

# Justice For Tamils

**Monitoring & Accountability Panel**

*A Roadmap To Victims' Justice*





## OFFICE OF THE PRIME MINISTER Transnational Government of Tamil Eelam

நாடுகடந்ததமிழீழஅரசாங்கம்  
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February 17, 2016

International Monitoring Panel Established to Ensure that Tamils Receive Justice

Dear Friends,

I am writing to inform you of an important step that Transnational Government of Tamil Eelam (TGTE) has taken to ensure that justice is done for the killing of over 70,000 Tamils and rape of Tamil women by the Sri Lankan Security forces.

The UN Human Rights Council at its 30th Session passed a Resolution calling on the Government of Sri Lanka to establish a domestic mechanism with the participation of foreign judges to investigate the international crimes - namely genocide, crimes against humanity and war crimes - committed before, during and after the Mullivaikal massacre. Because the Sri Lankan state is not ethnically neutral coupled with the fact that the crimes were committed by the Sri Lankan state itself, <http://www.tgte-icc.org/> Tamils from the island of Sri Lanka and across the globe called for an international investigation as demonstrated by the 1.6 million signatures in the "Million Signature Campaign," conducted by the TGTE in 2015 [http://tgte-icc.org/Sign/Country\\_List.asp](http://tgte-icc.org/Sign/Country_List.asp). While we continue our campaign for an international investigation, we also have to utilize the UNHRC Resolution to push for the participation of international judges in a judicial capacity and also to expose the duplicity of the Sri Lankan state.

TGTE has established an International Panel consisting of renowned legal experts called 'The Sri Lanka Monitoring and Accountability Panel' (MAP) [www.war-victims-map.org](http://www.war-victims-map.org) to monitor the UN mandated accountability process and to ensure that Sri Lanka does not take steps to evade or blunt the UN Resolution calling for the investigation of these killings. Sri Lanka, the master of sham commissions, is conniving to create sham trials as the next step in their culture of impunity. The Sri Lankan government's repeated statements that investigation is necessary to clear the names of the Sri Lankan armed forces clearly establishes to any reasonable person that the outcome of the proposed domestic investigation has already been determined.

The UNHRC Resolution said the 'credibility of the processes of truth-seeking, justice, reparations and guarantees of non-recurrence' depends on involving victims in their design and implementation and that 'international expertise, assistance and best practices' must be used.

It is our duty to assure that the voice of the victims is not drowned out by the noise of the Sri Lankan state. This MAP shall undertake independent monitoring from a victims' perspective and offer us advice and recommendations on the transitional justice mechanism in Sri Lanka. This advice will help victims become meaningful 'stakeholders' in the process.

We have been fortunate to recruit five internationally renowned legal experts and a consultant to serve on the MAP. They have the gravitas to maintain a watchful eye on Sri Lankan Government and expose any failings to meet the international obligations contained in the UN Resolution. The credentials of these experts are contained in this booklet. TGTE has pledged to provide a monthly honorarium to the members of the Panel for their services.

The Government of Sri Lanka is using its State patronage and its vast resources to its advantage in interpreting as well as blunting the UN Resolution.

Since the Tamils do not have such State patronage at present, it falls on members of the Tamil nation to come forward as an equal counterweight to the Sri Lankan State to ensure that justice is delivered to the Tamil people.

Thus, I appeal to you to donate funds towards this project to ensure its success.

No justice, No peace.

Thank you.

Yours sincerely

Visuvanathan Rudrakumaran, Esq.  
Prime Minister  
Transnational Government of Tamil Eelam (TGTE)

# Sri Lanka

## Expert Panel Nominated to Monitor Transitional Justice Mechanisms from Victims' Perspective: TGTE

The Transnational Government of Tamil Eelam (“TGTE”) has nominated a panel of five legal experts to monitor the design and implementation of the transitional justice mechanisms in Sri Lanka, including the judicial measures to investigate and prosecute war crimes, crimes against humanity and genocide (“Monitoring Accountability Panel” or “MAP”).

Following the Report of the OHCHR Investigation on Sri Lanka, dated 16 September 2015, and the UN Human Rights Council Resolution on ‘Promoting reconciliation, accountability and human rights in Sri Lanka,’ dated 1 October 2015, the Sri Lankan Government undertook to establish accountability mechanisms to address the crimes committed during the Sri Lankan armed conflict. These will include a special criminal court with foreign judges and prosecutors.

