



Sri Lanka Monitoring and Accountability Panel

SPOT REPORT:

Roadmap for Justice in Sri Lanka

15 February 2016

The Sri Lanka Monitoring Accountability Panel (“MAP”) was established to provide independent monitoring, advice, and recommendations on the transitional justice mechanisms in Sri Lanka, from a victims’ perspective.¹ The MAP members are legal experts with considerable expertise in national and international criminal justice mechanisms designed to address wartime atrocities.²

This Spot Report is intended to assist the ongoing debate over the most appropriate judicial mechanism, among many options, to address the allegations of war crimes and crimes against humanity committed during the armed conflict. The right choice will help foster accountability and reconciliation. The wrong choice will waste another opportunity to deliver meaningful justice to tens of thousands of beleaguered victims, and thereby remain an obstacle to political stability.

At the time of writing, the debate had reached a crucial crossroads: Whilst United Nations (“UN”) experts have consistently called for a special court with the participation of international judges and prosecutors, the current Sri Lankan Government (“SLG”) appears to be rejecting the form of international participation envisaged by the UN. Relying on experience from other war crimes courts, the MAP will provide views on these respective positions. In doing so, it will assist stakeholders—particularly victims—to provide informed views during the consultation process.

This Spot Report is issued to coincide with the Human Rights Council’s (“HRC”) Thirty-first Session.

I. Background

After a 26-year-long armed conflict and several internationally brokered attempts at peace, the civil war came to a bloody end when the SLG defeated the Liberation Tigers

¹ For news and developments please visit <http://war-victims-map.org/>

² The Members of the MAP are (alphabetically): Marie Guiraud (France), Peter Haynes QC (UK), Richard J Rogers (UK), Heather Ryan (USA), Justice Ajit Prakash Shah (India), Nikesh Chandra (India), Peter Danby QC (UK), Richard J Rogers (UK), Heather Ryan (USA), Justice Ajit Prakash Shah (India). Full bios can be found in Annex 1.

of Tamil Eelam (“LTTE”) in 2009. The war left more than 40,000 dead³ and 280,000 displaced.⁴ According to independent investigations, the SLG security forces, Tamil paramilitaries and the LTTE were responsible for mass human rights violations, including arbitrary detentions, torture, enforced disappearances, unlawful killings and forced recruitment. The majority of crimes were allegedly committed by the SLG military.⁵

In 2010, the UN Secretary-General nominated a Panel of Experts (“First Panel”) to advise on the alleged violations of international human rights and humanitarian law during the final stages of the war. The First Panel concluded that the allegations of atrocities were credible and indicated that war crimes and crimes against humanity may have occurred. Following the First Panel’s investigation, the Human Rights Council issued Resolution 25/1. Resolution 25/1 requested the Office of the High Commissioner for Human Rights (“OHCHR”) to commence the OHCHR Investigation on Sri Lanka (“OISL”). The OISL inquired into crimes that the SLG and LTTE allegedly committed between 2002 and 2011. Upon completion of the investigation, the OISL Report concluded that both parties to the conflict committed gross human rights violations. The OISL Report also highlighted the serious weaknesses in the Sri Lankan justice system, including its susceptibility to political and ethnic biases, noting that Sri Lanka’s “criminal justice system is not yet ready or equipped to conduct the independent and credible investigations”.⁶ The OISL Report recommended the establishment of an “*ad hoc* hybrid special court, integrating international judges, prosecutors, lawyers and investigators [...] with its own independent investigative and prosecuting organ, defence office, and witness and victims protection programme”.⁷

³ The Washington Post, “U.N.: Sri Lanka’s crushing of Tamil Tigers may have killed 40,000 civilians”, 21 April 2011, accessed 20/12/15. Some estimates put the figure at more than 100,000.

⁴ U.S. Department of State, “Report to Congress on Incidents During the Recent Conflict in Sri Lanka”, 2009, accessed 21/01/16.

⁵ UN (2011). Report of the Secretary-General’s Panel of Experts on Accountability in Sri Lanka. *United Nations*, p. iii-iv.

⁶ Report of the OHCHR Investigation on Sri Lanka (OISL), UN Document No A/HRC/30/CRP.2, Advance Version, 16 September 2015, para. 75 (citing A/HRC/RES/25/1, preamble).

⁷ See OISL Report, p. 250.

The OISL considered that this mixed model was the only way to guarantee an impartial judicial process. In October 2015, the Human Rights Council adopted Resolution 30/L.29 and reiterated the importance of an accountability mechanism with the participation of international actors. The Resolution was co-sponsored by Sri Lanka.

