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Looking for 'Justice' in All the Wrong Places: An International Mechanism or Multidimensional Domestic Strategy for Mass Human Rights Violations in Sri Lanka?

Sujith Xavier

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Abstract:

I use the United Nations Panel of Experts on Accountability in Sri Lanka Panel's recommendation to create an international mechanism and recent demands for justice as a springboard to argue that the creation of a new ad hoc international or hybrid criminal tribunal for Sri Lanka may not produce the expected results of prosecuting those responsible for mass human rights violations. I argue that such an initiative will not heal the ruptures and cleavages among the different ethnic communities in Sri Lanka. By teasing out the political nature of international criminal law and the embedded nature of the history of international law, this chapter suggests that the creation of an international institution may not bring to justice the divergent perpetrators of war crimes. Rather, the politics of international institutions and the history of international law may allow for 'regulatory capture' and the continuing rise of international experts as seen through the illustrative history of the International Criminal Tribunal for Rwanda.

Keywords:

Sri Lanka, transitional justice, international criminal law

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“The Secretary-General should immediately proceed to establish an independent international mechanism (...).” The *UN Panel of Experts on Accountability in Sri Lanka* (March 2011).¹

1 Introduction

The international community, especially non-governmental organizations (NGO)² and the Tamil diaspora³ are eager at the prospects of ‘delivering justice’ and ‘ending impunity’ in Sri Lanka. One possibility is to create a new *ad hoc* or hybrid international criminal tribunal analogous to the International Criminal Tribunal for Former Yugoslavia (ICTY), International Criminal Tribunal for Rwanda (ICTR) or the Sierra Leone Special Court (SCSL).⁴ In her visit in August of 2013, Navi Pillay, the United Nations High Commissioner for Human Rights, pushed for some form of accountability for the civilian casualties from 27 years of conflict, especially during the lead up to the defeat of the Liberation Tigers of Tamil Eelam

¹ United Nations Secretary General’ Panel’s Report, Recommendation 1: Investigation (B): The Secretary General should immediately proceed to establish an independent international mechanism, whose mandate should include the following concurrent functions:

(i) Monitor and assess the extent to which the Government of Sri Lanka is carrying out an effective domestic accountability process, including genuine investigations of the alleged violations, and periodically advise the Secretary-General on its findings; (ii) Conduct investigations independently into the alleged violations, having regard to genuine and effective domestic investigations; and (iii) Collect and safeguard for appropriate future use information provided to it, which is relevant to accountability for the final stages of the war, including the information gathered by the Panel and other bodies in the United Nations system; United Nations, *UN Secretary-General’s Panel of Experts on Accountability in Sri Lanka* (September 2011), SG/SM/13791 HR/5072.

² Amnesty International, “Sri Lanka: Reconciliation at a crossroads: Continuing impunity, arbitrary detentions, torture and enforced disappearances: Amnesty International Submission to the UN Universal Periodic Review”, 1 April 2012; Amnesty International, No Real Will to Account: Shortcomings in Sri Lanka’s National Plan of Action to implement the recommendations of the LLRC, 30 August 2012, ASA 37/010/2012; International Crisis Group (ICG), *Sri Lanka’s Authoritarian Turn: The Need for International Action*, 20 February 2013, Asia Report N°243, available at: <http://www.unhcr.org/refworld/docid/5124deb32.html>; Human Rights Watch, “We Will Teach You a Lesson” - *Sexual Violence against Tamils by Sri Lankan Security Forces*, 26 February 2013, ISBN: 1-56432-993-3, available at: <http://www.unhcr.org/refworld/docid/5130850f2.html>.

³ For example see Kubes Navaratnam, “Post-conflict Sri Lanka needs Canadian R2P”, Embassy (28, 03, 2012); Vani Selvarajah, “Sri Lanka on notice: Where do we go from here?” (2013) Toronto Star; Harini Sivalingam, “Canada can help Sri Lanka” The Sun (Jan 17, 2013); CTC, Statement at the Press Conference held at the Canadian Parliament on November 15, 2012, online < <http://www.canadiantamilcongress.ca/article.php?lan=eng&cat=pr&id=74>>; See also Center for War Victims and Human Rights, “War Victim Documentation” Project, online < http://www.cwvhr.org/web/index.php?option=com_content&view=article&id=68&Itemid=55>.

⁴ “While similar to the first generation tribunals in their organizational structure, subject matter jurisdiction and international legitimacy, mixed [hybrid] tribunals are distinguished from the former by their legal status, their mixed jurisdiction and composition and their funding mechanism”; Daphana Shraga, “Mixed or international Courts” in Antonio Cassese, ed., *The Oxford Companion to International Criminal Justice* (Oxford: OUP, 2009) at 424; Frederic Megret, “In Defense of Hybridity: Towards a Representational Theory of International Criminal Justice” (2005) 38 Cornell International Law Journal.

(LTTE). These aspirations point to the possibility of indicting and prosecuting members of the current Sri Lankan regime and the remaining members of LTTE for potential war crimes and crimes against humanity charges.

In this paper, I use the Panel's *recommendation to create an international mechanism and recent demands for justice* as a springboard to argue that the creation of a new *ad hoc* international or hybrid criminal tribunal for Sri Lanka may not produce the expected results of prosecuting those responsible for mass human rights violations. Moreover I argue that such an initiative will not heal the ruptures and cleavages among the different ethnic communities in Sri Lanka. By teasing out the political nature of international criminal law and the embedded nature of the history of international law, this chapter suggests that the creation of an international institution may not bring to justice the divergent perpetrators of war crimes. Rather, the politics of international institutions and the history of international law may allow for 'regulatory capture'⁵ and the continuing rise of international experts⁶ as seen through the illustrative history of the ICTR. This is counterproductive to the goals of creating an international institution to deliver justice to the victims of war crimes and crimes against humanity. While international and hybrid institutions are theoretically distinct, I treat these two types of institutions as being similar in their effects.⁷

The local Sri Lankan and international NGOs working in the North and East rely, within the context of the vacuous political space created by the defeat of the LTTE, on the international community and its potential power to influence and control the behavior of the Government of Sri Lanka (GoSL). Some of local inhabitants believe that the international community has the potential to be their saviors.⁸ Inversely, pockets of the Tamil diaspora feeds off the narratives of victims as a means to fuel their nationalist agenda. The main challenge, however, is to critically examine the existing global governance⁹ mechanisms as a potential tool to bring those responsible for past mass atrocities and ongoing human rights violations, whilst moving forward by rebuilding the decimated Sri

⁵ Walter Mattli and Ngaire Woods, 'In Whose Benefit? Explaining Regulatory Change in Global Politics' in Walter Mattli and Ngaire Woods (eds), *The Politics of Global Regulation* (Princeton University Press, 2009) at 5.

⁶ David Kennedy, "Challenging Expert Rule: The Politics of Global Governance" (2005) 27 *Sydney Journal of International Law* 8; Elena A Baylis, 'Tribunal-Hopping with the Post-Conflict Justice Junkies' (2008) 10 *Oregon Review of International Law* 361.

⁷ Tim Kelsall, *Culture under Cross-Examination: International Justice and the Special Court for Sierra Leone* (Cambridge: CUP, 2009).

⁸ Makau W. Mutua, "Savages, Victims, and Saviors: The Metaphor of Human Rights" (2001) *Harvard International Law Journal* 42 (1) 201-245.

⁹ Lawrence Finkelstein, "What Is Global Governance?" (1995) 1 (3) *Global Governance* pp. 367-372; David Held, *Global Covenant: The Social Democratic Alternative to the Washington Consensus* (Polity, 2004); Peer Zumbansen, 'Transnational Legal Pluralism' (2010) 1(2) *Transnational Legal Theory* 141.

Lankan society.¹⁰ A new fabric must be reconstituted that takes account of the ethnic and religious divides that have been exacerbated by 27 years of war.

The protracted Sri Lankan ethnic conflict continues to this day, even though the GoSL defeated the LTTE, the Tamil secessionist movement. The continued discriminatory practices of the GoSL can be gleaned through its ongoing military occupation of the Northern and Eastern Provinces.¹¹ The discriminatory practices started with the independence from British rule and these practices resulted in the secessionist sentiments.¹²

The Panel's recommendation calls for the establishment of an independent international mechanism to monitor the Sri Lankan Government's initiation of accountability proceedings to investigate the alleged violations, and to collect evidence of past crimes. The recommendation does not suggest the utilization of the International Criminal Court (ICC) or other transitional justice tools.¹³ These tools can include Truth Commissions or Commissions of Inquiry, for example. By taking stock of the Panel's recommendation, I argue instead that the creation of a new international and/or hybrid institution through the investigation of alleged violations (and the collection of data for future use) may yield a whole host of other issues that are connected to the existing global politics and the history of international law.¹⁴ Whilst the UN Panel did not directly call for the creation of an *ad hoc* or hybrid international institution, there is implicit recognition that creating such a mechanism could monitor Sri Lanka's initiation of accountability proceedings and collect evidence. The international community has often relied

¹⁰ Accountability and memory are some of the main tenets of transitional justice. See for example Claudio Corradetti, *Philosophical Issues in Transitional Justice Theory: A (Provisional) Balance, Politica & Societa', Il Mulino, Bologna, 2/2013*.

¹¹ ICG report on the impeachment; Human Rights Watch, "We Will Teach You a Lesson" - Sexual Violence against Tamils by Sri Lankan Security Forces, 26 February 2013, ISBN: 1-56432-993-3, available at: <http://www.unhcr.org/refworld/docid/5130850f2.html>; International Crisis Group (ICG), *Sri Lanka's Authoritarian Turn: The Need for International Action*, 20 February 2013, Asia Report N°243, available at: <http://www.unhcr.org/refworld/docid/5124deb32.html>; The Social Architects, "The Numbers Never Lie: A Comprehensive Assessment of Sri Lanka's LLRC Progress", March 2013, available at: <http://cl.ly/0d0M1S2F3N3H>.

¹² ICG report on the impeachment; Human Rights Watch, "We Will Teach You a Lesson" - Sexual Violence against Tamils by Sri Lankan Security Forces, 26 February 2013, ISBN: 1-56432-993-3, available at: <http://www.unhcr.org/refworld/docid/5130850f2.html>; International Crisis Group (ICG), *Sri Lanka's Authoritarian Turn: The Need for International Action*, 20 February 2013, Asia Report N°243, available at: <http://www.unhcr.org/refworld/docid/5124deb32.html>; The Social Architects, "The Numbers Never Lie: A Comprehensive Assessment of Sri Lanka's LLRC Progress", March 2013, available at: <http://cl.ly/0d0M1S2F3N3H>.

