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Accountability for International Crimes in Sri Lanka

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A View on UN Approaches in other Situations

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I. Current situation in Sri Lanka

On 1 October 2015, the UN Human Rights Council (UNHRC) adopted resolution 30/1 ‘Promoting reconciliation, accountability and human rights in Sri Lanka’¹, co-sponsored by the Sri Lankan government. The Resolution envisaged a transitional justice process build on four pillars: truth-seeking, justice and accountability, reparations, and guarantees of non-recurrence. With regard to accountability the government committed to establishing a judicial mechanism involving the participation of international judges, with a special counsel to investigate human rights and international humanitarian law violations.² This meant to bolster the confidence of the Sri Lankan people in the independence and impartiality of any criminal proceedings. However, the government soon decided to change its course and rejected any special court with international judges.³ In March 2017, despite the fact that the transitional justice process in Sri Lanka was still far from actual implementation, the UNHRC granted the Sri Lankan government a 2-year extension to implement resolution 30/1.⁴

In its latest report of 25 January 2018, the Office of the United Nations High Commissioner for Human Rights (OHCHR) noted that still no concrete results had been delivered.⁵ It specified that, until today, only very few and largely insufficient efforts had been made to strengthen the forensic, investigative, and prosecutorial capacities in Sri Lanka and international crimes had not been incorporated into domestic law.⁶ Neither was the domestic justice system capable to independently and impartially prosecute international crimes.⁷ Instead, almost ten years after the end of the conflict, a culture of impunity was prevailing. The High Commissioner concluded that Sri Lanka was neither able nor willing to hold perpetrators of international crimes accountable. He urged once more that, with regard to accountability, it was critical that the government moved forward.

Taking up the OHCHR’s conclusions, this policy brief assesses avenues previously pursued by the UN in other situations, which could promote accountability as one important pillar of a transitional justice process in Sri Lanka. The focus is on a set of different functions various mechanisms have had to support their fight for accountability.

¹ UNHRC Res. A/HRC/RES/30/1 of 1 October 2015.

² Report of the OHCHR Investigation on Sri Lanka (OISL), OHCHR Res. A/HRC/30/CRP.2, of 16 September 2015, <http://www.ohchr.org/EN/HRBodies/HRC/Pages/OISL.aspx> (last accessed: 17 January 2019).

³ See, inter alia, “Flip-Flopping on Accountability – A Timeline“, 27 March 2017, <https://groundviews.org/2017/03/27/updated-flip-flopping-on-accountability-a-timeline/> (last accessed: 17 January 2019).

⁴ Cf. UNHRC Res. A/HRC/34/L.1 of 15 March 2017.

⁵ UN Doc. A/HRC/37/23 of 25 January 2018.

⁶ UN Doc. A/HRC/37/23 of 25 January 2018, Rn. 19.

⁷ Report of the Special Rapporteur on the independence of judges on lawyers on her mission to Sri Lanka, 12 June 2017, A/HRC/35/31/Add.1, http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/35/31 (last accessed: 17 January 2019).

II. Accountability in post-conflict situations

At the latest since the adoption of the Rome Statute of the International Criminal Court (ICC) in 1998, it is largely acknowledged that long-term peace solutions require those bearing the greatest responsibility for gross human rights violations to be held accountable and that, by contrast, the granting of amnesties to those perpetrators destructs any transitional process.⁸

Sri Lanka has not ratified the Rome Statute. Since a Security Council referral to the ICC would most likely fail because of a veto by at least one of the Council's permanent members, it is unlikely that the Court will gain jurisdiction over the situation in the country in the near future. However, other avenues for accountability exist. Beyond the Rome Statute, the legal obligation to conduct criminal prosecutions arises from the Geneva Conventions, the Genocide Convention, the Convention against Torture and the Convention on Enforced Disappearances as well as customary international law. Simultaneously, from the perspective of the victims of those crimes, various human rights treaties provide for a right to remedy and reparation. Thus, it is of utmost importance to strengthen those accountability mechanisms available both at the domestic and international level.

