nonis/> (“The head of military intelligence assured me that such [pro-LTTE] elements amounted to no more than 7% of the diaspora, but he then had no answer to my question as to what we were doing about the more than 90% whom we should have been winning over.”).

¹⁴² See, e.g. *Letter from a Tamil in North-East Sri Lanka*, Econ. & Pol. Wkly., (May 30, 2009) at 22, 22-23 (“There were several people from the other organizations who gave their lives in the fight for the rights of the Tamils in Sri Lanka. (The LTTE murdered many of them.) The LTTE dismissed them as traitors for the only reason that they did not belong to their movement and asked the people to revere only the dead LTTE cadres as ‘Great Heroes.’”); Kadirgamar, *supra* note 89, at 73 (“Over the last 25 years, the LTTE not only scuttled every effort with the political process, it also eliminated other Tamil voices capable of taking that process forward.”).

¹⁴³ Thiranagama, *supra* note 128, at 72. Thiranagama makes an important point that scholars narrowly focus on the LTTE in discussing Tamil militancy. The 1983 riots led to widespread recruitment into EPRLF, EROS, PLOTE, TELO, and LTTE; the LTTE gained dominance in 1986, after proscribing its rivals. As Thiranagama notes, “[t]he LTTE rise to supremacy saw 80-90 percent of those who had ‘risen up’ against state discrimination imagining themselves freedom fighters [in rival militant groups] become labeled potential Tamil traitors instead.” *Id.* at 189.

¹⁴⁴ *Id.* at 74 (a Tamil in London “found that most diasporic Tamils were pro-LTTE and unwilling to listen to her stories of LTTE-controlled Jaffna”); Banderage, *supra* note 133, at 116-17 (“As Tamil militant groups monopolized the political space, members of the diaspora who were disinterested in communal politics were persuaded, if not coerced into supporting separatism. Though living in democratic societies, diaspora members found that they were not free to take independent positions on the Sri Lankan situation.”); Interview with anonymous, (Oct. 29, 2014) (discussing Canadian Tamil who fled Sri Lanka because of the LTTE and was asked to carry an LTTE flag in 2009 to protest the war); Samanth Subramaniam, *This Divided Island: Stories from the Sri Lankan War 77* (2014) (recounting the story of a Canadian Tamil who served in the Sri Lankan Army in the 1980s and felt “doubly alienated by the war—not only from the army but also from his own community”); Brun and Van Hear, *supra* note 43, at 61 (describing process by which the LTTE dominated over other Tamil voices in Sri Lanka and among the diaspora). Indeed, the framing of a Sinhala versus Tamil conflict ignores major differences among Tamil

Successive Sri Lankan governments have advanced their own narrative, reducing the ethnic conflict to a war against terrorism. “Triumphalist in its successful ‘war on terror,’ the government of President Mahinda Rajapaksa refused to acknowledge, let alone address, the Tamil minorities’ legitimate grievances against the state.”¹⁴⁵ (The former President proclaimed after the war that there were no longer any minorities in Sri Lanka.¹⁴⁶) Using discourse analysis of major public speeches after the LTTE’s defeat, researcher Andi Schubert shows that the dominant state narrative “makes clear that over the past 30 years Sri Lanka has had to grapple with a terrorist problem rather than an ethnic conflict.”¹⁴⁷ The government’s “discourse then seeks to affirm that this outside/invaser [the LTTE] is both the problem and the cause of conflict in Sri Lanka. This is done through the flattening and simplification of the historical complexities of the conflict in Sri Lanka and limiting the conflict to the time during which the LTTE was in operation.”¹⁴⁸

The government’s narrative must be understood through the psyche of fear and, as with the diaspora narratives above, existential threat. Ethnic Sinhalese and other communities lived in fear of LTTE suicide attacks, and army checkpoints became a routine part of going to school, work, or shopping.¹⁴⁹ Parents would take different routes to reach the same destination so that if one parent died in an LTTE suicide blast, their children would not become orphans.¹⁵⁰ Car bombs, train bombs, bus bombs, airport bombs, and checkpoints became the norm for civilians living outside the north and east.¹⁵¹ As a 2011 Defense Ministry report put it:

The LTTE’s indiscriminate attacks on civilians, including the butchering of children, and its targeting of places of religious worship, made it clear that no one and nothing was safe from its violence. This placed tremendous strain on ordinary life in Sri Lanka, causing incalculable

groups in Sri Lanka. See, e.g., Banderage, *supra* note 133, at 6 (highlighting significant differences, including along caste lines, among northern Jaffna Tamils, eastern Batticaloa Tamils, hill country Indian Tamils, and Colombo Tamils—and stating that the Tamil diaspora perspective largely reflects a northern Jaffna Tamil voice).

¹⁴⁵ *Reconciliation in Sri Lanka: Harder than Ever*, Int’l Crisis Group (Jul. 18, 2011), available at <http://www.crisisgroup.org/en/regions/asia/south-asia/sri-lanka/209-reconciliation-in-sri-lanka-harder-than-ever.aspx> (last visited Feb. 25, 2015).

¹⁴⁶ V.K. Shashikumar, *The Rajapaksa Model of Combatting Terror*, Indian Defence Rev., Dec. 16, 2014, <http://www.indiandefencereview.com/spotlights/the-rajapaksa-model-of-combatting-terror>.

¹⁴⁷ Andi Schubert, *Victorious Victims: An Analysis of Sri Lanka’s Post-War Reconciliation Discourse* (Int’l Centre for Ethnic Studies, Colombo, Sri Lanka, Working Paper No. 6, Mar. 2013), at 16, available at <http://www.ices.lk/wp-content/uploads/2013/10/Victorious-Victims-PDF.pdf>.

¹⁴⁸ *Id.* at 8; see also Jayantha de Silva, *How the LTTE Hoodwinked the International Community*, Dec. 30, 2010, http://www.defence.lk/new.asp?fname=20090207_02 (last visited Oct. 19, 2014).

¹⁴⁹ See, e.g., Anura Hegoda, *Forgetting Ourselves*, Daily News (Sept. 26, 2014), <http://www.dailynews.lk/?q=features/forgetting-ourselves>.

¹⁵⁰ *Id.* (asking: “Do you remember the days when we said goodbye to loved ones in the morning not knowing if either party would return home safely after work or attending school?”); Interview with anonymous (May 1, 2014).

¹⁵¹ See, e.g., *Humanitarian Operation: Factual Analysis*, *supra* note 3, ¶¶ 24-30.

psychosocial harm to several generations of Sri Lankans of all ethnicities and disrupting civilian life.¹⁵²

A Sri Lankan citizen recalls feeling sheer panic in 2008 when a bus conductor in Colombo picked up a parcel that none of the passengers claimed. Passengers pushed and panicked to get off the bus, fearing a bus bomb. The parcel turned out to be an umbrella that someone had left by mistake, but the sheer panic of that moment underscored the collective trauma that many Sri Lankans felt.¹⁵³ The end of the war came as a relief for many Sri Lankans. Even those concerned about how the war was won hoped that its end would bring an unprecedented era of peace and unity.¹⁵⁴

There are still other narratives of violence and trauma in Sri Lanka. Muslims have long been vulnerable, increasingly so in recent years. In 1990, the LTTE ethnically cleansed Sri Lanka's north of 80,000 Muslims.¹⁵⁵ Norway's omission of Muslims from the 2002 Ceasefire Agreement has been described as a "basic design flaw."¹⁵⁶ Today, Muslims again face persecution from militant Buddhist extremist groups.¹⁵⁷ And in 1971 and the late 1980s, the Sri Lankan government brutally crushed JVP insurrections led by economically marginalized Sinhalese youth. Their hands full with JVP insurrections in the south and central parts of the country, the Sri Lankan government invited Indian peacekeeping forces to deal with emerging Tamil militancy in the north. These Indian troops committed widespread abuses against Tamil civilians, none of which have been investigated or prosecuted. Each of these stories shapes Sri Lanka's collective memories of violence.