¹³ United Nations, *UN Secretary-General's Panel of Experts on Accountability in Sri Lanka* (September 2011), SG/SM/13791 HR/5072, Recommendations 1B

¹⁴ Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press, 2004); Makau Mutua, "What is Twail?" (2000) American Society of International Law, Proceedings of the 94th Annual Meeting 31; Antony Anghie, 'What is TWAIL: Comment', (2000) 94 American Society of International Law 39; Obiora C. Okafor, 'Critical Third World Approaches to International Law (TWAIL): Theory, Methodology, or Both?' (2010) 10 International Community Law Review 37.

on such a process to start international criminal proceedings. For example, both the *ad hoc* tribunals were created based on similar recommendations and subsequent reports of the Commissions of Inquiry that were set up to investigate, monitor and collect evidence.¹⁵

The political power of potential international prosecutions as a possible deterrent against current or former oppressive regime is understandable.¹⁶ Moreover, it is a potential catalyst to a transitional justice moment, in which post-authoritarian, post-communist, and post-conflict societies can transition from moments of acute crisis to moving forward through the prosecution of those responsible for human rights violations.¹⁷ There are numerous alternatives to the formalist responses in transitional justice, ranging from national prosecutions, truth commissions, sanctions, reparations, amnesties and pardons.¹⁸ The emphasis on the legalist push within these moments of transitions has been subject to incisive criticism and interrogation. Rama Mani has suggested that transitional justice should focus on the creation of a holistic future that incorporates the rebuilding of legal and social institutions with reparations for past crimes while simultaneously fostering distributive justice.¹⁹ Likewise, there are other interventions that trace the connection between law and development strategies and transitional justice.²⁰ More recently, Vasuki Nesiah has noted that transitional justice tools have tended to emphasize accountability for past crimes through individual criminal responsibility for specific prohibited conduct and through the desire to move forward.²¹ Ultimately, therefore Nesiah argues that “transitional justice institutions [...] may be better understood as having operated as official gate

¹⁵ Cherif Bassiouni, “United Nations Commission of Experts Established Pursuant to Security Council Resolution 780 (1992)” (1994) 88 Am. J. Int'l L. 784; Robert Cryer, *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime* (Cambridge: Cambridge University Press, 2005) at 52; Leila Nadaa Sadat, & Michael P Scharf, *The Theory and Practice of International Criminal Law: Essays in Honor of M. Cherif Bassiouni* (Leiden: Martinus Nijhoff Publishers, 2008); Roy Lee, “The Rwanda Tribunal” (1996) 9 Leiden J. Int'l L 37 at 2.

¹⁶ Christoph J. M. Safferling, *Towards an International Criminal Procedure* (Oxford University Press, 2012).

¹⁷ Ruti G. Teitel, *Transitional Justice* (Oup 2000); Ruti G. Teitel, “The Transitional Apology,” in Elazar Barkan and Alexander Karn, eds, *Taking Wrongs Seriously: Apologies and Reconciliation* (Stanford University Press 2006); Paige Arthur, “How Transitions Reshaped Human Rights: A Conceptual History of Transitional Justice”, (2009) *Human Rights Quarterly* 2; Palmer, Nicola, Clark, Phil & Granville Danielle, *Critical Perspectives in Transitional Justice* (Intersentia, 2012).

¹⁸ Jose Alvarez, “Alternatives to International Criminal Justice” in Antonio Cassese, ed., *The Oxford Companion to International Criminal Justice* (Oxford: Oxford University Press, 2009);

¹⁹ Rama Mani, *Beyond Retribution: Seeking Justice in the Shadows of War* (Cambridge: Polity Press, 2002).

²⁰ Rama Mani, ‘Dilemmas of Expanding Transitional Justice, or Forging the Nexus between Transitional Justice and Development’ (2008) 2 *International Journal of Transitional Justice* 25.

²¹ Vasuki Nesiah, “The Trials Of History: Losing Justice In The Monstrous And The Banal” in P Zumbansen and R Buchanan (eds) *Law in Transition: Development, Rights and Transitional Justice* (Oxford, Hart Publishing, 2013).

keepers, privileging some histories and obscuring others.”²² This chapter builds on this literature to argue that groups advocating for post war accountability measures in Sri Lanka should consider turning away from the legalist model of international criminal institutions in favor of alternative, emancipatory tools for transitional justice.

The first part of this analysis sets out the intricate institutional landscape of international criminal institutions and then focus on the ICTR. The second section will draw broad claims from the ‘lived’ experience of these institutions and is largely based on my prior publications and my ongoing doctoral work. Based on historical examination, I contextualize the creation of ICTR within global governance discussions to argue that an international or hybrid tribunal for Sri Lanka may not deliver justice or end impunity. Thus, the focus should shift from the international to the local domestic,²³ such that more emphasis is placed on building the local judiciary and legal profession, especially through existing NGO structures, in order to foster an environment that promotes access to justice, particularly for the victims of the war.

2 Diverse Models of Delivering International Justice: International Criminal Tribunal for Rwanda

The evolution of international law is embedded within an expansionist colonial history that arguably commenced with Treaty of Westphalia and the creation of the nation-state.²⁴ The turn to international institutions²⁵ is both admired²⁶ and criticized²⁷ for importing components of domestic legal regimes to

²² Vasuki Nesiah, “The Trials Of History: Losing Justice In The Monstrous And The Banal” in P Zumbansen and R Buchanan (eds) *Law in Transition: Development, Rights and Transitional Justice* (Oxford, Hart Publishing, 2013) at 21.

²³ See generally Rosalind Shaw & Lars Waldorf, eds., *Localizing Transitional Justice: Interventions and Priorities After Mass Violence* (SUP, 2010); Dustin N. Sharp “Addressing Dilemmas of the Global and the Local in Transitional Justice”, online <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2288853>

²⁴ Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press, 2004); Martti Koskenniemi, “International Law and Raison D’Etat: Rethinking the Prehistory of International Law” in Benedict Kingsbury and Benjamin Straumann, *The Roman Foundations of the Law of Nations: Alberico Gentili and the Justice of Empire* (Oxford University Press, 2010), 297-361; Hauke Brunkhorst, *Constitutionalism and Democracy in the World Society*, in: Dobner & Loughlin (eds.), [see previous reference], 179-198.

²⁵ See generally David Kennedy, “The Move to Institutions”, (1987) 8 *Cardozo Law Review* 841.

²⁶ Jose E Alvarez, “Judging the Security Council” (1996) 90 *Am. J. Int’l. L* 1; Jean L. Cohen, “A Global State of Emergency or the Further Constitutionalization of International Law: A Pluralist Approach” (2008) 15 (4) *Constellations* 456; Neil Walker, “Beyond Boundary Disputes and Basic Grids: The Global Disorder of Normative Orders” (2008) 6 *International Journal of Constitutional Law* 373.

²⁷ M. S Sornarajah, “Power and Justice in International Law”, (1997) *Singapore Journal of International and Comparative Law* 28 at 32. There is a tangential discussion of the League of Nations’ failure.

the international sphere, for example, assemblies, tribunals, executives, and legislatures.²⁸ Theorists are preoccupied with understanding and describing the ebbs and flows of international law through its process, actors and norms,²⁹ using both domestic and plural conceptions of law, such as Global Administrative Law³⁰; Global Constitutionalism³¹; Legal Pluralism³² and Transnational Legal Pluralism³³. International criminal law is one of the fastest growing fields in international law. International criminal institutions are part and parcel of the existing global governance regimes. The end of the Cold War precipitated the proliferation of international criminal justice institutions.³⁴ Numerous international and hybrid or mixed criminal institutions have been created in the last twenty years, including the permanent International Criminal Court.³⁵

The *sui generis* tribunals (ICTR and ICTY) are the direct descendants of the International Military Tribunal for Nuremberg and the International Military Tribunal for the Far East.³⁶ The 60 year long gap between the prosecution of those responsible for the commission of war crimes during World War II and the international prosecution of war crimes in the Former Yugoslavia and Rwanda is

²⁸ John Charney, "Is International Law Threatened by Multiple International Tribunals?" (1998) 271 *Recueil des cours* 101; Carsten Stahn, "Judicial Review of Prosecutorial Discretion: On experiments and imperfections", in G. Sluiter (ed.), *International Criminal Procedure* (Leiden: Martinus Nijhoff, 2008); Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press, 2004) at 123-126.

²⁹ Peer Zumbansen, "Transnational Law, Evolving" in J. M. Smits (ed), *Elgar Encyclopedia of Comparative Law* (Edward Elgar Publishing Ltd, 2012).

³⁰ Benedict Kingsbury, Nico Krisch and Richard B Stewart, "The Emergence of Global Administrative Law" (2005) 68 *Law and Contemporary Problems* 15; Nico Krisch and Benedict Kingsbury, "Introduction: Global Governance and Global Administrative Law in the International Legal order" (2006) 17 *European Journal of International Law* 1; Benedict Kingsbury, "The Administrative Law Frontier in Global Governance" (2005) *ASIL Proceedings* 143; Benedict Kingsbury, "The Concept of "Law" in Global Administrative Law" (2009) 20(1) *European Journal of International Law* 23.

³¹ Jan Klabbers, 'Setting the Scene' in Jan Klabbers, Anne Peters and Geir Ulfstein (eds), *The Constitutionalization of International Law* (Oxford University Press, 2009); Ronald St. John Macdonald & D M Johnston, *Towards World Constitutionalism: Issues on the Legal Ordering of the World Community* (Martinus Nijhoff, 2005); Alec Stone Sweet, 'Constitutionalism, Legal Pluralism, and International Regimes', (2009) 16 (2) *Indiana Journal of Global Legal Studies* 621; But see Jose E. Alvarez, "The New Dispute Settlers: (Half) Truths and Consequences" (2003) 38 (3) *TexILJ* 421

³² Paul Schiff Berman, *Global Legal Pluralism* (CUP, 2012).

³³ Peer Zumbansen, 'Transnational Legal Pluralism' (2010) 1(2) *Transnational Legal Theory* 141.

³⁴ M. Cherif Bassiouni, "From Versailles to Rwanda in Seventy-five Years: the Need to Establish a Permanent International Criminal Court" (1997) 10 *Harv. Hum. Rts. J.* 11 at 39.

