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**CHASING TAILS: ESTABLISHING THE RIGHT TO TRUTH,
MOURNING AND COMPENSATION**

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Abstract

This article scrutinizes the possibility of introducing the right to truth and the right to mourn in Sri Lanka as an integral component of a right to an effective remedy that can be afforded to the family members of the victims of enforced disappearances. The first segment considers the existing international legal jurisprudence on the right to truth especially drawn from Latin American jurisdictions where such a right has been introduced in the light of the enforced disappearances. The second section analyzes the possibility of introducing right to mourn as a component of both the right to an

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effective remedy and the right to truth. The Sri Lankan experience regarding the same has been extensively relied on and certain clarifications are provided herein to raise awareness regarding the right to mourn. This paper seeks to establish the right to mourn as a right that can be exercised in public in accordance with the wishes of the victims. The final segment seeks to identify the mechanisms used in providing compensation to victims of violations in general and reliance is placed on both international and domestic jurisprudence pertaining to payment of compensation.

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I. THE RIGHT TO TRUTH

A. *Right to Truth as an Abstract Concept*

Over the last few decades, an international debate has been unfolding on the substantive right to truth. While there is an abundance of literature on truth itself, the academics fail to analyze the nature of truth in the light of those who demand the right to know what came of their missing family members. This necessitates an analysis of the scope of truth. This task is made difficult by the absence of an established substantive right or any interpretive aid

regarding the right to truth in any of the major international human rights instruments.¹ However, an international right to truth has been established in the Preamble and Article 24(2) of the International Convention on the Protection of All Persons from Enforced Disappearances (ICPPED).² The cumulative effect of those human rights instruments can be interpreted as setting a trend in favor of establishing a substantive, enforceable right to truth.³ This assertion is further supported through recent case law, from various jurisdictions, that seeks to set in motion a trend favorable to establishing right to truth.

It is essential however, to test the normative strength of truth. This requires clarity of conceptualization of what is encapsulated in the term. Justice Albie Sachs,⁴ Thomas M. Antkowiak⁵ and Jack M. Balkin⁶ have written on the right to truth and its normative limitations, which this article uses as a baseline. Sachs, who was a former judge of the Constitutional Court of South Africa, stated in “Truth and

1. See, e.g., International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, June 26, 1984, 1465 U.N.T.S. 85 [hereinafter CAT]; Convention on the Elimination of All Forms of Discrimination against Women, Dec. 18, 1976, 1249 U.N.T.S. 13 [hereinafter CEDAW]; Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter CRC]; Universal Declaration of Human Rights, G.A. Res. 217 (III), U.N. GAOR, 3d Sess., U.N. Doc. A/810 (Dec. 10, 1948) [hereinafter UDHR]; American Convention on Human Rights, Nov. 22, 1969, 1144 U.N.T.S. 123 [hereinafter ACHR], and African Charter on Human and People’s Rights, June 27, 1986, 1520 U.N.T.S. 217 [hereinafter ACHPR]. Although none of these Conventions guarantee the right to truth and the right to receive information, the right to an effective remedy has been incorporated.

2. International Convention for the Protection of All Persons from Enforced Disappearance, Dec. 20, 2006, 2716 U.N.T.S. 3 [hereinafter ICPPED].

3. U.N. Secretary-General, Panel of Experts on Accountability in Sri Lanka, ¶ 272 (Mar. 31, 2011) [hereinafter Darusman Report] http://www.un.org/News/dh/infocus/Sri_Lanka/POE_Report_Full.pdf last visited Mar. 23, 2016.

4. See generally Albie Sachs, *Truth and Reconciliation*, 52 SMU L. REV. 1563 (1999).

5. See generally Thomas M. Antkowiak, Note, *Truth as Right and Remedy in International Human Rights Experience*, 23 MICH. J. INT’L L. 977 (2001–2002).

6. Jack M. Balkin, *The Proliferation of Legal Truth*, 26 HARV. J. L. & PUB. POL’Y 5 (2003).

Reconciliation” that there are four categories of truth: microscopic, logical, experiential, and dialogic truth.⁷ Balkin, however, is of the view that we are facing a proliferation of truth in the postmodern legal culture.⁸ Justice Sachs’s approach to truth emanates from a sociological perspective.

This article places emphasis on the legal perspective of truth, which departs from Balkin’s argument against what he refers to as the “proliferation of truth.” Balkin’s approach is essentially based on the misguided notion that a proliferation negates the validity of truth. However, this is erroneous in that a sifting of “credible” and “conclusive” truth from that of the proliferation leads to pure legal truth meaning that *per se* proliferation does not negate legal truth’s validity.

The argument made in this article is that there are three categories of truth when viewed from a socio-legal perspective: pure legal truth, credible truth and conclusive truth. The four types of truth that Justice Sachs has introduced fall into the larger categories of credible⁹ and conclusive truth. Antkowiak has expressed the idea that the right to truth can be divided into two further categories: an individual right applying to the victim and the family member and a general societal right.¹⁰ The author argues that truth as a collective right and the right to mourn inclusive of preservation of memory should be substantive rights in the Sri Lankan context. These rights are connected with the second tier right to truth that Antkowiak has presented in his piece.

Sri Lanka has released reports of several commissions of inquiry pertaining to alleged war crimes, crimes against humanity, and enforced disappearances.¹¹ The latest is the Paranagama Report

7. See generally Sachs, *supra* note 4, at 1571-72.

8. See generally Balkin, *supra* note 6.

9. See generally Sachs, *supra* note 4.

10. See generally Antkowiak, *supra* note 5.

11. There are allegations that the Commissions of Inquiry have not been effective in combatting impunity and providing justice. See generally U.N, Org., REPORT OF THE SECRETARY GENERAL’S PANEL OF EXPERTS ON ACCOUNTABILITY IN SRI LANKA (2011). See also KISHALI PINTO-JAYAWARDENA (EDS), 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).

released in August 2015, which is more formally known as the Report on the Second Mandate of the Presidential Commission of Inquiry into Complaints of Abductions and Disappearances (“Paranagama Report”).¹² The recommendations contained herein resemble the commission’s perception that truth can be ascertained through court procedures that make findings regarding alleged war crimes and crimes against humanity committed in Sri Lanka.¹³ This appears as an attempt to arrive at conclusive and credible truth through a legal procedure, which would lead to the ascertainment of legal truth. However, the process suggested for the ascertainment of truth appears to be unbalanced due to biases and prejudices. The process appears to be founded on the assertion that the courts of law would certainly determine that war crimes and crimes against humanity have been committed in the given context although such matters are yet to be submitted to courts of law for determination. Such approaches can pose obstacles to the reconciliation process and the country ought to adopt cautious strategies in dealing with such propositions.

B. *Scope of the Right to Truth*

Antkowiak states “one might expect to encounter [a legal right to know the truth] in our victim-centered system of international human rights protection.”¹⁴ This is only directly available to citizens of the countries in which the ICPPED has been ratified.¹⁵ Nevertheless, if truth is considered as an integral aspect of an effective remedy, the dialogue pertaining to effective remedies should undergo a radical transformation. It has been suggested that, ideological transformation can be sought within the right to truth.¹⁶ However, for this to happen

12. REPORT ON THE SECOND MANDATE OF THE PRESIDENTIAL COMMISSION OF INQUIRY INTO COMPLAINTS OF ABDUCTIONS AND DISAPPEARANCES (2015, Sri Lanka) [hereinafter Paranagama Report].

13. *Id.* ¶ 419.

14. Antkowiak, *supra* note 5, at 977.

15. Although Sri Lanka is a signatory to the Covenant as of December 10, 2015, due to the monistic approach adopted by the country, enactment of an enabling legislation is necessary prior to the application of the full gamut of the ICPPED.

16. Balkin, *supra* note 6, at 10.

effectively there should be clarity in scope of the right to truth. Anyone defining the scope of the right to truth should be ready to accept the reality that “what is true from the standpoint of law is not really true.”¹⁷ This highlights the view that there are other aspects to truth that go beyond mere legal acceptance of a fact being true. The outcome of a case that is decided in a court of law may be true in the eyes of law, however that neither makes it a conclusive nor a credible truth.

The conflict lies in the fact that legal truth is invoked through an institutionalized process that Balkin argues seeks to “regulate and declare what is legal or not legal.”¹⁸ Balkin’s assertion is faulty because it does not take into account the situations in which a certain process begins on the presumption that something illegal has occurred. Enforced disappearances are an example of such an institutional process in which the act of forcible disappearance is declared illegal at the outset. There are three outcomes expected from a process of that nature: (1) ascertaining whether the alleged perpetrator is guilty of the forcible disappearance; (2) finding out whether the disappeared person is alive, has been tortured, or has died subsequent to torture; and (3) determining the procedure that should be adopted in relation to the perpetrator if he is found to be guilty. Two of the aforementioned elements do not fall into the “regulation” and “declaration” of legality, which Balkin has presented his views on. What is generally established in a courtroom is the “legal” truth and, in this sense, Balkin’s argument that it is not necessarily true is acceptable. The second aspect is ascertaining the truth, while the third is the application of sentencing policy. Even though it is clear that the truth needs to be ascertained, the scope of truth remains unclear.

Requirements of the society should guide the determination of the scope of truth. In the context of enforced disappearances, the following can be identified as the requirements of the society: (1) right to know about the progress and results of the investigations;¹⁹ (2)

17. *Id.*

18. *Id.* at 12.