The MAP will provide independent monitoring, advice, and recommendations, focusing on the effectiveness of accountability measures from a victims’ perspective. It will also consider issues of fair trial and due process for suspects and accused persons. The views and recommendations of the Panel will enable victims and other stakeholders to participate more effectively in the process and thus enhance the legitimacy of the measures.

The MAP shall formulate its opinions independently - irrespective of party political considerations or the agenda of any specific group (including the TGTE) – according to the interests of fair justice, applying international standards and best practices. The initial mandate of the Panel shall run from November 2015 to December 2016. Further detail of the Panel’s mandate can be found in the attached Terms of Reference.

The Members of the Monitoring Accountability Panel have been selected for their legal expertise in international criminal law and human rights, national war crimes courts, and regional criminal cases. The Panel Members (in alphabetical order) are:

**Marie Guiraud (France)**

**Peter Haynes QC (UK)**

**Richard J Rogers (UK)**

**Heather Ryan (USA)**

**Justice Ajit Prakash Shah (India)**

**Geoffrey Robertson QC** will act as a consultant to the Panel, providing additional independent advice.

[Visit war-victims-map.org](http://war-victims-map.org)

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[Contact maptgte@gmail.com](mailto:maptgte@gmail.com)

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- 2008 International Independent Group of Eminent Persons withdrew their participation in the Sri Lankan Presidential Commission of inquiry into several high profile massacres citing state bias and interference.
  - 2009 Amnesty International releases a scathing report titled “Sri Lanka: 20 years of make believe” evidencing the lack of judicial independence and transitional justice in past Commissions of Inquiry.
  - 2011 UN Panel of Experts report states up to 40,000 Tamil civilians killed in final phase of war.
  - 2012 UN Internal Review Panel “Petrie” report states up to 70,000 Tamil civilians killed and “Systemic failure” of UN.
  - 2015 Approximately 1.6 million Tamils around the world signed a petition requesting Sri Lanka to be investigated and prosecuted by the International Criminal Court (ICC).

UN Human Rights Commission calls for international inquiry on Sri Lanka via a hybrid mechanism.

President Sirisena who was also acting Commander of armed forces during final 2 weeks of war has taken strong position that no international judges would be allowed in any future judicial mechanism inquiring into war crimes.

Several army commanders including Sarath Fonseka have been promoted following the change in government.

UN allows Sri Lanka once again to investigate its own crimes against wishes of victims.

Who will monitor now?

# Monitoring Accountability Panel

## Members' Bios



### **MARIE GUIRAUD (FRANCE)**

#### *Panel Member*

Marie Guiraud, a French lawyer, has worked on human rights and international criminal law for fifteen years. She is currently the Civil Party Lead Co-Lawyer for the victims at the UN-assisted Extraordinary Chambers in the Courts of Cambodia (ECCC). Representing the interests of nearly 4,000 victims who participate in Case 002/02, Marie serves as the co-lead court advocate.

She has been heavily involved in the design and implementation of judicial reparations for victims of crimes under the Khmer Rouge regime. Prior to her current role, Marie worked at a major international human rights organization and then as a private lawyer in criminal litigation, both before French and foreign Courts: In France, she represented both defendants and victims in complex and serious criminal cases. Abroad, Marie represented victims of international crimes before Ivorian and Congolese Courts and was a Civil Party Lawyer in case 002/01 before the ECCC.



### **PETER HAYNES QC (UK)**

#### *Panel Member*

Peter Haynes QC is a British barrister with more than 30 years' experience in domestic and international criminal courts. He currently acts as the Lead Counsel for Jean Pierre Bemba at the International Criminal Court (ICC) and is the Lead Legal Representative of Victims at the Special Tribunal for Lebanon (STL). He is one of the very few practitioners who have led cases before the International Criminal Tribunal for the Former Yugoslavia (where he appeared for the defence of General Vinko Pandurevic in relation to the Srebrenica massacre), the ICC and the STL.

He has appeared in cases involving genocide, war crimes, crimes against humanity and international terrorism. He has been responsible for development of the jurisprudence, practice and procedure of the representation of victims in international / hybrid courts. Peter regularly lectures on the functioning of international criminal courts and, in particular, victim representation.