II. Sri Lanka's International Obligations to Victims

International human rights principles provide for the right of victims to participate in justice mechanisms.⁸ When appointing a Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-recurrence ("Special Rapporteur"), the Human Rights Council recalled the need to adopt a victim-centred approach to transitional justice.⁹ The Special Rapporteur has since urged governments to establish reparations mechanisms, with meaningful victim participation, and to measure their success not merely in terms of token measures, but in terms of satisfactory outcomes.

In 2005, the United Nations adopted Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law ("Basic Principles").¹⁰ The Basic Principles are, for all practical purposes, an international bill of rights of victims.¹¹ They do not entail new international or domestic legal obligations, but rather identify mechanisms, modalities, procedures, and methods for the

⁸ See International Covenant on Civil and Political Rights, art. 2, para. 3 and the 2005 Basic Principles on the right to remedy.

⁹ Human Rights Council resolution, A/HRC/RES/1.

¹⁰ UN General Assembly, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* : resolution / adopted by the General Assembly, 21 March 2006, A/RES/60/147, available at: <http://www.refworld.org/docid/4721cb942.html> [accessed 12 February 2016] Adopted without vote, 64th plenary meeting. Issued in GAOR, 60th sess., Suppl. no. 49."Annex: Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law": p. 2-9.

¹¹ International Recognition of Victims' Rights, M. Cherif Bassiouni, HRLR 6 (2006), 203-279.

implementation of *existing legal obligations* under international human rights law and international humanitarian law.¹² Sri Lanka should apply the Basic Principles.

The victims' rights outlined in the Basic Principles include to the following:

- *Equal and effective access to justice.* This includes the dissemination of information about remedies for violations of international humanitarian law, as well as the legal and consular help to ensure that victims can exercise their rights to remedy.
- *Adequate, effective and prompt reparation for harm suffered.* This includes: Restitution,¹³ compensation,¹⁴ rehabilitation,¹⁵ satisfaction,¹⁶ and guarantees of non-repetition.¹⁷
- *Access to relevant information concerning violations and reparation mechanisms.* This includes the right of victims to seek and obtain information on the causes of the gross violations and to learn the truth.
- *Effective criminal justice:* Victims have the right to an effective remedy under international law. In cases involving international crimes, "States have the duty to investigate and, if there is sufficient evidence, the duty to submit to prosecution the person allegedly responsible for the violations and, if found

¹² The provisions providing a right to a remedy for victims of violations of international human rights law are found in numerous international instruments, in particular article 8 of the Universal Declaration of Human Rights, article 2 of the International Covenant on Civil and Political Rights, article 6 of the International Convention on the Elimination of All Forms of Racial Discrimination, article 14 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and article 39 of the Convention on the Rights of the Child, and of international humanitarian law as found in article 3 of the Hague Convention respecting the Laws and Customs of War on Land of 18 October 1907 (Convention IV), article 91 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) of 8 June 1977, and articles 68 and 75 of the Rome Statute of the International Criminal Court.

¹³ This includes restoration of liberty; enjoyment of human rights, identity, family life and citizenship; return to residence and of property.

¹⁴ This should be provided for any economically assessable damage, proportionate to the gravity of the violation.

¹⁵ This includes medical/psychological care as well as legal and social services.

¹⁶ This includes verification of the facts and full and public disclosure of the truth, the search for the whereabouts of the disappeared, and judicial sanctions against persons liable for the violations.

¹⁷ This includes effective civilian control of military and security forces and strengthening the independence of the judiciary.

guilty, the duty to punish her or him”.¹⁸ This investigation must be done “effectively, promptly, thoroughly and impartially”.¹⁹ Where a state’s existing legal system is inadequate to handle these types of cases, the state should establish special procedures with international participation, or risk violating its international obligations.²⁰

Following his visit to Sri Lanka, the Special Rapporteur insisted that Sri Lanka permit consultation and participation by victims, civil society groups, and other stakeholders in the design and implementation of the transitional justice measures.

“Consultation with those affected by the violations is essential from a conceptual standpoint for rights cannot simply be foisted but need to be exercised. Citizens cannot be simply presented with ‘solutions’ in the design of which they were given no role. It is equally crucial from a practical standpoint, for transitional justice measures depend, to a large extent, on the willingness of victims and others to participate, for example, by sharing pertinent information with the relevant institutions. [...] This is more likely to happen if the stakeholders can claim ownership over them”.²¹

The SLG has promised “wide consultations with all stakeholders especially the victims of conflict, communities, political parties, civil society representatives, the military as well as the High Commissioner and his Office, bilateral partners, and other international organisations.” The SLG recognised the victims’ “right to justice, reparations and guaranteeing non-recurrence with the aim of achieving reconciliation

¹⁸ UN Resolution 60/147 (2005). *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, principle III. 4.

¹⁹ *Idem.* principle II. 3. (b).

