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TRUTH TELLING, GENDER AND COMMISSIONS OF INQUIRY IN SRI LANKA

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Editor's Note

Sri Lanka's past lessons with Commissions of Inquiry, some of which have been positive but most, overwhelmingly negative are applicable and relevant without a doubt to victims of all ethnicities and all communities in the country.

This is a fact that must be understood in all its complexity though the perception may be that their relevance is limited to the minority communities. Many of these bodies have been extremely politicized in their composition and functioning. Even where a Commission of Inquiry functioned reasonably well, its recommendations were routinely ignored by the administration of the day despite the considerable benefits that may have accrued to citizens through full implementation. This is a reality not limited to a particular government or a particular executive which again may not reflect the common perception.

The **LST Review** in its concluding Issue for the year 2011 publishes a reflection on truth telling and gender by researcher Joanna Baker which examines the manner in which the critique of Sri Lanka's Commission of Inquiry may be expanded by taking into account, the failure by such bodies to address gender discrimination issues. AS she points out, though Commissions of Inquiry within Sri Lanka's specific legal context cannot strictly be defined as truth telling mechanisms, nevertheless, they retain some relevant elements, such as gathering a credible picture of human rights violations.

Using international best practice, she looks at a gendered experience of conflict and displacement regarding women belonging to the ethnic Tamil minority from the broader viewpoint of discriminatory practices as well as their treatment by Commissions of Inquiry. While her analysis is therefore limited in terms of its subjects, it may well be opportune to reflect that the key areas identified by her for change in future experiments of this nature in truth telling applies across the board to women of all ethnicities.

As Sri Lanka has learnt from past experience, nominal representation of women whether in commissions, in politics, in administration or in the judiciary does not ensure that the needs and concerns of women, which demand specific and special treatment, are addressed. Insofar as Commissions of Inquiry are concerned, their mandates must reflect this, their resources must allow for this and the general environment in which they function must embody this quite apart from the superficial

and nominal inclusion of a woman as part of the composition of the body. Sri Lanka has yet to see this type of sensitivity in the establishment and functioning of inquiry bodies of this nature and the writer is quite correct in making the point that the critique of a commission process must embrace questions of gender inclusivity as well as the commonly emphasized focus on independence and effectiveness.

Comparative experience has shown that these exercises may be structured very differently from what Sri Lanka has known. As she comments;

“Recently designed truth commissions in Sierra Leone and Timor Leste have begun to build an explicit reference to gender into the legal instrument that creates them, ensuring dedicated staff, resources and guidelines, and more comprehensive involvement by female survivors. This has allowed for more consistent investigation into the privatized and structural harms that come from conflict, for the proper cross-distribution of these findings in the report and – essentially – in any follow up action”

And ideally, the mandate must include not only violations in the public sphere but also violations in the private sphere as this is where violence against women is centered, particularly in the context of conflict and displacement.

Commissioners themselves who are appointed to these bodies must realize the importance of these concerns. Gender sensitive procedures of protection are imperative for such efforts.

This paper is a substantial contribution to the existing debates of truth telling in Sri Lanka and it is hoped, will provoke a more extensive study across ethnicities in order to better inform the public mind.

Kishali Pinto-Jayawardena

RECONCILING TRUTH AND GENDER: LESSONS FOR SRI LANKA

*Jo Baker**

Abstract:

Truth-telling mechanisms have consistently been shown to take on and perpetuate the gender-biases of their contexts, in breach of international standards on non-discrimination. This paper aims to highlight the need for gender-sensitive truth commissioning and to assess key legal and practical obstacles, in reference to the international legal framework and principles. Drawing on critiques of Sri Lanka's past Commissions of Inquiry in relation to truth telling which were applicable to women of all ethnicities, it then proposes to rely on international best practice to place women of the minority Tamil ethnicity more centrally within the transitional narrative, particularly in the context of the recent conflict.

This study was conducted between December 2010 and September 2011, before the planned release of the report of the Lessons Learned and Reconciliation Commission (LLRC).

Introduction

“For Tamil women ... ‘The not telling of the story serves as a perpetuation of its tyranny’ which has the potential to provoke deep distortions in memory and the organization of everyday life later on. The fact that these are narratives which cannot be heard and cannot be witnessed to, is what constitutes a ‘mortal death blow to the survivor’.”

-Valkyrie¹

Although studies have framed truth commissions as valuable instruments for national reconciliation and reconstruction, and in some respects well suited to the complexity of the female experience of conflict and transition, major gender biases in their operations have been exposed in recent legal scholarship.² Critically-interpreted global women's human rights norms and binding non-discrimination provisions have been used to challenge the neutral and victim-centred posturing of truth commissions, and the inclusiveness of their mandates. At the same time, a legal and extra-legal discourse has flourished on the need for equal female participation in peacemaking and post-conflict transitions, of which truth-telling is

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¹ Valkyrie (25 April 2011) citing Dori Lamb, quoted in Elizabeth Jelin (2003) *State Repression and the Labors of Memory*, p.63,65 <http://groundviews.org/2011/04/25/national-security-in-post-war-sri-lanka-womens-in-security-in-the-north/>

² As outlined in Bell and O'Rourke (2007) pp.23-44.

an important preliminary step.³ All these factors point to the conclusion that gender-sensitive truth commissions are of value, but yet to be fully achieved. The picture emerging from Sri Lanka's three decades of conflict features gender dimensions that are familiar from recent studies on internal conflict, such as the disproportionate impact of displacement or sexual violence.⁴ Yet other discriminatory factors are unique because they have been defined by the intersection of gender with the ethnicity of the predominantly Sri Lankan Tamil minority.

While human rights-based arguments for the value of a truth-telling mechanism in Sri Lanka's post-conflict context have fuelled both the emergence, and international criticism of its homespun Lessons Learned and Reconciliation Commission (LLRC), this criticism has focused on issues of accountability and independence, with little consideration of discrimination by sex. This is despite the fact that women in the North and East (where most alleged violations took place) comprise the majority of surviving stakeholders, and despite recent indication from the United Nations (UN) Committee on the Convention on Discrimination Against Women (CEDAW), among other sources, that sex discrimination is prevalent in the country and magnified by the conflict.⁵ Published information on the intersectional experience of the war by Tamil women remains scarce.

This paper, therefore, explores the need for any truth commission in Sri Lanka, current or prospective, to be equipped and designed to include women – in this case, Tamil women in the North and East - and the key barriers to this being achieved according to the international legal framework on non-discrimination. Part One briefly introduces the function of truth commissions within the human rights framework; the current interpretation of State obligations relating to non-discrimination and gender roles; and how this has been applied to State-sanctioned truth-telling exercises. In Part Two, establish major prospective obstacles to sex equality in truth-telling are established by presenting key ways in which discrimination has been evidenced by state actors against Tamil women, and which have prompted disparate experiences of the conflict and its aftermath. In Part Three – aided by accounts of past and current Sri Lankan truth-telling exercises – best practices are drawn on to identify key areas for opportunity and change.

Among the limitations of this work, it must be acknowledged that the Government of Sri Lanka's reluctance to engage with minority grievances⁶ among other factors, consigns this to a largely theoretical realm, and presents limited opportunity for the application of the recommendations. Nevertheless, the paper expects to focus on an area little considered so far in Sri Lanka's post-conflict discourse - and prompt questions as to why this is the case.

³ Antkowiak (2001) pp.977-1009.

⁴ Explored, for example, in the report of the Special Rapporteur on violence against women, its causes and consequences (23 January 2001) *Violence against women perpetrated and/or condoned by the State during times of armed conflict* E/CN.4/2001/73.

⁵ CEDAW (4 February 2011), Concluding comments to the combined fifth, sixth and seventh periodic reports of Sri Lanka, CEDAW/C/LKA/5-7e, para.46.

⁶ Minority Rights Group (MRG) (2011), p.7; International Crisis Group (ICG) (2011) *Reconciliation*.

Part I: Truth Commissions and Gender: Theoretical Underpinnings

“Too often when we do not undertake specific actions to draw attention to the issues that affect women, what happens is that men and the experiences of men become the yardstick by which judgments are made.”

- Cheryl de la Rey,
*Truth and Reconciliation Commission of South Africa Report*⁷

i) Truth commissions in international human rights law

To outline the failure by truth commissions to address non-discrimination concerns, it will be useful to consider their objectives, and their place in the international human rights framework. Since they were introduced during a wave of political transition in Latin America in the 1980s, truth commissions have become considered valuable tools for national reconciliation and reconstruction following periods of conflict or authoritarian rule.⁸ Although transitional justice is flexible and *ad hoc* by nature, which makes its mechanisms difficult to define, truth commissions are commonly characterised as: temporary advisory bodies, authorised by the State to investigate periods of systematic human rights violation; ostensibly independent and non-judicial but with important powers of access; and with national and community reconciliation as an explicit purpose.⁹

Seminal scholars of transitional justice have presented truth commissions as instruments for partial accountability, for better or worse. They have analysed their ability to hurdle many of the legal, political and economic barriers to prosecutions that are encountered during political transition, and their use by new governments to improve their standing, at home and abroad, in pursuit of peace and stability.¹⁰ Yet during successive transitions truth commissions have been expanded by governments to suit a broader range of conflict resolution, human rights and socio-emotional goals, sometimes contributing to criminal prosecutions, but always given the ostensible aim of rebuilding a healing and more representative national narrative or identity.¹¹ They are now rarely presented as a substitute for trials, but as instruments with unique benefits that make them complementary, or even superior to trials in some respects.¹²

Legal arguments for the customary utilization of truth commissions in emerging transitional democracies have centred on the critical human rights tasks they perform, via both the cathartic procedure itself, and

⁷ (1998) Vol. IV, p.284.

