

The transnationalization of truth: A meditation on Sri Lanka and Honduras

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Abstract: The present article is an elaboration of the text prepared for a lecture, delivered in London, England, on Tuesday, October 19, 2010, as part of the Centre for Transnational Legal Studies' annual Transnational Justice Lecture series. The paper begins, in Section II, with general comments on a notion of "interactive diversity of knowledge" and how that connects up to a view about the nature of truth. Sections III and IV then present salient aspects of events in both Honduras and Sri Lanka over the last two years, with the coup d' état of 28 June 2009, in Honduras and the bloody end to the civil war in Sri Lanka in spring 2009 as fulcrums of the narrative. In each case, emphasis is also placed on the establishment of truth-related commissions or panels in relation to each country. The paper ends with a discussion of three interconnected quandaries—the inside/outside quandary; the consistency and fairness quandary; and the timing quandary. The timing (or staging) quandary offers some provisional thinking on the sequencing of processes related to truth, justice and reconciliation, offering some reasons not to fuse truth-seeking processes with either criminal justice or reconciliation processes -- with special reference to the Sri Lanka context.

The present paper consists of an elaboration of the text prepared for the first lecture of the 2010-2011 year in the CTLS / Centre for Transnational Legal Studies' annual Transnational Justice Lecture series. It was delivered in London, England, on Tuesday, October 19, 2010. The lecture itself consisted mostly of the first four sections of this text, with the discussion session addressing some aspects of the quandaries that make up the fifth section. A prior version appeared as Craig Scott, "The Transnationalization of Truth: A Meditation on Sri Lanka and Honduras (A Transnational Justice Lecture)", Osgoode CLPE Research Paper 07/2011 Vol. 07 No. 03 (2011), available for download <http://ssrn.com/abstract=1759072>. The present Ethics in Action version contains both a number of important copy-edits and several substantive additions (to section III on Honduras) subsequent to the Osgoode CLPE Research Paper. As with the previous version, the present version retains its dual format as both a lecture (with certain elements related to oral delivery) and a written article.

I. INTRODUCTION

I have a single, somewhat long, paper in hand, from which I am choosing elements for this lecture according to my understanding of the nature of the audience and also the needs of the moment. What do I mean by this enigmatic "needs of the moment"? Basically, I am thinking of the need for more people—ideally, more thoughtful people—to know about what I believe to be important (indeed, says the closet Hegelian in me, world-historical) events and processes that have occurred since early 2009 in two country contexts of which I have a special--not to say a full--knowledge. Those countries are Sri Lanka and Honduras. In this lecture, I seek to narrate developments in Sri Lanka and Honduras in a way that I hope keeps your attention and provokes you to sub-consciously muse about what "transnationalization of truth" dimensions seem to be raised by these events and processes.

I will proceed as follows. First, in Section II, I make some very general comments on a notion of "interactive diversity of knowledge" and how that connects up to a view about the nature of truth. Second, in Sections III and IV, I describe salient--while still selective--aspects of events in both Honduras and Sri Lanka, starting with the former. Third, I finally proceed in Section V to a condensed discussion of three interconnected quandaries; in future work I will hopefully use this paper as a springboard in order to knit together these quandaries more tightly and within a more unified flow of argument than will be possible here in this lecture. At present, I have opted to jump from hilltop to hilltop, largely ignoring the connecting valleys in between.

In order to provide you with some orientation for thinking about the implication of the upcoming narratives of developments in Honduras and Sri Lanka, I set out here the three quandaries that will be treated in some detail in Section V:

- In establishing truth in a national context, what account must be taken of internal/external dynamics related to both facts and perceptions concerning outside involvement, including facts and perceptions associated with state-sovereigntist beliefs? Let us call this the inside/outside quandary.
- Is the transnationalization of truth-seeking and truth-articulation in any way disabled by systemic problems (or assertions of systemic problems) of double standards, selectivity of attention, or even hypocrisy? Let us call this the consistency and fairness quandary.
- Partly in light of the inside/outside quandary and the fairness quandary, how should processes related to truth be timed or staged in relation to processes related to justice and reconciliation? Let us call this the timing quandary.

I am about to turn to the two contexts, starting with Honduras. But let me add a major caveat, lest you are expecting a rigorous comparative analysis. Such is not my purpose, at least not here, now. The Sri Lanka and Honduras reference points for this lecture owe much to serendipity, so please do not assume that my decision to treat both contexts in this lecture has been selected through a process of pure scholarly detachment. Rather, my interest in and knowledge of both contexts has been highly path dependent, in both cases resulting from being asked to serve either on a body (the civil-society Comisión de Verdad in Honduras) or within an organization (the Sri Lanka Campaign for Peace and Justice) that is each very transnational in nature and that each have the establishment of truth and the related objectives of justice and societal peace as their *raison d'être*. That said, the choice to follow serendipity's path is not purely arbitrary. Just as one of the most discovery-generating forms of basic research is--or, before our digitized age, used to be--browsing a library's stacks and spying titles by chance, I have discovered by chance that these two contexts can be reflected upon in tandem in a way that will turn out to be fruitful. Even so—and here I return to my caveat—it remains the case that the approach taken is more one of juxtaposed examples than one of integrated comparison.²

II. TRUTH AND INTERACTIVE DIVERSITY OF KNOWLEDGE

My main purpose in this brief section is to explain, very summarily, what I mean by seeking to achieve "interactive diversity of knowledge" in any process in which 'the truth of the matter' is being sought--whether the correct interpretation of a treaty provision, or whether something took place as alleged, or whether what took place constitutes a crime, and so on. This notion was initially presented in a work

called "Bodies of Knowledge", then in a piece called "Towards the Institutional Integration of the Core Human Rights Treaty Bodies", and is also discussed in a working paper called "Diverse Persuasion(s)."3

In the first two instances, the context was UN-level discussion about whether to consolidate the core UN human rights treaty bodies into one or two bodies, while the third piece looks more abstractly at the practice of treaty interpretation as it relates to whether there should be some form of international human rights court.

My argument has been that harnessing diversity of at least three forms of knowledge (expertise, experience, and intellectual or disciplinary perspective) must be central to any consolidation reforms let alone the creation of a new court. I have been advocating the position that a variety of diversity-enhancing initiatives must be undertaken immediately with respect to the current UN human rights treaty body order, in part because practical experimentation with the promotion of not simply diversity of knowledge, but interactive diversity of knowledge, should provide valuable lessons at the institutional design stages of any eventual consolidation project.

But the central thrust of the argument was--and is here--that such an approach is independently desirable quite apart from whether treaty-body consolidation is in the cards or indeed quite apart from the treaty-body context at all. Let me say something briefly about two of the central premises bearing on this desirability. The first is that superior collective judgment is exercised when multiple perspectives are encouraged to interact with each other in coming to grips with any given normative issue or decision. The second premise is that, in order for diverse perspectives and actors to interact, there must first be a commitment to ensuring diversity of knowledge within the composition of the membership of collective decision-making bodies. More generally, as an outgrowth of these two premises, diversity multiplies perspectives, while the need for decision-making necessitates that these perspectives engage each other. Diversity helps oust monological reasoning in favour of dialogical reasoning, making it less likely that reasoning will take place within the four corners of a single person's limited knowledge and more likely that it will take place in the context of the requirement to test one's intuitions, assumptions, and provisional conclusions against those of others.

I turn now to a few comments on the small matter of truth. Part of the rationale for any institutional strategy of opening up normative vistas by embracing an interactive diversity of knowledge lies in self-conscious awareness of our (we humans') tendency to link 'truth' and 'self-evidence' in untenable ways. All the same, even as we may be aware of this tendency, it is probably safe to say that most of us who actively take part in international or transnational human rights discourse are nevertheless striving to articulate something morally fundamental or essential in the course of our involvement. Indeed, many of us including myself would feel lost without such an orientation to the enterprise in which we are engaged.

However--and here I warn you that I am entering the rocky terrain of irony that I have been stumbling around in for a good couple decades now--that does not mean that we must necessarily believe that concepts in texts like "freedom of expression" or even "torture" correspond to some 'objective' reality waiting to be revealed as part of, or discovered in, the moral firmament. Even if some--or indeed many--of us do firmly believe that some correspondence (or, perhaps more subtly, idea of correspondence) between language and the revelation of something called moral reality is a defensible or even necessary way of thinking, such belief is still compatible with an awareness that what we may speak of in terms of objectivity or universal validity or truth is never knowable other than in terms of what we (whoever 'we'

are) understand to be objective or universally valid or true at a given point in time. By the reference to 'we' and not 'I', I wish to emphasize that access to truth is mediated by language, and language is a phenomenon constructed on the shifting ground of inter-subjective understanding. But--and here enters some element of existential worry with which, I believe, we must live⁴--we can never 'know' in any final way whether an understanding we have reached inter-subjectively is anything more than provisional, or valid in any sense beyond the inter-subjective. In this respect, whatever quest(s) for truth may be implicit (or indeed, perhaps necessarily implicit) in our various involvements in 'the' human rights project, meaning remains quintessentially human--both socially constructed and fallible in its relationship to that (ultimate) truth we (perhaps ironically) seek.

One obvious implication of all this is that each of us has good reason to be humble about our knowledge. Indeed, we have good reason to be positively suspicious of our own understandings to the extent that they have been produced unreflectively or outside conditions of dialogical diversity. Thus, ideas such as "epistemological humility" and "hermeneutics of suspicion" have had considerable currency in writing on interpretation for some decades. These ideas express the warning that we must be on our guard against the effects our specific location might have on our powers of criticism and judgment and on the reception we give to the arguments of others--especially when our specific location is, we understand, a privileged location on one or more relevant dimensions.

I know these will have been both quite abstract and somewhat Escheresque claims, while at the same time I hope that some of the points will have made sense on their own--that is, without a context to which to relate them. But first and foremost, I have taken the time--and indeed the liberty--to make these preliminary theoretical points so that you might have a better sense of where I am coming from when I discuss the two contexts--Honduras and Sri Lanka--in which I am playing some truth-seeking role. As well, I hope the relevance of some of the notions will become even clearer when I go on to discuss the three quandaries.

III. HONDURAS

A. EVENTS IN HONDURAS FROM 2005 TO 28 JUNE 2009 5

Honduras is a country of approximately eight million in the middle of the isthmus of Central America. Within the Americas (there are 33 states in the OAS), Honduras is in the bottom fifth or sixth on most human development indicators. On the UNDP's 2009 Human Poverty Index, Honduras does better than only four other countries in Latin America and the Caribbean (El Salvador, Belize, Guatemala, and Haiti). It has had a long history of military coups and lengthy dictatorships, but, since 1981, had an uninterrupted run of elected governments until 2009. It is generally recognized that much of the 1970s and, notwithstanding an elected government starting in 1981, most of the 1980s were periods of significant human rights peril from both state security forces and shadowy, state-connected paramilitaries. Honduras was a frontline state in the US proxy war that sought to overthrow the post-Revolutionary Sandinista government in Nicaragua in which the US used both the rebels known as the Contras and direct CIA covert action. This, most experts agree, exacerbated the militarization of Honduran society.

Honduras' current constitution was created afresh by a constituent assembly in 1981. In terms of how the democracy actually functions, essentially two parties--the Liberal Party and the National Party--vie for the Presidency and for control of Congress. In November 2005 (taking office in January 2006), the

Liberal Party candidate, Manuel Zelaya, was elected President. The Constitution prohibits a President from serving for consecutive terms, so his successor was scheduled to be elected in November 2009, only four months after the 28 June 2009 coup d' état that forced Zelaya from office early. The presidential candidates for his own Liberal Party and for the National Party had already been chosen well before the coup.

To the extent it is accurate to say that the Liberal-National contestation for political power has been very much an elite affair, Zelaya very much fit the norm as he came from a wealthy family. Unexpectedly—including for his own Liberal Party—he began to adopt policies that saw him increasingly characterized as both a populist and a leftist (which, in Honduras' very conservative elite political culture does leave a rather wide spectrum). Key examples were pushing through a 60 percent minimum wage hike and joining the Venezuela-led interstate agreement known as PetroCaribe that allowed Caribbean Basin countries access to oil at market prices on cost-saving preferential terms on condition that a state-owned company did the importing of the oil and no private companies act as intermediaries.

Attracting the most attention in the final period of Zelaya's Presidency was his effort to hold a national poll on 28 June 2009. That poll was to ask the people whether they would like to see an extra ballot added during the next set of Presidential (and other) elections -- i.e. those to be held in November 2009. On this added ballot would appear a question asking voters whether they wish to see convened a constituent assembly for purposes of replacing or revising the existing constitution. (Recall that there was a constituent assembly that led to the 1982 Constitution, such that any process that did lead to a constituent assembly following the November 2009 elections would take place almost 30 years after the last assembly.) To repeat for clarity's sake, if the planned June 28 poll were to produce a majority opinion in favour of including a ballot question about a constituent assembly during the November 2009 elections and if Zelaya then used that result as a basis for actually adding a ballot to the November 2009 elections voting form, it would be that latter ballot that would ask some sort of question as to whether people (or, put differently, 'the people') wanted to have a new constituent assembly. The merged question of a June 28 vote about whether to have another November vote became known as the "fourth ballot" (cuarta urna) issue, there being three ballots (including the election of the President and members of Congress) already part of the November 2009 vote.

The controversy around the fourth-ballot issue revolved around two overlapping issues—one being the substantive merits of having such a ballot in November from the perspective of (in)adequacy of the existing constitution, and the other being whether it was lawful for Zelaya to pursue a constituent assembly in the manner in which he was proceeding. This latter issue had a sub-issue of whether it was lawful to even seek out the opinion of the people (in June) about having such a fourth ballot (in November). At a certain point, it appears that a large majority of members of Congress—including many, possibly most, within Zelaya's own party--were against it. Some arguments centered on an alleged intention of Zelaya to use a constituent assembly as a means to change the constitution in order to permit him to run for a second term--which it not only prohibited in the current 1982 Constitution but is also designated by the Constitution as one of the unamendable (and thus perpetual) articles in the Constitution--and/or the fact that any constituent assembly could end up wanting to totally replace the whole constitution including any or all of the other unamendable provisions. Other arguments were about concern as to whether Zelaya would adhere to the current constitutional provisions on constitutional amendment (which centre on Congress) as the vehicle for convening a constituent assembly and as limits on what that constituent assembly could decide on its own (without being

confirmed by Congress in accordance with the existing constitutional amendment provisions). Further from the surface, but perhaps most significant, were almost certainly widespread fears about what principles Zelaya might try to use as the basis for the composition of a constituent assembly; such fears overlap with the question of the role of Congress which in turn overlaps with the desire of current political elites for political parties to be the basis on which representatives for a constituent assembly would be selected—and in turn these concerns overlap with rejection of other bases for the membership of a constituent assembly, such as principles related to social-sector representation (campesinos, worker representatives, indigenous communities, and so on) or demographic representativity (e.g. in relation to women).

Note as well that the accusation that Zelaya was being accused by some of wanting a constituent assembly so that he personally could run for a second consecutive term seemed to dovetail with a fierce reaction from some quarters to the perception that Zelaya had gotten too close to Venezuela's President Hugo Chavez (who had himself managed to amend the Venezuelan constitution so as to allow himself to run again for President). Note that the relationship with Venezuela, and thus Chavez, was not simply through PetroCaribe but also through Zelaya leading Honduras into a regional association originally formed by Venezuela and Cuba, an organization known as ALBA or the Bolivarian Alliance for the Peoples of Our America. Statements made by Chavez while in Honduras, which were highly dismissive of any opposition to ALBA, may have been the straw that broke the camel's back for some critics of Zelaya. (Finally, note that the argument Zelaya was somehow seeking to extend his presidency seemed to take on a dimension of hyperventilation after the June 28 coup when some asserted that Zelaya planned--somehow--to dissolve Congress the day after the June 28 opinion poll and--again, somehow--immediately convene a constituent assembly without conducting an actual ballot (i.e. the 'fourth ballot') on whether to have a constituent assembly let alone wait until November to do so.)

To better understand the issues at stake and the nature of what then transpired with the coup on the same day as the intended poll, it is important to distinguish between two stages of Zelaya's efforts to set the stage for a possible constituent assembly. Initially, Zelaya sought to hold a consultation (*consulta popular*) for June 28, which notion is recognized in the form of either a referendum or a plebiscite in the Constitution and circumscribed in terms of process and mechanisms by both the Constitution and laws enacted pursuant to the provision on the *consulta popular* (article 5 of the Constitution). Zelaya's government started the ball rolling on 23 March 2009, with Executive Decree PCM-05-2009, stating the plan to hold a *consulta popular*. But then, on May 8, a constitutional official known as the Ministerio Público (whose functions include defence of the constitutional order), applied to a judge (within the jurisdiction known as the Juzgado de Letras de la Jurisdiccion de lo Contencioso Administrativo) to have Executive Decree PCM-05-2009 declared illegal and to have it set aside (see discussion of the reasoning below). On May 26, this judge issued an interlocutory (interim) judgment (*sentencia interlocutoria*) ordering Zelaya's government to suspend the *consulta* preparation process. Here, note that Executive Decree PCM-05-2009 had not been published in the national gazette either at the time the legal challenge was launched or at the time of the judge's May 27 judgment. In Honduras, it is a task of the government to publish decrees in order for them to have the force of law. Before that, a decree is an executive bill (the Spanish word for bill, *proyecto* (project), nicely conveys the not-yet-law status of an unpublished decree. As decrees do not enter into force in Honduras until published, the Ministerio Público challenged (or purported to challenge) and the judge suspended (or purported to suspend) an executive act that was not yet law.

The second stage began on May 26, the day before the May 27 judicial ruling with respect to PCM-05-2009, mentioned in the last paragraph. On May 29, the government announced to the public through the media that, on May 26, that Executive Decree PCM-19-2009 had been adopted by Cabinet. In this new decree, the previously adopted (but never published) decree PCM-05-2009 on the consulta popular is replaced by the new PCM-19-2009 that sets out a new kind of sounding of national opinion in the form of a national opinion poll (encuesta nacional de opinion), with the question to be polled being almost but not quite same as the question that had been set out in PCM-05-2009. The poll would occur on June 28 and all other executive organs were required to actively carry out this poll. In tandem with the new Executive Decree PCM-19-2009, it was announced that Cabinet had approved an Executive Agreement 027-2009 that detailed the responsibilities of various actors within the executive. Notably, the National Institute of Statistics (INE / Instituto Nacional de Estadísticas) would run the poll and the armed forces were also to cooperate in carrying it out. Note that this PCM-19-2009 would be published, and this did enter into force as law, but the government did not publish it in the gazette until 25 June 2009 (that is, three days before the planned polling date, which became the coup date). In response to this May 29 announcement, the same court (at the insistence, again, of the Ministerio Público, it seems) issued a 'clarification' to its May 27 interlocutory judgment stating that his suspension extended to any other act, however named, attempting to do the same thing as what he had prevented. No new application was brought by the Ministerio Público and no new application was required by the judge, each assuming, it would seem, that the consulta popular contemplated in PCM-05-2009 was fungible with the national opinion poll planned by the subsequent PCM-19-2009. Absent from this annex to his previous judgment is any legal analysis of why a nonbinding opinion poll was (in the judge's view) illegal for the same reasons as a consulta popular. As with PCM-05-2009, neither the Ministerio Público nor the judge seemed at all concerned that they were again jointly impugning a decree that did not yet have the force of law (PCM-19-2009).

