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Annual report of the United Nations High Commissioner for Human Rights and reports of the Office of the High Commissioner and the Secretary-General

Albania, Australia,* Germany, Greece,* Latvia, Montenegro, Poland,* Romania,* Sri Lanka,* the former Yugoslav Republic of Macedonia, United Kingdom of Great Britain and Northern Ireland, United States of America: draft resolution

30/… Promoting reconciliation, accountability and human rights in Sri Lanka

The Human Rights Council,

Reaffirming the purposes and principles of the Charter of the United Nations,

Guided by the Universal Declaration of Human Rights, the International Covenants on Human Rights and other relevant instruments,

Recalling Human Rights Council resolutions 19/2 of 22 March 2012, 22/1 of 21 March 2013 and 25/1 of 27 March 2014 on promoting reconciliation and accountability in Sri Lanka,

Reaffirming its commitment to the sovereignty, independence, unity and territorial integrity of Sri Lanka,

Reaffirming also that it is the responsibility of each State to ensure the full enjoyment of all human rights and fundamental freedoms of its entire population,

Welcoming the historic free and fair democratic elections in January and August 2015 and the peaceful political transition in Sri Lanka,

Noting with interest the passage and operationalization of the nineteenth amendment to the Constitution of Sri Lanka and its contribution to the promotion of democratic governance and independent oversight of key institutions, including the provision on the promotion of national reconciliation and integration as among the constitutional duties of the President of Sri Lanka,

* Non-member State of the Human Rights Council.

Welcoming the steps taken by the Government of Sri Lanka since January 2015 to advance respect for human rights and to strengthen good governance and democratic institutions,

Welcoming also the efforts of the Government of Sri Lanka to investigate allegations of bribery, corruption, fraud and abuse of power, and stressing the importance of such investigations and the prosecution of those responsible in ending impunity and promoting good governance,

Welcoming further the steps taken to strengthen civilian administration in the former conflict-affected provinces of the North and East, and acknowledging the progress made by the Government of Sri Lanka in rebuilding infrastructure, demining and resettling internally displaced persons, and calling upon the international community, including the United Nations, to assist the Government of Sri Lanka in furthering these efforts, especially in expediting the process of delivering durable solutions for all internally displaced persons,

Recognizing the improved environment for members of civil society and human rights defenders in Sri Lanka while expressing concern at reports of ongoing violations and abuses of human rights, and recognizing the expressed commitment of the Government of Sri Lanka to address issues, including those involving sexual and gender-based violence and torture, abductions, as well as intimidation of and threats against human rights defenders and members of civil society,

Reaffirming that all Sri Lankans are entitled to the full enjoyment of their human rights regardless of religion, belief or ethnicity, in a peaceful and unified land,

Reaffirming also that States must ensure that any measure taken to combat terrorism complies with their obligations under international law, in particular international human rights law, international refugee law and international humanitarian law, as applicable,

Welcoming the Declaration of Peace of the Government of 4 February 2015 and its acknowledgement of the loss of life and victims of violence of all ethnicities and religions,

Emphasizing the importance of a comprehensive approach to dealing with the past, incorporating the full range of judicial and non-judicial measures, including , inter alia, individual prosecutions, reparations, truth-seeking, institutional reform, the vetting of public employees and officials, or an appropriately conceived combination thereof, in order to, inter alia, ensure accountability, serve justice, provide victims with remedies, promote healing and reconciliation, establish independent oversight of the security system, restore confidence in the institutions of the State and promote the rule of law in accordance with international human rights law with a view to preventing the recurrence of violations and abuses, and welcoming in this regard the expressed commitment of the Government to ensure dialogue and wide consultations with all stakeholders,

Recognizing that mechanisms to redress past abuses and violations work best when they are independent, impartial and transparent; are led by individuals known for displaying the highest degree of professionalism, integrity and impartiality; utilize consultative and participatory methods that include the views from all relevant stakeholders, including, but not limited to, victims, women, youth, representatives of various religions, ethnicities and geographic locations, as well as marginalized groups; and designed and implemented based on expert advice from those with relevant international and domestic experience,

Recognizing also that a credible accountability process for those most responsible for violations and abuses will safeguard the reputation of those, including within the military, who conducted themselves in an appropriate manner with honour and professionalism,

Recalling the responsibility of States to comply with their relevant obligations to prosecute those responsible for gross violations of human rights and serious violations of international humanitarian law constituting crimes under international law, with a view to ending impunity,

Taking note of the review of the high-security zones undertaken by the Government, and welcoming the initial steps taken to return land to its rightful civilian owners and to help local populations to resume livelihoods and to restore normality to civilian life,

Welcoming the commitments of the Government of Sri Lanka to the devolution of political authority,

Requesting the Government of Sri Lanka to implement effectively the constructive recommendations made in the report of the Lessons Learnt and Reconciliation Commission,

Welcoming the visit from 30 March to 3 April 2015 by and the observations of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, and the planned visit of the Working Group on Enforced or Involuntary Disappearances in November 2015,

Recognizing that the investigation into alleged serious violations and abuses of human rights and related crimes in Sri Lanka requested by the Human Rights Council in its resolution 25/1 was necessitated by the absence of a credible national process of accountability,

1. *Takes note with appreciation* of the oral update presented by the United Nations High Commissioner to the Human Rights Council at its twenty-seventh session, the report of the Office of the High Commissioner on promoting reconciliation and accountability in Sri Lanka[1] and its investigation on Sri Lanka requested by the Human Rights Council in its resolution 25/1,[2] including its findings and conclusions, and encourages the Government of Sri Lanka to implement the recommendations contained therein when implementing measures for truth-seeking, justice, reparations and guarantees of non-recurrence;

2. *Welcomes* the positive engagement between the Government of Sri Lanka and the High Commissioner and the Office of the High Commissioner since January 2015, and encourages the continuation of that engagement in the promotion and protection of human rights and in exploring appropriate forms of international support for and participation in Sri Lankan processes for seeking truth and justice;

3. *Supports* the commitment of the Government of Sri Lanka to strengthen and safeguard the credibility of the processes of truth-seeking, justice, reparations and guarantees of non-recurrence by engaging in broad national consultations with the inclusion of victims and civil society, including non-governmental organizations, from all affected communities, which will inform the design and implementation of these processes, drawing on international expertise, assistance and best practices;

4. *Welcomes* the commitment of the Government of Sri Lanka to undertake a comprehensive approach to dealing with the past, incorporating the full range of judicial and non-judicial measures; also welcomes in this regard the proposal by the Government to establish a commission for truth, justice, reconciliation and non-recurrence, an office of missing persons and an office for reparations; further welcomes the willingness of the

[1] A/HRC/30/61.
[2] See A/HRC/30/CRP.2.

Government to give each mechanism the freedom to obtain financial, material and technical assistance from international partners, including the Office of the High Commissioner; and affirms that these commitments, if implemented fully and credibly, will help to advance accountability for serious crimes by all sides and to achieve reconciliation;

5. *Recognizes* the need for a process of accountability and reconciliation for the violations and abuses committed by the Liberation Tigers of Tamil Eelam, as highlighted in the report of the Office of the High Commissioner for Human Rights investigation on Sri Lanka;[2]

6. *Welcomes* the recognition by the Government of Sri Lanka that accountability is essential to uphold the rule of law and to build confidence in the people of all communities of Sri Lanka in the justice system, notes with appreciation the proposal of the Government of Sri Lanka to establish a judicial mechanism with a special counsel to investigate allegations of violations and abuses of human rights and violations of international humanitarian law, as applicable; affirms that a credible justice process should include independent judicial and prosecutorial institutions led by individuals known for their integrity and impartiality; and also affirms in this regard the importance of participation in a Sri Lankan judicial mechanism, including the special counsel's office, of Commonwealth and other foreign judges, defence lawyers and authorized prosecutors and investigators;

7. *Encourages* the Government of Sri Lanka to reform its domestic law to ensure that it can implement effectively its own commitments, the recommendations made in the report of the Lessons Learnt and Reconciliation Commission, as well as the recommendations of the report of the Office of the High Commissioner,[1] including by allowing for, in a manner consistent with its international obligations, the trial and punishment of those most responsible for the full range of crimes under the general principles of law recognized by the community of nations relevant to violations and abuses of human rights and violations of international humanitarian law, including during the period covered by the Lessons Learnt and Reconciliation Commission;

8. *Also encourages* the Government of Sri Lanka to introduce effective security sector reforms as part of its transitional justice process, which will help to enhance the reputation and professionalism of the military and include ensuring that no scope exists for retention in or recruitment into the security forces of anyone credibly implicated through a fair administrative process in serious crimes involving human rights violations or abuses or violations of international humanitarian law, including members of the security and intelligence units; and also to increase training and incentives focused on the promotion and protection of human rights of all Sri Lankans;

9. *Welcomes* the recent passage by the Government of Sri Lanka of an updated witness and victim protection law and its commitment to review the law, and encourages the Government to strengthen these essential protections by making specific accommodations to protect effectively witnesses and victims, investigators, prosecutors and judges;

10. *Also welcomes* the initial steps taken to return land, and encourages the Government of Sri Lanka to accelerate the return of land to its rightful civilian owners, and to undertake further efforts to tackle the considerable work that lies ahead in the areas of land use and ownership, in particular the ending of military involvement in civilian activities, the resumption of livelihoods and the restoration of normality to civilian life, and stresses the importance of the full participation of local populations, including representatives of civil society and minorities, in these efforts;

11. *Encourages* the Government of Sri Lanka to investigate all alleged attacks by individuals and groups on journalists, human rights defenders, members of religious

minority groups and other members of civil society, as well as places of worship, and to hold perpetrators of such attacks to account and to take steps to prevent such attacks in the future;

12. *Welcomes* the commitment of the Government of Sri Lanka to review the Public Security Ordinance Act and to review and repeal the Prevention of Terrorism Act, and to replace it with anti-terrorism legislation in accordance with contemporary international best practices;

13. *Also welcomes* the commitment of the Government of Sri Lanka to sign and ratify the International Convention for the Protection of All Persons from Enforced Disappearance without delay, to criminalize enforced disappearances and to begin to issue certificates of absence to the families of missing persons as a temporary measure of relief;

14. *Further welcomes* the commitment of the Government of Sri Lanka to release publicly previous presidential commission reports;

15. *Encourages* the Government of Sri Lanka to develop a comprehensive plan and mechanism for preserving all existing records and documentation relating to human rights violations and abuses and violations of international humanitarian law, whether held by public or private institutions;

16. *Welcomes* the commitment of the Government of Sri Lanka to a political settlement by taking the necessary constitutional measures, encourages the Government's efforts to fulfil its commitments on the devolution of political authority, which is integral to reconciliation and the full enjoyment of human rights by all members of its population; and also encourages the Government to ensure that all Provincial Councils are able to operate effectively, in accordance with the thirteenth amendment to the Constitution of Sri Lanka;

17. *Also welcomes* the commitment of the Government of Sri Lanka to issue instructions clearly to all branches of the security forces that violations of international human rights law and international humanitarian law, including those involving torture, rape and sexual violence, are prohibited and that those responsible will be investigated and punished, and encourages the Government to address all reports of sexual and gender-based violence and torture;

18. *Requests* the Office of the High Commissioner to continue to assess progress on the implementation of its recommendations and other relevant processes related to reconciliation, accountability and human rights, and to present an oral update to the Human Rights Council at its thirty-second session, and a comprehensive report followed by discussion on the implementation of the present resolution at its thirty-fourth session;

19. *Encourages* the Government of Sri Lanka to continue to cooperate with special procedure mandate holders, including by responding formally to outstanding requests;

20. *Encourages* the Office of the High Commissioner and relevant special procedure mandate holders to provide, in consultation with and with the concurrence of the Government of Sri Lanka, advice and technical assistance on implementing the above-mentioned steps.

Sir Desmond de Silva QC, "Opinion for the Government of Sri Lanka", 23rd February 2014

Opinion

by The Rt. Hon. Desmond de Silva QC

23rd of February, 2014

for the Government of Sri Lanka

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OPINION

INTRODUCTION

I am instructed to give an Opinion and I quote "on the permissible parameters of collateral damage in the context of the non-international armed conflict in a Sri Lanka that ended on the 19th May 2009 having particular regard to the factual matrix with which I was supplied, and the historical practices in the prosecution of military conflicts and the legal pronouncements made by the former Prosecutor of the International Criminal Court (ICC) Luis Moreno-Ocampo on the circumstances that provided justification for collateral damage in the US led invasion of Iraq".

During this final phase of the conflict it is undoubted that there was considerable loss of civilian life; the figures, however, vary considerably. Sadly, this is what is called 'collateral damage' in military parlance. Following the military defeat of the LTTE a host of allegations had been made against the Sri Lankan Army (SLA) in having committed war crimes at this time.

My instructions include a request for me to address the following specific questions and in particular the Government of Sri Lanka (GOSL) seeks a written legal Opinion on the following matters:

1. The law and Practice relating to collateral damage resulting in the course of armed conflict, founded on, *inter alia*, the pronouncement of Luis Moreno-Ocampo referred to above, state practices, especially in the USA, UK and Israel and the positions taken up by these countries, in their official documents, written and oral pleadings before Courts and Tribunals and before United Nations agencies and bodies, including the Security Council and the Human Rights Council and it's predecessor bodies on the question of collateral damage.

2. In the context of the findings on 1. (above) and the facts relating to the prosecution of the war against the LTTE enumerated below, that the civilian casualties which occurred in the closing stages of the War against the LTTE, do not constitute a war crime having regard to *inter alia*, the following:

(a) The sole intention of the Sri Lankan Army was to gain a decisive military advantage over the LTTE and to bring to a close the 30 year war against the LTTE and their heinous reign of terror against civilians of all ethnic and religious groups on the country.

(b) The Sri Lankan Army pursued that objective having due regard to the principles of distinction and proportionality which the Sri Lanka Army strove at all times to follow.

(c) The above intention has been amply validated and the objective of ending the 30 year war against the LTTE fully realised, as demonstrated by the peace, freedom, democracy and development that have pervaded the whole of the North and East of the Country in the post-conflict phase, thereby lending unqualified justification and validity to the intent and purpose of the military action taken against the LTTE in the closing stages of the War.

Materials sent to me by GOSL are as follows:

1. Humanitarian Operation Factual Analysis
   -Ministry of Defence
   Democratic Socialist Republic of Sri Lanka
   July 2006 – May 2009
2. An Opinion by Luis Moreno-Ocampo
   9th February, 2006
3. A 31 page document entitled 'Instructions to Queens Counsel'

SUMMARY

By 2009 the Government of Sri Lanka had been in an ongoing internal armed conflict with the Liberation Tigers for Tamil Eelam (LTTE) for some thirty years. The LTTE waged a ruthless secessionist campaign to create an independent state in the North and East of Sri Lanka.

After many failed attempts at peace the GOSL launched an operation to finally end the conflict and bring to a close the war that had claimed tens of thousands of lives, both civilian and military. The Government created No Fire Zones (NFZs) with a view to saving civilian lives. Indeed, the creation of these zones is only realistically consistent with that intention. The first NFZ was created in January 2009. Upon realizing that the Army refrain from firing into NFZs the LTTE promptly moved it's CADRES and Artillery into the midst of these innocent civilians. This is, of course, a war crime committed by the LTTE. In the final phase of the conflict when the LTTE was facing inevitable defeat it resorted to holding hostages as a human shield and shelling the Sri Lankan Army (SLA) from No Fire Zones so as to force the Army to run the risk of causing civilian casualties in responding. No doubt, this was done for the purpose of assigning allegations of civilian killings to the Army. In addition, there was evidence from many sources that the LTTE fired artillery into their own people. This strategy, is not unknown in hostilities of this kind where there is a need on the part of the losing side to provoke a propaganda storm so as to invite international intervention to prevent impending defeat.