³⁵ International Criminal Tribunal for Former Yugoslavia (ICTY, 1993); International Criminal Tribunal for Rwanda (ICTR, 1994); Special Court for Sierra Leone (SCSL, 2002); International Criminal Court (2002). There are however nine such institutions in total. The other five are: Extraordinary Chambers in the Courts of Cambodia (ECCC, 2007); Special Tribunal for Lebanon (2007); 'Regulation 64' Panels (2000); Iraqi High Tribunal (formerly Iraqi Special Tribunal) and; East Timor Special Panels for Serious Crimes (2000-2005).

³⁶ Alexander Zahar & Goran Sluiter, *International Criminal Law; A Critical Introduction* (Oxford: OUP, 2009) at 6.

largely credited to the politics of the Cold War. It is often remarked that one of the casualties of the Cold War was the desire to prosecute those responsible for mass human atrocities,³⁷ as the international community could not agree on how to prosecute and who to prosecute.

Successful campaigns by the international human rights activists and the proliferation in international criminal justice mechanisms have ushered in numerous prosecutions of alleged perpetrators of human rights violations at the national level. Domestically, there are numerous universal jurisdiction-based cases from several countries.³⁸ The incorporation of the *Rome Statute* of the ICC into domestic criminal law bolsters the drive to prosecute alleged perpetrators of war crimes at the domestic level. The Canadian case against Désiré Munyaneza is an illustrative example:³⁹ a Rwanda Hutu militia member was prosecuted by the Canadian government on charges of war crimes, crimes against humanity, and genocide, using the domestic implementation act of the *Rome Statute*.⁴⁰ More recently, South Africa has decided to investigate the commission of rape during the 2009 elections in Zimbabwe under the leadership of President Mugabe.⁴¹

In what follows, both ICTR and ICTY will be presented, showcasing how they were created and how they operate, before delving into the mechanics of the ICTR.

2.1 *Sui Generis* International Institutions:

ICTY and ICTR⁴² were the first international criminal institutions to be established by the United Nation Security Council (UNSC) through its Chapter VII Charter powers to maintain peace and security.⁴³ The purpose of these institutions, as set out in their respective enabling UN Resolutions is: (i) to bring to justice persons allegedly responsible for the violation of international humanitarian law, (ii) to render justice to the victims, (iii) to deter future crimes and, (iv) to restore peace by ending impunity.⁴⁴

³⁷ M. Cherif Bassiouni, "From Versailles to Rwanda in Seventy-five Years: the Need to Establish a Permanent International Criminal Court" (1997) 10 Harv. Hum. Rts. J. 11 at 39.

³⁸ Lorna McGregor, "Torture and State Immunity: Deflecting Impunity, Distorting Sovereignty" (2008) 18 E.J.I.L. 903; Craig Forcese, "De-Immunizing Torture: Reconciling Human Rights and State Immunity" (2007) 52 McGill L.J. 127

³⁹ *R. v. Munyaneza* [2009] QCCA 2326.

⁴⁰ *Crimes Against Humanity and War Crimes Act* (2000, c. 24).

⁴¹ Geoffry York, Globe and Mail, <<http://www.theglobeandmail.com/news/world/in-ground-breaking-move-s-africa-steps-in-over-alleged-zimbabwe-mass-rapes/article9016480/>>

⁴² The Rwandan tribunal shares the appeal chamber and the prosecutor with ICTY; Roy Lee, "The Rwanda Tribunal" (1996) 9 Leiden J. Int'l L 37.

⁴³ *United Nations Charter*, 26 June 1945, 39 A.J.I.L. 190 Supp, (entered into force Oct. 24, 1945).

⁴⁴ Sarah Williams, "ICTY and ICTR (Completion Strategy)" in Antonio Cassese ed., *Oxford Companion to International Criminal Justice* (Oxford: OUP, 2009), at 362-363.

It is impossible to examine the ICTR without taking stock of the ICTY, since they have analogous histories and share many similarities. Both institutions are temporary, and therefore, the judges of the tribunals initiated completion strategies in 2003 (ICTR) and 2004 (ICTY),⁴⁵ providing deadlines by which point the tribunals are expected to ensure that they could complete their cases. ICTY is set to deliver its final judgment sometime 2014, while the ICTR has already delivered its final Trial level decision.

Both institutions have also adopted a policy of strengthening their respective national judicial systems. For instance, the ICTY has been a catalyst in setting up war crimes chambers in Bosnia and Herzegovina, Serbia and Croatia with the support of the UN Security Council. These local chambers focus on the intermediate and lower-level officials accused of committing serious human rights violations and are part of ICTY's completion strategy. Similarly, the Rwandan courts and Gacaca courts are in the process of prosecuting intermediate and lower-level officials. The Gacaca courts are the domestic local courts used to prosecute those suspected of having participated in the Rwandan Genocide in 1996. These courts exist and function parallel with the regular courts.⁴⁶

In 1992, the UNSC requested the UN Secretary General to establish an "impartial" Commission of Experts (COE) to examine, analyse, and provide "conclusions on the evidence of grave breaches of international humanitarian law committed in the territory of the former Yugoslavia".⁴⁷ In its first interim report, the COE concluded that grave breaches and other violations of international humanitarian law had been committed in the territory of former Yugoslavia.⁴⁸ The COE's work however, was marred with difficulties, particularly because of the allocation of resources.

With the submission of the first interim report by the COE,⁴⁹ the UNSC decided to prosecute those responsible for crimes against humanity, genocide and war crimes, by creating the *ad hoc* International Criminal Tribunal for the former

⁴⁵See ICTR/ICTY Completion Strategy; Sarah Williams, "ICTY and ICTR (Completion Strategy)" in Antonio Cassese ed., *Oxford Companion to International Criminal Justice* (Oxford: OUP, 2009) at 362-363.

⁴⁶ The Gacaca court is the domestic local court used to prosecute those suspected of having participated in the Rwandan Genocide in 1996. These courts exist and function parallel with the regular courts. Cecile Aptel, "Gacaca courts" in Antonio Cassese ed., *Oxford Companion to International Criminal Justice* (Oxford: OUP, 2009) at 330.

⁴⁷ UNSCOR, 3119th Meeting, UNSC Resolution 780 S/RES/780 (1992) ; 15 yes and 0 No/Abstentions, non-permanent members: Austria, Belgium, Cape Verde, Ecuador, Hungary, India, Japan, Morocco, Venezuela and Zimbabwe.

⁴⁸ UNSCOR, Report of Secretary General, S/1994/674 (1994) at para 10

⁴⁹M. Cherif Bassiouni, "United Nations Commission of Experts Established Pursuant to Security Council Resolution 780 (1992)" (1994) 88 Am. J. Int'l L. 784

Yugoslavia on May 27 1992, relying on its UN Chapter VII Charter powers (to maintain peace and security).⁵⁰

In 1994, the UNSC established a Commission of Experts to investigate the atrocities committed during the Rwandan genocide between January 1994 and December 1994.⁵¹ According to the COE's final October 1994 report, "[S]ince 6 April 1994, an estimated 500,000 unarmed civilians have been murdered in Rwanda".⁵² There was some concern about whether Rwanda was an international or non-international conflict. The COE report clearly adopted a position that it was not an international armed conflict.⁵³ The involvement of the international peacekeeping force, led by Canadian General Romeo Dallaire, and the role of the neighbouring countries throws these claims into doubt. The severity of the atrocities precipitated the UNSC to utilize its Charter powers to set up the Tribunal. The creation of a special mechanism for Sri Lanka will undoubtedly have to confront the very nature of the civil war between the LTTE and the Sri Lankan forces. If the Sri Lankan conflict is deemed to be a non-international armed conflict, the legal thresholds that would apply are wholly different from those ascribed to be international armed conflict.

The ICTY Statute has 34 provisions and the ICTR Statute has 32 provisions that delineate the international crimes, the organizational structure, and the composition of the tribunal.⁵⁴ The statutes set out four clusters of punishable crimes: genocide, grave breaches of the 1949 Geneva Conventions, war crimes and crimes against humanity⁵⁵. The judges of the tribunals were given the power to draft and adopt rules of procedure and evidence.⁵⁶ These powers are controversial because they have resulted in giving the judges quasi-legislative powers within the tribunals.⁵⁷ Some may conclude that a similar international mechanism could be the most useful in dealing with the 27 year conflict in Sri Lanka and support the process of healing by prosecuting those responsible for mass human rights violations.⁵⁸ On the other hand, scholars have sought to

⁵⁰ UNSCOR, 3217th Meeting, UNSC Resolution 827, S/RES/827 (1993) [ICTY Statute]; 15 Yes, 0 No/Abstentions, non-permanent members: Argentina, Brazil, Czech Republic, Djibouti, New Zealand, Nigeria, Oman, Pakistan, Rwanda and Spain.

⁵¹ See generally Leila Nadea Sadat & Michael P. Scharf, *The Theory and Practice of International Criminal Law: Essays in Honor of M. Cherif Bassiouni* (Leiden: Martinus Nijhoff Publishers, 2008).

⁵² UNSCOR, Report of Secretary General, S/1994/1125 (1994) at para 43.

⁵³ UNSCOR, Report of Secretary General, S/1994/1125 (1994) at para 91.

⁵⁴ UNSCOR, 3217th Meeting, UNSC Resolution 827, S/RES/827 (1993).

⁵⁵ Article 2, 3 and 4, UNSCOR, 3217th Meeting, UNSC Resolution 827, S/RES/827 (1993).

⁵⁶ Article 15, UNSCOR, 3217th Meeting, UNSC Resolution 827, S/RES/827 (1993).

⁵⁷ Decision on the Communications between the Parties and their Witness, Prosecutor v. Kupreskic et al., Case No. IT-95-16-T, ICTY..

⁵⁸ For example see Kubes Navaratnam, "Post-conflict Sri Lanka needs Canadian R2P", Embassy (28, 03, 2012); Vani Selvarajah, "Sri Lanka on notice: Where do we go from here?" (2013) Toronto Star; Harini Sivalingam, "Canada can help Sri Lanka" The Sun (Jan 17, 2013); CTC, Statement at the Press Conference held at the Canadian Parliament on November 15, 2012, online < <http://www.canadiantamilcongress.ca/article.php?lan=eng&cat=pr&id=74>>; See also

interrogate the formalism embedded in the structure of international law and its potential to deliver justice.