¹⁵² *Id.* at ¶ 30.

¹⁵³ Interview with anonymous (Oct. 29, 2014).

¹⁵⁴ See, e.g., Gananath Obeyesekere, *Foreword* to Sharika Thiranagama, *In My Mother's House: Civil War in Sri Lanka*, at xii (2011) ("[C]oncerns [about the fate of Tamil civilians] were overcome by the sheer relief felt by the overwhelming majority of the people. One can now board a bus without fear of a bomb; one can send children to school without being afraid of erratic suicide bomb attacks. The enshrouding fears that wars produce seem to have been dispelled. It is this sense of relief, especially among the Sinhala majority, that led to the feeling that any attempt to institute an investigation into possible violations of human rights in effect would diminish the sense of having at last overcome the LTTE terror."); see also Arun Pillai-Essex, *Tamil Diaspora in Post-War Sri Lanka*, *Groundviews* (May 24, 2010), <http://groundviews.org/2010/05/24/tamil-diaspora-in-post-war-sri-lanka/>. (Contrasting viewpoints among diaspora Tamils and Sinhalese on what the military victory meant); *Against the Grain*, *supra* note 19, at 31, 36-37 (contrasting Tamil and Sinhalese "repositor[ies] of remembered violence").

¹⁵⁵ Devenesan Nesiah, *Citizen's Commission: Expulsion of the Northern Muslims by the LTTE in October 1990* (Feb. 3, 2010), available at <http://www.groundviews.org/2010/citizens-commission> (last accessed May 7, 2015).

¹⁵⁶ See, e.g., Keenan, *supra* note 30, at 88-117.

¹⁵⁷ See, e.g., Farah Mihar, *The State of Sri Lanka's Muslims*, *Econ. & Pol. Wkly.*, (Sept. 19, 2009), at 24-25 <http://www.epw.in/commentary/state-sri-lankas-muslims.html>; Kadirgamar, *supra* note 88 (describing LTTE's ethnic cleansing of Muslims in the North and massacres in the East); *Sri Lanka Muslims Killed in Aluthgama Clashes with Buddhists*, *BBC News*, (June 16, 2014), <http://www.bbc.com/news/world-asia-27864716>.

“Reconciliation does not require writing a joint consensual history, but it may require admitting the other’s truth into one’s own narrative.”¹⁵⁸ This would be a tall order in today’s polarized environment. At the same time, failing to acknowledge different narratives—including those of one quarter of Sri Lanka’s Tamils who form the diaspora—could lead to further destabilization, placing meaningful reconciliation further from reach. Opening the door to competing narratives, including those that challenge the single narrative of a “Humanitarian Operation” to defeat terrorism, could at least serve as a starting place to come to terms with the past and explore hopes for a shared future.¹⁵⁹

Post-war, despite the LLRC’s call for diaspora engagement, the Sri Lankan government has failed to take any meaningful steps toward constructive engagement.¹⁶⁰ More is needed for Sri Lanka to address its violent past and construct a shared future.

V. Integrating Diaspora Narratives into a Transitional Justice Framework

Diaspora calls for accountability reflect the collective identities and traumas that led one quarter of Sri Lanka’s Tamils to seek refuge abroad. The question then becomes *how* diaspora narratives, including competing narratives within the Tamil diaspora, can be incorporated into Sri Lanka’s transitional justice framework. This section outlines some possibilities and challenges in formulating mechanisms for truth, redress, and justice that reflect diaspora voices.

Since Mahinda Rajapaksa was voted out of office in January 2015, the government of President Maithripala Sirisena has begun to make overtures to the diaspora community. In a 2015 speech in Washington, the Sri Lankan Foreign Minister stated, “we have already unofficially spoken ... to a section of the diaspora in how they can engage in the process of rebuilding our country. I take this opportunity again to invite the diaspora...all to come together to help Sri Lanka to move to a higher level of excellence, which it has yet to achieve. So let’s all work together.”¹⁶¹ While positive, such statements are forward-looking and do not acknowledge diaspora Tamils’ rights as *victims* to truth and redress. This section attempts to fill that gap, while noting challenges.

At the outset, any transitional justice framework must involve extensive consultations and outreach with relevant stakeholders. Consultations occur during the initial stages—through public workshops, focus groups, surveys, meetings, and release of key documents, practitioners refine mandates, create buy-in and legitimacy, and ensure

¹⁵⁸ Kelman, *supra* note 105, at 123.

¹⁵⁹ See, e.g., Laplante, *supra* note 1, at 625 (“Accepting the premise that memory is highly contested in post-conflict settings, there is no guarantee of *one* final collective memory, but rather there may be many contested versions of the past.”).

¹⁶⁰ See, e.g., Rajiva Wijesinha, *To Daily News Pala on ‘With Friends like Wijesinha, President Didn’t Need Enemies*, Colombo Telegraph (Nov. 24, 2014), <http://www.colombotelegraph.com/index.php/to-daily-news-pala-on-with-friends-like-wijesinha-president-didnt-need-enemies> (head of military intelligence “admitted [to Wijesinha] that the LLRC, the action plan regarding which has been approved by Cabinet, noted the need for a policy to win over the diaspora, but that nothing had been done about this”).

¹⁶¹ Mangala Samaraweera, Carnegie Endowment for International Peace, *Sri Lanka Foreign Minister, Discussion on Sri Lanka after the Presidential Election* (Feb. 11, 2015 1:19PM), available at <http://carnegieendowment.org/2015/02/11/sri-lanka-after-presidential-election/i13p>.

that victims' voices are heard.¹⁶² Outreach occurs throughout the life of the transitional justice measure—through public hearings, media, and civil society outreach, practitioners communicate findings and progress to the general public and affected communities.¹⁶³ The Sri Lankan government should engage in close consultations and outreach with diaspora Tamils in designing and implementing transitional justice measures to address diverse diaspora narratives.¹⁶⁴ This follows the LLRC's recommendation that the government create a multi-disciplinary task force to harness diaspora actors in the reconciliation process.¹⁶⁵

It is a valid question to ask whether diaspora communities *are* relevant stakeholders: efforts to seek truth, promote redress, or pursue justice will require political dialogue and compromise among those in Sri Lanka, including Tamil parties, other political parties, victim communities in the former warzone, and Sri Lankan civil society groups. Some might argue that while diaspora Tamils should contribute to Sri Lanka's transitional justice processes, they are not stakeholders in negotiations to define the broader framework. By contrast, some diaspora Tamils might suggest that the diaspora should play a prominent role in reaching a long-term political solution and negotiating the overall framework for transitional justice.

While it is beyond the scope of this article to settle these complex issues, the goals of each specific transitional justice project may help define the scope and limits of diaspora engagement. At its core, transitional justice aims at a whole range of goals, both individual and collective. At the individual level, transitional justice processes seek to vindicate victims' rights to truth, justice, and redress.¹⁶⁶ Many diaspora Tamils are victims, in a legal sense, with rights to truth and redress under international law. The Basic Principles and Guidelines define "victims" as

persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that

¹⁶² Paige Arthur, *Fear of the Future, Lived through the Past: Pursuing Transitional Justice in the Wake of Ethnic Conflict*, in *Identities in Transition: Challenges for Transitional Justice in Divided Societies* 271, 286 (Paige Arthur, ed., 2010).

¹⁶³ *Id.*

¹⁶⁴ See, e.g., Haider, *supra* note 73, at 226 (recommending consultations and outreach with diaspora communities in designing and implementing transitional justice mechanisms).

¹⁶⁵ LLRC Report, *supra* note 7, at ¶¶ 8.262, 8.265.

