

## SYMPOSIUM ON INTERNATIONAL CRIMINAL LAW'S CRITICAL AFTERMATHS

### TRUTH EATERS: TWAIL AND TRANSITIONAL JUSTICE IN SRI LANKA

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#### *Introduction*

Every May 18, mourners gather near the sandy beaches of Mullivaikkal, a small strip between Chundikulam and Mullaitivu in the Northern province of Sri Lanka, to commemorate the 2009 genocide against the Tamils. Mullivaikkal is where approximately three hundred thousand Tamil civilians found refuge as they fled the military bombardment between January and May 2009.<sup>1</sup> Starting in 2010, the remembrance day commemoration attracts thousands of locals, coming together near the beach to reflect and remember. Increasingly, the commemoration also attracts transitional justice experts, along with diplomats and international governmental organization workers. In my contribution, I reflect on the work of the local and diaspora Tamil transitional justice experts as they begin to gather evidence from the families of victims for the newly created 2024 Commission for Truth, Unity and Reconciliation. Drawing on Homer's *The Odyssey* and the story of the "lotus eaters," I frame these experts as "truth eaters," preoccupied with collecting victim narratives for the purpose of personal gratification. As they engage in the repeated collection of particular elements of the victims' truth—elements predicated on the demands of the field of transitional justice—the truth eaters are oblivious to the root causes of the war. I explain how attention to root causes through a Third World Approaches to International Law (TWAIL) lens can avoid the effects of the dominant liberal modes of truth seeking reflected in the work of these truth eaters.

This past May 18, I joined Tamil transitional justice colleagues as they waited to pay their respects to the victims. We waited in line for two hours under the hot sun to lay flowers at the site of the monument. In these fleeting moments of human connection, surrounded by the gravity of an alleged genocide, surprisingly little reference was made to the families of the victims, attending to remember their loved ones in community. In the distance, I noticed these families sitting under the Banyan trees, weeping while avoiding the sun. They were performing the traditional rites of oppari, a form of mourning ritual prevalent in the North and East of Sri Lanka. Reflecting on the frenzy of those around me, the distinct separation between the families and transitional justice experts, like myself, prompts this intervention.

On their return from Troy, Odysseus and his men stumble upon an island where the locals consume the lotus fruit. The consumption of the fruit casts its consumers into a dreamlike state, longing for more. Three of Odysseus's companions, after consuming the "honey sweet fruit of the lotus," refused to rejoin Odysseus,

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<sup>1</sup> GORDON WEISS, [THE CAGE: THE FIGHT FOR SRI LANKA AND THE LAST DAYS OF THE TAMIL TIGERS](#) (2011); [Report of the Secretary-General's Panel of Experts on Accountability in Sri Lanka](#) (Mar. 31, 2011).

becoming “forgetful of their homeward way” and purpose.<sup>2</sup> Taking inspiration from this characterization of the effects of the lotus fruit,<sup>3</sup> I view local and diaspora Tamil transitional justice experts collecting truth claims from the 2009 genocide victims as truth eaters. Truth in my formulation is the elixir, having the same effect as the lotus fruit that renders its consumers into a dreamlike state, unable to go beyond the task of consumption, while also forgetting the need for justice for the victims. In the following sections, I first locate my argument within the tradition of TWAIL, a tradition that is critical of the field of transitional justice (TJ) as an alternative to international criminal law (ICL). Then I turn to the history of truth commissions in Sri Lanka to make visible the state structures that are intricately involved in the production and the reproduction of a particular type of truth, recreating institutional fault lines around truth eating. From there, I reflect on the aftermath of critique, the animating purpose of this symposium. In the concluding section, I consider the connection between root causes and reparative methods returning to where I started from, namely the beaches of Mullivaikkal. I offer these insights as a former transitional justice worker focused on the northeast of Sri Lanka and a survivor of the internal armed conflict, with a deep commitment to building new and just possibilities for my community.