⁸ Hayner (2010) pp.10-14.

⁹ Hayner (2010), for a critical discussion of truth commission characteristics.

¹⁰ Popkin and Roht-Arriaza (1995) pp.79–116; Mendez (1997) p.225.

¹¹ Hayner (2010) p.11, pp.13-14; articulated as a State duty in Principle 3 of the Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity (2005).

¹² Brahm (2004) *Truth Commissions*, http://www.beyondintractability.org/m/truth_commissions.jsp.

the recommendations for reform and reparation that usually follow in their final reports.¹³ Most common among these are the rights to remedy and reparation, to compensation, effective investigation, legal and judicial protection, a hearing by a competent, independent and impartial tribunal, the right to freedom of expression, and family life. All are State obligations, enshrined in binding international human rights treaties and expanded by regional and international bodies. The contribution of truth commissions to preventing, or ensuring the non-repetition of treaty-right violations is also notable here, as is their potential for protecting emerging norms on victims' rights (particularly the right to truth, as recognized in international courts, UN policy papers and resolutions).¹⁴ However ultimately, the efficacy and international legitimacy of truth commissions depends on there being substantial political will to protect and enforce its recommendations, and increasingly, commissions' operational alignment with criteria identified in international human rights norms and principles.¹⁵ As a result, truth commissions now face much contemporary criticism for their failure to guard against a critical provision, discrimination against women, to the extent now required by international human rights law.

ii) Discrimination against women in international law

The basic principle of non-discrimination was established in the Universal Declaration of Human Rights (UDHR) and has been powerfully reinforced in the major human rights conventions, notably the International Covenant on Civil and Political Rights or ICCPR, and the International Covenant on Economic Social and Cultural Rights, or ICESCR (Article. 2 and 3) where it is read in conjunction with all other rights.¹⁶ Meanwhile, freestanding Article 26 of the ICCPR specifically “prohibits discrimination in law or in fact in any field regulated and protected by public authorities,”¹⁷ which makes it particularly applicable to transitional justice mechanisms. In formal terms, an act of discrimination violates the fundamental legal principle of equality and is considered *erga omnes*. One much-cited indication of its importance is an advisory opinion given in the Inter-American Court of Human Rights (ICtHR), which asserts that the principle of equality under the law, as permeating every law and forming the foundation of the domestic legal and international legal order, has become *jus cogens*.¹⁸

However a thorough substantive understanding of the concept in relation to women, and how to assess it, has taken time to emerge in international law due to its long-time use of the white male adult standard as its yardstick.¹⁹ Feminist legal scholars have been crucial to identifying this in social, economic, political and legal structures, and the ways in which sex discrimination should be combated, formally and

¹³ Ensalaco (1994) pp.656-675.

¹⁴ Hayner (2010), pp.3-24; Bassiouni, 2006, pp.203-279.

¹⁵ *Ibid* (Hayner (2010), pp.3-24; Bassiouni, (2006), pp.203-279; Aldana-Pindell (2002) p.1441.

¹⁶ UDHR Article 2; The ICCPR, 1966, 999 UNTS 171; The ICESCR, 1966, 993 UNTS 3.

¹⁷ Human Rights Committee (HRC) General Comment 18 on Non-Discrimination, CCPR/C/21.Rev.1.Add1, para.1.2

¹⁸ Cf. IACtHR, *Legal Condition and Rights of Undocumented Migrants*. Consultative Opinion OC-18/03, September 17, 2003. Series No. 18.

¹⁹ This remains a key weakness, say feminist scholars such as Ní Aoláin & Turner (2007) p.234, in using international law to push for equal treatment among the sexes.

substantively,²⁰ starting with the development of a comprehensive definition. CEDAW's Article 1, later adopted by both the Human Rights Committee (HRC) and Committee on Economic Social and Cultural Rights (CESCR),²¹ defines it as: "any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment and exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field."²²

Under these provisions States are obliged to show that they have effective strategies in place - as articulated in substantial human rights jurisprudence, General Comments, policy papers and a series of outcome documents from world conferences on women - to overcome the underrepresentation of women, and redistribute resources and power equally.²³ States must use measurable indicators to assess the impact of laws, policies and programmes, and respond with models of positive action, among them, temporary corrective measures.²⁴ This includes an obligation to counter norms and traditions that influence gender roles in society,²⁵ and which produce disadvantage where they intersect with other elements of identity such as ethnicity or marital status.²⁶ The principle of intersectional discrimination is receiving growing normative recognition, being most recently substantiated by the 2011 report of the UN's expert on violence against women, 'on multiple and intersecting forms of discrimination and violence against women.'²⁷

Recent years have seen particular international legal focus on the obligations of States to acknowledge women's disparate experiences of conflict, and combat their marginalisation in post-conflict reconstruction efforts. This has been expressed in binding doctrine such as UN Security Council (SC) Resolutions 1325 and 1889 on women, peace and security, and 1820, 1888 and 1960 on acts of sexual violence against civilians in armed conflict, spanning the years 2000 to 2010.²⁸

iii) Gendered exclusion in truth commissions

These developments have led to much greater expectations of state-authorised truth-telling operations under international law. Yet although truth commissions in countries such as South Africa, Timor Leste

²⁰ Charlesworth, Chinkin, Wright (1991) pp.613-645; Johnstone (2006) pp.148-185.

²¹ CESCR General Comment 16 p.11; HRC General Comment 18 p.6.

²² CEDAW (1979) 34 UN GAOR, Supp No. 46, 193, UN Doc.A34/46.

²³ Banda (2008) pp.5-22; see for example notes 17 and 21; and *The Due Diligence Standard as a Tool for the Elimination of Violence against Women*, UN Doc. E/CN.4/2006/61, (20 January 2006); or the Beijing Declaration and Platform for Action, (1995), reproduced in (1996) 35 International Legal Materials p.404.

²⁴ Banda (2008) p.15.

²⁵ Banda (2008) p.15; CEDAW's Article 5.

²⁶ Crenshaw (1991) 'Mapping', pp.1241-1299.

²⁷ Banda (2008) p.15; or the Special Rapporteur on violence against women, its causes and consequences, *On multiple and intersecting forms of discrimination and violence against women*, A/HRC/17/26 (2011).

²⁸ S/RES/1325 (2000); S/RES/1820 (2008); S/RES/1888 (2009); S/RES/1960 (2010).

and Peru have begun to feature gender components in their mandates, procedures and reports, many scholars emphasise the distance still to travel before States meet such standards.

On the most direct, technical level, sex discrimination has been linked to the greater difficulty of female victims and witnesses, compared to men, in accessing and engaging effectively with truth commissions, and an underreporting of issues that disproportionately affect women. Obstacles include lower levels of education, economic independence and experience in the public realm, and responsibilities that tie them to the home or to insecure forms of informal employment.²⁹

Yet this exclusion goes much deeper and by applying a gender lens, scholars such as Vesuki Nesiah have begun to question why “some facts emerge as critical to the historical account and others fade into the backdrop of the private or domestic arena, and where some actors’ agency is recognized and privileged and others fade into the anonymity of spouses, mothers, and sisters.”³⁰ In arguing that there is no such thing as a gender-neutral truth, such writers assert that the State must acknowledge the human-rights dimensions of women’s experiences, give more space to gendered forms of ostracism and violence experienced, and create diverse strategies that can hurdle the structural barriers to women’s participation during and following conflict.³¹ This line of argument has been much influenced by advances in international criminal law, which have contributed to the growing recognition that crimes against women cannot be isolated from a political context.³² The realisation of non-discrimination in the operation of truth commissions can therefore be extended to the forms of harm covered and the truths pursued and interpreted in mandates, as well as their procedures, as is explored in Part III.

As a continuously evolving area, the reach of each State’s non-discrimination obligations remains a matter of debate, particularly in the light of the way that transitional justice and truth-telling mechanisms can arguably, as more flexible, comprehensive and broad than trials, better represent and respond to women’s experiences.³³ It is important too, to note the arguments of feminist scholars, who assert that States are obliged to combine transitional justice tools with a gendered historical analysis so that broader State policy and practice can be brought in line with non-discrimination provisions in all fields - particularly in the area of reparations and reconstruction.³⁴ This would therefore impact on women’s equal rights in health, education and employment, and many more, as well as those traditionally associated with truth commissions, noted above. Although this study is limited to exploring the *operation* of truth

²⁹ Ní Aoláin & Turner (2007) p.230.

³⁰ Nesiah (2006) *Gender and Truth Commission Mandates*, <http://ictj.org>.

