The Politics of Sequencing: A Threat to Justice?
The South Asian Centre for Legal Studies (SACLs) works on advancing Transitional Justice: victims' right to truth, justice, reparations and guarantees of non-repetition.

Contact us for more information:

Address: No 22 Murugan Place, Colombo 6, Sri Lanka
Email: information@sacls.org
Facebook: www.facebook.com/sacslslk
Twitter: www.twitter.com/sacls lk
Website: http://sacls.org/

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I. Introduction

In post-conflict societies, transitional justice measures are sometimes utilized to address the root causes of violence and to consolidate democracy and the rule of law. Transitional justice measures include truth commissions, prosecutions, reparations and guarantees of non-recurrence such as vetting, lustration and institutional reforms.

Prosecutions of those responsible for grave crimes under international law are often the most controversial of all transitional justice measures. This is because prosecutions often target those—in the military or in the government—who retain a measure of formal or informal political power and may therefore jeopardize democratic processes. In addition, some scholars also argue that prosecutions may generate new grievances among the population and fuel further conflicts.

However, another school of thought recognizes that prosecutions tend to erode popular support for actors and institutions responsible for mass human rights violations. This in turn, strengthens a new regime’s commitment to break from the past. In addition, recent scholarship and UN literature emphasize that prosecutions for grave human rights violations are instrumental in restoring citizens’ trust in state institutions. On the contrary, foregoing prosecutions may “contribute to a short-lived experiment with democracy and peace.”

Thus, while some early scholarship on transitional justice believed peace and justice to be mutually incompatible goals, the overwhelming preponderance of recent scholarship recognizes that a measure of justice is essential for long-lasting peace, democratic reforms and the consolidation of the rule of law. The question therefore is no longer whether to embark on prosecutorial policies but when and how to do so, with the objective of strengthening peace building and nation building efforts. As explained by the UN Secretary-General, “justice, peace and democracy are not mutually exclusive objectives, but rather mutually reinforcing imperatives. Advancing all three in fragile post-conflict settings requires strategic planning,

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careful integration and sensible sequencing of activities.” In instances where there are significant political barriers to prosecutions, delaying the implementation of accountability measures may be inevitable. However, as experiences in Latin American countries have shown, accountability can eventually be achieved through relentlessly exploiting opportunities for justice while also strengthening democracy. In this context, sequencing refers to strategies that aim to advance justice, peace and democracy through the timely implementation of various transitional justice measures.7

In several Latin American countries, truth-seeking endeavours are believed to have laid the ground for prosecutions that took place several years later. While conditions in Latin America may have required a “truth first, justice later” approach, this is not necessarily a uniform global experience. In fact, countries experience different types of transitions and face diverse challenges in the implementation of transitional justice measures. Therefore, sequencing is context-dependent and the “truth first, justice later” approach is not a necessary condition to achieve accountability. In fact, recent examples suggest that this approach may even be harmful to the goal it seeks to pursue. We argue that Sri Lanka is one of these examples.

II. Sequencing Truth Commissions and Trials: Global Experience

Recent scholarship on sequencing recognizes that the goals of transitional justice—including those of consolidating peace, achieving reconciliation, and strengthening the rule of law—are better achieved through the intervention of multiple institutions and the pursuit of different strategies. Criminal prosecutions and the establishment of truth commissions are often regarded as instrumental to achieving these goals.8 States have opted for various sequencing arrangements in the pursuit of truth and justice. While some countries have led their transitional justice process with a truth commission, others have chosen to hold trials against alleged perpetrators first. Some countries have also established both types of institutions and carried out truth-seeking and criminal proceedings simultaneously.

As the various comparative experiences show, the decision to adopt a specific sequencing approach is highly dependent on the political, social and legal factors at play in a society after the transition. As Samuel Huntington notes, the relative strength of a new government and the nature

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7 Sequencing is not limited to truth commissions and trials. It also includes reparations measures. Some states have started the transitional justice process utilizing reparation schemes. Brazil is one such example. The Brazilian government started providing reparations for victims of human rights violations in 1990. It was only in 2011—after completing its reparation scheme—that the government established its National Truth Commission. See Glenda Mezarroba, “Between Reparations, Half Truths and Impunity: The Difficult Break with the Legacy of the Dictatorship in Brazil.” Sur: International Journal on Human Rights, Vol. 7 No. 13 (2010) [The Legacy].
of the transition are, *inter alia*, two key factors that shape the sequencing choices. For instance, the sequencing approach may differ in situations where the regime change was triggered by popular demand and in situations where the transition is the result of a negotiated agreement. Other factors may also be taken into account including social and political dynamics as well as victims’ priorities. Based on these factors, three main sequencing approaches may be identified where countries choose to implement truth commissions as well as trials; the “truth first, justice later” approach, the “trials first, truth later” approach, or the “truth and justice in a tandem” approach.

1. “Truth First, Justice Later” Approach

Scholars argue that the “truth first, justice later” approach may be instrumental in building support for a broader set of transitional justice measures including trials. This is because official truth telling and state acknowledgment of the official narrative may contribute to changing public perception and to decreasing resistance to accountability measures. Such strategies are crucial in countries with deep political barriers to accountability.

a. Rationale for the “Truth First, Justice Later” Approach

By providing a comprehensive account of past abuses and violations and establishing responsibilities for these abuses, truth commissions could generate support for accountability processes and weaken support for those responsible for these abuses. This has been the experience in some Latin American countries.

In Chile, when Pinochet’s dictatorship came to an end in 1980, the political and legal environment did not permit trials. In 1973, the economic crisis and social unrest laid the ground for Pinochet’s military coup. Over the years, Pinochet secured power by building a state apparatus that pledged allegiance to him. This support remained even after the democratic

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9 Huntington identifies four main ways in which a country transitions to democracy. He argues that the least amount of accountability will be achieved in situations of *transformation*. Transformation is where “those in power in an authoritarian regime take the lead and play the decisive role in ending that regime.” Slightly more accountability will be achieved in a *transplacement*. In *transplacement* “democratization is produced by the combined actions of government and opposition.” He states that in *transplacement*, accountability cannot be achieved immediately. However, with time, the conditions will be obtained to negotiate matters related to accountability. The third way in which regime changes take place is *replacement*. Here, the old regime is ultimately replaced by the opposition through a struggle: frequently through a coup or a civil war. In this context, accountability is particularly feasible as the ousted regime will not have power to resist trials. Finally, a country can transition to democracy through international intervention. According to Huntington, a higher level of accountability can be achieved in this context because of the involvement of external actors. See Samuel Huntington, *The Third Wave: Democratization in the Late Twentieth Century* (University of Oklahoma Press, 1991) pp. 124-151.


12 Ibid.
transition almost a decade later, in particular amongst the judiciary and the military. This hampered the newly elected government’s ability to address past atrocities. In addition, amnesty laws passed in 1978—only two years before Pinochet lost power—formally prevented prosecutions. Further, Pinochet himself was protected from prosecutions consequent to being appointed Senator for life.

Assuming power in this situation, President Aylwin decided to establish the 1990–1991 National Commission for Truth and Reconciliation. The Commission investigated inter alia the disappearances, executions and torture committed during the previous regime. Its final report was released in 1991. Over 95% of the human rights violations were attributed to state agents. The Commission’s findings contributed to an increased awareness in the society of the atrocities committed by the past regime. Polls conducted after the release of the report showed that more people were in favour of perpetrators being brought to justice than before the release of the report.

Experiences from other countries also suggest that publicizing the findings of truth commissions could contribute to moulding people’s perceptions of trials and other accountability measures. In Peru, the Final Report of the Truth and Reconciliation (CVR) helped the public comprehend the extent and seriousness of crimes committed by the State. The report challenged the narrative promulgated by the Fujimori regime that torture and murder were necessary to win the war. The Commission’s findings were received favourably by an estimated 48% of the population and allowed human rights groups the space to promote the CVR’s recommendations and monitor their implementation.