Central to the explicit legal reasoning on the consulta and the implicit legal reasoning on the encuesta appears to have been the view that the 1982 Constitution's prohibition on consecutive Presidential terms was, by the text of that Constitution, unamendable. From this starting point, it was reasoned that the entire process--starting with the planned June 28 consultation--could lead to an eventual constituent assembly deciding to allow for two or more consecutive terms. It was finally reasoned that the very start of this chain of possibility was unconstitutional.

Two seemingly salient points did not seem to dissipate the political--and then judicial-- opposition to the planned June 28 consultation about having a November fourth ballot. The first point is that the poll planned for June 28 was non-binding--it was advisory only. The second point was that the Presidential elections to take place in November 2009 was the constitutionally required election that would elect a new President in accordance with the existing constitution. Zelaya could not be on the ballot, and his own Liberal Party had already chosen their candidate to run in the election. Accordingly, two new candidates, one from the National Party and one from the Liberal Party, would be presenting themselves.

Thus, what people were to vote about in a non-binding poll on June 28 was whether to have a question in a November ballot about whether to have a constituent assembly, and even if such a November ballot resulted in a 'yes', a new President (other than Zelaya) would already have been elected that very same

day. This result is quite apart from the fact that a constituent assembly would still have to be held, at which point it is entirely possible no one would be seriously interested in the issue of increased presidential terms and that many might be more interested in a wholesale updating of the constitutional order (which does indeed seem to be what had generated significant enthusiasm amongst many Hondurans both for the June 28 poll and for any subsequent November "fourth ballot" on whether to have a constituent assembly). Political opponents have never quite managed to explain how Zelaya was going to manage to place himself on the ballot for the presidential election that was occurring the very same day as the "fourth ballot" that would answer the question of whether to convene a constituent assembly (some time after the date of the vote, obviously) that might at that point seek to change the constitutional clause prohibiting a second term. Put simply, unless an error in my reasoning is pointed out by more expert observers, it was an impossibility for Zelaya to end up with a second consecutive term through a process initiated by the planned June 28 referendum.

Thus, the political argument seems untenable--unless it shifted ground, as it eventually did after the coup. At that time, the argument moved away from being about what Zelaya was allegedly seeking to orchestrate through the fourth ballot in November, to become an accusation that Zelaya somehow intended to bring about a change to the constitution that would allow him to stand again and would do this between the June 28 vote and the November elections. The US Embassy in its Wikileaks analysis of 27 July 2009, dismisses as "supposition" two post-coup justifications that the Embassy was hearing (two of some seven arguments the Embassy notes being bandied about after the coup), namely "Zelaya intended to extend his term in office (supposition)" and "Had he been allowed to proceed with his June 28 constitutional reform opinion poll, Zelaya would have dissolved Congress the following day and convened a constituent assembly (supposition)."⁶ It is well worth noting that this line of argument does not seem to have faded as the currently governing President Lobo, on 29 January 2011, is reported to have said on Honduras' Radio Globo not only that Zelaya told him that he wanted to stay on for another term but that Zelaya attempted to get Lobo involved in this effort (in ways not entirely clear from the report).⁷

But it does not appear that the lower court seized with the issue of the legality and/or constitutionality of the June 28 vote (and the appeal court that at one point affirmed that judge's ruling) needed to be concerned with any alleged aspirations of Zelaya himself to serve a second consecutive term. As indicated above, its focus, it seems, was on the mere possibility that some constituent assembly would draft a constitution to allow some future President to run twice in a row (or a constitution that would amend or replace some other sections of the 1982 Constitution that were also considered as petrified and non-amendable). Thus it was that the court ordered Zelaya not to hold the consultation--because the consultation could result in a referendum that could result in a constituent assembly that could result in a purportedly new constitution that might not contain the unamendable clauses of the present constitution.

A series of impasses followed the Judge's May 29 extension of his judgment against a consulta to include the poll. On two separate occasions (June 6 and June 18), the judge sent a communication to Zelaya ordering the government to comply with his May 27 injunction as clarified by him on May 29. Whatever the balance between Zelaya resisting his opponents versus, as they would characterize it, defying the court, Zelaya went ahead with the plans to hold the poll, including launching in the lead-up to June 28 a vibrant national TV and radio campaign urging people to participate in politics by voting in the consultation. These plans proceeded notwithstanding that Executive Decree PCM-19-2009 did not enter

into force until 25 June 2009, when published in the gazette a mere three days before the planned polling day.

Zelaya had his own resistance to contend with. Close to June 28, Zelaya fired the Chief of Defence Staff, General Vasquez Velasquez, who had refused to order the army to assist with the carrying out of the June 28 national poll. Proceedings were brought by the General, and the Defence Chief was reinstated on June 25 by the Supreme Court based on an interpretation of the Constitution that (in the view of the Court) fettered the power of the President to fire the head of the military. As summarized in the US Embassy legal-analysis memo, "The Supreme Court's Constitutional Hall ruled June 25 that Zelaya was in violation of the Constitution for dismissing Defense Chief Vasquez Velasquez; the Constitution (article 280) states that the President may freely name or remove the chief of the armed forces; but the court ruled that since Zelaya fired him for refusing to carry out a poll the court had ruled illegal, the firing was illegal."

On the day that people were to take part in the poll--June 28--Zelaya was forcibly ousted from office when soldiers came to his Presidential residence and purported to arrest him. In the words of the US Ambassador in a Wikileaks cable (already mentioned above and discussed further below), "the soldiers forced their way in by shooting out the locks and essentially kidnapped the President."⁸ Rather than taking Zelaya into custody in Honduras, they placed him on a plane, still in his pajamas, and deposited him in Costa Rica.

No warrant was presented to Zelaya at the time of the ouster. After the ouster, Supreme Court documents were released that were dated before that ouster. These court documents (with date stamps and signatures) showed that some 18 criminal charges including treason had been brought against Zelaya in the Supreme Court by the Fiscal General (Chief National Prosecutor) on June 25, the same day as PCM-19-2009 was published in the gazette. The Supreme Court appointed an instructing magistrate (Juzgado de la Sala de lo Constitucional) from within its ranks to oversee the case. That judge then-- according to the documents released post-ouster--issued the warrant to arrest Zelaya on (it appears) June 26. The military, according to the terms of the warrant, were authorized to arrest Zelaya, but the warrant does not authorize his removal from the country. Other documents show that the warrant was initially made secret. On June 29, the day after the coup, the Supreme Court voted to make the fact of the charges and the arrest warrant public.

Questions have naturally been asked about just why it is that the military presented no arrest warrant despite Supreme Court documents showing said warrant to have been issued (albeit secretly) in advance of the ouster. The Wikileaks US Embassy cable is no doubt causing consternation amongst members of the Supreme Court for the way in which it discussed the warrant: "[C]oup supporters allege the court issued an arrest warrant for disobeying its order to desist from the opinion poll..." (emphasis added). The Embassy cable was sent by US Ambassador Hugo Llorens on 24 July 2009, almost a full month after the ouster. This is surely enough time for something as basic as a court document to be taken as a given by the Embassy within its analysis. Yet, Ambassador Llorens uses the word "alleges," which suggests he is not accepting as undisputed fact that such warrant was issued by the Supreme Court. The Embassy memo also notes that "[a]ccounts of Zelaya's abduction by the military indicate he was never legally 'served' with a warrant." Thus, from the US Ambassador's perspective, an alleged warrant was never produced for Zelaya to see. Personally and speaking for myself as just one Commissioner, I would be

very interested to know whether Ambassador Llorens indeed had doubts, and still has doubts, that the documents ordered released on June 29 by the Supreme Court existed before the June 28 ouster.

Soon after the ouster, Congress met and, reportedly, a unanimity or a vast majority of deputies voted to treat Zelaya as no longer President. The US Ambassador puts this 'vote' thus: "According to defenders of the ouster, Congress 'unanimously' (or in some versions by a 123-5 vote) deposed Zelaya." The Ambassador adds his own sidebar comment: "(after the fact and under the cloak of secrecy)". The President of Congress, Roberto Micheletti, was sworn in as President, as he was next in line according to the constitutional line of succession.

Congress' action was based--it seems--on some unclear interpretation of Congress' power to impeach. An express power to impeach does not appear in the current Constitution, which instead only lists the power to "disapprove" (desaprobar). The incapacitation of the President for having committed crimes is a ground for eventual removal, but, as the US Embassy analysis notes, that is, by the Constitution, a judicial process not a matter of Congressional fiat, and, even then, judicially-sanctioned removal obviously depends on proof of the crimes after court proceedings with due process and so on. Notwithstanding this, the Supreme Court at some point confirmed this was a lawful constitutional succession.

Floating around in the justificatory discourse at an early point was a letter of resignation that Zelaya had supposedly signed and left behind, but in the end this 'letter' (the existence of which Zelaya denied) does not appear to have made its way into the formal post-ouster record as part of the justification for his loss of power. This might have something to do with the fact that the letter—if it physically ever existed—is generally assumed to have been a forgery. Again according to the US Embassy Wikileaks analysis, "the purported "resignation" letter was a fabrication and was not even the basis for Congress's action of June 28."

After the ouster, there was one line of what seemed to be clear unconstitutionality that various sectors appeared willing to entertain, namely, the actual military removal of Zelaya from the country. The scenario of military scapegoats—possibly willingly so--was clearly being speculated upon as one strategy for presenting everything done by the "coup coalition" (a term discussed below) as having been constitutional, except this one slip by the military. According to the line of speculation, it would be congenial to members of the Supreme Court to point to the fact that the arrest warrant that emanated from their court authorized only arrest, not forcible deportation.⁹ The final two sentences of the US Embassy Wikileaks cable speaks volumes about this military-scapegoats scenario as something being speculated about at that time (end of July 2009, a month after the coup): "The coup's most ardent legal defenders have been unable to make the intellectual leap from their arguments regarding Zelaya's alleged crimes to how those allegations justified dragging him out of his bed in the night and flying him to Costa Rica. That the Attorney General's office and the Supreme Court now reportedly question the legality of that final step is encouraging and may provide a face-saving 'out' for the two opposing sides in the current standoff."

In the result, charges of abuse of power were brought by Honduras' Fiscal General (Attorney General) against six members of the military, including General Vasquez Velasquez, in January 2010. All six were treated as holders of high state office sufficient to trigger the Constitutional provisions requiring criminal

charges to be heard by the Supreme Court versus by the lower regular courts. The Supreme Court appointed its President as the instructing magistrate. (This may turn out to mean that the President of the Supreme Court appointed himself; the procedures for designating instructing magistrates still need to be clarified.) The abuse-of-power charges were comparatively minor (for example, they did not extend to treason, as had the charges against Zelaya himself). It also appears that the prosecutor did not bring any charges for the fact of the detention of Zelaya, thereby taking as given its validity due to the Supreme Court arrest warrant; nor does it appear that he was concerned that no warrant was presented at the time of the detention. At the time, it was assumed by many that, even if convicted, the officers would then be pardoned as about-to-be-inaugurated President Lobo had pledged to put an amnesty law (for both Zelaya and anyone involved in his ouster) to Congress once he was in office and, indeed, Congress may already have been discussing such a law.¹⁰ This prospect of an amnesty would seem to have played into some expectation that these members of the military would not only be charged but would also be convicted—and this played into the speculation hinted at by the US Ambassador that herein would lie the “face-saving” way forward with the six member of the military taking it on the chin for their excess. But, a few days before Lobo’s inauguration, the President of the Supreme Court, in his capacity as Instructing Magistrate, dismissed the charges as unfounded in law on the basis of reasoning related to a state of necessity. Within that reasoning, he appears to have accepted their defence that they had removed Zelaya from the country without malice and in the belief that his removal would prevent social unrest and violence.¹¹ So, what the US Ambassador saw as a possible scenario—an “out”—did not transpire. The President of the Supreme Court declined to rule in a way that would distinguish its behavior (the issuing of a warrant for arrest) from that of the military (following arrest with expulsion). Everyone, it seems, had acted legally in Honduras—except of course Zelaya, who remains under criminal indictment in the post-coup order.

B. INTERNATIONAL REACTIONS AND EFFORTS

There were a considerable number of distinct official reactions from international bodies and other states. These reactions either called the event a coup and demanded that Zelaya be permitted to return to Honduras and to re-assume office, or generated concerted diplomatic efforts to broker a solution that would see Zelaya resume office in some sort of transitional government and see out his term.¹² The OAS had already been forewarned by Zelaya who had invoked an early-warning clause in the OAS’ Inter-American Charter on Democracy, and, after the coup, a third-party clause in that Charter was invoked by

one or more other states. The Inter-American Charter on Democracy (which is not the same thing as the foundational document OAS Charter, but a much later treaty) had very much been born of the spirit of the times, once all Latin American governments except Cuba had evolved into (at least formal) democracies. It is essentially a never-again-military-coups-and-dictatorial-rule treaty. Articles 1 and 2 give the general flavour when they say, *inter alia*: “The peoples of the Americas have a right to democracy and their governments have an obligation to promote and defend it. ...The effective exercise of representative democracy is the basis for the rule of law and of the constitutional regimes of the member states of the Organization of American States.”

From an operational point of view, the Inter-American Charter on Democracy establishes mechanisms for convening OAS institutions in the event of “unconstitutional interruptions” or “alterations” in the democratic order, which terminology is clearly intended to include coups d’état or, in Spanish, golpes de estado. Article 17 includes provision for preventive appeal by a government when it feels its democratic

order is in jeopardy; Zelaya's notice about his fears of a coup to the OAS, some months before the aborted June 28 consultation, was an invocation of article 17. Article 20 allows any member state of the OAS to convene the OAS' Permanent Council after a coup has occurred, which duly transpired when Venezuela (and perhaps also other states) triggered the clause following Zelaya's forcible deportation to Costa Rica. The OAS Permanent Council gave the Micheletti government 72 hours to reverse what the Council characterized as a coup and to restore the presidency to Zelaya. When this did not happen, the OAS General Assembly suspended Honduras' membership in the OAS (which membership remains suspended). The UN General Assembly adopted a resolution condemning what it specifically called a coup d'état. Bilateral pressure was applied from the US, Europe and elsewhere--pressure that included stopping assistance payments. But Micheletti and Congress held firm.

In a clear and detailed academic treatment of the coup and its aftermath, Professor Thomas Legler of the Universidad Iberoamericana in Mexico City argues that a plausible interpretation of the strategy of what he calls the "coup coalition" was to hold out long enough to get to the already scheduled November elections (in which, as I have already noted several times, Zelaya would not be a candidate).¹³ Legler surmises that the coup coalition viewed the November elections as close enough in time that they could withstand the external pressure. He finds evidence for this not just in the result, but in terms of the way in which diplomatic negotiations with high-level mediation proceeded. A series of diplomatically-mediated agreements between the Micheletti de facto presidency and Zelaya were entered into. (Note that Zelaya had at one point slipped back into the country and was being harboured at the Brazilian Embassy.) The bottom line was that there was to be a national unity government with Zelaya appointees being some of the ministers and with Zelaya remaining President to the end of his term—which was 30 January 2010, inauguration day for whoever would win the November 2009 presidential elections. An omission in the agreements may have been deliberately treated as a loophole for delay by Congress. According to the agreements, it was Congress that was to formally invite back and restore Zelaya. However, no time frame was set on them doing so. Congress considered the matter, and considered the matter, and time ran out.

In the result, neither Zelaya nor any of his Ministers (re)entered Cabinet. (Note that, apart from the delay in reinstating Zelaya, Zelaya also refused to name any ministers until he was assured of being back in government.) The November elections for a new President went ahead with Zelaya still sitting in the Brazilian embassy. Porfirio (Pepe) Lobo, the National Party candidate, was elected. The OAS, the UN and other organizations declined to send observer missions to the elections. The US, Canada, Peru, Colombia and several neighbouring Central American states recognized the new government as lawful and legitimate, while Brazil, Argentina, and of course Venezuela led a group actively refusing to recognize. The international tussle over recognition continues, alongside pressure being led by the US and Canada for lifting Honduras' suspension from the OAS.

Countries like Brazil and especially Argentina (and again, of course Venezuela) have--to date--taken a very firm stand that allowing a coup to succeed in one country in the Americas will turn on a green light for the military and associated partners in other countries to consider doing the same thing. The experience in Venezuela obviously plays a role in creating a sense of the susceptibility to coups. In the attempted coup in Venezuela in 2002, the George W Bush Administration recognized the provisional government set up by the coup before the coup was thwarted by forces loyal to President Chavez, who was restored to power after being held in detention for two days. Informed observers believe there is good evidence the US (including former Ambassador to Honduras, John Negroponte, who was

Ambassador from 1981-85) was actively involved in the coup, and not simply recognizing it, while the US Department of State's Inspector General gave the US Department of State a clean bill of health.¹⁴ At the time of the Honduran coup itself, this reasoning--the regional-historical precedential effects of the Honduran coup--was emphasized time and again by most members of the OAS: if we let this happen, the militaries and their socio-economic collaborators will be back and some of our states will once again see coup-created regimes. I say "regional-historical here" and not worldhistorical because it was indeed the specific international law of the Americas that was at stake and it was the specific worry of Latin American states about their own collective backyard that drove concerns about the demonstrator effects.