It was the duty of the GOSL to free the civilian hostages from their LTTE captors. Attempts by the civilian hostages to escape from their unlawful captivity were met with their being shot. The operation to free those hostages and defeat their LTTE captors resulted in significant civilian casualties with a range of figures from 8,000 to 40,000. Whatever be the true figure of the civilian casualties, the overwhelming number of innocent civilians taken hostage

were saved. This was a humanitarian triumph achieved by the military defeat of the LTTE by the SLA, thereby ending the LTTE practice of forced recruitment in which "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[1]

Upon the defeat of the LTTE a host of allegations were launched against the SLA which included the unlawful targeting of civilians and causing illegal collateral damage.

References to the use of the atom bomb on Hiroshima and Nagasaki at the end of WWII for the purpose of determining the degree of acceptable collateral damage in a given set of circumstances is not helpful. The threshold as to what constitutes acceptable collateral damage under International Humanitarian Law (IHL) has changed significantly since WWII. Whereas, during WWII, it was generally held that widespread civilian death was acceptable so long as it furthered a legitimate military target, this broad view has changed markedly since WWII. Increasingly, the international community, and by extension IHL, requires a higher threshold in determining that civilian casualties are allowable under the laws of armed conflict.

Currently, whether or not an attack that results in civilian deaths is legal under IHL depends on whether the attack meets the requirements of three principles which guide the legality of actions under the laws of armed conflict and IHL: (1) Distinction, (2) Military Necessity, and (3) Proportionality.

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[1] United Nations Statement, Colombo, 16 February 2009 (www.un.lk/media_centre/archived.php): "There are indications that children as young as 14 are being recruited into the ranks of the LTTE. "UNICEF Colombo Statement 17 Feb. 2009, "More children victims of the conflict" (wwww.reliefweb.int/rw/rwb.nsf): "We have clear indications that the LTE has intensified forcible recruitment of children and that children as young as 14 years old are now being targeted." said Philippe Dummelle, UNICEF's Representative in Sri Lanka".

In evaluating the legality of civilian casualties in the final stages of the war, in order to determine if they are permissible collateral damage, a violation of IHL only occurs if there is an intentional attack directed against civilians (violation of principle of distinction), or if an attack is launched on a military objective with the knowledge that the incidental civilian injuries would be clearly excessive in relation to the anticipated military advantage (violation principle of proportionality).

In the final stages of the war, according to the *Report of the Secretary-General's Panel of Experts on Accountability in Sri Lanka* around 330,000 civilians were trapped in an ever decreasing area, fleeing the shelling but kept hostage by the LTTE and being used as a strategic human buffer between themselves and the advancing SLA. From February 2009 onwards, the LTTE started the point blank shooting of civilians who attempted to escape the conflict zone whilst continuing a policy of suicide attacks outside the conflict zone. On Friday (April 3) the UN Secretary General Ban Ki-Moon called on the LTE to allow civilians to leave the conflict area of their own free will. He expressed his deep distress by continuing reports of civilians being kept at extreme risk, against their will and with heavy casualties in a very small area by the LTTE. The UN Secretary-General (UNSG) deplored the forced recruitment of civilians, particularly children, stating the severe restrictions of the LTTE on their freedom of movement violated international law.[2]

The clear and immediate duty of the Government forces was to free the hostages by defeating their captors and in order to do so they were entitled to use as much force as was absolutely necessary to completely overwhelm their enemy, subject to the principle of

[2] www.pnn.gov.lk/news_update/Current_Affairs/ca200904/20090406troops...
Last viewed 21/02/2014

Proportionality. This was done, and 296,000 civilian hostages whose future was uncertain in the hands of the LTTE, were now saved. In my view, this was a military and humanitarian necessity. When military necessity is understood to require non-combatant death, such killing is permissible and legal if it is proportionate to the expected military advantage of the operation.

By doing their due diligence to ensure that the number of casualties was as low as possible and that only military targets were fired upon, the Government satisfied the principles of Necessity, Distinction and Proportionality.

I bear in mind that there was an urgent need to bring the war to a swift conclusion, save as many hostages as possible and to prevent the escape of the LTTE leadership by sea. Their escape would have enabled them to position themselves elsewhere in the World and continue directing murderous terrorist activities against the people of Sri Lanka. The phenomenon of a group from outside waging war against a state was exemplified by the Al-Qaeda attack on the Twin Towers in New York in 2001 and indeed by the murder of Rajiv Gandhi, the Prime Minister of India by the LTTE.

Thus, the damage and loss of life, regrettable as it was, was merely collateral damage. It is my opinion that a war crime cannot be ascribed to the Government on the basis of the facts set out above.

I set out my reasoning and conclusion in Sections 9 and 10 of this Opinion.

This is not to say that there were not, in the heat of battle, cases of war crimes committed by individual members of the SLA. However, the evidence does not suggest that the commission of a war crime by reason of the collateral damage referred to was Government policy. In other words, there is no evidence of state sponsored war crimes in this regard.

SECTION 1. FACTUAL ASSERTIONS IN MY INSTRUCTIONS

For thirty years, the Liberation Tigers of Tamil Eelam (LTTE) were responsible for conducting numerous attacks against the Sri Lankan government and its citizens as part of its effort to create a separate Tamil state.[3] After repeatedly failing to reach a peaceful settlement with the LTTE leadership through peace talks, the government decided to conduct a large-scale "Humanitarian Operation" in 2006 to finally rid the country of the organisation.[4]

By around January 2009, the SLA had pushed the LTTE fighters into a small area of the country.[5] However, due to the significant number of civilians that were in that particular location, the government established "No Fire Zones" (NFZs) where the greatest concentration of civilians was located.[6] The LTTE fighters decided to take advantage of the NFZs and began firing at the military forces from within the zones.[7] Additionally, the LTTE held tens of thousands of civilian hostages in the NFZs as human shields in order to deter the military from firing upon them while they conducted their attacks.[8]

Throughout the operation, the military followed a "zero civilian casualty policy."[9] However, in order to properly counter the LTTE attacks coming out of the NFZs, the military needed to launch counter-attacks against them. The military enacted several protective measures in order to limit the number of civilian casualties during the operations including specialised training for the troops, selectively using artillery fire, the use of snipers, the use of smaller fire teams, and the change in weaponry from rapid fire to deliberate fire.[10]

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[3] Government of Sri Lanka Assertions, p. 3.
[4] Id. at 4.
[5] Id. at 26.
[6] Id. at 12.
[7] Id. at 12.
[8] Id.
[9] Id. at 4.
[10] Id. at 20.

In addition to what has been said, the care exercised by the security forces included several institutional mechanisms in place to safeguard human rights.

a. The Directorate of Human Rights and Humanitarian Law of the Sri Lanka Army (SLA) was established in January 1997. Its role was to further improve the appreciation and knowledge of SLA personnel of International Humanitarian Law (IHL) and Human Rights (HR) through training, monitoring the compliance of its personnel to these norms, and inquiring into and reporting alleged transgressions.

b. The Sub Directorate on Human Rights and International Humanitarian Law in the Sri Lanka Navy (SLN) was established in June 2002 as a means of providing advice, conducting training programmes for naval personnel, disseminating information and coordinating work with various agencies on all matters related to HR & IHL.

c. The International Humanitarian Law and Human Rights cell of the Sri Lanka Air Force (SLAF) was established in 2002 along similar lines.

Training on Human Rights and International Humanitarian Law

Security Forces personnel receive in-depth training on HR and IHL through the directorates described above. In particular, officers and soldiers actively engaging in operations were trained to be aware of their responsibilities with regards to the safety of civilians and the protection of human rights, and to make appropriate and informed decisions in the heat of battle.

Training comprised three distinct programmes:

a. Training of instructors to conduct seminars and awareness programmes on HR and IHL for other personnel on a continuous, full time basis

b. Regular field level training for other personnel conducted by these trained instructors in the operational areas

c. Formal training for officers and other ranks at established training centres

These training programmes are supported by the dissemination of written materials including leaflets, instruction booklets, placards etc., dealing with human rights, codes of conduct, offenses in armed conflict and other relevant material.

Assistance for these training programmes has been obtained from Governmental, non-Governmental and international organisations such as the Ministry of Disaster Management, the ICRC, the UNDP, the British Council, the National Commission on Human Rights, the National Institute of Education, the Centre for the Study of Human Rights at the University of Colombo and the Sri Lanka Foundation Institute.

Overall, more than 175,000 personnel of the SLA have undergone training in this subject area since the year 2001. Education on IHL and HR has been a compulsory subject for al SLN personnel in induction training courses, on the job training and all mandatory courses pertaining to promotion. More than 24,000 personnel of the SLAF have also received training in this subject area.[11]

Eventually, the government declared victory in May 2009, but, despite the employment of these protective measures, many civilians were killed and civilian property, such as local

[11] *Humanitarian Operation Factual Analysis*
Ministry of Defence
Democratic Socialist Republic of Sri Lanka
July 2006 – May 2009

hospitals, was damaged.[12] These facts have been used to allege that the government committed war crimes during this operation. The government contends that civilians and the hospitals were never the intended target of their attacks, and that they were simply responding to attacks that the LTTE was launching against them. Further , that the LTTE had positioned itself and its guns besides hospitals.

Finally, allegations were made that the government prevented essential aid from reaching civilians caught in the conflict zone.[13] However, the government contends that it worked with several UN organisations to provide food and medicine to the affected civilians and that every effort was made to ensure that they were taken care of.

[12] Id. at 15-16.
[13] Id. at 17.

SECTION 2. APPLICABILITY OF INTERNATIONAL HUMANITARIAN LAW (IHL) TO INTERNAL ARMED CONFLICT

The GOSL is a party to the four main Geneva Conventions of 1949, and thus has an obligation to comply with International Humanitarian Law (IHL). It used to be understood that war crimes could only be committed during an international conflict, but after the ICTY's 1999 decision in *Prosecutor v. Tadic*, it is now well settled that violations of IHL can occur during internal conflicts as well.[14] Internal conflict is defined as "protracted armed violence between governmental authorities and organized armed group or between such groups within a state."[15] If such a conflict exists, the relevant IHL provisions will govern the parties' actions throughout the entire territory until a peaceful settlement has been reached.[16]

Both Common Article 3 (CA3) and Additional Protocol II (APII) to the Geneva Conventions apply to internal armed conflict.[17] Because Sri Lanka is not a party to APII, the provisions of CA3 and customary international law govern the conflict in question. CA3 includes the following important provisions that parties to an internal conflict must abide by:

> 1) Persons not taking part in the hostilities, including combatants who have laid down their arms, shall be treated humanely, including the prohibition on discrimination on the basis of race, color, religion, sex, birth or wealth; murder or torture; hostage-taking; cruel or degrading treatment; and the use of executions as a sentence without due process are prohibited.
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> 2) The wounded and sick are to be cared for.[18]

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[14] Antonio Cassese, International Criminal Law 2d ed., p. 82. (2008).
[15] Anthony Cullen, The Concept of Non-International Armed Conflict in International Humanitarian Law, P.190 (2010).
[16] *Supra* note 12 at 435.
[17] *Supra* note 66 at 153.
[18] *Supra* note 12 at 1195.

Any serious violation of these provisions could constitute a war crime.[19]

[19] Id.

SECTION 3. THE APPLICABILITY OF INTERNATIONAL HUMAN RIGHTS LAW (IHRL)

International Human Rights Law (IHRL) is made up of a set of treaties and conventions that member states have drafted in order to cooperate in the protection of rights that the international community recognizes as fundamental.[20] The most relevant agreements to this conflict that Sri Lanka is a party to include the International Covenant on Civil and Political Rights (ICCPR), the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, (CAT), and the International Covenant on Economic, Social and Cultural Rights. These instruments contain non-derogable rights that states are required to uphold for their citizens at all times.

IHRL is applicable both in armed conflicts and in times of peace. As a result, IHRL and IHL usually overlap with regards to crimes committed during armed conflict because a state is bound to respect both bodies of law.[21] In fact, the two bodies of law converge the most during internal conflicts because IHRL governs how a state treats its citizens and is therefore less applicable in cases of international conflicts.[22] Also, with regards to internal armed conflicts, it is most heavily relied on when the state refuses to recognize the applicability of CA3 to the conflict because certain human rights conventions, such as the ICCPR, contain non-derogable rights that cannot be ignored.[23]

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[20] *Supra note* 49 at 74.
[21] *Supra* note 12 at 1197.
[22] Id.
[23] *Supra* note 49 at 75.

SECTION 4. THE APPLICABILITY OF CUSTOMARY INTERNATIONAL LAW (CIL)

According to Article 38 of the statute for the International Court of Justice (ICJ), customary international law is defined as evidence of a general practice that is accepted as law.[25] To reach this level, the practice must be considered both extensive and uniform so that states essentially believe that the custom is actually required by law.[25] These practices may include treaties and other international agreements.

There are certain bodies of customary international law that do apply to internal armed conflicts such as the Sri Lanka conflict. In *Nicaragua v. U.S.*, the ICJ determined that CA3 has become so widely accepted that its provisions should be considered to be customary international law.[26] Additionally, although API is not considered customary international law as a whole, there are core provisions within it that reaffirm and supplement CA3 and are, therefore, considered to be binding as customary law.[27] These provisions include articles 4-6, 9 and 13, which cover the protection of civilians, medical and religious personnel, and the fundamental rights guaranteed to all those involved in the conflict.[28] Finally, the ICRC has drafted a list of rules that it considers be a part customary international law in both internal and international conflicts based on its recognition of state practice.[29] Because these provisions are customary law, they are considered binding on all parties of an internal conflict.

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[25] Id. at 49.
[25] FRG v. Denmark, ICJ Reports, ¶77, (1969).
[26] Nicaragua v. U.S., ICJ Reports, ¶178 (1986). See also Akayesu ¶¶603-5 (holding that the norms of CA3 have acquired the status of customary international law because most states have criminalized its prohibited acts within their own penal codes).
[27] Tadic at ¶117.
[28] *Supra* note 49 at 54.
[29] International Committee of the Red Cross, Customary International Law, available at: http://www.icrc.org/customary-ihl-eng/docs/home

SECTION 5. LIABILITY OF NON-STATE ACTORS – I.E. THE LTTE

The LTTE, as non-state actors engaging in armed conflict, still have liability under IHL, and thus are liable for any transgressions of the laws contained therein. Two theories support this conclusion. The majority view holds that non-State actors, like the LTTE here, 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)."[30] 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 (here, Sri Lanka) are subsequently binding on anyone in its jurisdictional territory. The advantage of this theory is that it may subject all armed groups active on a State territory to IHL, whether or not these groups have consented to be bound by IHL. Applied here, this theory would hold that the LTTE-by virtue of their physical presence in the sovereign land of Sri Lanka, are subsequently subject to jurisdiction for any obligations or treaties it is a party to, including IHL and the Geneva Conventions.

