

## **Submission to the Consultation Task Force on Reconciliation Mechanisms**

**By**

**The Centre for Policy Alternatives (CPA)**

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The present submission by the Centre for Policy Alternatives (CPA) is in response to the call for submissions by the Consultation Task Force. The submission highlights key issues CPA has raised over the years<sup>1</sup> and most recently with the adoption of the United Nations Human Rights Council (UNHRC) consensus Resolution 30/1 “Promoting reconciliation, accountability and human rights in Sri Lanka” (Resolution).<sup>2</sup> Although the Resolution is a welcome step forward, the present submission is not limited to the commitments in the Resolution but raises several broader issues that should be considered when moving forward with transitional justice and reconciliation in Sri Lanka.

### **Transitional Justice in Sri Lanka**

At the outset it is important to note the definition of what transitional justice is and what is meant in the Sri Lankan context. In 2004 the United Nations Secretary General in a report<sup>3</sup> defined transitional justice thus:

*“The notion of transitional justice discussed in the present report comprises the full range of processes and mechanisms associated with a society’s attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability,*

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<sup>1</sup> Further information on CPA’s work on transitional justice can be found on [www.tjsrilanka.org](http://www.tjsrilanka.org) and [www.cpalanka.org](http://www.cpalanka.org)

<sup>2</sup> U.N. Doc. A/HRC/30/L.29

<sup>3</sup> Report of the Secretary-General, **The rule of law and transitional justice in conflict and post-conflict societies**, S/2004/616 (2004)

*serve justice and achieve reconciliation. These may include both judicial and non-judicial mechanisms, with differing levels of international involvement (or none at all) and individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or a combination thereof.”*

Transitional justice is also known as ‘Dealing with the Past’ to ensure there is non-recurrence of violence. The four pillars of transitional justice- truth, justice, reparations and non-recurrence- are all key aspects of transitional justice and complement each other.

This submission briefly examines key areas that require attention highlighting specific steps that must be initiated by the Government without further delays. Some of the key steps are in point form below for easy reference and discussed in more detail later in the submission:

- **Identify key issues requiring attention for the proposed mechanisms (these are dealt with separately below)**
- **Formulate a comprehensive strategy with relevant actors including victim groups and civil society**
- **Introduce clear plans and timelines for the implementation of the commitments made of the different mechanisms and initiatives**
- **Have linkages between the different mechanisms and initiatives, complementing each other and to ensure sequencing of mechanisms and initiatives including the truth and reconciliation commission (TRC), Office of Missing Persons (OMP) and special court**
- **Ensure the transitional justice process is victim centered**
- **Have a comprehensive and broad based communication and outreach program**
- **Ensure the mechanisms and initiatives have local ownership**
- **Take steps to build capacity of staff required for the mechanisms and initiatives**
- **Bring in international experts with the necessary expertise and skills for the different mechanisms and initiatives**
- **Ensure the transitional justice process is transparent and inclusive**
- **Ensure the design and implementation of the transitional process and the different mechanisms/initiatives have a gender sensitive approach**

- **Reform the victim and witness protection legislation and have specific protection units in each mechanism**
- **Initiate security sector reform (SSR) which is located within the transitional justice agenda with attention on sequencing and due process**
- **Introduce legal reforms and ensure the strengthening of the rule of law**
- **Identify short, medium and long term measures including initiatives at confidence building**
- **Establish a fully fledged OHCHR country presence in Sri Lanka**
- **Initiate memorialization work across Sri Lanka**
- **Have a comprehensive documentation and archiving system**
- **Introduce transitional justice provisions in the new Constitution**

#### KEY ISSUES AND RECOMMENDATIONS RELATED TO THE FOUR MECHANISMS

##### **1) Office of Missing Persons (OMP)**

The first of four mechanisms, the Government has now introduced draft legislation for the OMP. While welcoming a permanent and independent office to address the significant caseload of missing persons, concerns remain regarding some provisions in the Bill. The OMP has a broad mandate to deal with missing persons with powers to investigate cases. While welcoming the provision for separate units on tracing and protection, there should be consideration of other areas such as **forensics, communication and outreach, documentation and archiving**.

The establishment of a **forensics unit** within the OMP should be a priority. In the absence of an in-house unit, the OMP will not be able to investigate mass graves, oversee exhumations, or identify the missing. Given that the OMP's primary purpose is to locate the disappeared and return remains to families where possible, an in-house, independent forensics unit is crucial to its work. Kosovo's Office of Missing Persons and Forensics (OMPF) and civil-society initiatives in Argentina, Peru, and Guatemala provide a useful roadmap for a victim-centered and low-cost approach to the missing. It is essential to have an investigative model that relies foremost on ante-mortem data provided by families of the disappeared, rather than a costly DNA lab. Given that two mass graves—Mannar and Matale—have been uncovered in recent years, and more

may follow, it is imperative that a single office be responsible for securing and examining the gravesites.