That said, there were international reactions beyond OAS states, which may turn out to be important for what they might suggest about a more globalized democracy norm. For example, UN Secretary-General Ban Ki-moon quickly condemned the June 28 ouster and the United Nations General Assembly adopted resolution 63/301 (1 July 2009), which referenced the fact of rupture of Honduras' own constitutional order while placing simultaneous emphasis on the democratic nature of that order that was being undermined. Resolution 63/301 was adopted unanimously, without vote. It referenced Inter-American regional law but did not simply invoke that law as the only international law basis for the condemnation in the resolution. The UN General Assembly could have chosen essentially to mirror the language found in Inter-American resolutions and declarations, and thus to offer a kind of UN-level 'rule of law' support for the OAS regional law of democracy. Instead, on my reading of UNGA Res 63/301, the UN took a giant stride or two into world-historical support for defence-of-representative-democracy as a global norm. The very title of the resolution, "Situation in Honduras: democracy breakdown" (not "breakdown in constitutional order" nor "breach of Inter-American law") is suggestive that the UN General Assembly response to Honduras may be looked back upon as a watershed moment in some sort of affirmation of a universal anti-coup norm, at least where the constitutional system in place was already a democracy. All five of its operative paragraphs are accordingly worth reproducing:

[The General Assembly]

1. Condemns the coup d'état in the Republic of Honduras that has interrupted the democratic and constitutional order and the legitimate exercise of power in Honduras, and resulted in the removal of the democratically elected President of that country, Mr. José Manuel Zelaya Rosales;

2. Demands the immediate and unconditional restoration of the legitimate and Constitutional Government of the President of the Republic of Honduras,

Mr. José Manuel Zelaya Rosales, and of the legally constituted authority in Honduras, so that he may fulfil the mandate for which he was democratically

elected by the Honduran people;

3. Decides to call firmly and unequivocally upon States to recognize no Government other than that of the Constitutional President, Mr. José Manuel

Zelaya Rosales;

4. Expresses its firm support for the regional efforts being undertaken pursuant to Chapter VIII of the Charter of the United Nations to resolve the political crisis in Honduras;

5. Requests the Secretary-General to inform the General Assembly in a timely manner of the evolving situation in the country. 15

As time wore on, and the Micheletti presidency and Congress weathered the storm of external criticism and sanctions, a noticeable shift began to occur in terms of the issue at stake. The focus shifted to whether the election of a new president in November 2009—which election would be organized by an illegal coup government and which government may have been holding out precisely to get to this point—should be recognized or whether such recognition would also signal support for a coup. The concern from countries such as Brazil was that recognition of a new Presidency in these circumstances would provide a model or roadmap for other countries as to how to carry out what might be called a cleansed coup. It is important to note that the US ultimately appeared not to be concerned about such a precedent, as the US broke ranks even before the elections when a key civil servant publicly hinted that the US would recognize whoever emerged as President from the election. One interpretation of the reason for this is as follows, from Thomas Legler:

Some sources suggest that the U.S. government's decision to recognize the November 29 elections irrespective of whether Zelaya was returned to office was the quid pro quo in a secret deal for which the Republican Party agreed to withdraw its senatorial opposition to the nomination of Arturo Valenzuela as assistant secretary of state for Latin America and Thomas Shannon as new ambassador to Brazil see (El Universal, December 23, 2009). 16

As you may have surmised, Zelaya was not suddenly asked to come back and serve out the last two months of his term remaining after the November elections. In December 2009, Congress, by a huge majority vote of deputies, voted not to invite Zelaya back. Micheletti stayed in office. On inauguration day for Porfirio Lobo, Micheletti was asked to stay away from the ceremony. Zelaya was escorted from the Brazilian Embassy to the airport where Lobo saw him off, as he left the country for a second time. He remains outside, and is still under the charges in the Supreme Court's arrest warrant.

C. THE CREATION OF TWO COMMISSIONS IN 2010

On the day of the ouster—keeping in mind the world has treated it as a coup—many thousands of people took to the streets of Tegucigalpa in what reports and testimonies make clear was non-violent protest. Over time, this popular protest movement morphed into a movement known as La Resistencia, with activity such as rallies and protest marches all around the country. There have been clashes with security forces during such assemblies. One of the original Resistencia leaders has been murdered as have others active in the Resistencia. Palpable polarization has taken over society, perhaps especially in Tegucigalpa. Meanwhile, there is also a polarization of the media, with the major daily newspapers and TV tending to be held by economic actors who are generally assumed to be on the conservative end of the political spectrum. Community radio tends to be the vehicle most relied upon by La Resistencia as well as the Internet for people able to access it. The use of "La Resistencia" to refer to a broad social movement with no initial institutionalized form at some point also came to refer to a more organized resistance movement, the Frente Nacional de Resistencia Popular, that has also begun to take on qualities of an electorally oriented organization (although with much internal debate over whether such transformation is desirable). 17

The Plataforma de Derechos Humanos is a coalition of a half-dozen human rights groups that received in late 2010 a human rights prize that is highly regarded in the Americas—the 2010 Letelier-Moffit Human

Rights Prize, named after a Chilean who had been a diplomat (Ambassador to the US) for Chile under the Allende government (Letelier), and who was assassinated in the streets of Washington DC by Pinochet's government in a car bombing that also killed development expert Ronni Moffitt. The Plataforma alleges—with extensive and well-documented supporting evidence from their own work and the reports of other national and international non-governmental organizations, as well as reports from various state and intergovernmental sources—that a significant number of serious human rights violations have occurred since the coup, most intensive, it seems, during the Micheletti period but also continuing (and, it seems, even deepening in important respects) since Porfirio Lobo took power in January 2010 following the elections of November 2009. Human rights issues include: disappearances, extrajudicial executions, widespread acts and threats of physical violence against human rights defenders, journalists, members of the Resistencia, transsexuals, gay men (especially those also associated with political activity), and members of land-reform campesino movements (especially in a region called the Aguan); extensive violations of rights of expression (with Honduras having the worst record for deaths of journalists in the world in 2010), assembly and association, including in terms of how the November 2009 election campaign played out; and special vulnerability of persons identified with certain social sectors, such as the gay, lesbian, bisexual and transgendered community.

Arising from all of this has been the creation by Porfirio Lobo of the Truth and Reconciliation Commission (Comisión de la Verdad y de Reconciliación, or CVR), which began its work in May 2010. 18 The establishment of a CVR was one of over a dozen conditions in the agreements negotiated in the fall of 2009, mentioned earlier. It seems likely that President Lobo understands that some states will view fulfillment of this condition as a very important factor in their decisions as to whether to recognize the Lobo government and/or lift Honduras' suspension from the OAS. Its mandate is to "clarify the facts that occurred before and after 28 June 2009, in order to identify the acts that led to the crisis situation and to make proposals to the Honduran people in order to avoid the repeat of such acts in the future." It was to have reported in approximately eight months and a report was expected by early 2011; the end of March 2011 or early April 2011 seems most likely at last indication.

The CVR is constituted by five members, three foreigners and two Hondurans. The two Hondurans have both been President of the National Autonomous University of Honduras; the inclusion of one seems to have been protested by some conservative sectors and the other from within the Resistencia-oriented sector. A Peruvian judge and a former Canadian Ambassador to the US are joined by a Guatemalan Chair, Eduardo Stein, a former vice-president of Guatemala. By their mandate, they have full access to all executive branch documentation, subject to later, at the time of the report, not being able to reveal state-sensitive information and being required to provide copies of corresponding documents to the OAS for safeguarding before those documents can be made public in 10 years.

On several occasions, the CVR's chair, Mr Stein, has made public statements seeking to alleviate concerns that, because of the wording of the CVR mandate, the CVR is not going to look seriously at human rights violations since the coup. Underlying this fear, for some, would appear to be a concern that the CVR may be more attuned to the political tensions surrounding and generated by the coup and more oriented toward elite-level reconciliation. Stein has emphasized that human rights violations are part of the CVR's inquiry—albeit only up to the start of the Lobo Presidency and thus with no coverage of the period since February 2010 to present.

It is fair to say that deep mutual distrust within a polarized society is a defining feature of Honduras at present. It is perhaps thus not surprising that the Plataforma de Derechos Humanos decided to constitute its own body, called simply the Comisión de Verdad (CV), or Truth Commission.¹⁹ At the time of the announcement of the plan to establish the CV, in spring 2010, Amnesty International appears also to have called for such a civil society commission. At that time, criticisms were made of the official CVR for not meeting now well established best practices standards generated from the experience of, and reflection on, some 70+ truth-related commissions that have been convened worldwide since the early 1980s. The lack of provision for witness protection within the CVR is high on the priority list of criticized gaps.

The mandate of the unofficial, civil society CV starts with preambular sections, some elements of which are worth noting for their philosophical relevance to some of the subsequent discussion. The CV is constituted in order that “never again” shall human rights violations occur following a “golpe de estado” (coup d’ état) and in order that any crimes committed be clarified and not allowed to enjoy impunity. The documentation of la memoria histórica is an essential part of the affirmation of human rights as well as of the construction of a new institutional order. Philosophically, the mandate states, “Sin verdad ni justicia no será posible la reconciliación de la familia hondureña.” -- Without either truth or justice, reconciliation of the Honduran family will not be possible.

The CV’s mandate then sets out a series of objectives, which include (in my own, provisional translation from the Spanish document):

- The CV shall investigate and establish the human rights violations that were occasioned by the coup of 28 June 2009, and those that have continued to be perpetrated until the end of the CV’s mandate, identifying, where possible, the persons responsible.
- The CV shall investigate and establish patterns of aggression and of the persecution to which human rights defenders and social leaders who promote structural change have been subjected, identifying the persons responsible.
- The CV shall assess the consequences of impunity and of the structures of repression that continue to operate in the country since the 1980s, and identify the mechanisms of impunity for past crimes that have permitted previous human rights violators to revive their activities within the setting of the coup.
- The CV shall identify the antecedents of the coup, the structural, institutional, economic and historical causes of the coup, and the actors that promoted and justified the coup; in this context, the CV shall analyze and identify, inter alia, foreign interests that appeased and supported the coup.
- The CV shall make proposals for victims to be able to assert their right to the truth, to justice and to remedies. The CV shall formulate recommendations that permit remedies for the victims, establishing measures, both individual and collective, for non-repetition, for restoration of rights, for redress, for rehabilitation and for compensation.
- The CV shall identify each state institution’s role in and linkage to the coup and human rights violations, whether by acts or by omissions. The CV shall thereupon make recommendations for removal from state institutions of all those persons who promoted or participated in the coup and who permitted or participated in human rights violations. The CV shall identify the corresponding civil and criminal responsibility.

- The CV shall write a report containing all of the preceding elements, which report will be presented to the Honduran people and to state institutions, in order that they may take up the recommendations, and the CV shall then distribute the report widely within the international community, in particular to the United Nations, the OAS, the European Union, and the International Criminal Court.
- A standing international body shall then be established to monitor, observe, take action, and provide the necessary advice to ensure compliance with the recommendations of the Truth Commission.

In terms of membership, we were constituted with 10 commissioners, eight foreigners and two Hondurans. Our Chair is Sister Elsie Monje from Ecuador who has just finished chairing a truth commission in Ecuador—an official one set up by the state—into the human rights abuses of the 1980s in that country. Two other highly regarded members of the Catholic clergy, a Honduran and a Belgian, were named to the commission. The second Honduran is a leading literature scholar and a well-known national cultural figure. Also on the CV, apart from myself, are a former Costa Rican Ambassador to the Netherlands (who also served as President of the UN Human Rights Committee for a period), an El Salvadoran judge, a Spanish judge who is an expert in the functioning of civil law judicial systems and international human rights law, a Nobel Peace Prize Laureate from Argentina, and one of the co-founders of Argentina's Mothers of the Plaza del Mayo movement.

The CV intends to cover events up to June 28 of next year (the second anniversary) and release our report by the end of 2011. Our first meeting straddled the first anniversary of the ouster, June 28 of this year, and we met again at the end of October and into early November. The plenary commission will return twice more before the second anniversary of the ouster, with the report preparation schedule from July 2011 yet to be finalized.

IV. SRI LANKA

A. SRI LANKA'S MAELSTROM

Sri Lanka is both better known and better documented at both intergovernmental levels—notably within the UN but also by the EU—and at NGO levels, with a slew of reports in the last two years. You may want to go to the Sri Lanka Campaign website -- www.srilankacampaign.org—where you can not only access (from the home page “Learn More” section) several key reports from the International Crisis Group (ICG), Amnesty International (AI), Human Rights Watch (HRW) and the Committee to Protect Journalists, but also a document by the Sri Lanka Campaign itself, that I helped prepare with a former Osgoode student, James Yap. It is called “The Breakdown of the Rule of Law in Sri Lanka: An Overview” and is a synthesis of work done by a dozen or so other organizations, within the Campaign's own overarching and decidedly critical interpretive argument about (what SL Campaign Advisor and Executive Director of the Hong Kong based Asian Human Rights Commission, Basil Fernando, has analyzed in his own publications as) the situation of “abysmal lawlessness” in Sri Lanka.²⁰ It is important to note that “The Breakdown of the Rule of Law” is not specifically about the war or the last months of the conduct of the war. Rather, it is a more general assessment within a wider time frame of the current breakdown of the rule of law in Sri Lanka. That said, it is exceedingly relevant for the question of what challenges there are within post-war Sri Lanka for dealing with allegations of war crimes and crimes against humanity committed by both government forces and the LTTE on the battlefield during the final

stages of the war. More generally, the Sri Lanka Campaign's overview synthesis may help show that the whats, whys and hows of human rights violations during the final conflict and in the detention-camp policies after the war cannot be fully understood without looking at the wider rule of law situation, both in terms of the development of the situation over time and in terms of how structures of accountability work—or don't work—outside the immediate context of accountability for the conduct of warfare.

For those of you not that familiar with Sri Lanka, I will attempt to give you an almost physical sense of the maelstrom in which Sri Lankans have been living for many decades. The years have been dominated by tensions and conflict with a clear ethnic dimension that have seen contestations for political and social space, and contestations over various myths, between a majority Sinhala-speaking and Buddhist Sinhalese population and a minority Tamil-speaking population from a mix of Hindu, Christian and Muslim religious heritages. At the same time, it would be a mistake to chalk up the grand sweep of modern Sri Lankan history to this single axis of conflict, as, for different periods and increasingly for the present period as well, state repression has to some extent been society-wide cutting across communities.

I mentioned the metaphor of the maelstrom. Hold your breath now for perhaps the longest single-sentence descent into a vortex in the history of lecturing—or at least the history of lectures at CTLS. ...Policies of placing more emphasis on Sinhala, the language of the Sinhalese community, after the end of British colonialism 60 years ago; decisions to reform the constitutional order with many pointing to the 1978 constitution as the watershed moment for the ever-deepening increase in executive power in Sri Lanka;

experience and perceptions of Tamils of life or government as being one of dominance by Sinhalese and, to an extent, increasingly militant Buddhism, or, more positively put, as lacking sufficient recognition either of Tamil distinctiveness as a minority or Tamil contributions to the wider nation;

the intermingling of such factors with an existing high concentration of Tamil-speakers in the North and Northeast bolstered by the outflow of Tamils from Colombo and other areas to the North as a consequence of either race riots at different points or, at least in 1983, something much closer to a pogrom; the creation of an organization in the 1970s that would eventually settle on the name Liberation Tigers of Tamil Eelam, the LTTE, and that at a certain point made its goal the armed achievement of a sovereign-state homeland in the north/north-east of the country; the rise of military, police, and paramilitary repression starting in the 1970s, which has waxed and waned ever since; the unique combination of conventional warfare capacities and recourse to urban terrorism by the LTTE; all too frequently, a general ruthlessness and brutality as a method of governance and control from both the state and the LTTE; a meaningful but still limited cross-ethnic interaction in society and politics which, along with moderate sentiments in all communities, has tended to be pushed aside by extremist and chauvinist elements in those communities;

independent dynamics within the Sinhalese community, especially involving politicians' and parties' rivalries that have tended to surge and to undermine the few occasions when peace negotiations seemed to have some potential;

similar dynamics in the Tamil community, including due to the treatment at different times of Muslim Tamils amounting to ethnic cleansing from some areas of the North, and also including the split of the so-called Karuna faction and its substantial combat forces from the overall LTTE, as well as the legacy for current paramilitary violence of that faction;

externalized dimensions of the conflict that includes a worldwide network of diasporic Sri Lankan Tamils that has provided communities to receive significant outflows of Tamil refugees and more general migration, but from within which the LTTE also found significant financial support;

further externalized dimensions in the form of Sri Lanka's rise over the decades within the grouping of states called the Non-Aligned Movement or NAM to become one of the recognized leaders of this grouping of over 100 states from which the government has been able to draw diplomatic support when needed; and--finally the big "and"--a ceasefire in the early 2000s that led to an almost desperate attempt by the world diplomatic community led by Norway to leverage the ceasefire into successful peace negotiations that would lead to some form of quasi-federal or federal autonomy in the North which would be acceptable to the central government but which, by around 2006 had clearly failed, and which ultimately helped pave the way to the election of the current President of Sri Lanka, Mahinda Rajapaksa, who stated to the UN General Assembly in 2006 his hope to make another push for a comprehensive peace that addressed minority concerns within a unified Sri Lanka, but who in the end seems at some point to have concluded that military victory—indeed a total military victory—over the LTTE was the only solution—ALL this (and this is the start of the principal clause in the sentence, by the way) reached a crescendo with the gradual strangling of the LTTE strongholds over the course of a two to three year military campaign that, in the last months of the war in early 2009, saw a couple hundred thousand civilians crowded into a coastal strip alongside the surrounded LTTE who physically blocked their escape even as the army bombarded the strip with artillery incessantly, with few pauses, in what must have been near-certain knowledge of the “collateral damage” that would be wrought on the civilians densely clustered in the targeted so-called “no-fire zones”, followed by an eventual surrender of the LTTE but not before anywhere from 7000 civilians (on some estimates) to many more (on other estimates) had been killed, let alone the many who were maimed, and with an aftermath that saw close to 300,000 civilians locked away for many months in a series of internment camps and somewhere in the neighbourhood of 10,000 LTTE or suspected LTTE members shunted to their own off-limits detention facilities where about half of them still remain after the release of some hundreds of children from their ranks and the eventual release (subject to restrictions on movement) of about 5000 of those deemed less ‘hard-core’ by the government.

END OF SENTENCE.

Are any of you still breathing? I hope this experience of the world's most grueling sentences ever given in a lecture has helped you imagine how it has felt for many Sri Lankans both over the decades and more recently as they all hurtled toward the final end game on the eastern shores of Sri Lanka after 35 years of deep and intractable conflict.