In the late 1800s and 1900s, American legal realist critique, inspired by Oliver Wendell Holmes' canonical *Path of Law*, destabilised traditional understandings of law.⁵⁹ Scholars like Holmes and Wesley Hohfeld wanted to question the very foundation of formal structures of law.⁶⁰ Roscoe Pound's helpful 19th century insight indicting international law as a "social end" and his condemnation of the preoccupation with abstract international law rules pushed scholars to re-imagine existing discourses.⁶¹ More contemporary versions of the realist critique have emerged.⁶² Building on the writings of Holmes, the legal realists wanted to replace formalism with "a pragmatic attitude toward law generally" and they believed that law "was made, not found".⁶³ Scholars were attuned to how judicial decisions were created, reflecting on the socio-political context of these decisions, as opposed to accepting that judicial decisions were the "outcome of reasoning from a finite set of determinate principles".⁶⁴ To better understand how law functions in the real world, the realists sought to combine law with social science and subsequently viewed law as a social science.

Center for War Victims and Human Rights, "War Victim Documentation" Project, online <http://www.cwvhr.org/web/index.php?option=com_content&view=article&id=68&Itemid=55>.

⁵⁹ Oliver Wendell Holmes, "The Path of the Law" (1897) 10 Harv. L. Rev. 457

⁶⁰ David Kennedy & William Fisher III, "Introduction" in Kennedy, David & Fisher, William III, *The Cannon of American Legal Thought* (Princeton, Princeton University Press, 2006) at 3; Oliver Wendell Holmes, "The Path of the Law" (1897) 10 Harv. L. Rev. 457; Wesley Hohfeld, "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning" (1913) 23 Yale Law Journal 16.

⁶¹ Roscoe Pound, "Philosophical Theory and International Law", (1923) *Bibliotkeca Visseiana* 1-90; Manley Hudson, "The Prospect for International Law in the Twentieth Century" (1925) 4 *Cornell Law Quarterly* 419 at 421; Marti Koskeniemi, "The Politics of International Law" (1990) 1 *E.J.I.L.* 4 at 8.

⁶² Victoria Nourse & Shaffer, Gregory. "Varieties of New Legal Realism: Can A New World Order Prompt A Legal Theory?" (2009) 95 *Cornell Law Review* 61 at 65; Miles, Thomas J. and Sunstein, Cass R. "The New Legal Realism" U of Chicago Law & Economics, Olin Working Paper No. 372 U of Chicago, Public Law Working Paper No. 191 at 2; Makau Mutua, "What is Twail?" (2000) *A.S.I.L., Proceedings of the 94th Annual Meeting* 31.; Antony Anghie, 'What is TWAIL: Comment', (2000) 94 *Am. Soc'y Int'l L. Proc.* 39.; Obiora C. Okafor, 'Critical Third World Approaches to International Law (TWAIL): Theory, Methodology, or Both?' (2010) 10 *International Community Law Review* 37.; Duncan Kennedy & Karl Klare, "A Bibliography of Critical Legal Studies" (1984) 94 *Yale L.J.* 435; Joseph Singer, "Legal realism Now" (1998) 76 (2) *California Law review* 465 at 474; David Kairys ed., *The Politics of Law: A Progressive Critique* (New York: Pantheon Books, 1998).

⁶³ H Oliver Wendell Holmes, "The Path of the Law" (1897) 10 Harv. L. Rev. 457; Joseph Singer, "Legal realism Now" (1998) 76 (2) *California Law review* 465 at 474.

⁶⁴ Livingston, Debra 'Round and 'Round the Bramble Bush: From Legal Realism to Critical Legal Scholarship (Note), 95 *HARV. L. REV.* 1669 (1982) at 1670.

This realist vernacular is now part of our understanding of international law and its doctrines, impacting both legal scholarship and lawyering,⁶⁵ by “fundamentally alter[ing] our conceptions of legal reasoning and the relationship between law and society”.⁶⁶

This method has been described as “*the* most important indigenous jurisprudential movement in the United States”.⁶⁷ Legal realism has led to the emergence of critical legal studies,⁶⁸ feminist legal theory⁶⁹, critical race theory,⁷⁰ and Third World Approaches to International Law (TWAIL)⁷¹. Drawing inspiration from these scholarly interventions and my own experience of working within the Appeals Chamber of the ICTR and ICTY⁷² and working in the North and East of Sri Lanka and Occupied Palestinian Territories, the following section will take a critical look at how the ICTR functions. I provide such an account to reveal the underbelly of the cosmopolitan international justice project and to demonstrate why an international mechanism similar to the two ad hoc tribunals or a hybrid institution may not be the best option to deliver justice to those affected by the conflict in Sri Lanka.

⁶⁵ Duncan Kennedy & Karl Klare, “A Bibliography of Critical Legal Studies” (1984) 94 Yale L.J. 435

⁶⁶ Joseph Singer, “Legal realism Now” (1998) 76 (2) California Law review 465 at 467.

⁶⁷ Brian Leiter, “American Legal Realism” in W. Edmundson and M. Golding eds. 2nd edition, *The Blackwell Guide to Philosophy of Law and Legal Theory*, edited (Maiden:Blackwell, 2005) at 50.

⁶⁸ Duncan Kennedy & Karl Klare, “A Bibliography of Critical Legal Studies” (1984) 94 Yale L.J. 435

⁶⁹ Mae C. Quinn, “Feminist Legal Realism” , Harvard Journal of Law and Gender, Vol. 35, No. 1, 2012; Mari Matsuda, *Beside My Sister, Facing the Enemy: Legal Theory Out of Coalition*, (1990) 43 Stanford Law Review, 1183-1192.

⁷⁰ Richard Delgado, “The Imperial Scholar: Reflections on a Review of Civil Rights Literature” (1984) University of Pennsylvania Law Review, Vol. 132; Patricia J Williams, *Alchemy of Race and Rights: Diary of a Law Professor* (Harvard University Press, 1991), at 146-166

⁷¹ Makau Mutua, “What is Twail?” (2000) A.S.I.L, Proceedings of the 94th Annual Meeting 31.; Antony Anghie, ‘What is TWAIL: Comment’, (2000) 94 Am. Soc’y Int’l L. Proc. 39.; Obiora C. Okafor, ‘Critical Third World Approaches to International Law (TWAIL): Theory, Methodology, or Both?’ (2010) 10 International Community Law Review 37.; Duncan Kennedy & Karl Klare, “A Bibliography of Critical Legal Studies” (1984) 94 Yale L.J. 435; Joseph Singer, “Legal realism Now” (1998) 76 (2) California Law review 465 at 474; David Kairys ed., *The Politics of Law: A Progressive Critique* (New York: Pantheon Books, 1998)

⁷² Legal Intern to Judge Agius, Vice President ICTY/ICTR (April to August 2011); Legal Intern, Al Haq (April to August 2009); Documentation Desk Program Officer, Home for Human Rights (1999-2001); Ad Hoc Legal Advisor, Home For Human Rights (2004-2012); International Consultant and ICL Trainer, Home for Human Rights (2012-2013). .

3 Situating the Cultural Local: International Criminal Justice and Witness Testimony⁷³

Recent interdisciplinary accounts reveal divergent descriptions of how international criminal institutions function. What emerges from the socio-legal and anthropological studies of these institutions is in stark contrast to the push for accountability through the legitimate prosecution of those responsible for war crimes. Therefore, I present the lived reality⁷⁴ of the ICTR as challenge to the mainstream assumption⁷⁵ that international criminal trials “have at least been considered useful mechanisms for determining who did what to whom during a mass atrocity”.⁷⁶ I use Nancy Combs’ empirical evidence from ICTR to argue that the creation of an *ad hoc* international mechanism is not the best option to “deliver justice and provide accountability” to the victims of mass human rights violations in Sri Lanka. In fact, the turn to the international is rather misplaced and misguided. I make these assertions based on the culture in which international criminal institutions operate.⁷⁷ The inability of the witnesses to accurately convey their stories to the prosecutors and the judges is the bedrock of the analysis below. This inability stems from the specific culture of Rwanda and its colonial past.⁷⁸ Sri Lanka too has a similar colonial past. Moreover Western understandings of how to conduct investigations and trials are superimposed through the adjudicatory process. This may elicit witness testimony that diverges from local customs and conceptions.⁷⁹ This claim therefore is premised on the role of the judges and the employees of the tribunals

⁷³ The following analysis is derived from my ongoing doctoral research and portions of this research have been published; see for example, Sujith Xavier, “Theorising Global Governance Inside Out: A Response to Professor Ladeur” (2012) 3(3) TLT 268; Sujith Xavier, Book Review, *Global Legal Pluralism: A Jurisprudence of Law Beyond Border*, Paul Schiff Berman (Cambridge University Press, 2012).

⁷⁴ Patricia J Williams, *Alchemy of Race and Rights: Diary of a Law Professor* (Harvard University Press, 1991)

⁷⁵ For example see Kubes Navaratnam, “Post-conflict Sri Lanka needs Canadian R2P”, Embassy (28, 03, 2012); Vani Selvarajah, “Sri Lanka on notice: Where do we go from here?” (2013) Toronto Star; Harini Sivalingam, “Canada can help Sri Lanka” The Sun (Jan 17, 2013); CTC, Statement at the Press Conference held at the Canadian Parliament on November 15, 2012, online < <http://www.canadiantamilcongress.ca/article.php?lan=eng&cat=pr&id=74>>; See also Center for War Victims and Human Rights, “War Victim Documentation” Project, online< http://www.cwvhr.org/web/index.php?option=com_content&view=article&id=68&Itemid=55>

⁷⁶ Combs, 2010 at 4.

⁷⁷ This argument is drawn from my doctoral thesis. See also Sujith Xavier, “Theorising Global Governance Inside Out: A Response to Professor Ladeur” (2012) 3(3) TLT 268; Sujith Xavier, Book Review, *Global Legal Pluralism: A Jurisprudence of Law Beyond Border*, Paul Schiff Berman (Cambridge University Press, 2012)

⁷⁸ Mahmood Mamdani, *When Victims Become Killers: Colonialism, Nativism, and the Genocide in Rwanda* (Cambridge University Press, 2002)..

⁷⁹ Nancy Combs, *Fact-Finding Without Facts: The Uncertain Evidentiary Foundations of International Criminal Convictions* (Cambridge University Press, 2010)..

