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“War by Other Means?”

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ABSTRACT

In the wake of Sri Lanka's transition from war to 'peace', a variety of actors have sought to advance competing visions of how to deal with the country's violent past. This paper seeks to critically analyse these efforts with particular attention to the underlying politics which animates them. Drawing on a body of critical scholarship that has recently emerged in the field, it is argued that the case of Sri Lanka provides a particularly stark illustration of the deeply contested nature of transitional justice, in ways which challenge its conceptualisation as a common enterprise or "global project". Moreover, contrary to the notion that transitional justice is most aptly characterised as a 'response' to past abuses of power, the example at hand is used to demonstrate the way in which it is also used to consolidate and legitimize new forms of authority – thus inviting the modification of Foucault's aphorism that transitional justice, like power, may represent 'war by other means'.

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ACRONYMS

GoSL Government of Sri Lanka

1. Introduction

*“... whoever can win the transition can win the peace, and
whoever can win the peace can win the war.”*

(Bell 2009: 25).

The military defeat of the Liberation Tigers of Tamil Eelam (LTTE) in May 2009 by the government of Sri Lanka (GoSL) brought a precarious conclusion to Sri Lanka's intermittent three-decade civil war in which both parties to the conflict are alleged to have committed serious violations of human rights, particularly in its final months. Since then, the GoSL has embarked upon an effort to consolidate the transition from war to peace primarily through a policy of “securitized development” underpinned by the optimistic logic that a combined package of military containment and economic growth will be sufficient for placating Tamil political grievances in the long-term (Goodhand 2011: 130). Though many of the structural causes of the conflict remain intact and indeed, have been exacerbated under this “victor's peace”, a diverse range of actors have since begun to advance the language and practices of ‘transitional justice’ – a field married to a broad ‘toolkit’ of options for those seeking to address a society's legacy of past violence that includes truth-telling, criminal prosecutions, reparations, institutional reform and memorialisation (ICTJ 2009).

A striking feature of this trend however, has been the divergent manner in which the government, the diaspora and the international community have engaged with the idea of transitional justice, with each of these actors offering a variety of competing visions of how to ‘deal with the past’. Whilst on the one hand the GoSL have been eager to demonstrate an ostensible commitment to ‘reconciliation’ under the auspices of the ‘Lessons Learnt and Reconciliation Commission’ (LLRC) and as part of its economic development and resettlement programmes, the Tamil diaspora have continued to press firmly for the criminal accountability of members of the Rajapakse regime under the charges of war crimes, crimes against humanity and genocide. Whilst the response of the international community has in many ways become increasingly sharp-toothed since the 2009 United Nations Human Rights Council (UNHRC) resolution which congratulated the government's military victory over the LTTE, its ability to pursue a transitional justice agenda grounded in the authority of international law has been persistently

constrained by the dynamics of inter-state politics. Despite the findings of the United Nations Secretary-General's Panel of Experts Report on Accountability in Sri Lanka that deemed 'credible' allegations of gross violations of international law and identified shortcomings in Sri Lanka's domestic transitional justice response, its recommendation for the establishment of an international independent mechanism of investigation is yet to come to fruition.

The aim of this paper is thus to analyse the contested terrain of transitional justice that has materialised under the victor's peace in Sri Lanka. Drawing on a critical literature that has recently emerged in the field which contends that greater attention needs to be paid to the hidden politics of how particular notions of transitional justice are constructed by actors, its core argument is that the case of Sri Lanka offers a rich example of the deeply contested nature of 'dealing with the past'. More precisely, the aim is to demonstrate that there exists a great deal of continuity between Sri Lanka's war-time political dynamics and those that currently animate the contest that is being fought over the meaning of transitional justice. As will be argued, articulations of transitional justice are closely bound up with the political identity and interests of those who express them, with actors utilizing the language and practices of the paradigm as a means of fulfilling their goals. In the context of Sri Lanka, this means that whilst actors may appeal to shared ideals such as 'reconciliation', such terms may often serve to obscure a divergent array of underlying interests and projects. Indeed, as will be seen, such terms and their associated practices may even provide cover for the continuation of the sort of domination and abuse that they purport to be addressing.