CPA notes that the OMP should consider having a **legal counsel embedded in the OMP**, ensuring there is legal expertise to oversee investigations and open subsequent prosecutions. What the OMP does not have is prosecutorial powers leaving open the question of how prosecutions will take place against alleged perpetrators. In this regard, CPA notes that the special counsel's office should be established immediately to ensure that the OMP and the special counsel's office are able to arrive at a working arrangement when they encounter evidence indicating potential criminal liability. (A more detailed note on specific provisions on the OMP will be submitted separately)

## 2) Truth and Reconciliation Commission (TRC)

The Government's commitment to a TRC is on paper welcome, but concerns remain as to the mandate and how it would differ from the flawed Commission of Inquiry (COI) structure presently in place. A truth telling initiative is welcome if the mandate of the mechanism is able to meet basic standards and has the necessary powers to investigate, inquire, and help Sri Lanka confront the multiple truths of the past.

A TRC should have a mandate to establish the truth of past abuses and recognize the harms suffered.<sup>4</sup> While there may remain contested truths, an independent and impartial TRC should enable **multiple narratives to be heard and made public**. A TRC is also a **platform for victims to speak of their abuses and grievances**, enabling a perspective that may have been ignored/sidelined to be given attention to. It is also an opportunity to unveil denials and silence of the past. The TRCs of Argentina and Chile highlight how truth was documented and made public, after years of military dictatorship. Similarly, the South African TRC provided a platform for the victims to recount past abuses publicly and inform the public of abuses that were not publicly acknowledged.

**A public record of past abuses and the causes of violence can also provide the impetus for reform.** A TRC can help establish that mass scale and systematic violations occurred in the past and highlight **structural flaws** that perpetuate impunity. Such information can mobilize authorities to take action and the public to demand change. This is an important moment to connect truth to non-recurrence.

A TRC should not be considered merely a truth telling and truth seeking initiative. It should be provided with the mandate and resources to ensure that the information received is **documented and archived** in a manner that it can be used and accessed later. It can also conduct outreach and awareness raising campaigns to inform the public of past abuses and underscore the importance of

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<sup>4</sup> For more information on TRCs globally, read: Priscilla B. Hayner, **Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions (2011) 2nd ed.** New York: Routledge

transitional justice for reconciliation. It must also explain why it is different from previous CoIs, making the case to victims and the public that its mandate and focus breaks from past initiatives. For this, it is essential that the TRC has **a clear communication strategy**.

The design of a TRC will need to also consider issues of the time period under focus and which specific incidents should be examined. Practical issues will also need to be factored in when designing a TRC. These include the **location** of a TRC and whether it should have a **presence in particular areas; protection** issues; **language and translation** facilities; the expertise and skills of commissioners and staff; and finances and other resources. It is also critical that a TRC have the necessary **powers to investigate and inquire, enter and search sites, and subpoena witnesses and others**. Partnering with others for specific tasks including civil society, media, victim groups and religious groups to conduct outreach, should be considered. Consideration should also be given to issues such as gender, technology, incentives, and follow up work.

### 3) Special court with special counsel

A key aspect of the Resolution is the government's commitment to establish a special court with a special counsel's office with the "*participation in a Sri Lankan judicial mechanism, including the special counsel's office, of Commonwealth and other foreign judges, defense lawyers and authorized prosecutors and investigators*". (OP 6 of the Resolution)

CPA has previously noted<sup>5</sup> the lack of progress with previous investigations and the continuing culture of impunity, and therefore the promises for accountability must entail novel and effective ways including the robust involvement of international participants. It is important to recognize that a **combination of both national and international actors** will have advantages such as independence, impartiality, capacity and expertise. Consideration will be required regarding composition, especially in terms of the national-to-international ratio, to the roles and responsibilities distributed among them and the practical issues of language.

There is opposition to international participation in an accountability mechanism. CPA has commented on this issue, making the case that **no constitutional bar** exists against foreign judges and lawyers serving in Sri Lanka.<sup>6</sup> Internationals must have a robust involvement in mechanisms. In the past, internationals have been commissioners, observers and advisers. Lessons from the past have indicated the pitfalls of internationals merely having an advisory role and that for real change, they should work alongside nationals and be fully integrated into the mechanisms.