B. RESPONSES TO THE WARFARE AND THE AFTERMATH OF THE WAR

But the world did not applaud. Criticism from states, from within the UN, from the EU, from a phalanx of NGOs, from media commentators must have seemed relentless in the eyes of the government. The criticism started when it became clear by late 2008 how many civilians were going to be sideswiped in the intensifying battlefield warfare and mounted when it became clear how thoroughly the gloves of international humanitarian law and international human rights law had been ripped off—by both sides in the warfare. By and large, the government of Sri Lanka did not heed the cries, both denying any reason for concern and keeping media and others from the war zones such that third-party reports could be characterized as conjecture or LTTE propaganda. After the surrender, new concern over the detention camps turned quickly to a new wave of external criticism, and soon demands for war crimes investigations were being called for from many quarters. In October 2009, the War Crimes Office of the US DOS produced a report for Congress identifying something like 300 possible war crimes incidents.²¹ Ten months later, in August 2010, the War Crimes Office issued a follow-up report updating Congress on what Sri Lanka had done in response to the previous report.²² Here is an extract from the August description:

Immediately following the release of the October 2009 Department of State report [on crimes against humanity during the war in Sri Lanka] to Congress, Sri Lankan President Mahinda Rajapaksa appointed a “Group of Eminent Persons” to look into the allegations in the U.S. report and prepare a report for him with its recommendations. The group’s report was initially due to President Rajapaksa on December 31, 2009, but the due date was subsequently delayed to April 2010 and then again to July 2010. ...

The Department of State concludes that the Group of Eminent Persons was ineffective. The Department of State received conflicting reports about the progress of the Group’s inquiry, and confirmed in May that it had not been active for months and that its mandate had been subsumed by the new commission. The Department of State is not aware of any findings or reports of the Group. The Group did not appear to investigate allegations or to make any recommendations pursuant to its mandate.

On May 15, [2010] President Rajapaksa issued a warrant to establish an eight-member commission under the Special Presidential Commissions of Inquiry Law of 1978. The warrant did not explicitly direct the commission to identify violations of internationally accepted norms in conflict situations or to identify those responsible. ... Since then, the Government of Sri Lanka has clarified the mandate of the LLRC in private conversations with U.S. Government officials (although it has not yet done so publicly).

On June 10, the Sri Lankan Ministry of Defense announced that President Rajapaksa had met with the members of the Commission on Lessons Learnt and Reconciliation on June 4. The Ministry’s announcement said that the President had informed commission members they had “the responsibility of acting in a forward-looking manner, through focus on restorative justice designed to further strengthen national amity.” The statement further noted that the President encouraged the members to “utilize their wide-ranging mandate to fulfil this objective, while always safeguarding the dignity of Sri Lanka.” ...

Evaluating the effectiveness of the CoI should first take into account the history of failings of a series of past CoIs established in Sri Lanka. For example, a 2006 commission charged with investigating sixteen allegations of serious human rights violations ultimately partially investigated only seven of the cases and did not identify any of the perpetrators. An International Independent Group of Eminent Persons (IIGEP) invited by President Rajapaksa to observe the local commission resigned after concluding that the GSL lacked the political will to properly pursue the investigations and that the commission was not

meeting international standards in areas such as witness protection, transparency, and financial commitment to the commission. The IIGEP was especially critical concerning a severe conflict of interest by the Attorney General's office, which both represented the GSL and led questioning during hearings. The then incumbent Attorney General, who in that capacity was criticized for obstructing the IIGEP's work, has been appointed as Chairman of the LLRC.

Not mentioned in the above narrative by the War Crimes Office of the State Department is how UN Secretary General Ban Ki-Moon announced in early 2009 that he would create a high-level Panel to advise him on how the UN should proceed with respect to the allegations of war crimes.²³ Against Sri Lanka's vehement objections, he went on to name the panel, which officially started its work in mid-September 2010 and is working towards a report by, it seems, February 2011. Sri Lanka initially barred entry to Sri Lanka of the Panel's three members, and only relented towards the end of 2010—saying that it would allow them in to meet with the LLRC.

Meanwhile, the LLRC has started its work with hearings in various locales.²⁴ It issued an invitation to various NGOs to testify, including to Amnesty International, Human Rights Watch and the International Crisis Group—the big three of muscular global humanitarian NGOs—all of which had been very scrutinous and critical for some time of Sri Lanka and notably with respect to the last stages of the war and its aftermath. The three heads of these three NGOs sent a joint letter to the Chair of the LLRC on 14 October 2010, in which they collectively declined the invitation. The letter is well worth reading as it contains a condensed version of some of the main lines of criticism about the general rule of law situation in Sri Lanka and the reasons they have for not thinking this Commission was serious.²⁵

Did I say earlier the world did not applaud? It turns out that was actually an overstatement. There does indeed appear to have been clapping in some quarters—and perhaps in many more governments than have made their real views public, notably from military, security and intelligence apparatuses of such governments.

Recall that I discussed in the Honduran context the regional-level precedent concerns— what political scientists tend to call the “moral hazard” of the OAS community allowing the ouster of Zelaya to prevail. In many respects, I believe that the manner in which the war in Sri Lanka was conducted and the blurring of those methods with the general rule of law situation in Sri Lanka represents a much more worldwide moral hazard, even as it is perhaps most acutely relevant elsewhere in Asia where more governments seem to be actively consulting with Sri Lanka on ‘lessons learned’ in fighting ‘insurgents’ or ‘terrorists’.

When I joined the Sri Lanka Campaign in spring 2009 as Advisor and also as one of three members of the Campaign Steering Committee, I expressed my central reason for doing so as follows (and this is what appears on the Campaign website):

I am ... deeply worried about the demonstrator effects of the Sri Lankan government's exploitation of security discourses to justify its methods and policies; there are already signs of other governments seeking to emulate the Sri Lankan ‘model’.

Others have analyzed the importance of Sri Lanka in similar terms. Recently, in August, The Elders issued a statement entitled “Sri Lanka's disturbing actions met by ‘deafening global silence.’” The Elders, as you may know, are an independent group of global leaders, brought together by Nelson Mandela in 2007,

who offer their collective influence and experience to support peace-building, help address major causes of human suffering and promote the shared interests of humanity. The current Elders are Martti Ahtisaari, Kofi Annan, Ela Bhatt, Lakhdar Brahimi, Gro Brundtland, Fernando Henrique Cardoso,

Jimmy Carter, Graça Machel, Mary Robinson and Desmond Tutu (Chair). Nelson Mandela and Aung San Suu Kyi are honorary Elders. Their statement on Sri Lanka begins "The Sri Lankan government's clampdown on domestic critics and its disdain for human rights deserves a far tougher response according to The Elders...." Returning to the issue of precedent or the "moral hazard" of leaving Sri Lanka unaddressed, Martti Ahtisaari, the former President of Finland, Nobel Peace Prize Laureate and a noted peace negotiator who was central, inter alia, to the ending of the NATO-Serbia War over Kosovo, stated:

Countries operating outside international norms watch each other carefully. They will be taking courage from Sri Lanka's apparent success at avoiding international reproach. This is a worry for all those who want to see more democracy, greater respect for human rights and less violence in the world.

The Economist put the matter as follows on 22 May 2010:26

Some of the world's less savoury regimes are beating a path to [Colombo's] door to study "the Sri Lanka option".

Last November, Myanmar's military dictator, Than Shwe, who rarely travels abroad, visited the island "so that his regime can apply any lessons learned to its efforts against the ethnic groups in Burma," says Benedict Rogers, a biographer of General Than.

After then mentioning interest also shown by Bangladesh and Thailand, the Economist continues:

Behind the scenes, hawkish generals and politicians from Colombia to Israel seem to be using Sri Lanka's experience to justify harsher anti-terror operations.

Louise Arbour, head of the International Crisis Group (ICG), says the Sri Lanka model consists of three parts: what she dubs "scorched-earth tactics" (full operational freedom for the army, no negotiations with terrorists, no ceasefires to let them regroup); next, ignoring differences between combatants and non-combatants (the new ICG report documents many such examples); lastly, the dismissal of international and media concerns. A senior official in President Mahinda Rajapaksa's office, quoted anonymously in a journal, *Indian Defence Review*, says "we had to ensure that we regulated the media. We didn't want the international community to force peace negotiations on us." The author of that article, V.K. Shashikumar, concludes that "in the final analysis the Rajapaksa model is based on a military precept ... Terrorism has to be wiped out militarily and cannot be tackled politically."

Very early on after the war, Sri Lanka appeared to be taking signals from these signs of welcome for its terrorism-fighting 'model' and seeking to leverage them into an eventual legitimizing strategy for the methods used. Note in particular, the elliptical foray of President Rajapaksa in his speech to the UN General Assembly in September 2010, when he obliquely but nonetheless quite clearly called for revising the laws of war in light of the Sri Lanka experience.²⁷ He set the scene as follows:

The rapidly forgotten truth is that we had to face one of the most brutal, highly organized, well funded and effective terrorist organizations, that could even spread its tentacles to other countries....

Many of the atrocities of terrorism that the West has come to experience in recent times, the people of Sri Lanka were themselves the victims of, for nearly 30 years, losing almost one hundred thousand lives...

And then a few paragraphs later, he drops in the following, only to leave it unelaborated:

In this context, it is worth examining the capacity of current international humanitarian law to meet contemporary needs. It must be remembered that such law evolved essentially in response to conflicts waged by the forces of legally constituted States, and not terrorist groups. The asymmetrical nature of conflicts initiated by non-state actors gives rise to serious problems which need to be considered in earnest by the international community.

V. THREE QUANDARIES

I proceed now to a tree-tops discussion of the three quandaries set out in the introduction.

A. THE INSIDE/OUTSIDE QUANDARY

In establishing truth in a national context, what account must be taken of internal/external dynamics related to both facts and perceptions concerning outside involvement, including facts and perceptions associated with state-sovereignist beliefs?

Transnationalization, however one understands this notion, automatically raises issues or perceptions of issues generated by an inside/outside dynamic. Nobody likes an outsider, or a perceived outsider, making something their business that we think is none of their business. And so it is also with states and national societies.

In contrast to the assumptions of many who study, write about or facilitate globalization whether of widgets or of grand ideas, it is arguable that sensitivities to outsiders are becoming more ascendant in our times as more and more states and their societies in the Global South acquire more and more power and leverage and more and more associated pride and confidence. I don't see this trend going away, but, rather, only deepening. Thus, for normatively justified or at least normatively understandable reasons and for reasons having more to do with political manipulation by state or other elites, transnationalizing something as contentious and potentially explosive as 'the truth' about alleged human rights violations or war crimes necessarily requires us to ask hard questions about normative imposition and institutional coercion.

On the one hand, this is a pragmatic consideration, a fact of life that must be taken into account from an effectiveness perspective: how can positive change be produced when nationalist or sub-societal sectoral resistance is not just a natural instinct but a highly salient force that is in play? On the other

hand, it is also about legitimacy, for all the reasons we understand there are principled underpinnings to the notion of the self-determination of peoples and within a more generalized ethic of presumptive respect for others (including others' self-understandings, even when 'we' believe 'they' are clearly wrong). And, finally, at a legal level, it brings us hard up against that thing called sovereignty that tends to get converted by state elites, not surprisingly, into state sovereignty, which, following what I said a short moment ago, is being more and more valued by more and more states in the Global South as the bedrock of the international legal system in a turn away from easy understandings that that system has by now somehow evolved inexorably to take on significant supra-state dimensions in the realm of the fundamental values underpinning both international humanitarian law and international human rights law.

Against that backdrop, consider the following stark contrast in viewpoint. First, consider the following 8 June 2010 observations and institutional prescription for dealing with the conduct of the war in Sri Lanka by Louise Arbour, former Prosecutor of the International Criminal Tribunal for the Former Yugoslavia (ICTY) and former UN High Commissioner for Human Rights and currently President of the International Crisis Group:²⁸

The long history of impunity, the legitimate fear of reprisals on the part of prospective witnesses and the persistent denial at the highest levels of government of any wrongdoing suggest that only an arms-length international process would be credible.

An international investigation is required to ensure that Sri Lanka rebuilds itself on the solid foundation of the rule of law including the fundamental principle that no one is above the law. It is also necessary to ensure that the future rests on a truthful acknowledgment of the past and that all the people of Sri Lanka understand what was done, seemingly on their behalf, to their fellow citizens, many of whom were innocent civilians trapped between a terrorist movement and a government unwilling to extend to them the protection to which they were entitled by law. The nature and the magnitude of the crimes are such that there is no prospect of a real, durable peace without justice.

Such an investigation is also necessary to reaffirm the international community's commitment to the principle of accountability for serious violations of international humanitarian law. This is particularly pressing since the "Sri Lankan option" may otherwise become increasingly attractive to those governments that will find it expedient to disregard the law if they are convinced that they may do so with impunity.

In contrast, three months later on 23 September 2010, Sri Lanka's President Rajapaksa said the following to the UN General Assembly in the same speech noted at the end of section IV:

Sri Lanka recognizes the challenges we face, among the greatest of which is healing the wounds of the recent past. To this end, earlier this year, a Lessons Learnt and Reconciliation Commission has been established, giving full expression to the principles of accountability. This independent Commission, comprising eight Sri Lankans of eminence and stature, has already begun its work. ...

We believe that for the rebuilding and healing of our nation to succeed, the process must evolve from within. If history has taught us one thing, it is that imposed external solutions breed resentment and

ultimately fail. Ours, by contrast, is a home grown process, which reflects the culture and traditions of our people.

We certainly welcome the support of the international community as we rebuild our lands and our economy. We sincerely hope that they will be prepared to take a practical approach to developing partnerships with Sri Lanka through international trade, investment and capacity building.

It will be immediately noticed that an internal/external dynamic is central to the President's articulation and that a clear line is drawn that leaves matters of justice, reconciliation, and, one assumes also, even free-standing truth outside the institutional realm of the "international community." He references both illegitimacy (we are handling this as Sri Lankans and "external imposed solutions" will breed resentment) and the ineffectiveness that flows from illegitimacy (resentment leads to resistance which leads to failure). That is all I will say for now before moving to the next quandary, other than to editorialize that, in the abstract, while there is much truth in his position, at the same time, both a sincere intention to heal wounds and a truly meaningful rule of law must concretely exist for such abstract arguments to amount to anything more than special pleading or, worse, calculated deceit.

Let me now turn to state sovereignty and national pride's kissing cousin, equal treatment and the associated repudiation of 'double standards.'

B. THE CONSISTENCY AND FAIRNESS QUANDARY.

Is the transnationalization of truth-seeking and truth-articulation in any way disabled by systemic problems (or assertions of systemic problems) of double standards, selectivity of attention, or even hypocrisy?

In the general narrative on Sri Lanka in section IV, I noted that a panel was appointed by the UN Secretary General to advise him on what the UN should do regarding how the warfare was conducted in Sri Lanka. Here is how that issue evolved at the earlier stages. I narrate with the purpose of showing you the salience of anti-hypocrisy discourse as an added layer to the internal/external dynamic just discussed.

As noted earlier, in early 2010, Secretary General Ban Ki-moon announced his attention to pick up on UN High Commissioner for Human Rights Navi Pillay's calls for investigation into war crimes and crimes against humanity. The Secretary General struck a panel to advise him on how to approach accountability questions with respect to the final stages of the war in Sri Lanka. This generated what would appear on its surface to be widespread support for Sri Lanka against this Secretary General initiative from the Non-Aligned Movement (or NAM), which consists of 118 states that, in broad terms, mostly come from the Global South. On 9 March 2010, the coordinating bureau of NAM sent a strongly worded letter to Ban expressing its "deep concern" especially, it argued, in light of Sri Lanka not having been consulted and no UN organ having authoritatively called for such an advisory panel.²⁹ Note here that with China and Russia on the UN Security Council, Sri Lanka has so far been protected from resolutions and even from the nonbinding but normatively salient consensus signals that take the form of "Statements of the President of the Security Council". In addition, Sri Lanka's diplomacy very successfully mobilized states to vote against any condemnatory resolution in the UN Human Rights Council and indeed to instead vote on a resolution that applauded Sri Lanka for having ended the war. The NAM letter also pointed to

the announced intention of Sri Lanka to appoint a commission to address accountability issues (this would become the LRRC set up in May, mentioned earlier) and, more broadly, linked this intention later in the letter to the “country’s ongoing and relentless efforts aimed at reinforcing reconciliation and national unity” that needed to be given “space and time” to take their own course “without interference or unsolicited assistance.”

For our immediate purposes, it is the double standards argument that is worth drawing particular attention to, and that was emphasized in one way or another for a good chunk of the NAM letter:

The Non-Aligned Movement strongly condemns the selective targeting of individual countries, which it deems contrary to the Founding Principles of the Movement and of the United Nations Charter. In this context, the Movement firmly opposes the unilateral evaluation and certification of the conduct of States as a means of exerting pressure on Non Aligned countries and other developing countries.

There are later references in the letter to “human rights issues” needing to be addressed “in a fair and equal manner, ...with ...objectivity, impartiality, non-selectivity.”

By all accounts and not surprisingly, the letter was drafted by Sri Lanka’s Ambassador to the UN. When Ban and a number of states, such as the United Kingdom, reacted with dismay and no small degree of anger to the NAM letter, word went out from various UN missions of NAM states that they regretted the letter. It is not clear whether this means that these missions had not seen or approved the NAM letter, that their capitals had not signed off on it, or that they realized they had gone too far, or a combination of these.

In any event, Ban was not deterred, arguing that he had full powers as Secretary General to seek advice on such matters in such a manner—and, as already noted, he went on to appoint the three-member Panel. Sri Lanka persisted and some months later, in July 2010, another letter was circulating as a NAM draft statement, this time in advance of the NAM annual meeting.³⁰ Sources suggest again that this draft was 100 percent drafted by the Sri Lankan foreign ministry. For all intents and purposes it maps onto the March letter, while updating it by reference to the fact it was now objecting to the actual announcement of Ban’s Panel and that the domestic commission that Sri Lanka had promised to constitute (the LLRC) had now indeed been set up.

Very interestingly, this second July 2010 draft letter seems to have sunk without a trace, as there is not even an oblique reference to it let alone to Sri Lanka in any statements or texts emerging from the NAM annual meeting. Very clearly, one major reason was geopolitical in the extreme or, viewed more benignly, it was about the power of normative precedent even in cut-throat international affairs. By this I mean that a large number of states, notably those also members of the Arab League and probably also the OIC / Organization of the Islamic Conference, were concerned that Sri Lanka’s campaign—that campaign being both against a Panel being called in its case and more broadly against the Secretary General having such powers—would boomerang and undermine NAM efforts to persuade Ban to appoint another UN panel to investigate what happened on 31 May 2010, with respect to Israel’s seizure of the Gaza-bound flotilla of vessels. Sri Lanka sought to distinguish the two contexts, by arguing that on June 1 the Security Council had authorized such a Gaza-related panel but no such authorization had come from anywhere in the UN for a Sri Lanka panel. A critical mass of NAM states nonetheless insisted

that Sri Lanka take a back seat. Some may have been aided in their firmness by information of important ties between Israel and Sri Lanka in the realm of arms procurement, and perhaps in other areas of cooperation relating to the military or security services. Some may have pointed out that Sri Lanka was wrong in law, in that it was a consensus Statement by the President of the Security Council, not a binding resolution, that had “called for” a panel on the Gaza-bound flotilla incident and that “call” left it for the Secretary General create the panel within his own authority (the Presidential Statement also noting the Secretary General had himself already called for the panel, and implicitly endorsed his power to create the panel). But, some accounts also suggest that there may partly be a more gratifying explanation, namely, traces of a conscience amongst the leadership of some NAM states even when they fiercely hold onto hardening views about state sovereignty and passionate views about non-selectivity. 141028.90

NAM’s sidelining of the second Sri Lanka letter may also have tapped into a wider discursive context. By the time of the July 2010 NAM annual meeting, a number of highly respected international figures had been speaking out against Sri Lanka’s handling of the war as well as against Sri Lanka’s repressive governance and diplomatic tactics. By this time, Desmond Tutu and Lakhdar Brahimi, both Elders, had already presaged what would become the (earlier-mentioned) August 3 Elders statement when they wrote an opinion editorial in the Guardian in June 2010.³¹ In that editorial, they had made it known they were writing as and on behalf of The Elders as a whole. Consistent with this narrative, some accounts of what transpired within NAM around the July 2010 Sri Lanka draft letter make clear that more than one state told Sri Lanka that its conduct and attitude was putting it perilously close to the category of being a rogue state in the international system.

