



# Transitional Justice and Terrorism: The Case of Sri Lanka

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ICCT Policy Brief

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International Centre for  
Counter-Terrorism

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## Abstract

Sri Lanka has experienced a 26-year-long civil war between the government and the Liberation Tigers of Tamil Eelam (LTTE), which ended in 2009 with the defeat of the latter. Since the end of the conflict, Sri Lanka has engaged in a transitional justice process, which has been characterised by a multiplication of truth-seeking mechanisms and a disregard for victims' needs. Currently, the government is establishing a new truth commission despite the disaccord of several civil society organisations and victims. Additionally, the proposed new Counter Terrorism Bill intended to replace the Prevention of Terrorism Act raises a lot of concerns as it does not meet, like its predecessor, international human rights standards. Although transitional justice tools have produced favourable results for addressing crimes committed by terrorist groups and state actors in other contexts, (such as in Northern Ireland, the Basque country, and, most recently, Colombia), Sri Lanka still struggles to deal with its past. The present policy brief argues that the failure of Sri Lanka to address violations committed by the LTTE – and by the state – through transitional justice mechanisms is due to the absence of certain required conditions for the application and success of transitional justice in a post-war and post-terrorism context, and not to an inherent incapacity of transitional justice to be applied in such context. The policy brief discusses these conditions in detail, demonstrates their absence in the Sri Lankan context, and the failure of any transitional justice procedure under the current circumstances. In doing so, it adds a new case study to the emerging debate on the role of transitional justice in the context of counter-terrorism.

**Keywords:** transitional justice, victims, Sri Lanka, Liberation Tigers of Tamil Eelam (LTTE), terrorism, counter-terrorism

## Introduction

Last May marked the fifteenth anniversary of the end of the 26-year-long Sri Lanka's civil war (1983-2009)<sup>1</sup> opposing government forces with the Liberation Tigers of Tamil Eelam (LTTE).<sup>2</sup> Agnès Callamard, Secretary General at Amnesty International, in her speech at a commemoration event in May 2024, underlined the failure of the Sri Lankan authorities and the international community to deliver justice to the victims of the civil war.<sup>3</sup> She also highlighted that memorial initiatives have often resulted in "arrests, arbitrary detentions and deliberately skewed interpretations of the Tamil community's attempts to remember their people lost to the war".<sup>4</sup> Indeed, the Sri Lankan authorities have used, inter alia, counter-terrorism legislation to target commemorating events organised by Tamil community members several times. For instance, in November 2023, nine ethnic Tamils were arrested under the Prevention of Terrorism Act (PTA) for commemorating war casualties.<sup>5</sup> A couple of days later, police reportedly shut down an event commemorating the Sri Lankan army's 1984 massacre of Tamil villagers in Othiyamalai, which took place at a Hindu temple in Mullaitivu district in the Northern Province.<sup>6</sup>

Although the Sri Lankan government has initially shown dedication to transitional justice tools aiming to address the atrocities committed during the civil war and a particular engagement to truth-seeking initiatives,<sup>7</sup> Sri Lanka can be seen as an example of failed transitional justice.<sup>8</sup> The United Nations (UN) have defined transitional justice as "the full range of processes and mechanisms associated with a society's attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation".<sup>9</sup> Its four pillars include: justice, truth, reparation, and guarantees of non-recurrence. In the case of Sri

1 During the conflict, atrocities have been committed by both sides. The government engaged in, among other acts, enforced disappearances, torture, and arbitrary arrests. The LTTE committed numerous crimes including recruiting child soldiers, torture, forced disappearances, and terrorist acts, such as suicide bombing. These atrocities have been extensively documented in reports of the Office of the United Nations High Commissioner for Human Rights: "Accountability for Enforced Disappearances in Sri Lanka", 17 May 2024 <https://www.ohchr.org/sites/default/files/documents/hrbodies/hrcouncil/sri-lanka/report-accountability-enforced-disappearances-sri-lanka-may2024-en.pdf>; "Comprehensive Report of the Office of the United Nations High Commissioner for Human Rights on Sri Lanka", A/HRC/30/61, 28 September 2015; UN experts "Report of the Secretary-General's Panel of Experts on Accountability in Sri Lanka", 31 March 2011; "Report of the Working Group on enforced or involuntary disappearances on its mission to Sri Lanka," A/HRC/33/51/Add.2, 8 July 2016; "Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak, Mission to Sri Lanka," A/HRC/7/3/Add.6, 26 February 2008, "Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston, Mission to Sri Lanka," E/CN.4/2006/53/Add.527, March 2006; and Human Rights Watch, "Complicit in Crime State Collusion in Abductions and Child Recruitment by the Karuna Group," 23 January 2007, <https://www.hrw.org/report/2007/01/23/complicit-crime/state-collusion-abductions-and-child-recruitment-karuna-group>, Human Rights Watch, "Return to War Human Rights under Siege," 5 August 2007, <https://www.hrw.org/report/2007/08/05/return-war/human-rights-under-siege>, Human Rights Watch, "Recurring Nightmare State Responsibility for "Disappearances" and Abductions in Sri Lanka," 5 March 2008, <https://www.hrw.org/report/2008/03/05/recurring-nightmare/state-responsibility-disappearances-and-abductions-sri-lanka>, Amnesty International, "Sri Lanka: Stop the War on Civilians in Sri Lanka: A briefing on the humanitarian crisis and lack of human rights protection," 27 March 2009, <https://www.amnesty.org/en/documents/asa37/004/2009/en/>

2 The LTTE was founded in 1976 following marginalisation and discrimination of the Tamil population by the Sinhalese-dominated government with the aim to establish an independent Tamil state. The LTTE has been designated as a terrorist group by the European Union (2006) and numerous states including Sri Lanka (1998-2002 and since 2009), the U.S. (1997), India (1992), Canada (2006), and the United Kingdom (2001).

3 Amnesty International, "Sri Lanka: Fifteen years after the end of war, victims still await justice at Mullivaikkal", 18 May 2024, <https://www.amnesty.org/en/latest/news/2024/05/sri-lanka-fifteen-years-after-the-end-of-war-victims-still-await-justice-at-mullivaikkal/>

4 Ibid.

5 Human Rights Watch, "Sri Lanka: Tamils Detained for Commemorating War Dead," 6 December 2023, <https://www.hrw.org/news/2023/12/06/sri-lanka-tamils-detained-commemorating-war-dead>

6 Ibid; "Sri Lankan police disrupt remembrance of Othiyamalai massacre in Mullaitivu" *Tamil Guardian*, 2 December 2023, <https://www.tamil-guardian.com/content/sri-lankan-police-disrupt-remembrance-othiyamalai-massacre-mullaitivu>

7 In 2015, the UN Human Rights Council adopted Resolution 30/1 promoting reconciliation, accountability and human rights in Sri Lanka sponsored by the Sri Lankan government (Resolution 30/1 adopted without vote by the Human Rights Council on 1 October 2015, A/HRC/RES/30/1). The government withdrew its support in 2020: Amnesty International, "Sri Lanka: Withdrawal from UN commitments requires robust response by Human Rights Council," 27 February 2020, <https://www.amnesty.org/en/latest/news/2020/02/sri-lanka-withdrawal-from-un-commitments-requires-robust-response-by-human-rights-council/>

The Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence visited Sri Lanka five times between 2015 and 2017 following invitations of the government. See: UN Human Rights Council, "Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Visit to Sri Lanka," A/HRC/45/45/Add.1, 18 June 2020.