Similarly, in Argentina, the publication of the final report of the National Commission on the Disappearance of Persons (CONADEP) contributed to laying the ground for trials. CONADEP was established to clarify the fate of the people who disappeared during Argentina’s 17-year military rule. The Commission released its report in 1984 and accounted for approximately 30,000 disappearances that took place between 1976 and 1983. The government took the initiative to publish a book-length version of the findings. The book Nunca Mas became an

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13 Ibid.
14 Ibid.  
18 The Legacy, supra 7, p. 44.
20 Ibid.
immediate best seller.\textsuperscript{21} It brought to public knowledge an unambiguous account of the systematic human rights violations and paved the way for the prosecution of nine military officers in 1985.

b. **Conditions for a Successful “Truth First, Justice Later” Approach**

Truth commissions may help overcome initial resistance to prosecutions. They may achieve this by building a collective memory that includes, on the one hand, the brutal ways in which the crimes were committed and, on the other, the pain and suffering of victims. This collective memory, in time, helps society understand the true cost of repression and violence, shame perpetrators and weaken public resistance to accountability. However, the mere fact that a truth commission is established does not bring about this change of perception. As scholars point out, two factors are essential for truth commissions to be successful in building support for accountability: first, state endorsement of the findings and public access to the report; and second, the passage of time.\textsuperscript{22} Further, while acknowledging the work of truth commissions in building institutional and sometimes public support for trials in the Latin American region, the significant role of continued activism from human rights groups seeking to overturn amnesty laws through various legal avenues must also be noted.

i. **Governmental and Public Support**

Scholarly writing suggests that there is a correlation between active promotion of a truth commission report by the state and acceptance of its findings by the public.\textsuperscript{23} This is because a state’s endorsement gives legitimacy to the truth commission’s findings. Without state support, the public may regard victims’ testimonies as baseless allegations and may not relate to the pressing need to address their grievances. Worse, the public may never access information and proceedings relating to the truth commission.

In Argentina, the Truth Commission’s report was widely publicized. The government printed the report in abridged versions and ensured widespread dissemination.\textsuperscript{24} It also took steps to make a documentary of the preliminary findings of the Commission and aired it on television.\textsuperscript{25} This


\textsuperscript{24} Truth Commission: Argentina, *supra* 19.

\textsuperscript{25} On July 4, 1984, CONADEP conducted a two-hour program on television. The program consisted of testimonies from survivors of concentration camps and parents and relatives of those who disappeared. The program was very
contributed significantly to changing public perception of trials and, one year after the release of the Commission’s report, Argentina was able to prosecute nine high-level military officials.\footnote{26} While the process subsequently stalled, the government’s endorsement of the commission’s findings greatly contributed to the initial momentum.

In contrast, Chile took significantly more time than Argentina to begin prosecuting alleged crimes committed during the dictatorship. While the commission’s report received the support of the President,\footnote{27} the Chilean judiciary and the army strongly rejected it as “an absurd critique tinged with political passions.”\footnote{28} As a result of this opposition, the government could not take measures to give wide publicity to the report. Relatively few copies of the report were printed, and public awareness of the findings remained low.\footnote{29} In addition, several political tactics used by the pro-Pinochet camp managed to divert people’s attention away from the report. Shortly after the report was released, three people who had closely worked with Pinochet were assassinated.\footnote{30} The pro-Pinochet camp alleged that left wing politicians were responsible for these assassinations and used the media to highlight these killings.\footnote{31} Extensive media coverage of Pinochet attending the funeral blunted the report’s impact.\footnote{32} Although the report led to an extensive reparation scheme, due to lack of publicity and government’s endorsement, it had little impact on anti-impunity measures until 1998 when Pinochet was arrested in London.\footnote{33}

Similarly in Peru, despite an initially positive reception of the Commission’s findings amongst the public, two factors undermined the long term impact of the report. First, the government lacked the political will to widely disseminate the findings and to initiate a genuine public debate on the basis of the report.\footnote{34} Second, the work of the Commission received little media coverage.\footnote{35}
As the situations in Chile and Peru illustrate, absent effective media coverage and unequivocal endorsement of a commission’s findings by the government, the public may remain unconvinced of the value of truth commission’s findings and of the importance of accountability measures to address atrocities committed in the past.

**ii. Passage of Time**

The passage of time is also a critical factor in enabling truth commissions to successfully lay the ground for trials. Even in cases where a State endorses the narrative established by truth commissions, and where the public reception of the report is relatively favourable, the required societal and political changes only materialize with the effluxion of time. First, while a truth commission’s report may generate a sustained demand for justice, a confluence of factors is required for this demand to eventually erode political barriers to accountability. These factors—including judicial awakening, international sanctions, and political and economic changes—can only materialize over time. Second, where there is significant support for perpetrator groups, society takes time to fully accept a truth commission’s findings and to see the need for accountability for past abuses. In fact, those who supported the regime or group allegedly responsible for mass human rights violations have to come to terms with the fact that this group or regime committed violations in their name or to advance a project in which they reposed faith. In addition, those who went as far as supporting the violations because the “end justifies the means” have to undertake a process of introspection to accept that they too bear a moral responsibility for these violations. These changes of perception and attitudes often take years, if not decades, to materialize.

Examples in Latin America illustrate this point. For instance, Chile took nearly eight years to initiate trials following the publication of the Truth Commission’s report. Although Argentina proceeded to try perpetrators soon after the Commission concluded its work, the process stalled on account of pressure from the military and it was only in 2003 that proceedings resumed in earnest.\(^{36}\)

**iii. Legal Activism**

While by all accounts truth commissions played a role in the Latin American region to build support for prosecutions, trials for serious crimes would not have been possible if narrow windows of opportunity were not fully exploited, based on a civil society strategy of relentlessly pursuing justice despite prevalent barriers. Thus, the pursuit of universal jurisdiction cases in countries like Spain and the filing of cases before the Inter-American Court on Human Rights were instrumental in overcoming amnesty laws in these countries.

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For instance, in 1996, a group of activists filed a case in Spain against the Argentinean military junta for committing genocide, terrorism, and enforced disappearances. The same year, a Spanish lawyers’ association filed charges in Spain against former Chilean military leaders including Pinochet for crimes allegedly committed during Pinochet’s time in office. To proceed with the trials, the Spanish Courts issued extradition requests, using the Chilean Truth Commission’s report in support. This eventually led to Pinochet’s arrest and protracted house arrest in London. This episode triggered a heated public debate in Chile about the Chilean judiciary’s apathy, opening the door to subsequent trials.

At the same period, the legality of amnesty laws in several Latin American countries was disputed by the Inter-American Court in a number of emblematic cases. The Court held that amnesty laws in Chile and in Peru were incompatible with several provisions of the American Convention on Human Rights. In light of this and other considerations, the Court declared amnesty laws devoid of legal effect. These rulings were instrumental in overcoming amnesty laws not only in Peru and Chile but also in Argentina where the Supreme Court ruling on the unconstitutionality of amnesty laws drew heavily from the jurisprudence of the Inter-American Court.

Pinochet’s arrest on a Spanish arrest warrant, the Inter-American Court’s jurisprudence on amnesty laws, as well as public pressure on the basis of truth commissions’ reports finally created the conditions necessary to initiate trials. In 1998—after years of impunity—the Communist party lodged the first complaint against Pinochet in the Chilean courts. In 2006, the Chilean Supreme Court ruled that the amnesty decreed by the military government in 1978 was inapplicable to war crimes or crimes against humanity. By 2009, 779 former officials had been charged and over 200 had been convicted of committing human rights violations.

In 2001, the Argentine judiciary held that the Full Stop Law and the Due Obedience Law were unconstitutional, which was later upheld by the Supreme Court of Argentina. The series of

37 See Richard Wilson, Prosecuting Pinochet: International Crimes in Spanish Domestic Law, p. 3.
38 Ibid, p. 3.
39 Hayner, supra 15, p. 49.
42 Supreme Court of Chile, Criminal Chamber, Molco Case, No. 559-2004, 13 December 2006, paras 19-20. (See, however, the Inter-American Court's findings in Almonacid v. Chile, para. 121).
44 See Hayner, supra 15, p. 46.
amnesty laws were formally repealed in 2003 and trials were initiated against nearly 700 persons.46

In 2009, the former president of Peru, Alberto Fujimori, was tried and found guilty of crimes against humanity and corruption, and was sentenced to life imprisonment.47

2. Alternatives to the “Truth First, Justice Later” Approach

In Latin America, where there were real political barriers to accountability, any political space or opening was fully exploited to pursue justice when it presented itself. In this context, the truth commissions’ work contributed to building support for accountability. However, we argue that in situations where there are no legal and political barriers to prosecutions, the “truth first, justice later” approach is unnecessary or may even be detrimental to the pursuit of justice. In light of this, many countries have opted for alternatives to the “truth first, justice later” approach by either carrying out trials and truth commissions’ proceedings in tandem or by conducting trials first and establishing a truth commission subsequently.

a. Truth and Justice: In Tandem

Some have argued that the “truth first, justice later” approach remains preferable even in the absence of significant political barriers to trials. This is because truth commission’s findings may feed into the “relevant criminal justice mechanism to make better-informed decisions about whom to try and for what crimes.”48 However, this is not necessarily the case. In some situations, prosecutions and extra-judicial truth-seeking endeavours are pursued jointly with equal success. In other situations, trials have preceded the establishment of a truth commission.