³¹ Manjoo (2004), www.unrisd.org; Ní Aoláin & Turner (2007) p.230.

³² With critics such as Manjoo and Nesiah (see notes 30 & 31) highlighting, for example, the way that South Africa’s Truth and Reconciliation Commission ignored violations against women locked into the segregated private sphere under apartheid, from their accessing of State resources to their vulnerability to ‘ordinary’ violence.

³³ Bell and O’Rourke (2007) p.33, citing Christine Chinkin (2001) ‘Women’s International Tribunal on Japanese Military Sexual Slavery,’ *American Journal of International Law* 95, though counter arguments are posed by Ní Aoláin & Turner (2007).

³⁴ Ní Aoláin & Turner (2007).

commissioning, rather than its product, it is clear that a greater interjection of marginalised women's voices and experiences into the dominant discourse during the transitional period will be a significant step in this direction, and in the grander scheme of gender justice.

Part Two: Sri Lanka

“Intersectionality simply came from the idea that if you're standing in the path of multiple forms of exclusion, you are likely to get hit by both.”

-Kimberlie Crenshaw³⁵

In the following section, the above framework is used to highlight aspects of discrimination practiced and condoned by state actors before examining how this has affected the agency of Tamil women and excluded them from the national narrative, during and after the war. The analysis will include key inequalities afforded by custom and tradition, for which the State is clearly and critically responsible under international law.³⁶ This will foreground the later claim that the continuum of sex discrimination and the gendered experience of conflict and displacement have human rights implications for both the focus of truth-telling mechanisms, and the means by which they are accessed.

Although the chosen focus is on women from the Sri Lankan Tamil Hindu minority, which make up the majority of the survivors most severely affected by the last chapter of the conflict and therefore truth commission stakeholders, discrimination has been documented against all Sri Lanka's minorities,³⁷ and women of the majority Sinhalese community as well. Within the Tamil minority, diverse issues of caste, class and geography have also shaped group experience of discrimination and war.³⁸ Due to the scope of the paper, common and prevalent aspects of the 'double bind' of being Tamil and female in the North and

³⁵ Crenshaw and Thomas (2001) *Intersectionality* <http://www.abanet.org/women/perspectives/Spring2004/CrenshawPSP.pdf>.

³⁶ CEDAW Articles 2f and 5a hold the state responsible for countering and modifying traditions and customs that discriminate against women, not excluding those of its minority cultures. While the implementation of these provisions remains a divisive issue, the CEDAW Committee has issued a number of General Comments that reinforce this obligation, such as General Comment 19 (1992) on violence against women; meanwhile independent experts, such as the Special Rapporteur on violence against women, its causes and consequences, has given detailed recommendations on the holistic measures required of states to combat sex discrimination and gender-based violence, including in the field of social and cultural rights (most recently reported in A/HRC/17/26; 2 May 2011, *On multiple and intersecting forms of discrimination and violence against women*). While discrimination in Tamil custom and tradition will be most effectively combated by Tamil civil society, the state has a clear responsibility to measurably ensure and facilitate this; to not do so constitutes discrimination.

³⁷ MRG (2011 p.5); Iqbal, *Rights of Minorities in Sri Lanka*, <http://www.ruleoflawsrilanka.org/resources/writings-of-m-c-m-iqbal/rights-of-minorities-in-sri-lanka-legislation-and>.

³⁸ For example 'Sri Lankan' or 'Ceylon' Tamils' are culturally and politically distinct from 'Up Country' Tamils who, since they did not endorse the Tamil liberation struggle, have been differently, and often less directly affected by the conflict. See MRG (2011) p.18.

East have been focused on. This is however by no means exhaustive and the emergence of further or more nuanced study is to be welcomed. Nevertheless the overall argument of this paper – the obligation of the state to better amplify the voices of those marginalized in truth-telling mechanisms – will apply to all groups.

i) The Sri Lankan context

Since the 1970s Sri Lanka has undergone two insurrections in the South, and a civil war in the North and East where the majority of its largest minority population, the Tamils, live. The war between State forces and Tamil separatist groups, led by the Liberation Tigers of Tamil Eelam (LTTE), amassed immense casualties among the Sinhalese majority and the predominantly Tamils and Muslim minority populations, with the final government assault in 2009 causing high civilian casualties.³⁹

The conduct of government policy during the final assault was critiqued by an Expert Advisory Panel appointed by the United Nations Secretary General in 2011 which alleged that government forces had violated international humanitarian and human rights law, in part, by the military's reported indiscriminate shelling of civilian areas, the extrajudicial killing of captives and its obstructing of humanitarian access to civilians during the war, and after it to those in internment camps.⁴⁰

There are now a reported 89,000 female headed households in the North and East, and while camps have been opened, human rights violations continue to be reported from the heavily militarized regions.⁴¹ In May 2010 the LLRC was created by presidential mandate to collect public and expert opinions on the root causes of ethnic conflict, in a bid for communal reconciliation, and has been subject to extensive international criticism, as is further explored in Part Three. Sri Lanka has ratified many major human rights treaties, including CEDAW and its Optional Protocol.

ii) Discrimination against Tamil women

Discrimination against Tamils

Prevalent ethnic discrimination by the State comprises one strand of the double bind faced by Tamil women, as indicated by reports from activists and academics, and long-uttered grievances from the Tamil population. State policies and practices have marginalized and politically isolated the Tamils in varying waves and stages and they continue to overshadow the transitional period.⁴² The ethnic divide has been compounded by various constitutional amendments that have strengthened hegemonic rule, and the

³⁹ Reuters (7 September 2011) *Amnesty seeks* <http://af.reuters.com/article/worldNews/idAFTRE7862RH20110907>.

⁴⁰ UN Secretary-General (31 March 2011) p.i-ix; UN Refugee Agency (21 July 2009).

⁴¹ Irin (9 Sept 2010) *Women take over*, <http://www.irinnews.org/report.aspx?reportid=90429>.

⁴² MRG (2011 p5); Iqbal, *Rights of Minorities in Sri Lanka*, <http://www.ruleoflawsrilanka.org/resources/writings-of-m-c-m-iqbal/rights-of-minorities-in-sri-lanka-legislation-and>.

triumphalism of the government's post-war rhetoric.⁴³ The State's response to the economic and social damage in the war-ravaged North and East has been internationally criticized by non-governmental organizations (NGO) and United Nations (UN) based commentators for lack of public consultation in the region, and limited political will to address Tamil-speakers.⁴⁴

While the endemic failure of justice for victims of human rights violations coupled with long-held security and emergency measures that violate international law and a weak judicial system have affected all Sri Lankan communities, they have, in particular, affected the minorities.⁴⁵ As noted by the Minority Rights Group (MRG) in 2010, "Many of those interviewed, particularly minority political leaders, saw the current period in Sri Lanka as one of the worst ever for minorities."⁴⁶ The MRG report contends that the current government refuses to acknowledge legitimate minority grievances or make steps towards promoting and protecting minority rights and freedoms.

Discrimination against women

According to international monitoring groups and academics, levels of inequality between the sexes of all Sri Lanka's ethnic groups remain high, even though the country holds a high regional rating in women's literacy and health.⁴⁷ As will be discussed, gender-based violations against Tamil women are facilitated by both State-led discrimination and the stronger patriarchal norms of Tamil culture. However the limited availability of data disaggregated by sex and ethnic group (as well as data on war-affected women in general), has made the intersectional experience difficult to report on comprehensively. The nature and ostensible reasons for this heightens the impression of their marginalisation, and the exclusions to come,⁴⁸ and prevents, as noted by the CEDAW Committee in 2011, "informed and targeted policymaking, and for the systematic monitoring and evaluation of progress achieved towards the realization of women's substantive equality in regard to all areas."⁴⁹

Sri Lankan governments have been consistently charged with having limited interest in realizing women's right to equality, formally or substantively, according to the legal obligations outlined earlier. This is evidenced by an inadequate legal framework and national machinery for non-discrimination, and its lack of affirmative measures to overcome political, economic and social structural impediments facing

⁴³ Abeysekera (2007) p.9; UN Secretary-General (31 March 2011) para.401.

⁴⁴ MRG (2011) p.14.

⁴⁵ Pinto-Jayawardena (2010) pp.6-7, 25-28; Amnesty International (AI; 2010) *Sri Lanka's New*, <http://www.amnestyusa.org/news/press-releases/sri-lanka-sri-lankas-new-parliament-must-drop-emergency-laws-says-amnesty-international>.

⁴⁶ pp.5-7.

⁴⁷ Samuel (8 February 2011) *Sri Lanka: the lin*; Gender Action for Peace and Security (GAPS; 2009) *Global Monitoring*, p.120, www.gaps-uk.org.

⁴⁸ In conversation with various NGO staff and academics, this has been attributed to the politicized nature of the topic – particularly sexual violence – and a security narrative that has prevented women in the North and East from reporting freely, and communicating well with other women's groups in the country.