8 See: Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, "Follow-up on the visits to Burundi, the United Kingdom of Great Britain and Northern Ireland and Sri Lanka," A/HRC/48/60/Add.2, 5 August 2021; Amnesty International, "Sri Lanka: When will they get justice? Failures of Sri Lanka's Lessons Learnt and Reconciliation Commission," 7 September 2011, <https://www.amnesty.org/en/documents/asa37/008/2011/en/>

9 United Nations Secretary-General, "The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies", 23 August 2004, S/2004/616, para 8.

Lanka, some of the main issues contributing to the failure of transitional justice are the absence of any follow-up mechanism applying the recommendations of more than ten established truth commissions,<sup>10</sup> the new Bill for the establishment of a Commission for Truth, Unity and Reconciliation<sup>11</sup> despite victims' and civil society's opposition, the absence of a holistic approach combining truth initiatives with prosecutions, reparations, and guarantees of non-recurrence,<sup>12</sup> the continuous misuse of PTA by the Sri Lankan authorities, as well as the highly criticised proposed Anti-Terrorism Bill to replace it.<sup>13</sup> In July 2024, Human Rights Watch highlighted the continuous use of the PTA against "perceived opponents and minority communities without credible evidence to support the allegations despite repeated pledges to end the practice,"<sup>14</sup> providing a series of examples.<sup>15</sup> The reform of the PTA was included in Resolution 30/1 and can be seen as a security reform in the context of transitional justice's fourth pillar (guarantees of non-recurrence).<sup>16</sup> However, as it will be examined below, the new proposed Bill presents many shortcomings.

Although transitional justice tools have produced favourable results for addressing crimes committed by terrorist groups (among other actors) in other contexts, such as Northern Ireland, the Basque country, and, most recently, Colombia,<sup>17</sup> Sri Lanka still struggles to deal with its past. The present policy brief argues that the failure of Sri Lanka to address violations committed by the LTTE (and by the state) through transitional justice mechanisms is due to the absence of certain required conditions for the application and success of transitional justice in a post-war and post-terrorism context,<sup>18</sup> and not to an inherent incapacity of transitional justice to be applied in such context. The policy brief identifies four required conditions: 1) a holistic approach where trials, truth-seeking initiatives, reparation programmes, and non-recurrence measures complement each other; 2) victims' trust in the process through consultations and engagement with the communities; 3) independent and impartial mechanisms; 4) political will and government engagement. This policy brief will discuss these conditions in detail, demonstrate their absence in the Sri Lankan context, and the failure of any transitional justice procedure under the current circumstances. In doing so, it adds a new case study to the emerging debate on the role of transitional justice in the context of counter-terrorism.<sup>19</sup> The policy brief is based on desk research

10 A non-exhausting list includes the following: The Sansoni Commission; The Presidential commissions inquiring into the involuntary removal of persons during 1991–1993; The three "zonal" commissions of inquiry into disappearances that took place in 1994; The 1998 "all-island" disappearances commission; The Udalagama Commission (2006); The Lessons Learned Reconciliation Commission (2010); The Paranagama Commission (2013); The Consultation Task Force for Reconciliation Mechanisms (2016); The Nawaz Commission (2021). See Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, "Visit to Sri Lanka", 18 June 2020, A/HRC/45/45/Add.1; Human Rights Watch, "If We Raise Our Voice They Arrest Us" Sri Lanka's Proposed Truth and Reconciliation Commission", 2023, p. 29 [https://www.hrw.org/sites/default/files/media\\_2023/09/srilanka0923web.pdf](https://www.hrw.org/sites/default/files/media_2023/09/srilanka0923web.pdf); Amnesty International, "Sri Lanka: Twenty years of make-believe. Sri Lanka's Commissions of Inquiry", 11 June 2009, <https://www.amnesty.org/en/documents/asa37/005/2009/en>

11 The Gazette of the Democratic Socialist Republic of Sri Lanka, Part II of December 29, 2023 Supplement (Issued on 01.01.2024), Commission for Truth, Unity and Reconciliation in Sri Lanka [http://documents.gov.lk/files/bill/2024/1/432-2024\\_E.pdf](http://documents.gov.lk/files/bill/2024/1/432-2024_E.pdf)

12 Reflecting transitional justice's four pillars: truth, justice, reparation, and guarantees of non-recurrence.

13 UN Press Release, "UN experts say Sri Lanka's counter-terrorism bill fails to heed their recommendations, status quo fundamentally unchanged," 18 October 2023, <https://www.ohchr.org/en/press-releases/2023/10/un-experts-say-sri-lankas-counter-terrorism-bill-fails-heed-their>; Human Rights Watch, "If We Raise Our Voice They Arrest Us" Sri Lanka's Proposed Truth and Reconciliation Commission", 2023, p. 20, [https://www.hrw.org/sites/default/files/media\\_2023/09/srilanka0923web.pdf](https://www.hrw.org/sites/default/files/media_2023/09/srilanka0923web.pdf); Amnesty International, "End of Use of and Repeal the Draconian PTA," February 2022, <https://www.amnesty.org/en/wp-content/uploads/2022/02/ASA3752412022ENGLISH.pdf>; Human Rights Watch, "Locked Up Without Evidence: Abuses under Sri Lanka's Prevention of Terrorism Act," 29 January 2018, [https://www.hrw.org/sites/default/files/report\\_pdf/srilanka0118\\_web\\_0.pdf](https://www.hrw.org/sites/default/files/report_pdf/srilanka0118_web_0.pdf)

14 Human Rights Watch, "Sri Lanka: False Terrorism Cases Enable Repression", 17 July 2024, <https://www.hrw.org/news/2024/07/17/sri-lanka-false-terrorism-cases-enable-repression>

15 Human Rights Watch, "Sri Lanka: Tamils Detained for Commemorating War Dead," 6 December 2023, <https://www.hrw.org/news/2023/12/06/sri-lanka-tamils-detained-commemorating-war-dead>

16 In Resolution 30/1, the Human Rights Council "[w]elcome[d] the commitment of the Government of Sri Lanka to review the Public Security Ordinance Act and to review and repeal the Prevention of Terrorism Act, and to replace it with anti-terrorism legislation in accordance with contemporary international best practices", para 12.

17 Amaia Alvarez Berastegi. "Transitional justice in settled democracies: Northern Ireland and the Basque Country in comparative perspective" *Critical Studies on Terrorism*, (2017); Joxerramon Bengoetxea, "The unique Basque peace process: Linking Basque and European generations for global transitional justice," *Oñati Socio-Legal Series*, 10:3, (2019), pp. 584–615; Mark Freeman and Iván Orozco, *Negotiating Transitional Justice: Firsthand Lessons from Colombia and Beyond*, (Cambridge: Cambridge University Press, 2020).