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<sup>5</sup> Bhavani Fonseka and Luwie Ganeshathasan, Hybrid vs Domestic: myths, realities, and options for transitional justice in Sri Lanka (January 2016), available at <http://www.cpalanka.org/hybrid-vs-domestic-myths-realities-and-options-for-transitional-justice-in-sri-lanka/>;

<sup>6</sup> Ibid.

The **ratio of internationals to nationals** will be critical. There must be careful consideration as to the number of judges, lawyers, commissioners, investigators and other relevant staff. In terms of dealing with international crimes and the lack of expertise within Sri Lanka at present, serious thought must be given to how best to move on this. To ensure that no gaps in investigations and prosecutions arise, it would be ideal to consider **more internationals at the beginning**, phasing out with time as expertise and capacity amongst Sri Lankans develop. This was done with the War Crimes Chamber of the Court of Bosnia-Herzegovina where there were both international and national judges and with time the phasing out to a more domestic model. Here it is important to think of timelines and how to build the capacity of local staff with the plan of phasing out internationals. The composition of both internationals and nationals at the early stages will also engender the confidence of victims, who have witnessed countless state investigations with limited follow up.

The court and the special counsel's office will need individuals who are **independent and impartial**. Appointments should be made on the basis of **expertise and merit**, rather than political connections. **International experts** will be required in a range of areas including forensics, investigations, protection, archiving, prosecutions and adjudication. **Selections** for these mechanisms should undergo a **rigorous** process, which meets standards of **professionalism, neutrality, integrity and independence**.

Of crucial importance will be **gender representation** throughout. Female victims of sexual violence and torture have indicated a preference towards having female judges, prosecutors, investigators and translators. The special court, like the other mechanisms, should have a **representative number of women at all levels of staffing**, ensure that all staff take a **gender-sensitive approach**, and investigate cases of **sexual and gender-based violence**. The court should also pay special attention to the **needs of female victims** when planning victim and witness protection and psycho-social support. **Female translators** should be available for all three languages.

It will be paramount that the court has a comprehensive **victim and witness protection unit**. Threats and harassment faced by victims and witnesses have in previous instances impacted testimony and ultimately been a factor in the ability to investigate and prosecute. Practical steps must be taken to provide protection and support to victims and witnesses prior to, during, and after engagement with mechanisms. Consideration can also be given as to how testimony can be obtained while protecting victims and witnesses such as by using **voice and image distortion** and **giving evidence behind screens/in another room**. Selection of personnel to the protection mechanisms should undergo a rigorous screening process, ensuring that the protection teams are comprised of individuals who have the necessary skills and expertise and are independent and professional. There also needs to be consideration of the **standing of victims** before the special court.

Attention must be paid to instituting **secure forms of storing and archiving information** and ensuring the **confidentiality** of evidence and testimony.

CPA also notes that a **special counsel's office** can be established speedily to commence investigating past abuses, collect evidence and testimony, design a prosecution policy, and indict and prosecute alleged perpetrators. A special counsel's office will be an independent office with its own staff to investigate, build a case and prosecute. CPA also notes that other aspects of a special court must be considered including the establishment of a **Defense Office** and **Registrar's Office**. All of these officers and others such as judges will need to be recruited and it is important that criteria for recruitment is based on expertise and merit.

#### 4) Office for Reparations

The fourth mechanism in the Resolution is the establishment of an Office for Reparations. This office should ideally focus on the provision of reparations and on introducing a reparations policy. Reparations include a range of initiatives from symbolic and material to individual and collective. Designing reparations and a policy can be politically sensitive as it will require the listing of different categories of victims and the provision of assistance.<sup>7</sup> In this, a central question is **the definition of a victim** which will require careful consideration. Will it only be limited to war affected communities? What about those affected by the JVP insurrection? Riots? Is there a particular time limit in deciding on the range of categories? These questions will require careful consideration to ensure there is equity and that a policy position does not lead to further discrimination and marginalization. Furthermore, it is important to study previous attempts where forms of reparations were evident such as compensation, restitution and rehabilitation schemes and institutions that had and continue to have a mandate, ensuring lessons are learnt and duplication avoided. A **reparations policy** will be able to set the parameters of a reparations program, ensuring that the policy and program is equitable and does not exacerbate divisions and tensions. Here, lessons from Peru and Colombia should be examined including what Kimberly Theidon has critiqued as the politics of victimhood.<sup>8</sup> A reparations program must also be financially realistic, with the Office having the necessary resources to implement a program comprehensively.

