

## **THE 'EVIDENTIARY BIND' IN POSTWAR LAND RESTITUTION: THE CASE OF SRI LANKA**

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### **Abstract**

The enormity of the world's dislocated population generated by contemporary conflicts has brought significant attention to a complicated process of returning housing, land and property (HLP) to their rightful occupants once conditions permit. As the complexity of large-scale HLP restitution becomes increasingly apparent, significant obstacles emerge that require examination. This article describes how the 'evidentiary bind' is such an obstacle. This bind emerges when large-scale HLP restitution processes require titles and deeds to be in the possession of the population who are the least likely to have them—the forcibly displaced. The technical, legal and political inability to acknowledge and accept alternative, informal, customary, or hybrid evidence for finding rightful owners means that the 'evidentiary bind' prevents returns, leaves a large amount of land in a state of limbo, produces grievances in the war-affected population, and invites corruption and the use of potentially destabilizing means to regain one's HLP. This article looks at the case of Sri Lanka where the current HLP restitution process faces a particularly acute form of the 'evidentiary bind.'

### **Keywords**

Post-conflict rehabilitation, peace building, resettlement, refugee return, restitution of housing, land and property, evidentiary bind, Sri Lanka

### **Introduction**

How to effectively engage in large-scale housing, land and property (HLP) restitution for those dislocated by armed conflict is a formidable social, legal, technical, institutional and political challenge. Frequently numbering in the hundreds of thousands to millions in today's conflicts, dislocated populations seeking to return to their HLP face significant problems in proving how they are legally attached to their HLP. This issue entails obstacles to evicting secondary occupants, preventing the state or other actors from re-allocating their properties, managing (often historical) counter claims, resolving a variety of HLP disputes that inevitably arise after a war, or receiving compensation or other remedies. More broadly, the effective return of dislocated populations to their HLP is fundamental to postwar recovery, reconciliation and reconstruction. The evidence (which most effectively proves whether a returning household is the rightful owner or occupant of a property) is a legal document issued by a government, often in the form of a deed or title; it is the evidence that virtually all HLP restitution processes focus on (see Das and van Houtte, 2008; IBPCA, 2006; Leckie, 2003; van Haersolte, 2006; Crook, 2006; FAO, 2007). Despite such an expectation of the evidentiary documentation after a war, it is a requirement imposed on the populations who are the least likely to have them—returning refugees and internally dislocated persons (IDPs).

In reality, these claimants usually have only partial, non-relevant, or informal documents if they have any documentation at all. Often such documents were left behind while fleeing, lost or destroyed during the war or during a dislocation; they may have never existed in the first place

if HLP had been held under forms of informal, customary, tribal or religious tenure (Das and Van Houtte, 2008; Dabbas and Burns, 2011; Unruh et al, 2017). One study has found that 93 percent of Syrian refugees do not have formal HLP documentation while a survey in Iraq shows that 57 percent of IDPs do not have state property documents (NRC, 2017; IOM, 2016). At the same time, there is always a surge in falsified HLP documentation during and after a war; HLP offices and archives are often intentional wartime targets. Those who have taken over others' HLP during wartime (or illegally purchased them) can have an 'official' documentation, as they want to seek to solidify their possession later (Das and Van Houtte, 2008; Dabbas and Burns, 2011; Unruh, 2011). While all the restitution programmes prioritize documented evidence, an exclusive reliance on documentation is unworkable in the scenarios of postconflict returns. Thus alternative forms of evidence as well as the method of their technical processing need to draw our attention (Leckie, 2003; Das and van Houtte, 2008; van Haersolte, 2006; Unruh et al, 2017).

Some postwar states are more reluctant than others to move in this direction, to the very significant disadvantage of returning refugees. HLP is not likely to be returned to former owners or occupants if they do not possess a proper documentation; the restitution process often does not recognize alternative forms of evidence. Such an 'evidentiary bind' results in the stalling or prevention of HLP restitution. Consequently, a great deal of HLP has not been returned to rightful owners and occupants often with a failure to evict secondary occupants who may have even been involved in ethnic 'cleansing' and other forms of war crimes. Also lacking are compensation and other forms of other assistance for the returnees to recover from a damage and destruction.

Failed, partial, or prejudicial restitution efforts have serious repercussions in stability, recovery, reparations and reconciliation. The resulting grievances as well as a loss of trust and confidence in a restitution process can lead returnees to take matters into their own hands frequently in destabilizing ways. This is indeed a primary concern in post-war Iraq. At the same time, a large number of HLP cases face uncertainty, inviting corruption, land grabbing, and political manipulation. While a documentary bind can be stricter in some cases than others, the question needs to focus on what actually prevents some HLP restitution processes from moving to include alternative, corroboratory or other non-documentary forms of evidence. This article explores the case of Sri Lanka where the limitations of such an evidentiary bind are clearly manifested, presenting multi-faceted and complex issues involved in its application.

As one of the root causes of the war, "[l]and is a key issue for reconciliation in Sri Lanka" (CPA, 2016a). The evidentiary bind is particularly problematic in the country because it fuses upwards from the local and provincial level treatment of evidence to the national level; it involves questions about a rule of law, policy and narratives held by the Sinhalese and Tamil communities. It also implicates the international level where the UN pursues a particular vision for reparations and transitional justice. Transitional justice (TJ) needs to be examined in a variety of contexts—war, transition from authoritarianism/dictatorship, and humanitarian intervention, among others. While TJ needs to be discussed in several different contexts, this research sheds light on HLP mass claims. The Sri Lankan case is important because it illustrates that the post-war evidentiary bind can be much more complicated than a simple legal redefinition of evidence rules in a transitional justice context. It makes the 'evidentiary challenge' for HLP restitution formidable in Sri Lanka.