²⁰ “Treaty-based and customary law do not impose an explicit duty on States to create special procedures. However, the language of the international instruments noted earlier contemplates that the remedy be ‘effective’ and administered by ‘competent’ tribunals and personnel in order to provide ‘just’ and ‘adequate’ reparations. Thus, to the extent that a State’s existing legal framework is inadequate to handle the claim, it would seem that the State is implicitly in violation of the requirements of the treaty-based law”. See Bassiouni, M C. *International Criminal Law; Volume 3: International Enforcement*. Leiden: Martinus Nijhoff, 2008, p. 645.

²¹ Observations by the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Mr. Pablo de Greiff, on the conclusion of his recent visit to Sri Lanka, <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=15820&LangID=E>., accessed 12 February 2016.

and durable peace to ensure long term progress of all her citizens".²² Whilst this rhetoric is positive, words must be matched by action.

As a result, the SLG announced the establishment of a Task Force composed entirely of representatives of civil society to carryout a national consultation regarding justice, reparation and non-recurrence.²³ However, little information about its mandate has been made public, causing uncertainty regarding the SLG's commitment to establishing the truth. Past failed attempts, such as the International Independent Group of Eminent Persons ("IIGEP"), demonstrate the importance of maintaining independence and impartiality throughout the process. Overall, the implementation of a Task Force is a step in the right direction but, as pointed out by the Special Rapporteur, "everyone's credibility" is on the line.²⁴

III. Essential Ingredients for a Special War Crimes Chamber

a. Genuine Political Commitment

Despite multiple initiatives by previous SLGs to establish domestic accountability mechanisms for wartime violations, all past efforts have fallen dramatically short of international standards and have failed to satisfy Sri Lanka's legal obligations.²⁵ The Commissions of Inquiry set between 1948 and 2011, the IIGEP in 2007, the Lessons Learnt and Reconciliation Commission in 2010, and the Army Court of Inquiry in 2012, all failed to develop into meaningful criminal investigations and lacked the necessary independence and impartiality to be credible. Some commentators have argued that the domestic initiatives were implemented solely to avoid an independent international

²² News, "Sri Lankan Government responds to UNHRC Report", 17 September 2015, accessed 11/02/16, available at <http://www.news.lk/news/sri-lanka/item/9793-sri-lankan-government-responds-to-unhrc-report>.

²³ Observations by the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Mr. Pablo de Greiff, on the conclusion of his recent visit to Sri Lanka, <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=15820&LangID=E>, accessed 12 February 2016.

²⁴ *Ibidem*.

²⁵ UN (2011). Report of the Secretary-General's Panel of Experts on Accountability in Sri Lanka. *United Nations*.

investigation into alleged violations.²⁶ The current SLG, which has recognised these past shortcomings, must not repeat the same mistakes.

Accountability cannot be achieved without sustained political commitment to a properly resourced judicial mechanism that operates in accordance with international standards. While the current SLG has expressed a commitment to true accountability, the recent statements made by President Sirisena that he will “never agree to international involvement” and that Sri Lanka “ha[s] more than enough specialists, experts and knowledgeable people in our country to solve our internal issues”²⁷ have left many unconvinced. The President’s statement goes against both the word and spirit of Resolution 30/L.29. It is also patently incorrect—as clearly outlined in successive reports by independent UN experts, the Sri Lankan justice system does not have the requisite independence, impartiality or expertise to administer fair and effective war crimes prosecutions.

The SLG must not breach its international obligations or use technical legal excuses to block full international judicial and prosecutorial participation. Rather, the SLG should demonstrate its commitment by adopting legislative reforms that incorporate international crimes and modes of liability into domestic law and by supporting the appointment of international judges and prosecutors to work alongside local counterparts.

b. The Right Legal Framework

Sri Lankan domestic law is not equipped “to deal with international crimes of this magnitude”.²⁸ Crimes against humanity and war crimes are not criminalised under existing penal provisions. To investigate and prosecute properly the alleged “system-

²⁶ BBC, “*Human Rights Groups Snub Sri Lanka War Crime Inquiry*”, 14 October 2010, accessed 20/01/16; see also Frontline Magazine, “The report of the Lessons Learnt and Reconciliation Commission of Sri Lanka may lack credibility in international fora”, 6 December 2011, accessed 20/01/16.

²⁷ BBC, “*Sri Lanka President Wants Internal War Crimes Court*”, 21 January 2016, Accessed 22/01/16.