⁴⁹ CEDAW, note 6, para.46.

women.⁵⁰ In its Concluding Comments for Sri Lanka in 2011, the CEDAW Committee remarked upon “the extremely low level of participation of women in politics and public life, including a low representation... at the decision making level.”⁵¹

For Tamil women, this participation is considerably lower. A 2009 report notes their virtual absence among the predominantly Sinhalese women represented in elected political bodies, with just a few exceptional cases, and pinpoints the very strong focus of civil and State-led political training and capacity-building programmes on Sinhala women in the South.⁵² Scholars too, have lamented the ‘superficial’ level of understanding and participation of many Tamil women in politics.⁵³ These factors have contributed to the marked exclusion of women from peace-building and reconstruction,⁵⁴ despite binding commitments in UN SC Resolution 1325,⁵⁵ recommendations by past Commissions of Inquiry,⁵⁶ and despite Tamil women making up the majority of conflict-affected survivors.⁵⁷

Other examples of formal State discrimination against women include discriminatory land ownership and inheritance laws, and administrative practices. Many of these have been aggravated in the conflict-affected areas and disproportionately affect Tamil women in breach of CEDAW’s Articles. 2f and 14, among other rights.⁵⁸ They include the administrative practice of granting land permits to the eldest son of a deceased, and *Thesawalami*, a customary Tamil personal law applicable in Sri Lanka’s Northern Province, which still requires a married woman to obtain a husband’s written consent to dispose of her property.⁵⁹ Meanwhile the State has not realized the obligation enshrined in Article 11, relating to the employment sector, in which many Sri Lankan women face the double or triple burden of household work, childcare, and income generation – particularly among traditional communities. There is a much higher rate of women than men involved in Sri Lanka’s informal sector, resulting in less protection, lower status and salaries, while divisions between ‘male’ and ‘female’ work domains remain strong.⁶⁰ In the post-conflict context, the vulnerability of Tamil women in the workplaces of the North and East has increased substantially.

⁵⁰ CEDAW Committee’s Consideration of reports submitted by States parties under article 18 of the Convention: Combined fifth to seventh periodic reports of Sri Lanka’ (11 February 2011), CEDAW/C/SR.971, para.26.

⁵¹ CEDAW, note 6, para.30.

⁵² Kodikara (2009) pp.14-16.

⁵³ Wickramasinghe (2006) pp.178-179.

⁵⁴ Gender Action for Peace and Security (GAPS; 2009) *Global Monitoring*, pp.120, 138, www.gaps-uk.org.

⁵⁵ S/RES/1325 (2000).

⁵⁶ Sri Lankan Presidential Commission of Inquiry (September 1997) *Western, Southern and Sabaragamuwa*, Chapter 11 Part 1, http://www.disappearances.org/news/mainfile.php/frep_sl_western/41/.

⁵⁷ Irin (9 Sept 2010) *Women take over*, <http://www.irinnews.org/report.aspx?reportid=90429>.

⁵⁸ Housing Land and Property Task Force Working Group (2010) p.23.

⁵⁹ *Ibid* p.24 (though as asserted by scholars such as Coomaraswamy (1994), p45, disadvantages for women were written into such laws during their interpretation by colonialists).

⁶⁰ Kodikara (2009) p.19.

Many of these aspects are attributable to the patriarchal practices and discriminatory attitudes that are found entrenched in the State machinery, seen for example, in the frequent sidelining of national gender agencies during policy formulation.⁶¹ It is also significant that widows are reportedly particularly ill-treated in public institutions, resulting in a common litany of rights violations, from physical integrity to access to education and employment,⁶² since this vulnerable group has dramatically swelled in the post-conflict arena.

The violation of Tamil women's rights to access justice is one grave consequence of direct and indirect State discrimination in regard to women of both the majority and minority communities. Women across the country have reported frequent harassment, intimidation and 'inappropriate' means of dealing with cases of sexual and domestic violence.⁶³ The reduced independence, public-realm experience and resources associated with the Tamil woman's intersectionality further hinders their effective engagement with the police, courts and other civil machinery, as does the heightened cultural stigma attached to victims of sexual violence.⁶⁴

The effect of this State-sanctioned 'legal black hole', as noted recently by media commentators and non-governmental organizations (NGOs), is the discouragement of women, and the tacit encouragement of abuses against them.⁶⁵ Cases of women struggling to report crimes and human rights violations, access protection mechanisms and compensation, or obtain death certificates for family members, paint a discriminatory picture of impunity.. This is of particular concern regarding sexual and domestic violence, and shapes the contours of the violations that women will experience during conflict and its aftermath, as highlighted in much recent international jurisprudence.⁶⁶

Traditional norms and gender roles

As mentioned, the intersection of ethnicity and gender often creates more intricate forms of disadvantage for Tamil women, than for women belonging to the Sinhalese majority. While this is due to practices of state actors in some instances, it is also due to the Tamil community's more stringent, caste-bound, patriarchal norms, which carry stronger ideological and psychological barriers.⁶⁷ Despite the variety among Tamil communities and castes,⁶⁸ a range of academics have explored what they consider to be the

⁶¹ Women and Media Collective (WMC; 2011) p.10.

⁶² Sri Lanka Supporting Regional Governance program (SuRG) (2011) p.xi.

⁶³ Such as there being no expedited procedure (as opposed to the usual 8-to-12-year docket delay) for sexual violence, and the use of mediation procedures in cases of domestic sexual violence; see note 52, p.29.

⁶⁴ See following section.

⁶⁵ Valkyrie, see note 1; Asian Human Rights Commission (AHRC; 2010) pp.49-51

⁶⁶ Explored, for example, in the reports of the Special Rapporteur on violence against women, its causes and consequences, such as *Violence against women perpetrated and/or condoned by the State during times of armed conflict* (23 January 2001) E/CN.4/2001/73.

⁶⁷ Rajasingham-Senanayake (2004), p.112.

⁶⁸ Rajasingham-Senanayake (2001) for example notes the matrilineal tendencies in Sri Lankan Tamil culture that were largely, but not completely eroded by the influence of colonial values, p.102-131.

pressures and customs common to the restricted agency of Tamil women. Primary in these works is the protective control wielded by women's parents and husbands, and their consignment to the domestic sphere, largely out of reach of political processes.⁶⁹ While an academic study in the 1980s argues that being born a woman in Sri Lankan Tamil society was as if being born into an inferior caste,⁷⁰ this has more recently been reaffirmed by Sumantra Bose, who wrote of "the stultifying straightjacket of conformity and subservience traditionally imposed upon [Tamil women] by a rigidly and self-righteously patriarchal society",⁷¹ and Radhika Coomaraswamy, who has lamented the "inequitable social practices which kept unmarried women at home and menstruating women in the back garden."⁷² Community ostracism is particularly strong for Tamil women in non-conventional positions. The Tamil word for widow, *vithavai*, for example, is interpreted as offensive and evokes a deplorable condition, compared to the socially higher position of the *sumangali*, a married woman with living children; widows are more likely to be accused of (and ostracized for) promiscuity.⁷³

Gender roles during the conflict

To consider female agency in Sri Lanka currently it is critical to explore the gender-role shifts that took place among the Tamil communities during the conflict. Some writers identified a surge in the kinds of gender-based conservatism that often accompany nationalist movements, in which women are cast as bearers of a threatened identity, and are "a discursive terrain on which significant socio-cultural tenets of the nation are produced."⁷⁴ The revival of gender stereotypes brings greater community restrictions regarding women's mobility, behavior, reproductive lives and their choice of partner, particularly where the threat of sexual violence is concerned. In many contexts in Sri Lanka women have thus been cast, inflexibly, as passive 'mothers and reproducers'.⁷⁵

However the conflict also saw the rise of a second, equally rigid construction of gender. The emergence of female cadres, and women's wings of militant groups have been credited in varying degrees with securing advances for women in some Tamil communities, and have given rise to reams of feminist and non-feminist analysis.⁷⁶ The LTTE certainly secured certain advances and advantages for women, including a swifter institutional response to domestic violence (now mourned in its absence), and a markedly low rate of sexual violence perpetrated within its ranks, according to Elisabeth Wood.⁷⁷ Yet, as much of the analysis contends, the influence of the female cadres' own 'ambivalent empowerment' on other Tamil

⁶⁹ Coomaraswamy, Radhika (1996) 'Tiger Women' p.8.

⁷⁰ Skjonsberg (1982) *A Special Caste? Tamil Women of Sri Lanka*, p.45.

⁷¹ Bose (1994) p.111.

⁷² See Coomaraswamy (1999) *A Question of Honor*, in which she worries that certain Tamil customs 'suspended' during war time, will return during peace.

⁷³ Sri Lanka Supporting Regional Governance program (SuRG) (2011) pp.xi-xii

⁷⁴ De Mel (2001) p.2.

⁷⁵ Sornarajah (2004) http://issues.lines-magazine.org/Art_Aug04/nanthini.htm.

⁷⁶ For example, De Silva (1994) p.28; Samarasinghe (1996) p.213; Peter Schalk (1992) Abeysekera (2007) *Implications*, pp.91-92; Rajasingham-Senanayake (2001) p.114.