19. *See generally* Comm’n on Human Rights, REP. OF THE WORKING GROUP ON ENFORCED OR INVOLUNTARY DISAPPEARANCES, U.N. Doc. E/CN.4/1996/38 (1996); Human Rights General Comment 10 of the Working Group on Enforced or

finding out what happened to the victim of disappearance; (3) in the event the direct victim is found dead, the right to know the whereabouts of the remains if such evidence is available and the right to have the remains returned to the indirect victims;²⁰ (4) discovering the identity of the perpetrator and punishment of the perpetrator;²¹ (5) payment of compensation to family members; and (6) reconciliation and post-conflict reconstruction of society by facilitating grieving, mourning, and reconciling with grief.²²

Those victimized by enforced disappearances could be given the right of compensation and the right to truth by bringing perpetrators to justice.²³ This in turn could be used as a means of fighting the culture of impunity created by enforced disappearances. According to Groome, “right to the truth litigation has proven to be an effective means of both remediating harm caused to individuals and satisfying society’s interest in the truth about gross violations of human rights.”²⁴ This is due to the variety of mechanisms used to fight impunity,²⁵ one of which should be the right to truth. International

Involuntary Disappearances, U.N. Doc. A/HRC/16/48 (2010) [hereinafter General Comment 10 of the Working Group].

20. REP. OF THE WORKING GROUP ON ENFORCED OR INVOLUNTARY DISAPPEARANCES, *supra* note 19.

21. In certain contexts, this may go against witness protection laws and may create threats to the lives of those providing testimony. Hence, it is necessary to adopt a procedure that would impede the process of truth-finding. *See* Comm’n on Human Rights, REP. OF THE WORKING GROUP ON ENFORCED OR INVOLUNTARY DISAPPEARANCES, U.N. Doc. A/HRC/13/31 (Dec. 21, 2009); General Comment 10 of the Working Group on Enforced or Involuntary Disappearances, *supra* note 19. (“[T]he issue whether the names of the perpetrators should be released as a consequence of the right to know the truth is still controversial. It has been argued that it is inappropriate to release the names of the perpetrators in processes such as ‘Truth Commissions’, when suspects do not benefit from the legal guarantees normally granted to persons in criminal trials.”).

22. *Contra* the observations made by the U.N. in Sri Lanka, located in the COMPREHENSIVE REP. OF THE OFFICE OF THE U.N. HIGH COMMISSIONER FOR HUMAN RIGHTS ON SRI LANKA, ¶¶ 6, 32 and 56, U.N. Doc. A/HRC/30/61 (Sept. 28, 2015).

23. *Id.* ¶¶ 74, 80.

24. Dermot Groome, *The Right to Truth in the Fight Against Impunity*, 29 BERKELEY J. INT’L L. 175, 198 (2011).

25. *Id.*

obligations of states require states to adjudicate matters pertaining to forcible disappearances as an integral aspect of an effective remedy, meaning that there is a trend to compel states to fight impunity through the ascertainment of truth using court procedures. This adjudication requirement creates a precedence that deters states from utilizing forcible disappearances as a political tool to crush opposition. It further creates a general duty to protect citizens from gross violations of human rights irrespective of the perpetrator's relationship with the state.

The right to truth can be more specifically established through constitutional recognition of societies' cumulative experience of suffering, which has been achieved in the post-apartheid constitution of South Africa.²⁶ Specificity of right to truth is achieved when conclusive truth ascertained from court proceedings or Truth and Reconciliation Commissions are used in shaping the reconciliation process and transitional justice. Conclusive truth that is retrieved through such processes may be utilized in determining the nature of remedies that are granted to victims of enforced disappearances.

Sri Lanka's various attempts to bring about post-war reconciliation further define the scope of right to truth. One of Sri Lanka's first attempts is encapsulated in the Lessons Learnt and Reconciliation Commission's (LLRC) Report.²⁷ This report recommends the introduction of the right to truth in Sri Lanka to provide the indirect victims with the opportunity to learn the whereabouts of the victim, the destiny that befell the victim, and the right to bring the matter to a close.²⁸ Enforced disappearances alleged to have been committed by illegal armed groups are generally attributed to the civil war and insurgencies and generally remain unprosecuted due to lack of evidence. The LLRC was influential because it established that investigations should be carried out, even

26. "[W]e the people of South Africa, recognize the injustices of our past; honour those who suffered for justice and freedom in our land; respect those who have worked to build and develop our country; and believe that South Africa belongs to all who live in it." S. AFR. CONST., 1996, preamble.

27. REPORT OF THE COMMISSION OF INQUIRY ON LESSONS LEARNT AND RECONCILIATION (Nov. 2011, Sri Lanka) [hereinafter LLRC REPORT], P.O. No. CA/3/3/24.

28. *Id.* ¶¶ 5.29, 9.49; see 9.73.

disappearances allegedly caused by illegal armed groups.²⁹ This Commission has however, not extended the scope of the right to truth to include the right to know the whereabouts of children of women who were pregnant at the time the women disappeared.³⁰ Hence, it is recommended that the scope of truth should be expanded to include such children because of the psycho-social impact that it can have on children and their family members.

The recent Report of the Office of the High Commissioner for Human Rights on Sri Lanka (OISL Report) contains a separate chapter titled the “Quest for Truth”³¹ which is premised on the notion that indirect victims’ suffering “may amount to torture or cruel, inhuman or degrading treatment.”³² The anguish and suffering experienced by the indirect victims is accepted as a basis for their entitlement to the right to truth.³³ The indirect victims’ anguish and suffering has been referred to as “ambiguous loss” by Pauline Boss in her work entitled, *Ambiguous Loss: Learning to Live with Unresolved Grief*.³⁴ Boss defines ambiguous loss as “the incomplete or the uncertain loss.”³⁵ The argument can be raised that³⁶ family members of the victims of disappearances face mental trauma due to the uncertainty of the loss.³⁷ Additionally, when there are no remedial measures available and loved ones are lost, ambiguity arises.³⁸ According to Boss, the

29. *Id.* ¶ 5.77; see also REPORT OF THE OHCHR INVESTIGATION ON SRI LANKA (adopted Sept. 16, 2015) A/HRC/30/CRP.2 ¶ 140 [hereinafter OISL REPORT].

30. See generally LLRC REPORT, *supra* note 27; Paranagama Report, *supra* note 12; OISL REPORT, *supra* note 29.

31. OISL REPORT, *supra* note 29, ¶ 92.

32. *Id.* ¶ 444.

33. *Id.*

34. PAULINE BOSS, *AMBIGUOUS LOSS: LEARNING TO LIVE WITH UNRESOLVED GRIEF* (Harvard University Press 1999).

35. *Id.* at 3.

36. *Id.* at 112.

37. See also Mr. S. Jegatheeswara Sarma v. Sri Lanka, Communication No. 950/2000, U.N. Doc. CCPR/C/78/D/950/2000 (2003).

38. See MENTAL HEALTH COST BORNE BY FAMILIES OF MISSING IN SRI LANKA, <http://www.refworld.org/cgi-bin/tehis/vtx/rwmain?page=search&docid=522efe804&skip=0&query> (last visited May 28, 2016).

unresolved nature of the issue creates and enhances this ambiguity.³⁹ It is this uncertainty that the OISL Report seeks to address in its segment on the “Quest for Truth.”

Paragraphs 446-452 of the OISL Report provide many examples of Sri Lanka’s failure to address the needs of victims’ family members effectively, continuing the ambiguity of the loss suffered by the indirect victims. The inadequacies of the writ of *habeas corpus*⁴⁰ and the general callousness with which the indirect victims have been treated are portrayed in the OISL Report. These instances support the assertion that the right to truth should encompass contemporary societal needs. One such requirement could be the institution of a Truth and Reconciliation Commission (TRC).

C. Truth and Truth Commissions

Kishali Pinto-Jayawardena, who is a human rights activist and media columnist of Sri Lanka, opines that “from the perspective of victims, a commission of inquiry can only partially fulfil their right to truth, justice and reparations.”⁴¹ The same could be presumed concerning court procedures that seek to establish right to truth. The extent of truth’s discovery through regular court procedure is questionable, as Justice Sachs points out.⁴² What appears best in such a context is the establishment of a TRC to discern truth while utilizing the traditional court procedure to provide reparations and compensations to victims.

39. See generally BOSS, *supra* note 34; See also Rep. of the United Nations Working Group on Enforced or Involuntary Disappearances, U.N. Doc. A/HRC/27/49 (2014).

40. See KISHALI PINTO-JAYAWARDENA & JAYANTHA DE ALMEIDA GUNERATNE, *HABEAS CORPUS IN SRI LANKA; THEORY AND PRACTICE OF THE GREAT WRIT IN EXTRAORDINARY TIMES* (2011). In this book, the authors provide a detailed account of the failures and successes of the writ of *habeas corpus* in Sri Lanka.

41. Kishali Pinto-Jayawardena, International Commission of Jurists, *Post-War Justice in Sri Lanka: Rule of Law, The Criminal Justice System and Commissions of Inquiry* 107 (2010) [hereinafter *Post-War Justice in Sri Lanka*]; see also Darusman Report, *supra* note 3, ¶ 37 which states that “commissions of inquiry have not been an effective tool for combating impunity, establishing the truth or achieving justice.”