²⁸ Statement by UN High Commissioner for Human Rights Zeid Ra'ad Al Hussein via videolink to the Human Rights Council, 30 September 2015; A/HRC/30/61, para. 77-78.

crimes”,²⁹ legislation will have to be enacted to establish the requisite international crimes, forms of liability, and other jurisdictional powers of the special war crimes chamber.³⁰

Temporal and territorial jurisdiction: A limited temporal jurisdiction is a pragmatic way to promote efficiency, but should not exclude the most significant crimes or used to shield particular persons from liability. Manipulated jurisdictional time frames will impact on the credibility of the court. Care must be taken to consult closely with victims before determining the appropriate time frame. One option that is consistent with the OISL Report would be to define the time frame as beginning in February of 2002 (at the end of the ceasefire agreement) and ending in late 2011 (the end of the post-conflict period).³¹ The territorial jurisdiction should include the entire area of Sri Lanka.

Substantive jurisdiction: The jurisdiction should include international crimes and forms of criminal responsibility developed through the international courts. These provide the essential tools to prosecute those most responsible for the alleged crimes. For example, the form of responsibility known as ‘command responsibility’ has been widely used in other war crimes courts to prove the culpability of military superiors. It is worth noting that,

“where so provided for in an applicable treaty or contained in other international legal obligations, statutes of limitations shall not apply to gross violations of international human rights law and serious violations of international humanitarian law which constitute crimes under international law”.³²

The definition of the international crimes and forms of responsibility can be taken from the Rome Statute of the International Criminal Court. This would help ensure

²⁹ See OISL Report, para. 1113.

³⁰ Article 105(1)(c) of the Sri Lankan Constitution currently provides for the ordaining and establishment of “other Courts” by Parliament for the protection of “the people”. This includes the creation of a special war crimes chamber.

³¹ OISL Report, para. 54-103.

³² UN Resolution 60/147 (2005). *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, IV. 6.

consistency with international case law and standards and allow judges to benefit from a large body of jurisprudence. Furthermore, all the crimes included in the Rome Statute were accepted to be customary international law at the time it was drafted and, therefore, may be adopted for the purposes of prosecution in Sri Lanka.³³

Personal jurisdiction: The special war-crimes chamber should limit personal jurisdiction to those most responsible for the crimes.³⁴ As with many decades-long conflicts, there are potentially hundreds (even thousands) of war-crimes suspects. Focusing on those most responsible reduces the risk that the special war-crimes chamber will become over-encumbered with lower-level perpetrators (the foot soldiers) and run out of time or money to pursue the more complex cases involving senior decision makers. In fact, the lower-level suspects can be tried and charged with crimes already punishable under Sri Lanka's domestic justice system, initially with international technical assistance. This dual-court model has been employed with respect to the former Yugoslavia, where the International Criminal Tribunal for Former Yugoslavia handled the most serious cases and the national courts—such as those in Bosnia and Herzegovina or Kosovo or Serbia—prosecuted the less serious cases.

c. A Competent, Independent, and Impartial Tribunal

A fundamental challenge for Sri Lanka is to ensure the independence and impartiality of the special war-crimes chamber. Past experience shows that lack of independence in the judiciary has become routine and that “security forces, police and intelligence services have enjoyed near total impunity [...]”.³⁵ Meanwhile, decades of wartime propaganda has created a deep-seated anti-Tamil bias amongst the Sri Lankan police,

³³ Whilst Article 13(6) of the Sri Lanka Constitution prohibits retrospective application of criminal laws, there is an exception for acts that were “criminal according to the general principles of law recognized by the community of nations”. Thus, acts that were criminalised under customary international law at the time they were committed may be prosecuted without offending the Sri Lanka Constitution.

³⁴ There are several formulations to choose from. For example, in the Sierra Leone Special Court, the phrase those who “bear the greatest responsibility for serious violations of national and international humanitarian law” was used. In the ECCC “senior leaders and those most responsible” was used.

³⁵ OHCHR Report, para. 83.

prosecutors, and many SLG organs.³⁶ Due to the nature of the allegations, powerful figures will have a vested interest in the outcome of the war-crimes investigations—the Sri Lankan judicial system thus “remains particularly vulnerable to interference and influence by powerful political, security and military actors”.³⁷ In addition to the independence and impartiality challenges, the Sri Lankan judiciary does not have the necessary experience to deal with complex issues of international law.

These shortcomings are not new to post-conflict situations. And the solutions are now well tested. The correct response to these challenges was outlined by the OISL and OHCHR, namely, the participation of international judges, prosecutors, investigators, and lawyers. It is clear from the OISL and OHCHR Reports that, to be effective, this participation must be significant; the foreign actors must have real decision-making powers. The drafters of the Resolution 30/L.29 undoubtedly envisaged this extensive form of participation as being necessary.

However, having co-sponsored Resolution 30/L.29, the SLG has since sought to give the concept of ‘participation’ an extremely narrow interpretation. The SLG interpretation—whilst not always consistent—appears to see the foreign actors as technical advisors, at best, rather than engaged as judges, prosecutors, or lawyers. President Sirisena’s recent claim that “[w]e have more than enough specialists, experts and knowledgeable people in our country to solve our internal issues” barely leaves room for any international role.