⁷⁷ Wood (2006) p.333.

women, after and even during the conflict, is questionable.⁷⁸ While the LTTE was often grandiose in its rhetoric of female liberation, it had little tolerance for movements that did not “flow parallel to the national cause”, and was selective in its messages of empowerment.⁷⁹ By disbanding or decimating many progressive women’s groups, militant or otherwise, it also blocked the route to sex equality.⁸⁰ Indeed there is documentation of female LTTE cadres proscribing rules to other women on the (conservative) ‘Tamil way’ to behave and dress, to which they themselves were not confined.⁸¹ This lack of wider progress for women also surfaces in accounts of the hostility and stigma awaiting young female cadres on their return to their own communities, and their difficulties reintegrating.⁸²

Meanwhile, the gains that women can derive as independent heads of households after conflict remains understudied in post-war Sri Lanka. One 2001 account of Sri Lankan women who were four or five years into displacement and widowhood, notes improvements in agency for some, due partly to the disruption of caste hierarchies.⁸³ Other conversations with Sri Lanka specialists in 2011 give less cause for hope, and depict conditions so poor and security restrictions so intense among the displaced Tamil population, that there is little room for any form of empowerment, male or female, however ambivalent.⁸⁴ Other writing reflects this pessimism. Darini Rajasingham-Senayake reported that in 2001 few women had “found a culturally appropriate language to articulate the transformations they have experienced, and many feel ashamed, guilty and/or traumatized”. She also interpreted an increase in cases of domestic violence and community-led harassment to indicate a backlash against women’s changing roles.⁸⁵ In 2009 a development report observed that despite the considerable change experienced by women in recent years, there had been very little challenge of gender constructions or perceptions.⁸⁶

Gendered violations during and after the conflict

“The Committee remains deeply concerned about reports of gross violations of the human rights of women on both sides, particularly the Tamil minority group, the internally displaced women and the female ex-combatants.”

-The CEDAW Committee⁸⁷

⁷⁸ Coined by Rajasingham-Senanayake (2001) p.106.

⁷⁹ Bose (1994) p.112.

⁸⁰ Maunaguru (1995) p.163; Alison (2003) pp.37-54; Liyanage, (1999) pp.131-2; Abeysekera (2007) *Implications of*, p.81.

⁸¹ Maunaguru, (1995) p.165.

⁸² Abeysekera (2007) p.89.

⁸³ Rajasingham-Senanayake (2001) p.117.

⁸⁴ Conversation with Nimmi Gowrinathan.

⁸⁵ Rajasingham-Senanayake (2001) , p. 109.

⁸⁶ Kodikara (2009) p.18.

⁸⁷ CEDAW, see note 6, para.40.

Reports specific to Sri Lanka, and on conflict in general, have established that the experience of discrimination of minority women is exacerbated by war, in both the violence and deprivations experienced, and the aid and redress made available. In Sri Lanka this has been indicated by female Tamils among victims of sexual violence and displacement, the low involvement of minorities in reconstruction and reconciliation initiatives, and the State's aggressive silencing of their concerns in the public realm.⁸⁸ By exploring these issues, it is sought to foreground the claim that the gendered experience of Sri Lanka's conflict has human rights implications for the focus of truth-telling and the means by which it would likely be accessed.

Gender-based violence

The history of sexual violence on all sides of the conflict, while not on a scale encountered in recent conflicts such as Rwanda or Sierra Leone,⁸⁹ has significantly affected Tamil women. Rapes in the North and East were allegedly perpetrated by State actors against female combatants and civilians, as well as by members of the Indian Peace Keeping Force (1987-90), and by Tamil militants against female detainees.⁹⁰ Sexual violence against Tamil women has been alleged in custody and in internment camps during and after the war, and during monitoring and surveillance exercises.⁹¹ Feminist academics have cited this as proof of women's historical sexualisation and disempowerment (and their perceived value as cultural trophies),⁹² and thus of the State's failure to uphold CEDAW's Article 5 (on eliminating prejudices and stereotyped roles), among others. Others have focused on discrimination expressed in impunity. Although some presidential directives have been issued to protect female victims and witnesses, critics point to the inadequacy of this security, the slow pace and low success rate of the cases that do make it to the courts, an underreporting of violations, and the lack of official initiatives to address sexual violence against women as signs of State complacency and active discrimination – all magnified by conflict.⁹³ Government spokesmen have been accused often of promoting the perception that rape is not a crime.⁹⁴

Young low-caste women among ethnic minorities have been reported as being more vulnerable to sexual violence and it has been observed that they 'expect' resistance and entrenched patriarchy "all the way from officials at the police stations, to the hospital personnel and the judiciary."⁹⁵ Incidents of sexualisation of violence in the North and East and the heightened vulnerability of minority women

⁸⁸ WMC (2006) p.2, UN Secretary-General (31 March 2011) para 404-414.

⁸⁹ Wood (2006) p.313.

⁹⁰ Bose (1994) p.109; UN Secretary-General (31 March 2011) para.37, pp.152-153.

⁹¹ Coalition of Muslims & Tamils for Peace & Coexistence (CMTPC) (15 July 2011) *Two Years On*, <http://cmtpc.wordpress.com/author/cmtpc/>.

⁹² Manoranjan (2011) *Beaten*, citing Coomaraswamy (1999) 'A Question of Honor: Women, Ethnicity and Armed Conflict'.

⁹³ Centre for Women's Research (CWR; 2001) pp.62-68; Pinto-Jayawardena (2010) pp.52-58; interview with Patricia Lawrence.

⁹⁴ AHRC (2010) p.46, pp.49-51.

⁹⁵ AHRC (2010), p.46.

outside of these areas have been documented.⁹⁶ These reports confront a State-led security narrative that still denies that sexual crimes against women took place – or are taking place.⁹⁷

The lack of space to address such failures in national and community narratives places Tamil women at greater risk. A primary example is the State's continued use of the military in the place of most civil administrative systems in the in the North and East, despite reported instances of violations against women.⁹⁸ The increase in sexual assaults in high-security zones has been accompanied by a rise in prostitution, trafficking and STDs, since women – often without male partners, a place to live or a means of income – are being obliged to interact with male Sinhalese soldiers as part of their daily routine.⁹⁹ One report notes a growing culture of sexual and gender-based violence in the post-conflict period, with widowed mothers in particular at risk.¹⁰⁰ This also has implications for women's economic, social and cultural rights, from food security to education, since many, as articulated by media commentator, Valkyrie, are reluctant to leave the "illusory security of their makeshift homes."¹⁰¹ Surveillance operations are often allegedly conducted without female officers, or explanations in terms that women heads of household may understand.¹⁰²

Other related consequences of the conflict include mothers forcing young daughters to marry early and bear children as a protection measure against sexual violence, leading among other consequences, to high numbers of ill-equipped teenage mothers, which has been linked with cases of child malnutrition.¹⁰³ Many women are socially isolated by the stigma attached to sexual abuse, which has adverse implications for individuals and communities; others are vulnerable to the higher rates of domestic violence associated with post-conflict contexts. Non-discrimination norms would oblige the full spectrum of such issues to be comprehensively considered by any State mechanism aiming to document and understand the effects of the conflict and address the fact that, as noted by Galuh Wandita, Karen Campbell-Nelson and Manuela Leong Pereira, "the slippery slope of victimization is steeper for women, who have fewer footholds and places to grasp to soften their fall."¹⁰⁴

Other gendered dimensions of displacement and conflict

Moreover severely injured and/or traumatized women have also become primary carers for other maimed and traumatized persons, many injured during extreme pockets of the conflict from reportedly

⁹⁶ Asian Centre for Human Rights (ACHR; 2008) p.24.

⁹⁷ CEDAW (see note 51) para.60; Valkyrie, Groundviews (25 April 2011) *National security*.

⁹⁸ CEDAW (see note 51) para. 22; Abeysekera (2007) P64; CWR (2001) p.71.

⁹⁹ BBC (25 June 2011) *NCPA warns*; ICG (June 2011) pp.14-15; Wax (3 March 2009) *Privacy*.

¹⁰⁰ SuRG (May 2011) pp.xii-xiii.

¹⁰¹ Valkyrie, Groundviews (25 April 2011) *National security*.

¹⁰² *Ibid.*

¹⁰³ CWR (2001) p.79; SAHR Report 2007 p.12; Iqbal, Rajani (23 October 2010) *Women in Postwar Reconstruction*, p.10.

¹⁰⁴ Wandita, Campbell-Nelson and Leong Pereira (2006) p.292.

indiscriminate artillery fire by the State and LTTE.¹⁰⁵ This has led to specific needs and concerns that any post-conflict initiative, without applying gender-lens, will be unable to address.¹⁰⁶

Malnourishment, starvation and illness (resulting from severe insufficiencies in housing and health facilities, water and sanitation during displacement),¹⁰⁷ have disproportionately reduced the capacity of such women, along with the State's restriction on international humanitarian operations, and previous failures to address the high prices of essential goods stemming from blockades and transporting constraints.¹⁰⁸ Due to the gender-based restrictions already touched on, women have had less opportunity to independently alleviate these concerns.¹⁰⁹ In the former war zones, women belonging to the minority community have faced obstacles in securing employment¹¹⁰ and the pace in opening up safer, regulated industries, offering skills training, and making appropriate interventions for women in these zones has been slow.¹¹¹

While overall rehabilitative responses by the State remain inadequate, the political underrepresentation of women suggests that gender-specific needs will be sidelined in any future programming, despite their new, increased roles and responsibilities. A lack of facilities for female-specific health needs have been documented in internment camps, along with a perceived lack of interest by the Presidential Task Force for Resettlement, Development and Security in the Northern Province (PTF) regarding 'extraneous' issues relating to women, resulting in the rejection of most gender-related initiatives.¹¹² Combined with the breakdown of social structures and the high levels of domestic violence and community distrust reported from the North and East, this will further entrench discrimination into the national fabric, unless they are actively addressed.