18 The designation of the LTTE as a terrorist group renders Sri Lanka an interesting case to study regarding the possibility of applying transitional justice mechanisms to deal with crimes committed by terrorists.

19 Elena Sciandra, "Facing states of fear: The emerging issues of terrorism and counterterrorism in transitional justice" in Scott Nicholas Romaniuk, Francis Grice, Daniela Ilerrea, and Stewart Webb (eds.), *The Palgrave handbook of global counterterrorism policy*, (Palgrave

of available literature and material, including academic publications, reports, and documents produced by NGOs, UN bodies and experts, and public authorities as well as other publicly available information, such as official press releases and media reports.

## The Absence of Required Conditions for Applying the Transitional Justice Toolkit in Sri Lanka

In 2015, the UN Human Rights Council adopted Resolution 30/1 promoting reconciliation, accountability and human rights in Sri Lanka, sponsored by the newly formed Sri Lankan government.<sup>20</sup> The Resolution indicates a series of steps to be taken by the government in order to end impunity and ensure accountability, peace, reconciliation, and non-repetition of human rights violations. Among the measures referred to in the resolution, the Human Rights Council supported “the commitment of the Government of Sri Lanka to strengthen and safeguard the credibility of the processes of truth-seeking, justice, reparations and guarantees of non-recurrence [..]”<sup>21</sup> and welcomed the commitment “to undertake a comprehensive approach to dealing with the past, incorporating the full range of judicial and non-judicial measures”.<sup>22</sup> Since then, Sri Lanka has been engaged in a series of initiatives without any successful outcome.<sup>23</sup> Almost ten years later, under the current circumstances, Sri Lanka’s commitments seem an unachievable chimera.

Transitional justice initiatives have been used in different contexts (following dictatorships,<sup>24</sup> conflicts,<sup>25</sup> and, more recently, by consolidated democratic societies to address past crimes that occurred on a mass scale)<sup>26</sup> and are, therefore, characterised by their flexibility. This adaptability contributes to transitional justice being “context-specific nationally owned and focused on the needs and informed choices of victims”.<sup>27</sup> Nevertheless, to be successful, transitional justice requires the existence of certain conditions in the country where it is to be applied.<sup>28</sup> These conditions are currently lacking in the Sri Lankan context, condemning the transitional justice process to continued failure. Successive governments have adopted an approach to transitional justice which overfocusses on truth-seeking initiatives, disregards victims’ inclusion, and

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Macmillan, 2017), 135–159; Joël Hubrecht, “Le terrorisme. Un défi pour la justice transitionnelle”, 3 *Les Cahiers de la Justice* 393, (2019); Sandrine Lefranc and Sharon Weill, “Le procès V13 comme expérimentation judiciaire: entre justices pénale et transformative” [The V13 trial as a judicial experiment: between criminal and transformative justice], *Les Cahiers de la Justice*, 1, (2023), p.41; Kristin Bergtora Sandvik, “Transitional Justice in Post-terror Contexts: The Norwegian 22 July Memorial and the Ambiguity of Litigation,” *International Journal of Transitional Justice*, 17, (2023), p. 286; Kerstin Bree Carlson, “Transitional Justice for European Terror Actors: Disrupting Europe’s Security/Rights Terror Law Impasse,” in Tine Destrooper, Line Engbo Gissel and Kerstin Bree Carlson (eds.), *Transitional Justice in Aparigmatic Contexts*, (Routledge, 2023), pp. 161–183; Anne Charbord and Fionnuala Ní Aoláin, “Transitional justice (increasingly) meets counter-terrorism” in Cheryl Lawther and Luke Moffett (eds.) *Research Handbook on Transitional Justice*, (Edward Elgar, 2023, 2nd edition), pp. 473–490; Frédéric Mégret, “Transitional justice for the “war on terror?”, *Journal of Human Rights*, 1, (2023), p. 643.

20 UN Human Rights Council adopted Resolution 30/1 promoting reconciliation, accountability and human rights in Sri Lanka sponsored by the Sri Lankan government (Resolution 30/1 adopted without vote by the Human Rights Council on 1 October 2015, A/HRC/RES/30/1). The government withdrew its support in 2020: Amnesty International, “Sri Lanka: Withdrawal from UN commitments requires robust response by Human Rights Council”, 27 February 2020, <https://www.amnesty.org/en/latest/news/2020/02/sri-lanka-withdrawal-from-un-commitments-requires-robust-response-by-human-rights-council/>

21 Resolution 30/1 promoting reconciliation, accountability and human rights in Sri Lanka, para 3.

22 *Ibid.*, para 4.

23 Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, “Follow-up on the visits to Burundi, the United Kingdom of Great Britain and Northern Ireland and Sri Lanka”, A/HRC/48/60/Add.2 5 August 2021.

24 See, for example: the Truth and Reconciliation commissions established in Latin American countries of the Southern Cone, Central and Eastern Europe and South Africa.

25 See, for example: the Sierra Leone Truth and Reconciliation Commission, Central African Truth, Justice, Reparation and Reconciliation Commission, the Commission for Reception, Truth and Reconciliation in East Timor.

26 See, for example: the Special Parliamentary Commission on Belgium’s Colonial Past, the Truth and Reconciliation Commission of Canada, the Independent Commission on Sexual Abuse in the French Catholic Church; National Commission on Children of Creuse (children exiled from Reunion island to mainland France between 1962 and 1984) in France.

27 Michelle Bachelet, “Peacebuilding and sustaining peace: Transitional justice in conflict and post-conflict situations”, 13 February 2020, <https://www.ohchr.org/en/statements/2020/02/justice-past-crimes-can-build-shared-future>

28 “Report of the United Nations High Commissioner for Human Rights, Situation of human rights in Sri Lanka”, A/HRC/54/20 6 September 2023, para 43.



avoids reforming Sri Lanka's anti-terrorism legislation according to international standards and international human rights law. The following section will focus on four required conditions and demonstrate their absence within the Sri Lankan context.

## 1. The Need for a Holistic Approach

Transitional justice should be implemented holistically through mechanisms which reflect its four pillars. Indeed, the pillars “should be thought of as parts of a whole”<sup>29</sup> to redress human rights abuses. This means that trials, truth-seeking initiatives, reparation programmes, and non-recurrence measures should complement each other. Criminal prosecutions should therefore be accompanied by truth-seeking initiatives taking place outside the judicial process where victims can obtain the truth they have been searching for. These initiatives can also provide justice where criminal prosecutions cannot, due to prosecutorial strategies, lack of evidence, low-ranking perpetrators relying on the doctrine of command responsibility, etc. In parallel, non-recurrence measures, such as the vetting of those responsible for the violations, should be adopted to reinforce victims' feeling of justice and trust in government commitment. The same goes for reparation measures which acknowledge victims' suffering and attest political engagement to redress past atrocities. Adopting a holistic approach is the only way to protect victims' rights to justice, truth, reparation, and the guarantee of non-repetition. Moreover, all these measures together contribute to reconciliation within the society which leads to rebuilt social cohesion, civil trust, and sustainable peace for future generations.