After introducing the HLP background to the Sri Lankan war, this author will briefly review the conventional HLP restitution process in a general context prior to its application to the Sri Lankan case, in particular. The article will provide an in-depth examination of the evidentiary bind in Sri Lanka, followed by a discussion of ways in which this bind might be loosened.

### **Background to the Sri Lankan War**

Land rights problems were a primary cause of the 30 year war in Sri Lanka (Fonseka and Raheem, 2010; 2011; CPA, 2016a; Bandara, 2010). It is important to one's identity and access to resources, always turning into a political struggle, particularly in the north and east of the country. Longstanding grievances, discontent and perceptions of government discrimination in land rights were hardened along ethnic lines prior to the conflict (CPA, 2016a; Fonseka and Raheem, 2011; Yusuf, 2017). Owing to poor management, inadequate recognition and enforcement of land rights, improper land settlement schemes and land grabs were allowed to dispossess significant segments of the population (Fonseka and Raheem, 2010). Lands were taken by various groups of individuals well connected to state institutions, elites and armed groups which aided personal gains through resource redistribution (Rajasingham-Senanayake, 2005; Fonseka and Raheem, 2011). While the neglect of these problems contributed to the onset of the conflict, they became overlain by additional land rights problems that emerged during the war.

The Liberation Tigers of Tamil Eelam (LTTE) pursued their own policies regarding the provision of land for the landless, and confiscated lands for their own use and for reallocation to specific individuals. For example LTTE evicted the entire Muslim population from the Northern Province and took over lands in the Eastern Province belonging to Muslims (Yusuf, 2017). LTTE also allocated some lands abandoned by those who fled the war, to people it felt were deserving and provided HLP documents to such persons. They also created forest reserves, declared certain areas 'restricted zones' (Fonseka and Raheem, 2011), and engaged in intimidation and violence against civilians under its control, resulting in large-scale displacement and duress land sales. More broadly there was widespread destruction and loss of HLP documentation by both individuals and the state during the war. This was aggravated by the increase in fraudulent documentation and by secondary occupation by a variety of actors, including other displaced civilians, the police and the military. Prior to the end phase of the war, the government estimated that over 58 percent of the housing stock in the north and east had been damaged or destroyed (Fonseka and Raheem, 2011). Large-scale population dislocation both internally and to other countries during the war resulted in a great deal of abandoned land and properties to which dislocates and their descendants are now returning.

Additional problems emerged during the war. HLP was bought and sold during the conflict without adherence to legal procedures and hence has not produced the necessary transfer documentation for postwar legal attachment to lands and properties (Fonseka and Raheem, 2011). Certain forms of spatial 'cleansing' occurred during the war that was not necessarily related to the conflict, but which took advantage of the fluidity and chaos of the wartime period. In one case a Muslim population in an area was forcibly dislocated by a Sinhalese group, followed by the takeover of the lands by a Tamil group. After the war the Muslim group has now returned and is intending to reclaim the land. More broadly the Muslim Rights Association has conducted a mapping exercise describing numerous land claims and conflicts for lands forcibly occupied by Tamils (MRO, 2003). There was also a long history of dual land administrative control in the north by both the state and armed groups. The repercussions of all these activities currently result in numerous highly contentious HLP disputes.

Dispossession from lands continues in some areas subsequent to the war as parts of government have acquired lands on national security grounds or for development projects or private ownership (LACSL, 2015; IDMC, 2016; Fonseka and Raheem, 2010). Secondary occupations

continue by private individuals and government entities, including the police, the military, the Forest Department, the Wildlife Department, the Archaeology Department, the Mahaweli Authority, religious authorities and the Urban Development Authority (MPRRRHRA, 2016; LACSL, 2015; Fonseka and Raheem, 2010). Some Forest Department officials refer to a 2005 Gazette Circular that indicates all lands that have been grown over with forest can be acquired by the Forest Department (LACSL, 2015). As well there are now investments (often large-scale) that have been made on lands acquired during and after the war; and there is a significant involvement of military elements in the administrative structures meant to decide contested land claims. Such secondary occupations aggravate the current widespread problems of contested claims, land disputes and restitution (Fonseka and Raheem, 2011).

Additional difficulties have emerged after the war. Land mines in some areas prevent returns, land reclamation projects have become politicized, and given the poor state of the cadaster system after the war, it is unknown how much land exists, where it is and how much needs to be returned. At the same time certain political actors at the district and provincial levels with no assigned jurisdiction over land and property issues are becoming involved in competing land claims. And there are a variety of powerful individuals becoming increasingly active in land issues facilitated by a lack of transparency regarding land policy and administration. Lands required for large-scale development projects in the north, including infrastructure projects, and the way such lands are acquired and the projects implemented, contribute to confusion over land rights (Sakalasuriya et al, 2016; Fonseka and Raheem, 2010; 2011; Hoglund and Orjuela, 2011). In some cases there are fears among Tamil communities of a process of ‘Sinhalaisation’ of some areas due to the suspicion of preferential treatment and economic incentives regarding land in the north provided to Sinhalese civilians from the south (LACSL, 2015; Fonseka and Raheem, 2011). But land conflicts often exist between Tamils as well. A frequent scenario is that a Tamil family flees the war and settles overseas. After the war they return to reclaim their land only to find that LTTE has given it to someone else who may have been occupying it for 10 years or more.