¹⁶⁶ *Report of the Special Rapporteur on the promotion of truth, justice, reparations, and guarantees of non-recurrence, Pablo de Greiff*, ¶ 54, delivered to the Human Rights Council, U.N. Doc. A/HRC/21/46 (August 9, 2012) (hereinafter, "TJ Special Rapporteur Report") (emphasizing "victim-centered approach" to transitional justice); G.A. Res. 60/147, U.N. Doc. A/RES/60/147 (Dec. 16, 2005) ("hereinafter, "Basic Principles and Guidelines") (affirming victims' rights to truth and reparations under international law); First Additional Protocol to the Geneva Conventions, arts. 32-33, Jun. 8, 1977, 1125 U.N.T.S. 3 (right of families to know the fate of their relatives and obligation of parties to search for those reported missing); Human Rights Committee, *General Comment 31, Nature of the General Legal Obligation on States Parties to the Covenant*, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004) (affirming state obligations under the ICCPR to investigate human rights obligations, provide redress, and bring perpetrators to account).

constitute gross violations of international human rights law, or serious violations of international humanitarian law.¹⁶⁷

Insofar as they fit this definition, diaspora Tamils should have standing as stakeholders to shape processes for truth, justice, and redress for the harms they incurred.

However, transitional justice also aims at broader goals of reconciliation, non-recurrence of violence, institutional reforms, and vetting and lustration of public officials, which reinforce longer-term possibilities for peace.¹⁶⁸ Other stakeholders may have a stronger stake than diaspora Tamils to shape these broader objectives. It may be possible to seek diaspora engagement for mechanisms that vindicate the rights of diaspora Tamils as victims to the ethnic conflict, without seeking engagement on other transitional justice processes.¹⁶⁹

Another threshold question involves sequencing: given the many transitional justice measures Sri Lanka will need to implement, initiatives to address historic grievances of diaspora Tamils may be lower priority than outstanding issues from the last stages of the war. Resettling internally displaced peoples (IDPs), identifying detainees currently in custody, naming the disappeared, reforming the security apparatus, and resolving land ownership claims may be more immediate concerns for Sirisena's administration.¹⁷⁰ Moreover, transitional justice measures should not address diaspora grievances *at the expense of* grievances among in-country Tamils, Muslims, or the Sinhalese.

Finally, in charting a transitional justice course, the Sri Lankan government should resist the urge to trade one measure of transitional justice for another—e.g., truth at the expense of justice.¹⁷¹ As the ICTJ explains:

Without any truth-telling or reparation efforts, for example, punishing a small number of perpetrators can be viewed as a form of political revenge.

¹⁶⁷ Basic Principles and Guidelines, *supra* note 166, art. 8.

¹⁶⁸ TJ Special Rapporteur Report, *supra* note 166, ¶ 28 (Transitional justice aims at “two mediate goals, i.e. providing recognition to victims and fostering trust, and two final goals, i.e. contributing to reconciliation and to strengthening the rule of law.”); *see also* Kristin van der Leest, Daniela Kolarova, & Laurie Mercreant, *A Capacity for Integrating Peacebuilding into Development*, Initiative for Peacebuilding, 43 (Dec. 2010), available at <http://www.initiativeforpeacebuilding.eu/pdf/1102PeaceDevelopment.pdf>. (“A transitional justice approach thus recognizes that there are two goals in dealing with a legacy of systematic or massive abuse: 1. To gain some level of justice for victims. 2. To reinforce the possibilities for peace, democracy, and reconciliation.”).

¹⁶⁹ *See e.g.* Laura Young and Rosalyn Park, *Engaging Diasporas in Truth Commissions: Lessons from the Liberia Truth and Reconciliation Commission Diaspora Project*, 3 Int'l J. of Transitional Justice 341, 345 (2009). The Liberian diaspora helped shape the diaspora component of that country's truth and reconciliation commission (*see infra*, Section V.A), without negotiating terms for the in-country TRC or other transitional justice processes.

¹⁷⁰ *See, e.g.*, P. Krishnaswamy, *Current Political Trend Signals Harmony Among Communities – M.A. Sumanthiran MP*, Sunday Observer (Jan. 25, 2015), <http://www.sundayobserver.lk/2015/01/25/fea01.asp>. (TNA leader highlighted land rights, IDP resettlement, and detainee release as priority issues for Tamils in Sri Lanka).

¹⁷¹ TJ Special Rapporteur Report, *supra* note 166.

Truth-telling, in isolation from efforts to punish abusers and to make institutional reforms, can be viewed as nothing more than words. Reparations that are not linked to prosecutions or truth-telling may be perceived as “blood money”—an attempt to buy the silence or acquiescence of victims. Similarly, reforming institutions without any attempt to satisfy victims’ legitimate expectations of justice, truth and reparation is not only ineffective from the standpoint of accountability, but unlikely to succeed in its own terms.¹⁷²

Thus, in a transitional justice processes to advance truth, redress and accountability should ideally proceed in parallel. As discussed below, each could incorporate a diaspora component and vindicate the rights of diaspora Tamils to truth, justice, and redress.

A. Truth

Truth is a pillar of transitional justice: truth commissions, commissions of inquiry, and fact-finding missions advance the right of individuals to fully investigate what happened during the period of conflict and identify perpetrators and victims.

[I]f societies are to prevent recurrences of past atrocities and to cleanse themselves of the corrosive enduring effects of massive injuries to individuals and whole groups, societies must understand—at the deepest possible levels—what occurred and why. In order to come fully to terms with their brutal pasts, they must uncover, in precise detail, who did what to whom, and why, and under whose orders.¹⁷³

In Sri Lanka, emblematic events, including Black July, fail to register across ethnic divides.¹⁷⁴ It was not until 2001 that then-President Chandrika Kumaratunga appointed a three-member truth commission to investigate ethnic violence between 1981 and 1984. The Commission failed to make any findings of *prima facie* culpability against any individual or recommend specific prosecutions, and Kumaratunga’s public apology in 2004 failed to identify those responsible or erase amnesties for 1980s-era abuses.¹⁷⁵ Although the Commission made several recommendations to promote national

¹⁷² *What is Transitional Justice?* Int’l Ctr. for Transitional Justice, <https://ictj.org/sites/default/files/ICTJ-Global-Transitional-Justice-2009-English.pdf> (last visited Feb. 26, 2015).

¹⁷³ Robert Rotberg, *Truth Commissions and the Provision of Truth, Justice, and Reconciliation*, in *Truth v. Justice: The Morality of Truth Commissions* 3, 3 (R. Rotberg and D. Thompson eds. 2010).

¹⁷⁴ As one journalist recounts, “I was born ten years after Black July. I am a Sinhalese. A week or so ago, as the thirty-year anniversary approached, for curiosity’s sake, I did a small experiment. I asked some of my peers a question: “What do you know about Black July?” Of twenty-two Sinhalese, eighteen did not know what it was. I asked eight Tamil friends, all of whom knew, and had family experiences to share.” Iraj de Alwis, *Forgetting Black July*, *Groundviews*, Jul. 31, 2013, <http://groundviews.org/2013/07/31/forgetting-black-july/> (last visited Nov. 3, 2014).

