

# **REPORT**

**On the Second Mandate**

**Of the Presidential Commission of Inquiry**

**Into Complaints of Abductions and Disappearances**

**August 2015**



## **Abbreviations and Acronyms**

9/11	11 <sup>th</sup> September 2001 Twin Tower attacks in New York
AGA	Additional Government Agent
ATM	Automated Teller Machine
CARE	Cooperative for Assistance and Relief Everywhere
CAT	Convention against torture and Other Cruel, Inhuman or Degrading Treatment of Punishment
CCHA	Consultative Committee on Humanitarian Assistance
CDS	Chief of Defence Staff
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CFA	Ceasefire Agreement
CGES	Commissioner General of Essential Services
CID	Criminal Investigation Department
CRC	Convention on the Rights the Child
DMI	Director Military Intelligence
DS	Divisional Secretariat
ENDLF	Eelam National Democratic Liberation Front
EPDP	Eelam People's Democratic Party
EPRLF	Eelam People's Revolutionary Liberation Front
FBI	Federal Bureau of Investigations
FCO	Foreign Commonwealth Office
FDL	Forward Defence Line
FTR	Family Tracing and Reunification Unit
GA	Government Agent
GN	Grama Niladhari
GOSL	Government of Sri Lanka
GPS	Global Positioning System
GSL	Government of Sri Lanka
HR	Human Rights
HRCSL	Human Rights Commission of Sri Lanka

HRW	Human Rights Watch
HSZ	High Security Zone
IAAC	Inter-Agency Advisory Committee
ICC	International Criminal Court
ICC-NHRI	International Coordinating Committee of National Human Rights Institutions
ICCPR	International Covenant on Civil and Political Rights
ICG	International Crisis Group
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
ICJ	International Court of Justice
IDP	Internally Displaced Person
IHL	International Humanitarian Law
IIGEP	International Independent Group of Eminent Persons
IMF	International Monetary Fund
INGO	International Non-Governmental Organization
IOM	International Organization for Migration
IS	Islamic State
JOC	Joint Operations Command
JVP	Janatha Vimukthi Peramuna or People's Liberation Front
KKS	Kankesanthurai
LRRP	Long Range Reconnaissance Patrols
LLRC	Lessons Learnt and Reconciliation Commission
LST	Law & Society Trust
LTTE	Liberation Tigers of Tamil Eelam (also known as the —Tamil Tigersl)
MBRL	Multi-Barrel Rocket Launchers
MOD	Ministry of Defence
MPCS	Multi-Purpose Cooperative Societies
MSF	Medecins Sans Frontieres
NCO	Non-Commissioned Officer

NGO	Non-governmental Organization
NFZ	No Fire Zone
NSC	National Security Council
NHRI	National Human Rights Institution
OHCHR	Office of the United Nations High Commissioner for Human Rights
OLA	Office of Legal Affairs
PHI	Public Health Inspector
PLOTE	People's Liberation Organisation of Tamil Eelam
PSO	Public Security Ordinance, No. 25 of 1947
PTA	Prevention of Terrorism (Temporary Provisions) Act. No.48 of 1979
PTF	Presidential Task Force for Resettlement, Development and Security in the Northern Province
PTK	Puthukkudiyiruppu
RDS	Rural Development Society
REPPIA	Rehabilitation of Persons, Properties and Industries Authority
RPG	Rocket propelled grenade
RUF	Revolutionary United Front
SBS	Special Boat Squadron
SCOPP	Secretariat for Coordinating the Peace Process
SCSL	Special Court for Sierra Leone
SEZ	Special Economic Zone
SFHQ	Security Forces Headquarters
SIHRN	Sub Committee for Immediate Humanitarian Needs
SIOT	Special Infantry Operations Team
SLA	Sri Lankan Army
SLAF	Sri Lankan Air Force
SLMM	Sri Lanka Monitoring Mission
SLN	Sri Lankan Navy
SOCA	Serious Organised Crime Agency
STF	Special Task Force
TELO	Tamil Eelam Liberation Organisation

TID	Terrorist Investigation Department
TMVP	Tamil Makkal Viduthalai Pulikal
TRC	Truth and Reconciliation Commission
TRO	Organization Tamale de Rehabilitation
TYP	Tamil Youth Organisation
UAV	Unmanned aerial vehicle
UN	United Nations
UNHCR	United Nations High Commissioner for Refugees
UNOCHA	UN Office of the Coordinator for Humanitarian Affairs
UN RC/HC	UN Resident and Humanitarian Coordinator
UPFA	United People's Freedom Alliance
USG	United States Government
Wanni	Term for the four northern districts of Sri Lanka including Vavuniya, Mannar, Jaffna and Trincomalee.
WFP	World Food Program

## **Acknowledgements**

In presenting this Report of our Commission to His Excellency the President I, as Chairman, wish to place on record my grateful thanks to all those who played a part in making this Report possible. Of course, my thanks go out to my hard working staff whose efforts to meet their deadlines were faced cheerfully and with diligence.

I owe a deep debt of gratitude to Mrs. Mano Ramanathan, Mrs. Priyanthi Suranjana Vidyaratne, my fellow Commissioners who found time to deal with the enlarged mandate of the Commission whilst also endeavouring to meet our commitments to dealing with the subject matter of the original mandate.

Given the enlargement of the mandate by President Rajapaksa on the 15 July 2014 which dealt in large part with the facts and circumstances attending the internal armed conflict that ended on 19 May 2009 and in particular called for all examination of the possible violations of international humanitarian law and international human rights law, we the Commission are greatly indebted to the expert assistance we had touching upon complex issues of international law which we the Commission found threw a great flood of new light upon the matters that fell to us for consideration.

My colleagues and I owe a particular debt of gratitude to the Right Honourable Sir Desmond de Silva, QC. (UK) who was Chairman of the legal Advisory Council together with Professor Sir Geoffrey Nice QC. (UK), Professor David M. Crane (USA), all of whom contributed specific legal opinions that collectively became a legal bedrock of this Report. The final distillation of the law was that of the Chairman of the Advisory Council working together with the members of the Commission. The Advisory Council was ably supported by Mr. Rodney Dixon, QC. (UK/ South Africa), Professor Michael Newton (USA) Vanderbilt University who formerly served as the Senior Advisor to the United States Ambassador-at-Large for War Crimes, Commander William Fenrick (Canada), Professor Nina Jorgensen of Harvard and The Chinese University of Hong Kong, and Major General John Holmes, DSO, OBE, MC (UK) former Commanding Officer of the Special Air Service (SAS), for whose independent Military Report we are greatly indebted. We include Mr. Paul Mylvaganam (UK), who acted as a liaison Counsel and his help with regard to truth and reconciliation matters. Our grateful thanks go to Victoria de Silva and Delarney Uyangodage for their research and help in preparing this Report.

No acknowledgement would be complete without the most grateful thanks being extended to the Secretary of the Commission, Mr H W Gunadasa who together with senior staff members and the entire secretarial staff performed their duties with great efficiency and dedication. Their names are appended at the back of this Report.

Maxwell Paranagama

Chairman

# Table of Contents

<b>Abbreviations and Acronyms</b> .....	i
<b>Acknowledgements</b> .....	v
<b>Mandate</b> .....	xii
<b>Methodology</b> .....	xv
<b>Executive Summary</b> .....	xviii
<i>The Darusman Report</i> .....	xviii
<i>Number of civilian deaths</i> .....	xix
<i>Application of the Principles of Distinction and Proportionality</i> .....	xx
<i>Deliberate attacks against civilians</i> .....	xxi
<i>The LTTE's Use of Human Shields</i> .....	xxii
<i>Overall Conduct of the LTTE</i> .....	xxiii
<i>Overall Conduct of Government Forces</i> .....	xxiv
<i>Command Responsibility</i> .....	xxv
<i>Accountability</i> .....	xxvii
<b>CHAPTER 1 – INTRODUCTION</b> .....	1
<b>CHAPTER 2 - THE 2011 REPORT OF THE SECRETARY-GENERAL'S PANEL OF EXPERTS</b> .....	11
<b>A. The Standard of Proof Adopted in the Darusman Report</b> .....	12
<b>B. The Accepted Facts in the Darusman Report</b> .....	13
<b>C. The Darusman Report's Failure to Identify Primary Source Material</b> .....	17
<b>D. The Disputed Facts and Law in the Darusman Report</b> .....	19
<i>The Myth of 40,000 Civilians Killed in the Final Phase of the War</i> .....	19
<i>The Use of Human Shields</i> .....	24
<i>The Application of the Principles of Distinction and Proportionality</i> .....	26
<i>Individual Shelling Incidents</i> .....	28
<i>Accountability and the Obligation to Prosecute</i> .....	29
<b>CHAPTER 3: THE SRI LANKAN ARMY</b> .....	30
<i>Training</i> .....	33
<i>Policy Change</i> .....	34
<i>Military Capability</i> .....	34
<i>Air Force</i> .....	35
<i>Navy</i> .....	35
<b>CHAPTER 4 - THE LTTE</b> .....	37

<i>Structure</i> .....	38
<i>Training</i> .....	39
<i>Policy</i> .....	40
<i>LTTE Military Capability</i> .....	41
<i>Propaganda, Glorification &amp; Martyrdom</i> .....	44
<i>Internet</i> .....	45
<b>CHAPTER 5 - THE PLIGHT OF CIVILIANS IN THE CONFLICT AREA</b> .....	47
<b>A. Background to the Last Phase of the War in Sri Lanka</b> .....	47
<b>B. The No-Fire Zones and other Measures to Reduce Civilian Casualties</b> .....	48
<b>C. The Deteriorating Civilian Situation</b> .....	50
<b>D. The Final Weeks of the War</b> .....	52
<b>E. The Role of the Tamil Diaspora</b> .....	54
<b>F. The Influence and Approach of the International Community</b> .....	55
<b>G. Appraisal of the Military Outcome and the Impact on Civilians</b> .....	57
<i>The Saipan-Okinawa/Masada Prospect</i> .....	58
<i>Factors Impacting on the Plight of Civilians</i> .....	59
<i>The Post-War Situation</i> .....	61
<b>CHAPTER 6 - THE LEGAL FRAMEWORK</b> .....	62
<b>A. The Applicability of IHL to Non-International Armed Conflicts</b> .....	62
<i>Common Article 3</i> .....	62
<i>Additional Protocol II</i> .....	63
<b>B. The Applicability of Customary International Law</b> .....	64
<b>C. The Applicability of International Human Rights Law</b> .....	65
<b>D. The Applicability of IHL to Non-State Actors</b> .....	65
<b>E. The Core IHL Principles of Distinction, Military Necessity and Proportionality</b> 66	
<i>The Principle of Distinction</i> .....	66
<i>Military Necessity</i> .....	68
<i>The Principle of Proportionality</i> .....	69
<i>The Application of the Proportionality Principle</i> .....	71
<i>The Shift in State Practice on Incidental Civilian Harm</i> .....	72
<i>War in the Balkans: Operation Allied Force</i> .....	72
<i>U.S. Policy and Practice</i> .....	73
<b>F. The Impact of Hostage taking and Use of Human Shields on Proportionality</b> .....	76
<i>The Prohibition on the Taking of Hostages</i> .....	76

<i>The Prohibition on the Use of Human Shields</i> .....	77
' <i>Direct</i> ' involvement of civilians in hostilities .....	80
<i>Involuntary and Voluntary Human Shields</i> .....	82
<i>Human Shields and Proportionality</i> .....	83
<b>G. The Law as to the Status of Hospitals</b> .....	86
<b>H. The Law as to the Status of Journalists</b> .....	88
<b>I. The Law Relating to the Denial of Humanitarian Assistance</b> .....	88
<b>J. The Law as to the Recruitment and/or Use of Child Soldiers</b> .....	92
<i>Definition of conscription</i> .....	93
<i>Definition of Use in Hostilities</i> .....	93
<b>K. The Law on Perfidy</b> .....	94
<b>L. Prohibited Weapons</b> .....	94
<b>M. The Law Relating to Genocide</b> .....	95
<i>Definition</i> .....	95
<i>Genocidal Intent</i> .....	95
<i>Recent European Domestic Decision on 'Racist State'</i> .....	97
<b>N. The Law on Enforced Disappearances</b> .....	97
<b>O. The Law as to Command Responsibility</b> .....	98
<b>P. Forms of Responsibility under International Law</b> .....	98
<b>CHAPTER 7 - THE PRINCIPAL ALLEGATIONS AGAINST THE GOVERNMENT OF SRI LANKA AND THE SRI LANKAN ARMY</b> .....	100
Introduction.....	100
<b>A. The Channel 4 Video Footage</b> .....	101
<i>Authenticity of Channel 4 footage</i> .....	102
<b>B. Disappearances of Detainees in the Final Phase of the War</b> .....	105
<b>C. The 'White Flag Killings'</b> .....	108
<i>Individual allegations of executions</i> .....	110
<b>D. Shelling of Civilians and Hospitals</b> .....	111
<i>Source of the shelling</i> .....	111
<i>Shelling in the NFZs</i> .....	113
<i>The proportionality assessment</i> .....	113
<i>Investigations into shelling incidents as war crimes</i> .....	117
<i>Shelling of hospitals</i> .....	119
<i>Area Weapons, Phosphorous and Cluster Bombs</i> .....	120
<b>E. Denial of Humanitarian Assistance</b> .....	122

<b>F. Genocide</b> .....	128
<b>G. War Without Witnesses</b> .....	129
<b>H. Conclusion</b> .....	132
<b>CHAPTER 8 - ACCOUNTABILITY MECHANISMS</b> .....	134
<b>A. The Darusman Report’s Position</b> .....	135
<b>B. Mechanisms for Accountability</b> .....	137
<i>The Extent of the Obligation to Prosecute</i> .....	138
<i>Truth Commissions as an Accountability Mechanism</i> .....	143
<i>Amnesties under International Law</i> .....	145
<i>Reparations and Reconstruction</i> .....	148
<b>C. The Mechanisms Adopted in Sri Lanka</b> .....	149
<b>D. Establishing a War Crimes Division within The Sri Lankan Court System</b> .....	151
<i>Amnesty</i> .....	153
<b>E. The Commission’s Recommendation</b> .....	153
<i>A Proposed Mechanism</i> .....	156
<b>CHAPTER 9 - ANSWERS TO GAZETTED QUESTIONS</b> .....	158
<b>A i. The principal facts and circumstances that led to the loss of civilian life during the internal armed conflict that ended on the 19th May 2009, and whether any person, group or institution directly or indirectly bears responsibility in this regard by reason of a violation or violations of international humanitarian law or international human rights law.</b> .....	158
<b>A ii. Whether such loss of civilian life is capable of constituting collateral damage of a kind that occurs in the prosecution of proportionate attacks against targeted military objectives in armed conflicts and is expressly recognised under the laws of armed conflict and international humanitarian law, and whether such civilian casualties were either the deliberate or unintended consequence of the rules of engagement during the said armed conflict in Sri Lanka.</b> .....	161
<b>A iii. The adherence to or neglect of the principles of distinction, military necessity and proportionality under the laws of armed conflict and international humanitarian law, by the Sri Lankan armed forces.</b> .....	163
<b>A iv. Whether the LTTE as a non-state actor was subject to international humanitarian law in the conduct of its military operations.</b> .....	164
<b>A v. The use by the LTTE of civilians as human shields and the extent to which such action constitutes a violation of international humanitarian law or international human rights law, and did or may have significantly contributed to the loss of civilian life.</b> ...	164
<b>B. The recruitment of child soldiers by the LTTE or illegal armed groups-affiliated with the LTTE or any political party in violation of international humanitarian law or international human rights law.</b> .....	164

<b>C. International criminal activities of the LTTE and the application of financial and other resources obtained through such illegal activities in the prosecution of the conventional and guerrilla war in Sri Lanka by the LTTE.</b>	167
<i>First Generation Funding Methods</i>	169
<i>Drug Dealing</i>	169
<i>Second Generation Funding</i>	171
<i>LTTE Shipping Fleet</i>	171
<i>Human Smuggling</i>	171
<i>LTTE Proscribed</i>	173
<i>Credit Card Frauds</i>	173
<i>Other Criminal Activities</i>	173
<i>Aiding and Abetting</i>	173
<b>D. The suicide attacks by LTTE using child soldiers and other combatants under the direct orders of the leader of the LTTE, Velupillai Prabhakaran or any persons acting on his behalf, and the culpability for such actions under international humanitarian law or international human rights law.</b>	175
<i>LTTE expertise in Suicide Terrorism</i>	176
<i>Conclusion as regards suicide bombing</i>	177
<b>Additional Acknowledgements</b>	179
<b>ANNEX 1 – MILITARY EXPERT OPINION BY MAJOR GENERAL JOHN HOLMES DSO OBE MC</b>	1
<b>INTRODUCTION</b>	1
<b>Summary</b>	1
<b>Accusations</b>	2
<b>Aim</b>	2
<b>GoSL POLICY</b>	3
<b>Background</b>	3
<b>Policy</b>	3
<b>Training</b>	3
<b>LTTE POLICY</b>	5
<b>Background</b>	5
<b>Policy</b>	5
<b>Training</b>	6
<b>THE FINAL PHASE- THE EASTERN WANNI</b>	8
<b>9 January 2009</b>	8
<b>Dilemma</b>	8

<b>Challenges Posed</b> .....	9
<b>Ground and Weather</b> .....	11
<b>SLA Military Capability</b> .....	12
<b>LTTE Military Capability</b> .....	14
<b>NFZs</b> .....	17
<b>SLA: Rules of Engagement (ROE)</b> .....	18
<b>Proportionality</b> .....	21
<b>CRATER ANALYSIS</b> .....	22
<b>IMAGERY ANALYSIS</b> .....	24
<b>Report No. 1</b> .....	24
<b>Report No 2</b> .....	24
<b>Imagery Summary</b> .....	26
<b>CONCLUSIONS</b> .....	27
<b>ANNEXES:</b> .....	32
<b>ANNEX A – BIBLIOGRAPHY</b> .....	i

## Mandate

1. On 15 August 2013, the former President of Sri Lanka, Mahinda Rajapaksa, established the Presidential Commission to Investigate into Complaints regarding Missing Persons comprised of three members<sup>1</sup>: former Judge Maxwell P. Paranagama (Chairman), Mrs. Mano Ramanathan and Mrs. Suranjana Vidyaratne ('Paranagama Commission' or 'PCICMP').<sup>2</sup> The Paranagama Commission has held public hearings in the North and East of Sri Lanka and has heard evidence in relation to approximately 2700 complaints relating to what will hereinafter be referred to as its **First Mandate**.
2. The scope of the Commission's mandate was expanded by Gazette notification on 15 July 2014 to address the facts and circumstances surrounding civilian loss of life and the question of the responsibility of any individual, group or institution for violations of international law during the conflict that ended in May 2009.<sup>3</sup> The expanded mandate will hereinafter be referred to as the **Second Mandate**. According to the terms of the **Second Mandate**, this Commission is tasked with inquiring into and reporting on the following matters that have been referred to in the report of the Lessons Learnt and Reconciliation Commission ('LLRC'), namely:

*'A. The matters referred in paragraph 4.359 of the Report of the LLRC. In this connection, the Commission is hereby required to investigate and report on the following specific issues:*

*The principal facts and circumstances that led to the loss of civilian life during the internal armed conflict that ended on the 19<sup>th</sup> May 2009, and whether any person, group or institution directly or indirectly bears responsibility in this regard by reason of a violation or violations of international humanitarian law or international human rights law.*

- i. *Whether such loss of civilian life is capable of constituting collateral damage of a kind that occurs in the prosecution of proportionate attacks against targeted military objectives in armed conflicts and is expressly recognised under the laws of armed conflict and international humanitarian law, and whether such civilian casualties were either the deliberate or unintended consequence of the rules of engagement during the said armed conflict in Sri Lanka.*
- ii. *The adherence to or neglect of the principles of distinction, military necessity and proportionality under the laws of armed conflict and international humanitarian law, by the Sri Lankan armed forces.*
- iii. *Whether the LTTE as a non-state actor was subject to international humanitarian law in the conduct of its military operations.*
- iv. *The use by the LTTE of civilians as human shields and the extent to which such action constitutes a violation of international humanitarian law or international human rights law, and did or may have significantly contributed to the loss of civilian life.*

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<sup>1</sup> The formal work of the Commission is to investigate abductions and disappearances in the North and East of Sri Lanka. In short form it is known as PCICMP.

<sup>2</sup> The Gazette of the Democratic Socialist Republic of Sri Lanka, No. 1823/42, 15 August 2013. (Documents of the work of the PCICMP are available at <<http://www.pcicmp.lk/>>).

<sup>3</sup> The Gazette of the Democratic Socialist Republic of Sri Lanka, No.1871/18, 15 July 2014.

v. *B. The recruitment of child soldiers by the LTTE or illegal armed groups-affiliated with the LTTE or any political party in violation of international humanitarian law or international human rights law.*

*C. International criminal activities of the LTTE and the application of financial and other resources obtained through such illegal activities in the prosecution of the conventional and guerrilla war in Sri Lanka by the LTTE.*

*D. The suicide attacks by LTTE using child soldiers and other combatants under the direct orders of the leader of the LTTE, Velupillai Prabhakaran or any persons acting on his behalf, and the culpability for such actions under international humanitarian law or international human rights law.'*

3. In view of the heavy workload of the Paranagama Commission, and at its request for assistance in addressing the complex questions of international law raised by the **Second Mandate**, former President Rajapaksa appointed a legal Advisory Council to this Commission comprised of international legal experts.<sup>4</sup>
4. President Maithripala Sirisena was elected as the new Sri Lankan President on 8 January 2015. On 5 February 2015, the time frame for the **First and Second Mandates** of the Paranagama Commission was extended until 15 August 2015.
5. This section of this Commission's report seeks to answer the questions posed in the Gazette notification of 15 July 2014 setting out the terms of the **Second Mandate** as reproduced above. It has been prepared by the Paranagama Commission with the assistance of the legal Advisory Council.
6. The Commission has limited its inquiry under the **Second Mandate** to the final phase of the war which can properly be regarded as the period between the fall of the LTTE administrative capital, Kilinochchi, on 2 January 2009 and the conclusion of the war on 19 May 2009.
7. The decision to restrict the temporal scope of the **Second Mandate** is based on several considerations. Most importantly, the principal questions raised in the **Second Mandate** relate to the period identified as the 'final phase of the war'. Additionally, the panel of experts appointed by the United Nations Secretary-General on 22 June 2010 ('Darusman Panel') was tasked with reporting on the obligations relating to accountability arising from the 'last stages of the war'.<sup>5</sup> Further, on 8 May 2015, the current Sri Lankan Minister of Foreign Affairs, Mangala Samaraweera, spoke of the government's responsibility 'to get at the root of all that had transpired during the closing stages of the war'.<sup>6</sup> Finally, on 13 May 2015, the German Foreign Minister, Frank-Walter Steinmeier, called for a 'credible domestic investigation of war crimes, during the last stages of the war'.<sup>7</sup> Therefore, noting both the domestic and international concern to address issues of accountability arising from the final stages of the conflict in Sri Lanka, this Commission will confine this section of its report to this relevant time frame. The Commission understands that this limitation may attract

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<sup>4</sup> The Gazette of the Democratic Socialist Republic of Sri Lanka, No.1871/18, 15 July 2014.

<sup>5</sup> Report of the Secretary-General's Panel of Experts on Accountability in Sri Lanka ('Darusman Report'), 31 March 2011, p. i.

<sup>6</sup> 'War crimes probe: Domestic Mechanism poised to start work', *Ceylon Today*, 8 May 2015, p. A2.

<sup>7</sup> 'German Foreign Minister says political changes impressive, urges meaningful reconciliation', *Daily FT*, 13 May 2015, p. 13.

criticism but given the breadth of the factual and legal analysis over the period of the mandate and due to the Commission's on going taking of evidence, this Report has concentrated on the principal causes of the loss of innocent civilian lives.

## Methodology

8. This Commission aims to analyse the complex legal standards applicable to military operations such as those that occurred in the final phase of the Sri Lankan conflict and to apply them to the unique set of factual circumstances that presented itself during the relevant time period. This exercise has not been adequately carried out in the existing report of the UN Secretary General's Panel of Experts (Darusman Report) nor in NGO reports on the final phase of the conflict.
9. In setting out the legal framework, this Commission has relied heavily upon the legal expertise of the members of the Advisory Council, who have an unrivalled experience of international law practice before the ad hoc international tribunals created or sponsored by the United Nations. As this Commission expressly requested the assistance of international experts, we have adopted and incorporated as our own and as part of our collaborative work the opinions provided by experts on military and legal matters where we have agreed with their analyses. In preparing this Report we add that it is the product of numerous conferences and the consideration of learned and professorial advice from outside the immediate Advisory Council. Of course, this is in addition to the factual findings we have made upon the evidence we have heard. The members of the Commission have heard evidence from witnesses, have summoned witnesses to give evidence before them and have engaged in the usual fact finding processes of a Commission of this kind. The Advisory Council played no part in this latter process. This Second Mandate has been discharged with fact finding by the Commission while applying international and military law upon which we have been advised by the three legal experts on the Advisory Panel. Military experts and professors of law were also brought in to assist on difficult areas of law that concerned the Commission.
10. As it concerns factual conclusions, for the purpose of its report under the Second Mandate this Commission has viewed a vast amount of material in the public domain. These sources have been both primary and secondary, including highly relevant reports such as the 'Darusman Report' (2011), the 'LLRC Report' (2011), the Report of the Secretary General's Internal Review Panel on United Nations Action in Sri Lanka - 2012 (Petrie Report), the Sooka Report (2014) 'An Unfinished War: Torture and Sexual Violence in Sri Lanka 2009—2014', the Reports to Congress by the US State Department (2009), reports by the International Crisis Group, Amnesty International, the University Teachers for Human Rights (Jaffna), Human Rights Watch, and many others.
11. In addition, the Commission had available to it via WikiLeaks, contemporaneous and classified cables from the US embassy in Colombo. The Commission is aware that in the judgment in the case of *The Queen (on the application of Louis Oliver Bancoult) v. Secretary of State for Foreign and Commonwealth Affairs*, the English Court of Appeal held that the evidence of these cables was admissible as it did not violate the archive and documents of the diplomatic mission which sent the cables, since they had already been disclosed to the world by a third party. The Commission has relied on the reasoning in that judgment.

12. The Commission has had the advantage of an independent Expert Military Report by Major General John Holmes, a former Commander of the Special Air Service Regiment (SAS) with extensive international experience, including in hostage operations ('Expert Military Report').<sup>8</sup>
13. Furthermore, the Commission has relied upon the work of a number of academic writers in the field of IHL as well as the considerable body of law generated by international courts, inter alia the International Court of Justice ('ICJ'), the International Criminal Tribunal for the Former Yugoslavia ('ICTY'), the International Criminal Tribunal for Rwanda ('ICTR'), and the Special Court for Sierra Leone ('SCSL').
14. Finally, the Commission has consulted a number of books and other published accounts of the Sri Lankan war. Some books have featured prominently in the discourse, presenting on one view, a narrative that is hostile to the GoSL, such as Gordon Weiss's, *The Cage*;<sup>9</sup> Frances Harisson's book *Still Counting the Dead*,<sup>10</sup> Sir John Holmes's *The Politics of Humanity – The Reality of Relief Aid*;<sup>11</sup> and Rajan Hoole's *Palmyra Fallen from Rajani to War's End*.<sup>12</sup>

The Commission has cited from these sources, sometimes to illustrate points, which have not been considered before. Some of these authors' observations demonstrate that they had a wider perspective of events than has been acknowledged within Sri Lanka. However, the Commission wishes to underline at this early part of the Report, in the interest of fairness, that some authors as mentioned above, and some organisations, such as the Jaffna based NGO, 'University Teachers for Human Rights (Jaffna), have been equally critical of the GoSL, as they have been of the LTTE. This Commission hopes it will be forgiven for not citing at every reference to the aforementioned, their overall stance at each and every citation. However, at the first citation referring to them, we make their criticisms of all sides, clear. Indeed, while their overall stance may be well known, we have provided a full citation of their work so that those who may wish to consider their texts more fully can do so.

Other works that have been consulted include Ahmed S. Hashim's *When Counterinsurgency Wins – Sri Lanka's Defeat of the Tamil Tigers*;<sup>13</sup> K.M. de Silva's *Sri Lanka and the Defeat of the LTTE*;<sup>14</sup> Padma Rao Sundarji's *Sri Lanka: The New Country*;<sup>15</sup>

15. In approaching the task of making determinations on the evidence, 'the reasonable basis to believe' test to be found in Article 53(1)(a) of the Statute of the International Criminal Court ('ICC') has been employed by this Commission. The Prosecutor of the ICC relies on this standard for the purpose of initiating an investigation. It has been

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<sup>8</sup> Major General John Holmes, *Expert Military Report*, Annex 1, 2015

<sup>9</sup> Gordon Weiss, *The Cage: The Fight for Sri Lanka and the Last Days of the Tamil Tigers*, London: Vintage Books, 2012.

<sup>10</sup> Frances Harrison, *Still Counting the Dead: Survivors of Sri Lanka's Hidden War*, London: Portobello Books, 2012.

<sup>11</sup> Sir John Holmes, *The Politics of Humanity – The Reality of Relief Aid*, London: Head of Zeus, 2013.

<sup>12</sup> Rajan Hoole, *Palmyra Fallen from Rajani to War's End*, Colombo: Harper Collins, 2015.

<sup>13</sup> Ahmed S. Hashim, *When Counterinsurgency Wins – Sri Lanka's Defeat of the Tamil Tigers*, India: Cambridge University Press, 2013.

<sup>14</sup> K. M. de Silva, *Sri Lanka and the Defeat of the LTTE*, Colombo: Vijitha Yapa Publications, 2012.

<sup>15</sup> Padma Rao Sundarji, *Sri Lanka: The New Country*, India, 2015.

interpreted by the Chambers of the ICC as requiring ‘*a sensible or reasonable justification for a belief that a crime falling within the jurisdiction of the Court “has been or is being committed”*’.<sup>16</sup> The Commission considers that this is the appropriate standard to use, given that it has not conducted an investigation of its own into all the relevant factual circumstances. The Commission has primarily reviewed information available in the public domain and reached findings to the extent that there exists a reasonable basis for such beliefs, recognising that these could constitute a foundation for further investigations and that such investigations could occur in due course. However, where there is strong supporting evidence for its findings, the Commission indicates that it is satisfied to the civil burden of proof, namely, the balance of probabilities.

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<sup>16</sup> International Criminal Court, Office of the Prosecutor, ‘Policy Paper on Preliminary Examinations’, November 2013, para. 34.

## Executive Summary

16. The Presidential Commission to Investigate Complaints regarding Missing Persons (hereinafter known as the ‘Paranagama Commission’) was established by the former President of Sri Lanka, Mahinda Rajapaksa, on 15 August 2013. The Paranagama Commission’s original mandate was to receive complaints and investigate abductions and disappearances in the North and East of Sri Lanka during the period 10 June 1990 – 19 May 2009 in order to identify the persons responsible and initiate legal proceedings against them (‘First Mandate’). By June 2015, the Commission had received more than 21,000 complaints and its work under the First Mandate is ongoing. In order to expedite the work of the Commission as regards the First Mandate, two additional Commissioners were appointed together with more investigators.
17. On 15 July 2014, the scope of the Paranagama Commission’s mandate was expanded to address the facts and circumstances surrounding civilian loss of life and the question of responsibility for violations of international law during the conflict that ended in May 2009, in particular, certain matters referred to in paragraph 4.359 of the 2011 report of the Lessons Learnt and Reconciliation Commission (‘LLRC’). A legal Advisory Council to the Paranagama Commission, set up at the behest of the Commission, comprising international legal experts was also appointed. This aspect of the Commission’s work, which has been carried out with the assistance of the Advisory Council and with the benefit of an Expert Military Report prepared by Major General John Holmes, is referred to as the Second Mandate.
18. Following the election of Maithripala Sirisena as the new Sri Lankan President on 8 January 2015, the time frame for both the First and Second Mandates of the Paranagama Commission were extended until 15 August 2015. So too was the life of the Advisory Council.
19. This section of the Paranagama Commission’s report is exclusively focused on the questions raised in the Second Mandate. The Commission has limited its inquiry under the Second Mandate to the final phase of the war, namely the period between the fall of the administrative capital of the Liberation Tigers of Tamil Eelam (‘LTTE’), Kilinochchi, on 2 January 2009, and the conclusion of the war on 19 May 2009. The Sri Lankan conflict is considered by this Commission to have been a non-international armed conflict during the final phase of which many of the most serious allegations of violations of international law have come to be levelled at the LTTE and the Sri Lankan Army (SLA).

### *The Darusman Report*

20. On 31 March 2011, the Secretary-General’s Panel of Experts on Accountability in Sri Lanka published its report (‘Darusman Report’) in which it examined possible violations of international humanitarian law and international human rights law during the conflict in Sri Lanka and made recommendations for an accountability process.

21. The Panel of Experts found credible allegations comprising six categories of crimes allegedly committed by members of the LTTE. These credible allegations included the fact that approximately 300,000 to 330,000 civilians were kept hostage by the LTTE in the Wanni and prevented from leaving the area, constituting a '*strategic human buffer*' to the advancing Sri Lankan Army. The Darusman Report further states that these civilians were forced to join the ranks of the LTTE, to dig trenches and prepare other defences, '*thereby contributing to blurring the distinction between combatants and civilians*'. Civilians who attempted to escape were shot by the LTTE and the Darusman Report notes that the LTTE fired artillery '*in proximity*' to large groups of civilians and in addition fired from or in proximity to civilian '*installations*' including hospitals. The Report found that '*many civilians were sacrificed on the altar of the LTTE cause and its efforts to preserve its senior leadership*'.
22. The Darusman Report also found credible allegations comprising five core categories of potential serious violations of international humanitarian law and international human rights law committed by the SLA, including large-scale and widespread shelling causing civilian deaths, and attacks on hospitals.
23. While this Commission accepts some of the findings of the Darusman Panel of Experts, it considers that its conclusions are either legally and/or factually incorrect or unsubstantiated in a number of different areas. The major points of contention are identified as follows:
  - The estimate of up to 40,000 civilian deaths in the final phase of the conflict (paragraph 137 of the Darusman Report).
  - The exemption of the LTTE from the international crime of using human shields (paragraph 237 of the Darusman Report).
  - The failure to take into account the true impact of a massive hostage taking, coupled with forced recruitment and the use of human shields, on the IHL principles of distinction and proportionality.
  - The emphasis on prosecutions as an essential aspect of any transitional justice process (paragraph 425 of the Darusman Report).

#### Number of civilian deaths

24. The Paranagama Commission is in little doubt that the Darusman Report has played an important part in moulding international perceptions with regard to the war in Sri Lanka. The most significant conclusion is in relation to the figure of up to 40,000 civilian deaths in the final phase of the war. The Commission rejects the Darusman Report's finding that '*a number of credible sources*' have estimated that there could have been as many as 40,000 civilian deaths. None of these sources are named and this figure is at substantial variance with other estimates of casualty numbers which vary from 7,721 (UN Country Team), to 6,710 (US State Department), to nearly 7,000 (International Crisis Group), to 10,000 (Amnesty International). This Commission is satisfied that such is the spread of figures given for the loss of civilian life during the final phase of the conflict that crude calculations and guesswork in assigning civilian deaths to the SLA should not take the place of meticulous research. The Commission

agrees with the independent Military Expert who asserts that the figure of 40,000 civilians killed is extremely difficult to sustain on the available evidence.

*Application of the Principles of Distinction and Proportionality*

25. Not all civilian deaths in war are unlawful and a violation of IHL does not occur every time a civilian dies or even when casualties reach a record high. Civilian casualties may constitute lawful collateral damage as long as a military force carrying out an attack complies with the core IHL principles of *distinction* and *proportionality*. In the view of the Commission, the use of human shields by the LTTE and its impact on the principles of distinction and proportionality needs to be factored into any evaluation as to whether civilian loss of life, however regrettable, was excessive in comparison to the anticipated military advantage and, therefore, unlawful.
26. The Commission recognises that this is a complex area of law where there is recent jurisprudence from the International Criminal Court for the former Yugoslavia (ICTY) Appeals Chamber which has not so far been considered in the context of the final phase of the war in Sri Lanka. In the *Gotovina* case neither the ICTY Trial Chamber nor the Appeals Chamber asserted that the use of artillery fire directed against purported military objectives, located in civilian areas, is in itself dispositive of illegality. The Commission finds that the law does not require perfect accuracy in targeting and recognises the fluidity of the operational environment, including the location and movement of both enemy personnel and civilians, the weaponry involved, the conduct and tactics of the fighting parties, and any deliberate exposure of civilians to harm. These are all factors that needed to be taken into account in the evaluation as to whether collateral damage was excessive in comparison to the anticipated military advantage.
27. As this Commission has already noted, the precise civilian casualty figures are unknown. In addition, it is not known what percentage of any estimated figure represented LTTE combatants and what percentage represented civilian hostages. Furthermore, it is not known how many civilians were present voluntarily in the area of the Wannu or how many, either voluntarily or through force, took an active part in hostilities. Civilians killed by the LTTE, whether deliberately or recklessly, including those civilians who were killed attempting to escape the conflict zone, should not figure in the estimate of collateral damage attributable to the SLA. The Commission notes the view expressed by the Military Expert regarding civilian casualties and the difficulties associated with determining what proportion of those killed were civilians.
28. Therefore, in alleging that the SLA caused an excessive number of civilian deaths, this Commission finds that the Darusman Report failed either to grasp or deal with the impact of the following on calculations as to proportionality:
  - a. The taking of 300,000 – 330,000 civilian hostages by the LTTE;
  - b. The use by the LTTE of some of those hostages as human shields;
  - c. The deliberate blurring by the LTTE of the distinction between their own fighters and non-combatants, thereby undermining the bedrock principle of distinction; and
  - d. The forcing of civilians, including children, into the front line.

29. Taking these factors into account, the Commission is satisfied that in terms of the military objective sought, the elimination of Prabhakaran was clearly a crucial factor in freeing Tamil civilians from LTTE captivity and in the main, the methods deployed were not disproportionate.
30. However, the Commission emphasises that there may be individual instances of violations of IHL which could amount to war crimes and must be the subject of a judge-led investigation. In addition, this Commission is of the view that the alleged attacks on hospitals and make-shift hospitals are widespread enough to potentially reach the crimes against humanity threshold. However, in Chapters 6 and 7 we have outlined the evidential difficulties that arise in shelling cases. Of course, each allegation will have to be measured against the Darusman finding, *'that the LTTE fired artillery in proximity to large groups of IDPs and fired from, or stored military equipment near IDPs or civilian installations such as hospitals.'* Nevertheless, there is strong support that many hospitals were hit by SLA shellfire and in the view of the Commission, this calls for a judge-led investigation so that if blame is to be assigned the matter can be properly determined.

#### *Deliberate attacks against civilians*

31. The Darusman Report alleges the employment of artillery by the SLA without distinction and within No Fire Zones ('NFZ'). The GoSL created the first No Fire Zone on 20 January 2009 in order to provide civilians with a safe haven from the conflict. However, the LTTE refused to accept or acknowledge such zones. According to Article 15 of the Fourth Geneva Convention, there has to be mutual agreement for an NFZ to come into effect. Such agreement must be clearly expressed. This rule is recognised as a customary principle of IHL. The rules applicable to demilitarized or safe zones are regarded as applicable in both international and non-international armed conflicts and have been observed in many such conflicts including in the former Yugoslavia, Iraq and Syria by express agreement. Since there was no mutual agreement between the GoSL and the SLA regarding the establishment of the NFZs, in reality they never existed in law.
32. The Commission is satisfied that where the SLA issued warnings to the civilian population to protect themselves by entering an NFZ, the effect of those warnings was nullified by the movement of the LTTE into such areas, preventing the flow of civilians to a safe environment. This had the effect of making the anticipated civilian casualties essentially unknowable by the SLA whilst the LTTE was properly positioned to accurately assess the precise number of deaths or injury to civilians under their control.
33. The Commission takes the view that one of the most significant factors leading to civilian deaths was the refusal by the LTTE to agree to the NFZs. Not only did the LTTE refuse to agree to such zones, they also entered them to hold and keep civilian hostages and embed their heavy weaponry amidst the civilian population so as to gain a military advantage by attempting to prevent the SLA from returning fire or by deliberately incurring civilian casualties for propaganda purposes. The Commission notes the statement made to a BBC journalist by Seevaratnam Pulidevan, the head of

the LTTE's peace secretariat, that the aim of keeping hundreds of thousands of women and children trapped was that if enough of them were killed the world would intervene. This Commission is familiar with the well-known terrorist tactic of creating 'media martyrs'.

34. The Commission finds that artillery fire into civilian areas, for example NFZs, cannot be deemed *per se* unlawful but must be subject to an analysis in accordance with the principles of distinction and proportionality. The Commission is of the view that there was sufficient legal justification for SLA's decision to return artillery fire under the 'counterterrorism' IHL paradigm, namely that terrorist forces should not be allowed to profit from their crime of hostage-taking, particularly when forcibly recruiting children as young as 12 into the front lines and executing Tamil civilians who were seeking to escape from the LTTE.
35. The Commission, however, goes further in taking the view that IHL permitted SLA forces to target LTTE combatants within NFZs *in order* to free civilians from the grip of LTTE predations.
36. The Commission finds that it was part of the LTTE tactics to so situate weaponry as to draw SLA fire towards such places as hospitals or UN positions, with the goal being to achieve a propaganda advantage if these installations were hit or damaged. This tactic makes it difficult to determine whether a shell was lawfully fired at a legitimate LTTE target or from which side a shell was fired on a particular day. The Commission finds that at this stage, although there is evidence of hospitals having been hit on a number of occasions, given the LTTE strategy of deliberately seeking to endanger the civilian population, there is insufficient evidence that all shelling incidents were part of a government sanctioned SLA campaign of deliberate targeting of hospitals.
37. The accusations made against the GoSL and the SLA imply either a deliberate policy to target civilians or recklessness as to the scale of civilian casualties in achieving its strategic objectives. It is the view of this Commission that there was no military advantage to the SLA in targeting civilians. Indeed, there are reported instances of SLA soldiers rescuing civilians. Furthermore, in a US diplomatic cable of July 15 the International Committee of the Red Cross (ICRC) head of operations for South East Asia is quoted as saying that while the SLA regarded their military objectives as paramount, the SLA were, '*open to adapting its actions to reducing casualties*'. Moreover, as the Military Expert has noted, excessive human casualties would have led to international intervention to avoid a humanitarian disaster, thereby preventing the SLA from achieving its key military objective of killing or capturing the LTTE leadership. Further, the fact that 290,000 Tamil civilians survived to be rescued by the SLA is inconsistent with the concept of a policy to accomplish the deliberate targeting of civilians.

#### *The LTTE's Use of Human Shields*

38. The Darusman Report, despite finding credible allegations that the LTTE took thousands of civilians as hostages and executed those attempting to flee, concluded that the LTTE's action did not in law amount to the use of human shields due to the

absence of credible evidence that civilians were deliberately moved towards military targets to protect the latter from attacks. In the view of the Commission, this conclusion is based on an unduly narrow interpretation of the law and factual situation.

39. The International Criminal Court's Elements of Crimes adopted on 30 June 2000 make it plain that the crime of using civilians as shields is made out when a perpetrator '*moved or otherwise took advantage of the location of one or more civilians*' intending to '*shield a military objective from attack or shield, favour or impede military operations*'. While this definition refers to Article 8(2)(b)(xxiii) of the ICC Statute, applicable to international armed conflicts, the use of human shields is also prohibited in non-international armed conflicts and the same basic elements may be deemed applicable. The view of this Commission is that the LTTE took advantage of the presence and location of thousands of civilian hostages to shield the LTTE leadership from attack and capture. The LTTE thus exploited the civilian status of the hostages to protect their most important military assets, namely, their commanders and their leader, Prabhakaran. This situation was exacerbated by the LTTE's act of forcibly preventing civilians who wished to leave the conflict zone from doing so and relying on their presence to obtain a military advantage. Indeed, this Commission finds that the crime of human shielding is clearly established.
40. The Commission is satisfied that there was a signal failure in the Darusman Report to deal with the paramount *military advantage* anticipated by the SLA in the capturing or killing of the LTTE leader, whose absence from the field would not only have led to an immediate freeing of civilian hostages, but would also have ended the multigenerational armed conflict that pivoted upon Prabhakaran's very existence.

#### Overall Conduct of the LTTE

41. In coming to its findings about the LTTE, the Commission was cognisant of the fact that every major NGO and many international organisations recognised the parasitic conduct of the LTTE in its treatment of the Tamil civilian population, including the forcible recruitment of children as soldiers, particularly in the last stages of the war. It has been estimated by a respected Jaffna based NGO that in the final twelve hours of the conflict the majority of the Tamil civilian casualties were caused by the LTTE.
42. This Commission is satisfied that the LTTE was principally responsible for the loss of civilian life during the final phase of the armed conflict through their actions which included:
- Taking 300,000-330,000 civilian hostages.
  - Implementing a strategy of killing Tamil civilians to suit their military aims.
  - Using civilians as a strategic human buffer leading to considerable loss of civilian life.
  - Using hostages to dig trenches and build fortifications thereby exposing them to harm.
  - Sacrificing countless civilian hostages to keep the LTTE leadership in power.
  - Arming hostages and forcing them into the front line leading to the deaths of large numbers.

- Forcing a great number of children to man the frontlines.
- Deliberately preventing civilians, under their effective control, from fleeing to areas away from the fighting and executing civilian hostages for attempting to escape their captivity.
- Shelling civilian hostages in order that the LTTE might assign those deaths to the SLA for media purposes to provoke international humanitarian intervention.
- Placing their heavy weaponry amid civilians making it inevitable that there would be civilian casualties.
- Killing civilians through the use of suicide bombers.
- Placing mines and other explosive devices that resulted in civilian deaths.
- Causing the deaths of civilians who drowned in an attempt to flee their LTTE captors.
- Adopting a practice whereby a significant number of its cadres fought in civilian clothes, thus blurring the distinction between combatants and civilians inevitably leading to civilian deaths.

For the above reasons this Commission is of the view that the principal reason for the loss of civilian life during the final phase of the war was the hostage taking and use of human shields by the LTTE. Indeed, in the absence of these actions, there may have been a much reduced number of civilian casualties.

#### Overall Conduct of Government Forces

43. However, the Commission must accept that shelling by the SLA undoubtedly led to a significant number of civilian deaths, but the Commission stresses this was an inevitable consequence of the LTTE's refusal to permit civilians to leave their control in order to use them both as a shield and a pool for recruitment, even when the GoSL permitted a ceasefire on April 12<sup>th</sup>. No government could be expected to permit young children to be forced into the front line without taking all available measures to put an end to such ruthless exploitation of a civilian population. The Commission has set out in its report the independent evidence bestowing praise on the SLA for the manner in which it discharged its duties in the years preceding the final stages of the war. In particular, the SLA was commended for conducting a military campaign that minimized civilian casualties. In early 2009, the Ambassador of the United States to Sri Lanka and the United Nations Resident Co-ordinator recognised the caution exercised by the Sri Lankan armed forces in keeping civilian casualties to a minimum and urged the GoSL not to tarnish this reputation in the final stages of the conflict.
44. As regards the allegation that the GoSL wanted to conduct a 'war without witnesses', the Commission notes that the US State Department has commented that *both* the GoSL *and* the LTTE placed tight restrictions on the press. It is a well-recognised principle that journalists can be excluded from conflict zones to protect military and national security. Indeed, reasonable restrictions can be placed on their access to conflict areas and they can also be excluded for their own safety. The Commission also finds that while the Darusman Report concluded that government medical supplies and food were grossly inadequate, as late as 7<sup>th</sup> April 2009, the UN were inaccurately estimating the civilian population at only 100,000 persons. Furthermore, the Darusman Report failed to analyse the manner in which the LTTE sought to sustain their own forces by gaining

access to food and medicines that were destined for civilians thereby increasing their control over the civilian population and prolonging civilian suffering. The Report of the Secretary General's Internal Review Panel on United Nations Action in Sri Lanka (Petrie Report), by way of example does make mention of an allegation that the LTTE may have sequestered 20% of all aid entering the Wanni. Indeed, the GoSL was permitted to limit the passage of aid, if that aid was destined to be diverted to sustain the LTTE. Therefore, it is the Commission's view that there was neither an intention to kill civilians through starvation, nor by deprivation of medicines so as to cause deliberate civilian suffering. There may well have been a limiting of food and medicine so as to deprive the LTTE from exploiting those items for its own purposes, thereby hastening their defeat.

45. The Commission notes that the GoSL undertook the final stage of the military campaign against the LTTE against the backdrop of many previous governments having failed to bring the LTTE to a negotiated political settlement. The Commission is satisfied that over the years, the LTTE used every ceasefire to resupply, rearm and upgrade their fighting capabilities.

#### Command Responsibility

46. Under the international law doctrine of command or superior responsibility, military and civilian superiors can be held responsible for the crimes committed by their subordinates if they knew or had reason to know that the subordinates were about to commit or had committed war crimes, and the superior failed to prevent or punish such crimes.
47. It is clear to the Commission that this doctrine may be engaged as it concerns the allegations relating to the 'white flag killings' of LTTE leaders and the images of executions that have formed the subject matter of a series of Channel 4 television broadcasts. The Commission is of the view, as found by the LLRC, that there are matters to be investigated in terms of specific instances of deliberate attacks on civilians. These matters must be the subject of an independent judicial inquiry. There are credible allegations, which if proved to the required standard, may show that some members of the armed forces committed acts during the final phase of the war that amounted to war crimes giving rise to individual criminal responsibility. These include such incidents as:
- The allegations of 'white flag killings' which led to the deaths of Balasingham Nadesan, the head of the political wing of the LTTE, and Seevaratnam Pulidevan, the LTTE's head of the peace secretariat and others who surrendered, having allegedly been given assurances at a high level. The Commission is of the view that despite some conflicting evidence, the underlying matrix is such that these alleged illegal killings, together with other such killings of those who surrendered, must be the subject of an independent judge-led investigation. To that list for investigation, must be added the cases of all those who were *hors de combat* and allegedly perished while in the custody of the SLA.
  - The alleged executions of individuals named in the various Channel 4 documentaries.

- The disappearance of busloads of persons who surrendered in the last days of the conflict. One such busload was accompanied by a Catholic Priest, Father Francis.
- The credible evidence that hospitals, both makeshift and otherwise, were damaged by shellfire with civilian casualties to the point that this Commission is of the view that, bearing in mind the special protected status accorded to hospitals, there must be a judge-led inquiry into the circumstances attaching to each individual case. However, the Commission has to balance these allegations against the strong supporting evidence of the propensity of the LTTE to place weaponry and indeed even a tank in close proximity to hospitals as confirmed by the Darusman Report.

The Commission notes and believes it should underline the fact that the former Commander of the Sri Lankan Armed Forces, now Field Marshall Sarath Fonseka as recently as May 2015, has himself, welcomed the need for a war crimes investigation into a number of incidents. In an interview recorded in the London Guardian newspaper on 27th May 2015, Fonseka maintained his innocence while being cited as ‘*accepting that some crimes occurred during the war,*’ albeit maintaining that such actions were done by individuals rather than as part of any widespread policy by the SLA.

### Genocide

48. The Commission rejects the suggestion that civilians were either targeted directly or indiscriminately by the SLA as a part of an alleged genocidal plan. The term ‘genocide’ is often used in a political context but it is a legal concept with a very precise and definite meaning and scope of application. Genocide involves a specific intent on the part of the perpetrator to destroy in whole or in part a national, ethnic, racial or religious group as such. In a recent judgment, the International Court of Justice rejected claims of genocide by both Croatia and Serbia making it plain that the crime is only made out if it is proved that the perpetrators acted with specific intent to destroy physically the group concerned - ‘*specific intent to destroy in whole or in part*’. The evidential bar has been set deliberately high for this most serious of international crimes.
49. This Commission refers in its report to a US diplomatic cable dated 15 July 2009, by Ambassador Clint Williamson that cleared the SLA of crimes against humanity during the Wannai offensive. Not only was the SLA cleared of crimes against humanity according to Ambassador Williamson during the Wannai offensive, Jacques de Maio, head of ICRC operations in South Asia, stated that any serious violations of IHL that may have been committed by Sri Lankan forces did not amount to genocide. The University Teachers for Human Rights (Jaffna) have similarly found that there is no evidence of genocide in the final stage of the war by the SLA.
50. While there may have been long-standing practices of religious, ethnic and racial discrimination carried out by various governments towards minorities, targeting that group, even if for discriminatory reasons, is not sufficient to constitute genocide. On all the evidence available, this Commission rejects the suggestion that the crime of genocide was or may have been committed during the final phase of the war.

## Accountability

51. This Commission finds that the Darusman Report, as well as other reports, have taken a particularly narrow and restricted view of the obligation upon the GoSL to prosecute international crimes. This Commission is satisfied that States and international organisations have adopted a wide range of measures to deal with post conflict recovery and that transitional justice admits of many mechanisms. The obligation to prosecute in all circumstances has not yet become a part of customary international law. This Commission notes that there is a general inconsistency among human right treaties as to whether the duty to prosecute exists in all circumstances. Those conventions that include an explicit duty to prosecute are limited in their application while those with a wider application contain ambiguous language which could be taken to imply a duty, but this is certainly not clear. While noting that the UN Charter places peace and security at a higher level than justice, this Commission is of the view that in order to achieve peace and reconciliation the issue of accountability on all sides of the conflict must be addressed. It is for the political authorities to determine whether a South African-style Peace and Reconciliation Commission without prosecution is the most appropriate mechanism or if the Sierra Leonean model of combining the prosecution of those '*who bear the greatest responsibility*' coupled with a Truth and Reconciliation Commission will better meet Sri Lanka's post conflict needs.

## CHAPTER 1 – INTRODUCTION

52. The background to this Report of the Presidential Commission of Inquiry to Investigate Complaints Regarding Missing Persons ('PCICMP') headed by former Judge Maxwell P. Paranagama (hereinafter called 'Paranagama Commission') is two earlier reports. The first of these is the Report of the Secretary-General's Panel of Experts on Accountability in Sri Lanka ('Darusman Report'). The Secretary-General's panel ('Darusman Panel') was appointed on 22 June 2010 and published its report on 31 March 2011.<sup>17</sup> The Darusman Report found credible allegations comprising five core categories of potential serious violations of international humanitarian law ('IHL') committed by the Government of Sri Lanka ('GoSL'), in addition to six categories of crimes allegedly committed by members of the Liberation Tigers of Tamil Eelam ('LTTE').<sup>18</sup> The second report is that of the Lessons Learnt and Reconciliation Commission ('LLRC'). The LLRC was established on 15 May 2010 by the former President of Sri Lanka, Mahinda Rajapaksa, and its report was published on 15 November 2011. The mandate of the LLRC covered the period from February 2002 to May 2009, looking ahead to an era of healing and peace building in Sri Lanka. The LLRC *inter alia*, addressed alleged violations of IHL arising in the last phase of the conflict in Sri Lanka and made recommendations which included investigations in relation to specific instances of alleged crimes.<sup>19</sup> However, the LLRC made it clear that its analysis of these IHL issues was '*not meant to be an exhaustive treatment*'.<sup>20</sup>
53. On 15 August 2013, former President Rajapaksa set up the Paranagama Commission comprised of three members: former Judge Maxwell P. Paranagama who serves as Chairman, Mrs. Mano Ramanathan and Mrs. Suranjana Vidyaratne, mandated to investigate complaints regarding missing persons ('First Mandate'). The Paranagama Commission has been the recipient of some 21,000 complaints and has held public hearings in the North and East of Sri Lanka. The mandate of the Paranagama Commission was expanded by Gazette notification on 14 July 2014 to look into allegations of war crimes and other violations of international law committed during the conflict in Sri Lanka ('Second Mandate'). The time period for completion of the Second Mandate was extended to 15 August 2015 by the new President of Sri Lanka, Maithripala Sirisena, who assumed office on 9 January 2015. By this extension the Sirisena Government added its support to the Paranagama Commission and its role in answering the concerns of the international community reflected in the First and Second Mandates.
54. Complex issues concerning the law of armed conflict, international human rights law ('IHRL') and customary international law ('CIL') arose for consideration in the Second Mandate. Following a request by the Chairman of the Paranagama Commission, former President Rajapaksa appointed a legal Advisory Council ('Advisory Council') consisting of a number of eminent international lawyers with wide experience of international legal practice. The new Sirisena Government retained the three principal

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<sup>17</sup> Report of the Secretary-General's Panel of Experts on Accountability in Sri Lanka ('Darusman Report'), 31 March 2011.

<sup>18</sup> Darusman Report, paras 176-177.

<sup>19</sup> Report of the Commission of Inquiry on Lessons Learnt and Reconciliation ('LLRC Report'), 15 November 2011, para. 4.360.

<sup>20</sup> LLRC Report, para. 4.28.

advisors appointed by the former Government, two of whom had previously been appointed by the Secretary-General of the United Nations to oversee, as Chief Prosecutors, post conflict transitional justice processes. All three advisers had carried the heavy burden of prosecuting heads of State.

55. In view of the issues raised by Second Mandate, the Paranagama Commission appointed Major General John Holmes, DSO, OBE, MC, as an independent military expert. Major General Holmes submitted his report ('Expert Military Report') with accompanying annexes on 28 March 2015.<sup>21</sup>
56. There is little doubt that the pressures applied by the international community played a significant part in the decision by the former Rajapaksa Government to make efforts to meet the accusations made against the GoSL and the Sri Lankan Army ('SLA') at the United Nations Human Rights Council ('HRC') and by NGOs. While it is clear to the Paranagama Commission that the Darusman Report made incorrect assertions of fact and law, the failure of the then Sri Lankan Government to address the allegations put forward in that report resulted in the world becoming a prisoner of the 'Darusman narrative'.
57. This Commission's objective is to present a balanced narrative by conducting a proper analysis of the final phase of the conflict – the period between January and May 2009 – taking into account expert military and legal advice. In achieving its objective, the Commission in no way discounts incidents that may have led to breaches of the laws of war during the conflict. This Commission has confined itself to a consideration of the final phase of the war as this is the period that has produced the main allegations of violations of the laws of war.
58. The Commission notes that it has not had access to what may be key evidence that has been supplied to the UNHRC and despite earlier requests from the LLRC for Channel 4 and for International NGOs to assist the process by supplying evidence, there has been a categorical refusal to assist the GoSL by providing evidence or testimony, even in a redacted form.<sup>22</sup> To that extent, there may be gaps in the primary evidence that the Commission has yet to deal with. This is unfortunate.
59. This Commission feels compelled at the outset to correct a view of sovereignty that is no longer current but which was espoused by some within Sri Lanka who seek to deny the international community *any* right to investigate what took place in the final stages of the conflict. The objection was that this in some way violated the sovereignty of Sri Lanka, for example by the setting up of a Commission of Inquiry into the conduct of the war by the UNHRC.
60. Prior to the Second World War, state action was a matter to be reviewed exclusively within each state's domestic jurisdiction. This notion has changed significantly with the rise of international human rights protections and humanitarian law, based on the idea of a globalized enforcement. These developments have eroded the primacy of states in the international legal system and underscored the transnational character of respect for

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<sup>21</sup> Expert Military Report, Annex 1.

<sup>22</sup> See Report of the Commission of Inquiry on Lessons Learnt and Reconciliation, Annexes, November 2011, pp. 145-148.

individual human rights and the universal condemnation of violations of international law.

61. Indeed, when a state signs up to the UN Charter it surrenders a part of its sovereignty in that it agrees to be bound by Security Council resolutions under Chapter VII. Thus, the non-intervention in the internal affairs of states is no longer an absolute rule, especially with the emergence of conventional norms regarding civil rights, and, more generally, human rights since the end of the Second World War.
62. Developments in IHL, including its application to non-international armed conflicts (through the 1949 Geneva Conventions and Additional Protocols I and II of 1977, as well as the establishment of international criminal tribunals and ‘hybrid’ courts in various parts of the world) have further reinforced the limitations of state sovereignty. All these advances have solidified the concept that state sovereignty is subject to international law regulating the conduct of states and their armed forces. States do not enjoy unfettered control over their domestic affairs or foreign policy.
63. The International Court of Justice (‘ICJ’) has recognised this shift in finding that universally accepted human rights constitute *erga omnes* obligations, that is, they are obligations owed to the international community as a whole and all states have a legal interest in their protection.<sup>23</sup> At the same time, this Commission does not accept that there is an associated *duty* to prosecute in all cases of serious human rights violations.<sup>24</sup> The Darusman Report’s contention that the prosecution of crimes at international law is central to transitional justice mechanisms is a misstatement of the true legal and policy position.
64. For example, in Haiti in 1994 it was decided that the prosecution of military leaders might lead to the downfall of the government which would have been unlikely to survive the destabilising effects of politically charged trials. A National Truth and Justice Commission was therefore set up. This mechanism was endorsed and supported by President Clinton and the US Government of the day, despite President Clinton having described the military leaders as ‘*the most violent regime in our hemisphere*’.<sup>25</sup> Indeed, although there were a few prosecutions in the 1990s, many of these were held in absentia and many of the key figures had fled to the US and continue to reside there.<sup>26</sup> Similarly, the establishment of a Truth and Reconciliation Commission (‘TRC’) in South Africa, which saw Nelson Mandela himself giving evidence is, to this day, broadly accepted by the international community as an acceptable accountability process. The Commission recognises that the greater the intransigence and obvious delay in establishing any form of mechanism of accountability, the greater the likelihood of international pressure for criminal prosecution and potential sanctions, trade and otherwise, against the state in question.

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<sup>23</sup> See *Case Concerning The Barcelona Traction, Light and Power Company, Limited*, Judgment, ICJ Reports 1970, p. 3 at para. 33. See also *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, p. 136 at paras 155-157.

<sup>24</sup> See e.g. Michael P. Scharf, ‘From the eXile Files: An Essay on Trading Justice for Peace’ (2006) *Washington and Lee Law Review*, vol. 63, issue 1, pp. 365-366, arguing that it does not follow from the *jus cogens* nature of crimes against humanity that the duty to prosecute has attained the status of *jus cogens*.

<sup>25</sup> William J. Clinton, Address to the Nation on Haiti, 15 September 1994, <http://www.presidency.ucsb.edu/ws/?pid=49093>.

<sup>26</sup> Human Rights Watch, *Haiti Thirst For Justice, A Decade of Impunity in Haiti*, Vol. 8, No. 7 (B), September 1996. < <http://www.hrw.org/reports/1996/Haiti.htm> >.

65. This Commission seeks to document chronologically some of the salient events that occurred during the final phase of the war in Sri Lanka and to analyse the thinking and conduct of both individuals and states whose interaction helped shape the outcome of the events both before and after the end of Asia's longest running civil war. The Commission makes no apology for having delved into diplomatic cables that have come to be disclosed by WikiLeaks to shed light on matters hitherto unknown or only guessed at. On 23 May 2014 the Court of Appeal in the UK upheld the principle that the contents of WikiLeaks cables could be admissible as evidence in court.<sup>27</sup> The Commission does not make any finding as to the legality or otherwise of how these diplomatic cables were originally obtained or have come to enter the public domain. While at times dealing with obvious criticisms of the GoSL, these cables also give praise for the way in which the SLA conducted itself and support the contention that the LTTE was preying upon its own civilian population, forcing young children into the front line and executing those who were seeking to escape to government lines. The cables also provide some insight into the rupture that took place between Western powers and the GoSL.
66. For nearly thirty years, the LTTE was responsible for conducting numerous attacks against the GoSL and the Sri Lankan population as part of its effort to create a separate Tamil state.<sup>28</sup> There were repeated failures to reach a peaceful settlement through negotiations. In early 2009, the GoSL had to confront the LTTE's determined effort to exploit the civilian population of the Wanni in the LTTE's drive to avoid military defeat and to ensure the preservation of its leadership.<sup>29</sup>
67. This Commission has considered the many allegations made against the SLA with regard to the conduct of its final campaign that ended the war. Some of these allegations have been of executions and deliberate or indiscriminate shellfire, acts which are totally inconsistent with what is expected of a responsible army discharging its duties in accordance with the laws and customs of war. The Commission has not shied away from examining those allegations and accepts that they must be dealt with seriously.
68. In stark contrast, this Commission finds that there is strong independent evidence of praise being conferred on the SLA regarding the manner in which its forces discharged their duties. An example of such a plaudit towards the end of the war is to be seen in a confidential diplomatic cable dated 27 January 2009 from the US Embassy in Colombo to Washington, referring to advice given to the GoSL by the US Ambassador to Sri Lanka:

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<sup>27</sup> *The Queen (on the application of Louis Oliver Bancoult) v. Secretary of State for Foreign and Commonwealth Affairs* [2014] EWCA Civ 708, 23 May 2014.

<sup>28</sup> For background to Sri Lanka's war and LTTE militancy see Crisis Group Asia Reports N° 124, *The Failure of the Peace Process*, 28 November 2006; N° 134, *Sri Lanka's Muslims: Caught in the Crossfire*, 29 May 2007; N° 135, *Sri Lanka's Human Rights Crisis*, 14 June 2007; N° 141, *Sri Lanka: Sinhala Nationalism and the Elusive Southern Consensus*, 7 November 2007; N° 146, *Sri Lanka's Return to War: Limiting the damage*, 20 February 2008; N° 159, *Sri Lanka's Eastern Province: Land, Development, Conflict*, 15 October 2008; N° 165, *Development Assistance and Conflict in Sri Lanka: Lessons from the Eastern Province*, 16 April 2009; N° 172, *Sri Lanka's Judiciary: Politicized Courts, Compromised Rights*, 30 June 2009; and *Asia Briefing N° 99, Sri Lanka: Bitter Peace*, 11 January 2010. Gordon Weiss, *The Cage: The Fight for Sri Lanka and the Last Days of the Tamil Tigers*, London: Vintage Books, 2012 ('Weiss, *The Cage*').

<sup>29</sup> When referring to the LTTE strategy Weiss maintained, 'The safety of civilians always came a distant second to their political and military objectives'. Weiss, *The Cage*, p. 114.

*‘The Government has gained considerable credit until this point for conducting a disciplined military campaign over the past two years that minimized civilian casualties. We are concerned by statements from several Government Ministers that the “[GoSL] will fully occupy the Vanni by your independence day on February 4. Given the recent high civilian casualties, we urge that you not tarnish your reputation for minimizing civilian casualties in your haste to end hostilities by February 4.’*<sup>30</sup>

69. A further example is the statement by the UN Resident Coordinator to the Sri Lankan Minister of Foreign Affairs on 7 February 2009:

*‘We [the UN] recognise that throughout the military campaign during 2008 the level of civilian casualties was minimal especially considering the scale of the military operation. This was in large part due to the actions and caution of the Sri Lankan forces. However since the first week of January, despite the best efforts, there has been a rapid increase in civilian casualties as the areas within which they are concentrated shrinks, and we have raised our concerns to the Government of Sri Lanka both publicly and privately in this regard. We have also highlighted publicly a number of times the grave responsibility the LTTE has for this terrible situation...’*<sup>31</sup>

70. The question thus arises as to how the most damning of indictments comes to be laid at the door of the SLA in respect of the last phase of the war with accusations of prisoner executions, deliberate or indiscriminate shelling of civilian areas and even genocide. Having reviewed the evidence and the observations of the kind referred to in paragraphs 68 and 69 above, just five months prior to the end of the war, the Commission is inescapably driven to the conclusion that an allegation of genocide against the SLA or the GoSL is unfounded. But the Commission has had to ask itself what changed in the final phase of the war for the SLA to face the allegation of an ‘*orgy of violence*’ as claimed by Channel 4.
71. In short, the answer lies with the taking by the LTTE of 300,000 to 330,000 Tamil civilian hostages. This act, together with the forced recruitment of children and executions of those attempting to escape, requires a fundamental recalibration of the *proportionality* test applicable in IHL. Previous legal assessments have failed to properly factor this critical issue of the hostage taking into the evaluation of proportionality. Sometimes it is not easy to assess what attacks are disproportionate; to a large extent the answer depends on an interpretation of the circumstances prevailing at the time. It requires very careful consideration to be given to the circumstances of *any* conflict before judgments about legality or illegality of military actions in the conflict are made publicly. This issue has simply not been given sufficient weight by either the Darusman Report or NGOs. As far as is known, neither the Darusman Report nor any other report to date has sought to provide a thorough analysis of the applicable

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<sup>30</sup> US Ambassador Robert Blake, ‘Sri Lanka: Declared Safe Zone Inoperative; ICRC Contemplates Full Withdrawal’, Embassy Colombo, *WikiLeaks*, 27 January 2009, released 30 August 2011. para. 7. <<http://www.cabledrum.net/cables/09COLOMBO95>>.

<sup>31</sup> *Report of the Secretary-General’s Internal Review Panel on United Nations Action in Sri Lanka* (‘Petrie Report’), November 2012, para. 77.

law, as presently defined and understood, and more particularly to focus that applicable law on the specific factual circumstances of the latter stages of the conflict. The SLA faced a fanatical enemy, which was preying upon its own people. Therefore, the SLA was driven to prevent the escape of the LTTE leadership, or kill or capture that leadership to end the war. As the Military Expert, Major General Holmes, stated: *'This would have posed a dilemma for the best trained and equipped armies in the world'*.<sup>32</sup>

72. Western powers clamouring for a ceasefire seemed to have forgotten that after the previous ceasefire in 1987 the LTTE regrouped, rearmed and continued the war for another twenty-three years. Indeed, in Sri Lanka there was a sense that when the LTTE were at the point of defeat in 1987, foreign intervention allowed the war to continue. Therefore, it has to be understood that there is a feeling locally, by those who have personally suffered from this conflict – be they Tamil, Sinhalese or Muslim – that outside intervention has not been crowned with success.
73. The GoSL may be criticised for its inept use of the expression a *'zero casualty'* war. However laudable this notion may be, it was unrealistic for the *'mission statement'*, in the aftermath of war, to be translated by politicians into claims that *'there were zero civilian casualties'*. Without a doubt, there were casualties. Indeed on 3 August 2011, Gotabaya Rajapaksa, the then Secretary of State for defence, admitted that civilian deaths could not be avoided.<sup>33</sup> The key question is whether in the main, those civilians were killed unlawfully by SLA or as a tragic and unfortunate consequence of a campaign which was proportionate to the military objective sought.
74. The Commission makes the obvious but preliminary comment that *'no war is clean'*, despite expressions such as *'surgical strikes'*. Indeed, as the US Defence Secretary, Hagel, told Congress in June 2014 over the trade of five Taliban detainees for Sgt. Bowe Bergdahl, *'War is a dirty business, and we don't like to deal with those realities, but realities they are.'*<sup>34</sup> Underlining this point, in 2011 a US soldier was convicted of murder by a court martial for the killing of three civilians in Afghanistan.<sup>35</sup> Three of his fellow soldiers also pleaded guilty to other charges relating to the incident. Similarly, in 2006 a British soldier, Corporal Payne, became the first to plead guilty in a military court in the UK for a war crime which took place in Iraq in 2003.<sup>36</sup>
75. The Sri Lankan conflict was a long and brutal, with the GoSL fighting a ruthless, suicidal enemy and it would be surprising to this Commission if participants on both sides would, at no time, have breached the laws of war. The Commission highlights the above examples simply to underline the fact that even in the most sophisticated, well trained armies of the world, individual criminal acts can take place, without such crimes resulting in a wholesale condemnation, or indeed the criminalisation of the entire nation's fighting force.

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<sup>32</sup> Expert Military Report, Annex 1, para. 83.

<sup>33</sup> Ben Doherty, *The Sydney Morning Herald*, 3 August 2011, <<http://www.smh.com.au/world/sri-lankan-civilian-deaths-unavoidable-20110802-1i9t9.html>>.

<sup>34</sup> Erin Mcclam, NBC News, 11 June 2014, <<http://www.nbcnews.com/storyline/bowe-bergdahl-released/war-dirty-business-hagel-defends-bowe-bergdahl-swap-n128356>>.

<sup>35</sup> Chris McGreal, "Kill team" US platoon commander guilty of Afghan murders', *The Guardian*, 11 November 2011, <<http://www.theguardian.com/world/2011/nov/11/kill-team-calvin-gibbs-convicted>>.

<sup>36</sup> Steven Morris, 'British soldier admits war crime as court martial told of Iraqi civilian's brutal death', *The Guardian*, 20 September 2006, <<http://www.theguardian.com/uk/2006/sep/20/iraq.military>>.

76. The LLRC report has already made it clear that it was incumbent on the GoSL to bring the individual perpetrators of war crimes to justice and that this would also avoid besmirching the reputation of the SLA as a whole. Indeed, contrary to international opinion, senior SLA officers concur with this approach. In responding to the question whether the GoSL should investigate the alleged execution of Balachandran, Prabhakaran's youngest son, Major General Udaya Perera, former Chief of Staff, stated:

*'More than the Government of Sri Lanka, it is we, the army, who should take responsibility, if that cowardly killing happened at the hands of our men.'*<sup>37</sup>

77. This Commission is acutely conscious of the 'Channel 4' allegations. It is critical of Channel 4 for not releasing the original video footage to the GoSL, but accepts that despite some opinions to the contrary, the weight of independent expert analysis of the video footage suggests the images are unlikely to be faked. The Commission is mindful of the fact that forensic pathology and other corroborative expert evidence support the video footage as genuine.

78. This Commission believes that many of the individual incidents that have been highlighted in Channel 4's programmes give rise to an urgent need for a credible judged investigation by the GoSL. The Commission cannot exclude the possibility that executions took place and if proven, these are grave crimes at international law that require an accountability mechanism. The then Foreign Affairs Minister, G. L. Pieris, speaking on behalf of the then government at the 25<sup>th</sup> Session of the Human Rights Council in Geneva in 2014, stated that the GoSL was in the process of seeking to identify potential witnesses arising from the Channel 4 allegations. This Commission assumes that he was referring *inter alia* to those who appeared in SLA uniforms in the Channel 4 video footage:

*'The identification of potential witnesses is currently in progress and once identified, they would be formally called as witnesses.'*<sup>38</sup>

The GoSL clearly have already embarked on an investigation process, but this Commission is critical of the delay in concluding these investigations.

79. In the light of the Channel 4 allegations, the Commission questions the characterisation of the last phase of the war by the then the GoSL as '*a humanitarian operation*'. This is only partially accurate and has invited the criticism that the characterisation of an operation in which thousands die as '*humanitarian*' is '*grotesque*'.

80. Indeed, the last phase of the conflict was part of a clear and understandable mission to target, capture or kill the LTTE leader, Prabhakaran. He was an enemy commander and as much of a legitimate military target as was Saddam Hussein or Osama bin Laden. In fact, in the balance of legal '*proportionality*' – by which civilian casualties are

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<sup>37</sup> Padma Rao Sundarji, *Sri Lanka: The New Country*, Harper Collins: India, 2015, p. 73.

<sup>38</sup> Statement by the Hon. Prof. G. L. Peiris, Minister of External Affairs and Leader of the Sri Lankan Delegation at the High Level Segment of the 25<sup>th</sup> Session of the Human Rights Council, Geneva, 5 March 2014, <<http://www.mea.gov.lk/index.php/en/media/media-releases/4474-statement-by-hon-prof-gl-peiris-minister-of-external-affairs-a-leader-of-the-sri-lanka-delegation-at-the-high-level-segment-of-the-25th-session-of-the-human-rights-council-05-march-2014-geneva>>.

measured – he carried greater value as his elimination or capture, in contrast to bin Laden’s death, would and did lead to an end of the hostage crisis and an immediate end to a thirty year war. Unlike, Al Qaeda, which operated on a decentralised basis, the LTTE was completely centralised under Prabhakaran and thus, his death brought all terrorist activity to a halt. It is significant that there has been no terrorist attack in Sri Lanka since the day he died and that his death ended a multi-generational war.

81. However, the LTTE response, to thwart any effort to target Prabhakaran, led the LTTE to protect him and other leaders of the LTTE by taking hundreds of thousands of civilian hostages. This response by the LTTE created parallel military objectives for the SLA. First it had to free those who were being forced to remain as human shields to protect Prabhakaran, including children who were increasingly being forced into the front line to fight. Secondly, it had to avert the threat of a Masada type mass suicide by the LTTE, as expressed by the then UN Under-Secretary-General for Humanitarian Affairs and Emergency Relief Coordination.<sup>39</sup> He was not alone in this fear.<sup>40</sup>
82. As this Commission sees it, there was indeed a humanitarian crisis, but by way of narrative, it came about as a response to the LTTE’s unlawful actions in a massive hostage-taking. What is critical is whether the SLA, faced with such an unprecedented scenario, conducted itself lawfully in carrying out the dual military aim of freeing the hostages and killing or capturing the LTTE leadership.
83. The SLA, and indeed the GoSL, had to defeat the LTTE while meeting its legal obligation to limit civilian casualties to the minimum. Sri Lanka was not only a party to the 1949 Geneva Conventions<sup>41</sup> but was also bound by other legal instruments such as the Convention on the Rights of the Child (‘CRC’), Article 38 of which required the Government ‘[t]o take all feasible measures to ensure that persons who have not reached the age of 15 years do not take a direct part in hostilities.’<sup>42</sup> The only way the SLA could free children from the clutches of the LTTE and protect them from being sacrificed on the front line, was by a decisive victory to bring that terrorist organization to an end.
84. In military terms the tactical options were stark. The LTTE was unyielding in its desire to retain its control over the civilian hostages. In recent times, the Nigerian Government has faced a similar dilemma over Boko Haram which has taken hundreds of young girls as hostages. In the case of the LTTE, not only had calls for the surrender of hostages not borne fruit, there followed an intensification in the use of children in the front line. In the view of this Commission there was a marked possibility that this suicide based philosophy of the LTTE would be implemented. The international community should not underestimate the importance of suicide and self-sacrifice in LTTE indoctrination. Despite the criticism of GoSL by a respected Jaffna based NGO for failing to resort to other alternatives, that NGO correctly captured the anarchic mood of the moment in these words:

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<sup>39</sup> Sir John Holmes, *The Politics of Humanity, The Reality of Relief Aid*, London: Head of Zeus, 2013, p. 112.

<sup>40</sup> Michael Roberts, *Tamil Person and State: Essays*, Colombo: Vijitha Yapa Publications, p. 194.

<sup>41</sup> International Committee of the Red Cross (ICRC), *Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention)*, 12 August 1949, 75 UNTS 287.

<sup>42</sup> UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3.