What is interesting in the Sri Lankan context is that the successive governments have demonstrated a particular enthusiasm for establishing truth commissions and commissions of inquiry without coordinating such initiatives with the other pillars.<sup>30</sup> Truth commissions are non-judicial bodies established for a fixed period with the mandate to investigate human rights violations that occurred in the past, and submit a final report with their findings and (non-binding) recommendations. To accomplish this task, they organise public hearings where victims and perpetrators can participate. They also engage in research and consultation with different actors. While truth commissions have a more general mandate focusing on long periods of abuse, looking into the historical, political and socioeconomic origins of the violence, commissions of inquiry look into specific events and often collect evidence to be used for criminal prosecutions.<sup>31</sup> However, both types of truth-seeking initiatives aim to spread light on past human rights violations and publish their findings in a report with specific recommendations. At the time of writing (2024), there have been more than ten truth commissions in Sri Lanka – some of them established in the early 1990s.<sup>32</sup> Nonetheless, the other transitional justice mechanisms have been particularly neglected.

Despite Resolution 30/1 calling for the establishment of a “judicial mechanism with a special council to investigate allegations of violations and abuses of human rights and violations of

29 “Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence,” A/HRC/21/46, 9 August 2012, para 20.

30 For instance, in Resolution 30/1 Sri Lanka committed to “establish a judicial mechanism with a special counsel to investigate allegations of violations and abuses of human rights and violations of international humanitarian law”. This mechanism was never established. Sri Lanka has also been opposing to prosecute security force members seeing them as ‘war heroes’: “Sri Lanka leader to shield general from war crimes case”, *Al Jazeera*, 3 September 2017, <https://www.aljazeera.com/news/2017/9/3/sri-lanka-leader-to-shield-general-from-war-crimes-case>; See, also: Nadeshda Jayakody, “Fifteen Years After Sri Lanka's Civil War Ended, a Different Approach to Transitional Justice is Needed” *Opinio Juris*, August 2024 <https://opiniojuris.org/2024/08/07/fifteen-years-after-sri-lankas-civil-war-ended-a-different-approach-to-transitional-justice-is-needed/>

31 See, for instance: the UN Commission of Inquiry on the 2018 protests in the Occupied Palestinian Territory; the UN Independent Commission of Inquiry on the 2014 Gaza Conflict; the Independent Investigative Mechanism for Myanmar; and the UN Independent Investigation on Burundi.

32 See: “Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Visit to Sri Lanka” A/HRC/45/45/Add.1, 18 June 2020; Human Rights Watch, “If We Raise Our Voice They Arrest Us” Sri Lanka's Proposed Truth and Reconciliation Commission”, 2023, p. 29 [https://www.hrw.org/sites/default/files/media\\_2023/09/srilanka0923web.pdf](https://www.hrw.org/sites/default/files/media_2023/09/srilanka0923web.pdf); Amnesty International, “Sri Lanka: Twenty years of make-believe. Sri Lanka's Commissions of Inquiry”, 11 June 2009, <https://www.amnesty.org/en/documents/asa37/005/2009/en>

international humanitarian law, as applicable”,<sup>33</sup> prosecutions remain very limited.<sup>34</sup> In 2017, the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence deplored the non-implementation of any comprehensive plan on transitional justice and of his recommendations after having visited the country five times between 2015 and 2017.<sup>35</sup> In 2021, a follow-up visit to Sri Lanka was carried out by the new mandate holder, Fabián Salvioli, who noted “the insufficient implementation of the recommendations made by his predecessor and the blatant regression in the areas of accountability, memorialization and guarantees of non-recurrence and the insufficient progress made regarding truth-seeking”.<sup>36</sup>

This focus on one pillar of transitional justice shows the one-sided nature of Sri Lanka’s engagement with transitional justice. It appears that the option of establishing truth commissions has been privileged over the years to avoid prosecutions of the perpetrators.<sup>37</sup> Although truth-seeking initiatives constitute an important part of the process, truth alone cannot provide justice to victims. Criminal responsibility should also be established for the violations committed, reparations (which are often recommended in the final report of truth commissions) should accompany trials and non-judicial mechanisms, and guarantees of non-recurrence should ensure that the violations will not be repeated through measures such as the dissemination of the truth commission’s findings, commemoration events, monuments, the teaching of the history, trainings on human rights for the public servants, and vetting procedures. For instance, Colombia has established the Comprehensive System of Truth, Justice, Reparation, and Non-Repetition (Sistema Integral de Verdad, Justicia, Reparación y no Repetición, SIVJRNR),<sup>38</sup> a series of transitional justice mechanisms on the basis of the 2016 Peace Agreement between the government and the Revolutionary Armed Forces of Colombia (FARC),<sup>39</sup> and enacted a series of reparation laws.<sup>40</sup> On the contrary, Sri Lanka’s application of a “pick and choose” process, instead of a comprehensive plan, has led the country to embark upon a fragmented process where “truth” comes without justice, reparation, and guarantees of non-recurrence. This fragmented process is condemned to fail independently of whether the perpetrators of certain crimes are alleged members of a terrorist group or not. It is, therefore, not the kind of violations or the status of the perpetrators that impede the transitional justice process but the Sri Lankan “pick and choose” approach.

## 2. The Importance of Victims’ Trust and Participation

Transitional justice processes must be trusted by victims. Fostering trust, together with providing recognition to victims, is a mediate goal of transitional justice, which contributes to the two final goals, reconciliation and strengthening of the rule of law.<sup>41</sup> To foster trust, large consultations with

33 Resolution 30/1 adopted by the Human Rights Council on 1 October 2015, A/HRC/RES/30/1, para 6.

34 See: Isabelle Lassée (ed.), Sri Lanka’s time to try. Prosecuting Conflict-related Abuses, *South Asian Centre for Legal Studies*, (2019), [https://www.ecchr.eu/fileadmin/Publikationen/Schueller\\_Mehta\\_Sri\\_Lanka\\_s\\_Time\\_to\\_Try.pdf](https://www.ecchr.eu/fileadmin/Publikationen/Schueller_Mehta_Sri_Lanka_s_Time_to_Try.pdf); See, also: United Nations High Commissioner for Human Rights, Situation of human rights in Sri Lanka, A/HRC/57/19, 22 August 2024, para 44-48.

35 “Observations by the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Mr. Pablo de Greiff, on the conclusion of his recent visit to Sri Lanka,” 23 October 2017, <https://www.ohchr.org/en/statements/2017/10/observations-special-rapporteur-promotion-truth-justice-reparation-and?LangID=E&NewsID=22274>

36 Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, “Follow-up on the visits to Burundi, the United Kingdom of Great Britain and Northern Ireland and Sri Lanka,” A/HRC/48/60/Add.2, August 2021.