¹⁷⁵ Chandrika Kumaratunga, President of Sri Lanka, *Apology to the Victims of Black Friday and the Nation: The 21st Anniversary of Black July* (Jun. 23, 2004), *available at* <http://www.presidentcbk.org/peace-speeches-11.php> (last visited Jan. 21, 2015); Indemnity Act, No. 20

healing and highlighted the lasting effect of violence in shaping Tamil collective identity, Kumaratunga's government failed to implement any recommendations, except issue compensation in selected cases.¹⁷⁶

Despite these shortcomings, during Kumaratunga's presidency, diaspora Tamils helped negotiate a ceasefire agreement with the LTTE and contributed substantial funds to rebuild after the tsunami.¹⁷⁷ Diaspora engagement during this period suggests that while identities are shaped by the past, diaspora Tamils may be willing to constructively engage with the government when transformation seems possible. By the same token, when new abuses against Tamils occurred with impunity, past apologies appear negated, with old wounds reopened.¹⁷⁸

The Presidential Truth Commission on Ethnic Violence only covered the 1981-1984 period, and the LLRC only covered events after 2002. To date, no domestic mechanism has comprehensively examined the root causes of Sri Lanka's ethnic conflict, which preceded the civil war. Similar to the Truth Commission on Ethnic Violence, the LLRC did not identify perpetrators or acknowledge state responsibility beyond vague or general expressions of remorse.¹⁷⁹ Further, to date, no domestic commission has systematically engaged diaspora Tamils.¹⁸⁰

(1982) (Sri Lanka) (granting amnesty to all government agents for any act "legal or otherwise, done or purported to be done with a view to restoring law and order"); Indemnity (Amendment) Act, No. 60 (1988) (Sri Lanka) (extending the relevant period of indemnity to December 16, 1988); Report of the Presidential Truth Commission on Ethnic Violence (1981-1984), printed as Sessional Paper No. III (Sept. 2002).

¹⁷⁶ Kishali Pinto-Jayawardena, *Post-war Justice in Sri Lanka: Rule of Law, the Criminal Justice System and Commissions of Inquiry*, Int'l Comm'n of Jurists (2010), available at http://reliefweb.int/sites/reliefweb.int/files/resources/04234216454178AFC12576B20038FF61-Full_Report.pdf (last visited Jan. 22, 2015); Final Report of the Presidential Truth Commission on Ethnic Violence (1981-1984), Ch. 5 (Sept. 2002).

¹⁷⁷ Baser, and Swain, *supra* note 85., at 681 (describing role of Tamil diaspora role in ceasefire negotiations).

¹⁷⁸ Anthropologist Sharika Thiranagama notes that for many Tamils in Sri Lanka, the past continues to shape individuals' expectations of the future. She concludes that "[u]ntil Tamils are more than second-class citizens, individual 'repair' can always be undone." Thiranagama, *supra* note 128, at 104-05. Likewise, Elizabeth Jelin noted that among Peru's indigenous communities, "new or recent forms of suffering are remembered within the frameworks offered by their long-term memories and ways of life." Elizabeth Jelin, *Silences, Visibility, and Agency: Ethnicity, Class, and Gender in Public Memorialization, Identities in Transition: Challenges for Transitional Justice in Divided Societies* 187, 196 (Paige Arthur, ed., 2010); see also *id.* at 212 ("The way in which 'short' memories fit into 'long' memories of a group is key to understanding identity dynamics.... [T]he short term is understood and placed into longer historical time.").

¹⁷⁹ LLRC Report, *supra* note 7, at ¶¶ 8.152-8.164 (describing Tamil grievances in general historical terms, without documenting specific facts or ascribing blame to particular state actors); see also *When will they get justice? Failures of Sri Lanka's Lessons Learnt and Reconciliation Commission*, Amnesty Int'l 12 (Sept. 7, 2011), available at <http://www.amnesty.org/es/library/info/ASA37/008/2011/en> (last visited Jan. 26, 2015).

¹⁸⁰ In 2008, the IIGEP Commission interviewed six at-risk witnesses living outside Sri Lanka by videoconference, but President Rajapaksa suspended further interviews. See *Twenty Years of Make Believe: Sri Lanka's Commissions of Inquiry*, Amnesty Int'l 35-36 (Jun. 11, 2009), available at <http://www.amnesty.org/en/library/info/ASA37/005/2009/en> (last visited Jan. 20, 2015). Besides IIGEP,

With Sri Lanka's defeat of the LTTE in 2009 and change in government in 2015, the country has an opportunity to start a genuine truth-seeking process to come to terms with the past. A comprehensive truth-seeking process would consider events that led to the formation of Sri Lanka's one-million-strong Tamil diaspora and collective traumas and identities shaped by those events. The U.N. Principles on Impunity emphasize states' duties toward victims and survivors to take measures "aimed at preserving the collective memory from extinction and, in particular, at guarding against the development of revisionist and negationist arguments."¹⁸¹ Truth-seeking processes should help "secur[e] recognition of such parts of the truth as were formerly denied."¹⁸² Consistent with these obligations, a truth-seeking mechanism in Sri Lanka should aim to address the collective identities and memories of diaspora Tamils.

The Sri Lankan government—as opposed to civil society, human rights groups, or artists—stands in a unique position to facilitate such a truth-seeking process. Government initiatives can mainstream recognition of collective traumas in a way that civil society efforts cannot.¹⁸³ Further, as the LLRC recognized: "the responsibility for being the prime mover of [any reconciliation] process lies squarely with the government."¹⁸⁴

Liberia may provide a helpful model for integrating diaspora Tamil narratives into a truth-seeking process. Recognizing the role of the Liberian diaspora in starting and fueling that country's civil war, the 2006 Truth and Reconciliation Commission made

no commission of inquiry (including the LLRC) has solicited diaspora testimonies. *See, e.g.*, Final Report of the Presidential Truth Commission on Ethnic Violence (1981-1984) 36 (Sept. 2002) (expressing difficulty in investigating 1983 riots because "most of the victims are still living outside the country" and Commission was limited to "the accounts of those who were able to give oral testimony"). IIGEP itself only engaged with select witnesses in the diaspora, rather than engage systematically with the diaspora to understand the root causes of conflict.

¹⁸¹ *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*, delivered to the Commission on Human Rights, U.N. Doc. E/CN.4/2005/102/Add.1 (Feb. 8, 2005) (Principle 3: The Duty to Preserve Memory).

¹⁸² *Id.* (Principle 6: The Establishment and Role of Truth Commissions).

¹⁸³ "All the commemorative efforts surrounding the 1983 riots...currently attract those who, for the most part, already share the ideals of the initiators of these efforts. If the riots of 1983 are to receive a fair and effective reckoning, commemorative efforts must be mainstreamed, ideally with the support of the GoSL, and include all ethnic communities in Sri Lanka as well as the Sri Lankan diaspora." Sash Jayawardane, *A Study of Impunity in Post-Colonial Sri Lanka*, Impunity Watch, 23 (Jan. 2013), available at http://www.impunitywatch.org/docs/Sri_Lanka_Research_Report.pdf (last visited Jan. 22, 2015). As Jayawardane notes, several civil society organizations have attempted to commemorate emblematic events in Sri Lanka's past. For example, Voices for Reconciliation held workshops in 2013 with U.K.-based diasporas to reach a more nuanced understanding of Black July. *See* Voices for Reconciliation, *Remembering the Riots*, Groundviews, Aug. 12, 2013, <http://groundviews.org/2013/08/12/remembering-the-riots/> (last visited Jan. 21, 2015). The citizen-journalism site Groundviews released a commemorative book in 2013 exploring Black July. *See Black July*, Groundviews, Sept. 7, 2013, <http://groundviews.org/2013/09/07/black-july-now-available-for-download-on-itunes/> (last visited Jan. 21, 2015). Likewise, in a book titled *Incomplete Thombu*, artist T. Shanaathanan exhibited floor plans, drawings, and stories of 80 individuals from the north—Tamil and Muslim—who were displaced by the conflict. T. Shanaathanan, *The Incomplete Thombu* (2011).