*'The talk of surrender in the air had also a disturbing effect on young cadres who had come to believe that the movement would never contemplate such a course after making so many commit suicide for its sacred cause. Among those who had cause for bitter complaint were parents who had lost a child or more who died fighting as conscripts. Because of disorganization during the latter period not all cadres had cyanide capsules. According to those who later escaped, a number of LTTE cadres began committing suicide by exploding grenades in their possession. There was a kind of anarchy. Some cadres were going to bunkers where civilians were sheltering, asking "so you want to run away to the Army do you?", and then opening fire at them.'*<sup>43</sup>

85. There was a pressing need for the SLA to act decisively and quickly if civilian lives were ultimately to be saved. It is the view of this Commission that the SLA made the right decision to act in order to achieve victory and save as many civilians as possible. Indeed, Major General John Holmes, a former Commander of the Special Air Service (SAS) himself an expert in hostage rescue operations, states:

*'It was [...] an entirely unique situation and the fact that 290,000 people escaped alive is in itself remarkable.'*<sup>44</sup>

Major General Holmes has also specified that had there been an intent to wipe out the civilian population indiscriminately, this could have been achieved within two to three days of shelling. The SLA had area weapons, such as Multi Barrelled Rocket Launchers, with fierce fire power and a high firing speed.

86. The Commission accepts that individual incidents of shell strikes against hospitals may have to be scrutinised, although it notes that not a single Government doctor was killed in a hospital in the final phase of the war, which casts doubt on NGO allegations of the deliberate targeting of hospitals. The Commission's independent satellite analysis conflicts with some of the Darusman Report's interpretations of such strikes. In the Commission's view, had these been launched at hospitals makeshift or otherwise, buildings would simply have been eviscerated.
87. The number of civilians killed in the final phase of the conflict is one of the greatest issues of dispute which this Commission has had to address, looking at the many reports on this topic. Satellite imagery does not indicate tens of thousands of graves. The Commission's own analysis will demonstrate that the figure of up to 40,000 civilians killed to be found in the Darusman Report is misleading. The Commission notes the UN Country Team estimate of 7,721 deaths as at 13 May 2009.<sup>45</sup> It must also be mentioned that according to witness accounts presented to a respected Jaffna based NGO, the majority of civilians who were killed in the final twelve hours of the conflict died at the hands of the LTTE.<sup>46</sup>

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<sup>43</sup> University Teachers for Human Rights (Jaffna), Sri Lanka, 'A Marred Victory and a Defeat Pregnant with Foreboding', *Special Report No. 32*, 10 June 2009, p. 5 ('UTHR Report No. 32'), <[http://www.uthr.org/SpecialReports/spreport32.htm#\\_Toc232409724](http://www.uthr.org/SpecialReports/spreport32.htm#_Toc232409724)>.

<sup>44</sup> Expert Military Report, Annex 1, para. 79.

<sup>45</sup> Darusman Report, para. 134.

<sup>46</sup> UTHR Report No. 32, p. 8.

88. In the light of these grave accusations at the end of the war, with the relief and the triumph of having concluded the multi-generational war against the LTTE, the Rajapaksa Government seems to have neglected the opportunity to state its case with clarity, confidence and with, in the view of this Commission, the weight of international humanitarian law on its side as regards the critical issue of *proportionality*. In addition, the former government elected not to engage with the UN resulting in extremely strained relations between the then government, on the one hand, and the international community, on the other. It was thus left to the critics of GoSL and supporters of the LTTE to have the field to themselves.
89. The Commission sets out the applicable legal framework within which to assess the conduct of the parties in the final months of the conflict. However, for these immediate purposes particularly to view other Reports, this Commission will touch upon certain vital principles of international humanitarian law. Our conclusion is that when the full set of factual circumstances are considered, the applicable legal standards *did* allow the Sri Lankan forces to attack the LTTE and its military locations despite their having embedded themselves amidst civilian hostages and form amongst whom the LTTE continued to shell SLA positions therefrom. Failing to respond to deliberate attacks by the LTTE upon the SLA whilst the former were embedded amongst a civilian hostage population would, in the view of this Commission, have been a signal to the LTTE and the world that an asymmetric advantage, unlawfully secured by illegal means would be rewarded. It is the view of this Commission that, in short, the LTTE should not be rewarded for having committed the crime of taking human hostages and taking advantage of them as human shields to support their military campaign. But that is not the end of the problem, indeed it is barely the beginning. Any attack, aimed as it was at defeating and finally destroying the LTTE, would only have been lawful if civilian casualties were not excessive and disproportionate in the circumstances. To meet this test the Government forces would need to have assessed – as accurately as possible – the number of civilians at risk, a task made extraordinarily difficult where the LTTE were deliberately and unlawfully embedded within the civilian population in order to deter SLA military responses or to protect their leadership.
90. This Commission seeks to be a milestone in the process of rigorously analysing the applicable law and takes a first step – no more – in applying the law to the known facts, particularly those facts that are widely accepted as having been accurately reported.
91. If the approach taken by this Commission is followed, well-reasoned and dispassionate findings can be reached in the best interests of all concerned, particularly the victims of the war and citizens of Sri Lanka. Only in this way can this Commission at least *approach* the truth – elusive as that may sometimes be – of the closing phase of this long and bloody conflict.

## CHAPTER 2 - THE 2011 REPORT OF THE SECRETARY-GENERAL'S PANEL OF EXPERTS

92. The Panel of Experts appointed by the UN Secretary-General on 22 June 2010 ('Darusman Panel') was mandated to '*advise the Secretary-General regarding the modalities, applicable international standards and comparative experience relevant to an accountability process, having regard to the nature and scope of alleged violations of international humanitarian and human rights law during the final stages of the armed conflict in Sri Lanka*'.<sup>47</sup> The members of the Panel were Marzuki Darusman, Steven Ratner and Yasmin Sooka. As the Panel explained, it '*applied the rules of international humanitarian and human rights law to the credible allegations involving both of the primary actors in the war, that is, the Liberation Tigers of Tamil Eelam (LTTE) and the Government of Sri Lanka*'.<sup>48</sup> It found '*credible allegations*' indicating a range of violations of international law by both the LTTE and the Government of Sri Lanka (GoSL) pointing towards the need for investigations and prosecutions, and a broader accountability process.
93. In carrying out its Second Mandate, this Commission cannot be blind to the very serious allegations made in the Darusman Report in relation to the conduct of the GoSL and the SLA. These allegations have had a profound effect on public perceptions and have come to dominate the political narrative in relation to the final phase of the war. As a result of its publication, there have been other reports, statements, recommendations, and indeed, even speeches in the British Parliament, which have proceeded on the assumption that there is something conclusive about the accusations made against GoSL and the SLA in the Darusman Report.<sup>49</sup> This Commission therefore sees as one of its duties the demonstration of errors in the Darusman Report and the presentation of an alternative narrative which, in this Commission's view, reflects more accurately the true circumstances and associated responsibilities related to the final phase of the war in Sri Lanka.
94. Indeed, some of the important findings in the Darusman Report assist in providing GoSL with a strong claim that its forces, in terms of general conduct, acted lawfully during the final phase of the conflict given the unique circumstances with which they were confronted. These findings have been corroborated by many other independent sources. Against this background, the Commission accepts that a judge-led investigation into individual violations which may amount to war crimes or crimes against humanity is necessary.
95. In this Chapter, the Commission will first comment on the standard of proof adopted in the Darusman Report before indicating some of the facts that this Commission accepts. It will then point out, with reasons, what it views as the Darusman Report's erroneous factual and/or legal assessments which expose the need for a fresh assessment by this

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<sup>47</sup> Darusman Report, p. i.

<sup>48</sup> Ibid.

<sup>49</sup> See for example, United Nations High Commissioner for Human Rights, 'Promoting Reconciliation and Accountability in Sri Lanka: Report of the Office of the United Nations High Commissioner for Human Rights' 24 February 2014, ('UNHCHR Report'), paras. 4, 62, 63, 66, 72; Yasmin Sooka, 'An Unfinished War: Torture and Sexual Violence in Sri Lanka 2009-2014', *The Bar Human Rights Committee of England and Wales and the International Truth and Justice Project, Sri Lanka*, March 2014 ('Sooka Report'), pp. 12, 14, 21, 43, 49, 79, 80.

Commission. This Chapter therefore provides a starting point for the Commission's own examination of the principal allegations relating to the final phase of the conflict in the light of the applicable law.

#### **A. The Standard of Proof Adopted in the Darusman Report**

96. This Commission notes at the outset that the Darusman Panel did not conduct '*fact-finding*' or reach '*factual conclusions regarding disputed facts*', and nor did it '*carry out a formal investigation that draws conclusions regarding legal liability or the culpability of States, non-state actors, or individuals*'.<sup>50</sup> The Report goes so far as to state that '*the Panel's mandate precludes fact-finding or investigation*'.<sup>51</sup>
97. The Darusman Panel sought '*to assess whether the allegations that are in the public domain are sufficiently credible to warrant further investigations*'.<sup>52</sup> To this end the '*reasonable basis to believe*' standard of proof '*to characterize the extent of the allegations, assess which of the allegations are credible based on the information at hand, and appraise them legally*' was employed.<sup>53</sup> The Panel '*determined an allegation to be credible if there was a reasonable basis to believe that the underlying act or event occurred*'.<sup>54</sup> This standard was settled upon because it '*gives rise to a responsibility under domestic and international law for the State or other actors to respond*'.<sup>55</sup> No authority or further explanation is given for this proposition. Further, no definition of the '*reasonable basis to believe*' standard was provided although such a definition exists under international law.
98. The highest standard of proof is that of '*beyond a reasonable doubt*' which is required to convict an accused of a crime.<sup>56</sup> Below the standard of '*beyond reasonable doubt*' is a standard of '*substantial grounds to believe*'. At the International Criminal Court ('ICC'), the latter standard is considered during the confirmation of charges process and requires that the Prosecution provide the Chamber with sufficient evidence to establish that '*substantial grounds [exist] to believe that the person committed each of the crimes charged*'.<sup>57</sup> The '*reasonable basis to believe*' standard is used at the ICC to determine whether an investigation should be launched and if any persons should be charged as a result of this investigation.<sup>58</sup> Although this standard does not require that the available evidence lead only to one conclusion, this Commission considers that it

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<sup>50</sup> Darusman Report, para. 9.

<sup>51</sup> Darusman Report, para. 51.

<sup>52</sup> Darusman Report, para. 51.

<sup>53</sup> Darusman Report, p. i.

<sup>54</sup> Ibid.

<sup>55</sup> Darusman Report, para. 51.

<sup>56</sup> Article 66(3) of the Rome Statute provides: '*In order to convict the accused, the Court must be convinced of the guilt of the accused beyond reasonable doubt.*' UN General Assembly, *Rome Statute of the International Criminal Court (last amended 2010)*, 17 July 1998, ('ICC Statute'), p. 43.

<sup>57</sup> ICC Statute, Article 61(5). See also *Situation in the Republic of Kenya, Pre-Trial Chamber II*, ICC-01/09, Decision pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, 31 March 2010, para. 28.

<sup>58</sup> ICC Statute, Article 53(1)(a).

does require a reasonable conclusion that is adequately supported by the available evidence. As the ICC Pre-Trial Chamber in the case of *Prosecutor v Al Bashir* held:

*‘It is sufficient at this stage to prove that there is a reasonable conclusion alongside others (not necessarily supporting the same finding), which can be supported on the basis of the evidence and information available’.*<sup>59</sup>

99. The Commission therefore notes that the Darusman Report appears to have used the standard that is recognised under international law to be at the lowest end of the calibration of proof of allegations. Even at this end, however, clear and demonstrable evidence (which is open to examination) to support the allegations relied upon is required. In this connection the Commission notes that much of the evidence and information on which the Darusman Report’s findings are based is un-sourced, whether in the main body of the Report or in the footnotes and the annexes.

### **B. The Accepted Facts in the Darusman Report**

100. Certain ‘*credible allegations*’ made against the LTTE in the Darusman Report are independently corroborated by a myriad independent sources such as to make these findings in the Darusman Report both convincing and supportive of this Commission’s own findings.
101. The Darusman Report found that there were ‘*credible allegations*’ that in the final phase of the war there were some 300,000 to 330,000 civilian hostages being held in the Wanni area by the LTTE.<sup>60</sup> The Report states:

*‘Despite grave danger in the conflict zone, the LTTE refused civilians permission to leave, using them as hostages, at times even using their presence as a strategic human buffer between themselves and the advancing Sri Lanka Army. It implemented a policy of forced recruitment throughout the war, but in the final stages greatly intensified its recruitment of people of all ages, including children as young as fourteen. The LTTE forced civilians to dig trenches and other emplacements for its own defences, thereby contributing to blurring the distinction between combatants and civilians and exposing civilians to additional harm. All of this was done in a quest to pursue a war that was clearly lost; many civilians were sacrificed on the altar of the LTTE cause and its efforts to preserve its senior leadership. From February 2009 onwards, the LTTE started point-blank shooting of civilians who attempted to escape the conflict zone, significantly adding to the death toll in the final stages of the war.’*<sup>61 62</sup>

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<sup>59</sup> *Prosecutor v. Al Bashir*, ICC-02/05-01/09-73, Judgment on the Appeal of the Prosecutor against the Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, 3 February 2010, para. 33.

<sup>60</sup> Darusman Report, p. ii and para. 100.

<sup>61</sup> Darusman Report, p. iii.

<sup>62</sup> US Department of State Report, 2009, p. 11.

102. The Commission is satisfied that this pattern of conduct by the LTTE in the final months of the war was a ploy to attract international attention and to invite international intervention so as to achieve a ceasefire. This would have prevented the LTTE's immediate defeat and enabled it to re-group and resume its fight another day. This central fact is confirmed in a variety of reports that deal with the misuse of civilians by the LTTE either as human shields or for other purposes constituting international crimes. For example:
- a. In 2011, Amnesty International published a report based on information independently gathered from sources such as eyewitness testimony and information from aid workers which concluded that *'the LTTE used civilians as human shields and conscripted child soldiers.'*<sup>63</sup>
  - b. The ICRC Head of Operations for South Asia, Jacques de Maio, informed US officials that the LTTE were trying to keep civilians in the middle of a permanent state of violence. A US diplomatic cable referring to de Maio's information states that the LTTE *'saw the civilian population as a 'protective asset' and kept its fighters embedded amongst them.'*<sup>64</sup>
  - c. On 26 March 2009, the UN Under-Secretary-General for Humanitarian Affairs and Emergency Relief Coordinator, Sir John Holmes, informed the UN Security Council that *'the LTTE continue to reject the Government's call to lay down their arms and let the civilian population leave, and have significantly stepped-up forced recruitment and forced labour of civilians ... at least two UN staff, three dependents and eleven NGO staff have been subject to forced recruitment by the LTTE in recent weeks.'*<sup>65</sup>
  - d. Further reports stated that the LTTE used the protection and resources provided by the UN and various NGOs for military purposes: for example, boats given by 'Save the Children', tents from the UNHCR, and a hospital built with INGO support were found to have been used by the LTTE forces to bolster their military campaign.<sup>66</sup>
103. There is ample evidence before this Commission that LTTE combatants fired artillery at the SLA from within civilian areas or next to civilian installations from the No-Fire Zones.

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<sup>63</sup> Amnesty International, *When Will They Get Justice? Failures of Sri Lanka's Lessons Learnt and Reconciliation Commission*, 2011, p.5. <[http://sydney.edu.au/arts/peace\\_conflict/docs/reports/failures\\_SL.pdf](http://sydney.edu.au/arts/peace_conflict/docs/reports/failures_SL.pdf)>.

<sup>64</sup> Griffiths, 'Sri Lanka: S/WCI AMB. Williamson's Geneva Meetings', Geneva, *WikiLeaks*, 15 July 2009, para. 5. <[https://www.wikileaks.org/plusd/cables/09GENEVA584\\_a.html](https://www.wikileaks.org/plusd/cables/09GENEVA584_a.html)>.

<sup>65</sup> UN Security Council briefing of Under-Secretary-General for Humanitarian Affairs and Emergency Relief Coordinator, Sir John Holmes, 26 March 2009. See, 'Grasping at straws leaving the tail: diaspora activist on Holmes' brief, *TamilNet*, 27 March 2009. <<http://www.tamilnet.com/art.html?catid=79&artid=28851>>.

<sup>66</sup> 'Sri Lanka probes aid groups for suspected rebel links', *oneindia*, 11 January 2007. <<http://news.oneindia.in/2007/01/11/sri-lanka-probes-aid-groups-for-suspected-rebel-links-1168532119.html>>.

- a. The Darusman Report found that the LTTE *‘fired artillery in proximity to large groups of internally displaced persons (IDPs) and fired from, or stored military equipment near, IDPs or civilian installations such as hospitals.’*<sup>67</sup>
- b. On 26 March 2009, the UN Under-Secretary-General for Humanitarian Affairs and Emergency Relief Coordinator, Sir John Holmes, briefed the UN Security Council on the humanitarian situation in Sri Lanka stating that: *‘The Government have promised on several occasions to refrain from using heavy weapons and to uphold a ‘zero civilian casualty’ policy. However, there are continuing reports of shelling from both sides, including inside the ‘no-fire zone’, where the LTTE seems to have set up firing positions.’*<sup>68</sup>
- c. On 27 January 2009, US Ambassador Robert Blake stated that *‘The LTTE must immediately desist from firing heavy weapons from areas within or near civilian concentrations.’*<sup>69</sup> On the same day, Ambassador Blake sent an Action Request to the Norwegian Ambassador, Torre Hattrem, noting that *‘The U.S. has publicly urged the LTTE to allow IDPs freedom of movement and to not fire from positions in or near IDP concentrations.’*<sup>70</sup>
- d. In January 2009, the Bishop of Jaffna Rt. Rev. Dr. Thomas Savundaranayagam wrote a public letter to President Mahinda Rajapaksa stating: *‘We are urgently requesting the Tamil Tigers not to station themselves among the people in the safety zone and fire their artillery – shells and rockets at the army. This will only increase more and more the death of civilians thus endangering the safety of the people.’*<sup>71</sup>
- e. A US diplomatic cable from Colombo to Washington relayed information obtained from the Head of ICRC Operations for South Asia, Jacques de Maio, where: *‘De Maio said that the LTTE commanders’ objective was to keep the distinction between civilian and military assets blurred. They would often respond positively when the ICRC complained to the LTTE about stationing weapons at a hospital, for example. The LTTE would move the assets away, but as they were constantly shifting these assets, they might just show up in another unacceptable place shortly thereafter.’*<sup>72</sup>

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<sup>67</sup> Darusman Report, p. iii.

<sup>68</sup> ‘Grasping at straws leaving the tail: diaspora activist on Holmes’ brief’, *TamilNet*, 27 March 2009.

<sup>69</sup> US Ambassador to Colombo, Robert O. Blake, Jr., ‘Sri Lanka: Declared Safe Zone Inoperative; ICRC Contemplates Full Withdrawal’, Embassy Colombo, *WikiLeaks*, 27 January 2009, released 30 August 2011, para. 5. <[https://www.wikileaks.org/plusd/cables/09COLOMBO95\\_a.html](https://www.wikileaks.org/plusd/cables/09COLOMBO95_a.html)>.

<sup>70</sup> *Ibid*, para. 7.

<sup>71</sup> ‘Don’t station artillery among civilians – Jaffna Bishop to LTTE’, *News Line*, 26 January 2009.

<[http://www.priu.gov.lk/news\\_update/Current\\_Affairs/ca200901/20090126\\_dont\\_station\\_artillery\\_among\\_civilians\\_jaffna\\_bishop.htm](http://www.priu.gov.lk/news_update/Current_Affairs/ca200901/20090126_dont_station_artillery_among_civilians_jaffna_bishop.htm)>.

<sup>72</sup> Griffiths, ‘Sri Lanka: S/WCI AMB. Williamson’s Geneva Meetings’, Geneva, *WikiLeaks*, 15 July 2009, para. 5. <[https://www.wikileaks.org/plusd/cables/09GENEVA584\\_a.html](https://www.wikileaks.org/plusd/cables/09GENEVA584_a.html)>.

104. This Commission notes that it was also reported that the LTTE continued to pursue its policy of using suicide bombers to target the civilian population during the conflict, even after it had ended.<sup>73</sup>
105. Further, it seems to be an undisputed fact that many LTTE cadres did not wear uniforms, often making it almost impossible for the SLA to draw clear distinctions between civilians and LTTE personnel. It was noted in the Darusman Report that the LTTE's '*positioning of mortars and other artillery among IDPs*' and the fact that '*LTTE cadres were not always in uniform*' led to '*retaliatory fire by the Government, often resulting in civilian casualties.*'<sup>74</sup> The Darusman Report further found that compelling civilians to dig trenches and other military facilities contributed '*to blurring the distinction between combatants and civilians and exposing civilians to additional harm.*'<sup>75</sup> As will be set out elsewhere in this Commission's report, these factors are of vital importance when considering the application of the principles of *distinction* and *proportionality* in international humanitarian law ('IHL').
106. This Commission is prepared to accept the evidence upon which the Darusman Report came to the conclusion that some 300,000-330,000 civilians were trapped in the Wannai area and were kept hostage there by the LTTE.<sup>76</sup> It accepts that not only were these civilians being kept as hostages but that their presence was being exploited by making them a strategic human buffer between the advancing SLA and the LTTE.<sup>77</sup> It accepts that the LTTE implemented a policy of forced labour throughout the war but that in the final stages of the war this was greatly intensified by the forced recruitment of people of all ages, including children as young as fourteen.<sup>78</sup> <sup>79</sup>It accepts that there is ample material to show that the LTTE forced civilians to dig trenches and other emplacements for its own defences thereby compelling civilians to play a direct part in their war effort.
107. This Commission is satisfied that the LTTE went to extraordinary lengths to blur the distinction between combatants and civilians so as to achieve a military advantage for themselves and that in the process they exposed civilians to additional danger.<sup>80</sup>
108. This Commission agrees with the conclusion of the Darusman Report that '*many civilians were sacrificed on the altar of the LTTE cause and its efforts to preserve its senior leadership.*'<sup>81</sup>

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<sup>73</sup> Darusman Report, para. 117.

<sup>74</sup> Darusman Report, para. 97.

<sup>75</sup> Darusman Report, p. iii.

<sup>76</sup> Darusman Report, p. ii.

<sup>77</sup> Darusman Report, p. iii

<sup>78</sup> Ibid

<sup>79</sup> US Department of State Report, 2009, p. 11.

<sup>80</sup> Frances Harrison, *Still Counting the Dead: Survivors of Sri Lanka's Hidden War* (London: Portobello Books, 2012), p. 245.

<sup>81</sup> Darusman Report, p. iii.

### **C. The Darusman Report's Failure to Identify Primary Source Material**

109. It is evident that the Darusman Panel consulted a variety of sources, but the evidence from these sources is not made available in the Report.<sup>82</sup> In particular, the statements and other evidence (for example documents and videos, if any were produced by witnesses) of those who were interviewed and consulted were not submitted with the Report. Indeed, witness statements – assuming there were any – are not even quoted anonymously, contrary to the common practice in other authoritative reports of alleged international crimes committed in conflicts.<sup>83</sup>
110. The Darusman Panel stressed that the only allegations included in the Report as credible are those *'based on primary sources that the Panel deemed relevant and trustworthy'*.<sup>84</sup> However, it is impossible to discern from the Report which *primary* sources were decisive for its findings, and there is no record of the discussions and assessments carried out by the Panel having considered these and other sources.
111. It could be that confidentiality required that certain of these sources remained undisclosed as the Panel noted that in some instances it had *'received written and oral material on the condition of an assurance of absolute confidentiality in the subsequent use of the information'*.<sup>85</sup>
112. Some key sources therefore remain completely *anonymous*, weakening the weight that can be given to this evidence and the findings based upon it. The Panel did not indicate whether consideration had been given to making anonymised, redacted or summarised versions of this evidence available for evaluation when considering the Report's findings and recommendations.
113. On a number of occasions, the Darusman Report makes strong allegations and statements with no sources to substantiate the findings put forward, for example:
- In relation to the first No-Fire Zone ('NFZ'), paragraphs 80-89 of the Report allege that the Government unlawfully shelled civilians. However, not a single source for this accusation is identified, except a footnote referring to a Government denial of the shelling. It appears that UN staff were present but there is no evidence provided from these persons whose need for absolute anonymity would be hard to justify if relied upon. The Report acknowledges that the LTTE were firing *'from approximately 500 metres away'* from the UN hub in the NFZ and *'from further*

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<sup>82</sup> The Darusman Report does include some examples of satellite imagery at Annex 3, but as explained below, the value of this evidence is undermined by the lack of any expert analysis on the relevance of this material and the fact that it does not assist in establishing that any of the alleged attacks were unlawful.

<sup>83</sup> Human Rights Watch, *Under Orders: War Crimes in Kosovo*, 26 October 2001; Organization for Security and Co-operation in Europe ('OSCE'), *Human Rights in Kosovo: As Seen, As Told. Volume I; An analysis of the human rights findings of the OSCE Kosovo Verification Mission from October 1998 to June 1999*, 5 November 1999; OSCE, *Human Rights in Kosovo: As Seen, As Told. Volume II, 14 June - 31 October 1999*, 5 November 1999.

<sup>84</sup> Darusman Report, para. 52.

<sup>85</sup> Darusman Report, para. 23.

*back in the NFZ*.<sup>86</sup> No evidence is provided about these positions and what actions the LTTE were taking.

- In relation to the second No-Fire Zone, paragraphs 109-114 of the Report include allegations about the SLA inflicting civilian casualties ‘*at the same time*’ as breaking through the LTTE defences.<sup>87</sup> UNICEF and ICRC reports are referenced, but it is not clear that these reports contain any concrete evidence about the unlawfulness of the alleged attacks and who was responsible for the reported deaths. It is also not clear whether these are the primary sources relied on by the Darusman Panel or whether there are witness statements or other confidential reports that constitute the underlying principal evidence.
- In relation to the alleged shelling of the PTK hospital at paragraphs 90-96 of the Report, some sources are provided – including from the ICRC – about this alleged attack which confirm that incidents of shelling and killings occurred, but no evidence is provided about those who may have been responsible.<sup>88</sup> The Report notes that the PTK ‘*was a strategic stronghold in the LTTE’s fight against the SLA*’ and that the LTTE thus had a ‘*sizeable presence*’ in the PTK.<sup>89</sup> It acknowledges that the LTTE were firing artillery from the vicinity of the hospital.<sup>90</sup> The Report refers to attacks on other hospitals by the SLA, such as the Putumattalan hospital where only a single source – an ICRC news release – is footnoted.<sup>91</sup> This does not appear to assist with identifying the alleged perpetrator/s on the basis of any clear evidence. This news release could of course be a piece of evidence to consider in any investigation, but the question is left open whether there is *any* primary evidence in existence on which the Darusman Panel based its conclusions.
- As it concerns the allegation that UN convoys into the Vanni were being used by the parties to the conflict, there is no evidence of the way in which this occurred, nor any analysis of the consequences for legitimate military action.<sup>92</sup>
- Some journalistic accounts *are* footnoted as sources. However it is unclear whether these are cited merely for corroborative purposes, or whether they are regarded *in any way and if so when*, as primary sources.
- Given that the UN had withdrawn from the Vanni by September 2008, as the Darusman Reports notes, there were virtually no international observers able to report on what was happening in the Vanni.<sup>93</sup> The Report states that journalists working with the SLA or LTTE continued to report from the area as did other organisations, including Tamil Net, a pro-LTTE website.<sup>94</sup> The extent to which the information from these bodies has been relied on by the Panel and taken into account when shaping the Report is unclear.
- The same lack of sourcing is evident in the findings of the Panel in respect of the alleged violations that occurred after the end of hostilities.<sup>95</sup> No source is provided

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<sup>86</sup> Darusman Report, para. 86.

<sup>87</sup> Darusman Report, para. 109.

<sup>88</sup> For example, Darusman Report, fn. 43.

<sup>89</sup> Darusman Report, para. 94.

<sup>90</sup> Ibid.

<sup>91</sup> Darusman Report, paras 104-105.

<sup>92</sup> Darusman Report, para. 78-79.

<sup>93</sup> Darusman Report, para. 76.

<sup>94</sup> Ibid.

<sup>95</sup> Darusman Report, paras 138-171.

for the wide-ranging allegations that are made about Government ‘clandestine operations’ against the LTTE.<sup>96</sup> Similarly, the allegations about there being a policy to target, torture and execute LTTE and other persons after the conflict are made as statements of fact without a body of clearly identifiable primary evidence, including witness statements, to back them up.<sup>97</sup>

114. By being denied a proper analysis and the sources upon which it is based, any reader of the Darusman Report is unable to gauge the validity and strength of the extremely serious allegations that have been made against GoSL and the SLA. Further, as the full body of evidence that was taken into account by the Darusman Report is unknown, it is impossible to know what has been taken into account *and* whether any particular piece of evidence which may be important to counter an allegation has been overlooked.

#### **D. The Disputed Facts and Law in the Darusman Report**

##### *The Myth of 40,000 Civilians Killed in the Final Phase of the War*

115. One of the most explosive findings of the Darusman Report is the allegation of civilian deaths in ‘*a range of up to 40,000*’ which, it is stated ‘*cannot be ruled out*’, but which requires further investigation.<sup>98</sup> The pro-LTTE diaspora and some NGOs have seized upon this figure and have sought to increase it. This compromised figure seems to have become, as this Commission will demonstrate, the ‘*North Star*’ of calculations now being made. This Commission finds that there was no reliable body of information consistent with other information that 40,000 civilians were killed in the final phase of the war.
116. This Commission takes the view that in light of what *preceded* and what *followed* this totally unsubstantiated estimate of the number of civilians killed, unsourced guess work has solidified into the factual acceptance of a myth. The endorsement of this figure extended as far as the Conservative member for Ilford who, addressing a question to Prime Minister Cameron in the House of Commons on 18 November 2013, stated in reference to the recently concluded Commonwealth Heads of Government Meeting (CHOGM), in Colombo:

*‘Does my [Right Hon.] Friend agree that the real issue at stake is the approximately 40,000 women, children and men – innocent people – who were slaughtered at the end of the conflict [...]’*<sup>99</sup>

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<sup>96</sup> Darusman Report, para. 63.

<sup>97</sup> Darusman Report, paras. 138-171.

<sup>98</sup> Darusman Report, para. 137.

<sup>99</sup> Lee Scott, ‘Oral Answers to Questions [:] Commonwealth Meeting and the Philippines’, House of Commons, *Parliament website*, 18 November 2013, <<http://www.publications.parliament.uk/pa/cm201314/cmhansrd/cm131118/debtext/131118-0001.htm>>. Column 965.

117. The mischief of this particular allegation of 40,000 civilian deaths becomes clear when there are other sources which give a lower estimate, but not all of the various competing accounts are mentioned in the Darusman Report.<sup>100</sup> The Darusman Report does acknowledge that only a proper investigation can lead to the identification of an accurate figure, but it has not provided the full range of views from which to begin this important task.
118. The UN Country Team figure of 7,721 civilian deaths (up until 13 May 2009) is mentioned in the Darusman Report but then disputed without any explanation as to how it comes to be that over 30,000 people could thereafter have been killed within five days, if the figure of 40,000 is ever to be correct and accurate.<sup>101</sup> The Darusman Report provides no concrete evidence to support its considerable leap from the UN Country Team's figure of less than 10,000.
119. In 2009, the US Department of State in its unclassified Report to Congress on Incidents During the Recent Conflict in Sri Lanka stated:

*'The State Department has not received casualty estimates covering the entire reporting period from January to May 2009. However, one organization, which did not differentiate between civilians and LTTE cadres, recorded **6,710 people killed** and 15,102 people injured between January 20 to April 20. These numbers were presented with a caveat, supported by other sources, that the numbers actually killed and injured are probably higher.'*<sup>102</sup>

120. With regard to documented deaths, the International Crisis Group had this to say:

*'UN agencies, working closely with officials and aid workers located in the conflict zone, documented **nearly 7,000 civilians killed** from January to April 2009. Those who compiled these internal numbers deemed them reliable to the extent they reflected actual conflict deaths but maintain it was a work in progress and incomplete.'*<sup>103</sup>

121. Some three weeks before the war ended, Reuters reported as follows:

*'A U.N. working document, a copy of which was obtained by Reuters, says **6,432 civilians have been killed** and 13,946 wounded in fighting since the end of January.'*<sup>104</sup>

122. According to Amnesty International's study:

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<sup>100</sup> UTHR Report No. 32, p. 5. See also US Department of State, 'Report to Congress on Incidents During the Recent Conflict in Sri Lanka, 2009, ('US Department of State Report'), p. 15, which reported on the casualty figure being 6710 until 20 April 2009 without drawing any distinction between LTTE cadres and civilians killed.

<sup>101</sup> Darusman Report, para. 134.

<sup>102</sup> US Department of State Report, p.15. <<http://www.state.gov/documents/organization/131025.pdf>>. Emphasis added.

<sup>103</sup> International Crisis Group, *Asia Report 191*, 17 May 2010, p. 5. Emphasis added.

<sup>104</sup> C. Bryson Hull, 'Q+A-Plight of civilians at end of Sri Lanka's war', *Reuters Report*, 24 April 2009. <<http://uk.reuters.com/article/2009/04/24/idUKCOL474568>>. Emphasis added.

*‘Amnesty International’s conclusions, derived independently from eyewitness testimony and information from aid workers, are that at least 10,000 civilians were killed.’<sup>105</sup>*

123. This Commission notes that these figures make no attempt to separate from the broad category of ‘civilians’ those who lost their civilian status by taking an active part in hostilities and ununiformed LTTE combatants.

124. It seems to this Commission that the allegation of up to 40,000 civilians killed stems from Gordon Weiss when he left the UN in 2009. Appearing on Australian television, he stated:

*‘I believe that between 10,000 and 40,000 is a reasonable estimate. I think most likely it’s somewhere between 30,000 and 40,000’.*<sup>106</sup>

125. Despite the fact that at that time the UN Office in Colombo issued a statement that his views did not reflect the position of the UN, Gordon Weiss makes the admission that:

*‘Since that time, the UN has decisively owned what I said, and has gone much further’.*<sup>107</sup>

126. In May 2009 Gordon Weiss stated:

*‘Up until a certain point, we had very good evidence to show that there were about 7,000 people that were killed. ...Then the intense battle kicked in and there were many more deaths, but we didn’t know exactly how many’.*<sup>108</sup>

127. In this regard, there was a lamentable failure by the Darusman Report to apply the appropriate standard of proof with the rigour that was required to determine such a critical question. Given the uncertainty as to the number of civilian deaths, and without the ability to determine what percentage of those fatalities were LTTE fighters not in uniform, or civilians who in law may have lost their protected status, this Commission finds it most unfortunate that speculation and not evidence has been the basis for the allegation made by the Darusman Panel, whose unsourced findings have now passed into public consciousness as the truth.

128. When this Commission considers the facts that are now known it becomes clear that the number of *innocent* civilian deaths in the final phase of the war cannot be quantified and is very likely to be far fewer than promulgated by the Darusman Report.

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<sup>105</sup> Amnesty International, *When Will They Get Justice? Failures of Sri Lanka’s Lessons Learnt and Reconciliation Commission* (hereinafter ‘When Will They Get Justice?’), 2011, p. 5

<sup>106</sup> Ginny Stein, ‘War Stories’, *SBS ONE*, 28 February 2010. < <http://www.sbs.com.au/news/dateline/story/war-stories> >.

<sup>107</sup> Gordon Weiss, ‘Towards a resolution in March 2014’, *Gordon Weiss blog*, 16 February 2014. <[www.gordonweissauthor.com/blog](http://www.gordonweissauthor.com/blog)>. Emphasis added.

<sup>108</sup> International Crisis Group, *Asia Report 191*, 17 May 2010, p.5

129. The following factors play a significant role in any calculation as to whether deaths were those of civilians or combatants:
- The LTTE not only used a vast number of the civilian hostages as human shields but also forced them into the front line carrying guns, or to dig trenches and prepare other defences, ‘*thereby contributing to blurring the distinction between combatants and civilians*’ and putting such civilians in the line of fire.<sup>109</sup>
  - The LTTE forced children as young as fourteen, with little training, into the front line, thereby putting them in harm’s way.<sup>110 111</sup>
  - The LTTE concealed their uniforms beneath sarongs in order ‘*to confuse the drones and [exploit the] civilians as a human buffer*’.<sup>112</sup>
  - The LTTE executed large numbers of civilians when they tried to escape from LTTE captivity.<sup>113</sup>
  - The LTTE fired artillery into their own civilians.<sup>114</sup>
  - The creation of civilian casualties was in the interests of the LTTE war aims.<sup>115</sup>
  - Towards the end of the conflict, LTTE cadres wearing suicide vests detonated themselves, killing themselves and civilians. Others used grenades, not just to kill themselves but killing many civilians in the process.<sup>116</sup>
  - The LTTE never gave up their tactical practice of stripping the body of a dead LTTE cadre in uniform and putting civilian items such as a *lungi* on the body so as to create the impression that the slain person was a civilian.<sup>117</sup>
130. Most trenchantly, the Darusman Report concludes that ‘*many civilians were sacrificed on the altar of the LTTE cause and its efforts to preserve its senior leadership*’.<sup>118</sup> However, the Darusman Report fails to offer any figures for the number of civilians allegedly killed or injured by the LTTE. This is a critical question given that the Darusman Report appears to allege that these *same* persons were *unlawfully* targeted by the Government.
131. Further, it was a known fact that the LTTE forces were using heavy artillery which was fired from civilian locations in the Wannu, including the NFZs.<sup>119</sup> These weapons and locations would have been regarded as legitimate military targets by the SLA and could themselves have been targeted with appropriate weaponry to achieve the destruction of those LTTE weapons.<sup>120</sup> This undoubtedly may have caused incidental civilian deaths as was intended by the LTTE.

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<sup>109</sup> Darusman Report, pp. ii-iii.

<sup>110</sup> Darusman Report, para. 240.

<sup>111</sup> US State Department Report, 2009, p. 11

<sup>112</sup> Harrison, *Still Counting the Dead*, p. 245.

<sup>113</sup> Darusman Report, para. 238.

<sup>114</sup> Darusman Report, para. 388. See also LLRC Report, 15 November 2011, p.145, para 4.359xii.

<sup>115</sup> Harrison, *Still Counting the Dead*, pp. 62-63.

<sup>116</sup> Darusman Report, para. 242.

<sup>117</sup> Independent Diaspora Analysis Group, *The Numbers Game* (2012)

<<http://www.satp.org/satporgtp/countries/shrilanka/document/TheNG.pdf>>. , p.7.

<sup>118</sup> Darusman Report, pp. ii-iii.

<sup>119</sup> See for example, Darusman Report, p. iii and paras 69 and 97.

<sup>120</sup> For example, *Nicaragua v. United States of America*, ICJ Judgment, 27 June 1986, para. 176, noted Article 51 of the UN Charter set out that ‘*self-defence would warrant only measures which are proportional to the armed attack and necessary to respond to it, a rule well established in customary international law.*’

132. When this Commission reviews what is set out above, it vividly highlights the point that it is almost impossible in these circumstances – largely created by the LTTE – for anyone to work out, however well-intentioned, the extent of the *innocent civilian loss of life*. The shortcomings of the Darusman Report may be explained by the fact that the Panel, as it acknowledged itself, did not conduct a ‘*fact-finding*’ inquiry or ‘*carry out a formal investigation that draws conclusions regarding legal liability or the culpability of States, non-state actors, or individuals*’.<sup>121</sup> The reality is, of course, that given what this Commission has set out any fact-finding effort would have been unlikely to yield an accurate answer as to the true number of civilians who were killed and at whose door the responsibility for this can be laid.
133. Reports, statements and recommendations subsequent to the Darusman Report have tended to regard its findings as conclusive.<sup>122</sup> The report, ‘An Unfinished War: Torture and Sexual Violence in Sri Lanka 2009-2014’ prepared by Yasmin Sooka, a member of the Darusman Panel, on behalf of the Bar Human Rights Committee of England and Wales and the International Truth and Justice Project of Sri Lanka (‘Sooka Report’), for example, stated that:

*‘There is plenty of evidence available from other reliable sources to corroborate the allegations made in this report. Since 2009, there were a number of reports, including that of the UN Secretary-General’s Panel of Experts published in March 2011, documenting violations of international humanitarian law and international human rights law.’*<sup>123</sup>

134. The Sooka Report also notes, ‘*a growing international consensus that the civilian death toll in the final phase of the 2009 conflict in Sri Lanka was very high indeed, running into tens of thousands*’.<sup>124</sup> Yasmin Sooka was to say that her Report was produced in order to influence the Human Rights Council in its consideration of its resolution on Sri Lanka in March 2014.

*‘We released the Report in time before the Geneva resolution because we wanted to influence the Geneva resolution.’*<sup>125</sup>

135. On 27 February 2013, Yasmin Sooka addressed a Global Tamil Forum meeting at the Palace of Westminster.<sup>126</sup> In the wake of the LTTE’s May 2009 military defeat, pro-LTTE elements in the Tamil diaspora created several new organisations, chief among them, the Global Tamil Forum (GTF) designed to carry forward the struggle for a separate Tamil state.

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<sup>121</sup> Darusman Report, para. 9.

<sup>122</sup> UNHCHR Report, paras 4, 62, 63, 66, 72; Sooka Report, pp. 12, 14, 21, 43, 49, 79, 80.

<sup>123</sup> Sooka Report, p. 49.

<sup>124</sup> Sooka Report, p. 12.

<sup>125</sup> Senator Jaffer with Yasmin Sooka – ‘An Unfinished War: Torture and Sexual Violence in Sri Lanka 2009-2014’, (9 May 2014) *Youtube* < [https://www.youtube.com/watch?v=cdf-R\\_qo7Q](https://www.youtube.com/watch?v=cdf-R_qo7Q) >. 20:57

<sup>126</sup> Gordon Weiss, Westminster Hall address to Global Tamil Forum meeting, *Gordon Weiss’s website*, 28 February 2013. < <http://www.gordonweissauthor.com/blog/?p=250> >. Letter to the Global Tamil Forum’s 3rd Anniversary Conference, *Global Tamil Forum* (2013) < [http://www.ticonline.org/images/eventfiles/GTF\\_Conference\\_2013\\_57.pdf](http://www.ticonline.org/images/eventfiles/GTF_Conference_2013_57.pdf) >. p.1

136. Nine days after the war was concluded, *The Guardian* correspondent in London quoted the UN spokesman in Colombo, Gordon Weiss, who said ‘we have always said many thousands of people died during the conflict’.<sup>127</sup> The article went on to say that privately UN staff were puzzled by the methodology used to achieve the new death toll, then alleged to be 20,000. UN staff were reported as saying:

“Someone has made an imaginative leap and that is at odds with what we have been saying before,” one official said. “It is a very dangerous thing to do to start making extrapolations.”<sup>128</sup>

137. It is the respectful view of this Commission that UN panels of experts should be ‘on guard’ against the risk that unsourced assertions or allegations appearing in a sequence of reports allow the development of ‘false collateral’ of one report by another, that may have been constructed on the same un-sourced allegations.<sup>129</sup>
138. Such reports may end up being relied upon within the international community to draw conclusions which are in fact unproven but which are repeated and reproduced over time. The reports become the accepted narrative of the conflict and of those responsible for unlawful or even criminal conduct without independent investigation and verification of the ‘facts’, let alone any judicial findings following a proper legal inquiry.
139. This Commission is satisfied that international criminal courts and tribunals have not placed reliance on reports of this nature as being probative evidence to prove allegations in trials for war crimes and crimes against humanity.<sup>130</sup> As set out in the jurisprudence of these courts, the Darusman Report would be of virtually no value to a court seeking to establish the truth, and it should not be given any more weight *outside* of the courtroom.

### *The Use of Human Shields*

140. The Darusman Report, despite finding credible allegations that the LTTE took thousands of civilians as hostages and executed those attempting to flee, concluded that the LTTE’s action did not in law amount to the use of human shields due to the absence of credible evidence that civilians were deliberately moved towards military

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<sup>127</sup> Gethin Chamberlain, ‘Sri Lanka death toll unacceptably high’, says UN’, *The Guardian*, 29 May 2009, <<http://www.theguardian.com/world/2009/may/29/sri-lanka-casualties-united-nations>>.

<sup>128</sup> Ibid.

<sup>129</sup> Or that may, as with this Report and the Sooka Report, have a panel member in common.

<sup>130</sup> See for example, *Prosecutor v. Gbagbo*, ICC-02/11-01/11-432, Decision adjourning the hearing on the confirmation of charges pursuant to Article 61(7)(c)(i) of the Rome Statute, 3 June 2013, para. 29; *Prosecutor v. Bemba*, ICC-01/05-01/08-424, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean- Pierre Bemba Gombo, 15 June 2009, para. 51; *Prosecutor v. Mbarushimana*, ICC-01/04-01/10-465-Red, Decision on the confirmation of charges, 16 December 2011, para. 78; *Prosecutor v. Milutinovic*, IT-05-87-T, Decision on Evidence Tendered through Sandra Mitchell and Frederick Abrahams, 1 September 2006, para. 16.

targets to protect the latter from attacks.<sup>131</sup> In the view of the Commission, this conclusion is based on an unduly narrow interpretation of the law and factual situation.

141. The International Criminal Court's Elements of Crimes adopted on 30 June 2000 make it plain that the crime of using civilians as shields is made out when a perpetrator '*moved or otherwise took advantage of the location of one or more civilians*' intending to '*shield a military objective from attack or shield, favour or impede military operations*'. While this definition refers to Article 8(2)(b)(xxiii) of the ICC Statute, applicable to international armed conflicts, the use of human shields is also prohibited in non-international armed conflicts and the same basic elements may be deemed applicable. The Darusman Panel relied on Rule 97 of the ICRC's study on customary international humanitarian law in support of its conclusion. However, this rule does not indicate that deliberate movement towards military targets is required in all circumstances. Indeed, the commentary states that what is required is an '*intentional co-location of military objectives and civilians or persons hors de combat*'.<sup>132</sup> The view of this Commission is that the LTTE took advantage of the presence and location of thousands of civilian hostages to shield the LTTE leadership from attack and capture. The LTTE thus exploited the civilian status of the hostages to protect their most important military assets, namely, their commanders and their leader, Prabhakaran. In other words, contrary to the Darusman Report's conclusions, the war crime of using human shields was a complete offence with or without the deliberate moving of civilians, so long as the LTTE co-located civilians and military targets to gain a military advantage from the presence of the civilians. This situation was exacerbated by the LTTE's act of forcibly preventing civilians who wished to leave the conflict zone from doing so and relying on their presence to obtain a military advantage. The Commission finds that the elements of the crime of using human shields are therefore on their face established.
142. This Commission also points out that even on the restricted legal and factual test, there is evidence of the LTTE moving civilians to protect their military targets from destruction.<sup>133</sup>
143. The complexity of the issue is reflected in the fact that a respected international NGO reporting prior to the Darusman Report also fell into error:

*'The government and others have referred to the LTTE's actions as "human shielding." While this is accurate in the general sense, the actions likely do not amount to the war crime of human shielding. That crime requires the perpetrator to "intend to shield a military objective from attack or shield, favour or impede military operations". Rome Statute, Elements of Crimes, Article 8(2)(b)(xxiii). This would apply only if the LTTE expected the presence of civilians to deter the security forces from advancing, which the evidence suggests*

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<sup>131</sup> Darusman Report, para. 237.

<sup>132</sup> Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, ICRC and Cambridge University Press, vol. I, Rules, 2005, p. 340.

<sup>133</sup> UTHR Report No. 32, Introduction; Frances Harrison, *Still Counting the Dead: Survivors of Sri Lanka's Hidden War*, London: Portobello Books, 2012, pp. 62-63; Interview with Robert O. Blake, Jr., Assistant Secretary, Bureau of South and Central Asian Affairs, *Campbell Conversations*, WRVO Radio, Syracuse NY, 28 January 2011 ('Campbell Conversations'). <<http://www.state.gov/p/sca/ci/in/rmk/2011/155628.htm>>.

*was not the case. Indeed, they did not necessarily want it to deter them.*<sup>134</sup>

144. This Commission is satisfied that the legal error made by the NGO is simply answered by the Darusman Report which found that the civilian hostages being held by the LTTE and prevented from leaving the Vanni area, in fact, constituted a ‘*strategic human buffer to the advancing Sri Lankan Army*’, thus, constituting the war crime of human shielding.<sup>135</sup>

*The Application of the Principles of Distinction and Proportionality*

145. In its consideration of the IHL principles of distinction and proportionality, the Darusman Report failed to take into account the following factors which are crucial to a determination of the issue as to whether excessive collateral damage was caused by the SLA during the final phase of the war:
- a. The taking of 300,000 – 330,000 civilian hostages by the LTTE;<sup>136</sup>
  - b. The use by the LTTE of some of those hostages as voluntary or involuntary human shields;
  - c. The deliberate blurring by the LTTE of the distinction between their own fighters and non-combatants, thereby undermining the bedrock principle of *distinction*;<sup>137</sup> and
  - d. The forcing of civilians, including children, into the front line.
146. Indeed, neither the Darusman Report, the UNHRC Report, nor any report emanating from any NGO has addressed the issue of the crime of using human shields, resorted to by the LTTE, with a view to determining the impact such a crime had on the key principles of *distinction* and *proportionality* in IHL.
147. This Commission bears in mind that the deaths in combat of regular LTTE cadres do not form part of the proportionality equation. Nor do the deaths of civilian hostages who were dragooned into fighting for the LTTE and killed in battle. Whilst there is a division of opinion as to whether the deaths of *voluntary* human shields, intentionally playing their part to shelter the LTTE leadership by seeking to give the LTTE a military advantage - by making it more difficult for the SLA to discover and kill the LTTE leadership - should or should not form part of the proportionality equation, this Commission is of the view that those human shields voluntarily playing their part, as set out above, should not form part of the proportionality equation. In addition, *collateral* civilian casualties can be attributed to a myriad factors, not the least of which were LTTE defences, the dispersal of their targets, LTTE deception and of course, their deliberate comingling with the hostage population, so as to blur the distinction between civilians and combatants, already made more difficult by the fact that numbers of the regular LTTE cadres were not uniformed, quite apart from civilians compelled into the front line. The all-important issue of whether the number of civilian deaths was excessive is not purely a matter of arithmetic. There is one area, however, in which

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<sup>134</sup> International Crisis Group, ‘War Crimes in Sri Lanka, *Asia Report No. 191*, 17 May 2010, p. 25, fn. 120.

<sup>135</sup> Darusman Report, p. iii

<sup>136</sup> Darusman Report, para. 100.

<sup>137</sup> Darusman Report, paras 97-98.

numbers become vital. The number of civilian casualties can be indicative of the underlying intention of the military commanders – bearing in mind that the crime of unlawfully targeting civilians depends on whether they were intentionally targeted or fired on indiscriminately. In the final analysis the Commission is satisfied that the large percentage of the LTTE cadres were killed and the vast majority of the civilians, who had been held hostage, were saved. This Commission is satisfied that these numbers speak volumes. With some 290,000 civilians saved, far from showing any intention on the part of the SLA to target civilians, it shows the precise reverse.<sup>138</sup>

148. The true number of civilians entitled to civilian protected status killed in the conflict is of critical significance to the application of the laws of war, especially in respect of whether any *innocent civilian* loss of life (as opposed to deaths of persons who were killed while participating in hostilities) was proportionate to the military advantage of any particular attack or series of attacks (assuming that such persons were killed in these attacks and not by other means).
149. It would have been very difficult for the Government forces to determine at the time the extent to which these civilians were *voluntarily* serving as human shields, and were thus legitimate military targets while taking part in hostilities. In any event, the Government forces were entitled under IHL, however harsh this sounds, to regard the deaths of civilians who were *forced* to participate as human shields as, *in theory*, justifiable ‘collateral’ damage, given the military objective of the attacks. Such innocent civilian losses, of course, must not have outweighed the military objective sought and eventually achieved, by the Government’s defeat of the LTTE in order to end the conflict once and for all.
150. There is no hard and fast rule on the precise limits of acceptable civilian casualties under IHL, and each situation must be assessed on its merits. The peculiar circumstances of the final months of the conflict – which are largely not contested – were ones in which the SLA should, in accordance with the rules of IHL, be afforded a margin of latitude commensurate with the military exigencies that they encountered and taking into account the widespread unlawful use of civilian hostages by the LTTE.
151. The problem the GoSL faced was not one that, at the time, could be solved ‘on paper’ by lawyers any more than it could now be established by lawyers *alone*. As regards questions as to whether what was done in the final phase of the war was lawful or unlawful, this Commission realizes that this is an area of the law heavily dependent for its impact on the lawfulness of what a government does through its military on what senior service officers judged *at the time* to be lawful. And those officers will often have made judgments in the heat of battle with sometimes incomplete information and intelligence. *Post facto* assessment of legality in these circumstances requires best analysis by independent top-level military personnel of the justifications made by Sri Lanka’s high command and sometimes by its field commanders. In any judicial examination of the lawfulness of what was done by the Government forces, it should be borne in mind that anyone bringing a case against the GoSL for unlawful attacks against the LTTE would call (a) military expert(s) to assist the court. And the Government would be in a position to call experts in its defence. The public discussion – that in some quarters has been condemnatory of the Government – has failed to reflect

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<sup>138</sup> Darusman Report, p. 1.

this proper practice by seeking independent *military* analysis of what was done. Instead it has generated an emotive response by presenting emotionally charged visual imagery and a simplistic explanation of the law (at best), all coupled to statistical information that is usually or always highly controversial.

### Individual Shelling Incidents

152. This Commission accepts that certain incidents should be the subject of a judge-led inquiry as set out later in its report. However, the lack of proper sourcing is a matter of particular concern when considering the Darusman Report's overall findings about the alleged shelling into the NFZs (which forms a major part of the Report's discussion of the alleged violations). The Panel acknowledged that the LTTE did not accept the NFZs as 'binding'.<sup>139</sup> According to the Report, the LTTE *were* present in the NFZs, firing from them and in them, and keeping the civilian population hostage:

*'Retaining the civilian population in the area that it controlled was crucial to the LTTE strategy. The presence of civilians both lent legitimacy to the LTTE's claim for a separate homeland and provided a buffer against the SLA offensive. To this end, the LTTE forcibly prevented those living in the Vanni from leaving. Even when civilian casualties rose significantly, the LTTE refused to let people leave, hoping that the worsening situation would provide an international intervention and a halt to the fight. It used new and badly trained recruits as well as civilians essentially as "cannon fodder" in an attempt to protect its leadership until the final moments.'*<sup>140</sup>

153. The Darusman Report records that as the LTTE suffered military setbacks in the final phases of the war, the NFZs were used as places to which to retreat with the civilian population being used by the LTTE to bolster their military campaign.<sup>141</sup> The extent to which the use of the civilian population – whether acting *voluntarily* or *forced* into action – has to be taken into account when determining the lawfulness of any Government military action against the LTTE. The Darusman Report does not address this all important issue. The truth may be that the evidence of what occurred in these final phases in and around the NFZs was simply not available for analysis by the Panel.<sup>142</sup>
154. This Commission finds that it is essential when considering the alleged attacks against hospitals to take account of the fact that the LTTE had deliberately set up artillery firing positions in the vicinity of hospitals. This is strong evidence that the LTTE was relying on return fire from the SLA to lead to some damage to the hospital so as to make the allegation against the SLA that it was deliberately shelling a hospital.

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<sup>139</sup> Darusman Report, para. 80.

<sup>140</sup> Darusman Report, para. 70.

<sup>141</sup> Darusman Report, paras 97-99.

<sup>142</sup> The Report acknowledges that the UN had withdrawn from the Vanni in September 2008 and that from this moment on there 'were virtually no international observers able to report to the wider world what was happening in the Vanni', Darusman Report, para. 76.

155. The extent to which the LTTE targeted its own Tamil civilian population and prevented injured persons from leaving the area, including via ICRC ships,<sup>143</sup> is not taken into account at all in the Panel's assessment of who may have been responsible for alleged attacks on civilians in hospitals.

Accountability and the Obligation to Prosecute

156. The Darusman Report concludes that the GoSL's efforts at the time of the Report to address accountability fell short of international standards according to which the rights of victims to truth, justice and reparations should be central. The Report makes certain recommendations for the investigation of alleged crimes and the adoption of measures to advance accountability in the short and longer term.
157. The Darusman Report acknowledged that accountability standards '*cannot be examined in a vacuum*', and that the advice given to the Secretary-General on appropriate accountability mechanisms had to be based on '*the nature and scope of the alleged violations*'.<sup>144</sup>
158. This Commission will address the issue of accountability mechanisms in a separate chapter of its report, taking account of its own assessment of the alleged violations and the current discussion in Sri Lanka concerning peace, justice and reconciliation.

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<sup>143</sup> Darusman Report, para. 108.

<sup>144</sup> Darusman Report, para. 9.

### CHAPTER 3: THE SRI LANKAN ARMY

159. The Commission notes that the qualities of the Sri Lankan Army (SLA) have been expressed as follows:

*'the Sri Lankan military had more than two decades of experience in warfare and any military involved in high intensity war against a resolute and deadly enemy is bound to learn how to fight.'*<sup>145</sup>

160. The SLA was established in the British colonial period and was essentially a ceremonial force.<sup>146</sup> Until the insurgencies in the North and South of Sri Lanka that commenced in the 1970s, the SLA had little or no experience of combat warfare in the domestic context.
161. Both Sri Lanka and India have had an unbroken tradition of democratic rule since independence and have also had an unbroken record of subordination of the military to civilian authority.<sup>147</sup> This is in stark contrast to Pakistan and Bangladesh. Sri Lanka, on the other hand, has nurtured and developed its welfare state model since the 1930s and the price it paid for this was to neglect its security services.<sup>148</sup>
162. In 1960, according to Central Bank figures, the total amount of money expended on defence and external affairs was 78.1 million rupees which represented 3.95% of the total government expenditure.<sup>149</sup>
163. Based on figures from the Stockholm International Peace Research Institute, in 2009 Sri Lanka had allocated 1.6 billion dollars for defence.<sup>150</sup>
164. The real threat to public security came in the form of the JVP insurgency in the South of the island. Between 1971 and 1974 efforts were made to provide the armed services and the police with more up-to-date equipment.<sup>151</sup> This extra expenditure, however, amounted to no more than a 2 to 3 percent increase in defence expenditure within the annual budget.<sup>152</sup> Yet this increase was not continued into the mid-to late-1970s even though there was a marked change in level of threat from the Tamil separatist forces operating from the North, which had the added transnational dimension of Indian intervention.<sup>153</sup>

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<sup>145</sup> Ahmed S. Hashim, *When Counterinsurgency Wins: Sri Lanka's Defeat of the Tamil Tigers*, New Delhi: Cambridge University Press, 2014, p. 187.

<sup>146</sup> Jagath Senaratne, 'The Security Establishment in Sri Lanka', in Gavin Cawthra and Robin Luckham (eds) *Governing Insecurity: Democratic Control of Military and Security Establishments in Transitional Democracies*, London: Zed Books, 2003.

<sup>147</sup> K. M. de Silva, *Sri Lanka and the Defeat of the LTTE*, New Delhi: Penguin Books, 2012, p. 86

<sup>148</sup> Ibid.

<sup>149</sup> Ibid, p. 87.

<sup>150</sup> Anjali Sharma, 'Post-War Sri Lanka: A Resurgent Nation', *Observer Research Foundation*, 12 July 2010 <<http://orfonline.org/cms/sites/orfonline/modules/analysis/AnalysisDetail.html?cmaid=19481&mmacmaid=19470>>.

<sup>151</sup> K. M. de Silva, *Sri Lanka and the Defeat of the LTTE*, p. 87

<sup>152</sup> Ibid.

<sup>153</sup> Ibid.

165. By the late 1990s the LTTE had metamorphosed into a disciplined and highly effective conventional fighting force which numbered over 10,000 combatants and were capable of striking at the heart of the capital Colombo, as well as conducting combat operations in the North and East with its naval arm and rudimentary air force.<sup>154</sup>

*‘It was a formidable fighting force. Though massively outnumbered and outgunned by the Sri Lankan armed forces, estimated today at over 200,000 personnel, it made up for these short falls in many ways, through effective use of resources, bravery – martyrdom and tactical mobility, for example, enough to deprive the Sri Lankan state of a monopoly of force and even to lay plans to create a de facto state within Sri Lanka.’<sup>155</sup>*

166. Therefore, in order to defeat the LTTE the SLA itself had to overcome what has been described as the LTTE’s hybrid war capability, which was *tripartite*. The LTTE deployed terrorism, insurgency and quasi-conventional capabilities in parallel, rather than sequentially.<sup>156</sup>

*‘The LTTE was the most advanced hybrid war entity in existence till its destruction in 2009. It was capable of waging terrorism, insurgency and conventional war.’<sup>157</sup>*

167. There were some early indications, however, that the LTTE was not invincible. Under General Cyril Ranatunga’s command, there were efforts to increase force numbers and improve intelligence.<sup>158</sup> General Ranatunga was critical of government policy while he was Army Commander,

*‘There appeared to be a total lack of continuity in the conduct of operations against the armed Tamil terrorists. This is the result of having no policy on how to eradicate terrorism. This type of ethnic based armed conflict, once ignited due to many reasons, is difficult to eradicate without a firm policy derived from strength and practicability.’<sup>159</sup>*

168. The offensive he commenced in May 1997 with 8,000 troops, supported by elements of the Sri Lankan Air Force, had by the first week of June resulted in the capture of the entire northern peninsula as well as the recovery of large amounts of weaponry.<sup>160</sup> As the second phase of the operation was about to be launched in June 1997 with the objective of capturing Jaffna from the LTTE, the Indian Government’s concern about the death of Tamil civilians led to a demand by the Indians that the military operation be halted.<sup>161</sup>

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<sup>154</sup> Eleanor Pavey and Chris Smith, Chapter 8, ‘Post conflict Reconstruction and Security Sector Reform in Sri Lanka’, 2009, in H. Born and A. Schnabel (eds), *Security Sector Reform in Challenging Environments*, Germany, Lit Verlag, DCAF Yearbook, 2009, p. 192.

<sup>155</sup> Ibid.

<sup>156</sup> Hashim, *When Counterinsurgency Wins*, pp. 31-32.

<sup>157</sup> Ibid, p.32.

<sup>158</sup> Ibid, p.91. Ranatunga was the primary mover in improving information and intelligence gathering in the early 1980s.

<sup>159</sup> Cyril Runatunga, *Adventurous Journey: From Peace to War, Insurgency to Terrorism*, Colombo: Vijitha Yapa Publications, 2009, p. 88

<sup>160</sup> Hashim, *When Counterinsurgency Wins*, p.93.

<sup>161</sup> K. M. de Silva, *Sri Lanka and the Defeat of the LTTE*, p.2.

*‘The Indian intervention on that occasion had saved the LTTE who lived to fight another day [...]. Those of us who knew what had happened were disappointed at the consequences of this Indian intervention but always felt the LTTE could be defeated militarily and that a military defeat would halt their terrorist attacks in the country. That was something we had in mind whenever we were told in later years by defeatist academics, defeatist politicians and defeatist generals that the campaign against the LTTE was an “unwinnable war”.’<sup>162</sup>*

169. Throughout the 1990s as internal security threats increased from both the JVP uprising in the south and the LTTE in the northern and eastern peninsulas, the army grew rapidly in both size and capability. Between 1990 and 1996 the army doubled in number, reaching approximately 95,000 soldiers.<sup>163</sup>
170. By the end of the war it was estimated that the Sri Lankan military numbered over 300,000 personnel.<sup>164</sup> Indeed, it had been shortly after President Rajapaksa’s election in November 2005 that the SLA received a ‘massive and unprecedented increase in resources’<sup>165</sup> due to shrewd and decisive strategic changes. These included dividing up some battalions and enhancing the concept of long-range penetration patrol units into numerous, Special Infantry Operations Team (‘SIOT’) consisting of 8 and 4 man teams who operated as Special Forces teams. When Eelam War IV started there were 1500 SIOT trained troops; by 2008 there were more than 30,000.<sup>166</sup> They undertook tailor made courses in jungle warfare, medical training and targeting. They were able to operate independently of their larger military units and when reassigned to their larger units, were able to raise standards within those units by imparting their battle craft experiences. The new government made a determined effort to increase the size of the armed forces exponentially and achieved a tripling in size of the army from 100,000 to 300,000 personnel over 3 years.<sup>167 168</sup>
171. The Defence Ministry ensured that military salaries were increased upward and these were doubled for the rank and file as well as new resources of equipment being made available.
172. In order to combat the LTTE’s renowned flexibility and rapid deployment on the battlefield, the SLA transformed its ability to conduct more than one operation at a time. A key factor to the success of the SLA was its newfound ability – due to its enlarged size and skill – to conduct operations on multiple fronts and across different axes continuously.<sup>169</sup>

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<sup>162</sup> K. M. de Silva, *Sri Lanka and the Defeat of the LTTE*, p.2.

<sup>163</sup> Pavey and Smith, Chapter 8, ‘Post conflict Reconstruction and Security Sector Reform in Sri Lanka’, p. 196.

<sup>164</sup> Ashok Mehta, ‘How Sri Lanka Won the Fourth Tamil Eelam War’, *Transcurrents*, 20 May 2010, <[http://transcurrents.com/tc/2010/05/how\\_sri\\_lanka\\_won\\_the\\_fourth\\_t.html](http://transcurrents.com/tc/2010/05/how_sri_lanka_won_the_fourth_t.html)> .

<sup>165</sup> Pavey and Smith, Chapter 8, ‘Post conflict Reconstruction and Security Sector Reform in Sri Lanka’, p. 195.

<sup>166</sup> Peter Layton, *The Diplomat*, 9 April 2015, <<http://thediplomat.com/2015/04/how-sri-lanka-won-the-war/>>.

<sup>167</sup> Hashim, *When Counterinsurgency Wins*, p.188.

<sup>168</sup> An additional 40,000 new recruits were drafted into the army creating five new Divisions.

<sup>169</sup> Hashim, *When Counterinsurgency Wins*, pp. 185-186.

## Training

173. Historically, the SLA had been a relatively inflexible and ponderous organisation with little capability to manoeuvre at speed. This effectively gave the LTTE, who were capable of rapid deployment, the advantage and also allowed them to build effective terrorism and quasi-conventional capabilities in parallel.<sup>170</sup> One of the most striking military reforms was a new emphasis on small unit operations – hitherto the SLA had always operated, as if in a conventional operational setting, at company and platoon level. This made them vulnerable to LTTE ambushes, artillery and mines. This new emphasis on small unit operations kept casualties lower and proved more effective in terms both of reconnaissance and subsequent strike action. It also better prepared the SLA for operations in a variety of environments through primary jungle, thick bush, paddy and plantations. The new tactics encompassed the creation/expansion of specialised units such as Special Forces in the SLA and the Rapid Action Battle Squad and Special Boat Squadron in the Navy.<sup>171</sup> Infantry Battalions also selected individuals, gave them specialist training and formed them into 4 or 8 man SIOT teams.<sup>172</sup>
174. The Commander of the SLA, General Cyril Ranatunga, who oversaw the successful 1997 operations mentioned above, established the Directorate of Human Rights and Humanitarian Law of the SLA in January 1997.<sup>173</sup> He subsequently wrote his memoirs, which were critical of government policy and it is worth quoting as he not only perceived the lack of a policy, but he also clearly understood the many lines of operation that a successful strategy would require.
175. One of General Ranatunga's requirements was for all ranks to understand and implement Human Rights and Humanitarian Law. According to the SLA's own statistics some 140,971 members of the army were trained or refreshed on various courses between 1997 and 2008. Similar directorates had been established for the Sri Lankan Navy and Air Force in 2002.<sup>174</sup>
176. One of the most striking military reforms was a new emphasis on small unit operations – hitherto the SLA had always operated, as if in a conventional operational setting, at company and platoon level. While General Ranatunga has underlined the fact that Long Range Reconnaissance Patrols (LRRP) were operating ten years prior to 2009, the small unit concept was certainly adapted and expanded under General Fonseka.<sup>175</sup>
177. When the LTTE was defeated in 2009 the Sri Lankan military had been enlarged to some 300,000 combatants. It was not an easy task to raise a military force that large in the midst of a conflict which resulted in an almost 80% increase in manpower between 2006 and 2009.<sup>176</sup> This led to the military having to deploy newly raised forces that were sent to the front as soon as they had finished their basic training, knowing that

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<sup>170</sup> Ibid, pp. 31-32.

<sup>171</sup> Tim Fish, 'Sri Lanka learns to counter Sea Tigers' swarm tactics', *Jane's Navy International*, March 2009. <[http://www.defence.lk/news/Sri\\_Lanka\\_Navy.pdf](http://www.defence.lk/news/Sri_Lanka_Navy.pdf)>.

<sup>172</sup> Hashim, *When Counterinsurgency Wins*, p. 188

<sup>173</sup> Humanitarian Factual Analysis: July 2006 – May 2009, *Sri Lanka Ministry of Defence*, July 2011, para. 248.

<sup>174</sup> Expert Military Report, Annex 1, para. 10

<sup>175</sup> General Cyril Runatunga, *Adventurous Journey: From Peace to War, Insurgency to Terrorism* (Colombo: Vijitha Yapa Publications, 2009) p.118.

<sup>176</sup> Hashim, *When Counterinsurgency Wins*, p. 46.

the *'quality of manpower was not going to be uniform across the board'*.<sup>177</sup> The Commission is cognisant of this as a factor in understanding the practical ability of the SLA to provide an effective human rights training platform in the last months of the war, despite what may have been a well-intentioned training programme prior to the final drive to end the conflict.

### Policy Change

178. In 2005, the former President Rajapaksa appointed himself Minister of Defence and his brother, Gotabaya Rajapaksa, as Secretary of Defence. Lieutenant General Sarath Fonseka was appointed as Army Commander. The former President also obtained parliamentary approval for major increases in the defence budget.<sup>178</sup> This allowed General Fonseka to revitalise the SLA by increasing both its remuneration and its manpower over 3 years,<sup>179</sup> creating 5 new divisions.<sup>180</sup> This facilitated an operational rotation of troops at the front, whilst securing rear areas. The SLA was also re-equipped, as was the Sri Lankan Air Force (SLAF). Importantly, as the 'Sea Tigers' controlled a sizeable portion of the Eastern coastline, the Sri Lankan Navy also transformed itself. This included the ability to launch blue water operations.

### Military Capability

179. The higher direction of the war against the LTTE was provided by the National Security Council (NSC), which was *'charged with the maintenance of national security, with authority to direct security operations and matters incidental to it'*.<sup>181</sup> The NSC's directives would then be passed through the Joint Operations Headquarters, run by the Chief of Defence Staff, to the single service commanders. In the case of the SLA, command then passed from the Army Commander to regional headquarters known as Security Forces Headquarters (SFHQ), and from there to Divisional and Task Force Headquarters for implementation.<sup>182</sup> For operations in the Wannu, SFHQs were involved; SFHQ-Wannu based at Vavuniya and SFHQ-Jaffna based at Palaly.<sup>183</sup> Operations in the Wannu were conducted by five divisions (although one of these - the 58 Division - was also designated a Task Force) and four task forces. A division was sub-divided into three brigades of three infantry battalions each. A brigade consisted of between 2,500 and 3,000 personnel. A task force consisted of only two brigades of three battalions each. There were also specialist brigades such as Special Forces,

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<sup>177</sup> Ibid.

<sup>178</sup> Elisabeth Sköns, Wuyi Omitoogun, Catalina Perdomo and Petter Stålenheim, 'Chapter 8 Military expenditure' in *'SIPRI (Stockholm International Peace Research Institute) Yearbook 2005: Armaments, Disarmament, and International Security'*, Oxford: Oxford University Press, 2005, p. 311

<sup>179</sup> Hashim, *When Counterinsurgency Wins*, p. 188.

<sup>180</sup> Ibid.

<sup>181</sup> International Crimes Evidence Project, 'Island of Impunity? Investigation into international crimes in the final stages of the Sri Lankan civil war' ('ICEP 'Island of Impunity?' Report'), February 2014, para 16.7. <[http://www.piac.asn.au/sites/default/files/publications/extras/island\\_of\\_impunity.pdf](http://www.piac.asn.au/sites/default/files/publications/extras/island_of_impunity.pdf)>.

<sup>182</sup> Ibid, para. 16.27.

<sup>183</sup> Ibid, para. 16.33.

Commando, Air Mobile and, significantly, an Artillery Brigade.<sup>184</sup> Overall, it is reasonable to assume that there were upwards of eighty thousand troops available for operations in the Wannu. This reflects the reality of conducting operations in challenging circumstances with high casualty rates, inclement weather and a fanatical enemy. There was also the need to rotate units through the front line, whilst also securing rear areas.

### Air Force

180. It should also be mentioned that Eelam War IV saw extensive use of air support for land and sea operations utilising in particular Squadron 10, which was made up largely of Israeli made Kfir ground attack fighters.<sup>185</sup> For close air support the Sri Lankan Air Force had Kfir C-2, Kfir C-7 and MiG-27M Flogger J2 fixed wing and attack helicopters<sup>186</sup>.
181. These pilots had acquired a high level of training and expertise and were crucial in softening the LTTE's defences.<sup>187</sup> The GoSL also ensured that advanced Mig-29 fighters were purchased, so that operations could be supported effectively.<sup>188</sup>

### Navy

182. The Sri Lankan Navy, in a manner similar to the army, reinvented itself post the 1983 insurgency. The greatest changes, however, took place between 2005 and 2009. The LTTE having created the Sea Tigers and Black Tiger suicide squadrons, were able not only to use their navy to smuggle weapons to and from India and beyond but also to seek to control the territorial waters off the north eastern coast of Sri Lanka.<sup>189</sup>
183. The Navy expanded in size and created a Rapid Action Battle Squad which numbered some 36 personnel in 2005 and which by 2009 had grown to 600. In addition, there was a Special Boat Squadron (SBS) which was modelled on the same institution in Britain. This latter squadron has over the years been trained by the Indian Marine Commandos, the US Green Berets and the US Navy Seals. In addition, the navy upgraded their sea craft so that in terms of numbers of boats and technical ability they were able to operate more effective naval counter operations.<sup>190</sup>
184. The Navy adapted Dvoras, that had been purchased in the late 1980s and began building their own small boats which they used by mirroring LTTE naval tactics. In

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<sup>184</sup> Ibid, para. 16.43.

<sup>185</sup> Hashim, *When Counterinsurgency Wins*, p. 164.

<sup>186</sup> ICEP 'Island of Impunity?' Report, para. 16.74.

<sup>187</sup> Hashim, *When Counterinsurgency Wins*, p. 164.

<sup>188</sup> Ibid.

<sup>189</sup> Fish, *Sri Lanka learns to counter Sea Tigers' swarm tactics*

<sup>190</sup> Ibid.

essence, they learned from the enemy. The larger Dvoras were used for patrolling and for sea operations and the smaller boats for specific mission orientated targets.<sup>191</sup>

185. When the ceasefire ended in 2006, the navy was in a position to take on LTTE warehouse ships in international waters. The ability to launch 'blue water operations', enabled the Navy to destroy 11 LTTE warehouse ships in one year and destroy a further 3 ships in 2007. This had a further impact on the LTTE's ability to rearm and resupply and was critical in winning the land campaign.<sup>192</sup>

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<sup>191</sup> Ibid.

<sup>192</sup> Ibid.

## CHAPTER 4 - THE LTTE

186. The LTTE's primary goal was to attain an independent state for Sri Lankan Tamils, known as "Tamil Eelam", in the Northern and Eastern Sri Lanka.<sup>193</sup>
187. The Liberation Tigers of Tamil Eelam grew out of an emerging Tamil nationalist movement that gained support in the 1970s, in the aftermath of race riots in 1958,<sup>194</sup> and in response to perceived discrimination by the Sinhalese majority.<sup>195</sup>
188. The Tamil, political elite were outflanked by young Tamil militants who felt cut off from economic and educational advancement.<sup>196</sup> While other Tamil nationalists favoured political approaches to securing autonomy, the LTTE took up arms. The Commission notes that their killing of thirteen Sri Lankan soldiers was the violent spark that led to the 1983, race riots in Colombo and the exodus of many Tamils, which in itself, led to the internationalisation of the conflict that ended in 2009.
189. At one stage the LTTE controlled about a quarter of Sri Lanka's territory and a fighting force of approximately 20,000 cadres.<sup>197</sup> 'By 2002 the LTTE ran a virtual state within a state'.<sup>198</sup>
190. In seeking a separate state, Eelam, in Sri Lanka, the LTTE has used conventional, guerrilla, and terror tactics, that included over 200 suicide bombings, in a bloody, two-decade-old civil war that has claimed more than 60,000 lives and displaced hundreds of thousands in Sri Lanka.<sup>199</sup>
191. The LTTE leader, Velupillai Prabhakaran, fashioned the LTTE into a formidable rebel organisation by creating a highly disciplined and motivated fighting force. He personified the movement and created a cult based on his position as 'Supreme Leader'.<sup>200</sup> The *Economist* described his role within the organisation as a 'textbook fascist'.<sup>201</sup>

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<sup>193</sup> Liberation Tigers of Tamil Eelam." South Asia Terrorism

<http://www.satp.org/satporgtp/countries/shrilanka/terroristoutfits/LTTE.HTM>

<sup>194</sup> Chattopadhyaya, H. *Ethnic Unrest in Modern Sri Lanka: An Account of Tamil-Sinhalese Race Relations*, p. 54

<sup>195</sup> Shyam Tekwani : 'LTTEs online network and its implications for Regional Security'

[http://www.academia.edu/4738748/The\\_LTTEs\\_online\\_network\\_and\\_its\\_implications\\_for\\_Regional\\_Security](http://www.academia.edu/4738748/The_LTTEs_online_network_and_its_implications_for_Regional_Security)

[http://tamilnation.co/ltte/060101shyam\\_tekwani.htm](http://tamilnation.co/ltte/060101shyam_tekwani.htm)

<sup>196</sup> Hashim, *Defence Against Terrorism Review Vol 3 No.1 Spring 2010*, p7.

[http://www.coedat.nato.int/publication/datr/volume5/01-Lions\\_and\\_Tigers\\_in\\_Paradise\\_Terrorism...pdf](http://www.coedat.nato.int/publication/datr/volume5/01-Lions_and_Tigers_in_Paradise_Terrorism...pdf)

<sup>197</sup> Javier Argomaniz and Orla Lynch (eds) *International Perspectives on Terrorist Victimisation: An Interdisciplinary Approach*. London: Palgrave Macmillan, 2015, p.78

<sup>198</sup> Hashim, *Defence Against Terrorism Review Vol 3 No.1 Spring 2010*, p22.