At this point, we can see the beginnings of a more nuanced ‘kindler and gentler’ Sri Lanka discourse (i.e. from mid to late summer 2010), including what seems to have been a good will tour of Foreign Minister Peiris through many important centres, from Beijing to New York to Delhi and now today London. During his China visit, Peiris made empathy-laced remarks about the Sri Lanka government’s sentiments and intentions that would take Sri Lanka a long way were they to prove to be more than mere words of a Foreign Minister in a foreign capital and to also actually match up with the institutional and political realities of the Sri Lanka government. This discourse includes also Rajapaksa’s September 2010 speech to the UN in which he both calls obliquely for the laws of war to be adjusted and says, in a now oft-referenced line, “Let me be clear, no nation on earth can wish Sri Lanka’s Tamil community more good fortune than Sri Lanka itself.”

But none of this gainsays that the argument based on a concern about double standards has somehow disappeared simply because it was not repeated in July 2010 NAM statements—even as it may show that double standards discourse does have its limits.

The relative ease with which a double-standards objection was made a pillar of the March 2010 NAM letter to Secretary General Ban speaks for itself about the salience of this argument. The question, for present purposes, is how might we think about the objection’s significance.

First let me give two other relevant examples from the realm of transnational truth and justice in order to take matters away a bit from the more emotive context of Sri Lanka, in which many may have trouble trusting many arguments from Sri Lanka’s government, in light of decades of experience with truth-telling from Colombo, and may tend wrongly to suppose that all arguments stemming from Colombo are not to be trusted.

Consider the post-9/11 (and some pre-9/11) conduct of the United States, both during the George W Bush era and since President Obama has taken office. Consider the position of the United States in relation to the slow dribbling out of information—much rising to the level of widely presumed truth—about methods used and decisions taken as part of the United States’ approach to the so-called ‘global war on terror’: deliberate extraordinary renditions to partner intelligence services, such as Syria or Egypt, who will torture renditioned persons and flip any information back to the US; authorization of a range of methods of so-called enhanced interrogation that included some free-standing practices that are clearly torture—such as the water-boarding that pre-Vietnam America learned from the French’s widespread use of it in Algeria—and included many ways in which a combination of such methods also clearly constituted torture; ‘ghost planes’ crisscrossing the globe and not only doing the transfer side of renditions but also delivering

prisoners to “black hole” detention facilities in countries like Uzbekistan; Abu Ghraib; Guántanamo; going to war in Iraq partly on the basis of known poor-quality intelligence, knowingly contrived linkages between terrorism and weapons of mass destruction, lies about al-Qaeda and Iraq cooperating, no UN authorization in a context when trained UN teams were reporting no evidence of WMD in Iraq, and no serious regard for the fact international law clearly prohibits preventive use of force of the kind at issue; high levels of civilian casualties from conventional warfare at different periods in both Afghanistan and Iraq; the ease with which the US—including President Obama even more enthusiastically than President Bush—has embraced targeted killings around the globe as a counter-terrorist tactic in contexts in which the only plausible legal argument is either that host states have given valid consent (when many have not done so publicly, e.g. Pakistan) or that the laws of war have already changed to bring counter-terrorism firmly into a transnational war paradigm and further and further away from the criminal law enforcement paradigm.

Have I missed anything? I am sure I have, but this list of examples of problematic conduct by the US is sufficient for present purposes. An important caveat should be lodged before I continue to discuss the relevance of these examples to the double standards issue, namely, that I do not wish to be understood as saying that all of these rise to the level of what the Sri Lankan military or government are accused of doing over the years, including in what Tutu and Brahimi call the “slaughter” of the last days of the war. But nor are there easy categorical distinctions in the case of many of the examples given. And, most centrally, the overriding commonality is that, when pushed by terrorism, the US got very ugly and remains quite ugly in its methods. It may have got much uglier if various aspects of the rule of law were not in place—here I include the inculcation of due process and sound legal analysis as a value system for military lawyers in a way it tends not to be the case in the CIA or amongst parachuted ideological lawyers in the Bush-era Departments of Defence, Justice and State—and if the US’ media and political democracy were less robust than they are.

Thus it is that one then turns to the following question: where have justice and truth been in relation to US practices? Can anyone tell me when the Rumsfeld or Cheney or Bush trial—or trials—will take place? We do not know whether the Department of Justice in the US will eventually acquire a combination of both principle and backbone, but I would not hold my breath. We do not know whether higher courts will overturn a lower court decision that accepts the arguments of the Obama Administration that civil suits by detainees cannot go ahead because of some sweeping doctrine of state secrets, but I would not hold your breath too much there either. Especially not in a US where President Obama places such emphasis on bridge-building—‘one America not a Red America nor a Blue America’—and on a forward-

looking ethos that has quite precise parallels in the look-to-the-future-not-the-past discourse of President Rajapaksa. Especially in a US where the very idea of a truth commission, let alone one recommended (forget imposed) by the UN, would bring the Tea Party into the White House. Especially not when President Obama has indicated at one point that reconciliation was his concern with respect to the conduct of the previous administration, by which he clearly means reconciliation within the US: he apparently sees no moral problem prioritizing reconciliation over truth or justice when the context of harm is in no way a self-contained one of Americans-against-Americans but rather is as transnational as one can possibly get—the primary victims of US counter-terrorism policy being non-Americans and the large percentage of harm occurring outside the US.

But there is no UN Panel of Experts to advise the Secretary General on how to deal with the United States' conduct of the 'global war on terror.' And there is no Lessons Learned and Reconciliation Commission in the US.

Let me now turn to a second example, that of seeking transnational justice through the route of universalized jurisdiction in another country's criminal justice system. Let us take the highest profile example for the past decade, that of Spain (even as, I hasten to add, some other countries, like Belgium, have at different points had broader laws and arguably more effective efforts to prosecute). Amongst the numerous cases of alleged crimes being investigated by the Audiencia Nacional (National Court) from around the world (which may include Sri Lanka now, but of this I am not aware), one case involved Americans being investigated, notably six lawyers where the issue is whether their legal advice was so poor or manipulated that they were complicit in the conduct they helped authorize. (Recent Wikileaks cables have caused some stir in Spain because of the pattern of meetings between the US Embassy and some members of Spain's investigating apparatus, and the clear pressure the US placed on Spain to see any actual prosecutions as disastrous for US-Spain relations.)

Now, let me play the devil's advocate from, say, Lincoln, Nebraska, USA.

Did you (Spain) not have a murderous civil war with vicious war crimes that led to no trials of members of the victorious side? When Franco died, did you not agree to an amnesty law extending back through the Franco dictatorship to the Civil War, which amnesty law you take so seriously that your national Judicial Council suspended one of your investigating magistrates (Judge Baltasar Garzón) for having proceeded with investigations into mass gravesites on a theory (that he sought to ground in international law as received by Spanish law) that the amnesty could not cover certain categories of crimes under international law after the Supreme Court ruled that a criminal law charge of prevaricación could go ahead against Garzón for intentional abuse of the law for having pursued this line of argument? And now you seek to try our citizens (our military officers, our politicians, Heaven forbid our lawyers), you seek to try our citizens based on a universal jurisdiction that does not apply to yourselves?

Spain's parliament cut back on the scope of its already qualified universal criminal law jurisdiction in late 2009 (although not nearly as far as some suppose) precisely because not only were countries—notably the US, China and Israel—pressuring it about sheer encroachment on their sovereignty but also, we must assume, because Spain in the form of its foreign service was being worn down over a decade of dozens of cases being investigated, indictments laid, and extradition requests issued by the sheer hypocrisy of Spain's position—or at least foreign perceptions of such hypocrisy. Indeed, I cannot of course prove, and I am only speculating, but I would not be surprised if it turned out that Judge Garzón,

the instructing judge most associated with Spain's judicial efforts, especially felt the force of the perceived double standard—on this dimension, he was Spain—that there may have come a point when he decided that, as an ethical and almost existential matter, he had to turn his sights inward on Spain's own record on the war crimes and crimes against humanity front. All of this is a way of saying that charges of hypocrisy can take their toll and prompt changes in conduct.

Having outlined two examples of hypocrisy (the US and Spain), let me now turn to a very clear instance of Sri Lanka's responses to external criticism and pressure, along antihypocrisy lines. What makes it especially interesting is how it references the West in general—and thus the record of Western states—but in the context of rejecting criticisms made not by states but particularly by major global NGOs. In late May or early June (the report on the Sri Lanka government website is dated June 1, 2010) in Washington DC,³² Foreign Minister Peiris is quoted as reacting strongly in the context of an open forum or a press conference to a question, characterized as a demand, by someone from Amnesty International:

When the sustained questions continued and an Amnesty International representative called for an independent, international body, alleging that the credibility of various government appointed human rights and investigative commissions were suspect, Peiris shot back, "Don't forget that only one year has elapsed since the end of the war."

"Look at the experience of other countries in similar situations. How long have they taken? I won't mention countries (but) some of them have taken 30 years. So, why are you applying double standards? Why isn't Amnesty International in a mood to apply these same standards universally? Why single out Sri Lanka. Is it because Sri Lanka is a poor country, Sri Lanka can be pushed around--kicked around like a football? Certainly not! We won't allow that by Amnesty International or anybody else."

Peiris said, "If you believe in a set of values, at the very least, apply those values across the board. Do not be selective. Do not be discriminatory," and continuing to pillory Amnesty International and the other human rights groups, asked, "Are those values applied with any iota of consistency. What about the performance of other countries in comparable situations? I think we have done a great deal within a very short period."

Peiris reiterated, "We don't want Amnesty International telling us what to do. We will take it from the Security Council, (but) we will certainly not take it from Amnesty International. What is the moral authority of Amnesty International? We will read the International Crisis Group and Amnesty International's reports, we will listen to them. But we do not think that they have any coercive moral authority to tell us what to do."³³

On the same morning of the present lecture, Foreign Minister Peiris gave an eloquent and sharply argued keynote speech just down the road at the International Institute for Strategic Studies in London, at a session I attended. There was a considerable amount that he said that was constructive and persuasive, but he also did indeed take a similar attack-tack when faced with a question from a London-based Amnesty International representative. He characterized Amnesty's criticisms as "almost colonial, patronizing and condescending" (all quotations are from my own notes of the exchange). Amnesty is "not objective, not dispassionate." Amnesty has a "political objective" in its criticisms of Sri Lanka. In

specific response to the question from the Amnesty representative about the state of progress of a Witness Protection Bill in Sri Lanka's Parliament, Peiris said "we are not going to accept a model you dictate." Finally, when an elderly gentleman asked a leading question from the floor, Peiris partly agreed with its thrust by referring to a "mercenary incentive" for NGOs to claim there are problems or to work from negative presumptions about government conduct or intentions, because it keeps them in a job as it were, "a way of life, very comfortable."

Is all this political hot air that leverages normativity when it is convenient to do so, but otherwise of no special import? I don't think so, or at least, it is certainly not entirely so.

First, let me get out of the way one of the uses of fairness and consistency arguments. Even assuming a given contrast is fully on point and not one of the cruder efforts to compare (in other words, assume that relevantly like cases are not being treated alike within the same system), it does not follow that a norm ceases to apply to one actor because it has not also been applied to another. Most moral or legal philosophers treat this as a no-brainer, essentially a variant of "two wrongs do not make a right" (or, perhaps more accurately, "being second to commit a wrong does not turn that wrong into a right"). You can't convert a wrong into a right because others have gotten away with the same wrong. If that is what Foreign Minister Peiris is trying to do, then it does not fly as a serious argument.

But what if one widens the aperture of our lens? On the ethical side, a notion arises that any actor that is itself guilty of inconsistently applying the norm—either not applying it, for example, to their friends or, in a situation of pure hypocrisy, advocating it but not applying it to oneself—should, from an ethical point of view, be precluded (or, to use a legal metaphor, stopped) from taking the institutionalized action it seeks to take. Perhaps such preclusion even extends, in a world of very prickly sovereign sensitivities as embodied by Foreign Minister Peiris, to a disentitlement to even state one's understanding of the truth through verbal criticism. Could this be in effect what Foreign Minister Peiris is saying? I think it may well be. But, if so, that does not mean he is correct in his premises, especially regarding an NGO like Amnesty International that has forged its reputation over the decades on scrupulous attention to accurate facts and consistent application of its mandate worldwide. One would have to show that in their worldwide remit, AI, or other criticized NGOs, do not take all governments—and indeed relevant non-state actors (such as the LTTE)—to task on the basis of the same applicable norms.

Showing such inconsistency and unfairness of attention is not something that Foreign Minister Peiris can easily do, in my view. (I will leave aside, for attention at some future date, my view that it is not persuasive to equate verbal criticism—especially when that criticism comes from non-state, civil-society quarters—with the kind of more coercive conduct that kicks in with more institutionalized conduct. For reasons related to a certain power to be selective within free expression, I do not see such selectivity as presenting the same ethical challenges as when institutional action is carried out hypocritically.)

But there is an even wider setting for that lens aperture that might also be what Foreign Minister Peiris is partly concerned with. That is the perspective on the legitimacy—not the strict legality, but the legitimacy—of the system as a whole. To the extent that a system operates in such a way that axes of criticism and calls for institutionalized coercion in the name of the system strongly tend to go in some directions while not in others, then we can speak of a problematic system-wide imbalance that

undermines its legitimacy. I will avoid, here and at this time, going into the legal philosophical discussion of whether such systemic illegitimacy ever circles back to render the system's norms illegal or renders coercion on the basis of those norms illegal. For present purposes, I content myself with observing that the systemic perspective at the very least adds fuel to the fire of the ethical concerns about pressuring one set of actors to account while leaving others only occasionally touched or, worse, untouchable.

Without getting into, let alone resolving, several other more theoretical questions that could well be asked, I will simply state my general view that double standards, selectivity, inconsistency, and hypocrisy—all notions that get at similar if not fully identical concerns—are valid concerns not only for the interstate legal system but also for the more fluid universe of transnationalized interventions in the name of law. And, beyond these being real normative concerns, it is significant from a purely practical point of view that national audiences can quite easily be motivated to rally around a selectivity critique made against external actors by their own government, especially in contexts in which the audiences already feel victimized, ganged up upon, misunderstood, isolated, and so on. This is so even if the contrasts being drawn by the government are crude (e.g. were Mauritania to tell the US to back off of criticisms with respect to slavery practices by pointing out the US had slavery until the US Civil War, or were Honduras to tell Canada to back off criticizing the lack of state protection for the many transsexuals killed in that country by pointing to press reports that gay-bashing attacks occasionally occur in Canada³⁴) or even if, let us assume, the contrasts are simply mistaken about relevant comparators. An example of such a mistake is when Sri Lanka asserts that a major difference between the Secretary General striking panels in relation to Gaza and in relation to Sri Lanka is that the Security Council authorized one but not the other—which is simply a misreading of what the Security Council did, as explained earlier. But, notwithstanding being mistaken, consistency arguments can, in the real world, persuade the wider populace even if those arguments conveniently ignore relevant differences (as in, the Secretary General's Gaza panel is an investigatory panel that is to probe and issue a report on its view of the facts and legality of the flotilla seizures while the Sri Lanka panel is only to give advice on what processes, if any, to initiate in future). In all these illfounded instances, the critique can still find a receptive ground 'back home'.

One way or the other, it seems to me—and here I am combining the discussion in each of these quandaries (the inside/outside one and the double standards one)—that truth transnationalizers have some sort of obligation to consider perceptions that their role is one or more of three things: external, imposed, and/or selective. When all three are in play, then the implications are all the more in need of serious reflection. In general, those establishing transnationalized truth processes or institutions, or those operating within already established ones, need to have regard to the following three approaches, strategies or modes of conduct:

First, such actors—truth transnationalizing actors—should associate themselves, and act in accordance, with the values and principles related to non-selectivity and consistency of treatment. Sometimes this will be more difficult where mandates and resources place constraints on what can be done, but, even then, it places some sort of obligation to seek changes to the mandate or to more effectively marshal resources to eliminate unjustifiably selective treatment. This mode of conduct has both a substantive-jurisdictional and a spatial-jurisdictional face. Here, by a substantive-jurisdictional focus, I mean the thematic focus circumscribed by a mandate, holding constant the geographical scope—so, if the focus is Sri Lanka and the issue is wartime conduct, it is unacceptable to focus only on the government and not also on the LTTE. Extending the example, if the focus is on the many dimensions of the breakdown of the

rule of law in Sri Lanka, it is important to also consider the nature of the LTTE when it was a de facto localized (undemocratic and

repressive) government in areas of northern Sri Lanka and in terms of what it would have been like had it become the government of a new state of Tamil Eelam. It is important to do this for a number of reasons that include the need to strike at certain myths such as the myth that abuse of human rights and undervaluing of democracy is somehow a Sinhalese attribute or that Sinhalese-dominated national-government repression explains the conduct of either LTTE leader Prabakaran and his officials, or the LTTE as a whole.³⁵

In further respect to the aforementioned opinion editorial by Desmond Tutu and Lakhdar Brahimi, they put it well and succinctly when they wrote in the Guardian last June about “obligations on the Tamil community within and outside Sri Lanka” and argued that “they also have to find the courage to admit the crimes of the LTTE committed in their name”, which will “help provide the platform for honest negotiation between the government and credible, independent representatives of Tamils and Muslims.” I would go further and say that, from a transnationalized perspective on truth, the bright lines of a border on a map should not dictate the chain of causation and responsibility that is relevant to knowing a reasonably fulsome truth. Depending on the transnational context, and depending on the mandate, the conduct of external actors and their related responsibility may well need to be brought into the picture, whether that means arms and intelligence suppliers of the government of Sri Lanka or organizations in the diaspora when it comes to the LTTE side of things.³⁶

Consistency of a spatial-jurisdictional sort applies especially to international institutions like the UN and also to non-governmental organizations that have a general mandate for the world or a whole region. I mean here that such organizations have some sort of obligation to make connections across geographically-identified situations, and rectify any differences in treatment of some situations that are not materially different in the nature of the issues or in the levels of seriousness than other situations receiving critical attention. This does not mean accepting to be browbeaten into backing off from one situation because one has not yet moved on to another (think of this as a sequencing issue)—that one cannot do what is right everywhere does not mean not doing right somewhere, where the circumstances lead one to a reasonable judgment that this “somewhere” needs to be made a priority. But, yet, it does mean not simply relying on such circumstances lazily or without concern for why comparable situations do not seem yet to be on the radar screen. Here, my assumption is that the record of NGOs like Amnesty International, Human Rights Watch and the International Crisis Group is far better than any state or any interstate forum where a combination of interest-based politics or diplomatic compromise drives the agenda. The UN Human Rights Council is an obvious example of an institution not well positioned to act consistently except where it delegates functions to arm’s length mechanisms such as the theme-based special rapporteurs who are (meant to be) independent experts and whose mandate requires holding all states up to scrutiny for adherence to the same norms.