### **RICHARD J ROGERS (UK)**

#### *Panel Member and Secretary*

Richard Rogers, a USA (California) and UK qualified lawyer, has 20 years' experience in international criminal law and human rights. He has held senior positions in the UN and OSCE: He was the OSCE's Chief legal system monitor in post-conflict Kosovo, the Principal Defender at the UN's Extraordinary Chambers in the Courts of Cambodia, and the head of legal support for the Appeals Chamber at the UN's International Criminal Tribunal for Yugoslavia.

Richard is currently assisting several victim groups before the International Criminal Court and has worked with national war crimes courts in Bangladesh, Bosnia and Herzegovina, Croatia, Kosovo, and Uganda. Richard has recently provided expert testimony before the US Congress House Committee on Foreign Affairs, and spoken to human rights issues before the European Parliament's human rights committee and the Bosnian Parliament. He is a founding partner of Global Diligence LLP.



### **HEATHER RYAN (USA)**

#### *Panel Member*

Heather Ryan, a US lawyer, has been working in the field of international law for over 15 years. She is currently a special consultant for the Open Society Justice Initiative monitoring the Extraordinary Chambers of the Courts in Cambodia (ECCC), a hybrid tribunal set up to prosecute senior leaders of the Khmer Rouge Regime responsible for mass atrocities form 1975-1979.

She has been involved since 2005 in evaluating and reporting on the development and implementation of the ECCC in terms of compliance with international fair trial standards, as well as the court's effectiveness in meeting its goals with respect to the victims and public. Her experience also includes work at the Carr Center for Human Rights Policy at Harvard's Kennedy School, Global Green grants Fund, The Coalition for International Justice, teaching international criminal law, as well as private law practice.

# Monitoring Accountability Panel

## Members' Bios



### **JUSTICE AJIT PRAKASH SHAH (INDIA)**

#### *Panel Member*

Justice Shah, a renowned Indian jurist, has been practicing law as an advocate and judge for around 40 years. Following his practice as a lawyer in Bombay, Justice Shah was elevated to the bench in 1992, becoming a permanent Judge of Bombay High Court in 1994. He was promoted to Chief Justice of the Madras High Court in 2005 and Chief Justice of Delhi High Court in 2008. He retired from the bench in 2010.

Until August 2015, Justice Shah was the Chairman of the 20th Law Commission of India, a body established by the Indian Government to promote legal reform throughout the justice system. He was also the Chairperson of the Broadcasting Content Complaints Council, a self-regulatory body for non-news TV channels set up by the Indian Broadcasting Foundation in consultation with the Ministry of Information & Broadcasting.



### **GEOFFREY ROBERTSON QC**

#### *Consultant*

Geoffrey Robertson QC is founder and joint head of Doughty Street Chambers. He has had a distinguished career as a trial and appellate counsel, an international judge, and author of leading textbooks. He has argued many landmark cases in media, constitutional and criminal law, in the European Court of Justice; the European Court of Human Rights; the Supreme Court (House of Lords and Privy Council); the UN War Crimes courts; the World Bank's International Centre for Settlement of Investment Disputes (ICSID) and in the highest courts of many commonwealth countries.

Geoffrey has, as a jury advocate, appeared in many criminal trials at the Old Bailey and libel trials in the High Court. He has appeared in several hundred reported cases in the Court of Appeal (both civil and criminal divisions) and in judicial reviews in the High Court, and in subsequent appeals. He has a large advisory practice, for clients including governments, media corporations, NGO's and local councils.



# Terms of Reference

## Background and Overview

1. The Panel of Experts to Monitor Accountability in Sri Lanka (“Monitoring Accountability Panel” or “MAP”) has been established at the request of the Transitional Government of Tamil Eelam (“TGTE”) to provide independent monitoring, advice, and recommendations on the transitional justice mechanisms in Sri Lanka, following the end of the civil war in 2009.
2. The overall mandate of the MAP is to monitor, advise and report on the design and implementation of the judicial and non-judicial measures for transitional justice established by the Sri Lankan Government pursuant to the Report of the OHCHR Investigation on Sri Lanka (“OISL Report”), dated 16 September 2015, and the UN Human Rights Council Resolution (A\_HRC\_30\_L.29) on ‘Promoting reconciliation, accountability and human rights in Sri Lanka,’ dated 1 October 2015. Whilst the MAP will focus on the effectiveness of accountability measures from a victims’ perspective, it will also consider issues of fair trial and due process for suspects and accused persons.
3. The UN Human Rights Council<sup>1</sup> and the UN Special Rapporteur on Transitional Justice have called for broad participation and consultation in the design and
4. The MAP shall garner the views of victims inside and outside Sri Lanka. It shall formulate its opinions independently - irrespective of party political considerations or the agenda of any specific group (including the TGTE) – according to the interests of fair justice, applying international fair trial standards and best practices.
5. The MAP’s Legal Experts shall agree all reports prior to publication or distribution. The initial mandate of the MAP shall run from November 2015 to December 2016.