An alternative rationale has it that, because some 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.[31] Such a theory, however, requires that a non-state group exercise *de facto* control of an area, and so this does not apply universally.[32] Irrespective of its limited scope, however, it is worth looking at this explanation in respect of those groups that do exercise

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[30] Cedric Ryngaert, *Non-State Actors and International Humanitarian Law*, working paper, Katholieke Universiteit Leuven Faculty of Law (2008) available at: http://www.law.kuleuven.be/iir/nl/onderzoek/wp/WP146e.pdf

[31] Cedric Ryngaert, *Non-State Actors and International Humanitarian Law*, working paper, Katholieke Universiteit Leuven Faculty of Law (2008) available at: http://www.law.kuleuven.be/iir/nl/onderzoek/wp/WP146e.pdf

[32] *Id.*

territorial control. Additionally, 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.

Finally, it should be noted that IHL, to the extent that it's embodied in customary international law, would also be binding on non-state actors like the LTTE.

SECTION 6. THE RIGHT OF A STATE IN INTERNATIONAL LAW TO ENSURE NATIONAL SECURITY AND DEFEND ITSELF FROM INSURGENTS AND TERRORISTS

Article 51 of the U.N. Charter recognizes a State's right to use force to defend itself, and under this provision Sri Lanka is justified in using necessary and proportional force to defend itself from insurgents and terrorists. This interpretation gives Sri Lanka a military right to defend itself under the clear mandates of the Charter. This conflict was an internal armed conflict and, therefore, IHL applies.

SECTION 7. A HISTORY OF IHL IN NON-INTERNATIONAL CONFLICTS AND THE LAW OF COLLATERAL DAMAGE

A) Principles of International Humanitarian Law ("IHL")

The rules of international humanitarian law govern armed conflict.[32] Although the concept of 'armed conflict' is not defined in the Geneva Conventions or its subsequent Protocols, it has elsewhere been described a conflict "arising between states and leading to the intervention of members of the armed forces" and that it exists "whenever there is a resort to armed force between states or protracted armed violence between governmental authorities and organized armed groups within a state".[33] Armed conflicts have traditionally been classified as either international or non-international, with each governed by separate rules.[35] As there is no debate that the present conflict in Sri Lanka is non-international in nature, this Opinion will only address IHL as it relates to non-international armed conflict.

B) Non-International Armed Conflict

i. Sources of Law

Whereas the regulation of international armed conflict is "comprehensive and elaborate," comprising the majority of the provisions in the 1949 Geneva Conventions, the law governing non-international conflict is sparse. Specifically, only one provision of the 1949 Geneva Convention, Common Article 3, and the later-added Additional Protocol II govern non-international armed conflict. Additionally, it has been argued that customary international law also governs non-international armed conflict, although the extent to which this is true has been debated.[36]

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[32] Michael N. Shaw, INTERNATIONAL LAW, 1190 (6th ed. 2008)
[33] *Id.*
[35] Monika Hlavkova, *Reconstructing the Civilian/Combatant Divide: A Fresh Look at Targeting in Non-international Armed Conflict*, 1 CONFLICT & SEC L. 1, 2 (2013)
[36] *Supra* note 14 at 1

ii. Common Article 3

Article 3, common to all four Geneva Conventions, is the only article in the Conventions that applies to non-international armed conflict. It provides minimum guarantees for protecting those not taking an active part in hostilities.[37] Sri Lanka both signed and ratified all four Geneva Conventions, and thus is bound by the provisions of common article 3. Additionally, common article 3 has gained customary international law status, and so is binding on all state parties now, not just signatories.[38]

iii. Additional Protocol II

Common article 3 was developed and expanded upon by Protocol II (1977), which applies to all non-international armed conflicts that take place in the territory of a state party between its armed forces and dissident armed forces.[39] The stated aim of Protocol II was to extend the essential rules of the law of armed conflicts to internal wars. Thus, Additional Protocol II provides additional protections to those engaged in internal armed conflict. In particular, Protocol II lists a series of fundamental guarantees and other provisions calling for the protection of non-combatants. In particular, Additional Protocol II requires that, so long as they do not take part in hostilities, the civilian population and individual civilians "shall enjoy general protection against the dangers arising from military operations" and "shall not be the object of

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[37] Common article 3 lists the following as the minimum safeguards.

1. Persons taking no active part in hostilities to be treated humanely without any adverse distinction based on race, color, religion or faith, sex, birth or wealth.

To this end the following are prohibited:

a) violence to life and person. In particular murder, cruel treatment and torture;

b) hostage-taking;

c) outrages upon human dignity, in particular humiliating and degrading treatment;

d) the passing of sentences and the carrying out of executions in the absence of due process.

2. The wounded and the sick are to be cared for.

[38] Rikke Ishoy, HANDBOOK ON THE PRACTICAL USE OF INTERNATIONAL HUMANITARIAN LAW, 44 (Danish Red Cross 2008)

[39] *Supra* note 12 at 1195

attack."[40] Protocol II does not apply to situations of internal disturbances and tensions, such as riots and isolated and sporadic acts of violence. Sri Lanka neither signed nor ratified Additional Protocol II. However, the Protocol which acceded to or not by individual nations have assumed the weight of customary international law because they have broadly accepted by a majority of nations as good law. See Appeal Chamber judgment in Tadic in the Defence Motion for Interlocutory Appeal on Jurisdiction rendered on October 2, 1995 in the Prosecutor v Dusco Tadic.

iv. Customary International Law

Customary international law is generally binding on all states regardless of agreement or objection because custom emanates from universal norms of behavior among states. Applicable customary law here includes Articles 4-6, 9, 13 of AP II and all of common article 3.

C) Sources of IHL Governing Collateral Damage

i. Defining Collateral Damage

Providing civilian protection while simultaneously allowing for military objectives to be fulfilled is a central goal of IHL. Accordingly, IHL seeks to protect civilians from the causalities of war to the greatest degree possible, while still allowing belligerents to engage in armed conflict. 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."[41] International humanitarian law and the Rome Statute permit belligerents to carry out proportionate attacks against military objectives, even when it is known

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[40] International Committee of the Red Cross (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, available at: http://www.refworld.org/docid/3ae6b37f40.html [accessed 15 February 2014]

[41] *See, e.g.*, Prosecutor of the International Criminal Court Luis Moreno-Ocampo, "Letters to Senders regarding Iraq" (February 9, 2006), available here: http://www.icc-cpi.int/NR/rdonlyres/04D143C8-19FB-466C-AB77-4CDB2FDEBEF7/143682/OTP_letter_to_senders_re_Iraq_9_February_2006.pdf (last viewed 16 February 2014)

that some civilian deaths or injuries will occur.[42] In particular the three principles already referred to namely—(1) distinction, (2) military necessity, and (3) proportionality—guide the legality of actions under the laws of armed conflict and IHL.

During the reporting period, senior Sri Lankan officials made repeated public statements denying that the GSL was shelling the NFZ or targeting hospitals and was not responsible for any civilian casualties. However, sources alleged that the majority of shelling in the NFZ was from GSL forces. The GSL announced that it would observe a 48-hour ceasefire on two occasions. The stated aim of these was to allow civilians to move into areas in which they would not be subject to shelling. Incident reports suggest, however, that the GSL may have begun shelling before the end of the second 48-hour ceasefire. Reports also indicated that the LTTE forcibly prevented the escape of IDPs and used them as "human shields."

Distinction requires that combatants distinguish between civilian and military personnel and targets in planning and executing military action.[43] The principle of military necessity stipulates that the use of force must be used only to "compel the complete submission of the enemy ... [T]he destruction of property to be lawful must be imperatively demanded by the necessities of war... There must be some reasonable connection between the destruction of property and the overcoming of the enemy forces."[44] Thus, the doctrine of military necessity requires that legitimate targets are, "limited to those that make an effective contribution to

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[42] *Id.*

[43] Michael N. Schmitt, *The Principle of Discrimination in 21st Century Warfare*, 2 YALE HUM. RTS. & DEV. L.J. 143, 148-49 (1999)

[44] Jefferson D. Reynolds, *Collateral Damage on the 21st Century Battlefield: Enemy exploitation of the Law of Armed Conflict, and the Struggle for a Moral High Ground*, 56 A.F.L. REV 1, 15 (2005), quoting the Nuremberg Tribunal.

military action *and* whose destruction or neutralization offers a definite military advantage in circumstances ruling at the time."[45]

The final principle of lawful engagement, proportionality, offers the strongest protection to civilians. Proportionality holds that the anticipated military advantage of any use of force must be balanced against the probable or expected civilian losses.[46] In order to meet the requirements of proportionality, such losses cannot be "excessive" when compared to the military advantage gained by the use of force.[47] The civilian casualties from otherwise permissible attacks on valid necessary military targets are called collateral damage.

In evaluating the legality of civilian casualties in order to determine if they are permissible collateral damage, a violation of IHL only occurs if there is an intentional attack directed against civilians (violation of principle of distinction), or if an attack is launched on a military objective with the knowledge that the incidental civilian injuries would be clearly excessive in relation to the anticipated military advantage (violation principle of proportionality).[48] Thus, there may very well exist a valid military target that is unlawful to attack because the civilian loss expected greatly exceeds any military advantage conferred.

ii. Proportionality Explained

As stated above, the death of civilians in non-international armed conflict is only lawful when the attack that precipitated it was in furtherance of a necessary military target (encompassing "military necessity" and "distinction") *and* when the attack was in accordance with the principle of proportionality.[49] In cases, such as this, where civilians were killed by

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[45] Bruce Cronin, *Reckless Endangerment Warfare: Civilian casualties and the collateral damage exception in international humanitarian law*, J. Peace Res. 50(2) 175, 176 (2013).
[46] *Supra* note 13 at 176
[47] *Id. at 176*
[48] *Supra* note 12
[49] *See, e.g.*, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, VOLUME I: RULES 46-50 (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005)

intentional military action engaging a valid military target, the critical issue in determining whether the act was lawful was whether it comported with the principles of proportionality. Proportionality's fundamental premise is that the "means and methods of attacking the enemy are not unlimited."[50] 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 death of innocents. It is not easy to assess what 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.[51]

It should also be noted that the principle of proportionality is often misapplied. For instance, in some cases the mere quantum of collateral damage and incidental injury causes critics to condemn a strike as disproportionate.[52] However, 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" (an absolute concept).[53]Gide Proportionality in - 164

Damage to civilians or their property can be extensive <u>without</u> being excessive. Assuming the military advantage anticipated itself is <u>high</u> extensive damage will not be excessive. Thus, where the military object is of paramount importance the right of civilians to be free from the effects of hostility diminishes.

When assessing the legality of "collateral damage" under IHL, disproportionate attacks are prohibited in two ways. First, military commanders must evaluate the potential civilian

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[50] Laurie Blank & Amos Guiora, *Teaching an Old Dog New Tricks: Operationalizing the Law of Armed Conflict in New Warfare*, 1 HARV. NAT'L SEC. J. 45, 56 (2010)

[51] Rikke Ishoy, HANDBOOK ON THE PRACTICAL USE OF INTERNATIONAL HUMANITARIAN LAW, 44, 108 (Danish Red Cross 2008)

[52] Michael Schmitt, *Precision attack and international humanitarian law*, INTERNATIONAL REVIEW OF THE RED CROSS 87 (859), 445, 457 (2005)

[53] Michael Schmitt, *Precision attack and international humanitarian law*, INTERNATIONAL REVIEW OF THE RED CROSS 87 (859), 445, 457 (2005)

losses anticipated, and not pursue the attack if they are excessive in relation to the military advantage gained.[54] 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 proportional.[55] For example, in *Prosecutor v. Stanislav Galic*, the defendant was charged with illegal deliberate and indiscriminate attacks on civilians. Explaining the 'reasonable commander' standard, the court in *Stanislav Galic* 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."[56]

Second, 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. For example, in *Isayeva v. Russia*, the European Court of Human Rights held that a Russian aerial attack on a village violated the principles of proportionality because the attack continued even when civilians tried to escape the village. Even though the Russians were attacking a valid military target—insurgents in the village—they were found to violate the mandates of proportionality because they failed to show that the attack was carried out with the "requisite care for the lives of the civilian population" that is required by the laws of armed conflict."[57] Thus, commanders must exercise great caution in avoiding targeting even necessary military targets.

iii. Human Shields

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[54] *Supra* note 18 at 56
[55] *Supra* note 18 at 57
[56] *Prosecutor v. Stanislav Galic*, Case No. IT-98-29-T, Judgment, ¶ 58
[57] *Isayeva v. Russia*, 41 Eur. Ct. H.R. 847 ¶ 17 (2005)

No specific textual prohibition of human shielding exists in the law of non-international armed conflict.[58] Additional Protocol II, however, does contain a more general proscription against endangering civilians, holding that "the civilian population and individual civilians shall enjoy general protection against the dangers arising from military operations."[59] Thus, because human shields clearly place civilians in unnecessary danger from military operations, their use would violate AP II would thus is prohibited in non-international armed conflict too.

D. Historical Shift in Prevailing Views on Acceptable Collateral Damage: WWII to Present

The international view on what constitutes acceptable civilian casualties in armed conflicts has changed significantly since the end of the Second World War. In particular, the twentieth century following the end of World War II has, with each conflict, seen a decreasing tolerance for what is viewed as acceptable collateral damage. What follows is a treatment of the change in views throughout history relating to collateral damage.

i. WWII

WWII saw a bombing strategy by all actors—first the Germans, then followed by the British and Americans---that for the first time was focused heavily on civilian population centers, and defeating civilian morale.[60] The Germans executed large-scale bombing runs on London early in the war, and the British and Americans followed suit in Germany and along the Axis lines.[61] The American's finished the war with what stands today as arguably the greatest accepted act of "lawful" collateral damage—the use of the atomic bomb on Hiroshima and

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[58] Although a rule prohibiting human shields was proposed for inclusion in Additional Protocol II, it did not survive the diplomatic conference. *Article Adopted by Committee III, XV Official Records of the Diplomatic Conference on the Reaffirmation and Develop of International Humanitarian Law Applicable in Armed Conflict* 321 (1973-77)

[59] Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of Non-international Armed Conflicts, 1977, Art. 13(1), 1125 *UN.T.S.* 609 [hereinafter: Additional Protocol II).

[60] Jefferson D. Reynolds, *Collateral Damage on the 21st Century Battlefield: Enemy exploitation of the Law of Armed Conflict, and the Struggle for a Moral High Ground*, 56 A.F.L. REV 1, 15 (2005)

[61] *Id.*

Nagasaki.[62] Although at the time the act was considered lawful because the targets were a military necessity[63] required to end the war, this expansive view would not be shared in later conflicts.

ii. War in the Balkans: Operation Allied Force

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 Serbian forces employed a wide variety of concealment warfare tactics to deceive NATO forces, including dispersing troops and equipment throughout and within civilian population centers and hidden in civilian homes, barns, schools, factories, and monasteries. Serbian forces even dispersed among civilian traffic during their movements and used human shields to protect military equipment.[64]

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 causalities. In spite of these incidents, an investigation conducted by a committee of the International Criminal Tribunal for the Former

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[62] *Id.*

[63] 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 *in US. v. List*, Feb. 19, 1948, *in* 11 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW No. 10, 1946-1949, at 1253-54.

[64] Jefferson D. Reynolds, *Collateral Damage on the 21st Century Battlefield: Enemy exploitation of the Law of Armed Conflict, and the Struggle for a Moral High Ground*, 56 A.F.L. REV 1, 36-40 (2005)

Yugoslavia (ICTY) concluded that none of the foregoing collateral damage incidents presented sufficient evidence to warrant additional review or prosecution for violations of LOAC.[65]

The circumstances of the collateral damage in the form of civilian casualties referred to in the Kosovo Operation and in relation to which the investigation by a committee of the ICTY is highly relevant to the circumstances that appertained to the situation in the final phase of the conflict in Sri Lanka.