In situations where the domestic judicial system is unable or unwilling to act, one possible way to hold perpetrators bearing the responsibility for the commission of grave crimes accountable are extraterritorial proceedings. Based on the principle of universal jurisdiction, third states can prosecute international crimes in their domestic judicial systems even though neither the perpetrator nor the victim is a national of that state. For Sri Lanka, extraterritorial proceedings based on the principle of universal jurisdiction are a genuine option to consider on the path towards accountability. The ECCHR, among other civil society actors, pushes for, initiates and supports universal jurisdiction cases. By now, those cases are actively pursued by a number of states.

While the conduct of extraterritorial proceedings on the basis of universal jurisdiction remains within the responsibility of national states, it is important that the UN continues to emphasize the necessity of these proceedings. Pursuing justice and accountability at the international level and in third-country states are not two options excluding each other. They are also not barring any future judicial proceedings in the country of the commission of the crimes itself. Rather, all those options complement and strengthen each other. Thus, the UNHRC is urged to express its support for universal jurisdiction investigations and prosecutions to be conducted with regard to Sri Lanka.

⁸ Tolbert/Wierda, Stocktaking: Peace and Justice, ICTJ Briefing, May 2010, p. 3, <http://ictj.org/sites/default/files/ICTJ-RSRC-Global-Peace-Briefing-2010-English.pdf> (last accessed: 22 February 2019).

On the international level, in cases where domestic solutions or proceedings before international courts or tribunals had not been an option, a number of creative extraordinary accountability mechanisms have been established within the UN system in recent years. All these mechanisms have or had important functions at their disposal, which contribute(d) to more effective criminal investigations and prosecutions.

This policy brief assesses transitional justice mechanisms currently operating within the UN system. By drawing on lessons learned from those mechanisms, the brief examines whether an extraordinary accountability mechanism could be an additional avenue to end impunity in Sri Lanka.

III. Functions of Recent Accountability Mechanisms

The following section provides an overview of various functions of different accountability mechanisms that have recently been established. It is also briefly elaborated on how the respective mechanisms are designed to accomplish their task.

1. Mandate to collect, consolidate and preserve evidence

With the passing of time, evidence vanishes and with it the chances of presenting the evidence to a court become more and more limited. To ensure that strong evidence is still available once independent proceedings are ready to deal with the international crimes committed, it is important to start collecting, consolidating and preserving evidence of violence as early as possible after the commission of a crime. This ensures that a sound basis of evidence gathered according to international rule of law standards exists for any domestic or international prosecutions that might take place. It also facilitates the conduct of criminal proceedings in third states.

The *International, Impartial and Independent Mechanism to assist in the investigation and prosecution of persons responsible for the most serious crimes under International Law committed in the Syrian Arab Republic since March 2011 (IIIM for Syria)* was established to pursue this function with relation to the Syrian conflict. This was one of the two major tasks that were assigned to the Mechanism without the consent of the Syrian government.⁹ In fulfilling its mandate, the IIIM for Syria collects evidence and information from third sources, such as States, international or regional organizations, entities of the United Nations system, non-governmental organizations, foundations and individuals. It further directly collects evidence in the form of interviews, witness testimony, documentation, and forensic material.¹⁰ It closely engages and coordinates its work with victim communities and civil society

⁹ UN GA Res. A/RES/72/764 of 28 February 2018.