*Third World Approaches to International Law, International Criminal Law, and Transitional Justice*

Transitional justice is an expansive field, with competing and overlapping definitions.<sup>4</sup> The oft-cited description, offered by the UN secretary-general’s 2004 report to the UN Security Council suggests that transitional justice is a set of practices, processes, and mechanisms that can reconcile a violent past through “accountability, justice and reconciliation.”<sup>5</sup> The “field” is composed of multiple approaches to overcoming past violence,<sup>6</sup> centered on four major themes: individual criminal accountability, truth telling, reparations, and institutional reform and non-recurrence. From this vantage point, the field of TJ encompasses international criminal law through individual criminal prosecutions. The mechanisms of TJ may complement or supplant ICL, particularly when individual prosecutions are unavailable for a myriad of reasons.

At its core, TWAIL reveals the embedded racial hierarchy within international law and exposes practices of domination, while also calling for the construction of new and alternative legal edifices.<sup>7</sup> Since its inception, TWAIL has offered broad and overarching insights into the “politics of resources, the politics of knowledge, and the politics of the professional and practice dimensions of international law and policy.”<sup>8</sup> TWAIL scholars attuned to the unequal North-South dynamics in global governance and international law have also critiqued the myopic nature of TJ at

<sup>2</sup> HOMER, *THE ODYSSEY* 83 (Samuel Bulter trans., 2020). For another example of the use of Homer’s poem, see Jeffrey Dunoff & Joel Trachtman, *The Lotus Eaters*, EJIL:TALK! (July 16, 2010).

<sup>3</sup> Greg Beatty, *The Lotus Eaters: Sky Glabush*, 19 BORDER CROSSINGS 4 (2000); Edwin Haward, *Review of Nebru: The Lotus Eater from Kashmir*, 30 INT’L AFFS. 122 (1954).

<sup>4</sup> See generally Sujith Xavier, *Transitional Justice*, in RESEARCH HANDBOOK ON THIRD WORLD APPROACHES TO INTERNATIONAL LAW (Anthony Anghie et al. eds., forthcoming).

<sup>5</sup> UN Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, para. 8, UN Doc. S/2004/616 (Aug. 23, 2004); GUIDANCE NOTE OF THE SECRETARY-GENERAL: UNITED NATIONS APPROACH TO TRANSITIONAL JUSTICE (2010).

<sup>6</sup> Christine Bell, *Transitional Justice, Interdisciplinarity and the State of the “Field” or Non-Field*, 3 INT’L J. TRANSITIONAL JUST. 5 (2009).

<sup>7</sup> See, e.g., Makau Mutua, *What Is TWAIL?*, 94 ASIL PROC. 31 (2000); Obiora Chinedu Okafor, *Critical Third World Approaches to International Law (TWAIL): Theory, Methodology, or Both?*, 10 INT’L CMTY. L. REV. 371, 371–78 (2008); Obiora Chinedu Okafor, *International Human Rights Fact-Finding Praxis: A TWAIL Perspective*, in *THE TRANSFORMATION OF HUMAN RIGHTS FACT-FINDING* 49 (Philip Alston & Sarah Knuckey eds., 2016).

<sup>8</sup> VASUKI NESLAH, *INTERNATIONAL CONFLICT FEMINISM: THEORY, PRACTICE, CHALLENGES* (2024).

various registers.<sup>9</sup> Some TWAAIL scholars have focused on transitional justice's emphasis on recent violence to the exclusion of historic harms of settlement and conquest.<sup>10</sup> Others have challenged transitional justice's preoccupation with a community's turn to the future, without sufficient attention to root causes of violence.<sup>11</sup> This latter point is particularly salient in the context of the commemorations in Mullivaikkal and the role of transitional justice experts.

