

Reconciling Truth and Gender: Lessons for Sri Lanka

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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. In exploring the scope of State-led and condoned discrimination towards Sri Lanka's largest group of war-affected survivors, Tamil women in the North and East of the country, this paper aims to highlight the need for gender-sensitive truth commissioning following the conflict, and to assess key legal and practical obstacles, in reference to the international legal framework on non-discrimination. Drawing on critiques of Sri Lanka's past and current Commissions of Inquiry, and on best practice, it then briefly proposes ways to place Tamil women more centrally, and therefore legally, within the transitional narrative.

Introduction

“For the 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’.”

-Valkyrie ¹

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 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 ethno-nationalist warfare 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. In Part One I will briefly introduce 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, I establish major prospective obstacles to sex

¹ Valkyrie (25 April 2011) citing Dori Lamb, quoted in Elizabeth Jelin (2003) *State Repression and the Labors of Memory*, p63,65 <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) pp23-44

³ Antkowiak (2001) p977-1009

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

equality in truth-telling by presenting key ways in which the Government of Sri Lanka (GoSL) has discriminated against Tamil women, and prompted disparate experiences of the conflict and its aftermath. In Part Three – aided by accounts of past and current Sri Lankan truth-telling exercises - I will draw on best practice to identify key areas for opportunity and change. Among the limitations of this work, I must acknowledge that the GoSL's reluctance to engage with minority grievances and pursue internationally credible standards of truth and accountability,⁶ among other factors, consigns this to a largely theoretical realm, and presents limited opportunity for the application of my recommendations. Nevertheless I hope at the very least, to flag an area little considered so far in Sri Lanka's post-conflict discourse - and prompt questions as to why this is the case.

⁶ Minority Rights Group (MRG) (2011), p7; 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 characterized as: temporary advisory bodies, authorized 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 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

⁷ (1998) Vol IV, p284

⁸ Hayner (2010) p10-14

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

¹⁰ Popkin and Roht-Arriaza (1995) pp79–116; Mendez (1997) p225

¹¹ Hayner (2010) p11, p13-14; 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

¹³ Ensalaco (1994) p656-675

¹⁴ Hayner (2010), pp3-24; Bassiouni, 2006, p203-279

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 (Arts. 2 and 3) where it is read in conjunction with all other rights.¹⁶ Meanwhile, freestanding Art. 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 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

¹⁵ Ibid (Hayner (2010), pp3-24; Bassiouni, 2006, p203-279); Aldana-Pindell (2002) p1441

¹⁶ UDHR Art. 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. Serie A No. 18,

¹⁹ This remains a key weakness, say feminist scholars such as Ní Aoláin & Turner (2007) p234, in using international law to push for equal treatment among the sexes.

²⁰ Charlesworth, Chinkin, Wright (1991) pp.613-645; Johnstone (2006) pp148–185

²¹ CESCR General Comment 16 p11; HRC General Comment 18 p6

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

²³ Banda (2008) pp5-22; 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 p404

²⁴ Banda (2008) p15

²⁵ Banda (2008) p15; CEDAW’s Art.5

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

Meanwhile 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 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 I explore 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

²⁶ Crenshaw (1991) 'Mapping', pp1241–1299

²⁷ Banda (2008) p15; 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/1889 (2009); S/RES/1960 (2010)

²⁹ Ní Aoláin & Turner (2007) p230

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

³¹ Manjoo (2004), www.unrisd.org; Ní Aoláin & Turner (2007) p230

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) p33, 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).

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 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.

³⁴ Ní Aoláin & Turner (2007)

_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 I will use the framework above to highlight pervasive aspects of discrimination practiced and condoned by the GoSL against Tamil women, before examining how this has affected their agency and excluded them from the national narrative, during and after the war. My 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 my 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 my 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 all backgrounds. 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 I have only been able to address common and prevalent aspects of the ‘double bind’ of being Tamil and female in the North and East, which is by no means exhaustive, and I look forward to the emergence of further or more nuanced study. 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 the estimated loss of 10-20,000 lives in the North.³⁹ The conduct of the GoSL was condemned by a UN Expert Advisory Panel in 2011, which in its report gave credence to allegations that it