¹⁸⁴ LLRC Report, *supra* note 7, at ¶ 8.149.

efforts to systematically engage the fractured Liberian diaspora in its truth seeking process.¹⁸⁵ Commissioners signed a memorandum of understanding with a U.S. organization (The Advocates), which collected over 1500 testimonies and conducted hearings in eleven U.S. cities over a three-year period, in close consultation with Liberian TRC Commissioners. This process gave diaspora members a chance to share stories, find common ground, and contribute recommendations. In some cases, diaspora members were unwilling to be in the same room together, but the TRC was able to document these tensions formally and make recommendations for bridging divides.¹⁸⁶

Sri Lanka could likewise hold sittings and collect testimonies from diaspora Tamils in India, Canada, U.K. France, Germany, Australia, and the U.S. These testimonies could aim to understand the causes of displacement and identify the (diverse) needs and priorities of diaspora Tamils. This process would need to be part of a much broader truth seeking mechanism within Sri Lanka, which would capture perspectives from in-country Tamils, Sinhalese, and Muslims.

Truth commissions are typically grounded in *victims'* rights to information and redress. Accordingly, it is valid to question diaspora Tamils' standing as victims to participate in a truth-seeking process. In the Liberian example, diaspora participants were either direct victims or indirect victims who had lost family members or experienced other effects of the conflict.¹⁸⁷ In this situation, diaspora Tamils certainly have standing as direct or indirect victims to tell their own stories of loss or displacement and seek truth about the underlying root causes. They may, however, lack standing to the extent a truth-seeking process is narrowly focused on the last stages of the civil war.

A more difficult question is whether diaspora Tamils have standing to testify not only about their individual stories of loss and trauma but also about the political ideology with which they frame those harms. Put differently, it is an open question whether truth commissions should apply an evenhanded human rights conception of victim/perpetrator to witness testimony instead of a more politicized or contextualized understanding. Truth commissions have their moral foundations in providing public recognition for victims, to offer a space for them to tell their stories and thereby "reintegrate victims into the 'speech community' and [] reinstate their right to speak, and especially to be listened to."¹⁸⁸ But

¹⁸⁵ As the ICTJ noted, despite broad diaspora engagement, the Liberian TRC was plagued with other weaknesses: "Many of the challenges the TRC faced in its operation, namely limited technical capacity, poorly coordinated programming, and disharmony among its commissioners, are reflected in the commission's final report, which lacks evidentiary data, coherence between and within sections, specificity, and the unanimous support of all commissioners, two of whom refused to endorse it." Paul James-Allen, Aaron Weah, and Lizzie Goodfriend, *Beyond the Truth and Reconciliation Commission: Transitional Justice Options in Liberia*, Int'l Ctr. For Transitional Justice 3 (May 2010), available at <http://www.ictj.org/sites/default/files/ICTJ-Liberia-Beyond-TRC-2010-English.pdf> (last visited Feb. 26, 2015).

¹⁸⁶ Young and Park, *supra* note 169, at 341.

¹⁸⁷ *Id.* at 351. Likewise, in Cambodia, victims seeking civil party status before the ECCC were required to show that their injuries (whether physical, material, or psychological) were directly linked to the charged offenses. Internal Rules of the Extraordinary Chambers in the Courts of Cambodia, Rule 23(2) (2007).

¹⁸⁸ Silvia Rodríguez Maeso, *The Politics of Testimony and Recognition in the Guatemalan and Peruvian Truth Commissions: The Figure of the 'Subversive Indian'*, 3 RCCS Annual Review 38, 61 (2011), available at <http://rccsar.revues.org/396?file=1> (last visited Feb. 26 2015).

can a diaspora Tamil testify about Eelam or genocide, or glorify the LTTE, in narrating his or her own story of loss? Some might say no.¹⁸⁹

However, it may be best to recognize victims as persons with political agency (not merely victims), without losing sight of guilt or responsibility.¹⁹⁰ This point was made in connection with Peru's truth commission. By declaring neutral reparations for all victims of armed conflict, some claimed that Peru's truth commission (CVR) stripped historical events of subjective context that would have revealed peasant self-defense groups as political actors with both strengths and limitations, deserving of both praise and blame.¹⁹¹

The "lawfare" discussion would come full circle if diaspora Tamils were permitted to speak but censored on what to say. Perhaps the best that a truth commission can do is to aim at a representative sample through active outreach within diaspora communities. Sincere efforts should be made to avoid privileging elites in seeking diaspora narratives of conflict.

Sri Lanka has a long history of commissions of inquiry with little to show for it (most reports remain unpublished).¹⁹² Many diaspora Tamils may view engagement with new processes as a futile charade.¹⁹³ Before embarking on another truth seeking process (with or without diaspora involvement), the Sri Lankan government should release the reports of past commissions and commit to a transparent and credible process. Departing from failed commissions in the past, the government should ensure independence, adequate resources, subpoena power, and witness protection for any truth-seeking process. In addition, the terms of reference and mandate for any commission "should be based upon broad public consultations in which the views of victims and survivors

¹⁸⁹ Anthropologist David Stoll famously criticized Nobel Peace Prize winner Rigoberta Menchú's narrative of state violence in Guatemala, stating that as a former militant, Menchú "believed in the ideology and used it to frame the experience of her family and people." Interview of David Stoll by Dina Fernandez-Garcia, *Stoll: "I Don't Seek to Destroy Menchú,"* in *The Rigoberta Menchú Controversy* 67 (Arturo Arias and David Stoll eds. 2001). The South African TRC selected victims for public testimony across multiple racial and political dimensions, "writing-out" race in order "to valorize a human rights' conception of victimhood instead of heroic resistance." Madeleine Fullard and Nicky Rousseau, *Truth Telling, Identities, and Power in South Africa and Guatemala*, in *Identities in Transition: Challenges for Transitional Justice in Divided Societies* 54, 74 (Paige Arthur, ed., 2010).

¹⁹⁰ Maeso, *supra* note 188, at 61-64.

¹⁹¹ Jemima Garcia-Godos, *Victim Reparations in the Peruvian Truth Commission and the Challenge of Historical Interpretation*, 2 Int'l J. Transitional Justice 63, 82 (2008). *See also Id.* at 77, 79 ("The problem is that in the process of identifying these ideal victim-subjects, any seemingly distractive features of the actors, such as political membership and behavior, are washed away." "The attempt to create empathy for and among victims should not deprive them of their agency.").

¹⁹² *See Twenty Years of Make Believe*, *supra* note 180; *A List of Commissions and Committees Appointed by GoSL (2006-Nov. 2013)*, CENTRE FOR POLICY ALTERNATIVES (Jan. 9, 2014), available at <http://www.cpalanka.org/a-list-of-commissions-and-committees-appointed-by-gosl-2006-2013/> (last visited Jan. 20, 2015); Pinto-Jayawardena, *supra* note 176.

¹⁹³ For example, Dr. Manoharan, the father of a Tamil student killed in Trincomalee in 2006, saw the LLRC as a charade: he had already testified before a 2006 commission of inquiry, and he wanted the report made public before he could trust another domestic mechanism. Yolanda Foster, *Quo vadis Sri Lanka?*, Groundviews, May 18, 2014, <http://groundviews.org/2014/05/18/quo-vadis-sri-lanka/> (last visited Jan. 28, 2015).

especially are sought.”¹⁹⁴ These efforts would help build trust and facilitate constructive engagement with diaspora and in-country Tamils alike.

Incorporating diaspora narratives in truth-seeking processes would be nothing short of a sea change. Under former President Rajapaksa, the Sri Lankan government marginalized diaspora Tamils as the “LTTE rump.” Long term, diaspora narratives could help challenge the single narrative of the ethnic conflict. Diaspora Tamil narratives of discrimination could be situated against Sinhalese narratives of fear and Muslim narratives of displacement. Diverse narratives from within the diaspora community could debunk the notion that the Tamil diaspora is uniformly pro-LTTE.

B. Reparations

Reparations programs seek to redress past harms and ensure that harms will not recur.¹⁹⁵ Reparations can include monetary compensation, return of land or property, official apologies, museums, memorials, education programs, psychological support, and creating days of commemoration. A carefully designed reparations program could attempt to incorporate diaspora perspectives of the conflict.