Following a literature review, Chapter Three begins by considering the two 'home-grown' transitional justice responses that have emerged in Sri Lanka under the rubric of the LLRC and as part of the government's economic development and resettlement programme. Analysing the discourses in which notions such as 'reconciliation' and 'truth-telling' have been packaged by elites, it is argued that the GoSL have appropriated the language of the transitional justice paradigm whilst simultaneously stripping it of its normative content. Moreover, it is argued that the particular discourses that have been deployed serve important political functions - in terms of consolidating the authority of the regime, in concealing the continued domination of the Tamil population, and in deflecting demands for accountability. In this respect, it is suggested that the puzzle of

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2. Literature Review: Sri Lanka in Context

Over the last twenty years, transitional justice has emerged as an established field of scholarship connected to a field of practice aimed at addressing the legacies of past human rights abuses in societies in transition. Whilst it is not possible to provide a comprehensive overview of its evolution, three developments are of particular relevance to the aims of this paper.

First, whilst at the field's inception the term 'transition' referred to shifts from authoritarian rule to democracy (based on the experiences of Central America and Eastern Europe in the 1980s and early 1990s), the meaning of the term has been augmented to denote societies undergoing transition from periods of violent conflict to peace more generally. Whilst Sri Lanka has undergone a transition from war to a 'negative peace', it poses a somewhat peculiar case for the paradigm in that the

of the term 'reconciliation' in particular may frequently serve to conceal a wide array of positions over its precise content. This paper thus draws on the work of critical scholars such as Bell, Lundy and McGovern, who have stressed the importance of deconstructing the language of transitional justice, and of considering the underlying motives of the actors who employ it (Bell 2009; Lundy & McGovern 2009).

Finally, the growth of the field has been accompanied by the proliferation of a diverse array of institutions and actors engaged in shaping its normative terrain, and in designing and implementing its mechanisms in practice. The study of transitional justice has thus

recently presented at the National Conference for Peace and Conflict Research (2012). This dissertation seeks to make a modest contribution to this literature by considering the case of Sri Lanka through the lens of the more critical scholarship which has recently emerged in the field of transitional justice.

3.

A notable aspect of Sri Lanka's post-war period has been the GoSL's ostensible focus on resettlement and development programming in the North and East of the country (the latter

emerged, and as land disputes and creeping ‘Sinhalisation’ produce new grievances among the local population (ICG 2012: 7). This case thus highlights an interesting contradiction, in which the language of reconciliation has been used to justify measures which may run counter to the realization of that goal.

the following analysis suggests, the LLRC process both contains and is embedded in three discourses in particular that appear to have been designed to serve the interests of the Rajapakse regime.³

i) Limiting the Scope of 'Truth-Telling'

First, it can be argued that the LLRC's mandate provides an immediate discursive framing of the appropriate scope of 'truth-telling' which helps to deflect calls for accountability for violations of international law. By seeking to inquire "into the facts and circumstances which led to the *failure of the ceasefire agreement* operationalised on 21st February 2002 and the sequence of events that followed thereafter up to the 19th of May 2009", the report appears to intentionally skew the process of truth-telling towards a very particular set of causes of the conflict (LLRC 2011: 5, emphasis added). Rather than focussing primarily on truth-telling in relation to standards in the conduct of the war within its mandate, the LLRC conceives of its goals of preventing recurrence and promoting reconciliation as principally rooted in an analysis of the failure of the peace process, thereby 'constructing' a particular narrative about the past (LLRC 2011: 5-6; Cherry 2009: 257).