37 Kiran Kaur Grewal. “The Epistemic Violence of Transitional Justice: A View from Sri Lanka”, *International Journal of Transitional Justice*, Volume 17, Issue 2, (2023), p. 324 (stating that the calls for investigations and prosecutions after the end of the civil war were met with hostility from the government which opted for the “Lessons Learnt and Reconciliation Commission” instead)

38 UN Verification Mission in Colombia, Comprehensive System of Truth, Justice, Reparation, and Non-Repetition (SIVJRNR) <https://colombia.unmissions.org/en/comprehensive-system-peace#:~:text=The%20SIVJRNR%2C%20also%20known%20as,and%20the%20former%20FARC%20DEP>

39 The Comprehensive System of Truth, Justice, Reparation, and Non-Repetition includes the following mechanisms: the Special Jurisdiction for Peace [*Jurisdicción Especial para la Paz – JEP*], the Truth Commission [*Comisión para el Esclarecimiento de la Verdad, la Convivencia y la No Repetición – CEV*], and the Unit for the disappeared persons [*Unidad de Búsqueda de Personas dadas por Desaparecidas en el contexto y en razón del conflicto armado – UBPD*].

40 Reparations, Responsibility & Victimhood in Transitional Societies, “Colombia”, accessed August 20, 2024, <https://reparations.qub.ac.uk/countries/colombia/#:~:text=With%20the%20peace%20agreement%20with,slated%20to%20run%20until%202021>

41 “Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence,” A/HRC/21/46, August 28 2012, para 28.9

victims, victims' groups, affected communities, NGOs, and civil society should take place during the design of the process and throughout it. Only if victims trust the responsible institutions transitional justice has a chance to succeed. Moreover, victims should have a say regarding the form that the transitional justice process will take. What should be the composition and mandate of the truth-seeking mechanism? What legislative reforms are needed and should these be adopted through referenda? What measures of reparation are the most adequate ones? Victims should have the possibility to answer such questions and their inputs should be taken into consideration by the institutions and individuals in charge of the process. In other words, victims must be at the centre of transitional justice mechanisms and their needs, rights, and aspirations should be taken into account at every phase of the process.<sup>42</sup> Additionally, in societies that have suffered long-lasting violations, the integration of a transgenerational perspective should be considered and consultations should include young people who have not experienced the period when the violations took place.<sup>43</sup>

In parallel, transitional justice mechanisms should guarantee the meaningful participation of victims, as well as their security. Marginalised populations, including women and girls, indigenous peoples, refugees, persons with disabilities, LGBTQ+, and religious and ethnic minorities should all be able to access transitional justice tools.<sup>44</sup> This necessitates sufficient outreach activities and communication campaigns throughout the country as well as giving the possibility of truth and reconciliation commissions to organise hearings in different locations, notably in rural areas. To make mechanisms more inclusive, measures such as the translation of documents into local dialects, a gender-sensitive approach, and providing interpretation during hearings should be available. Furthermore, securitisation measures, such as anonymity, use of non-public entrances and exits for victims, concealing physical appearances, and voice distortion should be applied if necessary.

In the case of Sri Lanka, the above-mentioned required conditions to build trust are lacking. Although there have been consultations with victims in the past for the establishment of transitional justice measures, the recommendations submitted were not applied by the government.<sup>45</sup> Today, the government continues to exclude victims from the transitional justice process. Notwithstanding the 2021 report of the UN High Commissioner for Human Rights on Sri Lanka, which underlined that “numerous commissions of inquiry appointed by successive governments failed to credibly establish truth and ensure accountability”,<sup>46</sup> the government has proposed a new bill for the establishment of a Commission for Truth, Unity and Reconciliation. The Bill was published in the Gazette on 1 January 2024.<sup>47</sup> Many victims and civil society organisations are opposed to the establishment of this commission, as Sri Lanka's past with truth commissions testifies to the failure of these initiatives and the absence of consultations with victims.<sup>48</sup> Recommendations issued from previous truth commissions have not been implemented, resulting in victims' frustration<sup>49</sup> and demonstrating a misuse and politicised manipulation of the transitional justice toolkit. In the context of the current Bill, limited conversations with victims and civil society were

42 “UN Guidance Note of the Secretary General, Transitional Justice A Strategic Tool for People, prevention and Peace”, 2023, p. 8 [https://www.ohchr.org/sites/default/files/documents/issues/transitionaljustice/sg-guidance-note/2023\\_07\\_guidance\\_note\\_transitional\\_justice\\_en.pdf](https://www.ohchr.org/sites/default/files/documents/issues/transitionaljustice/sg-guidance-note/2023_07_guidance_note_transitional_justice_en.pdf)

43 Ibid., p. 9.

44 Ibid., p. 8.

45 “Report of the Office of the United Nations High Commissioner for Human Rights on Sri Lanka” A/HRC/34/20, 10 February 2017, para 13- 14.

46 “Report of the United Nations High Commissioner for Human Rights, Promoting reconciliation, accountability and human rights in Sri Lanka”, A/HRC/46/20, 9 February 2021.

47 The Gazette of the Democratic Socialist Republic of Sri Lanka, Part II of December 29, 2023 Supplement (Issued on 01.01.2024),

Commission for Truth, Unity and Reconciliation in Sri Lanka [http://documents.gov.lk/files/bill/2024/1/432-2024\\_E.pdf](http://documents.gov.lk/files/bill/2024/1/432-2024_E.pdf)

48 See: International Commission of Jurists, “Sri Lanka: New Bill to establish ‘Commission for Truth, Unity and Reconciliation’ lacks credibility and unlikely to bring accountability”, 12 January 2024, <https://www.icj.org/sri-lanka-new-bill-to-establish-commission-for-truth-unity-and-reconciliation-lacks-credibility-and-unlikely-to-bring-accountability/>; Human Rights Watch, “If We Raise Our Voice They Arrest Us” Sri Lanka's Proposed Truth and Reconciliation Commission, 2023, [https://www.hrw.org/sites/default/files/media\\_2023/09/srilanka0923web.pdf](https://www.hrw.org/sites/default/files/media_2023/09/srilanka0923web.pdf); “Sri Lanka: Victim community rejects proposed “National Unity and Reconciliation Commission” Sri Lanka Brief, 14 July 2023, <https://srilankabrief.org/sri-lanka-victim-community-rejects-proposed-national-unity-and-reconciliation-commission/>

49 Ibid.



only conducted after the commission's design had been decided.<sup>50</sup> Additionally, although the Bill provides for the development and implementation of a protection and psycho-social support scheme<sup>51</sup> for witnesses, past experiences with the Victim and Witness Protection Act raise fears for the future.<sup>52</sup>

Unsurprisingly, not taking into consideration the findings and recommendations of the previous truth commission and excluding victims and civil society from the design and implementation of transitional justice mechanisms has resulted in unsuccessful attempts to deal with the violence. As it was demonstrated, this is due to the repeated failure of the Sri Lankan government to gain victims' trust and not to an inherent incapacity to deal with violations committed by terrorist groups, among other actors.