Sierra Leone is one example that challenges the relevance of the “truth first, justice later” approach. Pursuant to the 1999 Lomé Accords, the country established its Truth and Reconciliation Commissions (TRC) in 2002. The same year, President Kabbah sought help from the UN to establish a Special Court (SCSL).49 By implementing trials and the truth commission’s proceedings simultaneously in a context of political volatility, Sierra Leone demonstrated that political instability is not always an obstacle to accountability.50 In fact, the Sierra Leonean experience proves that limited opportunities available within a country may be exploited to achieve justice; provided some political will exists.

46 See Hayner, supra 15, p. 47.
48 Interactions in Transition, supra 10, p. 440.
49 See The Special Court for Sierra Leone, http://www.rscsl.org/ (accessed on 10th September 2016) [The Special Court for Sierra Leone].
50 The Lome Peace Agreement also provided amnesty for perpetrators on all sides of the conflict. Therefore when steps were taken to establish the TRC, perpetrators feared that it will lead to an annulment of amnesty. They sought to sabotage efforts to establish the TRC. Consequently, this led to a renewal of fighting. The possibility of war breaking out compelled the Government to reassess its position with respect to amnesty, and subsequently they made a request to United Nations to establish a special tribunal.
While there was some scepticism about the SCSL’s and the TRC’s capacity to work together, in hindsight, the model appears to have been successful in achieving some measure of justice.\textsuperscript{51} The Truth Commission carried out its mandate in identifying the root causes of the conflict and made recommendations to prevent repetition.\textsuperscript{52} It provided a platform for victims to share their versions of the story. On the other hand, the Special Court gathered evidence relating to crimes committed during the armed conflict and swiftly prepared to hold trials. Just one year after establishment, the Prosecutor brought thirteen indictments against individuals allegedly responsible for war crimes and crimes against humanity.\textsuperscript{53} Among them, the indictment of then-serving Liberian President, Charles Taylor, and the Sierra Leone Internal Affairs Minister, Hinga Norman were significant achievements. The trials sent a powerful message against impunity to society.\textsuperscript{54} At the same time, it dispelled the popular belief that justice must be compromised in order to achieve stability.

Timor-Leste offers yet another example where trials and truth commission’s proceedings were carried out in tandem. In 2000 and 2001 respectively, Timor-Leste established the Special Panels and a Commission for Reception, Truth and Reconciliation (CAVR) to look into crimes committed in Timor-Leste during its conflict with Indonesia.\textsuperscript{55} The Special Panels brought a total of 95 indictments against 391 individuals and 87 received final verdicts.\textsuperscript{56} This is a remarkable achievement given the fragility of state institutions at the time. While transitional justice mechanisms were taking shape, the state in Timor-Leste itself was in its formative stages as the country’s infrastructure, including its courts, prisons, and schools, had been completely destroyed as a result of the scorched earth policy employed by militias. Timor-Leste’s serving judges, prosecutors, and the majority of the lawyers and the court staff were Indonesians who left Timor-Leste after its independence. As a result, United Nations Transitional Administration in East Timor (UNTAET) established a provisional administration which helped Timor-Leste to implement trials.

The interactive relationship between the Special Panels and the CAVR may have contributed to the relative success of the process and the high number of prosecutions.\textsuperscript{57} In contrast to Sierra

\textsuperscript{53} The Special Court for Sierra Leone, supra 49.
\textsuperscript{54} Ibid.
\textsuperscript{55} The Commission was an independent statutory authority established to inquire into and report on Human Rights violations committed in the context of political conflicts in the territory between April 1974 and October 1999. Its initial two-year mandate was extended until 2005, and its final national public hearing was completed in late March 2004. The Commission submitted its final report to the President on October 31, 2005. See Caitlin Reiger, “Hybrid attempts at accountability for serious crimes in Timor Leste,” in Naomi Roht-Arriaza, supra 21, p. 143 [Caitlin].
\textsuperscript{56} Ibid, p.151.
\textsuperscript{57} Though the Special Panels managed to have a high number of prosecutions they could not enforce the punishment as many perpetrators—who were found guilty—escaped to Indonesia. The Indonesian government refused to cooperate with East Timor. Therefore the guilty remain free within Indonesia without facing punishment.
Leone—where the TRC and SCSL functioned in separate and watertight compartments in the transitional justice process—the Special Panels and CAVR had a rather more complementary relationship. One of CAVR’s assigned tasks was to facilitate community-level reconciliation. It mediated between victims and low-level perpetrators to reach agreements involving non-penal accountability measures.58 This left the most serious criminal cases to be investigated by the Special Panels. The division of labour between the two institutions helped Timor-Leste achieve a measure of accountability.59

More recent examples include the transitional justice processes in Colombia, the Central African Republic, and Côte d’Ivoire, where the respective governments are currently pursuing a truth and justice in tandem approach. In both Côte d’Ivoire and the Central African Republic, justice initiatives at both the international and national level have been prioritized as strongly, if not more so, than truth-seeking initiatives in spite of tremendous political hurdles in each setting.60 In Colombia, judicial processes have been seen as complementary to truth-seeking functions.61 Further, the narrow rejection by referendum of the most recent Colombia peace agreement, largely on the basis of the general population’s rejection of amnesty provisions contained in the agreement, also suggests the growing importance placed on justice mechanisms alongside, if not prior to, truth-seeking mechanisms among general populations in transitional societies.62 Thus, in certain contexts, trials and truth commissions can and do work in tandem to advance a comprehensive anti-impunity agenda and foster reconciliation.

b. “Trials First, Truth Later” Approach

South Korea is one of the rare cases where high profile trials were held prior to the establishment of truth commissions. Between 1948 and 1988, South Korea was ruled by three autocratic regimes.63 During this time, the State was responsible for the perpetration of mass human rights

58 In addition, the CAVR was responsible for local panels named “Community Reconciliation Procedures.” The function of CAVR was to oversee these panels and provide expertise and support in the task.

59 Investigations led to indictment of members of the Indonesian armed forces and senior militia leaders. Most notable was the indictment of General Wiranto, the former head of the Indonesian military. See Caitlin, supra 55, p. 152.


61 “In Colombia, significant progress has already been made toward clarifying the truth and constructing historical memory, thanks to judicial processes like the Peace and Justice Process, the work of the Historical Memory Group and the National Center for Historic Memory, unofficial civil society initiatives around the country, and the findings of prior truth commissions that concentrated on specific issues or periods of the conflict.” International Center for Transitional Justice, What Role for a Truth Commission in Colombia (5 June 2015), available at: https://www.ictj.org/news/colombia-role-truth-commission.


violations. The height of oppression came in 1980 when Chun Doo-Hwan—then President—brutally crushed a protest in Gwangju, killing nearly 600 people. The government’s response to the Gwangju protest aroused mass condemnation among the public and fortified their desire for justice. However it took nearly 13 years before Korea’s autocratic rule came to an end and for its democratic transition to begin. Public pressure on the new government eventually led to the 1995-1996 trials, which convicted perpetrators, including Chun Doo Hwan, for crimes committed during his rule.

The Korean experience is significant because the government held trials against former government officials within two years of coming to power. A truth commission was not deemed necessary as a preliminary measure. Two factors may have played a role in this regard. First, there was no public demand for a truth commission. Second, the legacy of Gwangju was one of the government’s campaign platforms. Therefore, when the government came to power in 1993, it was compelled to deliver on its promise of the justice demanded by the public. The continued pressure from the public, combined with favourable political factors, created the conditions to hold trials without delay. It was only after perpetrators were tried that the government decided to establish a truth commission to build a historical narrative about the country’s violent past.

Further, as explained above, more recent justice initiatives in transitional and post-conflict societies are not designed to be contingent on the operations or results of truth commissions. This enables trials to proceed even when truth commissions face roadblocks. The experience of transitional justice mechanisms in Aceh, Indonesia illustrates this point. In spite of ongoing hurdles to the establishment of the Aceh truth commission envisioned in the Helsinki Memorandum of Understanding, the establishment and functioning of the Human Rights Court, which was conceived at the same time as the truth commission and aimed at curtailing ongoing human rights abuses in the region, has proceeded, albeit slowly.