Beyond shielding the government and security services from calls for accountability, this construction of history appears to serve the political interests of the Rajapakse regime in two further ways. First, the promotion of a narrative that depicts those responsible for the failure of the peace process as the dominant wrongdoers helps to sustain the impression that the resumption of military operations in 2006 was an inevitable outcome. Whilst many of the causes of the conflict did indeed stem from the decisions of the previous government, not least in terms of the perverse effects of its neo-liberal reform agenda, such a discourse neglects the agency of the Rajapakse regime in evaluating the reasons behind the escalation of the conflict (Venugopal 2009). Furthermore, the apportioning of blame onto Wickremesinghe's UNP contains many obvious political benefits given its current status as the main opposition party. In this respect the LLRC appears largely to have followed in the tradition of past truth commissions in Sri Lanka, which as one

language of 'reconciliation' may in fact become a vehicle for the exercise of power when articulated as a process of psychological change – in this case, the attempt to deny minority identities and to advance a hegemonic nationalism grounded in Sinhala-Buddhism. What the case of Sri Lanka demonstrates quite strikingly therefore is that

32). Similarly, the Sri Lankan Army's establishment of a panel of inquiry to investigate human rights abuses in March 2012 appears to have served as a ploy to deflect pressure for accountability at an upcoming UNHRC session. In this sense, the behaviour of the GoSL with regards to transitional justice processes can be described as following a "performative logic" – a term which Drexler has recently used to describe the way in which elites from East Timor and Indonesia have jointly initiated truth commissions as a means of dampening demands for a more powerful (and prosecutorial) international tribunal (2011: 51).

In this vein, another striking similarity between these cases and that of Sri Lanka has been the way in which elites have attempted to favourably compare their initiatives to the South African Truth and Reconciliation Commission – an initiative that carries many positive connotations within the international community, but which also coheres with the interests of these transitional elites in terms of its focus on reconciliation via restorative justice, economic reparations, and its appeals to localization (Karthick 2012). The invocation of the imagery of the TRC by the GoSL, as well as its attempts to forge diplomatic ties with South Africa around that process, thus highlights the importance which transitional elites seem to place on the management of external perceptions through the use symbolic measures (Arbour 2011). More generally, it underscores the point that the field of transitional justice needs to pay heed to the underlying political agendas which may explain the question of why particular transitional justice processes are pursued by elites at particular times. As the case at hand suggests, these processes may simply be part of a strategy of 'window-dressing' designed to win the acquiescence of potentially threatening external actors.

This then begs the second question: how effective has the deployment of transitional practice and rhetoric by the GoSL been as a means of subverting accountability issues? Despite the apparent strengthening of the international community's resolve on accountability demonstrated by the UNHRC resolution in March 2012, there are several indications that Sri Lanka's transitional justice discourses have also gained some purchase within the international diplomatic community. For example, as one member of a recent UK parliamentary delegation commented in regards to the implementation of infrastructure projects in North and East, "we can describe these developments as the positive signs of the reconciliation process" (*Sri Lankans Puwath* 2012). Furthermore, in

response to the recent announcement of a 'National Action Plan' for the implementation of the LLRC recommendations, a US government press-statement commended the "very serious posture and stated that, "we believe the full implementation of the National Action Plan will benefit all citizens of Sri Lanka by furthering long-term reconciliation and peace" (*Colombo Telegraph* 2012a). Whilst the significance of these examples

identified as crucial for the continuation of violence at several stages of the conflict (Anderson 1992; Fair 2007). At the same time however, scholars have stressed the ambiguity of this relationship over time, highlighting the way in which it has been contingent on the changing opportunity structures relating to identity maintenance, leadership struggles, organisational interests, and concerns about status in the homeland (Shain 2002: 128).

In many ways, Shain's observation of these war-time dynamics is strongly echoed in the engagement of the Tamil diaspora with transitional justice processes since May 2009. Most significantly, the defeat of the previously hegemonic LTTE has generated political space and opportunities for new organisations and expressions of Tamil nationalism to emerge. On the one hand, and at the risk of over-generalizing, this re-mobilisation has

to the view that 'transitional justice' is about addressing the drivers of conflict, the phrase again appears to be capable of concealing the pursuit of a number of war-time goals. In practice, this universalist/particularist tension that has characterised the Tamil diaspora's articulations of transitional justice has been most visible in terms of the scepticism with which judicial bodies have treated overtly biased accountability-seeking groups. The danger however is not merely that accountability-seeking of this sort won't be effective, but also that it will serve to promote and reinforce the same kind of oppositional identity politics that has historically fuelled the Sri Lankan conflict.