³⁵ Crenshaw and Thomas (2001) *Intersectionality*

<http://www.abanet.org/women/perspectives/Spring2004CrenshawPSP.pdf>

³⁶ CEDAW Arts 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 report: 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 p5); Iqbal, *Rights of Minorities in Sri Lanka*, <http://www.ruleoflawsrilanka.org/resources/writings-of-m-c-m-igbal/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) p18

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

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 I further explore in Part Three. Sri Lanka has ratified the major human rights treaties, including CEDAW and its Optional Protocol.

ii) Discrimination against Tamil women

Discrimination against Tamils

Prevalent ethnic discrimination by the GoSL 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 since the promulgation of the country's constitution in 1978, 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 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 NGO and UN-based commentators for a lack of public consultation in the region, and limited political will to address Tamil-speakers.⁴⁴ Long-held security and emergency measures that violate international law have also disproportionately affected Tamils, under which a high rate of human rights abuse continues to be reported, yet insufficiently addressed by the State.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 report contends that the GoSL 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 I will go on to discuss, 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

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>

⁴³ Abeysekera (2007) p9; UN Secretary-General (31 March 2011) para.401

⁴⁴ MRG (2011) p14

⁴⁵ Pinto-Jayawardena (2010) p6-7, 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 p5-7

⁴⁷ Samuel (8 February 2011) *Sri Lanka: the lin*; Gender Action for Peace and Security (GAPS; 2009) *Global Monitoring*, p120, 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.

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

The GoSL has 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 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 Arts. 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 Art. 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, as I cover later, the vulnerability of Tamil women in the workplace has increased substantially.

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

⁴⁹ CEDAW, note 5, para.46

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 5, para.30

⁵² Kodikara (2009) pp14-16

⁵³ Wickramasinghe (2006) pp178-179

⁵⁴ Gender Action for Peace and Security (GAPS; 2009) *Global Monitoring*, p120, 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) p23

⁵⁹ Ibid p24 (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) p19

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. The former is manifest in the civil service, with women across the country reporting frequent harassment, intimidation and 'inappropriate' means of dealing with cases of sexual and domestic violence.⁶³ Yet 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 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, which I expand on below. 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 the Sinhalese majority. While this is due to outright state-led ethnic discrimination (which, in relation to women specifically, remains under researched and reported), 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 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

⁶¹ Women and Media Collective (WMC; 2011) p10

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, p29

⁶⁴ See following section

⁶⁵ Valkyrie, see note 1; Asian Human Rights Commission (AHRC; 2010) pp49-51

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), p112.

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, p102-131

⁶⁹ Coomaraswamy, Radhika (1996) 'Tiger Women' p8

⁷⁰ Skjonsberg (1982) *A Special Caste? Tamil Women of Sri Lanka*, p45

⁷¹ Bose (1994) p111

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

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 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 social workers 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

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

⁷⁴ De Mel (2001) p2

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

⁷⁶ For example, De Silva (1994) p28; Samarasinghe (1996) p213; Peter Schalk (1992) Abeysekera (2007) *Implications*, p91-92; Rajasingham-Senayake (2001) p114.

⁷⁷ Wood (2006) p333

⁷⁸ Coined by Rajasingham-Senayake (2001) p106

⁷⁹ Bose (1994) p112

⁸⁰ Maunaguru (1995) p163; Alison (2003) p37-54; Liyanage, (1999) pp131- 2. Abeysekera (2007) *Implications of*, p81.

⁸¹ Maunaguru, (1995) p165

⁸² Abeysekera (2007) *Implications of*, p89

⁸³ Rajasingham-Senayake (2001) p117

⁸⁴ Conversation with Nimmi Gowrinathan

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 Meanwhile, Tamil women must also now contend with a state-led narrative that links female strength and independence with displays of terrorism.⁸⁷

iii) 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 Committee⁸⁸

Reports specific to Sri Lanka, and on conflict in general, have established that the experience of discrimination by 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 the high proportion of 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.⁸⁹ By exploring these issues I aim to foreground my 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 long 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,⁹⁰ 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.⁹¹ High rates of sexual violence against Tamil women have been alleged in custody and in internment camps during and after the war, and during monitoring and surveillance exercises.⁹² Feminist academics have cited this as proof of women's historical sexualisation and disempowerment (and their perceived value as cultural trophies),⁹³ and thus of the State's failure to uphold CEDAW's Art. 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.⁹⁴ The GoSL has been accused often of promoting the perception that rape is not a crime.⁹⁵