[http://www.coedat.nato.int/publication/datr/volume5/01-Lions\\_and\\_Tigers\\_in\\_Paradise\\_Terrorism...pdf](http://www.coedat.nato.int/publication/datr/volume5/01-Lions_and_Tigers_in_Paradise_Terrorism...pdf)

<sup>199</sup>

<sup>200</sup> For comprehensive accounts of the LTTE's international networks and the ethnic conflict in Sri Lanka see the works of Rohan Gunaratna on the LTTE, including *Sri Lanka's Ethnic Conflict and National Security*, South Asian Network on Conflict Research, 1998; 'LTTE Fundraisers Still on the Offensive,' *Jane's Intelligence Review*, December 1997; *International and Regional Security Implications of the Sri Lankan Tamil Insurgency*, Alumni Association of the Bandaranaike Centre for International Studies, 199

<sup>201</sup> 'Victory for the Tiger-slayer', *The Economist*, 28 January 2010. <

<http://www.economist.com/node/15393468> >.

192. This Commission while acknowledging the genuine grievances of the Tamil citizens of Sri Lanka, feels compelled to underline that while the LTTE presented a ‘freedom fighting’ image abroad, assisted by some members of the sophisticated diaspora, the experience of many of their brethren left behind and living under Prabhakaran’s rule, was stark;

*‘[He] has established a rule of terror in the city of Jaffna...many of his own lieutenants have been murdered; Tamils who have criticised him, even mildly or in jest have been picked up, tortured and executed...’<sup>202</sup>*

193. The ability to spread this terror beyond the North was demonstrated in the January 1996 suicide bomb attack that destroyed the Central Bank. This was followed by a suicide attack on the World Trade Centre in Colombo, which was modelled on the US World Trade Centre (1993) attack plan.<sup>203</sup>
194. From 1997, with the aim of disrupting civil administration, the LTTE also assassinated Tamil political leaders, including Members of Parliament and a female mayor.<sup>204</sup> The LTTE remain the only terrorist organisation in the world to have killed a President and a Prime Minister.<sup>205</sup> It is not to be forgotten that the LTTE also attempted to kill President Chandrika Bandaranaike Kumaratunga, gravely injuring her in the process.
195. The scale of LTTE operations have led them be described as “*probably the most sophisticated terrorist organization in the world*”<sup>206</sup>. This was the only terrorist force in the world to have a conventional fighting force, a navy and a rudimentary air wing. In 1997 they are believed to have mounted what may have been the first terrorist cyber-attack.<sup>207</sup>

### Structure

196. *‘The Tamil Tigers were organised along a two-tier structure. A military wing that was reminiscent of many professional armies; and a subordinate political wing.’<sup>208</sup>*

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<sup>202</sup> K. M. de Silva, citing John Burns, from The New York Times in 1995. p.35

<sup>203</sup> Rohan Gunaratna. ‘Asia Pacific Organised Crime & International Terrorist Networks’, *South Asia Terrorism Portal*, 2002.

< <http://www.satp.org/satporgrp/publication/books/global/gunaratna.htm> >.

<sup>204</sup> Sarojini Yogeshwaran, the first woman to become the Mayoress of Jaffna.

<https://www.ceylontoday.lk/51-98492-news-detail-duraiappah-killing-mirrors-terrorist-mind.html>.

<sup>205</sup> Rohan Gunaratne, ‘The LTTE and suicide terrorism’, *Frontline Magazine*. February 5-8 2000

<http://www.frontline.in/static/html/fl1703/17031060.htm> >.

<sup>206</sup> Dr. Magnus Ranstorp, Chief Scientist at the Centre Asymmetric Threat Studies of the Swedish National Defence College.

<sup>207</sup> Rohan Gunaratna. ‘Asia Pacific Organised Crime & International Terrorist Networks’, *South Asia Terrorism Portal* (2002) <http://www.satp.org/satporgrp/countries/shrilanka/terroristoutfits/LTTE.HTM>

<sup>208</sup> Peter Chalk: ‘LTTE- International Organization and Operations-a Preliminary Analysis’, Commentary No. 77, *A Canadian Security Intelligence Service*, 17 March 2000<  
[http://fas.org/irp/world/para/docs/com77e.htm#N\\_27](http://fas.org/irp/world/para/docs/com77e.htm#N_27) >.

197. Overseeing both, was a Central Governing Committee. This was all headed by its Supreme Leader, Velupillai Prabhakaran, at the pinnacle of an organisation that he ruled with an iron fist;

*‘The LTTE maintained a fascist, totalitarian control over the civilian population with a network of prisons the dissidents and enemies [...] who were killed or tortured and a strict pass system that did not allow people under their control to leave’.*<sup>209</sup>

198. The Central Committee had the responsibility for directing and controlling several subdivisions, which included:

- An amphibious group (the Sea Tigers, headed by Soosai).
- An airborne group (known as the Air Tigers, headed by Shankar).
- An elite fighting wing (known as the Charles Anthony Regiment, headed by Balraj).
- A suicide commando unit (the Black Tigers, headed by Pottu Amman).
- A highly secretive intelligence group.
- A political office headed by Thamilchelvan (political leader) and Anton Balasingham (political advisor and ideologue).<sup>210</sup>

### Training

199. The LTTE, *‘invested heavily in training and discipline, command and control, communications, ideological indoctrination and psychological warfare instruction.’*<sup>211</sup>

200. The training given to front line LTTE fighters fell broadly into three categories. Basic training, which lasted approximately 4 months<sup>212</sup> and took place in LTTE bases, these were set up in most villages<sup>213</sup>. Training encompassed, special operations training which included, special reconnaissance, sniping, mine laying, artillery and refresher training for all the above.<sup>214</sup>

201. The preamble to a LTTE training document seized in 2009 describes the movement’s aims and concludes by stating;

*‘In such a situation military training must be provided that gives efficiency and confidence in order to drive away the enemy with vigour to reclaim our territories and it is our political aim to build up a militarized people power with*

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<sup>209</sup> Daya Somasunda, Collective Trauma in the Vanni, *International Journal of Mental Health Systems*, 4:22 (2010), < <http://www.ijmhs.com/content/pdf/1752-4458-4-22.pdf> >.

<sup>210</sup> Peter Chalk: “LTTE- International Organization and Operations-a Preliminary Analysis”. [http://fas.org/irp/world/para/docs/com77e.htm#N\\_27\\_](http://fas.org/irp/world/para/docs/com77e.htm#N_27_) SUPRA in final print

<sup>211</sup> International Crimes Evident Project Report dated Feb 2014, para 16.120

<sup>212</sup> ‘Liberation Tigers of Tamil Eelam (LTTE)’, *South Asian Terrorist Portal*. <<http://www.satp.org/satporgtp/countries/shrilanka/terroristoutfits/LTTE.HTM> >.

<sup>213</sup> Moorcroft, *Total Destruction of the Tamil Tigers*, p. 94

<sup>214</sup> Humanitarian Factual Analysis MOD Sri Lanka dated Jul 2011, para 51

*clear political vision. Accordingly we have established our hierarchy and militarized our activities’.*<sup>215</sup>

202. The Commission notes that the inference of the above statement is that the LTTE would militarize the Tamil civilian population in the areas that they controlled. There is support for this conclusion in that from 1999, ‘civil militias’ were used to support regular LTTE fighters.<sup>216</sup> Three militia forces were formed at this time, one of which, the ‘Eela Padai’ was said to number 2,000 who acted as home guards and ran LTTE commercial ventures.<sup>217</sup>

203. Indeed, the Darusman Report noted that in the final phase,

*‘Civilians were also enlisted by the LTTE into their war effort in other ways, using them, for example, to dig trenches and build fortifications, often exposing them to additional harm’.*<sup>218</sup>

204. The control the LTTE exercised is also illustrated by their exclusionary policies in the areas they controlled. The worst example being the expulsion of some 75,000 Muslim residents from the Jaffna peninsula in October 1990<sup>219</sup>. Overall, the civilian population were there to be used for whatever purpose the LTTE saw fit. Tamil opposition groups were ruthlessly stamped out and internal dissent was not tolerated – the LTTE saw itself as the sole representative of the Tamil people. *‘Its elusive leader, Velupillai Prabhakaran, demanded absolute loyalty and sacrifice and cultivated a cult-like following’*<sup>220</sup>.

### Policy

205. As outlined above, the LTTE used the period of the 2002/6 ceasefire to rearm and to prepare for what they referred to as ‘the final war’.<sup>221</sup> They also endeavoured to consolidate their political and administrative organisation in the territories that they held as well as attempting to extend their influence in other parts of the country, where under the terms of the ceasefire agreement they were allowed to set up political offices.<sup>222</sup>

206. However, there were setbacks. In 2004 the second in command of the LTTE, Vinayagamoorvthi Muralitharan, also known as Colonel Karuna, defected together with his fighters.<sup>223</sup> He not only provided significant intelligence that assisted later operations, but his defection also led to a substantial reduction in LTTE recruitment in

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<sup>215</sup> Translated Copy of LTTE training document. See Expert Military Report, Annex 1, para. 16.

<sup>216</sup> Joanne Richards. ‘An Institutional History of the Liberation Tigers of Tamil Eelam’, The Centre of Conflict, Development and Peacebuilding, *The Graduate Institute of Geneva*, November 2014, p. 29.  
< <http://sangam.org/wp-content/uploads/2015/02/LKA-geschichte-ltte-e.pdf> >.

<sup>217</sup> *ibid.*

<sup>218</sup> Darusman Report, para. 68, p. 18

<sup>219</sup> Humanitarian Factual Analysis, MOD Sri Lanka, July 2011, para 35.

<sup>220</sup> UN Sec Gen Panel of Experts, the Darusman Report dated 31 Mar 2011, para 31.

<sup>221</sup> Humanitarian Factual Analysis, MOD Sri Lanka, July 2011, para 121.

<sup>222</sup> Humanitarian Factual Analysis, MOD Sri Lanka, July 2011, para 120.

<sup>223</sup> Human Rights Watch, ‘*Living in Fear*,’ November 2004 Vol. 16 No 13(c) p4.

the Eastern Province.<sup>224</sup> Colonel Karuna's eastern forces formed the backbone of the LTTE and this splintering of the organisation was, '*a severe setback from which it never really recovered.*'<sup>225</sup>

207. The Commission is mindful of the fact that events of 9/11 and the subsequent war on terror would have a knock-on effect on the international community's perception of the LTTE and by 2006 the proscription and diplomatic ban on the LTTE by the European Union had far reaching implications on their ability to operate and raise funds.<sup>226</sup>
208. Indeed, with the assistance of the Indian Navy, from 2005, the Sri Lankan Navy had begun to reduce the LTTE's maritime capability and seize its floating warehouses – according to Jane's Review 11 x LTTE warehouse ships were destroyed in 2006 and a further 3 in 2007. These logistic issues manifested themselves in the last months of the war when allegedly the LTTE ran short of artillery ammunition<sup>227</sup>. It also put added significance on the LTTE's ability to manufacture their own war material.
209. Whilst the LTTE acknowledged and prepared for a further conflict, it was perhaps not initially apparent to them, despite the clear SLA upgrades, that this would be fought more on conventional lines and at a sustained tempo, which their logistic structure would be incapable of supporting and their manpower reserves would be proved inadequate.
210. The loss of Colonel Karuna, then of the Eastern Province in July 2007 meant that defeat of the LTTE was possible. This coupled with the collapse of their administrative capital, Kilinochchi, on 2 January 2009 meant that, unless they could secure a ceasefire, military defeat, was inevitable. In an interview with the Guardian of London it was Colonel Karuna who commented on Prabhakaran and corroborated this analysis, "*...he had a totalitarian mindset. I told him the LTTE could never win. I had spent 22 years on the battlefield. But he did not listen... After he lost Kilinochi he knew he could not make a stand ...*"<sup>228</sup>

#### LTTE Military Capability

211. The LTTE had an organised command structure that was divided into 7 geographical divisions or wings, each under the command of a district commander who was responsible to VB. Additionally, there were 10 specialist wings; intelligence, procurement, finance, military, political, communications, research, black tiger, sea tiger and air tiger, all of which reported to VB<sup>229</sup>. At the beginning of 2008 it was estimated that the military wing had approximately 20,000 to 30,000 fighters or cadres supported by an auxiliary force that had been given basic military training. The LTTE were able to access military equipment, finance and political support through

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<sup>224</sup> The Hindu, '*Tiger vs Tiger*', 15 March 2004.

<sup>225</sup> K. M. de Silva, *Sri Lanka and the Defeat of the LTTE*, p. 181.

<sup>226</sup> Ibid.

<sup>227</sup> International Crimes Evidence Project Report, February 2014, para. 16.126.

<sup>228</sup> Randeep Ramesh 'Tamil Tigers Finished says former Leader' *The Guardian*, 21 March 2009 < <http://www.theguardian.com/world/2009/mar/21/tamil-tigers-sri-lanka-karuna> >.

<sup>229</sup> International Crimes Evidence Project Report, February 2014, paras. 16.113 onwards.

their extensive diaspora and throughout the 2002/06 ceasefire were able to upgrade their weapon systems and stockpile weapons/ammunition and equipment not only on shore but also in floating warehouses (for example ships) in blue water.

212. The Air Tigers had approximately 25 trained pilots and 6 Czech-built Zlin Z-143 single engine four seat aircraft that were modified to carry up to four bombs per mission<sup>230</sup>. Their last attempted strike was on 20 February 2009 when 2 aircraft attempted a ‘9/11’ type attack on Colombo – they were destroyed before they reached their targets.<sup>231</sup> This Commission notes, that despite their military capacity having been severely depleted by this stage, such LTTE attacks on the capital created a fear psychosis in the capital and it must be underlined this was in the very last months of the war.
213. The Sea Tigers were demonstrably more successful than their air compatriots. At their height they numbered some 6,000 fighters divided into numerous teams based in units along the North East coast. They adapted or manufactured many of their own craft, including semisubmersibles and were developing mini submarines. Importantly, they cooperated closely with the Military Wing and were carefully integrated into most operations<sup>232</sup>. However, by the end of 2008 the SLA had captured 20 Sea Tiger bases and their contribution in the last months of the war was minimal. The ‘Black Tigers’ comprised elite fighters especially trained for suicidal missions and they were under the direct command of Velupillai Prabhakaran. The LTTE developed the use of the suicide vest and became the world leaders in this method of indiscriminate attack.<sup>233</sup>
214. Although reduced to some 5,000 hard core fighters, the LTTE were reinforced by conscripted civilians of all ages – as the Darusman Commission recognised<sup>234</sup>;
- ‘The LTTE mainly relied on forced recruitment in an attempt to maintain its forces. While previously the LTTE took one child per family for its forces, as the war progressed, the policy intensified and was enforced with brutality, often recruiting several children from the same family, including boys and girls as young as 14. Civilians were also enlisted by the LTTE into their war effort in other ways, using them, for example, to dig trenches and build fortifications, often exposing them to additional arm’.*<sup>235</sup>
215. The LTTE were also highly skilled in building defensive earthworks, called bunds and the Commission notes that they ensured conscripted labour was engaged in these dangerous tasks, which were often on the frontlines. Major General Holmes sets out the detail at paragraph 35 of his Expert Report<sup>236</sup>, giving an example of one such bund in the western Wannu being over 30 kilometres long and ‘the SLA lost 153 soldiers in breaching just one section of it’.<sup>237</sup>

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<sup>230</sup> International Crimes Evidence Project Report dated Feb 2014, para 16.128.

<sup>231</sup> The Times of India, 21 February 2009. <<http://timesofindia.indiatimes.com/world/south-asia/Colombo-air-strikes-were-suicide-attacks-LTTE/articleshow/4163124.cms>>.

<sup>232</sup> International Crimes Evidence Project Report dated Feb 2014, para 16.134.

<sup>233</sup> Alex Perry, ‘How Sri Lanka Rebels build a Suicide Bomb’, *Time Magazine*, 12 May 2006. <<http://content.time.com/time/world/article/0,8599,1193862,00.html>>.

<sup>234</sup> Darusman Report, para. 66.

<sup>235</sup> Darusman Report, para. 68.

<sup>236</sup> Expert Military Report, Annex 1, para. 35.

<sup>237</sup> Moorcroft, *Total Destruction of the Tamil Tigers*, 2012, p. 131

216. In terms of artillery the LTTE had access to medium range artillery pieces, although their supply chains had been disrupted, especially after the loss of their floating warehouses. According to one source:

*'these vessels were carrying over 80,000 artillery rounds, over 100,000 mortar rounds, a bullet proof jeep, three aircraft in dismantled form, torpedoes and surface to air missiles'.<sup>238</sup>*

217. By way of corroboration, there is a report that in one of the battles (at Iranapalai) on 4/5 April the LTTE lost 3 130mm guns.<sup>239</sup> There is little doubt that the LTTE had access to artillery and mortars until the end:

*'Towards the end of the war the numbers of shells, but not the accuracy declined.'<sup>240</sup>*

218. A list of all recovered LTTE weapons from 2006 and some photographs are attached at Annex C of the Expert Military Report. The list of weaponry is extensive and includes wire guided anti-tank missiles, surface to air missiles and MBRLs. The Commission notes;

*'The LTTE were technically innovative and made their own weapons. An example of which is the 6 barrel MBRLs, two of which were recovered on 3 March and 13 May 2009 respectively. They also manufactured improvised rocket launchers, artillery pieces and giant mortars (see photos at Annex D). It is believed the giant mortar rounds were still in development and according to Government sources the round itself had an improvised phosphorous war head. However, an observation on improvised weapons and ammunition is that their range and accuracy would be inconsistent. For instance, the improvised 6 x barrel MBRL appears to lack a solid platform and so would have been extremely unstable when fired – this would have resulted in inaccuracy and consequently a much greater spread of rounds, which inevitably might have added to the civilian casualty count. Perhaps the most effective homemade weapon in the LTTE armoury was the suicide bomber, who were used to the very end.'<sup>241</sup>*

219. The Darusman Report supports the contention that the LTTE possessed weaponry, even in the last stages, such as MBRLs, which the Commission recognises are capable of inflicting huge civilian casualties;

*'Although the LTTE's supply chains had been disrupted, especially after the loss of its floating warehouses, it still had access to some stockpiles of weapons, including some artillery and a few MBRLs. It used them to offer stiff resistance from behind its fortifications and earth bunds and also launched waves of suicide attacks'.<sup>242</sup>*

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<sup>238</sup> Ahmed Hashim, *When Counterinsurgency Wins, Sri Lanka's defeat of the Tamil Tigers* (New Delhi: Cambridge University Press, 2014), p.94.

<sup>239</sup> Moorcroft, *Total Destruction of the Tamil Tigers*, p. 137.

<sup>240</sup> Ibid, p.130.

<sup>241</sup> Expert Military Report, Annex 1, para. 38.

<sup>242</sup> Darusman Report, para 69.

220. The LTTE external activities were subdivided into three main areas:
- fundraising;
  - publicity and propaganda;
  - arms procurement and shipping.<sup>243</sup>
221. While the activities of these various operations invariably overlapped, for the most part each section acted autonomously, to avoid exposure.<sup>244</sup>

Propaganda, Glorification & Martyrdom

222. The LTTE were skilled at the use of propaganda and used the “Maveerar Naal” - the Martyrs’ Day, the week-long commemorations organized by the LTTE internationally which, besides commemorating the cadres who had died in fighting for the LTTE, also celebrated the birthday of LTTE leader Velupillai Prabhakaran, wending in a grand finale speech by him on November 27<sup>th</sup> which was broadcast at these rallies and on the internet.<sup>245</sup>

*“The entire week was full of meetings, religious rituals, processions, exhibitions etc. to commemorate the fallen LTTE cadres. Cut outs, posters and handbills of the departed cadres were distributed widely. Each village was asked to pay homage to those Tigers from their area who were now great heroes. Each school was asked to pay tribute to those of their alumni who had fallen in battle.”<sup>246</sup>*

223. This Commission is of the view that such events served as an important method of glorifying of terrorism, where the cadres of an internationally recognised terrorist organisation were being venerated and portrayed as an example of ‘martyrdom’. This Commission notes that IS and other terrorist organisations that have appeared after the LTTE have ascribed a similar importance to martyrdom and glorification toward the ‘cause’.

*“The LTTE by nurturing this cult of martyrdom is achieving many things. It provides those cadres among the living a bond of affiliation with their departed comrades. The cadres get a feeling of reassuring comfort that he or she too would be honoured in similar fashion when dead. The LTTE cadres are fighting and dying in the belief that posterity will remember and honour their memory.”<sup>247</sup>*

224. Lakshman Kadirgamar, the Sri Lankan Foreign Minister, who was himself a Tamil, in a speech given in Washington delivered exactly a year before 9/11, was very clear as to how the LTTE had acquired its massive war chest;

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<sup>243</sup> See Gazette answers paragraph 665 onwards.

<sup>244</sup> International Crisis Group Asia Report 186, 23 February 2010, p. 5

<sup>245</sup> DBS Jeyaraj, ‘Tigers give Rajapakse breathing space’, *The Sunday Leader*, 4 December 2005. < <http://www.thesundayleader.lk/archive/20051204/issues.htm> >.

<sup>246</sup> Ibid.

<sup>247</sup> Ibid.

*“...So, therefore, it behoves the international community to be very, very concerned about the export of terrorism, and when one speaks about the export of terrorism and when one speaks about that then naturally one speaks about fund-raising. In our case fund-raising is taking place... because there is a large expatriate community of Tamil-speaking people... They are able, if they wish, to fund terrorist activities in Sri Lanka. Millions of dollars a month are raised in Australia, Canada, Europe, the UK. Certainly, there is enough money available to buy light arms, and enough to buy missiles.”<sup>248</sup>*

225. Indeed, the Commission notes that not only did the LTTE demonstrate their ability to destabilise the Sri Lankan state machinery by tragically, assassinating Lakshman Kadirgamar, himself, in 2005, but they did so by deploying a sniper.
226. The concern at the LTTE’s ability to purchase dangerous weapons was clearly underlined when the FBI foiled an attempt by an LTTE cell to purchase Stinger missiles on US soil, in 2008.<sup>249</sup>
227. Indeed, to underline the level of threat the GoSL faced, this Commission, notes that Assistant Secretary for U.S. Immigration and Customs Enforcement (ICE), Julie L. Myers after this plot was foiled went on to state that the LTTE was a potential threat beyond Sri Lanka;<sup>250</sup>

*“In today’s world, keeping sophisticated U.S weapons from falling into the hands of terrorists has never been more important. Arming a radical organisation with more than 200 suicide bombings to its credit jeopardizes the security of the United States and nations around the globe...”*

### Internet

228. In August 1997 In August 1997, a US-based group sympathetic to the LTTE, calling itself the Internet Black Tigers (IBT), claimed responsibility for bombarding several Sri Lankan foreign Embassies with junk e-mail<sup>251</sup>. The group claimed to be an elite unit off

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<sup>248</sup> *“The Terrorism Challenge to Democracies: Potomac Institute for Policy Studies, Washington DC 13<sup>th</sup> September 2000.”* Democracy Sovereignty and Terror: Lakshman Kadirgamar on the Foundations of International Order. Edited by Sir Adam Roberts.” I.B.Tauris and Co.Ltd, London, 2012

<sup>249</sup> In 2008, two Sri Lankan Tamils, who had become Canadians, were arrested and later sentenced to 25 years each in prison by a New York court for attempting to buy heat-seeking missiles and military assault rifles. They were arrested, along with several alleged Tiger backers, in a sting operation by the Federal Bureau of Investigation and the Royal Canadian Mounted Police. The men, were willing to pay \$1 million for the arms. The FBI said the missile plot was designed by Tamil Tigers intelligence chief Pottu Amman. ‘US: LTTE sympathisers sentenced to 25 years in prison’, *Rediff News*, 8 February 2010. < <http://news.rediff.com/report/2010/feb/09/lte-sympathisers-sentenced-to-prison-in-new-york.htm> >.

<sup>250</sup> Senpathi, ‘Targeting the transnational Tiger’, *The Nation*, 1 January 2014. < <http://www.nation.lk/2007/01/14/newsfe4.htm> >.

<sup>251</sup> Rohan Gunaratna. ‘Asia Pacific Organised Crime & International Terrorist Networks’, *South Asia Terrorism Portal*, 2002. < <http://www.satp.org/satporgtp/publication/books/global/gunaratna.htm> >.

the LTTE specializing in “...email bombing”. The US authorities classified this infrastructure attack as the first incident of cyber terrorism: no one was apprehended.<sup>252</sup>

229. Indeed by seizing the opportunities presented by the Internet, the LTTE permitted the Tamil diaspora communities an opportunity to participate in and have an impact on their home communities. This they did by a number of methods:<sup>253</sup>
230. Disseminating propaganda through pro-LTTE websites such as ‘Tamilnet.com’ and ‘Eelam.com’, which espoused LTTE ideology while at the same time portraying the GoSL as a racist regime.
231. Using the internet to organise fund raising and promote specific cash calls for LTTE backed charities, where the funds would be channelled to back to the former.
232. Facilitate the transfers of clandestine cash and the use of the ‘dark market’ to trade in stolen credit card details or pre-paid cards.<sup>254</sup>
233. A study of the LTTE’s internet capabilities noted;

*‘Diaspora Sri Lankan Tamils can read Eelam newspapers; listen to Eelam Radio; mail Eelam e-cards showing Eelam maps and flags to friends on festive occasions; listen to tapes of their ‘national leader’s’ speeches; and refer to online yellow pages and web directories for information on Eelam Tamils.’*<sup>255</sup>  
<sup>256</sup>

234. Indeed, by August 2007, Janes Intelligence Review believed that:

*‘through its licit and illicit businesses and fronts, the Tamil Tigers generate an estimated USD 200 to 300 million per year. After accounting for an estimated USD 8 million a year of costs within LTTE administered Sri Lanka, the profit margins of its operating budget would likely be the envy of any multinational Corporation.’*<sup>257</sup>

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<sup>252</sup> Ibid.

<sup>253</sup> Security and South Asia: Ideas, Institutions and Initiatives. Edited by Sawaran Rajagopalan: ‘Diaspora populations’ Kavita R. Kory p169. Routledge, New Delhi, 2006.

<sup>254</sup> Gift cards have been reported to be used in “cyber money laundering” or “e-fencing” in which criminals use stolen credit card numbers to buy gift cards online, and then sell them to the highest bidder at an online auction website or for a set discount at a gift-card exchange website.

The Singapore Internal Security Department has found that the Liberation Tigers of Tamil Eelam (LTTE) has made extensive use of mobile phones loaded with prepaid cards.

The Singapore Government has sought to regulate the sale of prepaid cards for mobile phones.

<http://www.fintrac-canafe.gc.ca/publications/typologies/2009-05-01-eng.asp#n14>

<sup>255</sup> Indrajit Banerjee. *The Internet and Governance in Asia: A Critical Reader*, Singapore: Asia Media Information Communication, 2007, p177.

<sup>256</sup> In September 2008, LTTE registered a Satellite channel named “GTV” through UK based OFCOM (OFCOM is the regulatory authority not the sat provider) which was alleged to have been engaged in carrying out LTTE propaganda in Europe and Middle East and attempted to expand its network of coverage. Ravinatha P. Aryasinha, ‘How has the LTTE adapted to the “post- proscription phase” in the West?’ in ‘Time to Act: The LTTE, its Front Organizations, and the Challenge to Europe’, *EU-US International Seminar on LTTE*, 9 – 10 December 2008. <[http://www.priu.gov.lk/lte\\_report/chapter6.html](http://www.priu.gov.lk/lte_report/chapter6.html) >.

<sup>257</sup> Janes Intelligence Review: 2007 <http://c-cft.org/publication/pdf/FeedingtheTiger.pdf>

## CHAPTER 5 - THE PLIGHT OF CIVILIANS IN THE CONFLICT AREA

### A. Background to the Last Phase of the War in Sri Lanka

235. Sri Lanka was and remains a democratic country which faced the threat of '[o]ne of the most brutal, lethal terrorist organisations in the world'.<sup>258</sup> Indeed, well before what came to be known as 9/11, the World Trade Centre in Colombo was attacked when a truck laden with explosives was blown up in an adjoining car park.<sup>259</sup> Seventeen people were killed and the casualties included seven US citizens and thirty-three other foreign nationals. The year previously, a similar LTTE suicide attack on the Central Bank killed more than 90 people and injured 1,400, with many blinded from shattering glass.<sup>260</sup> These attacks had the effect of deterring foreign tourists and did significant damage to the Sri Lankan economy. For thirty years, the scourge of terrorism touched the lives of all Sri Lankans, whether Tamil, Sinhalese or Muslim.
236. Unlike other terrorist groups such as Al Qaeda, or even the more recent so-called Islamic State ('IS'), that operate in a decentralised manner, the LTTE was completely centralised under their leader, Prabhakaran who enjoyed a cult like status. He was able to indoctrinate countless young Tamil suicide cadres to blow themselves up, imbued as they were in their belief in him as the 'Supreme Leader'. Significantly, whilst the elimination of Osama bin Laden has done little to dent the terrorist activities of Al Qaeda, the death of Prabhakaran has successfully brought a thirty year terrorist campaign to an end. There has not been a single LTTE terrorist attack on Sri Lankan soil since the defeat of the LTTE.
237. At the beginning of 2009, the US Embassy in Colombo assessed the Sri Lankan Army ('SLA') as being a '*far more capable fighting force than previously*'.<sup>261</sup> Consequently, the SLA was at that point closer to expelling the LTTE from the North than ever before. The US Ambassador indicated that the SLA's increased strength would be likely to initiate a new and even more lethal phase of LTTE terrorism.<sup>262</sup> This was prescient, as within a very short time, the SLA was faced with possibly the largest hostage taking the world had seen.
238. The fall of their administrative capital at Kilinochchi on 2 January 2009 spelled the military end to the LTTE. It followed a series of victories for the Government on the Northern battlefield. However, the view of the US Ambassador in Colombo was that,

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<sup>258</sup> Campbell Conversations with Assistant Secretary of State Robert Blake.

<sup>259</sup> '17 Die, 100 Wounded by Huge Bomb and Gunfire in Sri Lanka', *New York Times*, 15 October 1997. <<http://www.nytimes.com/1997/10/15/world/17-die-100-wounded-by-huge-bomb-and-gunfire-in-sri-lanka.html>>.

<sup>260</sup> '19 anniversary of deadly Central Bank Bomb in Colombo', *Independent Television Network News*, 31 January 2015. <<http://www.itnnews.lk/?p=59802>>.

<sup>261</sup> US Ambassador Robert Blake, 'Sri Lanka: After The Fall Of Kilinochchi, What Way Forward?', Embassy Colombo, *WikiLeaks*, 9 January 2009, released 30 August 2011, para. 1.

<<https://www.cabledrum.net/cables/09COLOMBO33>>.

<sup>262</sup> *Ibid.*

*'we do not believe the GSL will be able to put an end to Sri Lanka's 25 year old conflict, because the LTTE will continue to be able to draw on funding from the Tamil diaspora and support within Sri Lanka'.*<sup>263</sup>

239. In the immediate past history of the conflict, the Eastern Operations conducted by the SLA between 10 August 2006 and 10 July 2007 resulted in the SLA taking Batticaloa. This was followed by the first phase of the Wannu Operations which began in January 2008 and ended on 2 January 2009 with the SLA taking Kilinochchi, the administrative capital of the LTTE. The capture of Kilinochchi was the most critical moment for the LTTE. To quote from the Expert Military Report:

*'[u]nless they could secure a ceasefire, military defeat, in detail, was inevitable: the only strategy available to the LTTE after Kilinochchi fell was to secure a ceasefire and to bend all their resources to achieving that goal.'*<sup>264</sup>

240. Any urgings by the international community as to a ceasefire would have been a 'replay' of a previous situation. On the verge of routing the LTTE in 1987, the GoSL had been thwarted by an Indian Peace Keeping Force coming to occupy Jaffna, the administrative capital of the Northern Province.<sup>265</sup> This intervention robbed the GoSL of an opportunity to defeat the LTTE which '*lived on to fight another twenty three years*' until 2009.<sup>266</sup> This Commission considers that it cannot have been lost upon the GoSL in 2009 that there was a need to study the lessons of the past and of previous failures so as to understand the nature of the LTTE. From all the material viewed by this Commission, it is clear that unless the LTTE surrendered unconditionally, the GoSL was not once again going to forego the opportunity finally to defeat the LTTE and bring an end to this multi-generational war.<sup>267</sup> The Commission stresses the fact that the GoSL did make genuine attempts to permit the LTTE to lay down their arms. It was the LTTE that refused to countenance surrender, no matter what the cost to the civilians under their control.

## **B. The No-Fire Zones and other Measures to Reduce Civilian Casualties**

241. In order to secure the safety of hundreds of thousands of civilian Tamils, the GoSL set up a series of No-Fire Zones ('NFZ').

*'The Government unilaterally declared a series of no-fire zones within the conflict area and told civilians to move into them – by means of its local officials in the Wannu, through public appeals, and through leaflets dropped from aircraft'.*<sup>268</sup>

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<sup>263</sup> US Ambassador Robert Blake, 'Sri Lanka: Army Captures Kilinochchi; LTTE Answers with Attack on Air Force Headquarters', Embassy Colombo, WikiLeaks, 2 January 2009, released 30 August 2011, para. 1. <<https://www.cabledrum.net/cables/09COLOMBO3>>.

<sup>264</sup> Expert Military Report, Annex 1, para. 14.

<sup>265</sup> Weiss, *The Cage*, p. 82.

<sup>266</sup> K.M. de Silva, *Sri Lanka and the Defeat of the LTTE*, Colombo: Vijitha Yapa Publications, 2012, p. 67.

<sup>267</sup> C.A. Chandraprema, *Gota's War: The Crushing of Tamil Tiger Terrorism in Sri Lanka*, Sri Lanka: Piyasiri Printing Systems, 2013, p. 465.

<sup>268</sup> Petrie Report, para. 19, fn. 28.

However, the LTTE refused to recognise any such safe areas. This refusal on the part of the LTTE could in itself constitute *prima facie* evidence of its intention to use civilians and civilian objects as an illegal extension of its military campaign.

242. International law requires that ‘*safe areas*’, *ceasefires* and *truces* are accepted by both warring parties: agreement by both sides is a pre-requisite for their validity.<sup>269</sup> Because such safe zones, pronounced by the GoSL, were not established by agreement with the LTTE, they cannot formally be considered protected zones, such as set out in the First and Fourth Geneva Conventions, Additional Protocol I and in customary international law.<sup>270</sup> Therefore the laws relating to such zones had no legal status in reality, though they continue to be described as such. After the end of the war, the LTTE and others have sought simply to ignore the fact that it was the LTTE, not the GoSL, who refused to give their agreement to the creation of safe zones that were legally binding.
243. The GoSL took other steps to limit the loss of life to civilians after the fall of Kilinochchi. First, in view of the fact that the LTTE were now facing almost certain defeat militarily, the GoSL requested the LTTE to lay down their arms, surrender and release their captives.<sup>271</sup> The LTTE did not accept this. Secondly, the GoSL sent a message to the LTTE through the Norwegian Ambassador to Sri Lanka offering an amnesty to all LTTE cadres, apart from Prabhakaran and the LTTE Chief of Intelligence, Pottu Amman, both of whose extradition had been formally sought by India, if ever they were captured.<sup>272</sup> This offer was also rejected by the LTTE.
244. On the 29th January 2009 President Rajapaksa urged the LTTE ‘*to allow free movement of civilians to ensure their safety and security*’.<sup>273</sup> The response of the LTTE was negative. As the US Ambassador was to state in a secret cable to Washington:

*‘The LTTE had refused to allow civilians to leave because the LTTE needs the civilians as human shields, as a pool for forced conscription, and as a means to try to persuade the international community to force a ceasefire upon the government, since that is the LTTE’s only hope’.*<sup>274</sup>

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<sup>269</sup> See e.g. Article 15 of Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War. For the customary international law status of the rule see, Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, ICRC and Cambridge University Press, vol. I, Rules, 2005, Rule 35, pp. 119-120. The Darusman Report recognises in para. 80 that the LTTE did not recognise the NFZs as binding.

<sup>270</sup> Human Rights Watch, *War on the Displaced*, Sri Lankan Army and LTTE Abuses against Civilians in the Vanni (‘HRW Report’), February 2009, p. 13, fn. 25.  
<[http://www.hrw.org/sites/default/files/reports/srilanka0209web\\_0.pdf](http://www.hrw.org/sites/default/files/reports/srilanka0209web_0.pdf)>.

<sup>271</sup> US Ambassador Robert Blake, ‘Sri Lanka: Captures Kilinochchi ; LTTE Answers with Attack on Air Force Headquarters’, Embassy Colombo, *WikiLeaks*, 2 January 2009, released 30 August 2011, para. 2.  
<<https://www.cabledrum.net/cables/09COLOMBO3>>.

<sup>272</sup> US Ambassador Robert Blake, ‘Sri Lanka: Vanni’s Civilians Squeezed as Army Pushes On; LTTE Leadership Gone Underground’, Embassy Colombo, *WikiLeaks*, 20 January 2009, released 30 August 2011, para. 1. <<http://www.cabledrum.net/cables/09COLOMBO65>>. This official request by India was in relation to the murder of the Prime Minister of India, Rajiv Gandhi.

<sup>273</sup> ‘Allow free movement to the civilians in 48 hours – President urges LTTE’, *Ministry of Defence website*, 18 August 2011. <[http://www.defence.lk/new.asp?fname=20090130\\_01](http://www.defence.lk/new.asp?fname=20090130_01)>.

<sup>274</sup> US Ambassador Robert Blake, ‘Co-Chair Meeting with UN Special Envoy to Sri Lanka’, Embassy Colombo, *WikiLeaks*, 5 February 2009, released 30 August 2011, para. 4.  
<<http://www.cabledrum.net/cables/09COLOMBO133>>.

245. On 18 February 2009, the Government of India called on the LTTE to lay down its arms and release civilians hostages. The Indian Government even offered to evacuate civilians. These calls and offers were all rejected by the LTTE.<sup>275</sup>

### **C. The Deteriorating Civilian Situation**

246. When the first NFZ, covering some 35 square kilometres, was set up on 20 January 2009, it was the view of the US Ambassador in Colombo that it was not at all clear that the LTTE would honour it as a safe haven for civilians and further that it was unlikely that the LTTE would allow civilians to leave the area under their control.<sup>276</sup> Indeed, the LTTE wilfully moved their heavy artillery into the first NFZ and began to shell the SLA positions from amidst the civilians, who were now trapped in that NFZ.<sup>277</sup> The LTTE placed their offices and military equipment near IDP sites and civilian installations and fired their weaponry from those very areas. In addition to launching their attacks on SLA positions from amidst their captive civilian population, they even set up artillery near a UN aid convoy in an attempt to immunize that position.<sup>278</sup> The LTTE now had at its disposal hundreds of thousands of civilian hostages to obey LTTE orders. These hostages were also a reservoir from which the LTTE would recruit civilians, either willing or forced, to replace killed or injured cadres. At this stage the civilian hostages being held by the LTTE also included UN aid workers.<sup>279</sup> With regard to civilian casualties incurred in the NFZs, the Commission notes the following observation in the Petrie Report:

*'we recognise the LTTE bears responsibility for this as they have not permitted civilians the choice of departing [and are likely to] have fired from areas in the no-fire zone'.*<sup>280</sup>

247. On 16 February 2009, the UN Resident Coordinator publicly condemned the shooting of fleeing civilians by the LTTE, the forced recruitment of children as young as 14, and the forced recruitment of UN local staff who had been prevented from leaving the Wannu.<sup>281</sup>

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<sup>275</sup> US Ambassador Robert Blake, 'Northern Sri Lanka SitRep 16', Embassy Colombo, *WikiLeaks*, 19 February 2009, released 26 August 2011, para. 1. <<http://www.cabledrum.net/cables/09COLOMBO180>>.

<sup>276</sup> Sri Lanka Army, 'Army Declares New Safe Zone for Wannu Civilians, 21 January 2009. <<http://www.army.lk/morenews.php?id=19769>>. ; US Ambassador Robert Blake, 'Sri Lankan Military Creates Safe Zone For Civilians Trapped In North', Embassy Colombo, *WikiLeaks*, 22 January 2009, released 26 August 2011, para. 5. <<http://www.cabledrum.net/cables/09COLOMBO79>>.

<sup>277</sup> US Ambassador Robert Blake, 'Sri Lanka: Army Captures Mullaitivu; Both Sides Violate GSL-Declared No-Fire Zone', Embassy Colombo, *WikiLeaks*, 26 January 2009, released 30 August 2011, para. 2. <<http://www.cabledrum.net/cables/09COLOMBO86>>. ; 'Don't station artillery among civilians – Jaffna Bishop to LTTE', *Asian Tribune*, 27 January 2009. <<http://www.asiantribune.com/node/15327>>.

<sup>278</sup> Human Rights Watch interview, Vavuniya, 8 February 2009, cited in HRW Report, p. 9.

<sup>279</sup> Weiss, *The Cage*, p. 102.

<sup>280</sup> Petrie Report, para. 66.

<sup>281</sup> US Ambassador Robert Blake, 'Northern Sri Lanka SitRep 14: ICRC to Ship Food Aid into the Wannu; UN Condemns LTTE Forced Recruitment, Targeting of Civilians', Embassy Colombo, *WikiLeaks*, 17 February 2009, released 26 August 2011, para. 2. <<http://www.cabledrum.net/cables/09COLOMBO166>>.

248. On 17 February 2009, the UN Children’s Fund (‘UNICEF’) issued a statement concerning the safety of children under LTTE control by stating that there were clear indications that the LTTE had intensified forcible recruitment of children as young as 14 and that their recruitment was intolerable.<sup>282</sup>
249. On 2 March 2009, the Sri Lankan Minister of Disaster Management and Human Rights, addressing the Human Rights Council in Geneva, called upon the Council to bring its influence to bear on the LTTE to permit civilians under their control to move to safety.<sup>283</sup> This call went unheeded by the LTTE.
250. On 6 April 2009, the former President of Sri Lanka called upon Velupillai Prabhakaran to surrender or face annihilation. On that same day the LTTE appealed to all civilians under its control to help the LTTE until ‘*the upcoming Indian elections, when a new, possibly more sympathetic government might emerge*’.<sup>284</sup>
251. On 7 April 2009, the Bishop of Mannar reported to the US Ambassador that the LTTE had discovered 400 children who were being given shelter in a church by a Catholic priest. The LTTE broke into the church, captured the children and forced them into LTTE military service.<sup>285</sup> The position of the LTTE’s hostages was reported as becoming worse by the day.
252. On 9 April 2009, President Rajapaksa informed the UN Secretary General that he was considering a 48 hour pause in the fighting.<sup>286</sup> On 12 April 2009, the Secretary-General of the UN welcomed an announcement by the former President of Sri Lanka of a 48 hour period of restraint during which the SLA would confine itself to defensive operations only. The object of this was to enable civilians wishing to leave the conflict zone to do so.<sup>287</sup> The LTTE refused to release any of the civilian hostages. On 15 April 2009, Sri Lanka’s then Secretary for Defence stated that had the LTTE released any civilian hostages, the GoSL would have extended the ceasefire. However, the LTTE continued offensive operations against the SLA until the ceasefire expired.<sup>288</sup>
253. It is the view of this Commission that one of the reasons why civilians were unable to escape during the halting of offensive operations declared by the SLA was that, whilst not having to defend themselves against SLA attacks, the LTTE were better able to keep their captives civilians from fleeing. As Sir John Holmes of the UN was to put it,

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<sup>282</sup> United Nations Children’s Fund (UNICEF), ‘More Children Victims of the Conflict’, 17 February 2009. <[http://www.unicef.org/media/media\\_48044.html](http://www.unicef.org/media/media_48044.html)>.

<sup>283</sup> Ministry of Foreign Affairs Sri Lanka, ‘Minister Samarasinghe addresses the Human Rights Council at Sri Lanka’s UPR’, 2 March 2009. <<http://www.mea.gov.lk/index.php/en/missions/mission-activities/3710-minister-samarasinghe-addresses-the-human-rights-council-at-sri-lankas-upr>>.

<sup>284</sup> US Ambassador Robert Blake, ‘Northern Sri Lanka SitRep 47’, Embassy Colombo, *WikiLeaks*, 6 April 2009, released 26 August 2011, para. 3. <<http://www.cabledrum.net/cables/09COLOMBO396>>.

<sup>285</sup> US Ambassador Robert Blake, ‘Northern Sri Lanka SitRep 48’, Embassy Colombo, *WikiLeaks*, 7 April 2009, released 26 August 2011, para. 6. <<http://www.cabledrum.net/cables/09COLOMBO402>>.

<sup>286</sup> US Ambassador Robert Blake, ‘Northern Sri Lanka SitRep 50’, Embassy Colombo, *WikiLeaks*, 10 April 2009, released 26 August 2011, para. 4. <<http://www.cabledrum.net/cables/09COLOMBO412>>.

<sup>287</sup> US Ambassador Robert Blake, ‘Northern Sri Lanka SitRep 51’, Embassy Colombo, *WikiLeaks*, 13 April 2009, released 26 August 2011, para. 2. <<http://www.cabledrum.net/cables/09COLOMBO413>>.

<sup>288</sup> US Ambassador, Blake, ‘Northern Sri Lanka SitRep 53’, Embassy Colombo, *WikiLeaks*, 15 April 2009, released 26 August 2011, para. 2. <<http://www.cabledrum.net/cables/09COLOMBO418>>.

*'it is also clear that not only did this not allow more civilians to get out, there seemed to be less civilians getting out during the pause than before'.<sup>289</sup>*

254. A US diplomatic cable from Colombo dated 17 April 2009 contained a situation report, including an account from a priest who had escaped from the 'safe zone'. The priest asserted that all the civilians in the LTTE controlled area would leave if they could but with only three villages left under LTTE control, it was now much more difficult for civilians to evade detection by the LTTE when attempting to escape.<sup>290</sup> The same diplomatic cable made reference to the Tamil National Alliance ('TNA') sending four TNA Members of Parliament to Delhi to explain that India had to tell the GoSL that if it could not protect civilians then India would have a responsibility to do so.<sup>291</sup> In the view of this Commission, this must have appeared to the GoSL as a possible repeat of the events of 1987 when India intervened and halted the advance of the SLA.<sup>292</sup>

#### **D. The Final Weeks of the War**

255. Early in the morning of 20 April 2009, Sri Lankan troops attacked LTTE positions near and in Putumattalan enabling 35,000 civilians to cross over to government lines. In addition, some 92 small boats with about 1,500 civilians on board escaped the conflict zone. In order to deter civilians escaping to government lines at least three LTTE suicide bombers caused many civilian deaths.<sup>293</sup>
256. On 24 April 2009, a cable from the US Embassy in Colombo records UN casualty estimates between 20 January and 20 April as being 6,432 killed and another 13,946 wounded. *'Embassy considers these to be the most reliable figures available'*.<sup>294</sup>
257. On 5 May 2009, the UN Office for Humanitarian Affairs ('OCHA') reported that 188,445 people had crossed into the government controlled areas from those under LTTE control.<sup>295</sup>
258. On 7 May 2009, former President Rajapaksa urged all friendly nations to bring pressure to bear on the LTTE to lay down their arms and release remaining civilians under their control. The President also asked the international community to call upon Sri Lankans residing abroad to bring pressure on the LTTE to release the civilians. The LTTE failed to respond.<sup>296</sup> In the view of this Commission, their refusal was a carefully calculated

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<sup>289</sup> 'Two-day truce insufficient to alleviate suffering in Sri Lanka – UN official', *UN News Centre*, 15 April 2009. < <http://www.un.org/apps/news/story.asp?NewsID=30481#.VcmwSPmqkq> >.

<sup>290</sup> US Ambassador, Blake, 'Northern Sri Lanka SitRep 55', Embassy Colombo, *WikiLeaks*, 17 April 2009, released 26 August 2011, paras. 6-7. < <http://www.cabledrum.net/cables/09COLOMBO432> >.

<sup>291</sup> *Ibid.*, para. 9.

<sup>292</sup> K. M. de Silva, *Sri Lanka and the Defeat of the LTTE*, p. 67.

<sup>293</sup> US Ambassador, Blake, 'Northern Sri Lanka SitRep 56', Embassy Colombo, *WikiLeaks*, 20 April 2009, released 26 August 2011, para. 1. < <http://www.cabledrum.net/cables/09COLOMBO435> >.

<sup>294</sup> US Ambassador Blake, 'Northern Sri Lanka SitRep 60', Embassy Colombo, *WikiLeaks*, 24 April 2009, released 26 August 2011, para. 12. < <http://www.cabledrum.net/cables/09COLOMBO459> >.

<sup>295</sup> US Ambassador Blake, 'Northern Sri Lanka SitRep 66', Embassy Colombo, *WikiLeaks*, 5 May 2009, released 26 August 2011, para. 1. < <http://www.cabledrum.net/cables/09COLOMBO492> >.

<sup>296</sup> US Ambassador Blake, 'Northern Sri Lanka SitRep 68', Embassy Colombo, *WikiLeaks*, 7 May 2009, released 26 August 2011, para. 2. < <http://www.cabledrum.net/cables/09COLOMBO507> >.

move described by a top tier LTTE leader, as a plan to prolong the end of the war by keeping hundreds of thousands of women and children trapped so as to achieve a Kosovo style international intervention, if enough civilians were seen to be killed.<sup>297</sup> This insight into cynical LTTE plans was recorded in a book written by the BBC journalist, Frances Harrison, who at the time was in direct touch with Seevaratnam Pulidevan, a head of the LTTE's political wing. This Commission notes that Harrison does not hide her criticism of the GoSL and candidly states that her work was '*an account of the victory from the perspective of the defeated.*'<sup>298</sup>

259. By the last stages of the war in 2009, US diplomatic cables acknowledged that the LTTE was pursuing a monstrous campaign of cannibalising its own people, particularly children. Even apparent opponents of the GoSL corroborate the fact that the dragooning of Tamil civilians into the front line by the LTTE was to increase the scale of Tamil civilian deaths so as to force some form of international intervention in response to a humanitarian disaster. It is significant that Prabhakaran continued to sacrifice his own people right up to 16<sup>th</sup> May 2009, when the ruling party of Tamil Nadu – Dravida Munnetra Kazhagam - which he believed might have intervened and ensured his survival lost out in the Indian general election. Prabhakaran's hopes for the election in Tamil Nadu of a party supportive of the LTTE were dashed when the Congress Party of India secured a majority without the need to accommodate pro-LTTE parties in the central Government.<sup>299</sup>
260. On 18<sup>th</sup> May 2009 it was announced that Prabhakaran was dead and on 19<sup>th</sup> May 2009 the President formally declared victory in Parliament. In the final hours of the conflict an estimated 72,000 civilians escaped to government lines.<sup>300</sup> The US Embassy in Colombo was to report that more than one of their UN contacts rejected as exaggerated the LTTE claim of 25,000 civilians wounded or dead in the conflict zone.<sup>301</sup>
261. Witnesses who were present on the morning of 18 May 2009 state that the majority of those killed in the NFZ during the last twelve hours of the war were killed by LTTE shelling. Those witnesses were certain that they were being fired upon by the LTTE itself.<sup>302</sup>
262. The UTHR(J) also stated:

*'Some reliable witnesses and other IDPs who were present when the Army entered are certain that a large number, perhaps the majority, of those killed in the NFZ during the last 12 hours were killed by LTTE shelling.'*<sup>303</sup>

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<sup>297</sup> Harrison, *Still Counting the Dead*, pp. 62-63.

<sup>298</sup> *Ibid*, p.7.

<sup>299</sup> C.A. Chandraprema, *Gota's War*, p. 482

<sup>300</sup> US Ambassador, Blake, 'Northern Sri Lanka SitRep 74', Embassy Colombo, *WikiLeaks*, 17 May 2009, released 30 August 2011, para. 1. <<http://www.cabledrum.net/cables/09COLOMBO535>>.

<sup>301</sup> US Ambassador, Blake, 'Northern Sri Lanka SitRep 75', Embassy Colombo, *WikiLeaks*, 18 May 2009, released 26 August 2011, para. 12. <<http://www.cabledrum.net/cables/09COLOMBO539>>.

<sup>302</sup> UTHR Report No. 32, para. 1.4.2.

<sup>303</sup> *Ibid*.

## **E. The Role of the Tamil Diaspora**

263. The Darusman Report states that the Tamil '*[d]iaspora has played a crucial role through the war with segments providing uncritical support to the LTTE, through crucial funding and advocacy, consistently denying any wrongdoing by the LTTE throughout the conflict*'.<sup>304</sup> Attempts by the US to get Tamil diaspora representatives to urge the LTTE to release civilians were rejected.<sup>305</sup>
264. On 29 April 2009, the British and French Foreign Secretaries, David Miliband and Bernard Kouchner, arrived in Sri Lanka in a last ditch endeavor to halt the war. In a routine cable, Richard Mills, a political officer at the US Embassy, reported that he had been informed by a diplomat from the British Foreign and Commonwealth Office that the reason for the British Government lavishing so much time and attention on Sri Lanka was the '*very vocal*' Tamil diaspora numbering tens of thousands that had been camping in front of the British Parliament building since 6 April 2009.<sup>306</sup> Frances Harrison records the fact that to some, this was seen as an attempt to woo Tamil voters in the upcoming parliamentary elections in the UK.<sup>307</sup> According to one British MP, the size and organizational skills of the Tamil diaspora, around cities such as London, enabled it to wield an influence beyond its size and occasionally determined the outcome of elections.<sup>308</sup>
265. In the closing months of the war, as the military position of the LTTE became increasingly dire, the diaspora organizations and their supporters in the West mobilized in large numbers with protests in foreign capitals becoming increasingly radical and sometimes illegal. The Sri Lankan Embassies in Oslo and The Hague were attacked by Tamil protestors and the Indian High Commission in London was vandalized.<sup>309</sup> There were hunger strikes in India, Europe and the US with an act of immolation by a Tamil youth in 2009 outside the UN HQ in Geneva.<sup>310</sup> This was all part of an attempt to escalate negative public opinion around the world with regard to Sri Lanka. This was done mainly with the view to provoke international intervention and a ceasing of hostilities so as to avoid an outright LTTE military defeat.
266. The international community does not appear to have impressed upon the Tamil diaspora that knowingly funding perpetrators of international crimes, such as hostage taking and the unlawful use of human shields, may amount to aiding and abetting such crimes. The diaspora funding of the LTTE continued unabated.

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<sup>304</sup> Darusman Report, para 34.

<sup>305</sup> US Ambassador Robert Blake, 'Sri Lanka: Visit By Using Chief of Staff Namiar Yields Mixed Results', Embassy Colombo, *WikiLeaks*, 17 April 2009, released 30 August 2011, para. 10. <<http://www.cabledrum.net/cables/09COLOMBO431>>.

<sup>306</sup> 'Diaspora Tamils protest, fast in increasing numbers; call for ceasefire', *Tamil Guardian*, 15 April 2009. <<http://www.tamilguardian.com/article.asp?articleid=2281>>.

<sup>307</sup> Harrison, *Still Counting the Dead*, p. 28.

<sup>308</sup> International Crisis Group interview, 16 July 2008, cited in International Crisis Group, *Asia Report N° 186*, 23 February 2010, p.15.

<sup>309</sup> International Crisis Group, *Asia Report N° 186*, p. 21.

<sup>310</sup> 'Murugathan Immolated Infront of the UN in Geneva in Protest of Tamil Sufferings', *LankaNewspapers*, 13 February 2009. <[http://www.lankanewspapers.com/news/2009/2/39361\\_space.html](http://www.lankanewspapers.com/news/2009/2/39361_space.html)>.

## **F. The Influence and Approach of the International Community**

267. There was a dichotomy in the reaction of the international community as it evolved during the final stages of the conflict. When the SLA began its military push to defeat the LTTE, the view of the UN High Commissioner for Human Rights, Navanethem Pillay, directed at the GoSL was expressed thus:

*‘our view is that you can never succeed through military solution. The problem can be solved politically.’<sup>311</sup>*

268. In stark contrast to the position taken by the UN High Commissioner, the UN Under-Secretary-General for Humanitarian Affairs and Emergency Relief Coordinator, Sir John Holmes, had this to say about proposed political negotiations:

*‘There was no real enthusiasm for pressing the government to go back to the negotiating table with the LTTE, given the latter’s track record, or even, in truth, much support for a full ceasefire which would have suspended the action, because that would have let the LTTE off the hook. What Western governments really wanted, though they could not and did not say so, was a quick victory and minimal civilian casualties in the process.’<sup>312</sup>*

269. This apparent division of views in the international community was not helpful to the GoSL. On the one hand, it was confronted with a situation in which the LTTE refused to lay down their arms and free captive civilians, whilst at the same time seeking to get Western nations to force a ceasefire upon the government as their only hope of survival.<sup>313</sup> On the other hand, as said in the previous paragraph, what Western governments wanted was a quick government victory with limited civilian loss.<sup>314</sup> Thus they were trying publicly to appease the Tamil diaspora in their own countries by calling for a ceasefire and in the case of the Labour Government in Britain, ‘to woo Tamil votes for the upcoming Parliamentary elections’.<sup>315 316</sup> It is clear to this Commission from the material available in the public domain that the GoSL had come to the conclusion that, that if they could not induce the LTTE to surrender, then the total military defeat of the LTTE was the only realistic option, regardless of diaspora pressure.

270. The Rhodes Scholar and eminent historian, Michael Roberts, has advanced a theory worthy of consideration in his latest book published in 2014, *Tamil Person and State Essays*. He holds that despite earlier concerns raised by human rights organisations,

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<sup>311</sup> ‘UN wants SL to allow HR monitors see for themselves’, *The Island*, 25 March 2009. <<http://www.island.lk/2009/03/25/news4.html>>.

<sup>312</sup> Sir John Holmes, *The Politics of Humanity: The Reality of Relief Aid*, London: Head of Zeus, 2013, p. 105, emphasis added. Sir John Holmes was not a UN career civil servant but a senior retired British diplomat who had served as a UK Ambassador to Paris.

<sup>313</sup> US Ambassador Robert Blake, ‘Co-Chair Meeting With UN Special Envoy To Sri Lanka’, Embassy Colombo, *Wikileaks*, 5 February 2009, released 30 August 2011, para. 4. <<http://www.cabledrum.net/cables/09COLOMBO133>>.

<sup>314</sup> Holmes, *The Politics of Humanity*, p.105

<sup>315</sup> Harrison, *Still Counting the Dead*, p. 28.

<sup>316</sup> Julian Borger, ‘Wikileaks cables: David Miliband focused on Sri Lankan war ‘to win votes’’, *The Guardian*, 1 December 2010. <<http://www.theguardian.com/world/2010/dec/01/wikileaks-david-miliband-sri-lanka>>.

their condemnation of the GoSL and SLA had become more pronounced as from late 2008. What is more, through a perceived shift by the leadership in Sri Lanka towards China and Russia, the powerful support of the USA and the West became engaged. The LTTE, having correctly read the international political scene, exploited their well-placed connections in the media and political circles in the West, by relying on the traditional humanitarian concerns of the liberal democracies and their commitment to human rights. In fact, by taking hundreds of thousands of civilian hostages, what the LTTE was endeavouring to do was to invoke the consequences of their own crime to escape military defeat. This, on any view, created a humanitarian crisis which the LTTE was able to turn to its own advantage by calling upon the international community to intervene and stop what was being portrayed as a genocide. This was at a time when the GoSL was on the verge of victory and the LTTE leadership must have known they were facing certain military defeat. The Commission finds this situation well expressed by Michael Roberts:

*‘The Tiger act of moral blackmail was only feasible because of this climate of opinion in the West. In consequence, Amnesty International, Human Rights Watch, International Crisis Group... et cetera became cats-paws in a grand LTTE strategy. This act of blackmail did not succeed.’<sup>317</sup>*

271. With the growing clamour of the Tamil diaspora in the US, Canada, the EU and the UK, a further US diplomatic cable dated 17 April 2009 shows both the President of Sri Lanka and the Foreign Minister turning down demands from the UN, the US, the EU and India for an immediate pause in the fighting. The GoSL’s position was that it could not give the LTTE another chance to regroup and forcibly recruit more civilians. With the rejection by the GoSL of these calls for a ceasefire and high level diplomacy came intense pressure and warnings that if the Government failed to agree to a ceasefire it would face ‘consequences’. These included the suspension of aid to Sri Lanka by the US, closer scrutiny of IMF lending, and above all, possible war crimes investigations and other punitive actions.<sup>318</sup>
272. Perhaps the confusion on the part of the GoSL in the light of these threats is best captured by the arrival of the new US Ambassador to Colombo, Patricia Butenis. On the presentation of her credentials, the former President of Sri Lanka signalled the importance of getting the relationship of the US and Sri Lanka back on track. This is reflected in a diplomatic cable to Washington by the new US Ambassador which reads as follows:

*‘Expressing a combination of bewilderment and frustration, the President pointed out that while President Bush had personally encouraged him to pursue the defeat of the LTTE, we were now criticizing Sri Lanka for the conduct of its fight against terrorism.’<sup>319</sup>*

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<sup>317</sup> Michael Roberts, *Tamil Person and State Essays*, Colombo: Vijitha Yapa Publications, 2014, p.185.

<sup>318</sup> US Ambassador Robert Blake, ‘Sri Lanka: Visit by UNSYG Chief of Staff Number Yields Mixed Results’, Embassy Colombo, *WikiLeaks*, 17 April 2009, released 30 August 2011, paras. 9-10.  
<<http://www.cabledrum.net/cables/09COLOMBO431>>.

<sup>319</sup> US Ambassador Patricia Butenis, ‘President Bewildered, Frustrated with U.S. Sri Lanka Policy’, Embassy Colombo, *Wikileaks*, 18 September 2009, released 30 August 2011, para. 3.  
<<http://www.cabledrum.net/cables/09COLOMBO893>>.

273. Exactly one month before the SLA claimed victory over the LTTE a diplomatic cable from the US Embassy in Colombo to Washington noted that 35,000 civilians had escaped from LTTE control that very day, but nevertheless went on to say,

*'[...] the U.S. is certainly glad large numbers were able to get out, but noted that this may have come at a high cost in civilian casualties that could have been averted had the GSL waited to use diplomacy.'*<sup>320</sup>

274. The Commission believes that there was a failure to accept the reality that diplomatic initiatives and ceasefires had never worked in the past because the LTTE used such lulls in fighting to regroup, recruit and launch fresh attacks. It is the view of this Commission that calls for the use of diplomacy at that stage to avoid casualties was, regrettably, naïve. It is the Commission's finding that it was the LTTE who endangered the lives of civilians by keeping them captive and stopping their escape under pain of death.

275. Yet, just weeks before the war ended, the international community became more strident in its calls for a ceasefire as a confidential diplomatic cable, dated 30 April 2009, from the US Ambassador in Colombo confirmed:

*'The week's procession of high level visitors carrying consistent messages left the government with no doubt of the international community's consensus on the need to halt combat operations and prevent further large scale casualties in the NFZ.'*<sup>321</sup>

276. It is apparent to this Commission that the GoSL gradually recalibrated its international ties by tilting towards China, Russia, Libya and Iran, thus leaving its relations with its traditional supporters in Europe and the USA in tatters. Towards the end of the war, China became by far the largest provider of weapons to the GoSL.<sup>322</sup>

## **G. Appraisal of the Military Outcome and the Impact on Civilians**

277. This Commission considers that the international community has not given sufficient weight to the GoSL's dilemma when faced with the LTTE taking such a vast number of civilians as hostages, using them as shields and executing them if they sought to escape. How to resolve these issues go to the heart of any fair appraisal of the military outcome in Sri Lanka:

- Given that the concept of the 'responsibility to protect' had by this time gained currency and that the LTTE propaganda machine calling for international intervention was in full swing, was the GoSL not entitled to prevent the

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<sup>320</sup> US Ambassador Robert Blake, 'Northern Sri Lanka SitRep 56', Embassy Colombo, *WikiLeaks*, 20 April 2009, released 26 August 2011, para. 1. <<http://www.cabledrum.net/cables/09COLOMBO435>>.

<sup>321</sup> Chargé d'Affaires, James R. Moore, 'Sri Lanka: Few Results from High-Level Visits', Embassy Colombo, *WikiLeaks*, 30 April 2009, released 30 August 2011, para. 12. <<https://www.cabledrum.net/cables/09COLOMBO479>>.

<sup>322</sup> 'Pawns of Peace Evaluation of Norwegian peace efforts in Sri Lanka, 1997-2009', Report 5/2011 – Evaluation, Norad, September 2011, p. 78. <<http://www.oecd.org/countries/srilanka/49035074.pdf>>.

leadership of this proscribed and deadly organisation from escaping to resume its fight another day?

- Did the GoSL not have a responsibility towards the remaining 19 million plus citizens of Sri Lanka who were being regularly subjected to lethal terrorist attacks by the LTTE?
- Would the LTTE's firing of artillery and mortars at their own Tamil civilian population, so as to assign blame to the SLA, combined with the execution of hostages trying to escape and the deteriorating living conditions within the final NFZ, not have presented the GoSL with a humanitarian disaster on a much larger scale had they failed to intervene decisively in order to bring about the defeat of the LTTE, the release of the captives and the end of the war?<sup>323</sup>
- Were factors such as the co-mingling of the LTTE fighters with the captive population, thereby blurring the distinction between civilians and combatants, and LTTE suicide attacks within the final NFZ, not to be taken into account in dealing with anticipated casualty figures for the purpose of determining the IHL principle of proportionality?
- When LTTE fighters, unable to face the prospect of defeat and mentally conditioned to the concept of suicide began to blow themselves up and civilians with them, was the GoSL not entitled to react to avert the very real possibility, anticipated by experienced observers such as the UN Under-Secretary-General for Humanitarian Affairs, of a mass suicide killing?

#### *The Saipan-Okinawa/Masada Prospect*

278. On 16 May 2009 all possibility of Prabhakaran being saved by the intervention of India disappeared when the outcome of the Indian elections was announced. The United Progressive Alliance of Manmohan Singh and Sonia Gandhi put an end to all hopes of the LTTE being rescued. Large numbers of LTTE fighters wearing suicide vests started committing suicide. The Commission takes the view that there was reason to believe a mass suicide or mass killing event was imminent.

279. Michael Roberts, reviewing the position during the currency of the war stated:

*'Sitting in Colombo on the 18<sup>th</sup> April 2009 I anticipated a massive bloodbath and wondered if a mass act of suicide of the **Saipan-Okinawa** sort would be sponsored'.*<sup>324</sup>

280. The UTHR(J), watching the inevitable end of the LTTE from a Tamil point of view, had this to say about deaths through large scale suicide:

*'The talk of surrender in the air had also a disturbing effect on young cadres who had come to believe that the movement would never contemplate such a course after making so many commit suicide for its sacred cause. [...] Because of the disorganization during the latter period not all cadres had cyanide*

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<sup>323</sup> US State Department Report, 2009, p. 24.

<sup>324</sup> Roberts, *Tamil Person and State Essays*, p.194, emphasis added. Saipan-Okinawa was the site of many Japanese suicides of men, women and children at the end of World War II.

*capsules. According to those who later escaped, a number of LTTE cadres began committing suicide by exploding grenades in their possession. There was a kind of anarchy. Some cadres were going to bunkers where civilians were sheltering, asking “So you want to run away to the Army do you?”, and then opening fire at them.’<sup>325</sup>*

281. Sir John Holmes reviewed the position at the conclusion of the war in a manner not dissimilar to Michael Roberts and the UTHR(J):

*‘My worst fears of a concluding dreadful act of a Masada-style mass suicide were not realized. The army announced that victory was theirs. But the real end did not come until 19 May, when Prabhakaran and his fellow LTTE leaders were killed’.<sup>326</sup>*

282. The Commission’s Military Expert not only echoes the Masada style prospect but also states:

*‘In my military opinion [...] this presented as a wholly unique and unusual hostage taking situation. Indeed ISIL has adopted some of these strategies, forcing the allied coalition in Iraq to make hard choices in the overall protection of the civilian population and the stability of the region’.<sup>327</sup>*

283. The Commission is of the view that where LTTE cadres had begun detonating themselves and killing others it would have been a derogation of duty on the part of the GoSL not to act decisively to bring what might have become an even more horrendous humanitarian situation to an end. The thinking behind a decision to act in such circumstances is illustrated by the NATO bombing campaign in the former Yugoslavia in 1991. At a joint press conference, NATO Secretary-General, General Wesley Clark, Supreme Allied Commander Europe, said:

*‘The military mission...is to attack Yugoslav military and security forces and associated facilities with sufficient effect to degrade its capacity to continue repression of the civilian population and to deter further military actions against its own people’.<sup>328</sup>*

### Factors Impacting on the Plight of Civilians

284. As this Commission sees it, there were three critical and pivotal new factors which came into play in the final stages of the war. First, the taking by the LTTE of hundreds of thousands of Tamil civilians in order to use them as human shields. These hostages, became a pool for forced conscription, while those who failed to comply or tried to

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<sup>325</sup> UTHR Report No. 32, para. 1.1.

<sup>326</sup> Sir John Holmes, *The Politics of Humanity*, p.112, emphasis added. Masada: in 73 AD the Roman Legions laid siege to the cliff fortress. With the breaching of the walls of the fortress the Jewish inhabitants committed mass suicide having been persuaded by the Sicari leader to kill themselves.

<sup>327</sup> Expert Military Report, Annex 1, para. 18, emphasis added.

<sup>328</sup> General Wesley K. Clark, *Waging Modern War: Bosnia, Kosovo, and the Future of Combat*, USA: PublicAffairs, 2001, p. 203.

escape were executed. Secondly, the refusal by the LTTE to accept the creation by the GoSL of the NFZs designed specifically as safe havens for the civilian population. Thirdly, the refusal of the LTTE to release civilian hostages in the April 2009 ceasefire.<sup>329</sup>

285. The LTTE's last defence, on a coastal strip where their leadership had '*a complex network of bunkers and fortifications*',<sup>330</sup> led to the Military Expert's observation that nothing could have prepared the SLA for the challenge they now faced, namely to kill or to capture thousands of well-armed fanatical LTTE fighters in prepared positions operating from among thousands of civilians. The Expert Military Report states:

*'The author can think of no military precedent that the SLA could have turned to for guidance. This would have been a challenge for the most professional and best informed and equipped armies in the world.'*<sup>331</sup>

286. This Commission takes the view that '*the appraisal [of] whether the [civilian] casualties are excessive in relation to the military advantage anticipated must make allowances for the fact that – if an attempt is made to shield military objectives – civilian casualties will be higher than usual*'.<sup>332</sup>

287. On 28 January 2011, the former US Ambassador to Colombo, Robert Blake, now an Assistant Secretary of State, made the following observation in relation to the movement of IDPs during the last stage of the conflict:

*'The LTTE systematically refused international efforts to allow those internally displaced persons to move South. To move away from the conflict areas where they could have been given food and shelter and so forth. So they [the LTTE] systematically basically refused all efforts and in fact violated international law by not allowing freedom of movement to those civilians. So had the LTTE actually allowed people to move South none of this would have happened in the first place, so it is important to make that point. I think that often gets lost in the debate on this.'*<sup>333</sup>

288. Ambassador Blake also commented:

*'[T]he LTTE often deliberately put its heavy artillery in the midst of civilian encampments precisely to draw fire so that people would get killed in the hopes that there would then be international outrage and there would be essentially demands on the Sri Lankan Government to stop the fighting and (agree to) some form of negotiated settlement.'*<sup>334</sup>

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<sup>329</sup> 'Two-day truce insufficient to alleviate suffering in Sri Lanka – UN official', UN News Centre, 15 April 2009. < <http://www.un.org/apps/news/story.asp?NewsID=30481#.Vcmr1fmqqkp> > .

<sup>330</sup> Darusman Report, para. 97.

<sup>331</sup> Expert Military Report, Annex 1, para. 19.

<sup>332</sup> Yoram Dinstein, *The Conduct of Hostilities Under the Law of International Armed Conflict*, Cambridge: Cambridge University Press, 2004, p.131; See also A.P.V. Rogers, *Law on the Battlefield*, 2<sup>nd</sup> ed, Manchester: Manchester University Press, 2004, p. 129, emphasis added.

<sup>333</sup> Campbell Conversations with Assistant Secretary of State Robert Blake.

<sup>334</sup> Ibid.

289. In the view of this Commission, the overall factual circumstances of the final months of the conflict in Sri Lanka are distinctive and possibly unique. As detailed in this report, the two critical factors impacting on the overall plight of civilians in the final stages of the conflict have been afforded inadequate consideration in the assessment of the IHL principles of distinction and proportionality. This is particularly germane considering the SLA's twin objectives of preventing further LTTE atrocities and killing or capturing the LTTE leadership.

*The Post-War Situation*

290. In the last three years of the war alone some 6,200 SLA soldiers were killed and 30,000 wounded.<sup>335</sup> Of some 300,000 to 330,000 civilians formerly under the control of the LTTE, approximately 290,000 were freed or made their way through to SLA lines. Another 14,000 were evacuated by sea.<sup>336</sup> Deeply regrettable though it is, many civilians perished. Whatever the true figure of the civilian casualties, this Commission finds it necessary to underline that the vast majority of civilians under LTTE control were in fact saved whilst an overwhelming number of LTTE cadres were killed.

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<sup>335</sup> US Ambassador Blake, 'Northern Sri Lanka SitRep 79', Embassy Colombo, *WikiLeaks*, 22 May 2009, released 26 August 2011, para. 11. < <http://www.cabledrum.net/cables/09COLOMBO559>>.

<sup>336</sup> Darusman Report, p. 1.

## CHAPTER 6 - THE LEGAL FRAMEWORK

### A. The Applicability of IHL to Non-International Armed Conflicts

291. In the view of the Commission the conflict between the SLA and the LTTE was a non-international armed conflict governed by the body of IHL applicable to such conflicts. Whereas the law applicable to international armed conflicts is ‘*comprehensive and elaborate*’, non-international armed conflicts have traditionally been less well-regulated. Only one provision of the 1949 Geneva Conventions, Common Article 3, specifically applies to non-international armed conflicts. Additional Protocol II to the Geneva Conventions, adopted in 1977, provides a more comprehensive regime governing non-international armed conflict. Additionally, rules of customary international law apply during non-international armed conflict.

#### Common Article 3

292. Sri Lanka has signed and ratified all four Geneva Conventions and is therefore bound by the provisions of Common Article 3. Common Article 3 provides minimum guarantees to protect persons not taking an active part in hostilities as follows:

*‘(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed ‘hors de combat’ by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.*

*To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:*

*(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;*

*(b) taking of hostages;*

*(c) outrages upon personal dignity, in particular humiliating and degrading treatment;*

*(d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognised as indispensable by civilized peoples.*

*(2) The wounded and sick shall be collected and cared for.*<sup>337</sup>

293. Common Article 3 is considered to form part of customary international law and is therefore binding on all states, whether or not parties to the Geneva Conventions.<sup>338</sup>

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<sup>337</sup> International Committee of the Red Cross (‘ICRC’), *Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (‘Fourth Geneva Convention’), 12 August 1949, 75 UNTS 287. <<http://www.refworld.org/docid/3ae6b36d2.html>>.

<sup>338</sup> See e.g. Rikke Ishøy, *Handbook on the Practical Use of International Humanitarian Law*, Danish Red Cross, 2008, p. 44.

Additional Protocol II

294. Common Article 3 was developed and expanded upon by Additional Protocol II, which under its Article 1(1) applies to conflicts ‘which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.’<sup>339</sup> Additional Protocol II does not apply to situations of internal disturbances and tensions, such as riots and isolated and sporadic acts of violence (Article 1(2)). The aim of Additional Protocol II was to extend the applicability of the essential rules governing armed conflict to non-international armed conflict.
295. Additional Protocol II lists a series of fundamental guarantees and other provisions calling for the protection of those taking no active part in hostilities. In particular, Article 4 provides:

- ‘1. All persons who do not take a direct part or who have ceased to take part in hostilities, whether or not their liberty has been restricted, are entitled to respect for their person, honour and convictions and religious practices. They shall in all circumstances be treated humanely, without any adverse distinction. It is prohibited to order that there shall be no survivors.*
- 2. Without prejudice to the generality of the foregoing, the following acts against the persons referred to in paragraph 1 are and shall remain prohibited at any time and in any place whatsoever:*
- (a) violence to the life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment;*
  - (b) collective punishments;*
  - (c) taking of hostages;*
  - (d) acts of terrorism;*
  - (e) outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault;*
  - (f) slavery and the slave trade in all their forms;*
  - (g) pillage;*
  - (h) threats to commit any of the foregoing acts.*
- 3. Children shall be provided with the care and aid they require, and in particular:*
- (c) children who have not attained the age of fifteen years shall neither be recruited in the armed forces or groups nor allowed to take part in hostilities;*
  - (d) the special protection provided by this Article to children who have not attained the age of fifteen years shall remain applicable to them if they take a direct part in hostilities despite the provisions of sub-paragraph (c) and are captured.’*

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<sup>339</sup> ICRC, *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, 8 June 1977, 1125 UNTS 609 (‘Additional Protocol II’). <<http://www.refworld.org/docid/3ae6b37f40.html>>. See also, Malcolm N. Shaw, *International Law*, 6th ed., 2008, p. 1195.

296. Article 13 of Additional Protocol II on ‘Protection of the civilian population’ provides:

*‘1. The civilian population and individual civilians shall enjoy general protection against the dangers arising from military operations. To give effect to this protection, the following rules shall be observed in all circumstances.  
2. The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.  
3. Civilians shall enjoy the protection afforded by this Part, unless and for such time as they take a direct part in hostilities.’*

297. Sri Lanka has neither signed nor ratified Additional Protocol II. However, as discussed below, the core provisions of the Protocol are regarded as being part of customary international law and are thus binding on all parties to the conflict in Sri Lanka.

## **B. The Applicability of Customary International Law**

298. Article 38 of the Statute of the International Court of Justice indicates as one of the sources of international law ‘international custom, as evidence of a general practice accepted as law’.<sup>340</sup> The establishment of a rule of customary international law is considered to require two elements: state practice of a sufficient degree of generality and uniformity, and a belief on the part of states that such practice is legally binding (*opinio juris*).<sup>341</sup> Treaty law may constitute a codification of custom or alternatively, customary law may derive from treaties. As a consequence, the rules of customary international law in a particular area may mirror treaty provisions while retaining their separate existence.