To date, only a handful of those affected by the civil war have received compensation from the government.¹⁹⁶ The Sri Lankan government has not erected any public memorials to commemorate the 1983 riots or held any other emblematic events in the protracted ethnic conflict. Nor are such events discussed in history textbooks issued by the Ministry of Education.¹⁹⁷ By contrast, although reparations are severely lacking for Sinhalese victims of the JVP insurrections, the government did erect a memorial in

¹⁹⁴ U.N. Doc. E/CN.4/2005/102/Add.1, *supra* note 181 (Principle 6).

¹⁹⁵ *See, e.g.*, G.A. Res. 60/147, U.N. Doc. A/RES/60/147 (Dec. 16, 2005) (“Van Boven/Bassiouni Principles,” defining victims’ rights to remedy, including compensation, restitution, rehabilitation, satisfaction, and guarantees of non-recurrence, fore breaches of international human rights law and international humanitarian law).

¹⁹⁶ In 2004, President Kumaratunga authorized compensation for 937 individuals who testified before the Presidential Truth Commission on Ethnic Violence about events that occurred between 1981 and 1984. This number pales in comparison to the number of Tamils who fled the island—one quarter of the total population, numbering one million today.

¹⁹⁷ Jayawardane, *supra* note 183, at 22; *see also* Sanjayan Rajasingham, *Being a New Sri Lanka-2*, Jan. 30, 2015, <http://dbsjeyaraj.com/dbsj/archives/37916#more-37916> (last visited Feb. 26, 2015) (“Shortly after finishing my ‘O’ Level exams in 2006, I realized how little I was taught about post-independence Sri Lanka’s history. My textbooks had nothing to say about Rohana Wijeweera and the two JVP insurrections, let alone why they came about. They had nothing to say about SJV Chelvanayakam, about the ethnic riots of ’58, ’77, ’81 and ’83, or about the Banda-Chelva and Dudley-Chelva pacts. Whatever the reason these (and other) events were excluded, it meant that many of my generation knew nothing about them. Or, they only knew those parts that were passed on within their communities.”).

1997 for 33 students abducted and killed in Embilipitiya in the late 1980s.¹⁹⁸ Without question, more could be done to redress victims on all sides of the ethnic conflict.

In designing reparations programs, the Sri Lankan government could evaluate ways to recognize collective memories and redress collective harms of diaspora Tamils. For example, museums, memorials, and commemorations could explore root causes of displacement and violence and acknowledge state and LTTE responsibility for past harms. Museums and memorials, however, should be careful to recognize past harms “in a way that does not demean the dignity of other groups” or “foment a sort of tit-for-tat escalation of competing symbols in the public sphere—which may reinforce a sense of group threat.”¹⁹⁹ Careful curation could not only recognize collective traumas among diaspora Tamils but also break down monolithic notions of ethnicity.²⁰⁰

Symbolic reparations might also track cultural notions of identity and loss, in particular, the longing for *sonta ūr* (ancestral village).²⁰¹ Post-war, some diaspora Tamils have journeyed back to their *sonta ūr*; these “homecoming” journeys are emotional but potentially restorative and worth encouraging.²⁰² One potential challenge is that complex

¹⁹⁸ The ‘Shrine for the Innocent’ was built in 1997 but removed in 2012 by the Urban Development Authority (implicating then-Secretary of the Ministry of Defence and Urban Development, Gotabhaya Rajapaksa). See *Written statement submitted by the International Movement Against All Forms of Discrimination and Racism (IMADR)*, page 4, delivered to the Human Rights Council, U.N. Doc. A/HRC/19/NGO/123 (Feb. 14, 2012).

¹⁹⁹ Paige Arthur, *Fear of the Future, Lived though the Past*, *supra* note 162, at 291-92.

²⁰⁰ For example, exhibits could profile Sinhalese individuals who protected their Tamil neighbors; diaspora Tamils who fled the LTTE; and the psychological effects of displacement and war across ethnic divides.

²⁰¹ Researchers have noted the central role of *sonta ūr* (ancestral village) in shaping Tamil identity. E. Valentine Daniel, *Fluid Signs: Being a Person the Tamil Way* 63 (1987) (“One of the most important relationships to a Tamil is that which exists between a person and the soil of his *ūr*.”); Thiranagama, *supra* note 128, at 151 (“[*U*]*r*—translatable most properly as home or natal village—is one of the most ordinary (thus evocative) words in colloquial Tamil. For the refugees, *ur* is an often-used Tamil word. It evokes an everyday emotive language of expectation, love, and sentiment. For those I worked with, because one is a person, one has an *ur*, and because one has an *ur*, one must either love it or feel obliged to love it.”). Diaspora Tamils (like northern Muslims), displaced by decades of war, express a longing for *ūr*—as one U.K. Tamil stated: I used to think about walking the streets of Jaffna, to my house, all the time. I used to think that it would be the happiest moment for me – it would be a wonderful day. It would mean that the situation would have changed politically. It would represent more than a homecoming, it would mean a resuscitation of the community. Interview of Narmada Thiranagama, *No More Tears Sister: Anatomy of Hope and Betrayal* (Jun. 27, 2006), http://www.pbs.org/pov/nomoretears/update_narmada.php (last visited Jan. 26, 2015). Likewise, journalist D.B.S. Jeyaraj, who returned to Sri Lanka after 25 years in exile, stated: “The hope of return is always there. It is this hope that sustains a person in exile living away from the mother country.” See Marianne David, *D.B.S. Jeyaraj’s journey home*, Daily FT, Feb. 26, 2014, <http://www.ft.lk/2014/02/26/d-b-s-jeyarajs-journey-home/> (last visited Jan. 26, 2015). It should be noted that *ūr*, or home, is a distinct construct from “homeland”: *ūr* evokes an imagined past, an identity based on place that crosses ethnic divides. Thiranagama, *supra* note 128, at 152. This characteristic may render the concept of *ūr* a less contentious site for commemoration and social memory than homeland (e.g., Eelam).

²⁰² One U.S.-based Tamil expressed a profound sense of healing upon her return to Jaffna after thirty years—having left at the age of 16 and returned at age 46, she felt healed when members of her church recognized and embraced her. In subsequent visits, she has taken two aunts with her to see their former homes and villages; although her aunts were initially reluctant to go, both visits were emotional and

land rights issues could emerge, given decades of displacement. Symbolic efforts directed solely at diaspora Tamils could also leave internally displaced Muslims feeling more marginalized. As the ICTJ notes, tackling politically charged issues such as overlapping or competing land claims can lead to renewed tensions.²⁰³ Still, failing to address property and land issues could lead to further conflict,²⁰⁴ and symbolic homecoming efforts could help address collective traumas (across communities) formed by displacement and exile.

Reparations not only redress past harm, “they also have a forward-looking goal of helping to rebuild society by affirming the status of victims as *equal citizens* in a new order that aspires to be not only more peaceful but also more legitimate, more democratic, more inclusive.”²⁰⁵ Yet, in seeking parity of status, reparations programs should consider whether to recognize the political agency of victim groups. “[A] reparations project inspired by a desire to give victims recognition as *equal citizens* cannot systematically disregard the fact that different groups among the population might have a different experience of the violence.”²⁰⁶ Reparations programs structured to redress all victims of ethnic conflict, irrespective of ethnicity, political persuasion, or role in the war, may strip historical events of subjective context and fail to challenge the single narrative of conflict.²⁰⁷ At the same time, memorials and commemorations that consider victims as political actors should avoid privileging elite voices (or certain political viewpoints) within diaspora communities.