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One of the benefits of the “trials first, truth later” model is that it entrenches the rule of law immediately after the transition “by reaffirming that society will henceforth be governed by laws, the violation of which will have consequences.”70 In addition, the elimination of perpetrators from political power at the very outset increases prospects for a successful transition and ensures that those most responsible for mass atrocity crimes are no longer in a position to stall progress on reforming the state in the long-run, this can help restore a society’s and the victims’ confidence in state institutions and provide assurances that there will be a clear break from the past.71

3. Drawbacks to the “Truth First, Justice Later” Approach

Initially, the “truth first, justice later” approach was an inevitable experiment in an attempt to overcome legal and political barriers preventing justice. However, following the examples of South American countries, this approach has acquired firm believers. As a result, post-conflict countries are often encouraged to adopt this formula, irrespective of the actual political situation in which they find themselves. This is a dangerous path to take. In fact, recent examples demonstrate that this approach is used as a way to delay or permanently stall the pursuit of justice.

a. Confusing Political Will with Political Barriers

Evidence suggests that some countries prioritize truth commissions over trials citing legal and political barriers to accountability when in fact the real problem is one of political unwillingness to pursue justice despite the availability of political space. In fact, governments have sometimes admitted their willingness to set up truth commissions in an attempt to avoid trials. For example, in Guatemala, at the time of the peace agreement between the armed forces and rebel groups, Mario Enriquez, then minister of defence, stated that “we are fully in support of a truth commission…Just like in Chile: truth, but no trials.”72 As Hayner notes, many other governments have understood, hoped, or agreed that a truth commission should take the place of trials. These include, but are not limited to, Sierra Leone (1999), the Democratic Republic of the Congo (2002), and Liberia (2003).73

It is important to distinguish at the outset legal and political barriers from legal and political challenges. In most cases, initiating prosecutions requires the expenditure of political capital and

72 See Hayner, supra 15, p. 91.
73 Ibid.
the exertion of political will. On the other hand, political barriers are obstacles that require more than the mere expenditure of political capital by a government. Political barriers are those that would threaten the life of the nation or a reformist government itself and are beyond its control. This is the case for instance when powerful actors opposed to accountability retain significant formal or informal power and therefore pose a credible threat to the stability of the new government. Countries in transition always face political challenges to transitional justice to varying degrees. However, only a few experience political and legal barriers to accountability. These may require the adoption of a “truth first, justice later” approach, which may not be necessary to overcome mere political challenges.

El Salvador is one such example where the government’s lack of political will resulted in the stalling of accountability measures. El Salvador’s Truth Commission emerged as part of the UN-brokered peace agreement, which ended a 12 year civil war between El Salvador security forces and the Farabundo Martí National Liberation Front (FMLN). In the peace agreement, the parties recognized, inter alia, the need to address human rights violations committed during the war. However, the government was reluctant to enact criminal accountability measures. Instead a truth commission was established under the peace agreement. As commentators point out, establishing the Truth Commission did not exclude the possibility of holding trials. However, due to political unwillingness, the government never exploited this possibility to hold trials against alleged perpetrators.

The Truth Commission established under the peace agreement was mandated to investigate “serious acts of violence that have occurred since 1980,” and recommend legal, political, and legal barriers to accountability. These may require the adoption of a “truth first, justice later” approach, which may not be necessary to overcome mere political challenges.

75 See Hayner, supra 15, pp. 102-104.
76 The Salvadoran Civil War was a conflict between the military-led government of El Salvador and the Farabundo Martí National Liberation Front (FMLN). FMLN was a coalition or "umbrella organization" of five left-wing guerrilla groups. The full-fledged civil war lasted for more than 12 years and saw extreme violence from both sides. It also included the deliberate terrorizing and targeting of civilians by death squads, the recruitment of child soldiers, and other violations of Human Rights, mostly by the military. An unknown number of people disappeared during the conflict, and the UN reports that more than 75,000 were killed.
79 See Sriram, supra 4, pp. 95-96. In fact, Thomas Buergenthal who was one of the three commissioners of the El Salvadoran Truth Commission later stated in an interview that to recommend prosecutions when serious trials were out of the question would have made things worse. “They would have gone through the motions and acquitted the accused,” he says, giving the government an opportunity in effect to retry the commission’s findings. “And how would you expect anyone to testify against these people? Who would testify against Defense Minister [René Emilio] Ponce, for example? Trials would have had the opposite effect of what people expect, I am sure. Nobody would have given testimony, and everybody would be acquitted, except those on the left. People were almost too scared to talk to us.” Hayner supra 15, p.92.
80 See Cath Collins, supra 28, p. 160.
administrative measures to address them.\textsuperscript{81} The Commission’s report released in 1993 included \textit{inter alia} the names of over forty high officials responsible for serious abuses.\textsuperscript{82} However, throughout the truth-seeking process, the government adopted an ostensible anti-accountability attitude. Subsequently, the government attempted to block the release of the report.\textsuperscript{83} Once the report was released, it was strongly rejected by almost all actors in government including the President.\textsuperscript{84} Moreover, just five days after releasing the report, the government responded to the Commission’s findings by passing an amnesty law.\textsuperscript{85} The timing of the law sent a clear message about the government’s intention to shield all perpetrators from punishment including the ones identified in the report.\textsuperscript{86} Even more damaging was the manner in which the government belittled truth and justice as values that should be protected in society. Commentators argue that the government introduced the Truth Commission to appease victims and the international community and dispel pressure to hold trials.\textsuperscript{87} Nearly 20 years after the release of the report, little progress has been made on the implementation of the Commission’s recommendations; no reparations programs have been established and very few institutional reforms have been undertaken.\textsuperscript{88}

While in El Salvador, the use of the Truth Commission to divert the pressure on accountability was blatant; in many cases truth commissions serve an anti-accountability agenda in a more subtle manner. This is especially the case when they are used as a delaying tactic.

\textsuperscript{83} See Wiebelhaus-Brahm, \textit{supra} 22, p. 83.
\textsuperscript{84} The military’s top negotiator, General Mauricio Vargas, described the report as “biased, incomplete, unfair, totally unacceptable.” The military leadership in its entirety appeared on national television to characterize the report as “unfair, incomplete, illegal, unethical, partisan and insolent.” The Supreme Court also immediately denounced it. Salvadoran President Alfredo Cristiani of the right-wing Nationalist Republican Alliance (ARENA) condemned the commission for failing to advance national reconciliation and “exceeding its mandate. See Wiebelhaus-Brahm, \textit{supra} 22, pp. 83-84.
\textsuperscript{86} The Amnesty came as a shock to many people. There was no open debate about it and the Truth Commission did not make any reference to it. The law was broad and it was not restricted to a certain group of people, like in South Africa. See generally Margaret Popkin, \textit{Peace without Justice: Obstacles to Building the Rule of Law in El Salvador} (The Pennsylvania State University, 2000), p. 158.
b. Using Sequencing as a Delaying Tactic

In several countries, carrying out truth commissions’ proceedings before trials may diminish prospects of prosecutions. This is because prolonged truth commissions’ proceedings may exhaust political capital until the window of opportunity for prosecutions eventually closes. In some cases, this is used as a strategy to permanently delay trials. Such a strategy demoralizes those who are engaged in the truth-seeking process and diminishes public interest in the transitional justice project. For instance, in Uganda, the Truth Commission severely lacked resources and had to suspend its work on several occasions.  

89 It operated for eight years before concluding its mandate.

The Ugandan government led by Museveni came into power in 1986, ending many years of political repression. The government promised to institute various democratic guarantees, including redress for past grievances. In 1986, the Ugandan Commission of Inquiry was established to look into violations of human rights. However, the mandate, staffing and subsequent incidents surrounding the Commission evidenced the government’s lack of political will to live up to its initial commitment. The government gave the Commission a broad mandate but did not set any deadline for the completion of its work.  


90 The CIVHR was called upon to investigate “violations of Human Rights, breaches of the rule of law and excessive abuses of power committed against the people of Uganda by the regimes and governments” in power from October 1962 until January 1986. The legislation listed nine wide-ranging categories of violations for consideration. It also stipulated that the Commission can consider any other matter connected to the categories already mentioned. These included investigation of mass murder; arbitrary arrest, detention and imprisonment; unfair trials; torture; crimes of law enforcement agents; the displacement, expulsion or disappearance of Ugandans; discriminatory treatment; the denial of any human right; the protection of anyone who had perpetrated such crimes; and anything else the Commission deemed necessary. See The Un-Doing of the Ugandan Truth Commission, supra 89, p. 408.