At the level of the individual, tenure insecurity for some IDPs and returnees is currently so severe that they believe that lands returned today can be taken away tomorrow (LACSL, 2015). There is also a lack of awareness among the civilian population as to the need for valid documentation relating to land and property and many have never had land documentation (LACSL, 2015). For others there is the issue of how land documents provided during the war will now be treated. Those civilians that received land documents from LTTE are unlikely to have these recognized and will probably lose their lands. It is unclear if land distributed and documented during the war by other armed actors and the state in the north and east of the country will face similar problems. In addition there are different understandings in the north regarding what constitutes legitimate land ownership, control and use. Some believe that simply having a piece of paper, regardless of how or from whom it was issued, constitutes ownership of HLP. Others believe that simple occupation provides ownership, still others believe that longer term occupation legitimizes their claims, while some believe that promises made by government or other political actors constitutes ownership (Fonseka and Raheem, 2011).

Overlain on these problems is the return of members of the Sri Lankan diaspora and their descendants to reclaim lands that others have occupied for years. Granting of citizenship for certain returnees is a major issue as they return from India with children and grandchildren who are not citizens and so have no access to land documents or inheritance of lands. At the same time

children born of wartime rape who are now young adults are discriminated against in a variety of issues including HLP.

While some reports indicate that 95 percent of all 'official IDPs' have been allowed to return to their HLP, a good number of these returnees have had a difficulty in actually accessing their lands. And a number of categories of IDPs are not included in the count of 'official IDPs'; namely those living with host families, and those that are termed 'old IDPs'. As well refugees who were not resettled are not included in this count. Marginalized groups, in particular, women, face significant hardship in (re)accessing lands after the war. Women headed households are particularly common in the north, due to loss of spouses in the course of the war.

### **The Conventional HLP Restitution Process**

Housing, land and property restitution processes after wars have become critical components of peace-building processes in delivering the needed stability, reconciliation, reintegration and recovery (Leckie, 2009; FAO, 2007; Fay and James, 2009; Karrer, 2005; Holtzmann and Kristjansdottir, 2007; Van Houtte, 1999). Restitution in an HLP context includes a return of one's property or alternative remedies such as compensation, alternative HLP, employment, vouchers, shares or other options. Prevailing peace-building practice places a significant stress on transparent, rapid, and just HLP restitution in resolving wide grievances and establishing an enduring peace (Schwebel, 2007; van den Houtte, 2006; Das and Van Houtte, 2008). Being left unattended, HLP grievances often become aggravated over generations; the descendants of the displaced may want to pursue claims by any means available to them, potentially laying the foundation for future instability (e.g., Fischbach, 2006; Moyo and Yeros, 2005; Fay, 2009).

Planning and organizing a restitution program usually begins after hostilities are concluded and returnees come to find that their HLP is occupied by others. It becomes part of a new political or ethnic landscape; intergroup relations are further damaged or destroyed when an access to HLP becomes difficult or impossible. The restitution process itself is predicated on a set of transitional justice measures comprised of legal procedures and concepts that should attend to fairness in processing postwar HLP restitution claims from hundreds of thousands and occasionally millions of returnees. The usual approach for operating a restitution program with HLP mass claims is establishing a land commission or other specialized institutions (Holtzmann and Kristjansdottir, 2007; Das and Van Houtte, 2008; Van Houtte and Delmartino, 2008). Given the necessity of legal and administrative expertise, the role of lawyers, judges and associated institutions has been supported and often required as a precondition for assistance subsequent to armed conflict by the international community. A legal basis and its legitimacy as well as institutional rules of operation and decisions have been anchored to both international and domestic laws (Das and Van Houtte, 2008; Holtzmann and Kristjansdottir, 2007; Van Houtte and Delmartino, 2008; McGovern, 1990).

Yet the treatment of evidence in conventional restitution programs constitutes a particular challenge. Claims processed under state laws almost always focus on the adequacy of documentary evidence, and a number of restitution programs likewise embody a 'documents only' operating approach (Das and Van Houtte, 2008). However, in transitional HLP restitution programs, such exclusive reliance on documentary evidence becomes highly problematic and necessitates an expanded approach and process (e.g., Fay and James, 2009; Haersolte, 2006). TJ evidence rules should be tailored to what IDPs and returning refugees do have. Evidence rules need to be relaxed, reversing the burdens of proof to favour the claimants along with the acceptance of al-

ternative forms of evidence. In addition, administering claims should permit the categorization of claim types, corroboration of evidence and rapid legal decisions for whole categories of claims at once—thus speeding up the overall process. The corroboration of evidence permits the use of records and other types of proofs directly tied to land rights, such as registries and lists of electricity, water and other service provision (e.g., McGovern, 1990; Crook, 2006; Das and Van Houtte, 2008; Holtzmann and Kristjansdottir, 2007; van Haersolte, 2006; IBPCA, 2006).

## **Reparations and HLP Restitution in Sri Lanka**

### ***Methods***

Data collection is embedded in a case study approach, involving a fieldwork in Sri Lanka in February of 2018 comprised of individual and group interviews and discussions totaling 145 people. Among these were members of the Sri Lankan military at different levels, the Lands Department, the Sri Lanka Reparations Office, International Institutions working on restitution in Sri Lanka, Sri Lankan NGOs, the Secretariat of the Coordinating Reconciliation Mechanisms for Sri Lanka, the UN Country Team for Sri Lanka, District level government officials, the Office of the UN High Commissioner for Human Rights, the Rehabilitation of Persons, Properties and Industries Authority (REPPA), the National Peace Council of Sri Lanka, World Health Organization-Sri Lanka, and the UN Peace and Security Section-Asia. Also surveyed were international diplomats in the country, international advisors to the government, international experts on reparation policy and practice, Sri Lankan journalists, members of Tamil and Sinhalese civil society, international reparation judges, and experts from other reparations and HLP restitution processes elsewhere in the world, including, Colombia, the Philippines, Guatemala, Peru, Bosnia, Sierra Leone, Canada, Nepal, East Timor, Northern Ireland, and Germany.