Ultimately, any effort at memorialization or symbolic redress would reflect a significant change in diaspora engagement for the Sri Lankan government. Last year, the Rajapaksa administration banned foreign passport holders from travel to the north and proscribed 424 individuals and 16 Tamil organizations as “terrorism” financiers.²⁰⁸ These measures, taken years after the war’s end, should be reversed to credibly engage diaspora Tamils in any transitional justice process. Early signs under President Sirisena are promising—days after the January 2015 elections, the new government scrapped the foreign travel ban, and its External Affairs Minister stated: “I have met some of the people in London whose groups were banned by the earlier government. I do not believe

transformative for all involved. Peace activist Ashima Kaul, a displaced Hindu from Kashmir, India, likewise speaks of personal healing in traveling back to Kashmir—when a Muslim imam greeted her and welcomed her to her natal home, she felt decades of pain erase. Interview with anonymous (Oct. 31, 2014).

²⁰³ *Transitional Justice and Displacement: Challenges and Recommendations*, Int’l Ctr. For Transitional Justice 8 (Jun. 2012), <http://www.ictj.org/sites/default/files/ICTJ%20and%20Brookings-LSE%20Transitional%20Justice%20and%20Displacement%20Report.pdf> (last visited Jan. 26, 2015).

²⁰⁴ *Id.*

²⁰⁵ Ruth Rubio-Martin, Claudia Paz y Paz, and Julie Guillerot, *Indigenous Peoples and Claims for Reparation: Tentative Steps in Peru and Guatemala*, in *Identities in Transition: Challenges for Transitional Justice in Divided Societies* 17, 18 (Paige Arthur ed., 2010).

²⁰⁶ *Id.* at 22.

²⁰⁷ Garcia-Godos, *supra* note 191, at 82 (discussing missed opportunities in Peruvian context); Krystalli, *supra* note 111 (challenging the single narrative of conflict).

²⁰⁸ *Prior approval for foreign nationals visiting the north*, *supra* note 65; Gazette No. 1854/41, *supra* note 64.

that they are terrorists.”²⁰⁹ However, proscriptions on specific diaspora groups and individuals currently remain in place.

C. Justice

Justice processes hold perpetrators individually accountable for serious violations of international human rights and humanitarian law, ensuring that those accused are tried in accordance with due process. It has been suggested that criminal accountability also promotes reconciliation, by shifting blame from whole groups to individual perpetrators.²¹⁰ In addition, trials may provide critical space to recognize and incorporate competing narratives of conflict, including diaspora Tamil narratives.

Few studies discuss the impact of collective memories on criminal trials.²¹¹ Trials provide “a privileged site for conflicting accounts:” a courtroom can serve as a “‘theater of ideas,’ where large questions of collective memory and even national identity are engaged.”²¹² Ultimately, it may not be possible for criminal trials to “settle disputes about historical interpretation of recent events,” but trials may “go a long way in settling the factual basis of some events, so that discussions can then proceed over a shared understanding of what actually happened.”²¹³

Emblematic cases of violence against Tamils linger in collective memories and continue to shape diaspora views of the Sri Lankan state.²¹⁴ Impunity likewise shapes collective memories. Entrenched impunity has led many diaspora Tamils to lose trust in the state’s ability to provide justice, leading them to seek accountability in the international sphere.²¹⁵

The shared nature of memories and collective histories could prove helpful in developing justice mechanisms. In contrast to truth commissions, criminal prosecutions consider a limited number of events, which may not reflect the full scope of harms perpetrated or experienced. The few victims who are eligible to participate in criminal trials play supporting roles as witnesses, and they must limit their testimonies to the

²⁰⁹ Narayan, *supra* note 70; *Sri Lanka Scraps Ban on Foreigners Visiting Northern Former War Zone*, N.Y. Times, Jan. 16, 2015, <http://www.nytimes.com/reuters/2015/01/16/world/asia/16reuters-sri-lanka-north-ban.html> (last visited Jan. 21, 2015).

²¹⁰ First Annual Report of the President of the ICTY, delivered to the U.N. General Assembly, U.N. Doc. A/49/342-S/1994/1007 (Aug. 29, 1994).

²¹¹ A notable exception: Laplante, *supra* note 1, at 625 (analyzing how competing groups in Guatemala understood the Rios Montt trial).

²¹² Mark Osiel, *Mass Atrocity, Collective Memory, and the Law* 41 (1997). Ruti Teitel likewise describes criminal trials as the “long-standing ceremonial forms of collective history making.” Ruti G. Teitel, *Transitional Justice* 72 (2000).

²¹³ Juan E. Méndez, *Latin American Experiences of Accountability*, in *The Politics of Memory: Truth, Healing, and Social Justice* 127, 137 (Ifi Amadiume & Abdullahi An-Na’im eds., 2000) (citation omitted).

²¹⁴ “For every major account of atrocity in the public consciousness of the Tamil community, most Tamils also have a list of incidents ‘closer to home’, within their own towns and villages, where they themselves or their friends and relatives were exposed to the everyday violence of war.” Pragasam, *supra* note 106, at 84.

²¹⁵ One diaspora Tamil, the father of a Tamil student executed by security forces in 2006, asked the UNHRC to advance the investigation “to the international level,” stating that he had “no hope for justice in Sri Lanka.” Foster, *supra* note 193.

offenses charged.²¹⁶ However, criminal convictions have the potential to vindicate harms beyond those alleged in any specific case. In the same way that impunity for emblematic cases shapes diaspora views, convictions of “big fish” for these emblematic cases may symbolically vindicate broader collective and individual memories of violence.²¹⁷ The Sri Lankan government could investigate and prosecute state actors, paramilitaries, and LTTE leaders alleged to be most responsible for emblematic human rights abuses on all sides of the ethnic conflict.²¹⁸ In cases where perpetrators are no longer alive, the state could publicly release archival evidence in its custody, issue apologies, and make reparations to victims who can establish a claim.

The Sri Lankan government could start by creating an independent institution, with powers akin to those of a special prosecutor, to investigate emblematic cases on all sides of the ethnic conflict. Past domestic commissions made this recommendation. Noting structural barriers to accountability, including conflicts of interest within the Attorney General’s department, the 1994 and 1998 Disappearances Commissions called for the creation of an “Independent Human Rights Prosecutor” in Sri Lanka, funded by Parliament and given the same independence as the elections commissioner.²¹⁹ The LLRC likewise recommended an “independent institution” to address grievances “arising out of any executive or administrative act, particularly those based on ethnicity or religion.”²²⁰

If created, the Sri Lankan government should grant such an institution broad independence and subpoena powers to investigate and prosecute historic crimes. The special prosecutor could start by investigating perpetrators identified by past commissions of inquiry.²²¹ In seeking justice for diaspora Tamils, the independent prosecutor could prosecute historic cases alongside more recent abuses. The independent

²¹⁶ Cecile Aptel, *International and Hybrid Tribunals: Reconciling or Stigmatizing?* in *Identities in Transition: Challenges for Transitional Justice in Divided Societies* 149, 183-84 (Paige Arthur ed., 2010).

²¹⁷ For example, Guatemala’s 2013 conviction of former de facto head of state Rios Montt vindicated the rights of victims beyond those connected to the specific charges against Montt. Montt was charged for the killing of 1,771 civilians in the Ixil triangle, along with forced displacement of 29,000, rapes, torture, bombing of civilian communities, and forced concentration of civilians. Victims continue to consider his conviction valid, despite a later ruling by the Constitutional Court vacating the verdict. *See, e.g., Justice on Trial in Guatemala: The Rios Montt Case*, Int’l Crisis Group 6, 9 (Sept. 23, 2013), available at [http://www.crisisgroup.org/~media/Files/latin-america/Guatemala/050-justice-on-trial-in-guatemala-the-rios-montt-case.pdf](http://www.crisisgroup.org/~/media/Files/latin-america/Guatemala/050-justice-on-trial-in-guatemala-the-rios-montt-case.pdf) (last visited Feb. 25, 2015) (quoting one victim: “This is sacred for us, because this is the truth of our grandparents, our mothers, our brothers and sisters, our uncles. This is their truth, whether or not others deny it.”).