299. In *Nicaragua v. United States of America*, the International Court of Justice (‘ICJ’) indicated that Common Article 3 reflects ‘elementary considerations of humanity’ and may be deemed part of customary international law.<sup>342</sup> The International Criminal Tribunals for the Former Yugoslavia (‘ICTY’) and Rwanda (‘ICTR’) have upheld this view.<sup>343</sup> Additionally, although Additional Protocol II is not considered customary international law as a whole, its core provisions that reaffirm and supplement Common Article 3 are considered to be binding as customary law.<sup>344</sup> These provisions include articles 4, 5, 6, 9 and 13, which cover the protection of civilians, medical and religious personnel, and the fundamental rights guaranteed to all those involved in the

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<sup>340</sup> United Nations, *Statute of the International Court of Justice*, 18 April 1946.

<<http://www.refworld.org/docid/3deb4b9c0.html>>.

<sup>341</sup> *North Sea Continental Shelf Cases*, Judgment, ICJ Reports 1969, p. 3.

<sup>342</sup> *Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, ICJ Reports 1986, paras 218 and 220.

<sup>343</sup> *Prosecutor v. Dusko Tadić*, IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Appeals Chamber, 2 October 1995, para. 134, confirming that customary international law imposes criminal liability for serious violations of common Article 3; *Prosecutor v. Jean-Paul Akayesu*, ICTR-96-4-T, Judgment, 2 September 1998, (‘*Akayesu* Trial Judgment’), para. 608.

<sup>344</sup> *Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, *ibid*, para. 117.

conflict.<sup>345</sup> Finally, the ICRC has drafted a list of rules that it considers to be a part of customary international law in both non-international and international armed conflicts.<sup>346</sup>

### **C. The Applicability of International Human Rights Law**

300. Sri Lanka is a party to the International Covenant on Civil and Political Rights ('ICCPR'), the Convention Against Torture and Cruel, Inhuman or Degrading Treatment or Punishment ('CAT') and the International Covenant on Economic, Social and Cultural Rights ('ICESCR'). These instruments contain certain non-derogable rights that states are required to uphold for their citizens at all times.
301. IHRL is applicable in both international and non-international armed conflicts. As a result, IHRL and IHL overlap during armed conflicts and states are bound to respect both bodies of law.<sup>347</sup> In fact, the two bodies of law converge the most during non-international armed conflicts because IHRL governs how a state treats its own citizens.<sup>348</sup> IHRL is relied on most heavily when a state refuses to recognise the applicability of Common Article 3.<sup>349</sup>

### **D. The Applicability of IHL to Non-State Actors**

302. The LTTE, as non-state actors engaging in armed conflict, are liable for any transgressions of IHL. Three theories support this conclusion. The first holds that non-state actors are bound by IHL 'by reason of their being active on the territory of a Contracting Party (a State Party to the Geneva Conventions and/or its Additional Protocols)'.<sup>350</sup> This theory is also referred to as the 'principle of legislative jurisdiction'. Put simply, this theory posits that any agreements that a state may enter into are subsequently binding on anyone in its jurisdictional territory. Thus, according to this theory, all armed groups active on a state's territory are subject to IHL, whether or not these groups have consented to be bound by this body of law. According to this theory the LTTE, by virtue of their physical presence in the territory of Sri Lanka, are subject to the obligations under any treaties to which Sri Lanka is a party, including the Geneva Conventions.

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<sup>345</sup> Eve La Haye, *War Crimes in Internal Armed Conflicts*, Cambridge University Press, 2008, p. 54. *Akayesu* Trial Judgment, para. 610, stating that the fundamental guarantees in Article 4(2) of Additional Protocol II are part of customary international law. *Prosecutor v. Pavle Strugar*, IT-01-42-AR72, Decision on Interlocutory Appeal, 22 November 2002, para. 10: 'Customary international law establishes that a violation of [Article 13 of Additional Protocol II] entails individual criminal responsibility.'

<sup>346</sup> Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, ICRC and Cambridge University Press, 2005, vol. I, Rules and vol. II, Practice; ICRC, Customary International Law database at <<http://www.icrc.org/customary-ihl/eng/docs/home>>.

<sup>347</sup> Shaw, *International Law*, p. 1197.

<sup>348</sup> Ibid.

<sup>349</sup> La Haye, *War Crimes in Internal Armed Conflicts*, p. 54.

<sup>350</sup> Cedric Ryngaert, *Non-State Actors and International Humanitarian Law*, working paper, Katholieke Universiteit Leuven Faculty of Law, 2008. <<http://www.law.kuleuven.be/iir/nl/onderzoek/wp/WP146e.pdf>>.

303. Under the second theory, armed groups are bound by the rules of IHL when they exercise control over territory sufficient to enable them to mount sustained military operations (as is recognised in Article 1 of Additional Protocol II). Accordingly, it is accepted that when armed groups exercise *de facto* control over territory, they behave like states, and therefore the international obligations – including obligations under IHL – incurred by states should also be incurred by non-state actors engaging in armed conflict.<sup>351</sup> However, this theory requires that a non-state group exercise *de facto* control of an area, and so this does not apply universally.<sup>352</sup> This theory would also apply to the LTTE as they did exercise *de facto* control over large portions of the North and East of Sri Lanka at the relevant time.
304. The third theory is that international humanitarian treaty and customary law create rights and obligations for individuals, including non-state actors.<sup>353</sup> Thus, individuals are bound by these rules directly under international law and may be held individually criminally responsible for violations amounting to war crimes. Adopting this approach, the UN Secretary-General in a 2001 report on the protection of civilians in armed conflict recalled ‘*the prohibition against targeting civilians and conducting indiscriminate attacks on civilians, enshrined in customary international humanitarian law, which is binding not only on States and their Governments but equally and directly so on armed groups that are parties to the conflict*’ and noted that the practice of the ICTY and ICTR, as well as the ICC Statute, ‘*have underlined the principle of direct responsibility of armed groups for violations of international humanitarian law*’.<sup>354</sup>
305. The use of suicide attacks by an armed force is not per se an unlawful means of attack under IHL. LTTE suicide bombers, like other combatants, were required by IHL to observe the fundamental principles of distinction, military necessity and proportionality as explained below.

## **E. The Core IHL Principles of Distinction, Military Necessity and Proportionality**

### *The Principle of Distinction*

306. A central tenet of IHL is that the parties to a conflict may not directly target and attack civilians and the civilian population. *Distinction* requires that combatants distinguish between civilian and military personnel and targets in planning and executing military action.<sup>355</sup> The principle of distinction is expressed as follows in the ICRC’s first rule of customary IHL:

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<sup>351</sup> Ibid.

<sup>352</sup> Ibid.

<sup>353</sup> La Haye, *War Crimes in Internal Armed Conflicts*, p. 120.

<sup>354</sup> Report of the Secretary-General to the Security Council on the Protection of Civilians in Armed Conflict, UN Doc S/2001/331, 30 March 2001, para. 48.

<sup>355</sup> Michael N. Schmitt, ‘The Principle of Discrimination in 21<sup>st</sup> Century Warfare’, 2 *Yale Human Rights and Development Law Journal*, 143, 1999, pp. 148-49.

*‘Rule 1. The parties to the conflict must at all times distinguish between civilians and combatants. Attacks may only be directed against combatants. Attacks must not be directed against civilians.’*<sup>356</sup>

The rule is codified in Article 51(2) of Additional Protocol I.<sup>357</sup> The principle of distinction also forms the basis of Article 13(2) of Additional Protocol II.

307. Although Additional Protocol II does not contain a definition of civilians, under customary international law civilians are defined as ‘persons who are not members of the armed forces’.<sup>358</sup> Civilians who take a direct part in hostilities lose their protection against attack for such time as they participate in combat.<sup>359</sup> As elaborated below, there is as yet no clear and uniform definition of ‘direct participation in hostilities’, though use of weapons and other violent means against enemy forces is clearly included.<sup>360</sup>
308. Article 8(2)(e)(i) of the ICC Statute establishes that the violation of the principle of distinction during non-international armed conflicts may amount to the war crime of ‘intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities’.<sup>361</sup>
309. The principle of distinction is also at the heart of the war crime of ‘acts of terrorism’, reflecting Article 13(2) of Additional Protocol II and included in the Statutes of the ICTR<sup>362</sup> and Special Court for Sierra Leone (‘SCSL’).<sup>363</sup>
310. The underlying conduct that may lead to charges of attacks against civilians or acts of terrorism as war crimes can also amount to the crime against humanity of, for example, murder, where there is evidence of a widespread or systematic attack against the civilian population. In the ICTY case of *Galić*, the accused was charged, *inter alia*, with infliction of terror and attacks on civilians (constituted by unlawful shelling) as violations of Article 13 of Additional Protocol II, as well as the crimes against humanity of murder and other inhumane acts based on the same conduct.<sup>364</sup> Notably though, in order to qualify as a crime against humanity under the ICC Statute, the widespread or systematic attack directed against any civilian population must be

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<sup>356</sup> Henckaerts and Doswald-Beck, *Customary International Humanitarian Law*, vol. I, p. 3.

<sup>357</sup> ICRC, *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977, 1125 UNTS 3. <<http://www.refworld.org/docid/3ae6b36b4.html>>.

<sup>358</sup> Henckaerts and Doswald-Beck, *Customary International Humanitarian Law*, vol. I, p. 17 (Rule 5).

<sup>359</sup> *Ibid.*, p. 19 (Rule 6).

<sup>360</sup> *Ibid.*, p. 23.

<sup>361</sup> The elements of this crime are as follows: 1. The perpetrator directed an attack. 2. The object of the attack was a civilian population as such or individual civilians not taking direct part in hostilities. 3. The perpetrator intended the civilian population as such or individual civilians not taking direct part in hostilities to be the object of the attack. 4. The conduct took place in the context of and was associated with an armed conflict not of an international character. 5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict. See International Criminal Court (‘ICC’), *Elements of Crimes*, (‘ICC Elements of Crimes’), 2011. <<http://www.refworld.org/docid/4ff5dd7d2.html>>.

<sup>362</sup> UN Security Council, Statute of the International Criminal Tribunal for Rwanda (as amended), 8 November 1994, Article 4.

<sup>363</sup> Statute of the Special Court for Sierra Leone, 16 January 2002, Article 3.

<sup>364</sup> *Prosecutor v. Stanislav Galić*, IT-98-29-I, Indictment, 26 March 1999.

*‘pursuant to or in furtherance of a state or organizational policy to commit such attack.’<sup>365</sup>*

311. Civilian objects are to be distinguished from military objectives, as again expressed in the ICRC’s rules of customary IHL:

*Rule 7. The parties to the conflict must at all times distinguish between civilian objects and military objectives. Attacks may only be directed against military objectives. Attacks must not be directed against civilian objects.*<sup>366</sup>

312. Military objects (whether individuals, equipment, locations etc.) may be attacked, as Article 52(2) of Additional Protocol I explains:

*‘Attacks shall be limited strictly to military objectives. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.’<sup>367</sup>*

313. Therefore, a party to an armed conflict is obligated to *‘[d]o everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects and are not subject to special protection but are military objectives.’<sup>368</sup>*

314. In the *Gotovina case* neither the ICTY Trial Chamber nor the Appeals Chamber asserted that the use of artillery fire directed against purported military objectives located in civilian areas is in itself dispositive of illegality.<sup>369</sup>

315. The ICC Statute does not explicitly provide for the war crime of attacks on civilian objects in non-international armed conflict although Article 8(2)(e)(xii) provides for the war crime of destruction of the property of an adversary unless such destruction is ‘imperatively demanded by the necessities of the conflict’.

### Military Necessity

316. The principle of *military necessity* stipulates that the use of force must be used only to *‘compel the complete submission of the enemy’* and for the destruction of property to be lawful, it *‘must be imperatively demanded by the necessities of war.’<sup>370</sup>* Thus, the doctrine of military necessity requires that legitimate targets are *‘limited to those that make an effective contribution to military action and whose destruction or*

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<sup>365</sup> ICC Statute, Article 7(2)(a).

<sup>366</sup> Henckaerts and Doswald-Beck, *Customary International Humanitarian Law*, vol. I, p. 25.

<sup>367</sup> This definition of military objectives is considered to apply in non-international armed conflicts, *ibid.*, pp. 30-31.

<sup>368</sup> Bruce Cronin, ‘Reckless Endangerment Warfare: Civilian casualties and the collateral damage exception in international humanitarian law’, (2013) 50(2) *Journal of Peace Research*, 175, p. 176.

<sup>369</sup> *Prosecutor v. Ante Gotovina and Mladen Markač*, IT-06-90-A, Judgment, Appeals Chamber, 16 November 2012; Judgment, Trial Chamber, 15 April 2011.

<sup>370</sup> Jefferson D. Reynolds, ‘Collateral Damage on the 21<sup>st</sup> Century Battlefield: Enemy exploitation of the Law of Armed Conflict, and the Struggle for a Moral High Ground’, (2005) 56 *Air Force Law Review* 1, p.15.

*neutralization offers a definite military advantage in circumstances ruling at the time.*<sup>371</sup>

317. According to Article 8(2)(e)(xii) of the ICC Statute, the destruction or seizure of the enemy's property may amount to a war crime 'unless such destruction or seizure be imperatively demanded by the necessities of the conflict'.<sup>372</sup>

### The Principle of Proportionality

318. Proportionality's fundamental premise is that the '*means and methods of attacking the enemy are not unlimited.*'<sup>373</sup> The function of the principle of proportionality is to relate means to ends—did the military result justify the means required to accomplish it? The ICTY has confirmed the customary international law status of the principle of proportionality, '*whereby any incidental (and unintentional) damage to civilians must not be out of proportion to the direct military advantage gained by the military attack.*'<sup>374</sup> Oppenheim states that the presence of civilians '*will not render military objectives immune from attack for the mere reason that it is impossible to bombard them without causing injury to the non-combatants. But . . . it is of the essence that a just balance be maintained between the military advantage and the injury to non-combatants.*'<sup>375</sup>
319. According to the ICRC, the essence of the principle of proportionality applicable to both international and non-international armed conflicts is as follows:

*'Launching an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated, is prohibited.'*<sup>376</sup>

320. It is not easy to assess which attacks are disproportionate. To a large degree the answer depends on an interpretation of the circumstances prevailing at the time, the expected military advantage gained by striking a certain military target, and other context-specific considerations.<sup>377</sup> It should also be noted that the principle of *proportionality*

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<sup>371</sup> Cronin, 'Reckless Endangerment Warfare', p. 176. See also Hilaire Maccoubrey, 'The Nature of the Modern Doctrine of Military Necessity', 30 *Military Law and Law of War Review*, 1991, pp. 215-252.

<sup>372</sup> The elements of the crime are as follows: 1. The perpetrator destroyed or seized certain property. 2. Such property was property of an adversary. 3. Such property was protected from that destruction or seizure under the international law of armed conflict. 4. The perpetrator was aware of the factual circumstances that established the status of the property. 5. The destruction or seizure was not required by military necessity. 6. The conduct took place in the context of and was associated with an armed conflict not of an international character. 7. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

<sup>373</sup> Laurie Bland & Amos Guiora, 'Teaching an Old Dog New Tricks: Operationalizing the Law of Armed Conflict in New Warfare', 1 *Harvard National Security Journal*, 45, 2010, p. 56.

<sup>374</sup> *Prosecutor v. Goran Kupreškić et al.*, IT-95-16-T, Judgment, Trial Chamber, 14 January 2000 ('*Kupreškić Trial Judgment*'), para. 524.

<sup>375</sup> Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, vol. II, p. 325.

<sup>376</sup> Henckaerts and Doswald-Beck, *Customary International Humanitarian Law*, vol. I, p. 46 (Rule 14). See also Sandesh Sivakumaran, *The Law of Non-International Armed Conflict*, Oxford University Press, 2012, p. 349.

<sup>377</sup> Ishøy, *Handbook on the Practical Use of International Humanitarian Law*, p. 108.

is often misapplied. The mere quantum of collateral damage and incidental injury is not determinative of whether a military strike is disproportionate.<sup>378</sup> The extent of harm and damage is relevant only as it relates to the military advantage that was reasonably expected at the time the attack was launched. Importantly, the standard is ‘*excessive*’ (a comparative concept), not ‘*extensive*’.<sup>379</sup> Thus damage to civilians or their property can be extensive without being *excessive*. Assuming the military advantage anticipated is itself high, extensive damage may not be *excessive*.

321. Article 8(2)(b)(iv) of the ICC Statute defines a disproportionate attack amounting to a war crime in the context of an international armed conflict as follows:

*‘Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term severe damage to the natural environment which would be **clearly** excessive in relation to the concrete and direct **overall** military advantage anticipated.’*<sup>380</sup>

322. The ICC Elements of Crimes included a footnote that reads as follows:

*‘The expression “concrete and direct overall military advantage” refers to a military advantage that is foreseeable by a commander at the relevant time. Such advantage may or may not be temporally or geographically related to the object of the attack. It reflects the proportionality requirement inherent in determining the legality of any military activity undertaken in the context of an armed conflict.’*<sup>381</sup>

323. Article 8(2)(b)(iv) of the ICC Statute arguably widens the scope of the military advantage that can be considered in the proportionality analysis (through inclusion of the word *overall*) and narrows what level of collateral damage is considered excessive (by specifying that the damage needs to be *clearly* excessive to generate criminal liability).<sup>382</sup> The inclusion of a proportionality requirement to mark off a specific war crime under the ICC Statute is significant because unlike the grave breach formulation found in Protocol I, the criminal offence in the Rome Statute is completed when based on the *intentional* initiation of a disproportionate attack. The highest possible *mens rea* standard implicitly concedes that some foreseeable civilian casualties are lawful.

324. There is no direct equivalent to Article 8(2)(b)(iv) of the ICC Statute applicable in the context of non-international armed conflicts. Additional Protocol II does not specifically refer to disproportionate attacks but launching an attack in the knowledge that it would cause excessive incidental civilian loss, injury or damage is considered to

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<sup>378</sup> Michael Schmitt, ‘Precision attack and international humanitarian law’, 87 *International Review of the Red Cross*, 2005, pp. 445, 457.

<sup>379</sup> *Ibid.*

<sup>380</sup> Emphasis added to note the words added to align the ICC Statute with state practice following the adoption of Additional Protocol I. See also Henckaerts and Doswald-Beck, *Customary International Humanitarian Law*, vol. I, pp. 49-50.

<sup>381</sup> ICC Elements of Crimes, fn. 46.

<sup>382</sup> See further Robert Cryer et al., *An Introduction to International Criminal Law and Procedure*, 2<sup>nd</sup> ed, Cambridge University Press, 2010, p. 300. See also comments of states in Henckaerts and Doswald-Beck, *Customary International Humanitarian Law*, vol. II, p. 327.

constitute a serious violation of IHL potentially amounting to a war crime also in non-international armed conflicts.<sup>383</sup>

### The Application of the Proportionality Principle

325. There are several strands to the practical application of the proportionality principle.<sup>384</sup> First, military commanders must determine the anticipated military advantage, which states have interpreted to mean the advantage anticipated from the attack as a whole and not from isolated aspects of the attack.<sup>385</sup> The assessment of military advantage is a subjective one. The ICRC has observed that the military advantage ‘*can only consist in ground gained and in annihilating or weakening the enemy armed forces.*’<sup>386</sup> Military advantage may legitimately include protecting the security of the commander’s own forces.<sup>387</sup>
326. Second, military commanders must use the information available at the time to judge proportionality. This means evaluating the anticipated civilian losses and not pursuing the attack if those losses are excessive in relation to the military advantage to be gained. International courts and national military tribunals use a ‘*reasonable commander*’ standard based on the circumstances at the time to determine whether a particular military act was proportionate. For example, in the *Galić* case, the accused was charged with illegal deliberate and indiscriminate attacks on civilians. Explaining the ‘*reasonable commander*’ standard, the ICTY Appeals Chamber opined that:
- [in] determining whether an attack was proportionate it is necessary to examine whether a reasonably well-informed person in the circumstances of the actual perpetrator, making reasonable use of the information available to him or her, could have expected excessive civilian casualties to result from the attack.*<sup>388</sup>
327. Third, once a decision has been made to target a necessary military objective that will likely result in the loss of civilian life, every reasonable effort must be made to minimize civilian losses. Thus, commanders must exercise great caution in avoiding civilian losses even when striking necessary military targets.
328. The law does not require perfect accuracy in targeting and recognises the fluidity of the operational environment including the location and movement of both enemy personnel and civilians, the weaponry involved, enemy tactics and conduct. An ‘*effects based analysis*’ after the event, using only the number of casualties and the effects of destruction, must be avoided. With regard to the evaluation of proportionality and

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<sup>383</sup> Henckaerts and Doswald-Beck, *Customary International Humanitarian Law*, vol. I, p. 601 (Rule 156).

<sup>384</sup> See Sivakumaran, *The Law of Non-International Armed Conflict*, pp. 350-351.

<sup>385</sup> Henckaerts and Doswald-Beck, *Customary International Humanitarian Law*, vol. II, pp. 326-331.

<sup>386</sup> ICRC, *Commentary on the Geneva Conventions, Protocol I, Article 57(1)(a)(iii)*, para. 2218.

<sup>387</sup> See for example, Joint Doctrine Publication 3-64, Joint Force Protection, para. 102

<[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/33706/100428JDP364Finalweb.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/33706/100428JDP364Finalweb.pdf)>.

<sup>388</sup> *Prosecutor v. Stanislav Galić*, IT-98-29-T, Judgment, Trial Chamber, 5 December 2003 (‘*Galić* Trial Judgment’), para. 58.

what constitutes acceptable collateral damage in a proposed attack, there could well be a significant difference of view between that of a military commander and that of an NGO or those involved in humanitarian work given that their respective interpretations of the principle of proportionality are taken from different standpoints.

*The Shift in State Practice on Incidental Civilian Harm*

329. The Second World War saw a bombing strategy by all actors—first the Germans, followed by the British and Americans – that for the first time was focused heavily on civilian population centres, and defeating civilian morale.<sup>389</sup> The Germans conducted large-scale bombing raids on London early in the war, and the British and Americans followed suit in Germany. The American’s ended the war in the Pacific with the use of the atomic bombs on Hiroshima and Nagasaki. This action was at the time considered militarily necessary in order to end the war.<sup>390</sup> The law evolved rapidly after the Second World War through the adoption of the Geneva Conventions in 1949, the post-war trials such as the International Military Tribunals at Nuremberg and Tokyo, and the elaboration of the concepts of crimes against humanity and genocide. As the precision of modern weaponry and the ability to target more accurately has increased, so too has the obligation upon commanders to adopt methods and weaponry that better ensure minimum civilian casualties.
330. This Commission finds it relevant to note some key examples reflective of the historical shift in prevailing views on incidental civilian harm.

*War in the Balkans: Operation Allied Force*

331. From March to June 1999, the U.S. and NATO allies engaged in military operations to end Serbian atrocities in Kosovo, and force Slobodan Milosevic to withdraw forces from the area. During this operation, Milosevic’s forces employed a wide variety of concealment warfare tactics to deceive NATO forces, including dispersing troops and equipment throughout and within civilian population centres and hidden in civilian homes, barns, schools, factories, and monasteries. Serbian forces even dispersed

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<sup>389</sup> Jefferson D. Reynolds, ‘Collateral Damage on the 21<sup>st</sup> Century Battlefield: Enemy exploitation of the Law of Armed Conflict, and the Struggle for a Moral High Ground’ 56 *Air Force Law Review* 1, 2005, p. 15.

<sup>390</sup> The Nuremberg Tribunal’s definition of ‘military necessity’ best embodies the view of acceptable collateral damage at the time: ‘Military necessity permits a belligerent, subject to the laws of war, to apply any amount and kind of force to compel the complete submission of the enemy with the least possible expenditure of time, life, and money . . . . It permits the destruction of life of armed enemies and other persons whose destruction is incidentally unavoidable by the armed conflicts of the war; it allows the capturing of armed enemies and others of peculiar danger, but does not permit the killing of innocent inhabitants for purposes of revenge or the satisfaction of a lust to kill. The destruction of property to be lawful must be imperatively demanded by the necessities of war. Destruction as an end in itself is a violation of international law. There must be some reasonable connection between the destruction of property and the overcoming of the enemy forces.’ *US. v. List*, 19 February 1948, in 11 *Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10, 1946-1949*, pp. 1253-54.

among civilian traffic during their movements and used human shields to protect military equipment.<sup>391</sup>

332. These tactics contributed to several incidents of collateral damage resulting in civilian casualties, the most notable of which included: inadvertent attacks on refugees over a twelve-mile stretch of a major road in Kosovo, resulting in seventy-three civilian casualties; ballistic attacks near a small town where 87 civilians were killed; and two incidents involving attacks on civilian buses that each involved heavy civilian casualties.
333. In addition to these incidents there was the attack on the Chinese Embassy in Belgrade on 7 May 1999, which damaged the building and killed 3 civilians and which was explained as having occurred as a mistake due to incorrect intelligence<sup>392</sup>; and an attack on Istok Prison on 21 May 1999, which killed 19 civilians.<sup>393</sup>
334. In many of the instances, NATO responded by admitting responsibility for the attacks, but arguing that the targets were legitimate, and the attacks were either made with no knowledge that civilians were present or that they would equal the numbers that they in fact did.<sup>394</sup> In some cases, NATO representatives alleged that Milosevic's forces used human shields.<sup>395</sup>
335. These incidents of collateral damage, among others, caused allegations to be made against NATO that their forces committed war crimes.<sup>396</sup> However, an investigation conducted by a committee of the International Criminal Tribunal for the Former Yugoslavia (ICTY) concluded that none of the foregoing collateral damage incidents presented sufficient evidence to warrant additional review or prosecution for war crimes.<sup>397</sup> The court found that before each attack, the military and its legal advisors carefully analysed the proposed targets, that the targets were legitimate, and that the number of civilian deaths was in fact proportional to the urgent military objective to overwhelm and defeat Milosevic's forces.

#### U.S. Policy and Practice

336. The United States Department of Defence defines collateral damage as unintentional or incidental injury or damage to persons or objects that would not be lawful military targets in the circumstances ruling at the time. Such damage is not unlawful so long

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<sup>391</sup> Reynolds, 'Collateral Damage on the 21<sup>st</sup> Century Battlefield', pp. 36-40.

<sup>392</sup> Defence Secretary William Cohen said: '*One of our planes attacked the wrong target because the bombing instructions were based on an outdated map.*' *The Guardian*: <<http://www.theguardian.com/world/1999/oct/17/balkans>>.

<sup>393</sup> ICTY, Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, ('ICTY Report'), <<http://www.icty.org/sid/10052>>.

<sup>394</sup> Press Release, 'Once Again NATO Admits Accidental Bombing of Civilians', *Chicago Tribune*, 16 May 1999, <[http://articles.chicagotribune.com/1999-05-16/news/9905160355\\_1\\_korisa-serbian-soldiers-and-police-nato-official](http://articles.chicagotribune.com/1999-05-16/news/9905160355_1_korisa-serbian-soldiers-and-police-nato-official)>.

<sup>395</sup> Ibid.

<sup>396</sup> ICTY Report, para. 2.

<sup>397</sup> Ibid.

as it is not excessive in light of the overall military advantage anticipated from the attack.<sup>398</sup>

337. As a matter of policy, the Department of Defence requires its service components, including the Army, Navy, Air Force, and Marines, to comply with the laws of war during all military operations and armed conflicts.<sup>399</sup> In relevant part, the Department of Defence defines the law of war as, '[t]hat part of international law that regulates the conduct of armed hostilities. It is often called the 'law of armed conflict.' The law of war encompasses all international law for the conduct of hostilities binding on the United States or its individual citizens, including treaties and international agreements to which the United States is a party, and applicable customary international law.'<sup>400</sup>
338. Although the United States is not a party to Additional Protocol I, the American military openly endorses the principle of *distinction*. American armed forces include that endorsement in their training materials, ensuring that every member of the U.S. military is aware that civilians may not be targeted. For example, the U.S. Air Force provides its entire force with a copy of the Airman's Manual, an instructional reference guide.<sup>401</sup> The Airman's Manual codifies the policy of distinction simply, saying 'Do not... Attack noncombatants who include civilians.'<sup>402</sup>
339. Current doctrine from the US Army's accredited Judge Advocate General's (JAGC) Legal Center and School<sup>403</sup> emphasizes the fundamental elements of the laws of war essential to avoiding unlawful civilian casualties, including the following: *military necessity, distinction, proportionality*, and no *unnecessary suffering*. Army lawyers are instructed to address these elements in all circumstances and to follow specific international legal obligations, including treaties and customary international law.<sup>404</sup>
340. The American-led invasion of Iraq resulted in numerous civilian deaths, many of them attributable to the use of ground-launched cluster munitions.<sup>405</sup> While cluster munitions are not unlawful per se at this stage of the development of international law,<sup>406</sup> this highlights the difficulty of facing commanders in the battlefield when countering ruthless and determined opposing forces who are prepared to exploit the presence of civilians in their midst. Problems with training as well as dissemination and clarity of the rules of engagement (ROE) for U.S. ground forces also contributed to civilian casualties.<sup>407</sup>

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<sup>398</sup> Joint Publication (JP) 1-02, U.S. Department of Defence Dictionary of Military and Associated Terms 93, 2001.

<sup>399</sup> U.S. Department of Defence, Directive 2311.01E, *DoD Law of War Program*, Pentagon, Washington, D.C., 9 May 2006, p.2, <<http://www.au.af.mil/au/awc/awcgate/dod/231101p.pdf>>.

<sup>400</sup> Ibid.

<sup>401</sup> U.S. Air Force, *Airman's Manual*, 1 June 2004.

<sup>402</sup> Ibid. p. 14

<sup>403</sup> This institution provides legal training to judge advocates and develops legal doctrine. <[www.jagcnet.army.mil](http://www.jagcnet.army.mil)>.

<sup>404</sup> US Department of the Army Judge Advocate Generals Legal Center and School, *Operational Law Handbook*, International and Operational Law Department, Charlottesville, VA, 2009, pp. 10–13. <[http://www.loc.gov/rr/frd/Military\\_Law/operational-law-handbooks.html](http://www.loc.gov/rr/frd/Military_Law/operational-law-handbooks.html)>.

<sup>405</sup> Sean Kay, *Global Security in the Twenty First Century*, Maryland: Rowman and Littlefield, 2006. The US is alleged to have used 10,782, cluster munitions that would have had approximately 1.8 million sub-munitions.

<sup>406</sup> The Convention on Cluster Munitions of 30 May 2008 has been ratified by 92 states.

<sup>407</sup> Human Rights Watch, *Off Target: The Conduct of the War and Civilian Casualties in Iraq*, 2003, pp. 128-32.

341. In the decades since 9/11, the United States has engaged in a robust campaign of targeted killings of purported enemies in the so-called War on Terror, mostly conducted through unmanned drone strikes. These attacks ostensibly balance the principles of *military necessity*, *discrimination*, and *proportionality*, and in theory are regarded as a surgical means of fighting the war that minimizes collateral damage. In practice, however, drone strikes have faced significant criticism from the international community because of allegations that they account for unjustified and disproportionate civilian casualties.<sup>408</sup>
342. In response to criticism about the legality of drone strikes, the Obama Administration has argued that the U.S. is in an armed conflict with Al Qaeda and the Taliban, and that the U.S. may thus act in self-defence pursuant to the Authorized Use of Military Force issued by Congress on September 18, 2001. Specifically, State Department Legal Advisor Harold Koh argued that, because al-Qaeda has not abandoned its intent to attack the U.S., the U.S., *'has the authority under international law, and the responsibility to its citizens, to use force, including lethal force, to defend itself, including by targeting persons such as high-level al-Qaeda leaders who are planning attacks.'*<sup>409</sup>
343. In 2009 the US State Department issued a 'Report to Congress on Incidents During the Recent Conflict in Sri Lanka' which stated that:

*'The principle of proportionality requires that parties to a conflict refrain from attacks on military objectives that would clearly result in collateral civilian casualties disproportionate to the expected military advantage. Accordingly, some level of collateral damage to civilians – however regrettable – may be incurred lawfully if consistent with proportionality considerations. All parties to a conflict must take all practicable precautions, taking into account both military and humanitarian considerations, in the conduct of military operations to minimise incidental death, injury, and damage to civilians and civilian objects.'*<sup>410</sup>

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<sup>408</sup>'Drone strikes kill, maim and traumatize too many civilians', 2012.

<<http://www.cnn.com/2012/09/25/world/asia/pakistan-us-drone-strikes>>.

<sup>409</sup> Harold Koh, 'The Obama Administration and International Law,' *Annual Meeting of the American Society of International Law*, 25 March 2010, <<http://www.state.gov/s/l/releases/remarks/139119.htm>>.

<sup>410</sup> Report to Congress on Incidents During the Recent Conflict in Sri Lanka, US State Department, 2009.

<<http://www.state.gov/documents/organization/131025.pdf>>.

## **F. The Impact of Hostage taking and Use of Human Shields on Proportionality**

### *The Prohibition on the Taking of Hostages*

344. Both Additional Protocol II and Common Article 3 prohibit the taking of hostages. According to Article 1 of the 1979 International Convention against the Taking of Hostages ('Hostages Convention'), to which Sri Lanka is a party:<sup>411</sup>

*'Any person who seizes or detains and threatens to kill, to injure or to continue to detain another person (hereinafter referred to as the "hostage") in order to compel a third party, namely, a State, an international intergovernmental organization, a natural or juridical person, or a group of persons, to do or abstain from doing any act as an explicit or implicit condition for the release of the hostage commits the offence of taking of hostages ("hostage-taking") within the meaning of this Convention.'*

345. Hostage taking is an enumerated crime in the ICC Statute in respect of both international and non-international armed conflicts (Articles 8(2)(a)(viii) and 8(2)(c)(iii) respectively). The key elements of the crime under Article 8(2)(c)(iii) are as follows:

- '1. The perpetrator seized, detained or otherwise held hostage one or more persons.*
- 2. The perpetrator threatened to kill, injure or continue to detain such person or persons.*
- 3. The perpetrator intended to compel a State, an international organization, a natural or legal person or a group of persons to act or refrain from acting as an explicit or implicit condition for the safety or the release of such person or persons.*
- 4. Such person or persons were either hors de combat, or were civilians, medical personnel or religious personnel taking no active part in the hostilities.'*

346. In the *Blaškić* case, the ICTY Trial Chamber reiterated the importance of the prohibition against the taking of hostages, stating that '*civilian hostages are persons unlawfully deprived of their freedom, often arbitrarily and sometimes under threat of death.*'<sup>412</sup> The SCSL addressed the issue of the taking of UN peacekeepers as hostages in the context of a non-international armed conflict in the case against former members of the Revolutionary United Front ('RUF'). In that case the SCSL Appeals Chamber commented that the customary international law elements of the war crime of hostage taking were by no means clear and made reference to the Hostages Convention from which the ICC elements were derived.<sup>413</sup> Significantly, in clarifying the customary international law elements of the offence, the Appeals Chamber held that the

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<sup>411</sup> International Convention Against the Taking of Hostages, G.A. Res. 146 (XXXIV), U.N. GAOR, 34th Sess., Supp. No. 46, at 245, U.N. Doc. A/34/46, 1979, entered into force 3 June 1983.

<sup>412</sup> *Prosecutor v. Blaškić*, IT-95-14-T, Trial Judgment, 3 March 2000, ('*Blaškić* Trial Judgment'), para. 158. See also para. 187.

<sup>413</sup> *Prosecutor v. Issa Hassan Sesay, Morris Kallon and Augustine Gbao*, SCSL-04-15-A, Appeals Judgment, 26 October 2009, paras 577-8.

communication of the threat to a third party was not required.<sup>414</sup> The SCSL Appeals Chamber also stated that ‘[a]s a matter of law, the requisite intent [to compel] may be present at the moment the individual is first detained or may be formed at some time thereafter while the persons were held’ thus confirming the continuing nature of the offence.<sup>415</sup>

### *The Prohibition on the Use of Human Shields*

347. In simple terms, ‘[h]uman shielding involves the use of persons protected by international humanitarian law, such as prisoners of war or civilians, to deter attacks on combatants and military objectives.’<sup>416</sup> Human shielding may take various forms, including the use of hostages as shields.<sup>417</sup> The clearest prohibition on human shielding appears in Article 51(7) of Additional Protocol I:

*‘The presence or movements of the civilian population or individual civilians shall not be used to render certain points or areas immune from military operations, in particular in attempts to shield military objectives from attacks or to shield, favour or impede military operations. The Parties to the conflict shall not direct the movement of the civilian population or individual civilians in order to attempt to shield military objectives from attacks or to shield military operations.’*

348. This provision covers both the passive use of civilians as shields (taking advantage of their presence and location) and the active use of civilians (moving them to a location they will shield).<sup>418</sup> It is supplemented by Article 58 of Protocol I which requires that state parties ‘endeavour to remove the civilian population, individual civilians and civilian objects under their control from the vicinity of military objectives.’<sup>419</sup> Both these provisions are considered to form part of customary international law applicable to international armed conflict.<sup>420</sup> Rule 97 of the ICRC study on customary international law states the relevant rule without qualification as follows: ‘*The use of human shields is prohibited.*’<sup>421</sup>
349. Article 8(2)(b)(xxii) of the ICC Statute includes the prohibition on human shielding as a war crime in international armed conflicts as follows:

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<sup>414</sup> Ibid, para. 586.

<sup>415</sup> Ibid, para. 597. See also Sivakumaran, *The Law of Non-International Armed Conflict*, p. 269: ‘Thus, an initially lawful detention could later turn into an unlawful taking of hostages if, at one moment in time, there is seizure, detention, or holding of an individual; a threat to kill or to continue to detain; both with the intention of compelling a third party to act in a particular manner.’

<sup>416</sup> Michael N. Schmitt, ‘Human Shields in International Humanitarian Law’, 47 *Columbia Journal of Transnational Law*, 2009, pp. 292-293.

<sup>417</sup> Sivakumaran, *The Law of Non-International Armed Conflict*, p. 421, who cites as an example ‘preventing persons from leaving the area of fighting and using them as a buffer, as was done by the LTTE in 2009 during the final stages of the armed conflict in Sri Lanka.’

<sup>418</sup> Schmitt, ‘Human Shields in International Humanitarian Law’, p. 302.

<sup>419</sup> ICRC, Article 58 of Protocol I.

<sup>420</sup> Henckaerts and Doswald-Beck, *Customary International Humanitarian Law*, vol. I, p. 337 (Rule 97), p. 71 (Rule 23) and p. 74 (Rule 24); *Kupreškić Trial Judgment*, para. 524.

<sup>421</sup> Henckaerts and Doswald-Beck, *Customary International Humanitarian Law*, vol. I, p. 337.

*‘Utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations.’*

350. The ICC’s Elements of Crimes in respect of Article 8(2)(b)(xxii) provide:

1. *The perpetrator moved or otherwise took advantage of the location of one or more civilians or other persons protected under the international law of armed conflict.*
2. *The perpetrator intended to shield a military objective from attack or shield, favour or impede military operations.*
3. *The conduct took place in the context of and was associated with an international armed conflict.*
4. *The perpetrator was aware of factual circumstances that established the existence of an armed conflict.*

351. The crucial element of the war crime is therefore the specific intent to shield a military objective from attack. The ICRC Commentary to its customary Rule 97 notes that *‘[m]ost examples given in military manuals, or which have been the object of condemnations, have been cases where persons were actually taken to military objectives in order to shield those objectives from attacks.’*<sup>422</sup> However, the wording of both Article 51(7) and the ICC Statute and Elements of Crimes make it clear that both *‘taking advantage of voluntary movements of persons, as well as the forcing of persons into particular locations’* are prohibited.<sup>423</sup> While the ICRC concludes *‘that the use of human shields requires an intentional colocation of military objectives and civilians or persons hors de combat with the specific intent of trying to prevent the targeting of those military objectives’*<sup>424</sup> this does not mean that the intent can only be proved if the human shields are themselves moved. The intentional colocation or intermingling of military objects and civilians being used as shields may be sufficient to meet the elements of the crime. It should moreover be noted that the IHL prohibition under customary international law may be broader than the war crime in international armed conflicts defined under the ICC Statute.

352. In the context of non-international armed conflicts there is no specific prohibition of human shielding in any of the relevant treaties. Nonetheless, according to the ICRC’s study of customary IHL, the rule that *‘the use of human shields is prohibited’* is applicable in international and non-international armed conflicts alike.<sup>425</sup> Furthermore, the San Remo Manual on the Law of Non-International Armed Conflict includes the prohibition on the use of civilians as shields.<sup>426</sup> The ICRC notes that the use of human

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<sup>422</sup> Henckaerts and Doswald-Beck, *Customary International Humanitarian Law*, vol. I, p. 339.

<sup>423</sup> See also Sivakumaran, *The Law of Non-International Armed Conflict*, p. 421. According to this author, in order to reflect more accurately the various ways in which civilians are in practice used as human shields, *‘the open language of the Customary International Humanitarian Law study rule is to be preferred over the description in the commentary as better reflecting the customary proscription.’*

<sup>424</sup> Henckaerts and Doswald-Beck, *Customary International Humanitarian Law*, vol. I, p. 340.

<sup>425</sup> Henckaerts and Doswald-Beck, *Customary International Humanitarian Law*, vol. I, p. 337 (Rule 97).

<sup>426</sup> Michael M. Schmitt, Charles H. B. Garraway and Yoram Dinstein, *The Manual on the Law of Non-International Armed Conflict with Commentary*, International Institute of Humanitarian Law, 2006, para. 2.3.8: *‘The use of civilians (as well as captured enemy personnel) to shield a military objective or operation is forbidden. It is also forbidden to use them to obstruct an adversary’s operations.’*

<sup>427</sup> <http://www.iihl.org/iihl/Documents/The%20Manual%20on%20the%20Law%20of%20NIAC.pdf>. The commentary states: *‘Should civilians voluntarily elect to shield a military objective or obstruct military*

shields in non-international armed conflicts is prohibited in national military manuals and criminalised in the domestic legislation of several states.<sup>427</sup> For example, the British *Manual of the Law of Armed Conflict*, extends the norm in Article 51(7) of Additional Protocol I into non-international armed conflict.<sup>428</sup> An ICTY Trial Chamber in *Kupreškić* suggested in the context of the principle embodied in Article 58 of Protocol I, the ‘customary nature of the duty of each party to the conflict, to the extent feasible, to remove civilian persons and objects under its control from the vicinity of military objectives in both international and non-international armed conflicts.’<sup>429</sup>

353. Article 13(1) of Additional Protocol II on the protection of civilians from the dangers of military operations may be taken to cover the use of civilians as shields.<sup>430</sup> In addition, it has been suggested that ‘those seized and forced to act as shields qualify as hostages’ under Common Article 3(1)(b).<sup>431</sup> Common Article 3 and Additional Protocol II, as reflected in customary international law, therefore provide a framework for the prosecution of the use of human shields as a war crime in non-international armed conflict. In the practice of international criminal tribunals, human shielding has been charged as ‘inhuman treatment’ constituting a grave breach of the Geneva Conventions and ‘cruel treatment’ recognised under Common Article 3(1)(a).<sup>432</sup> The same facts alternatively constituted hostage-taking.<sup>433</sup> Tihomir Blaškić was thus convicted of ‘inhuman or cruel treatment of civilians and, in particular, their being taken hostage and used as human shields’.<sup>434</sup> Similarly in *Kordić*, evidence of use as hostages and as human shields was taken together, resulting in a conviction for inhuman treatment as a grave breach.<sup>435</sup> In *Aleksovski*, the use of detainees as human shields was characterised as an ‘outrage upon personal dignity’, a war crime under Common Article 3(1)(c).<sup>436</sup> It is also worth noting that the initial indictment against Karadžić and Mladić included charges of inhuman treatment and cruel treatment under the heading hostages/human shields in respect of the holding of UN peacekeepers against their will at potential NATO targets in order to render these locations immune

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operations, they would in almost all circumstances be taking an active (direct) part in hostilities, and, for the purposes of this Manual, could be treated as fighters.’

<sup>427</sup> Henckaerts and Doswald-Beck, *Customary International Humanitarian Law*, vol. I, p. 338.

<sup>428</sup> UK Ministry of Defence, *The Manual on the Law of Armed Conflict*, Oxford University Press, 2005, 5. 22: ‘The presence or movements of the civilian population or individual civilians shall not be used to render certain points or areas immune from military operations, in particular in attempts to shield military objectives from attacks or to shield, favour or impede military operations. The Parties to the conflict shall not direct the movement of the civilian population or individual civilians in order to attempt to shield military objectives from attacks or to shield military operations.’ 5. 22. 1: ‘Any violation by the enemy of this rule would not relieve an attacker of his responsibility to take precautions to protect the civilians affected, but the enemy’s unlawful activity may be taken into account in considering whether the incidental loss or damage was proportionate to the military advantage expected.’ These paragraphs to be read in conjunction with 15.24.1: ‘Nothing is laid down in customary law or in the treaties dealing with internal armed conflicts about precautions in defence. This is a matter of common humanity. The use of human shields is prohibited.’

<sup>429</sup> Henckaerts and Doswald-Beck, *Customary International Humanitarian Law*, vol. I, p. 75, referring to *Kupreškić* Trial Judgment, paras 524-525.

<sup>430</sup> Schmitt, ‘Human Shields in International Humanitarian Law’, p. 306.

<sup>431</sup> *Ibid.* See also Henckaerts and Doswald-Beck, *Customary International Humanitarian Law*, vol. I, p. 338, ‘It is significant [...] that the use of human shields has often been equated with the taking of hostages’.

<sup>432</sup> *Blaškić* Trial Judgment, paras 709-710.

<sup>433</sup> *Ibid.*, para. 750.

<sup>434</sup> *Ibid.*, p. 267.

<sup>435</sup> *Prosecutor v. Dario Kordić and Mario Čerkez*, IT-95-14/2-T, Trial Judgment, 26 February 2001, p. 353.

<sup>436</sup> *Prosecutor v. Zlatko Aleksovski*, IT-95-14/1-T, Trial Judgment, 25 June 1999, para. 229.

from NATO airstrikes.<sup>437</sup> In the Third Amended Indictment, Karadžić is charged with ‘taking of hostages’ as recognised by Common Article 3(1)(b) by being part of a joint criminal enterprise to take hostages in order to compel NATO to abstain from conducting airstrikes against Bosnian Serb military targets.<sup>438</sup>

‘Direct’ involvement of civilians in hostilities

354. The ICRC commentary to Article 51(3) of Additional Protocol I defines the circumstances in which civilians will lose their protection in the context of international armed conflicts if ‘they take a direct part in hostilities’:

*‘The immunity afforded individual civilians is subject to an overriding condition, namely, on their abstaining from all hostile acts. Hostile acts should be understood to be acts which by their nature and purpose are intended to cause actual harm to the personnel and equipment of the armed forces...’*

*It seems that the word “hostilities” covers not only the time that the civilian actually makes use of a weapon, but also, for example, the time that he is carrying it, as well as situations in which he undertakes hostile acts without using a weapon ...*

*Thus “direct” participation means acts of war which by their nature or purpose are likely to cause actual harm to the personnel and equipment of the enemy armed forces.’<sup>439</sup>*

355. This definition makes clear that it is not necessary for civilians to be carrying arms to lose their civilian status – the test is whether they are engaged in acts that are hostile to the adversary. The protection of military positions by civilians to seek to prevent the destruction of these objectives by the enemy or to serve as a ‘buffer’ would come within the definition of performing hostile acts.

356. The ICRC commentary to Article 13(3) of Additional Protocol II which states in relation to non-international armed conflicts that civilians will lose their protected status ‘for such time as they take a direct part in hostilities’, adopts a similar test:

*‘The term “direct part in hostilities” ... implies that there is a sufficient causal relationship between the act of participation and its immediate consequences.’*

*Hostilities have been defined as “acts of war that by their nature or purpose struck at the personnel and matériel of enemy armed forces”. However, several delegations considered that the term “hostilities” also covers preparations for combat and returning from combat.’<sup>440</sup>*

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<sup>437</sup> Radovan Karadžić and Ratko Mladić, IT-95-14/1-T, First Initial Indictment, 24 July 1995, paras 46-48.

<sup>438</sup> Radovan Karadžić, IT-95-5/18-PT, Third Amended Indictment, 27 February 2009, paras 25 and 84.

<sup>439</sup> ICRC Commentary to Additional Protocol I, paras 1942-1944.

<sup>440</sup> ICRC Commentary to Additional Protocol II, paras 4787-4788.

357. It is widely recognised that more *indirect* forms of participation in hostilities will also result in civilians losing their protections, and that commanders need to make an honest assessment on a case-by-case basis in the circumstances of the military operations about whether such persons can be attacked as legitimate military targets.

- It is ‘*generally and increasingly considered that there are many activities which involve a more indirect role for civilians ... yet which are also considered as direct participation in hostilities.*’<sup>441</sup>

- ‘*Civilians do not have to be located in the zone of hostilities or bear arms themselves in order to be considered as direct participants in hostilities and as subject to attack themselves.*’<sup>442</sup>

- The US Navy manual provides that:

*‘Civilians who take a direct part in hostilities by taking up arms or otherwise trying to kill, injure, or capture enemy personnel or destroy enemy property lose their immunity and may be attacked. Direct participation may also include civilians serving as guards, intelligence agents, or lookouts on behalf of military forces. Direct participation in hostilities must be judged on a case-by-case basis. Combatants in the field must make an honest determination as to whether a particular civilian is or is not subject to deliberate attack based on the person’s behavior, location and attire, and other information available at the time.’*<sup>443</sup>

- ‘*A person who delivers ammunition within combat zones is generally considered to be directly participating in hostilities. Yet, in this case, these persons are not themselves directly participating in an actual attack, but engaging in an activity which makes possible the direct participation in an attack by another person. Still, they are considered by most authorities to be legitimate military targets for the duration of their participation.*’<sup>444</sup>

- A ‘criticality’ test may also be applied in which civilians will lose their protected status if ‘*performing an indispensable function in making possible the application of force against the enemy ... In other words, the appropriate test is whether that individual is an integral facet of the uninterrupted process of defeating the enemy.*’<sup>445</sup>

358. Accordingly, while the supplying of foodstuffs to combatants and the delivery of humanitarian relief do not constitute participation in hostilities, the supply and

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<sup>441</sup> Avril MacDonald, *The Challenges to International Humanitarian Law and the Principles of Distinction and Protection from the Increased Participation of Civilians in Hostilities*, Asser Institute, April 2004, p. 17.

<sup>442</sup> Ibid, p. 18.

<sup>443</sup> US Navy/Marine Corps/Coast Guard, *The Commander’s Handbook on the Law of Naval Operations*, NWP 1-14M, MCWP P5800.7, 1995, para. 11.3.  
<[http://www.ficnl.org/uploads/media/US\\_Navy\\_Commander\\_s\\_Handbook\\_1995.pdf](http://www.ficnl.org/uploads/media/US_Navy_Commander_s_Handbook_1995.pdf)>.

<sup>444</sup> MacDonald, *The Challenges to International Humanitarian Law*, p. 18, referencing A.P.V. Roger, *Law on the Battlefield*, Manchester University Press, 1996, p. 8.

<sup>445</sup> Michael Schmitt, *Direct Participation in Hostilities and 21<sup>st</sup> Century Armed Conflict*, Festschrift for Dieter Fleck, 2004, pp. 501, 525.

transport of weapons and ammunition to combatants may amount to direct involvement in hostilities.<sup>446</sup>

359. It makes no difference whether the civilians concerned achieve the intended result of their hostile actions. In other words, they may still be attacked even if the hostile acts they perform do not in fact harm the enemy. Otherwise, ‘*it leaves too much to chance*’.<sup>447</sup> Furthermore, a commander is not required to consider the motivations of civilians apparently engaging in hostilities but rather to assess their actions on a case-by-case basis and to assess all the available information at the time before taking action.
360. It must be highlighted that where civilians in their work and actions put their own lives in danger ‘*they cannot claim the protection against attack*’.<sup>448</sup> As a leading publicist in IHL, Prof. Kalshoven, has stated: ‘*civilians cannot enjoy protection from attack when they enter military objectives or accompanying military units. This protection is diminished even when civilians merely live near or pass by a military objective, by dint of the very tangible danger of a legitimate collateral damage in case of attack.*’<sup>449</sup>

#### *Involuntary and Voluntary Human Shields*

361. The ICTY case law establishes that there is often a close connection between the taking of hostages and their use as human shields. A hostage is by definition detained under threat while human shields may be either voluntary or involuntary.
362. Involuntary human shields retain their civilian status and protections under IHL at all times. When Saddam Hussein abducted foreign nationals and placed them in the vicinity of military objectives during the First Gulf War in August 1990, the fact that he termed them ‘special guests’ in no way changed the illegality of his actions, which the UN Security Council unanimously condemned.<sup>450</sup>
363. In a situation where civilians are involuntarily used as shields, Article 51(8) of Additional Protocol I states that the violation of the prohibition against shielding ‘*shall not release the Parties to the conflict from their legal obligations with respect to the civilian population and civilians, including the obligation to take the preliminary measures provided for in Article 57.*’ The ICRC’s commentary on Article 51(8) does not forbid attacks on military objectives in the event that they are shielded by civilians but explains that it is compulsory to apply the provisions relating to the protection of civilians before proceeding with such an attack.<sup>451</sup> If involuntary human shields are treated as ordinary civilians in terms of the proportionality calculation, the party using

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<sup>446</sup> See e.g. *Prosecutor v. Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu*, SCSL-04-16-T, Judgment, Trial Chamber, 20 June 2007, para. 1266 where the SCSL Trial Chamber noted in relation to the use of child soldiers: ‘*the use of children to participate actively in hostilities is not limited to participation in combat. An armed force requires logistical support to maintain its operations. Any labour or support that gives effect to, or helps maintain, operations in a conflict constitutes active participation.*’

<sup>447</sup> MacDonald, *The Challenges to International Humanitarian Law*, p. 20.

<sup>448</sup> Ibid, p. 22, referencing Frits Kalshoven and Liesbeth Zegveld, *Constraints on the Waging of War*, ICRC, March 2001, p. 129.

<sup>449</sup> Kalshoven and Zegveld, *Constraints on the Waging of War*, ibid.

<sup>450</sup> See UN Security Council Resolution 664, U.N. Doc. S/RES/664, 18 August 1990.

<sup>451</sup> ICRC Commentary to Article 51(8) of Protocol I.

those shields will benefit from a violation of the prohibition on their use. There are consequently differing views on whether their presence should be given less weight in assessing proportionality.<sup>452</sup>

364. This Commission takes the view that in contrast to involuntary human shields, voluntary human shields may be regarded as persons taking a direct part in hostilities.<sup>453</sup> Voluntary human shields, even though they may not wear uniforms, carry guns openly, or follow a chain of command, have chosen directly to participate in the war effort and in certain cases, can be targeted. As Michael Schmitt has cautioned, ‘unless voluntary shields are characterized as direct participants excluded from the proportionality equation, a sufficient number of them can absolutely immunize a target from attack.’<sup>454</sup> If this were to be the result, it would allow those who engage in asymmetrical warfare of this nature to benefit from their violation of the law. Thus, voluntary human shields are not to be ‘*taken into account when assessing collateral damage*.’<sup>455</sup>

### Human Shields and Proportionality

365. The use of human shields is prohibited and criminalized precisely because it directly exposes civilians to harm and constitutes an abuse of the legal protections afforded to civilians under IHL. The practice also unfairly shifts to the opposing party in a conflict the burden of responsibility for the harmful consequences to civilians used as shields. It has been noted that the principal objective of a party employing shields is often ‘to weaken support for the enemy’s war effort on the part of the international community, other States (including coalition partners), non-governmental organizations, and individuals, while enhancing its own domestic and international backing.’<sup>456</sup> In the view of the Commission, it is appropriate to interpret IHL in such a way as to deter warring parties from using human shields. This means on the one hand strengthening the enforcement of the prohibition, encouraging compliance with the principle of distinction in terms of a belligerent’s own conduct in distinguishing combatants from civilians as opposed to merely in its targeting operations, and interpreting the elements of the crime in a manner that accords with the circumstances of modern conflicts. On the other hand, it means a considered recalibration of the proportionality test so as to

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<sup>452</sup> See Sivakumaran, *The Law of Non-International Armed Conflict*, p. 422.

<sup>453</sup> See e.g. Schmitt, ‘Human Shields in International Humanitarian Law’, pp. 327-329, who describes three approaches to the question whether voluntary human shields are direct participants in hostilities: (1) voluntary shielding fails to meet the requisite qualitative threshold for direct participation and volunteers remain subject to the protections afforded to civilians; (2) voluntary shields contribute to military action in a direct causal way and it would contort the architecture of IHL to describe them as anything but direct participants; (3) as a variation of the second approach, civilians who participate directly in hostilities become unlawful combatants.

<sup>454</sup> Schmitt, ‘Human Shields in International Humanitarian Law’, p. 319. See also Sivakumaran, *The Law of Non-International Armed Conflict*, pp. 422-423.

<sup>455</sup> Joint Targeting, Joint Publication 3-60, 31 January 2013, Appendix A, 4(a)(1), p. A2.

<[http://justsecurity.org/wp-content/uploads/2015/06/Joint\\_Chiefs-Joint\\_Targeting\\_20130131.pdf](http://justsecurity.org/wp-content/uploads/2015/06/Joint_Chiefs-Joint_Targeting_20130131.pdf)>.

<sup>456</sup> Schmitt, ‘Human Shields in International Humanitarian Law’, p. 298. See also A. P. V. Rogers, ‘Zero Casualty Warfare’, *International Review of the Red Cross*, no. 837, 2000.

<<https://www.icrc.org/eng/resources/documents/misc/57jqcu.htm>>, noting the ‘CNN factor’ in the context of reduced tolerance for civilian casualties.

take due account of involuntary human shields and discount voluntary human shields who are directly participating in hostilities.

366. The problem of the use of human shields presents military decision-makers with one of the most potent challenges to the implementation of IHL in modern conflicts. On the one hand, civilians remain entitled to absolute protection from the effects of hostilities *‘unless and for such time as they take a direct part in hostilities.’*<sup>457</sup> This includes the right to be absolutely free of deliberate targeting efforts by both military adversaries at all times and under all circumstances. On the other hand, when one side violates its obligations to *‘avoid locating military objectives within or near densely populated areas’* and fails to *‘take the other necessary precautions to protect the civilian population, individual civilians and civilian objects under their control against the dangers resulting from military operations’* its opponent is faced with what can be termed an impermissible *‘forced choice’*. Either the commander in the field cedes an unlawfully obtained military advantage to the enemy, and suffers casualties with no possible recourse, or undertakes careful strikes in response, directed against military objectives.
367. The Commission has noted the contentions of some scholars that *‘this adjustment is necessary precisely to achieve greater protection for civilians’*.<sup>458</sup> The ICRC has stated that *‘if one of the Parties to the conflict is unmistakably continuing to use this unlawful method for endeavouring to shield military objectives from attack, the delicate balance established in the Conventions and the Protocols between military necessity and humanitarian needs would be in great danger of being jeopardized and consequently so would the protection of the units concerned.’*<sup>459</sup>
368. The killing of involuntary human shields cannot be treated merely as acceptable collateral damage in all circumstances. The US Joint Targeting Manual adopts this approach by recognising that while an enemy cannot lawfully use civilians as human shields in an attempt to protect, conceal, or render military objects immune from military operations or force them to leave their homes or shelters to disrupt the movement of an adversary, the proportionality principle remains fully applicable in its conventional application (i.e., permitting attacks unless the collateral damage is clearly excessive in relation to the concrete and direct overall military advantage anticipated).<sup>460</sup> It may appear that in cases of involuntary human shields, the principle of distinction is primarily implicated because the attacker must endeavour by all feasible means to direct attacks at military objectives while employing all feasible measure to minimize or to eliminate civilian deaths. Hence, the attacking commander must take steps to avoid harming involuntary human shields, perhaps by changing the choice of weaponry or the time of attack, or by vigorous advance warning.<sup>461</sup>

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<sup>457</sup> Protocol I, Article 51(3).

<sup>458</sup> See e.g. Amnon Rubinstein and Yaniv Roznai, ‘Human Shields in Modern Armed Conflicts: The Need for a Proportionate Proportionality’, 22 *Stanford Law & Policy Review*, 2011, pp. 120-124; W. H. Parks, ‘Air War and the Law of War’, 32 *Air Force Law Review*, 1990, p. 162.

<sup>459</sup> ICRC Commentary to Additional Protocol I, para. 540.

<sup>460</sup> Joint Targeting, Joint Publication 3-60, 31 January 2013, Appendix A, 4(a)(1), p. A2.

<sup>460</sup> <[http://justsecurity.org/wp-content/uploads/2015/06/Joint\\_Chiefs-Joint\\_Targeting\\_20130131.pdf](http://justsecurity.org/wp-content/uploads/2015/06/Joint_Chiefs-Joint_Targeting_20130131.pdf)>.

<sup>461</sup> Additional Protocol I, Art. 57(2)(c).

369. It is inevitable that civilian casualties will be higher in circumstances in which the enemy has acted unlawfully and placed civilians in harm's way and the principle of proportionality has to accommodate this reality. The Commission finds that this position has been widely endorsed:

- The UK's Manual of the Law of Armed Conflict provides that *'if the defenders put civilians or civilian objects at risk by placing military objectives in their midst or by placing civilians in or near military objectives, this is a factor to be taken into account in favour of the attackers in considering the legality of attacks on those objectives'*, and that *'The enemy's unlawful activity may be taken into account in considering whether the incidental loss or damage was proportionate to the military advantage expected.'*<sup>462</sup>
- The ICRC's Model Manual on the Law of Armed Conflict for Armed Forces states that the attacking commander is *'entitled to take the defending commander's actions into account when considering the rule of proportionality.'*<sup>463</sup>
- Human Rights Watch has stated in relation to human shields used in the conflict in Iraq that *'a military objective protected by human shields remains open to attack, subject to the attacking party's obligations under IHL to weigh the potential harm to civilians against the direct and concrete military advantage of any given attack, and to refrain from attack if civilian harm would appear excessive.'*<sup>464</sup>
- Similarly, a policy paper from the US Joint Chiefs of Staff states that: *'Joint force targeting during such situations is driven by the principle of proportionality, so that otherwise lawful targets involuntarily shielded with protected civilians may be attacked, and the protected civilians may be considered as collateral damage, provided that the collateral damage is not excessive compared to the concrete and direct military advantage anticipated by the attack.'*<sup>465</sup>
- In addition, scholars, experts and publicists in IHL have stressed that *'the proportionality assessment [...] cannot be detached from the shielding party's actions and ought to take into account the incentive to illegally use civilians as human shields.'*<sup>466</sup> It has been explained that *'the measure of proportionality must be adjusted'* particularly *'when the use of involuntary or unknowing human shields is part of a widespread or systematic policy.'*<sup>467</sup> The principle of *proportionality* must be applied but *'the appraisal whether civilian casualties are excessive in relation to the military advantage anticipated must*

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<sup>462</sup> U.K. Ministry of Defence, *The Manual of the Law of Armed Conflict*, 2004, paras. 2.7.2 and 5.22.1.

<sup>463</sup> ICRC, *Fight it Right: Model Manual on the Law of Armed Conflict for Armed Forces*, 1999.

<sup>464</sup> 'International Humanitarian Law Issues in a Potential War in Iraq', Human Rights Watch, 20 February 2003 <<http://www.hrw.org/sites/default/files/reports/Iraq%20IHL%20formatted.pdf>>.

<sup>465</sup> Joint Targeting, Joint Publication 3-60, 31 January 2013, Appendix A, 4(a)(1), p. A2.

<sup>466</sup> Rubinstein and Roznai, 'Human Shields in Modern Armed Conflicts', p. 121.

<sup>467</sup> Ibid.

*make allowances for the fact that – if an attempt is made to shield military objective with civilians – civilian casualties will be higher than usual.*<sup>468</sup>

- A leading expert and publicist, Major-General A.P.V. Rogers, similarly states that a court approaching the issue should take into account the use of human shields and give the necessary weight to this consideration so as to redress the balance between the rights and duties of the opposing parties ‘*which otherwise would be tilted in favour of the unscrupulous.*’<sup>469</sup>

370. The basic rule is thus that it is not unlawful under IHL to target military objectives (including soldiers, military equipment, locations, etc.) when they are guarded or surrounded by involuntary civilian human shields or hostages. This rule is contingent on adherence to the laws applicable to military attacks - including respect for the principles of proportionality - but by taking into account that the ‘proportionality’ equation must be considered in light of the unlawful use by the opposition of civilians and by adjusting the proportionality ratio accordingly.

### **G. The Law as to the Status of Hospitals**

371. Hospitals enjoy a special protected status under IHL. The following rules identified by the ICRC in its study on customary international law applicable to both international and non-international armed conflict are relevant:

*‘Rule 28. Medical units exclusively assigned to medical purposes must be respected and protected in all circumstances. They lose their protection if they are being used, outside their humanitarian function, to commit acts harmful to the enemy.’*<sup>470</sup>

*‘Rule 35. Directing an attack against a zone established to shelter the wounded, the sick and civilians from the effects of hostilities is prohibited.’*<sup>471</sup>

372. Common Article 3 implicitly embodies the ICRC’s Rule 28 and Additional Protocol II explicitly provides that medical units must be respected and protected at all times, and must not be the object of attack.<sup>472</sup> All medical personnel who are engaged exclusively in the search for in the process of the collection, treatment transport of the wounded and sick; in disease prevention, or in administration of medical units fall under the aforementioned protected category.<sup>473</sup> It is also unlawful to use a hospital in direct

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<sup>468</sup> Yoram Dinstein, *The Conduct of Hostilities Under the Law of International Armed Conflict*, 2004, p. 131. See also A.P.V. Rogers, *Law on the Battlefield*, 2nd ed, 2004, p. 129.

<sup>469</sup> Rogers, *Law on the Battlefield*, *ibid.*

<sup>470</sup> Henckaerts and Doswald-Beck, *Customary International Humanitarian Law*, vol. I, p. 91.

<sup>471</sup> *Ibid.*, p. 119.

<sup>472</sup> *Ibid.*

<sup>473</sup> First Geneva Convention, Article 24.

support of a military campaign, for instance to covertly use one part of the hospital as an ammunition dump.<sup>474</sup>

373. An attack against medical facilities will be lawful only if two conditions are present: (1) the medical unit is used to commit harmful acts; and (2) these harmful acts are not related to the humanitarian function. Additional Protocol I, however, provides a non-exhaustive list of acts that are not to be considered harmful to the enemy:

*'i. Personnel of the unit are equipped with light individual weapons for their own defence or for that of the wounded and sick in their charge;  
ii. The unit is guarded by a picket or by sentries or by an escort;  
iii. Small arms and ammunition taken from the wounded and sick, and not yet handed to the proper service, are found in the units;  
iv. Members of the armed forces or other combatants are in the unit for medical reasons.'*<sup>475</sup>

374. Article 8(2)(e) of the ICC Statute provides for the following war crimes in non-international armed conflict:

*'(ii) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law';*

*'(iv) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives'.*

375. The ICTY case of Galić illustrates the high evidential bar to establish the war crime of indiscriminate shelling of hospitals which requires an assessment of the:

*'distance between the victim and the most probable source of fire; distance between the location where the victim was hit and the confrontation line; combat activity going on at the time and the location of the incident, as well as relevant nearby presence of military activities or facilities; appearance of the victim as to age, gender, clothing; the activity the victim could appear to be engaged in; visibility of the victim due to weather, unobstructed line of sight or daylight.'*<sup>476</sup>

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<sup>474</sup> See, e.g., Michael Boothby, *The Law of Targeting*, 2013, p. 233, explaining that IHL requires protection or precautions that exceed those ordinarily afforded to civilians and civilian objects for the specific class of civilian objects comprised of hospitals and civilian medical units.

<sup>475</sup> First Geneva Convention, Article 22.

<sup>476</sup> *Galić* Trial Judgment, para. 188.

## **H. The Law as to the Status of Journalists**

376. IHL aims to protect journalists as civilians in conflict. Article 79(1) of Additional Protocol I provides that: *‘Journalists engaged in dangerous professional missions in areas of armed conflict shall be considered as civilians within the meaning of Article 50, paragraph 1.’*
377. These protections are re-enforced by the Charter for the Safety of Journalists Working in War Zones or Dangerous Areas, but subject to journalists not compromising their status or being regarded as taking a part in the hostilities:

*‘Principle 8 Legal protection*

*Journalists on dangerous assignments are considered civilians under Article 79 of Additional Protocol I of the Geneva Conventions, provided they do not do anything or behave in any way that might compromise this status, such as directly helping a war, bearing arms or spying. Any deliberate attack on a journalist that causes death or serious physical injury is a major breach of this Protocol and deemed a war crime.’<sup>477</sup>*

378. The ICRC study on customary international law states the rule applicable in both international and non-international armed conflict:

*‘Rule 34. Civilian journalists engaged in professional missions in areas of armed conflict must be respected and protected as long as they are not taking a direct part in hostilities.’<sup>478</sup>*

## **I. The Law Relating to the Denial of Humanitarian Assistance**

379. Article 54 of Additional Protocol I prohibits attacks against ‘objects indispensable to the survival of the civilian population’ such as food supplies, and provides that ‘starvation of civilians as a method of combat is prohibited.’ Article 14 of Additional Protocol II provides: *‘Starvation of civilians as a method of combat is prohibited. It is therefore prohibited to attack, destroy, remove or render useless, for that purpose, objects indispensable to the survival of the civilian population, such as foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works.’* According to the ICRC, the prohibition on the ‘use of starvation of the civilian population as a method of warfare’ applies as a matter of customary international law in both international and non-international armed conflict.<sup>479</sup>
380. However, these prohibitions are subject to considerations of military necessity. Article 54(3) of Additional Protocol I provides that these objects can be targeted if ‘used by an adverse Party: (a) as sustenance solely for the members of its armed forces; or (b)

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<sup>477</sup> ‘Charter for the Safety of Journalists Working in War Zones or Dangerous Areas’, *Reporters without Borders* (March 2002) < [http://www.rsf.org/IMG/pdf/charter\\_en.pdf](http://www.rsf.org/IMG/pdf/charter_en.pdf)>.

<sup>478</sup> Henckaerts and Doswald-Beck, *Customary International Humanitarian Law*, vol. I, p. 115.

<sup>479</sup> Henckaerts and Doswald-Beck, *Customary International Humanitarian Law*, vol. I, p. 186 (Rule 53).

*if not as sustenance, then in direct support of military action, provided, however, that in no event shall actions against these objects be taken which may be expected to leave the civilian population with such inadequate food or water as to cause its starvation or force its movement.'*

381. These provisions give expression to the principle of military necessity that requires a balance to be struck between protecting civilians and the necessities of military operations.<sup>480</sup> This principle underlines that '*military forces in planning military actions are permitted to take into account the practical requirements of a military situation at any given moment and the imperatives of winning.*'<sup>481</sup>
382. The parties to conflicts as a general rule must endeavour to allow the passage of humanitarian aid to civilian populations, as provided for in Article 17<sup>482</sup> and Article 23<sup>483</sup> of Geneva Convention IV; and in Article 70<sup>484</sup> of Additional Protocol I and Article 18(2)<sup>485</sup> of Additional Protocol II.<sup>486</sup>
383. The provision of aid is however conditioned on certain clear exceptions based on military necessity and other considerations. In particular, Article 23 of Geneva

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<sup>480</sup> See Heike Spieker, 'The Right to Give and Receive Humanitarian Assistance', in H.-J. Heintze and A. Zwitter (eds.), *International Law and Humanitarian Assistance*, Springer-Verlag Berlin Heidelberg, 2011, p. 9.

<sup>481</sup> See Françoise Hampson, 'Military Necessity' <<http://www.crimesofwar.org/a-z-guide/military-necessity/>>.

<sup>482</sup> Fourth Geneva Convention, Article 17 provides: '*The Parties to the conflict shall endeavour to conclude local agreements for the removal from besieged or encircled areas, of wounded, sick, infirm, and aged persons, children and maternity cases, and for the passage of ministers of all religions, medical personnel and medical equipment on their way to such areas.*'

<sup>483</sup> The first paragraph of this article provides that: '*Each High Contracting Party shall allow the free passage of all consignments of medical and hospital stores and objects necessary for religious worship intended only for civilians of another High Contracting Party, even if the latter is its adversary. It shall likewise permit the free passage of all consignments of essential foodstuffs, clothing and tonics intended for children under fifteen, expectant mothers and maternity cases.*'

<sup>484</sup> This article provides: '*1. If the civilian population of any territory under the control of a Party to the conflict, other than occupied territory, is not adequately provided with the supplies mentioned in Article 69, relief actions which are humanitarian and impartial in character and conducted without any adverse distinction shall be undertaken, subject to the agreement of the Parties concerned in such relief actions. Offers of such relief shall not be regarded as interference in the armed conflict or as unfriendly acts. In the distribution of relief consignments, priority shall be given to those persons, such as children, expectant mothers, maternity cases and nursing mothers, who, under the Fourth Convention or under this Protocol, are to be accorded privileged treatment or special protection.*

*2. The Parties to the conflict and each High Contracting Party shall allow and facilitate rapid and unimpeded passage of all relief consignments, equipment and personnel provided in accordance with this Section, even if such assistance is destined for the civilian population of the adverse Party.*'

<sup>485</sup> This provision states: '*2. If the civilian population is suffering undue hardship owing to a lack of the supplies essential for its survival, such as foodstuffs and medical supplies, relief actions for the civilian population which are of an exclusively humanitarian and impartial nature and which are conducted without any adverse distinction shall be undertaken subject to the consent of the High Contracting Party concerned.*'

<sup>486</sup> Although Article 18 creates an obligation to allow the passage of aid, it is notable that during the drafting process for Additional Protocol II, the drafters '*explicitly rejected any form of required access for humanitarian operations*' due to concerns about preserving national sovereignty. States showed themselves to be more concerned with preserving their national sovereignty than '*with obliging acceptance of relief actions during*' non-international armed conflict. See, Sean Watts, 'Under Siege: International Humanitarian Law and Security Council Practice concerning Urban Siege Operations,' Research and Policy Paper, Counterterrorism and Humanitarian Engagement Project, May 2014, p. 19 and note 80.

Convention IV limits the requirement to allow the passage of humanitarian aid, including if the adversary may obtain an advantage:

*‘The obligation of a High Contracting Party to allow the free passage of the consignments indicated in the preceding paragraph is subject to the condition that this Party is satisfied that there are no serious reasons for fearing:*

- (a) that the consignments may be diverted from their destination,*
- (b) that the control may not be effective, or*
- (c) that a definite advantage may accrue to the military efforts or economy of the enemy through the substitution of the above-mentioned consignments for goods which would otherwise be provided or produced by the enemy or through the release of such material, services or facilities as would otherwise be required for the production of such goods.’<sup>487</sup>*

384. These provisions take account of the fact that ‘*a relatively large proportion of relief supplies ends up in the hands of combatants*’ and that ‘*humanitarian aid is sometimes even used by the belligerents as a weapon of war.*’<sup>488</sup> It is thus widely recognised that the obligations on supplying humanitarian aid are ‘*limited in obligation and scope.*’<sup>489</sup> For example, Article 17 of Geneva Convention IV, obligates parties to ‘*merely “endeavour” to remove only a narrow class of civilians*’ from besieged areas including those civilians who are ‘*wounded, sick, infirm, ... aged persons, children or maternity cases.*’<sup>490</sup>

385. Furthermore, Article 23 of Geneva Convention IV<sup>491</sup> and Article 70(3) of Additional Protocol I<sup>492</sup> both provide that the passage of humanitarian aid can be made contingent on certain stipulations such as the supervision of its distribution or by prescribing technical arrangements, including searching of the aid.<sup>493</sup> In the event that the stipulations prescribed by the party allowing passage are not met, the party could lawfully deny access of the aid. This is confirmed in Article 70(3)(c) which specifically states that ‘*in cases of urgent necessity*’, consignments may be diverted.

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<sup>487</sup> These provisions are reflected in the UK Joint Service Manual on the Law of Armed Conflict, section 9.12 <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/27874/JSP3832004Edition.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/27874/JSP3832004Edition.pdf)>

<sup>488</sup> Ruth Abril Stoffels, ‘Legal regulation of humanitarian assistance in armed conflict: Achievements and gaps’, ICRC, 2004, p. 515.

<sup>489</sup> Watts, ‘Under Siege’, p. 16.

<sup>490</sup> Ibid.

<sup>491</sup> Fourth Geneva Convention, Article 23, provides: ‘*The Power which allows the passage of the consignments indicated in the first paragraph of this Article may make permission conditional on the distribution to the persons benefited thereby being made under the local supervision of the Protecting Powers. Such consignments shall be forwarded as rapidly as possible, and the Power which permits their free passage shall have the right to prescribe the technical arrangements under which such passage is allowed.*’

<sup>492</sup> Additional Protocol I, Article 70(3), provides: ‘*3. The Parties to the conflict and each High Contracting Party which allow the passage of relief consignments, equipment and personnel in accordance with paragraph 2: (a) shall have the right to prescribe the technical arrangements, including search, under which such passage is permitted; (b) may make such permission conditional on the distribution of this assistance being made under the local supervision of a Protecting Power; (c) shall, in no way whatsoever, divert relief consignments from the purpose for which they are intended nor delay their forwarding, except in cases of urgent necessity in the interest of the civilian population concerned.*’

<sup>493</sup> See Spieker, ‘The Right to Give and Receive Humanitarian Assistance’, p. 10.

In addition, Article 18(2) of Additional Protocol II states that relief action ‘*shall be undertaken subject to the consent of the High Contracting Party concerned.*’

386. While ‘*balance[ing] the interests of the civilian population*’ against the interests of the parties<sup>494</sup>, these provisions reflect the view that ‘*[t]he primary responsibility for minimization of collateral civilian casualties continues to reside with the party to the conflict with control over the civilian population.*’<sup>495</sup> These provisions seek to deter situations in which the party in control of the civilians exploits such control for the purpose of obtaining humanitarian aid from the opposing party.
387. It should also be taken into account that even though Article 54 of Additional Protocol I and Article 14 of Additional Protocol II prohibit the ‘*[s]tarvation of civilians as a method of warfare*’, siege tactics and blockades are not contrary to IHL and ‘*remain a core competency and operational staple of modern armed forces.*’<sup>496</sup> Providing the operation is not aimed at the starvation of civilians, and is based on military objectives, it will not violate the rules of IHL.<sup>497</sup> The Judgment of the Nuremberg Tribunal in the *Von Leeb* case found that the starvation of civilians due a siege against the enemy based on military objectives, is lawful.<sup>498</sup>
388. It is recognised that ‘*[w]hile operationally desirable or even essential, isolation of besieged areas almost inevitably produces tensions with the humanitarian needs of civilian populations.*’<sup>499</sup> A balance must be maintained between meeting the humanitarian obligations while simultaneously ensuring that aid is not ‘*being converted to military use by the besieged force to prolong or tip the balance of a closely contested siege.*’<sup>500</sup> While the besieging party bears ‘*significant responsibilities toward facilitating relief actions*’<sup>501</sup> within the bounds of its limitations, both the besieging and besieged parties - particularly the party in control of the civilians<sup>502</sup> - owes a duty to facilitate the evacuation of civilians from the siege area, particularly when delivering humanitarian aid is not possible.<sup>503</sup> As noted above, Article 17 of Geneva Convention IV<sup>504</sup> and Article 58 of Additional Protocol I<sup>505</sup> set out that the

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<sup>494</sup> Ibid, p. 13.