(experts), and how this expertise is created in these institutions. I draw on my previous assertions elsewhere and my on-going doctoral research.⁸⁰

My arguments are based on the culture context in which international criminal institutions operate.⁸¹ The witnesses' inability to accurately convey their stories to the prosecutors and the judges is the basis of the forthcoming analysis below. I argue that this inability to relay the events is rooted in the specific culture of Rwanda and its colonial past.⁸² Importantly the Western experiences of how to conduct investigations and trials are superimposed through the adjudicatory process. Such a superimposition elicits witness testimony that may seem at odds with and diverges from the local customs and conceptions of justice of the local population.⁸³ The central argument therefore is based on the role of the judges, the employees of the tribunals (experts) and how expertise is created in these institutions. I examine the implications of culture vis-à-vis international criminal justice within ICTR to illustrate the difficulties of such a model for accountability in post-war Sri Lanka.

3.1 ICTR: Faulty Witness Testimony

Nancy Combs' study examines three tribunals with remarkably diverse histories. She reviews the transcripts of witness testimony from the ICTR, SCSL, and the East Timor Special Panels.⁸⁴ Each tribunal is extraordinary in the manner in which it was created and its respective criminal and temporal jurisdictions.⁸⁵ She refutes assumptions that international criminal prosecutions will be able to determine who did what to whom, by highlighting the problematic nature of witness testimonies before these tribunals. She points to a significant hurdle that has plagued these three institutions: reveals a disjuncture between the evidence provided by the witnesses and the adjudicatory process undertaken by the tribunals.

Combs states, Trial Chambers "often seem content to base convictions on highly problematic witness testimony," with the result that it fails to find "reasonable doubt in some of the most doubtful instances and as a consequence, convict just

⁸⁰ Sujith Xavier, "Theorising Global Governance Inside Out: A Response to Professor Lateur" (2012) 3(3) TLT 268; Sujith Xavier, Book Review, *Global Legal Pluralism: A Jurisprudence of Law Beyond Border*, Paul Schiff Berman (Cambridge University Press, 2012).

⁸¹ This argument is drawn from my doctoral thesis. See also Sujith Xavier, "Theorising Global Governance Inside Out: A Response to Professor Lateur" (2012) 3(3) TLT 268; Sujith Xavier, Book Review, *Global Legal Pluralism: A Jurisprudence of Law Beyond Border*, Paul Schiff Berman (Cambridge University Press, 2012)

⁸² Mahmood Mamdani, *When Victims Become Killers: Colonialism, Nativism, and the Genocide in Rwanda* (Cambridge University Press, 2002)..

⁸³ Nancy Combs, *Fact-Finding Without Facts: The Uncertain Evidentiary Foundations of International Criminal Convictions* (Cambridge University Press, 2010)..

⁸⁴ Nancy Combs, *Fact-Finding Without Facts: The Uncertain Evidentiary Foundations of International Criminal Convictions* (Cambridge University Press, 2010). at 4.

⁸⁵ ICTY & ICTR Statutes.

about every defendant who comes before them”.⁸⁶ Of particular interest, Combs demonstrates that witnesses often cannot provide detailed account of the dates, the times, and the specific location of the events, or more importantly, accurately place the perpetrator at the scene of the crime.⁸⁷

These discrepancies are the result of educational, cultural, and translation-related factors. This aligns with the research on domestic criminal prosecutions. Witnesses called in to testify are expected to provide a detailed account of who did what to whom. Criminal law scholars, who have identified witness testimony as deeply flawed based on numerous insights, flowing from critical race theory, feminism, and disability studies perspectives.⁸⁸ Yet these interventions about the unreliability of witness testimony have not yet made their way into international criminal law.

Instead, international criminal law debates have primarily focused on the substantive legality of international criminal adjudication.⁸⁹ There are numerous accounts of the problematic features of institutional practices from defence counsel⁹⁰ and academics with specific institutional knowledge of international mechanisms,⁹¹ and interdisciplinary insights from political scientists and anthropologists.⁹² Nonetheless the focus on the mechanics of the institutions, especially as they relate to international criminal procedure, is minimal.⁹³ While

⁸⁶ Nancy Combs, *Fact-Finding Without Facts: The Uncertain Evidentiary Foundations of International Criminal Convictions* (Cambridge University Press, 2010) at 222; Importantly, Combs suggests that the judges are not “convicting innocent defendants”. “What I am suggesting, however is that the Trial Chambers’ cavalier attitude towards fact finding impediments is inconsistent with the beyond-a-reasonable-doubt standard of proof as that standard is traditionally understood”.

⁸⁷ Sujith Xavier, “Theorising Global Governance Inside Out: A Response to Professor Ladeur” (2012) 3(3) TLT 268 at 277-279.

⁸⁸ David M Tanovich, ‘The Charter of Whiteness: Twenty-Five Years of Maintaining Racial Injustice in the Canadian Criminal Justice System’ (2008) 40 *Supreme Court Law Review* (2d) 655; David M Tanovich, ‘Moving Beyond “Driving While Black”: Race, Suspect Description and Selection’ (2005) 36 *Ottawa Law Review* 315; Sandra G Thompson, ‘Judicial Gatekeeping of Police-Generated Witness Testimony’ (2011) *University of Houston Law Center* No 2011-A-8.

⁸⁹ See eg M Cherif Bassiouni, *Introduction to International Criminal Law* (Transnational Press, 2004); Antonio Cassese (ed), *Oxford Companion to International Criminal Justice* (Oxford University Press, 2009); Antonio Cassese, *International Criminal Law* (Oxford University Press, 2003); Robert Cryer *et al*, *An Introduction to International Criminal Law and Procedure* (Cambridge University Press, 2010).

⁹⁰ Wayne Jordash, ‘The Practice of “Witness Proofing” in International Criminal Tribunals: Why the International Criminal Court should Prohibit the Practice’ (2009) *Leiden Journal of International Law* 22.

⁹¹ Alexander Zahar and Göran Sluiter, *International Criminal Law: A Critical Introduction* (Oxford University Press, 2009).

⁹² Kamari Clarke & Mark Goodale eds., *Mirrors of Justice: Law and Power in the Post-Cold War Era* (Cambridge Univ. Press, 2009); Tim Kelsall, *Culture under Cross-Examination: International Justice and the Special Court for Sierra Leone* (Cambridge: CUP, 2009).

⁹³ Christoph J. M. Safferling, *Towards an International Criminal Procedure* (Oxford University Press, 2012).

there are different requests to incorporate diversity into the current framework⁹⁴ or criticisms of the problematic nature of admitting faulty evidence,⁹⁵ there is little attention paid to the critical insights emerging from domestic criminal jurisdictions with regard to witness testimony. The rationale is two fold.

First, the Nuremberg Tribunal Prosecutors relied on documents prepared by Nazi officials to establish guilt. ICTR prosecutors, however, rely exclusively on witness testimony.⁹⁶ Contemporary international criminals, especially those in front of the ICTR, did not leave a trail of documentary evidence that could be used by the ICTR prosecutors.⁹⁷ Rather, the perpetrators of the genocide relied other forms of communication.

Second, the Rules of Evidence and Procedure (REP) of the *ad hoc* tribunals were drafted and amended by the judges, prosecutors, and other officials of the tribunals. The debates have therefore focused on the institutional and meritorious aspects of the REP and the degree to which common law and civil law traditions have influenced the development of these rules.⁹⁸ Ultimately, critical insight regarding the questionable usefulness of witness testimony, gathered in the domestic context, was left out or totally ignored. The role of experts in this development is significant.

Moving back to the specifics of the Rwandan Tribunal, even though ICTR witnesses know for a fact that the Rwandan President's plane was shot down on 6 April 1994, precipitating the genocide, they are not able to place perpetrators of the genocide at the scene of the crime on a specific date. The rationale is cultural. Some witnesses cannot convey events based on the Western calendar or lack formal Western-style education to respond to questions about specific dates and times. The prosecutors and most international staff conducting the

⁹⁴ Jessica Almqvist, 'The Impact of Cultural Diversity on International Criminal Proceedings' (2006) 4(4) *Journal of International Criminal Justice* 745.

⁹⁵ Alexander Zahar, 'The Problem of False Testimony at the International Criminal Tribunal for Rwanda' in André Klip and Göran Sluiter (eds), *Annotated Leading Cases of International Criminal Tribunals Vol 25: International Criminal Tribunal For Rwanda* (Intersentia, 2006) 509.

⁹⁶ Nancy Combs, *Fact-Finding Without Facts: The Uncertain Evidentiary Foundations of International Criminal Convictions* (Cambridge University Press, 2010) at 6.

⁹⁷ Sujith Xavier, "Theorising Global Governance Inside Out: A Response to Professor Ladeur" (2012) 3(3) TLT 268 at 279.

⁹⁸ Gabrielle K McDonald, 'Trial Procedures and Practices' in Gabrielle K McDonald and Olivia Swaak-Goldman (eds), *Substantive and Procedural Aspects of International Criminal Law: The Experience of International and National Courts* (Kluwer, 2000); Fausto Pocar, 'Common and Civil Law Traditions in the ICTY Criminal Procedure: Does Oil Blend with Water?' in Janet Walker and Oscar G Chase (eds), *Common Law, Civil Law and the Future of Categories* (LexisNexis, 2010); Patrick L Robinson, 'The Interaction of Legal Systems in the Work of the International Criminal Tribunal for the Former Yugoslavia' (2009)16 *ILSA Journal of International and Comparative Law* 5.

investigations, trials and legal research are Western.⁹⁹ For example, it is important to determine whether the accused was present at the scene of the crime and whether the witnesses saw the perpetrator. Witnesses at times cannot determine the exact date or the month of the incident and therefore they cannot place the accused at the scene of the crime. Witnesses use cultural practices to identify events such as the seasons to determine the time of year. These practices are culturally specific and contingent. The notion of temporality or temporal sequences of events is another issue of contention, where witnesses are unable to provide the exact chronology in which the alleged incitement to genocide occurred. Meanwhile, the prosecutors and most international staff conducting the investigations, trials, and legal research are Western.¹⁰⁰

The judges have accepted “faulty witness testimonies” for compelling reasons. In light of their political affiliations, it is assumed that the accused perpetrators were involved in the genocide. This serves as the central basis for their conviction.¹⁰¹ The judges rely on these factors to believe the witness testimonies. The ICTR has an 85 per cent conviction rate, which supports Combs’ assertions. Even when there are inconsistencies in the witness testimony, Combs notes that the ‘[T]rial Chambers explain these away as products of the passage of time, the frailty of memory and errors introduced by investigators and interpreters’.¹⁰²

Taking a broader perspective, the adjudicatory process followed by these tribunals is based on western common law (adversarial) and civil law (inquisitorial) traditions.¹⁰³ The common law tradition relies heavily on witness testimony and the judges (and the Tribunal as whole) have adopted these as the *modus operandi*.¹⁰⁴ By using the western trial process, ‘international criminal proceedings cloak themselves in the form’s garb of fact-finding competence, but

⁹⁹Elena Baylis, “*Tribunal-Hopping with the Post-Conflict Justice Junkies*”, (2008) 10 Oregon Review of International Law 361.