²¹⁸ Indeed, in a groundbreaking recent survey of victims and survivors in the former warzone, Tamils in Sri Lanka prioritized prosecutions of those most responsible over prosecutions of low-ranking soldiers or rebels. *How can we have peace?*, Sri Lanka Campaign for Peace and Justice (Mar. 24, 2015), available at <http://www.srilankacampaign.org/how-can-we-have-peace-new-report-says-survivors-needs-must-drive-sri-lanka-reconciliation/> (last visited Mar. 30, 2015).

²¹⁹ Pinto-Jayawardena, *supra* note 176, at 90, 94.

²²⁰ LLRC Report, *supra* note 7, at ¶¶ 8.201-8.203.

²²¹ For example, the Sansoni Commission report named police officers involved in the 1977 anti-Tamil riots, and the 1994 Disappearances Commission submitted names of suspected perpetrators to the President. Pinto-Jayawardena, *supra* note 176, at 99, 123.

prosecutor could also engage directly with diaspora communities to investigate emblematic human rights cases. For example, the office could set up a Victim's Unit, similar to the one of the Extraordinary Chambers in the Courts of Cambodia (ECCC),²²² with a diaspora liaison who could receive evidence from victims and witnesses within diaspora communities.

To prosecute historic crimes, blanket amnesties may need to be revisited. Under the Indemnity Laws currently in place, state officials and security forces are immune from any legal proceeding (civil or criminal) for actions "legal or otherwise" taken between August 1977 and December 1988 "with a view to restoring law and order," if "done in good faith" by or at the direction of a Minister, Deputy Minister, or public servant.²²³ Likewise, the Prevention of Terrorism Act shields security personnel from civil or criminal liability for arbitrary detentions and other actions purported to be taken "in good faith" pursuant to the Act.²²⁴ These statutes were enacted to retroactively immunize all state actors from liability for unlawful conduct. When enacted, these provisions were inconsistent with Sri Lanka's then-existing obligations under international law to provide victims with "effective remedy," including "the possibilities of judicial remedy."²²⁵ Today, these blanket amnesties for torture and gross human rights violations are invalid under international law.²²⁶ An independent prosecutor could therefore argue that existing amnesty laws do not preclude prosecution of historic crimes.²²⁷

Criminal trials, whether historic or recent, always carry political implications. Decisions about who to prosecute and for what crimes may be perceived as politically

²²² Internal Rules of the Extraordinary Chambers in the Courts of Cambodia, Rule 12(2) (2007) (establishing a Victim's Support Section to serve as an intermediary between victims and the court, to receive, process, and categorize victim information); *see also* Rome Statute of the International Criminal Court, art. 43(6) (establishing a "Victims and Witnesses Unit").

²²³ Indemnity Act, No. 20 (1982) (Sri Lanka), as amended by Indemnity (Amendment) Act, No. 60 (1988) (Sri Lanka).

²²⁴ Prevention of Terrorism Act, No. 48 (1979) (Sri Lanka) (originally enacted as temporary provisions but made permanent in 1982).

²²⁵ For example, Sri Lanka ratified the ICCPR in 1980, which obligates it "to ensure that any person whose rights or freedoms ... are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity." International Covenant on Civil and Political Rights, art. 2(3)(a), Dec. 16, 1966, 999 U.N.T.S. 171 (1967). *See also id.* art. 2(3)(b) (obligating state parties to "develop the possibilities of judicial remedy").

²²⁶ *See, e.g., Prosecutor v. Anto Furundžija*, No. IT-95-17/1-T, Judgment, ¶ 155 (Dec. 10, 1998) (amnesty for torture would be "internationally unlawful" and "would not be accorded international legal recognition"); Commission on Human Rights, Res. 2005/81, U.N. Doc. E/CN.4/RES/2005/81 (Apr. 21, 2005) (resolution on impunity, recognizing "that amnesties should not be granted to those who commit violations of human rights and international humanitarian law that constitute crimes" and welcoming "the lifting, waiving, or nullification of amnesties and other immunities"); *see also Yousuf v. Samantar*, 699 F.3d 763 (4th Cir. 2012) (denying foreign official immunity for violations of *jus cogens* norms).

²²⁷ Other countries have revoked their amnesty laws in recent past. For example, Argentina revoked its 1980s-era amnesty laws in 2003; Argentina's Supreme Court declared these blanket amnesties unconstitutional in 2005, paving the way for "dirty war" prosecutions currently underway. *See generally*, Lisa J. Laplante, *Outlawing Amnesty: The Return of Criminal Justice in Transitional Justice Schemes*, 49 VA. J. Int'l L. 915, 916-17 (2009).

motivated.²²⁸ In the case of Sri Lanka, prosecuting Army killings of surrendering LTTE cadres in 2009 may be received as more political than prosecutions for the denial of humanitarian aid or shelling of civilian targets. Likewise, a decision to prosecute crimes against one community could be perceived as a whitewash of crimes committed against another. To complicate matters, cases that are easier to establish in terms of liability evidence may be less politically palatable. Resource constraints may require an independent prosecutor to make difficult choices about whether to first prosecute a member of the Army or the LTTE, and whether to prioritize historic versus more recent crimes.

While there are no easy answers, it is worth considering how justice mechanisms in Sri Lanka could incorporate a diaspora component. Prosecuting historic cases, for example, might provide diaspora Tamils with acknowledgement and recourse after decades of impunity.

VI. Conclusion

Since the end of the civil war in May 2009, diaspora Tamils have been vocal proponents for accountability. Some might label certain forms of diaspora advocacy as “lawfare” or “long-distance nationalism,” but such labels fail to account for the complex memories and history that may shape diaspora perspectives. This article steps back to consider whether diaspora Tamil voices for accountability differ from mainstream human rights groups; why these differences may exist; and how diaspora voices might be incorporated within an inclusive transitional justice framework for Sri Lanka.

With the change in government in January 2015, Sri Lanka has an opportunity to constructively engage with diaspora Tamils in formulating a transitional justice framework. Diaspora narratives could be solicited in truth commissions, and symbolic reparations could seek to provide redress for shared memories of violence, marginalization, and exile. Criminal trials could prosecute historic abuses alongside more recent crimes, providing victims in the diaspora with recourse after decades of impunity. While this article does not recommend a particular course of action, there may be several ways in which the Sri Lankan government could seek to incorporate diverse diaspora narratives within an inclusive transitional justice framework for truth, redress, and justice.

Doing so may present challenges. One challenge is incorporating diaspora narratives without privileging diaspora elites: those who fled the LTTE may offer different narratives of conflict from those sympathetic to the LTTE. Another deals with political aspects of diaspora engagement: in opening the door to diaspora narratives, it is not clear to what extent political views among diaspora Tamils regarding “genocide” or “Eelam” (statehood) should form part of the discussion. Also, at a macro level, diaspora engagement may be lower priority among Sri Lanka’s many transitional justice challenges.

²²⁸ The ICTR, for example, is criticized for anti-Hutu bias for its exclusive focus in prosecuting Hutu perpetrators. The ICTY adopted a different approach, securing indictments across all ethnic groups. But this invited a different criticism: that the ICTY was “more inspired by the desire to balance the responsibility among ethnoreligious or national groups rather than prosecuting those bearing the greatest level of responsibility.” Aptel, *supra* note 216, at 174-75.

Even so, the recent change in government presents a historic opportunity for Sri Lanka to come to terms with the past. Irrespective of sequencing and prioritization, diaspora engagement will need to be part Sri Lanka's effort to come to terms with the past and look to a shared future. As Sri Lanka's Lessons Learnt and Reconciliation Commission recognized, failing to engage diaspora groups altogether could risk further polarization and put meaningful reconciliation farther from reach.²²⁹

²²⁹ LLRC Report, *supra* note 7, at ¶¶ 8.262, 8.265.