91 See Hayner, supra 15, p. 243.


93 Ibid.


95 See Wiebelhaus-Brahm, supra 22, pp. 108-110; The Commission forwarded many cases to the police investigation unit, when sufficient evidence was collected to hold trials. The police, in turn, sent these cases to the director of public prosecutions. But very few of these cases ever made it to a courtroom. The few cases that made it to the courtroom were not pursued and the perpetrators have been released. See Hayner, supra 15, p. 243.
The Ugandan example illustrates the dangers of the “truth first, justice later” approach. When the new Ugandan government came to power, the former regime had lost its popularity and credibility. Thus, there were no apparent political barriers to accountability. In such a context, the “truth first justice later” approach must be questioned. In fact, by choosing to adopt that approach, the government prematurely blocked a faster track to trials. Subsequently, fighting resumed between the government and the rebels and the window of opportunity for trials closed until 2006, when the peace agreement between the parties was signed. However the government took no concrete steps to end the culture of impunity in the country.

The experiences in El Salvador and Uganda, for example, show that it is paramount to distinguish situations where there exist real political barriers to accountability from situations where a country merely faces political challenges compounded by a lack of political will to pursue accountability measures. As demonstrated, in the latter case, the “truth first, justice later” approach is often detrimental to the pursuit of accountability. In addition, as the Ugandan example shows, it can even be detrimental to the truth-seeking endeavour. Furthermore, when the political will to achieve justice is lacking, truth commissions may also be used to institutionalize an anti-accountability approach, which can be highly detrimental to the overall objectives of transitional justice including restoring the rule of law.

c. Institutionalizing an Anti-Accountability Approach

When governments have no genuine intention to initiate prosecutions for atrocity crimes but nonetheless establish a truth commission, the latter may be used to create institutional obstacles to accountability. Nepal provides an example in this respect.

In Nepal, an Ordinance to establish the Truth and Reconciliation Commission (Nepalese TRC) was enacted in 2013. The law was heavily criticized by the international community including the Office of the High Commissioner for Human Rights (OHCHR). The OHCHR pointed out that the Nepalese TRC Ordinance did not conform to Nepal’s international legal obligations, as it allowed for amnesty for gross violations of human rights committed during the course of armed conflict. Subsequently, the Ordinance was struck down in part by the Supreme Court in

97 See Wiebelhaus-Brahm, supra 22, p. 106.
100 Ibid, p. 1.
January 2014. In its judgment, the Court directed the government to redraft a new law, which would exclude the possibility of amnesty for serious human rights violations.  

Following the Supreme Court’s decision, the government formed a team of experts and drafted a new bill. The new bill—*The Commission on Investigation of Disappeared Persons, Truth and Reconciliation*—received Parliament’s approval and became law in 2014. While the new Act remedied some inadequacies found in the 2013 Ordinance, it still falls short of international legal standards in some respects. In particular, it continues to allow for amnesties for gross violations of human rights. The Act provides that the Commission may make recommendations for amnesty in cases other than rape or offences of a “grave nature”. However, this provision does not specify which offences should be considered sufficiently grave to exclude the possibility of an amnesty. In addition, the law provides that even in cases involving “offences of grave nature,” the Commission may find grounds or reasons to grant amnesty. Another problematic aspect relates to the power of the Commission to bring about reconciliation between victims and perpetrators, possibly without the consent of one of the parties involved.

In addition, some provisions also evidence attempts to introduce additional obstacles to prosecutions. The Nepalese TRC is intended to operate as an initial forum for all conflict related complaints. It is responsible for deciding which individuals should be considered for amnesty or for prosecutions. Where prosecution is recommended, the Commission must communicate its recommendation to the Ministry of Peace and Reconstruction, which in turn must inform the Attorney General. It is only if the Attorney General decides to proceed with prosecutions that a case will be filed at the—yet to be formed—Special Court. However, it remains unclear whether cases recommended by the TRC will fall exclusively within the remit of the Special Court. If this were to be the case, no prosecutions could take place pending the creation of the Special Court.

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102 The Enforced Disappearances Enquiry, TRC Act, 2071 (2014), published in Gazette No. 2071/01/28 on 11 May 2014 [Truth and Reconciliation Act].

103 In Chapter I, section 2(j) gross violation of Human Rights are defined as “following acts which were committed in the course of armed conflict directed against unarmed persons or civilian population or committed systematically: (1) Murder, (2) Abduction and taking of hostage, (3) Enforced disappearance, (4) Causing mutilation or disability, (5) Physical or mental torture, (6) Rape and sexual violence, (7) Looting, possession, damage or arson of private or public property, (8) Forceful eviction from house and land or any other kind of displacement, (9) Any kind of inhuman acts inconsistent with the international Human Rights or humanitarian law or other crime against humanity;” Truth and Reconciliation Act, section 25(2)(b).

104 Truth and Reconciliation Act, section 22.


106 Ibid, section 22.

107 Ibid, section 29.
As the various examples studied demonstrate, efforts to bring about accountability must reflect the political context of each country. A “one size fits all” sequencing approach following the “truth first, justice later” model tends to ignore this reality. Each country has its own window of opportunity in which the political space to initiate reforms necessary for accountability may be taken forward. These opportunities must be seized. A dogmatic approach to sequencing could fatally undermine prospects for justice. This is the danger that the Sri Lankan transitional justice process currently faces.
III. **Sequencing Truth and Justice: Way Forward for Sri Lanka**

As we argue in this paper, a “truth first, justice later” approach is fundamentally ill-suited to current conditions in Sri Lanka. Instead, the government should capitalize on the existing political opportunity to establish a special court with a special prosecutor’s office with the promised levels of international participation without delay.

We base these arguments on an assessment of the existing political context. Although establishing such a court would require the expenditure of political capital, there are currently no barriers to justice such as those described in Part II. In particular, Sri Lanka does not face the risk of an imminent military coup and does not have any existing amnesty laws. On the contrary, the government has already publicly committed itself to establishing a special court with international participation. Sri Lanka’s past experience with commissions of inquiry also lends weight to the argument that the government should pursue an alternative approach to the “truth first, justice later” approach. This history must also be taken into account when assessing the relevance of any given sequencing approach.

1. **“Truth First Justice Later;” An Unpopular Option in a Narrow Window of Opportunity**

In Sri Lanka, while victims and human rights organizations have campaigned fiercely for justice for atrocity crimes stemming from the armed conflict, calls for a truth commission have been notably absent. Disappointing experiences with past commissions of inquiry partially explain the lack of faith in purely truth-seeking mechanisms.

a. **No Public Demand for a Truth Commission**

A number of reasons may explain the disinterest in non-judicial truth-seeking mechanisms, including: victims’ fatigue with previous commissions of inquiry; mistrust of the intention behind establishing a truth commission; the fear of retraumatising victims and witnesses who have been compelled to provide evidence at a number of previous truth-seeking initiatives; and a legitimate fear among victim communities and civil society that a truth commission would undermine measures of accountability. This apathy vis-à-vis truth-seeking commissions is in stark contrast with the demands for criminal prosecutions and for an institution dedicated to tracing missing persons. In particular, over the years, activists have consistently highlighted the entrenched impunity in Sri Lanka in reports and submissions to international fora.  

these submissions formulate demands for prosecutions and to ascertain the fate of missing persons. These demands have received further support from several reports by international NGOs, which have identified the need for accountability in Sri Lanka.\textsuperscript{109} Notably, the Report of the OHCHR Investigation on Sri Lanka (OISL) also specifically recommended a hybrid special court and an institution to trace missing persons, but did not recommend the establishment of a truth commission.\textsuperscript{110}

The idea of establishing a truth commission, though periodically discussed over a long period in Sri Lanka, was intensely pursued by the Rajapaksa administration in an apparent attempt to halt international pressure for accountability of wide-scale abuses.\textsuperscript{111} The truth commission was to be based on the South African model on which the then government consulted the South African government in earnest.\textsuperscript{112} However, when the new government came into power it revived the idea of such a truth commission while also promising several other mechanisms including a special court.

Admittedly, the lack of public demand does not itself discount the value of a truth commission. However, prevalent sentiment among victim groups and civil society regarding a truth commission is an important consideration when attempting to gauge the potential impact of such a mechanism. The origination of the idea and the disappointing experiences victim communities and civil society have had with past commissions explain the low expectations with respect to a new commission tasked with investigating war-time abuses.

Further, while the current political context may be more conducive to genuine truth-seeking endeavours than under the previous regime, many of the conditions that limited the impact of truth-seeking in the past persist. It therefore seems highly unlikely that a future truth commission, without simultaneous accountability measures, will be viewed as anything other than a weak institution designed to impede justice.

b. A Well-founded Scepticism

Sri Lanka has witnessed a proliferation of state and non-state led truth-seeking initiatives, including various commissions of inquiry established by the President of Sri Lanka, various UN mandated investigations, as well as other investigations led by civil society.