<sup>495</sup> Parks, ‘Air War and the Law of War’, pp. 175-176. Emphasis added.

<sup>496</sup> Watts, ‘Under Siege’, p. 523.

<sup>497</sup> Henckaerts and Doswald-Beck, *Customary International Humanitarian Law*, vol. I, p. 186 (Rule 53).

<sup>498</sup> Daniel Butler, ‘Enforced Starvation: Exploring Individual Criminal Responsibility for State-Induced Famines’, *Human Rights Law Commentary*, vol. 3, The University of Nottingham, 2007, p. 11 and note 98.

<sup>499</sup> Watts, ‘Under Siege’, pp. 3-4.

<sup>500</sup> Ibid, p. 18.

<sup>501</sup> Ibid.

<sup>502</sup> Parks, ‘Air War and the Law of War’, pp. 175-176.

<sup>503</sup> Stoffels, ‘Legal regulation of humanitarian assistance in armed conflict’, p. 523.

<sup>504</sup> Fourth Geneva Convention, Article 17: ‘*The Parties to the conflict shall endeavour to conclude local agreements for the removal from besieged or encircled areas, of wounded, sick, infirm, and aged persons, children and maternity cases, and for the passage of ministers of all religions, medical personnel and medical equipment on their way to such areas.*’

<sup>505</sup> Additional Protocol I, Article 58: ‘*The Parties to the conflict shall, to the maximum extent feasible: (a) without prejudice to Article 49 of the Fourth Convention, endeavour to remove the civilian population, individual civilians and civilian objects under their control from the vicinity of military objectives; (b) avoid locating military objectives within or near densely populated areas; (c) take the other necessary precautions to protect the civilian population, individual civilians and civilian objects under their control against the dangers resulting from military operations.*’

parties must ‘endeavour’ to evacuate the civilian population to a location in which they can safely access humanitarian aid.

389. It is significant that Article 58 of Additional Protocol I places the obligation to facilitate evacuation on the party who controls the civilian population, and may be defending against an attack or siege operation.

## **J. The Law as to the Recruitment and/or Use of Child Soldiers**

390. Sri Lanka is a party to the 1989 UN Convention on the Rights of the Child, Article 38 of which requires all parties to ‘*take all feasible measures to ensure that persons who have not attained the age of fifteen years do not take a direct part in hostilities*’ and to ‘*refrain from recruiting any person who has not attained the age of fifteen years into their armed forces*’.<sup>506</sup> Of the relevant IHL treaties, the strictest obligation on State parties appears in Additional Protocol II: “*children who have not attained the age of fifteen years shall neither be recruited in the armed forces or groups nor allowed to take part in hostilities.*”<sup>507</sup> The ICC Statute was the first treaty to include the enlistment, conscription or use of children in hostilities as war crimes entailing individual criminal responsibility in its Articles 8(2)(b)(xxvi) and 8(2)(e)(vii). Although some of the key terms continue to cause disagreements, the protections are now considered to be of customary status.<sup>508</sup>
391. On 25 May 2000, the UN General Assembly adopted the Optional Protocol to the Convention on the Rights of the Child on the involvement in children in armed conflict which entered into force in 2002. Sri Lanka is a party to the Optional Protocol. The Protocol increased protections by establishing 18 as the minimum age for enlistment into the armed forces of a state. The Protocol also places obligations on non-state armed forces. Article 4 states that:

*‘Armed groups that are distinct from armed forces of a state should not under any circumstances, recruit or use in hostilities persons under the age of 18.’*<sup>509</sup>

392. The Government of Sri Lanka made a declaration at the time of its ratification of the Optional Protocol setting the bar for voluntary recruitment into the armed forces at a minimum age of 18.

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<sup>506</sup> Convention on the Rights of the Child, GA resolution 44/25, 20 November 1989, in force 2 September 1990.

<sup>507</sup> Additional Protocol II, Article 4(3)(c).

<sup>508</sup> Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone, S/2000/915, 4 October 2000, para. 14. See further Nina H. B. Jørgensen, ‘Child Soldiers and the Parameters of International Criminal Law’, *Chinese Journal of International Law*, vol. 11, no. 4, 2012, 657-688.

<sup>509</sup> UN General Assembly, *Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict*, 25 May 2000.

### Definition of conscription

393. The prohibition against recruitment includes both conscription and enlistment<sup>510</sup>. Conscription, *'implies some use of force'*, some *'compulsion, albeit it in some cases through force of law'*.<sup>511</sup> The essential component of conscription is compulsion with the precise nature of the compulsion being a secondary consideration.<sup>512</sup> It encompasses *'the abduction of persons for specific use within an organisation'* and *'the forced military training of persons'*.<sup>513</sup>
394. There has been a traditional view of conscription that has been associated with government policy requiring citizens to serve in their armed forces<sup>514</sup> but taking into account the likelihood that conscription may involve non-state armed groups. The term conscription must be widely construed.<sup>515</sup>

### Definition of Use in Hostilities

395. The acts that may fall within the definition of active participation in hostilities have been summarised as follows, based on the jurisprudence of the Special Court for Sierra Leone and the ICC in the *Lubanga* case: *'the use of children: in combat; in armed patrols; to guard military objectives; as spies, scouts, bodyguards to commanders, and human shields; to man military checkpoints; and to engage in sabotage.'*<sup>516</sup> Activities that fall outside the scope of this category include: *'the use of children: for domestic labour; to forage for food; or to undertake 'domesticated jobs of a purely civilian character like cooking, food finding, laundry or running routine errands.'*<sup>517</sup>
396. In addition, in the case of Charles Taylor, the former President of Liberia, the SCSL examined the ambit of 'active participation' with regard to children up to 15 years who were used by the various sides in the civil war.<sup>518</sup> The judgment sought to assess all the various relevant conduct that would qualify as active participation and included: *'children in combat'*, *'children carrying arms and ammunition'*, *'children as bodyguards for commanders'*, *'children sent on food finding missions'*, *'children guarding mines'* and *'children engaged in domestic chores'*.<sup>519</sup> This approach was based on an evaluation of the risk to which children were exposed. This is to be compared with some previous case law such as the RUF case in which food finding missions without concrete use of arms were not considered as active participation in

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<sup>510</sup> *Prosecutor v. Lubanga*, Decision on the Confirmation of Charges, 29 January 2007, para. 24. See also *Prosecutor v. Fofana and Kondewa*, SCSL-04-14-T, Judgement, Trial Chamber, 2 August 2007, para 191.

<sup>511</sup> *Prosecutor v. Norman*, SCSL-2004-14-AR72 (E), Decision on Preliminary Motion Based on Lack of Jurisdiction 'Child Recruitment', Dissenting Opinion of Justice Robertson, 31 May 2004, paras 1, 5.

<sup>512</sup> Sivakumaran, *The Law of Non-International Armed Conflict*, p. 319.

<sup>513</sup> *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T, Judgment, Trial Chamber, 2 March 2009, para. 1695.

<sup>514</sup> Sivakumaran, *The Law of Non-International Armed Conflict*, p. 319.

<sup>515</sup> *Prosecutor v. Brima, Kamara, and Kanu*, SCSL-04-16-T, Judgment, Trial Chamber, 20 June 2007, para. 734.

<sup>516</sup> Sivakumaran, *The Law of Non-International Armed Conflict*, pp. 317-318.

<sup>517</sup> *Ibid*, p. 318.

<sup>518</sup> *Prosecutor v. Taylor*, SCSL-03-01-T, Judgment, Trial Chamber, 18 May 2012 paras 1457 ff and in particular para. 1596.

<sup>519</sup> *Ibid*, paras 1526, 1578-1479, 1604.

hostilities even if they were generally supported the armed group.<sup>520</sup> This approach has a profound impact on the notion of active participation and its underlying acts and appears to be a broadening of the scope of the relevant crime.<sup>521</sup>

#### **K. The Law on Perfidy**

397. IHL prohibits the killing, injuring or capture of an adversary by perfidy. The prohibition applies in both international and non-international armed conflicts as a matter of customary international law and treaty law.<sup>522</sup>
398. The Hague Regulations (Article 23(b)) prohibit the killing or wounding ‘treacherously’ of enemy forces. Article 37(1) of Additional Protocol I defines perfidy as ‘acts inviting the confidence of an adversary to lead him to believe that he is entitled to, or obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence’. The ICC Elements of Crimes has adopted the same definition for perfidy in all conflicts.<sup>523</sup> As confirmed by the ICRC, the essence of perfidy is the invitation to obtain and then breach the adversary’s confidence. It is an abuse of good faith.<sup>524</sup> Thus feigning an intent to negotiate under a flag of truce or surrender, feigning incapacitation by wounds or sickness, feigning non-combatant status by the use of signs, for example, using uniforms such as those of the United Nations, would be examples of perfidy. The simulation of civilian status in order to attack the enemy would breach this rule. It is essential that civilians not taking a direct part in hostilities should be protected, and hence it is forbidden to misuse this rule to gain a military advantage. Thus, perfidy is relevant in the context of LTTE suicide bombers pretending to be civilians and then blowing themselves up, and the SLA negotiating a surrender under a white flag and then firing upon and killing those who surrendered.

#### **L. Prohibited Weapons**

399. The ICC Statute contains war crimes provisions concerning prohibited weapons only in the context of international armed conflicts but the prohibitions are also considered to apply in non-international armed conflict.<sup>525</sup>

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<sup>520</sup> *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T, Judgment, Trial Chamber, 2 March 2009, para. 1743, contrasted to the Taylor Trial Judgment paras 1478-1480.

<sup>521</sup> Alberto Oddenino, ‘The Enlistment, Conscripted and Use of Child Soldiers as War Crimes,’ in *War Crimes and the Conduct of Hostilities: Challenges to Adjudication and Investigation*, Fausto Pocar, Marco Pedrazzi, Micaela Frulli (eds), Cheltenham: Edward Elgar Publishing Ltd, 2013, p. 129.

<sup>522</sup> Henckaerts and Doswald-Beck, *Customary International Humanitarian Law*, vol. I, p. 221 (Rule 65).

<sup>523</sup> Elements of Crimes for the ICC, Definition of killing or wounding treacherously individuals belonging to the hostile nation or army/a combatant adversary as a war crime (ICC Statute, Article 8(2)(b)(xi) and (e)(ix)).

<sup>524</sup> Henckaerts and Doswald-Beck, *Customary International Humanitarian Law*, vol. I, p. 223.

<sup>525</sup> See e.g. ICC Statute, Article 8(2)(b)(xx): ‘Employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict’; *Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, paras 119-24.

400. Sri Lanka has not ratified the Convention on Cluster Munitions of 30 May 2008 which entered into force on 1 August 2010.<sup>526</sup> At the time relevant to the final stage of the Sri Lankan conflict in 2009, any use of such weapons would be subject to the IHL principles of distinction and proportionality.

## **M. The Law Relating to Genocide**

### *Definition*

401. Genocide is defined in Article 2 of the 1948 Genocide Convention as follows:<sup>527</sup>

*‘In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:*

- (a) Killing members of the group;*
- (b) Causing serious bodily or mental harm to members of the group;*
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;*
- (d) Imposing measures intended to prevent births within the group;*
- (e) Forcibly transferring children of the group to another group.’*

### *Genocidal Intent*

402. In its Judgment of 3 February 2015 in the case of Croatia v. Serbia<sup>528</sup> the ICJ made plain in rejecting the claims of genocide from both States that genocide can only be made out if it is proved that perpetrators acted with the specific intent to destroy physically the group concerned – targeting the group (for whatever reason, even if for discriminatory reasons) is not sufficient to constitute genocide. The intention needs to exceed aiming to attack the group, to seeking to physical wipe it off the face of the earth.
403. The ICJ emphasised that *‘the intent to destroy a national, ethnic, racial or religious group as such is specific to genocide and distinguishes it from other related criminal acts such as crimes against humanity and persecution.’*<sup>529</sup> The highest form of intent must be proved, that of *‘dolus specialis, that is to say a specific intent, which, in order*

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<sup>526</sup> Convention on Cluster Munitions, 30 May 2008, <<http://www.stopclustermunitions.org/media/1045/convention-englishfinaltext.pdf>>.

<sup>527</sup> UN General Assembly, *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, United Nations, Treaty Series, vol. 78, p. 277.

<sup>528</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Croatia v. Serbia*, Judgment, 3 February 2015 (*‘Croatia v. Serbia Genocide Case’*), <<http://www.icj-cij.org/docket/files/118/18422.pdf>>.

<sup>529</sup> *Ibid*, para. 139.

*for genocide to be established, must be present in addition to the intent required for each of the individual acts involved.*<sup>530</sup>

404. Destruction once and for all, so that the group disappears, and not just targeting of the group, must be the aim:

*'there must be evidence of acts on a scale that establishes an intent not only to target certain individuals because of their membership of a particular group, but also to destroy the group itself in whole or in part.'*<sup>531</sup>

405. The ICJ has highlighted in previous judgments that this very high threshold for establishing genocide is rooted in the drafting history of the Genocide Convention. This has been illustrated by the ICJ in its Judgment in *Bosnia and Herzegovina v. Serbia and Montenegro*<sup>532</sup> and in its Advisory Opinion on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*.<sup>533</sup> The Court has consistently found that *'[t]he Convention was manifestly adopted for a purely humanitarian and civilizing purpose'* and *'its object ... is to safeguard the very existence of certain human groups.'*<sup>534</sup> This was further confirmed when the Court stated that *'the intent must be to destroy at least a substantial part of the particular group. That is demanded by the very nature of the crime of genocide: since the object and purpose of the Convention as a whole is to prevent the intentional destruction of groups.'*<sup>535</sup> The same position has been adopted before international criminal courts when dealing with the individual criminal responsibility of individuals for the crime of genocide.<sup>536</sup>

406. The ICJ has further noted, in addressing state responsibility for genocide, that the standard of proof is the highest standard of 'beyond reasonable doubt':

*'The dolus specialis, the specific intent to destroy the group in whole or in part, has to be convincingly shown by reference to particular circumstances, unless a general plan to that end can be convincingly demonstrated to exist; and for a pattern of conduct to be accepted as evidence of its existence, it would have to be such that it could only point to the existence of such intent.'*<sup>537</sup>

407. This point was further emphasised by the Court in its most recent Judgment:

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<sup>530</sup> Ibid, para. 132.

<sup>531</sup> Ibid, para. 139.

<sup>532</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Bosnia and Herzegovina v. Serbia and Montenegro*, Judgment, 26 February 2007 ('*Bosnia v. Serbia Genocide Case*'), <<http://www.icj-cij.org/docket/files/91/13685.pdf>>.

<sup>533</sup> *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion*, 28 May 1951.

<sup>534</sup> *Bosnia v. Serbia Genocide Case*, para. 161, citing *Reservations Advisory Opinion*, *ibid*, p. 23. See also *Croatia v. Serbia Genocide Case*, para. 139.

<sup>535</sup> *Bosnia v. Serbia Genocide Case*, para. 198.

<sup>536</sup> See for example *Prosecutor v. Krstić*, IT-98-33-A, Appeals Judgment, 19 April 2004, paras 8-11 and ICTR cases cited therein; Yearbook of the International Law Commission, 1996, Vol. II, Part Two, p. 45, para. 8 of the Commentary to Article 17.

<sup>537</sup> *Bosnia v. Serbia Genocide Case*, para. 373.

*‘The Court recalls that, for a pattern of conduct to be accepted as evidence of intent to destroy the group, in whole or in part, it must be “such that it could only point to the existence of such intent”. This signifies that, for the Court, intent to destroy the group, in whole or in part, must be the only reasonable inference which can be drawn from the pattern of conduct.’<sup>538</sup>*

#### Recent European Domestic Decision on ‘Racist State’

408. In a recent judgment<sup>539</sup> a Dutch court examined the LTTE’s assertion that the Sri Lankan state could be cited as a ‘racist regime’ in the context of Article 1(4) of Additional Protocol I. *Prosecutor v X* was decided in 2011 in the District Court of The Hague and in a 47 page judgement found that the Sri Lankan state could **not** be defined as a ‘racist regime’ in the context of IHL.
409. The Court found that not every instance of racial discrimination by a State could lead to the conclusion that there is a racist regime within the provisions of the Protocol. The conclusions of the court found support in the United Nations General Assembly Resolution 3103 (XXVIII) entitled ‘*Basic principles of the legal status of the combatants struggling against colonial and alien domination and racist regimes*’, which connotes ‘racist regime’ within the context of apartheid and racial oppression. In its judgement, this Dutch Court in The Hague came to the following conclusion:
- ‘although the case file does contain evidence that Tamils were discriminated against in Sri Lanka, the defence did not substantiate sufficiently that the state of Sri Lanka could be considered a racist regime, nor has this been made plausible in any other way.’<sup>540</sup>*
410. It is the view of this Commission that if the Dutch lawyers representing alleged LTTE members in this trial, were unable to substantiate before this Dutch Court the claim that the GoSL could be defined in law, as a ‘racist state’, it follows, that the higher legal threshold for ‘a genocidal state’ could not be met.

#### **N. The Law on Enforced Disappearances**

411. Enforced disappearances are regulated under the 1992 UN Declaration on the Protection of All Persons from Enforced Disappearance<sup>541</sup> and the 2006 International

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<sup>538</sup> *Croatia v. Serbia Genocide Case*, para. 417.

<sup>539</sup> *Interpretation of ‘Racist Regime’ under Article 1(4) of Additional Protocol I Prosecutor v X*, District Court of The Hague, 21 October 2011, LJN BU2066 (English translation LJN BU9716).

<sup>540</sup> *Ibid*, English translation, p.16 of 47.

<sup>541</sup> *Declaration on the Protection of All Persons from Enforced Disappearance*, A/Res/47/133, 18 December 1992, <<http://www.un.org/documents/ga/res/47/a47r133.htm>>.

Convention for the Protection of All Persons from Enforced Disappearance.<sup>542</sup> Sri Lanka is not a party to the 2006 treaty.

412. The ICRC study on customary IHL states that forced disappearance is prohibited in both international and non-international armed conflict and that it may involve the violation of other rules such as the prohibitions on torture, cruel treatment and murder.<sup>543</sup>
413. According to Article 7(1)(i) of the ICC Statute, enforced disappearance may amount to a crime against humanity.<sup>544</sup> Enforced disappearance is defined in the Statute as: *'the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time'*.
414. The victims of enforced disappearances are considered to include friends and families of the 'disappeared'.

#### **O. The Law as to Command Responsibility**

415. Command or superior responsibility has three basic ingredients: (1) a superior – subordinate relationship; (2) knowledge or notice of the subordinate's offence or its imminent commission; and (3) a failure by the superior to prevent or punish the act.<sup>545</sup> Therefore, inaction may make a superior liable where there is a duty to act. Thus, those in positions of leadership can be investigated and prosecuted on the basis they were obliged under IHL to take action and failed to do so. Command or superior responsibility applies to persons in superior positions, both military and political.<sup>546</sup>

#### **P. Forms of Responsibility under International Law**

416. This Commission notes that under international law, states are responsible for breaches of IHL and IHRL and these bodies of law are in the first instance directed towards states.<sup>547</sup> As explained above, non-state armed groups such as the LTTE are also bound to apply IHL in certain circumstances. Serious violations of IHL and IHRL may amount to war crimes or crimes against humanity entailing individual criminal

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<sup>542</sup> UN General Assembly, *International Convention for the Protection of All Persons from Enforced Disappearance*, 20 December 2006. <<http://www.ohchr.org/EN/HRBodies/CED/Pages/ConventionCED.aspx>>.

<sup>543</sup> Henckaerts and Doswald-Beck, *Customary International Humanitarian Law*, vol. I, p. 340 (Rule 98).

<sup>544</sup> See also Brian Finucane, 'Enforced Disappearance as a Crime under International Law: A Neglected Origin in the Laws of War', (2010) 35 *The Yale Journal of International Law* 171-197.

<sup>545</sup> *Prosecutor v. Delalić et al.*, IT-96-21-T, Trial Judgment, 16 November 1998, para. 346.

<sup>546</sup> See ICC Statute, Article 28.

<sup>547</sup> See International Law Commission, *Responsibility of States for Internationally Wrongful Acts*, 2001, <[http://legal.un.org/ilc/texts/instruments/english/draft%20articles/9\\_6\\_2001.pdf](http://legal.un.org/ilc/texts/instruments/english/draft%20articles/9_6_2001.pdf)>.

responsibility as indicated in this Chapter. The ICJ, recognising that both states and individuals may be responsible for genocide, has clarified that:

*'State responsibility and individual criminal responsibility are governed by different legal regimes and pursue different aims. The former concerns the consequences of the breach by a State of the obligations imposed upon it by international law, whereas the latter is concerned with the responsibility of an individual as established under the rules of international and domestic criminal law, and the resultant sanctions to be imposed upon that person.'*<sup>548</sup>

417. Individuals may be held criminally responsible under the doctrine of command responsibility or under various modes of liability such as committing (whether individually or jointly with others as co-perpetrators or participants in a joint criminal enterprise), ordering, instigating, or aiding and abetting.<sup>549</sup>
418. The overlapping bodies of law addressed in this Chapter as well as the various forms of responsibility as they apply to both states and individuals have been taken into account by this Commission when discussing proposed accountability mechanisms in Chapter 8.

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<sup>548</sup> *Croatia v. Serbia Genocide Case*, para. 129.

<sup>549</sup> See e.g. ICTY Statute, Article 7(1); ICC Statute, Article 25.

## CHAPTER 7 - THE PRINCIPAL ALLEGATIONS AGAINST THE GOVERNMENT OF SRI LANKA AND THE SRI LANKAN ARMY

### Introduction

419. In this Chapter the Commission will address the principal allegations against the GoSL that have been raised principally in the Channel 4 video footage<sup>550</sup> and the Darusman Report<sup>551</sup> and have crystallised into the prevailing narrative of the final stage of the Sri Lankan conflict through endorsement in various reports by NGOs and other bodies. This Chapter is presented in the context of the legal framework set out in Chapter 6. Together with this Commission's own narrative of the final phase of the war and its comments on the Darusman Report in Chapter 2 of this report, the current Chapter provides the basis for answering the questions raised under the Second Mandate. As highlighted earlier in its report and specified in more detail in this Chapter, the Commission takes the view that an independent judge-led inquiry into serious incidents that may amount to war crimes and/or crimes against humanity is necessary in order to come closer to the truth of these events and provide justice for the victims.
420. The Commission commenced Public Sitings in January 2014 in the North and East of Sri Lanka. The Commission has recorded oral evidence from approximately 2700 persons who had submitted complaints in response to the "Public Notice" that was published in print and the electronic media in all three languages.

During the course of the hearings it was evident to the Commission, from the families of missing persons, that some of the complaints would have to be further investigated by a special investigation team. On the issue of appointing an investigative team the Commission had to ensure that credible persons acceptable to society, as a whole, had to be selected.

On 21<sup>st</sup> August 2014 the Commission wrote to the then President expressing the need to appoint an investigative team to ensure the credibility of the Commission so that the Government and the public would be satisfied that investigations were being carried out in an independent, transparent and unbiased manner.

The Commission's letter of 21<sup>st</sup> August 2014, was followed up with regular contacts with the Presidential Secretariat to expedite the appointment of credible, independent and suitable persons to serve on the investigative team as questions arose from various sources regarding the steps taken by the Commission to investigate cases accompanied by *bona fide* evidence that required investigation with a view to establishing accountability.

In response to the Commission's letter to the President there was a reply from the Inspector General of Police in the form of a letter dated 21<sup>st</sup> October 2014 which

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<sup>550</sup>*No Fire Zone*, Callum Macrae. Channel 4. 2013. Film. <<http://www.channel4.com/programmes/no-fire-zone>>.

<sup>551</sup> Darusman Report, 31 March 2011.

appointed an investigative team to assist the Commission in carrying out its investigations.

The Commission took the view that it would not be prudent to appoint officers still in the service of the Terrorist Investigation Department (TID) and Criminal Investigation Department (CID). With this in view, the Commission requested the new President, on the occasion of the presentation of its Interim Report on 10<sup>th</sup> April 2015, to appoint an independent investigating team with appropriate investigative backgrounds. Accordingly, the Commission recommended an investigative unit which is now headed by a retired High Court Judge.

On 15th July 2015 the Presidential Secretariat, under the new President, confirmed the appointment of retired High Court Judge as the head of a team comprising of investigative officers drawn from all ethnic communities. In addition to which, there will be a female investigating officer who will be selected from the district in which the investigations are to be conducted.

Since the appointment and confirmation of the investigative team by the Presidential Secretariat, the members of the Commission have held regular meetings to brief the team on the manner in which the investigation should be carried out. A code of ethics and terms of reference were given to the team setting out details of the requirements of responsibility, accountability, honesty, integrity, caution, thoroughness and other essential requirements that should govern their approach in order to achieve the highest standards in the conduct of the investigations.

#### **A. The Channel 4 Video Footage**

421. The allegations contained in the Channel 4 programmes and the photographic images that have surfaced have given rise to considerable adverse publicity as regards the conduct of the SLA.
422. The LLRC has already concluded that these matters gave rise to allegations that should be investigated. As a consequence, the Channel 4 allegations were made the subject of proceedings before a Military Court of Inquiry in Sri Lanka. Having heard some primary evidence on at least one allegation contained in the documentary, this Commission has now requested an investigation team to be appointed to conduct a full investigation into what it has found to be credible allegations of criminal conduct.
423. The Channel 4 website explains the making of the film as follows:

*‘Our evidence of how it was done comes in the form of mobile phone footage, Tamil and government film footage, and mobile phone “trophy footage” in which soldiers filmed themselves abusing and executing Tamils who had either surrendered or been captured. War crimes were committed on both sides in what was a barbarous conflict. But the Government action that we report tonight transcends anything seen during this phase of the civil conflict. It is a harrowing and difficult film to watch. **But it represents not only the evidence required to convict, but a first ever testament in the digital age to the dawning***

*truth that in this age it is becoming close to impossible for warring forces to cover up what they have done’.*<sup>552</sup>

424. As a preliminary point, the Commission notes that there is no indication of which legal system Channel 4 might have been referring to when it spoke of ‘*evidence required to convict*’.<sup>553</sup> Like domestic criminal courts, an international criminal court such as the ICC requires that a succession of stages be passed before a suspect can be tried, with rising requirements at each stage as to the relevant standard of proof that must be met. As stated in Article 66 of the ICC Statute:

*‘a. Everyone shall be presumed innocent until proved guilty before the Court in accordance with the applicable law.*

*b. The onus is on the Prosecutor to prove the guilt of the accused.*

*c. In order to convict the accused, the Court must be convinced of the guilt of the accused beyond reasonable doubt.’*<sup>554</sup>

425. This Commission will proceed on the understanding that what Channel 4 in fact meant by its observation, ‘*evidence required to convict*’, was that the content of the programmes justified an investigation, founded on the presumption of innocence, to establish beyond reasonable doubt whether members of the SLA committed war crimes. Indeed, the claim was made in the programme that the ‘*things you are about to see would drive any prosecutor – here in the UK, in Sri Lanka or in the International Criminal Court – to make a proper investigation and to bring to justice anyone – government force member or Tamil Tiger...*’ In the Commission’s view, the Channel 4 programmes provide enough material to form a reasonable basis to believe that war crimes may have been committed, warranting an investigation. However, the Commission stresses that it does not consider the programmes in themselves provide conclusive evidence of war crimes and less still, evidence of any overarching political or military directive to commit such crimes.

426. Neither television programmes nor reports of commissions of inquiry can ever be substitutes for a proper investigation and accountability process. It is a common occurrence in the modern media age to assume guilt from the findings of UN and INGO reports without the proper testing of allegations and evidence. The Commission recognises, however, that the delay by the GoSL in submitting its alleged conduct to such a process, even domestically, may have helped to allow these allegations to gain the currency of proven facts.

#### *Authenticity of Channel 4 footage*

427. There have been several suggestions that the film footage shown in the Channel 4 video is fake in whole or part. The GoSL highlighted using their own experts some discrepancies in the video that could give rise to a suspicion that the executions depicted were staged. However, the UN Special Rapporteur on extrajudicial, summary

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<sup>552</sup> Jon Snow, ‘Sri Lanka’s Killing Fields – a project that can affect history’, Snowblog, *4 News* (14 Jun 2011) <<http://blogs.channel4.com/snowblog/sri-lankas-killing-fields-project-affect-history/15457>>. Emphasis added.

<sup>553</sup> Ibid.

<sup>554</sup> ICC Statute, Article 66.

or arbitrary executions, Philip Alston, commissioned experts who authenticated the footage while accepting that a small number of characteristics in the footage could not be explained.<sup>555</sup>

428. The authenticity of the video footage is not an issue that this Commission can resolve, other than to comment that many of the members of its Advisory Council have prosecuted cases at the highest level before international tribunals and are familiar with footage of the kind used by Channel 4. As the UN has used a number of pathologists and firearms experts of world renown, who have now corroborated this footage, the Commission has acted on the assumption, which of course can be displaced by evidence, that the images depicted are genuine.<sup>556</sup> Taking the Channel 4 allegations at their highest, the Commission proceeds on the basis that the material is, or may be, genuine and, therefore, presents strong circumstantial evidence of war crimes. The assistance of the Advisory Council has contributed to this Commission's decision that the Channel 4 allegations require a proper judicial enquiry and it is imperative that once commenced, any of those alleged to have been involved are brought to account. Currently a former High Court Judge is heading the investigative team.

429. Indeed, the LLRC's own view and recommendation was that:

*'4.375 Based on the available material and taking into account the above considerations, the Commission wishes to recommend that the Government initiate an independent investigation into this matter to establish the truth or otherwise of the allegations arising from the video footage.'*

*'4.377 The Commission therefore recommends that the Government of Sri Lanka institute an independent investigation into this issue with a view to establishing the truth or otherwise of these allegations and take action in accordance with the laws of the land. Equally, the Commission feels that arrangements should be made to ensure and facilitate the confidentiality and protection of information and informants. The Commission strongly urges all those concerned, especially the organizations that provided the original images and the broadcasting organization, to extend fullest cooperation by providing the necessary information to facilitate this work.'*<sup>557</sup>

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<sup>555</sup> Alston commissioned the three reports following the publication of four opinions by Sri Lankan experts, all of which concluded that the video was a fake. Mr Peter Diaczuk, an expert in firearms evidence, concluded that the recoil, movement of the weapon and the shooter, and the gases expelled from the muzzle in both apparent shootings were consistent with firing live ammunition, and not with shooting blank cartridges. Dr Daniel Spitz, a prominent forensic pathologist, found that the footage appeared authentic, especially with respect to the two individuals who are shown being shot in the head at close range. He found that the body reaction, movement, and blood evidence was entirely consistent with what would be expected in such shootings. Mr Jeff Spivack, an expert in forensic video analysis, found no evidence of breaks in continuity in the video, no additional video layers, and no evidence of image manipulation.

<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=9706#sthash.fhFpq5NP.dpuf>.

<sup>556</sup> It is not possible for the Commission to form any valuable opinion on whether the footage is fake, in whole or part, without having access to all relevant material and discussing the issue with at least one, and possibly more than one, of the relevant experts who have already contributed different opinions.

<sup>557</sup> LLRC Report, 15 November 2011, pp. 151-152.

430. Under the then government of President Mahinda Rajapaksa, on 5 March 2014, at the 25<sup>th</sup> Session of the Human Rights Council, the Minister of External Affairs at that time, Professor G. L. Peiris, stated:

*'[t]he Court of Inquiry appointed by the Army is now addressing the second part of their mandate, comprising the Channel 4 allegations, which commenced in March 2013. The identification of potential witnesses is currently in progress and, once identified, they would be formally called as witnesses. It may be noted that the LLRC, in its Observations/Recommendations on the Channel 4 video, inter alia expressed its regret at "the fact that the broadcaster did not respond positively to the request made by the commission to provide more comprehensive information", and noted that "greater cooperation by the organisation that provided to the television stations these video images and by the producers/broadcasters that aired this footage is essential to establish the facts of the case".*<sup>558</sup>

431. To date, this Commission has not had made available to it the findings of the Military Court of Inquiry as regards its Channel 4 investigations referred to by the former Minister of External Affairs in 2014.

432. This Commission is critical of Channel 4's conduct in not supplying the original film footage of alleged crimes. The Commission is cognisant of the importance of protecting sources, but it appears no effort has been made to camouflage those whose identity may be compromised in the footage and then send such footage on to the GoSL, as source material.

433. Apart from the issue of authenticity, there are several issues that *may* arise from a detailed consideration of the film, including issues that go to the fairness of the programme makers, but do not detract from the gravity of the circumstantial evidence:

- the programme's failure to differentiate between who was doing the shelling when there was abundant evidence that the LTTE were both shooting and shelling their own civilians;<sup>559</sup>
- the programme's failure to deal fairly with controversy over the number of civilians killed and its emphasis on the figure of 40,000 in the light of other responsible estimates of a much smaller number including that of the UN Country Team, who put the death toll at 7,721 from August 2008 to 13 May 2009 or, indeed, the US State Department's figure of 6,710 killed between January to May 2009;<sup>560 561</sup>
- the programme's failure to underline that because the LTTE had failed to accept the Government's No Fire Zone ('NFZ') that under international law there were no NFZs in existence;

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<sup>558</sup> Statement by Hon. Prof. G.L. Peiris at the High Level Segment of the 25<sup>th</sup> Session of the Human Rights Council, 5 March 2014, Geneva, p. 6.

<sup>559</sup> LLRC Report, pp. 151-152; Darusman Report, para. 109.

<sup>560</sup> Darusman Report, para. 134.

<sup>561</sup> US State Department, p. 15. ( This did not distinguish between civilians and LTTE cadres)

- that the failure of the programme lay in neglecting to make mention of the risk to the life of civilians came from the LTTE's forcing of civilians to '*retreat with its forces, rather than allowing them to flee to safer areas*' and to state that this placed legal obligations on the GoSL to ensure that its civilians were wrested from LTTE control.<sup>562</sup>

## **B. Disappearances of Detainees in the Final Phase of the War**

434. The history of the conflict in Sri Lanka is characterised by the agony of individuals and families who are seeking closure to the pain of not knowing what has become of their relations or loved ones. The Commission's First Mandate addresses that aspect of this urgent need which also rightly finds a place in the concern of the international community.
435. However, the Commission's first Mandate overlaps with its Second Mandate to the extent that complaints of disappearances during the final phase of the conflict, in addition to invoking international human rights law, may amount to allegations of the crime against humanity of forced disappearances. In this respect, the Commission is concerned to establish whether a discernible pattern of widespread or systematic conduct emerges. Furthermore, where there is evidence that persons who went missing were subsequently mistreated and/or killed, this may constitute an allegation of a violation of Common Article 3 to the Geneva Conventions, namely murder, cruel treatment, torture or the carrying out of executions without prior judgment, as war crimes.
436. The Commission has heard first hand testimony on one of the incidents dealt with in the Channel 4 allegations which may involve international crimes, namely the alleged forced disappearance and alleged summary execution of approximately 100 persons who boarded a bus during the last days of the war.
437. The Commission is of the view that a judge-led investigation into this incident is necessary and indeed the Commission has already taken steps to appoint an investigative team that has begun its work in relation to this incident. We have made a finding that there is a reasonable basis to believe, having heard evidence on this issue, that these individuals may have been executed
438. In the paragraphs that follow, the Commission will look at a few instances of disappearances where there is clear evidence of individuals passing into the hands of the SLA who were likely to have re-established contact with their families, if and when they were released.
439. Typical of the evidence taken by the Commission at a public sitting in Mullativu on 4 November 2014 was the case of the two brothers Selvakumar and Raja whose mother Murugesu Sellamma gave evidence that on 17 May 2009 she handed over her two sons, 29 and 26 years of age, to the army. One of them had been forcibly taken by the LTTE,

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<sup>562</sup> Human Rights Watch, *War on the Displaced*, Sri Lankan Army and LTTE Abuses against Civilians in the Vanni, February 2009, ('HRW Report'), p. 8.

whilst the other had not been involved in the LTTE in any way. Neither of them has been seen again.<sup>563</sup>

440. Vasanthan Regina giving evidence before the Commission at Pudhukudiyiruppu on 6 July 2014 referred to handing over her 35 year old husband at Vattuvaahal Army check point on 17 May 2009. He had been an LTTE cadre but had escaped and joined his family. She testified that she was him when he handed himself in as a result of an announcement by the Army directed at those who were or had been members of the LTTE. She witnessed him being put on to a bus with others who had also surrendered. She was informed by the Army that those who were taken were going to be inquired into, after which they would be returned. She never saw her husband again.<sup>564</sup>
441. Bageerathan Perinbanayagi giving evidence before the Commission sitting at Pudhukudiyiruppu on 5 July 2014 informed the Commission that her husband Selvarajah Paheerathan, who had been in the security service of the LTTE, surrendered to the army on 18 May 2009. She was with him at the time of the surrender. Her husband was one of roughly 50 people put on to a bus after they surrendered. He was never seen again.<sup>565</sup>
442. Chandrakumar Dayalinie gave evidence before the Commission at Mullativu on 5 November 2014. Her evidence related to her brother aged 42, whose name was Thirichelvam Mailwahanam. He was a member of the LTTE. Her evidence was that he was one of many people who responded to the call by the army for LTTE members to surrender. He surrendered at Wattuwal on 17<sup>th</sup> May 2009. She gave evidence that neither his wife nor family have seen him again.<sup>566</sup>
443. Thanabalasingham Pushpabal gave evidence before the Commission at Mullativu on 3 November 2014. She gave evidence about her son aged 32, Thanabalasingham Wijayapaskar. She accompanied her son when he handed himself in to the army at Mulliwaikkal on 19 May 2009. She was separated from her son who was taken away for the purpose of inquiry and put onto a red bus by the army, with about 40 others. She got on to another bus. She was taken to Chettikulam Zone 4 in Vavuniya and the last she saw of her son was him waving to her from the bus in which he was. She knew three other boys of the 40 that were loaded onto the red bus with her son. She has seen none of them again although she had carried out searches at army camps within Vavuniya. Her evidence was that they were all members of the LTTE.<sup>567</sup>
444. Yasmin Sooka, Executive Director of the Foundation for Human Rights in South Africa and former UN Adviser on Post-war Accountability issues in Sri Lanka has made an allegation to the UNHRC supported by a list of 110 names of those it is alleged surrendered to the SLA on 18 May 2009 and were loaded onto busses. These individuals who were last seen in the custody of the military, it is alleged, have never been seen again by their families. This number includes a Catholic Priest, Fr. Francis Joseph.<sup>568</sup>

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<sup>563</sup> Ref: No. 0110/2012/3193 Public Sitting held at Mullativu, Oddusuddan on 4 November 2014.

<sup>564</sup> Ref: No. 3326 Public Sitting held at Pudhukudiyiruppu, Divisional Secretariat on 6 July 2014.

<sup>565</sup> Ref: No. 1954 Public Sitting held at Pudhukudiyiruppu, Divisional Secretariat on 5 July 2014.

<sup>566</sup> Ref: No. 5296 Public Sitting held at Mullativu, Oddusuddan on 5 November 2014.

<sup>567</sup> Ref: No. 000749 Public Sitting held at Mullativu, Marritimepattu on 3 November 2014.

<sup>568</sup> *Ceylon Today*, 19 May 2015, p. 6.

445. In evidence taken by this Commission at public sittings, it has been thus clearly established that several individuals who handed themselves in or who were handed in to the SLA were put on buses or other transport and that those individuals now remain among the disappeared. Whilst the Commission does not suggest that any of the disappeared referred to in the evidence in the preceding paragraphs are living elsewhere and are in hiding from their loved ones, the possibility of phantom disappearances cannot be completely excluded. The most high profile such case was that of Kathiravel Thayapararajah, who was alleged by LTTE sources to have been executed by the security forces with a respected Jaffna based NGO describing his gun shot injuries and subsequent cremation.<sup>569</sup> The truth was that he had gone underground, surfacing in May 2014 in Tamil Nadu with his wife and four children.<sup>570</sup> His identity was discovered upon his arrest for illegal entry into India. The Commission does not speculate as to how many such phantom disappearances there may have been. However, it is alert to the observations of the former BBC journalist who wrote of the detention camps to which those who surrendered were taken.

*'The Sri Lankan military that maintained the cordon sanitaire around the camps, manned the gates, patrolled the perimeters, monitored the handing over of food parcels from worried relatives and managed the thin trickle of visitors allowed into the camps now began to allow people to slip away. It quickly became apparent to senior commanders that lower-ranking soldiers were taking bribes to let people go, or sympathetically turning a blind eye to bedraggled and worn civilians escaping the heat, filth and confinement of the enclosures.'*<sup>571</sup>

446. The Commission has recorded a complaint by Mrs. Ilangatheepan Thusiyanthini of Mullativu, who due to the circumstances of the conflict became separated from her husband. Having made a complaint to this Commission that her husband was missing she subsequently informed the Commission that she had received information from friends of her husband that he was seen at the Andapan Camp in South India where he was a refugee. She was able to make contact with her husband at the camp and they are now reunited and living in Sri Lanka.<sup>572</sup>

447. The Commission through the Ministry of Foreign Affairs has requested information on the names of persons who may have sought refuge in foreign countries. Such information has been denied to this Commission by foreign governments citing their privacy laws as an obstacle. This does not make the burden faced by this Commission any easier.

448. In the Interim Report presented by this Commission to HE President Sirisena on the 23<sup>rd</sup> of April 2015, the Commission then noted with regret that written requests to the Ministry of Defence and to the Ministry of Justice to ascertain the names of persons who were in custody, in prisons, detention camps, refugee camps and rehabilitation

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<sup>569</sup> UTHR(J), 'Let Them Speak: Truth about Sri Lanka's Victims of War', Report No. 34, 13 December 2009, ('UTHR Report No. 34'), p. 140.

<sup>570</sup> *The Island*, 20 May 2015, photograph.

<sup>571</sup> Weiss, *The Cage*, p. 243.

<sup>572</sup> Paranagama Commission – File No.1057.

centres, had not been complied with. However, since that date this Commission welcomes the fact that names have now begun to be supplied to the Commission.

449. Whilst it is quite possible that persons who had been in custody went abroad upon their release, without the knowledge of their families, or alternatively went underground, or changed their identities, the truth must be ascertained as regards the fate of the majority of those disappeared persons whose fates are hitherto unknown. This, the Commission feels is a vital contribution to reconciliation.

### C. The ‘White Flag Killings’

450. The Commission takes the view that the extra-judicial executions of 18 May 2009 that were dubbed ‘White Flag Killings’ in the Channel 4 programmes must be the subject of an independent judicial inquiry. These events are alleged to have led to the deaths of Balasingham Nadesan, the head of the political wing of the LTTE, and Seevaratnam Pulidevan, the LTTE’s head of the peace secretariat, and others who are said to have emerged under the protection of a white flag and on assurances of their personal safety. If proven, such conduct undoubtedly qualifies as a war crime under the Hague Regulations,<sup>573</sup> and Common Article 3 of the Geneva Conventions. Surrendering can take many forms and clearly includes emerging from a position displaying a white flag.<sup>574</sup>
451. The LLRC makes reference to evidence (although not to the surrendering leadership of the LTTE) of combatants and civilians who employed the use of white flags in surrendering and came to no harm at the hands of the army.<sup>575</sup> However, in the view of this Commission, this evidence makes the allegation relating to the surrendering LTTE leadership even more sinister, as it would seem to suggest that the leadership was being singled out for execution.
452. The Commission notes that the desire of Balasingham Nadesan, Seevaratnam Pulidevan and others to surrender was communicated to the well-known British journalist, the late Marie Colvin, of *The Sunday Times*. This underscores to the Commission the fact that the leadership of the LTTE did have continuing access to international journalists. She wrote,

*‘Through highly placed British and American officials I had established contact with the UN special envoy in Colombo, Vijay Nambiar, chief of staff to Ban Ki-moon, the secretary-general. I had passed on the Tigers’ conditions for surrender, which he said he would relay to the Sri Lankan government.’*<sup>576</sup>

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<sup>573</sup> International Conferences (The Hague), *Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land*, 18 October 1907, Article 23(c).

<sup>574</sup> See Henckaerts and Doswald-Beck, *Customary International Humanitarian Law*, vol. I, p. 168.

<sup>575</sup> LLRC Report, para. 4.317.

<sup>576</sup> Marie Colvin, ‘Tigers begged me to broker surrender’, *Sunday Times*, 24 May 2009, <[http://www.thesundaytimes.co.uk/sto/news/world\\_news/article169874.ece](http://www.thesundaytimes.co.uk/sto/news/world_news/article169874.ece)>.

453. As regards the assurances of safety allegedly received by the political wing of the LTTE, the fact that those assurances from the Government were conveyed to Nadesan at about 6.30 a.m. on 18 May 2009, turn on the unsigned statement of a witness.<sup>577</sup>
454. Frances Harrison had been the resident BBC Correspondent in Sri Lanka and had kept up regular contact with Pulidevan and incidentally, had even ‘lobbied the Church of England to take a moral position [...] about more than 300,000 Tamil civilians trapped in the battlefield’.<sup>578</sup> She described as ‘unclear’ what happened in the final hours of the war, when the alleged white flag killings took place.<sup>579</sup> She wrote that one version of the story was that ‘the group including Nadesan and his wife had been killed in a hail of machine-gun fire when they were **trying** to surrender’.<sup>580</sup>
455. The US Department of State Report to Congress in 2009 stated:
- ‘According to these reports, Nadesan and Puleedevan spoke to international and domestic actors who acted as intermediaries with the Secretary to the Foreign Ministry, Dr. Palitha Kohona, to negotiate their surrender along with 300 other people. Nadesan requested the presence of UN Secretary-General envoy Vijay Nambiar to witness the surrender, but was told that he had President Rajapaksa’s assurance that the safety of surrendering LTTE leaders would be assured. On the morning of May 18, Nadesan and Puleedevan led a group of approximately one dozen men and women out to the SLA troops, waving a white flag. According to a Tamil witness who later escaped the area, the SLA started firing machine guns at them. Everyone in the group reportedly was killed.’*<sup>581</sup>
456. Another account by two alleged eye-witnesses was that Nadesan, his wife and Pulidevan were met by a group of Sri Lankan Army personnel and were required to remove their shirts. The Commission finds that this would be consistent with an endeavour to ensure that no suicide vests were being worn.<sup>582</sup>
457. Yet another account was that a witness alleged that he had been informed that having surrendered, the political wing had been given tea after which they were beaten and shot.<sup>583</sup>
458. Shashirekha Thamilselvan, the wife of the deceased LTTE political wing leader S. P Thamilselvan, stated in an interview in 2011 that when she surrendered no one carried white flags and that the ‘story’ that some LTTE leaders came out carrying white flags is not true.<sup>584</sup>

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<sup>577</sup> International Crimes Evidence Project, ‘Island of Impunity? Investigation into international crimes in the final stages of the Sri Lankan civil war’, February 2014, (‘ICEP ‘Island of Impunity?’ Report’), p. 122, para. 9.25.

<sup>578</sup> Harrison, *Still Counting the Dead*, pp. 63 and 65.

<sup>579</sup> *Ibid.*, p. 67.

<sup>580</sup> *Ibid.*, p. 70. Emphasis added.

<sup>581</sup> US Department of State 2009, Report to Congress on Incidents During the Recent Conflict in Sri Lanka, p.46.

<sup>582</sup> ICEP ‘Island of Impunity?’ Report, p. 122, para. 9.32.

<sup>583</sup> ICEP ‘Island of Impunity?’ Report, p. 122, para. 9.39.

<sup>584</sup> Chamara Lakshan Lumara, Diaspora’s bid to mislead us will not succeed’, *The Nation*, 28 August 2011, <<http://www.nation.lk/2011/08/28/inter.htm>>.

459. The Commission is aware that in an article written by Frances Harrison in *The Independent* newspaper on 24 February 2013, she refers to ‘two witnesses who have come forward for the first time’ to allege that the Sri Lankan Army executed LTTE leaders after they surrendered, having carried white flags.<sup>585</sup> The photographs of their bodies in death gives rise to the inference that they were subject to violence or other forms of trauma prior to their demise.
460. In the view of the Commission, as borne out by the sometimes contradictory evidence cited above, the circumstances of the ‘white flag killings’ are by no means clear. Due to the seriousness of these allegations, the Commission has come to the conclusion that an independent judicial inquiry is necessary to establish the facts, determine responsibility and arrive at the truth.

*Individual allegations of executions*

461. In November 2013 Channel 4 Television released footage of Shoba alias Isaipriya as a prisoner of the SLA. She was a high profile member of the LTTE press and communication wing. Images of her dead body also shown by Channel 4, clearly suggest arbitrary execution. The Commission has also received first hand information of this disappearance from the family of Isaipriya.
462. In relation to T. Thurairajasingham alias ‘Colonel Ramesh’, video and photographic material obtained by Channel 4 and other sources depict this LTTE commander being interrogated by the security forces. The video camera recording purports to show a SLA interrogation in the final days of the war capturing also the faces of interrogators, who Channel 4 allege are SLA. The metadata from the recording device, taken some days after this, with ‘still’ images of Colonel Ramesh’s mutilated body would again suggest arbitrary execution.
463. In February 2013, a series of photographs emerged depicting Balachandran Prabahakaran, the 12-year old son of the LTTE leader. The images suggest that he was in a bunker alive and well in May 2009. The allegation is that he was then in the custody of the SLA. Not long afterwards he is shown dead on the ground with his chest pierced by bullets. Whilst both sets of photographs are said to have been taken, a few hours apart with the same camera.<sup>586</sup> Forensic pathologists instructed by Channel 4 suggest that the child was executed. Clearly if this allegation is proven, this is a clear breach of the laws of war. At least one serving senior Sri Lankan General, Major General Udaya Perera, has stated the importance of an investigation into this alleged atrocity.<sup>587</sup> The need for war crimes investigations has even been supported, more recently, by the former Commander of the SLA, now Field Marshall Sarath Fonseka.<sup>588</sup>

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<sup>585</sup> Frances Harrison, ‘Witnesses support claim that Sri Lankan army shot prisoners’, *The Independent*, 24 February 2013. <<http://www.independent.co.uk/news/world/asia/witnesses-support-claim-that-sri-lanka-army-shot-prisoners-8508617.html>>.

<sup>586</sup> Human Rights Council 25<sup>th</sup> Session, A/HRC/25/23, 24 February 2014, para. 57(a).

<sup>587</sup> Sundarji, *Sri Lanka: The New Country*, p. 73.

<sup>588</sup> David Corlett, ‘Former Sri Lanka army chief says he would welcome war crime investigation’, *The Guardian*, 27 May 2015. <<http://www.theguardian.com/world/2015/may/27/former-sri-lanka-army-chief-says-he-would-welcome-war-investigation>>.

#### **D. Shelling of Civilians and Hospitals**

464. While there can be no dispute that shelling into and shelling out of the NFZs and shelling attacks that struck hospitals resulted in civilian deaths, the issue for this Commission is whether the evidence available gives reasonable grounds to believe that there was a government policy of indiscriminate or deliberate shelling in violation of the IHL principles of distinction and proportionality and the special protections afforded to civilians and hospitals; and/or that any serious violations of the relevant principles of IHL were committed by members of the SLA that may amount to war crimes and/or crimes against humanity.

##### Source of the shelling

465. This Commission accepts that there is satellite imagery that underlines the fact that shelling took place. The fairest assessment of this matter is to be found in the Report to Congress by the US Department of State in 2009:

*‘Numerous commercial imagery-based reports issued by UN agencies and non-governmental organisations identified evidence of shelling in the NFZ. U.S. government sources are unable to attribute the reported damage to either the Government of Sri Lanka or LTTE forces. Sandy soil conditions in the NFZ and the emerging monsoon season resulting in increasing cloud cover further complicated efforts to monitor the conflict with commercial and USG sources.*

*Such limitations preclude the kind of testing and corroboration of evidence that would be necessary to evaluate whether the allegations presented are factually supported and/or would constitute violations of international law’.*<sup>589</sup>

466. The same US Department of State report noted that it could not be ruled out that the LTTE shelled civilian areas in order to blame the SLA.<sup>590</sup> Indeed, there is positive evidence that such shelling of Tamil civilians by the LTTE did take place.<sup>591</sup>
467. Pivotal to the attribution of shelling to a particular side in a war is ‘*proving that a specific crater was caused by a shell from a particular type of weapon, which was fired on a particular bearing. The British Army Pamphlet covers crater analysis and is titled Artillery Training in Battle, Pamphlet No. 12 part 3[...]. The crater selected for examination should be fresh. Distinctive features tend to erode over time and may disappear altogether in poor weather.*’ It goes on to say that, ‘*it may not be possible to examine craters when the ground is unsuitable. The ground may be too rocky and hard in which case little impression is made. Conversely, the ground may be too soft and wet in which case the crater may fill with water*’.<sup>592</sup>

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<sup>589</sup> US State Department Report, 2009, p. 10.

<sup>590</sup> US State Department Report, 2009, p. 24.

<sup>591</sup> UTHR Report No. 32, para. 1.4.2.; Weiss, *The Cage*, p. 109

<sup>592</sup> Expert Military Report, Annex 1, para. 71

468. The Commission's Military Expert rejects the conclusions at paragraph 101 of the Darusman Report that because the barrels of SLA artillery tracked the declaration of the NFZs, it was an indication that it was the SLA shells that were fired into the NFZs. The Expert Military Report describes the Darusman conclusion as '*inaccurate and speculative devoid of any forensic analysis.*'<sup>593</sup> The Military Expert goes on to state at paragraph 71 that '*it is not possible at this point in time and, on the evidence available, to accurately state which side's artillery and mortars caused identified shell craters and civilian casualties.*'<sup>594</sup>

469. In the view of the Military Expert, it is not possible on the basis of the evidence currently available to accurately state which side's artillery and mortars caused identifiable shell craters and civilian casualties. His comments are:

*'[T]he clinching argument as to where responsibility lies for the shelling is in the direction from which the shells were fired. This can only be retrospectively determined from analysis of the shell craters either on the ground as soon as possible after the event or from available imagery or, to a lesser extent, from credible witnesses at the receiving end. To suggest, as one report does, that because the barrels of SLA artillery tracked the declaration of the 'NFZs' is an indication that they fired into those NFZs is inaccurate and speculative, devoid of any forensic relevance. It is normal artillery practice for guns to be laid in the direction of the threat, but that does not mean they actually fired. Given that the analysis of the shell craters is inconclusive, the only source of reliable information are eye-witness accounts, where the direction of shot is best determined either visually by observing a gun flash or audibly by hearing the discharge of a gun or mortar. The flat nature of the ground in the Eastern Wannu makes observation difficult, but a witness might hear a distant bang from a particular angle and after a small pause observe the explosion of a shell close by; he can then with some assurance, but not with total certainty, say that the round came from a particular direction. This method, though, is to an extent dependent on a practised ear and the absence of surrounding noise and other distractions. Most accounts that describe events within the NFZs over those last few months tell of chaos, confusion, emotion and terror - these background conditions are less than ideal when endeavouring to determine the direction of incoming indirect fire. The author therefore believes that it is not possible at this point in time, on the evidence available, to accurately state which side's artillery and mortars caused identified shell craters and civilian casualties.'*<sup>595</sup>

470. This is a conclusion with which this Commission respectfully agrees and can only underline that while shelling incidents clearly require investigation, experts in this area of law have highlighted the particular evidential hurdles in actually proving such allegations to a criminal standard of proof.

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<sup>593</sup> Expert Military Report, Annex 1, para. 71.

<sup>594</sup> Expert Military Report, Annex 1, para. 71.

<sup>595</sup> Expert Military Report, Annex 1, para. 71.

### Shelling in the NFZs

471. In 1990, during an earlier part of the conflict in Sri Lanka, the Government and the LTTE agreed that there should be established a hospital zone or a safe zone in relation to the Jaffna hospital. There was agreement between the Government and the LTTE that a compound would be marked with red crosses for identification purposes and that no armed personnel nor military vehicles would be stationed within that vicinity. However, *'[a] unilateral declaration by one party alone will not suffice'*.<sup>596</sup> The legal authority of the SLA to respond to attacks initiated by the LTTE was unaffected by the semantic designation of the NFZ. The legality of specific artillery strikes in the so-called NFZs are thus entirely dependent upon a case by case, target by target analysis, common to the assessment of any operational decisions in the context of armed conflict.
472. As has already been observed, the LTTE refused to acknowledge the NFZs as safe areas or protected zones.<sup>597</sup> Therefore, the mere labelling of an area as an NFZ had no legal effect on the underlying authority of the SLA to attack lawful targets within such areas using lawful weapons in a lawful manner as permitted under the laws and customs of war.
473. In the final days of the war an important Jaffna based NGO had this to say:
- 'At the beginning of the operation the Army had used some shells which resulted in some civilian casualties. However, the IDPs are uniformly emphatic that the Army shelled only in reply to the militants' mortar and gun fire from among the civilians'*.<sup>598</sup>
474. Whilst criticizing the GoSL for making the decision to move the Army into the densely populated NFZs the same Jaffna based NGO went on to say:

*'From what has happened we cannot say that the purpose of bombing or shelling by the government forces was to kill civilians. As pointed out earlier, ground troops took care not to harm civilians. But the decision to go in and take area meant that it had to counter the LTTE's firepower with its own firepower, inevitably leading to large civilian casualties'*.<sup>599</sup>

### The proportionality assessment

475. With reference to its assessment of the applicable law in Chapter 6, the Commission finds that it is clear that artillery fire into areas where civilians were present cannot be deemed *per se* unlawful, but must be subjected to the traditional analysis drawn from the principles of distinction, military necessity and proportionality.

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<sup>596</sup> Sivakumaran, *The Law of Non-International Armed Conflict*, p. 381.

<sup>597</sup> Darusman Report, para. 80.

<sup>598</sup> UTHR Report No. 32, p. 6.

<sup>599</sup> Ibid, p. 22.

476. In calculating the number of civilians killed by shell fire alone, that can be ascribed to one side or the other (including deaths as a result of LTTE tactics of situating its weaponry near to UN positions or hospitals to attract SLA responses or the ‘*shoot and scoot*’ tactics of the LTTE)<sup>600</sup>, the Commission is faced with factors that render it almost impossible to determine how many such civilians were in fact killed as a result of shell fire by one side or the other. The reasons that complicate any such evaluation are the following:
- The LTTE shelling of its own Tamil civilian hostages.<sup>601</sup>
  - The LTTE’s use of homemade multi barrelled rocket launchers (MBRLs), which according to the Commission’s Military Expert lacked a solid platform and would thus have been extremely unstable when fired, resulting in a loss of range, inaccuracy and a much greater spread of rounds which would inevitably have added to the civilian casualty figures.<sup>602</sup>
  - The fact that so many LTTE fighters did not wear uniforms.
477. The Commission is satisfied that the LTTE used human shields in violation of IHL and that their use of such human shields met the elements necessary to establish a war crime as set out in Chapter 6. It would have been very difficult for military commanders to determine at the time the extent to which these civilians were serving voluntarily as human shields, and were thus legitimate military targets while taking part in the hostilities. Indeed, there is little case law that assists on the specific subject of proportionality in the context of the extensive use of human shields.<sup>603</sup> It seems to this Commission that the Government forces would have been entitled to take into account a variety of factors at the time, which reasonable commanders in their same position would have thought necessary and prudent to consider when deciding on the nature, target and proportionality of any military attack:
- As was widely known, the LTTE’s strategy was to use the civilian population (whether voluntarily or not) of the Wannai for the sole purpose of defeating the GoSL’s military campaign to destroy the LTTE so as to enable the LTTE to continue to exist and to be able to continue the war.<sup>604</sup>
  - In situations such as this, when an enemy force melts into the civilian population and persons who appear to be civilians periodically engage in hostilities, determining who is a legitimate target becomes nearly impossible. The fluidity between hostile persons and civilians, and the conscious blending

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<sup>600</sup> Weiss, *The Cage*, p. 111.

<sup>601</sup> Weiss, *The Cage*, p. 109.

<sup>602</sup> Expert Military Report, Annex 1, para. 38.

<sup>603</sup> There have been other cases and scenarios where human shields have been considered, but none would seem to parallel the factual circumstances in Sri Lanka. For example, the use of human shields in the Balkans: Fifth Periodic Report on the Situation of Human Rights in the Territory of the Former Yugoslavia submitted by Mr. Tadeusz Mazowiecki, Special Rapporteur of the Commission on Human Rights, E/CN.4/1994/47, 17 November 1993, paras 36-37.

<sup>604</sup> Darusman Report, pp. ii, iii.

of hostile persons into the civilian population makes targeting decisions even harder.<sup>605</sup>

- Various reports indicate that LTTE forces fired artillery from civilian areas or near civilian installations to attempt to shield themselves from attack and total destruction.<sup>606</sup> LTTE forces also stationed weaponry in civilian locations such as hospitals.<sup>607</sup>
- It was known that the LTTE forces were using heavy artillery which was fired from locations in the Wanni, including from within the so called NFZs.<sup>608</sup> These weapons and locations would have been regarded as legitimate military targets and could themselves have been targeted with weaponry appropriate and proportionate to the destruction of the LTTE's weapons.
- The Government had at an early stage in 2009 offered the LTTE the chance to surrender, they had refused. There were known international efforts to broker a surrender that involved Kumaran Pathmanathan which apparently broke down due to the intransigence of the leader, Prabhakaran.<sup>609</sup>
- Crucially, the LTTE were using their suicide squads and were conscripting adults and children as young as 13 as they lost fighters.<sup>610</sup> They controlled who could be evacuated by boat by the ICRC and were shooting those trying to cross to SLA lines.<sup>611</sup> In the view of this Commission there was clearly an obligation on the Government to act to end the crisis. Delay and inaction could have led to greater civilian casualties at the hands of the LTTE.
- In the ultimate, the resolve of the Government to end the conflict, even when faced with the unpalatable choice of killing or injuring civilians in the vicinity of LTTE artillery batteries, and other legitimate targets is likely to have saved many more civilian lives and those of the armed forces by bringing the war to a close.

478. Accounting for the use of artillery further or closer to the strike zone, which in turn affects the accuracy of projectiles, the *Gotovina* Appeals Chamber dismissed the 200 meter 'margin of error' *per se* rule that had been developed and imposed by the Trial Chamber. This is important for two reasons: 1) there is no bright line prohibition that would have tilted the *proportionality* calculation through a rigid analytical template that ought to have been known to Sri Lanka commanders, and 2) evidence that the Sri

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<sup>605</sup> Laurie R. Blank and Amos N. Guiora, 'Teaching an Old Dog New Tricks: Operationalizing the Law of Armed Conflict in New Warfare', 1 *Harvard National Security Journal* 45, 2010, pp. 65-66

<sup>606</sup> See e.g. Darusman Report, para. 177(c); ICEP 'Island of Impunity?' Report, para. 6.104.

<sup>607</sup> Ibid.

<sup>608</sup> See e.g. Darusman Report, p. iii, paras. 69, 97.

<sup>609</sup> 'Now, US suspects credibility of LTTE surrender offer Sri Lanka Defence Symposium: \* Dismisses KP, Nadesan as mouthpieces with no real authority', *LankaNewspapers*, 3 June 2011. < [http://www.lankanewspapers.com/news/2011/6/67536\\_space.html](http://www.lankanewspapers.com/news/2011/6/67536_space.html) >.

<sup>610</sup> 'Child suicide bomber sent to army frontline in Chalai', *MOD website*, 30 December 2010. < [http://www.defence.lk/new.asp?fname=20090205\\_10](http://www.defence.lk/new.asp?fname=20090205_10) >.

<sup>611</sup> HRW, *War on the Displaced*, p. 25

Lanka forces did their best to anticipate causal factors that could have exacerbated civilian casualties such as firing at a military objective from a greater distance indicates compliance with the *proportionality* principle. The Sri Lanka military cannot be responsible for a higher margin of error than anticipated, and in the language of the ICTY Appeals Chamber ‘*it could not be excluded that the shells were all aimed at legitimate military targets.*’<sup>612</sup>

479. This Commission is conscious of the important fact that in the two years prior to the final phase of the war there had been no allegations of indiscriminate shelling of the use of artillery that was capable of being assessed as a war crime. As observed by the Military Expert:

*‘It is important to underline that there had not been allegations of indiscriminate shelling and war crimes in the previous military artillery operations that equate to the criticisms made in the last phase of the 2009 operation. In my opinion this is indicative of a command ‘culture’ that did not appear to espouse indiscriminate shelling.’*<sup>613</sup>

480. This Commission is aware that SLA were equipped with Multi-Barrelled Rocket Launchers (MBRL’s) which could fire 40 rockets every 18-22 seconds. These weapons are characterised by their fierce fire power, high speed firing and their ability to devastate an area 600 x 400 metres with every salvo.<sup>614</sup>

481. In the view of the Commission’s Military Expert:

*‘Indeed, given the allegations of the use of MBRLs and use of heavy weaponry against the civilian population had the SLA embarked on an indiscriminate campaign of bombardment, the trite but obvious point that any military expert is forced to conclude, is that 2/3 days of shelling would have decimated all those in that final confined area. I reiterate, in my experience of hostage rescue, the fact that so many escaped, is remarkable.*

*This suggests to the author that it is extremely difficult to sustain an accusation of the deliberate killing of civilians by the SLA by shelling, which had the artillery potential over a very short period of time to devastate the temporary civilian encampments, particularly in NFZs 2 and 3. Mistakes that resulted in unnecessary civilian deaths were most definitely made by the SLA, but all armies in all conflicts make such mistakes. There may even have been mistakes that were reckless and greater analysis of particular incidents, such as some of the IDF hospital strikes may demonstrate this. Again, this will depend on whether this was SLA return fire on the LTTE, who had deliberately used ‘shoot and scoot’ tactics, to endanger the hospitals and patients.*

*However, overall and for the reasons considered above, on the available evidence it is my opinion, that the SLA’s operations in broad terms, were proportionate in the circumstances. Whilst the SLA was a relatively*

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<sup>612</sup> *Prosecutor v. Ante Gotovina and Mladen Markač*, IT-06-90-A, Judgment, Appeals Chamber, 16 November 2012, pp. 60-65.

<sup>613</sup> Expert Military Report, Annex 1, para. 76.

<sup>614</sup> *Ibid*, para. 31.

*unsophisticated army, they had evolved into a battle and ultimately war winning machine [...]. In my military opinion, faced with a determined enemy that were deploying the most ruthless of tactics and which involved endangering the Tamil civilian population, SLA had limited options with regard to the battle strategy they could deploy. This would have posed a dilemma for the very best trained and equipped armies in the world. The SLA had either to continue taking casualties **and** allow the LTTE to continue preying upon its own civilians, or take the battle to the LTTE, albeit with an increase in civilian casualties. The tactical options were stark, but in my military opinion, justifiable and proportionate given the unique situation SLA faced in the last phase. Therefore, on the evidence available to me and taking into account my own military experience, I do not find in broad terms that the artillery campaign was conducted indiscriminately, but was proportionate to the military objective sought.*<sup>615</sup>

482. The Commission adopts this conclusion of the Military Expert in assessing the proportionality of the shelling campaign carried out by the SLA while accepting that the question of individual criminal responsibility for specific shelling incidents can only properly be examined through an independent judicial inquiry, which this Commission has undertaken, so to do by appointing a retired High Court Judge to head an investigative team.

*Investigations into shelling incidents as war crimes*

483. This Commission has considered carefully the law and the evidential hurdles in shelling cases. The Commission is deeply indebted to William Fenrick, a military lawyer for many years, who worked as a senior legal advisor for The Office of the Prosecutor at the ICTY for 10 years. He, at the request of the Advisory Council, supplied some of his work prepared for the ICTY, reflecting his experience. He provided a checklist to assist colleagues at the ICTY and elsewhere in identifying incidents of unlawful shelling for the purpose of prosecutions. The Commission regards this document as illustrative of the great evidential gaps that exist, at this moment in time, in being able to ascribe individual criminal responsibility when it comes to the issue of shelling. Fenrick's invaluable checklist is as follows:

- 'A. Investigation where the projectile landed:*
- i. Where did the projectile land?*
  - ii. What damage did the projectile cause? Death or injury (identify victims and provide proof of death or injury)? Damage or destruction of property (how much damage or destruction was caused and to what kinds of structures, e.g., generic civilian objects, objects under additional special protection such as hospitals, institutions dedicated to religion, charity, education, Arts and sciences, historic monuments and works of Art and science)? Precisely where, when and how was death, injury, damage or destruction caused? What prior investigations, if any, have been conducted in relation to the incident? Obtain copies of relevant prior reports.*

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<sup>615</sup> Expert Military Report, Annex 1, paras. 80-83.

- iii. *Was this damage or injury done to military objectives (including combatants or civilians taking a direct part in hostilities), to civilians or to civilian objects? If the damage was done to military objectives only then it is not unlawful. If damage was done to military objectives and civilians or civilian objects then an assessment must be made whether or not the damage to civilians or civilian objects was 'excessive/disproportionate' in relation to the military advantage gained by the attack. If the damage was not excessive or disproportionate then, once again, it is not unlawful.*
- iv. *If both military objectives and civilians and/or civilian objects were hit, in what order were they hit?*
- v. *What other military objectives were located relatively close to the area of impact (50 metres, 100 metres, 200 metres, 500 metres) at the time of impact or shortly beforehand (shoot and scoot mortars for example)?*
- vi. *What other projectiles landed relatively close to the area of impact (50 metres, 100 metres, 200 metres, 500 metres) at or about the time of the incident?*
- vii. *What kinds of projectiles were used?*
- viii. *Where were projectiles landed from (using crater analysis and other techniques if available)?*
- ix. *When (time and day) did the incident occur and what was the weather like? [...]*
- x. *In general terms, what else was occurring in the battle (particularly fairly close by) on the day and particularly about the time when the incident occurred?*

*B. Investigation where the projectile was launched from:*

- xi. *Where is the launch site located and how far was the weapon from the point of impact of the projectile? It is important to establish that the weapon had a range which would enable a projectile fired from it to reach the point of impact.*
- xii. *Was the point of impact of the projectile visible to those firing or directing the firing of the weapon? Vision may be obscured by, among other things, weather, foliage, buildings and smoke.*
- xiii. *What were those firing the projectile or their superiors actually aiming at?*
- xiv. *What was the firing protocol process? Who or what aimed the weapon? Who gave the order to fire and who implemented it? What kind of spotting process was there?*
- xv. *What measures were taken to eliminate or minimise civilian casualties, such as intelligence gathering and assessment?*
- xvi. *What were the applicable rules of engagement and/or firing orders?*
- xvii. *What was the applicable doctrine of artillery generally and for use of this type of weapon? What are the characteristics of this type of weapon, in particular those concerning range and accuracy?*
- xviii. *Who controlled use of the weapon and allocation of projectiles to it?*
- xix. *What (other) weapons systems were available to the attacking commander?*
- xx. *What unit actually conducted the firing and what was its chain of command to the potential accused?'<sup>616</sup>*

484. With this checklist before it, this Commission finds that surmise or guess work is no substitute for hard evidence as to where shelling was coming from and whose shells were causing unlawful damage.

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<sup>616</sup> William J. Fenrick, 'The Prosecution of Unlawful Attack Cases Before the ICTY', (2004) 7 *Dalhousie University Law School*, pp. 183-4

485. The Commission emphasises that ‘intent’ is a key component in being able to ascribe criminal responsibility to such shelling incidents, be they in relation to hospitals or the targeting of civilians.

*‘...In determining whether or not an attack is unlawful, it is essential to distinguish between motive and intent. An attack directed against a military objective which is not expected to cause disproportionate/ excessive civilian casualties or damage to civilian objects is a lawful attack. If that lawful attack is directed by a commander to enable others to commit crimes such as ethnic cleansing (persecution) or for some other mode of participation but the attack itself does not become an unlawful attack...’<sup>617</sup>*

### Shelling of hospitals

486. According to the Darusman Report, ‘Throughout the final stages of the war, virtually every hospital in the Vanni, whether permanent or makeshift, was hit by artillery’.<sup>618</sup> It would appear that the following hospitals were damaged by shell fire between January and May 2009 – Tharmapuram Hospital; Puthukkudiyiruppu (PTK) Hospital; Vallipunam Hospital; Uddayarkattu (UDK) Hospital; Ponnampalam Memorial Hospital; Putumattalan (make-shift hospital for PTK) Hospital; Valayanmadam make-shift hospital; Mullivaikkal Hospital; Mullivaikkal Primary Health Centre; Vellamullivaikkal Hospital.
487. As far as this Commission is concerned, whereas there is abundant evidence that hospitals, both makeshift and otherwise, were damaged by SLA artillery, there is a body of evidence that the LTTE were deliberately attracting SLA fire towards protected targets. An example was referred to on 27 January 2009, when the *New York Times* stated that a hospital came under shelling. The article quoted one witness saying, ‘Our team on the ground was certain the shell came from the Sri Lanka military, but apparently in response to an LTTE shell. All around them was the carnage from casualties from people who may have thought they would be safer being near the UN.’ Another witness said, ‘The team on the ground had suspected that the rebels were firing at government forces from close to where civilians were taking shelter.’<sup>619</sup>
488. Gordon Weiss, a United Nations spokesman in Sri Lanka, recorded a UN official stating ‘The Tamil Tigers were placing their guns dangerously close to [the UN convoy] location, and were quite intentionally in my view drawing fire towards the hospital’.<sup>620</sup>
489. After the fall of Kilinochchi on 2 January 2009, the Puthukkudiyiruppu (PTK) hospital was the only permanent hospital left in the Wannai and its neutrality was recognised by

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<sup>617</sup> Fenrick, ‘The Prosecution of Unlawful Attack Cases Before the ICTY’, p.158.

<sup>618</sup> Darusman Report, para. 81.

<sup>619</sup> Somini Sengupta, ‘U.N. Staff and Hospital Come Under Shelling as Sri Lanka Fights Cornered Rebels’, *The New York Times*, 27 January 2009. < [http://www.nytimes.com/2009/01/28/world/asia/28lanka.html?\\_r=0](http://www.nytimes.com/2009/01/28/world/asia/28lanka.html?_r=0) >.

<sup>620</sup> Weiss, *The Cage*, p. 111. Emphasis added.

the Government and the LTTE.<sup>621</sup> That hospital comprised at least ten buildings clearly marked with the Red Cross emblem with approximately another twenty buildings which were likely to be associated with the hospital.<sup>622</sup> This Commission draws the reasonable inference that due to its spread and its size this hospital would have been more vulnerable to misguided shells or damage from exploding shells in and around the PTK area. The inference drawn by this Commission is fortified by the fact that ‘[t]he LTTE also fired mobile artillery from the vicinity of the hospital, but did not use the hospital for military purposes until after it was evacuated’.<sup>623</sup> In addition, within the hospital safe zone was an LTTE tank, formerly captured from the SLA.<sup>624</sup> The Commission is satisfied that the Darusman Panel fell into error in concluding that the hospital was not used for military purposes. The Commission notes the recorded testimony to the Jaffna based NGO, UTHR(J) from a witness: ‘[i]n my judgment, although the Army was some distance to the south, the LTTE chose to fire from the surroundings of the hospital, as they felt it afforded them some protection.’<sup>625</sup> A UN official sheltering in a compound opposite the PTK Hospital ‘could see the barrel flashes from a Tiger heavy artillery piece just 300 meters from the hospital, quite apart from hearing its thumping reports as the Tiger artillery sent outgoing rounds against the army’s advance, and then quickly shifted positions he could count off the seconds until an incoming barrage responded in an effort to destroy the guns.’<sup>626</sup> This lends further weight to the conclusion of the Commission that the SLA was targeting LTTE weapons and that the LTTE were undoubtedly using the environs of hospitals from which to fire upon the SLA. In addition, UTHR(J) received and recorded evidence that the LTTE disregarded requests from ICRC not to put its military vehicles in front of the hospital as these could be spotted by the army UAVs leading to shell attacks.<sup>627</sup> Indeed the LTTE took over hospital ambulances which were used by the LTTE leadership to move around.<sup>628</sup>

490. As regards the allegation of the deliberate shelling of hospitals by the SLA, the view of this Commission is that there is sufficient evidence to give rise to a reasonable belief that a crime or crimes may have been committed. It is also the view of this Commission that a Judge-led investigation should take place in relation to these allegations to determine in the light of the applicable law, if in fact, there is a *prima facie* case based on the carefully scrutinised evidence.

#### Area Weapons, Phosphorous and Cluster Bombs

491. There is no evidence that this Commission could find to suggest that the SLA used inherently indiscriminate weapons such as barrel bombs that are typically known for their capacity to affect a wide area at great range.

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<sup>621</sup> Darusman Report, para. 90.

<sup>622</sup> ICEP ‘Island of Impunity?’ Report, para. 6.71.

<sup>623</sup> Darusman Report, para. 94.

<sup>624</sup> Hoole, *Palmyra Fallen*, p. 215.

<sup>625</sup> Ibid.

<sup>626</sup> Weiss, *The Cage*, p. 109.

<sup>627</sup> UTHR Report, No.34, p. 36,

<sup>628</sup> UTHR Report No. 34, p. 43.