¹⁰ The International, Impartial and Independent Mechanism to assist in the investigation and prosecution of persons responsible for the most serious crimes under International Law committed in the Syrian Arab Republic since March 2011, FAQ, <https://iiim.un.org/faq/> (last visited: 1 February 2019).

organizations¹¹ and is responsible for taking appropriate measures to respect and ensure respect for the confidentiality, privacy, interests and personal circumstances of victims.¹²

By adopting procedures according to international criminal law standards when collecting evidence and sharing it only with legal systems that uphold human rights standards, it is furthermore ensured that the IIIM's work contributes only to proceedings complying with rule of law standards.¹³ Questions have been raised about how the Mechanism will assess the integrity of national jurisdictions. In its first report, the IIIM acknowledges this as a challenge and states that it is currently developing a consistent methodology for this issue.¹⁴

This challenge becomes equally obvious with the *Investigative Team (IT)* in Iraq, which was established on 21 September 2017 to complement domestic investigation efforts to hold the Islamic State in Iraq and the Levant accountable. The IT is also mandated to collect, consolidate and preserve evidence. This evidence is only supposed to serve fair and independent criminal proceedings consistent with applicable international law. This creates a discrepancy, as, according to its constituting agreement, the IT is supposed to primarily support Iraqi national courts. Proceedings against ISIL suspects before those courts, however, are still undermined by serious due process violations.¹⁵ Additionally, Iraqi criminal law currently does not provide for the prosecution of international crimes and is therefore not ready to comprehensively reflect the legal wrongs of the crimes committed.¹⁶ Still, once an adequate judicial system is set up and running, the evidence preserved by the IT will be ready to serve future fair, independent and impartial prosecutions.

Based on those experiences, it is currently discussed to create a permanent IIIM with the mandate to comprehensively investigate international crimes. To facilitate criminal proceedings

¹¹ Syria Justice and Accountability Center, A memorandum to the Secretary General of the United Nations regarding the new United Nations mechanism for investigation and prosecution, 19 January 2017, <https://syriaaccountability.org/updates/2017/01/19/a-memorandum-to-the-secretary-general-of-the-United-nations-regarding-the-new-united-nations-mechanism-for-investigation-and-prosecution/> (last visited: 17 September 2018).

¹² The International, Impartial and Independent Mechanism to assist in the investigation and prosecution of persons responsible for the most serious crimes under International Law committed in the Syrian Arab Republic since March 2011, FAQ, <https://iiim.un.org/faq/> (last visited: 1 February 2019).

¹³ The Mechanism's mandate, as stated in paragraph 4 of resolution 71/248, is "to collect, consolidate, preserve and analyze evidence of violations of international humanitarian law and human rights violations [...] and to prepare files in order to facilitate and expedite fair and independent criminal proceedings, in accordance with international law standards" in national, regional or international courts that have or may have jurisdiction over these crimes.

¹⁴ UNHRC Res. A/HRC/37/23 of 25 January 2018.

¹⁵ Human Rights Watch, Iraq: Missed Opportunity for Comprehensive Justice, 21 September 2017, <https://www.hrw.org/news/2017/09/21/iraq-missed-opportunity-comprehensive-justice> (last visited: 8 August 2018).

¹⁶ Mehra, Bringing (Foreign) Terrorist Fighters to Justice in a Post-ISIS Landscape Part III: Collecting Evidence from Conflict Situations, 12 June 2018, <https://icct.nl/publication/bringing-foreign-terrorist-fighters-to-justice-in-a-post-isis-landscape-part-iii-collecting-evidence-from-conflict-situations/> (last visited 8 August 2018); Human Rights Watch, Iraq: Missed Opportunity for Comprehensive Justice, 21 September 2017, <https://www.hrw.org/news/2017/09/21/iraq-missed-opportunity-comprehensive-justice> (last visited: 8 August 2018).

and end impunity for grave crimes, the collected material is then to be shared with any jurisdiction ready to deal with the crimes in accordance with international standards.¹⁷

2. *Preparation of case files*

The preparation of case files constitutes an additional step towards the implementation of criminal proceedings. The IIM for Syria is mandated to prepare case files and does this relying on “crime-based” evidence, hence linking evidence to potential perpetrators.¹⁸

3. *Mechanisms to combat corruption and impunity by complementary investigation units*