In addition, this research has depended on the review of relevant academic, donor, government, NGO and UN literature. This includes the Sri Lankan laws: the National Policy on Durable Solutions for Conflict-Affected Displacement, 2016; the Reparations Bill of, 2018; the Title Registration Act of, 1998, and the UN Resolution for Sri Lanka of, 2015.

### ***Government and international restitution efforts***

From the end of the war in 2009 until 2015, the Sri Lankan government did little to engage in reparations, HLP restitution or reconciliation after having won the war militarily. There was a lack of cooperation with the international community; and displaced populations were not officially recognized (MPRRRHRA, 2016). As a result, IDP and refugee returns and HLP restitution issues became aggravated and took on new forms. A change in a government in 2015 saw a change in willingness to pursue reparations, including HLP restitution and durable solutions to displacement (Yusuf, 2017). In 2016 the government enacted a ‘National Policy on Durable Solutions for Conflict-Affected Displacement’ which articulated a wide-ranging set of principles, rights, durable solutions and monitoring approaches (MPRRRHRA, 2016). In 2017, the government also enacted a ‘National Policy on Reconciliation’ (IOM, 2018a). In addition, the government established a ‘Presidential Taskforce’ to look into reparations, appointed a ‘Lessons Learnt and Reconciliation Commission’; an ‘Office for Reparations’ was established to address the issue of reconciliation (CPA, 2016b). The internationally recognized reparations program only started in February of 2017 and by 2018 was partly underway with a series of activities for the

government and affected communities, whereas other parts of the program were still under development, pending on a parliamentary approval.

A United Nations resolution co-sponsored by the new government was adopted by the 30th Session of the UN Human Rights Council (UNHRC) in October 2015 (GNPSL, 2016). The resolution, 'Promoting Reconciliation, Accountability and Human Rights in Sri Lanka,' has two components that address the restitution of HLP. While praising the government's initial efforts in HLP restitution, the resolution "encourages the Government of Sri Lanka to accelerate the return of land to its rightful civilian owners, and to undertake further efforts to tackle the considerable work that lies ahead in the areas of land use and ownership" (UNHRC, 2015). Because the Government of Sri Lanka is a party to this resolution stipulating restitution of HLP, it is internationally bound to this objective. The government bears a primary responsibility for designing reparations; it should be done in consultation with civil society so as to be as inclusive as possible. The UN High Commissioner for Human Rights (UNHCHR) also reminds Sri Lanka that reparation is not a charity but a right; the process needs to be speeded up. The UNHCHR also notes that the government is a signatory to a number of international agreements on restitution and reparations. As of the time of writing, however, no real timeframe has been provided by the government to reach the goals of the resolution, thus concerning the UN. It has been nine years since the end of the war, but the non-return of remaining IDPs and refugees is an ongoing and worsening problem. Meanwhile the Sinhalese majority continues to oppose certain provisions in the UN resolution that focus on prosecutions (UNHRC, 2017). The UNHRC notes a growing frustration on the part of IDPs and returning refugees who have not been given their land back (UNHRC, 2017).

In an HLP context, there has, in reality, been a very slow progress in finding solutions to HLP restitution in the country. The trust deficit between members of affected communities on one hand and the government and military on the other means that communities can be suspicious of any official plans as another means to dispossess them of lands. In some cases, just deciding which claim is most valid and legitimate has generated a potential for worsening tensions among communities and raising new questions about government intentions (Fonseka and Raheem, 2011). This distrust extends to government actors who have control over zoning (CPA, 2016a). There is also rigidity and a lack of awareness among the legal establishment about how to deal with different types of HLP evidence for a claim other than an optimal document. There is also a lack of a real consultation with IDP groups in ascertaining their priorities and evidence required for HLP restitution. Information campaigns for IDPs are lacking; consequently, they do not know about the relevant laws, policies, rules, options available to pursue a claim. Such a lack of information allows a greater room for manipulating information, the claims process, and HLP generally. As a result, with suspicions increasing, those impatient with a slow progress engage in protests, which are growing. And hardline political slogans from the extremes find fertile ground for agitation. At the same time, local elections in February 2018 did not favour the current government; an electoral success of harder line parties more aligned with the previous government impede the progress of HLP restitution and broader reparations (Economist, 2018).

### *Three HLP restitution efforts*

Current HLP restitution activities in the country can be categorized into three efforts, two that are of primary significance and another that is more minor, but highly instructive. The first comprises the endeavours of the military. Parts of the military appear genuinely frustrated by three elements of the HLP restitution problem. The first is that they indicate that they have already turned

over a great deal of land to the government, but the government does not know how to administratively or legally then allocate the land to beneficiaries. The second is that there is frustration with the ongoing nature of the problem in the areas under military control, in that once a resolution is agreed upon with a group of IDPs, the agreement often does not last, and protests continue. Third, is their frustration at not receiving assistance from government in order to deal with the problem of HLP restitution or other remedies. They believe there is no effective government commission or capable institution they can turn to for assistance. As a result the different military commanders located in different parts of the country each try to deal with the problem on their own, but they indicate that they have no HLP administrative or judicial training or personnel that can engage effectively in mediation efforts.