492. There have, however, been reports of phosphorus and cluster munitions being used by the SLA in areas where civilians were congregated. Indeed, the Darusman Report refers to ‘allegations’ of the use of cluster bomb munitions or white phosphorous around PTK.<sup>629</sup> The sources of the information, which are not ascribed are supported by the following comment:

*‘accounts refer to large explosions, followed by numerous smaller explosions, consistent with the use of a cluster bomb...some wounds in various hospitals are alleged to have been caused by cluster munitions or white phosphorous.’<sup>630</sup>*

493. This Commission notes that in 2012, four years after the end of the conflict, a leaked email from a member of the United Nations Development Programme mine clearance team suggests that there had recently been discovered some evidence of retrieved cluster munitions in the former Sri Lankan conflict zone.<sup>631</sup>

494. It should be noted that the SLA at the time denied the use of such munitions, and that this denial was accepted by the UN at the time of the fighting.<sup>632</sup> In other words it appeared that they did not have any contemporaneous evidence to dispute that denial. The Jaffna based, NGO, UTHR(J) also makes clear that although TamilNet regularly reported the use of cluster munitions, they did not publish any photographic evidence at the time.<sup>633</sup>

495. However, this Commission wishes to make clear that the use of such weapons were not illegal *per se* at the time and that the Cluster Munitions Convention banning their use was not in force. Some countries, such as the US, India and Sri Lanka, were amongst those countries that did not sign the convention.

496. The key issue that would fall to be determined, if such use is proven, is whether deployment was proportionate. If used against civilians clearly this would be a breach of IHL, but if used to counter an attempt to breach SLA lines by those trying to facilitate the LTTE leaders’ escape, subject to the proximity of civilians, it *may* be proportionate.

497. The Commission notes that the Darusman panel did not find conclusive evidence as to whether such munitions were being deployed, who was deploying such munitions and the exact location of deployment.

498. However, the Commission cannot ignore evidence emanating from many quarters, albeit, some of it unsubstantiated, that civilians were hit by cluster munitions or had phosphorus burns. The Commission notes that the UTHR(J) maintains that many of those evacuated by the ICRC had burn injuries.<sup>634</sup> Neither does the Commission ignore the allegation made by a Tamil doctor, who has been granted asylum abroad, who

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<sup>629</sup> Darusman Report, para. 169.

<sup>630</sup> Darusman Report, para. 169.

<sup>631</sup> ‘Cluster bombs found in Sri Lanka, UN expert says’, *BBC News*, 26 April 2012. <<http://www.bbc.com/news/world-asia-17861187>>.

<sup>632</sup> ‘U.N. cites Sri Lanka cluster bomb use’, *Los Angeles Times*, 4 February 2009. <<http://articles.latimes.com/2009/feb/04/world/fg-srilanka4>>.

<sup>633</sup> UTHR Report No. 34, p. 52.

<sup>634</sup> UTHR Report No. 32, p. 17.

'believes' a phosphorus shell exploded above his tent in the final phase of the war, causing it to catch fire and burn him on his back and hands.<sup>635</sup>

499. The Commission is of the view that this is an area requiring further investigation. The Commission believes that there should be a comprehensive medical review of recorded injuries to ascertain whether these weapons were being used, which should also collate the type of injuries caused so that a forensic analysis can be made. Should the UN be in a position to disclose further material on this issue such as photographs, this would no doubts assist local or other investigation teams to examine this matter further.

#### **E. Denial of Humanitarian Assistance**

500. It has been alleged that the Government of Sri Lanka prevented humanitarian aid from reaching affected areas of the Wannai in the final stages of the armed conflict. One of the methods of doing so was by alleged shelling. As a matter of law, parties to a conflict are entitled to control and restrict the flow of humanitarian aid for imperative military reasons, particularly if aid is being appropriated by an adversary in support of its war effort and to sustain its fighters. It is even permissible under IHL to use 'siege warfare' or blockades as a method of waging war providing that it serves legitimate military objectives.
501. Therefore, though IHL envisages scenarios where 'blockade' warfare is permissible, there is no evidence that any form of blockade warfare was employed by the SLA in the final months of the war. Nor, in the view of this Commission is there evidence of a deliberate campaign to starve the civilian population. On the contrary, there is no dispute that humanitarian foodstuffs and aid were permitted to enter the most affected areas to assist the civilian population held hostage by the LTTE, and who were controlled by the LTTE forces. There is evidence that the LTTE were using supplies sent in by the UN and humanitarian organisations to assist their military operations and support their own forces.<sup>636</sup> No armed force can be expected to sustain an adversary through allowing the supply of aid and foodstuffs during armed conflict.
502. A careful balance needs to be struck at all times between supporting civilians without the adversary being able to gain a military advantage. Of course, the adversary has similar obligations to permit humanitarian relief to reach civilians and to prevent its forces from misappropriating such aid.
503. The Darusman Report alleges that the Government of Sri Lanka conducted a '*widespread or systematic attack on the civilian population of the Vanni during and subsequent to, as well as perhaps preceding, the final stages of the war.*'<sup>637</sup> It claims that this attack was achieved in part through the denial of humanitarian aid to the civilian population as well as the shelling of locations such as food distribution centres. The Darusman Report alleges:

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<sup>635</sup> Harrison, *Still Counting the Dead*, pp. 82-83.

<sup>636</sup> Petrie Report, para. 46.

<sup>637</sup> Darusman Report, para. 251.

- The Government ‘shelled the United Nations hub, food distribution lines and near the International Committee of the Red Cross (ICRC) ships that were coming to pick up the wounded and their relatives from the beaches. It shelled in spite of its knowledge of the impact, provided by its own intelligence systems and through notification by the United Nations, the ICRC and others.’<sup>638</sup>
  - ‘[S]everal humanitarian relief objects experienced SLA shelling, in particular Convoy 11, the United Nations presence near Putumattalan, food distribution lines in the first NFZ and Ampalavanpokkanai, and shelling near the ICRC ships.’<sup>639</sup>
504. The Darusman Report therefore concluded that there exist ‘credible allegations [which] point to a violation of the ban on attacks directed against ... humanitarian objects, including food distribution lines.’<sup>640</sup> As set out above, the Darusman Report contains no proper analysis of the application of the core principles of IHL, particularly in respect of *distinction* and *proportionality*, when reaching conclusions about the lawfulness of the military operations as a whole. The same deficiency is evident in respect of the Darusman Report’s conclusions about attacking humanitarian objects – there is no assessment of the military imperatives as weighed against the damage to civilian objects, nor of the LTTE’s actions in locating their military positions close to humanitarian objects and using civilians to shield these positions. Nor is there any assessment of the extent to which the LTTE tactics were to deliberately draw SLA counter fire towards the civilians and UN staff.<sup>641</sup> It is the view of this Commission, as said earlier, that one of the desired aims of the LTTE was to cause civilian casualties so as to ascribe such deaths as wanton killings by the SLA.
505. Human Rights Watch illustrates the much written about position of the UN Humanitarian Convoy 11 in these terms;
- ‘When the 11<sup>th</sup> United Nations Humanitarian Convoy was held back at PTK for about a week in January due to heavy fighting...the LTTE forces immediately set up firing positions close to the convoy and started firing artillery. The SLA responded with its own artillery – one shell struck 100 meters from the convoy [...].’*<sup>642</sup>
506. By citing the above, this Commission is not seeking to convey the impression that the SLA fired but one shell. Indeed, it is accepted that civilians were killed in the Convoy 11 strike, but the key issue is whether there was a deliberate targeting of a UN Convoy or civilians close to it, or whether the SLA attack was a proportionate response to an LTTE attack. The violation of IHL by the LTTE by positioning its artillery close to the UN convoy resulted in a heavy artillery exchanges between the LTTE and the SLA. There can be little doubt that civilians were killed in these exchanges. However, this is an example of LTTE forces deliberately endangering those of protected status leading to tragic loss of life.

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<sup>638</sup> Darusman Report, p. ii.

<sup>639</sup> Darusman Report, para. 210.

<sup>640</sup> Darusman Report, para. 200.

<sup>641</sup> Weiss, *The Cage*, pp. 110, 111.

<sup>642</sup> Human Rights Watch interview, Vavuniya, February 8, 2009. Cited in HRW Report, p. 9.

507. The Darusman Report also highlighted that the *‘living conditions for displaced civilians were poor and deteriorated with repeated displacements; basic necessities, including food, were increasingly scarce’*.<sup>643</sup> It is beyond question that the conditions faced by civilians were very serious. The Darusman Report does not however examine the failure of the LTTE to address this situation or indeed the manner in which it was created and aggravated by the LTTE’s actions in preventing civilians from leaving the area and failing to provide a safe passage for their escape in order to alleviate the humanitarian crisis.
508. Instead, the Darusman Report focuses on the allegation that the Government deprived civilians of food and humanitarian aid.<sup>644</sup> It concluded in a sweeping and unsubstantiated fashion that the Government of Sri Lanka violated the IHL rule that *‘prohibits starvation as a method of warfare’*, noting that this rule *‘also requires the parties to “allow and facilitate rapid and unimpeded passage of humanitarian relief for civilians in need, which is impartial in character and conducted without any adverse distinction, subject to their right of control.”’*<sup>645</sup> The Darusman Report suggests that these rules were breached by *‘depriv[ing] persons in the conflict zone of humanitarian assistance, in the form of food and basic medical supplies, particularly supplies needed to treat injuries.’*<sup>646</sup>
509. At no stage does the Darusman Report consider any of the exceptions to the provision of aid under IHL, particularly when it is being misused by the adversary to provide a military advantage.
510. The Darusman Report does concede that there was no blanket ban on the delivery of humanitarian aid in the final stages of the war. Rather, the Darusman Report claims that while the Government agreed to the supply of aid, it limited the amount made available.
511. It should also be underlined that the UN, themselves, had underestimated the number of civilians in the conflict zone. On 7 April 2009, the *Guardian* newspaper in London cited Walter Kaelin, the representative on the human rights of internally displaced persons, who maintained that there were more than 100,000 trapped civilians in the war zone. The Darusman Report maintains that there were three times more.<sup>647</sup>
512. The Commission notes that *‘the United Nations Resident / Humanitarian Coordinator and the head of the World Food Programme (WRP) in Sri Lanka secured an agreement with the Government, which allowed the United Nations to continue its humanitarian assistance with weekly convoys into the Vanni to deliver food, shelter and medicine’*. The Darusman Report then states that the Government *‘imposed extensive restrictions on convoy participants’* and on *‘food and medical supplies’*<sup>648</sup>, and that *‘the Government downplayed the number of civilians present in the LTTE-controlled area, using the low estimates to restrict the amount of humanitarian assistance that could be*

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<sup>643</sup> Darusman Report, para. 72.

<sup>644</sup> Ibid.

<sup>645</sup> Ibid, para. 211.

<sup>646</sup> Ibid, para. 176(c). See also, pp. ii-iii.

<sup>647</sup> Gethin Chamberlain, ‘Sri Lanka rejects UN call for ceasefire in war against Tamil Tigers’, *The Guardian*, 7 April 2009. <<http://www.theguardian.com/world/2009/apr/07/sri-lanka-rejects-ceasefire-call>>.

<sup>648</sup> Darusman Report, para. 178.

*provided, especially food and medicine.*<sup>649</sup> It states that the ‘*different calculations of need*’ were ‘*deliberately kept low*’<sup>650</sup> and that as a result ‘*the food delivered by WFP to the Vanni was a fraction of what was actually needed, resulting in widespread malnutrition, including cases of starvation.*’<sup>651</sup> The Report also concludes that ‘*the medical supplies allowed into the Vanni were grossly inadequate to treat the number of injuries incurred by the shelling*’ and that ‘*the absence of the needed medical supplies imposed enormous suffering and unnecessarily cost many lives.*’<sup>652</sup>

513. The Darusman Report does not analyse whether any restrictions may have been imposed due to the LTTE getting unauthorized access to the aid supplied, thus depriving the civilians of its use, and relying on that very aid for the LTTE’s own survival to be able to keep engaging the SLA.
514. The Petrie Report did list a number of factors that needed to be taken into account including the fact that food reserves in 2008 had already been low, the food storage in the Wannai had been looted when the UN evacuated the region in 2009 and that the constant displacement meant it was difficult for families to transport food.<sup>653</sup> The Petrie Report also makes mention of an allegation that the LTTE may have taken up to 20% of all the assistance that had been sent into the Wannai.<sup>654</sup>
515. This is plainly a most relevant consideration that should have been taken into account on any fair minded assessment of the facts. The rules of IHL, as set out below, permit restrictions to be imposed on the supply of humanitarian relief for legitimate military reasons. It is also necessary given the factual circumstances of the final stages of the conflict to consider the responsibilities that fell upon the LTTE towards the civilians they were holding and preventing from leaving the conflict zone and to address their humanitarian needs. No responsible government would want to be party to bolstering the enemy’s position by supplying large quantities of humanitarian aid in order that their enemy could continue to exercise control over civilian hostages, and thereby prolong the conflict. The imperative as this Commission sees it, would have been to seek to get the civilians released from the area as soon as possible.
516. As set out above, it is widely reported that in the final stages of the conflict, the LTTE held and controlled the civilian population in the Wannai in order to gain a military advantage.<sup>655</sup> The ICRC Head of Operations for South Asia, Jacques de Maio, informed US officials that the LTTE were trying to keep civilians in the middle of a permanent state of violence. A US diplomatic cable states that the LTTE ‘*saw the civilian population as a “protective asset” and kept its fighters embedded amongst them.*’<sup>656</sup> On 26 March 2009, the UN Under Secretary-General for Humanitarian Affairs and Emergency Relief Coordinator, Sir John Holmes, informed the UN Security Council that:

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<sup>649</sup> Ibid, para. 124.

<sup>650</sup> Ibid, para. 126.

<sup>651</sup> Ibid, para. 128.

<sup>652</sup> Ibid.

<sup>653</sup> Petrie Report, para 46.

<sup>654</sup> Ibid.

<sup>655</sup> Darusman Report, para. 70.

<sup>656</sup> Griffiths, ‘Sri Lanka: S/WCI AMB. Williamson's Geneva Meetings’, Embassy Colombo, *WikiLeaks*, 15 July 2009, para. 5. <[http://www.wikileaks.org/plusd/cables/09GENEVA584\\_a.html](http://www.wikileaks.org/plusd/cables/09GENEVA584_a.html)>.

*‘the LTTE continue to reject the Government’s call to lay down their arms and let the civilian population leave, and have significantly stepped-up forced recruitment and forced labour of civilians ... at least two UN staff, three dependents and eleven NGO staff have been subject to forced recruitment by the LTTE in recent weeks.’<sup>657</sup>*

517. On the basis of this and other information, the Commission is of the view that the LTTE violated their obligation to protect the civilian population by not locating military objectives within civilian areas and removing the population from the vicinity of military operations. On the contrary, the LTTE deliberately placed the civilian population in danger.
518. In light of these breaches by the LTTE, the delivery of humanitarian aid was severely complicated. LTTE fighters were mixed with the civilian population making it very difficult to determine whether humanitarian aid was received for the benefit of civilians and not the LTTE. There were many reports that LTTE forces appropriated from the UN and various NGOs humanitarian aid intended for the civilian population. It is documented that boats given by ‘Save the Children’, tents from the UNHCR, and a hospital built with NGO support were used by the LTTE forces for their military campaign.<sup>658</sup>
519. Based on what has been said above, it is the Commission’s view that the Government of Sri Lanka was permitted to limit the passage of aid to the extent that such aid may have been used by the LTTE for its military efforts and to sustain its forces.
520. As to the allegations that the SLA conducted attacks directed against food distribution centres<sup>659</sup>, it must be noted that the Darusman Report found that the LTTE *‘fired artillery in proximity to large groups of internally displaced persons (IDPs) and fired from, or stored military equipment near, IDPs or civilian installations such as hospitals.’*<sup>660</sup> It was recorded at the time that the *‘U.S. has publicly urged the LTTE to allow IDPs freedom of movement and to not fire from positions in or near IDP concentrations’*.<sup>661</sup>
521. This Commission observes that the US would only have adopted that position if it had good information to corroborate the LTTE’s positioning of weaponry near the civilian population. Nevertheless, this Commission is of the view that a full investigation is necessary with regard to the allegations relating to the deliberate targeting of food queues.<sup>662</sup>

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<sup>657</sup> Grasping at straws leaving the tail: diaspora activist on Holmes' brief, *TamilNet*, 27 March 2009, <<http://www.tamilnet.com/art.html?catid=79&artid=28851>>.

<sup>658</sup> ‘Sri Lanka probes aid groups for suspected rebel links’, *oneindia*, 11 January 2007, <<http://news.oneindia.in/2007/01/11/sri-lanka-probes-aid-groups-for-suspected-rebel-links-1168532119.html>>.

<sup>659</sup> Darusman Report, para. 176(b).

<sup>660</sup> Darusman Report, p. iii.

<sup>661</sup> ‘Sri Lanka: Declared Safe Zone Inoperative; ICRC Contemplates Full Withdrawal’, *Embassy Colombo, WikiLeaks*, 27 January 2009, para. 7. <[https://www.wikileaks.org/plusd/cables/09COLOMBO95\\_a.html](https://www.wikileaks.org/plusd/cables/09COLOMBO95_a.html)>.

<sup>662</sup> Darusman Report, p. ii, para. 83, 200, 202, 210.

522. It is clear that medicines and food supplies were limited in the final stages of the conflict. It is clear that there was an underestimate of the number of people trapped in the conflict zone, but it is worth noting that the UN and ICRC also underestimated this figure.<sup>663</sup> However, this Commission is of the opinion that INGOs have failed to provide a balanced analysis on the deprivation of food and medicines.
523. It appears clear that there were inadequate supplies of medicines and food, though this is the sad fact that applies to many conflicts across the world. The essence of ‘blockade’ warfare lies in an attempt to capture the disputed territory *through* starvation. This Commission is of the view that the GoSL’s intention appeared to demonstrate a desire not to kill civilians through starvation, but rather, to induce the LTTE to surrender.
524. It is significant that Article 58 of Additional Protocol I places the obligation to facilitate evacuation on the party who controls the civilian population and who may be defending against an attack or siege operation. In this case, it was the LTTE. One account, given by one of the academics who belongs to UTHR(J), (the group of mainly Jaffna based academics that is critical of both the GoSL and the LTTE), recounts an instance which underlined the callous manner in which this control was exercised:

*‘[Sivalojan] escaped and was caught by the LTTE and shot through the back just missing his heart [...]. An LTTE doctor saw him, read the report from the cadres who brought him, and consigned Sivalojan to lie with the patients who were left to die [...]. A government doctor later saw him, and left instructions for him to be washed, moved to a bed and to be administered certain injections and saline and later shipped on an ICRC vessel. Another LTTE doctor came later, looked at his record, placed his pen and drew a mark across the record and remarked that Lojan was a traitor who refused to fight and therefore not fit to live. He was sent back to lie with the dying [...]. He was refused permission to board the ICRC ship. He miraculously survived [...] and was later admitted to Vauniya Hospital.’<sup>664</sup>*

525. The Commission finds in such an example further evidence that it was the LTTE who were controlling those who could or could not leave the war zone, thereby subjecting their own civilians to additional harm. Nevertheless, this Commission believes that the GoSL should make this aspect of the complaint against the GoSL part of the judged investigation along with other matters upon which this Commission has already called for further investigation.<sup>665</sup>

<sup>663</sup> Pierre Krähenbühl, ‘Sri Lanka: situation of civilians nothing short of catastrophic’, ICRC website, 21 April 2009. Press Release. < <https://www.icrc.org/eng/resources/documents/press-briefing/sri-lanka-press-briefing-210409.htm> >. ; Å Shenali D Waduge, ‘ICRC Sri Lanka during final phase of war’, Lankaweb, 21 January 2014. < <http://www.lankaweb.com/news/items/2014/01/21/icrc-sri-lanka-during-final-phase-of-war/> >.

<sup>664</sup> Hoole, *Palmyra Fallen*, pp. 221-222

<sup>665</sup> GoSL permitted ICRC evacuations and they continued until 9 May 2009 after which the fighting became too intense.

## F. Genocide

526. It has been alleged, including most recently in a resolution of the Northern Provincial Council, that successive Sri Lankan governments have committed genocide against Tamils, and it has been asserted that these allegations should be probed by the UN High Commissioner for Human Rights.<sup>666</sup> The claims of genocide are based both on alleged conduct during the final phase of the war and also on other alleged acts of genocide by which Tamils have been targeted since the 1950s. This Commission will only address the former allegations in this report.
527. Genocide is a legal and not a political term. Indeed, in assessing claims of genocide, not only do the factual allegations need to be verified (including the numbers of deaths), but equally, the applicable legal standards for the crime of genocide must be properly understood and applied.
528. It appears to this Commission that no reports of any NGOs to date have referred to a recent judgment of a Dutch domestic court absolving the GoSL from being characterised as a ‘racist regime’ or addressed the recent jurisprudence of the ICJ relating to genocide allegations in the context of the conflict in the former Yugoslavia as described in Chapter 6 of this report.<sup>667</sup> A close study of these cases may dissuade groupings seeking political attention through use of the term ‘genocide’ from persisting with claims that do not meet the deliberately narrow legal standards for establishing that particular offence.
529. This Commission rejects the suggestion that the GoSL’s policies during the last phase of the conflict in Sri Lanka meet the deliberately high legal test of the perpetrator ‘[intending] to destroy, in whole or in part, a national, ethnical, racial or religious group [...]’ as such.<sup>668</sup> To this extent the Commission rejects the idea that either the GoSL or the SLA deliberately targeted Tamil civilians with an intent to destroy the Tamil race. The Commission is supported in this view by a US diplomatic cable which refers to Jacques de Maio, head of ICRC operations in South Asia, stating to US Ambassador Clint Williamson that any crimes that may have been committed by Sri Lankan forces **did not amount to genocide**.<sup>669</sup> <sup>670</sup> While the ICRC is usually unwilling to provide commentary from war zones, so as to preserve its neutrality, this cable is significant as it provides a contemporaneous insight by an organisation that was in theatre during this critical time.

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<sup>666</sup> ‘NPC passes resolution asking UN to investigate genocide of Tamils by Sri Lanka state’, *Tamil Guardian*, 10 February 2015. <<http://www.tamilguardian.com/article.asp?articleid=13726>>.

<sup>667</sup> *Interpretation of ‘Racist Regime’ under Article 1(4) of Additional Protocol I, Prosecutor v X*, District Court of The Hague, 21 October 2011, LJN BU2066 (English translation LJN BU9716); *Croatia v. Serbia Genocide Case*.

<sup>668</sup> The 1948 Convention on the Prevention and Punishment of the Crime of Genocide (article 2)

<sup>669</sup> Griffiths, ‘Sri Lanka: S/WCI AMB. Williamson's Geneva Meetings’, Geneva, *WikiLeaks*, 15 July 2009, para. 3. <[https://www.wikileaks.org/plusd/cables/09GENEVA584\\_a.html](https://www.wikileaks.org/plusd/cables/09GENEVA584_a.html)>.

<sup>670</sup> Shamindra Ferdinando, ‘How the ICRC exonerated SLA from genocide charge. War crimes: The relevance of a secret US missive from Geneva’, *The Island*, 22 July 2014. Emphasis added. <[http://www.island.lk/index.php?page\\_cat=article-details&page=article-details&code\\_title=107200](http://www.island.lk/index.php?page_cat=article-details&page=article-details&code_title=107200)>.

530. Corroboration for this viewpoint is also to be found in the report of 10 June 2010 by the Jaffna based NGO, The University Teachers for Human Rights, Jaffna, ('UTHR(J)') which states:

*'The population before was estimated at 300 to 350 thousand. Presently nearly 300 000 are accounted for in IDP camps. It would be some time before all are registered and detailed checks could be made. **There is no evidence of genocide.** It is hard to identify any other Army that would have endured the provocations of the LTTE, which was angling for genocide, and caused proportionately little harm.'*<sup>671</sup>

531. On the basis of the evidence available to this Commission and the prevailing law, the suggestion that the crime of genocide was or may have been committed during the final phase of the war is without foundation. While there may have been long standing practices of religious and racial discrimination carried out by various governments toward minorities, targeting such groups even if for discriminatory reasons is not sufficient to constitute genocide.

### **G. War Without Witnesses**

532. The conflict in Sri Lanka has been dubbed a 'war without witnesses'. It has been alleged that the government suppressed the media in order to commit crimes that would be hidden because of the absence of a media presence. The Commission finds that such a suggestion is misleading and one-sided in that both the GoSL and the LTTE placed tight restrictions upon the Press. In the language of the US State Department:

*'Both the GSL and LTTE denied press, foreign governments, and other organizations unrestricted access to the conflict zone'*<sup>672</sup>

533. The measures to exclude journalists from conflict zones by the SLA in the final months of the armed conflict need to be assessed in the light of international state practice designed to protect journalists and to ensure that their presence does not provide an undue military advantage to their adversaries. The Commission has had to consider whether the position taken by the GoSL on media exclusion was a departure from what has occurred in other conflict zones, and whether it was consistent only with an intention to breach the laws of war.

534. Frances Harrison, the BBC journalist, has said that 'Dubbing [the] Sri Lankan conflict as "war without Witness" is simply not true'. In particular, there were 60 catholic priests and nuns, 240 local NGO workers and Tamil civil servants working for the Central Government including five doctors.<sup>673</sup>

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<sup>671</sup> UTHR Report No. 32, para. 5. Emphasis added.

<sup>672</sup> US State Department Report, p. 9.

<sup>673</sup> Frances Harrison at Frontline Club debate, London, 16 May 2012. Francis Harrison, 'Dubbing Sri Lankan Conflict as 'war without Witness' is Simply not True', *DBSJeyaraj*, 17 May 2012, <<http://dbsjeyaraj.com/dbsj/archives/6482>>.

535. Whilst this Commission has been preparing this Report, the appalling beheading of the Japanese journalist Kenji Goto and others have taken place at the hands of the so called Islamic State (IS). The kidnapping and killing of journalists by IS has highlighted both the vulnerability of journalists in conflict zones as well as the ways that the media can be misused by insurgents and terrorists. In an asymmetrical conflict the media can be exploited for political and military ends. It can be exploited to spread ideologies, to spread terror, to seek to attract new recruits on the back of even horrific propaganda and to seek to gain the military upper hand. In 2001, when the late Marie Colvin – *The Times of London* journalist – was injured by SLA troops while crossing back to the GoSL lines with the assistance of LTTE cadres, her injury, rather than the precarious position in which she had placed herself, created a huge media furore and a two page spread in the *Sunday Times* in 2001.<sup>674</sup> Lost in all this was the fact that she had entered LTTE territory illegally, thereby placing herself in great danger. Nevertheless, the incident generated considerable adverse reactions towards the GoSL.
536. It is also clear to this Commission that from the mid-1980's, using the extensive Tamil diaspora funds, by 2008/9 the LTTE possessed a highly sophisticated media operation with numerous websites and the ability to lobby both politicians and senior international journalists. Indeed, Pulidevan right up to the last day of the conflict on 18 May 2009 was able to contact Frances Harrison of the BBC by satellite phone.<sup>675</sup> Furthermore, we know from evidence of his wife, which she gave as recently as the week of June 22<sup>nd</sup> 2015 that her husband was also in contact with prominent South Indian politicians at the same period on this satellite phone.<sup>676</sup> Similarly, the LTTE leadership was able to contact and lobby through the late Marie Colvin, *The Times* journalist, the most senior officials of the United Nations.<sup>677</sup>
537. This Commission notes that most of the cables from the US Embassy in Colombo to Washington during the final phase of the war dealing with civilian casualty figures provided by a Tamil website contain the caution '*these reports cannot be confirmed and are frequently exaggerated*'.
538. It is clear that while the GoSL may well have sought to 'control' the media reporting, it is evident from contemporaneous TV footage that there were journalists present in the field and there were at least two embedded foreign journalists who suggest that they were given access to the warzone, albeit, not for the last two days of the conflict.<sup>678</sup>
539. Therefore, this Commission has analysed the practice of other states in seeking to ascertain whether the media policy of the GoSL reflects that adopted by other states in conflict which have sought to restrict access to conflict zones for security reasons but also to prevent the adversary from using the press as a means of gaining a military advantage. It may be that there are compelling moral and policy considerations in

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<sup>674</sup> 'Marie Colvin, wounded while working in Sri Lanka in 2001 dies in Syria', *Transcurrents*, 22 February 2012. <<http://transcurrents.com/news-views/archives/8508>>.

<sup>675</sup> Harrison, *Still Counting the Dead*, p. 67.

<sup>676</sup> Sulochana Ramiah Mohan, 'I want justice' – Pulithevan's wife speaks', *UK Tamil News*, 30 June 2015. <<http://www.uktamilnews.com/?p=13644>>.

<sup>677</sup> Ibid.

<sup>678</sup> Michael Roberts, 'Witnesses to "The War Without Witnesses"' *Colombo Telegraph*, 30 December 2013. <<https://www.colombotelegraph.com/index.php/witnesses-to-the-war-without-witnesses/comment-page-1/>>.

favour of these restrictions, which are directed at preventing insurgents and terrorists from abusing civilian protection for military purposes.

540. It is well-recognised that journalists can be excluded from conflict zones to protect military and national security interests and for their safety. Reasonable restrictions can be placed on their access to conflict areas. The right of access to conflict areas is clearly not absolute. The US courts, for example, have held that such restrictions are justified.<sup>679</sup> The US restrictions concerned the access of journalists to the battlefield in Iraq. The military ordered a complete black-out of media reporting when ground operations began, stating that: ‘*We cannot permit the Iraqi forces to know anything about what we're doing.*’<sup>680</sup>
541. This Commission is aware that the restrictions that the US had initially applied included that no journalists could enter the conflict zone without a US military escort and no interviews of military personnel were permitted without an escort present. Any violations of these rules could result in arrest, detention, revocation of press credentials, and expulsion of the journalist from the combat zone. The Pentagon explained that these rules were designed to protect American troops, military operations, and the journalists themselves. One high Navy official stated that: ‘There is a clear and present danger in today's instant communications age, which may put our troops at risk. Our enemies are watching CNN-TV.’<sup>681</sup> Importantly, the US courts have held that these restrictions were constitutional.<sup>682</sup>
542. In 2009, at the same time as the conflict in Sri Lanka, this Commission also notes that the Pakistani Government was struggling to contain a terrorist threat in the Waziristan border region with the technical assistance of the US military. The Pakistanis also felt the need to close off the region to foreign journalists and prevent access to the ICRC and Medicines Sans Frontiers (‘MSF’). Brice de la Vigne, the operational coordinator for MSF stated, ‘*We can't get within a hundred kilometres of Waziristan.*’<sup>683</sup>
543. The Commission is of the opinion that while the GoSL may have been reluctant to admit it, they lacked the ability to counter the well funded and sophisticated propaganda machinery of the LTTE. Indeed, the Commission has made a finding that the doctrine of the Responsibility to Protect (R2P) argument was being deployed by the LTTE, in an effort to force either foreign intervention, a ceasefire, or the rescue of the LTTE leadership. Therefore, the GoSL's reluctance to permit free access to the battlefield by the media may well have been an acknowledgment that they were ‘outgunned’ in terms of media sophistication.
544. Had the media been present, this Commission feels that whatever the reasons for excluding journalists from the battle front may have been, the now overwhelmingly accepted atrocities committed by the LTTE may have come to light much earlier, with

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<sup>679</sup> *Flynt Lfp v. H Rumsfeld*, United States Court of Appeals, District of Columbia Circuit, 355 F.3d 69.

<sup>680</sup> ‘War and the Media: Press Freedom v. Military Censorship’, *Constitutional Rights Foundation* <<http://www.crf-usa.org/war-in-iraq/press-freedom.html>>.

<sup>681</sup> *Ibid.*

<sup>682</sup> *Flynt Lfp v. H Rumsfeld*, United States Court of Appeals, District of Columbia Circuit, 355 F.3d 69.

<sup>683</sup> Jane Mayer, ‘The Predator War: What are the risks of the C.I.A.’s covert drone program?’, *The New Yorker*, 26 October 2009. <<http://www.newyorker.com/magazine/2009/10/26/the-predator-war>>.

a much more accurate ability to gauge the number of innocent civilians who were killed. It would have been harder for the LTTE to depict those killed in fighting when not in uniform as ‘excessive’ civilian casualties. The absence of objective, neutral journalists has enabled the very matter the GoSL feared, namely, a manipulation of parts of the evidence by a more sophisticated diaspora propaganda machine. While the Commission is satisfied that the massive hostage situation was created by the LTTE, the GoSL to some extent created a rod for its own back.

545. This Commission, while accepting the fact that an absence of journalists *may* have facilitated those who deliberately sought to operate in contravention of the rules of war, does not find that ‘a war without witnesses’ was a government policy designed to conceal a genocide or crimes against humanity. Whilst this Commission cannot rule out that certain war crimes may have been committed by members of the SLA, this Commission is not satisfied that the exclusion of journalists was done as a part of an overarching plan by the GoSL to hide the commission of Government’s sponsored war crimes that were awaiting perpetration. Indeed the Commission believes the GoSL followed policies adopted by other states in times of war/conflict.

## **H. Conclusion**

546. The Commission is of the view that the material shown in Channel 4 – shorn of its theatrical and dramatic presentation and of the occasionally extravagant language used – does show, however, that there was material enough to justify a judge-led investigation. It is the recommendation of this Commission that Military Courts of Inquiry, in these circumstances, may appear to lack the impartiality and independence to inspire confidence.
547. This Commission makes this finding on the basis of the provisional assumption that the images depicted are genuine. Such a finding the Commission believes will lend weight to the LLRC findings. The depiction of executions and of bodies said to have died in circumstances suggesting they were executed points to the need to investigate, even if that investigation were ultimately to show that all the adverse scenes had been ‘stage managed’ by the LTTE.
548. These are not images that can be set aside simply because the journalism is extravagant. The true central issue is *not* the journalistic standards of Channel 4 but the death and maltreatment of people who had the right to be properly treated. The reputation of the SLA is indeed at stake, but proper accountability is of equal, if not greater importance. Subject to resolution of the issue regarding the authenticity of the material broadcast, these views are compatible with the recommendation of LLRC which this Commission commends and adopts.
549. At paragraph 4.376 of its report, the LLRC stated:

*‘Firstly, if [...] the footage reflects evidence of real incidents of summary execution of persons in captivity and of possible rape victims, it would be necessary to investigate and prosecute offenders as these are clearly illegal acts. It is also the obligation of the Government to clear the good name and*

*protect the honour and professional reputation of soldiers who defended the territorial integrity of Sri Lanka and particularly the many thousands of soldiers who perished carrying out their combat duties cleanly and professionally against a widely condemned terrorist group who used most inhumane tactics in combat. Offences if any, of a few cannot be allowed to tarnish the honour of the many who upheld the finest traditions of service.*<sup>684</sup>

550. As this Commission has stated, it has gone further than the LLRC on this issue by requesting an investigation unit to be appointed so as to assist in the inquiries the Commission has been conducting. The work of the nearly appointed investigative team referred to at paragraph 420 of this Report has begun and is continuing.

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<sup>684</sup> LLRC Report, para. 4.376.

## CHAPTER 8 - ACCOUNTABILITY MECHANISMS

551. The Darusman Report stresses that ‘[w]hile there is some flexibility on the forms of punishment under international law, investigations and trials are not optional.’<sup>685</sup> This Commission does not regard this as an accurate reflection of the position at international law. In this Chapter the Commission will therefore identify and review the international legal standards and requirements applicable to accountability for violations of international law in post conflict situations with particular reference to the armed conflict in Sri Lanka which ended in 2009. The Commission has taken into account the range of State practice on post conflict accountability.
552. The fact that accountability mechanisms need to be based on national assessments with the rejection of ‘one size fits all’ was underlined in 2015 by UNHRC in its guidance to Commissions of Inquiry and Fact Finding Missions.<sup>686</sup>
553. States continue to observe ‘Head of State’ and official immunity in their relations (as confirmed by the ICJ),<sup>687</sup> and the African Union has, in respect of both the Sudan and Kenya cases before the ICC, strongly asserted that head of State immunity also applies before international criminal courts.<sup>688</sup>
554. The Darusman Report focused exclusively on the final phases of the conflict between the end of 2008 and May 2009. The former Government acted to address the conduct of *all* of the parties throughout the *entire* period of the conflict by appointing the LLRC.<sup>689</sup>
555. As recently as 23 March 2015, Dominik Stillhart, Director of Operations of the ICRC had this to say about the LLRC:

*‘The report of the Lessons Learnt and Reconciliation Commission, which was appointed by the Sri Lankan government, came up with some excellent recommendations. Our proposal is based on some of the recommendations of the LLRC. We need to bring all parties and all working groups together in solving this problem.’*<sup>690</sup>

556. The Report of the LLRC recommended further investigations into alleged violations. As set out in detail below, these have been prioritised to recommend the prosecution and punishment of individuals regardless of their position.<sup>691</sup>

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<sup>685</sup> Darusman Report, para. 285.

<sup>686</sup> United Nations Human Rights, Office of the High Commissioner, *Commissions of Inquiry and Fact-Finding Missions on International Human Rights and Humanitarian Law*, New York and Geneva, 2015, p. 13.

<sup>687</sup> *Democratic Republic of the Congo v. Belgium, Case Concerning the Arrest Warrant of 11 April 2000*, ICJ Judgment, 14 February 2002, pp. 21-22.

<sup>688</sup> Decision on International Jurisdiction, Justice and the International Criminal Court (ICC), Doc. Assembly/AU/13(XXI), 26-27 May 2013; Decision on the Implementation of the Assembly Decisions on the International Criminal Court, Doc. EX.CL/670(XIX), 30 June – 1 July 2011.

<sup>689</sup> See also LLRC Report, para. 1.5.

<sup>690</sup> Dominik Stillhart, Director Operations, ICRC, ‘SL needs more comprehensive mechanism to look into missing persons’ issue’, *Daily News*, 23 March 2015.

<sup>691</sup> LLRC Report, paras. 5.156, 8.191.

557. As part of these efforts, the Paranagama Commission, whose mandates are described in an earlier section of this report, was established on 15 August 2013.
558. The measures required to ensure accountability are dependent on a thorough, forensic investigation of the relevant events and circumstances. This Commission is fully aware that, before an appropriate consideration of the rules of armed conflict can be applied to the facts, it is essential that there be a proper legal and military consideration as to the core principles of,
- a. *distinction*,
  - b. *military necessity and*
  - c. *proportionality*
- as they may apply to the military operations conducted in the final phase of the conflict.
559. The aim of this Commission is to examine the broad international context in which the initiatives of the former and current GoSL have been launched and to gauge whether they accord with any recognised and developing norms or what may be expected of nations emerging from the upheavals of armed conflict.
560. The overall conclusion of this Commission is that, when viewed in its proper context, the course embarked on by the GoSL accords, in general, with accepted international standards and practices of the majority of States that have emerged from deeply divisive, turbulent and destabilising internal conflicts. It conforms to the general requirements of international law and practice under which multifaceted methodologies have been favoured by the international community for addressing the complexities of post conflict reconstruction, reconciliation and accountability. Experience suggests that such methodologies may be instrumental in achieving lasting peace and bringing justice for victims.

#### **A. The Darusman Report's Position**

561. The Darusman Report recognised that international standards have emerged for responding to allegations of war crimes and crimes against humanity.<sup>692</sup> The Report placed emphasis on the '*legal duty*' of States to investigate and prosecute serious violations. At the same time, the Report accepted that States have engaged a '*full range of processes and mechanisms*' to '*ensure accountability, serve justice and achieve reconciliation*', which the Darusman Report notes have become collectively known as '*transitional justice*'.<sup>693</sup>
562. Further, the Darusman Report highlighted that '*truth, justice and reparations*' must be guaranteed to victims of the conflict because these rights are '*are based on international standards and should form an essential part of a transitional justice*

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<sup>692</sup> Darusman Report, para. 262.

<sup>693</sup> Darusman Report, para. 269

*approach.*<sup>694</sup> It stated that *'international standards require that States both ensure justice, by investigating violations and prosecuting crimes, and implement other measures for victims, including truth and reparations.'*<sup>695</sup>

563. One of the main criticisms of the LLRC by the Darusman Report was that there was a lack of recommendations as to a range of accountability issues.<sup>696</sup> The Report's main criticism was that the then Sri Lankan Government had failed to investigate and prosecute those responsible for violations allegedly committed by the SLA. As already noted, the GoSL took further steps in the direction of accountability by appointing the current Commission.
564. The Darusman Report incorrectly stresses that *'[w]hile there is some flexibility on the forms of punishment under international law, investigations and trials are not optional'*.<sup>697</sup> The Darusman Report further claims that *'in most countries where there have been Truth Commissions, these have not precluded criminal prosecutions; rather prosecutions have followed them.'*<sup>698</sup> Further, the Darusman Report criticized the GoSL for considering noncustodial sentences for former LTTE members as a means of promoting integration and reconciliation.<sup>699</sup>
565. These assertions by the Darusman Panel do not take account of substantial State practice and developing international standards which have *not* assigned more weight to criminal prosecutions over other mechanisms, *or* insisted on such prosecutions taking place ahead of all other considerations as the highest priority in the sequence of peacebuilding and accountability mechanisms. It is worth noting in this context that Article 65 of Additional Protocol II provides that at the conclusion of hostilities, the *'broadest possible amnesty to persons who have participated in the conflict'* should be granted.<sup>700</sup> The ICRC Commentary on this provision states: *'The object of this sub paragraph is to encourage gestures of reconciliation which can contribute to re-establishing normal relations in the life of the nation which has been divided.'*<sup>701</sup>
566. While recognising Sri Lanka's efforts to develop and restore the conflict affected areas through *'overall reconstruction of the North (and East)'* and through spending and investment in these areas for the development of infrastructure, housing, and other facilities,<sup>702</sup> the Darusman Report argues that these steps cannot be equated with *'reparations'*. The Darusman Report states that *'[r]eparations must represent an acknowledgement on behalf of the State and must be provided to people because their*

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<sup>694</sup> Darusman Report, para. 272.

<sup>695</sup> Darusman Report, para. p. 287.

<sup>696</sup> Darusman Report, para. 342

<sup>697</sup> Darusman Report, para. 285.

<sup>698</sup> Darusman Report, para. 284.

<sup>699</sup> Darusman Report, para. 286.

<sup>700</sup> Additional Protocol II, Art 6(5), *'At the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained.'*

<sup>701</sup> See Michael P. Scharf, 'From the eXile Files: An Essay on Trading Justice for Peace' (2006) *Washington and Lee Law Review*, vol. 63, issue 1, pp 352-353.

<sup>702</sup> Darusman Report, para. 283.

*rights were violated*<sup>703</sup> and that ‘[t]he Sri Lankan Government should use reparations as a demonstration of genuine acknowledgement of violations and as redress for victims, not as a cover-up for accountability.’<sup>704</sup>

567. However, when viewing State practice and commentary by authoritative bodies on various mechanisms for achieving accountability and redress, criminal trials do *not* feature as the central component regardless of any other considerations. The Darusman Report emerges as overly selective and narrow in its discussion of transitional justice and accountability.
568. The UN and all bodies considering Sri Lanka’s post conflict actions should assess the mechanisms adopted by the former and the current Governments of Sri Lanka against the comprehensive body of international standards that have developed and crystallised in recent years.
569. This Commission has examined below the various approaches taken to ‘transitional justice’ that have been approved of by many states following other conflicts, many of which are similar to those embarked on by the GoSL.
570. The Commission wishes to stress again that the full investigation of the facts and circumstances of the conflict is always an essential component of an accountability and justice process. As set out below, it may be pivotal to the restoration and maintenance of peace.<sup>705</sup>

## **B. Mechanisms for Accountability**

571. It is generally acknowledged that there are four core components – judicial and non judicial – to post conflict accountability and transitional justice. They are:

*‘a justice process, to bring perpetrators of mass atrocities to justice and to punish them for the crimes committed; a reparation process, to redress victims of atrocities for the harm suffered; a truth process, to fully investigate atrocities so that society discovers what happened during the repression/conflict, who committed the atrocities, and where the remains of the victims lie; and an institutional reform process, to ensure that such atrocities do not happen again.’*<sup>706</sup>

572. These concepts pervade the modern discourse on accountability. However, it is far from certain whether they have or even could, as a matter of reality, have evolved into binding norms of international law. States and international organisations have

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<sup>703</sup> Darusman Report, para. 288.

<sup>704</sup> Ibid.

<sup>705</sup> See paragraph 420

<sup>706</sup> Clara Sandoval Villalba, ‘Briefing Paper, Transitional Justice: Key Concepts, Processes and Challenges’, *Institute for Democracy & Conflict Resolution*, 2011, p.3

adopted a wide range of measures tailored to address their particular interests and needs, which have in many instances been endorsed by other States and international organisations. There is no definitive international consensus on a set of legal rules and standards that apply to *all* situations regardless of their characteristics. The imperatives of peace have often impinged on the demands for justice, and they continue to do so. It would be short sighted and naïve to claim that without question, international law is settled with no legitimate room for exceptions and new developments.

573. Amnesties continue to be used and approved in a variety of circumstances. When the South African amnesty scheme was challenged on the grounds that it violated the rights of families to seek judicial redress for the murders of their loved ones, the newly created constitutional court rejected the claim on the ground that neither the South African Constitution nor any applicable treaty prevented granting amnesty in exchange for truth.<sup>707</sup>

#### *The Extent of the Obligation to Prosecute*

574. Proponents of the view that prosecutions are required in all circumstances argue that although:

[human rights treaties such as] *‘the International Covenant on Civil and Political Rights, the European Convention for the Protection of Human Rights and Fundamental Freedoms, and the American Convention on Human Rights, do not expressly incorporate such an obligation, all of them do expressly include the “right to a remedy”.*<sup>708</sup>

575. In addition, it is sometimes argued that non prosecution will deny victims the process for discovering the truth. Principle 2 of the UN’s ‘Updated Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity’ provides that

*‘Every people has the inalienable right to know the truth about past events concerning the perpetration of heinous crimes and about the circumstances and reasons that led, through massive or systematic violations, to the perpetration of those crimes. Full and effective exercise of the right to the truth provides a vital safeguard against the recurrence of violations.*<sup>709</sup>

576. The existence of these ‘rights’ has not been questioned by Sri Lanka or the international community generally. Similarly recognised is that the duty to prosecute in all circumstances has *not* yet crystallised as an international norm or become part of customary international law except in relation to specific international crimes, such as genocide and grave breaches of the Geneva Conventions. It has been noted that

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<sup>707</sup> Scharf, ‘From the eXile Files’, p. 350, fn. 42.

<sup>708</sup> Villalba, ‘Briefing Paper, Transitional Justice’, p.4.

<sup>709</sup> UN, ‘Principle 2, The Inalienable Right To The Truth’, *Updated Set of principles for the protection and promotion of human rights through action to combat impunity*, E/CN.4/2005/102/Add.1, 8 February 2005.

*'[t]here is a general inconsistency among human rights treaties on whether the duty to prosecute exists. Those conventions that include an explicit duty to prosecute are limited in their application; meanwhile, those with a wider application contain ambiguous language, which could be taken to imply a duty, but this is certainly not clear.'*<sup>710</sup> It is also accepted that the assertion that *'the obligation to prosecute set out in certain treaties is unconditional and without any exception'* cannot be sustained.<sup>711</sup> To quote Professor Michael Scharf,

*'Though there is no question that the international community has accepted that the prohibition against committing crimes against humanity qualifies as a jus cogens norm, this does not mean that the associated duty to prosecute has simultaneously obtained an equivalent status. In fact, all evidence is to the contrary. Not only have they been numerous instances of states providing amnesty and asylum of leaders accused of crimes against humanity, but, even more telling, there have been no protests from states when such amnesty for asylum has been offered.'*<sup>712</sup>

577. Moreover, it has been observed that *'treaties are ... to be interpreted in light of the subsequent practice of parties to the treaty'*, and that the practices of States in this regard have been inconsistent.<sup>713</sup> State practice has demonstrated that even

*'[w]hen states assume their duties to ensure that such atrocity crimes are prosecuted, they often pursue the matter rather like the United Nations did with respect to Sierra Leone. There may be some symbolic trials, but there is no attempt at full-blown and exhaustive implementation.'*<sup>714</sup>

For example:

- In Iraq, the Iraqi Special Tribunal to Try Crimes Against Humanity was established in 2003 to prosecute individuals accused of crimes against humanity, war crimes and genocide in Iraq between 1968 and May 2003. Despite its very broad mandate, it only conducted a few trials, against Saddam Hussein and certain other senior members of his government.

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<sup>710</sup> Elizabeth B. Ludwin King, 'Amnesties in a Time of Transition', *George Washington International Law Review*, vol. 41, no. 3, 2009-10, p. 596; William Schabas, 'Chapter 7: No Peace Without Justice: The Amnesty Quandry' in *Unimaginable Atrocities: Justice, Politics, and Rights at the War Crimes Tribunals*, 2012, p. 182. The treaties referred to include: the Convention on the Prevention and Punishment of the Crime of Genocide, Articles 4, 6; Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, Articles 6, 7; Geneva Convention I 1949, Articles 49, 50, 51, and the provisions on repression in Geneva Conventions II, III, and IV.

<sup>711</sup> Schabas, *Unimaginable Atrocities*, *ibid.* Indeed, in May 2004 the Office of the Inspector General of the CIA issued a report on Counter Terrorism, Detention and Interrogation Activities between September 2001 and October 2003. President Obama admitted that some of the techniques used in the interrogation of detainees at Guantanamo Bay detention camp authorized by the Bush administration amounted to torture, see <<http://www.whitehouse.gov/the-press-office/2014/08/01/press-conference-president>>. There has been no prosecutions by the US and indeed an indication has been given that under the current administration there will be no prosecutions.

<sup>712</sup> Scharf, 'From the eXile Files', p. 339.

<sup>713</sup> Schabas, *Unimaginable Atrocities*, p. 182.

<sup>714</sup> *Ibid.*

- In Sierra Leone, in 2002, following a savage decade long civil war, the mechanisms used for reconciliation and justice consisted of:
  - i. A UN sponsored treaty based court known as the Special Court for Sierra Leone to try the war crimes that arose from that internal armed conflict but limiting those to be indicted as those who bore the greatest responsibility,<sup>715</sup> and
  - ii. A TRC.<sup>716</sup>

This was the first time the international community had set up an *ad hoc* tribunal alongside a TRC.

578. One of the main arguments in favour of requiring prosecutions is that justice is an important step to the attainment of peace.<sup>717</sup> Yet it has been recognised that there is little proof that justice results in peace. The ‘*casual connection claimed to exist between justice and prevention is still to be proven*’ because ‘*transitional justice processes take time, even more than one generation*’ and ‘*it is not easy to measure the impact that domestic or international trials can have on prevention.*’<sup>718</sup> Furthermore, recent situations before the ICC have ‘*challenge[d] the assumption underlying the international justice enterprise: that holding military and political leaders accountable for war crimes would actually contribute to peace, by deterring such conduct in the future and by encouraging national reconciliation.*’<sup>719</sup>

579. It has been widely accepted that the requirements for achieving peace might not always be compatible with justice and that in some situations justice can instead be an active obstacle to peace. International legal experts have recognised that pursuing criminal prosecutions as an absolute requirement to accountability and transitional justice can carry the risk of compromising peace and destabilising a State which has just emerged from a conflict. Many post conflict States have taken account of this reality in the accountability mechanisms that they have adopted, and many other States have actively approved of these processes, such as:

- In Haiti, it was accepted by such countries as the United States that a ‘*decision to prosecute members of the military regime might have appeared*

<sup>715</sup> *Agreement between the United Nations and the Government of Sierra Leone and Statute of the Special Court for Sierra Leone*, 16 January 2002.

<sup>716</sup> ‘Chapter Two, Setting up the Commission’ in *Sierra Leone Truth and Reconciliation Commission [TRC] Reports* <file:///C:/Users/admin/Downloads/Volume1Chapter2.pdf>.

<sup>717</sup> ICC Prosecutor Fatou Bensouda, *Statement to the United Nations Security Council on the Subject of ‘Working Methods of the Security Council’*, ICC, 23 October 2014, <[http://www.icc-cpi.int/en\\_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/reports%20and%20statements/statement/Documents/Prosecutor%27s%20Statement\\_UNSC\\_Working%20Methods.pdf](http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/reports%20and%20statements/statement/Documents/Prosecutor%27s%20Statement_UNSC_Working%20Methods.pdf)>.

<sup>718</sup> Villalba, *Briefing Paper, Transitional Justice*, pp. 5-6.

<sup>719</sup> Louise Arbour, ‘Doctrines Derailed?: Internationalism’s Uncertain Future’, *International Crisis Group*, 25 October 2014, <<http://www.lawfareblog.com/2013/10/louise-arbour-on-icc-and-r2p/>>. and <<https://www.youtube.com/watch?v=EYW6sWp6hCM>>. See minutes 5:17 – 5:45. The following comment is made while discussing the mantra: ‘*there can be no lasting peace without justice*’ and noting that while this mantra is true, the ‘*inevitable tension between peace and justice*’ has not been resolved ‘*in a really workable fashion.*’ In stating that the ICC should be supported, Louise Arbour emphasised that ‘*we need to be more strategic about the convergence of justice with the resolution of armed conflict.*’ See minutes 4:53 – 5:17 and 9:48 - 11:23.

*inappropriate, and even nonsensical - if not downright dangerous*’ because the Government would have been *‘unlikely to survive the destabilizing effects of politically charged trials without massive foreign military support.’*<sup>720</sup>

- Regarding the conflicts in Libya and Darfur, the former High Commissioner for Human Rights, Louise Arbour, noted that the *‘[t]wo referrals by the Security Council to the ICC, in the cases of Darfur and Libya, respectively, have done very little to ... contribute to peace and reconciliation in their respective regions.’*<sup>721</sup>
- It was observed in respect of the peace negotiations in Uganda that the ICC Prosecutor’s interventions could *‘undermine or foreclose the possibility of peace talks’.*<sup>722</sup>

580. Academic scholars have further emphasised this point:

- *‘An important challenge to the justice element of transitional justice is the perception that it can be an obstacle to peace, truth and/or reconciliation in the aftermath of conflict or repression. Those who support this view often claim that in such periods of change the international law paradigm is not applicable given the exceptional circumstances faced by states, or that international law does not fully rule out amnesties for past crimes, as is often believed ... For them, peace (or any of the other goals mentioned) has to be sought first, even at the expense of justice.’*<sup>723</sup>
- *‘Most post conflict states, while grappling with the restraints of limited resources and capacity to hold legitimate trials, have to take into account additional considerations when determining whether to prosecute offenders. Specifically, criminal trials can actually harm recovery from a conflict more than they might help; prosecution can thwart or stall reconciliation attempts within a fractured nation that is working towards peace.’*<sup>724</sup>
- *‘Absolute formulations here are always dangerous. Both peace and justice are to be sought. But sometimes, peace will only be attainable if justice is sacrificed. Moreover, too much justice may imperil peace. Rigid, inflexible approaches to these issues, characterized by the exaggerated claim that amnesty is prohibited by international law, or that impunity inexorably leads to further conflict, are counterproductive.’* The assertion that prosecutions are required and *‘arrest warrants cannot be dropped as a matter of principle’* means that there will be

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<sup>720</sup> Michael P. Scharf, ‘Swapping Amnesty for Peace: Was There a Duty to Prosecute International Crimes in Haiti?’, (1996) 31 *Texas International Law Journal*, 1, 6, p. 8.

<sup>721</sup> Ibid.

<sup>722</sup> Adam Branch, Keynote address delivered at ‘The Politics of Peace and Justice’ Panel Discussion, *International Criminal Court Review Conference*, Kampala, 3 June 2010, p. 4. < <http://www-rohan.sdsu.edu/~abranche/Publications/Branch--No%20Peace%20without%20Justice.pdf> >.

<sup>723</sup> Villalba, *Briefing Paper, Transitional Justice*, pp. 3-4.

<sup>724</sup> Ludwin King, *Amnesties in a Time of Transition*, p. 581.

in some cases ‘a resumption of hostilities, with all of the terrible human suffering that this may involve.’<sup>725</sup>

- There are ‘cases in which peace is established sustainably without prosecuting those who committed violence in the lead-up to that peace. It is also a fact that the insistence on criminal justice can derail peace processes ... the blanket claim of no peace without justice can be dangerous for peace because it categorically refuses and closes off the kind of often distasteful political compromises that may be necessary to establish peace.’<sup>726</sup>

581. The viewpoint is also relevant that the ‘UN Charter posits peace and security as higher values than justice.’<sup>727</sup> In the Secretary General’s Report to the Security Council on Transitional Justice, the prerogative of adopting a multifaceted approach to justice that takes into account the needs of the society as a whole when pursuing justice, is emphasised. The Secretary General’s Report states ‘[j]ustice is an ideal of accountability and fairness in the protection and vindication of rights and the prevention and punishment of wrongs’ which ‘implies regard for the rights of the accused, for the interests of victims and for the well-being of society at large.’<sup>728</sup>
582. The UN has also acknowledged that the timing of justice initiatives is a relevant factor: the ‘question for the UN is never whether to pursue accountability and justice, but rather when and how.’<sup>729</sup> The UN has outlined that it will ‘seek to promote peace agreements that safeguard room for accountability and transitional justice measures in the post conflict and transitional periods.’<sup>730</sup>
583. Indeed, the UN has defined transitional justice as ‘**the full range** of processes and mechanisms associated with a society’s attempts to come to terms with a legacy of large-scale past abuse, in order to secure accountability, serve justice and achieve reconciliation. These may include both judicial and non-judicial mechanisms, with differing levels of international involvement (or none at all) and individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or a combination thereof.’<sup>731</sup>
584. It is also accepted that the situation in every post conflict State is unique and requires the fashioning and modification of transitional justice mechanisms in order best to suit and benefit the entire society.<sup>732</sup>

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<sup>725</sup> Schabas, *Unimaginable Atrocities*, pp. 196, 198.

<sup>726</sup> Adam Branch, ‘No Peace without Justice?’ Keynote address at ‘The Politics of Peace and Justice’ Panel Discussion, *International Criminal Court Review Conference*, Kampala, 3 June 2010, p. 4.

<sup>727</sup> Ben Saul, ‘Chapter 10. Forgiving Terrorism: Trading Justice for Peace, or Imperilling the Peace?’ In Miriam Gani, Penelope Mathew (eds), *Fresh Perspectives on the ‘War on Terror’*, Canberra: ANU E Press, 2008.

<sup>728</sup> Guidance Note of the Secretary-General: United Nations Approach to Transitional Justice, March 2010.

<sup>729</sup> *Ibid.*, p. 4.

<sup>730</sup> *Ibid.*

<sup>731</sup> UN Security Council, *Report of the Secretary-General, The rule of law and transitional justice in conflict and post conflict societies*, S/2004/616, 23 August 2004. See also Todd Landman, *Human Rights and Democracy: The Precarious Triumph of Ideals*, London: Bloomsbury, 2013, p. 107.

<sup>732</sup> See Scharf, *Swapping Amnesty for Peace*, p. 9.

- The Secretary General’s Report on transitional justice notes that the various processes towards accountability exist in ‘*fragile post conflict and transitional environments*.’<sup>733</sup> It notes that ‘*[t]ransitional justice processes and mechanisms do not operate in a political vacuum*’ and the ‘*UN must be fully aware of the political context and the potential implications of transitional justice mechanisms*.’<sup>734</sup>
- The Office of the UN High Commissioner for Human Rights has stated that post conflict States should seek a ‘*holistic transitional justice strategy that takes into account the particular circumstances of every situation*.’<sup>735</sup>
- Academic scholars have noted that ‘*the impact of criminal prosecutions, including those of the ICC, upon peace is dependent upon the political context in which those proceedings take place*.’<sup>736</sup>

### Truth Commissions as an Accountability Mechanism

585. Truth Commissions have been used as a key tool in promoting accountability. In general, they are viewed positively as ‘*establish[ing] some sort of record of the violations and abuses that were perpetrated*’ and ‘*deliver[ing] a ‘right to truth*.’<sup>737</sup>
586. In 2013 an expert group of scholars and practitioners prepared the Belfast Guidelines on Amnesty and Accountability; published by the Transitional Justice Institute of the University of Ulster.<sup>738</sup> The study created guidelines which States could use to evaluate whether the mechanisms adopted fulfilled the core concepts of transitional justice. The Guidelines ‘*aim[ed] to assist all those seeking to make or evaluate decisions on amnesties and accountability in the midst or in the wake of conflict or repression*.’<sup>739</sup> Experts involved in preparing the Guidelines included Yasmin Sooka, author of the Sooka Report.
587. The Guidelines make clear that when a State is evaluating the most appropriate mechanism to achieve accountability based on its unique post conflict situation, it is acceptable and in accordance with international law for a State to seek non legal mechanisms of accountability instead of prosecutions. Indeed, it has been noted by

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<sup>733</sup> Guidance Note of the UN Secretary-General on Transitional Justice, p. 4.

<sup>734</sup> Ibid.

<sup>735</sup> Office of the United Nations High Commissioner for Human Rights, *Rule-of-Law Tools for Post conflict States: National Consultations on transitional justice*, 2009, p. 1.

<sup>736</sup> Branch, Keynote address at ‘The Politics of Peace and Justice’ Panel Discussion, p. 4.

<sup>737</sup> Christine Bell, ‘The “New Law” of Transitional Justice’, *Transitional Justice Institute University of Ulster Northern Ireland*, 2009, p. 112.

<sup>738</sup> ‘The Belfast Guidelines on Amnesty and Accountability’, *Transitional Justice Institute*, University of Ulster, 2013.

<sup>739</sup> Ibid, p. 1.

scholars that '[t]ruth commissions [are] successful when they create a middle road between morally and objectionable impunity and politically risky trials.'<sup>740</sup>

588. The Guidelines also set out criteria that should be met in order to guarantee accountability, and note that, in some situations, other mechanisms of accountability besides prosecutions might be preferable:

*'Those responsible for gross violations of human rights or international crimes should be held accountable. In addition to legal mechanisms of accountability, which normally give rise to individual prosecution, there are non-legal mechanisms the use of which may, in some contexts, be preferable. Key elements of an effective accountability process include:*

- a) *investigating and identifying individuals or institutions that can be held to account for their decisions, actions or omissions.*
- b) *holding these individuals or institutions to account through a process in which they are to disclose and explain their actions.*
- c) *subjecting such individuals or institutions to a process through which sanctions can be imposed on individuals and reforms imposed on relevant institutions. Appropriate sanctions may include imprisonment, exclusion from public office, limitations of civil and political rights, requirements to apologise, and requirements to contribute to material or symbolic reparations for victims.'*<sup>741</sup>

589. Truth Commissions have been used by several post conflict States as a method of achieving accountability. However, many Truth Commissions have been modelled on the process of '*amnesty for truth*' as first practiced by the South African Truth and Reconciliation Commission.<sup>742</sup> This process provides a mechanism for amnesties to be granted in exchange for '*a full disclosure by the perpetrator of all the relevant facts relating to the criminal act*'.<sup>743</sup> This method of involving amnesties in the process of Truth Commissions has been used by other post conflict States, including the Truth Commissions of Nepal,<sup>744</sup> South Korea and Chile.<sup>745</sup>

590. In February 2015, a South African Delegation led by Nomaindia Mfeketo the Deputy Minister of International relations and Cooperation in South Africa arrived in Sri Lanka for talks with the Sirisena/ Wickremasinghe Government with a view to sharing its experience of tackling transitional justice and the South African experiment in setting up a Truth and Reconciliation Commission (SATRC). At the behest of Prime Minister Ranil Wickremasinghe, Sir Desmond de Silva QC, Chairman of the Advisory Council

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<sup>740</sup> Tricia D. Olsen, Leigh A. Payne, Andrew G. Reiter and Eric Wiebelhaus-Brahm, 'When Truth Commissions Improve Human Rights', (2010) *The International Journal of Transitional Justice*, vol. 4, p. 469.

<sup>741</sup> The Belfast Guidelines on Amnesty and Accountability, pp. 7-8.

<sup>742</sup> Francesca Pizzutelli, *Moving Away from the South African Model: Amnesties and Prosecutions in the Practice of 40 Truth Commissions*, 25 January 2010.

<sup>743</sup> *Ibid.*, p. 2. See also Constitution of the Republic of South Africa Act 200 of 1993, Epilogue 'National Unity and Reconciliation'; *South Africa, Promotion of National Unity and Reconciliation Act 34 of 1995*, 25 July 1995, para. 4.

<sup>744</sup> Mark Kersten, 'Rethinking Amnesty and Accountability', *Justice in Conflict*, 14 January 2014.

<<http://justiceinconflict.org/2014/01/14/rethinking-amnesty-and-accountability/>>.

<sup>745</sup> Olsen et al., *When Truth Commissions Improve Human Rights*, pp. 472-473.

had the advantage of a private meeting exploring with the South African delegation the necessary requirements and mechanisms to make a success of a TRC. The talks included amnesties in return for full and honest disclosure and the provision of reparations.

*Amnesties under International Law*

591. The question arises whether amnesties are in fact prohibited under international law and whether processes that include amnesties can be sufficient for providing justice and accountability for the victims.
592. The Darusman Report states that ‘*since the establishment and work of the South African TRC, the global legal landscape has changed, and there is wide recognition that amnesties for certain crimes are no longer permissible.*’<sup>746</sup> There is little authority offered in support of this proposition and, as Darusman might properly have noted, international law and State practice do not unambiguously prohibit amnesties.
593. There is instead no clear consensus on the legality of amnesties under international law.<sup>747</sup> It is argued that ‘*there is no treaty text in public international law instruments explicitly prohibiting amnesty and there is no consistent practice of states allowing the conclusion that this is a norm of customary international law.*’<sup>748</sup> It is acknowledged that ‘*[s]ome level of amnesty would seem to be allowed by international law and even required.*’<sup>749</sup> It is noted that while ‘blanket amnesties’ may not be permitted, some amnesties are required because, for example, ‘*conflict-related prisoners and detainees must be released, demilitarized, demobilized, and enabled to reintegrate.*’<sup>750</sup>
594. It cannot be overlooked that Article 6 (5) of Additional Protocol II provides that authorities shall grant broad amnesties at the conclusion of hostilities both to persons who have participated in the hostilities and those whose liberty was deprived during the conflict. Although the ICRC has stated that these provisions do not apply to persons who have committed crimes under international law, the Updated Principles on Impunity nevertheless still contemplate the use of amnesties (albeit with restrictions), without barring them.<sup>751</sup>
595. Furthermore, the duty to prosecute provided for in the Convention Against Torture, for example, does not conclusively prohibit amnesties. Treaty interpretation is formulated, in part, by State practice which has clearly demonstrated that amnesties are still widely used.<sup>752</sup> In the past 25 years, ‘*more than a dozen countries have enacted amnesties*’ in

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<sup>746</sup> Darusman Report, para 286.

<sup>747</sup> Ludwin King, *Amnesties in a Time of Transition*, p. 618.

<sup>748</sup> Schabas, *Unimaginable Atrocities*, p. 182.

<sup>749</sup> Bell, *The ‘New Law’ of Transitional Justice*, p. 108.

<sup>750</sup> *Ibid.*, p. 106.

<sup>751</sup> United Nations, Economic and Social Council, Commission on Human Rights, ‘Principle 24. Restrictions and other measures relating to amnesty’, *Updated Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity*, E/CN.4/2005/102/Add.1, 8 February 2005.

<sup>752</sup> Schabas, *Unimaginable Atrocities*, p. 182.

post conflict situations<sup>753</sup> and the potential for amnesties has been considered and accepted in several more conflicts. For example:

- **South Africa** offered amnesties in exchange for full disclosure of violations committed. The proponents of this model argued that *‘there were goals which could be accomplished by the Truth Commission mechanism that could not be accomplished by trials.’*<sup>754</sup>
- **South Korea** in 2005 provided for amnesties in investigating some 3000 of 11000 cases submitted to it, in which the truth of 1813 of these 3000 cases was verified. It was viewed positively *‘as advancing an important process’* in establishing the truth about widespread allegations.<sup>755</sup>
- **Burundi** established a National Truth and Reconciliation Commission in 2000 to investigate and clarify the history and causes of the conflict and to promote reconciliation. As part of the peace agreement and in order to establish the Commission as well as an International Judicial Commission of Inquiry, the Peace Agreement provided for both prisoner releases and amnesties for all combatants who had not committed the crimes of genocide, crimes against humanity or war crimes.<sup>756</sup>
- **Nepal** established a Truth and Reconciliation Commission in 2014 with the power to make recommendations about granting amnesties to individuals. The Commission’s mandate does not allow for amnesties to be recommended for *‘serious crimes that lack sufficient reasons and grounds for granting amnesty’*. It has been noted that the scope of *‘serious crimes’* has not been defined in this mandate.<sup>757</sup>
- **In Haiti**, it was decided *‘to pursue amnesty rather than prosecution of the military leaders’* because this was viewed as *‘the best way to persuade the military leaders to step down without a fight’* due to the belief that *‘the anticipation of prosecution and punishment would encourage the military leaders to fight to retain power’*.<sup>758</sup> The US encouraged the use of amnesties in this situation as the best method of ensuring peace. President Clinton is quoted as stating that amnesties avoided *‘massive bloodshed and perhaps an extended period of occupation that could have been troubling to our country and to the world’*.<sup>759</sup> Haitian President Aristide viewed the amnesties as a “commitment to peace”, stating that *‘This amnesty is part of the reconciliation and rebuilding*

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<sup>753</sup> Ludwin King, *Amnesties in a Time of Transition*, p. 577.

<sup>754</sup> Bell, *The ‘New Law’ of Transitional Justice*, p. 112.

<sup>755</sup> The Commission was criticised, *inter alia*, for failing positively to contribute to the *‘process of democratic development’* and on the ground that *‘the truth process began before Korean society was ready to embrace it.’* See, Olsen et al., ‘When Truth Commissions Improve Human Rights’, pp. 472-473. See also, Ahn Byung-ook, ‘Verification of Truth,’ *Korea Times*, 26 May 2008.

<sup>756</sup> Bell, *The ‘New Law’ of Transitional Justice*, p. 115.

<sup>757</sup> Kersten, *Rethinking Amnesty and Accountability*.

<sup>758</sup> Scharf, *Swapping Amnesty for Peace*, p. 9.

<sup>759</sup> *Ibid.*

process'.<sup>760</sup> The use of amnesties in this situation has been viewed as 'achiev[ing] far more for the restoration of human rights in Haiti than what would have resulted by insisting on punishment and risking political instability and continued social divisiveness'.<sup>761</sup>

- **In Northern Ireland**, a 'sentence review' process was put in place to shorten sentences for serving paramilitary offenders as part of the Belfast Agreement.<sup>762</sup> It was stressed that providing this type of amnesty 'preserved the accountability effect by the criminal law, while meeting the demands of paramilitary groups' which was 'crucial to reaching a peace agreement' in Northern Ireland.<sup>763</sup>
- Moreover, it emerged recently that full amnesties had been given to IRA fighters. It was reported that immunity from prosecution had been provided to 187 individuals as an initiative by the UK Government to address the issue of individuals on the run or fearing prosecution for paramilitary crimes committed in the UK before the Good Friday peace agreement of 1998.<sup>764</sup> In February 2014, a UK court dismissed a case concerning the bomb blast in Hyde Park in 1982 based on a letter the accused received from the UK Government promising him that no criminal proceedings would be initiated against him. The judge dismissed the case on the basis of the amnesty provided, stating that the public interest in prosecution was outweighed by the principle of 'holding officials of the state to promises they have made in the full understanding of what is involved in the bargain'.<sup>765</sup> These amnesties have subsequently been withdrawn by the UK Government, but it is unclear what the effect of this retraction might be.<sup>766</sup> There have to date been no further reports of prosecutions taking place.
- **In the US**, a report from the Council on Foreign Relations stated that the White House supported a proposal by the Iraqi Prime Minister in which the Iraqi government would give limited amnesty and pardons to Iraqi insurgents who renounced violence, even if an insurgent had attacked American troops in Iraq.<sup>767</sup> The granting of amnesties has been part of a plan to promote national reconciliation efforts and democracy in Iraq.<sup>768</sup>

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<sup>760</sup> Ibid, pp. 10-11.

<sup>761</sup> Ibid, p. 11.

<sup>762</sup> Bell, *The 'New Law' of Transitional Justice*, p. 114.

<sup>763</sup> Ibid.

<sup>764</sup> 'On The Run: How Court Hearing Revealed Nature and Extent of Deal', *BBC News, Northern Ireland*, 25 February 2014. <<http://www.bbc.com/news/uk-northern-ireland-26330327>>.

<sup>765</sup> 'Northern Ireland First Minister threatens to quit after Hyde Park bombing case dropped', *The Telegraph*, 26 February 2014. <<http://www.telegraph.co.uk/news/uknews/terrorism-in-the-uk/10662700/Northern-Ireland-First-Minister-threatens-to-quit-after-Hyde-Park-bombing-case-dropped.html?mobile=basic>>.

<sup>766</sup> 'On the Run scheme 'not amnesty and lawful says judge', *BBC News Northern Ireland*, 17 July 2014. <<http://www.bbc.com/news/uk-northern-ireland-28334382>>.

<sup>767</sup> Lionel Beehner, 'The Debate over Granting Amnesty to Iraqi Insurgents', *Council on Foreign Relations*, 22 June 2006. <<http://www.cfr.org/iraq/debate-over-granting-amnesty-iraqi-insurgents/p10965#p8>>. See also Rory McCarthy, Suzanne Goldenberg and Nicholas Watt, 'Amnesty for Iraqi insurgents', *The Guardian*, 5 July 2004. <<http://www.theguardian.com/world/2004/jul/05/iraq.rorymccarthy>>.

<sup>768</sup> Lionel Beehner, *Council on Foreign Relations Debate on Amnesty in Iraq*, Introduction.

- The possibility of granting amnesties was contemplated in Syria, and in particular for President Bashar al-Assad. Former US Ambassador at Large for War Crimes, Professor David Scheffer, argued for an amnesty from prosecution at the ICC in exchange for ‘*complete withdrawal from political and military power in Syria in order to qualify for continued omission from the Court’s jurisdiction*’.<sup>769</sup>

### Reparations and Reconstruction

596. As noted above, the Darusman Report criticised the steps taken by the former Sri Lankan Government to provide reparations for the benefit of victims and their communities through development and aid programmes. The Report stated that ‘*truth, justice and reparations*’ must be guaranteed to all victims and that ‘*development programmes and humanitarian assistance are not to be equated with reparations*’.<sup>770</sup> The Panel argued that the Government must ‘*use reparations as a demonstration of genuine acknowledgement of violations and as redress for victims, not as a cover-up for accountability*’.<sup>771</sup>
597. The Report cites no settled authorities to support these claims. Development programmes and humanitarian assistance may be regarded as reparations, and it is nowhere legally *required* that reparations are made as part of an admission of guilt.
598. It is common for States to engage in a reparations process ‘*without acknowledging any legal responsibility for the human rights violations or crimes that were committed*’.<sup>772</sup> An example often cited is the Colombian Government’s establishment of a reparations program to assist victims of the crimes of disappearances, torture and arbitrary killings committed by paramilitary groups.<sup>773</sup>
599. While the Darusman Report refers to the ‘*Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*’, it fails to consider the guidelines for reparations set out in the document which recognises a wide range of measures. They provide guidance on all forms of reparations available

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<sup>769</sup> David Scheffer, ‘Fanning the Flames of Justice in Syria’, *Project Syndicate*, 1 March 2012. <<http://www.project-syndicate.org/commentary/fanning-the-flames-of-justice-in-syria>>.

<sup>770</sup> Darusman Report, para. 272.

<sup>771</sup> Darusman Report, para. 288.

<sup>772</sup> Villalba, *Briefing Paper on Transitional Justice*, p. 6.

<sup>773</sup> Programa de Reparación Individual por Via Administrativa, 2008 (‘Administrative Reparations Programme’). See Knut Andreas O. Lid, ‘Land Restitution in Transitional Justice: Challenges and Experiences - The case of Colombia’, *Norwegian Centre for Human Rights*, University of Oslo, 15 August 2009, p. 11. See also, OHCHR, *Guidance Note of the Secretary-General: Reparations for Conflict-Related Sexual Violence*, June 2014, p. 6 which notes that an ‘*administrative reparations programme is an out-of-court process used by States to provide reparation to massive numbers of victims of gross violations of international human rights law and/or serious violations of international humanitarian law*’ and ‘*[t]hey imply recognition of the harm suffered, without subordinating it to the judicial establishment of the responsibility of the perpetrator.*’

including restitution, compensation, rehabilitation, satisfaction and guarantees of non repetition.<sup>774</sup>

600. The UN has also provided guidance stating that '*reparations can include monetary compensation, medical and psychological services, health care, educational support, return of property or compensation for loss thereof, but also official public apologies, building museums and memorials, and establishing days of commemoration*'. The UN has outlined that reparations programmes should provide 'concrete remedies to victims', '*promot[e] reconciliation*' and '*restor[e] public trust in the State*'.<sup>775</sup>
601. Both the International Law Commission's 'Responsibility of States for Internationally Wrongful Acts', and the 'Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law', set out guidelines for reparations. Part IX of the Basic Principles specifically provides in paragraph 16 that '*States should endeavour to establish national programmes for reparation and other assistance to victims in the event that the parties liable for the harm suffered are unable or unwilling to meet their obligations*'.<sup>776</sup>

### **C. The Mechanisms Adopted in Sri Lanka**

602. It is claimed in the Darusman Report that the former Government of Sri Lanka made a '*de facto decision not to hold accountable those who committed serious crimes on behalf of the State during the final stages of the war*'.<sup>777</sup> It did not take account of the specific mandate of the LLRC<sup>778</sup> which was to:

*'inquire and report on the following matters that may have taken place during the period between 21<sup>st</sup> February 2002 and 19<sup>th</sup> May 2009, namely;*

- i. The facts and circumstances which led to the failure of the Ceasefire Agreement operationalized on 21st February 2002 and the sequence of events that followed thereafter up to the 19th of May 2009;*
- ii. Whether any person, group or institution directly or indirectly bear responsibility in this regard;*
- iii. The lessons we would learn from those events and their attendant concerns, in order to ensure that there will be no recurrence;*
- iv. The methodology whereby restitution to pay persons affected by those events or their dependants or their heirs, can be effected;*

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<sup>774</sup>UN General Assembly, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, A/RES/60/147, 21 March 2006, para. 18.

<sup>775</sup> Guidance Note of the UN Secretary-General on Transitional Justice, p .9.

<sup>776</sup> Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, para. 16.

<sup>777</sup> Darusman Report, para. 285.

<sup>778</sup> LLRC Report, para. 1.5.v.