If the SLG is serious about bringing justice and fulfilling its legal obligations to victims, it must change its position. Incorporating international expertise merely as technical advisors will not work. As seen with the IIGEP, advisors with no judicial decision-making authority cannot overcome the independence gaps of the domestic system. Without a significant cadre of foreign actors working alongside Sri Lankan counterparts

³⁶ The use of torture and degrading treatment by reason of ethnicity is a recurring problem and many were “treated as suspects and detained because of their Tamil ethnicity”. See OHCHR Report, para. 55

³⁷ OHCHR Report, para. 79 (emphasis added).

and with real decision-making powers, the special war-crimes chamber is bound to fail. Without full international participation, it will be impossible to gain legitimacy from affected Sri Lankan communities.

International Judges: Incorporating international judges into a domestic special war-crimes chamber, where the majority are Sri Lankan appointed judges, would leave control in the hands of domestic judges and risk political interference. The “supermajority” voting utilised at the Extraordinary Chambers in the Courts of Cambodia (ECCC) has been ineffective. Therefore, the MAP strongly recommends that each of the judicial chambers of a special war crimes chamber be composed of a majority of international judges. Contrary to the SLGs observations, the Constitution does not require Sri Lankan citizenship as a criterion for appointing judges.³⁸

The MAP suggests additional qualifications for the appointment of both domestic and foreign judges, such as gender, ethnicity, as well as (for internationals) experience in international criminal trials. Moreover, the MAP recommends that specialised training programmes be offered for judges, with visits to local legal institutions, attendance at domestic trials, cultural awareness, and familiarity with local laws.

International prosecutors and investigators: The concerns relating to judicial expertise independence and impartiality also apply to prosecutors. Powerful suspects may seek to interfere in the investigative process to manipulate case selection; some of the most serious cases could be buried before they get off the ground. Therefore, it is crucial to include international prosecutors with independent decision-making powers. The ECCC model, with equal co-prosecutors—one national and one international—is one solution. A lead international prosecutor is another option.

International defence lawyers: Every suspect and accused has the right to an effective defence. Whilst this does not (legally) require international defence lawyers for persons accused of war crimes in a hybrid court, it is nonetheless advisable; defence lawyers

³⁸ *Victor Ivan v Sarath Silva* (2001), 1 SLR 309.

have made significant positive contributions to the development of international justice. A special war-crimes chamber in Sri Lanka would benefit from including experienced international lawyers within each defence team. There is no proscription that prevents foreign lawyers from assisting in cases in a hybrid court.³⁹

d. Adequate Victim Participation

The Assistance to and Protection of Victims and Witnesses Act (“WPA”) was an important step forward in ensuring that victims are not deprived of their remedies, including reparations, individual monetary compensations and medical treatment, independent of the penal sanction⁴⁰ and other remedies that may be awarded by a civil court.⁴¹ However, it falls short of the truth-seeking and accountability mandate on which the “healing and reconciliation” is premised.⁴²

Regarding the participation of victims in the criminal proceedings, the WPA provides the victims with the right to initiate public action in respect of the alleged crimes by presenting, either orally or in writing, a complaint pertaining to the commission of an offence.⁴³ Moreover, the right to legal representation at “several stages of the criminal proceedings”⁴⁴ has also been explicitly guaranteed, along with the right to be present at all judicial proceedings⁴⁵ and participate at the sentencing stage.⁴⁶ However, it is not

³⁹ Bhavani Fonseka and Luwie Ganesathasan, “Hybrid vs. Domestic: Myths, Realities and Options for Transitional Justice in Sri Lanka”, Centre for Policy Alternatives, January 2016.

⁴⁰ Parliament of the Democratic Socialist Republic of Sri Lanka, “*Assistance to and Protection of Victims and Witnesses Act*”, Section 28(1).

⁴¹ Victims of Crime and Witnesses Act, Section 28(5).

⁴² Resolution A/HRC/30/L.29 “*Promoting reconciliation, accountability and human rights in Sri Lanka*”, p.2.

⁴³ Victims of Crime and Witnesses Act, Section 3(g) reads “to present, either orally or in writing, a complaint pertaining to the commission of an offence and to have such complaint recorded by any police officer, in any police station or other unit or division of the Police Department and to have such complaint impartially and comprehensively investigated by the relevant investigating authority”.

⁴⁴ Victims of Crime and Witnesses Act, Section 6(n).

⁴⁵ Victims of Crime and Witnesses Act, Section 3(l).