Finally, the narrowing of democratic space in the reconstruction phase is a valuable portent of exclusions in truth-telling.¹¹³ Although this restriction affects Tamils (and other Sri Lankans) of both genders, the convergence of traditional norms with a high-security environment has particularly reduced the space for Tamil women to openly explore their experiences of human rights violation, their shifting roles and the new skills required of them, or to have their needs and grievances publicly represented. This has sidelined

¹⁰⁵ UN Secretary-General (31 March 2011) p.i-ix; UN Refugee Agency (21 July 2009).

¹⁰⁶ Iqbal, Rajani (23 October 2010) *Women in Postwar Reconstruction* p.9; Somasundaram (8 February 2003) *Addressing the Psychosocial Problems* http://issues.lines-magazine.org/Art_Feb03/Daya.htm.

¹⁰⁷ UN Secretary-General (31 March 2011) p.329; CEDAW CO (2011) p.40; ICG (18 July 2011) p.14.

¹⁰⁸ CEDAW, see note 6, para.41f; Irin (9 Sept 2010) *Women take over*.

¹⁰⁹ CEDAW see note 6, para 41.e

¹¹⁰ Irin (9 Sept 2010) *Women take over*.

¹¹¹ UCA News (18 Oct 2010) *Widows* <http://www.ucanews.com/2010/10/18/sri-lankan-war-widows-clear-landmines-for-a-living/>.

¹¹² The SAHRC (2007) p.13; (CMTPC) (see note 90); and communications with Patricia Lawrence. The central government set up the PTF on 7 May 2009, which has the authority to give approval to reconstruction projects in the north.

¹¹³ MRG (2010) p.6.

them more acutely from a narrative that is already masculine by default, and which has been intensely masculinized by conflict.¹¹⁴

Furthermore, as Valkyrie notes, the needs and experiences of Tamil women have been appropriated by both the State and the LTTE for political gain during the war, and must be reclaimed; but since “oral narratives are their only means at their disposal to record their experiences, trauma and survival mechanisms... these women have no space within the dominant narrative to place their stories on record.”¹¹⁵ Therefore the intense restrictions placed on communal gatherings in the Vanni under emergency legislation, for example,¹¹⁶ disproportionately silence the voice of minority women, and indicate discrimination in the protection of their rights, from free expression and assembly to food security and health.

Part Three: Reconciling Truth and Gender in Sri Lanka: Key areas for action

“Commitment to bring back ‘normalcy’ rings hollow in the ears of women for whom normalcy means subordination, economic dependence, vulnerability to violence and a lack of autonomy,”

- Sunila Abeysekera¹¹⁷

“I would not encourage [women] in the current context to expose themselves, put their safety in jeopardy and talk about traumatic experiences, when they could be disbelieved, ridiculed, or have individuals or groups affiliated with the perpetrators turn up at their homes to harass them, and when there’s no form of support in the sense of counseling or restitution –absolutely nothing at all.”

-Ambika Satkunanathan¹¹⁸

While state actors have discriminated against women of all communities, this segment of the analysis seeks to establish that Sri Lankan Tamil women in the North and East have been most particularly affected in the post-war period. This is partially due to the indirect gender-based discrimination expressed and condoned in traditional norms, drastically compounded by the women’s disparate experience of conflict, and their confinement within a hostile security narrative. It is clear that only a dedicated commitment to corrective measures could begin to overcome these factors in a truth-telling process in satisfaction of Sri Lanka’s international commitments. As a state-authorised body, the bar of expectation for any inquiry is set high.

¹¹⁴ Abeysekera (2007) pp.59-105.

¹¹⁵ Valkyrie (25 April 2011) *National security*

¹¹⁶ *Ibid.*

¹¹⁷ (2007) p.93.

¹¹⁸ Interview with the author.

The following section will briefly identify key steps toward combating sex discrimination in the transitional period, responding to some of the concerns above. To do so, it will draw on accounts of past and current Sri Lankan experiences of truth-telling, and contemporary best practice as recommended by human rights and transitional justice experts. This short paper can only be the tip of the iceberg in this area. However, by exploring how gender can and has been mainstreamed into the composition, mandates and processes of truth commissions, it is hoped to highlight the disparity between state practice and obligation, as well as some avenues for further action.

i) Past commissions

Since its independence, Sri Lanka has employed commissions of inquiry (CoIs) for a range of purposes, to questionable effect.¹¹⁹ Perhaps credited most highly are a series of CoIs mandated by former president Chandrika Kumaratunge in 1994 to ostensibly strengthen accountability following a widespread pattern of disappearances.¹²⁰ Commissioners were credited for their rigor and integrity, however limited resources, scope and powers (particularly to have their recommendations publicized or acted on in any meaningful way), resulted in their having negligible impact.¹²¹ Other experiences were even less positive. A commission of inquiry appointed by Sri Lanka's incumbent President in 2006 was mandated to inquire into various cases of serious human rights violations attributed both to the LTTE and government forces but prematurely wound up a few years later with its report not being published. The cynicism attending these exercises clung to the appointment of an LLRC in 2010. This analysis will not examine the LLRC's recommendations as the research and writing was completed before its report and recommendations were released.¹²²

The LLRC's mandate was described as 'deeply flawed' by the UN Secretary General's Panel of Experts.¹²³ It was rejected by key international NGOs for what they considered to be insufficient terms of reference, procedures, powers, composition and resources, which in substantive terms has denied its users the chance to tell their stories the way they wish to.¹²⁴ Nevertheless the limited opportunity that it presents has also been recognised, and issues of militarization, land grabbing, 'Sinhalicization' and human rights abuses following the war have been raised by those testifying.¹²⁵ In general, the treatment of gender-

¹¹⁹ Foreword to Pinto-Jayawardena (2010) by Philip Alston, former UN mandate holder on extrajudicial executions, p.v.

¹²⁰ These comprised three 1994 Disappearances Commissions and the 1998 All-Island Disappearances Commission.

¹²¹ Pinto-Jayawardena (2010).

¹²² The Gazette of the Democratic Socialist Republic of Sri Lanka (16 June 2010).

¹²³ Para.345.

¹²⁴ ICG (14 Oct 2010) *Crisis Group Refuses to Appear* <http://www.crisisgroup.org/en/publication-type/media-releases/2010/asia/sri-lanka-crisis-group-refuses-to-appear-before-flawed-commission.aspx>.

¹²⁵ See for example, the submission of the Catholic Bishop of Mannaar to the LLRC (8 January 2011) available at http://www.jrs.net/Assets/Regions/IOR/media/files/LLRCsubmission_by_MannaarDiocese.pdf.

based violations as a specific category with specific imperatives has largely been absent in mandates of past commissions of inquiry¹²⁶ and this trend appears to have continued in respect of the LLRC.¹²⁷

Though none of these CoIs have explicitly featured truth-telling in their mandates, it is asserted in this paper that their aims have ostensibly aligned with those of many truth commissions: to gather a credible picture of human rights violations during the course of the conflict via the often-public testimony of victims and witnesses. For the purposes of this paper the commissions are strong indicators of State practice, although there is unfortunately limited scope here for their comprehensive assessment in relation to discrimination against women. This is despite the fact that, as with most such inquiries, a high proportion of women were documented as stakeholders for each.

ii) Future areas for action

Mandate

Current scholarship has identified the scope of violations covered in truth commission mandates, their definition of a victim and their conceptual framing of ‘truth’ to be strongly discriminatory. Appraisals of past Sri Lankan mechanisms have not shown them to be exempt in this regard.¹²⁸ Any Sri Lanka-based CoI tasked with building a truthful picture of the conflict would need a mandate that roundly addresses and counteracts this prioritizing of the male experience.

Some such progress has been seen in truth commissions without gender explicitly mentioned in their mandates. For example, in South Africa (initiated in 1995) commissioners pushed the envelope by interpreting gender-neutral language on torture and ill-treatment to address sexual violence. They began to link it directly to conflict and to the State’s failure to combat sex discrimination, recognising that state forces had predominantly exploited vulnerabilities tied to women’s gender.¹²⁹ Rape gained a higher profile as a conflict-related violation, and thanks to the work of women’s activists and academics, it was excluded from the list of crimes subject to amnesty.¹³⁰ In certain Sri Lankan CoIs too, despite narrow mandates, some commissioners attempted to consider aspects of women’s experiences. The Western, Southern and Sabaragamuwa Provinces (WSSP) CoI in 1994 produced a short chapter on women in its final report that touched on the victimisation of women as abductees/ detainees and as those ‘left behind,’ and was able to raise some questions regarding its observation that “the climate of impunity existing

¹²⁶ Interviews with Kishali Pinto-Jayawardena and M.C.M. Iqbal.