- v. *The institutional, administrative and legislative measures which need to be taken in order to prevent any recurrence of such concerns in the future, and to promote further national unity and reconciliation among communities and; to make any such other recommendations with reference to any of the matters that have been inquired into under the terms of the Warrant.*<sup>779</sup>

603. In its report the LLRC made specific recommendations that ‘*priority should be given to the investigation, prosecution and disposal*’ of cases and that ‘*all allegations should be investigated and wrongdoers prosecuted and punished irrespective of their political links, so as to inspire confidence among the people in the administration of justice*’ and the criminal justice system.<sup>780</sup> The LLRC asked that the ‘*Office of the Commissioner should be provided with experienced investigators to collect and process information necessary for investigations and prosecutions*’<sup>781</sup> and made clear that ‘*due account must be taken of the violation of core Human Rights and International Humanitarian Law Principles so that appropriate punishment, commensurate with the grave nature of such crimes could be meted out.*’<sup>782</sup>
604. As a consequence, this Commission was established and entrusted with the Second Mandate which is the subject of this report.
605. This Commission is of the view that these are all far reaching developments. The course that has been embarked upon by the GoSL has placed proper emphasis on the need for investigation and the establishment of the truth, as well as accountability for those responsible for the commission of any serious violations of international law. This is entirely in accordance with international standards, as explored above, for transitional justice.
606. It is unhelpful for the Darusman Report to claim that the GoSL’s approach is not ‘victim centred’ and that it does not focus sufficiently on the ‘retributive’ aspects of justice.<sup>783</sup> The mandate of the Paranagama Commission of Inquiry is rooted in the victims of the protracted conflict knowing the truth, as well as being able to be part of a stable society, free of conflict, in which reconstruction and reconciliation are priorities. The LLRC’s mandate and report acknowledged ‘*a clear need to heal the wounds of the past and to make recommendations to reconcile the nation by recognising all victims of conflict, providing redress to them and thereby promoting national unity, peace and harmony.*’<sup>784</sup>
607. The Government’s programmes of economic and social reconstruction should be properly recognised as means of compensating all victims of the conflict on all sides. Redevelopment of the conflict affected areas is an essential step in redressing the

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<sup>779</sup> LLRC Report, para. 1.5.

<sup>780</sup> LLRC Report, paras 5.156, 8.191.

<sup>781</sup> LLRC Report, paras 5.48, 9.51.

<sup>782</sup> LLRC Report, para. 9.26.

<sup>783</sup> Darusman Report, p. 79, paras 284-285. The Darusman Report criticises the LLRC stating *inter alia* that ‘*[w]hile there is some flexibility on the forms of punishment under international law, investigations and trials are not optional, and the creations of a Commission such as the LLRC does not in itself fulfil the State’s duty*’.

<sup>784</sup> LLRC Report, para. 1.7.

fortunes of all those who have suffered throughout the conflict. This has included reconstruction of pre-existing infrastructure and spending and investing on new infrastructure, housing and other facilities in the North and East of Sri Lanka.<sup>785</sup>

608. In addition, it is reported that the Government has ‘*secured the rehabilitation and resettlement of thousands of former combatants of the LTTE and brought them into the mainstream of national life; returned over 3500 child soldiers of the LTTE to their parents and provided them with opportunities to pursue their education and fulfill their potential as peaceful citizens of Sri Lanka; and encouraged several leaders of the LTTE to publicly denounce and abandon violence and persuaded them to join the mainstream of political life in the country to work together within a democratic framework, to develop the country and collectively find peaceful solutions to the country's political, social and economic challenges.*’<sup>786</sup> These initiatives have been taken in the ‘*larger interest of national reconciliation, peace and harmony among all the people of Sri Lanka.*’<sup>787</sup>
609. These measures are consistent with those that have been adopted in other post conflict situations, and which have been approved by other States, including the US and UK.
610. With the election of the new government in January 2015, the new administration took immediate steps to ease tensions in the North and in the East of Sri Lanka by the replacement of the military Governors of the Northern and Eastern Provinces and the release of approximately 1000 acres of land belonging to Tamils and previously held by the military as part of a security zone. Together with these significant acts came the release of Tamil political detainees. All these matters were crowned by the visit of the Indian Prime Minister, Narendra Modi, to Sri Lanka, and in particular, to Jaffna, in March 2015.

#### **D. Establishing a War Crimes Division within The Sri Lankan Court System**

611. Article 13 (6) of the 1978 Constitution of Sri Lanka provides as follows:

*‘No person shall be held guilty of an offence on account of any act or omission which did not, at the time of such act or omission, constitute such an offence, and no penalty shall be imposed for any offence more severe than the penalty in force at the time such offence was committed.*

*Nothing in this Article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by the community of nations.*’<sup>788</sup>

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<sup>785</sup> See Darusman Report, para. 283. See also LLRC Report, para. 6.30.

<sup>786</sup> Gazette No. 1871/18, p. 2.

<sup>787</sup> Gazette No. 1871/18, p. 2.

<sup>788</sup> The Constitution of The Democratic Socialist Republic of Sri Lanka, Article 13(6), *Chapter III - Fundamental Rights*, 1978, emphasis added.

612. The law recognised by the community of nations clearly includes international humanitarian law, international human rights law and customary international law.
613. However, there can be no effective domestic mechanism for the purpose of investigating international crimes that apply in all conflicts, including non-international armed conflicts, unless the GoSL incorporates into Sri Lankan law the core crimes applicable in non-international armed conflicts so that they could be relied on under statute law to investigate and prosecute any crimes during the past conflict, consistent with Article 13(6) of the Constitution.<sup>789</sup> In particular, the doctrine of command responsibility, which is part of customary international law for all conflicts and thus applicable to the Sri Lankan conflict, should be incorporated into Sri Lankan law. This has occurred in many other countries through the adoption of specific legislation to create certainty about the applicable law.
614. Once the relevant provisions of international law have been incorporated into domestic law there is no difficulty in establishing a new jurisdiction to try war crimes within the existing Sri Lankan court structure.
615. There is a wealth of precedent from different national jurisdictions for proceeding in this way. **Uganda** set up an International Crimes Division (Division of the High Court) which provides for the recruitment of foreign judges given the international nature of the cases.<sup>790</sup> **Kenya** set up an International Crimes Division of the High Court. No specific provision has been made for foreign judges but judges of Commonwealth countries can be appointed to sit in Kenya.<sup>791</sup> The War Crimes Court of **Bosnia and Herzegovina** is part of the Criminal Division of the State Court of Bosnia and Herzegovina. This was established in 2002 and provides for foreign judges.<sup>792</sup> The Courts in **Fiji** were authorised to prosecute international crimes by the Crimes Decree 2009. Further, Fiji's High Court Act allows foreign judges to be appointed to the High Court who are nationals of countries that include Sri Lanka.<sup>793</sup> Alternatively, international technical assistance may be supplied by the UN, or friendly nations, as was done and in the trial of Saddam Hussein.<sup>794</sup>
616. Thus in view of the fact that neither the current Government of Sri Lanka, nor its predecessor was disposed to submitting any individuals to the jurisdiction of foreign courts, it is the view of this Commission that a successful experiment in **The Gambia**

<sup>789</sup> The Constitution Of The Democratic Socialist Republic Of Sri Lanka, Article 13(6), *Chapter III - Fundamental Rights* (1978)

<sup>790</sup> International Crimes Division, *The Judiciary, The Republic of Uganda*, July 2008 <[http://www.judicature.go.ug/data/smenu/18/International\\_Crimes\\_Division.html](http://www.judicature.go.ug/data/smenu/18/International_Crimes_Division.html)>.

<sup>791</sup> Kenyans for Peace with Truth and Justice, 'A real option for Justice? The International Crimes Division of the High Court of Kenya', July 2014. <<http://kptj.africog.org/a-real-option-for-justice-the-international-crimes-division-of-the-high-court-of-kenya/>>.

<sup>792</sup> 'Public Information and Outreach Section (PIOS)', *The Court of Bosnia and Herzegovina* <<http://www.sudbih.gov.ba/?opcija=sadrzaj&kat=7&id=15&jezik=e>>.

<sup>793</sup> Crimes Decree 2009 (Decree No. 44 of 2009), *Republic of Fiji Islands Government Gazette*, vol. 10, no. 95, 5 November 2009. <[http://www.fiji.gov.fj/getattachment/604e31fc-c7b1-41a0-9686-71377917b6eb/Decree-No-44---Crimes-Decree-2009-\(pdf\).aspx](http://www.fiji.gov.fj/getattachment/604e31fc-c7b1-41a0-9686-71377917b6eb/Decree-No-44---Crimes-Decree-2009-(pdf).aspx)>.

<sup>794</sup> The Iraqi Special Tribunal was not established with Iraqi and international judges and prosecutors working together to try cases. Instead, all prosecutors and investigative judges were required to be Iraqi nationals. The law allowed for the possibility of appointing non-Iraqi trial and appeals chamber judges, but only if the Iraqi Governing Council approved. The Iraqi Special Tribunal law also provided for some international advisors and monitors.

in 1981, following an upheaval in which many died, may possibly be viewed with favour. In that instance a court which was part of the national legal system, known as the Special Division of the Supreme Court of Gambia, was set up taking on some judges from the Commonwealth.<sup>795</sup> This was a court that met both national and international concerns.

617. In the event that Sri Lanka were to set up a purely domestic tribunal without the participation of any foreign judges, it is the view of this Commission that there should be international technical assistance and observers.

### Amnesty

618. It would also be possible to provide for amnesties from prosecution under national law through the adoption of such legislation. The application of international law within the national system in Sri Lanka would *not* prevent the use of amnesties in accordance with Sri Lanka's national laws. This is precisely what has occurred in several countries, including in **South Africa** in relation to crimes committed in the apartheid era and, in **Uganda** for the amnesties given to the Lords' Resistance Army fighters at the end of the conflict there. These national amnesties are often provided in the interests of achieving a peaceful resolution to internal conflicts and to promote reconciliation in accordance with the specific terms of the amnesties under national law. Although national amnesties may not be applicable before **any international courts**, they can operate to provide an immunity from national prosecutions in the national system concerned **even** if the national system is applying international law in accordance with the applicable national law on amnesties.

*'Yet there should be little tolerance when there is a failure to examine actual amnesty practice, including what amnesty laws actually say, how the enacting parties actually explain and defend them, and how the external community of states actually reacts. On the latter aspect, a review of the outcomes of the UN human rights Council's Universal Periodic Review process is telling for its near-total lack of criticism of states that recently adopted amnesties covering human rights crimes, such as Algeria and Afghanistan.'*<sup>796</sup>

### **E. The Commission's Recommendation**

619. The Mandate of this Commission includes inquiring and reporting upon matters that have been referred to at paragraph 4.359 of the Report of the LLRC.<sup>797</sup> It is the view of this Commission that insofar as recommendations were made in the LLRC Report at paragraphs 4.360 that all such matters, not already specifically dealt with in that report, together with such specific matters that have been dealt within this report that

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<sup>795</sup> Hassan B. Jallow, *Journey for Justice*, Authorhouse UK, 2012, p.128.

<sup>796</sup> Francesca Lessa and Leigh A. Payne, 'Chp 2 Amnesty controversy in international law' in '*Amnesty in the Age of Human Rights Accountability*', Cambridge: Cambridge University Press, 2012, p. 37

<sup>797</sup> LLRC Report, para. 4.359.

call for investigation and accountability, are dealt with by a domestic mechanism that meets the concerns of the international community.<sup>798</sup>

620. This Commission has been through an exhaustive tour of possible alternatives and has explored State practice in order to make recommendations as to how accountability can and should be addressed in Sri Lanka. It is the view of this Commission that a credible TRC would be an essential component in addressing accountability. In view of what this Commission has already said, the duty to prosecute in **all** circumstances has not yet crystallised into an international norm or become part of customary international law. Whether prosecutions should take place at all is a matter peculiarly within the province of the GoSL taking into account all existing factors that such a course may have in impeding the path to reconciliation.

*‘It is a common misconception that trading amnesty for peace is equivalent to the absence of accountability and redress. As in the Haitian and South African situations described above, amnesties can be tied to accountability mechanisms that are less invasive and domestic or international prosecution. Ever more frequently in the aftermath of an amnesty–or exile–for peace deal, the concerned governments have made monetary reparations to the victims and their families, established Truth Commissions to document the abuses (and sometimes identified perpetrators by name), and have instituted employment bans and purges (referred to as lustration) that keep such perpetrators from positions of public trust. While not the same as criminal prosecution these mechanisms do encompass much of what justice is intended to accomplish: prevention, deterrence, punishment and rehabilitation. Indeed, some experts believe that these mechanisms to not just constitute "a second best approach" when prosecution is impracticable, but that in many situations they may be better suited to achieving the aims of justice.’<sup>799</sup>*

621. If this Commission had come to the conclusion that there was a case of genocide to answer, in the light of the legal principles in the recent ICJ case of *Croatia v. Serbia* which addressed the issue of state responsibility for genocide,<sup>800</sup> this Commission would have felt that a criminal investigation with a view to prosecution was unavoidable. We have come to the conclusion that genocide can be discounted in this case.
622. Moreover, the Commission believes it is of significance that on the crucial issue of complementarity, that Article 17 of the ICC Statute requires an ‘investigation’ but does not specify that it be a ‘criminal’ investigation.

*‘The concerned state could argue that a truth commission (especially one modeled on that of South Africa), constitutes a genuine investigation. On the other hand, subsection 2 of article 17 suggests that the standard for determining that an investigation is not genuine is whether the proceedings are inconsistent with an intent to bring the person concerned to justice—a phrase that might be interpreted as requiring criminal proceedings.’<sup>801</sup>*

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<sup>798</sup> LLRC Report, para. 4.360.

<sup>799</sup> Scharf, ‘From the eXile Files’, pp. 346-347, fn. 42.

<sup>800</sup> *Croatia v. Serbia Genocide Case*.

<sup>801</sup> ICC Statute, Article 17.

In the Commission's opinion this underlines the far from settled approach to acceptable mechanisms of transitional justice.

*'In sum, the Rome Statute is purposely ambiguous on the question of whether the ICC should defer to an amnesty/exile for peace arrangement in deciding whether to exercise its jurisdiction. ... Arrangements can vary greatly. Some, as in South Africa and Haiti are closely linked to mechanisms for providing accountability and redress; other such as in the case of Charles Taylor, are simply a mindful forgetting. The ICC should take only the former types of amnesty/exiles into account in prosecutorial decisions. Moreover, the ICC should be particularly reluctant to defer to an amnesty/exile in situations involving violations of international conventions that create obligations to prosecute, such as the Genocide Convention and the grave breaches of the Geneva conventions. The other international agreements and customary international war crimes that make up the ICC's subject matter jurisdiction make prosecution for related crimes possible, **but not mandatory**, and should be treated as such by the court in the broader interests of peace and international security.'*<sup>802</sup>

623. On the 2<sup>nd</sup> to 3<sup>rd</sup> May, US Secretary of States John Kerry undertook an official visit to Sri Lanka. Considering that the US had been in the forefront of the UNHRC Resolution of the 27<sup>th</sup> March 2014, he made a speech indicating that the change in Government had been brought about by a majority that was committed to the difficult task of healing the wounds of war. The Secretary of States went on to deal with the necessity to discover the truth, '*wherever the truth may lead*' and he saw this as an essential part of the healing and reconciliation process.<sup>803</sup> It is notable that he made no references to war crimes prosecutions.
624. The Commission, therefore, does not accept the restrictions on accountability mechanisms that the Darusman Report suggests ties the hands of the GoSL. This Commission is of the view that any one of the following mechanisms individually or in combination are available :
- i. Reparations to represent an acknowledgement on behalf of the State that human rights were violated.
  - ii. A Truth and Reconciliation Commission (TRC) with amnesties as in the South African model.<sup>804</sup>
  - iii. A TRC without amnesties.
  - iv. The prosecution within the domestic court system of **all** those alleged to have committed war crimes and/or crimes against humanity.<sup>805</sup>

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<sup>802</sup> Scharf, 'From the eXile Files', pp. 371-372. Emphasis added.

<sup>803</sup> 'John Kerry on strengthening US-Sri Lanka partnership for human rights, lasting peace', *Daily FT*, 5 May 2015, p. 15.

<sup>804</sup> TRCs can require reparations to victims and removal of civic rights by way of barring individuals from holding public office. The South African TRC termed these as 'lustrations'.

<sup>805</sup> In its report the LLRC at para 1.5.v made specific recommendations that '*priority should be given to the investigation, prosecution and disposal*' of cases and that '*all allegations should be investigated and wrongdoers prosecuted and punished irrespective of their political links, so as to inspire confidence among the people in the administration of justice*' and the criminal justice system.

- v. The prosecution within the domestic court system of those alleged to have committed war crimes and/or crimes against humanity but **confined** to those who bear the greatest responsibility.
- vi. A combination of prosecution within the domestic court system of those at (v) above coupled with a TRC – as in Sierra Leone.

A Proposed Mechanism

625. Whereas criminal trials underline criminal accountability, a Truth and Reconciliation Commission underpins the essence of reconciliation. This Commission has considered an approach which has not previously been tested elsewhere but which has the potentiality to bring about peace and reconciliation in post conflict Sri Lanka. Subject to the necessary domestication of international law, already touched upon in paragraphs 611 and 612 which deal with '*the general principles of law recognised by the community of nations*', to be found at Article 13 (6) of the Constitution, there could be,

- i. the creation of a Truth and Reconciliation Commission (hereinafter known as the Sri Lankan Truth and Reconciliation Commission (SLTRC) and a War Crimes Division of the High Court (hereinafter called the Court).
- ii. That the Attorney General of Sri Lanka be empowered to place before a judge of that Court evidence in relation to any individual who may on the evidence available to the Attorney General be individually criminally liable for a violation or violations of the laws of war, where such a liability arises upon evidence that has resulted from a judge-led investigation into facts and circumstances that may indicate individual criminal responsibility in relation to such an offence or offences;
- iii. That any such individual so appearing before the Court will have the right to be present personally and be represented at such a hearing and be able to submit that he/she has no case to answer in relation to such an allegation or allegations;
- iv. Where the evidence submitted by the Attorney General is held by a judge of the Court to amount to a *prima facie* case the 'named individual' against who such a finding is made would be summonsed to appear before the TRC, where that individual would be put to his or her election. A failure to answer the Summons will render the 'named individual' subject to the following penalty or combination of penalties;
  - a. fine
  - b. withdrawal of civic rights
  - c. imprisonment
- v. Where the 'named individual' answers the Summons and makes his or her appearance before the TRC the 'named individual' would be put to his or her election. The choices for the 'named individual' would be;
  - a) To appear before the TRC and give evidence or be tried before the Court

- b) If the 'named individual' chooses to appear before the TRC and make a full admission, that 'named individual' could thereafter apply to the TRC for an amnesty in relation to that to which he has admitted. If the TRC is satisfied that the individual before it making the application has been honest and truthful the TRC will then have a discretion to grant such an individual an Amnesty which would, thereafter, act as a bar to any further criminal or civil proceedings<sup>806</sup> against that individual within Sri Lanka. Even if an Amnesty were to be granted, the TRC in its discretion in appropriate cases would have the power to forfeit civic rights and order reparations.
- c) Where the TRC is satisfied that an individual appearing before it has failed to tell the truth the TRC would have the power to send the matter for trial as if the 'named individual' concerned had exercised his or her right to choose to be tried when put to his or her election under (v)(a) above.
- d) Where a 'named individual' exercises his/her right to be tried or is remitted for trial, as set out at (c) above, the matter will proceed in the same way as in any other criminal trial within the jurisdiction of Sri Lanka.
- e) Anyone convicted by the Court will have the right to appeal against conviction and or sentence to the Court of Appeal.

626. It is the view of this Commission that if the above proposal and all other recommendations made within the body of this Report are effectively implemented they will serve to bring about a measure of closure that will assist peace and reconciliation.

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<sup>806</sup> This reflects aspects of the South African TRC

## CHAPTER 9 - ANSWERS TO GAZETTED QUESTIONS

**A i. The principal facts and circumstances that led to the loss of civilian life during the internal armed conflict that ended on the 19th May 2009, and whether any person, group or institution directly or indirectly bears responsibility in this regard by reason of a violation or violations of international humanitarian law or international human rights law.**

627. The Commission has described in detail in this report the principal facts and circumstances that led to the loss of civilian life in the final phase of the conflict. Chapter 5 has addressed the question of the persons, groups or institutions that directly or indirectly bear responsibility for that loss of civilian life against the legal framework set out in Chapter 6.
628. The Commission draws attention to two questions at the centre of its assessment:
- i. who, in *this* case, for the purposes of International Humanitarian Law, were civilians?
  - ii. what was the unlawful extent of that civilian loss?
629. The Commission is satisfied that hundreds of thousands of hostages were taken and used as human shields by the LTTE. Some human shields may have been *voluntary*, even if they did not wear uniform, carry guns openly or follow a chain of command. Where civilians have chosen directly to participate in the war effort and put themselves in harm's way, they may be targeted for such time as they participate in hostilities in that manner as they have intentionally endangered their own safety in their effort to serve the military interests of a party to the conflict.
630. As there were so many civilian hostages taken by the LTTE and as there were so many LTTE fighters in civilian clothes, it is the view of this Commission that it is now impossible to calculate how many innocent civilians were in fact killed. For the reasons set out in this report in Chapter 2 from paragraph 115 onwards, the figure of up to 40,000 civilian deaths in the final phase of the war is wholly unsupported by any evidence and completely fails to take into account the other relevant evidence. The Commission notes that the UN Country Team, itself, put the death toll at 7,721 from August 2008 to 13 May 2009.<sup>807</sup> The Commission has sought to analyse the death toll from a variety of sources that have supplied figures as to civilian deaths and deal with by this Commission again, within Chapter 2. The ultimate significance being that there remains great uncertainty as to how many innocent Tamil civilians died in the final phase of the war making calculations as to numbers potentially totally speculative.
631. Had the LTTE freed the civilian hostages when repeatedly asked to do so, the number of civilian deaths is likely to have been significantly reduced.<sup>808</sup> Thus, this Commission can say with confidence that the principal causes for the loss of civilian life were as follows:

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<sup>807</sup> Darusman Report, para. 134.

<sup>808</sup> Campbell Conversations with Assistant Secretary of State Robert Blake

- The taking by the LTTE of some 300,000- 330,000 hostages, many of whom were either *forced* into acting as human shields or *voluntarily* acted as human shields, and from whose number even children were conscripted to fight, despite minimal training.<sup>809</sup>
  - The LTTE systematically refusing all calls by the international community to free the civilian hostages, which escalated the number of civilian deaths.<sup>810</sup>
  - The LTTE leadership refusing to surrender when their defeat was imminent and when called upon by the international community to do so, when the war could not possibly be won by them.<sup>811</sup>
  - The LTTE refusing to agree to the creation of no fire zones (NFZs) as a sanctuary for civilians.<sup>812</sup>
  - The deployment by the LTTE of their forces within densely populated areas and in particular amidst civilian hostages who were being held by the LTTE.<sup>813</sup>
  - The forcing of civilians by the LTTE to dig trenches and other emplacements for the LTTE's defence, thereby contributing to the blurring of the distinction between combatants and civilians and exposing the latter to the dangers of combat.<sup>814</sup>
  - The co-mingling of the LTTE with civilian hostages so as to blur the distinction between civilians and combatants.
  - The executions by the LTTE of civilians who tried to escape to Government lines.<sup>815</sup>
  - The deaths of all civilians who were the victims of LTTE shelling in order that the LTTE might assign those deaths to the SLA for propaganda purposes as media martyrs.<sup>816</sup>
  - The killing of civilians by the LTTE by means of suicide attacks.<sup>817</sup>
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- Alleged killings by the SLA as a result of the LTTE '*deliberately [locating] or [using] mortar pieces, other light artillery, military vehicles, mortar pits, bunkers and trenches in proximity to civilians*'.<sup>818</sup>
  - Allegations of reckless or deliberate shelling by the SLA, excluding hospitals.
  - Allegations of the deliberate shelling of hospitals with consequential loss of life.
  - Evidence of the disappearance of persons who handed themselves in or who were handed in to Army custody at the end of the conflict.
  - Allegations that persons who were induced to surrender were executed.

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<sup>809</sup> Darusman Report, p. ii.

<sup>810</sup> 'To move away from the conflict areas where they could have been given food and shelter and so forth. So they systematically basically refused all efforts and in fact violated international law by not allowing freedom of movement to those civilians. So had the LTTE actually allowed people to move south, none of this would have happened in the first place, so it's important to make that point. I think that often gets lost in the debate on this.' Campbell Conversations with Assistant Secretary of State Robert Blake.

<sup>811</sup> Darusman Report, para. 70.

<sup>812</sup> Darusman Report, para. 80.

<sup>813</sup> Human Rights Watch, *War on the Displaced: Sri Lankan Army and LTTE Abuses against Civilians in the Vanni*, 20 February 2009, p. 8.

<sup>814</sup> Darusman Report, p. iii.

<sup>815</sup> Darusman Report, para. 238.

<sup>816</sup> US State Department Report, 2009, p. 24; UTHR, Special Report 32, para. 1.4.2.

<sup>817</sup> Darusman Report, para. 242.

<sup>818</sup> Darusman Report, para. 239.

- Evidence of images of those seen alive in military custody were killed whilst in that custody.

632. For all the reasons set out above, this Commission is satisfied that the LTTE, both directly and indirectly, bears the primary responsibility for the loss of innocent civilian life during the final phase of the conflict that formally ended on 19 May 2009. However, the Commission recognises that in any conflict violations of IHL are likely to occur on both sides and has examined with care the conduct of both the LTTE and the SLA. While this Commission has listed above, the principal allegations resulting in civilian deaths in the final phase of the conflict, it recognises that there are a number of individual cases involving the SLA where there is a reasonable belief as to breaches of the laws of war.<sup>819</sup> The main allegation against the SLA is that the principal cause of civilian deaths was the result of indiscriminate shelling. While there are such allegations each must be examined on a case-by-case basis on account of the LTTE tactic of placing artillery close to civilians and hospitals. Indeed, the need for such detailed examinations is underlined by the Darusman Report which held that the LTTE

*‘also fired artillery in proximity to large groups of internally displaced persons (IDPs) and fired from, or stored military equipment near, IDPs or civilian installations such as hospitals.’<sup>820</sup>*

633. Thus individual investigations are required before any tribunal can ascribe culpability to one side or the other. The Commission recommends a judge-led inquiry of all these incidents, such as those involving hospitals. SLA shelling which was a principal cause of civilian deaths, as alleged, has got to be seen in the light of the principles of proportionality which have already been outlined in the Report.<sup>821</sup>

634. The Commission notes that the former Commander of the SLA, Sarath Fonseka, now promoted to Field Marshall, has himself welcomed the need for investigations and has stated recently that he believed individual incidents of war crimes did occur in the final phase.<sup>822</sup>

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<sup>819</sup> These are listed in Chapter 7

<sup>820</sup> Darusman Report, p. iii

<sup>821</sup> See Chapter 6

<sup>822</sup> David Corlett, ‘Former Sri Lanka army chief says he would welcome war crime investigation’, *The Guardian*, 27 May 2015. < <http://www.theguardian.com/world/2015/may/27/former-sri-lanka-army-chief-says-he-would-welcome-war-investigation> >.

**A ii. Whether such loss of civilian life is capable of constituting collateral damage of a kind that occurs in the prosecution of proportionate attacks against targeted military objectives in armed conflicts and is expressly recognised under the laws of armed conflict and international humanitarian law, and whether such civilian casualties were either the deliberate or unintended consequence of the rules of engagement during the said armed conflict in Sri Lanka.**

635. The Commission has given detailed consideration to the legal framework governing the core IHL principles of distinction, military necessity and proportionality and the impact of the use of human shields by the adversary in the practical application of those principles. It is well established that ‘*under international humanitarian law... the death of civilians during an armed conflict, no matter how grave and regrettable, does not in itself constitute a war crime.*’<sup>823</sup> IHL permits belligerents to carry out proportionate attacks against military objectives even when it is known that some civilian deaths or injuries will occur.<sup>824</sup>

*‘In all armed conflicts, IHL requires that combat operations be conducted in accordance with the principles of distinction and proportionality. The law of war principle of distinction requires parties to the conflict to distinguish between military and civilian objects and prohibits the intentional targeting of the civilian population as such, including individual civilians. The law recognises, however, that civilians taking direct part in hostilities lose their immunity from attack.’*<sup>825</sup>

*‘The principle of proportionality requires that parties to a conflict refrain from attacks on military objectives that would clearly result in collateral civilian casualties disproportionate to the expected military advantage. Accordingly, some level of collateral damage to civilians – however regrettable – may be incurred lawfully if consistent with proportionality considerations. All parties to a conflict must take all practicable precautions, taking into account both military and humanitarian considerations, in the conduct of military operations to minimize incidental death, injury, and damage to civilians and civilian objects.’*<sup>826</sup>

636. This Commission has taken the view that the unique factual circumstances of the final phase of the war, involving a massive hostage taking by the LTTE combined with the use of human shields, forced recruitment and threat of execution of civilians attempting to escape, warrant a reevaluation and a recalibration of the proportionality principle.

637. As explained in this report, the Commission thus finds that the taking of hostages by the LTTE and their use as human shields had a direct impact upon the evaluations

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<sup>823</sup> See e.g., Prosecutor of the International Criminal Court Luis Moreno-Ocampo, ‘Letters to Senders regarding Iraq’, ICC, 9 February 2006. <[http://www.icc-cpi.int/NR/rdonlyres/04D143C8-19FB-466C-AB77-4CDB2FDEBEF7/143682/OTP\\_letter\\_to\\_senders\\_re\\_Iraq\\_9\\_February\\_2006.pdf](http://www.icc-cpi.int/NR/rdonlyres/04D143C8-19FB-466C-AB77-4CDB2FDEBEF7/143682/OTP_letter_to_senders_re_Iraq_9_February_2006.pdf)>.

<sup>824</sup> Ibid.

<sup>825</sup> US State Department Report, p. 15.

<sup>826</sup> Ibid, pp. 15-16.

involved in calculations as to proportionality. The Commission has noted that the ‘*use of [involuntary] human shields does not necessarily bar attack on a lawful target*’<sup>827</sup> but the attack must nevertheless be conducted in accordance with the rules of IHL, including the application of the principle of proportionality to assess whether the military advantage of the attack outweighs the humanitarian protections afforded to the civilians in question. The fact that the enemy has acted unlawfully and placed civilians in harm’s way can be taken into account as an important factor when assessing whether the number of civilian casualties is so excessive as to outweigh the military advantage. In other words, specific allowance can be made for the LTTE’s unlawful conduct in the proportionality calculation to reflect the inevitability that civilian casualties will be higher in these circumstances.

638. Thus the Commission has found that in the circumstances outlined above, loss of civilian life incurred by the SLA is *capable* of constituting collateral damage if it was part of a lawfully conducted proportionate attack against military objectives.

639. The Chairman of this Commission, who also had the benefit of serving on the LLRC, is satisfied to having had sight of restricted documents provided to the LLRC,<sup>828</sup> that evidenced the fact that the SLA did operate under Rules of Engagement (ROE). However, the Chairman has not seen any ROE evidence that goes beyond the first week of February 2009. The Chairman, therefore, agrees with Major General Holmes where the General notes from his own investigations that there appeared to be no ROE that arose in the very final stages of the conflict. Clearly, this may be an important factor in any investigation relating to shelling incidents as observed by General Holmes in his Military Expert Report to the Commission.<sup>829</sup>

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<sup>827</sup> Michael N. Schmitt, ‘Human Shields in International Humanitarian law’, (2012) *Israeli Yearbook on Human Rights*, 2012, p. 47.< <http://www.marshallcenter.org/mcpublicweb/MCDocs/files/College/HShlds-Schmitt.Pdf> >.

<sup>828</sup> Archive No. LLRC 6/33/122 .

<sup>829</sup> Expert Military Report, Annex 1, para. 43 onwards.

**A iii. The adherence to or neglect of the principles of distinction, military necessity and proportionality under the laws of armed conflict and international humanitarian law, by the Sri Lankan armed forces.**

640. The Commission has noted the praise bestowed on the SLA, notably by both the US and the UN, for its respect for the core principles of IHL, aimed at minimizing civilian losses, up to the final stage of the war.<sup>830</sup> The Commission has also described the factors that in its view led to an increase in the number of civilian deaths in the final campaign to defeat the LTTE, in particular the hostage taking on an unprecedented scale.
641. When these factors are considered against the legal framework elaborated in Chapter 6, the Commission is satisfied that the SLA acted in the main in accordance with the principles of distinction, military necessity and proportionality in attacking the LTTE, its leadership and its weaponry despite the presence of civilians in the area of combat. The Commission has not found evidence of a deliberate policy on the part of Government forces to target civilians or civilian objects. Should such evidence emerge or be forwarded to the Commission, then clearly this may alter our conclusions. However, given the Indian Elections that were taking place in May 2009, it appears to this Commission that such a campaign to target civilians deliberately would have been counterproductive in sustaining the Government of India's support, which was crucial to the GoSL. Given the weaponry available, to the SLA, had the SLA been unmindful of civilian casualties, it would have led to far fewer civilian survivors emerging from the conflict zone. The Commission notes that, a failure to respond to attacks from the LTTE upon the SLA, because they had embedded themselves amongst the civilians, would, in effect, have handed to the LTTE a military advantage and would have rewarded them for their own violations of IHL and further, encouraged them to continue with the forced recruitment of civilians.
642. The Commission emphasises, however, that individual and isolated incidents which are capable of amounting to war crimes or even crimes against humanity as indicated in Chapter 7 of this report should be the subject of a judge-led investigation. The Commission has found there are credible allegations of individual incidents that echo the LLRC's call for the urgent need for investigation.

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<sup>830</sup> See e.g. US Ambassador Robert Blake, 'Sri Lanka: Declared Safe Zone Inoperative; ICRC Contemplates Full Withdrawal', Embassy Colombo, *WikiLeaks*, 27 January 2009, released 30 August 2011, para. 7. <<http://www.cabledrum.net/cables/09COLOMBO95>>; Petrie Report, pp. 64-65.

**A iv. Whether the LTTE as a non-state actor was subject to international humanitarian law in the conduct of its military operations.**

643. The Commission has addressed this question in Chapter 6 of this report at paragraph 302 onwards and concluded that the LTTE, as a non-state actor, was subject to IHL in the conduct of its military operations.

**A v. The use by the LTTE of civilians as human shields and the extent to which such action constitutes a violation of international humanitarian law or international human rights law, and did or may have significantly contributed to the loss of civilian life.**

644. The Commission has addressed this question extensively in its report, especially in Chapter 6 from paragraph 347 onwards. We are satisfied that in the light of the applicable law, the LTTE violated IHL by using both voluntary and involuntary human shields and that this conduct also gives rise to our conclusion that the LTTE committed the war crime of hostage taking in order to use the civilian population as a human shield.

645. It is also clear to the Commission, as explained in this report that the LTTE's use of human shields contributed significantly to the loss of civilian life. The LTTE's objective was to preserve its leadership at all costs. This Commission takes the view that the LTTE was also seeking Western intervention by creating a humanitarian disaster.<sup>831</sup> Sir John Holmes, a UN Under Secretary General for Humanitarian Affairs, observed in relation to the calls for intervention by the Tamil diaspora:

*'Sadly they put no similar pressure on the LTTE to let their fellow Tamils go'.*  
<sup>832</sup>

**B. The recruitment of child soldiers by the LTTE or illegal armed groups-affiliated with the LTTE or any political party in violation of international humanitarian law or international human rights law.**

646. The law relating to the recruitment and/or use of child soldiers has been set out by this Commission at Chapter 6, paragraph 390 onwards.

647. The Commission finds that there has been a long history of the LTTE recruiting child soldiers. Prabhakaran chose Basheer Kaka to establish a training camp in Southern India for recruits who were under the age of sixteen.<sup>833</sup> Child recruitment increased

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<sup>831</sup> Harrison, *Still Counting the Dead*, p. 63.

<sup>832</sup> Holmes, *The Politics of Humanity*, p. 164.

<sup>833</sup> Rohan Gunaratna, 'LTTE Child Combatants', *Janes Intelligence Review* of July 1998.

from October 1987 when the LTTE turned against the Indian Peace Keeping Force ('IPKF').<sup>834</sup> It is believed that a shortage of cadres led to this policy when the LTTE had to take on the 100,000 strong IPKF in October 1987.<sup>835</sup> The Batticaloa Brigade was made up of children under fifteen with some being only nine years old. Following the departure of the Indian Forces and renewed conflict with SLA in June 1990, the LTTE continued its policy of child recruitment in unprecedented numbers.<sup>836</sup>

648. *'Children were initially recruited into what was known as the "Baby Brigade," but were later integrated into other units. An elite "Leopard Brigade" (Siruthai puligal) was formed of children drawn from LTTE-run orphanages and was considered one of the LTTE's fiercest fighting units.'*<sup>837</sup>

649. In a Report conducted by UNICEF entitled 'The Impact of Armed Conflict on Armed Children', Graça Machel, the former First Lady of Mozambique, cited an LTTE attack on government forces, which left 180 Tamil Tiger guerrillas killed. More than half were teenagers and 128 were girls. This Report was published some 13 years prior to the end of the war.<sup>838</sup> UNICEF also reported that more than 40 percent of children recruited by the LTTE were girls.<sup>839</sup>

650. According to the Darusman Report:

*'It [the LTTE] implemented a policy of forced recruitment throughout the war, but in the final stages greatly intensified its recruitment of people of all ages, including children as young as fourteen.'*<sup>840 841</sup>

651. The University Teachers of Human Rights (Jaffna) stated:

*'The LTTE politically took Tamil society hostage from the mid-1980s through systematic terror. Militarily stymied, it took physical hostage of 300 000 people in its final stages, repeatedly provoking the Army to underpin its claims of genocide, shooting or shelling hundreds who tried to escape and forcing thousands of their children who could barely carry a rifle to man the frontlines. Even as the LTTE leaders were discussing surrender terms, they were sending out very young suicide cadres to 'martyrdom' to slow down the army advance.'*<sup>842</sup>

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<sup>834</sup> The Coalition to Stop the Use of Child Soldiers, *Child Soldiers Global Report 2001*, p. 341. ; Liberation Tigers of Tamil Eelam (LTT), SATP. <<http://www.satp.org/satporgtp/countries/shrilanka/terroristoutfits/LTTE.HTM>>.

<sup>835</sup> Rohan Gunaratna, 'LTTE Child Combatants', *Janes Intelligence Review of July 1998*, 23 September 2001 <<http://www.freerepublic.com/focus/f-news/530278/posts>>.

<sup>836</sup> Ibid.

<sup>837</sup> HRW, Vol. 16, No 13(C), pp.5-6

<sup>838</sup> 'Impact of Armed Conflict on Children, Children at both ends of the gun', *UNICEF website* <<http://www.unicef.org/graca/kidsoldi.htm>>.

<sup>839</sup> HRW, Vol. 16, No 13(C), p. 6

<sup>840</sup> Darusman Report, p. iii.

<sup>841</sup> US Department of State Report, 2009, p. 11

<sup>842</sup> UTHR Report No. 32, para. 0.

652. The 2009 US Department of State Report stated:

*‘For many years there have been reports that the LTTE forcibly recruited children into its cadres. According to reports of the incidents noted below, on numerous occasions during the January to May 2009 reporting period the LTTE took both male and female children, some as young as 12, to join LTTE cadres. In some instances, sources alleged that when parents or children resisted they were beaten or killed.’<sup>843</sup>*

653. The human agony of child recruitment by the LTTE is best captured in these words:

*‘As LTTE recruitment increased, parents actively resisted, and families took increasingly desperate measures to protect their children from recruitment. They hid their children in secret locations or forced them into early arranged marriages.<sup>844</sup> LTTE cadre would beat relatives or parents, sometimes severely, if they tried to resist the recruitment. All these approaches, many of them aimed at defending the LTTE and its leadership, portrayed callousness to the desperate plight of civilians and a willingness to sacrifice their lives.’<sup>845</sup>*

654. A 38 year old engineer who escaped from the Wannu with his family, when interviewed by Frances Harrison, a former BBC correspondent, was to tell her in relation to forcible child recruitment that he had witnessed:

*‘livid parents screaming at the Tigers for snatching their children away to fight. “The Tigers tried to explain how important it was, but the mothers would never accept it. They took them by force.’ When families were arranging marriages to protect their children from being recruited, “They did it without any proper checks first”.’<sup>846</sup>*

655. The Commission at one of its public sittings heard first hand evidence in relation to the 24th March 2009 from a father who gave an account of how a large group of uniformed members of the LTTE forcibly recruited up to eight hundred children in the last weeks of the conflict. The children, both Hindu and Christian had taken shelter in a church in the Mankulam diocese, when they were forcibly seized and taken away by the LTTE. The complainant has not seen his son since.<sup>847</sup>

656. In addition the Commission is aware of the high incidence of child recruitment by the LTTE and other paramilitaries, such as the Tamil Makkal Viduthalai Pulikal (TMVP), in the Eastern regions of Sri Lanka. Much of the evidence of forced recruitment in this area falls outside the very final phase of the conflict with which this Commission is concerned in relation to the Second Mandate. However, LTTE leaders who have

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<sup>843</sup> US Department of State Report, 2009, p. 11.

<sup>844</sup> Early marriage was perceived to protect girls and boys from LTTE recruitment, as the LTTE preferred to recruit unmarried youth. Early marriage is a threat to the health and development of young women. Later, in the IDP camps, parents also hoped that marriage would protect girls who had reached puberty from sexual violence by Government forces. See Darusman Report p. 28, fn 52.

<sup>845</sup> Darusman Report, para. 98.

<sup>846</sup> Harrison, *Still Counting the Dead*, p.170.

<sup>847</sup> Public Sitting Held at Kacheri Kilinochchi on 20<sup>th</sup> January 2014. Ref no. 10227.

survived and who held command roles should be investigated in relation to the recruitment that did occur in the final stages of the conflict. This Commission has heard primary evidence, some of which is outlined above, of the LTTE harassing and threatening families that refused to willingly submit their children to the movement. The Commission is in no doubt that this too should form part of a judge-led investigation together with any former LTTE leaders who are alive and who must be held accountable.

657. The Commission is therefore satisfied that the LTTE recruited child soldiers and used them to participate actively in hostilities and that this widespread practice constitutes a crime under both conventional and customary international law entailing individual criminal responsibility.
658. The Commission is satisfied that the LTTE recruited child soldiers and used them to participate actively in hostilities and that this widespread practice constitutes a crime under both conventional and customary international law entailing individual criminal responsibility.

**C. International criminal activities of the LTTE and the application of financial and other resources obtained through such illegal activities in the prosecution of the conventional and guerrilla war in Sri Lanka by the LTTE.**

659. While the LTTE controlled a large swathe of territory in the North and East of the island this Commission finds the organisation also generated resources internally by levying tolls upon the local population. These funds were generated by sales taxes, of approximately 10% on building material, 7.5% on car parks and 20% of cigarettes.<sup>848</sup> The Commission notes that major international sources of funds included the following:<sup>849</sup>
- i. Contributions from diaspora fundraising
  - ii. Front companies and businesses
  - iii. The informal system of money transfer known as Undiyal<sup>850</sup>
  - iv. Drug smuggling
  - v. Weapons smuggling
  - vi. Credit card frauds
  - vii. Internet fraud/cyber crime
660. The huge war chest of the LTTE did not emerge overnight. The Commission notes that the first political assassination associated with the LTTE leadership took place in

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<sup>848</sup> Mathew Rosenberg, 'Sri Lanka Rebel Arms Buying Goes Global', *Associated Press*, 5 November 2007, < [http://usatoday30.usatoday.com/news/world/2007-11-05-842382138\\_x.htm](http://usatoday30.usatoday.com/news/world/2007-11-05-842382138_x.htm) >.

<sup>849</sup> 'Feeding the Tiger', *Janes Intelligence Review*, August 2007 < <http://c-cft.org/publication/pdf/FeedingtheTiger.pdf> >.

<sup>850</sup> Maneshka Borham, 'Undiyal money transfer a threat to security', *The Nation*, 25 January 2015. < <http://www.nation.lk/edition/news-features/item/37700-undiyal-money-transfer-a-threat-to-security.html> >.

1975.<sup>851</sup> The Commission further notes that it should not be under-estimated that the LTTE, even by the mid-1990s had a criminal funding base that went back 20 years.

661. However, it was the 1983 riots between the Sinhalese and the Tamils which began with a deadly ambush by the LTTE that killed 13 SLA soldiers, with a consequential Sinhalese backlash which led a large number of Tamils killed.<sup>852</sup> The ensuing riots exponentially increased LTTE support. The Tamil diaspora emerged largely as a by-product of the 1983 riots with most Tamils who left Sri Lanka settling eventually in Western countries.<sup>853</sup> There was a nexus that developed between this refugee diaspora and the LTTE, which did not exist with Sri Lankan Tamils who had left the country prior to 1983. This single event that led to the settlement of the Tamil diaspora in Western countries provided the LTTE with the foundations of its war chest.

*'Generally speaking they [the LTTE] saw the west as a goldmine and an almost inexhaustible source of cash.'*<sup>854</sup>

662. As a US State Department publication, *Patterns of Global Terrorism*, which concurred with this view, stated in 1996 that:

*'The LTTE also uses its international contacts to procure weapons, communications and bomb-making equipment.... Exploiting the Tamil communities in North America, Europe and Asia to obtain funds and supplies for its fighters in Sri Lanka.'*<sup>855</sup>

663. By August 2007, *Jane's Intelligence Review* stated that:

*'through its licit and illicit businesses and fronts, the Tamil Tigers generate an estimated USD 200 to 300 million per year. After accounting for an estimated USD 8 million a year of costs within LTTE administered Sri Lanka, the profit margins of its operating budget would likely be the envy of any multinational Corporation.'*<sup>856</sup>

664. Therefore, Western governments were under no illusion as to the extent of the LTTE's financial muscle. Within fifteen years of its establishment, the LTTE was able to threaten the very fabric of the Sri Lankan state.<sup>857</sup> This Commission is driven to the conclusion that the scale of the LTTE wealth not only permitted them to create quasi-state within a state, but also served as an asset base to wage war for many years to come.

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<sup>851</sup> Alfred Durayappah, mayor of Jaffna murder was the first execution associated with Prabhakaran, who was 17 years old at that time. K.M. de Silva, *Sri Lanka and the defeat of the LTTE*, p. 27.

<sup>852</sup> '24 July 1983', *Peace and Conflict Timeline*, < <http://pact.lk/24-july-1983/> >.

<sup>853</sup> Frances Harrison, 'Twenty years on - riots that led to war', *BBC News*, 23 July 2003. < [http://news.bbc.co.uk/2/hi/south\\_asia/3090111.stm](http://news.bbc.co.uk/2/hi/south_asia/3090111.stm) >.

<sup>854</sup> International Crisis Group, *Asia Report N° 186*, p. 5

<sup>855</sup> U.S. Department of State's, '*Patterns of Global Terrorism; Appendix B*', 1996 < <http://www.state.gov/www/global/terrorism/1996report/appb.html> > ; 'Terrorism: Major Terrorist Groups', *Towson University*. < <http://www.towson.edu/polsci/ppp/sp97/terror/groups.html> >.

<sup>856</sup> 'Feeding the Tiger' *Janes Intelligence Review*, August 2007, p. 16 < <http://c-cft.org/publication/pdf/FeedingtheTiger.pdf> >.

<sup>857</sup> K. M. de Silva, *Sri Lanka and the defeat of the LTTE*, p. 29.

### First Generation Funding Methods

665. It is believed that the LTTE commenced its operations in a relatively unsophisticated manner in what has been termed ‘first generation fundraising methods’. These included collections from Tamil individuals and businesses.<sup>858</sup> The LTTE very effectively harnessed its diaspora either willingly or through coercion and extortion.<sup>859</sup> Some of the contributions made were overt and others covert.<sup>860</sup> Event based fundraising was organised with regular appeals for funds. As the group became more sophisticated this even included the equivalent of ‘plate dinners’ with touring senior LTTE representatives who came to Europe in 2006, as part of the Peace Process initiative.<sup>861</sup>
666. The Commission notes that the LTTE’s reach into the diaspora communities continues. In October 2011 a Dutch court convicted a number of Sri Lankan Tamils, who then held Dutch passports. The prosecutors said the men extorted euros from the Tamil diaspora through blackmail and threats. The convictions were based on their guilt of involvement in a criminal organisation as the LTTE had been outlawed by the European Union in 2006.<sup>862</sup>

### Drug Dealing

*‘From the very outset, the LTTE made optimum use of its access to the sea.’<sup>863</sup>*

667. It is believed that from as early as 1984 the LTTE was involved in the peddling of narcotics using sea routes from the Golden Crescent and the Golden Triangle to Europe and the West.<sup>864</sup> According to one expert on the LTTE, its nexus to the narcotics trade is believed to have taken several forms: bulk shipping of heroin and cannabis; small scale courier delivery; the operation of drug distribution networks dealing in countries with a high drug consumption and working as couriers between dealers and distributors.<sup>865</sup>
668. An investigative study on criminal gangs in France in 2008 by a French criminologist and authority on organized crime has illustrated that the fund raising activities of the LTTE and its active collaboration with Tamil criminal gangs operate across Europe.<sup>866</sup>

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<sup>858</sup> Shanaka Jayasekara ‘LTTE fundraising and Money Transfer operations’, *Transcurrents*, 24 October 2007. <<http://transcurrents.com/tamiliana/archives/399>>.

<sup>859</sup> Ibid.

<sup>860</sup> Ibid.

<sup>861</sup> Ibid.

<sup>862</sup> ‘Dutch court convicts five for Tamil Tiger fundraising’, *BBC News*, 21 October 2011. <<http://www.bbc.com/news/world-europe-15408378>>.

<sup>863</sup> K. M. de Silva, *Sri Lanka and the defeat of the LTTE*, p. 75

<sup>864</sup> Ibid.

<sup>865</sup> G. H. Peiris, ‘Secessionist War and Terrorism in Sri Lanka: Transitional Impulses’, Paper presented by G. H. Peiris at an international seminar on ‘The Global Threat of Terror: Ideological, Political and Material Linkages’, held in New Delhi, October 29-31, 2001, conducted by the Delhi-based Institute of Conflict Management, *Island Newspaper*. <<http://www.island.lk/2001/11/09/featur01.html>>.

<sup>866</sup> Jérôme Pierrat, a journalist who specialises in criminology, has described the fund raising activities by the LTTE in his book *Maifias Gangs et Cartels: La Criminalite internationale en France*’.

669. This analysis of the criminal gangs in France led the French investigating author to the conclusion that large sums of money were being laundered from illicit proceeds and sent to banks in Switzerland.<sup>867</sup> This was corroborated by an arrest in 2004, when customs officers of Ottmarsheim in the Haut-Rhin department arrested two men aged 44 and 35 together with a woman and two children carrying 200,000 euros in cash in their car. One of them accepted that he already transported 5.4 million euros to a bank in Zurich during six trips he made in the previous year.<sup>868</sup>
670. This Commission notes that the allegation that the Organization Tamale de Rehabilitation (TRO) was a cover organisation to launder extorted funds for the LTTE and that in 2006 alone approximately 6 million euros had been collected.<sup>869</sup>
671. It is believed that the first major detection of LTTE linked drug rings in Europe was in Italy in September 1984, following the arrest of a Tamil courier on his way to Rome.<sup>870</sup> This led to the arrest of about 200 Tamils in Italy most of whom were believed to have belonged to a Rome based narcotic distribution network spread over several Italian cities such as Milan, Naples, Acilia, Cetania and Syracuse, and across and into Sicily. This Italian operation galvanised other drug enforcement agencies resulting in the arrest and imprisonment of many Sri Lankan Tamils associated with the drug trade. It also led to the confiscation of large amounts of high grade heroin.<sup>871</sup>
- 'By 1988, Italian police had broken up four separate rings of Tamil heroin smugglers. All were using some of their profits to fund the insurgency...'*<sup>872</sup>
672. The French and German police arrested no less than 200 Tamil drug couriers in a two year period ending in 1987.<sup>873</sup>
673. This Commission notes that once the LTTE had acquired a shipping fleet, they were able to graduate to much larger scale shipments not only of drugs but weapons and other contraband as well. A separate Canadian investigation found that while the LTTE was not found to be involved in actual street level distribution of heroin in Canada, it did claim that a portion of the USD 1 billion drug market in Montreal was connected to the LTTE.<sup>874</sup>

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<sup>867</sup> Jérôme Pierrat, *Mafias Gangs et Cartels: La Criminalite internationale en France*.

<sup>868</sup> Ibid.

<sup>869</sup> Ibid.

<sup>870</sup> Ibid.

<sup>871</sup> GH Peiris, 'LTTE and Narcotics: Hanging on to Tiger's Tail', *The Island*, 16 June 2015

<[http://www.island.lk/index.php?page\\_cat=article-details&page=article-details&code\\_title=126636](http://www.island.lk/index.php?page_cat=article-details&page=article-details&code_title=126636) >.

<sup>872</sup> John Thompson, 'Hosting Terrorism: The Liberation Tigers of Tamil Eelam in Canada', in *Terror in the Peaceable Kingdom: Understanding and Addressing Violent Extremism in Canada*, ed. Daveed Gartenstein-Ross & Senator Linda Frum, Washington: DC: FDD Press, 2012, p.44.

<sup>873</sup> Ibid. p. 38.

<sup>874</sup> 'Feeding the Tiger', *Janes Intelligence Review*, August 2007. <[http://fas.org/irp/world/para/docs/com77e.htm#N\\_27\\_](http://fas.org/irp/world/para/docs/com77e.htm#N_27_) >.

## Second Generation Funding

### LTTE Shipping Fleet

674. The LTTE is believed to have started building their maritime network in the mid-1980s.<sup>875</sup> The fleet was estimated to consist of ten freighters. They were equipped with on board radar and Inmarsat communication technology. The vessels often travelled under Panamanian, Honduran or Liberian flags and were crewed by Tamils originating from the Jaffna sea port of Valvettithurai. A port well known to smugglers, and the hometown of the LTTE leader. The ships frequented ports in Japan, Indonesia, Singapore, South Africa, Burma, Turkey, France, Italy and Ukraine.<sup>876</sup> Some were armed with heavy weapons and able to engage with both the Indian and the Sri Lankan navy when confronted. The majority of the shipments may well have been legitimate commercial goods such as hardwood, tea, rice paddy, cement and fertilizer. However, a percentage of illicit cargo played a vital role in supplying explosives, arms, ammunitions and other war related material to the LTTE.<sup>877</sup>
675. This Commission notes that the problems of organised crime and terrorism were often considered separate activities prior to the September 11<sup>th</sup> Twin Tower attacks in New York. The Commission acknowledges that the total scale of LTTE links to criminality, in foreign jurisdictions, may never be known as the simple cost factor of investigating a *terrorist crime* would engage a huge amount of state resources and raise complicated legal defences. If a state concerned could prosecute on the substantive crime involved be it credit card fraud or drug importation, it is understandable that such a route to a conviction would be preferable to the issues and costs that arise in pursuing terrorist cases.<sup>878 879</sup>

### Human Smuggling

676. In the early years of the mass exodus of Tamil youth in the 1980s the LTTE was able to exploit the desperation of those wishing to escape Sri Lanka illegally.<sup>880</sup> In the initial phases of the international structure of the Tiger movement in the West, it is believed that some Tamil asylum seekers had to serve as drug couriers either to or after their entry into their intended destinations. This was often a method of repayment of debt to the traffickers.<sup>881</sup> The Commission notes that in the 1980's, instead of seeking asylum

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<sup>875</sup> Peter Chalk, 'LTTE- International Organization and Operations-a Preliminary Analysis'. *Canadian Security Intelligence Service*, 17 March 2000. <[http://fas.org/irp/world/para/docs/com77e.htm#N\\_27\\_>](http://fas.org/irp/world/para/docs/com77e.htm#N_27_>).

<sup>876</sup> *ibid*

<sup>877</sup> *ibid*

<sup>878</sup> Frank S. Perri, Terrance G. Lichtenwald, and Paula MacKenzie, 'Evil Twins: The Crime Terror Nexus', *Forensic Examiner*, 18, no. 4, 2009, pp. 16-29.

<sup>879</sup> *Prosecutor v X*, District Court of The Hague, 21 October 2011.

<sup>880</sup> G. H. Peiris, 'Secessionist War And Terrorism In Sri Lanka: Transnational Impulses', in KPS Gill & Ajay Sahai (eds) *Global Threat of Terror*, New Delhi: Institute of Conflict Studies, 2003. <<http://www.satp.org/satporgtp/publication/books/global/peiris.htm> >.

<sup>881</sup> *Ibid*

in countries that might ordinarily have been considered the closest in proximity for the purpose of making an asylum claim, such as India or even Singapore, a sophisticated method of moving civilians to Europe and Canada via Moscow and Africa was devised.<sup>882</sup>

677. However, the role of the LTTE in human smuggling first came to the attention of Western Governments after the Federal Bureau of Investigations (FBI) launched an operation to investigate the LTTE's US network. Starting in 2001, the FBI developed a comprehensive understanding of how the LTTE earned its money from human smuggling. Vijayshanthar Patpanathan alias Chandru was in charge of LTTE fundraising in this area.<sup>883</sup> The Commission notes that he was alleged to have been the Deputy Head of the LTTE in the US. In addition he had oversight of the revenues of the TRO.
678. In 2001 Chandru was involved in a human smuggling operation of Tamils to Canada. Both Chandru and his associate Yoga who was subsequently apprehended, later 'cooperated' with the FBI following their arrest.<sup>884</sup>
679. Following the end of the war in 2009 the extent and the ability of the smuggling networks to move human cargo was exposed when many fleeing to Canada and elsewhere utilised the remnants of the LTTE shipping fleet to escape Sri Lanka.<sup>885</sup>
680. Some components of the networks morphed into pure criminal networks. As human smuggling produced huge revenues, it became the preferred mode of business for many former terrorists. One well known operation was of Wimalraj, a military operative from Trincomalee who moved to Indonesia in 2010 to establish a human smuggling network.<sup>886</sup>
681. The Commission notes this overlap with criminal gangs. This is underlined by arrests in a Europe that have led to the breakup of large human smuggling rings with Sri Lankan Tamil connections.<sup>887</sup>

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<sup>882</sup> John Thompson, 'Hosting Terrorism: The Liberation Tigers of Tamil Eelam in Canada', in *Terror in the Peaceable Kingdom: Understanding and Addressing Violent Extremism in Canada*, ed. Daveed Gartenstein-Ross & Senator Linda Frum, Washington: DC: FDD Press, 2012, p 45-46.

<sup>883</sup> Camelia Nathaniel 'LTTE Human Smuggling Links', *The Sunday Leader*, 1 June 2014. < <http://www.thesundayleader.lk/2014/06/01/ltte-human-smuggling-links/> >.

<sup>884</sup> Ibid.

<sup>885</sup> 'Transnational Organized Crime in East Asia and the Pacific', United Nations Office on Drugs and Crime, April 2012, pp.v-vi < [http://www.unodc.org/documents/data-and-analysis/Studies/TOCTA\\_EAP\\_web.pdf](http://www.unodc.org/documents/data-and-analysis/Studies/TOCTA_EAP_web.pdf) >.

<sup>886</sup> Camelia Nathaniel, 'LTTE Human Smuggling Links', *The Sunday Leader*. < <http://www.thesundayleader.lk/2014/06/01/ltte-human-smuggling-links/> >.

<sup>887</sup> 'Int. Tamil smuggling Ring Smashed by German Police', *Sri Lanka Watch*, 13 August 2015. < [http://srilankawatch.com/index.php?option=com\\_content&task=view&id=173&Itemid=1](http://srilankawatch.com/index.php?option=com_content&task=view&id=173&Itemid=1) >.

### LTTE Proscribed

682. Following the LTTE having been listed as a terrorist organisation by the USA in 1997 and banned by many European countries,<sup>888 889</sup> it transformed itself into a myriad different fronts such as charities, through which their funds were channelled. The TRO was which was one of the most prominent of these was channelling funds through to the LTTE. In 2007 the US froze its funds after US officials found it to be a front for terrorism.<sup>890</sup> The US Treasury was to say,

*‘money raised by the TRO for humanitarian purposes had reportedly been used by the Tamil Tigers for military purposes.’<sup>891</sup>*

### Credit Card Frauds

683. Apart from its activities in Europe relating to human smuggling, drug trafficking, gun running and organized crime, the LTTE used petrol stations to enable them to earn a legitimate income and also generate illicit earnings through credit card frauds. Credit cards used by customers had their details stolen/cloned – commonly called ‘skimming’- when payments were made at such stations. The customers’ accounts were then being plundered by the criminals who had stolen the credit card details. The trans-national scale of this offending is illustrated by a few examples below.

684. In New York in 2007 a group linked to the LTTE - led by a Sri Lankan who used a fake passport to get security clearance at Newark Airport – was arrested in a plot to loot city ATMs. Prosecutors in Manhattan maintained that the eight men had ties to the LTTE and were part of a scheme to clone stolen credit card numbers in order to steal \$250,000 in New York and tens of millions from ATMs worldwide.<sup>892</sup>

### Other Criminal Activities

#### Aiding and Abetting

685. Aiding and Abetting war crimes and/or crimes against humanity can be accomplished in a number of ways. One such way is by providing funding or assistance in the collection of funding with the appropriate criminal intent. As in domestic law, there is no need for the assistance to bear a causal relationship to the commission of the offence by the principal.

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<sup>888</sup> US State Department Report, 2009, p. 3.

<sup>889</sup> Banned in the US in 1997; in India in 1992; in the UK in 2001.

<sup>890</sup> ‘US to freeze Tamil charity assets’, *BBC News*, 15 November 2007.  
<[http://news.bbc.co.uk/2/hi/south\\_asia/7097221.stm](http://news.bbc.co.uk/2/hi/south_asia/7097221.stm)>.

<sup>891</sup> *Ibid.*

<sup>892</sup> Barbara Ross, ‘Sri Lankan terror gang busted in ATM heist plot’, *NY Daily News*, 16 October 2007.  
<<http://www.nydailynews.com/news/crime/sri-lankan-terror-gang-busted-atm-heist-plot-article-1.230846>>.

*'...customary international law recognises an accomplice's liability as long as the assistance has a substantial effect on the commission of the crime...'*<sup>893</sup>

686. Indeed, as a principle of international law this finds support in ICTY case law.<sup>894</sup> Moreover, the Commission notes that in the case of Charles Taylor, the former President of Liberia, he was convicted of aiding and abetting the commission of war crimes in Sierra Leone by supplying weapons to government rebels waging war against the government.<sup>895</sup> The Commission is of the view that international criminal law is capable of supporting the concept of prosecuting those who fund terrorist organisations in the knowledge that such funds will be used for the commission of war crimes or crimes against humanity.
687. The President of the TYO in the UK, Goldan Lambert (a holder of a French passport) was arrested by the UK Counter Terrorism Command (S015), on 21<sup>st</sup> June 2007, under the Anti-Terrorism Act. The allegation involved his connection with the British Tamil Association in organising the 'Black July' rally in Hyde Park on 25<sup>th</sup> November 2006. He was indicted and faced trial in the Central Criminal Court in London under section 11, Sub sections 1 and 3 of the Anti-Terrorism Act of 2000. In addition Chrisanthakumar, also known as AC Shanthan, was charged with five counts, including arranging meetings for the LTTE in London contrary to the Terrorism Act 2000.<sup>896</sup>
688. It is quite clear that the UK Government has – as has been demonstrated by multiple prosecutions of Muslim extremists and the above mentioned cases<sup>897</sup> - the capability to prosecute those LTTE supporting diaspora members. Such prosecution can be mounted in a number of ways; aiding and abetting terrorist organisations or being a member of proscribed organisation and/or funding such organisations, or indeed by glorifying terrorism. The glorifying of terrorism is also an offence under UK law.<sup>898</sup>

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<sup>893</sup> Archbold International Criminal Law. 10-39

<sup>894</sup> *Prosecutor v Furezidja*, ICTY Trial Judgment, 10 December 1998, para. 209.

<sup>895</sup> *Prosecutor v Charles Ghankay Taylor*, Special Court for Sierra Leone, Case No. SCSL-03-01-A Judgement, 26 September 2013 < <http://www.rscsl.org/Documents/Decisions/Taylor/Appeal/1389/SCSL-03-01-A-1389.pdf>>.

<sup>896</sup> 'Pair facing Tamil Tigers charges', *BBC News*, 27 June 2007. <[http://news.bbc.co.uk/2/hi/uk\\_news/6250396.stm](http://news.bbc.co.uk/2/hi/uk_news/6250396.stm)>.

<sup>897</sup> 'Violent Extremism and Related Criminal Offences', *The Crown Prosecution Service*, <[http://www.cps.gov.uk/publications/prosecution/violent\\_extremism.html#bk](http://www.cps.gov.uk/publications/prosecution/violent_extremism.html#bk)>.

<sup>898</sup> Terrorism Act 2006, Chapter 11, *The National Archives*, 2006. <<http://www.legislation.gov.uk/ukpga/2006/11>>.

**D. The suicide attacks by LTTE using child soldiers and other combatants under the direct orders of the leader of the LTTE, Velupillai Prabhakaran or any persons acting on his behalf, and the culpability for such actions under international humanitarian law or international human rights law.**

689. The killing of civilians is prohibited under Common Article 3 and constitutes a war crime even in non-international armed conflict. Similarly, acts of terrorism are prohibited under Additional Protocol II and have been prosecuted as war crimes in non-international armed conflicts. However, Military targets are considered legitimate for attack.
690. It has been said that Velupillai Prabhakaran's genius lay in building a culture of sacrifice and martyrdom with himself as a demi-God with a willingness to embrace death.<sup>899</sup>
691. Suicidal terrorism can be defined as, '*a politically motivated violent attack perpetrated by a self-aware individual (or individuals) who actively and purposely causes his own death through blowing himself up along with his chosen target. The perpetrator's ensured death is a precondition for the success of his mission*'.<sup>900</sup>
692. According to Peter Schalk, Professor of History of Religions at Uppsala University and an authority on Tamil studies, '*all the LTTE deaths up to 1992 one third died by swallowing the kuppi [cyanide capsule]*'<sup>901</sup>
693. It is the view of this Commission that it is but a short step from a suicide based culture to suicide attacks and suicide terrorism. Without going into all the names of the local councillors, provincial councillors, members of the Sri Lankan Parliament, Ministers, and senior military personnel of all communities who were killed by LTTE suicide bombers, this Commission needs only mention;
- the suicide bombing of Rajiv Gandhi the former Prime Minister of India in 1991;
  - the suicide bombing of President Premadasa in 1993;
  - in 1999, the attempted assassination of the former President, Chandrika Kumaratunga;
  - in 2006, the attempted assassination by suicide car bomb attack upon the then the Defence Secretary, Gotabaya Rajapaksa;

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<sup>899</sup> Alex Perry, 'How Sri Lanka's Rebels Build a Suicide Bomber', *TIME magazine*, 12 May 2006, <<http://content.time.com/time.world/article/0,8599,1193862,00.html>>.

<sup>900</sup> Yoram Schweitzer defined suicide terrorism in a lecture her presented in the International Conference on Countering Suicide Terrorism at ICT, Herzeliya, Israel on 21st February, 2000. Yoram Schweitzer, 'Suicide Terrorism: Development and Characteristics', *International Institute for Counter-Terrorism*, 21 April 2000. <<http://www.ict.org.il/Article.aspx?ID=779>>.

<sup>901</sup> Michael Roberts, 'Blunders in Tigerland: Pape's Muddles on "Suicide Bombers" in Sri Lanka', Working Paper No. 32, South Asia Institute Department of Political Science University of Heidelberg, *Heidelberg Papers in South Asian and Comparative Politics*, November 2007, p. 7.

- in 2006, the attempted assassination of Lieutenant General Sarath Fonseka, Commander of the Sri Lankan Army;
- in 2006, the attempted assassination by planting a claymore bomb of the current President of Sri Lanka, Maithripala Sirisena, at a time when he was a Senior Minister in the GoSL.

This Commission has dealt with examples of LTTE suicide bombing. Of course, there were other victims of assassination at the hands of the LTTE. Lakshman Kadirgamar, who was Foreign Minister of Sri Lanka, was one such victim. Because he was assassinated by a sniper, his and similar murders are not included in this section which concentrates on suicide bombing.

The above examples give the clearest indication to this Commission that this policy of suicide killing was instigated by Velupillai Prabhakaran and the highest echelons of the LTTE. The LTTE leadership was organised along a two-tier structure: a military wing and a subordinate political wing. Overseeing both was a central governing committee, headed by Prabhakaran.<sup>902</sup>

#### LTTE expertise in Suicide Terrorism

694. The majority of LTTE recruits were initially youths. In 1990, 75% of its membership was below the age of 30, with around half between the ages of 15-21.<sup>903</sup> In this way the LTTE was able to indoctrinate more than two generations of Tamil youth into its suicide based approach.
695. Armed with explosives, as masters of innovation, the LTTE created the first working suicide vest as an instrument of destruction.<sup>904</sup>

*‘What distinguishes a suicide terrorist is that the attacker does not expect to survive a mission and often employs a method of attack that requires the attacker’s death in order to succeed’.*<sup>905</sup>

696. This suicide bodysuit was fashioned from a jacket and based on ammunition pouches. It was equipped with explosives and two switches: one for arming and the other for triggering the device. There were also variations on these vests which took the form of a type of belt bomb worn around the waist which would release steel ball bearings at high velocity on detonation.<sup>906</sup>

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<sup>902</sup> ‘Liberation Tigers of Tamil Eelam (LTTE)’, *South Asian Terrorism Portal* < <http://www.satp.org/satporgtp/countries/shrilanka/terroristoutfits/LTTE.HTM> >.

<sup>903</sup> Ariel Merari, *Driven to Death: Psychological and Social Aspects of Suicide Terrorism*, Oxford: Oxford University Press, 2010, p. 70

<sup>904</sup> Kate Pickert, ‘A Brief History of the Tamil Tigers’, *Time magazine*, 4 January 2009. < <http://content.time.com/time/world/article/0,8599,1869501,00.html> >.

<sup>905</sup> Robert Pape, ‘The Strategic Logic of Suicide Terrorism’, *American Political Science Review*, vol. 97, no. 3, 2003, p.3.

<sup>906</sup> Rohan Gunaratna, ‘Suicide terrorism in Sri Lanka and India’ in *Countering Suicide Terrorism: An International Conference* (Herzliya, Israel: The International Policy Institute for Counter-Terrorism, 2001), p70.

697. The Black Tigers were the group responsible for a number of attacks on Sri Lankan army camps. The LTTE motivated these suicide bombers with a mixture of ethno-nationalism combined with a high level of psychological indoctrination. These cadres occupied a special status and were imbued with an aura of secrecy and isolated from the main cadres. They were carefully selected and trained for approximately a year.<sup>907</sup> Classically, their method of waging war was to drive vehicles loaded with explosives into SLA camps at unexpected times thereby catching the army unawares.
698. One third of the Black Tigers were women. This enabled the LTTE to assert cynically that they were committed to gender equality. There was a large expansion in the number of female recruits in the 1990s.<sup>908</sup> As the Commission has noted elsewhere, they played a vital role in the last phase of the conflict by inflicting casualties on both the SLA and their own civilians.
699. In the final phase of the war the LTTE used suicide bombers to kill their own Tamil civilians. A notable example of this was at the beginning of February 2009 when, in order to deter Tamil civilians from fleeing LTTE captivity to Government reception centres, a female suicide bomber infiltrated the Tamil civilians and detonated herself killing 28 people, including two female SLA soldiers who were assisting the escaping civilians.<sup>909</sup>
700. Each attack on a legitimate military target has to be assessed on its own facts, taking into account the rules on perfidy to determine whether it constitutes a war crime. The law with regard to perfidy is dealt with in Chapter 6 from paragraph 397 onwards.
701. Whereas, this Commission is satisfied that the LTTE embarked upon the illegal recruitment and use of child soldiers in conflict, this Commission is not satisfied, nor has it heard evidence that such child soldiers were used by the LTTE for the purpose of conducting suicide attacks.

#### *Conclusion as regards suicide bombing*

702. The Commission has come to the conclusion that the widespread use of suicide bombers is capable of being a war crime, as outlined in Chapter 6 at paragraph 306 onwards, where such attacks are conducted with a disregard for civilian casualties thereby violating one of the cardinal principles of distinction in IHL.
703. The overwhelming evidence of the deployment of suicide cadres by the senior LTTE leadership during the conflict satisfies the Commission that there is strong evidence of the deliberate and indiscriminate targeting of civilians. This could be a war crime.

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<sup>907</sup> Ibid. p. 96.

<sup>908</sup> R. Ramasubramanian, 'Suicide Terrorism in Sri Lanka', IPCS Research Papers, New Delhi, August 2004, 5, p.11 ; Clara Beyer, 'Messengers of Death-Female Suicide Bombers', *International Institute for Counter Terrorism*, 12 February 2003. < <http://www.ict.org.il/Article.aspx?ID=854> >.

<sup>909</sup> Ranga Sirilal and Shihar Aneez, 'Female suicide bomber kills at least 28 in Sri Lanka', *ReliefWeb*, 9 February 2009. < <http://reliefweb.int/report/sri-lanka/female-suicide-bomber-kills-least-28-sri-lanka> >.

Where former senior LTTE leaders have survived the war, particularly those who have made admissions about their knowledge and possible involvement in organising suicide bombings, it is the view of the Commission that they should be subjected to a full judge-led inquiry to ensure accountability in the same fashion as this Commission has recommended in relation to other instances where the facts and circumstances give rise to a '*reasonable basis to believe*' that such a crime or crimes may have been committed within the jurisdiction of Sri Lanka.

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22. Miss Sujani Menaka
23. Miss Sharanya Kenkanathan
24. Miss Asokan Lena
25. Mr. Saman Premarathne
26. Mr. Munasinghe
27. Mr. Alwis
28. Mr. Kasun Chinthaka
29. Mr. Hemapala
30. Mr. Wijesinghe
31. Mr. Sandamal Samararathna
32. Mr. P.A.T. Sampath
33. Mr. T. Greshan Perera



**ANNEX 1 – MILITARY EXPERT OPINION BY MAJOR  
GENERAL JOHN HOLMES DSO OBE MC**

**EXPERT MILITARY REPORT**

**By**

**Major General John Holmes DSO OBE MC**

Mr Maxwell Paranagama, Chairman of the Commission to Investigate  
Complaints Regarding Missing Persons.  
Colombo  
Sri Lanka

28th March 2015

*Dear Mr Paranagama,*

I was requested to research and provide an expert military opinion on questions A.i and A.ii of the Presidential Proclamation, No. 1871/18 of 15 July 2014;

*Ai. The principal facts and circumstances that led to the loss of civilian life during the internal armed conflict that ended on the 19th May 2009, and whether any person, group or institution directly or indirectly bears responsibility in this regard by reason of a violation or violations of international humanitarian law or international human rights law.*

*Aii. Whether such loss of civilian life is capable of constituting collateral damage of a kind that occurs in the prosecution of proportionate attacks against targeted military objectives in armed conflicts and is expressly recognized under the laws of armed conflict and international humanitarian law, and whether such civilian casualties were either the deliberate or unintended consequence of the rules of engagement during the said armed conflict in Sri Lanka.*

I attach my opinion, which goes into considerable detail on the history and context of the events under review to ensure that my conclusions are based on as full a picture as possible and, in particular, because these events took place five years ago.

Yours faithfully

*J.T. Holmes*

J T Holmes  
Maj Gen (Rtd)

Attachment:

Sri Lanka Report

*y.*

## **Major General (Retired) John Holmes DSO OBE MC**

General Holmes' military career began at the Royal Military Academy Sandhurst in 1968. He was commissioned into the Scots Guards, before joining 22 Special Air Service Regiment in 1974. His career thereafter was essentially with UK Special Forces until retirement in 2002.

He first saw action in Northern Ireland during 1971 during a tour with the Scots Guards. In this deployment he won a Military Cross for confronting a crowd of some 350 rioters with just 3 soldiers behind him. During his first tour as a Troop Commander of 22 SAS he completed two operational tours in Dhofar (Oman's Southern Province), fighting a Communist insurgency. In 1978 he also commanded the UK's Counter-Terrorist Military Response Team (CTMRT) and helped evolve the tactics and equipment that have subsequently been used world-wide in hostage rescue operations. After an operational jungle deployment, a close protection task in two Central American countries and a further two tours in Northern Ireland, he attended Staff College in 1982.

After Staff College he was given command of a SAS Squadron and for 6 months of his two year posting again commanded the CTMRT. In late 1989 he took over command of 22 SAS Regiment, which was deployed in 1991 in Western Iraq during Gulf War One. He was awarded an OBE for this deployment. Additionally, as commanding officer, he was charged with oversight and command of CTMRT and deployed on numerous domestic and overseas exercises. He returned as Director UK Special Forces in 1999 and deployed to command Operation Barras in Sierra Leone in 2000. This was a highly complex and challenging hostage rescue operation in the Sierra Leone jungle. Its ultimate success acted as part catalyst to the successful conclusion of the Sierra Leone conflict. He was awarded his DSO for this operation.

His various staff appointments included a posting in Washington DC as the Special Operations Liaison Officer and three years at Supreme Headquarters Allied Powers Europe in Belgium, where he was SACEUR's NATO Command Group Secretary. During this latter appointment he was involved in planning for operations in Kosovo.