⁴⁶ Victims of Crime and Witnesses Act, Section 3(o).

clear whether the victim has the status of a “party” versus a “participant.” It is imperative that the regulations governing the WPA address this matter.⁴⁷

Currently, there is no positive provision in the WPA that permits involvement of international counsel to represent victims of international crimes. At the ECCC, victims have the right to choose their legal counsel (foreign and national)⁴⁸ and have a unique representation system that includes international lawyers working alongside national lawyers.⁴⁹ Sri Lanka should follow this example.

e. Protection for Witnesses

The OHCHR highlighted “the absence of any reliable system for victim and witness protection, particularly in a context where the threat of reprisals is very high”.⁵⁰ The

⁴⁷ Cf. ECCC Internal Rule Glossary, p. 81 “party”: refers to the Co-Prosecutors, the Charged Person/Accused and Civil Parties. The term Civil Parties refers to “a victim whose application to become a Civil Party has been declared admissible by the Co-Investigating Judges or the Pre-Trial Chamber in accordance with these IRs [Internal Rules].”

According to the International Criminal court, “*Victims Before the International Criminal Court: A Guide for the Participation of Victims in the Proceedings of the Court*”, Part III - examples of the ways in which a legal representative of a victim may participate at the ICC is through attendance and participation in hearings before the Court, making opening and closing statements, providing observations to the judges while the Court is still deciding whether or not to proceed with an investigation or case, present their views to the judges when the Court is considering what charges will be brought against the accused person(s) and ask questions to witness(es) or expert(s) who are testifying before the Court. In the proceedings before the ICC, the victims are required to demonstrate that their personal interests are affected before presenting their views and concerns to the Court. By contrast, at the ECCC, owing to the status of Civil Parties as “party”, they are granted an equal standing as that of the Accused, albeit with their own distinct participatory rights relevant to their status.

⁴⁸ Cf. ECCC Internal Rule 22 “Any person entitled to a lawyer under these IRs shall have the right to the assistance of a national lawyer, or a foreign lawyer in collaboration with a national lawyer, of their own choosing”. Persons who are able to pay for their lawyer shall have the right freely to choose from amongst national lawyers and foreign lawyers who are registered with the Bar Association of Kingdom of Cambodia. Indigent persons entitled to representation under these Rules also have the right freely to choose from amongst national lawyers and foreign lawyers from the lists maintained by the court.

⁴⁹ See also ECCC Internal Rule 22(1)(c) that states that a foreign lawyer shall work in conjunction with a national lawyer before the ECCC. This rule further provides details of how the ECCC maintains the balance between the participation of international and national lawyers. See for example, Internal Rule 22(2): “During proceedings before the ECCC, the following provisions shall apply: a) The national lawyer shall request recognition of any foreign lawyer, the first time such lawyer appears before each judicial body of the ECCC. Once recognized, such foreign lawyer shall enjoy the same rights and privileges before the ECCC as a national lawyer; b) however, at all stages of the proceedings, the national lawyer has the right to speak first.”

⁵⁰ A/HRC/30/61, para 76.

current situation in Sri Lanka is perhaps more extreme than any yet faced by a domestic war-crimes court. Given that the security apparatus is still intact, as well as the intense militarisation of the northeast of the country where many Tamil witnesses live, Tamils will rightly be fearful of participating in the special war crimes chamber.⁵¹ Only the most rigorous witness protection system will reduce the risks to witnesses and build the necessary trust. Despite the passage of the WPA in 2015, witness interference in Sri Lanka continues to be rife,⁵² with no apparent political will to prosecute or investigate crimes involving witness interference. The current security forces have denied knowledge of this practice, despite the existence of evidence that security forces are complicit in torture and witness intimidation.⁵³ Recent reports published by civil-society organizations document instances of violence against witnesses and destruction of evidence of war crimes, which suggests that little has changed under the current regime.⁵⁴ This claim was later acknowledged by the UNHCHR during his recent visit to Sri Lanka.⁵⁵

The WPA should be amended to address several shortcomings. First, neither of the two overseeing mechanisms is autonomous from the SLG.⁵⁶ Second, the respective functions

⁵¹ In the past, the SLG has alleged the need to locate witnesses abroad as a justification for the lack of progress in the prosecution of cases, however, the Attorney General has excluded testimonies given via video-link.. It is imperative that the WPA guarantee protection measures including overseas trial locations, video-link testimony from abroad and independent judges, prosecutors, and witness units.

⁵² See in general: OISL Report; International Truth and Justice Project (ITJP), *“Report: A Still Unfinished War: Sri Lanka’s Survivors of Torture and Sexual Violence 2009-2015 (2015)”*; Sri Lanka Brief, *“Sri Lanka to Investigate UNWGEID Claims on Witnesses Intimidation”*, 19 November 2015, available at: <http://srilankabrief.org/2015/11/sri-lanka-to-investigate-unwgeid-claims-on-witness-intimidation/>; ITJP, *“Report: Silenced: survivors of torture and sexual violence in 2015 (2016)”*, available at: http://www.itjpsl.com/wp-content/uploads/2015/07/Silenced_jan%202016.pdf; Freedom from Torture, *“Statement: Torture Casts a Shadow over Sirisena’s First Year as President of Sri Lanka (5 January 2016)”*, available at: <http://www.freedomfromtorture.org/news-blogs/8786>.