¹⁰⁰Elena Baylis, “*Tribunal-Hopping with the Post-Conflict Justice Junkies*”, (2008) 10 Oregon Review of International Law 361; Sujith Xavier, “Theorising Global Governance Inside Out: A Response to Professor Ladeur” (2012) 3(3) TLT 268 at 279.

¹⁰¹ Sujith Xavier, “Theorising Global Governance Inside Out: A Response to Professor Ladeur” (2012) 3(3) TLT 268 at 280.

¹⁰² Nancy Combs, *Fact-Finding Without Facts: The Uncertain Evidentiary Foundations of International Criminal Convictions* (Cambridge University Press, 2010) at 221.

¹⁰³ Fausto Pocar, ‘Common and Civil Law Traditions in the ICTY Criminal Procedure: Does Oil Blend with Water?’ in Janet Walker and Oscar G Chase (eds), *Common Law, Civil Law and the Future of Categories* (LexisNexis, 2010).

¹⁰⁴ Fausto Pocar, ‘Common and Civil Law Traditions in the ICTY Criminal Procedure: Does Oil Blend with Water?’ in Janet Walker and Oscar G Chase (eds), *Common Law, Civil Law and the Future of Categories* (LexisNexis, 2010); Patrick L Robinson, ‘The Interaction of Legal Systems in the Work of the International Criminal Tribunal for the Former Yugoslavia’ (2009) 16 *ILSA Journal of International and Comparative Law* 5.; Sujith Xavier, “Theorising Global Governance Inside Out: A Response to Professor Ladeur” (2012) 3(3) TLT 268 at 280.

it is only a cloak, for many of the key assumptions that underlie the Western trial form do not exist in the international context'.¹⁰⁵

The UNSC enabled the judges of the Tribunals to draft (and amend) their own respective rules of evidence and procedure. This may have provided them with perfect tool to resolve any outstanding problems. The very design of the trial process, and even pre-trial investigation, was left up to the judges of the tribunals to determine as they saw fit.¹⁰⁶ In light of these conclusions, arguably there is a disconnect between the witness testimony evidence and the mandate to prosecute those with the gravest responsibility for the mass human rights violations and respecting the rights of the accused to due process.

The Judges made amendments to the rules that were precipitated by the need for efficiency and expeditious trials without running up the costs of international justice. This pro-conviction bias of the judges may possibly stem from their personal background and their expertise.¹⁰⁷ Within the Rwandan context, political affiliations signal to the tribunals the potential culpability of the accused. These factors ultimately lend support to the belief that the accused participated in the genocide, even without the 'beyond-reasonable-doubt' threshold given the faulty witness testimonies. The pro-conviction bias of the judges may possibly stem from their personal background and their expertise.

3.2 Post-Conflict Justice Junkies and the Role of Expertise

The individuals that staff these tribunals are crucial, particularly the judges and the respective employees of the tribunals' different organs. Judges are selected through the United Nations and approved by the UNSC. More importantly, given the scarcity of practical expertise in international criminal law, judges move from one tribunal to the next, given international criminal law's scarcity of expertise.¹⁰⁸ The judges rely on the expertise of international employees to conduct legal research and conduct the affairs of the tribunals.¹⁰⁹ Employees of the United Nations, from judges to legal clerks to prosecution attorneys to in-house translators) populate the different departments and organs of the tribunals. In this regard, Elana Baylis has coined the phrase "post-conflict justice junkies" to describe the international staff who work on "post-conflict justice issues and who

¹⁰⁵ Nancy Combs, *Fact-Finding Without Facts: The Uncertain Evidentiary Foundations of International Criminal Convictions* (Cambridge University Press, 2010) at 179.

¹⁰⁶ Sujith Xavier, "Theorising Global Governance Inside Out: A Response to Professor Ladeur" (2012) 3(3) TLT 268 at 280.

¹⁰⁷ Nancy Combs, *Fact-Finding Without Facts: The Uncertain Evidentiary Foundations of International Criminal Convictions* (Cambridge University Press, 2010) at 167–88, 221.

¹⁰⁸ Elena Baylis, "Tribunal-Hopping with the Post-Conflict Justice Junkies", (2008) 10 Oregon Review of International Law 361 at 361- 389.

¹⁰⁹ I make this assertion based on personal observation as an Appeals Chamber Legal Intern to Judge Aguis of the ICTY/ICTR from March 2011-August 2011.

maintain an itinerant lifestyle in pursuit of that work”.¹¹⁰ The employees move from one hot spot to another within these tribunals.¹¹¹

Baylis relies on her personal experience to tell the story of young aspiring internationals engaged in trying to ‘make a difference’ by transferring their social activist legal (and other) training from western institutions to conflict hotspots and international criminal institutions.¹¹² These good intentions, however, are clouded by what Baylis demonstrates as the ‘known unknowns’. These known unknowns are characterized as the “lack of local knowledge of post-conflict settings, whether that is knowledge of the local legal system, local facts, local culture or any other relevant information”.¹¹³ She argues that these known unknowns are notoriously hard to deal with due to lack of timing, false expertise, complexity and geographic size of the local context. False expertise then emerges from the nature of the work that is undertaken and the ability to transfer skills to other hotspots. These international “experts” spend no more than two to three years at each tribunal as they follow the “spread of international criminal justice.”¹¹⁴ The role of experts, unlike how it is presented within the institutions, is not value-neutral. Their roles can be challenged using different perspectives, ranging from anthropology,¹¹⁵ sociology¹¹⁶ to history¹¹⁷. For the current purpose, it is important to reflect on how these issues relate to the creation of an international mechanism for Sri Lanka.

David Kennedy’s insights suggest that background norms of institutions are more important to global governance than originally thought.¹¹⁸ The political values of experts within the tribunals shape the tribunals’ outcomes. The experts manage the background norms that permeate the value structure of the tribunals. As Kennedy has highlighted, what really matters at the global governance level is not what is in the foreground, the tribunals, or the context, Rwanda or Sri Lanka,

¹¹⁰ Elena Baylis, “*Tribunal-Hopping with the Post-Conflict Justice Junkies*”, (2008) 10 Oregon Review of International Law 361 at 364. I am deeply indebted to Michelle McKinley for suggesting this approach.

¹¹¹ Sujith Xavier, “Theorising Global Governance Inside Out: A Response to Professor Ladeur” (2012) 3(3) TLT 268 at 281.

¹¹² Sujith Xavier, “Theorising Global Governance Inside Out: A Response to Professor Ladeur” (2012) 3(3) TLT 268 at 281.

¹¹³ Elena Baylis, “*Tribunal-Hopping with the Post-Conflict Justice Junkies*”, (2008) 10 Oregon Review of International Law 361 at 383.

¹¹⁴ ICTY/ICTR slogan, see <http://www.icty.org/sid/10058>

¹¹⁵ Annelise Riles, “Models and Documents: Notes on Some Artifacts of International Legal Knowledge” (July 1999) 48 International and Comparative Law Quarterly 809 – 825..

¹¹⁶ Yves Dezalay & Bryant G. Garth, “The Confrontation between the Big Five and Big Law: Turf Battles and Ethical Debates as Contests for Professional Credibility” (2004) 29 (3) Law & Social Inquiry 615–638.

¹¹⁷ Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press, 2004).

¹¹⁸ David Kennedy, “Challenging Expert Rule: The Politics of Global Governance” (2005) 27 Sydney Journal of International Law 8 at 3.

for that matter. Rather, Kennedy argues that the background experts have “colonized the foreground and the context. In that the experts determine the contents of the foreground and the context. The foreground increasingly seems a mere spectacle — a performance to which we attribute agency, interest and ideology”. Simultaneously, it is difficult to “locate elements of context, which are not constructed by people managing background norms and institutions”. Kennedy argues that “foreground and the context may well turn out to be effects of background practices”.¹¹⁹

It matters that judges and experts have a pro-conviction bias, which may inherently be rooted in manner in which international law was historically constructed.¹²⁰ This bias has a detrimental effect on those who want to uphold justice through international criminal institutions. The role of the experts within these institutions, therefore, is not susceptible to the types of control expected in domestic administrative law or criminal law.¹²¹ Ultimately, cultural factors, such as the level of education of the witnesses and their cultural background, the role of the experts, the nature of their expertise, and their relationship to the judges essentially determine the way these institutions function and deliver legal decisions. These cultural factors in turn relay the truths in which these institutions operate, as opposed to the facts.

4 Looking for Justice in the Wrong Places? Accountability and Impunity in the Protracted Sri Lankan Conflict

The history of international law has often shown discrepancies between *cosmopolitan ideals* and *on-the-ground realities*.¹²² In the 16th century, Grotius’ attempts to curtail the raw power of the sovereign by creating new rules in the form of international law may be the ideal method of solving inter-state conflict.¹²³

¹¹⁹ David Kennedy, “Challenging Expert Rule: The Politics of Global Governance” (2005) 27 Sydney Journal of International Law 8 at 12.

¹²⁰ Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press, 2004).

¹²¹ See for example *Baker v Minister of Citizenship and Immigration*, [1999] S.C.J. No. 39

¹²² In the 15th annual 2012 Commonwealth Lecture, African novelist Chimamanda Adichie suggests that there is a distinction between ‘fact’ and ‘truth’. In making the case for realist literature, Adichie states: “I knew the basic facts of Nigerian history when I first read Chinua Achebe’s novels “Things Fall Apart” and “Arrow of God,” but it was those novels that made me realize that while I may very well know the facts, I did not really know the truths. Bloodless words like ‘pacification’ and ‘amalgamation’ and ‘indirect rule’ were the facts, but the truths were in the human stories. A respected man being flogged publicly by agents of the colonial government. A priest, once resplendent in his pride and stubbornness, now reduced to sitting on a cold prison floor because he had dared to reject an offer from a British district officer. And in images such as these, I learned a great truth which the history books said nothing about: the loss of dignity”; Chimamanda Adichie, “Commonwealth Lecture”, 2012.