The second primary HLP restitution effort in the country comprises a loosely organized effort by the current government together with support from the international community. The government pursues two primary legal approaches of varying utility. The first is the drafting of two legal tools, the 'National Policy on Durable Solutions for Conflict-Affected Displacement' noted above, and a recently approved 'Reparations Bill' with a minor HLP restitution component, passed by parliament in June 2018 (GoSL, 2018). The second legal approach is a measure (with some history) to issue 'permits' to occupy land. A significant number of IDPs have such permits which can be renewed every two years. There is some indication that in certain circumstances these can be turned into title deeds but this is apparently quite difficult and rare. More often is the attempt at renewal, however loss of permits is also common, as is their use in convoluted and confusing housing and loan schemes (LACSL, 2015). While a permit does allow access to lands, they are not available to everyone, are tenure insecure and are not restitution of lands. The permit holder is not able to transfer the land and only has limited rights, and the government is unwilling to convert permits to deeds due to the lack of a previous deed number to work from. As a result those with such permits remain in a state of tenure insecurity with rights of limited utility (Fonseka and Raheem, 2010). With regard to land disputes, at the time of writing there was no cohesive, effective, statutory approach for resolving disputes over land. Instead there are a variety of mediation, conciliation and local advocacy and discussions efforts by a variety of NGO actors (Selvakkumaran, 2017).

The more minor HLP restitution effort is informal (or semi-formal) and is applied in an irregular, patchwork way in some locations but not others, and is not officially recognized. However it does suggest considerable potential in terms of what works. This effort involves the occasional local level government official working on their own, without support of or liaison with provincial or national institutions, but who seek to move forward with returning lands as best they can through criteria that function locally. This more informal approach proceeds differently in different locations. One local official describes his approach in the following manner. When returning IDPs have deeds, other HLP documents, or when there is no counter claim or dispute (even if documents are lacking) he facilitates the direct return of their HLP. If documentation has been lost, and there is a counter claim or other type of dispute, the official tries to ascertain if the government has a copy of the relevant documents, and if so an effort is made to locate it and make a duplicate to provide it to the claimant. As well if a claimant does not have a document, but a neighbour does, then that neighbour may have the claimant's name on their document as sharing a border. In this case the evidence is enough for the claimant to return to their HLP. If a claimant or neighbour has no HLP documents at all the official then will focus more on mediation of any disputes or counter claims, and less on the application of actual law. In this regard he is less concerned with deeds, deed numbers and the need to build a historical chain of transfer on

deed numbers, than with resolving disputes and trying to determine who should go where in the near-term. A related approach for such a dispute is for the local official to work with the village leadership who knows where everyone used to live and farm and so can assist with a decision. In this case a village agreement is the operating foundation for a claim. An additional approach used in the absence of HLP documentation is to ask the claimants a series of questions relevant to the specific HLP. Depending on their answers (i.e., how well they know the details of the HLP and its history—intimate knowledge) he allows them to return to their lands or not. However it should be noted that arrangements that do not involve a deed number are not officially legal restitution and operate with an unclear form of tenure from the perspective of the state—is it ownership, permission to occupy, a permit, customary tenure, none of these? This localized approach reflects both neglect on the part of the state and the law, but also innovation coupled with a more localized priority to resolve HLP issues and pursue what works. For such local officials the process of re-attaching people to HLP is very localized, hands on, village by village, claim by claim and dispute by dispute.

### The Evidentiary Bind

#### Conceptual Framework

Figure 1 below presents a conceptual framework for the evidentiary bind. On the left side of the

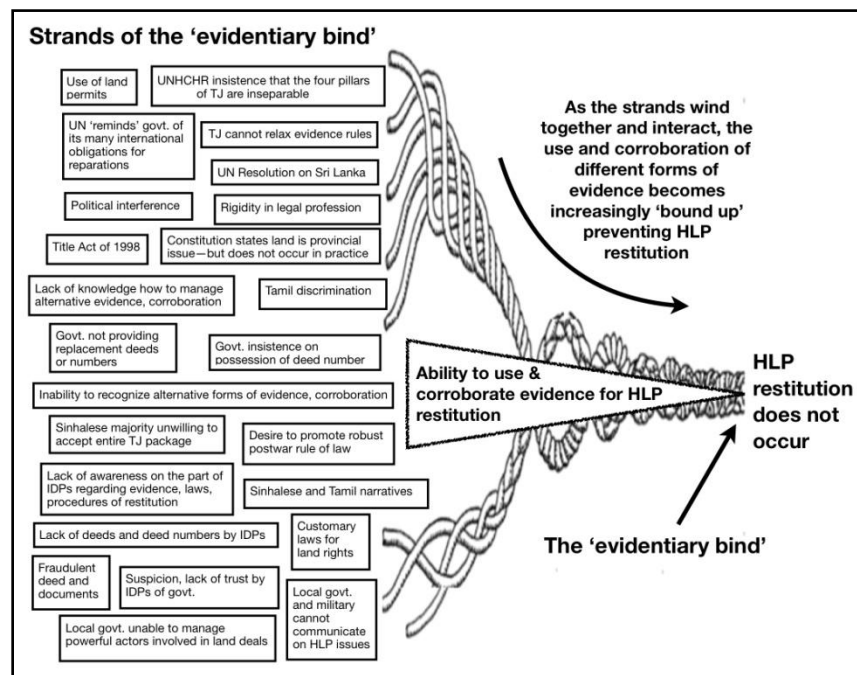


Figure 1: Conceptual framework for the social, legal, technical, institutional and political strands of the 'evidentiary bind'. Graphic adapted from Scarborough (2018).

figure are the 'strands' of the HLP situation in Sri Lanka that become entwined to comprise a binding effect on the use of different forms of evidence for resolving HLP claims and moving forward with effective, large-scale restitution. The strands, combined together, comprise a tightly bound rope that provides an effective analogue for how the evidentiary bind works. Moving toward the right of the figure, as the different strands act together, becoming wound up in each

other, they ultimately constrict the use and corroboration of evidence, effectively prohibiting effective restitution of HLP. The section below describes how the different strands of the HLP scenario in Sri Lanka operate to create the ‘evidentiary bind’.