¹²⁷ Interviews with Ambika Satkunthanathan.

¹²⁸ *Ibid.*

¹²⁹ Nesiah (2006) *Gender and Truth Commission Mandates*, <http://ictj.org>; and World Bank (2006) p19, which gives a range of examples, including: “rape or threats of rape and other forms of sexual abuse, threats against family and children, removal of children from their care, false stories about illness or death of family members and children, and humiliation and abuse surrounding biological functions such as menstruation and childbirth.”

¹³⁰ World Bank (2006) p.8.

during the major part of the period under scrutiny lead to the victimisation of women as much as men,” and that “some of the personal scores seem to be linked directly with the femaleness of the victim.”¹³¹

Yet without dedicated expertise or clear guidelines, these efforts left much unexplored and under-implemented, and leave proceedings open to the bias of commissioners. A narrow understanding of sexual violence for example, has meant that other violations and their effects have been consistently overlooked, and the gendered roots and consequences of these actions have not been investigated. This advances, according to Nesiah, a “partial and narrow truth”.¹³² She and others have observed that while the experience of rape by black women in South Africa was sensationalized as a violation, the ‘ordinary violence’ and deprivations that women experienced in the private sphere as a result of apartheid was largely ignored (which ranged from gender-specific violence and intimidation, to black women’s difficulties accessing state services and basic provisions for living).

In past Sri Lankan CoIs, many of these issues have barely arisen. The limited recommendations and perfunctory analysis of WSSP commissioners on the situation of women ‘left behind’ falls far short of current best practice,¹³³ and as with other commissions, women receive barely a mention in the rest of the report. Though commissioners decided to look at the rape and murder of girls who had been abducted from their homes by persons looking for their fathers or brothers, and noted the involvement of gender-based ‘personal scores’,¹³⁴ there was little room to take this further. Its mandate excluded disappearances arising from personal disputes and other forms of physical injury, which are areas in which most violations against women would likely fall, and it did not allow for the necessary resources or expertise (as covered below). The LLRC has similarly given no explicit space to gender-based crimes.¹³⁵ According to Sri Lankan legal researcher, Ambika Satkunanathan: “We all hear stories, anecdotes...but sexual violence remains one of the least documented violations from this conflict.”¹³⁶

A middle ground can be seen in Peru, where gender was not featured in the mandate, but where a gender unit was established, partly funded by the UN Office of the High Commission for Human Rights. The mainstreaming of gender was not 100% successful, but it was well represented in the final report and its recommendations, which included a chapter on gender analysis and another on sexual violence against women. Contrary to the expectations and awareness of Peruvian society at the beginning of the process, this established the grave scale, and to some extent the range, of the violence perpetrated against women during the armed conflict. In South Africa a similar unit had to restrict itself to low-cost initiatives, and was largely restricted to those women who wished to come forward.¹³⁷

¹³¹ Sri Lankan Presidential Commission of Inquiry (September 1997) *Western, Southern and Sabaragamuwa*, 11.4.

¹³² Nesiah (2006) *Gender and Truth Commission Mandates*.

¹³³ Compare with Guillerot’s (2006) appraisal of Peru’s TRC report for example, pp.136-194.

¹³⁴ Pinto-Jayawardena (2010) p.79.

¹³⁵ Conversation with Ambika Satkunanathan.

¹³⁶ In conversation with the author.

¹³⁷ World Bank (2006) p.15.

In contrast, recently designed truth commissions in Sierra Leone and Timor Leste have begun to build an explicit reference to gender into the legal instrument that creates them, ensuring dedicated staff, resources and guidelines, and more comprehensive involvement by female survivors. This has allowed for more consistent investigation into the privatized and structural harms that come from conflict, for the proper cross-distribution of these findings in the report and – essentially – in any follow up action.¹³⁸ As noted by Nesiiah, in looking at harsh bodily injuries through a gender lens, the Commissioners identified a high percentage of victims among women and girls, which then informed steps to reform laws relating to gender justice.

Unlike many conflicts, rape and sexual violence do not appear to have been deployed as a tool of Sri Lanka's conflict;¹³⁹ however it was reported throughout in areas directly affected by conflict. To avoid discrimination a commission must investigate violations that were made possible by the war-fuelled environment of violence and impunity, in public, but also in the private realm where most women, due to social convention, are situated and too often overlooked. Rather than excluding 'private harms' as instructed by the 1994 CoIs, a mandate would include the impact of such violence in relation to women's different socioeconomic circumstances; social ostracism, for example, or the effect on her chances of employment, and her family's welfare. By doing so it would be much less at risk of recommending discriminatory measures for reform and reparation – which is another emerging field of study.¹⁴⁰

As a further illustration, to enquire into the gendered implications of disappearance in Sri Lanka would be to explain not only how acts of kidnapping, torture, rape or murder were able to take place, but also to account for the kinds of violation and hurdles to justice that women have experienced as they searched for disappeared relatives.¹⁴¹ The needs of female-headed households during displacement and periods of militarization would need to be identified, along with any other rights that may be violated due to the loss of their loved ones, whether related to health, employment, family life or education. This route leads to a holistic and healing process that equally addresses survivors, and which satisfies Sri Lanka's international commitments. Analysis by Peru's TRC saw the prioritising of a new Declaration of Forced Disappearance, which the Ombudsman's Office would release if a claim was made and a disappeared person not found. This was recognized for the disproportionately positive impact it would have on women as the majority of survivors, in terms of their rights to property, inheritance and remarriage,¹⁴² and it holds significant parallels to the current difficulties of Sri Lankan families, many female-headed, on obtaining death certificates.

Finally, for these issues to be addressed without sex discrimination, the time span of an inquiry would need to encompass periods of significance to women. In the case of Sri Lanka, this would include the months following the war, during which reports of human rights violations against internally displaced

¹³⁸ ICTJ (2010) p.9; World Bank (2006) p.7.

¹³⁹ Wood (2006) p.313.

¹⁴⁰ Such as in Ruth Rubio-Marin (ed. 2006) *What Happened to the Women?*

¹⁴¹ World Bank (2006) p.2.

¹⁴² *Ibid.*, p.15.

persons (IDPs) in and outside of internment camps by military personnel were frequent, yet which the LLRC's time frame excludes.

Composition and consultation

The underrepresentation of Tamil women in the public sphere and in past truth-telling exercises in Sri Lanka, runs contrary to best practice on firstly, the composition of its panel and secondly, the need for broad consultation with women's groups, as articulated in soft law provisions such as the Updated Principles on Impunity.¹⁴³ The design of the mandate and procedure cannot be legitimately inclusive when drafting decisions take place in forums that lack input from women (and other marginalized groups).

The presence of just one female Tamil commissioner out of eight (alongside just one other male Tamil), makes the LLRC composition 'seriously deficient' according to the UN Panel of Experts, and does not represent the diversity of Sri Lankan society – particularly those most directly affected by the conflict.¹⁴⁴

The issue of representation is arguably reflected in the final reports of Sri Lanka's All Island and the WSSPs CoIs. Both were headed by the same female commissioner and both, though insufficiently, made mention of women's experiences, in comparison to an absence of any such efforts by the all-male North East Inquiry panel as well as by the all-male Central, North Western, North Central and Uva inquiry panel.

Nevertheless, international standards require that stakeholder groups be proportionally represented (for example the Beijing Platform for Action – which articulates the UNGA's definition of gender balance and perspective in special mechanisms). This is increasingly being seen. In Sierra Leone three out of seven commissioners were women, and in Timor Leste two of seven were women, determined through public consultation and special sessions with women NGOs.

Yet because gender parity does not guarantee a panel's full understanding of the complexities involved in human rights, gender and ethnicity, the participation of experts in gender analysis and other related fields (such as anthropology and social psychology) is an important measure to prevent discrimination. In the same vein, the close involvement of women's groups is critical from the appointment process onward, and can help facilitate the periodic training of staff in gender sensitization, as well as inspire women's confidence in the exercise. Before gender training in the Sierra Leone initiative, for example, some staff questioned female victims of sexual violence about the clothes that they were wearing when attacked, and why they were outside alone, at night, showing clear discriminatory attitudes.¹⁴⁵ Proactive outreach to communities, and coordination with survivors and victim's groups, as seen in the kind of women-only

¹⁴³ Principle 7, UN Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity (8 February 2005) E/CN.4/2005/102/Add.1.

¹⁴⁴ UN Secretary-General (31 March 2011) p.309.

¹⁴⁵ World Bank (2006) p.17.

public consultations and research projects pioneered in Timor Leste and Sierra Leone, can also forge closer links to victims and guard against discrimination by utilizing further expertise on gender - particularly in operational design.¹⁴⁶

In Timor Leste, which was established under the interim UN government, women were mobilized and widely involved as civil groups, as experts on the steering committee and as commissioners at national, regional, and district levels,¹⁴⁷ as well as partners on research projects and healing workshops.¹⁴⁸ The gender training of staff in Sierra Leone, by UNIFEM and other groups, contributed to broad contribution by women, and a final report that called for significant reforms for women's participation in education, in political and social life, and community initiatives to encourage acceptance of the survivors of rape and sexual violence. Such initiatives are absent, and appear little considered in the case of Sri Lanka.