¹²³ Falk, Richard. “Introduction” in Charles S. Edwards, Hugo Grotius The Miracle of Holland; A study in Political and Legal Thought (Chicago: Nelson-Hall inc, 1981) at x.

International law was used nonetheless to regulate the colonial encounter between local inhabitants of the new world and European colonizers.¹²⁴ The development of international law in the 17th and 18th centuries was closely connected to colonialism and imperialism.¹²⁵ By the late 19th and 20th centuries, the accelerated drive of international law had resulted in an abundance of international institutions that were instituted to deliver aid, regulate finances, and monitor waterways. In this regard, the creation of the new international criminal institutions is symptomatic of an established practice of creating international institutions to deal with global problems.

The possibility of deterrence through international criminal justice is significant, especially given the GoSL's total disregard for the applicability of the rule of law and established international standards.¹²⁶ That said, and recognizing the duality of victim and savior¹²⁷, the above analysis points to a significant challenge in pushing for an internationalist agenda in "delivering justice" in the transitional moment, especially through an international mechanism.¹²⁸

Nonetheless, the existing tools for grappling with transitions, especially when addressing mass human rights violations, are limited and often encapsulated within the truth vs. justice paradigm, or commissions vs. courts, debate.¹²⁹ Evidence of success from international and hybrid institutions is weak. As scholars debate the merits of international justice, a growing body of literature challenges the role courts play in delivering justice.¹³⁰ The evidence of success

¹²⁴ Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press, 2004).

¹²⁵ Makau Mutua, "What is Twail?" (2000) A.S.I.L. Proceedings of the 94th Annual Meeting 31.; Antony Anghie, 'What is TWAIL: Comment', (2000) 94 Am. Soc'y Int'l L. Proc. 39.; Obiora C. Okafor, 'Critical Third World Approaches to International Law (TWAIL): Theory, Methodology, or Both?' (2010) 10 International Community Law Review 37.

¹²⁶ Amnesty International, "Sri Lanka: Reconciliation at a crossroads: Continuing impunity, arbitrary detentions, torture and enforced disappearances: Amnesty International Submission to the UN Universal Periodic Review", 1 April 2012; Amnesty International, No Real Will to Account: Shortcomings in Sri Lanka's National Plan of Action to implement the recommendations of the LLRC, 30 August 2012, ASA 37/010/2012; International Crisis Group (ICG), *Sri Lanka's Authoritarian Turn: The Need for International Action*, 20 February 2013, Asia Report N°243, available at: <http://www.unhcr.org/refworld/docid/5124deb32.html>; Human Rights Watch, "We Will Teach You a Lesson" - Sexual Violence against Tamils by Sri Lankan Security Forces, 26 February 2013, ISBN: 1-56432-993-3, available at: <http://www.unhcr.org/refworld/docid/5130850f2.html>.

¹²⁷ Kamari Clarke, *The Rule of Law Through Its Economies of Appearances: The Making of the African Warlord*, Indiana Journal of Global Legal Studies Vol. 18 #1 (Winter 2011)

¹²⁸ Simultaneously, the law's ability to protect those that are the weakest must also be recognized; See for example Patricia J Williams, *Alchemy of Race and Rights: Diary of a Law Professor* (Harvard University Press, 1991), at 146-166.

¹²⁹ Vasuki Nessaih, "Truth vs. Justice? Commissions and Courts", in Jeff Helsing and Julie Mertus eds., *Human Rights and Conflict*, USIP (2006) at 377.

¹³⁰ See for example: Kamari Clarke & Mark Goodale eds., *Mirrors of Justice: Law and Power in the Post-Cold War Era* (Cambridge Univ. Press, 2009); Makau Mutua, "The International

from Commissions of Inquiries and Truth and Reconciliation Commissions, especially South Africa and Canada, seem) have similar pitfalls as international courts. They too are susceptible to politics, similar to what was illustrated in the previous section.¹³¹ What then are the alternatives for a plural and diverse society that has been ravaged by conflict, such as Sri Lanka? I now briefly sketch out a rudimentary potential transitional justice plan for Sri Lanka.¹³²

The alternatives are located in Sri Lanka's past, present, and future. Sri Lanka does not operate within a political vacuum. Its recent move to a middle-income country status is significant, as it demonstrates the country has a fast-developing economy that has joined the rest of the region in experiencing profound economic growth.¹³³ Additionally, Sri Lanka has a rich history, albeit described as problematic, in tackling past atrocities through Presidential Commissions of Inquiry.¹³⁴ Whether successful or an utter failure, these Commissions provide an existing domestic framework that can be drawn upon, which has been deployed in the past.¹³⁵ To build on the existing tents of the transitional justice literature, the alternatives available to confront human causalities during the conflict must be multifaceted and diverse.¹³⁶ I employ an access to justice approach in dealing with mass human right violations. In doing so, I invoke the important contributions of Professor Ronald MacDonald,¹³⁷ who suggests that an access to justice approach brings to the center a multidimensional strategy. Such a strategy "must

Criminal Court in Africa: Challenges and Opportunities" Norwegian Peacebuilding Centre NOREF Working Paper, September 2010, Buffalo Legal Studies Research Paper No. 2011 – 003.

¹³¹Stanton, Kim, "Looking Forward, Looking Back: The Canadian Truth and Reconciliation Commission and the Mackenzie Valley Pipeline Inquiry" (2012) 27 (1), Canadian journal of law and society 81-99; Sujith Xavier, "[Sri Lankan Presidential Commission of Inquiry \(2007\): Did it amount to a fair hearing?](#)" (2010) 10 Mexican Yearbook of International Law, 347.

¹³² Such a plan is based on extensive field work during the following periods: in the Eastern Province in 1999-2000 as Documentation Officer, Home For Human Rights; Legal Advisor, Home for Human Rights, 2008-2012; Trustee, Home for Human Rights, 2012-Present; See also, Sujith Xavier, "[Sri Lankan Presidential Commission of Inquiry \(2007\): Did it amount to a fair hearing?](#)" (2010) 10 Mexican Yearbook of International Law, 347.

¹³³ World Bank, Countries, <http://www.worldbank.org/en/country/srilanka>; But see also, Safraty

¹³⁴ Sujith Xavier, "[Sri Lankan Presidential Commission of Inquiry \(2007\): Did it amount to a fair hearing?](#)" (2010) 10 Mexican Yearbook of International Law, 347.

¹³⁵ The Social Architects, "The Numbers Never Lie: A Comprehensive Assessment of Sri Lanka's LLRC Progress", March 2013, available at: <http://cl.ly/0d0M1S2F3N3H>.

¹³⁶Rama Mani, 'Dilemmas of Expanding Transitional Justice, or Forging the Nexus between Transitional Justice and Development' (2008) 2 International Journal of Transitional Justice 25; Vasuki Nessaih, "Truth vs. Justice? Commissions and Courts", in Jeff Helsing and Julie Mertus eds., Human Rights and Conflict, USIP (2006)

¹³⁷ Roderick A. MacDonald, "Access to Justice in Canada Today: Scope, Scale and Ambitions" in Julia Bass, W. A. Bogart and Frederick H. Zemans, eds., *Access to Justice for a New Century: The Way Forward* (Toronto: LSUC, 2005) 19-31, 99-101; Roderick A. MacDonald "Access to Justice and Law Reform #2» (2001) 19 Windsor Yearbook of Access to Justice 317-326.

be pluralistic and embrace all the sites where law is made, administered and enforced”.¹³⁸

In light of the politics of contemporary Sri Lanka, such an invocation may not be conducive to the realities of the day, given the GOSL’s current position on post war reconciliation. Nonetheless, keeping with the theme of this volume as part of a moment in post-war Sri Lanka, an attempt must be made to imagine new possibilities. I suggest that an access to justice model will open up new vistas for different interest holders, especially victims of war crimes. I imagine an access to justice model to be a turn towards truth claims, blended with justice claims about the past, the present, and future, where those who were affected and those who continue to be affected, can come to terms with their emotional trauma through institutional recognition of the truth, delivery of some form of institutional justice, and socio-political outcomes that result in systemic change. I adopt such an approach cautiously, taking stock of and reflecting on the contributions from law and development over the years.¹³⁹

4.1 Access to Justice

Current characterizations of access to justice suggest there are constant shifts in relativizing law’s formality. Starting in the 1960s, there has been an emphasis on law’s formalism and a turning away from the nation state’s monopoly on making laws.¹⁴⁰ Particularly in North America, the political context, inspired by feminist¹⁴¹, civil rights¹⁴² and international human rights movements, such as those referred to earlier¹⁴³, warrant a radicalization of law. Thus, we saw the development of progressive lawyering through the emergence of practicing

¹³⁸ Roderick A. MacDonald, “Access to Justice in Canada Today: Scope, Scale and Ambitions” in Julia Bass, W. A. Bogart and Frederick H. Zemans, eds., *Access to Justice for a New Century: The Way Forward* (Toronto: LSUC, 2005) at 8.

¹³⁹ David Trubek & Marc Galanter, “Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States”, (1974) *Wisconsin Law Review*, p 1062; David Trubek & Alvaro Santos, “Introduction: The Third Moment in Law and Development Theory and the Emergence of a New Critical Practice”, in: David Trubek & Alvaro Santos (eds), *The New Law and Economic Development: A Critical Appraisal 1* (New York, Cambridge University Press, 2006); Peer Zumbansen & Ruth Buchanan, “Approximating Law and Development, Human Rights and Transitional Justice” in P Zumbansen and R Buchanan (eds) *Law in Transition: Development, Rights and Transitional Justice* (Oxford, Hart Publishing, 2013).

¹⁴⁰ Sally Engle Merry, “Legal Pluralism” (1988) 22 (5) *Law & Soc’y Rev.* 869; Marc Galanter, “Justice in Many Rooms: Courts, Private Ordering and Indigenous Law”, (1981) 19 *Journal of Legal Pluralism* 1.

¹⁴¹ Mari Matsuda, *Beside My Sister, Facing the Enemy: Legal Theory Out of Coalition*, (1990) 43 *Stanford Law Review*, 1183-1192.