Between 1980 and 1990, successive governments appointed a series of commissions to investigate human rights violations and enforced disappearances. These include the Presidential TRC on Ethnic Violence (1981-1984), the Presidential Commissions (1991-1993), the 1994 Commissions of Inquiry into Disappearances and the 1998 All Island Disappearances Commission. More recently, the government established several other commissions to look into cases of extrajudicial killings and/or disappearances. In 2006, the Presidential Commission on the Disappeared (known as the Mahanama Tilakaratne Commission) was established to look into abductions, disappearances, unidentified dead bodies and unexplained killings. The same year, the Udalagama Commission was established to inquire into serious violations of human rights. In 2009, the government formed the Lessons Learnt and Reconciliation Commission (LLRC) primarily to determine political responsibilities for the failure of the ceasefire agreement that led to the final offensive of the Sri Lankan military. The LLRC also looked into allegations of gross violations of human rights and humanitarian law allegedly committed during the armed conflict. In 2013, the Presidential Commission to Investigate Complaints Regarding Missing Persons, otherwise known as the Paranagama Commission, was established. In addition, several UN investigations also conducted inquiries into gross human rights violations in

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114 The mandate of the Commission was “to examine the circumstances that lead to such incidents of abductions, disappearances, unidentified dead bodies and unexplained killings as were reported throughout Sri Lanka in the recent past, to identify any armed group or groups, any other forces or persons who were directly or indirectly responsible for or involved in these incidents, to identify the causes and motives for such incidents, to assess the adequacy of the security arrangements made by the police and the security forces to prevent such incidents.” See Center for Policy Alternatives, “A List of Commissions of Inquiry and Committees Appointed by the Government of Sri Lanka (2006–2012)” (March 2012) https://lnwnewsbackup.files.wordpress.com/2012/03/commissions-and-committees-appointed-since-2005.pdf and <http://sangam.org/wp-content/uploads/2014/01/CPA-A-list-of-Commissions-and-Committees-appointed-by-GoSL-since-2005-December-2013.pdf>(accessed on 25th October 2016) [List of CoIs].

115 UNHRC, OISL, supra 110, ¶72.

116 The Commissioners were to “inquire and report on the following matters that may have taken place during the period between 21st February 2002 and 19th May 2009, namely; (i.) The facts and circumstances which led to the failure of the Ceasefire Agreement operationalized on 21st February 2002 and the sequence of events that followed thereafter up to the 19th of May 2009; (ii). Whether any person, group or institution directly or indirectly bear responsibility in this regard; (iii). The lessons we would learn from those events and their attendant concerns, in order to ensure that there will be no recurrence; (iv). The methodology whereby restitution to pay persons affected by those events or their dependents or their heirs, can be effected; (v) The institutional, administrative and legislative measures which need to be taken in order to prevent any recurrence of such concerns in the future, and to promote further national unity and reconciliation among communities and; to make any such other recommendations with reference to any of the matters that have been inquired into under the terms of the Warrant”, LLRC Report (November 2011) ¶1.5.

117 UNHRC, OISL, supra 110, ¶512.
Sri Lanka. Among them are the 2011 *UN Panel of Experts* and the 2015 *OHCHR Investigation on Sri Lanka*. However, despite the profusion of such bodies, impunity for human rights violations remained rampant in Sri Lanka during the armed conflict and in the post-conflict phase. Almost all of the commissions established domestically lacked the requisite independence and impartiality needed to conduct objective and complete investigations. For example, the commission members were chosen by the President and served at his pleasure. The work of these commissions has been the subject of criticism concerning victim’s intimidation, alteration of testimonies, and even tampering of evidence. These factors severely eroded the credibility with which the public viewed the work of each of the domestic commissions of inquiry. Even in situations where investigations were conducted, reports were not published. This inevitably accentuated a sense of futility among victims. In other cases where reports were published, the government neither took measures to implement the recommendations nor followed-up on the findings through criminal investigations.

In contrast, the two UN investigations in respect of Sri Lanka were tailored to augment pressure and support in favour of accountability. For instance, the UN Expert Panel’s findings empowered victims’ representatives who used the report’s conclusions and recommendations to support their demand for criminal trials. In addition, the public release of the report and the fervent opposition of the government to its findings and recommendations triggered heated debates and opened hitherto absent public space to discuss alleged violations. Moreover, they galvanized international action, and in the case of the OISL Report, the government’s commitments on transitional justice.

For a truth-seeking exercise to create an environment conducive to prosecutions, several conditions must be met: first, the truth-seeking exercise must be independent, impartial, and executed in good faith; and second, it must receive some form of endorsement from the government. None of the previous truth-seeking exercises carried out in Sri Lanka fulfilled these two criteria cumulatively. As already explained, many national truth-seeking endeavours lacked independence and impartiality, which undermined their credibility. They deferred to governmental power and were cautious not to challenge the status quo. Where commissions were critical of state functionaries, the government refused to accept the findings and led political campaigns to denounce their work. The government’s response to UN truth-seeking initiatives illustrates this point.

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119 UNHRC, OISL, *supra* 110.
121 List of CoIs, *supra* 114.
122 Ibid.
However, as explained above, even if a future truth commission successfully meets these two conditions, a confluence of other external factors is also required for the truth commission to have a long lasting and deep societal impact and to lay the ground for trials. These include the wide dissemination of proceedings, findings and information regarding the report through media coverage and an endorsement of the findings by the government and by a range of political actors. There is no guarantee that these conditions will be met in Sri Lanka.

While space may exist for the creation of an independent truth commission, it would be unwise to assume that the commission’s findings would receive unequivocal endorsement by the government. In particular, in the event some actors within government are attempting to utilize the truth commission to deflect attention from accountability, it is most unlikely to invest in processes that would ensure such accountability in the long term. Absent a decisive course of action to ensure accountability, a truth commission’s findings implicating military officials in war crimes and crimes against humanity would be treated by various parties across the political spectrum as an inconvenient attempt to revive a defeated accountability agenda. Those within government most critical of accountability measures would be empowered, and reformists who insisted that accountability is essential would be weakened. In addition, some prominent political actors outside the government would, undoubtedly, protest vehemently against such findings. This distorted view, together with polarized media coverage, is likely to negatively influence public perception of the truth commission’s findings.

2. Truth First: Building Resistance to Truth and Accountability

While a truth commission’s findings may have been instrumental to building support for trials in some countries, we argue that, in Sri Lanka, the creation of a truth commission may heighten resistance to accountability. In fact, as will be shown below, if it is established before a special court, the truth commission is likely to be rejected by a number of relevant stakeholders: victims of crimes perpetrated by the state across all communities; the vast majority of the Tamil political and civil community; and human rights defenders. Paradoxically, the truth commission will likely be regarded as a stepping-stone for trials by those traditionally opposed to accountability and will also likely be opposed on that ground.

a. Resistance from Those Who Want Justice

First, those seeking to advance justice for atrocity crimes from within the Tamil polity and human rights defenders will in all likelihood reject a truth commission if it is not also accompanied by a special court. This position is supported by a number of human rights defenders and institutions all over the country. A public statement signed by a number of individuals and organizations, which was released in June 2016 stated:

“We have since heard of plans by the Government of Sri Lanka to establish a TRC and delay the establishment of the proposed accountability mechanism and the office of
reparations. This betrays a deeply flawed approach to transitional justice and fails to appreciate and undermines the rights of victims to truth, justice, reparations and guarantees of non-recurrence. Many Sri Lankan victims and members of civil society have consistently demanded that credible investigations be conducted and perpetrators held accountable with respect to credible allegations of human rights violations. Previous Commissions of Inquiries and the Criminal Justice system have only resulted in the acute retraumatisation of victims with little satisfaction in terms of justice and reparations. Moreover, the recommendations of these Commissions with respect to the investigation of human rights violations, and the prosecution of alleged perpetrators, have not been implemented, exacerbating Sri Lanka’s culture of impunity that these institutions are meant to combat. For these reasons, yet another commission established without a meaningful guarantee of accountability and reparations will signal a lack of commitment to the Government’s own commitments and to genuinely breaking with the past.”