### 3. The Requirement of Independent and Impartial Mechanisms

Transitional justice mechanisms must be independent and impartial. This includes the members of the mechanisms, the procedure of selection, and their mandate.<sup>53</sup> Regarding a truth commission, a non-politicised procedure for the appointment of commissioners and the selection of individuals with moral standing within the community can result in rendering the initiative credible and trusted by the victims. As a general rule, transitional justice mechanisms should include victims' representation and be gender-balanced. Furthermore, their findings and conclusions should be accessible and open to the public.

On this note, the draft Bill on the new Sri Lanka Commission for Truth, Unity and Reconciliation<sup>54</sup> is not in line with the requirement of independence and impartiality. According to the Bill, the commission consists of three bodies: the Commission for Truth, Unity and Reconciliation in Sri Lanka; the Monitoring Committee; and an Advisory Panel. The Constitutional Council plays a substantive role in the composition of the Commission. Considering that currently the majority of the Constitutional Council's members are politicians and its independence has been questioned several times,<sup>55</sup> political influence seems very likely. In particular, the Commission shall consist of seven to twenty-one members, all of them Sri Lankan citizens appointed by the President upon recommendation by the Constitutional Council.<sup>56</sup> Furthermore, the Constitutional Council plays an important role in the possible removal of a member, as, according to the procedure, a member of the Commission may be removed by the President with the concurrence of the Constitutional Council.<sup>57</sup> The same applies to the appointment and removal of the Monitoring Committee's members.<sup>58</sup> More specifically, out of the eleven people appointed by the President, five will be ex-officio members, while the remaining six will be citizens of Sri Lanka appointed for a period of three years upon the recommendation of the Constitutional Council.<sup>59</sup> Although the Bill indicates

50 Alan Keenan. "Sri Lanka Needs Truth, but Not (Yet) a Truth Commission" *International Crisis Group*, 7 September 2023 <https://www.crisisgroup.org/asia/south-asia/sri-lanka/sri-lanka-needs-truth-not-yet-truth-commission>

51 Part V Protection of the Rights of Aggrieved Persons and Witnesses; The government also introduced Assistance to and Protection of Victims of Crime and Witness Act No 10, 2023 <https://www.parliament.lk/uploads/acts/gbills/english/6297.pdf>

52 Bhavani Fonseka and Naveera Perera. "Does Sri Lanka Need a Truth and Reconciliation Commission? - A Comment on the Latest Proposal & Ground Realities", *Centre for Policy Alternatives*, 2023, p. 16 <https://reliefweb.int/report/sri-lanka/does-sri-lanka-need-truth-and-reconciliation-commission-comment-latest-proposal-ground-realities>; See, also: Transparency International, "Increasing Protection for Victims and Whistleblowers in Sri Lanka", 2019, <https://www.anticorruptionpledgetracker.com/case-study/third-case-study-this-one-should-not-be-show-in-the-nav/>; Maneshka Borham, "A failure to protect?" *Sunday Observer*, 27 May 2018, <https://archives1.sundayobserver.lk/2018/05/27/news-features/failure-protect>

53 "UN Guidance Note of the Secretary General, Transitional Justice A Strategic Tool for People, Prevention and Peace", 2023, pp. 14-15

54 The Gazette of the Democratic Socialist Republic of Sri Lanka, Part II of December 29, 2023 Supplement (Issued on 01.01.2024),

Commission for Truth, Unity and Reconciliation in Sri Lanka [http://documents.gov.lk/files/bill/2024/1/432-2024\\_E.pdf](http://documents.gov.lk/files/bill/2024/1/432-2024_E.pdf)

55 Bhavani Fonseka and Naveera Perera. "Does Sri Lanka Need a Truth and Reconciliation Commission? - A Comment on the Latest Proposal & Ground Realities", *Centre for Policy Alternatives*, (2024) p. 15 <https://reliefweb.int/report/sri-lanka/does-sri-lanka-need-truth-and-reconciliation-commission-comment-latest-proposal-ground-realities>

56 Article 3(1) and 3(4).

57 Article 3(4)(3).

58 Article 40(1) and 40(8)(a).

59 Article 40.

that the “Committee shall reflect a gender balance and the pluralistic nature of Sri Lanka”, there is no guarantee that among the six appointed citizens there will be representatives of victims, affected communities, and members of civil society organisations.<sup>60</sup>

In addition, the temporal mandate of the commission is restricted to “the conflict which took place in the Northern and Eastern Provinces during the period 1983 to 2009, or its aftermath”.<sup>61</sup> Consequently, the root causes of the conflict will not be examined and analysed. This reflects a political choice which prioritises dealing with the symptoms rather than the causes. However, an examination of the situation prior to the 26-year-long civil war could contribute to a deep understanding of the factors which led individuals to participate or associate with LTTE, the adequacy and proportionality of the state’s responses, the victimhood, the perpetuation of biases, the marginalisation of certain communities, and the stereotypes among the population.<sup>62</sup>

In a post-terrorism context, assuring an impartial and independent transitional justice process with a mandate that looks into the grievances and origins of violence, is the key to success. The procedure to designate the members of the mechanisms (for example, commissioners, judges, and personnel) and the mandate of the mechanisms (for example, to exclude certain violations or a period of time) should reflect the impartiality and independence of the process. For instance, in Colombia, the Committee in charge of appointing the members of the JEP, the CEV, and the UBDP, consisted of five independent members from national, international, and regional bodies.<sup>63</sup> Additionally, the CEV dedicated the third volume of its final report to the historical context of the internal armed conflict in Colombia starting from the end of World War I.<sup>64</sup> This choice was made to answer questions about the origin of the conflict, its development and the actions of the different groups and institutions involved, as well as to understand the political violence, its transformations, degradation, and persistence.<sup>65</sup> The report took into account the contribution of the previously established Historical Commission on the Conflict and its Victims.<sup>66</sup> The resistance of the Sri Lankan government to take into account the reports of the previous mechanisms and guarantee an independent and impartial transitional justice process impedes any new initiative.