4.3. Beyond Accountability: The Politics of Memorialisation and Reconciliation

Finally, it is worth considering the alternative ways in which the Tamil diaspora have been engaged in transitional justice processes beyond accountability-seeking. First, the Tamil diaspora has been involved in memorialisation - a process which the transitional justice literature suggests is capable of reconciling tensions through the acknowledgement of past atrocities and the honouring of victims (for example ICTJ 2012). Again however, these processes have remained deeply embedded in nationalist discourse in ways which run counter to the goals of the paradigm. For example, the primary diaspora event honouring Sri Lanka's war dead consists of the annual 'Hero's Day', which combines commemoration of the victims of violence the celebration of the LTTE's 'martyrdom'. In this respect, memorialisation efforts by the Tamil diaspora have largely mirrored state sanctioned efforts in Sri Lanka, which as one scholar writes, have been "confined to honouring combatants and not to honouring victims at large or remembering the violence in general" (Anonymous 2011: 44). Absent memorialisation initiatives which seek to bridge the ethno-nationalist divide, such efforts from a transitional justice perspective therefore seem incapable of delivering reconciliation, and indeed, would appear to further aggravate its attainment.

Several diaspora organisations have however sought that goal in a very direct way through specific reconciliation-oriented programmes. Working around accountability issues, groups such as *Voices for Reconciliation* have undertaken projects (such as workshops) which seek to bring together individuals from across the ethnic divide. From a transitional justice perspective, the contribution of such initiatives can be conceptualised in terms of their effect in chal

“demonstrating the possibility of dialogue and alternatives” to the homeland population (Haider 2012: 11). Notably however, such initiatives have been criticised by more nationalist elements of the Tamil diaspora who perceive them as legitimizing the same ‘thin’ model of reconciliation offered by the GoSL and thereby consolidating the political status quo. For example, as one *TamilNet* article reads, “the intensification of such activities targeting the Eezham Tamil diaspora in a post-Mu'llivaaykkaal scenario by such organizations, without seeking to address truth of genocide and structural genocide, but talking only about reconciliation, makes the intentions of such actors questionable” (2011).

This contestation poses two challenges to the transitional justice paradigm. First, it again highlights the fact that it cannot be conceptualised as a singular unifying “global project” (Nagy 2008), but rather a contested terrain, in which the language of transitional justice (e.g. ‘reconciliation’) conceals a diverse array of political positions about the specific content of concepts and their practical implementation. Secondly, it highlights the tension between transitional justice and issues of *political* justice more broadly - for example, with regards to the right to self-determination. Whilst the field of transitional justice contains ‘political reform’ within its toolkit of options, in many ways it is ill-equipped to deal with the dual demands of addressing both human and political rights issues. This fact would appear to derive from the assumption, often implicit within the paradigm, that the *transition itself* will have involved the righting of political injustices. In the case of Sri Lanka’s “non-liberal transition” however, such assumptions may simply lead to calls for processes that serve (or at least are perceived) to simply ‘pave over the cracks’ of broader political injustices (Hansen 2011). Having considered the ways in which the meaning of transitional justice is subject to contestation among the diaspora, the following section will now look at the way in which its application has been subject to broader power politics within the international community of states.