42. Sachs, *supra* note 4, at 1571.

There is no absolutism in law to compel the use of a court procedure to find truth. Balkin, argues “[law] colonizes the human mind,”⁴³ meaning modern society attempts to seek remedies to societal inequities and perpetuations of injustice through law and law alone. However, this restrictive approach shuts out the pathways through which sociological, psychological, economic and financial perspectives could be utilized in steering the search for remedies. The attempt at establishing a TRC in Sri Lanka could be a mechanism that transcends the borders of law in finding a remedy for the plague of enforced disappearances. Nonetheless, this requires the process to be fundamentally dissimilar to one that is adopted within a purely “legal” framework. In this exercise, one must be mindful that the social reality ascertained through a TRC may not be different from the legal reality. However, this needs to be viewed with an open mind and the willingness to accept that a TRC’s social reality may surpass a court’s legal reality.⁴⁴

There is no doubt that truth is an essential element in reconciliation and post-war societal reconstruction. However, the policies of adopting a TRC ought to be strategized with extreme caution, as it should be enriched with the capacity to respond to the particular requirements of the society and the lived realities of contemporary Sri Lanka. At a recent workshop organized by the National Peace Council of Sri Lanka, which the author attended,⁴⁵ many expressed the opinion that the South African Model of TRCs would be appropriate to Sri Lanka provided that it is implemented without the provision of amnesties to those who are found to have committed offences.⁴⁶ This is a peculiar suggestion for several

43. Balkin, *supra* note 6, at 8.

44. *See also* Paranagama Report, *supra* note 12, ¶ 625, in which the commission drew a distinction between criminal trials and TRCs saying “whereas criminal trials underline criminal accountability, a Truth and Reconciliation Commission underpins the essence of reconciliation.” According to the report, the essence of reconciliation is interconnected with the social realities that are experienced by the people and a TRC’s capacity to reveal the truth transcends the establishment of criminal accountability through regular court procedures.

45. National Peace Council, “Transitional Justice Training Workshop” October 20-21, 2015 (Colombo, Sri Lanka).

46. *But see* Paranagama Report, *supra* note 12, sec. (ii)-(iii), ¶ 624. The Commission suggested that there is a possibility of bringing a TRC with amnesties.

reasons. There are major divergences between the context in which South Africa established its TRC and the context in which Sri Lanka seeks to establish its TRC. One major point of departure is that the context of apartheid, in which the white minority propagated discrimination against the black majority, is unlike the Sri Lankan ethnic cleavage between the majority Sinhalese and the minority Tamil communities. The Sri Lankan ethnic divide has been attributed to the colonialist's "divide and rule," which led to later political policies to prioritize the Sinhalese majority to the detriment of the Tamil minority by *inter alia* denying citizenship to Tamils of Indian origin and the introduction of draconian language policies that failed to recognize Tamil as an official language.⁴⁷ Moreover, the success of the TRC in South Africa has often been associated with the amnesties provision, which allowed the perpetrators to volunteer to narrate the crimes committed. This facilitated the process of social reconstruction through the encouragement of collective forgiving of, while memorializing, the crimes committed. This prevented revisionism while enhancing the trust-building process in the new South African society. Inherent voluntarism is therefore the distinctive characteristic that underpins the South African TRC. If this voluntariness is defeated in the Sri Lankan context and its community is left to believe that an unyielding TRC is imposed on Sri Lanka, its expected end-products (reconciliation, accountability, ending of impunity) would be unachievable. A TRC in essence refers to a voluntary procedure that does not require, for instance, the issuance of summons to individuals or the treatment of non-participation as contempt of the TRC. If this restrictive approach to TRCs, which has been proposed for Sri Lanka, is adopted in an attempt to copy the South African model, leaving out the element of amnesty and voluntarism that majorly contributed to its success, the Sri Lankan model's failure would be colossal.

Nevertheless, part (iii) of paragraph 624 suggests that there is also a possibility of bringing in a TRC without amnesties.

47. See Official Languages Act, No. 33 of 1956. This was commonly referred to as the "Sinhala Only Act." Those who proposed the legislation argued that it was a move to recognize the historically diminished use of the indigenous language during the time of colonization. See also Ceylon Citizenship Act, No. 18 of 1948 (which denied citizenship to Tamils of Indian origin working in plantations and estates).

In analyzing the TRC of South Africa, Justice Sachs writes that:

First of all, with regard to truth, I was very puzzled. So little truth comes out of court hearings – truth on which you can confidently rely. So much truth came pouring out of the Truth Commission, you would think due process of law is a greater guarantee of truth than the very open proceedings of the TRC, but it was the other way around.⁴⁸

Justice Sachs' approach indicates concisely, yet precisely, the effectiveness of a TRC provided that the procedure utilized differs from the usual due process and formalities that are adopted in a court of law. Dogmatism may be connoted in a court's formality and rigidity, which can deter an individual from clearing his complete conscience by divulging the offences committed under conditions that challenged his/her capacity of maintaining humanity. If Sri Lanka seeks to ascertain truth through a TRC, it is necessary to rethink the process through which such a measure best be adopted. Enforcement of the recommendations of the Paranagama report may not be suitable in achieving such ends.

The South African example and the Sri Lankan dialogue surrounding it proves two things: (1) that there will be conservatives who oppose TRCs on the basis that it is an international conspiracy to undermine Sri Lankan sovereignty, without genuinely knowing its benefits; and (2) there will be individuals who believe that harsh criminal penalties should be imposed on the perpetrators and oppose the granting of amnesties through TRCs.⁴⁹ However, if credible and conclusive truth is to be gained through TRCs, it may be necessary to

48. Sachs, *supra* note 4, at 1571. See also James P. Sewell, *Justice and Truth in Transition*, 8 *Global Governance* 119, 127 (2002) (reviewing GARY JONATHAN BASS, *STAY THE HAND OF VENGEANCE: THE POLITICS OF WAR CRIMES TRIBUNALS* (2000)); RICHARD J. GOLDSTONE, *FOR HUMANITY: REFLECTIONS OF A WAR CRIMES INVESTIGATOR* (2000); HUMAN RIGHTS WATCH, *HUMAN RIGHTS WATCH WORLD REPORT 2001* (2001); MARTHA MINOW, *BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE* (1998); RUTI G. TEITEL, *TRANSITIONAL JUSTICE* (2000) (“[T]rials elicit only limited forms of truth; moreover they rechannelled energy otherwise available for ferreting out facts vital to reconstruct what happened. Courts render authoritative but sometimes specious and often premature closure on truth.”).

49. See Sachs, *supra* note 4, at 1567.

make an offer of amnesty to alleged perpetrators. Truth ascertained through a court procedure, though legal, may not necessarily be credible or conclusive. However, if the purpose of TRCs is viewed as social reconstruction, reintegration, reconciliation and post-war remedying, one must strive to achieve credible and conclusive truth through a voluntary process that would enable the perpetrators to divulge the truth without fear of punishment. This process should further guarantee, to the indirect victims, the right to know what happened to their loved ones, thus facilitating the process of healing, ending of ambiguity of the loss suffered and bringing closure to the matter.

The debate pertaining to the establishment of TRCs in Sri Lanka has been popular in local discussion for several years. The LLRC, Darusman Report, Udalagama Report and Paranagama Report provide proof to substantiate the above assertion. The Paranagama Report identifies that the right to truth is a “vital contribution to reconciliation,”⁵⁰ and a representative of the organization of Mothers and Friends of Missing Persons in Batticaloa stated that there should be a special commission and that: “this special commission should listen deeply to each story, verify facts, through a process of inquiry and investigation, establish responsibility, verify the truth, analyze the root causes, and share the lessons learned to make necessary changes in the legal system.”⁵¹

This indicates that the society in general seems to entertain a favorable attitude towards the establishment of TRCs. However, if TRCs are established in Sri Lanka, they ought to be viewed as a national responsibility. Careful and considerate review and evaluation should guide the process of designing a TRC for Sri Lanka. The Paranagama Report recommends that individuals could be summoned to the TRC. If this rigid process is adopted, the fundamental premise on which TRCs rest, i.e., voluntariness, would be defeated. This Report indicates that an individual could be fined, be deprived of civic rights and imprisoned for failure to appear before the TRC after

50. Paranagama Report, *supra* note 12, ¶ 449.

51. LLRC REPORT, *supra* note 27, ¶ 5.29; *see also* Paranagama Report, *supra* note 12, ¶ 460.

having being summoned.⁵² The usefulness of such a rigid process, which negates the foundations of TRCs in principle, remains moot.

The issue of amnesty is a point of controversy, especially in relation to allegations of war crimes in general and more specifically with regard to enforced disappearances. This antipathy to amnesties is levelled both on conceptual and practical levels. On a conceptual and international level, the general aversion to amnesties is evident in Article 18 of the Declaration on the Protection of all Persons from Enforced Disappearance, which prohibits the provision of amnesty.⁵³ The possibility of providing amnesty through TRCs may further be affected due to Sri Lanka becoming a party to the ICPPED in December 2015. However, it is impossible to expect the perpetrators to be completely truthful and engage in self-incrimination if the threat of being incarcerated, or a death penalty, casts a shadow of darkness over the TRC.⁵⁴ Sachs J. points out that those guilty of crimes during the apartheid regime were willing to support the negotiation process, the TRC, and post-apartheid reconciliation, provided that they were not going to jail afterwards.⁵⁵ This indicates the usefulness of amnesties in truth ascertainment. Although there is a fear that blanket immunity would create complete impunity and unaccountability, these considerations require further evaluation without being rejected at the

52. Paranagama Report, *supra* note 12, ¶ 625 (iv).

53. The issue whether amnesties should be provided to the military officers for the acts that they committed while in power was a controversy in Latin American countries too. *See generally* Naomi Roht-Arriaza, TRUTH COMMISSIONS AND AMNESTIES IN LATIN AMERICA: THE SECOND GENERATION *Proceedings of the Annual Meeting*, 92 AM. SOC'Y INT'L L. PROC. 313 (1998). *See also* S.C. Res. 1325, ¶ 11 (Oct. 31, 2000) (emphasizing the need to exclude genocide, crimes against humanity and war crimes where feasible from amnesty provisions); General Comment on Article 18 of the Declaration on the Protection of all Persons from Enforced Disappearance, U.N. Doc. E/CN.4/2006/56 (2005) (emphasizing in ¶¶ 2(b) and 8 that amnesty laws should not prevent, impede, or hinder the granting, of adequate indemnification, rehabilitation, compensation and reparation as a result of the enforced disappearances).