These matters are further examined Section VIII under Operation Allied Force.

[65] INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA: FINAL REPORT TO THE PROSECUTOR BY THE COMMITTEE ESTABLISHED TO REVIEW THE NATO BOMBING CAMPAIGN AGAINST THE FEDERAL REPUBLIC OF YUGOSLAVIA [Hereinafter ICTY FINAL REPORT], vol. 39(5) (Sep., 2000); 39 I.L.M. 1257, 1282-83 (2000). *available at* http://www.un.org/icty/pressreal/nato061300.htm.

SECTION 8. STATE PRACTICE ON COLLATERAL DAMAGE

I. THE NORTH ATLANTIC TREATY ORGANIZATION (NATO)

NATO has been an integral part to many military operations (especially those that are stability/peacekeeping in nature) around the world. This section will address NATO's policies regarding collateral damage during armed conflict and present some examples from Operation Unified Protector and Operation Allied Force for consideration.

A. NATO Collateral Damage Policy

As an organisation made up entirely of states that are party to the Geneva Conventions, NATO considers the laws of war to be extremely important to the planning of military operations. For example, in Secretary General Anders Fogh Rasmussen's annual report for 2011, he stated that in the preparations for Operation Unified Protector in Lebanon, it was understood that there was an "absolute requirement to minimize collateral damage and civilian casualties."[66]

Additionally, NATO's Military Committee has drafted a number of military doctrines that outline its policies regarding the use of military force during certain circumstances. For example, in its Peace Support Operations doctrine, there is an entire doctrine devoted to exercising restraint in the use of force.[67] It stresses that, at all times, LOAC should be complied with and that force should be "precise, appropriate, proportionate, and designed to resolve and defuse a crisis."[68] All options other than force should be considered first, and when necessary,

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[66] NATO, Secretary General's Annual Report 2011 [hereinafter Annual Report], 26 Jan. 2012, available at: http://www.nato.int/cps/en/natolive/opinions_82644.htm?selectedLocale=en.
[67] NATO, Peace Support Operations [hereinafter PSO], July 2001, available at: http://www.nato.int/cps/en/natolive/opinions_82646.htm?selectedLocale=en.
[68] Id. at ¶320.

only the minimum force necessary should be used.[69] However, this does not exclude the use of force that might be sufficient to overwhelm the entire enemy force, so long as it is proportional.

Additionally, its Counter-insurgency (COIN) doctrine advises military commanders to consider the extent to which collateral damage might occur as a result of the proposed operation.[70] In many locations throughout the document, it recognizes that collateral damage, especially the loss of civilian lives, can be used against NATO as propaganda and undermine its efforts as a result.[71] In fact, the doctrine states that counter-insurgency operations will inevitably be counterproductive if the level of collateral damage is significant.[72] Accordingly, the manual recommends that the smallest and most precise amount of force should be applied in order to yield the greatest effectiveness out of an operation.[73] For these reasons, the document also advises commanders to be extremely cautious in the planning of operations to be conducted in urban environment because they possess the greatest risk of causing collateral damage.[74]

Overall, both doctrinal documents consistently recommend the use of the least amount of and the most precise use of force in conducting military operations. In most cases, the doctrine recommends using precision air strikes and small arms. At the same time, military forces are permitted to use as much force as absolutely necessary to completely overwhelm the enemy. The bottom line is that NATO commanders shall use as much force as necessary until the predicted level of collateral damage makes it counterproductive, which is identical to proportionality.

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[69] NATO, Allied Joint Doctrine for Counterinsurgency (COIN) [hereinafter COIN], February 2011, available at: http://info.publicintelligence.net/NATO-Counterinsurgency.pdf.
[70] Id. at ¶ 510.
[71] Id.
[72] Id. at ¶ 541.
[73] Is. At ¶ 224.

B. Examples of Collateral Damage in NATO Military Operations

Two of the most prominent examples of collateral damage issues in NATO military operations include Operation Allied Force in Kosovo and Operation Unified Protector in Libya. This section will examine the type of collateral damage that occurred and response made by NATO and the international community.

1. Operation Allied Force

Operation Allied Force was a NATO response to the horrific human rights abuses that were occurring throughout Kosovo and the Former Yugoslavia in the late 1990's under President Milosevic.[75] The objectives of the operation included: a stop to all military action and violence; agreement to establish station an international military presence in Kosovo, and ensure the withdrawal of President Milosevic's military and police forces from Kosovo.[76]

In order to best minimize collateral damage, NATO forces relied heavily on strategic air power to strike key military targets in the region.[77] While many of the legitimate military targets were successfully hit during the operation, it was reported that a significant number of civilians were killed as well as a great degree of damage to civilian infrastructure as a result of the air strikes. Some of these incidents included:

1) The destruction of a civilian passenger train at the Grdelica Gorge on 12 Apr 1999 in which 10 civilians were killed;

2) The attack on the Djakovica Convoy on 14 Apr 1999 in which 70 to 75 civilians were killed;

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[75] Walter Sharp, Operation Allied Force: Reviewing the Lawfulness of NATO's Use of Military Force to Defend Kosovo, 23 Md.J.Int'l L. 295, 301-02 (1999).

[76] Press Release, The Situation in and Around Kosovo, NATO, 12 Apr 1999, available at: http://www.nato.int/docu/pr/1999/p99-051e.htm.

[77] Id. at 305.

3) The attack on the Chinese Embassy in Belgrade on 7 May 1999, which damaged the building and killed 3 civilians; and

4) An attack on Istok Prison on 21 May 1999, which killed 19 civilians.[78]

These incidents of collateral damage, among others, caused allegations to be launched against NATO that their forces committed war crimes and that their use of force was not legitimate in the first place.[79] The allegations even prompted the ICTY to inquire into whether the incidents justified a formal investigation by the prosecutor.[80]

In many of the instances, NATO responded by admitting responsibility for the attack, 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 did.[81] In some cases, NATO representatives alleged that Milosevic's forces used human shields.[82] Additionally, on the question of legitimacy, NATO asserted that they were acting pursuant to collective self-defence and acting to stabilize the region.[83] Civilians were never the intended targets and had they known civilians were present or that the degree of collateral damage was so high, they would never have followed through with some of those missions.

Notably, the ICTY ended up agreeing with the NATO assertions and found that no formal investigation by the prosecutor's office was necessary.[84] The court found that before each attack, the military and its legal advisers carefully analyzed the proposed targets, that the

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[78] International Criminal Tribunal for the Former Yugoslavia (ICTY), Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia [hereinafter ICTY Report], available at: http://www.icty.org/sid/10052.
[79] Id.
[80] Id.
[81] Press Release, Once Again NATO Admits Accidental Bombing of Civilians, Chicago Tribune, 16 May 1999, available at: http://articles.chicagotribune.com/1999-05-16/news/9905160355_1_korisa-serbian-soldiers-and-police-nato-official.
[82] Id.
[83] *Supra*, note 10 at 310.
[84] ICTY Report at ¶ 90.

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.

ii. Operation Unified Protector

In 2011, amidst the backdrop of the Arab Spring, the people of Libya rebelled against the government of Moammar Gadhafi.[85] In response to the serious risk that Gadhafi was going to commit atrocities against his people, the U.N. Security Council issued Resolution 1973, which authorized military intervention in Libya.[86] Pursuant to the resolution, NATO implemented Operation Unified Protector, which called for the use of military force to protect the civilians caught up in the middle of the Libyan conflict.[87] Again, due to the potential risk to life to the NATO members and civilians, military involvement was limited to air and naval precision strikes as well as the enforcement of a no fly zone.[88]

This operation ended up being much less controversial in the long-run due to the level of caution that the NATO commanders put into their planning of each mission and the sound legal basis it had for intervening pursuant to Resolution 1973. Additionally, NATO representatives boast that essentially no civilian casualties were reported due to their immense focus on minimizing collateral damage.[89] Secretary General Rasmussen stated that as a means of ensuring the low degree of collateral damage, military forces never targeted civilian infrastructure, such as water supplies or oil production facilities, or the general area surrounding those locations.[90]

Additionally, in October 2011, NATO Military Committee Chairman Admiral Giampaolo Di Paola remarked that, from the very beginning, all members understood that "no

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[85] Annual Report.
[86] Press Release, Security Council Authorizes 'All Necessary Measures' to Protect Civilians in Libya, 2011, available at: http://www.un.org/apps/news/story.asp?NewsID=37808&Cr=libya&Cr1=#.UwRwC2RDuC4.
[87] Annual Report.
[88] Id.
[89] Id.
[90] Id.

civilian casualties and no collateral damage was an absolute must."[91] U.N. Secretary General Ban-Ki Moon even stated that the low degree of collateral damage during the operation was "unprecedented."[92] He also attributes this success to the use of "persistent surveillance and reconnaissance" of each target location in order to know exactly what is going on and know for certain whether a precision strike can be made without creating any collateral damage.[93]

Some watch groups, such as the Human Rights Watch, claim that civilians were indeed harmed as a result of NATO's air campaign during Operation Unified Protector.[94] Even if these reports were true, NATO representatives would still argue that each target was carefully analyzed, that it was believed the targets were free of civilians, the targets were all necessary in weakening Gadhafi's military campaign, and that they complied with their obligations under international law to take all means necessary to minimize civilian casualties.

II. ISRAEL

A. Israel Policy on Collateral Damage

Israel has not ratified Additional Protocol I to the Geneva Conventions, and thus is not bound by the Protocol's broad protections of civilian populations during armed conflict. Nevertheless, Israel Defense Force (IDF) written statements of policy indicate that they adhere to the principle of Distinction that is central to IHL. For example, an Israeli Defense Force policy doctrine mandates that, "IDF soldiers will not use their weapons and force to harm human beings who are not combatants or prisoners of war, and will do all in their power to avoid causing harm

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[91] Transcript, Speech by Admiral Giampaolo Di Paola, Chairman of the NATO Military Committee [hereinafter Adm. Di Paola Speech], NATO, 8 Oct. 2011, available at: http://www.nato.int/cps/en/SID-D2C12DED-57896C03/natolive/opinions_79333.htm?selectedLocale=en.

[92] Id.

[93] Id.

[94] Human Rights Watch, Unacknowledged Deaths: Civilian Casualties in NATO's Air Campaign in Libya, 2012, available at: http://www.hrw.org/sites/default/files/reports/libya0512webwcover.pdf.

to their lives, bodies, dignity, and property."[95] Although the Israeli government has acknowledged the laws of war, it nevertheless justifies some military operations against civilian targets—including the practice of destroying the homes of Palestinians suspected of assisting terrorists—on the basis of military necessity.[96]

The Israeli government and IDF additionally publicize a robust policy meant to affirmatively minimize collateral damage during armed conflict with Hamas and other Palestinian groups operating in the Gaza strip. In particular, the IDF claims that the following are some methods they used to minimize civilian causalities in recent conflicts[97]:

1) **Phone calls:** During the last 24 hours of the operation, thousands of Israeli phone calls were made to residents of the Gaza Strip, warning them of IDF strikes in the area.

2) **Leaflets:** The Israel Air Force has dropped leaflets over Gaza that warns civilians to "avoid being present in the vicinity of Hamas operatives."

3) Diverting missiles in mid-flight: During Operation Cast Lead in 2008-09, the IDF aborted many missions seconds before they were to be carried out, due to civilians being present at the site of the target. The following video is an example of an IAF airstrike that was called off *as the missile was on its way to the target.*

4) **Roof Knocking:** "Roof knocking" is when the IAF targets a building with a loud but non-lethal bomb that warns civilians that they are in the vicinity of a weapons cache or other target. This method is used to allow all residents to leave the area before the IDF

[95] Israel Defense Force, Doctrine, Available at: http://www.idf.il/1497-en/Dover.aspx (last visited 19 February 2014)
[96] Israeli Ministry of Foreign Affairs, *Demolition of Palestinian Structures Used for Terrorism – Legal Background*, available at: http://mfa.gov.il/MFA/ForeignPolicy/Terrorism/Palestinian/Pages/Demolition%20of%20Palestinian%20Structures%20Used%20for%20Terrorism%20-%20Legal%20Background%20-%20May%202004.aspx (last viewed 19 February 2014)
[97] How Does the IDF Minimize Harm to Palestinian Civilians? Israeli Defense Forces (September 16, 2012) available at: http://www.idfblog.com/2012/11/15/how-does-the-idf-minimize-harm-to-palestinian-civilians/ (last viewed 19 February 2014)

targets the site with live ammunition.

51 **Pinpoint Targeting:** The IDF, whenever possible, singles out terrorists and targets them in a way that will endanger few or no bystanders. This can often be hard to do, since terrorists prefer to hide in crowded areas.

B. Examples of Collateral Damage in Israeli Military Operations

Over the years, the Israeli Defense Force (IDF) has been engaged in conflicts with Hamas in the Gaza Strip and Hezbollah militants in Lebanon. Both cases have provided issues regarding collateral damage for consideration.

i. Hamas Conflict

For years, Israeli citizens have suffered as a result of constant Hamas missile strikes into Israel.[98] For example, in 2012 alone, 1,650 rockets were fired into Israel from the Gaza Strip.[99] As a result of these missile attacks and other Hamas terrorist attacks, the IDF has conducted a number of operations in response. One such operation was "Operation Cast Lead" which took place from December 2008 to January 2009.[100] In that operation, the IDF sought to destroy the infrastructure that Hamas was using to launch attacks against Israeli citizens.[101]

During Cast Lead, hundreds of civilian homes, infrastructure, and lives were destroyed as a result of Israeli rocket fire.[102] This led to allegations that Israel had committed war crimes.[103] This caused so much controversy that calls for the ICC to get involved were made, but, due to jurisdiction concerns over Palestine not being a state, the matter was never considered. However,

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[98] Operation Pillar of Defense [Hereinafter Pillar Defense], Israel Military Advocate General's Corps, 14 Nov 2012, available at: http://www.law.idf.il/sip_storage/FILES/0/1350.pdf.
[99] Id. at 2.
[100] The Operation in Gaza: Factual and Legal Aspects, p. 5, July 2009, available at: http://www.law.idf.il/SIP_STORAGE/FILES/8/638.pdf.
[101] *Id.*
[102] Id. at 6.
[103] *Guardian investigation uncovers evidence of alleged Israeli war crimes in Gaza*, The Guardian (24 March 2009), available at: http://www.theguardian.com/world/2009/mar/23/israel-gaza-war-crimes-guardian (last viewed 19 February 2014)

Israel contended that just because civilians were killed does not necessarily make their conduct illegal because they were strictly acting in self-defence and each of their targets were thus legal.[104]

Israel further asserts that it was their policy during this mission to warn civilians of rocket fire before in struck in order to help minimize the number of civilian casualties.[105] For example, for some strikes, the IDF utilized missiles that could be aborted in flight if unexpected civilians appeared in the vicinity of the target.[106] Additionally, they dropped leaflets over areas that would be subject to heavy rocket-fire so that civilians could leave the area.[107] Also, IDF members would sometimes use "Roof Knocking Bombs," which are non-lethal projectiles that are used by IDF to warn civilians that they are in the range of the reach of their weapons in order to give them time to leave the area.[108]

Based on this, and the fact that targets were selected because they were believed to be where Hamas was launching its attacks from, Israel asserts that their targeting practices were legal and that any civilian death or property damage is just collateral damage.[109]

ii. Operations Against Hezbollah

Israel has also suffered the effects of attacks from Hezbollah militants that operated inside of Lebanon. One of the major operations that took place as part of this ongoing conflict occurred from 12 July 2006 to 14 August 2006.[110] In response to Hezbollah rocket fire into Israel, the IDF launched thousands of rockets and artillery shells into residential areas where it

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[104] *Id.* at 8.
[105] Pillar Defense at 8.
[106] *Id.*
[107] Press Release, How Does the IDF Minimize Harm to Palestinian Civilians?, 15 Nov 2012, available at http://www.idfblog.com/2012/11/15/how-does-the-idf-minimize-harm-to-palestinian-civilians/.
[108] *Id.*
[109] Pillar Defense 8-10.
[110] Amnesty International, Israel/Lebanon: Deliberate Destruction or "Collateral Damage?" Israeli Attacks on Civilian Infrastructure, 2006.

believed Hezbollah operatives to be located.[111] As a result, significant damage was done to civilian homes and infrastructure and hundreds of civilian lives were lost. This operation also created controversy for Israel because it appeared that these counter-attacks were being launched indiscriminately.[112] However, just as they did in the aftermath of Operation Cast Lead, the government asserted that their targets were legitimate because Hezbollah was hiding in residential areas to fire rockets into Israel and the IDF was trying to be as precise as possible but needed to target those areas to protect their own citizens.[113] This operation still generates much controversy today.