## Specific Terms of Reference

### Re: The judicial mechanism with a special counsel

6. To monitor, evaluate, and make recommendations on the establishment of the “judicial mechanism with a special counsel to investigate allegations of violations and abuses of human rights and violations of international humanitarian law.”  
The monitoring shall focus on the need for full and fair accountability, victim reparations, as well as fair trial and due process.
7. Subject to available information, particular attention should be given to:
  - a. The concerns and expectations of victims;
  - b. The treatment of victims within the system, particularly victims
  - c. The mechanisms for victim participation in the process and for
  - d. The participation of foreign judges and the set-up of judicial
  - e. The participation of foreign prosecutors and investigators and
  - f. The selection process and qualifications of national judges;
  - g. The procedures for selecting suspects for prosecution; standpoint, for transitional justice measures depend, to a large extent, on the willingness of victims and others to participate, for example, by sharing pertinent information with the relevant institutions. It is also necessary from the standpoint of effectiveness, for the measures, after all, should respond to the needs and expectations of their potential beneficiaries. And it is called for in terms of their sustainability for these are inevitably long-term projects that will likely depend on the willingness of stakeholders to defend them over time from the contingencies of politics. This is more likely to happen if the stakeholders can claim ownership over them.”
  - h. The application of international standards of fair trial and due
  - i. The mechanisms for witness protection.

# HUMAN RIGHTS



## RE: Other areas of transitional justice

8. To monitor, evaluate, and make recommendations on the other judicial and non-judicial transitional justice mechanisms implemented by the Government of Sri Lanka.
9. Subject to available information, particular attention should be given to:
  - a. Non judicial processes for truth-seeking;
  - b. Institutional reform, including vetting of public employees;
  - c. Treatment of prisoners of war;
  - d. Demilitarisation and demobilization;
  - e. Security sector reforms;
  - f. The legality of measures designed to fight terrorism;
  - g. Measures to prevent torture and sexual violence by the security
  - h. The response to allegations of enforced disappearances; i. The treatment of Tamils and Muslims within the Sri Lankan legal
10. The MAP will submit an interim report by March 2016 and a final report by January 2017 on those matters outlined in this Terms of Reference. It may issue press releases and position papers as the need arises.

# Monitoring and Accountability Panel (MAP)

## Starts its work

**Web/blog:** [www.war-victims-map.org](http://www.war-victims-map.org)

On 19 November 2015 the Transitional Government of Tamil Eelam nominated a panel of five legal experts to monitor the design and implementation of the transitional justice mechanisms in Sri Lanka, including the judicial measures to investigate and prosecute war crimes, crimes against humanity and genocide.

The Monitoring Accountability Panel – or “MAP” – started its work on 1st December 2015. Following the Report of the OHCHR Investigation on Sri Lanka, dated 16 September 2015, and the UN Human Rights Council Resolution on ‘Promoting reconciliation, accountability and human rights in Sri Lanka,’ dated 1 October 2015, the Sri Lankan Government undertook to establish accountability mechanisms to address the crimes committed during the Sri Lankan armed conflict. These will include a special criminal court with foreign judges and prosecutors.

The MAP will provide independent monitoring, advice, and recommendations, focusing on the effectiveness of accountability measures from a victims’ perspective. It will also consider issues of fair trial and due process for suspects and accused persons.

Panel Member, Richard J Rogers, stated: “Fifteen years after the first hybrid tribunal emerged in East Timor, we’ve seen several models of varying quality— but no fixed templates. Far from being bound in any way, wise planners are free to cherry-pick past successes, negotiate around pitfalls, and fill gaps with innovative solutions. With its vast collective experience, the MAP will offer constructive advice and guidance to those seeking to bring justice to Sri Lankan victims.”

The views and recommendations of the Panel will enable victims and other stakeholders to participate more effectively in the process and thus enhance the legitimacy of the measures.