54. General Comment on Article 18 of the Declaration on the Protection of all Persons from Enforced Disappearance, ¶ 5, U.N. Doc. E/CN.4/2006/56 (2005) (stating that the ascertainment of truth through pardons could prevent disappearances in societies where systematic and massive violations of human rights have occurred due to internal armed conflicts and political repressions).

55. Sachs, *supra* note 4, at 1566.

outset due to preconceived prejudices against amnesty.⁵⁶ In light of the privilege against incrimination and the result expected out of TRCs, it is necessary to review this procedure.

The purpose of TRCs is not only to hold an individual or a group of people accountable. Its mandate in truth seeking overrides the mere goal of establishing accountability. Groome is of the view that “the adjudication of an individual’s criminal responsibility makes a number of constructive contributions to the right to the truth in both the individual and collective sense of the right.”⁵⁷ But there is nothing in the doctrinal approach of law to substantiate the stance that accountability can only be achieved through a criminal trial, an incarceration, or the imposition of a death penalty and a rigid TRC process void of amnesty. Accountability also lies in the declaration and acceptance of the truth. Credible and conclusive truth can be ascertained through TRCs that provide amnesties to perpetrators provided that the cases are determined by an objective board of members of the TRC. Moreover, the truth that is ascertained can pave the way for the prevention of future enforced disappearances.⁵⁸ The provision of amnesties does not hence *per se* encourage impunity and unaccountability as has been suggested. Such an argument is baseless when attention is paid to the fact that the complete divulgence of the truth provides a foundation on which the collective memory of violence could be put on record, which can later be utilized to defeat revisionist and negationist arguments about the events of the past.

TRCs with option of amnesties are regarded as posing further practical issues pertaining to justice. According to Article 2(3) of the ICCPR, the UNHRC states that those responsible for the acts should be brought to justice despite the availability of any domestic amnesty

56. *Id.* See also Darusman Report, *supra* note 3, ¶ 284 (Commission states that truth commissions have been followed by prosecutions in most countries).

57. Groome, *supra* note 24, at 190.

58. Although Article 18 of the Declaration on the Protection of all Persons from Enforced Disappearance prohibits the granting of amnesties in general, it provides the exception to adopt measures similar to amnesties in accordance with Article 3 of the Declaration with a view to preventing disappearances in the future. G.A. Res. 47/133, Art. 18 (Dec. 18, 1992). Thus, it cannot be argued that providing amnesties is a lacuna in a proposed TRC.

measures.⁵⁹ What the UNHRC means in this context is ambiguous in that it does not specify how justice is to be brought about despite domestic measures of amnesty.⁶⁰ Its ambiguity lies in the fact that the UN seems to be implying that justice could only be arrived at through vengeful penalties. This is antithetical to the whole human rights framework that the UN has given rise to, which arose on the strong need to prevent limitless punishments as well.

When the above dialogue is applied to the Sri Lankan context, it seems to suggest that the right to truth is absolute and that the perpetrators deserve harsh penalties once they are forced to incriminate themselves through a summoning process that would lead to criminal contempt if not abided by. Its incongruity is blaring when compared to the notions encapsulated in the General Comment on the Right to the Truth which states that “restrictions on the right to the truth do not affect the right to justice of the victims . . . In the meantime, the realization of the right to the truth may in exceptional circumstances result in limiting the right to justice.”⁶¹ If a TRC with amnesties is established through which perpetrators are led to divulge the truth on the assurance that there will be no subsequent criminal penalties, the withdrawal of that privilege pursuant to the TRC process would be inherently inimical to, and inconsistent with, the process of justice, which functions on principles of certainty, legitimate expectation and fundamental guarantees against retrospective introduction of penalties. Nonetheless, these issues pose the question whether truth and justice are complementary. Professor Roht-Arriaza argues:

My first point is that those who posited that truth could substitute for justice, could even in some cases be a better form of justice, are now seeing that even almost twenty years later the thirst for justice

59. Antkowiak, *supra* note 5, at 988.

60. Darusman Report, *supra* note 3, ¶ 287 (stating, however, that there is a false dichotomy between restorative and retributive justice which can be interpreted as implying that it is possible to impose the death penalty on the perpetrators. The practicality of doing so is questionable given that the perpetrators would not have an incentive to reveal the truth, which would necessarily hamper the process of justice that would prevent imposition of any penalty on them due to applications of due process).

61. General Comment 10 of the Working Group, *supra* note 19, ¶ 39.

is there even after at least a good part of the truth has been officially acknowledged. In both Argentina and Chile, families and survivors want more than to know who was killed – they want to know who killed them, why and where the body is buried. They want to recover the body and be able to bury their loved ones with dignity. And they want an admission of official culpability from the military, even more than individual trials of lower-ranking soldiers.⁶²

Her arguments are erroneous on certain grounds when applied to specific circumstances. Firstly, what she portrays as the needs of the survivors and victims are in general associated with, as has been argued in this article, the right to truth and not with justice. Secondly, if her claims are to be regarded as being those of justice, then there appears to be no controversy of attaining them through a TRC as opposed to from a court of law. Thirdly, her argument that there has to be official admission of culpability of military cannot be done unless it can be proven that the mandate of the military was something similar to that of Nazi Germany, where there were government policies authorizing violations of human rights. Therefore, it would necessarily mean that individuals responsible for the commission of crimes should be tried separately rather than making a blanket declaration that there is official culpability on the part of the whole of the military. In circumstances as that of Sri Lanka, it is therefore essential that trials are conducted at the individual level and command responsibility be invoked to penalize the commanding officers accountable for giving *per se* illegal orders, if there have been such orders. Moreover, the binary approach adopted by Professor Roht-Arriaza in relation to truth and justice, in which the two concepts and their lived realities have been confused, fails due to lack of thoughtful conceptualization.

What is questionable, however, is what sort of justice is demanded by the victims. In this regard, states dealing with enforced disappearances associated with war or tyrannical regimes may be required to make a judgment call as to whether right to absolute truth

62. Naomi Roht-Arriaza, *Truth Commissions and Amnesties in Latin America: The Second Generation Proceedings of the Annual Meeting* 92 AM. SOC'Y INT'L L. PROC. 313, 313 (1998).

is granted or “justice,” in whatever form that may be appropriate for the circumstances, is granted. One thing is clear however, the victims should be either satisfied with absolute right to truth, which they may be able to be ascertained through TRC with amnesties, or they have to be satisfied with a court process which grants “justice” through the ascertainment of “legal” truth, which may not correspond to the actual truth that the victims are searching for.

D. Right to Truth in Law

According to Groome:

The right to the truth derives its legal basis as an enforceable right primarily from two underlying categories of protections found in international conventions:

- i. A state’s failure to disclose the fate of a person in the custody of the state continues inhuman treatment with respect to family members and is a continuing violation of applicable protections against such treatment.
- ii. A state’s failure to adequately investigate and prosecute crimes committed against a person in its custody constitutes a violation of family’s right of access to justice.⁶³

A similar approach seems to be adopted in the OISL Report, where an attempt has been made to examine “the main obstacles to accountability that have prevented the victims and their relatives—of all communities—from exercising their rights to truth, justice and reparations.”⁶⁴ In addition, the right to truth has often been associated with TRCs, right to an effective remedy and the right to equality. The right to an effective remedy comes into question especially when the family members of the victims continue to suffer because of the fate suffered by the loved one and also due to ambiguity of not knowing the reality, which prevents them from grieving the dead and/or

63. Groome, *supra* note 24, at 177.

64. OISL REPORT, *supra* note 29, ¶ 7.

moving on with their lives.⁶⁵ In that context, it is further evident that transitional justice is not feasible without the right to truth being provided by and through law to the people in whom the sovereignty rests in Sri Lanka.⁶⁶ It then, perhaps, is not an outrage to suggest that the non-provision of the right to truth as a substantive right is a negation of Sri Lankan people's sovereignty, which is the bedrock upon which the whole system of constitutional governance and democracy rest. Thus, any allegations to the effect that post-war reconciliation and transitional justice remain unsuccessful, to date, can be attributed to the denial of people's sovereignty through the denial of the right to truth.

Justice and reparation are presumed to be associated with the right to truth, and this presumption has been proven true through the many commission reports that Sri Lanka has been bestowed with in relation to the alleged violations and disappearances that occurred before, during and after the civil war. The Darusman Report states "international standards require that States both ensure justice, by investigating violations and prosecuting crimes, and implement other measures for victims, including truth and reparations."⁶⁷ Moreover, the LLRC recommendations provide that right to truth can be invoked on the basis of the constitutional guarantee of right to equality.⁶⁸ This recommendation is commendable. However, in the absence of legislative provisions, which expressly provide for the right to truth, one may have to depend upon the mercy of the judiciary to adopt a purposive approach in interpreting Article 12 of the 1978 Constitution of the Democratic Socialist Republic of Sri Lanka.⁶⁹

It is doubtful as to whether the judiciary would adopt such a dynamic approach to equality, as is required for the petitioner to show

65. Mahmut Kaya v. Turkey, App. No. 22535/93, 2000-III Eur. Ct. H.R. See also U.N. Working Group on Enforced or Involuntary Disappearances, General Comment No. 9, U.N. Doc. A/HRC/16/48 (2011). See also OISL REPORT, *supra* note 29, ¶ 13.