### *The functioning of the ‘evidentiary bind’*

The evidentiary bind for postwar HLP restitution begins in Sri Lanka as it does in other war-affected scenarios—with an over-focus on the possession of valid HLP documentation in order to participate in the restitution process, but for a population that is least likely to have such documentation. The Sri Lankan government and the legal establishment are particularly preoccupied with the correct HLP documentation being in the possession of returning IDPs and refugees. The process relies in-part on the Registration of Title Act of 1998 which contains a large number of very precise stipulations involved in registration of land in order to obtain title (PDSRSL, 1998). The Act is quite bureaucratic involving numerous personnel and institutional steps that are easily and severely disrupted by armed conflict, particularly a long lasting one. This is problematic given that the law states that no claim to land that was once registered under provisions of the Act is valid unless any transfer has also been registered. The Act further states that entries in the title register are the “conclusive evidence” of ownership (PDSRSL, 1998). However during the war many of the forcibly displaced did not have time to collect their documents before fleeing and others experienced loss or destruction of their documents over the course of the 30 year war. Still others have documents but they are incomplete or they are supporting documents to a deed but out of date due to the war and so are not considered valid. As well access to registry offices was disrupted in some areas during the war, or not trusted by those sympathetic to the Tamil cause or otherwise distrustful of government. Others never had documents in the first place because they engaged in land tenure under informal village conventions, or inherited land while dislocated (LACSL, 2015). At the same time fraudulent HLP documents were created during the war, and are still created, as some individuals have access to those who can produce deed numbers. And in some areas of the country the government is not providing replacement deeds to those who lost them, even though it is in possession of the records. Such deed numbers are *the* key ingredient to a Sri Lankan HLP deed, and they are used to track the legal transactions of specific HLP over time.

The lack of deeds and deed numbers on the part of IDPs and returning refugees in order to follow the sequence of ownership and transfer over time is what confounds government efforts at legally re-attaching people to their HLP, including HLP turned over to government by the military. And yet the government restitution process is unable to legally or technically recognize other forms of evidence and techniques of corroboration as valid in order to issue new deed numbers even though most IDPs and returning refugees are in possession of or can obtain such alternative evidence. This is the evidentiary bind Sri Lanka faces. In this regard the government appears to truly be in a quandary regarding what to do about the absence of deeds, numbers and other HLP documents for returns, with no real plan for going forward. Alternative evidence that IDPs/refugees have or could obtain include: ancillary documentation (including detailed hand-drawn maps reflecting intimate knowledge of relevant lands and landscapes); detailed histories of specific lands; knowledge of the location of buried features (refuse, tanks, building foundations, wires, pipes, cables, etc.); photos of themselves or family members at the properties and areas lived in; attestations by village and civil society leaders, relatives and friends regarding HLP boundaries and history of occupation and ownership; non-party evidence (evidence held by

parties other than the claimant, such as lists or databases for electricity, water, banking and school services that include location information); and historical lineage occupations of lands that have been recorded or are widely acknowledged. In addition evidence patterns can be created whereby HLP abandoned, confiscated, destroyed or damaged at specific points in time for specific areas, in aggregate create patterns of similar evidence, with the pattern itself then becoming valuable evidence. While such forms of evidence individually are not as powerful as a deed, they do have corroborative power among themselves, and have been used in a variety of other HLP restitution scenarios in TJ settings (Das and van Houtte, 2008; Holtzmann and Kristjansdottir, 2007; van Houtte and Delmartino, 2008). Some countries dealing with HLP restitution have found customary laws regarding land to be useful (Roodt, 2003; IBPCA, 2006; Bailliet, 2003; du Plessis, 2003). And while forms of customary law are thought by some in Sri Lanka to be not relevant or not exist, and in any case are not recognized by statutory law, customary law in the north does have a specific history relating to land (Island, 2009; Bandara, 2010). And Dharmasiri (2017) and Senaratne (2015) consider customary law in Sri Lanka to be quite useful. Meanwhile Islamic law is only officially recognized for Muslims in areas of domestic issues—although this does include inheritance.

In Sri Lanka the evidentiary bind is also embedded in other legal and institutional constructs that work against recognition of non-deed evidence. There is a great deal of legal rigidity regarding even the prospect of temporarily changing the evidence rules for IDPs and refugees in order to facilitate restitution and other remedies. The culture of the legal profession, particularly within government is certainly a factor, made more difficult by a postwar desire to re-assert a robust form of rule of law so as to bring greater order to a chaotic postwar socio-legal environment, combined with a relatively low legal innovation capacity. Thus relaxing evidence rules and allowing for less than optimal HLP evidence in a TJ context can be seen as allowing greater legal fluidity to flourish when stricter adherence to the rule of law is held as a priority important to recovery. In this context the focus of the legal establishment is more on attending to the integrity of the law, as opposed to addressing socio-political concerns. But there are also other reasons for focusing exclusively on the deed. There can be a desire to reduce the volume of claims ostensibly so as to reduce the size of the restitution problem. And allowing alternative evidence into the restitution program would likely expand the inclusiveness of the claims process, and would be resisted by those who stand to gain from a narrow definition of HLP evidence. But at the same time there is also a lack of understanding and interest on the part of the legal establishment about how to technically structure the inclusion and treatment of alternative evidence into a restitution process.

Additional factors contribute to the bind. Even though land issues are legally a local government issue, local officials note that there is not enough actual devolution of power for them to really decide land issues, and actually reattach people to lands. Thus while the 13th Amendment to the Constitution states that land rights explicitly reside within the jurisdiction of the Provincial Councils (CPA, 2016a), the central government in fact controls land issues in the country, effectively precluding widespread use of local initiatives and innovations regarding use of alternative evidence. One provincial official noted that while the military has control over a good deal of land, he cannot talk to them, because he is a provincial level official and the military is unwilling to work with provincial officials on the issue. In addition, a variety of powerful actors have become more involved in land issues, making it quite difficult for the de-centralized parts of government to function without involving higher-level people (Fonseka and Raheem, 2011).