Panel Member Marie Guiraud added: “The success of any transitional justice measures depends, to a large extent, on the willingness of victims and other stakeholders to participate and claim ownership. The MAP plans to consult widely with affected communities and ensure that their views are taken into account in the design and implementation of accountability mechanisms for Sri Lanka.”

The Members of the MAP (in alphabetical order) are:

**Marie Guiraud (France)**

**Peter Haynes QC (UK)**

**Richard J Rogers (UK)**

**Heather Ryan (USA)**

**Justice Ajit Prakash Shah (India)**

**Geoffrey Robertson QC** will act as a consultant to the Panel, providing additional independent advice.



# Open Letter

## to the United Nations High Commissioner for Human Rights: ‘Sri Lankan Victims Deserve Real Justice’

**February 3, 2016**

The MAP notes with concern the recent statement made by President Maithripala Sirisena (BBC interview, 21 January 2016) that he will “never agree to international involvement” in the special war crimes court. This statement goes against both the word and spirit of the Human Rights Council Resolution (A/HRC/30/L.29). The Sri Lankan Government must not be allowed to backtrack on its commitments to establish a special court with international judges and prosecutors.

In light of the upcoming visit by the UN High Commissioner for Human Rights to Sri Lanka, the MAP has sent an Open Letter to the High Commissioner urging him to insist on broad consultations with all stakeholders, followed by full and proper implementation of the Resolution.

The Open Letter, dated 3 February 2016, is available here: [MAP-OpenLetter-UNHCHR-3.2.16](#)

**Mr Zeid Ra'ad Al Hussein**  
**UN High Commissioner for Human Rights**  
**United Nations**  
**Geneva, Switzerland**

**Sri Lanka Monitoring Accountability Panel**  
**Contact: Richard J Rogers [richardrogers@globaldiligence.com](mailto:richardrogers@globaldiligence.com)**

**3 February 2016**

**Dear High Commissioner:**

The Sri Lanka Monitoring Accountability Panel ('MAP') has been established to provide independent monitoring, advice, and recommendations on the transitional justice mechanisms in Sri Lanka. We focus on accountability from a victims' perspective. Please see <http://war-victims-map.org/> for more information.

We understand that you will visit Sri Lanka in the coming days to discuss the progress made by the Sri Lankan Government to address the mass atrocities and other human rights abuses committed during, and since, the armed conflict. The types of judicial and non-judicial measures necessary to deal effectively with these violations were outlined in the OHCHR Report, dated 28 September 2015.

The subsequent Human Rights Council Resolution (A/HRC/30/L.29) - which was co-sponsored by the Sri Lankan Government - reiterated the need to establish a special judicial mechanism to investigate and prosecute "violations and abuses of human rights and violations of international humanitarian law." The Resolution affirmed "the importance of participation in a Sri Lankan judicial mechanism, including the special counsel's office, of Commonwealth and other foreign judges, defence lawyers and authorized prosecutors and investigators."

We note with concern the recent statement by President Maithripala Sirisena (BBC interview, 21 January 2016) that he will "never agree to international involvement" and that "[w]e have more than enough specialists, experts and knowledgeable people in our country to solve our internal issues". This statement goes against both the word and spirit of the Resolution. It is also patently incorrect - as clearly outlined in successive reports by independent UN experts, the Sri Lankan justice system does not have the requisite independence, impartiality or expertise to administer fair and effective war crimes prosecutions. The Sri Lanka Government must not be allowed to backtrack on its commitments or use technical legal excuses to block full international judicial and prosecutorial participation.

If the accountability mechanisms are to "uphold the rule of law and to build confidence in the people of all communities of Sri Lanka" there must be a meaningful consultation process. The victims' voice must be heard. And their views on the need for full participation of foreign judges and prosecutors within the judicial process must be accommodated.

We urge you to insist that the Sri Lankan Government conducts broad consultations with all stakeholders and respects its international commitments by implementing the word and spirit of the Resolution.

Please accept, Excellency, the assurances of our highest consideration. Marie Guiraud; Justice Ajit Prakash Shah; Peter Haynes QC;  
Heather Ryan; Richard J. Rogers.

## The Appointment of Field Marshall Sarath Fonseka to the Sri Lanka Parliament Is

# An Affront to Victims of the Civil War

### **PRESS RELEASE** **February 11, 2016**

The Sri Lanka Monitoring and Accountability Panel (“MAP”) notes with great concern the appointment on 9 February 2016 of Field Marshall Sarath Fonseka to parliament as a national list member.