Different schemes will need to be designed to address the range of violations and victim groups. Decisions will need to be made as to whether reparations are individual and/or collective. In some instances a **collective reparations project**, such as supporting the construction of a community space, can be considered. In specific instances of violations, **individual reparations** will be needed such as compensation for victims of torture or sexual violence. CPA's research indicates that victims prefer a **payment scheme** over a one-off payment, as this provides security to the victim.<sup>9</sup> There will also be instances where **symbolic**

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<sup>7</sup> Bhavani Fonseka, *The Need for a Comprehensive Reparations Policy and Package*, Centre for Policy Alternatives (March 2015)

<sup>8</sup> For more information, refer to the work of Kimberly Theidon, *Histories of Innocence*, in Rosalind Shaw and Lars Waldorf (eds.), *Localizing Transitional Justice: Interventions and Priorities After Mass Violence*, Stanford University Press (2013)

<sup>9</sup> Addressed in detail in a forthcoming paper by CPA titled *Accountability and Reparations for Victims of Conflict Related Sexual Violence in Sri Lanka* (July 2016)

**reparations** are possible. A **public apology**, recognizing past abuses and a public commitment to prevent future violence is symbolic and can send a strong message to victims of the Government's commitment to transitional justice and reconciliation.

## OTHER ISSUES AND RECOMMENDATIONS RELATED TO THE TRANSITIONAL JUSTICE PROCESS

This section briefly discusses other issues that must be considered in a transitional justice process.

- In responding to past abuses, it is essential to have a comprehensive approach including investigating past violations, establishing the truth, prosecuting perpetrators, providing reparations and introducing reforms to prevent future violence. While the Government has committed to processes and mechanisms falling within the four pillars, there continues to be a lack of a **comprehensive transitional justice strategy**. The lack of such a strategy has led to delays and frustrations among victims and civil society.
- The effectiveness of a transitional justice process hinges on several factors including **government commitment, local ownership, victim centeredness, timing, communication and outreach, capacity building and ensuring the different mechanisms and initiatives are relevant to the specific context**. The Government must take the lead in implementing its own commitments in a **transparent and inclusive** manner.
- Furthermore, other processes underway such as constitutional reform have resulted in the perception that transitional justice and reconciliation are lower down in the list of priorities for the Government. Moreover, the tensions within the transitional justice process, political demands, and negotiations, raise concerns as to whether the Government will water down its own commitments. And the lack of a clear and coherent communication strategy where the coalition Government speaks in one voice in terms of the transitional justice commitments and plans also raises serious concerns. Thus, steps must be taken immediately to **communicate plans and initiatives and conduct outreach work**.
- Outreach is critical, ensuring that victims and the public are informed and engaged in a transitional justice process, which recognizes its importance for reconciliation in Sri Lanka. Attention should be given to **different outreach tools**, including mainstream and social media, theater, art and discussions. Outreach and the dissemination of information as to what is proposed and why it will be different from the past is essential to earn the



confidence of victims, many having had to engage with several initiatives by successive governments with disappointing results. A transitional justice process must be **victim centered** but also take note of other views. It is, therefore, necessary that a cross section of citizens consider the processes necessary for reconciliation. Citizens must also understand that reforms will lead to concrete changes, thereby gaining their trust and confidence in proposed mechanisms and initiatives. Outreach can also address the different expectations of a transitional justice process, highlighting possible limitations and explaining why all mechanisms and initiatives are necessary. All of these considerations, among several others, provide for a credible process that has the ownership of Sri Lankans and addresses local needs and grievances.

- There should be **linkages** between the different mechanisms and initiatives and attention must be on **sequencing** of mechanisms and initiatives including the truth and reconciliation commission (TRC), Office of Missing Persons (OMP) and special court. Lessons can be learnt from countries such as Sierra Leone which had both a court and a TRC but faced challenges as a result of the two mechanisms working separately. Thus, it is crucial that a clear plan be in place as to how the different mechanisms function independent of each other but in certain instances complement and coordinate. Attention thus must be given towards drafting **terms of reference** and introducing **working methods** to be able to work together in specific instances.
- Paramount when designing mechanisms is to not be held hostage to political expediency and convenience. A credible concern among victims has been with the Government's commitment to truth and justice. The lack of **tangible progress** with past investigations and the prevailing culture of **impunity** must be addressed and the Government must ensure that truth and justice not be deferred indefinitely.
- It is also crucial to **identify resources** required for the different mechanism including persons with the relevant expertise and funding. A critical aspect of successful transitional mechanisms is to recruit the necessary **personnel**, including internationals with specific expertise. Furthermore, **funding sources** must be identified that are able to sustain transitional justice mechanisms and initiatives for several years and possibly decades. The Government will need to ensure that funding does not influence or interfere with the workings of any of the mechanisms. Related to funding should be consideration of a **trust fund for victims**. This too must be independent, providing a neutral source of funding which can provide for reparations and other related needs.