More broadly, the evidentiary bind is connected to land issues as a root cause of the war. While the war has been cast as an ethnic conflict pitting the Sinhalese majority against the Tamil minority, another analysis posits that the conflict was more about the Tamil campaign against what were viewed as discriminatory state structures and policies, including those regarding HLP, instead of against the Sinhalese community itself (Yusuf, 2017). Discrimination in HLP rights has as its basis the non-recognition of claims and evidence for claims. Thus state institutions and policies upon which non-recognition were based, created a situation similar to the current evidentiary bind prior to the war.

What contributes to the evidentiary bind in Sri Lanka still further, is that it connects to the roles and activities of certain international processes and organizations. At the center of this connection is the important element of TJ regarding the use of alternative evidence for HLP restitution noted earlier—the relaxing of evidence rules to allow for alternative forms of evidence and treatment of evidence to be used. While as a technical endeavor on its own this could be possible in Sri Lanka, this aspect of TJ is bound together with other components of TJ as promoted by the UNHCHR, such that four ‘pillars’ of TJ exist as one package with the insistence that they cannot be separated (also CPA, 2016b). One of these pillars is significantly problematic for the Sinhalese majority. The four pillars include: 1) the ‘right to know’ the truth regarding missing persons, results of commissions of inquiry and human rights violations; 2) the ‘right to justice’ involving victims and a fair remedy, and involving the duty of the state to investigate and prosecute perpetrators of human rights violations, 3) the ‘right to reparations’ which includes the return of HLP to civilians, and 4) the ‘guarantees of non recurrence’ involving domestic law, security sector reforms, and attention to international law (TCA, 2016; GNSG, 2010). It is the second pillar which is the primary obstacle to acceptance of the overall TJ approach as promoted by the UNHCHR. According to a number of those spoken to during the fieldwork, a good portion of the Sinhalese population do not have much of a problem with returning lands, or compensation. They do however have a problem with the accountability and punishment components of the TJ package. The prospect of prosecuting those in the military who are seen as responsible for winning the war is difficult to accept from the Sinhalese perspective. And while the Sinhalese population understands that reparations are about accountability for perpetrators on both sides of the war, they believe it unlikely that Tamil war crimes perpetrators will be brought to court, because they essentially cannot be found. They are either dead in battle, outside the country, or rehabilitated and released back into society; so that there are in reality only five or six individuals that could realistically be brought to court. Whereas on the side of the military, the numbers of individuals is potentially large. Thus there is considerable difficulty for a significant segment of the Sinhalese population in supporting the entire TJ package. And because the Sinhalese are in the majority, democratic forces are expected to facilitate their priorities. As a result the acceptance and implementation of the TJ package has proven difficult and has become political, with different politicians promising different things with regard to these TJ processes—implement them, stop them, disengage from the international community, etc. For the Sinhalese there is a good deal of reluctance to engage the international community on issues of accountability and prosecution for alleged war crimes committed during the war, and a strong reluctance to accept TJ pillar number two—with significant repercussions for effective HLP restitution.

Some of the various political arguments regarding acceptance (or not) of the TJ package resonate strongly among certain segments of the population. For some, the military is seen as deserving what they have obtained in the war—land, properties, investments, businesses, etc—and to now return these to those that supported the opposition is seen as objectionable. This nar-

rative has a good deal of history connected to it, and lumps Tamil civilians who lost land together with Tamil combatants who fought in the war. As well there is reportedly misinformation coming from certain politicians regarding giving HLP back to the dispossessed. One such perspective promotes the notion that the current government is selling out the country to the international organizations and the Tamils, both of whom want accountability for war crimes.

The broader narratives of the Tamils and Sinhalese population with regard to the war, reparations and restitution also feed into the bind. On the part of the Sinhalese, they believe they have given a great deal to the Tamil population in terms of recovery assistance. And that the reparations process is moving too fast, is too much in control of the international community and is detrimental to the country. The narrative on the part of the Tamils on the other hand, holds that the current government works against them. Their view is that TJ is moving too slow. The lack of progress in HLP restitution then feeds the narrative of suspicion on the part of the Tamil population. At the same time it has been nine years since the end of the war, and HLP restitution and returns have stagnated and pressure from Tamil civil society and the international community is mounting.

### **Loosening the Bind**

Given the multi-faceted and multi-scalar nature of ‘the bind’ what might be potential ways forward? This section explores some of the suggestions provided by a variety of knowledgeable Sri Lankans and representatives of international organizations working in Sri Lanka, as well as the author. One of the more prominent suggestions is that there is a need to deal with the domain where TJ and narratives intersect. There is a poor understanding of the details, nuances and variations of TJ within the Sinhalese and Tamil narratives (also IOM, 2018b), but also arguably by the UNHCHR. Sri Lankans observe that both the government and the international community need to better engage the population in outreach, awareness raising and communication regarding how TJ proceeds, the options available and what it can entail, including the prospect of amnesty for Sinhalese war heroes; and that this engagement should be ongoing and not a one-time consultation. In reality there are multiple options regarding TJ and how it can proceed (GNSG, 2010) and how it could be tailored to Sri Lanka (Samararatne, 2017). The problem is that in the absence of a well articulated public awareness campaign, rumour, fear, and speculation (encouraged by some politicians) fill the void, causing considerable problems. At present the two sides are polarized in their narratives with regard to TJ and the Sri Lankans spoken to indicate that a priority should be for these narratives to move toward each other. One problem in this regard is that the media views reparations as involving communities (Sinhalese, Tamil) and not individuals. However the government and the international community view reparations as being about individuals, which is relevant to HLP restitution.