Field Marshall Fonseka was the commander of the Sri Lankan army in May 2009 and was in that capacity responsible for the actions of troops who are widely believed to have carried out war crimes and crimes against humanity. Successive governments in Sri Lanka have failed to investigate those allegations, and whilst the present regime has made apparent commitments to do so, the current appointment casts serious doubt on the partiality of any process it initiates or undertakes.

No proper and impartial investigation of the events of May 2009 could fail to examine the acts and omissions of Mr Fonseka. His appointment as an MP sends a chilling signal to the victims of the crimes allegedly committed by his subordinates. No less significant is the timing of this appointment. Made as it was during the visit of the UN High Commissioner for Human Rights to Sri Lanka, it is an affront not only to the victims but also to the United Nations and the international community.





## Submission to Human Rights Council Thirty-first Session

**15 February 2016**

The Sri Lanka Monitoring Accountability Panel (“MAP”) was established to provide independent monitoring, advice, and recommendations on the transitional justice mechanisms in Sri Lanka, from a victims’ perspective. The MAP members have considerable expertise in national and international criminal justice mechanisms designed to address wartime atrocities.<sup>1</sup>

### I. Sri Lanka’s International Obligations to Victims

In 2005, the United Nations adopted the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (“Basic Principles”). The Basic Principles identify mechanisms, modalities, procedures, and methods for the implementation of including to the following:

- Equal and effective access to justice.
- Adequate, effective and prompt reparation for harm suffered.
- Access to relevant information concerning violations and reparation mechanisms.
- Effective criminal justice.

States have the duty to investigate and, if there is sufficient evidence, to prosecute persons allegedly responsible for the violations.

effectively, promptly, thoroughly and impartially”. Where a state’s existing legal system is inadequate, it should establish special procedures with international participation, or risk violating its international obligations.

The Sri Lanka Government (“SLG”) must comply with its legal obligations to victims, including the right to an effective remedy and the right to participate in proceedings.



## II. Essential Ingredients for an Effective Special War- Crimes Chamber

### a. Genuine Political Commitment

All past efforts by SLGs to establish accountability for wartime violations have fallen dramatically short of international standards. Accountability cannot be achieved without sustained political commitment to a properly resourced judicial mechanism that operates in accordance with international standards. The SLG should not use technical legal excuses to block full existing legal obligations, States have the duty to investigate and, if there is sufficient evidence, to prosecute persons allegedly responsible for the violations. This investigation must be done “international judicial and prosecutorial participation. Rather, the SLG should demonstrate its commitment by adopting legislative reforms that incorporate international crimes and modes of liability, and by facilitating the appointment of international judges, prosecutors, and lawyers to work alongside local counterparts.

### b. The Right Legal Framework

Legislation will have to be enacted to establish the requisite international crimes, forms of liability, and other jurisdictional powers of the special war-crimes chamber.

A limited temporal jurisdiction is a pragmatic way to promote efficiency, but should not exclude the most significant crimes or be used to shield particular persons from liability. Manipulated jurisdictional time frames will undermine credibility. Defining the time frame from February of 2002 to late 2011 is a sensible option.

The substantive jurisdiction should include international crimes and forms of criminal responsibility developed through the international courts, including ‘command responsibility.’ These provide the essential tools to prosecute those most responsible for the alleged crimes. The definition of the international crimes can be taken from the International Criminal Court (“ICC”) Rome Statute. Since all the ICC crimes were accepted to be customary international law, these may be adopted for the purposes of prosecution in Sri Lanka.<sup>2</sup>

The special war-crimes chamber should limit personal jurisdiction to “those most responsible” for the crimes. Focusing on those most responsible reduces the risk that the special war-crimes chamber will become over-encumbered with lower-level perpetrators (the foot soldiers) and run out of time or money to pursue the more complex cases involving senior decision makers.



### c. A Competent, Independent, and Impartial Tribunal

The Sri Lankan judicial system “remains particularly vulnerable to interference and influence by powerful political, security and military actors”. Further, the Sri Lankan judiciary does not have the necessary experience to deal effectively with complex international crimes. These shortcomings are not new to post- conflict situations. The correct response is to facilitate the full participation of international judges, prosecutors, and lawyers. This participation must be significant; the foreign actors must have real decision-making powers.