The ability to independently investigate a case is a minimum competence of an accountability mechanism. The work of the *Interdisciplinary Group of Independent Experts (GIEI* by its Spanish acronym) showed the relevance of independent investigations: The GIEI was established in the aftermath to the forced disappearance of the 43 students of Ayotzinapa, Mexico in the night of September 26th, 2014. It was mandated to assist in the search for the students and the organizing of aftercare for the victims of the attack and their families and to carry out technical analysis of the lines of investigation to determine criminal liabilities.¹⁹ Although the GIEI was dependent on the prosecutorial actions of the Attorney General, it managed to disprove the government’s theory of what had happened²⁰ – as was later also officially confirmed by a federal court.²¹

In order to combat corruption, two mechanisms with the comprehensive power to carry out independent investigations have been established in Latin America: The *International Commission against Impunity in Guatemala (CICIG* by its Spanish acronym) was established on 12 December 2006 by an agreement between the UN and the Guatemalan government.²² The Commission has the mandate to promote the investigation and criminal prosecution of illegal security groups and clandestine security organizations that are linked either directly or indirectly to the state or will be able to hide in impunity. To be able to fulfill this mandate, the CICIG is provided with the freedom to enter all state and military institutions, to question all

¹⁷ <https://www.ejiltalk.org/a-turning-point-in-the-pursuit-of-accountability-for-international-crimes/>;
https://www.telegraph.co.uk/news/2018/09/26/angelina-jolie-william-hague-un-needs-new-body-investigate-war/?WT.mc_id=tmg_share_fb.

¹⁸ UN GA Res. A/RES/72/764 of 28 February 2018.

¹⁹ OAS, Press Release, Interdisciplinary Group of Experts to Launch at IACHR Headquarters its Work on the Case of the Students of Ayotzinapa, Mexico, 30 January 2015,
http://www.oas.org/en/iachr/media_center/PReleases/2015/008.asp (last visited: 17 September 2018).

²⁰ WOLA, Resource Page: Analysis and Information on Mexico’s Ayotzinapa Case, 28 June 2018,
<https://www.wola.org/analysis/analysis-and-information-on-mexicos-ayotzinapa-case/> (last visited: 17 September 2018).

²¹ WOLA, Resource Page: Analysis and Information on Mexico’s Ayotzinapa Case, 28 June 2018,
<https://www.wola.org/analysis/analysis-and-information-on-mexicos-ayotzinapa-case/> (last visited: 17 September 2018).

²² The text of the agreement is accessible on <https://www.wola.org/analysis/cicig-text-of-the-agreement-between-the-united-nations-and-the-state-of-guatemala-on-the-establishment-of-an-international-commission-against-impunity-in-guatemala/> (last visited: 17 September 2018).

state personnel, and to access all official information and documentary material.²³ To ensure the commission's unimpeded workflow, the CICIG also has the ability to lodge complaints with the relevant authorities against government officials refusing to cooperate.

In light of the success of the CICIG's work in neighboring Guatemala, the *Mission to Support the Fight against Corruption and Impunity in Honduras* (MACCIH by its Spanish acronym) was set up on 19 January 2016²⁴ to combat corruption and impunity in Honduras.²⁵ To fulfill its task, the MACCIH is mandated to collaborate with the Honduran judicial authorities in the investigation and prosecution of cases.

However, when setting up mechanisms like that, potential obstacles that could hinder the mechanism's work need to be considered. In this sense it has to be taken into account that the approval of legal reforms always depends on the legislative dynamics within the country.²⁶ This had two implications in the case of Guatemala and Mexico: First, the CICIG's mandate was initially limited to two years. In view of the commission's complex task, this created uncertainty for its future from the very beginning.²⁷ Similarly, the GIEI was initially mandated just for one year, which allowed it to work on administrative and technical issues only. When the group eventually proceeded with disproving the government's story in the Ayotzinapa case, the Mexican government was only willing to consent to the extension of the GIEI's mandate in a restricted version with limited competencies.²⁸

Second, the CICIG's work faced strong resistance, as organizations targeted by the commission had been infiltrating the state for more than two decades. Therefore, during its first eight years, the CICIG only produced chronically uneven and often isolated results.²⁹ Only in 2015 it achieved great success by exposing *La Linea scheme*, which brought down Guatemala's former president and former vice president accused of corruption and which led to the removal of further public officials who had collaborated with criminal organizations.³⁰ Nevertheless, the

²³ CICIG agreement.