⁵³ ITJP, *“Report: Silenced: survivors of torture and sexual violence in 2015 (2016)”*, p. 35.

⁵⁴ Ceylon Today, *“Evidence of torture chambers in Valikamam North”*, 7 January 2016, available at: <https://www.ceylontoday.lk/51-114376-news-detail-evidence-of-torture-chambers-in-valikamam-north.html>; Tamil News Network, *“SL military conceals mass graves at Vara’ni in Thenmaraadchi”*, 28 April 2014, available at: <http://www.tamilnewsnetwork.com/2014/04/28/sl-military-conceals-mass-graves-at-varani-in-thenmaraadchi-2/>.

⁵⁵ UNOHCHR media statement, *“Statement by UN High Commissioner for Human Rights, Zeid Ra’ad Al Hussein, at the end of his mission to Sri Lanka”*, 09 February 2016.

⁵⁶ The National Authority for the Protection of Victims of Crime and Witnesses and the Victims of Crime and Witnesses Assistance and Protection Division.

of these bodies are unclear.⁵⁷ Third, the WPA sets out no specific criteria for the grant of protection to victims and witnesses and provides no comprehensive list of available protective measures. Lastly, the WPA offers no protection to witnesses who have not yet provided information in the course of an investigation.

Without amendments to correct these issues, the WPA is likely to fail at assuring witnesses that they can safely testify in the special war-crimes chamber, particularly in cases involving high-ranking police or military personnel. In order to grant effective protection to the witnesses, the SLG should formulate legal criteria based on UN's Model Witness Protection Bill,⁵⁸ allocate sufficient resources to the programme, and include international assistance.

IV. Conclusion

If the accountability process has any chance of real success, the SLG must comply with the international obligations to victims, conduct broad consultations, and establish a criminal justice mechanism that is 'effective' according to international standards. In the context of Sri Lanka, that must include significant participation of international judges and prosecutors, as well as defence counsel and victim lawyers. If the special war-crimes chamber fails to meet these standards, it will only serve to compound the human rights violations and exacerbate the ethnic tensions.

V. Recommendations

The SLG should undertake wide-ranging consultations with relevant stakeholders, including the victims of conflict, Sri Lankan community leaders and civil society, Sri Lankan diaspora representatives, international human rights organisations, and relevant legal experts.

⁵⁷ WPA, section 20(1) and 13(1)(h).

⁵⁸ United Nations Office on Drugs and Crime, "*Model Witness Protection Bill*", 2000, available at: https://www.unodc.org/pdf/lap_witness-protection_2000.pdf.

As part of the consultation process, the SLG should ensure that victims are adequately informed of the options for transitional justice, including a special war-crimes chamber of hybrid nature.

The SLG should adopt a victim-centered approach to transitional justice, and protect and promote the rights of victims outlined in the Basic Principles, including:

- Equal and effective access to justice.
- Adequate, effective and prompt reparation for harm suffered
- Access to relevant information concerning violations and reparation mechanisms.
- Effective criminal justice.

The SLG should establish a special war crimes chamber comprised of the following general attributes:

- a. Trial and Appellate Chambers with a **majority of international judges** sitting alongside national counterparts. The judges should have equal voting rights.
- b. For the selection of all judges, a reasonable balance of gender and ethnicity should be a requirement. For the selection of international judges, experience in dealing with international crimes should be an additional requirement.
- c. Implementation of specialised training programmes for judges.
- d. **Co-prosecutors** with equal decision-making powers, one international and one national. Procedural rules to ensure that cases cannot be blocked by one prosecutor.
- e. A vetting process to remove from office any SLG personnel and public officials allegedly involved in human rights violations.
- f. A rigorous witness protection system including:

- a. An overseeing mechanism that is autonomous from the SLG.
- b. Unequivocal provisions related to the functions and responsibilities of the overseeing mechanism.
- c. Clear legal criteria for the grant of protection to victims and witnesses.
- d. A list of physical and psychological protective measures for victims and witnesses in accordance with International Constitutional Law, including but not limited to overseas trial locations, video-link testimony from abroad and independent judges, prosecutors, and witness units.
- g. **Victims with rights to meaningful participation** in the proceedings. The right to free choice of counsel, including international counsel.
- h. An overseeing mechanism that guarantees that remedies available to victims are implemented.
- i. Suspects and accused to have free choice of counsel, including **international counsel** with full rights of audience.
- j. **Legal aid** for indigent victims, suspects, and accused.
- k. The application of **substantive customary international law** applying the ICC definitions, including (as applicable) war crimes, crimes against humanity, and genocide, as well as recognised forms of criminal liability such as command responsibility.
- l. The ratification of international conventions such as the International Convention on the Protection of All Persons from Enforced Disappearances, the Additional Protocols to the Geneva Conventions, and the Rome Statute of the International Criminal Court.