The Sri Lankans spoken to in the research note that the media, NGOs and community organizations should play a larger role to inform people about TJ and how it works. And that this role should become part of the overall reparations process while being independent from government. Sri Lankans point out that at present the efforts and activities of the government are not known by the public. And that the government needs to take greater control of the overall narrative in order to mitigate the negative aspects of the current narratives of the Sinhalese and Tamil communities. In this regard some international officials highlight that the fear of the Sinhalese population—that accountability in a TJ context will necessarily involve prosecution and prison terms for military personnel—could be mitigated by articulating that accountability in TJ does

not always mean such punishment. In many cases reparations are more about recognition of rights violated. But this is not widely understood among the population, or government. A number of countries have dealt with accountability by recognitions of wrongs done, followed by acknowledgement of accountability with forms of amnesties, apologies, etc. This can be particularly useful if the state does the apologizing and not the military or individuals (IOM, 2018a). The point of working with narratives in the HLP evidentiary context is to open up possibilities of moving forward with the broader TJ package, including the transitional acceptance of alternative evidence in the issuing of new deed numbers.

Sri Lankans also noted that the international community and especially the UNHCHR needs to be much more careful and more aware of the Sinhalese and Tamil narratives, and derive ways to engage these in a more nuanced way, as opposed to pressuring the government and reminding it of its international commitments and at what point the UNHCHR will “be satisfied” with Sri Lanka. This is important to how the UN and the international community is perceived in the country and therefore cooperated with or not in acceptance of TJ. Sri Lankans included in the research indicate that at this point the UNHCHR is making the situation unnecessarily risky. They suggest that the ‘four pillars’ of TJ that the UNHCHR is insisting on in Sri Lanka come across as clumsy, poorly thought through, unwieldy and blind to important national level specifics that can delay and potentially derail the process with this insistence. Instead, they argue that the TJ process needs a more tailored approach to the Sri Lankan case, needs to be more nuanced, sequenced, less one size fits all and more aware of what country level roadblocks exist, and derive ways to deal with them. And in fact the UN Guidance Note of the Secretary General describing the UN approach to transitional justice (GNSG, 2010) highlights the importance of taking into account political and country context and coordination with in-country rule of law efforts. More broadly there is currently an expansion within the field of TJ to include more than the preconceptions inherent in the four pillars (accountability, truth, reconciliation, and non-recurrence) toward more of a focus on correcting structural violence and inequality in matters of basic human needs (McAuliffe, 2017). This comes with the understanding that an over focus on atrocities and other crimes against humanity have rendered less visible the inequities that are often root causes of conflict—land rights problems, poverty, unemployment, and political discrimination—and that peace can only reasonably be attained by attending to such root causes (McAuliffe, 2017). Research among postwar populations indicate that such socio-cultural preoccupations are often more important than desires for criminal justice (Miller, 2013). Even the former UN High Commissioner for Human Rights, Louise Arbour called for a re-orientation of TJ towards attending to forms of discrimination and problems of economic and social rights during and after wars (Mani, 2002).

In a strictly HLP restitution context, the author suggests that alternatives to the over reliance on the deed number are needed in order to move forward with issuing new deeds and other HLP documentation. A better understanding by the legal establishment, particularly within government, of the HLP evidentiary aspects of TJ would be a valuable starting point. Important here would be the temporary nature of TJ evidence rules regarding use of alternative evidence for restitution purposes; the importance of attending to socio-political grievances over integrity of the law for its own sake; and the great deal of experience other countries have had in dealing with the same HLP restitution problem as Sri Lanka is experiencing. At the same time attending to Sri Lankan law that stipulates land issues are a provincial concern and not necessarily a federal issue, would allow for more locally tailored approaches to HLP restitution such as that described

earlier; and encourage military commanders and others to deal directly with local officials on restitution issues.

Examples from elsewhere illustrate the prospect of using alternative, non-documentary evidence in restitution processes. In Yemen, prior to the Houthi incursion in the south, the Southern Yemen Land Commission was in the process of engaging in large-scale land restitution and allowed a wide variety of historical, testimonial, informal drawings, and assertions into the claims process (Unruh, 2016). After Mozambique's long war ended in the late, 1990s, the land return process made legally equal the possession of title and informal evidence attesting to 'occupation' (Unruh, 2005). In postwar East Timor the Land and Property Unit allowed for the recognition of pre-Indonesian occupation rights along with customary evidence (du Plessis, 2003). And in Guatemala alternative forms of evidence, such as oral testimony were important to the re-establishment of customary land rights (Bailliet, 2003). What Sri Lanka can learn from these examples and others, is that there are effective ways to structure alternative evidence into the technical processing of restitution claims. And that the contributions to reconciliation and reparations that HLP restitution make, often need to take precedence over the integrity of the law.

### Conclusions

The HLP restitution effort in Sri Lanka is an ongoing process, as is the broader reparations effort of which it is a part. While the evidentiary bind in postwar HLP restitution is not particular to Sri Lanka, it is unusually acute and multi-faceted in the country, extending well beyond the need to broaden evidence rules for restitution in a TJ context. Large-scale HLP restitution programs operate at the federal level with international support and a heavy reliance on laws, policies and procedures that attend to international standards. Even though these have their merits, important lessons can be learned from local approaches. The activities of some local officials acting on their own in certain parts of the country to re-attach people to their HLP deserve a serious attention. It may not be suitable to all types of restitution problems, but it helps get around the evidentiary bind for certain categories of restitution.

As HLP restitution continues to grow in importance as a critical component of postwar recovery, reconstruction, reconciliation and reparations, its complexity becomes apparent and important obstacles require examination. Most importantly, this article has shown that the 'evidentiary bind' is one such obstacle that needs significant attention by illustrating how it functions.

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