III. UNITED STATES

A. U.S. Policy on Collateral Damage

The United States Department of Defense (DoD) 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 as it is not excessive in light of the overall military advantage anticipated from the attack.[114]

As a matter of policy, the DoD 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.[115] In relevant part, the Department of Defense 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

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[111] *Id.*
[112] *Id.*
[113] *Id.*
[114] Joint Publication (JP) 1-02, U.S. DEP'T OF DEF. DICTIONARY OF MILITARY AND ASSOCIATED TERMS 93 (2001)

[115] U.S. Dep't of Def., Directive 2311.01E, *DoD Law of War Program*, Pentagon, Washington, D.C., 9 May 2006, p.2, available at: http://www.au.af.mil/au/awc/awcgate/dod/2311001p.pdf (last viewed 18 February 2014)

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."[116]

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.[117] The Airman's Manual codifies the policy of Distinction simply, saying "Do not . . . Attack noncombatants who include civilians."[118] Current doctrine from the US Army's accredited Judge Advocate General's (JAGC) Legal Center and School[119] emphasizes the fundamental elements of the laws of war essential to avoiding unlawful civilian causalities, 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.[120]

Additionally, the U.S. Army includes the Principle of Distinction in its training materials too. The first chapter of the Soldier's Manual of Common Tasks is about the laws of war.[121] The Manual explains that the Hague conventions and customary international law limit targeting

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[116] *Id.*
[117] U.S. AIR FORCE, AIRMAN'S MANUAL (2004)
[118] *Id.*
[119] This institution provides legal training to judge advocates and develops legal doctrine. See www.jagcnet.army.mil (last visited 19 February 2014).
[120] 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, available at: http://www.loc.gov/rr/frd/Military_Law/operational-law-handbooks.html (last visited 19 February 2014)
[121] HEADQUARTERS DEPARTMENT OF THE ARMY, SOLDIER'S MANUAL OF COMMON TASKS: SKILL LEVEL 1 (2003).

decisions, and that the latter prohibits "targeting or attacking civilians."[122] It goes on to state that civilians are protected from "all acts or threats of violence. . . ."[123] Likewise, the Army's field manual on the law of land warfare says that "[a]ttacks [a]gainst the [c]ivilian population as [s]uch [are] [p]rohibited."[124]

The United States Joint Operations Targeting Doctrine also provides guidance regarding the DoD's position on targeting as it relates to collateral damage. Per the doctrine, all targeting decisions involving attacks must comply with controlling rules of engagement *as well as* international humanitarian law, including the "fundamental principles of military necessity, unnecessary suffering, proportionality, and distinction (discrimination)".[125] The targeting doctrine cautions that, in relation to avoiding collateral damage, the primary threats to the civilian population depend on "engagement techniques, weapon used, nature of conflict, commingling of civilian and military objects, and armed resistance encountered".[126] The doctrine further suggests that military commanders should further verify with reliable intelligence that attacks are directed only against military targets and that any incidental "civilian injury or collateral damage to civilian objects must not be excessive in relation to the concrete and direct military advantage expected to be gained".[127] The doctrine even indicates that, when it is practicable, advance warning of the attack should be given to allow civilians to depart the targeted area.[128] Finally, the doctrine provides that the attack must be cancelled or suspended

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[122] *Id.* at 3-17
[123] *Id.* at 3-24
[124] US Department of the Army Field Manual 27-10, The Law of Land Warfare, Pentagon, Washington, D.C., 15 July 1976, Rules 41-44.
[125] US Department of Defense, Joint Publication 3-60, Joint Targeting, Pentagon Washington, D.C., 12 April 2007, pp. E1-2, available at: www.dtic.mil/doctrine/new_pubs/jointpub_operations.htm (last visited 19 February 2014)
[126] *Id.* E-4
[127] *Id.*
[128] *Id.*

when "it becomes apparent that a target is no longer a lawful military objective".[129] The DoD has even expanded its emphasis on mitigating civilian categories in recent years, publishing further guidance on how to avoid unnecessary civilian death during armed conflict.[130]

B. Examples of Collateral Damage in Recent U.S. Campaigns

i. Drone Strikes

In the decades since 9/11, the United States has engaged in a robust campaign of targeted killings of purported enemies of the War on Terror, mostly effectuated through unmanned drone strikes. These attacks ostensibly balance the principles of military necessity, discrimination, and proportionality, and in theory are billed 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.[131] Some of the best known examples of the alleged disproportionate effect that drone strikes have on civilians involve numerous cases where funeral processions were targeted, killing numerous civilians attending those funerals.[132]

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

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[129] *Id.*

[130] *See, e.g.,* US ARMY TACTICS, TECHNIQUES, AND PROCEDURES, CIVILIAN CASUALTY MITIGATION, Pentagon, Washington, D.C., 18 July 2012, available at: www.fas.org/irp/doddir/army/attp3-37-31.pdf (last visited 19 February 2014). (The pamphlet emphasizes the need to mitigate civilian casualties in all combat actions and in all combat environments)

[131] *see, e.g., Drone strikes kill, maime and traumatize too many civilians*, www.cnn.com (2012) available at: http://www.cnn.com/2012/09/25/world/asia/pakistan-us-drone-strikes/ (last viewed 19 February 2014)

[132] *See* Chris Woods, *Get the Data: Obama's terror drones*, THE BUREAU OF INVESTIGATIVE JOURNALISM (February 4, 2012); *See also* Robert Chesney, *Is DPH the Relevant Standard in Pakistan? An Important Element in the Debate Missing from BIJ's Report*, LAWFARE (February 6, 2012).

thus act in self-defence pursuant to the Authorized Use of Military Forced issued by Congress on September 18, 2001. Specifically, State Department Legal Advisor Harold Koh has argued that, because al-Qaeda has not abandoned its intent to attack the United States, the United States, "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."[133] A study by Stanford and NYU Law Schools that included over 100 interviews and two trips to Pakistan to investigate drone strikes opined that; "[i]n the United States, the dominant narrative about the use of drones in Pakistan is of a surgically precise and effective tool that makes the US safer by enabling 'targeted killing' of terrorists, with minimal downsides or collateral impacts. This narrative is false."[134] Interestingly, in light of widespread criticism, the Obama Administration, although still defending drone strikes, just last year purported to take a "zero tolerance" for civilian causality policy, claiming that moving forward, "before any strike is taken, there must be near-certainty that no civilian can be killed or injured—the highest standard we can set."[135]

ii. IRAQ: Operation Iraqi Freedom

It is undisputed that the American-led invasion of Iraq has resulted in numerous civilian deaths. Although the United States military does not officially track civilian deaths figures, outside sources estimate that since the U.S. invaded Iraq in 2003, civilian causalities total

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[133] Harold Koh, "The Obama Administration and International Law," Annual Meeting of the American Society of International Law, 25 March 2010, available at: http://www.state.gov/s/l/releases/remarks/139119.htm (last viewed 19 February 2014)

[134] Stanford Law School, International Human Rights and Conflict Resolution Clinic; New York University School of Law, Global Justice Center, *Living Under Drones: Death, Injury and Trauma to Civilians From US Drone Practices in Pakistan*, available at: http://www.livingunderdrones.org/wp-content/uploads/2013/10/Stanford-NYU-Living-Under-Drones.pdf (last viewed 19 February 2014)

[135] *Obama Defends Drone Strike but Says No Cure All*, PBS.com, available at: http://www.pbs.org/newshour/rundown/obama-defends-drone-strikes-but-says-no-cure-all/ (last viewed 19 February 2014)

between 121,000 –134,000 deaths.[136] Most of the civilian casualties attributable to Coalition conduct in the ground war appear to have been the result of ground-launched cluster munitions, which were reportedly responsible for 273 civilian casualties at al-Hilla and al-Najaf, and ground combat was responsible for 381 civilian deaths at al-Nasiriya.[137] In some instances of direct combat, especially in Baghdad and al-Nasiriyya, problems with training on as well as dissemination and clarity of the rules of engagement (ROE) for U.S. ground forces may have contributed to loss of civilian life.[138] The *Los Angeles Times* completed a survey of twenty-seven hospitals in Baghdad and the local area, reporting that at least 1,700 civilians died and more than 8,000 were injured in the capital during the initial ground operations at the beginning of the war.[139]

Numerous accounts exist detailing allegations of impermissible killings of civilians. In one case, U.S. Army soldiers opened fire on an unidentified vehicle as it was approaching a U.S. checkpoint near al-Najaf on March 31, 2003.[140] Soldiers attempted to direct the vehicle to stop, and then opened fire, killing seven of the fifteen civilian passengers on board.[141] The *London Times* also reported an account of a firefight between Coalition forces and insurgents in which sixteen Iraqi soldiers were killed along with twelve civilians.[142] There were even reports of U.S.

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[136] *See* The Iraq Body Count Database, http://www.iraqbodycount.net (last visited on February 19, 2014). This site collates reports from major news publications. It requires two independent news agencies to report a civilian death before it is counted; *see also Les Roberts et. al., Mortality Before and After the 2003 Invasion of Iraq: Cluster Sample Survey, 364 THE LANCET 1857 (2004)* (stating that of the civilian deaths recorded, only 5% were due to coalition small arms fire, the majority were the result of attacks from coalition artillery and aircraft)

[137] HUMAN RIGHTS WATCH, OFF TARGET: THE CONDUCT OF THE WAR AND CIVILIAN CASUALTIES IN IRAQ 128-32 (2003).

[138] HUMAN RIGHTS WATCH, OFF TARGET: THE CONDUCT OF THE WAR AND CIVILIAN CASUALTIES IN IRAQ 128-32 (2003).

[139] Laura King, *Baghdad's Death Toll Assessed*, L.A. TIMES, May 18, 2003, at Foreign Desk 1(1), available at: http://articles.latimes.com/2003/may/18/news/war-iraqidead18 (last viewed 19 February 2014)

[140] Press Release, Amnesty International, Iraq: U.S. Must Investigate Civilian Deaths, News Service No: 075 (Apr. 1, 2003).

[141] *Id.*

[142] Elizabeth Neuffer, *City Battles Will Boost Growing Civilian Toll*, BOSTON GLOBE, Apr. 7, 2003, at A-25.

forces targeting a hospital where two high profile Iraqi political leaders arrived, brandishing satellite phones. Although two Red Crescents marked the roof of the hospital, a coalition attack killed four and injured 70 patients.[143] Accounts of extensive civilian deaths were so widespread, even among coalition force members, that two reporters wrote a book detailing the allegations of misconduct by U.S. troops in killing civilians.[144]

iii. Afghanistan: Operation Enduring Freedom

Many of the most flagrant examples of egregious collateral damage during OEF involve aerial bombing campaigns. In the first few months of the war, the United States mistakenly bombed a Red Cross building—twice.[145] Although there were no direct casualties from this attack, the bombing left some 55,000 people without food and blankets.[146] The mistake was alleged to be due to a "human error in the targeting process."[147] More seriously, a 2008 bombing of Azizabad, Afghanistan left over 90 civilians dead, including 60 children.[148] The attack was aimed at killing just one militant leader.

The International Criminal Court (ICC)

In relation to the Coalition invasion of Iraq, the Office of The Prosecutor of The ICC received over 240 communications expressing concern regarding the military operations in that country

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[143] Ed Vulliamy, *Cover Story: Battle Cries*, OBSERVER, Jul. 6, 2003, at 22.

[144] *Chris Hedges, et al, Collateral Damage: America's War Against Iraqi Civilians*, Nation Books, New york (2009), from the publisher: "authors brings together testimony from the largest number of on the record, named, combat veterans who reveal the disturbing, daily reality of war and occupation in Iraq. Through their eyes, we learn how the mechanics of war lead to the abuse and frequent killing of innocents. They describe convoys of vehicles roaring down roads, smashing into cars, and hitting Iraqi civilians. They detail raids that leave families shot dead in the mayhem. And they describe a battlefield in which troops, untrained to distinguish between combatants and civilians, are authorized to shoot whenever they feel threatened."

[145] *U.S. Planes Bomb a Red Cross Site for Second Time*, New York Times (October 27, 2001) available at: http://www.nytimes.com/2001/10/27/international/asia/27MILI.html (last viewed 19 February 2014)

[146] *Id.*

[147] *Id.*

[148] Carlota Gall, *Evidence Points to Civilian toll in Afghan Raid*, New York Times (September 7, 2008) available at: http://www.nytimes.com/2008/09/08/world/asia/08afghan.html?pagewanted=all&_r=1& (last viewed February 19, 2014)

and the resultant human loss. On the 9th February, 2006, The Prosecutor Luis Moreno-Ocampo indicated that he had a very special role in mandate as specified in the Rome Statue and that in accordance with Article 15 of the Rome Statute he had a duty to analyse information received with regard to potential crimes in order to determine whether there is a reasonable basis to proceed with a particular investigation. As the Chief Prosecutor he had to consider whether the available information provided a reasonable basis to believe that a crime within the jurisdiction of the Court had been or was in the process of being committed. Where this requirement was satisfied he had to consider admissibility before the Court in the light of requirements relating to gravity and complementarity with national proceedings. Thirdly, if those factors were positive he had to give consideration to the interests of justice.

Sri Lanka, of course, is not a party to the International Criminal Court. However, the reasoning by the Chief Prosecutor in relation to the complaints made in relation to Iraq are worthy of consideration. The conclusion The Prosecutor arrived at was this; the events in question occurred in the territory of Iraq which, again, like Sri Lanka was not a State Party to the Rome Statute and which had not lodged a declaration of acceptance under Article 12 (3) thereby accepting the jurisdiction of the Court.

Therefore, in accordance with Article 12 of the Rome Statute, acts on the territory of a non-State Party fell within the jurisdiction of the Court only when the person accused of the crime is a national of a State that has accepted jurisdiction (Article 12(2)(b)). The Prosecutor did not have jurisdiction with respect to actions of non-State Party nationals on the territory of Iraq.