#### 4. The Necessity for the Government’s Political Will and Engagement: the Example of Legislative Reforms

Finally, the use of transitional justice tools is based on political will. Initiatives cannot lead to successful results if they are not accompanied by political will and government engagement. This applies to every step of the process, including the follow-up mechanisms. Political will can

60 Bhavani Fonseka and Naveera Perera. “Does Sri Lanka Need a Truth and Reconciliation Commission? - A Comment on the Latest Proposal & Ground Realities”, *Centre for Policy Alternatives*, (2024) p. 13 <https://reliefweb.int/report/sri-lanka/does-sri-lanka-need-truth-and-reconciliation-commission-comment-latest-proposal-ground-realities>

61 Article 12.

62 Anne Charbor, “Transitional Justice in Contexts Where Terrorism and Counter-terrorism are Part of the Discourse”, December 2023, p. 59 <https://www.ohchr.org/sites/default/files/documents/issues/transitionaljustice/sg-guidance-note/7th-tj-ct.pdf>

63 1. A delegate appointed by the Criminal Chamber of the Supreme Court of Justice; 2. A delegate appointed by the Secretary General of the United Nations; 3. A delegate appointed by the Permanent Commission of the State University System; 4. A delegate appointed by the President of the European Court of Human Rights; and 5. A delegate appointed by the delegation in Colombia of the International Centre for Transitional Justice (ICTJ). Decree 587 of 2017, Article 2 <https://www.funcionpublica.gov.co/eva/gestornormativo/norma.php?i=80613>; See also Legislative Act 01 of 2017

64 Comisión para el Esclarecimiento de la Verdad, la Convivencia y la No Repetición, “Hay futuro si hay verdad. No matarás. El primer mandamiento de la democracia colombiana”, [There is a future if there is truth. You Shall not Kill. The first commandment of Colombian democracy] *Informe Final, Tomo 3*, (August 2022), <https://www.comisiondelaverdad.co/hay-futuro-si-hay-verdad>; See also Article 12 Decree 588 de 2017 <https://wayback.archive-it.org/20948/20230523101749/https://web.comisiondelaverdad.co/images/decreto-588-de-2017-comision-verdad-mandato-funciones.pdf>

65 Comisión para el Esclarecimiento de la Verdad, la Convivencia y la No Repetición, “Hay futuro”, p. 24-25.

66 The Historical Commission on the Conflict and its Victims [Comisión Histórica del Conflicto y sus Víctimas] was created in the framework of the peace talks between the Colombian State and the FARC-EP in Havana. It consisted of fourteen intellectuals working on the understanding of the conflict. See: Comisión Histórica del Conflicto y sus Víctimas, “Contribución al entendimiento del conflicto armado en Colombia” [Contribution to the understanding of the armed conflict in Colombia], 2015 <https://indepaz.org.co/wp-content/uploads/2015/02/Version-final-informes-CHCV.pdf>

be expressed, inter alia, by the financial sustainability of the process, the willingness of the government to apply the recommendations of the truth commission, and the seriousness of legislative reforms.

In the case of Sri Lanka, it is clear that the political will is missing. This unwillingness is aptly illustrated by the government's reluctance to follow recommendations made by the previous truth commissions and the resistance to proceed with much-needed legislative reforms, which should enhance compliance with international human rights standards. An interesting example demonstrating the lack of political will is the reform of the PTA.<sup>67</sup>

The Act has been extensively criticised for many years by domestic and international bodies, including the United Nations. On 27 January 2022, the Sri Lankan government published an amendment. Nevertheless, the proposed amendments failed to provide a law in line with international standards.<sup>68</sup> In March 2023, a new Bill was gazetted<sup>69</sup> with a new version on 15 September 2023,<sup>70</sup> which was presented in the Parliament in January 2024. The current version of the Bill presents a series of problems.<sup>71</sup> For instance, terrorism is defined vaguely through a list of offences, including "committing the offence of robbery, extortion or theft, in respect of State or private property" and "causing the destruction of, or serious damage to, religious or cultural property"<sup>72</sup> which fall under ordinary criminal offences and should not enact the application of counter-terrorism legislation. Additionally, the mens rea is very broad, referring to "intimidating [the] public or section of the public" and "wrongfully or unlawfully compelling the government of Sri Lanka"<sup>73</sup> which can be interpreted for targeting and arresting strikers and members of civil society. The scope of judicial guarantees is restricted considering, for example, that the appeal against a detention order is to be decided by the Board of Review, a non-judicial body constituted by the Secretary to the Ministry of the Minister of Defence and two other people appointed by the President.<sup>74</sup>

Defining terrorism broadly and providing no judicial guarantees can lead to baseless attacks against minority communities, human rights defenders, and journalists and it silences any form of

67 In 2015, the government had engaged to review, repeal and replace the PTA with anti-terrorism legislation which would be in accordance with international best practices. See: UN General Assembly, "Resolution 30/1 adopted by the Human Rights Council on 1 October 2015", A/HRC/RES/30/1, para. 12.

68 See: The five "necessary prerequisites" to ensure the PTA is amended to be compliant with international law obligations identified by seven UN Special Procedures mandates in their communication to the Government "OL LKA 7/2021", December 2021 <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gld=26863>

69 The Gazette of the Democratic Socialist Republic of Sri Lanka, Part II of March 17, 2023 Supplement (Issued on 22.03.2023), Anti-terrorism A Bill [http://documents.gov.lk/files/bill/2023/3/304-2023\\_E.pdf](http://documents.gov.lk/files/bill/2023/3/304-2023_E.pdf); Human Rights Watch, "In a Legal Black Hole: Sri Lanka's Failure to Reform the Prevention of Terrorism Act", 2022, <https://www.hrw.org/report/2022/02/07/legal-black-hole/sri-lankas-failure-reform-prevention-terrorism-act>

70 Parliament of the Democratic Socialist Republic of Sri Lanka, Anti-terrorism A Bill, presented by the Minister of Justice, Prison Affairs and Constitutional Reforms on 10th of January, 2024 (Published in the Gazette on September 15, 2023) [http://documents.gov.lk/files/bill/2024/1/444-2024\\_E.pdf](http://documents.gov.lk/files/bill/2024/1/444-2024_E.pdf); International Center for Not-for-Profit-Law, Sri Lanka (30 January 2024) <https://www.icnl.org/resources/civic-freedom-monitor/sri-lanka>

71 See: UN reaction: United Nations High Commissioner for Human Rights, Call to Sri Lanka to revise anti-terrorism bill, 19 January 2024 <https://www.ohchr.org/en/press-briefing-notes/2024/01/call-sri-lanka-revise-anti-terrorism-bill>; See: "At a local level", Centre for Policy Alternatives, October 2023 <https://www.cpalanka.org/wp-content/uploads/2024/03/ATA-Table-Complete-v1.2.pdf>; See, on previous versions: Amnesty International, "Sri Lanka: Countering terrorism at the expense of human rights: Concerns with Sri Lanka's Counter Terrorism Bill", 31 January 2019, <https://www.amnesty.org/en/documents/asa37/9770/2019/en/>

72 Section 3(2)(g) and 3(2)(j)

73 Section 3(1)(a) and 3(1)(b)

74 Section 40(2). Other problematic points include: Section 31(1)(e) and Section 37, according to which although a detention order "may initially be issued for a period not exceeding three months", detention may be extended up to one year. Further, Section 82 offers the possibility for the President to issue a Proscription Order, banning an organisation based on "reasonable grounds" to believe that it is engaged in any act amounting to an offence under the Act. The "reasonable grounds" requirement places the threshold very low and can lead to extensive abuse, used against NGOs and civil society organisations, or any organisation disagreeing with the government. Banning an organisation should always meet high thresholds, which respect the right to freedom of association guaranteed by international human rights treaties. See, for instance: European Commission for Democracy through Law (Venice Commission) and OSCE Office for Democratic Institutions and Human Rights, "Joint Guidelines on Freedom of Association", 13 December 2014, [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2014\)046-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2014)046-e). Finally, the freezing of bank accounts and assets of a suspect can be ordered by the Magistrate following an application made by the police on the grounds of facilitating the investigation (Section 65). If the Magistrate is satisfied that the application is made in good faith and the assistance sought is reasonably necessary for the purpose of facilitating the conduct of investigations, he/she shall issue the order. The "good faith" requirement can result in abusive use of freezing assets which can be disproportional.