Secondly, truth transnationalizing actors should self-consciously pay attention to the normative bases for the assumed legitimacy of their interventions—in an effort to persuade, as and when the need arises, all relevant national sectors (and indeed persuade themselves) that their normative involvement is justified. This must of course include rigorous and well-grounded appeals to relevant global and/or regional norms, and careful attention to factual nuances that may raise serious issues of limitations on

or exceptions to rights. In some cases, it means achieving an informed level of confidence that the research, findings and analysis of other bodies, upon which one is relying in some measure, merit being treated as authoritative for a given purpose. For example, when a co-author and I were preparing the overview paper called “The Breakdown of the Rule of Law in Sri Lanka: An Overview” for the Sri Lanka Campaign, we took care to make careful judgments about which organizations had, in our view, a record of producing accurate and fair work and then making sure that their Sri Lanka-relevant work was relied upon corroboratively and not as the sole basis for a specific conclusion about an aspect of the rule-of-law situation. Standard stuff, you will be thinking, and, yes, that is true. However, for an advocacy-oriented organization like Sri Lanka Campaign, where the general argument we felt needed to be made (i.e. the situation of “abysmal lawlessness” in SL) was so strong, it was all the more important to test that argument against a range of solid sources. This is not to say the document itself is even-handed. As one of the authors, I am aware of some of its limitations. For example, apart from slipping into perhaps an unduly polemical tone in several places (perhaps as a subconscious reaction to the hyperbolic tone often adopted by the Sri Lankan government), it does have as one limitation a focus solely on the failure of government institutions and associated rule of law—including over the period when the LTTE was running its own government institutions in insurgent-held areas. The reason for such focus is that the question of the rule of law was being addressed not as a historical matter but in relation to the practices of the sole government ruling, since the end of the war in 2009, all of Sri Lanka. At the same time, and returning to the first approach canvassed above, discussion is now going on within the Sri Lanka Campaign about whether we have the resources to produce a similar synthesis-style report about the nature of LTTE governance and conduct, which report would be conducive to a wider truth and to our overarching objectives of a sustainable peace through, and with, justice. And some discussion is also underway over how to report and evaluate the positive developments that the Sri Lankan government understandably wishes to emphasize (albeit in ways that do not always seem fully accurate and that almost always denies that there are serious problems worthy of external attention).

Thirdly, justifying one’s involvement as a transnationalized actor also can, and should, be connected to the nature of a situation in terms of the ways and extent to which the situation is already transnationalized, often thoroughly so. This could mean a range of things with respect to why such actors not only are justified in getting involved—for example and perhaps notably, because of some sort of transnationalized interest in a problem (international law’s characterization of some norms as creating obligations running from all states to all states, and so on)—but also why their involvement may well enhance the quality of the process in a way that the presence of only domestic actors cannot. This last point generates too many obvious examples to go into further, but I would say that the broader idea of transnationalization as a process enhancer does need more theoretical and analytical attention, which I hope to give in future work. The specific contexts of Honduras and Sri Lanka also suggest another important dimension. In these cases, I believe a good argument can be made not only that transnationalization is legitimate but also that the situation in each country may indeed merit a certain priority of (transnationalized) attention precisely because of the world-historical or region-historical significance of what went on and is going on in each context. In this respect, recall the earlier moral-hazards, demonstrator-effects discussion.

Fourthly, while this argument is quite suggestive at present without showing all the steps in the argument, a further consequence of simultaneously taking inside/outside and consistency/fairness dynamics seriously may well be that institutional hybridization should perhaps hold a special appeal for

us. Transcending of internal/external lines could also extend to the blurring of official/unofficial lines. In speaking of hybrids, I am both including the idea of institutions that are themselves hybrid—in terms of composition and process, for example—and also looking at a situation from a wider angle so as to treat different institutions and processes in terms of a virtual whole within which hybridization occurs largely through interaction across institutional boundaries which in turn may entail interaction across governance-jurisdictional borders. Allow me to use this as the opportunity to give an example of transnational inter-institutional hybridization, which may be an example that the Secretary General's advisory panel on Sri Lanka will look seriously at as a possible model—with all appropriate adjustments for context and institutional realities, with account taken of a widespread view of observers that this hybrid has not as yet succeeded, and subject to what I will say at the end of the lecture on the timing and staging of truth in relation to justice or reconciliation.

The model is that of the International Commission against Impunity in Guatemala (CICIG as the Spanish acronym), which was established four years ago in 2006 by a treaty between Guatemala and the UN. Note that this is a specifically criminal justice oriented institution, and not a truth commission (Guatemala has had two truth commissions in the last fifteen years, one an official one and one a civil-society one), although of course there is a truth-generating core to any criminal justice process. What is it and how is it a transnationalized hybrid? I will by and large rely on the CICIG's own self-description of its mandate and functions, as my own research into it—and notably its effectiveness—has only recently begun. 37

CICIG is an independent body with the mandate to support the Public Prosecutors Office, the National Civilian Police and other Guatemalan state institutions in the investigation of a limited number of sensitive and difficult cases in relation to the operations of illegal security groups and clandestine security organizations, with the purpose of dismantling such groups. A second reason it is in place—and has had its mandate extended to 2011—was the hope that CICIG's work would assist in strengthening the capacity of national judicial sector institutions, including prosecution and police institutions, to deal with illegal groups and organized crime in the future. CICIG has the authority to lead investigations into the existence of the groups, in all their dimensions including links between state officials and organized crime and their sources of financing. The lead responsibility for investigation and prosecution of individuals within the groups rests with Guatemalan institutions, principally the Attorney General, but CICIG is accorded an assistance role. Within the prosecution process, CICIG is able to tap into the existing Guatemalan Code of Criminal Procedure and participate as what is known as a “complementary prosecutor” (*querellante adhesivo*) in the prosecutorial process—a role I do not yet fully understand. The Commission also has legal standing to bring administrative complaints against public officials, in particular when officials have sought to obstruct the fulfillment of CICIG's mandate, and it can also act as an interested third party in disciplinary procedures initiated against such officials. Finally, it has a system-reform, public-policy role in that it is authorized to make recommendations to the Government for law reform—including mechanisms and procedures—both directed at the eradication of these groups and the strengthening of the state's capacity to protect basic human rights.

The immediate reason that the CICIG comes to mind is that both Honduran President Lobo and the Chair of the official CVR, Eduardo Stein, started musing out loud in late summer 2010—in a trial balloon kind of way—about whether this CICIG model might not be worthy of consideration for Honduras as well. (It is not entirely clear whether Stein was trial-ballooning as much as he may have been responding to media queries as a result of balloons set aloft by President Lobo.) In any event, my purpose is to draw

attention to it as an example of transnational inter-institutional hybridization but not, in the present context, to assess the pros and cons of the CICIG model. I would note, though, that I believe the civil-society CV should also look very carefully at how it appears to have functioned in practice and on its upsides and downsides in relation to other institutional options.

Without prejudicing such reflection on the relevance or non-relevance of CICIG for the Honduran situation, it is instructive to consider some of the comments that Eduardo Stein has made this past September in what I have called a trial-balloon mode. These quotations are from September, and appear to be long transcripts of comments by Stein, reproduced by one or more newspapers. These are my rough translations from transcripts in Spanish on the CVR website:

One way of looking at it is that creating CICIG is like hiring a foreign manager to try to improve the firepower of the national football team.

The agreement [between Guatemala and the UN] is not for purposes of substitution [of an international body for national ones]. That would be fatal. On the contrary, it is an agreement for institutional strengthening, that is to say, the UN is invited to create an International Commission composed of highly skilled experts in the prosecution of crime in order to put together criminal cases that can be brought before the Guatemalan justice system. But this Commission does not replace the Attorney General nor the courts.

I return now to some of the thoughts outlined in section II, on truth and interactive diversity of knowledge. Hybridization can have the major benefit of helping generate a certain kind of engagement that may shake participants out of comfort zones by exposing them to different perspectives—whether institutionalized perspectives or more general worldviews or backgrounds—and by placing pressure on a process to embrace some form of a dialogical rationality as opposed to the more monological rationality that arises when participants share too closely backgrounds, professions, cultural narratives, nationalities and so on. Apart from such a focus on cooperative intra- or inter-institutional relations, we should also not forget the age-old insight that diversity of perspective within a larger whole is also justified by ‘checks and balances’ and ‘jurisdictional competition’ kinds of benefits.

To take the recent example of the Turkel Commission set up by Israel to investigate itself with respect to the 31 May 2010 Gaza-flotilla incident, it was set up to include two respected international observers who are entitled to be full participants in the Commission’s deliberation process although without the right to vote. On the one hand, I would be surprised if these non-Israelis’ points of view did not enter into the persuasive mix in the minds of the Israeli members, especially given the special expertise in the laws of war that the Canadian member, the former Judge Advocate General, Brigadier General Ken Watkin, will bring to the table and the experience of Lord David Trimble, former First Minister of Northern Ireland, the line between the legal and the extra-legal in security situations. On the other hand, I can only imagine how difficult it would be for any commission to produce a whitewash—not that I am not assuming these Israeli commissioners are at all inclined to, as I know nothing about them—given that the non-Israelis will surely act as some sort of external conscience. Put differently, the presence of Trimble and indeed of Watkin gives me reasonable confidence that the report of the Commission will be fairer to the law than it might otherwise end up being—although fairness does not of course preclude that the Commission will arrive at interpretations of the facts and the law with which I may strongly disagree.³⁸

Without saying more than I should, I might also note parenthetically that I am inclined to think about the relationship between the CVR and the CV (which at the moment is an entirely virtual one as the commissions have not met) in terms of keeping each other honest. I do not mean 'honest' in the literal sense but in the more figurative sense, according to which the presence of another institution with complementary and to some extent overlapping mandates keeps an institution on its toes in the sense that a markedly superior performance from the other institution—for example, in the form of a more

persuasive report—will 'show up' one's own institution. The result will, I hope, be a fuller truth, including as may be produced by discussion and debate about any differences in findings, interpretations, recommendations or emphasis between the two reports. In the most simplified sense, as I have said more than once to the media in Canada or Honduras, "more truth is better than less." In a more complex sense, though, it is my expectation that it will not only be a matter of quantity (more truth)—although that will certainly be the case on the pure factual findings side of things—as a quality thing (deeper

truth): the presence of the CVR and the CV means the quality of what each produces should be higher than if the other did not exist as its shadow.

C. THE TIMING QUANDARY

Partly in light of the inside/outside quandary and the fairness quandary, how should processes related to truth be timed or staged in relation to processes related to justice and reconciliation?

Allow me to set up this discussion by returning again to Eduardo Stein. One way or the other, the preceding discussions emphasized issues of imposition (and perceptions thereof). In reflecting on the CICIG model from Guatemala, Stein was making clear that he is not thinking a straightforward transplant makes sense. This follows from the emphasis he placed on the need to take great care with national dignity in crafting the design, the time it takes to do so, and the fact that the final outcome will reflect a variety of inputs over that time. Here is how he put the matter (this again being my provisional rough translation):

How does one avoid a commission of this nature being perceived as a loss of what was the country's own capacity to govern?

The decision in my country [Guatemala] about this impunity commission [CICIG] lasted almost four years, during which the debate was very wide, very diverse, at some moments difficult, but at least citizens could know the different opinions directly from their deputies in Congress, from the Court of Justice, from the Attorney General, and from the upper chambers of the tribunals.

Doing something like this in a hurry without citizens understanding the reasons for doing so, that is politically risky, but it also risks a round of infighting within the State, that also is not healthy for democracy.

In the course of discussions amongst some of us involved in the Sri Lanka Campaign, reflection on how to think about truth in relation to either or both reconciliation and justice has become central in considering what would be the desirable outcomes of the current UN Panel established by Ban Ki-moon to advise him on ways forward for Sri Lanka. Here, note two constraining conditions about that panel's work. One condition is that the Secretary-General and thus this Panel is only concerned about the

question of the conduct at the end of the war, and possibly also concerned about internment, detention and resettlement issues that may themselves be partly governed by the laws of war/international humanitarian law. This Panel is not there to deal as such with other wrongs in the past, let alone with the current state of affairs in Sri Lanka. The second constraining condition is precisely the reasonably held view that the very situation of the highly compromised rule of law in Sri Lanka determines the extent to which anything serious or robust can emerge from Sri Lanka's own political institutions—or politically created such as the LLRC—at this time.

This has consequences for the justifiability, from the perspective of need, of an international body or of a transnationalized hybrid body such as a CICIG. Recall Louise Arbour's reasoning, which was essentially that the international system is the necessary fallback because Sri Lanka has shown persistently for years that it will not engage in serious scrutiny of its own officials. The preference expressed in June 2010 by the two Elders, Bishop Desmond Tutu and former Algerian Foreign Minister Lakhdar Brahimi, in their already-noted Guardian article, seems to follow a similar logic, although their institutional recommendation adds a dimension (reconciliation) not specifically addressed by Arbour. They stated their view as follows:

There is a growing body of evidence that there were repeated and intentional violations of international humanitarian law by both the government of Sri Lanka and the Liberation Tigers of Tamil Eelam (LTTE or Tamil Tigers) in the last months of the war.

President Mahinda Rajapaksa's decision earlier this month to appoint a commission on lessons learnt and reconciliation is a step in the right direction but not nearly enough. There is no indication, as yet, that the commission intends to hold anyone to account for any violations of domestic or international law.

Without a clear mandate for legal accountability, the commission has little chance of producing either truth or reconciliation. Nor will victims and witnesses feel safe in giving evidence.

The Elders believe an independent, international inquiry, with the ability to gather evidence within the country, is the best option. We hope this will be the recommendation of the expert panel due to be set up to advise the UN secretary-general, Ban Ki-moon.

If so, Sri Lanka's friends should then press the government to accept such an inquiry. In our experience in South Africa and other countries, these kinds of inquiries work best alongside a full and open reconciliation process. This would allow the suffering—and mistakes—of all communities during decades of war to be acknowledged.

How to think about this proposal from these two eminent Elders? I suggest that we approach their proposal starting from the premise that (a) contextualization and (b) staging/timing issues need to be considered together when it comes to "reconciliation."

One of the legacies of 70+ processes in various countries over the years—and perhaps mostly due to South Africa as a foremost example—is that we sometimes may tend to assume "truth and reconciliation" are like bonded atoms in a compound that necessarily has something essential to do with both peace and justice. Part of this assumption is that they (truth-seeking processes and reconciliation-

seeking processes) should take place coterminously in transitional or post-conflict situations. Note how the Tutu/Brahimi view does advocate a co-terminous treatment of truth and reconciliation, albeit with the very important nuance of an institutional separation with truth-generation having a central international institutional dimension while institutional processes directed towards reconciliation would be national. Even as their proposal for a form of inter-jurisdictional hybridity creates a separation of truth and reconciliation, the issue to be discussed is the fact that they still do occur coterminously on the Tutu/Brahimi proposal. However, there are good reasons to reflect longer and harder on this simultaneity.

Let me make some brief general remarks on contextualization as part of thinking about timing and in particular about the simultaneity assumption. We must think hard about how—in a given context within a given geopolitical environment and within a given regional or global normative environment—processes related to truth and reconciliation should be sequenced if meaningful and sustainable justice and reconciliation are to be given a chance. South Africa is not Peru is not Cambodia and neither of them is Honduras or Sri Lanka. That said, with respect to two factors, there is a similarity between the situation of Honduras and Sri Lanka, whatever their many differences. First, justice and, perhaps especially meaningful reconciliation, are very hard to achieve in the face of the reluctance and resistance of current political power-holders who include in their ranks some—if not many or most—of the persons whose individual responsibility would be under scrutiny in any justice process. A Wikileaks cable from the US Embassy in Colombo made exactly that point. Ambassador Butenis cabled Washington on 15 July 2010 with the following observation: “There are no examples we know of a regime undertaking wholesale investigations of its own troops or senior officials for war crimes while that regime or government remained in power. In Sri Lanka this is further complicated by the fact that responsibility for many of the alleged crimes rests with the country’s senior civilian and military leadership, including President Rajapaksa and his brothers and opposition candidate General Fonseka.”

39

Second, the lack of a passage of time—the fact of being in the raw early stages of a transition—also speaks against meaningful reconciliation and justice efforts. We need only recall the post-Liberation period in France at the end of the Second World War and be grateful that Sri Lanka has not followed the French example. In the 1944-1958 period (but primarily 1944-1949), a combined cleansing and vengeance process that became known as L’Épuration took place. L’Épuration saw, on some accounts, some 3000 execution sentences handed down against French collaborators from courts specially created by General de Gaulle’s transitional regime, with something like 1200-1500 of these death sentences actually carried out. This is apart from the wholesale and often rabid street justice that French citizens were permitted to mete out upon each other, which almost certainly saw killings in the tens of thousands of those deemed to have collaborated (as well as those killed either in personal settling of accounts or as political assassinations as wartime resistance groups vied for post-war positioning). Quite apart from executions as post-war justice, post-war France saw various tribunals or juries set up to judge the conduct of persons in different professions or sectors of society, and to decide whether they should lose their jobs and/or various privileges of citizenship. Even as these proceedings had certain merits as non-criminal law mechanisms, they were not noted for their procedural protection for the persons accused of having assaulted French national dignity, thereby dishonouring themselves. 40

We should also ask whether truth-only commissions have possibly done a better job at the truth-revealing function when not fettered by a simultaneous reconciliation function.