The first Prosecutor of the ICC Luis Moreno-Ocampo was to sayFOOTNOTE 1 :

"For war crimes, a specific gravity threshold is set down in Article 8(1), which states that 'the Court shall have jurisdiction in respect of war crimes in particular when committed as apart

of a plan or policy or as part of a large-scale commission of such crimes'. This threshold is not an element of the crime, and the words 'in particular' suggest that this is not a strict requirement. It does, however, provide Statute guidance that the Court is intended to focus on situations meeting these requirements.

According to the available information, it did not appear that any of the criteria of Article 8(1) were satisfied.

Even if one were to assume that Article 8(1) had been satisfied, it would then be necessary to consider the general gravity requirement under Article 53(1)(b). The Office considers various factors in assessing gravity. A key consideration is the number of victims of particularly serious crimes, such as wilful killing or rape. The number of potential victims of crimes within the jurisdiction of the Court in this situation – 4 to 12 victims of wilful killing and a limited number of victims of inhuman treatment – was of a different order than the number of victims found in other situations under investigation or analysis by the Office. It is worth bearing mind that the OTP is currently investigating three situations involving long-running conflicts in Northern Uganda, the Democratic Republic of Congo and Darfur. Each of the three situations under investigation involves thousands of wilful killings as well as intentional and large-scale sexual violence and abductions. Collectively, they have resulted in the displacement of more than 5 million people. Other situations under analysis also feature hundreds or thousands of such crimes.

Taking into account all the considerations, the situation did not appear to meet the required threshold of the Statute".

He went on to say that in accordance with Article 15(6) of the Rome Statute that his conclusion at that stage were that the statutory requirements for the seeking of authorisation to initiate an investigation into the situation in Iraq had not been satisfied.

SECTION 9. BASED ON THE FACTUAL ASSERTIONS AND KNOWN PREVAILING CONDITIONS AT THE TIME, THE ACTIONS OF THE SLA DO NOT CONSTITUTE WAR CRIMES

The war crimes allegations against Sri Lanka appear to fall into three main categories, which include (1) harm to civilians and civilian objects; (2) killing of captives or combatants seeking to surrender; and (3) preventing necessary food and medicine from being provided to civilians.[149] This section will provide a brief overview of the law that is relevant to war crimes and then analyze whether the government of Sri Lanka is liable for the above allegations based on the assertions they provided.

A. The Law Pertaining to War Crimes

According to the ICTY judgment of *Prosecutor v. Tadic*, four requirements need to be met in order for someone to be prosecuted for a war crime:

1) The violation must infringe a rule of IHL;

2) The rule must be found in customary law or applicable treaty law;

3) The violation must be serious in that the rule protects important values and the breach involves grave consequences for the victim; and

4) The violation must entail individual criminal responsibility.[150]

As discussed earlier, the applicable IHL provisions to this particular conflict is common article 3 (CA3) and customary international law[151]. Customary international law includes CA3 and the core provisions[152] of Additional Protocol II (APII).[153] *Tadic* held that any violation of these

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[149] See U.S. Dep't. of State, Report to Congress on Incidents During the Recent Conflict in Sri Lanka 3-4 (2009) [hereinafter DOS Report].

[150] Prosecutor v. Tadic, Case No. IT-94-1-T, Judgment, ¶94 (Int'l Crim. Trib. For the Former Yugoslavia Oct. 2, 1995). (This test has also been applied in subsequent tribunal cases and is considered the modern norm to subject matter jurisdiction analysis of international criminal tribunals.)

[151] For further information on the customary international law that applies, see section III to the appendix attached to this memorandum.

[152] The provisions include Articles 4-7, 9, and 13 because they tend to supplement the provisions of CA3.

provisions should satisfy the elements outlined above. Additionally, the three categories of allegations against Sri Lanka are all considered violations of these provisions.

Whether harm to civilians or civilian objects, a violation of CA3 and customary law, was unlawful is typically analysed against the principles of distinction, necessity, proportionality and humanity (unnecessary suffering), as discussed previously. So long as a military commander or government complies with these principles, the harm will be considered lawful collateral damage.[154]

With regards to the allegation of killing captives, CA3(1) and APII(4) strictly forbid inhumanely treating combatants who have laid down their arms, such as by the use of torture or execution.[155] These crimes are illegal per se, so no analysis is needed to determine whether it was excused or not. All that is required is a determination as to whether it happened or not.

Finally, the allegation that Sri Lanka prevented civilians from receiving necessary medicine and food would, if true, violate the relevant IHL. It is well settled under CA3 and customary IHL that the wounded and sick shall be collected and cared for, and no party to the conflict shall impede that effort.[156] Again, this type of crime is illegal if it is committed, and is not subject to a balancing test to determine whether it is excused or not.

B. Harm to Civilians and Civilian Objects

As previously discussed, one of the most serious allegations made against Sri Lanka is that they indiscriminately shelled civilians and civilian structures during the Humanitarian

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[153] Eva La Haye, War Crimes in Internal Armed Conflicts 54 (2008). See also Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶610 (International Criminal Tribunal for Rwanda Sept. 2, 1998) (holding that although APII is not customary on its whole, Art. 4(2) supplements CA3 enough to be part of customary law).

[154] See Dr. Saby Ghoshray, When Does Collateral Damage Rise to The Level of a War Crime?: Expanding the Adequacy of Laws of War Against Contemporary Human Rights Discourse, 41 Creighton L.Rev. 679, 686, 691-94 (2008).

[155] See Common Article III(1) and Additional Protocol II(4) to the Geneva Conventions.

[156] See Common Article III(2) and Additional Protocol II(7) to the Geneva Conventions.

Operation.[157] These assertions are made based on the fact that sources consistently reported that, during the months of January to May 2009, the government indiscriminately fired into the NFZs as well as during a 48-hour cease-fire.[158] Most of the shelling, according to the allegations, was actually directed at areas where major hospitals were located.

The government contends that, although targeting was made toward these areas, several measures were put into place to limit the effect on civilians. First, the government asserts that the LTTE forced civilians into these areas to create human shields in order to deter the military from attacking.[159] The government's case is importantly supported by Jacques de Maio, International Committee of the Red Cross (ICRC) and Head of Operations for South Asia informed US officials that the LTTE *"had tried to keep civilians in the middle of a permanent state of violence"*. The LTTE saw the civilian population as a *"protected asset"* and kept it's fighting men embedded amongst them. He went on to say, that the LTTE Commanders' object was to keep the distinction between the civilian and military assets blurred.[160]. The Government established the NFZs in order to reduce civilian casualties but the LTTE moved its men and heavy weaponry into these zones from which they began to shell SLA positions.[161] Again, the position of the Government is supported by the following observations by Sir John Holmes, UN Under Secretary-General for Humanitarian Affairs and Emergency Relief Coordinator;

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[157] GOSL Assertions, p. 14.
[158] See DOS Report 15:44.
[159] GOSL Assertions, p. 4.
[160] "Subject: Sri Lanka:S/Wci Amb. Williamson's Geneva Meetings", US Government cable, 15 July 2009, available at http://www.aftenposten.no/spesial/wikileaksdokumenter/article4109603.ece.

[161] Id.

"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."[162]

Additionally, the SLA took several measures in order to minimize casualties such as using snipers, selectively using artillery power, change from rapid fire to deliberate fire, the establishment of a "zero civilian casualty policy," and the use of smaller fire teams to conduct missions.[163] Furthermore, the damage described by the government is minimal.[164]

Based on the above instructions, it is unlikely that the operations of the SLA constituted any war crimes, even though civilian lives were lost during the operation. First, the principle of necessity is satisfied. GOSL asserts that the necessity was to respond to attacks being launched from the NFZs[165] and in order to free civilians that were being held hostage in these areas[166], both of which are considered legitimate reasons to use force under IHL.[167] For example, the 2009 State Department report to Congress acknowledged that there was clear evidence that the LTTE was firing artillery shells from within the hospital premises and concentrations of civilians.[168] In addition, the International Contact Group (ICG) also documented that there were "*LTTE gun positions within 500m of the Centre*". The ICG also recorded that most "*of the LTTE artillery was located in the no fire zones*"[169]

Additionally, the principle of distinction is satisfied. The government asserts that they established the NFZs to help troops distinguish between civilians and non-civilians and even

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[162] Sir John Holmes, "Briefing on the humanitarian situation in Sri Lanka", United Nations, 26 March 2009. Full text of briefing available at http://transcurrents.com/tc/2009/03/most_pressing_concern_remains.html

[163] Id. at 20.
[164] Id. at 15-16.
[165] Id. at 12.
[166] Id. at 14-17.
[167] Judith Gardam, Necessity, Proportionality and the Use of Force, 4-8 (2004).
[168] See DOS Report.
[169] *War Crimes in Sri Lanka*, Asia Report No. 191, International Crisis Group, 17 May 2010.

when it the SLA had to fire into those zones, it did so selectively and targeted only the locations that LTTE artillery was coming from.[170] Further, the hospitals in question were not directly targeted and some, for the most part, were no longer being used for treating patients.[171] Based on these assertions, it is evident that the government did its best to distinguish between military and civilian targets.

The proportionality and unnecessary suffering principles have also been satisfied based on the assertions. As previously stated, proportionality is violated where the incidental loss to human life outweighs the anticipated military advantage.[172] Here, despite the fact that civilian casualties might have been expected, the government appeared to do their utmost to minimize those casualties in order to achieve their military objective of stopping future attacks from the LTTE out of those locations and rescuing the civilians among their many other objectives outlined on page 27 of my instructions.[173] In this case, the incidental civilian deaths and property damage was collateral damage. Additionally, 290,000 civilians were rescued as a result of this operation.[174]

It is also important to note that, at many times, the direction of fire could not be discerned, so it is difficult to attribute most of the deaths to the government.[175] For example, Gordon Weiss, the UN Spokesman in Sri Lanka, acknowledged that there is good evidence that the LTTE fired artillery shells at their own people as a method of causing international outcry against the government.

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[170] GOSL Assertions, p. 12 of my instructions
[171] Id. at 16-17.
[172] Gary Solis, The Law of Armed Conflict, 273 (2010).
[173] This is different than criminal tribunal cases where the accused intentionally ordered the killing of civilians (See Akayesu (finding that the accused directed the killing of hundreds of Tutsis from his commune)) or the controversial conflict between Israel and Hezbollah in 2006 in which Israel indiscriminately used cluster bombs, air strikes, and thousands of artillery shells into residential areas where Hezbollah was firing from (See *supra* note 66 at 320-21). Some scholars see the use of force in that case as disproportionate and indiscriminate.
[174] GOSL Assertions, P. 26.
[175] Id. at p. 16

It should be noted that the mere presence of civilians or the use of human shields does not bar an attack against the enemy force.[176] In fact, the test of proportionality tends to be relaxed in those circumstances and any civilian deaths will be attributed to the party using the human shield.[177] War is imprecise and unpredictable and as long as the principles are satisfied, the incidental deaths will be considered as collateral damage. Where military operations are conducted among civilian populations, civilian casualites have always been a tragic consequence of armed conflict. The principle of military necessity allows for the intentional killing of potentially large numbers of people if the harm is both unintended and is not disproportionate to a legitimate military objective.

Therefore, based on the government's assertions and the established facts, it is unlikely that the harm to civilians in this context constituted a war crime.

C. *Killing of Captives or Combatants Seeking to Surrender*

Another allegation made against the Security Forces was that they executed surrendering soldiers of the LTTE. These allegations are based on video footage allegedly showing Sri Lankan soldiers killing captive LTTE members in January 2009 as well as other sources that reported that government forces killed several LTTE leaders while they attempted to surrender in May 2009.[178] CA3(1) and APII(4), strictly prohibit the murder of former combatants who have laid down their arms so any violation of this provision would certainly constitute a war crime. However, it is correct to say that a great deal of controversy attaches to the accuracy of videotape footage that has been produced.

Based on my instructions, however, it is unlikely that this crime was committed. As I have observed before, if there were individual acts that amounted to war crimes the authorities

[176] *Supra* note 60 at 320.
[177] Id.
[178] See DOS Report at 45 (2009).

have the judicial structures within which to deal with perpetrators. According to the government, 11,986 LTTE members were either detained or surrendered and 10,490 have already undergone rehabilitation and have been reintegrated into society.[179] The rest are either currently under rehabilitation or are scheduled for prosecution.[180] Additionally, the government asserts that the same accommodations were made for family members of LLTE.

Therefore, based on these facts alone, it is unlikely that this crime occurred.[181]

D. Preventing Necessary Food and Medicine From Being Provided to Civilians

Finally, the government was alleged to have deprived civilians in the conflict zone from receiving necessary humanitarian aid.[182] This allegation is based on the fact that there was a significant shortage of food and medicine available despite deliveries that were made to the various conflict zones.[183] Under the relevant IHL's requirements to provide for the sick and wounded, it could be considered a war crime to actively prohibit access to humanitarian aid. It might also be a violation of the relevant Human Rights Law, such as the International Convention on Economic, Social, and Cultural Rights (ICESR), which is discussed further elsewhere.

The government asserts that they worked with several UN agencies to provide aid to those in need in the conflict zones.[184] Additionally, if there was any shortage in aid supplied, it was due to the fact that the LTTE consistently targeted the UN food convoys throughout the

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[179] GOSL Assertions, p. 21.
[180] Id.
[181] Again, however, it is important to note that these issues are questions of fact. Even though the facts asserted by the government do not give rise to the presence of a war crime, it could be considered that one was committed based on the fact that a video did surface that portrayed members of the Sri Lankan military executing LTTE prisoners and other sources indicated to the Dept. of State that Sri Lankan military forces killed LTTE members attempting to surrender in May and that Army Chief General Sarath Fonseka stated in July that traditional rules of war were overlooked by killing LTTE rebels who waved the white flag to surrender.
[182] GOSL Assertions, p. 17.
[183] Id.
[184] Id.

operation.[183] Furthermore, few facts have been asserted that actually attribute responsibility to the government for the shortage in aid.

Based on my instructions, however, it is unlikely that this particular crime was committed.

[183] Id. at 18

SECTION 10. CONCLUSION

It is difficult to establish how many civilian casualties there were at the end stage of the conflict. Suffice it to say *the UN Panel of Experts on Accountability in Sri Lanka said*:

"Two years after the end of the war, there is still no reliable figure for civilian death."[186]

What can, however, be said is this: but for the taking by the LTTE of hundreds of thousands of hostages for reasons I have already gone into in this Opinion, the casualties would largely have encompassed LTTE fighters alone.

Based on my instructions, my analysis of the relevant law, from the factual matrix made available to me and other research, my opinion is that the great mass of civilian deaths which occurred in the final stage of the conflict were regrettable but permissible collateral damage. It was occasioned in the process of the security forces fighting to overwhelm and defeat the LTTE who had taken hostages in such large numbers that this may well be considered to be one of the largest hostage takings in history. The human stakes were colossal considering that the hostages were being murdered if they had tried to escape. The end result of saving some 290,000 hostage lives and the defeat of the ruthless LTTE were legitimate military and humanitarian objectives and the collateral damage, in my view, was not disproportionate to the military advantage and was wholly consistent with the humanitarian imperatives that prevailed at that grim time.

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[186] *Report of the Secretary-General's Panel of Experts on Accountability in Sri Lanka*, United Nations, New York, 31 March 2011, p.41, available at http://www.un.org/News/dh/infocus/Sri_Lanka/POE_Report_Full.pdf

Professor DM Crane and Sir Desmond de Silva QC, “Opinion to the Commission re. Legal Issues pertaining to the use of Human Shields and Hostage Taking by the Liberation Tigers of Tamil Eelam (LTTE)

The Island March 19 2015

Opinion to the Commission from Professor DM Crane and Sir Desmond de Silva, QC re.