66. CONSTITUTION OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA, 1978 art. 3, 4.

67. Darusman Report, *supra* note 3, ¶ 287.

68. LLRC REPORT, *supra* note 27, ¶ 5.117.

69. CONSTITUTION OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA, 1978.

the court that similarly circumstanced persons have been treated differently than him/her. Petitioners may face this challenge due to the practical reasons of no other citizens being granted the right to truth as a substantive right, emanating within the scope of right to equality in Sri Lanka. While the Darusman and LLRC reports view right to truth through international perspectives, reparations and equality, the Paranagama Report asserts that it is a procedure by which both accountability and transitional justice can be achieved.⁷⁰ The mandate of the latter is greater than those of the Udalgama Commission and the Lessons Learnt and Reconciliation Commission because it focuses mainly on the “victims of the protracted conflict knowing the truth, as well as being able to be part of a stable society, free of conflict, in which reconstruction and reconciliation are priorities.”⁷¹

There has not been a substantive attempt at the legal recognition of a right to truth in Sri Lanka despite the aforementioned reports advocating that there be such a right. The international dialogue on right to truth arose several years ago in relation to cases of enforced disappearances in Latin America.⁷² The IACHR decided in 2000 that the access to an effective and fair judicial remedy contains a guarantee of the right to truth.⁷³ Moreover, there is a general understanding in the international amphitheater of rights that truth should be made available as a substantive right in the existing victim-centered human rights framework.⁷⁴ Right to an effective remedy is established in many human rights instruments,⁷⁵ which in turn can be regarded as the

70. Paranagama Report, *supra* note 12, ¶ 605.

71. *Id.* ¶ 606.

72. Darusman Report, *supra* note 3, ¶ 273.

73. *Bámaca-Velásquez v. Guatemala*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 70 (Nov. 25, 2000).

74. Antkowiak, *supra* note 5, at 977.

75. American Convention on Human Rights, art. 7 (6), 25, Nov. 22, 1969; Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment, art 4(b), *opened for signature* Dec. 10, 1984, ICPPED, *supra* note 2, art. 8(2), 18, 24; and UDHR, *supra* note 1, art. 8; Comm’n on Human Rights, *The Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity* (adopted Feb. 8, 2005, E/CN.4/2005/102/Add.1) Principle 4; Protocol Additional to the Geneva Conventions of August 1949; *see also* Protection of Victims of International Armed Conflicts, art. 32-June 8, 1977. The

basis on which this could be elevated to the standard of an international right. In 2003, the IACHR further concluded that there is a right to truth that is interrelated and inseparable from justice and reparations⁷⁶ and that there is a rising jurisprudence pertaining to the right to truth in international law.⁷⁷

Furthermore, the human rights framework affords that “gross violations of human rights give rise to a clear right of victims (all of those harmed by the violation) to know the truth about what happened to their loved ones, to access a judicial remedy, and to receive reparations.”⁷⁸ Rights to judicial remedies and reparations, as mentioned above, are integral components of many human rights instruments. The relationship that exists between such rights and the right to truth, justifies the claim that there exists a substantive right to truth in law, both domestically and internationally.

Despite the generally favorable approach of society towards the right to truth, it cannot be considered an absolute right in the absence of express provisions providing for that right. The contemporary international framework does not recognize this right as an absolute right in circumstances in which primacy is placed on societal reconstruction and reconciliation.⁷⁹ Hence, it is essential that the nature of truth appropriate for this context is evaluated prior to importing any system, whether it is from South Africa or elsewhere. Legal truth leading to penalties through a court procedure may not be the best suited mechanism for Sri Lanka, as indicated by the mild uprising that occurred when Sergeant Sunil was adjudged guilty for

general essence embodied in the COMPREHENSIVE REPORT OF THE OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS ON SRI LANKA, A/HRC/30/61 of 28 September 2015 further recognizes right to truth as an element of an effective remedy that functions as a contributor to reconciliation, healing and transitional justice.

76. *See generally* Garcia Lucero et al. v. Chile, Preliminary Objection, Merits and Reparations, Judgment, Inter-Am. Ct. H.R., (ser. C) No. 267 (Aug. 28, 2013).

77. *See generally* UNGA, Rep. of the WGEID, General Comment on the Right to Truth in Relation to Enforced Disappearances, U.N. Doc. A/HRC/16/48 (2011).

78. *Post-War Justice in Sri Lanka*, *supra* note 41, at 8.

79. *See generally* General Comment on the Right to Truth in Relation to Enforced Disappearances, *supra* note 77. Stating that the right to know the truth is not absolute and that states have opted to non-disclosure of truth in certain circumstances to facilitate reconciliation.

having murdered eight Tamil civilians in Murusuvil.⁸⁰ Although it may appear to be a controversial suggestion, if the primary objective of this post-war society is to achieve effective reconciliation and lasting peace, it might be necessary to abandon vengeful approaches and resort to credible, conclusive truth through a TRC, which is capable of providing amnesties to lesser offences. Through a TRC, it is possible to both learn the whole truth, while also facilitating the reconciliation process. However, this may be a distant dream if attempts are made to consider right to truth as an absolute right that can only be effectively introduced to Sri Lanka through a court procedure, which would then be followed by harsh penalties against those who reveal the truth.

E. Right to Truth as a Collective Remedy

Truth is an essential requirement in setting the stage for post-conflict reconciliation.⁸¹ In a society like Sri Lanka, where the ethnic cleavages continue to exist between Tamil and Sinhalese, it is essential to commence the dialogue on truth as a collective remedy. Such an approach would lay the stepping-stones to an effective democratic system where the society as a whole would have access to information and truth.⁸² Understanding the circumstances in which the gruesome disappearances occurred and learning the truth about the victims would relieve some tensions, helping to facilitate the reconciliation process as a whole. It is now recognized that the right

80. ROSHINI WICKREMESINGE & SANJANA HATTOTUWA, SAVING SUNIL: A STUDY OF DANGEROUS SPEECH AROUND A FACEBOOK PAGE DEDICATED TO SGT. SUNIL RATNAYAKE (2015). Sgt. S. Ratnyake was sentenced to death by the High Court holden in Colombo on 25 June 2015 for the crime of murdering eight civilians inclusive of minors on 19 December 2000. The other respondents of the case were acquitted due to lack of direct evidence against them.

81. See generally ALEXANDRA B. DE BRITO ET AL., THE POLITICS OF MEMORY: TRANSITIONAL JUSTICE IN DEMOCRATIZING SOCIETIES (2001); IDENTITIES IN TRANSITION: CHALLENGES FOR TRANSITIONAL JUSTICE IN DIVIDED SOCIETIES (Paige Arthur ed., 2011); LEONARD C. HAWES, A NEW PHILOSOPHY OF SOCIAL CONFLICT: MEDIATING COLLECTIVE TRAUMA AND TRANSITIONAL JUSTICE (2015).

82. DE BRITO ET AL., *supra* note 81.

to truth is both an individual and a collective right and its revelation can be utilized for the prevention of reoccurring violence.⁸³

The search for a collective remedy and the impact that truth can have on that search is evident in the formation of Associations by family members whose loved ones have disappeared. Truth is undoubtedly a collective remedy when viewed in the sense that it provides a solace to the indirect victims. The acceptance of the past violations by the perpetrators lays a foundation through which the society can learn of its ignoble past, identify the root causes to prevent future violations and terminate indeterminate uncertainty pertaining to the disappearances. These factors contribute to the effective reconciliation process. The Human Rights Council stressed in its Resolution 9/11 on Right to the Truth that “it is important for states to provide appropriate and effective mechanisms for society as a whole and, in particular, for relatives of the victim, to know the truth regarding gross violations of human rights and serious violations of international humanitarian law.”⁸⁴ The effectiveness of the mechanism will depend on its ability to create reconciliation, which is a step in the process of social reconstruction that results from the success of transitional justice in post-war or post-conflict societies. Moreover, it is clear that the relative inability of indirect victims, due to various reasons such as financial constraints and political interferences, to find out the truth about their disappeared loved ones could further victimize them, thus creating a greater social injustice.⁸⁵ The rewriting of the social contract based on the truth revealed, which is then put to use as a collective remedy, would lead to the societal reconstruction that is capable of preventing future violence and mistrust. This in turn would lead to the bridging of perennial ethnic cleavages.

83. See generally General Comment on the Right to Truth in Relation to Enforced Disappearances, *supra* note 77. See also *The Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*, *supra* note 75 at Principle 2. See also Darusman Report, *supra* note 3, ¶ 266 which emphasizes on the significance of institutional guarantees of non-recurrence.

84. Human Rights Council Res., Right to the Truth, A/HRC/RES/9/11 (2008).

85. See generally Wasana Punyasena, ‘*The Façade of Accountability: Disappearances in Sri Lanka*’, 23.4 B.C. THIRD WORLD L.J. 115 (2003).

II. THE RIGHT TO MOURN

A. *Abstract Conceptualization of the Right to Mourn*

The contemporary international law does not postulate a specific right to mourn.⁸⁶ Nonetheless, such a right can be deduced from the right to truth and the right to an effective remedy. Those who find the truth about the victims of disappearances would then be granted the right to public or private mourning in order to dignify those who have died or disappeared. It is imperative that such a right be recognized in societies similar to that of Sri Lanka, where there has been historical oppression against certain communities. A very convenient argument against this proposition would be that some disappeared individuals belonged to or are alleged to have belonged to groups of non-state actors such as the LTTE, which brought untold suffering to the general public of the country through their separatist cause. However, the family members themselves may not have been involved with such groups. Even if they had been involved with such groups at one point in time, it is necessary to identify that social reconstruction can only be a reality if there is willingness to reintegrate them fully to the civil society. The process should comprise of awareness-raising to educate the society that any individual could be rehabilitated and reintegrated to society in full. Moreover, the society should be trained to abstain from viewing such individuals through their prejudicially misted glasses.