Could it be that the luxury of the single function allows for more expansive and highquality conclusions about the truth? This is my instinct. Without being able here to elaborate, let me just say that a simultaneous reconciliation function can capture or coopt the truth function, because it produces pressures to instrumentalize (by downplaying or generalization or even omission) in order to enhance the chances of the right kind of reconciliatory social dynamic emerging. Admittedly—and this is a crucial caveat—the institutional separation of functions in the Tutu/Brahimi proposal (into an international truth component and a national reconciliation component) diminishes this likelihood, but it does not eliminate it if there is intended to be interaction between the international truth process and the national reconciliation process.

Beyond these problems of reconciliation colouring how truth is approached, there is the more straightforward issue of sequencing. Surely, for a variety of reasons, the most stable (not to mention most just) form of reconciliation is one based on the fullest possible knowledge of relevant truth/s. Without getting into details of the Spanish example, this is how many would view what has (not) happened in Spain. Spain not only set aside justice from the start of its transition, as already noted in discussing the tensions between Spain's extra-territorial criminal jurisdiction and amnesties, but it then created a constrained process of negotiating what became known as La Transición, that kept many things off the table in the interests of a peaceful transition. This negotiation process then generated its own narratives about reconciliation; the fact of having negotiated a constitution without a coup, or worse a descent into civil conflict, was treated not just as a pragmatic victory—one for which it might well have been worth sacrificing both justice and truth— but also as itself identical with Reconciliación. Making it out of the Transición was itself a victory and this victory generated a kind of story of elite-level acceptance of the rules of a new party-political game within a liberal democratic constitution qua political justice qua reconciliation. Yet, many—admittedly primarily those of the left and centre-left of the Spanish social and political spectrum—feel there is a serious lack in the soul of Spain, a historical amnesia to go along with the historical amnesties. As Spain enters the second decade of the second millennium, there seems little appetite, interest or will for capital“J” Justicia with time itself having made that largely redundant even with respect to the Franco years (ending with his death in 1975). But, very much alive seems to be a sense amongst a critical mass of Spaniards that La Verdad in the form of a national Memoria Histórica very much needs to be part of Spain's post-Franco journey in order that a fuller Reconciliación can be possible, a knowledge-based reconciliation not one based on seething sub-texts. 41

But what about Justice plus Truth, you might ask? Unfortunately, the same may apply to formal justice-seeking especially regarding justice-seeking in the sense of criminal justice, which arguably tends to take all the air out of the room. Done too early, justice processes can easily be victor's justice and degenerate into procedurally corrupted justice. This is all the more so if early-stage justice processes are carried out by institutions with little social trust, such as, for example, the court system as it stands at present in Sri Lanka and in Honduras, both. Each conviction of a person associated with the losers in a conflict or social struggle and each acquittal or light sentence for a person associated with the prevailing power structures will foster cynicism. Truth will both be and be perceived widely as distorted and reconciliation will be thin or fragile.

As for internationalized trials at an early stage, they too have drawbacks. They can drag on forever; they give the misimpression that a wider structural justice is being dealt with (e.g. the situation with respect to the rule of law in a country) when at best individual justice is being dealt with; they can juridify and, to that extent, fetter truth telling and a sense of the historical record that will reach the average person; they can sensationalize; and their very prospect arguably deepens the inside/outside laager mentality in the country subject of the trials. One has only to read two extremely well-researched books on the efforts to try Germans after the Second World War to realize just how little may have been accomplished in terms of these trials playing a serious role in educating Germans (truth) about the nature of German society's role in the functioning of the Nazi system. 42 That Germany has emerged coming to terms with its society's responsibility for the events of the Nazi era far more reflectively than, for example, societies like Austria and Japan have come to grips with their conduct is probably due much less to criminal trials than is widely assumed. 43

In light of these considerations, and now speaking only of Sri Lanka, it seems to me that the priority goal should be to assist, prod and pressure (in equal measure) Sri Lanka to get on the road to a state of affairs in which there is well-founded trust that the domestic rule of law is capable of and will end impunity on a forward-looking basis. If and when one gets to that state of affairs, the politics within Sri Lanka, including the politics of engagement with the UN, other states, and external NGOs as well as diasporic critics, may (and hopefully will) result over time in revisiting of the alleged war crimes and crimes against humanity committed by both the government and the LTTE—and indeed may also pave the way to a revisiting of various 'peace time' crimes like torture, extrajudicial execution, and disappearances. Here, the reference to “over time” is central: criminal law justice or truth-seeking refracted through criminal law justice arguably should not be the priority in the Sri Lankan context for the immediate future—on condition that serious processes of truth-seeking, including internationalized and transnationalized ones, are able to go forward.

This all seems rather defeatist, I realize many of you may be thinking. Indeed, I acknowledge that I am to some extent in a thinking-out-loud mode here and not fully persuaded by my own line of thinking. But, sticking with this line of argument for the time being, I believe we should be open to seeing a realist approach to reconciliation and, especially, criminal justice, as not necessarily a capitulation to all that is brutal and craven and indeed evil in this very flawed world. In contrast, we might want to reflect, philosophically as it were, on the sense in which truth can be its own form of justice and not to be treated as something of value only in its instrumental relationship to criminal justice or reconciliation. 44 Beyond the free-standing value of truth as a form of justice, if truth may need to be clearly established and wider populations somehow persuaded, over time, that the truth processes were legitimate and the truth told substantially correctly, then there may arise a more solid foundation for reconciliation (which process will necessarily need to work out where criminal and compensatory justice fit into the picture).

How might all this relate to the role of the Secretary General's Sri Lanka Panel, whose job is essentially to advise him and the UN on what to do in the future?

I would suggest that the Panel first recommend the creation of an international commission with a rigorous investigative and truth-determining mandate but not a mandate extending to a prosecution function. I would suggest a second part of such an international commission's mandate should be a report—that is, to be clear, by the commission that I think the Panel should recommend to be created, not by the present Panel—on what should follow its own investigation and truth-determining process, in

terms of the reconciliation and justice themes and in terms of the kinds of changes needed to the rule of law situation in Sri Lanka for there to be any connecting up between both political and justice institutions in Sri Lanka and the results of the body's truth-seeking investigations.

This second future-oriented function of the international commission will need to address seriously whether there is a real prospect of resuscitating the rule of law without some kind of ongoing international role including possible hybrid national/international bodies. The commission will need to reflect on models such as the CICIG (Guatemala) example and other examples of hybrid international/national processes that may have worked better than CICIG. That said, the commission should not be solely focused on criminal justice as necessarily the next stage. A CICIG-like body or newly-designed hybrid body may well be what is needed to extend the investigation and truth-determining mandate of the international commission beyond the warfare and immediate-post-war context into the more general and contemporary peacetime situation of Sri Lanka—on the basis of an assessment that eventual legal accountability for war crimes and crimes against humanity is a chimera without the infrastructure and culture of the rule of law.

There can be little doubt that such a recommendation from the current UN Panel (for such an international commission to be created with the double mandate I suggest) will be resisted vigorously by Sri Lanka, perhaps for some time. Even if or when Sri Lanka reacts more positively to such an international commission, one would naturally expect a protracted period of debate and discussion would occur, oriented toward getting the government and indeed Sri Lanka as a society to the point that it will enter into an agreement with the UN for cooperation with the international investigation and truthdetermining commission.

I wish to end these “meditations” by doing a distant colleague the honour of something he did not expect or ask for, but that I asked his permission to be able to do. That colleague is Basil Fernando, Executive Director of the Hong Kong-based Asian Human Rights Commission and one of the most insightful observers of the Sri Lankan context. His work provided the central conceptual pillars for the Sri Lanka Campaign report mentioned earlier, “The Breakdown of the Rule of Law in Sri Lanka: An Overview.” Fernando is himself a Sri Lankan of Sinhalese background, who has lived effectively in exile from Sri Lanka for the past couple of decades.

I wish to quote (with his permission) from some recent ideas that Fernando has put forward on the notion, introduced above, of ‘truth as its own form of justice’ and how this relates to the quandary of how to sequence truth-seeking in relation to both reconciliation and accountability processes. His ideas emerged after several days’ email exchange in October 2010, towards the end of which I had come to articulate the outlines of what I have set out above. Here is what he wrote several days ago. I could not have put it better myself, which is why I have decided to end this lecture with his words and not mine:

I tend to agree with this approach. It covers many areas which have worried me for a long time, about Sri Lanka and Cambodia. There is a lot to think about.

There have been many missed opportunities due to trying to hurryingly initiate criminal justice processes, relating to situations where violence of great magnitude has taken place, often ignoring the political processes that arise as a result of such situations. By separating the need to find and articulate

truth and bring culprits to justice, opportunities can be found to deal with both, but not necessarily at the same time. Ferocious political reactions arising out of fear of criminal actions, can give rise to political processes that further suppress the victims and silence many who want to, and in fact feel the need to, speak out the truth.

If opportunities are created for establishing truth, without immediate linkage to establishing evidence valid for legal purposes, great moments of creativity can be evolved, which in turn may change the political dynamics in the particular country or at least create a more conducive social climate, where more initiatives for reconciliation is possible.

May I illustrate this with one example? Between 1987-1991, there was a period of intense violence in Sri Lanka, particularly in the South. In 1994 there was a change of the government, particularly due to popular reaction against large scale forced disappearances which took place at the time. The government appointed several fact finding commissions. It established around 30,000 disappearances, done by police and military. Several international groups demanded immediate prosecution. Hardly anyone was prosecuted and the whole affair was gradually hushed up. The whole society had no occasion to get involved in stating what it knew about what happened and reflect on the political, social and legal consequences of these events.

If such a process had happened, in all probability, the society and the international community would have gained a better insight into what was happening and the subsequent developments may have taken a different turn. Instead, new political initiatives found favour with the military, and the ferocity of the violence shifted to North and East. The international community quietly forgot about what happened between 1987-1991, and attention shifted to the "New Conflict". The Truth of what took place to cause such massive disappearances is now no one's concern. If the international community had a broader outlook than merely demanding prosecutions, it would have responded differently.

Between correct sounding slogans and the actual potential in a given historical situation, there often is vast gap. As human rights groups we need to broaden our approach to meet with such situations. 45

With these challenging words, I conclude this Transnational Justice Lecture on the transnationalization of truth.

Thank you for attending and thank you for listening.

1 Professor of Law, Osgoode Hall Law School of York University, Toronto; Director (on leave, 2010-2011), Nathanson Centre on Transnational Human Rights, Crime and Security. This paper was prepared while an Ikerbasque Fellow, 2010-2011, with Basque Government's Foundation for Science and while based at Deusto University, Bilbao. The author is currently serving as one of ten commissioners on the Honduran Comisión de Verdad (Truth Commission) established in June 2010 by a coalition of six human rights non-governmental organizations, known collectively as the Plataforma de Derechos Humanos. He is also a member of the Advisory Council of the Sri Lanka Campaign for Peace and Justice.

2 Also, note that this piece, with its source in a lecture, is very lightly footnoted. Where footnoted, it is as much as an aide-memoire to myself as for any other principled reason.

3 "Bodies of Knowledge: A Diversity Promotion Role for the UN High Commissioner for Human Rights" in Philip Alston and James Crawford, eds., *The Future of UN Human Rights Monitoring* (Cambridge: Cambridge University Press, 2000) 403-437; "Towards the Institutional Integration of the Core Human Rights Treaties" in Valerie Oosterveld and Isfahan Merali, eds., *Reaching Beyond Words: Giving Meaning to Economic, Social and Cultural Rights* (Philadelphia: University of Pennsylvania Press, 2001), chapter 1 (pp 7-38, fn: 213-225); "Diverse Persuasion(s): From Rhetoric to Representation (and Back Again to Rhetoric) in International Human Rights Interpretation" (January 24, 2008). CLPE Research Paper No. 4/2008, Vol. 4, No. 1, available at SSRN: <http://ssrn.com/abstract=1087339>.

4 In the working paper called "Diverse Persuasion(s)", *ibid*, I discuss a certain existentialist approach to legal judgment in the name of human rights, in terms of what I call the "rhetorical responsibility" of the person judging.

5 It bears emphasizing that the following summary is my responsibility alone, and does not necessarily reflect the assessments of facts or the views of my co-Commissioners on the Comisión de Verdad. Further, even from my own point of view, these are provisional views, which I am open to revising if errors are pointed out; in that respect, I wholeheartedly welcome communications that point out any inaccuracies. Finally, this overview is, by and large, schematic and general. As such, both detail and nuance--of the sort that will be found in the final report of the Comisión--will, for the most part, necessarily be lacking.

6 Cable from Ambassador Hugo Llorens to Department of State Legal Advisor Harold Koh, "TFHO1: OPEN AND SHUT: THE CASE OF THE HONDURAN COUP", Reference ID 09TEGUCIGALPA645, July 24, 2009 (classification "Confidential"), available at <http://www.wikileaks.ch/cable/2009/07/09TEGUCIGALPA645.html> [Llorens-Koh cable].

7 Associated Press, "Honduras' Lobo: Zelaya Wanted To Stay In Office -- Honduras' Lobo Says Ousted President Zelaya Told Him Point-blank He Wanted To Stay In Power", *WashingtonPost.com* (January 29, 2011), available for download at <http://www.washingtonpost.com/wp-dyn/content/article/2011/01/29/AR2011012903633.html> (last accessed February 8, 2011).

8 Llorens-Koh cable, above note 6.

9 Indeed, the Supreme Court not long after the ouster generated a package of documents which it put up as a slide show on the Poder Judicial (Judicial/Power/Authority) website, in an effort to defend itself as not having been part of any coup; it wrote dozens of letters around the world (including the International

Tribunal for the Law of the Sea, in Hamburg...) asking for solidaristic support from the world's judiciary against accusations it had participated in the coup, and uploaded those letters and the one response it apparently received (from the Supreme Court of Costa Rica, which simply thanked them for the letter and noted it had been received).

10 Marc Lacey, "6 cited in Honduran leader's ouster", *New York Times* (July 7, 2010), available for download at <http://www.nytimes.com/2010/01/08/world/americas/08honduras.html?ref=josemanuelzelaya> (last accessed February 8, 2011). On January 29, 2011, another Wikileaks cable was released, Cable

10TEGUCIGALPA16 FROM Ambassador Hugo Llorens, "CHARGES FILED AGAINST MILITARY FOR FLYING ZELAYA OUT OF HONDURAS", available at [http://](http://www.wikileaks.ch/cable/2010/01/10TEGUCIGALPA16.html)

www.wikileaks.ch/cable/2010/01/10TEGUCIGALPA16.html. See further reference to this cable in note 13 below.

11 Elizabeth Malkin, "Honduras: Court clears military officers of charges," New York Times (January 27, 2010), available for download at <http://query.nytimes.com/gst/fullpage.html?res=9D00E2DA113AF934A15752C0A9669D8B63> (last accessed February 8, 2011).

12 While there is a near unanimity amongst external actors (some Republicans in the US Congress notwithstanding) that there was a coup, there is a spectrum of views on what constituted the coup. Even within US government circles, we know of two diametrically different legal analyses. On the one hand, a truly problematic legal memo (dated in August 2009) from a foreign law 'expert' working with the Library of Congress concluded that the only unconstitutional conduct on the part of the actors responsible for ousting Zelaya was the fact of forcibly flying him out of Honduras—due to his constitutional mobility rights. American journalists to whom I have spoken say this memo was sometimes on hand, or referred to, when Republican members of Congress were seeking to moderate the rigour of the US' response to the ouster. See Directorate of Legal Research for Foreign, Comparative and International Law, Law Library of Congress, "Honduras: Constitutional Law Issues", Report for Congress LL File No. 2009-002965, August 2009 (prepared by Norma C Gutierrez, Senior Foreign Law Specialist), available at http://schock.house.gov/UploadedFiles/Schock_CRS_Report_Honduras_FINAL.pdf. On the other hand, the above-mentioned Wikileaked Embassy cable signed by the US Ambassador contains a much more sophisticated and nuanced analysis which concludes that multiple violations of the constitution were part of the coup. No fewer than seven purported grounds of constitutionality for the coup are analysed and found wanting, with at least one being characterized as a "fabrication" (the supposed resignation letter from Zelaya) and another as a "canard" [spelled as "canard" in the Embassy memo] (this being the argument raised after the ouster that the mere fact of Zelaya proposing a constituent assembly automatically stripped him of the presidency). Interestingly, this memo was sent towards the end of July—i.e. before the August Library of Congress memo had been generated. See Llorens-Koh cable, above note 6. To date, I have seen no evidence that the Department of State used (let alone released) this opinion to counter the use of the far-less-damning Library of Congress memo as an authoritative legal analysis by Republican members of Congress. I am specifically interested to know whether the Department of State shared this Embassy analysis, or other Department of State analyses benefiting from the Embassy analysis, with the members of Congress including Senator John Kerry who demanded that the Law Library of Congress memo be withdrawn in October 2009: see J A Jacobs, "Law Library of Congress refusing to retract report on Honduras coup", compendium of two newspaper reports, November 1, 2011, available at <http://freegovinfo.info/node/2796>. The two newspaper reports are Sarah Miley, Law Library of Congress refusing to retract report on Honduras coup: report, Jurist (Oct 31, 2009), available at <http://jurist.law.pitt.edu/paperchase/2009/10/library-of-congress-refusingto-retract.php>; and Lesley Clark, "Library of Congress stands by report on Honduras coup," McClatchy Newspapers (October 29, 2009).

13 Thomas Legler, "Coups Coalitions and the Collective Defence of Democracy in the Americas: The Honduran Paradox", Paper prepared for delivery at the 2010 Congress of the Latin American Studies Association, Toronto, Canada October 6-9, 2010, available at <http://lasa.international.pitt.edu/members/congress-papers/lasa2010/files/1768.pdf>. In terms of the notion of a "coup coalition" going well beyond the military, this also appears to be the assessment in the above-cited US Embassy's Wikileaks cable, note 6, that contains the damning legal analysis of purported justifications for Zelaya's ouster; that cable concludes "the actions of June 28 can only be considered a coup d'etat by the legislative branch, with the support of the judicial branch and the military, against the executive branch." The more recent US Embassy cable, note 10, contains the following observation by US Ambassador Llorens, when considering new speculation in January 2010 that the Attorney General of Honduras wanted to secure a conviction of the military before any amnesty law came into effect, as the Attorney General was, speculation had it, miffed that the military's expulsion of Zelaya from the country had undercut his ability to continue prosecuting Zelaya under the charges lodged on June 25, which he could have continued doing if Zelaya had been taken into custody and kept in Honduras: "However, it is important to note the Supreme Court, which will hear the case, played an important role in league with the military in the coup de 'tat [sic] of June 28." (Recall the President of the Court ended up dismissing the case on his own.) The posture of the Attorney General in relation to the military will need to be clarified. Such clarification will need to include the tensions between the image of him acting as rule-of-law guardian and the US Ambassador's acceptance as fact that the Supreme Court colluded with the military. On the latter, the question arises: if the Supreme Court colluded with the military and if it was the Attorney General's June 25 laying of charges that led to the "alleged" warrant (Llorens' words in the first-released Wikileaks cable), (how) was the Attorney General somehow outside the coup coalition despite having been the one to bring the charges that were essential to the Supreme Court being "in league with" the military (again, per Llorens)?