A transnational class of experts have appeared with expertise arising out of their praxis in each aforementioned transitional justice theme.<sup>12</sup> The role of these experts and their expertise is the subject of TWAAIL expositions.<sup>13</sup> One strand of TWAAIL scholarship alludes to experts' limited knowledge of the local context.<sup>14</sup> In each conflict situation, there are particularities that may have sparked mass violence, including socio-political, economic, and historical factors. For instance, transitional justice experts purported to help the trial chamber of the International Criminal Tribunal for Rwanda understand the colonial history of Rwanda and the construction of racial and ethnic difference.<sup>15</sup> Yet the Trial Chamber's understanding of the context as laid out in *The Prosecutor v. Akayesu* (the first decision of the Tribunal) was devoid of such historical specificities, especially as it related to the particular group dynamics of the Hutu, Tutsi, and Twa communities and identities.<sup>16</sup>

Other TWAAIL scholars have focused on victims and competing interests of the transitional justice community.<sup>17</sup> The constituents of the transitional justice community are diverse, motivated by their own respective objectives, and include global governance institutions, activist communities (especially diasporic communities that may have fled violence), and international donors. Transitional justice experts working with victims are required to document and narrate the stories of victims in specific, albeit problematic, ways.<sup>18</sup> The conversion of the victims' truth claims moreover is necessary (for example through Tamil to English translations), ensuring that they are palatable and accessible to the core constituents of the transitional justice community, especially within truth telling and truth commissions. These demands of the core constituents has led some TWAAIL scholars to characterize transitional justice experts as "entrepreneurs," who reproduce colonial relations.<sup>19</sup>

Sri Lanka is illustrative of these various fault lines of transitional justice. There is now a cottage industry of transitional justice experts embroiled in collecting truth narratives from victims' families.<sup>20</sup> These experts, the truth eaters, focus on truth for personal gratification offered through the approval of TJ's constituents, as opposed to undoing relations of domination.

<sup>9</sup> Obiora Chinedu Okafor & Uchechukwu Ngwaba, *The International Criminal Court as a "Transitional Justice" Mechanism in Africa: Some Critical Reflections*, 9 INT'L J. TRANSITIONAL JUST. 1 (2014).

<sup>10</sup> Xavier, *supra* note 4.

<sup>11</sup> Kamari Maxine Clarke, *The Rule of Law Through Its Economies of Appearances: The Making of the African Warlord*, 18 IND. J. GLOB. LEGAL STUD. 7 (2011).

<sup>12</sup> B.S. Chimni, *International Institutions Today: An Imperial Global State in the Making*, 15 EUR. J. INT'L L. 1 (2004).

<sup>13</sup> Elena Baylis, *Tribunal-Hopping with the Post-Conflict Justice Junkies*, 10 ORE. REV. INT'L L. 361 (2008); Sujith Xavier, *Talking About Justice, in SRI LANKA: THE STRUGGLE FOR PEACE IN THE AFTERMATH OF WAR* (Amarnath Amarasingam & Daniel Bass eds., 2017); *see also* Briony Jones & Ulrike Lühe, *Knowledge for Peace: Transitional Justice and the Politics of Knowledge in Theory and Practice, in KNOWLEDGE FOR PEACE: TRANSITIONAL JUSTICE AND THE POLITICS OF KNOWLEDGE IN THEORY AND PRACTICE* 1 (Briony Jones & Ulrike Lühe eds., 2021).

<sup>14</sup> Baylis, *supra* note 13; Xavier, *supra* note 13; *see also* Jones & Lühe, *supra* note 13.

<sup>15</sup> Prosecutor v. Akayesu, Case No. ICTR-96-4-T, *Judgment*, paras. 83–86 (Sept. 2, 1998).

<sup>16</sup> MAHMOOD MAMDANI, *WHEN VICTIMS BECOME KILLERS: COLONIALISM, NATIVISM, AND THE GENOCIDE IN RWANDA* 41–75 (2020).

<sup>17</sup> Tshepo Madlingozi, *On Transitional Justice Entrepreneurs and the Production of Victims*, 2 J. HUM. RTS. PRAC. 208 (2010).