²⁴ The Guardian, Honduras president announces international body to tackle corruption, 19 January 2016, <https://www.theguardian.com/world/2016/jan/19/honduras-juan-orlando-hernandez-oas-international-corruption-maccih> (last visited: 17 September 2018).

²⁵ Cf. CICIG agreement.

²⁶ WOLA, The International Commission Against Impunity in Guatemala, June 2015, p. 26, https://www.wola.org/wp-content/uploads/2015/07/WOLA_CICIG_ENG_FNL_extra-page.pdf (last visited: 17 September 2018).

²⁷ Open Society Justice Initiative, Against All Odds, CICIG in Guatemala, p.14, 45, <https://www.opensocietyfoundations.org/sites/default/files/against-odds-cicig-guatemala-20160321.pdf> (last visited: 17 September 2018).

²⁸ OAS, Ayotzinapa, <http://www.oas.org/en/iachr/activities/giei.asp> (last visited: 17 September 2018).

²⁹ Open Society Justice Initiative, Against All Odds, CICIG in Guatemala, p.4, <https://www.opensocietyfoundations.org/sites/default/files/against-odds-cicig-guatemala-20160321.pdf> (last visited: 17 September 2018).

³⁰ Open Society Justice Initiative, Against All Odds, CICIG in Guatemala, p.39, <https://www.opensocietyfoundations.org/sites/default/files/against-odds-cicig-guatemala-20160321.pdf> (last visited: 17 September 2018).

latest ban of the current Commissioner Ivan Velásquez from re-entering the Guatemala shows just how vulnerable the CICIG's structures still are.³¹

4. *Prosecutorial competencies*

An independent prosecutorial body can generate credibility in judicial proceedings, especially where the work of domestic judicial institutions is impeded by corruption and nepotism. The CICIG, for example, can file criminal complaints together with the public prosecutor or join criminal proceedings as a complementary prosecutor, thus providing it with restricted prosecutorial abilities.³² Nevertheless, the CICIG cannot independently prosecute cases, as this was rejected by Guatemalan authorities as not being in line with the countries' constitution.³³

The MACCIH, in turn, has no co-prosecutorial competencies and it is highly dependent on a constructive partnership with the Attorney General.³⁴ This brought about drawbacks to its mission after it gained two indictments in two high-profile cases against five congressional deputies and against the former first lady Rosa Elena de Loba. As a reaction, the Haitian congress passed laws that effectively blocked any prosecutorial action with regard to the two cases. The MACCIH's work was further impeded by a Supreme Court ruling declaring the Anti-Corruption Unit, MACCIH's main partner for building anti-corruption cases within the Attorney General's Office, unconstitutional.³⁵

5. *Suggestion of Legal reforms and public policies*

In order for investigations carried out by an independent mechanism to contribute to fair prosecutions complying with the rule of law and to, in the long run, build a sustainable legal framework, it is important for that mechanism to also suggest legal reforms.

The set-up of the IT already points to this necessity in a very obvious way, as legal reforms in Iraq are necessary before the IT will actually be able to share its findings with the Iraqi prosecution authorities and thus before its work will actually begin to bear fruits.

³¹ The Guardian, Alarm as Guatemala bans head of UN anti-corruption body from country, 5 September 2018, <https://www.theguardian.com/world/2018/sep/05/guatemala-cicig-ivan-velasquez-jimmy-morales-ban> (last visited: 17 September 2018).