⁸⁵ Rajasingham-Senanayake (2001), p 109

⁸⁶ Kodikara (2009) p18

⁸⁷ From conversations with Sri Lankan legal scholars

⁸⁸ CEDAW, see note 5, para.40

⁸⁹ WMC (2006) p2, UN Secretary-General (31 March 2011) para.404-414

⁹⁰ Wood (2006) 313

⁹¹ Bose (1994) p109; UN Secretary-General (31 March 2011) para.37, 152-153

⁹² Coalition of Muslims & Tamils for Peace & Coexistence (CMTPC) (15 July 2011) *Two Years On*,

<http://cmtpc.wordpress.com/author/cmtpc/>

⁹³ Manoranjan (2011) *Beaten*, citing Coomaraswamy (1999) 'A Question of Honor: Women, Ethnicity and Armed Conflict'

⁹⁴ Centre for Women's Research (CWR; 2001) p62-68; Pinto-Jayawardena (2010) p52-58; interview with Patricia Lawrence

⁹⁵ AHRC (2010) p46, pp49-51

The Asian Human Rights Commission (AHRC) has reported that young low-caste women among ethnic minorities are more vulnerable to sexual violence, and that they ‘expect’ resistance and entrenched patriarchy “all the way from officials at the police stations, to the hospital personnel and the judiciary.”⁹⁶ The growing sexualisation of violence in the North and East and the heightened vulnerability of minority women there are being increasingly reported outside of the country,⁹⁷ yet these reports confront a State-led security narrative that still denies that widespread sexual crimes against women took place – or are taking place.⁹⁸

This evidence of formal and substantive discrimination against Tamil women, and the lack of space for them to address such failures in national and community narratives, places them at greater risk now. 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 its consistent link to violations against women.⁹⁹ 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.¹⁰⁰ One report notes a growing culture of sexual and gender-based violence in the post-conflict period, with widowed mothers in particular being targeted, not only by the army, navy and military police, but by other male civilians.¹⁰¹ 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.”¹⁰² Surveillance operations are often allegedly conducted without female officers, or explanations in terms that women heads of household may understand.¹⁰³

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.¹⁰⁴ 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.”¹⁰⁵

Other gendered dimensions of displacement and conflict

A high level of continuous gender-specific violence has been sustained by women in the North and East throughout the war, a measure of which I have explored above. However many 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 indiscriminate artillery fire by the State and

⁹⁶ AHRC (2010), p46

⁹⁷ Asian Centre for Human Rights (ACHR; 2008) p24

⁹⁸ CEDAW (see note 50) para.60; Valkyrie, Groundviews (25 April 2011) *National security*

⁹⁹ CEDAW (see note 50) para. 22; Abeysekera (2007) P64; CWR (2001) p71

¹⁰⁰ BBC (25 June 2011) *NCPA warns*; ICG (June 2011) p14-15; Wax (3 March 2009) *Privacy*

¹⁰¹ SuRG (May 2011) pxii-xiii

¹⁰² Valkyrie, Groundviews (25 April 2011) *National security*

¹⁰³ Ibid

¹⁰⁴ CWR (2001) p79; SAHR Report 2007 p12; Iqbal, Rajani (23 October 2010) *Women in Postwar Reconstruction*, p10

¹⁰⁵ Wandita, Campbell-Nelson and Leong Pereira (2006) p292

LTTE.¹⁰⁶ This has led to specific needs and concerns that any post-conflict initiative, without applying gender-lens, will be unable to address.¹⁰⁷

Malnourishment, starvation and illness (resulting from severe insufficiencies in housing and health facilities, water and sanitation during displacement),¹⁰⁸ 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.¹⁰⁹ Due to the gender-based restrictions I have already touched on, women have less opportunity to independently alleviate these.¹¹⁰ Various reports have documented the conflict-compounded harassment and underpayment of Tamil women in the employment sector,¹¹¹ and the slowness of the State to open up safer, regulated industries, offer skills training, and make appropriate interventions for women in these zones.¹¹²

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) for 'extraneous' issues relating to women, resulting in the rejection of most gender-related initiatives.¹¹³ This, combined with the breakdown of social structures and the high levels of domestic violence and community distrust reported from the North and East, will further entrench discrimination into the national fabric, unless they are actively addressed.