- The Resolution provides for **security sector reform** (SSR). This area has received less attention than the others, but is extremely important for transitional justice and reconciliation. With the promise of a special court, there is an expectation that the most serious allegations will be investigated and alleged perpetrators prosecuted. This, however, is based on several factors including admissibility of evidence, capacity to investigate and prosecute and legal framework recognizing international crimes. Thus, there is a possibility that not all cases will be investigated leading to prosecutions.
- A comprehensive SSR program coupled with targeted prosecutions and a broad truth telling initiative can contribute to addressing the denial of past abuses and acknowledging and acting on the culture of impunity.<sup>10</sup> Such a process can **reform structures** including the military, police and intelligence. A SSR process must be **located within the transitional agenda** and must be **sequenced to ensure it complements other initiatives and does not undermine larger reforms**. A SSR process should also be done efficiently and in a timely manner, avoiding unnecessary delays that can exacerbate the erosion of trust and confidence in public institutions and perpetuate the culture of impunity. That said, a SSR process must also take care to **avoid a governance gap** in particular institutions.
- A concrete vetting process can ensure that those most responsible are held to account and prevented from holding office. **Lustration** (removing or barring human rights abusers from positions of responsibility) can go a long way toward restoring confidence in public institutions and sending a message of zero tolerance for violence. SSR must be done with **due process** standards in place and based on a thorough assessment of an individual's conduct. Group or institutional affiliation is only relevant where a particular unit or organization is widely implicated in abuses.
- There must also be attention to **legal reforms** including **domestic statutory reforms** to incorporate international crimes such as war crimes and crimes against humanity without statutes of limitations and to enact modes of liability with respect to international crimes, such as command responsibility and joint and co-perpetration, into domestic legislation. Legal reforms in other areas include the **repeal of the PTA** and **reform of the PSO** with security legislation enacted in adherence to international standards, **reform of the victim and witness protection legislation**, and **criminalisation of disappearances**. CPA also urges Sri

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<sup>10</sup> For more information, refer to: U.N. DEVELOPMENT PROGRAMME BUREAU FOR CRISIS PREVENTION AND RECOVERY, VETTING PUBLIC EMPLOYEES IN POST-CONFLICT SETTINGS: OPERATIONAL GUIDELINES 9 (2006); OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS, VETTING: AN OPERATIONAL FRAMEWORK (2006)

Lanka to sign and ratify the Rome Statute of the **International Criminal Court** and introduce enabling domestic legislation.

- Although CPA recognizes that an acceptable process of design and implementation of transitional justice mechanisms and initiatives cannot be rushed and will take time, there must be attention to **short-medium-long term action**. Reconciliation cannot be achieved overnight or by checking boxes; it will take time if it is to be sustainable. This though should not hold hostage **confidence building initiatives** such as the release of lands to legal owners, repeal of the PTA and bringing in new security legislation in line with international standards, reforming the victim and witness protection legislation and criminalizing enforced disappearances, among other things. In this regard, it is critical that the Government focuses on the commitments in the Resolution, identifies a roadmap with clear time frames, and ensures that every effort is made to fully implement the commitments contained in the Resolution by March 2017.
- In addition to the establishment of mechanisms to examine and act on past abuses, there must also be steps to prevent violations and to monitor situations by independent actors. CPA for years has consistently called the Government to invite the **OHCHR** to establish a **full-fledged country presence** to monitor the human rights situation. This would be in addition to the existing work of technical assistance.
- In comparative transitional justice processes an important element has been the **right to memory and memorialization**. This requires consideration of different views and grievances and consultation of different communities when designing memory projects. Every attempt should be taken to avoid either a triumphalist approach or initiatives that only recognize one side of a narrative and ignore multiple narratives. Space should also be available for citizens to organize their own events where citizens are able to stand in solidarity with others on a range of issues. This should also include religious and cultural events related to remembering past events. In terms of remembrance, the Government should consider identifying a separate **day to remember the victims of past violence**.
- Linked to remembering and memory projects is **documentation and archiving work**. This is a commitment in the Resolution and the Government should examine best practices in other comparative contexts, including different methods used to protect evidence, and have a secure archiving system.

- Finally, CPA notes the importance of including transitional justice provisions in the new Constitution for Sri Lanka. CPA made specific recommendations regarding this as part of a larger submission to the subcommittee of the constitutional assembly on fundamental rights. CPA includes the relevant part of the submission to the subcommittee of the constitutional assembly as an annex to this submission, thereby informing the Task Force of key issues related to their mandate with relevance to other reform processes.