14 Ed Vuilliamy, "Venezuela coup linked to Bush team: Specialists in the 'dirty wars' of the Eighties encouraged the plotters who tried to topple President Chavez," (April 21, 2011) *The Observer*, at <http://www.guardian.co.uk/world/2002/apr/21/usa.venezuela>; Embassy of the United States, Venezuela, Public Affairs Office, "State Dept. Issues Report on U.S. Actions During Venezuelan Coup (Inspector General finds U.S. officials acted properly during coup)", Press release, July 30, 2002, at <http://web.archive.org/web/20061006053902/embajadausa.org.ve/www1927.html>

15 Admittedly, reading this 2009 General Assembly resolution as a breakthrough affirmation of a universal anti-coup norm is not without its difficulties given changes in power that have gone uncondemned by the General Assembly elsewhere in the world and given that amongst the UN member states that were part

of the General Assembly "unanimity" would have been a range of states not plausibly characterizable as democracies—although the semantic pliability of the word "democratic" (People's Democratic Republic of Korea, i.e. North Korea) and its overlap with the term "people" (People's Republic of China) may be such that these states were 'happy' to treat any military disturbance of constitutional order as condemnable at the UN level (whether based on a rule of law or a democracy rationale). But what of recent changes of power that have gone uncondemned? In terms of comparisons, we can recall that, in 2006, an even more blatant military coup occurred in Thailand. Prime Minister Thaksin, who had rubbed

traditional political elites the wrong way with his own populism, was ousted and never returned to Thailand—I say “returned” because he was actually attending a session of the UN General Assembly in New York when the coup occurred. Not even that boldness on the part of the Thai coup coalition was enough to produce a UN General Assembly resolution and there was comparatively little by way of official (states) outcry. The regional norm there—represented by the Association of Southeast Asian Nations (ASEAN)—was very much one of non-intervention in such ‘local’ matters, and this may well have been refracted onto the UN level. All that said, in fast-moving times, perhaps the three year gap between Thailand in 2006 and Honduras in 2009 was enough for the normative terrain to have shifted—although one must still cautiously keep in mind that the OAS regional law overlay may still be invoked, in Asia in particular, as the distinguishing point between Honduras and Thailand.

16 Thomas Legler, “Coup Coalition” at footnote 9 in his paper. A journalist with a leading newspaper in the US has also told me that s/he believes this quid pro quo to have taken place, but that proof of the deal will be very difficult to turn up. We might also note with interest that the US approach seems to have a precedent with respect to what the Inspector General of the US Department of State has found as a fact (without condemning it as inappropriate) in relation to the Venezuela coup attempt of 2002: “Both the Department and the embassy worked behind the scenes to persuade the interim government [created by the coup] to hold early elections and to legitimize its provisional rule by obtaining the sanction of the National Assembly and the Supreme Court.” See State Dept. Issues Report on U.S. Actions During Venezuelan Coup” note 14.

17 See the Frente’s website at <http://resistenciahonduras.net/>. The tendency in Honduras is to refer to “la Frente” for the organization and “La Resistencia” for the wider social phenomenon, but this is not a consistent practice either.

18 The CVR’s website is <http://www.cvr.hn>.

19 The CV’s website is <http://www.comisiondeverdadhonduras.org>. In Spanish “de verdad” without “la” (as in “de la verdad”) can mean both “real” (or “true”) and “truth”—thus the Comisión de Verdad’s is formally intended to mean Truth Commission but, at another level, it could also mean the Real (True) Commission.

20 James Yap and Craig Scott, “The Breakdown of the Rule of Law in Sri Lanka: An Overview” (September 22, 2010). Available at SSRN: <http://ssrn.com/abstract=1682133>.

21 Office of War Crimes Issues, US Department of State, Report To Congress on Incidents During the Recent Conflict in Sri Lanka, October 22, 2009, at <http://www.state.gov/documents/organization/131025.pdf> (last accessed January 31, 2011).

22 See also the Office of War Crimes’ follow-up report in August 2010 in which it expresses serious misgivings about the LLRC: Office of War Crimes Issues, US Department of State, Report To Congress on Measures Taken by the Government of Sri Lanka and International Bodies To Investigate Incidents During the Recent Conflict in Sri Lanka, and Evaluating the Effectiveness of Such Efforts, August 11, 2010, at <http://www.state.gov/s/wci/srilanka/releases/145884.htm> (last accessed January 31, 2011).

23 BBC News, “UN chief sets up panel on Sri Lanka war” (June 22 2010), at <http://www.bbc.co.uk/news/10384964>; Matthew Russell Lee, “As Sri Lanka Panel Meets With Nambiar, 4 Month Clock Frozen, Pillay's Office Will Staff”, Inner City Press (July 20, 2010), at <http://www.innercitypress.com/sri2experts072010.html>; “Secretary-General Holds First Meeting with Panel of Experts,” UN Doc SG/SM/13104 (September 17, 2010) at <http://www.un.org/News/Press/docs/2010/sgsm13104.doc.htm>.

24 To see the names of the LLRC Commissioners and the Warrant issued by President Rajapaksa that sets out the LLRC mandate, see Government of Sri Lanka, “Sri Lanka: President appoints Lessons Learnt and Reconciliation Commission (May 17, 2010)”, reproduced at <http://www.reliefweb.int/rw/rwb.nsf/db900SID/SNAA-85K8EL?OpenDocument> and also the LLRC website at http://www.llrc.lk/index.php?option=com_content&view=article&id=27&Itemid=54 (the mandate in three languages) and http://www.llrc.lk/index.php?option=com_content&view=article&id=18&Itemid=2 (the list and professions of the commissioners). Transcripts of some submissions/testimony are published on the LLRC’s website at http://www.llrc.lk/index.php?option=com_content&view=article&id=35&Itemid=57 (for sessions known as “public sittings”) and at http://www.llrc.lk/index.php?option=com_content&view=article&id=26&Itemid=56 (for “field visits”). On the field visits web page, the LLRC comments that there are no transcripts for in-camera proceedings—which seem to include, for example, a September 20, 2010, visit of the LLRC to the Mullaitivu Security Forces Headquarters and October 2 and 3, 2010, visits to the Omanthai Detention Centre. With respect to the public sittings web page, instructions at the top of the page say: “Public Sittings (click on each name to read transcript)”. However, not all names are hyperlinked.

As of February 3, 2011, the present author counted 148 names listed as having made submissions/presentations. Of these 148 names, there are hyperlinks for 112 of them but 36 were not hyperlinked--and thus there is currently no access via the LLRC to these presentations/testimonies. I can find no explanation on the LLRC website as to the reasons for the lack of hyperlinks to these 36 -- e.g. whether this is due to a delay in preparing a transcript, whether there are security reasons, and so on. Some of the testimonies for which there are no links include presentations from notables such the (former) highly regarded Judge on the International Court of Justice Christopher Weeramantry, Bishop Daniel Thiagarajah of the Jaffna Diocese, and former Air Vice Marshal V. Tennakoon. Apparently as a response to these gaps, on January 17, 2011, a citizens-journalism website, Groundviews.org, launched its own archive of documentation from and about the LLRC (including an archive of submissions and testimonies, and an archive of media reports). The announcement with reasons for the creation of the archive is at <http://groundviews.org/2011/01/17/archive-of-lessons-learnt-and-reconciliation-commission-llrc-submissions-and-media-reports/> while the archive itself is at <http://groundviews.org/llrc-media-coverage-and-submissions/>. At the former URL, the following appears: “The archives respond to numerous requests we got for a single-window access to this content. The content included in the archives are generated by a trusted source outside the country by going through information on the web, including the LLRC’s official website. New submissions and media reports, once sent to Groundviews, are uploaded to the archive and curated by us.” At the latter URL, the following appears: “Biased and incomplete media coverage of submissions made to Sri Lanka’s Lessons Learnt and Reconciliation Commission (LLRC) has made it difficult to know what information has been provided to the commissioners and how, if at all, they have responded. Deliberate misreporting by

leading mainstream media in Sri Lanka has further complicated finding accurate versions of submissions to the LLRC. While the LLRC's own website, launched well after the hearings started, includes a large number of transcripts of its hearings, it does not provide a comprehensive list of all oral and written submissions." The present author has not yet been able to thoroughly cross-check the transcripts that appear on the LLRC site with those appearing on the Groundviews site in order to understand disparities in numbers and coverage. The last digest of submissions on the Groundviews site lists 75 submissions taken from the LLRC site (which is 37 less than the current number—112—of submissions that have links on the LLRC site). On the other hand, there is a close correspondence in the number of names without hyperlinks on the LLRC site (36) and the number of names for which Groundviews has uploaded submissions from sources other than the LLRC (35, being 8 from unattributed sources and 27 from sources such as the Sri Lanka Guardian, Asia Tribune, Transcurrents, Lanka Web, Groundviews itself, and even three from "Government of Sri Lanka Website." For example, the Weeramantry and Thiagarajah submissions are sourced, respectively, from Transcurrents (and turned into a Google Doc by Groundviews at <https://docs.google.com/leaf?id=0Bxbk4wYolphwYmU2Y2ExMjMtNWl0MS00MjMwLWE5ZWUtYmJkZDI5MDc1NGUz&hl=en&authkey=CPGEIdIN>) and Sri Lanka Watch (and turned into a Google Doc by Groundviews at <https://docs.google.com/viewer?a=v&pid=explorer&chrome=true&srcid=0Bxbk4wYolphwOGE2NTMwNTltNzQ2My00ZWJlLWJnZUtOTM3NDZlMmUwYTdk&hl=e>). But the Tennakoon testimony that had no hyperlink on the LLRC site has apparently not been sourced yet by Groundviews from any other source. The author has not yet had time to compare the list of 36 nonhyperlinked names from the LLRC site line up with the 35 names for whom alternative sources were used by Groundviews.

25 The letter is reproduced in full on all three NGOs' websites. See e.g. <http://www.crisisgroup.org/en/publication-type/media-releases/2010/asia/sri-lanka-crisis-group-refuses-to-appear-before-flawedcommission.aspx>. At the end of the letter, an appendix is added of the three organizations' recent publications on Sri Lanka, which is convenient digest: see the URL *ibid*.

26 "Sri Lanka politics: Friends like these," *The Economist* (May 22, 2010), at http://www.eiu.com/index.asp?layout=VWArticleVW3&article_id=1647142749®ion_id=420000442&country_id=900000290&refm=vwCtry&page_title=Latest+analysis&rf=0

27 Ministry of Foreign Affairs of Sri Lanka, "Sri Lanka pursues nation-wide agenda of renewal—President", excerpts from President Mahinda Rajapaksa's speech to the UN General Assembly, September 23, 2010, at http://www.slmfa.gov.lk/index.php?option=com_content&task=view&id=2517&Itemid=75

28 Louise Arbour, "Sri Lanka still demands justice », June 8, 2010, at <http://www.crisisgroup.org/en/regions/asia/south-asia/sri-lanka/arbour-sri-lanka-still-demands-justice.aspx>

29 Letter from Chair of the Coordinating Bureau of the Non-Aligned Movement, His Excellency Maged A. Abdulaziz, to His Excellency UN Secretary General Ban Ki-moon, dated March 9, 2010, NAM Doc 106/2010 (PDF copy in possession of the author)

30 “Draft Statement from Non-Aligned Movement” (text as of June 30, 2010), at <http://www.thesundayleader.lk/2010/07/09/draft-statement-from-non-aligned-movement/>.

31 Desmond Tutu and Lakhdar Brahimi, “Sri Lanka, one year on from war”, *The Guardian*, May 18, 2010, at <http://www.guardian.co.uk/commentisfree/2010/may/18/sri-lanka-lasting-peace>.

32 For further commentary on Foreign Minister Peiris’ May 2010 visit to Washington D.C., see Craig Scott, “Taking Tea with Torturers” (January 31, 2011). OpenDemocracy, January 2011. Available at SSRN: <http://ssrn.com/abstract=1752889>.

33 “Amnesty International can’t dictate terms to us, says Lankan minister,” Rediff News (June 1, 2010), at <http://news.rediff.com/report/2010/may/27/amnesty-international-cant-dictate-terms-to-us-lankanminister-peiris.htm>

34 Compare to less crude comparisons, which would require more fine-grained discussion of how apt the comparison is as a basis for an anti-hypocrisy pushback: e.g. were a country to have ineffective state protection for social practices of racial discrimination that bear striking similarity to practices within the US well into recent times, or were Honduras to point to accurate information about the failure of authorities in Canada to prevent, and then to adequately investigate, a steady stream of killings of prostitutes (or presumed prostitutes) in Vancouver over the years.

35 On this score, a member of the Tamil diaspora wrote in a Sri Lanka Campaign LC blog post a few months ago: “There have been such myths in Sri Lanka on all sides. Tamils have had the myth that the authoritarianism and brutality of the LTTE was a sad but unavoidable consequence of Sinhalese oppression. Sinhalese have had the myth that colonial rulers are responsible.. [and so on].”

36 Recall, by way of comparison, that the mandate of the civil-society Comisión de Verdad in Honduras includes looking at the roles and responsibilities of external actors in relation to the coup and human rights violations.

37 The Official website of CICIG is <http://www.cicig.org/>. The following article does a good job describing the formal structure of CICIP, but it should not be relied upon as a study of how CICIP has actually functioned: Andrew Hudson and Alexandra Taylor, “The International Commission against Impunity in Guatemala: A New Model for International Criminal Justice Mechanisms”, (2010) 8 *Journal of International Criminal Justice* 8 (2010), 53-74.

38 See Craig Scott, “Israel’s Seizure of the Gaza-Bound Flotilla: Applicable Laws and Legality” (October 19, 2010). Osgoode CLPE Research Paper No. 42/2010. Available at SSRN: <http://ssrn.com/abstract=1694682> for some discussion of the several institutional processes looking at the Gaza-bound flotilla incident. The Turkel Commission has now reported, but I have not had a chance to read the report as of the time of writing of the present article.

39 Cable 10 Colombo 32, “Sri Lanka War-Crimes Accountability: The Tamil Perspective”, January 15, 2011, at <http://www.wikileaks.ch/cable/2010/01/10COLOMBO32.html>.

40 For a masterful and comprehensive treatment of the “dishonour”, status-stripping processes, contextualized within the broader judicial trials of collaborators, see Anne Simonin, *Déshonneur dans la République: une histoire de la indignité, 1791-1958* (Paris: Grasset, 2008).

41 Of the explosion of literature in the past decade or so in Spain on this topic, I have found especially useful Pablo Oñate Rubalcaba, *Consenso e ideología en la transición española* (Madrid: Centro de Estudios Políticos y Constitucionales, 1998) as well as Paloma Aguilar, “Memoria Histórica”, pp 768-774, and “Reconciliación”, pp 1024-1031, and Juan Francisco Fuentes, “Transición”, pp 1173-1183, in Javier Fernández Sebastián and Juan Francisco Fuentes (eds), *Diccionario político y social del siglo XX español* (Madrid: Alianza Editorial, 2008).

42 Ingo Müller, *Hitler’s Justice: Courts of the Third Reich* (IB Tauris, 1991; trans. Deborah Schneider); Valerie Hébert, *Hitler’s Generals on Trial: The Last War Crimes Trial at Nuremberg* (University of Kansas Press, 2010).

43 This footnote contains placeholder thoughts of an extremely provisional sort. A major factor in the resistance from within Germany to criminal-trial-based accounting was the rapid advent of the Cold War, and the knowledge of former officials in the Nazi regime and the average prideful German that Germany was both seen and needed as a bulwark against the Soviet Communist threat. It was not good geopolitics to put former Nazi-era officials on trial and alienate the average German by associating them with the evils of the Nazi era (in the sense that trials of Germans “just doing their job”, the judges and the Wehrmacht generals and so on, rubbed off on the average citizen’s sense of whether they too bore some responsibility). Indeed, it was ‘good’ realpolitik to create as much continuity as possible with the former regime so as to retain expertise—in the judiciary, in the intelligence services, and so on—and so as to produce the feeling of partnership with the West in the struggle against a common enemy. It requires much more reflection and empirically based argument than I can present here, but both Honduras and Sri Lanka—especially the latter—‘enjoy’ geopolitical positioning that could very much produce goingthrough-the-motions internationalized criminal justice processes analogous in some respects to how the Americans and British fairly easily acquiesced in not pursuing trials in Germany with great vigour—if those geopolitical realities ever even allowed such processes to be created in the first place in relation to Sri Lanka and Honduras. Much is rightly made of Sri Lanka’s very clear geopolitical leverage that allows them to receive unrelenting Chinese support if they want it—see the new deepwater port built in President Rajapaksa’s district with the capacity to service Chinese naval vessels and the surge of Chinese infrastructure-creation muscle that is being brought to bear on economic ‘development’ in ‘reconstruction’ in the North of Sri Lanka—and to also play India off against unwanted Chinese influence. Wherever China and India fit in Sri Lanka’s gamesmanship, it takes little imagination to see how Sri Lanka can appeal to the West’s (notably the United States’) desire not to ‘lose’ Sri Lanka to the rising Asian giants. As for Honduras, its poverty and below-the-global-radar-screen status can easily lull the casual observer into thinking it is of no geopolitical consequence. However, it actually sits in a strategic location with respect to the US’ regional military reach, providing along with Panama a linking point into South

America and the Caribbean. The Palmerola air force basis in Honduras is a huge overseas asset of the US, and Honduran elites know this gives them clout when it comes to seeking and receiving support of the system as it stands. And strategic thinkers will not quickly forget how Honduras was key in terms of how the US organized efforts to crush both the FMLN guerrillas in El Salvador and the Sandinistas in Nicaragua after they had come to power. The US strategic goal of not seeing portions of Latin America

go left-revolutionary and even left-populist also makes Honduras an important country in a domino-theory worldview.

44 I recognize there may be something quite Catholic in this line of argument. See, for instance, Catholic Canon Code 2469: "The virtue of truth gives another his just due." Being neither Catholic nor even a believer, turning to Catholic thinking will be, for me, something other than a theological turn.

45 Basil Fernando, email correspondence, October 2010.