This position was reiterated in a subsequent statement. Given the disenchantment with truth-seeking commissions apparent in these civil society statements, the establishment of yet another such commission will likely alienate these constituencies who are crucial to the success of transitional justice mechanisms. Victims and those who firmly advocate for criminal accountability measures are likely to regard a “truth first, justice later” approach as another attempt to avoid credible prosecutions, and outright reject a truth commission established in pursuit of that objective. A truth commission without the support of those for whose ostensible benefit it is instituted will necessarily fail.

b. Resistance from Those Who Oppose Justice

Those who oppose accountability for violations allegedly committed during the armed conflict are also unlikely to support a truth commission or its findings even in the absence of trials. In fact, they are likely to oppose the truth commission on the basis that it could constitute a stepping-stone for trials. Opposition on this ground will be even stronger if the truth commission has a robust investigative mandate to compensate the absence of mechanisms specifically dealing with questions of criminal accountability. Political responses to the recent Office on Missing Persons (OMP) illustrate this point. As expected, the Bill establishing the OMP became widely unpopular among those who oppose accountability. The investigative mandate of the OMP and its robust investigative powers were portrayed as evidence that the Office will be instrumental to

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laying the ground for trials.\textsuperscript{125} This characterization indubitably resonated within certain sections of society. A truth commission is very likely to meet with the same or perhaps even greater resistance. Should this happen, the government will be required to justify and convince its constituency of the need to establish a truth commission. Such an effort will no doubt be time consuming and may even cost political capital that could otherwise be utilized to set up a special court.

Thus, a truth commission minus trials will not satisfy victims for whose ostensible benefit it will be established. For diametrically opposite reasons, the proposed truth commission will also likely be rejected by those opposed to trials. The truth commission will therefore be attacked on multiple fronts, undermining it from the very outset.

3. Making Use of a Narrow Political Window of Opportunity

While the change of government in January 2015 opened a window of opportunity for the establishment of a special court, this window is rapidly narrowing. The pursuit of a “truth first, justice later” approach may lead to the closing of this window before the establishment of a special court. In this respect, those within government who are opposed to criminal accountability may be tempted to use the truth commission as a delaying mechanism to indefinitely postpone the creation of a special court.

a. The Narrowing Political Window for a Special Court

We believe that there is an opportunity in the present context to enact legislation for trials. The political transition that took place in 2015 and the government’s decision to co-sponsor the UN Human Rights Council (UNHRC) resolution have opened up space in the Sri Lankan political landscape to advance accountability. The adoption of UNHRC resolution 30/1, with government co-sponsorship, was historic.\textsuperscript{126} For the first time, Sri Lanka committed to extensive reforms to end impunity for human rights violations and to address the root causes of the armed conflict. Subsequent statements by the Foreign Minister confirmed Sri Lanka’s commitment to see through the implementation of these commitments.\textsuperscript{127} A two-day parliamentary debate was


organized in October 2015 to discuss the resolution, where it was overwhelmingly supported by politicians across the mainstream political spectrum.\(^ {128} \)

However, despite the government’s commitments to implement the UNHCR resolution, progress has been slow. Almost two years after the change of government, the report of the Consultation Task Force on Reconciliation Mechanisms is, at the time of publication of this paper, yet to be published.\(^ {129} \) In addition, the government has made no attempt to build public support for the establishment of a special court.\(^ {130} \) Troublingly, recent statements by the President indicate that the window of opportunity for reforms in Sri Lanka may be narrowing.\(^ {131} \) In fact, the President has repeatedly assured the military that its interests will be protected.\(^ {132} \) Statements of this nature have raised concerns domestically and internationally and have called into question government’s political will to pursue accountability.

Nevertheless, while the window of opportunity is closing, it is not completely shut. For all the President’s rhetoric, he has not at any point ruled out the possibility of trials or of a special court.


Instead, his administration’s stated resistance has been limited to the narrow question of the use of international judges, in lieu of which he has suggested the presence of international advisors.\textsuperscript{133} At the same time, recent developments, including the replacement of the Head of the Military Intelligence at the bequest of civil society groups indicate that not only is the civilian leadership capable of controlling the security apparatus when it wants to, it is also receptive to the views of civil society even on matters of national security.\textsuperscript{134}

Another fear articulated by some close to government is that the establishment of a special court could precipitate a rapid decline in the incumbent government’s popularity with the Sinhalese population, and set the stage for a return of the Rajapaksa family to power. We believe this fear to be overstated for a number of reasons. First, as alluded above, the government successfully defended the UNHCR resolution publicly soon after it was adopted. Moreover, it has continued to insist publicly that it will implement the resolution including its commitments on a special court.\textsuperscript{135} This positioning by the government may have required the expenditure of political capital, but these firm commitments have not threatened the stability of the government. Instead, the government has on occasion confidently asserted that it would ensure accountability.\textsuperscript{136}

The real concern does not appear to be the lack of political space, but an unwillingness and at best a disinterest on the part of some within government to preserve that space. As the political window of opportunity begins to close, their actions appear to be designed to expedite that closing, not delay it. The government’s singular lack of communications on—and advocacy for—a transitional justice process has been commented on widely.\textsuperscript{137} We believe that yet another truth-seeking commission will encourage those opposed to accountability within government to bide time till the political space closes, at a time when the government’s communication apparatus should be compelled to prize open existing opportunities. In our view, it is only the establishment of a special court that will compel the government to expend the necessary political capital to retain the existing political space for transitional justice.

\textsuperscript{133} See Gagani Weerakoon, Will Maithri Succumb to International Pressure, Ceylon Today (10 July 2016) \url{http://www.ceylontoday.lk/columns20160321CT20170330.php?id=288}.

\textsuperscript{134} Sri Lanka Removes Intelligence Chief After Jaffna Disturbances, Arab News (3 November 2016), \url{http://www.arabnews.com/node/1005841/world}.


b. Guarding Against Delaying Tactics

Establishing a truth commission without a concurrent special court, could delay justice in two different ways. First, it may provide the government with the space to forego opportunities to establish a special court and second, it may stymie progress made on cases currently under investigation.

As discussed in Part II, governments have often established truth commissions in an attempt to demonstrate their goodwill while at the same time appeasing those opposed to trials. This strategy aims at diverting international and domestic pressure for trials and delaying accountability measures. In the meantime, the political window of opportunity for trials may close. This would provide an excuse for governments to renege on their promise to initiate prosecutions. This strategy was attempted by the former administration. In fact, the LLRC was created in an attempt to ease the growing pressure for accountability and divert international initiatives. In particular, it is significant that the LLRC was initiated at a time when the UN Secretary General was considering his options with respect to advancing the terms of the UN’s 2009 Joint Communique with Sri Lanka, in which President Rajapaksa agreed that Sri Lanka would address questions of accountability arising from the war.

In addition, the establishment of a truth commission accompanied by promises that the special court will be established soon thereafter may undermine progress on cases currently under criminal investigation. This is because the creation of the truth commission may create an expectation that conflict-related cases or cases involving gross human rights violations are no longer the responsibility of regular criminal courts but must be investigated by the truth commission and subsequently referred to the special court. However, if the creation of the special court is delayed this could create a situation where many cases remain in legal limbo. As the Nepal example shows, the “truth first, justice later approach” may engineer a situation of institutionalized impunity.

We believe these arguments support the view that a special court must be established alongside, and at any rate, not later than the establishment of a truth commission. In the event there is legitimate fear that resistance to trials will be unmanageable, we suggest there are alternative strategies than may be utilized to mitigate this risk, including a well thought through prosecutorial strategy.

c. Building Support for Trials through Other Strategies

Once a special court is established, the prosecutor will have to formulate a prosecutorial strategy and select cases that should be investigated as a priority. This may be done in a way that takes into account the political context in the country and public resistance to the prosecution of specific cases. For instance, at the beginning of the process, the prosecutor could initiate trials in relation to perpetrators who at this particular point in time have lost political capital, and are less
likely to mobilize opinion against trials. Further, the prosecutor could initially focus on crimes that affected all communities such as enforced disappearances, while building comprehensive cases in the background through the investigation of more contentious cases. This would mean that a certain amount of political sensitivity will be woven into the court’s activities as a necessary strategy to strengthen its efficacy in the long run. Such a strategy would offer other advantages as well. It would provide the prosecutor with more time to conduct investigations into more contentious crimes while rectifying teething problems and creating precedents for successful prosecutions through the pursuit of cases that are less complex and contentious. This could build confidence in the institution and would help entrench rule of law.

Besides political and social factors, capacity in carrying out transitional justice measures must also be taken into account when deciding on a sequencing approach for Sri Lanka.

4. Sequencing and Capacity Challenges

In this section we address the following questions: To what extent does Sri Lanka have the capacity to carry out trials for international crimes? How does this consideration influence sequencing choices?

a. Prioritizing Truth over Justice: An Ill-suited Solution to Capacity Concerns

It must be noted on the outset that, whenever possible, capacity challenges ought to be addressed through targeted capacity building programs and, where appropriate, international support and assistance. The sequencing of transitional justice measures may only be a suitable response to capacity challenges in situations where the capacity deficit overwhelmingly outweighs the support that external parties may provide to a country. This is limited to extreme cases where a country experiences a general institutional breakdown or resource scarcity that renders the carrying out of a multi-sectoral reform agenda impossible. This is plainly not the case in Sri Lanka.