³² CICIG Agreement; UN Department of Political Affairs, CICIG (International Commission against Impunity in Guatemala), <https://www.un.org/undpa/en/americas/cicig> (last visited: 17 September 2018).

³³ WOLA, The International Commission Against Impunity in Guatemala, June 2015, p. 5, https://www.wola.org/wp-content/uploads/2015/07/WOLA_CICIG_ENG_FNL_extra-page.pdf (last visited: 17 September 2018).

³⁴ InSight Crime, How Honduras' MACCIH Loses, Even When It Wins, 21 June 2018, <https://www.insightcrime.org/news/analysis/how-honduras-maccih-loses-even-when-it-wins/> (last visited: 17 September 2018).

³⁵ InSight Crime, Honduras Court Ruling Could Undermine Anti-Graft Body, 1 June 2018, <https://www.insightcrime.org/news/analysis/honduras-court-ruling-undermine-anti-graft-body/> (last visited: 17 September 2018).

The CICIG's capacity to recommend public policies and legal, judicial, and institutional reforms³⁶ is also a very important feature for the overall effectiveness of its work: As the CICIG operates under Guatemalan law, the success of its work heavily depends on the instruments available in that law.

6. *Victim-centered approach*

A victim-centered approach is indispensable, as it, on the one hand, enables a mechanism to better understand the interests and needs of the civil society and, on the other hand, strengthens the affected communities' confidence in the mechanism's work. The advantages of this could be well observed in the case of the GIEI: By working closely together with victims and their families, the group was able to gain the trust of the civil society.

Unlike the GIEI, the IIM on Syria is not able to conduct any work directly in Syria. Nevertheless, a victim-centered approach is equally important to the mechanism: Its work relies significantly on cooperation with victims and eyewitnesses.

While the importance of taking a victim-centered approach cannot be emphasized enough, when engaging with victims and witnesses, the risk of re-traumatization needs to be considered.³⁷ Among others a mechanism should ensure not to duplicate any work by requiring survivors to recount their experience.

IV. Way forward with regard to Sri Lanka

As long as impunity for international crimes is prevailing in Sri Lanka and neither the domestic system is able and willing to deal with those crimes appropriately nor a hybrid court as envisaged in Resolution 30/1 is set up, alternatives must be considered. The six functions described above should form the basis for developing those alternatives.

As could be seen in Latin America, a mechanism established with the consent of the government could facilitate prosecutions in Sri Lanka itself. By cooperating with the domestic prosecutorial authorities, it would potentially enhance the overall institutional capacities of prosecuting grave crimes. But while a governmental consent is preferable, it is not a necessary precondition: With national criminal proceedings in Syria being unlikely in the near future, and after Russia and China had repeatedly blocked a Security Council referral to the ICC, the UN General Assembly established the IIM for Syria.³⁸

³⁶ UN Department of Political Affairs, CICIG (International Commission against Impunity in Guatemala), <https://www.un.org/undpa/en/americas/cicig> (last visited: 17 September 2018).

³⁷ Human Rights Watch, Iraq: Missed Opportunity for Comprehensive Justice, 21 September 2017, <https://www.hrw.org/news/2017/09/21/iraq-missed-opportunity-comprehensive-justice> (last visited: 8 August 2018).

³⁸ UN GA A/RES/71/248 of 21 December 2016.

When setting up any kind of extraordinary mechanism it has to be ensured that the mechanism is mandated for time sufficient to fulfill its task. As could be learned from the setting up of the CICIG and the GIEI, the time required to establishing a functioning office before the mechanism is able to start its substantive work needs to be considered.

All the above-mentioned functions would contribute to ending impunity and fostering the transitional justice process in Sri Lanka. Irrelevant of what concrete form an extraordinary accountability mechanism for Sri Lanka would take, it is most crucial for the UN to keep a robust accountability process a top priority on its agenda on Sri Lanka.