Methodology

The legitimacy of any commission-built collective memory will rest on the procedures used to classify, filter and translate information, particularly in the eyes of those who use it. Operationalisation and outreach are therefore of critical importance when considering equal formal and informal access to truth commissions. Only diverse special measures can begin to attempt to counter the challenges outlined above, including perhaps most significantly, the increased vulnerability of women to intimidation or obstruction, compounded in so many cases by displacement, widowhood or disability.

While Sri Lanka's various inquiry mechanisms have been approached by a large majority of women, with strong efforts made by some commissioners in the 1990s to facilitate their physical access,¹⁴⁹ many have been revictimised by ill-treatment, or the lack of support or protection given by the State. The more recent LLRC has been dogged by the absence of a discernible State effort to adjust a narrative that has previously vilified female Sri Lankans campaigning for investigations into disappearances.¹⁵⁰ The LLRC has also been criticized for its lack of victim-centred methodology and its failure to address the emotional needs of victims.¹⁵¹

To prevent discrimination, a legitimate truth mechanism would both need to arrange effective ad hoc protection throughout and after a commission, and provide women with gender-sensitive guidance for the

¹⁴⁶ Timor Leste: Wandita et. al, (2006) p286-303; Sierra Leone: Nesiah (2006) *Truth Commissions and Gender* p.12.

¹⁴⁷ *Ibid*: Regional commissioners were typically balanced between men and women and led district teams, each with two male and female statement takers and a male and female victim support staff; the male executive director was supported by a female programme manager – an experienced activist in the field of gender and human rights.

¹⁴⁸ Timor Leste: Wandita et. al, (2006) pp.286-303.

¹⁴⁹ For example, MCM Iqbal, former Secretary to the Central Zone and All Island Inquiries on disappearances has detailed the distance travelled by commissioners to visit affected villages.

¹⁵⁰ Secretary-General (2011) para.313, pp.333-4; ICG (2011) *Reconciliation* p.24.

¹⁵¹ Secretary-General (2011) para.326-331; see examples drawn from LLRC transcripts in AI (2011) p.50 *When will they get justice?*

duration of the procedure. The range of best practice runs from statement-taking and information-gathering by trained female officers, to appropriate levels of privacy in testimony, as detailed at length in World Bank and ICTJ guidelines.¹⁵² Protective psychological measures may include mental health professionals on standby. Women should be able to choose in-camera or private testimony, be interviewed away from other family members where possible, and staff must be trained to pick up on the cues that a woman may give, having experienced forms of violence she considers shameful.

Recent truth commissions have dedicated public and private thematic sessions to women's testimony of their experiences, expectations and needs, which in the case of South Africa for example, was preceded by preparatory workshops. This has improved the rehabilitative function of the commission for women, while allowing them to provoke discussion about shifting gender roles, and the pressures on female breadwinners.¹⁵³ One of eight national public hearings in Timor Leste's CAVR was on women and conflict, and included a broad range of women, covering issues from coercive birth control, to humanitarian issues.¹⁵⁴ Furthermore, in contrast to allegations that the current LLRC has failed to create a supportive environment or bear the costs of witnesses, best practice dictates that technical assistance overcome difficulties more likely to inhibit women.¹⁵⁵ This would include compensating their transport or child care costs, or money lost to absence from work in the informal sector.

It has become a recently understood fact that women are generally less ready to testify about violations against themselves than those against family members.¹⁵⁶ Women in Sri Lanka have been no different, resulting in severe underreporting, and therefore under-consideration of the range of violations against women. To counter this, encouraging measures will be needed to inform the female population about their status as victims, the full spectrum of harms – including gendered harms - and their rights within a commission mandate.

Women often testify at great personal risk, of a physical, psychological, but also a markedly social nature, as detailed above. While reprisals have certainly affected both men and women in Sri Lanka,¹⁵⁷ and are ill-guarded against (ensured by parliament's failure to enact a bill for witness protection in 2008) the stigma associated with sexual violence and other violations, is a critical barrier for female testifiers, and can result in estrangement from family members, and even the mistreatment of their children. This needs to be countered with community-targeted education projects. However it should be noted that in Sri Lanka this stigma can be viewed as led by both community and State, when considering the government's

¹⁵² World Bank (2006) p.7; Nesiiah (2006) *Truth Commissions and Gender* p.13.

¹⁵³ Nesiiah (2006) *Gender and Truth Commission Mandates*; Guillerot (2006) p.295.

¹⁵⁴ Timor Leste: Wandita et. al, (2006) p.295.

¹⁵⁵ Secretary-General (2011) para.80-96; AI (2011) p.52 *When will they get justice?*; as directed by the Updated Principles on Impunity, 10c “[a]ll expenses incurred by those giving testimony shall be borne by the State.”

¹⁵⁶ Secretary-General (2011) para.80-96; Nesiiah (2006).

¹⁵⁷ Though they can be gendered, as covered by MCM Iqbal, for example in Baker (22 August 2009), *A Thankless Task*, in which a Sri Lankan mother was raped by police in retaliation for testifying in a CoI, and her remaining son abducted.

keenness to deny allegations of war crimes, including those of a sexual nature.¹⁵⁸ This has placed a sector of vulnerable and violated women out of reach of assistance and the national agenda.

A comprehensive outreach strategy is critical to any public truth or inquiry process, and must be sure to address all communities equally in a manner that they understand. According to accounts of the 1994 CoIs, victims would frequently testify without comprehending the goal or the outcome of the inquiry,¹⁵⁹ and the LLRC has been criticized for its minimal public information programme.¹⁶⁰ This speaks of the need for a media strategy to target different groups. For women this would offer reassurance that the process is safe and sensitive, let them know what will be expected of them, and importantly - what they can ultimately expect themselves. This should involve information about evidentiary thresholds and how to write an adequate application, Past recommendations such as those from the World Bank and the International Centre for Transitional Justice (ICTJ), have included the wider use of community networks, which Tamil women are more likely to encounter, trust and understand,¹⁶¹ (rather than, for example, a government mouthpiece), advertisements in local dialects in publications and programmes commonly read and watched by minority women, and the use of NGO-run workshops. These considerations extend to the dissemination of any final report.

It is clear that women are affected by discrimination in truth commission mandates and procedures, on an individual and a community level, however the product too – the final report – can have a great national impact, and crucial for the full value of the process to be diffused throughout a society. There is little scope in this paper to consider the historical analysis required in a truth commission's report, its evaluation of institutional responsibility or its recommendations in relation to gender, power and victimisation, as covered by scholars such as Fionnuala Ni Aolain and Catherine Turner; Christine Bell and Catherine O'Rourke; and Ruth Rubio-Marin. It is also notable that neither the warrant of the LLRC or the Commission of Inquiry act requires the publication of a final report. Yet it is important to highlight that any discrimination in a truth commission's mandate, composition and procedure will be carried onward in any reforms or reparations that it proposes, reducing the likelihood of improvements for women in the form of gender-appropriate health care, rehabilitation, welfare payments or opportunities in the civic sector. By cutting women from the process, they are cut from the historical record and its benefits – ostensibly, consideration in the post-conflict agenda, and any 'lessons learned'. As mentioned, the final reports of certain commissions have included a special chapter on gender – some like Peru's more successful than for example, South Africa, or the short chapter in Sri Lanka's WSSP CoI. However increasingly, calls are being made for gender to be mainstreamed throughout the whole document to prevent women's issues being 'ghettoised'.¹⁶² If the purpose of a truth commission is to build a nation's

¹⁵⁸ ABC (6 July 2011) *Sri Lankan Military*, <http://www.abc.net.au/news/2011-07-06/sri-lankan-military-denies-war-crime-claims/2785010>.

¹⁵⁹ Interview with MCM Iqbal, who noted for example, that many women expected missing family members to be produced after they had testified, and refused offers of compensation.

¹⁶⁰ Secretary General (2011) pp.308, 340.

¹⁶¹ Pinto-Jayawardena (2010) p.16.

¹⁶² For example, Guillerot, note 128.

collective memory of a period, to leave more than 50% of those affected on the periphery of this memory, is a gross act of discrimination, not only at that point in time, but extending far into the future.

Conclusion:

Truth-telling in the transitional context can offer opportunity amid crisis for those whose voices have not traditionally been heard. For Sri Lanka's minority women, the opportunity is being dishearteningly squandered. By failing to uphold key human rights standards in its memory-building response to the conflict, the State appears ready to retrench forms of discrimination that already acutely violate the spectrum of civil, political, economic, social and cultural rights held by Tamil women. Sri Lanka's challenging political climate – indeed its ostensible lack of transition – will limit the practical contribution of the recommendations made above.

Yet with greater attention to the equality framework and corresponding best practice, this paper has attempted to highlight avenues that can begin to counteract the historical exclusion of Tamil women and place them more squarely, and thus legally, within the post conflict narrative. It is time for both those who control, and who challenge Sri Lanka's transitional justice mechanisms to do so with gender equality in mind.

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