opposition.<sup>75</sup> In May 2023, the Office of the United Nations High Commissioner for Human Rights published its preliminary comments on Sri Lanka's draft Anti-Terrorism Bill underlining the possible lack of compliance of several aspects of the draft Bill with the State's obligations under international human rights law.<sup>76</sup> It also mentioned the need to respect the five "necessary prerequisites"<sup>77</sup> to ensure the PTA is amended to be compliant with international law obligations identified by seven UN Special Procedures mandates in their communication to the government in December 2021. These include the use of definitions of terrorism in compliance with international norms and the prevention of arbitrary detention. In August 2024, the report of the UN High Commissioner for Human Rights on the situation of human rights in Sri Lanka also underlined the broad powers that the new Bill grants to the executive, and the inclusion of new provisions which criminalise speech under "encouragement of terrorism".<sup>78</sup> Despite the national and international opposition, the current position of the Sri Lankan government demonstrates that there is no serious political will to reform its anti-terrorism legislation, which could contribute to sustainable peace and reconciliation. On the contrary, the persistence of the Sri Lankan government to ignore calls of civil society and UN bodies regarding the new anti-terrorism Bill downplays the transitional justice process.

## Recommendations

Following the analysis, this policy brief proposes the following recommendations:

*Recommendations to the government of Sri Lanka regarding the first, second, and third conditions:*

- The adoption of a holistic transitional justice process by the Sri Lankan government, which will include truth-seeking initiatives, prosecutions, reparations, and guarantees of non-recurrence, is recommended. These mechanisms should complement and reinforce each other and guarantee victims' inclusion.
- Attention should be paid to an in-depth examination and analysis of the situation prior to the rise of terrorism, the beginning of the civil war, and the grievances that led to it. Simplified narratives and the perpetuation of stereotypes and biases regarding minorities and vulnerable groups should be avoided. Victims' inclusion, including marginalised groups and youth, in the design and implementation of the transitional justice process should be prioritised. The mechanisms should guarantee a gender-sensitive approach, transgenerational perspectives, as well as victims' security.
- Suspend the establishment of the new Commission for Truth, Unity and Reconciliation. Review the reports of the past truth commissions, and implement their key recommendations.

*Recommendation to the government of Sri Lanka regarding the fourth condition:*

- Repeal the PTA and amend the Counter Terrorism Bill in accordance with international human rights law ensuring that any new counter-terrorism legislation meets international due process and fair trial standards. To do so, establish an independent review mechanism to check the accordance of counter-terrorism legislation with international law and standards. Effective remedies and reparations to individuals who have been targeted under the PTA should be provided.

<sup>75</sup> See Human Rights Watch, "Sri Lanka: False Terrorism Cases Enable Repression", 17 July 2024, <https://www.hrw.org/news/2024/07/17/sri-lanka-false-terrorism-cases-enable-repression>

<sup>76</sup> Office of the United Nations High Commissioner for Human Rights, "Preliminary comments on Sri Lanka's draft Anti-Terrorism Bill" <https://www.ohchr.org/sites/default/files/documents/countries/sri-lanka/OHCHR-sri-lanka-preliminary-review-ATB.pdf>

<sup>77</sup> Ní Aoláin et al., "OL LKA 7/2021", 9 December 2021, <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gld=26863>.

The five "necessary prerequisites" are the following: 1) Employ definitions of terrorism in compliance with international norms; 2) Ensure precision and legal certainty; 3) Institute provisions to prevent and halt arbitrary detention; 4) Ensure preventive measures to prevent torture and enforced disappearance and adhere to their absolute prohibition; 5) Enable due process and fair trial guarantees including judicial oversight and access to legal counsel.

<sup>78</sup> United Nations High Commissioner for Human Rights, "Situation of human rights in Sri Lanka," A/HRC/57/19, 22 August 2024, para 14.

*Recommendations to countries wishing to implement a transitional justice process to deal with crimes committed by terrorist groups, among other actors:*

- Transitional justice should always be implemented holistically, and include truth-seeking initiatives, prosecutions, reparations, and guarantees of non-recurrence.
- (Counter-terrorism) Strategies, policies, and legislations which are in compliance with international human rights law should be promoted, while clear criteria for labelling individuals or groups as terrorists, and ensuring that they are not being used to target minorities, activists, journalists, and any individual or group that disagrees with governmental policies should be set.
- Victim-centred approaches to justice that provide meaningful participation to victims regardless of their attitude towards the terrorist violence carried out during the conflict should be adopted.
- Finally, governments should coordinate the efforts with the respective UN agencies and bodies working on counter-terrorism and transitional justice.

## Concluding Remarks

Over the course of 26 years, the people of Sri Lanka endured a civil war that left profound and untreated scars. Although transitional justice initiatives have resulted in relatively successful solutions in other countries, Sri Lanka remains incapable of applying such tools to address its past. Considering that transitional justice mechanisms have produced favourable results in countries dealing with terrorist violence, the present research demonstrated that the failure of transitional justice in Sri Lanka is linked to the absence of required conditions for its application and not to the incapacity of transitional justice to address crimes committed by terrorists, among other actors. The current Sri Lankan approach to transitional justice impedes the analysis of the root causes, perpetuates stigma and power-relations, and blocks conversations on conflict resolution while repressing activists and civil society actors.

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### Niki Siampakou

Dr. Niki Siampakou joined the International Centre for Counter-Terrorism for the Rule of Law Responses to Terrorism Programme, in May 2023, as a Joint Research Fellow with T.M.C. Asser Instituut. Her work focuses on the appropriate legal responses against violent extremism and terrorism, with a particular focus on (inter) national criminal justice and human rights considerations. Before joining the ICCT, Niki worked in the field of transitional justice as a research and training project manager at the IFJD-Institut Louis Joinet in France. She also participated in two field missions in the Central African Republic and in several conferences. Between 2016 and 2019, she was a contractual researcher at Aix Marseille University.

Niki holds a PhD in international criminal law and a master's degree in public international law from Aix Marseille University and a bachelor's degree in law from the Aristotle University of Thessaloniki. Her doctoral dissertation, entitled "*Against all hopes: The untenable promise of reparations of the International Criminal Court*", provides a critical analysis of the ICC's reparation mandate. During her PhD, she was a visiting scholar at New York University (JSD Program, 2018-2019) and at the University of Amsterdam (ACIL, 2017-2018). She also interned with the Victims participation and reparations section of the International Criminal Court and the Greek Ministry of Justice.



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