Finally, I contend that the narrowing of democratic space by the GoSL in the reconstruction phase is a valuable portent of exclusions in truth-telling.¹¹⁴ 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 them more acutely from a narrative that is already masculine by default, and which has been intensely masculinized by conflict.¹¹⁵ 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."¹¹⁶ Therefore the intense restrictions placed on communal gatherings in the Vanni under emergency legislation, for example,¹¹⁷ 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.

¹⁰⁶ UN Secretary-General (31 March 2011) p.i-ix; UN Refugee Agency (21 July 2009)

¹⁰⁷ Iqbal, Rajani (23 October 2010) *Women in Postwar Reconstruction* p9; Somasundaram (8 February 2003) *Addressing the Psychosocial Problems* http://issues.lines-magazine.org/Art_Feb03/Daya.htm

¹⁰⁸ UN Secretary-General (31 March 2011) p329; CEDAW CO (2011) p40; ICG (18 July 2011) p14

¹⁰⁹ CEDAW, see note 5, para.41f; Irin (9 Sept 2010) *Women take over*

¹¹⁰ CEDAW see note 5, para 41.e

¹¹¹ Irin (9 Sept 2010) *Women take over*

¹¹² UCA News (18 Oct 2010) *Widows* <http://www.ucanews.com/2010/10/18/sri-lankan-war-widows-clear-landmines-for-a-living/>

¹¹³ The SAHRC (2007) p13; (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.

¹¹⁴ MRG (2010) p6

¹¹⁵ Abeysekera (2007) p59-105

¹¹⁶ Valkyrie (25 April 2011) *National security*

¹¹⁷ Valkyrie (25 April 2011) *National security*

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 Abeysekera¹¹⁸

“I would not encourage them 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 Satkunanathan, on Sri Lankan victims of gender-based violence, after the war¹¹⁹

While the GoSL discriminates against women of all groups, I have established that its international obligations are being acutely breached in relation to Sri Lankan Tamil women in the North and East 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.

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 I 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, I hope to be able 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 (Cols) for a range of purposes, to questionable effect.¹²⁰ Perhaps credited most highly are a series of Cols mandated by former president Chandrika Kumaratunge in 1994 to ostensibly strengthen accountability following a widespread pattern of disappearances.¹²¹ 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),

¹¹⁸ (2007) p93

¹¹⁹ Interview with the author

¹²⁰ Foreword to Pinto-Jayawardena (2010) by Philip Alston, former UN mandate holder on extrajudicial executions, p.v

¹²¹ These comprised three 1994 Disappearances Commissions and the 1998 All-Island Disappearances Commission

resulted in their having negligible impact.¹²² More recently, the LLRC was created by presidential mandate in May 2010 to collect public and expert opinions on the root causes of ethnic conflict, in a bid for communal reconciliation, and is due to deliver its report in November 2011.¹²³ Due to the wider political context, chances of the LLRC achieving a measure of accountability are widely considered to be slim. It has been described as ‘deeply flawed’ by the UN Panel of Experts,¹²⁴ and rejected by key international NGOs for what they consider 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.¹²⁵ 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, though not much ‘probed’.¹²⁶ Gender-based violations have largely been absent from testimony.¹²⁷

Though none of these CoIs have explicitly featured truth-telling in their mandates, I assert 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. Key among my recommendations is that, along with the many current challenges to the legitimacy of the latest commission from the fields of human rights and humanitarian law, discrimination by gender deserves a much greater role.