Mourning could also be a process through which memory of an incident could be perpetuated. Subsequent to the brutal regime of Hitler (which gave rise to the Nuremberg trials and the Eichmann trial in Jerusalem, as well as the establishment of Auschwitz museum) it is well accepted in international law that processes through which justice

86. There is a rising jurisprudence pertaining to an employee's right to mourn (with paid leave) when there is a family funeral. See Section 57(A) of the Employment Rights Act of 1996 (UK) which requires the employer to grant a 'reasonable' time period to the employee to grieve the loss of a loved one; Article 56 of the Labour Law of the People's Republic of China; '*ABC of Women Workers' Rights and Gender Equality*' (2d ed., 2007), INTERNATIONAL LABOR OFFICE, http://www.ilo.org/wcmsp5/groups/public/dgreports/gender/documents/publication/wcms_087314.pdf (last accessed Mar. 9, 2016). However, analogies from these laws are not drawn due to the inherent differences between the two systems of law.

is sought could also enhance and conserve memory.⁸⁷ This could be either at the individual level or the collective level. What matters is that those who lost their family members in an ignoble manner be given the privilege of remembering the loved ones in any manner they choose, so long as that does not violate any of the accepted laws of the land.

Choosing a particular date to grieve the dead should be at the discretion of the indirect victims whose suffering has been prolonged through impunity and state inaction. Principle 3 of the Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity⁸⁸ establishes a state's duty to preserve memory. It states that:

A people's knowledge of the history of its oppression is part of its heritage and, as such, must be ensured by appropriate measures in fulfilment of the State's duty to preserve archives and other evidence concerning violations of human rights and humanitarian law and to facilitate knowledge of those violations. Such measures shall be aimed at preserving the collective memory from extinction and in particular, at guarding against the development of revisionist and negationist arguments.⁸⁹

The process of protecting memory can be altered in accordance with the requirements of the society. In the Sri Lankan context, there appears to be a need to commemorate those who have been subject to enforced disappearances or death in the last stages of the war, on a selected date.⁹⁰ This should be identified as a right of the indirect victims not only to mourn and grieve but also as an integral aspect of the right to memory and preservation of such memory. Unfounded objections to such a right forecast revisionism and negativity that hinder the process of reconciliation and transitional justice. Viewed from the perspective of equality, the prevention of the right to mourn

87. See generally HANNAH ARENDT, EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL (1964).

88. The Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity, *supra* note 77, at Principal 3.

89. *Id.* at Principle 3.

90. See the discussion pertaining to 'Maaveerar Naal' in this paper. *Infra* section II.B.

of a certain group of people is nothing but discrimination.⁹¹ If the argument that Sri Lanka is a Buddhist state is in fact to be relied upon, it is inconceivable as to why some seek to violate one's right to mourn. One of Lord Buddha's primary teachings is that hatred does not cease by hatred but by love.⁹² If this is to be practically applied to the context of mourning the dead/disappeared, all communities could join in the mourning process. Though not enforceable by law, such approaches may prove to be more reconciliation-friendly than law could ever be.

B. "Maaveerar Naal" or the Great Heroes Day

A cultural martyrdom has always surrounded the *maaveerar naal* celebrations or the Great Heroes Day (GHD).⁹³ This day is generally mistaken as the celebration of Velupillai Prabhakaran's (late LTTE leader) birth day, which was on November 26th.⁹⁴ However, the notion of the GHD arose due to celebrations meant to commemorate the death of the first LTTE member who died in the separatist cause. His name was Sathiyathan and was also known by the aliases Suresh and Shankar.⁹⁵ His death occurred on November 27, 1982 and the commemoration of the fallen heroes commenced seven years later

91. See generally ONTARIO HUMAN RIGHTS COMMISSION, POLICY ON PREVENTING DISCRIMINATION BASED ON CREED (2015); and INTERNATIONAL CENTRE FOR TRANSITIONAL JUSTICE, TRUTH SEEKING: ELEMENTS OF CREATING AN EFFECTIVE TRUTH COMMISSION (Eduardo Gonzales & Howard Varney eds. 2013).

92. 1 VEN. DR. BOKANORUWE DEVANANDA, THE DHAMMAPADA YAMAKAVAGGA VIVARANA: AN EXPOSITION OF THE TWIN VERSES 14 (2011). Hatred never ceases by hatred as preached by the Lord Buddha is presented in the following Pali verse -

'*nahi vērēna vērāni,
saṃmanīda kudācanam,
avērēna ca saṃmanti,
ēsa dhammō sanatanō*'.

93. See generally JOHN C. HOLT (EDS), THE SRI LANKA READER: HISTORY, CULTURE, POLITICS 545 (2011).

94. Velupillai Prabhakaran, ENCYCLOPAEDIA BRITANNICA (Online Edition).

95. D.B.S. Jeyaraj, *The Enduring Mystique of "Maaveerar Naal:." What Makes the "Great Heroes Day" Tick?*, <http://dbsjeyaraj.com/dbsj/archives/12790> (last visited Feb. 26 2016).

in 1989 in recognition of the “services” rendered by LTTE cadres in their violent separatist cause.⁹⁶

The above event is associated with several levels of hypocrisy. Firstly, the LTTE movement did not allow the family members of other Tamil movements to mourn their dead in public or do so on the GHD.⁹⁷ Secondly, the requests made by Tamil citizens demanding Sri Lanka to celebrate the fallen “LTTE heroes,” is hypocritical given that it can be equated to a potential German demand to celebrate the fallen Nazi “heroes” on a day that the first Nazi member died. Thirdly, a demand to celebrate the GHD can be regarded as perpetuating an inherent discrimination amidst the Tamil community, which seeks to attribute heroism to those of LTTE and cowardice to those of other Tamil movements. In fact, the history of Sri Lanka tends to attribute heroism to the great Tamil leaders and individuals who strived to achieve a political solution without resort to arms and violence even in the midst of the political difficulties of the day.⁹⁸

Additionally, the *Maaveerar* celebration has nothing to do with the disappeared Tamil individuals and it may appear incongruous for the Tamil community to celebrate the missing/dead on a day associated with terrorist violence and LTTE discrimination of other Tamil movements and Tamil civilians.⁹⁹ Jeyaraj opines that “[i]t would however be a grave blunder to assume that the ‘Maaveerar Naal’ of the LTTE is a day of National mourning for the Tamils of Sri Lanka.”¹⁰⁰ This opinion rings true given the bifurcated approach that was adopted by the LTTE to demarcate between Tamil civilians and the members of the LTTE. Moreover, the LTTE’s open utilization of the *maaveerar naal* was propaganda through which more innocent Tamil civilians could be brainwashed into embracing the *Eelam* cause which resulted in the unnecessary deaths, disabilities and disappearances of many Sri Lankans.¹⁰¹ Thus, GHD cannot be

96. *Id.*

97. See generally D.B.S. Jeyaraj, *Political Hypocrisy of “Maaveerar Naal” Mourning*, Daily Mirror, Dec. 7, 2013, <http://www.dailymirror.lk/39878/political-hypocrisy-of-maaveerar-naal-mourning>.

98. See generally THE SRI LANKA READER, *supra* note 93.

99. Jeyaraj, *supra* note 97.

100. *Id.*

101. *Id.*

regarded as a day which unites those in grief due to its controversial beginnings.

C. *A Day for Mourning the Disappeared*

The International Day of the Disappeared (IDD) is annually celebrated on August 30th.¹⁰² Many organizations fighting against enforced disappearances use the IDD and related events to raise awareness of the rights of the victims of enforced disappearances and emphasize the pressing necessity to find out the truth about the disappearances.¹⁰³ The events may also create a momentum through which enabling legislation is adopted to facilitate implementation of the ICPPED. The indirect victims of enforced disappearances in Sri Lanka may select this day to mourn the missing/dead, which would be appropriate at the public level because it establishes a common opportunity to mourn that does not divide ethnicities or race. Sinhalese, Tamils, Muslims and individuals belonging to any other race in Sri Lanka may commonly use this day and the opportunity to come together to demand the rights that they deserve.

Controversies have also arisen about the appropriateness of the Tamil people mourning the dead and missing during the final stages of the war on May 18th—the day on which Terrorism was militarily defeated in Sri Lanka—and selecting this day as a day for public mourning should not give rise to the misguided controversies. The state sponsored celebrations generally occur on May 19th in commemoration of the war heroes since the end of the war in 2009.¹⁰⁴ While it is regarded as a victory by the majority Sinhalese, the victory, if it was a victory, was gained by swimming in rivers of blood that resulted in many civilian casualties.¹⁰⁵ The casualties comprised of

102. U.N. Secretary-General, *International Day of the Victims of Enforced Disappearances*, U.N. Doc (Mar. 10, 2016).

103. *Id.*

104. No “Remembrance Day”, *Sirisena Celebrates “War Heroes Day”*, COLOMBO TELEGRAPH, May 20, 2015, <https://www.colombotelegraph.com/index.php/no-remembrance-day-sirisena-celebrates-war-heroes-day/>.