Legal Issues pertaining to the use of Human Shields and Hostage Taking by the Liberation Tigers of Tamil Eelam (LTTE) by Professor David M Crane, Sir Desmond de Silva, QC and Advisory Council of Experts

INDEX

1. Whether the LTTE's attempts to immunise its military leadership and assets through the criminal act of hostage taking and the subsequent internment of civilians near areas of strategic importance constitutes the international crime of Human Shielding, and;

2 Whether an evaluation of the customary principle of Proportionality relative to the government's military operations is meaningfully affected by the LTTE's intentional use of civilian hostages as human shields for the purpose of using any loss of civilian life to discredit the government, and;

3. Whether civilians may lose their protected status by becoming voluntary "hostages" for the purpose of creating a human shield in order to assist a belligerent party in gaining a military advantage, and;

4. Whether an evaluation of the customary principle of distinction relative to the government's military operations is affected by the LTTE's decision to use combatants not in uniform to enter the conflict with the intent to gain a military advantage by making it more difficult to distinguish between combatants and civilians or to deliberately conduct their operations blurring the distinction between civilians and combatants.

OPINION TO THE COMMISSION FROM PROFESSOR DAVID M. CRANE land SIR DESMOND de SILVA QC2,

Re: Legal issues pertaining to the use of Human Shields and Hostage Taking by the Liberation Tigers of Tamil Eelam (LTTE).

1. INTRODUCTION AND FACTUAL ASSERTIONS:

2) It is asserted that, for thirty years, the Liberation Tigers of Tamil Eelam (LTTE) were responsible for conducting numerous attacks against the government of Sri Lanka (GOSL or the Government) and its citizens as part of its effort to create a separate Tamil state.3 After repeatedly bailing to reach a peaceful settlement with the LTTE leadership through peace talks, the Government was forced to confront the LTTE's determined effort to utilize the presence of the civilian population of the Vanni so as to immunize their positions from attack, to avoid defeat in battle, and to ensure the preservation of the LTTE leadership to enable them to continue waging their war.

3) After the fall of Kilinochchi in the 2nd January 2009 to the SLA, in order to secure the safety of hundreds of thousands of civilian Tamils the Government set up a series of No Fire Zones (NFZ's). Despite this effort, the LTTE allegedly refused to recognise the NFZs. International law requires that safe areas, ceasefires and truces are accepted by both warring parties: agreement is a pre-requisite for legitimacy. Due to the refusal of the LTTE to recognise any such NFZs the laws relating to such zones have less relevance to any analysis of the situation in the last stages of the conflict. It is asserted that the LTTE fighters took advantage of the NFZs, embedded themselves in the NFZ's and began firing at the military forces from within the zones.' Additionally, the LTTE allegedly held thousands of civilians and some UN aid workers hostage in the NFZs as human shields in order to deter the military from firing upon them while they conducted their attacks.

4) Eventually, the GOSL declared victory on 19th May 2009, but allegations that tens of thousands of civilians were killed in the final phase of the war and that civilian property, such as local hospitals, were damaged have been used to support the argument that the government committed war crimes during this operation. However, the Government contends that civilians and the hospitals were never the intended target of their attacks, rather the SLA were returning fire against enemy targets embedded as they were amidst civilians and close to hospitals.

5) In addition, other allegations have been made that the government killed LTTE leaders after they had already surrendered and had laid down their arms. This is based on video footage received by local media.

6) What follows is a discussion of the legal implications of the LTTE's alleged hostage taking and use of human shields as it relates to the potential liability on the part of the Government of Sri Lanka for alleged war crimes. The discussion will begin with a presentation of existing substantive law followed by an analysis of the facts alleged by

the relevant parties in the instant case.

STATEMENT OF THE LEGAL STATUS OF THE CONFLICT:

7) In the instant case, the Sri Lankan Conflict qualifies as a non-international armed conflict (NIAC) as a matter of law. In the landmark Tadic decision, the Appeals Chamber for the ti International Criminal Tribunal for the Former Yugoslavia (ICTY), relying on existing custom, established what is now widely recognised as a two part test for determining whether a conflict qualifies as a NIAC, that is whether there is: (1) protracted, armed violence (2) between governmental authorities and organised armed groups within a state. This twofold test has since been adopted by a myriad of other international criminal courts including the Special Court for Sierra Leone (SCSL) and the International Criminal Court (ICC) and is widely considered authoritative.

8) As to the first element, one highly diapositive factor is the duration of the conflict.Here, the conflict between the LTTE and the GOSL lasted almost 30 years, certainly sufficient duration to satisfy the first element of the definition. As to the second element, the ICTY has made it clear that some degree of organization by the parties will suffice, thereby establishing a very low threshold for what constitutes an "organised armed group". 15 In the instant case, it is well documented that the LTTE has been a "disciplined and highly effective conventional fighting force" since the late 1990s, possessing both naval and air assets. The LTTE's military capabilities are certainly sufficient to establish the second element of the argument.

9) With both elements satisfied, it is likely that most impartial judges would agree that the Sri Lankan conflict is properly categorized as a NIAC and that any analysis of the legal issues appurtenant to that conflict should be categorised accordingly.

ISSUES PRESENTED:

1. Whether the LTTE's attempts to immunise its military leadership and assets through the criminal act of hostage taking and the subsequent internment of civilians near areas of strategic importance constitutes the international crime of Human Shielding, and;

2. Whether an evaluation of the customary principle of proportionality relative to the government's military operations is meaningfully affected by the LTTE's intentional use of civilian hostages as human shields for the purpose of using any loss of civilian life to discredit the government, and;

3. Whether civilians may lose their protected status by becoming voluntary "hostages" for the purpose of creating a human shield in order to assist a belligerent party in gaining a military advantage, and;

4. Whether an evaluation of the customary principle of distinction relative to the government's military operations is affected by the LTTE's decision to use combatants not in uniform to enter the conflict with the intent to gain a military advantage by

making it more difficult to distinguish between combatants and civilians or to deliberately conduct their operations blurring the distinction between civilians and combatants. DISCUSSION: Whether the LTTE's attempts to immunise its military leadership and assets through the criminal act of hostage taking and the subsequent internment of civilians near areas of strategic importance constitutes the international crime of Human Shielding:

A. The Definition of the International Crime of Human Shielding:

10. In both international and non-international armed conflicts, customary international law prohibits the use of civilians to shield military objectives and operations. This practice, known as human shielding, has been held as a "grave breach" and a violation of the "laws or customs of war" by the ICTY Trial Chamber.

11. Recently, when addressing the law applicable to the Sri Lankan Armed Conflict in 2009, the United States categorically affirmed this position, declaring that "the civilian population must not be used to shield military objectives from military attack."

12. In 1996, the ICTY determined that the facts contained in an indictment against Radovan Karadzic and Ratko Mladic were sufficient to constitute the crime of Human Shielding. According to the indictment, the accused had captured at least 248 UN personnel and ordered their subordinates to place the hostages at several potential NATO air targets, such as ammunition bunkers and military communication centres, in order to make it difficult for NATO to target those sites.

13) The ICTY has also determined that, as long as protected detainees (civilians or POWs) are being used to shield military objectives from attacks, a war crime has been committed regardless of whether the detainees were actually harmed or attacked.`In Blaskic, the accused was convicted of using civilian hostages as human shields to protect his headquarters at the Hotel Vitez, but appealed on the grounds that the hotel was not under attack at the time and that the hostages did not suffer any mental or physical harm.23 The court affirmed the conviction holding that it was sufficient just to prove that the civilians were placed at the hotel for the strategic purpose of protecting the headquarters.

14) It is also noteworthy that the Israeli High Court found the Israeli Defence Force's (IDF) Early Warning program to be an illegal use of a human shield.25 Under the Early Warning Program, the IDF would solicit Palestinian residents to warn civilians in the West Bank that the IDF would be conducting military operations. The resident would not be asked to do this if the IDF believed he or she was at risk and, according to the IDF, the residents were not forced if they did not want to participate. Nevertheless, the Justices determined that using civilians to conduct missions on behalf of the military is the creation of a human shield because it puts civilians into combat zones and it is being done for the advantage of the IDF. This case demonstrates that the standard in many cases for what constitutes the unlawful act of human shielding has been relatively low, and an advantage sought does not need to rise to the level of immunization from

attack before it becomes illegal; any advantage may-be sufficient. B. Findings as to the First Question

15) There is evidence to suggest that the LTTE were firing artillery at the SLA from the Is' NFZ from the very outset of its creation. The Bishop of Jaffa in a letter to the President on 25 January, 2009, stated; "We are also urgently requesting the Tamil Tigers not to station themselves among the people in the safety Zone and fire their artillery shells and their rockets at the army. This will only increase more and more the death of civilians thus endangering the safety of the people."

16) Throughout the final months of the Sri Lanka Conflict in 2009, it has been asserted that the LTTE kept up its attacks on the SLA from all NFZ's that were set up by the Government. This was allegedly done with the intent to immunise themselves from attacks by government security forces; the very same activity and intent which the Monadic court found sufficient to constitute human shielding.

17) While a distinction may be drawn between the facts in Mladic, where the accused individuals were placing protected persons in strategic areas, and the instant case, where the LTTE were merely entering NFZs where civilians were already heavily concentrated, this distinction is not legally relevant. As Blaskic noted, Geneva Convention IV, Art. stands for the premise that even the mere presence of protected persons cannot be used to render a military target immune from attack. In other words, a belligerent who hides within an area with high concentrations of civilians is committing the crime of Human Shielding even if the belligerent party is not 'actively placing them into a location. Furthermore, there are numerous reports of LTTE holding UN personnel and their families hostage in the NFZs in order to prevent or make difficult any counter attack by the SLA; facts which are nearly identical to those which the Mladic court relied upon in its determination of the sufficiency of the indictment against the defendants for the crime of Human Shielding.

18) For all the aforementioned reasons, the LTTE's activities as alleged, both in hostage taking and redeployment to the NFZ's with the intent of immunising its assets from attack—if true—would likely support LTTE liability for the crime of Human Shielding. Whether an evaluation of the customary principle of Proportionality relative to the government's military operations is meaningfully affected by the LTTE's intentional use of civilian hostages as human shields for the purpose of using any loss of civilian life to discredit the government:;

A. The Customary Principle of Proportionality:

19) The laws and customs of war prohibit the "launching [of] 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" This principle has been applied coequally to operations involving both attack and the exercise of self-defence, with the principle operative factor being whether damage and loss of life is excessive in relation to any

anticipated military objective. 34 Relative to self-defence, the International Court of Justice (ICJ) has held that customary international law "warrant[s] only measures which are proportional to the armed attack and necessary to respond to it..." In determining proportionality generally, as demonstrated in the Case Concerning Oil Platform and the Advisory Opinion on Nuclear Weapons respectively, international courts will consider, inter alia, both the scale of the operation as a whole, and the risk associated with the weapons used.

20) Modern warfare has seen a dramatic increase in the use of human shields as the battlefronts have moved from open fields to urban population centres. Involuntary human shields, that is, persons who are "forcibly located around a military objective" in order to prevent that position from being targeted are the most frequently encountered situation of human shielding. However, involuntary human shielding has also been interpreted in the Commentary on the Additional Protocols to include not only the forcible location of civilians but also the act of taking advantage of voluntary movements of persons. In situations where a belligerent employs involuntary human shields, those persons being used as such cannot be considered as taking an active part in hostilities, and thus their presence would have to be weighed in any analysis of the proportionality of an attack.

21) Despite the frequency of occurrences and plethora of definitions relative to human shielding, authoritative case law providing guidance on the issue is relatively sparse. To further complicate the issue, international legal commentators are split as to what extent the presence of involuntary human shields affects the proportionality analysis. The prevailing view holds that persons used as involuntary human shields do not lose their protected status and thus casualties resulting from an attack are only defensible as collateral damage provided they are not excessive when compared to the military advantage anticipated by the attack.

22) By contrast, a view which has gained some recognition holds that requiring the impeded party to factor involuntary human shields into the proportionality equation at all would allow the shielding party to profit from a clear violation of the laws of war, and thus should not be allowed.

23) There has to be an allowance made between the (ICRC) prevailing view and the minority view. There appears to be significant support among commonly cited publicists for the notion that casualties resulting from the use of involuntary human shields are at least somewhat diminished in the proportionality analysis. However, even these scholars disagree as to the circumstances where such diminished value may be appropriately assessed.

24) Yoram Dinstein has posited that in cases involving involuntary human shields, "the actual test of excessive injury to civilians must be relaxed", making allowances for the unavoidable fact that, "if an attempt is made to shield military objectives with civilians, civilian casualties will be higher".
25. An example of this, he argues, can be found in the Israeli bombardment of Beirut in

June and July of 1982 where, despite the high number of civilian casualties, some commentators recognised that the number was "not necessarily excessive given the fact that military targets were placed among the civilian population."

26) In such cases, Dinstein has argued that, since the belligerent state is not vested by the laws of war with the power to immunise an otherwise lawful target by placing civilians in harm's way, the ultimate responsibility for civilian casualties should fall upon the shielding party rather than on the impeded party.

27) What is more, this principle does enjoy some support in the area of state practice. For example, in the context of its 2006 conflict with Hezbollah, there were several reports of Hezbollah militants using Lebanese civilians as human shields, firing rockets and otherwise conducting combat operations from within residential areas. Because of this, the IDF had launched thousands of air and artillery strikes into southern Lebanon that caused the deaths of over 1000 Lebanese civilians. 50 Israel has since been accused of war crimes as a result of those deaths.

28) In response, the Israeli Ministry of Foreign Affairs adopted the above principle in a statement which declared: "the deliberate placing of military targets in the heart of civilian areas is a serious violation of humanitarian law, and those who choose to locate such targets in these areas must bear responsibility for the injury to civilians which this decision engenders."

29) The Ministry re-emphasized this point in a similar statement a year later, which stated that while the attacking party still has the responsibility to minimize civilian casualties, the ultimate responsibility for civilian loss will lie with the party deliberately placing civilians in harm's way.

30) Amnon Rubenstein, another highly qualified publicist, agrees with Dinstein's view that the proportionality evaluation should be adjusted when involuntary human shields are used. However, Rubenstein asserts that such adjustment is only appropriate when the targeted objective poses a "clear and present danger" to the impeded party's troops or civilians, such as targeted positions from which mortars or missiles are being fired.

31) However, for the reasons that follow, it appears that this view might be regarded as quite compelling from a policy standpoint, a fact which is of considerable weight if not only due to the absence of controlling custom or case law.

32) These uncertainties in international law could not have made it easy for Sri Lankan field commanders. Deciding whether to act or refrain from acting against the position of an adversary — especially when that position presents a clear and present danger to military assets and civilians— is a decision which carries grave consequences if made incorrectly. Here, it is asserted that Sri Lankan commanders often faced the difficult choice of neutralizing active LTTE artillery positions at the cost of casualties among purported civilian groups, or refraining from action at the cost of suffering military losses or failing to protect its own civilian population. In either scenario, the legal

uncertainty as to the proper value assigned to casualties resulting from human shielding within an analysis of proportionality likely made it very difficult for Sri Lankan field commanders to conform their conduct to the law; and it is asserted that this difficulty was frequently and deliberately exploited by the leadership of the LTTE.