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*; Baylis, *supra* note 13; Xavier, *supra* note 13.

<sup>20</sup> Kishali Pinto-Jayawardena, *Cheers in Colombo, Apathy in Jaffna*, SUN. TIMES (Aug. 28, 2016).

*The Historical Truth About Truth Commissions in Sri Lanka*

In order to understand the truth-eating function of transitional justice experts, it is necessary to place them in a longer, colonial history of truth commissions and commissions of inquiry. These public institutions are central to the narratives of post-independence Sri Lanka. The first Commission of Inquiry Act was promulgated by Governor-General William Henry Gregory in 1872. Since then, commissions were used to grapple with communal ethno-racial violence, relying on victim narratives to reach factual and legal determinations that fail to account for victims' experiences of violence. Importantly, this practice continued well after independence. In 1948, the newly independent state of Ceylon (becoming Sri Lanka after 1972) created the Presidential Commission of Inquiry Act.<sup>21</sup> Since then, Sri Lanka has consistently used this law to make truth determinations about specific instances of state and non-state violence, especially in the traditional, north-eastern homelands of the Tamils.<sup>22</sup> Between 1981–84, a particularly violent period for the Tamils, Sri Lanka established numerous truth commissions to make truth determinations about the ethno-racial violence.<sup>23</sup>

Twelve months after defeating the Tamil Tigers in May 2009, President Mahinda Rajapaksa set up the Commission of Inquiry on Lessons Learnt and Reconciliation (LLRC) under the 1948 Act.<sup>24</sup> In the final stages of the war, the Sri Lankan military had pushed close to three hundred thousand fleeing civilians to Mullivaikkal, the site of the commemoration that opened this essay. The LLRC was tasked with looking back at the conflict and “ahead for an era of healing and peace building in the country.”<sup>25</sup> It minimized the number of civilian casualties on the basis that there was no official death toll. This was contrary to the findings of a UN expert panel.<sup>26</sup>

Under mounting international pressure to secure accountability for the alleged genocide, a newly elected president relented to a United Nations Human Rights Council consensus resolution in 2015.<sup>27</sup> Sri Lanka agreed to create various transitional justice mechanisms and appoint a new Consultation Task Force. Unlike prior commissions, the Task Force was charged with soliciting “views and comments” from the public on the proposed mechanisms. Yet the Task Force’s report was tabled after a change of government in 2019. Another commission was established in January 2024, again under international pressure, to investigate and make recommendations about the mass violence that occurred between 1983 and 2009.<sup>28</sup>

This history of commissions in Sri Lanka has led international human rights organizations to suggest that there is a process of “make believe” in dealing with past violence through the 1948 Act.<sup>29</sup> Returning to the site of commemoration at Mullivaikkal, there was a palpable dissonance between the TJ experts that I was with and the families sitting under the Banyan trees.

<sup>21</sup> [The Presidential Commissions of Inquiry Act, No. 17, Acts of Parliament, 1948](#), § 2 (Sri Lanka).

<sup>22</sup> From 1963 to 2002, the Act was deployed on fourteen different occasions.

<sup>23</sup> KISHALI PINTO-JAYAWARDENA, [A LEGACY TO REMEMBER, SRI LANKA’S COMMISSIONS OF INQUIRY, 1963–2002: A REFERENCE GUIDE TO COMMISSION REPORTS WITH A TABULATED LIST OF RECOMMENDATIONS](#) (2010).

<sup>24</sup> [Xavier](#), *supra* note 13.

<sup>25</sup> Comm’n Inquiry on Lessons Learnt and Reconciliation, [The Report of the Commission of Inquiry on Lessons Learnt and Reconciliation](#) (Nov. 2011) (Sri Lanka); [Xavier](#), *supra* note 13.