- m. The application of Sri Lankan procedural law modified for consistency with the International Covenant on Civil and Political Rights **protections**.
- n. An international-standards **oversight mechanism** in line with the above.

Annex 1: Members of Panel

Justice Ajit Prakash Shah (India) – Panel Member

Justice Shah, a renowned Indian jurist, has been practicing law as an advocate and judge for around 40 years. Following his practice as a lawyer in Bombay, Justice Shah was elevated to the bench in 1992, becoming a permanent Judge of Bombay High Court in 1994. He was promoted to Chief Justice of the Madras High Court in 2005 and Chief Justice of Delhi High Court in 2008. He retired from the bench in 2010. Until August 2015, Justice Shah was the Chairman of the 20th Law Commission of India, a body established by the Indian Government to promote legal reform throughout the justice system. He was also the Chairperson of the Broadcasting Content Complaints Council, a self-regulatory body for non-news TV channels set up by the Indian Broadcasting Foundation in consultation with the Ministry of Information & Broadcasting.

Richard J Rogers (UK) – Panel Member and Secretary

Richard Rogers, a USA (California) and UK qualified lawyer, has 20 years experience in international criminal law and human rights. He has held senior positions in the UN and OSCE: He was the OSCE's Chief legal system monitor in post-conflict Kosovo, the Principal Defender at the UN's Extraordinary Chambers in the Courts of Cambodia, and the head of legal support for the Appeals Chamber at the UN's International Criminal Tribunal for Yugoslavia. Richard is currently assisting several victim groups before the International Criminal Court and has worked with national war crimes courts in Bangladesh, Bosnia and Herzegovina, Croatia, Kosovo, and Uganda. Richard has recently provided expert testimony before the US Congress House Committee on Foreign Affairs, and spoken to human rights issues before the European Parliament's human rights committee and the Bosnian Parliament. He is a founding partner of Global Diligence LLP.

Marie Guiraud (France) – Panel Member

Marie Guiraud, a French lawyer, has worked on human rights and international criminal law for fifteen years. She is currently the Civil Party Lead Co-Lawyer for the victims at the UN-assisted Extraordinary Chambers in the Courts of Cambodia (ECCC). Representing the interests of nearly 4,000 victims who participate in Case 002/02, Marie serves as the co-lead court advocate. She has been heavily involved in the design and implementation of judicial reparations for victims of crimes under the Khmer Rouge regime. Prior to her current role, Marie worked at a major international human rights organization and then as a private lawyer in criminal litigation, both before French and foreign Courts: In France, she represented both defendants and victims in complex and serious criminal cases. Abroad, Marie represented victims of international crimes before

Ivorian and Congolese Courts and was a Civil Party Lawyer in case 002/01 before the ECCC.

Peter Haynes QC (UK) Panel Member

Peter Haynes QC is a British barrister with more than 30 years' experience in domestic and international criminal courts. He currently acts as the Lead Counsel for Jean Pierre Bemba at the International Criminal Court (ICC) and is the Lead Legal Representative of Victims at the Special Tribunal for Lebanon (STL). He is one of the very few practitioners who have led cases before the International Criminal Tribunal for the Former Yugoslavia (where he appeared for the defence of General Vinko Pandurevic in relation to the Srebrenica massacre), the ICC and the STL. He has appeared in cases involving genocide, war crimes, crimes against humanity and international terrorism. He has been responsible for development of the jurisprudence, practice and procedure of the representation of victims in international / hybrid courts. Peter regularly lectures on the functioning of international criminal courts and, in particular, victim representation.

Heather Ryan (USA) – Panel Member

Heather Ryan, a US lawyer, has been working in the field of international law for over 15 years. She is currently a special consultant for the Open Society Justice Initiative monitoring the Extraordinary Chambers of the Courts in Cambodia (ECCC), a hybrid tribunal set up to prosecute senior leaders of the Khmer Rouge Regime responsible for mass atrocities from 1975-1979. She has been involved since 2005 in evaluating and reporting on the development and implementation of the ECCC in terms of compliance with international fair trial standards, as well as the court's effectiveness in meeting its goals with respect to the victims and public. Her experience also includes work at the Carr Center for Human Rights Policy at Harvard's Kennedy School, Global Greengrants Fund, The Coalition for International Justice, teaching international criminal law, as well as private law practice.