105. Darusman Report, *supra* note 3; HUMAN RIGHTS WATCH, “Sri Lanka: Events of 2009”, <https://www.hrw.org/world-report/2010/country-chapters/sri-lanka> (last visited Mar. 10, 2016).

innocent individuals belonging to all races in Sri Lanka, transcending the provincial borders of Northern and Eastern Provinces.¹⁰⁶ Selecting May 18th as a day of public mourning for the Tamil civilians who lost their lives or went missing in the last stages of the battle is not controversial as it is commonly known that the war victory brought with it many casualties especially during the final battle.¹⁰⁷ May 18th could be selected for mourning due to the indirect victims' unawareness of the exact date on which their loved one lost their lives. Moreover, men, women and children who grieve publicly at a religious gathering can hardly be regarded as a threat to national security.¹⁰⁸ A positive duty rests on the part of the government to create awareness and inform the general public that all citizens have the right to mourn their dead on a day of their choice provided that the selected date is not associated with controversy and discrimination similar to that of *maaveerar naal*.¹⁰⁹

In the Sri Lankan context, the implementation of the right to mourn may pose challenges because there is no specific recognition of the right to truth as well. However, in comparative jurisdictions, there is a rising jurisprudence pertaining to the recognition of the right to mourn as a constituent element of right to truth.¹¹⁰ For instance, in Buenos-Aires, the federal courts have indicated a preference to grant

106. MINISTRY OF DEFENCE, SRI LANKA, *LTTE Accountability: Central Bank Bombed – 31 January 1996*, http://www.defence.lk/new.asp?fname=LTTE_Accountability_Central_Bank_bombed_31_January_1996_20140131_03 (last visited Mar. 10, 2016); Austin Fernando, *Revisiting Arantalawa Bhikku Massacre*, THE ISLAND, June 1, 2012 http://www.island.lk/index.php?page_cat=article-details&page=article-details&code_title=53356 ; See generally MINISTRY OF DEFENCE, SRI LANKA, HUMANITARIAN OPERATION FACTUAL ANALYSIS: JULY 2006 – MAY 2009 (2011).

107. See Darusman Report, *supra* note 3; HUMAN RIGHTS WATCH, “Sri Lanka: Events of 2009”, *supra* note 105; MINISTRY OF DEFENCE, SRI LANKA, *LTTE Accountability: Central Bank Bombed – 31 January 1996*, *supra* note 106; MINISTRY OF DEFENCE, SRI LANKA, HUMANITARIAN OPERATION FACTUAL ANALYSIS: JULY 2006 – MAY 2009, *supra* note 106.

108. Father Elil Rajendram, *Tamils Brave Harassment, Threats to Mourn Their Dead*, Sri Lanka Brief (May 22, 2015) <http://srilankabrief.org/2015/05/tamils-brave-harassment-threats-to-mourn-their-dead/>.

109. Jeyaraj, *supra* note 97.

110. Antkowiak, *supra* note 5, n.9.

both right to truth and right to mourn subsequent to full and fair investigations into the circumstances of disappearances.¹¹¹

Irrespective of the above attempts to establish a right to mourn, the uncertainty of the experience needs recognition. In most of the cases of disappearances, the issue remains unresolved and Boss writes that:

Unlike death, an ambiguous loss may never allow people to achieve the detachment that is necessary for normal closure. Just as ambiguity complicates loss, it complicates the mourning process. People can't start grieving because the situation is indeterminate. It feels like a loss but it is not *really* one. The confusion freezes the grieving process.¹¹²

Boss further explains that these emotions of uncertainty are further enhanced by not experiencing ordinary loss similar to the other members of the society, which is “codified by official verification – death certificate, a funeral ceremony, and a ritualized burial, entombment or scattering of the ashes.”¹¹³ In cases of enforced disappearances, the families do not receive that privilege, which would ease the process of grieving. In such circumstances, if the families do select a day of mourning the loss of loved ones, although the loss remains ambiguous, it is the duty of the state to facilitate such grieving without thwarting the attempts to publicly express their feelings. Such an outward expression of grief may facilitate them to come to terms with the loss that they have suffered even though in reality, the ambiguity would remain until the end of the lives of the mourners as well.

III. RIGHT TO COMPENSATION

Accountability can be established by the state's duty to pay compensation for rights violated. In the latter case, the duty arises when the state has been unable or unwilling to safeguard the rights of its citizens. As the legitimacy of the state is drawn from the

111. Roht-Arriaza, *supra* note 62, at 313.

112. BOSS, *supra* note 34, at 10, 11.

113. *Id.* at 9.

sovereignty of its people, the state bears a duty to safeguard it, which necessarily gives rise to the right to compensation in the event the state fails in that duty.

A. *Right to Compensation in International Law*

Article 24(4) of ICPPED states that “each state party shall ensure in its legal system that the victims of enforced disappearance have the right to obtain reparation and prompt fair and adequate compensation.”¹¹⁴ This creates a duty on the state party to domestically facilitate, through legislations, the provision of compensation to victims of enforced disappearances. Moreover, the state bears a duty to provide the compensation promptly, fairly and adequately. The term “promptly” could mean that the payment of compensation should be made as soon as it is established that an individual has been the victim of an enforced disappearance. “Fairly” means that those who are placed in similar circumstances ought to be treated equally. The article could perhaps have been drafted in this manner to prevent the states from bearing too great a financial burden.¹¹⁵

The provision enshrined in the CAT is broader than the ICPPED provision in that it states *inter alia* “in the event of the death of the victim, as a result of an act of torture, his dependents shall be entitled to compensation.”¹¹⁶ Furthermore, it highlights an individual’s right to fair and adequate compensation along with a right to full rehabilitation in the event the victim survives. It may be necessary to provide advanced support to facilitate societal reintegration of returning missing persons who have been away from society under restrictive conditions for prolonged periods.

The most relevant provision to the Sri Lankan context can be found in Article 9(5) of ICCPR, which states that “anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.”¹¹⁷ However, Act No 56 of 2007

114. ICPPED, *supra* note 2.

115. There is no specific General Comment providing interpretive aid to this Article.

116. CAT, *supra* note 1, at art. 14(1).

117. ICCPR, *supra* note 1.

of Sri Lanka, which is the domestic enabling legislation, does not incorporate an enforceable right to compensation. Nonetheless, the general duty of the state to provide compensation under Article 9(5) has been established in General Comment No. 35 of the HRC.¹¹⁸ The broad application of Article 9(5) is succinctly presented in the following passage:

A surface reading of Article 9(5) of the ICCPR appears to create a right for victims of ‘unlawful arrest(s) and detention(s)’ to have ‘an enforceable right to compensation.’ The question arises as to who reserves the right to claim compensation under this provision. It uses the term ‘anyone’ and does not restrict its application to ‘detainees.’ A broad reading of the provision implies that ‘anyone’ who can produce evidences in substantiation of the fact that he or she is a victim in that situation, may be eligible for compensation. The nomenclature employed herein plays a significant role as it does not limit the right to the individual who is detained.¹¹⁹

The HRC states in GC No. 35 that state parties “should establish the legal framework within which compensation can be afforded to victims, as a matter of enforceable right and not as a matter of grace or discretion.”¹²⁰ In *Abushaala v. Libya*, the HRC clearly stated its position regarding the victims of enforced disappearances and the state’s duty to pay compensation.¹²¹ There, the HRC ordered that the state should provide “adequate compensation to the author and his parents for the violations suffered as well as to Abdelmoteleb Abushaala, if he is still alive.”¹²² This establishes the rights of both the direct and indirect victims to receive compensation under the ICCPR in the event of an enforced disappearance. Because Sri Lanka is a party to the ICCPR, and because the HRC has established

118. Human Rights Comm., General Comment No. 35, (adopted 16 December 2014), CCPR/C/GC/35.

119. Danushka S. Medawatte, *Justice in Dire Straits: Unlawful Pretrial Detainees, Family Members and Legal Remedies*, 16 BUFF. HUM. RTS. L. REV. (forthcoming).

120. G.C. 35, *supra* note 118, ¶ 50.

121. Human Rights Council Comm. 1913/2009, U.N. Doc. CCPR/C/107/D/1913/2009 (Mar. 18, 2013).

122. *Id.* ¶ 8.

precedence regarding the matter at hand, it is possible to claim compensation by taking matters pertaining to enforced disappearances to the HRC. The only obstacle in this regard is that Sri Lanka is not a party to the Optional Protocol to the ICCPR, which grants the right to individuals to directly communicate their grievances to the HRC.

The duty to pay compensation has also been recognized in the European Convention on Human Rights (ECHR) by virtue of Article 5(5).¹²³ There is also a general right to compensation in the ECHR.¹²⁴ However, Article 5(5) has received a special place as it authorizes individuals to communicate their claims before the European Court of Human Rights in the event a state violates Article 5(5). This is not the same, however, when a state has violated the general right to compensation present in the ECHR.¹²⁵ In *Kurt v. Turkey* the European Court declared that when a person disappears, the family member should have an arguable right to compensation, thus setting precedence to the right of indirect victims to claim compensation in such contexts.¹²⁶

There is a general tendency to approve paying compensation to indirect victims as well as direct victims. Observing this trend, Mr. Matt Pollard, a Senior Legal Advisor of the International Commission of Jurists, states that “the consistency across the global and regional treaty systems [in guaranteeing the right to compensation] suggests that explicit treaty provisions and jurisprudence on compensating reflect an underlying rule of general international law.”¹²⁷ Accordingly, it could be argued that the right to compensation is founded in customary international law as well, and that it is not

123. Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entry into force 3 September 1953) 213 UNTS 222 (ECHR).

124. *Id.* at protocol 7 art. 3.

125. HELEN FENWICK, CIVIL LIBERTIES AND HUMAN RIGHTS, 57 (Cavendish Publishing, 3d ed. 2002).

126. *Kurt v. Turkey*, App. No. 24276/94. 1998, Eur. Ct. H. R., Judgment (1998).

127. Matt Pollard, *Scope of Remedies upon a Successful Challenge to the Lawfulness of Detention*, UN WORKING GRP. ON ARBITRARY DET., GLOBAL CONSULTATION ON THE RIGHT TO CHALLENGE THE LAWFULNESS OF DETENTION (Sept. 2014), <http://www.ohchr.org/Documents/Issues/Detention/Consultation2014/MatthewPollard.pdf>.

essential to premise the right on a domestic legislation or an international covenant.