<sup>26</sup> [Report of the Secretary-General’s Panel of Experts on Accountability in Sri Lanka](#), *supra* note 1; see also Amnesty International, [Sri Lanka: When Will They Get Justice?](#) (2011).

<sup>27</sup> [Human Rights Council Res. 30/1](#), at 1 (Oct. 14, 2015).

<sup>28</sup> M.S.M Ayub, [Why So Many Tools for Reconciliation?](#), DAILY MIRROR (Jan. 1, 2024).

<sup>29</sup> Amnesty International, [Twenty Years of Make-Believe: Sri Lanka’s Commissions of Inquiry](#) (2009).

*Mapping a Different Path Under the Banyan Trees*

The lands and waters of Mullivaikkal are dry, even after the monsoon rains. Nestled between a Navy and Army camp, the commemoration is held on a sandy field, minutes away from the Indian Ocean. The field is dotted with tall Palmyra and Banyan trees, along with a handful of local shrubs.<sup>30</sup> The brown, golden sand makes it difficult to walk. On a sunny day, the sand is glistening, and the water looks inviting. Last May, before leaving the commemoration, I decided to walk to the beach a few kilometers away. On my way to the water, I noticed that the Navy and the Army had left intact one of the vehicles used by the Tamil Tigers in their last days of battle with a sign in the official languages. Hard to read, as the paint had eroded with the wind, rain, and sea water, the faded sign and the relic of war harkened back to the bloodshed on this land in the final days of the battle.

Even though the land holds these traumatic memories,<sup>31</sup> or perhaps because it does, the families return every year. They come to mourn and to remember. On May 18, the sandy shores of Mullivaikkal becomes a place of repair, where something new can be imagined and built, perhaps as part of the constructive view of reparations.<sup>32</sup> Unencumbered by the various forces conspiring against them, the families resolve to remember demonstrates their commitment to justice and repair, on their own terms. There is an untapped potential for the local and diasporic Tamil transitional justice experts to pave a different path, one rooted in constructive reparations and building on a TWAAIL ethos of finding alternatives. We can move beyond the consumption of victim stories for personal gratification aligned with the Sri Lankan state. By joining our community under the shade of the Banyan tree, the local and diasporic Tamil transitional justice experts may be able to achieve something much more meaningful for our community, all the while leaving behind the trappings of transitional justice.

As I prepare for the upcoming May 18 Commemorations, our symposium prompt on aftermaths of critique seems timely. From my standpoint, a reparative approach to participation in the commemoration might entail joining the victims' families as they perform the traditional rituals of grief and memory common to all Tamils and to share *Kangi*, a rice broth that sustained the victims during the war's final days. Through this alternative form of commemoration—one that brings forth memories of conflict—we may be able to critically reflect on the root causes of the war together and build new legal edifices, beyond the truth commissions of the state. By joining the families, in community and on the lands by the waters where the violence occurred, our collective attention can shift away from the Sri Lankan state, a central architect of the ethno-racial violence. Revisiting the root causes of conflict in community may uncover deeper perspectives on colonial group distinctions introduced on the Island, first formulated by Ambalavaner Sivanandan, a Tamil refugee, as the disintegration of our “social formations.”<sup>33</sup> Such a community-based, collective reflection on social formations is an opportunity to consider an anti-colonial and just future.

<sup>30</sup> People for Equality and Relief in Sri Lanka (PEARL), *State-Sponsored Sinhalization of the North-East* (2022).

<sup>31</sup> For a cursory review of the growing literature on the relationship between land, people, and law, see John Borrows, *Outsider Education: Indigenous Law and Land-Based Learning*, 33 WINDSOR Y.B. ACCESS JUST. 1 (2016).

<sup>32</sup> OLUFEMI O. TAÍWÒ, *RECONSIDERING REPARATIONS* (2022).

<sup>33</sup> Ambalavaner Sivanandan, *Sri Lanka: Racism and the Politics of Underdevelopment*, 26 RACE & CLASS 1 (1984).