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 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 progress has been seen in truth commissions in this regard without gender being explicitly mentioned in mandates. For example, in South Africa (initiated in 1995) and Peru’s TRCs (2001), 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

¹²² Pinto-Jayawardena (2010) Ch4

¹²³ The Gazette of the Democratic Socialist Republic of Sri Lanka (16 June 2010)

¹²⁴ Para.345

¹²⁵ 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>

¹²⁶ 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;

¹²⁷ Interviews with MCM Iqbal, Kishali Pinto-Jayawardena, Ambika Satkunanathan.

¹²⁸ Interviews with MCM Iqbal, Kishali Pinto-Jayawardena, Ambika Satkunanathan

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.”

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 Cols too, despite narrow mandates, some commissioners attempted to consider aspects of women's experiences. The Western, Southern and Sabaragamuwa Provinces (WSSP) Col 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 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 that together, 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 give the example of South Africa, where women's experiences under apartheid saw rape sensationalized as a violation, but the 'ordinary violence' and deprivations that women experienced in the private sphere as a result of apartheid largely ignored. These ranged from gender-specific violence and intimidation, to black women's difficulties accessing state services and basic provisions for living, whether during forced removals or under the group-area legislation that segregated living and working conditions.

In past Sri Lankan Cols, 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, and few if any cases have been reported officially.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

In contrast, recently designed truth commissions have begun to build an explicit reference to gender into the legal instrument that creates them, ensuring dedicated staff, resources and guidelines. This has allowed for investigation into the privatized and structural harms that come from conflict, and for the proper cross-distribution of these findings in the report and any follow up action.¹³⁷ In Peru for example, a gender unit was partly funded by the UN Office of the High Commission of Human Rights; although the mainstreaming of gender wasn't 100% successful, 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 range of the violence perpetrated against women during the armed conflict. In South Africa a similar

¹³⁰ World Bank (2006) p8

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, p136-194.

¹³⁴ Pinto-Jayawardena (2010) p79

¹³⁵ Conversation with Ambika Satkunanathan

¹³⁶ In conversation with the author

¹³⁷ ICTJ (2010) p9; World Bank (2006) p7

unit was sparsely funded, and had to restrict itself to low-cost initiatives; it therefore mainly reached only women who wished to come forward.¹³⁸

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 reportedly common throughout and was certainly more common 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 Cols, 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 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 Both Tamil commissioners meanwhile have been reported as less active or vocal than the other six, giving testifiers the

¹³⁸ World Bank (2006) p15

¹³⁹ Wood (2006) 313

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

¹⁴¹ World Bank (2006) p2

¹⁴² World Bank (2006) p15

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) p309

impression of being marginalized themselves.¹⁴⁵ Civilian women have perceived a lack of interest or sympathy in their stories in comparison, they allege, to the (mostly male) officials or elite actors invited to take part.¹⁴⁶ They have been berated for grieving publicly, passed over if unable to quickly compose themselves, and commissioners have suggested that in the interests of efficiency, one woman be chosen to represent others. Other reports tell of women being 'driven away' en masse.¹⁴⁷ These are strong indications of a gender-related disregard for women's experiences, and bias in the methodology for selecting witnesses.

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 female commissioners 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. 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.¹⁴⁸ Proactive outreach to communities, and coordination with survivors and victim's groups, as seen in the kind of women-only 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.¹⁴⁹ 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,¹⁵⁰ as well as partners on research projects and healing workshops.¹⁵¹ 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

¹⁴⁵ CMTPC (15 July 2011) *Two Years On*

¹⁴⁶ CMTPC (15 July 2011) *Two Years On*

¹⁴⁷ UN Secretary-General (31 March 2011) para 324; according to a Tamil Net report on an LLRC session in Mullaiththeevu Government Secretariat, at which fifteen of nearly four hundred persons, most of them women, were allowed to present (21 September 2010) http://www.peacewomen.org/news_article.php?id=1951&type=news

¹⁴⁸ World Bank (2006) p17

¹⁴⁹ Timor Leste: Wandita et. al, (2006) p286-303; Sierra Leone: Nesiha (2006) *Truth Commissions and Gender* p12

¹⁵⁰ 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.