Timor Leste and Cambodia provide interesting comparisons in this regard. In both these countries, the institutional breakdown was so severe that a temporary UN administration was set up to run the country and help rebuild institutions. In addition, domestic human and financial resources were extremely scarce. In Timor Leste, almost all Indonesians who were in charge of the East Timorese judicial administration fled the country at the outbreak of the war.\textsuperscript{138} Similarly in Cambodia, the Khmer Rouge’s systematic destruction of Cambodia’s professional class had a severe impact on the capacity of the country’s legal system.\textsuperscript{139} However, even in these situations,


the support and involvement of the UN enabled the carrying out of trials, despite the severe overall capacity deficit experienced by these countries.

The situation in these countries is in no way comparable to that of Sri Lanka, from an institutional standpoint or from that of human resources. Sri Lanka possesses a sophisticated, albeit damaged, legal system and continues to boast a rich abundance of technical legal know-how and expertise in most relevant areas, though there are significant exception such as the absence of lawyers trained in international criminal law and investigators and lawyers trained in the skills necessary to handle mass atrocity crimes.

Even in extreme situations of overall capacity deficit where sequencing transitional justice measures is the only available policy option, it does not follow that non-judicial truth seeking must be prioritized over prosecutions. As argued in this paper, the social and political conditions in Sri Lanka demand that justice be delivered without delays. The same does not obtain for non-judicial truth-seeking. While there is a humanitarian imperative to ascertain the fate and whereabouts of missing persons, the Office on Missing Persons was specifically entrusted with this task. Therefore, tracing investigations will in all likelihood fall outside the ambit of the proposed truth commission. In light of this and of the other arguments articulated in this paper, there is no reason to prioritize non-judicial truth-seeking over trials.

In addition, the capacity challenges in carrying out trials for international crimes are not greater than those faced in conducting credible non-judicial investigations into mass atrocities allegedly committed over several decades or in conducting effective investigations into the fate of over 16,000 missing persons.\footnote{See, e.g., Hayner, supra 15, pp. 210-233.} Indeed, the main capacity challenge for carrying out trials is the lack of knowhow in conducting investigations and prosecutions for mass-scale crimes involving a large number of witnesses and other evidence. As just one example, by the time the judges of the Trial Chamber of the Special Court for Sierra Leone retired to deliberate the charges against Charles Taylor in 2012, they had heard the testimony of 112 witnesses and reviewed evidence from 1,500 exhibits, over the course of five years.\footnote{Nicholas Jahr, the Strange Case of Charles Taylor (1 August 2012), available at: http://www.brooklynnrail.org/2012/08/express/the-strange-case-of-charles-taylor.} Any genuine truth seeking exercise will face similar challenges. In fact, truth commissions generally must wade through vaster amounts of evidence than trials, given their broader mandate. For example, the South African Truth and Reconciliation Commission heard testimony from over 21,000 victims and witnesses and reviewed 7,115 applications for amnesty.\footnote{See Hayner, supra 15, p. 28.} Truth commissions are also expected to execute their mandates in a smaller window of time than trials, typically two to three years.\footnote{Ibid, p. 215.} Investigations into international crimes also require that strict procedures be followed to ensure that the evidence meets the required evidentiary standard. This also necessitates experience and expertise. However, the same standards ought to be applied in non-judicial truth-seeking.
exercises to ensure that the evidence obtained is admissible in criminal proceedings.\footnote{144} In light of this, it appears that investigations into mass-scale violations require the same capacity whether or not they are conducted for prosecutorial purposes. Furthermore, non-judicial investigations sometimes require a range of additional expertise that may not be readily available. In fact, it was officially acknowledged that Sri Lanka lacks the full range of technical expertise to operationalize the Office on Missing Persons.\footnote{145} However, this may be addressed through the provision of external assistance and support as explicitly provided for in the Act establishing the Office on Missing Persons.\footnote{146} Similarly, capacity-related challenges in carrying out trials into international crimes may be appropriately addressed through the setting up of a special court and special prosecutor’s unit with international involvement.

b. A Special Court with International Involvement: An Adequate Solution to Capacity Concerns

The inclusion of international personnel within a special court and a special prosecutor’s unit would be essential to strengthen the capacity of the newly established court and enable the carrying out of international crimes trials. In fact, international personnel experienced in the investigation, analysis, prosecution and litigation of international crimes could bring in best practices as well as processes and methods for the efficient processing and analysis of a large amount of evidence. This could adequately complement existing domestic capacity. The continuous training of all staff members in the applicable law and in best practices for investigation and analysis of international crimes will also be essential in overcoming capacity challenges.\footnote{147}

In addition to the lack of experience and expertise in the carrying out of investigation into mass-scale crimes, the Sri Lankan judiciary faces a number of other issues that may impede the success of international crimes prosecutions. These include a lack of independence of the judiciary and of the Attorney General’s Department, especially for conflict related cases and human rights case; violations of due process rights; as well as protracted delays in the administration of justice.\footnote{148} However, these issues may also, to a large extent, be addressed

\footnote{144} “Separating the tracing and the criminal investigations serves neither the interests of truth-seeking nor the interest of justice. Given the overlap in both investigations, a strict separation between the tracing body and a criminal investigation is in any event not possible.” Dr. Isabelle Lassee, “Criminal” and “Humanitarian” Approaches to Investigations into the Fate of Missing Persons: A False Dichotomy” (2016).

\footnote{145} “Enough is enough: Mangala hits back MR on Office for Missing Persons,” (Sunday Times, 1 August 2016) \url{http://www.sundaytimes.lk/article/1006374/1006374} (accessed on 9\textsuperscript{th} November 2016).

\footnote{146} Office of Missing Persons Bill (Establishment, Administration and Discharge of Functions), Section 11, \url{http://sangam.org/wp-content/uploads/2016/08/OMP-Act-Aug-2016.pdf}.

\footnote{147} As argued elsewhere, trials for mass conflict related crimes or mass scale crimes would require legislative reforms to incorporate international crimes into domestic law with retroactive effect. See Dr. Isabelle Lassee & Eleanor Vermunt, “Fitting the Bill:” Incorporating International Crimes into Sri Lankan Law (2016).

through the creation of a special court with international participation.\textsuperscript{149} First, international participation in trials would minimize attempts of political interference with the judicial process. It would also lead to heightened international scrutiny by both States and INGOs. This will serve as a check on the integrity of the process and increase credibility of the trials.\textsuperscript{150} In addition, the establishment of a special court may also help circumvent chronic inefficiencies in the Sri Lankan legal system such as protracted delays.\textsuperscript{151} Finally, the creation of a special court would provide an opportunity to design its rules of procedure and evidence in line with international standards.

Therefore, capacity and other issues with respect to the carrying out of international crimes trials would be adequately addressed through the implementation of the Sri Lankan government’s commitment to set up a special court and special prosecutor’s unit with international participation.

\textbf{IV. Conclusion}

Sri Lanka has, since January 2015, embarked on an ambitious project of reform encompassing a wide range of areas: economic, constitutional, rule of law, reconciliation and human rights. In particular, Sri Lanka now has a unique opportunity to mark its transition from authoritarianism to democracy, and armed conflict to peace, through constitutional measures that address the root causes of the conflict as well as a transitional justice process to heal wounds of the past and end impunity. The sequencing choices between constitutional reform and transitional justice processes have not received comment in this paper. Indeed, it is now apparent that with the constitutional reform process on fast-track, that process will occupy centre-stage. There is also wide political support for this approach.

We suggest that once the constitutional reform process nears completion, Sri Lanka will once again face an important choice: one with far-reaching consequences for our democracy. At the heart of the sequencing debate is a central question: will the country eventually begin a serious process of ending impunity for mass crimes, or will we yet again countenance a lack of accountability for the most horrific crimes? In this paper, we suggest that if the country is to eventually grapple with and end the impunity that has given rise to chronic recurrences of mass atrocity crimes, it must eschew a dogmatic recourse to the “truth first, justice later” approach and

\begin{itemize}
\item \textsuperscript{149} See generally, Rhadeena de Alwis & Niran Anketell, A Hybrid Court: Ideas for Sri Lanka (2015).
\end{itemize}
move to enact the necessary legislation for trials swiftly. We suggest that to delay is to risk failure, and because the country simply cannot afford failure, the time for justice has come.