¹⁴² Richard Delgado, “The Imperial Scholar: Reflections on a Review of Civil Rights Literature” (1984) *University of Pennsylvania Law Review*, Vol. 132.

¹⁴³ Samuel Moyn, *The Last Utopia* (Belknap Press, 2012).

law for “poor people”.¹⁴⁴ In Canada, in particular, the development of access to justice has been understood in terms of temporal sequencing. The first wave of access to justice reforms addressed access to courts and lawyers, such that its focus was on the costs, delays, and complexity of the legal system.¹⁴⁵ The second wave honed in on legal aid and institutional restructuring. The third wave emphasized access to justice as an equality claim. In the fourth wave, the centrality of alternative dispute settlement mechanisms was highlighted. In the fifth phase, there is a holistic approach that builds on the previous phases. Thus, access to justice is now conceived of as substantive justice, procedural fairness, and equal access to institutions. The general strategy has centered on providing access to legal institutions, legal education, the judiciary, and public institutions for the historically excluded. Through the different stages, two basic strands of the access to justice strategy can be articulated: a multidimensional approach to access to justice and a legal pluralistic understanding of where law is produced, applied, and enforced.¹⁴⁶

Using these two strategies as the backdrop, I argue that the mass human rights atrocities in Sri Lanka can be handled through these two legal techniques as an alternative to the calls for the creation of an international mechanism to prosecute those responsible for mass human rights violations. The multidimensional strategy vis-à-vis accountability for mass human rights violations suggests that there must be an emphasis on domestic access to courts and other available tools. For example, the Sri Lankan judiciary has a robust history of adjudicating violations of fundamental rights for its citizens, especially from minority communities. Since the start of the conflict, local lawyers have been fast at work in bringing *habeas corpus* motions to the courts as a reaction to the draconian implementation of the *Prevention of Terrorism Act* (1978) and the *Emergency Regulations*¹⁴⁷. For example, in *Nallaratnam Singarasa v. Attorney General*,¹⁴⁸ local legal advocates challenged the unconstitutional nature of the detention, torture, and forced confession of the applicant. Even though the Sri Lankan courts were not sympathetic to the applicant’s claims, this particular

¹⁴⁴Gerald Lopez, Keynote Address: Living and Lawyering Rebeliously, (2005) 73 FORDHAM LAW REVIEW, 2041-2054; Robert A. Williams, Jr. "Vampires Anonymous and Critical Race Practice" Arizona Legal Studies Discussion Paper No. 09-32.

¹⁴⁵Roderick A. MacDonald, "Access to Justice in Canada Today: Scope, Scale and Ambitions" in Julia Bass, W. A. Bogart and Frederick H. Zemans, eds., *Access to Justice for a New Century: The Way Forward* (Toronto: LSUC, 2005) 19-31, 99-101; Roderick A. MacDonald "Access to Justice and Law Reform #2» (2001) 19 Windsor Yearbook of Access to Justice 317-326.

¹⁴⁶ Roderick A. MacDonald, "Access to Justice in Canada Today: Scope, Scale and Ambitions" in Julia Bass, W. A. Bogart and Frederick H. Zemans, eds., *Access to Justice for a New Century: The Way Forward* (Toronto: LSUC, 2005).

¹⁴⁷ Emergency (Miscellaneous Provisions and Powers) Regulations No. 1 of 2000 as promulgated in Gazette 1130/8 of 3 May 2000; and amendments promulgated to those concerning arrest and detention on 16 May 2000. A state of emergency has been in force in Sri Lanka nearly continuously since 1983.

¹⁴⁸ *Nallaratnam Singarasa v. Attorney General*, S.C. SPL (LA) No. 182/99 (2006), *reprinted in* 17 (227-228) L. & SOC. TRUST REV. 9-18 (2006).

case brought international attention to the GoSL's position, especially after the dubious and unprecedented move by the Sri Lankan Supreme Court to render the ratification of the *Optional Protocol to the International Covenant on Civil and Political Rights* unconstitutional.¹⁴⁹ A similar case was before the Sri Lankan Supreme Court where the applicant was tortured and murdered whilst in detention as result of prison riots.¹⁵⁰ Granted, the recent impeachment of the Chief Justice and numerous corruption claims against the judiciary loom over any calls to strengthen the domestic judiciary.¹⁵¹

Nonetheless, emphasis must be made to secure the de-politicization of the Sri Lankan judiciary and the legal profession. It should be emphasized that I am in no way suggesting the rule of law type model that is pervasive in the law and development discourse at the moment. Such an initiative can be gleaned through donor agencies policies (World Bank for example) to strengthen local governance through economic and structural reforms.¹⁵² The access to justice model advocated here however centers on providing access to legal institutions, legal education, the judiciary, and public institutions for the marginalized. It specially moves away from a top down process (imposition of rule of law from Western donors) to one that is much more holistic with an emphasis on grassroots mobilization.

Adopting an access to justice lens will require a holistic approach to how Sri Lanka's justice systems functions. There should be an emphasis on holding the judiciary and the state apparatus to account, whilst simultaneously providing the required training and legal education to judges and legal professionals. Local participants (all sections of the Sri Lankan polity) should encourage reforms to the existing structures to provide legal aid and re-conceptualize the legal claims based on discrimination on race, ethnicity and equality. Alternative dispute resolution mechanisms (as mediation and other forms of negotiation) should be fostered and encouraged.

Simultaneously, and as an ancillary process, an access to justice approach would encourage the utilization of existing international institutions to promote an accountability agenda.¹⁵³ For example, Sri Lanka is party to numerous international conventions with specialized monitoring bodies, such as the

¹⁴⁹ Nigel Rodley, "The Singarasa Case: Quis custodiet ... ? A Test for the Bangalore Principles of Judicial Conduct" (2008) *Israel Law Review* 41 (03), 500-521

¹⁵⁰ *Ambalavan Ganeshan v. Chief Inspector of Police & Attorney General* [2012]

¹⁵¹ International Bar Association, *A Crisis of Legitimacy: The Impeachment of Chief Justice Bandaranayake and the Erosion of the Rule of Law* (28 03 2013) online<<http://www.ibanet.org/Article/Detail.aspx?ArticleUid=0d4e1219-9ce2-4390-81f9-efd8cbdacf6c>>

¹⁵² Kerry Rittich, "The Future of Law and Development: Second Generation Reforms and the Incorporation of the Social", 26 *Michigan J. Int'l L.* 199 (2006)

¹⁵³ Undoubtedly, this is susceptible to the above listed criticism. I therefore suggest such an approach as way to buttress the local reforms.

monitoring body of the Convention Against Torture. Local NGOs and individuals should submit complaints to these existing international institutions. This should not be seen as a legal act to access justice, but as a political act of lobbying with the potential of creating an international record¹⁵⁴. Other international institutions such as the International Criminal Court should be utilized as means to gain leverage against the GoSL and its officials. For example, Union of the Comoros recently filed a complaint with respect to the 31 May 2010 Israeli raid on the Humanitarian Aid Flotilla bound for Gaza Strip. Comoros requested the Prosecutor of the ICC pursuant to Articles 12, 13 and 14 of the Rome Statute “to initiate an investigation into the crimes committed within the Court’s jurisdiction, arising from this raid”. Such an international strategy is available to accountability seeking groups such as the Tamil Diaspora. The international community can play a pivotal role in supporting local stakeholders, through, for example, grants, contributions, and educational opportunities for local experts to gain access to new knowledge fields, in securing such an access to justice model. Moreover, the international community can and should utilize existing tools, such as the referral mechanism within the ICC, as a way to leverage Sri Lanka’s compliance with an access to justice policy to strengthen domestic institutions.

5 Conclusion

My research and legal practice are informed and inspired by the lived experiences of the people of the Global South, prompting an increased collaboration between legal scholars and anthropologists, historians, political scientists and sociologists. A special aspect of this research is its emphasis on interdisciplinarity and empiricism. This approach is inspired by the literature (such as the works of Patricia J. Williams and David B. Wilkins¹⁵⁵) that uses personal stories and narratives to describe, understand, and theorize its subject position vis-à-vis its field of study. I am simultaneously committed to the methodologies associated with the Third World Approaches to International Law (TWAAIL) movement(s) that seek to unpack, deconstruct and then reconstruct international law.

In this context, this paper examined the UN Expert Panel’s recommendation for the establishment of an independent international mechanism to monitor the Sri Lankan Government’s initiation of an accountability proceeding, to investigate the alleged violations, and to collect data was taken as the foil to discuss some of the critical ramifications of creating an international criminal institution for Sri Lanka. This chapter has demonstrated that international criminal justice is fraught with

¹⁵⁴ Christoph J. M. Safferling, *Towards an International Criminal Procedure* (Oxford University Press, 2012).

¹⁵⁵ Patricia J. Williams, *The Alchemy of Race and Rights* (London: Virgo Press, 1993); Wilkins, David B., “The New Social Engineers in the Age of Obama: Black Corporate Lawyers and the Making of the First Black President”, (2011) Harvard Public Law Working Paper No. 11-12.

controversies and may not yield the optimum result in confronting past and on-going human rights violations.

This paper argued that the access to justice literature may open up new vistas as to how to manage past mass atrocities. The existing literature on transitional justice has alluded to the benefits of adopting a holistic multidimensional approach to dealing with past atrocities. Taking my cue from those critical of existing attempts to “end impunity”, I have preliminarily advocated for an access to justice model. Such an approach necessitates that we turn to existing domestic mechanisms and strengthen the judiciary, legal profession, and legal education, for example. More importantly, ‘we’ must adopt multidimensional strategies and recognize that law can be produced within multiple milieus. These are but a starting point in thinking through different transitional justice mechanisms.

I have argued for such a perspective based on my professional experience of working in the North and East of Sri Lanka. The conflict has had disastrous effects on the Tamil population; they have been shut out of the various conversations about governance generally for the last 27 years. Moreover pro-nationalist agenda emphasis has shifted the focus away from the needs of the community (vis-à-vis education, health care, access to institutions) to one that is based on an illusory rights claim (i.e. discrimination). The rights based approach is part and parcel of the top down spread of international law and international human rights law, fostered and promoted by the NGO elites in Colombo and abroad who lack real connections to those that are affected on the ground. I rely on the access to justice model as a possibility of turning back to the communities that have suffered from the onslaught of the civil war, both in the North and East and in the West and South and allowing them to decide their own future.