B. Right to Compensation in Sri Lanka

The OISL Report states that:

Since the first reported cases of enforced disappearance in the 1970's, there have been numerous commissions of inquiry and other mechanisms set up by successive Sri Lankan Governments, with different mandates and different timeframes. Some of these commissions have awarded compensation or made concrete recommendations, however few have been implemented and few meaningful steps have been taken to ensure accountability or prevent the recurrence of such practices.¹²⁸

The state of discomfort regarding compensation payments, even under the mandates of the various commissions mentioned above, is because these payments have been mostly inconsistent, unsystematic,¹²⁹ territorially restricted,¹³⁰ and, in certain circumstances, utilized as a means of forcing the victim's family members to accept that a loved one is dead even in the absence of evidence to prove the same.¹³¹ Moreover, the payment of compensation has only been implemented when the indirect victims

128. OISL REPORT, *supra* note 29, ¶ 1125. Compensation has been defined in the OISL Report as “any economically assessable damage, as appropriate and proportional to the gravity of the violation and the circumstances of each case, resulting from gross violations of international human rights law and serious violations of international humanitarian law, such as lost opportunities, loss of earnings and moral damage.” OISL REPORT, *supra* note 29, ¶ 1251.

129. OISL REPORT, *supra* note 29, ¶ 1254; *see also* U.N. Committee Against Torture, *Concluding Observations of the Committee Against Torture, Sri Lanka at its 47th Session*, ¶ 27, U.N. DOC. CAT/C/LKA/CO/3-4/Add.1 (Dec. 8, 2011). This paragraph emphasizes the need to implement the LLRC Recommendations which are inclusive of the payment of compensation.

130. U.N. Human Rights Committee, *Concluding Observations on the Fifth Periodic Report of Sri Lanka, at its 112th session*, ¶ 15, U.N. DOC. CCPR/C/LKA/CO/5 (Nov. 21, 2014).

131. OISL REPORT, *supra* note 29, ¶ 459.

accept a death certificate for the disappeared individual.¹³² A similar procedure has been adopted in relation to soldiers who were declared Missing in Action. When one year lapsed from the declaration, family members of the disappeared soldiers were forced to accept death certificates, without which they would not be entitled to compensation.¹³³ This is a violation of the indirect victims' rights because they should not be forced to accept a death certificate if they are not willing to accept that their loved one is dead in the absence of evidence to the contrary.¹³⁴ Although the family members may not be willing to accept a death certificate, they may feel compelled to do so for economic or other reasons.¹³⁵ Nevertheless, the mere provision of a death certificate cannot be used by a state to claim that the matter has been brought to a close if there is no proof of such person's death. In other words, the state should not be absolved of its duty to further inquire into disappearances even if the disappeared individual's family members have accepted a death certificate on his/her behalf. The government's obligation in this regard continues until genuine closure is achieved through the revelation of the truth pertaining to each disappearance.¹³⁶ Furthermore, there is a general duty on the part of the state to provide compensation to victims of human rights violations irrespective of such acts being committed by state or non-

132. See Daya Somasundaram et al., *Individual, Familial and Social Impacts of Enforced Disappearances: Tactics of a 'Repressive Ecology' and Ways of Responding*, in KATHARINA LAURITSCH & FRANC KERNJAK (EDS.) *WE NEED THE TRUTH: ENFORCED DISAPPEARANCES IN ASIA* 20 (2011).

133. *Id.* at 15.

134. Comm'n on Human Rights, REP. OF THE WORKING GROUP ON ENFORCED OR INVOLUNTARY DISAPPEARANCES, U.N. Doc. E/CN.4/1998/43 (1998), ¶ 74.

135. At an Operational Update on Missing Persons held at the ICRC premises in Colombo on 29 September 2015 which the author attended, the delegates of ICRC stated that a marriage certificate, certificate of nullification of marriage, documents proving a divorce, or a certificate of absence of a death certificate is necessary when admitting children to schools. The unaccounted absence of a parent without any document describing the cause of absence could prevent the child's admission to school. Hence, spouses are compelled to accept a certificate of absence or a death certificate on behalf of the missing spouse in order to facilitate simple aspects of day-to-day life. See also OISL REPORT, *supra* note 29, ¶ 460; Somasundaram, *supra* note 132, at 20.

136. OISL REPORT, *supra* note 29, ¶ 462.

state actors.¹³⁷ State's compensation is not required to be restricted to monetary payments because there is a possibility of compensation through other means.¹³⁸

Subsequent to the setting up of various commissions that recommended the payment of compensation to the victims of crimes, in 1987, the government issued a circular to regulate the payment of compensations.¹³⁹ The stated objective of this circular was to prevent the payments from becoming a financial burden on the country.¹⁴⁰ Although some payments have been made under the said scheme, no structural amendments were made in order to prevent further violations of human rights.¹⁴¹ If structural amendments are not adopted to prevent recurring violations of rights that lead to enforced disappearances, the value and effect of paying compensation to indirect victims would remain debatable. The ultimate goal of a state should be to compensate the losses suffered by its citizenry while adopting mechanisms to prevent future violations.

In addition to the analyzed disparities and lacunae, some indirect victims have also been forced to accept that the forcible disappearances were carried out by non-state actors because the laws in place only provide compensation when such acts are proven or accepted to have been carried out by non-state actors.¹⁴² The government can utilize this as a tool to perpetuate impunity and avoid accountability. The state of affairs remains the same although the CAT Committee has requested the Sri Lankan government to provide

137. Darusman Report, *supra* note 3, ¶ 227.

138. *Id.* ¶ 277 “Reparations can be provided to either individuals or communities and can take a wide variety of forms, including restitution of rights, monetary compensation, medical and psychological services, health care, educational support, return of property or compensation for loss thereof, as well as official public apologies, building museums and memorials and establishing official days of commemoration,” *See also* Paranagama Report, *supra* note 12, ¶¶ 599-600 (reaffirming the perspective of the DARUSMAN REPORT on compensation).

139. Public Administration Circular No: 369 (May 11, 1987) (Sri Lanka) [hereinafter Circular].

140. Somasundaram et al., *supra* note 132, at 29.

141. *Post War Justice in Sri Lanka*, *supra* note 41, at 91.

142. Circular, *supra* note 139 (limiting the possibilities of claiming compensation for disappearances carried out by the state or other non-state actors). *See also Post War Justice*, *supra* note 41, at 116.

information *inter alia* on redress and compensation offered to the victims.¹⁴³ In this regard, it is essential that a national policy on payment of compensation is implemented on behalf of all communities that have suffered and continue to suffer from enforced disappearances.¹⁴⁴ The drafters of such a national policy should further be sensitized towards gender because female indirect victims outnumber male indirect victims.¹⁴⁵

The case of *Premalal de Silva v. Inspector Rodrigo and Others* set judicial precedent in Sri Lanka that compensation should be paid to the family members of the direct victim in the event he/she disappears pursuant to an illegal arrest.¹⁴⁶ The court held that “[i]f the petitioner has disappeared the compensation is payable to his legal representatives.”¹⁴⁷ This is broader than merely recommending payment to the immediate family members because whoever was appointed as a legal representative, or claims to be so under the laws of Sri Lanka, can claim compensation in accordance with this judgment. While this indicates a positive trend, more measures of implementation need to be adopted for the effective redressing of the violations endured by Sri Lankans due to the unexplained disappearances over the years.

143. Comm. Against Torture, Consideration of reports submitted by States parties under article 19 of the Convention, U.N. Doc. CAT/C/LKA/CO/3-4, (Dec. 8, 2011).

144. OISL REPORT, *supra* note 29, ¶ 1253. “[A] national policy on reparations is therefore needed to ensure that a full range of measures are developed and implement taking into account the needs of all affected communities and individuals.”

145. See generally RUTH RUBIO-MARIN (EDS.) WHAT HAPPENED TO THE WOMEN: GENDER AND REPARATIONS FOR HUMAN RIGHTS VIOLATIONS (2006). U.N. Secretary-General, *Study on Women, Peace and Security* ¶¶ 153-155 (2002). (Part E of the document pays special attention to the impact of disappearances and detention on women.); Comm. on the Elimination of Discrimination against Women, *Concluding Observations*, U.N. Doc. CEDAW/C/LKA/CO/7 (2011) (paragraph 25 (b) emphasizes on the general importance of increasing gender sensitization of judiciary, public officials, law enforcement officers, health service providers, social workers, community leaders and the general public).

146. *Premalal de Silva v. Inspector Rodrigo and Others*, 2 SLR 307 (1991) (Sri Lanka).

147. *Id.* at 308.

IV. SUMMARY

This article has sought to establish the right to truth, right to mourn and compensation as enforceable rights within Sri Lanka. Through the examination of the existing recommendations (which remain unimplemented), domestic laws, and circulars, this article has indicated that lacunae exist in this area. This article analyzed the possibility of enforcing these rights and the overwhelming insistence on the international law and a general favorable approach towards the establishment of customary international laws, especially with regard to the enforceability of the right to truth and right to compensation. The conclusions that can be drawn from this analysis indicate a possibility of allowing right to truth through mechanisms that transcend formal court procedures. In this regard, the establishment of a TRC, which is specifically designed to cater to the unique requirements of Sri Lanka and not blindly adopted from other jurisdictions, is advocated for in this article. Right to mourning should then be based on establishing the truth regarding the disappearances through the aforementioned procedure. It is also recommended that Sri Lanka implements the provisions pertaining to the payment of compensation to the family members of the disappeared without imposing a duty to admit that their loved ones are dead when there is insufficient evidence to prove the death of an individual.