The SLG has sought to narrow the meaning of ‘participation’ and downgrade foreign actors to ‘technical advisors.’ This model will not work. Advisors with no judicial decision-making authority cannot overcome the independence gaps of the domestic system. Without a significant cadre of foreign actors working alongside Sri Lankan counterparts and with real decision-making powers, the special war-crimes chamber is bound to fail.

If the national judges remain in the majority, the court will remain open to political interference. The “supermajority” voting system has been ineffective. Therefore, each of the judicial chambers should be composed of a majority of international judges. The Constitution does not require Sri Lankan citizenship to be appointed.

The concerns relating to expertise and political interference also apply to prosecutors. Powerful suspects may seek to manipulate case selection; some of the most serious cases could be buried before they get off the ground. Therefore, it is crucial to include

international prosecutors with independent decision-making powers. Equal co-prosecutors or a lead international prosecutor are sensible options.

A special war-crimes chamber should permit experienced international lawyers within each defence team. There is no proscription that prevents foreign lawyers from participating.

#### **d. Adequate Victim Participation**

The Assistance to and Protection of Victims and Witnesses Act (“WPA”) was an important step forward in ensuring that victims are not deprived of their remedies, including reparations.

However, it falls short of the truth-seeking and accountability mandate on which the “healing and reconciliation” is premised. The WPA provides the victims with the right to initiate public action in respect of the alleged crimes by presenting, either orally or in writing, a complaint pertaining to the commission of an offence. Moreover, the right to legal representation at “several stages of the criminal proceedings” is guaranteed. However, it is not clear whether the victim has the status of a “party” or a “participant” – this should be clarified.

At the ECCC, victims have the right to choose their legal counsel (foreign and national) and have a representation system that includes international lawyers working alongside national lawyers. Sri Lanka should follow this example.

#### **e. Protection for Witnesses**

The OHCHR highlighted “the absence of any reliable system for victim and witness protection, particularly in a context where the threat of reprisals is very high”. The current situation in Sri Lanka is perhaps more extreme than any yet faced by a domestic war-crimes court; witness interference in Sri Lanka continues to be rife. Tamils will rightly be fearful of participating unless a rigorous witness protection system is established.

The WPA should be amended to address several shortcomings. First, neither of the two overseeing mechanisms is autonomous from the SLG. Second, the respective functions of these bodies are unclear. Third, the WPA sets out no specific criteria for the grant of protection to victims and witnesses and provides no comprehensive list of available protective measures. Lastly, the WPA offers no protection to witnesses who have not yet provided information in the course of an investigation.

Without amendments, the WPA will fail to reassure witnesses that they can testify safely, particularly in cases involving high-ranking police or military personnel. The SLG should formulate legal criteria based on the UN’s Model Witness Protection Bill, allocate sufficient resources to the programme, and include international assistance.

## Recommendations

The SLG should undertake wide-ranging consultations with all relevant stakeholders. Victims should be adequately informed of the options for justice, including a special war-crimes chamber of hybrid nature.

The SLG should protect the rights of victims outlined in the Basic Principles. To satisfy the right to effective criminal justice, the SLG should establish a special war-crimes chamber comprised of the following attributes:

- a. Trial and Appellate Chambers with a majority of international judges sitting alongside national counterparts.
- b. Co-prosecutors with equal decision-making powers, one international and one national. Or a lead international prosecutor.
- c. A rigorous witness protection system based on the UN's Model Witness Protection Bill, including:
  - a. An overseeing mechanism, autonomous from the SLG, with unequivocal functions and responsibilities.
  - b. Clear legal criteria for granting protective measures.
  - c. A list of the available physical and psychological protective measures.
  - d. Victims with rights to meaningful participation in the proceedings. The right to free choice of counsel, including international counsel.
  - e. Suspects and accused to have free choice of counsel, including international counsel with full rights of audience.
  - f. Legal aid for indigent victims, suspects, and accused.
- g. The application of substantive customary international law as well as recognised forms of criminal liability, applying ICC definitions.
- h. The application of Sri Lankan procedural law modified for consistency with the ICCPR protections.



# Donation Information

Funds can be donated through the TGTE PayPal account by connecting to [www.tgte.org](http://www.tgte.org).

Funds also can be donated by reaching out to anyone of the following individuals:

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- 2 **MR. S. GNANESWARAN (CANADA)**  
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