¹⁵¹ Timor Leste: Wandita et. al, (2006) p286-303

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,¹⁵² 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 accounts of reprisal, pro-government bias and intimidation, and there has been no discernible State effort to adjust a narrative that has previously vilified the mainly female Sri Lankans campaigning for investigations into disappearances.¹⁵³ The LLRC has also been roundly criticized for its lack of victim-centred methodology and its failure to address the emotional needs of victims.¹⁵⁴ Reports from the International Crisis Group, for example, tell of 'desultory', 'curt and dismissive' staff chastising women for crying, and requesting written submissions in the place of oral testimony, which as noted above, has been linked to a particular lack of tolerance for female testifiers.¹⁵⁵ According to the UN Panel of experts, submission forms are in Sinhalese and English only.

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 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.¹⁵⁶ 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.¹⁵⁷ 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.¹⁵⁸ 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.¹⁵⁹ 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.¹⁶⁰ 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

¹⁵² 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.

¹⁵³ Secretary-General (2011) para.313, p333-4; ICG (2011) *Reconciliation* p24

¹⁵⁴ Secretary-General (2011) para.326-331; see examples drawn from LLRC transcripts in AI (2011) p50 *When will they get justice?*

¹⁵⁵ Secretary-General (2011) para.326-331; ICG (2011) *Reconciliation* p24

¹⁵⁶ World Bank (2006) p7; Nesiha (2006) *Truth Commissions and Gender* p13

¹⁵⁷ Nesiha (2006) *Gender and Truth Commission Mandates*; Guillerot (2006) p295

¹⁵⁸ Timor Leste: Wandita et. al, (2006) p295

¹⁵⁹ Secretary-General (2011) para.80-96; AI (2011) p52 *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."

¹⁶⁰ Secretary-General (2011) para.80-96; Nesiha (2006)

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,¹⁶¹ 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 GoSL's keenness to deny allegations of war crimes, including those of a sexual nature.¹⁶² 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 Cols, victims would frequently testify without comprehending the goal or the outcome of the inquiry,¹⁶³ and the LLRC has been criticized for its minimal public information programme.¹⁶⁴ 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, as recommended by the UN Panel, which cited the LLRC's lack of Tamil language forms as evidence of its 'basic modalities'.¹⁶⁵ NGOs have also condemned proceedings as 'neither safe nor gender-sensitive', and have highlighted inadequate Tamil translation and a bias toward hearing (male) community leaders.¹⁶⁶ Past recommendations such as those from the World Bank and ICTJ, have included the wider use of community networks, which Tamil women are more likely to encounter, trust and understand,¹⁶⁷ (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 require 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,

¹⁶¹ 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 Col, and her remaining son abducted.

¹⁶² ABC (6 July 2011) *Sri Lankan Military*, <http://www.abc.net.au/news/2011-07-06/sri-lankan-military-denies-war-crime-claims/2785010>

¹⁶³ 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.

¹⁶⁴ Secretary General (2011) P308, 340;

¹⁶⁵ Secretary General (2011) P308, 340; insufficient outreach has been labeled by past Sri Lankan Col Commissioners as a breach of human rights obligations, for example, the All-Island Commission, noting its inability to serve remote areas. http://www.disappearances.org/news/mainfile.php/frep_sl_ai/109/

¹⁶⁶ CMTPC (15 July 2011) *Two Years On* <http://cmtpc.wordpress.com/author/cmtpc/>

¹⁶⁷ Pinto-Jayawardena (2010) p16

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 Col. However increasingly, calls are being made for gender to be mainstreamed throughout the whole document to prevent women’s issues being ‘ghettoised’.¹⁶⁸ If the purpose of a truth commission is to build a nation’s 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.

¹⁶⁸ For example, Guillerot, note 128

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, as I have explored, 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, I have tried at the very least, 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 – while also urging those who challenge Sri Lanka's transitional justice mechanisms, to do so with sex equality in mind. I find both aims illustrated in a 2011 report on Sri Lanka by the International Crisis Group - made without overtures to gender - which observes:

Rebuilding relations among those communities and getting to a point where each has some real understanding of what the others have gone through should be a central goal...

It may be several years before the country is able to have a truly inclusive and representative process, but it is something Sri Lankans should be able to look forward to.¹⁶⁹

¹⁶⁹ ICG (2011) *Reconciliation* p35, 40

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