## TABLE OF CONTENTS

<b><u>INTRODUCTION</u></b> .....	1
<u>Summary</u> .....	1
<u>Accusations</u> .....	2
<u>Aim</u> .....	2
<b><u>GoSL POLICY</u></b> .....	3
<u>Background</u> .....	3
<u>Policy</u> .....	3
<u>Training</u> .....	3
<b><u>LTTE POLICY</u></b> .....	5
<u>Background</u> .....	5
<u>Policy</u> .....	5
<u>Training</u> .....	6
<b><u>THE FINAL PHASE- THE EASTERN WANNI</u></b> .....	8
<u>9 January 2009</u> .....	8
<u>Dilemma</u> .....	8
<u>Challenges Posed</u> .....	9
<u>Ground and Weather</u> .....	11
<u>SLA Military Capability</u> .....	12
<u>LTTE Military Capability</u> .....	30
<u>NFZs</u> .....	17
<u>SLA ROE</u> .....	18
<u>Proportionality</u> .....	21
<b><u>CRATER ANALYSIS</u></b> .....	22
<b><u>IMAGERY ANALYSIS</u></b> .....	24
<u>Report No. 1</u> .....	24
<u>Report No.2</u> .....	48
<u>Imagery Summary</u> .....	26
<b><u>CONCLUSIONS</u></b> .....	27

## INTRODUCTION

### Summary

1. The Liberation Tigers of Tamil Ealam (LTTE) were founded in 1976 and carried out their first major attack on 24 July 1983. From the outset, the LTTE's military commander was Velupillai Prabhakaran. By 2002 the LTTE controlled large tracts of Northern and Eastern Sri Lanka and were supported by a rich and influential diaspora. They had also fashioned a well trained and equipped military force comprising land, sea and air components. The movement was ruthless in its control of Tamil areas including the violent suppression of Tamil opposition groups and forced recruitment of child soldiers, both boys and girls. *"Velupillai Prabhakaran demanded absolute loyalty and sacrifice and cultivated a cult-like following"*.<sup>910</sup> An undated LTTE oath of loyalty even mentioned Velupillai Prabhakaran by name:

*"I hereby affirm sincerely to toil to redeem our motherland, Tamil Ealam, from the oppressors of atrocities and to establish the lost sovereignty and uphold the dignity of our race, under the leadership of our national leader Hon V Prabhakaran and dedicate myself to the liberation of the nation and fight against all suppression"*.<sup>911</sup>

2. For the first 23 years of the conflict the Government of Sri Lanka (GoSL) remained open to a political solution with the LTTE and tried to engage them in peace talks. GoSL even accepted an Indian Peace Keeping Force for two years in 1987. In 2002 a peace process was facilitated by Norway and a ceasefire agreement signed and a Monitoring Mission established (SLMM). Between Feb 2002 and May 2007, the SLMM ruled that the LTTE violated the ceasefire 3,830 times as opposed to 351 violations by GoSL<sup>912</sup>. Hostilities resumed in July 2006 with a successful GoSL campaign securing the Eastern Province by July 2007. In March of that year GoSL had also launched an offensive in the north where the LTTE controlled some 6,792 sq kms of territory ('The Wannu'). By Nov 2008 the Western Wannu was secured and operations were underway to take the LTTE administrative capital of Kilinochchi, which was secured on 2 Jan 2009. Until January 2009 there were no significant complaints against the conduct of the Sri Lankan Armed Forces. In fact quite the reverse is true: a cable from the US Embassy in Colombo to the US State Department states:

*"The Government has gained considerable credit until this point for conducting a disciplined military campaign over the past two years that minimized civilian casualties"*<sup>913</sup>.

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<sup>910</sup> Report of the Secretary General's Panel of Experts on Accountability in Sri Lanka [hereinafter 'Darusman Report'] (31 March 2011) < [http://www.un.org/News/dh/infocus/Sri\\_Lanka/POE\\_Report\\_Full.pdf](http://www.un.org/News/dh/infocus/Sri_Lanka/POE_Report_Full.pdf) >. para 31.

<sup>911</sup> Translated copy of an LTTE oath, undated, as found in document recovered by SLA.

<sup>912</sup> Ministry of Defence (MOD), Democratic Republic of Sri Lanka, *Humanitarian Factual Analysis Sri Lanka, July 2006- May 2009* (July 2011), para 125.

<sup>913</sup> US Ambassador Robert Blake, 'Sri Lanka: Declared Safe Zone Inoperative; ICRC Contemplates Full Withdrawal', Embassy Colombo, *WikiLeaks*, 27 January 2009, released 30 August 2011, para. 7. < <http://www.cabledrum.net/cables/09COLOMBO95> >.

## Accusations

3. There are numerous critical reports that have alleged that the Sri Lankan Army (hereinafter, SLA) disregarded the laws of armed conflict and international humanitarian law during the final five months of the campaign in the Wannu. I have read a number of these reports including the following:
  - The Secretary General’s Panel of Experts on Accountability in Sri Lanka dated 31 March 2011 (The Darusman Report)<sup>914</sup>.
  - The report of the Secretary-General’s Internal Review Panel on UN Action in Sri Lanka dated November 2012 (The Petrie Report).<sup>915</sup>
  - The University Teachers for Human Rights (Jaffna) Special Report No 32 dated 10.06.09.<sup>916</sup> – in essence, a Tamil report, critical of both GoSL and the LTTE.
  - US Embassy Cables-‘Wikileaks’
  - Human Rights Watch-War on the Displaced February, 2009.<sup>917</sup>
4. The above reports contain a number of allegations, a major one of which is that the scale of the loss of civilian life in the final five months of the war was contrary to the principles of distinction, military necessity and proportionality as defined by the laws of armed conflict and international humanitarian law. They refer in particular to the continuous shelling of civilians in no fire zones (NFZs) and **directed** artillery fire at hospitals, both temporary and permanent.

## Aim

5. The aim of this document is to report on the actions of the SLA against the LTTE during the final five months of the war to help determine whether the SLA’s operations, particularly **regarding the use of artillery**, constituted a deliberate disregard of the laws of armed conflict and international humanitarian law. In addition, this report addresses **whether the military operations of SLA were proportionate** in accordance with the laws of armed conflict.

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<sup>914</sup>Darusman Report, (31 March 2011)

<sup>915</sup> *Report of the Secretary-General’s Internal Review Panel on United Nations Action in Sri Lanka*, (November 2012) < [http://www.un.org/News/dh/infocus/Sri\\_Lanka/The\\_Internal\\_Review\\_Panel\\_report\\_on\\_Sri\\_Lanka.pdf](http://www.un.org/News/dh/infocus/Sri_Lanka/The_Internal_Review_Panel_report_on_Sri_Lanka.pdf) >.

<sup>916</sup> University Teachers for Human Rights (Jaffna), ‘*A Marred Victory and a Defeat Pregnant with Foreboding, Special Report No. 32*’ (10 June 2009), < <http://www.uthr.org/SpecialReports/spreport32.htm> >.

<sup>917</sup> Human Rights Watch, *War on the Displaced*, 19 February 2009  
<[http://www.hrw.org/sites/default/files/reports/srilanka0209webwcover\\_0.pdf](http://www.hrw.org/sites/default/files/reports/srilanka0209webwcover_0.pdf)>.

## GoSL POLICY

### Background

6. Mahinda Rajapaksa was elected President of Sri Lanka in November 2005: his manifesto included a pledge to review the 2002 cease-fire agreement with the LTTE. He was also committed to an increase in resources for the SLA and was well aware that the LTTE had used the ceasefire to rearm. By July 2006 hostilities had resumed. The failure of successive peace initiatives over the years cannot have encouraged continued political dialogue and the US 'War On Terror' together with the proscription of the LTTE as a terrorist organisation by the US in 1997, the UK in 2001 and the EU in 2006, would also have added weight to consideration of a possible military solution.<sup>918</sup> It was also felt that the intervention of India in June 1997 halted an ongoing and successful SLA operation that would probably have destroyed the LTTE – a set of events that was not forgotten in 2009.<sup>919</sup> Additionally GoSL were aware that the LTTE were using the protracted ceasefire to rearm.<sup>920</sup>

### Policy

7. The then President appointed himself to be Minister of Defence and his brother, Gotabaya Rajapaksa, as Secretary of Defence and Lieutenant General Fonseka as Army Commander. The President also obtained parliamentary approval for major increases in the defence budget which grew to \$1.6b in 2009.<sup>921</sup> This allowed General Fonseka to revitalise the SLA by increasing both its remuneration and its manpower to 300,000 troops over 3 years<sup>922</sup>, which created 5 new divisions<sup>923</sup> and facilitated an operational rotation of units at the front, whilst securing rear areas. The Sri Lankan Air Force ( hereinafter, SLAF) was also re-equipped and, importantly, as the 'Sea Tigers' controlled a sizeable length of the Eastern coastline, the Sri Lankan Navy ( hereinafter, SLN) developed a blue water capability.

### Training

8. Historically, the SLA had been a relatively inflexible and ponderous organisation with little manoeuvre capability. This effectively gave the LTTE, who were capable of rapid deployment, the initiative and also allowed them to build effective terrorism and conventional military capabilities in parallel.<sup>924</sup> One of the most striking military reforms

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<sup>918</sup> Manjula Fernando, 'EU classification of LTTE as a terrorist group stands', *Sunday Observer* (16 November 2012) < <http://www.sundayobserver.lk/2014/11/16/fea06.asp> >.

<sup>919</sup> K.M. de Silva, *Sri Lanka and the Defeat of the LTTE* (Colombo: Vijitha Yapa Publications, 2012), p. 2.

<sup>920</sup> MOD, *Humanitarian Factual Analysis Sri Lanka*, para 88.

<sup>921</sup> Anjali Sharma, 'Post-War Sri Lanka: A Resurgent Nation', *Observer Research Foundation* (12 July 2010) < <http://orfonline.org/cms/sites/orfonline/modules/analysis/AnalysisDetail.html?cmaid=19481&mmaacmaid=19470> >.

<sup>922</sup> Ahmed S. Hashim, *When Counterinsurgency Wins: Sri Lanka's Defeat of the Tamil Tigers* (New Delhi: Cambridge University Press India Pvt. Ltd., 2014), p.188

<sup>923</sup> *Ibid*

<sup>924</sup> *Ibid.* at pp. 31-32

was a new emphasis on small unit operations – hitherto the SLA had always operated, as if in a conventional operational setting, at company and platoon level. This made them vulnerable to LTTE ambushes, artillery and mines. This new emphasis on small unit operations kept casualties lower and proved more effective in terms of both reconnaissance and subsequent strike action. It also better prepared the SLA for operations in a variety of environments from primary jungle to thick bush, paddy fields and plantations. The new tactics encompassed the creation and expansion of specialised units such as Special Forces and the Rapid Action Battle Squad and the Special Boat Squadron in the Navy.<sup>925</sup> Infantry Battalions also gave selected individuals specialist training and formed them into 4 or 8 man teams, called Special Infantry Operational Teams.

9. The former Commander of the SLA, General Cyril Ranatunga, who oversaw the successful 1997 operations against the LTTE, established the Directorate of Human Rights and Humanitarian Law in January 1997<sup>926</sup>. His memoirs, written in 2009, were critical of government policy and are worth quoting as he not only perceived the lack of a policy, but also clearly understood the many lines of operation that a successful strategy would require:

*“There appeared to be a total lack of continuity in the conduct of operations against the armed Tamil terrorists. This is the result of having no policy on how to eradicate terrorism. This type of ethnic- based armed conflict, once ignited due to many reasons, is difficult to eradicate without a firm policy derived from strength and practice ability”.*<sup>927</sup>

10. One of his requirements was for all ranks to understand and implement Human Rights and Humanitarian Law. He understood the importance of seeking not to alienate the Tamil civilian population and sought to improve on ‘hearts and minds’ training. According to the SLA’s own statistics some 140,971 soldiers of all ranks were trained or refreshed on various courses between 1997 and 2008. Similar directorates for the Navy and Air Force were established in 2002. According to evidence given before the LLRC Commission in August 2010, human rights cells had been set up at every HQ down to field level:

*“The Security Council had decided to pursue a strategy aimed at avoiding civilian casualties in the conduct of military operations. Accordingly, all operational orders to the Army, Navy and Air Force had clearly directed that every possible step be taken to avoid civilian casualties”*<sup>928</sup>.

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<sup>925</sup> Fish, *Sri Lanka learns to counter Sea Tigers’ swarm tactics*

<sup>926</sup> MOD, *Humanitarian Factual Analysis Sri Lanka*, para 248.

<sup>927</sup> General Cyril Ranatunga, *Adventurous Journey: From Peace to war, Insurgency to Terrorism* (Sri Lanka: Vijitha Yapa Publications, 2009), p.92

<sup>928</sup> *Report of the Commission of Inquiry on Lessons Learnt and Reconciliation* (Hereinafter ‘LLRC’) (November 2011) < [http://www.priu.gov.lk/news\\_update/Current\\_Affairs/ca201112/FINAL%20LLRC%20REPORT.pdf](http://www.priu.gov.lk/news_update/Current_Affairs/ca201112/FINAL%20LLRC%20REPORT.pdf) >. para 4.36

## LTTE POLICY

### Background

11. The LTTE had an organised command structure that was divided into 7 geographical divisions or wings, each under the command of a district commander who was responsible to Velupillai Prabhakaran. Additionally, there were 10 specialist wings; intelligence, procurement, finance, military, political, communications, research, black tigers, sea tiger and air tiger, all of which reported to directly to Prabhakaran.<sup>929</sup> At the beginning of 2008 it was estimated that the military wing had approximately 20 to 30,000 fighters or cadres supported by an auxiliary force that had been given basic military training. The LTTE were able to access military equipment, finance and political support through the extensive Tamil diaspora, some of whom were supporters of the LTTE; throughout the 2002/06 ceasefire the LTTE were able to upgrade their weapon systems and to stockpile weapons, ammunition and equipment not only on shore but also in floating armouries in international waters. The Air Tigers had approximately 25 trained pilots and 6 Czech-built Zlin Z-143 single engine four seat aircraft that were modified to carry up to four bombs per mission.<sup>930</sup> Their last attempted strike was on 20 February 2009 when 2 aircraft attempted a ‘9/11’ type attack on Colombo – they were destroyed before they reached their targets.
12. The Sea Tigers were demonstrably more successful than their air compatriots. At their height they numbered some 6,000 fighters divided into numerous teams based in units along the North East coast. They adapted or manufactured many of their own craft, including semi-submersibles, and were developing mini submarines. Importantly, they co-operated closely with the Military Wing and were carefully integrated into most operations.<sup>931</sup> But by the end of 2008 the SLA had captured 20 Sea Tiger bases and their contribution in the last months of the war was minimal. The ‘Black Tigers’ comprised elite fighters especially trained for suicide missions under the direct command of Velupillai Prabhakaran. Following the example of the bombing of the US Embassy in Beirut by Islamic Jihad in 1984<sup>932</sup>, the LTTE were the first terrorist organisation to perfect and develop the use the suicide concept since World War II. They established this tactic as an integral part of their fighting strategy and transferred their expertise to other terrorist organisations.

### Policy

13. The LTTE used the period of the 2002-6 ceasefire to rearm and to prepare for what they referred to as “*the final war*”<sup>933</sup>. They also endeavoured to consolidate their political and administrative organisation in the territories that they held and attempted to extend their

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<sup>929</sup> International Crimes Evidence Project Report (ICEP), ‘*Island of Impunity? Investigation into international crimes in the final stages of the Sri Lankan civil war*’ [Hereinafter ‘Island of Impunity’] (February 2014), paras. 16.113 onwards

<sup>930</sup> Ibid, para. 16.128.

<sup>931</sup> Ibid, para. 16.134.

<sup>932</sup> ‘On This Day (1950-2005) 20 September 1984’, *BBC website*. <

[http://news.bbc.co.uk/onthisday/hi/dates/stories/september/20/newsid\\_2525000/2525197.stm](http://news.bbc.co.uk/onthisday/hi/dates/stories/september/20/newsid_2525000/2525197.stm)

<sup>933</sup> MOD, *Humanitarian Factual Analysis Sri Lanka*, para 121.

influence in other parts of the country where, under the terms of the ceasefire agreement, they were allowed to set up political offices.<sup>934</sup>

*“It operated and sought to project itself as a de facto state. To this end the LTTE developed a well-structured international strategy and, in the territory it controlled, established its own police, jails, courts, immigration department, banks and some social services”*<sup>935</sup>.

14. However, there were setbacks. In 2004, the second in command of the LTTE, Vinayagamoorthy Muralitharan, (aka. Colonel Karuna), defected together with his 6,000 fighters. He not only provided significant intelligence that assisted later operations, but his defection also led to a substantial reduction in LTTE recruitment in the Eastern Province<sup>936</sup>. It was also clear that the events of 9/11 and the subsequent war on terror would have a knock-on effect on the international community’s perception of the LTTE. With the help of the Indian Navy, the Sri Lankan Navy began to reduce the LTTE’s maritime capability and seize its floating armouries – according to Jane’s Review, 11 LTTE floating armouries were destroyed in 2006 and a further 3 in 2007.<sup>937</sup> These logistic issues manifested themselves in the last months of the war when the LTTE allegedly ran short of artillery ammunition.<sup>938</sup> It also put added significance on the LTTE’s ability to manufacture their own war material.
15. Whilst the LTTE acknowledged and prepared for a further conflict, it was, perhaps, not initially apparent to them, despite the very obvious improvements to SLA capabilities, that this would be fought at a sustained tempo which their logistics structure would be incapable of supporting and for which their manpower reserves would be inadequate. The loss of the Eastern Province in July 2007 meant that defeat was possible; the loss of their administrative capital, Kilinochchi, on 2 January 2009 meant that, unless they could secure a ceasefire, military defeat, in detail, was inevitable: the only strategy available to the LTTE after Kilinochchi fell was to secure a ceasefire and to bend all their resources to achieving that goal. This was a strategy acknowledged by US Ambassador Blake in his cable to the State Department of 5 February 2009,

*“The LTTE had refused to allow civilians to leave because the LTTE needs the civilians as human shields as a pool for forced conscription, and as a means to try and persuade the international community to force a cease- fire upon the government, since that is the LTTE’s only hope.”*<sup>939</sup>

## **Training**

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<sup>934</sup> Ibid para. 120.

<sup>935</sup> Darusman Report, para 33.

<sup>936</sup> Malik Jalal, ‘Think Like a Guerrilla, Counterinsurgency Lessons from Sri Lanka’, *Harvard Kennedy School Review* (2011), p. 6

<sup>937</sup> Jane’s Intelligence Review

<sup>938</sup> ICEP, *Island of Impunity*, para 16.126.

<sup>939</sup> US Ambassador Robert Blake, ‘Co-chair Meeting with UN Special Envoy to Sri Lanka’, Embassy Colombo, *WikiLeaks*, 5 February 2009, para 4.

16. The training given to front line LTTE fighters fell broadly into three categories. Basic training, which lasted approximately 4 months<sup>940</sup> and took place in LTTE bases which were established in almost every village<sup>941</sup>: special operations training, which included special reconnaissance, sniping, mine laying, artillery<sup>942</sup>: and last, but by no means least, refresher training<sup>943</sup> for all of the above. The LTTE,

*“invested heavily in training and discipline, command and control, communications, ideological indoctrination and psychological warfare instruction”*.<sup>944</sup>

The preamble to a LTTE training document seized in 2009 describes the movement’s aims and concludes by stating,

*“In such a situation military training must be provided that gives efficiency and confidence in order to drive away the enemy with vigour to reclaim our territories and it is our political aim to build up a militarized people power with clear political vision. Accordingly we have established our hierarchy and militarized our activities”*<sup>945</sup>.

17. The inference of the above statement was that the LTTE would militarize the Tamil civilian population in the areas that they controlled.

*“Civilians were also enlisted by the LTTE into their war effort in other ways, using them, for example, to dig trenches and build fortifications, often exposing them to additional harm”*<sup>946</sup>.

They also pursued exclusionary policies in the areas they controlled. The worst example was the expulsion of some 75,000 Muslim residents from the Jaffna peninsula in October 1990.<sup>947</sup> Overall, the civilian population were there to be used for whatever purpose the LTTE saw fit. Tamil opposition groups were ruthlessly stamped out and internal dissent was not tolerated – the LTTE saw itself as the sole representative of the Tamil people and *“its elusive leader, Velupillai Prabhakaran, demanded absolute loyalty and sacrifice and cultivated a cult-like following”*<sup>948</sup>

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<sup>940</sup> ‘Liberation Tigers of Tamil Eelam (LTTE)’, *Jane’s World Insurgency and Terrorism* (6 Jun 2012), p. 11.

<sup>941</sup> Paul Moorcroft, *Total Destruction of the Tamil Tigers* (South Yorkshire: Pen & Sword Military, 2012), p. 94.

<sup>942</sup> MOD, *Humanitarian Factual Analysis Sri Lanka*, para. 49.

<sup>943</sup> *Ibid*, para. 51

<sup>944</sup> ICEP, *Island of Impunity*, para 16.120.

<sup>945</sup> Translated Copy of LTTE training document handed to author by SLA, undated.

<sup>946</sup> Darusman Report, para 68.

<sup>947</sup> MOD, *Humanitarian Factual Analysis Sri Lanka*, para 35.

<sup>948</sup> Darusman Report, para 31.

## THE FINAL PHASE- THE EASTERN WANNI

### 9 January 2009

18. The SLA had, by 9 January 2009, secured the western part of the Northern Province, opened up the A9 road through to Jaffna (for the first time in 23 years) and occupied Kilinochchi, the administrative capital of the LTTE. On 2 January the President called upon the LTTE to lay down its arms and surrender.<sup>949</sup> The SLA had effectively reached a tipping point whereby the LTTE were now trapped in an area of some 1,800 sq kms (see map at Annex B) and was surrounded on three sides. It would also have been obvious to the SLA command chain through aerial reconnaissance, UAV footage and Humint,<sup>950</sup> that there were large numbers of civilians trapped in the same area. This would clearly present tactical challenges if the fighting was to continue and was probably a factor in offering terms. The LTTE did not surrender. Indeed the retention of a civilian population in their zone of influence was a vital element of their strategy as it,

*“Lent legitimacy to their claim for a separate homeland and provided a buffer against the SLA offensive”.*<sup>951</sup>

Over the next five months the number of civilians trapped in the remaining LTTE controlled area became a subject of intense debate between GoSL, the UN and associated NGOs. The Darusman Report states that *“around 330,000 civilians were trapped into an ever decreasing area, fleeing the shelling but kept hostage by the LTTE”*.<sup>952</sup> In factual terms, 290,000 IDPs were processed at the end of the war and the University Teachers Report in its introduction states that *“Militarily stymied, it (LTTE) took physical hostage of 300,000 people in its final stages”*. Whilst the true number will never be known, it can be reasonably assumed that a minimum of 290,000 civilians were concentrated into the shrinking LTTE perimeter during the final months. But it should not be forgotten that for many of the civilians this was their home and that they feared what would happen to them if they crossed over – some also had experienced the SLA occupation of Jaffna and had moved with the LTTE since 1995.<sup>953</sup> Many also had relatives serving with the LTTE either voluntarily or as a result of forced recruitment.

### Dilemma

19. Given that the LTTE had no intention of surrendering, GoSL had an unpalatable dilemma. It could either accept a ceasefire, which the international community and UN were starting to promote, or continue with the offensive whilst trying to mitigate the threat to civilians. GoSL had no intention of accepting a ceasefire, as experience had shown that the LTTE merely used ceasefires to regroup and rearm. This occurred in 1997 during the Indian

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<sup>949</sup> MOD, *Humanitarian Factual Analysis Sri Lanka*, para 173

<sup>950</sup> Human intelligence sources

<sup>951</sup> Darusman Report, para. 70

<sup>952</sup> Darusman Report, p. ii.

<sup>953</sup> Darusman Report, para. 71.

brokered ceasefire and again during the 2002/06 ceasefire. There would also have been concern that the LTTE leaders would escape and be able to start a guerrilla campaign. A UN concern voiced by Sir John Holmes, UN Under-Secretary-General for Humanitarian Affairs 2007 -2010, was that the LTTE might use the trapped civilians to stage a mass suicide,

*“My worst fears of a concluding dreadful act of a Masada-style mass suicide were not realised”.*<sup>954</sup>

In my military opinion, factoring in this experienced diplomat’s view, which appears to corroborate some of the GoSL’s own views on the ruthlessness of the LTTE, this presented as a wholly unique and unusual hostage taking situation. Indeed, ISIL, in Syria, has adopted some of these strategies, forcing the allied coalition in Iraq to make hard choices in the overall protection of the civilian population and the stability of the region. However, I must stress that final phase of the Sri Lankan situation, in 2009, appeared, at the time, to be a unique event, pitting the GoSL against a well trained and suicidal fighting force who were prepared to kill their own civilians. In fact, I do not believe that the strategic difficulties of resolving the last phase of the war have been fully appreciated by military strategists until relatively recently.

SLA tactics would have to take into account their likely casualties when they pressed their case against a fanatical enemy determined to fight to the last. If the strategic aim was to destroy the LTTE and its leadership once and for all, thus saving lives in the long term, then the dilemma was how to accomplish this whilst saving as many of the civilians trapped in the Wannai as practically possible. Tactical options open to the SLA are discussed in more detail at paragraph 20 below.

### **Challenges Posed**

20. From the start of the Eastern offensive in August 2006, GoSL had referred to their operations as being ‘Humanitarian’, which perhaps reflected the emphasis placed by SLA on civilian protection, rather than any form of punitive aspect directed *against* civilians: but nothing can have prepared them for the challenge they now faced. In an area approximately the size of Greater London within the M25, with no dominating ground and during the inclement weather of the north east monsoon, they had to kill or capture up to 5,000 thousand well-armed, fanatical LTTE fighters (many of whom had been issued with cyanide pills) in prepared positions, operating amongst and around over 290,000 civilians, who were themselves short of food and medical supplies. Additionally, large numbers of LTTE fought in civilian clothes in order to “*confuse the drones and exploit the civilians as a human buffer*”.<sup>955</sup> Indeed, the Darusman Report makes it clear that in the last phase stage of the conflict “*LTTE cadre were not always in uniform...*”.<sup>956</sup> The author can think of no

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<sup>954</sup> Sir John Holmes, *The Politics of Humanity: The Reality of Relief Aid* (London: Head of Zeus, 2013), p.112; Sir John Holmes was UN Under-Secretary-General for Humanitarian Affairs 2007 -2010

<sup>955</sup> Frances Harrison, *Still Counting the Dead: Survivors of Sri Lanka’s Hidden War* (London: Portobello Books, 2012), p. 245.

<sup>956</sup> Darusman Report. Para97. pp27-28

military precedent that the SLA could have turned to for guidance. This would have been a challenge for the most professional and best informed and equipped armies in the world.

21. All the available evidence shows that the LTTE were using civilians as human buffers/shields to obtain a military advantage.<sup>957</sup> The SLA would have been justified in using appropriate firepower to attain their military objectives. To do otherwise would be tactically unjustifiable.
22. In military terms the tactical options were stark. Field Commanders would have been well aware of past SLA casualty numbers and it is generally acknowledged that soldiers become less prepared to put their lives on the line towards the end of a campaign that is obviously moving towards a successful conclusion. As it was, and according to official GoSL figures, a total of 2,126 members of the Sri Lankan Security Forces were killed and 10,679 wounded from 1 January to 19 May 2009. Conversely, higher command would have been eager to get the job completed whilst the SLA had both the initiative and the momentum to achieve the strategic goal. The one inescapable military certainty was that the LTTE could only be defeated 'in detail' through a protracted infantry and Special Forces operation. More sophisticated armed forces could have considered an amphibious option behind LTTE lines, which might have achieved surprise and shortened the conflict. In my military opinion, the SLA did not have a sufficient amphibious capability. Similarly, the Sri Lankan Air Force did not possess the rotary assets to complete an airmobile assault. More imaginative use of armour might also have been considered, but the terrain, weather (see below) and soft soil limited its deployment as did the availability to the LTTE of anti-tank missiles and mines. A well targeted Special Forces operation with the aim of killing Prabhakaran and his immediate commanders could have been countenanced with precise intelligence and precision guided weapons (PGMs). But SLAF did not have the exact location of Prabhakaran and, as the perimeter shrunk, the collateral danger to civilians increased. The latter also negated the use of overwhelming and sustained firepower. The only realistic option was a step by step 'boots on the ground' advance. Photographs taken by the author in December 2014 at Annex C show the few remaining houses in the combat area that still show battle damage – although of little evidential significance, the battle damage has all been caused by small arms fire. The tactical balance to be struck was to ensure the assaulting troops were given the necessary fire support whilst minimising SLA casualties and collateral damage and civilian casualties.
22. The mitigation measures adopted to protect civilians included the attempted designation by GoSL of NFZs,<sup>958</sup> humanitarian corridors, leaflet drops (examples are shown at Annex D), the use of loud speakers to encourage civilians to cross the lines, UN organised humanitarian aid convoys, the facilitation of ICRC brokered evacuations from the beach, and the preparation of camps and medical facilities to receive significant numbers of IDPs. On 6 April 2009, as detailed in paragraph 174 of the Darusman Report, the Commander of the SLA, Lieutenant General Fonseka, was quoted in Sri Lanka's Observer newspaper as

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<sup>957</sup> Darusman Report. Para98. p28

<sup>958</sup> The LTTE did not agree the terms of any NFZ in the final phase.

saying that the SLA was involved in “*the world’s largest hostage rescue*” operation.<sup>959</sup> On 12 April, coinciding with the Sinhala and Tamil New Year the Sri Lankan President announced a 48 hour period of military restraint to allow civilians to escape and for the LTTE to surrender (see Annex E). On 27 April 2009 a joint Indian-Sri Lankan statement was released which stated, “...*the Sri Lankan security forces have been instructed to end the use of heavy calibre guns, combat aircraft and aerial weapons which could cause civilian casualties*”.<sup>960</sup> In fact, and according to a Government source the use of artillery and 122mm mortars had been stopped with the declaration of the first NFZ on 19 January 2009. However, and according to the same source, the use of 81 and 82mm mortars was possible with Brigade or Divisional agreement. There is therefore a degree of ambiguity in the Presidential statement for the definition of a heavy calibre gun – see para 24.<sup>961</sup>

23. The most effective measure to reduce civilian casualties would be the degree of detailed planning and rehearsal that would govern the assault during the last few months. Equally important would be the tempo of operations, as surprise was going to be difficult to achieve and too much haste, given the LTTE tactics, would inevitably result in more civilian casualties. Step by step Special Forces led, infantry operations gradually became the norm and this was reflected in Lieutenant General Fonseka’s comment (Paragraph 22 above) on 6 April 2009. For the final assault across the Nandhikkadal Lagoon into what were NFZs 4 and 5, a model was created which accurately reflected LTTE positions as pin pointed by UAV coverage.
24. It is perhaps useful at this stage to understand some military terminology. A **direct fire weapon** is in simple terms one that is aimed and fired at a visible target. An **indirect fire weapon** is one where the firer cannot actually see the target and is normally working off co-ordinates provided by an observer closer to the front – mortars and artillery are indirect fire weapons. Obviously the danger of collateral damage is greater with an indirect fire weapon. It should be born in mind that during combat it is unusual to be able to destroy an indirect fire weapon with direct fire except by the use of air delivered laser guided bombs or rockets. However, to have such a capability immediately available would have required a ‘cab rank’ of airborne, armed aircraft available for immediate tasking by ground troops: the Sri Lankan Air Force did not have that capability. The dilemma for the SLA was how to respond when their ground forces were subjected to LTTE indirect fire: did they respond in kind and would any response have been proportionate. This is discussed further at paragraph 28. Artillery is generally acknowledged to fall into three categories:
  - Light artillery are guns up to and including 105mm calibre.
  - Medium artillery are guns of more than 105mm and less than 155mm.
  - Heavy artillery are guns of 155mm and larger (not possessed by SLA).

### **Ground and Weather**

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<sup>959</sup> Darusman Report, para. 174

<sup>960</sup> Moorcroft, *Total Destruction of the Tamil Tigers*, p. 144

<sup>961</sup> Heavy Artillery are guns of 155mm and the SLA neither used, nor were in possession of heavy artillery during the conflict.

25. The terrain in the Eastern Wanni varies from primary jungle in the south to paddy fields and Palmyra plantations around Kilinochchi and dry scrub towards the coast. The whole area was waterlogged in January 2009, as indeed it was when the author visited in December 2014. There are two significant natural water obstacles parallel with the coast; the Jaffna Lagoon to the north and the Nandhikkadal Lagoon to the south. The latter would play a significant role in preventing civilians from escaping west to safety. The appalling conditions were worsened when the LTTE destroyed the walls of the Kalmadukulam tank, which flooded some fifteen square kilometres. They attempted to do the same to the Iranamadu tank, the largest reservoir in the north (approximately 6 to 8 times the size of the Kalmadukulam tank), but the LTTE fighters sent to complete the mission disobeyed orders and surrendered to the SLA instead.<sup>962</sup> It is of note that if they had completed their mission successfully, the effects were potentially catastrophic for both trapped civilians and the advancing SLA. The area was bounded by two un-metalled roads, the A9 running north to Jaffna and the A34 running from Mullaittivu on the coast west to its junction with the A9. The soil type varies from 'paddy' earth around Kilinochchi to lighter sandy soil and then sand along the beach and lagoons.
26. The north east monsoon lasts from December to March and on poor days brings a low cloud base and torrential rain, which would have had a significant effect on airborne surveillance, whether from satellites, fixed wing aircraft or UAVs. The US State Department Report to Congress on Incidents During the Recent Conflict in Sri Lanka, 2009, states, when referring to satellite imagery, on page 10 states that, "*sandy soil conditions in the NFZ and the emerging monsoon season resulting in increased cloud cover further complicated efforts to monitor the conflict with commercial and USG sources.*"<sup>963</sup> I have adopted this observation to conclude that the prevailing weather conditions made contemporaneous and accurate satellite imagery difficult.

### **SLA Military Capability**

27. The strategic and political direction of the war against the LTTE was provided by the National Security Council (NSC), which was "*charged with the maintenance of national security, with authority to direct security operations and matters incidental to it*".<sup>964</sup> The NSC's directives would then be passed through the Joint Operations Headquarters, run by the Chief of Defence Staff, to the individual service commanders. In the case of the SLA, command then passed from the Army Commander to regional headquarters known as Security Forces Headquarters (SFHQ), and from there to Divisional and Task Force Headquarters for implementation.<sup>965</sup> For operations in the Eastern Wanni, one SFHQ was involved, SFHQ-Wanni based at Vavuniya.<sup>966</sup> Operations in the Wanni were conducted by five divisions, although one of these (58 Division) was also designated a Task Force, and 4 Task Forces. A Division was sub-divided into three Brigades of three infantry

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<sup>962</sup> Paul Moorcroft, *Ibid*, p. 134.

<sup>963</sup> *U.S. Department of State, Report to Congress on Incidents During the Recent Conflict in Sri Lanka (2009)*, <<http://www.state.gov/documents/organization/131025.pdf>>. p. 10

<sup>964</sup> ICEP, *Island of Impunity*, para 16.7.

<sup>965</sup> *Ibid*, para 16.27.

<sup>966</sup> *Ibid*, para 16.34

Battalions each. A Brigade consisted of between 2,500 and 3,000 personnel. A Task Force consisted of only two Brigades of three Battalions each. There were also specialist Brigades such as Special Forces, Commando, Air Mobile and an Artillery Brigade.<sup>967</sup> Overall, it is reasonable to assume that there were approximately 80,000 troops available for operations in the Wanni (East and West). Whilst this might, on the face of it, sound excessive, it merely reflects the reality of conducting operations in challenging circumstances with high casualty rates, inclement weather and a fanatical enemy. There was also the need to rotate units through the front line, whilst also securing rear areas. The available SLA deployment area declined in parallel with the shrinking perimeter.

28. In terms of artillery support open sources indicate that the SLA had access to (45):
- Mortars – 81mm, 82mm, 107mm, 120mm.
  - Artillery – 85mm, 122mm, 130mm, 152mm.
  - MBRLs – 122mm

The artillery, MBRLs and the 107mm and 122mm mortars would probably have been part of the Artillery Brigade and detached to support Divisions and Task Forces. The 81mm and 82mm mortars are more likely to have been integral to infantry Battalions. It is of note that the SLA did not possess heavy artillery (guns of 155mm calibre and above).

29. According to the SLA the only fuzes available for both artillery and mortars were ‘impact fuzes’ – eg. they exploded on hitting the ground. Although there have been some references to MBRL air burst fuzes being used by the SLA,<sup>968</sup> these cannot be substantiated. Indeed, given the protection afforded by the tree canopy in many areas, a purchase of air burst munitions would not have made a lot of sense. Artillery and mortar fire support is most effective if it is properly controlled and directed. To this end the SLA would have deployed Forward Observation Officers (FOOs) and relied on their UAV coverage for target identification. They also had 4 Chinese locating radars, which, by numerous accounts were highly effective.<sup>969</sup> Locating counter battery radars have been developed principally for counter-battery fire – they enable a commander to locate enemy guns that have been shelling his own troops and provide the coordinates to allow his own artillery to shell the enemy guns. However, this tactic is only effective if the enemy guns stay in position long enough to become targets themselves. If so called ‘shoot and scoot’ tactics were used by the LTTE then the effectiveness of the counter battery radar would be somewhat curtailed. An eye witness account of such tactics being used by the LTTE is recounted by a retired UN Bangladeshi Colonel on page 109 (Chapter 5, The Convoy) of Gordon Weiss’s book, “*The Cage*”.<sup>970</sup>

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<sup>967</sup> Ibid, para 16.46

<sup>968</sup> Moorcroft, *Total Destruction of the Tamil Tigers*, p. 135

<sup>969</sup> Ibid, p. 130.

<sup>970</sup> Gordon Weiss, *The Cage*, p.109. Weiss describes the account of the UN convoy member who was apparently a former artillery officer. “*There were artillery exchanges between the army and the Tigers, who had stationed mobile artillery batteries in and around PTK. Harun could see the barrel flashes from Tiger heavy artillery piece just 300 metres from the hospital, quite apart from hearing its thumping reports. As the Tiger artillery sent outgoing rounds against the army’s advance and then shifted position, he could count off the seconds until an incoming barrage responded in an effort to destroy the guns.*”

30. In the *'US Department of State - Report to Congress on Incidents During the Recent Conflict in Sri Lanka, 2009'*, I noted that there appeared to be an acceptance of the LTTE deliberately placing their artillery guns close to civilians in order to cause casualties upon the Tamil civilian population.<sup>971</sup>
31. There are reports of SLA using Multi-Barrel Rocket Launchers (hereinafter MBRLs) during the final months of the war. It has not been possible to substantiate these claims. It is of note, however, that the killing power of a MBRL is significant and that at their most effective, the SLA variant could fire 40 rockets in 18 to 22 seconds. These are described as 'area weapons' which unleash, fierce firepower. This would kill or seriously injure any unprotected person in an area approximately 600 x 400m. Given the political circumstances prevailing at the time, if such destructive force had been deployed, this would have caused a major outcry to halt the fighting. There is no evidence from what I have examined of the destruction that would have been caused, particularly with regard to buildings such as hospitals, if such firepower had been unleashed. Moreover, unnecessary casualties would have been counterproductive to the overall SLA military strategy: any military commander would have been cognisant of this obvious political factor.
32. For close air support the Sri Lankan Air Force had Kfir C-2, Kfir C-7 and MiG-27M Flogger J2 fixed wing aircraft.<sup>972</sup> They also had MI 24 attack and MI 17 transport helicopters. The author could not determine whether Precision Guided Munitions (PGM) were available to the Air Force.
33. The Sri Lankan Navy possessed some 50 combat and support ships and in excess of 100 inshore patrol craft.<sup>973</sup> They were supported by the Sri Lankan Special Boat Service (SBS) which by 2009 numbered some 600 personnel.<sup>974</sup> The SBS's role was to penetrate LTTE territory to provide reconnaissance, surveillance and direct action operations. According to official accounts<sup>975</sup> the Sri Lankan Navy established secure sea corridors for civilians escaping from LTTE held areas, although in practical terms they were probably not that successful because escaping civilians would have neither the navigational aids nor the knowledge to conform to them. There are, however, many reports<sup>976</sup> of the Navy helping escaping civilians, whether by taking them on board or by offering medical treatment.

### **LTTE Military Capability**

34. The LTTE use of civilians has already been referred to elsewhere in this Report, but it is worth emphasising once again as, during the final months of the conflict, it reached new

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<sup>971</sup> "January 27 – The New York Times reported that a hospital came under shelling. The article quoted one witness saying, "Our team on the ground was certain the shell came from the Sri Lanka military, but apparently response to an LTTE shell. All around them was the carnage from casualties from people who may have thought they would be safer being near the UN." Another witness said, "The team on the ground had suspected that the rebels were firing at government forces from close to where civilians were taking shelter."

<sup>972</sup> ICEP, *Island of Impunity*, para 16.74.

<sup>973</sup> ICEP, *Island of Impunity*, para. 16.89

<sup>974</sup> Ibid.

<sup>975</sup> MOD, *Humanitarian Factual Analysis Sri Lanka*, para 229.

<sup>976</sup> Ibid, para. 234-235

levels of intensity. The two quotes below come from the University Teachers Report mentioned at Paragraph 3 above.

*“The upshot was the LTTE whose astounding military success was founded on despoiling the social fabric of the Tamils and making everything, from child bearing to education, creatures of its military needs.”*

*“Even as the LTTE leaders were discussing surrender terms, they were sending out very young suicide cadres to ‘martyrdom’ to slow down the army advance”.*<sup>977</sup>

Although reduced to some 5,000 hard-core fighters<sup>978</sup> the LTTE were reinforced by conscripted civilians of all ages – as the UN recognised;

*“The LTTE relied on forced recruitment in an attempt to maintain its forces. While previously the LTTE took one child per family for its forces, as the war progressed, the policy intensified and was enforced with brutality, often recruiting several children from the same family, including boys and girls as young as 14. Civilians were also enlisted by the LTTE into their war effort in other ways, using them, for example, to dig trenches and build fortifications, often exposing them to additional harm”.*<sup>979</sup>

35. The LTTE were also masters of defensive earthworks called bunds (example at Annex F), and they had the time and the conscripted labour to build them. One such bund in the western Wanni was over 30 kms long and *“the SLA lost 153 soldiers in breaching just one section of it”*.<sup>980</sup> The use of defensive bunkers and bunds lasted until the final days of the conflict:

*“Increasingly, LTTE forces, mounting their last defence, moved onto the coastal strip in the second NFZ, particularly in the Mullivaikkal area, where the LTTE leadership had a complex network of bunkers and fortifications and where it ultimately made its final stand”.*<sup>981</sup>

36. In terms of artillery the LTTE were reasonably well off, although their supply chains had been disrupted, especially after the loss of their floating armouries. One source reports that,

*“these vessels were carrying over 80,000 artillery rounds, over 100,000 mortar rounds, a bullet- proof jeep, three aircraft in dismantled form, torpedoes and surface to air missiles”.*<sup>982</sup>

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<sup>977</sup> University Teachers for Human Rights (Jaffna), ‘A Marred Victory and a Defeat Pregnant with Foreboding, Special Report No. 32’ (10 June 2009), < <http://www.uthr.org/SpecialReports/spreport32.htm> >. p. 2.

<sup>978</sup> Darusman Report, para. 66.

<sup>979</sup> Ibid, para 68.

<sup>980</sup> Moorcroft, *Total Destruction of the Tamil Tigers*, p. 131

<sup>981</sup> Darusman Report, para. 97

<sup>982</sup> Ahmed S. Hashim, *When Counterinsurgency Wins: Sri Lanka’s Defeat of the Tamil Tigers* (New Delhi: Cambridge University Press India Pvt. Ltd., 2014), p. 94

According to daily Government press releases during the final five months of the conflict, the following LTTE artillery pieces and mortars were recovered, although it is not possible from the information available to determine the last time they had been used<sup>983</sup>:

- 29 Jan – 1 x 152mm artillery piece.
- 31 Jan – 3 x 120mm mortars, 3 x 81mm mortars, 1 x 60mm mortar.
- 16 Feb – 2 x 130mm artillery barrels.
- 24 Feb – 14 x 60mm mortars, 43 x 60mm mortar barrels, 25 x 2 inch mortar barrels, 3 x 120mm mortar barrels.
- 3 Mar – 1 x 130mm artillery piece, 1 x 122mm gun barrel.
- 6 Mar – 6 x 60mm mortars.
- 16 Mar – 5 x improvised mortars.
- 28 Mar – 2 x 60mm mortars.
- 31 Mar – 1 x 130mm artillery piece.
- 13 May – 2 x 60mm mortars.
- 15 May – 22 x 60mm mortars, 1 x 81mm mortar barrel.
- 16 May – 1 x 152mm artillery piece, 3 x 60mm mortars, 1 x 81mm mortar barrel.

By way of limited corroboration, there is a report <sup>984</sup> that in one of the last battles (at Iranapalai) on 4/5 April the LTTE lost three 130mm guns. There is no doubt that the LTTE had access to artillery and mortars until the end,

*“Towards the end of the war the numbers of shells, but not the accuracy declined”.*<sup>985</sup>

37. A list of all recovered LTTE weapons during the war and some photographs are attached at Annexes G and H. The list is extensive and includes wire guided anti-tank missiles, surface to air missiles and homemade MBRLs. There were two capability gaps in the LTTE inventory: first, the Air Tigers were never really effective and did not contribute at all during the final months: second, the LTTE had limited surveillance capacity, fire control measures or equipment. This would not have made a difference during the pitched battles when SLA were assaulting the bunds, but would have made a significant difference when LTTE were using indirect fire. One former LTTE intelligence major interviewed by the author<sup>986</sup> stated that when the LTTE pulled back from a location they would record its position and then shell it from their new position on the basis that the SLA would have subsequently occupied it. Unobserved fire such as this could obviously catch civilians and SLA troops alike.
38. The LTTE were technically innovative and made their own weapons including the 6 barrel MBRLs, two of which were recovered on 3 March and 13 May 2009 respectively (see Annex H). They also manufactured improvised rocket launchers, artillery pieces and giant mortars (see Annex H). It is believed the giant mortar rounds were still in development and

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<sup>983</sup> Extracted from GoSL press releases between January – May 2009

<sup>984</sup> Moorcroft, *Total Destruction of the Tamil Tigers*, p.137

<sup>985</sup> Ibid, p. 130.

<sup>986</sup> Interview Author and (Maj) Subramaniam Sathyamoorthi Ex LTTE, 19 December 2014..

according to Government sources, the round itself had an improvised phosphorous war head. An observation on improvised weapons and ammunition is that their range and accuracy would be inconsistent. For instance, the improvised 6 barrel MBRL (Annex H) appears to lack a solid platform and so would have been extremely unstable when fired – this would have resulted in loss of range, inaccuracy and a much greater spread of rounds, which inevitably would have added to the civilian casualty count. Perhaps the most effective homemade “weapons” in the LTTE armoury were the suicide bombers, who were used to the very end. Annex I, which is an extract from a government list of suicide attacks, details the attacks and casualties during the last five months of the war. Serial 114, which is attached to this report, deals with the numerous suicide attacks, and is noteworthy for its callousness as it took place at an IDP reception centre and appeared to be an illustration of a willingness of the LTTE to use suicide attacks to kill their own civilian population who were trying to escape,

*“Although the LTTE’s supply chains had been disrupted, especially after the loss of its floating warehouses, it still had access to some stockpiles of weapons, including some artillery and a few MBRLs. It used them to offer stiff resistance from behind its fortifications and earth bunds and also launched waves of suicide attacks”.*<sup>987</sup>

### **NFZs**

39. There were 5 NFZs. The idea for such zones would appear to have come from the SLA and instructions are set out in letters (copies at Annex J) as follows:
- NFZ 1 letter dated 19 Jan 2009.
  - NFZ 2 letter dated 19 Jan 2009.
  - NFZ 3 letter dated 19 Jan 2009.
  - NFZ 4 dated 11 Feb 2009.
  - NFZ 5 dated 9 May 2009.

The first two letters come from Army HQ and are signed by Brigadier K A D Karunasekera and addressed to the Head of Delegation, ICRC. The third letter comes from the Military Intelligence Directorate and appears to have a military distribution with the ICRC being informed by SFHQ Wann. Trapped civilians were informed of the NFZs by leaflet drops (an example from the last days of the conflict is at Annex J), loud-speakers and wireless.

40. According to the Rules of Armed Conflict<sup>988</sup>, a NFZ only becomes effective if all warring parties agree its details. The LTTE did not endorse any of the NFZs and from the moment they were created they fired artillery and mortars at the SLA from inside the NFZs, sometimes from close to hospitals,

*“The LTTE also fired mobile artillery from the vicinity of the hospital, but did not use the hospital for military purposes until after it was evacuated.”*<sup>989</sup>

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<sup>987</sup> Darusman Report, para. 69

<sup>988</sup> Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, ICRC, 12 August 1949.

<sup>989</sup> Darusman Report, para. 94

*“The LTTE is now widely recruiting from among the trapped population, forcing both young and old to fight, and is positioning its artillery within civilian concentrations”.*<sup>990</sup>

Photographs purporting to be LTTE positions amongst the civilian population in the Eastern Wanni are at Annex K. They were allegedly taken by Reddy, one of two Indian journalists embedded with the SLA. It is also well documented that in the closing months, LTTE fighters wore civilian clothes as noted in the Darusman Report, “*LTTE cadres were not always in uniform at this stage*”.<sup>991</sup> Furthermore, the trapped civilians were either voluntarily helping or being forced to build military fortifications; this is on top of forced conscription, which intensified as the war progressed.

41. The logic behind the delineation of the NFZs has in some accounts raised questions, but in the author’s view, the NFZs followed the movement of the civilian population, which essentially followed the loss of territory by the LTTE. Given the LTTE’s overall use of trapped civilians, it follows that they were forced to retreat in tandem with the LTTE and “*beginning in February, the LTTE commenced a policy of shooting civilians who attempted to escape, and, to this end, cadre took up positions where they could spot civilians who might try to break out*”.<sup>992</sup>
42. Whilst in the perception of the International Community the NFZs were inviolate, they did not legally exist, as the LTTE had not agreed to them. Additionally, the LTTE fought from within the NFZs, often in civilian clothes, whilst also using the IDPs as a buffer from the SLA and also as a source of labour and fighters. All armies will retain their inherent right to self-defence when threatened and, given the presence of so many civilians, any such response in these circumstances should be judged by the principles of distinction, legitimate targeting, military necessity and proportionality as defined in international law. Faced with these circumstances, a western Army would control their response through the use of well circulated and easily interpretable Rules of Engagement (ROE). Additionally, the command chain would ensure that all troops were aware of civilian concentrations, hospitals, UN/NGO facilities, humanitarian convoys etc. within their area of operations. The SLA would appear to have complied with this passage of information requirement and the author was given photocopies of 6 x signals issued by SFHQ(W) during January and early February 2009. These are at Annex L.

### **SLA: Rules of Engagement (ROE)**

43. In essence, ROE set out the operational parameters for military action – as such, they can provide both authorisation, for, or limitations on the use of force. Historically, ROE have provided a measure of protection for civilians caught up in an armed conflict. In their most basic form they inform an individual soldier of the circumstances in which he might use

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<sup>990</sup> US Ambassador Robert Blake, ‘Northern Sri Lanka SitRep 35’, Embassy Colombo, *WikiLeaks*, 19 March 2009, para. 5.< <http://www.cabledrum.net/cables/09COLOMBO310> >.

<sup>991</sup> Darusman Report, para. 97.

<sup>992</sup> *Ibid*, para. 99.

force. During recent years, particularly in sophisticated armed forces, ROE have assumed a growing importance as the ability to conduct precision, long range strikes, either by manned aircraft or UAVs, has increased. The key to understanding ROE is that they seek to limit collateral damage (proportionality) through precision (distinction) whilst allowing operations to progress (legitimate targeting and military necessity). ROE do **NOT** and are unlikely ever to prevent collateral damage and civilian deaths, even with the most well equipped and trained armies. A UK definition of ROE, from the Staff Officer's Handbook 14, is at Annex M. Note the penultimate sentence, "*The UK's inherent right to self defence however, will always apply*". Similar wording is used in almost all international ROE seen by the author.

44. I have seen documents that equate with ROE applying to the early weeks of 2009. I have not made available to me any ROE's thereafter. On the face of it this might appear to be a serious omission and a possible factor behind some of the alleged violations of the Laws of Armed Conflict. But SLA's operational capabilities have to be kept in perspective. From 2006 the SLA became an increasingly effective army as it expanded together with the addition of new weapons, tactics and increased remuneration. These factors combined to increase morale, which in turn resulted in a successful series of operations. However, the SLA was still a developing force with a minimum education requirement for recruitment purposes of Sri Lankan Grade 8, which requires reading and writing skills. Post war the standard was raised to Grade 10. Even in modern western armies the interpretation of written ROE can prove challenging. A Human Rights Watch Report entitled '*Off Target, The Conduct of the War and Civilian Casualties in Iraq*' dated 2003 stated on page 102 that "*While US rules of engagement on paper met international humanitarian law standards, in practice, soldiers and marines reported conflicting interpretations of what they meant and how to apply them in practice....*" Doctrinally, the SLA 2006 reforms had introduced a form of '*auftragstaktik*' or mission command, which encourages initiative at lower rank levels. It is the opposite of '*befehlstaktik*', which is a process requiring detailed orders down to the lowest levels. To that end, the SLA had discovered a winning formula that was ideally suited to the final challenges of the Wannu.
45. The operations during this phase of the war involved small unit actions, set piece conventional engagements and 'hostage rescue' operations in different environments. Subjectively, the SLA, at its operational best, most probably operated at a sophistication level of 6 out of 10. Issuing ROE for the final four months of the war would have been confusing and impractical. Instead, the SLA relied upon the over-arching political direction to avoid excessive human casualties, as this would have had the likelihood of ensuring international intervention, on the basis of a humanitarian disaster, thereby frustrating a key military objective, namely to kill or capture the LTTE leadership. Common sense dictates that this is likely to have been passed down the command chain. If this had been otherwise, in my opinion, it is astonishing that 290,000 Tamil civilians survived to be rescued by the SLA. It is also of note that there are too many well recorded instances of soldiers helping Tamil civilians to escape to believe that the 'no civilian casualty' policy was not understood by all ranks. Gordon Weiss makes the point on page 216 of his book, '*The Cage*',

*“It remains a credit to many of the front-line SLA soldiers that, despite odd cruel exceptions, they so often seem to have made the effort to draw civilians out from the morass of fighting ahead of them in an attempt to save lives”.*<sup>993</sup>

If there had been a blanket policy of elimination of LTTE cadres, then the capture and rehabilitation of approximately 12,000 cadres who emerged from the final phase,<sup>994</sup> supports the contention that there was neither a systematic policy to kill surrendering LTTE, nor civilians.<sup>995</sup> If I compare this approach to internal conflicts of which I have personal experience, such as in Sierra Leone, where widespread and systematic atrocity crimes took place, this supports my opinion that this was not an army that was seeking to indiscriminately exterminate their enemy or civilians. Of course, this does not exclude individual instances where war crimes may have occurred.

In my opinion it might also be argued that some of the deliberate operations completed by the SLA had as an additional aim, the rescue of civilian hostages. In a US Embassy cable to the State Department on 20 April 2009, US Ambassador Blake reports a successful SLA operation near and in Putumattalan that enabled 35,000 civilians to escape the combat zone with a further 1,500 escaping by sea.

46. The Sri Lankan Air Force operated at a more sophisticated level, which, given the technical requirements of their service, is not surprising. Additionally, the Air Force had the necessary surveillance (satellite imagery and UAV coverage) and delivery vehicles to operate more sophisticated targeting and battle damage assessments. Until the final five months, the Air Force targeting procedures appear to have been relatively rigorous with targeting collateral collected from numerous sources; informants, ground surveillance, UAV and air sorties. As a general rule, as recorded in an official publication, all Battlefield Air Interdiction (BAI) sorties occurred within a 3 to 5 km belt of the LTTE's defence lines, thus enhancing civilian safety. The same publication admits that this was not possible in the final months of the war and that BAI sorties ceased. But a cable from the US Embassy to the State Department on 27 April 2009 states quite clearly,

*“The Sri Lankan Air Force says it continues to attack targets only in the area south of the CSZ and north of Mullaitivu. Targets include LTTE fighting positions in the area south of the safe zone.”*

Further down the same paragraph the cable continues,

*“An Air Force source reports there is no use of attack helicopters since the capture of Puttukudiyuruppu (PTK) East because they are too vulnerable to LTTE small*

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<sup>993</sup> Gordon Weiss, *The Cage*, p. 216

<sup>994</sup> Camelia Nathaniel, '11,770 Rehabilitated Ex-LTTE Cadres of Both Genders Are Being Re-integrated into Society', *Dbsjeyaraj Website*, 24 January 2013. <<http://dbsjeyaraj.com/dbsj/archives/15251>>.

<sup>995</sup> <http://dbsjeyaraj.com/dbsj/archives/15251>, As an aside, this article by a respected Tamil journalist, suggests that following a rehabilitation programme former cadres have been trained with vocational skills and reintegrated back into society.

*arms. According to this source, the SLAF Commander categorically refuses to carry out strikes within the “no fire zones” despite Army pressure to do so”.*

### **Proportionality**

47. In everything the author has had access to and reviewed there is no indication that SLA deliberately or disproportionately targeted the civilian population in the course of their operations. In fact, the available evidence suggests the reverse. The use of civilians as human buffers by the LTTE in whatever circumstances would have resulted in civilian deaths.
48. In the author’s experience in situations of this kind the intelligence picture is never a hundred per cent. Who was or was not a genuine civilian could not have been known. In such circumstances a commander acting reasonably and in accordance with the law would take what steps he could, whilst minimising civilian casualties, to achieve his military objective. These principles would have applied during the final months of the war and thus the loss of civilian life, to the extent that it can be determined, is capable of being interpreted as collateral damage that, however regrettable, is permitted by the laws of armed conflict. These conclusions are further borne out by the sections that follow on crater and imagery analysis.

## CRATER ANALYSIS

49. The interpretation of satellite imagery played a role in the Darusman assertion in paragraph 251 that the SLA were guilty of the “widespread shelling of a large IDP population”<sup>996</sup> throughout the final months of the conflict and subsequently. A cable from the US Embassy in Sri Lanka back to the State Department on 3 April 2009 states:

*“Ambassador recommended to UN Resident Representative Neil Buhne that he considers sharing the UN imagery with the GoSL because it demonstrates that there is proof of shelling and could discourage future shelling if the government knows there is a mechanism for tracking it”*.<sup>997</sup>

50. If the aim is to attribute shelling to a particular participant, then it is pivotal to the argument to prove that a specific crater was caused by a shell from a particular type of weapon which was fired on a particular bearing. The British Army Pamphlet that covers crater analysis is titled Artillery Training in Battle, Pamphlet No 12, Part 3. The introduction section of the pamphlet, under the heading ‘Criteria’, states that “*The crater(s) selected for examination should be fresh. Distinctive features tend to erode over time and may disappear altogether in poor weather.*” It goes on to state that “*It may not be possible to examine craters when the ground is unsuitable. The ground may be too rocky and hard in which case little impression is made. Conversely, the ground may be too soft and wet in which case the crater may fill with water*”.<sup>998</sup> Lastly, the introduction states that craters must be approached carefully as foot/tyre marks may destroy valuable details indicated by the spoil, splinter pattern and fragments. In the case of the Wannu, the presence of so many civilians in the area and the desire to recover the dead and wounded would probably have destroyed much of this kind of evidence quite early on. The pamphlet also notes that “*The craters made by bombs delivered by aircraft are not particularly distinctive*”.<sup>999</sup>
51. Apart from immediate on the ground inspection, the same principals can be applied to the analysis of imagery of shell craters. Most craters make a clearly defined pattern on the ground and differ according to the type of projectile fired and the type of fuze used. Without going into unnecessary detail, the explosion of a shell causes an inner crater, its momentum carries the effect forward and the splinter pattern is thrown to the sides in the form of an arrow that points back towards the gun that fired the shell. A mortar crater has different characteristics, but it is still possible to determine the angle of impact and the line of fire.
52. There are three significant factors that impact the interpretation of the available imagery from the Eastern Wannu:

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<sup>996</sup> Darusman Report, para. 251.

<sup>997</sup> US Ambassador Robert Blake, ‘Northern Sri Lanka SitRep 46’, Embassy Colombo, *WikiLeaks*, 3 April 2009, para. 2 < <http://www.cabledrum.net/cables/09COLOMBO393> >.

<sup>998</sup> British Army Pamphlet that covers crater analysis is titled Artillery Training in Battle, Pamphlet No 12, Part 3. The introduction section of the pamphlet, under the heading ‘Criteria’

<sup>999</sup> British Army Pamphlet that covers crater analysis is titled Artillery Training in Battle, Pamphlet No 12, Part 3. The introduction section of the pamphlet, under the heading ‘Criteria’

- The weather; ‘...emerging monsoon season resulting in increased cloud cover...’<sup>1000</sup>
- The soil, light to sandy.
- The number of civilians in the area.

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<sup>1000</sup> Moorcroft, *Total Destruction of the Tamil Tigers*, p. 134.

## **IMAGERY ANALYSIS**

53. Two reports have been prepared by McKenzie Intelligence Services (MIS), a specialist imagery company based in London. The reports are attached respectively at Annexes N and O. Rather than repeat the full content of each report, this document only sets out the aim and main conclusions.

### **Report No. 1**

54. MIS was tasked to look at a frequently quoted imagery study (believed to be dated 8 Oct 2009) by the American Association for the Advancement of Science (AAAS). The study was commissioned by Human Rights Watch and Amnesty International and its overall aim was to study conditions in NFZ 3 during the period 6 to 10 May 2009. MIS concluded that:
- There are a number of craters above 3m in diameter, which may indicate that large calibre artillery systems or air delivered munitions might have been used in those cases.
  - However there are a number of key variables which all effect the nature of a crater.
  - Confidence in identifying which weapon system was used, and when, is low.
  - Identifying the direction of the shot from the available imagery is not possible with a high degree of confidence. This is possibly the most important issue in ascribing culpability and underlines the difficulty in any investigative process.

### **Report No 2**

55. The aim of this more comprehensive report was to:
- Determine whether any of the craters in the NFZs predate 2 January 2009.
  - Search for LTTE weapons in the NFZs.
  - Estimate the number of graves in each NFZ.
  - Estimate the maximum number of temporary shelters in each NFZ.
  - Check for the projection of ejecta for all identified craters in NFZs.
  - In addition to available imagery, incorporate, as appropriate, handheld photography taken from helicopter overflights of the NFZs on 29 May 2009.
  - Study the specific accusations of the use of artillery as recorded in the Darusman Report.
  - Define the weather in the NFZs in the period 2 January to 19 May.
56. Paragraph 81 of the Darusman Report states that during the period 19 -20 January 2009 shells hit Vallipunam Hospital in NFZ 1. Imagery dated 21 January 2009 indicates that “it was likely that the hospital had not received indirect fire on those dates”.
57. Paragraphs 83 and 84 of the Darusman Report state that artillery fire fell on a food distribution centre on 23 and 24 January and also hit the Udayaarkaddu Hospital on 24 January. Imagery for these dates was not available; however imagery dated 16 March 2009 does substantiate indirect fire being used in the area and “two of the hospital buildings appear to have significant damage”.

58. Paragraph 91 of the Darusman Report states that the hospital at Puthukkudiyiruppu was hit every day between 29 January and 4 February 2009 by Multi Barrelled Rocket Launchers (MBRLs) and other artillery taking at least nine direct hits. Imagery dated 5 February 2009 indicates that the hospital had suffered two possible areas of damage during the time frame, but not nine direct hits. However, imagery dated 16 March 2009 shows that the hospital and its associated buildings “had suffered from a great deal of damage”. The author also notes that even one salvo from a MBRL would have devastated the entire area (see paragraph 31).
59. Paragraph 94 of the Darusman Report states that on 6 February 2009 the Ponnambalam Hospital was shelled causing part of it to collapse and that it was shelled again on the 9 February 2009. Only imagery dated 5 February was available for this site and this shows the hospital to be in relatively good condition. Subsequent imagery does illustrate that the hospital did suffer over time from indirect fire and “several buildings were destroyed and probable craters can be observed around the hospital compound”. Three images relating to the Ponnambalam Hospital at page 189 of the Darusman Report are also possibly erroneous. Two of these images refer to specific buildings being destroyed between 21 January and 5 February 2009, yet on the available imagery dated 5 February 2009, both buildings are still standing. The third image again relates to a specific building being destroyed in the same time frame. The building is still standing in imagery dated 16 March 2009.
60. Paragraph 111 of the Darusman Report states that on 11 and 12 May 2009 the temporary hospital at Vellamullivaikkal was also hit by shells killing a number of people. Imagery dated 10 May 2009 revealed that the hospital had already received damage from probable indirect fire. However, imagery dated 24 May 2009 detected no additional damage.
61. Paragraph 104 of the Darusman Report states that on the 9 February 2009 shells fell on Putumattalan Hospital killing at least 16 patients. Imagery dated 9 February 2009 was not available but subsequent imagery throughout May 2009 does “show several probable indirect fire strikes and damage to hospital buildings”.
62. Paragraph 120 of the Darusman Report states that on 16 May the LTTE destroyed a lot of its equipment in a large explosion in an area of NFZ 3. A change detection study using imagery dated 16 March and 24 May 2009 showed “no evidence of large-scale destruction (craters or debris) was noted throughout the NFZ”.
63. Analysis of imagery dated 31 October 2008 indicated that NFZ 1 had received indirect fire, but the type and exact date could not be determined. Imagery dated 10 May 2009 concludes that the number of graves identified in the NFZs totals 1,332. Imagery dated 21 January 2009 identifies 4,174 temporary shelters within NFZ 1. Imagery dated 10 May 2009 reveals approximately 5,200 temporary shelters in NFZ 2 and 6,900 in NFZ 3. The report notes that in the case of NFZs 2 and 3, the shelters were densely packed and were within blocks defined by track networks. All craters identified from available imagery and photographs were checked for the projection of ejecta that would indicate the direction from which the

round was fired. The report concludes that for a variety of reasons “the analyst had low confidence in determining potential azimuths<sup>1001</sup> *from imagery analysis alone*”.

### **Imagery Summary**

64. To the author’s knowledge only ‘imagery snap shots’ (including this report’s two analyses) from the last four months of the war have been analysed in an attempt to determine the scale of shelling in the NFZs and attribute blame. It is possible that a more comprehensive daily overview from December 2008 onwards might yield more information, although the limitations as set out by the US State Department Report of 2009, would still apply
65. Indeed, if the US had access to satellite imagery that was more detailed and comprehensive, no doubt, it would have been disclosed by now.
66. There would appear to be sufficient evidence to challenge a number of the allegations in the Darusman Report, particularly from a timing view point. It is also noted that the specific allegation of the use of MBRLs would appear to have no basis in fact, as the level of destruction wrought by such weapons is significant and would almost certainly be identified from imagery. The number of temporary shelters and their lay out that were still standing on 10 May is also significant in that it refutes any suggestion of the deliberate targeting of civilians by SLA artillery, from indiscriminate use of such weapons which had the potential to devastate these areas in a very short space of time.

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<sup>1001</sup> direction of fire

## CONCLUSIONS

67. There was no military or political advantage to GoSL in killing civilians or shelling hospitals indiscriminately, indeed the reverse is the case. High civilian casualties would have made an international/Indian push for halting the final phase, more likely.
68. My task has not been to examine individual instances of war crimes, but rather to focus on the military responses to what was clearly a hostage situation and whether the responses of the SLA in broad terms were proportionate responses to the challenges they faced. It is of course entirely possible that there were incidents on both sides that may have amounted to breaches of the rules of war.
69. However, from the LTTE's perspective, the killing of civilians was an acknowledged part of their strategy. The status in law of *some* of these civilians is also arguable, as their voluntary assistance, particularly in a combat function, would forfeit their civilian protected status. However, I have made the assumption that the bulk were entitled to be treated as civilians who were forcibly prevented from leaving the conflict zone by LTTE as an adjunct to their strategy of compelling the international community and the UN into forcing a ceasefire on GoSL. By the Oxford Dictionary definition these people could be considered as hostages – “*A person seized or held as security for the fulfilment of a condition*”.<sup>1002</sup> This is spelt out with more clarity in Article 1 of the UN International Convention Against the Taking of Hostages (1 Dec 1979), which states,

*“Any person who seizes or detains and threatens to kill, to injure or to continue to detain another person in order to compel a third party, namely, a State, an international intergovernmental organisation, a natural or juridical person, or a group of persons, to do or abstain from doing any act as an explicit or implicit condition for the release of the hostage commits the offence of taking hostages.”*<sup>1003</sup>
70. There is evidence from plausible witnesses and imagery that both mortars and artillery were fired into and out of areas where civilians were present and being held there by the LTTE and that this fire also hit buildings acknowledged to be hospitals. It is, in any sense, wrong to label the areas as NFZs, as by law these did NOT exist. The areas under discussion were so small that an artillery or a mortar round would probably have been bound to injure or kill someone. This civilian melting pot also contained LTTE fighters in civilian clothes, civilians who were actively assisting the LTTE, as well as LTTE artillery and mortars.
71. The clinching argument as to where responsibility lies for the shelling is in the direction from which the shells were fired. This can only be retrospectively determined from analysis of the shell craters either on the ground as soon as possible after the event or from available imagery or, to a lesser extent, from credible witnesses at the receiving end. To suggest, as one report does<sup>1004</sup>, that because the barrels of SLA artillery tracked the declaration of the

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<sup>1002</sup> Available at < <http://www.oxforddictionaries.com/definition/english/hostage> >.

<sup>1003</sup> Article 1 of the UN International Convention Against the Taking of Hostages, 1 December 1979.

<sup>1004</sup> Darusman Report, para. 101.

'NFZs' is an indication that they fired into those NFZs is inaccurate and speculative, devoid of any forensic relevance. It is normal artillery practice for guns to be laid in the direction of the threat, but that does not mean they actually fired. Given that the analysis of the shell craters is inconclusive, the only source of reliable information are eye-witness accounts, where the direction of shot is best determined either visually by observing a gun flash or audibly by hearing the discharge of a gun or mortar. The flat nature of the ground in the Eastern Wanni makes observation difficult, but a witness might hear a distant bang from a particular angle and after a small pause observe the explosion of a shell close by; he can then with some assurance, but not with total certainty, say that the round came from a particular direction. This method, though, is to an extent dependent on a practised ear and the absence of surrounding noise and other distractions. Most accounts that describe events within the NFZs over those last few months tell of chaos, confusion, emotion and terror - these background conditions are less than ideal when endeavouring to determine the direction of incoming indirect fire. The author therefore believes that it is not possible at this point in time, on the evidence available, to accurately state which side's artillery and mortars caused identified shell craters and civilian casualties.

72. As cases from the ICTY have demonstrated this exercise can be attempted, but it is a very costly exercise and after such a period of time that has elapsed, whether accurate results can be established is far from certain. A number of military lawyers have been highly critical of the ICTY's attempts to investigate and prosecute cases involving shelling incidents and indeed, the most significant case that deals with this issue has been overturned on appeal and the defendant acquitted on the facts of this case. The military criticism, however, is not so as to shield those who may be guilty of war crimes, but simply because the technical expertise required to establish the necessary facts to the required standard is often absent. In addition, with the absence of contemporaneous forensic evidence, any investigating authority would require a huge amount of documentation from army records, such as war diaries, to try and piece together from which side a shell was being fired on a particular day. If the LTTE had not resorted to deliberately attracting fire into hospitals by positioning their guns in close proximity, or killing their own civilians, this task may have been easier. However, faced with this fact, as accepted by most NGOS, being able to establish which side fired from where, five years after the event, is going to be a difficult task.
73. My conclusion in this Report is that both sides fired into the so called 'NFZs', but it is GoSL that is being held to account, which brings us back to the tenet of proportionality, distinction, legitimate targeting and military necessity as applied to fire in support of deliberate operations, tactical encounters and counter battery fire.
74. Let us start with deliberate operations. The military aim was to defeat LTTE and, in the absence of their surrender, this meant killing or capturing their cadres/leaders and seizing their strongholds, even when they were located in areas populated by civilians. GoSL had to factor in the 'Masada' possibility as the LTTE became increasingly desperate. Evidence of their willingness to sacrifice their own civilians has, post the last phase, been acknowledged by many.<sup>1005</sup> Given the reported strength of their fortifications and an

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<sup>1005</sup> US State Department Report, 2009. p24.

understandable requirement to limit the SLA's own casualties, the use of targeted airpower and artillery, if used, would seem to be justified and proportionate, provided every effort had been made to get the civilians to move prior to the assault. It should also be noted that LTTE, on the evidence seen, appear to have responded to these deliberate assaults using all the weapons at their disposal, with some of their rounds inevitably landing in civilian areas to the rear of the assaulting troops. It is clear in my opinion, that looking at the military strategies that the LTTE adopted, that the leadership were desperate to protect Velupillai Prabhakaran and seek to ensure his escape whatever the cost to their own civilian population.

75. Given that on the SLA side, this was principally an infantry and Special Forces operation there would have been continual tactical engagements, some of which would have been over relatively quickly, while others would have involved a prolonged, but local, fire fight during which the SLA troops involved would have requested fire support from their Battalion's integral 81 and 82mm mortars - the necessary coordinates for which would be passed by radio either by a qualified Mortar Fire Controller (MFC) or by a trained senior rank. The fire would then have been adjusted as required to achieve the intended outcome. There is nothing that the author has either read or been told that states that local fire support of this kind was unavailable and going back to the premise of self-defence, nor should it have been. Again, it is inevitable that stray rounds from both sides would have caused civilian casualties.
76. Counter Battery fire is described at Para 29. The SLA had used it effectively in previous operations. It is important to underline that there had not been allegations of indiscriminate shelling and war crimes in the previous military artillery operations that equate to the criticisms made in the last phase of the 2009 operation. In my opinion this is indicative of a command 'culture' that did not appear to espouse indiscriminate shelling. The key question, however, is whether and how counter battery fire was used in the Eastern Wanni, as conditions there were quite unlike those of previous operations. Imagery most certainly supports the contention that the necessary artillery assets for counter-battery fire were available as were the necessary locating radars. In a perfect world the radar would identify a target, a UAV would confirm that it was still there (distinction, legitimate targeting and military necessity conditions fulfilled) and fire would be returned. This sequence would take a few minutes and the offending gun could probably have been moved – LTTE were using 'shoot and scoot' tactics with fighters dressed in civilian clothes. The process could be speeded up by just relying on the locating radar and not using an UAV, but this would only have satisfied the military necessity requirement and then only in terms of self-defence. In these circumstances, the LTTE must also share a large proportion of the blame because they were operating out of uniform amongst civilians.
77. The precise number of civilian deaths and their exact status at their time of death may never be known. The accusations against GoSL imply either a deliberate policy to target civilians or disinterest in the scale of civilian casualties in achieving their strategic objective. All the available evidence discounts any form of deliberate policy or systematically reckless or disproportionate conduct, despite the civilian casualties, to the extent that it is even possible to determine what proportion of those killed were civilians.

78. It is undeniable, though, that had LTTE not driven civilians before them and executed them when they attempted to escape, then civilian casualties would have been significantly lower. A figure of up to 40,000 civilian deaths is much quoted and has been simply arrived at by subtracting the number of IDPs processed (290,000) from the Darusman estimate of the number of civilians caught up in the final months of the war (330,000). The author believes that, in principle, there is every reason to challenge this estimate of the numbers killed: for instance, in the imagery analysis there are 1,332 obvious graves (para 63 above). These might be LTTE gravesites, but let us assume that they are IDP ones and that there are 4 bodies to each grave; then that gives a total of 5,328 bodies. There would, of course, be unmarked graves invisible to imagery and a large number of bodies were never recovered because they died by drowning, were buried in LTTE bunkers and fortifications or just decomposed quickly in the monsoon climate. However, in most wars the number of missing presumed dead is lower than the number of bodies recovered. A cable from US Ambassador Blake to the State Department on 7 April 2009 states that the UN estimate of deaths for the period 20 January to 6 April was 4,164 with a further 10,002 wounded. The cable also states that the estimated daily kill rate was 33 a day in January and 63 a day in February and March.<sup>1006</sup> To reach 40,000 deaths would require a kill ratio of 287 per day over 139 days (1 January to 19 May) and to reach 26,000 deaths would require a rate of 187 per day. Comparisons are of course invidious, but the accepted figure for German civilian deaths after the 1945 Dresden raid(s) is 25,000; and 24,000 Polish and German soldiers died during the 63 days intense fighting of the 1944 Warsaw Uprising. The figure of 40,000 civilians killed which has been repeatedly published is, in my view, extremely difficult to sustain on the evidence which I have seen.
79. The Wannu operation was not of the 'classic' hostage rescue variety if only because of the number of hostages involved and the ebb and flow of battle. However, there were similarities; the SLA did not rush in, but instead took its time to plan and adapt its tactics to take account of the civilian presence. It was, in the view of the author, an entirely unique situation and the fact that 290,000 people escaped alive is in itself remarkable.
80. Indeed, given the allegations of the use of MBRLs and use of heavy weaponry against the civilian population, had the SLA embarked on an indiscriminate campaign of bombardment, the trite but obvious point that any military expert is forced to conclude, is that 2/3 days of shelling would have decimated all those in that final confined area. I reiterate, in my experience of hostage rescue, the fact that so many escaped, is remarkable.
81. This suggests to the author that it is extremely difficult to sustain an accusation of the deliberate killing of civilians by the SLA by shelling, which had the artillery potential over a very short period of time to devastate the temporary civilian encampments, particularly in NFZs 2 and 3.
82. Mistakes that resulted in unnecessary civilian deaths were most definitely made by the SLA, but all armies in all conflicts make such mistakes. There may even have been

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<sup>1006</sup> US Ambassador Robert Blake, 'Northern Sri Lanka SitRep 48', Embassy Colombo, *WikiLeaks*, 7 April 2009 released 26 August 2011. < <http://www.cabledrum.net/cables/09COLOMBO402> >.

mistakes that were reckless and greater analysis of particular incidents, such as some of the IDF hospital strikes may demonstrate this. Again, this will depend on whether this was SLA return fire on the LTTE, who had deliberately used 'shoot and scoot' tactics, to endanger the hospitals and patients.

83. However, overall and for the reasons considered above, on the available evidence it is my opinion, that the SLA's operations in broad terms, were proportionate in the circumstances. Whilst the SLA was a relatively unsophisticated army, they had evolved into a battle and ultimately war winning machine that made up for its lack of sophistication by the application of three of the most important principles of war: selection and maintenance of the aim; offensive action and concentration of force. In my military opinion, faced with a determined enemy that were deploying the most ruthless of tactics and which involved endangering the Tamil civilian population, SLA had limited options with regard to the battle strategy they could deploy. This would have posed a dilemma for the very best trained and equipped armies in the world. The SLA had either to continue taking casualties **and** allow the LTTE to continue preying upon its own civilians, or take the battle to the LTTE, albeit with an increase in civilian casualties. The tactical options were stark, but in my military opinion, justifiable and proportionate given the unique situation SLA faced in the last phase. Therefore, on the evidence available to me, taking into account my own combat experience, I do not find, in broad terms that the military and artillery campaigns were conducted indiscriminately, but were proportionate to the military objectives sought.

London

Date

**ANNEXES:**

- A: Bibliography.
- B: Map of the Wannu.
- C: Photographs of Battle Damage.
- D: Examples of Leaflet Drops.
- E: Presidential Pause Statement.
- F: Example of a Bund.
- G: List of LTTE Weapons Recovered.
- H: Photographs of LTTE weapons.
- I: Log of Suicide Attacks.
- J. NFZ Letters.
- K: Photographs of LTTE Positions.
- L: SF HQ (W) 6 x Signals.
- M: ROE Definition.
- N: McKenzie Intelligence Services Report No 1.
- O: McKenzie Intelligence Services Report No 2.

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