5. Transitional Justice and the International Community

Whilst there has been growing optimism about the potential for the international community and its associated institutions to implement and positively engage with endeavours related to ‘dealing with the past’, what the case of Sri Lanka illustrates quite starkly is the way in which the application of transitional justice may also be heavily constrained by politics in this sphere. As this chapter will argue, these constraints do not merely result from the state-based nature of international institutions which enables the geo-political interests of powerful non-liberal states to shape transitional justice responses. As will be argued, these constraints also derive from issues relating to the former complicity of Western states in permitting and sustaining the conflict, as well as from strategic concerns about the potentially counter-productive impacts of accountability-seeking in terms of Sri Lanka’s domestic political dynamics. The aim is thus to challenge the dominant conception of transitional justice as a unifying “global project” and to highlight the manifold ways in which it is subject to political contestation at the global level. It will therefore seek to reinforce Hoglund and Orjuela’s observation that “while the transitional justice paradigm claims universalism, it is at the same time very arbitrary in terms of how it functions and in terms of who is held accountable” (Hoglund and Orjuela 2012: 6).

5.1. Accountability-Seeking in a System of States: between Norms and Interests

Whilst Teitel observes a trend of “growing entrenchment and institutionalization of the norms and mechanisms of transitional justice” epitomised by the establishment of the permanent International Criminal Court (ICC), our present example serves as a strong reminder of the limitations imposed on transitional justice by the

The absence of an effort for a referral thus far however draws our attention to the importance of geo-political considerations in conditioning the application of international transitional justice mechanisms. Two aspects of the Sri Lankan case in particular appear to demarcate it from the previously successful referrals of Darfur and Libya to the ICC. First, unlike these foregoing cases, Sri Lanka is subject to strategic concerns which levitate very strongly against the pursuit of justice - most significantly, in terms of

instrumental value to the pursuit of a number of other political goals, the desire is to further challenge the dominant formulation of transitional justice as a global project consisting of a pre-determined list of values and mechanisms. The apparent way in which accountability seeking is subject to these strategic concern instead lends support to Aplant's re-conceptualisation of transitional justice as essentially "a *negotiation* between normative political forces; the infusion of moral (and legal) considerations into what it is an inherently political project" (2012 emphasis added).

In this context, where the possibility for firm investigation into violations of international law has been undermined by the geo-political interests, former actions and strategic concerns of powerful actors within the international community, accountability-seeking from the international community has largely continued to operate via the exhortatory force of both the UNSG's Panel of Experts Report and the UNHRC, the latter of which passed a resolution in March 2012 asking the GoSL to explain how it will investigate allegations of human rights abuses. Whilst from one perspective this last development would appear to signal progress since the resolution in May 2009, it is important to note the way in which it also appears to endorse and condone the government's existing response by urging it to implement the recommendations of the LLRC.

In this respect, it would seem that the international community remains highly vulnerable to judging the progress of the GoSL's transitional justice response in terms of the execution of its 'home-grown' initiatives. As has been argued in Chapter Three however, these flawed initiatives are likely to amount to serving little more than a performative function for the government, enabling it to deflect accountability issues whilst concealing continued domination and abuse under the guise of 'reconciliation'. Whilst it seems unlikely that the recent announcement of the National Action Plan for the implementation of the LLRC's recommendations or the establishment of a panel of inquiry into human rights abuses committed by the army will yield a substantive form of transitional justice, it remains an open question whether these initiatives will be sufficient to "outlast international attention" (*Colombo Telegraph* 2012b). In the meantime, the GoSL's deft manipulation of the perceptions and interests of powerful actors within the international community continues to underscore the highly arbitrary nature of the way in which transitional justice functions, despite the paradigm's claim to universalism.

Tamil diaspora organisations attest, transitional justice processes may be tightly intertwined with the particularist goals of nationalism. On a broader level, it would seem that transitional justice responses are also deeply embedded in global structures of power which strongly determine their application. In light of the way in which accountability-seeking in Sri Lanka has been undermined by the geo-political interests, former actions and strategic concerns of powerful actors within the international community, we are reminded of the often very arbitrary nature of the way in which transitional justice functions despite its appeal to universalism.

Finally, the recent body of critical scholarship is hugely pertinent to the case of Sri Lanka because of the way in which it remains attuned to the question of *what is being 'transitioned', and on whose terms*. Not only does this sort of thinking provoke healthy scepticism about appeals to the 'localization' of transitional justice, but it also leads us to

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