33) The difficulties facing a field commander are compounded by the blurring of the differences between combatants and civilians where hostages are taken. This "forced choice" aspect is faced by many modern military commanders who have to contend with terrorist organisations suborning civilian populations into acting as human shields. They have to make on the spot decisions as to whether civilians are assuming the risk involved by their voluntary actions, or if they are civilians acting under duress.

34) The growing phenomenon of human shielding is a symptom of the increasing prevalence of asymmetric warfare in which weaker parties seek to defend against attacks by technologically superior foes by using the presence of civilians to deter military strikes.

35) In his recent study on proportionality, Professor Michael Newton recognises the problems within the ICRC definition and subsequent interpretive guidance, which did not go as far as stating that voluntary human shields who were actually functioning as direct participants in the hostilities forfeit their protected status. Indeed, he makes, it clear, that a number of the military experts who contributed to the interpretative guidance, particularly those with battlefield experience vociferously disagreed with that conclusion and despite considerable argument, failed to achieve a joint consensus on this point.

36) In an equally concerning trend, weaker parties have also engaged in a tactic known as "Jawfare" which "exploits legal norms to impede the enemy's operations", essentially punishing law abiding nations for their observance of the laws of war and rewarding the non-state actors who disregard them. As Rubenstein points out, if this trend continues in its failure to account for the interests of impeded states, IHL itself is in danger of "falling into disrepute."

37) However compelling this imperative might be, it is also important not to unnecessarily diminish or destroy the protection of civilians who have become hostages against their will. The Rubenstein approach, like the underpinnings of IHL itself, seeks to maintain a favourable balance between military necessity and humanitarian concerns by limiting diminished protection to situations where the target represents a clear and present danger to the impeded party. 5 8 For this reason, it is the most effective approach in addressing the exigencies of modern asymmetric warfare without needlessly diminishing protection for civilians.

Findings as to the Second Question:

38) In the instant case, given that the law in this area is not well settled, a precise application of the law is very difficult. However, it is reasonable to conclude upon the

facts asserted here that if any diminution of civilian protection is appropriate for cases involving involuntary human shields (or even if it is not), the military operations carried out against the LTTE by the GOSL were within the bounds of proportionality as a matter of international law.

39) First, the humanitarian operation launched by the GOSL was justified by a host of compelling military objectives, namely ending the nearly 30 year campaign of violence by the LTTE which included assassinations on duly elected officials and attacks on civilian objects such as the Central Bank of Sri Lanka, the international airport," and the Mavilaru sluice gate, in the latter case depriving the populace of access to water. As the Case Concerning Oil Platform demonstrates, the scale of the operation as a whole can be factored into a proportionality analysis. In applying that principle to the facts asserted in this case, it is clear the termination of such insidious and wholesale threats to civilian life represents a compelling military objective which already sets the bar fairly high relative to the acceptable level of civilian casualties in achieving that objective. This is a factor that could weigh heavily in favour of a finding of proportionality on behalf of GOSL operations overall as this is a factor which must be put into the balance of the proportionality equation. Even taking the highest figures ascribed to the deaths of Vanni civilians, assuming that there were up to 330,000 civilians in the NFZ as the Darusinan Report contends --7,000 of whom were killed-- this presumes a loss of life of approximately 2% of that civilian population. The respected UTHR report compiled by a group of Tamil academics places the "hostage" population at 300,000.66 If there were as many as 40,000 killed, this would be a loss of approximately 12% of that population. Whatever the figure in terms of a hostage rescue operation where some 295,000 were saved — it is a successful operation.

40) The GOSL, while declaring the NFZs, had to contend with LTTE efforts to utilise human shields to immunise their positions from attack. Once inside the NFZs, the LTTE carried out artillery and mortar strikes on security forces while simultaneously endangering the lives of the civilians in the area and shooting those that attempted to flee. As Gordon Weiss, who was working on ground at the time of the conflict later stated, "....The population also served as a recruiting pool, a practice that would become more voracious and unforgiving as the fighting progressed. Just what proportion of those in the Tiger ranks were forced to serve against their will can never be known but it is certain that the rate of reluctant recruits increased dramatically as the last battles sapped the remaining experienced tiger stalwarts into the fight. There were numerous accounts of brutal forced recruitment of children in the final days, including the daughter of one UN staff member, who eventually managed to desert and escape the siege. Most ominously of all, there is good evidence that at least on some occasions the Tamil Tigers fired artillery into their own people. The terrible calculation was that with enough dead Tamils, but all would eventually be reached that would lead to international outrage and intervention... "

41) Under the Rubenstein view, the fact that the LTTE was using their shielded position within the NFZs to carry out artillery strikes against GOSL forces represents precisely the sort of clear and present danger Rubenstein argued could logically support a

diminution of the value of civilian casualties in a proportionality calculation. In addition, under the Dinstein view, the ultimate responsibility for civilian casualties resulting from the LTTE's practice of taking and keeping hostages near military assets would fall on the LTTE and not the GOSL, since the laws and customs of war do not permit a belligerent to immunise a position from attack through the use of involuntary human shields.

42. Under the Dinstein view, civilian casualties area consequence of any military situation involving the use of involuntary human shields and so the analysis ends where they are intentionally used by one side to frustrate attacks by another.

43) Under the prevailing view, the anticipated military advantage sought must be proportional to the civilians endangered in the targeting of that objective with no associated reduction in the value of civilian_ casualties. Yet, even under this view, which affords no leniency regarding civilian casualties, it is likely that one could find that the destruction of the LTTE and the removal of some 295,000 civilians from danger of death, a proportional amount of civilian casualties. 68 This would be particularly so in view of the fact that it is now impossible to estimate what proportion of those civilians were killed by the LTTE firing upon them with a view to achieving an international propaganda victory by assigning those deaths to SLA forces. Indeed the arithmetic is further complicated by the number of LTTE fighters not in uniform whose deaths could be treated as civilian when in fact they were full combatants.

44) In summary of this issue, it appears that a proportionality analysis under either the prevailing view, or either of the scholarly views would support the legality of the operations carried out by the forces of the GOSL. However, the absence of authoritative custom or case law determining the precise effect of the use of involuntary human shields on the proportionality calculation suggests that the law in this area is not well settled. Therefore, there is room for state practice, informed by the exigencies of wise policy, to wield meaningful influence upon this area of customary international law. With these things in mind, the adoption of a balanced position such as that represented by the Rubenstein approach as set out at paragraph 40, is most likely to garner the widespread diplomatic support or acquiescence necessary to progress the formation of custom in this area of the law. Whether civilians may lose their protected status by voluntarily becoming "hostages" for the purpose of creating a human shield in order to assist a belligerent party in gaining a military advantage:

A. Definition of "Direct Participation":

45) Under customary international law, there is a distinction drawn between the protection afforded to civilians and the protection afforded to civilians taking direct part in hostilities. As a matter of lHL in the context of both NIAC and IAC, "civilians enjoy protection from attack unless and for such time as they take a direct part in hostilities. In other words, when civilians directly participate in hostilities, they become lawful targets and are thus not taken into account in a proportionality assessment when military targets in their proximity are attacked. This exception to the general

protection civilians enjoy against the dangers of military operations is widely accepted, but it is confined to the "temporal limits of the activity in question".

46) The ICRC has noted that a more precise definition of "Direct Participation" may not be found through a reading of treaty law, state practice, or international jurisprudence, and thus the notion must be interpreted in accordance with "the ordinary meaning given to its constituent terms in light of the object and purpose of IHL." Recognizing thins reality, the ICRC convened a panel of experts and published interpretive guidance detailing three constitutive elements of Direct Participation which reflect "the ICRC position on how existing 1HL should be interpreted" elements declare that in order for an act to be considered direct participation. in hostilities (1) "a certain threshold of harm must be likely to result from the act, (2) there must be a relationship of direct causation between the act and the expected harm, and (3) there must be a belligerent nexus between the act and the hostilities between the parties to the conflict. The Interpretive Guidance is not without its critics, with one noted scholar pointing out that the Guidance "does not reflect a consensus document" and that "key features... have proven highly controversial. However, despite its critics, the constitutive elements of the Interpretive Guidance remain important insofar as they have shaped the discussion among highly qualified pubhcists on whether participation as a voluntary human shield constitutes direct participation in hostilities.

B. Voluntary Human Shielding as "Direct Participation":

47) Voluntary human shielding occurs as a matter of law when a person seeking to shield a position remains in an area with the intent to frustrate enemy operations. Several highly qualified publicists agree that when civilians voluntarily act as human shields in this manner, they may be considered to be taking a direct part in hostilities in appropriate situations. In such cases, depending on the site being shielded, the presence of civilians situations serving as human shields can directly cause actual harm to the attacking party even if it is passive, thus resulting in a discount or reduction of the value of that civilian presence in the proportionality analysis.

48) With the forced choice of human shields, there will be greater loss of life as a result of a planned military strike of and the attendant harm to the human shields surrounding the military target. "In such a scenario: "Not only is the political organisation forcing its citizens to be voluntary human shields, but its actions force unwanted choices upon their enemies as well. Such considerations should call for adjustments in the way these states or political organisations are regarded both legally and morally... "

49) Nevertheless, even in such situations, the civilians themselves may not be the object of attack, but they may be subject to incidental harm from an attack on the site they are seeking to protect.82 However, following the themes enumerated in the Interpretive Guidance, there is some disagreement as to just-what situations are appropriate for such a designation. This disagreement has focused on similar factors to those enumerated in the ICRC's interpretive guidance.

50) Of the three aforementioned constitutive elements, the first two have garnered the most discussion and debate. Advocates for stronger protection for individuals voluntarily serving as shields claim that voluntary human shields rarely constitute an actual harm because they do not represent a physical threat to combatants or an obstruction to military operations.83 Such advocates find support for their position in the commentary to Additional Protocol I which "explains that direct participation implies a direct causal relationship between the activity engaged in and the harm done to the enemy at the time and place where the activity takes place"' and that acts must be "intended to cause actual harm to the personnel and equipment of the armed forces". On the other hand, their opponents take the position that the frustration of military objectives --objects whose nature makes an effective contribution to military action and whose destruction offers a definite military advantage-- "contributes to military action in a direct causal way", and is thus direct participation."

51) Others who advocate in favour of diminished protection for civilians taking direct part in hostilities point out that: "Voluntary human shields who seek to exploit their presumed civiliasn status to enhance the survivability of belligerents, their weapons systems, command and control facilities and infrastructure that directly support a belligerent state's war effort have clearly become involved in combat..."

52) The Israeli Supreme Court took a similar position in its judgment in the "targeted killings" case. In that case the Israeli Supreme Court sitting as the High Court of Justice dealt with the petitioner's challenge to Israel's targeted killings policy as contrary to both international and Israeli law on the grounds that it violated the rights of those targeted and those caught in the zone of fire. 87 The court rejected this argument, concluding that if a civilian participates as a human shield "of their own free will out of support for the organization, they should be seen as taking a direct part in the hostilities." In such situations, the court reasoned, an analysis of proportionality is not required because a civilian who takes direct part in hostilities is not entitled to the protections usually afforded to civilians.

C. Findings as to the Third Question

53) With regard to the issue of whether and to what extent 300-330,000 civilians went voluntarily with the LTTE as they began their retreat after the fall of Killinochchi on the 2 January 2009, is impossible to tell. It is, however, clear that a very large portion may have gone with the LTTE for a variety of reasons. Robert Blake, former American ambassador spelt it out eloquently when he stated, "...As the Sri Lankan army was pushing north into the Tamil areas, the predominantly Tamil areas that were controlled by the LTTE for more than two decades, they displaced... the Sri Lankan army displaced a large number of Tamil civilians and they all began to move northwards. The LTTE systematically refused international efforts to allow those internally displaced persons to move south. To move away from 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..."

54) Thus we arrive at a position where it is possible to say, that but for the alleged hostage takings by the LTTE -either voluntarily or forced- there would have been no civilian casualties in any significant numbers.

In addition, Sir John Holmes speaks as follows:

"As the LTTE retreated, the Tamil civilian population from the area they had controlled were going with them, which obviously exposed them to huge risks. How voluntaiy was this? It was hard to say for certain."

55) As a matter of logic, there is a powerful case for saying that it is extremely unlikely that some 20,000 cadres of LTTE, at that stage, could have taken up to 330,000 hostages against their will. The probability is that a large section of the civilians went voluntarily with the LTTE in order to play a part, albeit passive, in the LTTE war effort. It is asserted that this effort included seeking international intervention on the basis of a humanitarian crisis. Such an intervention, if it occurred, would or may have prevented the LTTE leadership from losing the war, which, after their defeat at Killinochchi (2 January 2009) looked inevitable. After the fall of Killinochchi there appeared to be a point of no-return for the Tamil Tigers. 93 An important question that arises is the extent to which the civilian population voluntarily played their part in furthering the war crimes of the LTTE, even if only to achieve international intervention and thus preserve the LTTE leadership from losing the war. Whether an evaluation of the customary principle of distinction relative to the government's military operations is affected by the LTTE's decision to use combatants not in uniform to enter the conflict with the intent to gain a military advantage by making it more difficult to distinguish between combatants and civilians or to deliberately conduct their operations blurring the distinction between civilians and combatants:

56) An adversary commits the crime of perfidy when he engages in an act that is intended to make the other party believe that it deserves protection under IHL in order to obtain a military advantage. There is an overwhelming consensus that simulating a civilian status with the intent to deceive the enemy and obtain a militancy advantage is a sufficient act to constitute the crime of perfidy. However, simply failing to wear a distinguishable military uniform is not, on its own, perfidious conduct. Additionally, conduct that constitutes the ordinary "ruses of war", such as the use of camouflage, mock operations, misinformation, and decoys -will not be considered perfidious because they are only designed to mislead the enemy rather than deceive him into believing that the actor deserves a protected status. Finally, perfidy, like most war crimes is often "perpetrated by a multitude of persons . . . acting in unison or, in most cases, in pursuance of a policy". As a general principle of customary international law, where all participants share the same intent to commit a crime, even if that intent did not extend to the ultimate result – such as death-- all participants may still be held

liable if the death was a natural and foreseeable result of their common criminal plan.

57) The ICTY has made it clear that lHL strictly prohibits the feigning of civilian status in an internal armed conflict under the rule against perfidy." State practice has also shown that those who conceal themselves as civilians in order to conduct an attack to be engaging in perfidious conduct. In U.S. v. Jawad a Military Commission Judge found that the government could prosecute an individual as an unlawful combatant for perfidious conduct as a result of feigning civilian status. In that case, the accused had dressed in civilian attire in order to approach U.S. military personnel and kill them with a grenade that he had concealed.

58) The U.S. also utilised the principle that suicide bombings are sufficient to constitute the crime of perfidy in the al-Nashiri case where the accused was charged with using perfidious and treacherous conduct in the 2000 bombing of the USS Cole. The government alleged that he had masterminded the attack in which the attackers approached the USS Cole on a civilian vessel in order to get close enough to detonate its bombs. Israel has also historically adopted similar principles. In the 1994 Swarka case, an Israeli Military Tribunal found that two members of the Egyptian military had committed perfidy and could not benefit from POW status after disguising themselves as civilians in order to get closer to Israeli military forces and launch attacks from civilian territory. 105 Another example can be found in Afghanistan in connection with Operation: Enduring Freedom (OEF). In that scenario the Taliban used civilians to approach U.S. forces and attack them from residential areas, which ultimately forced them to "wait for insurgents to attack and then attempt to ensnare them. This latter example illustrates one of the major problems the U.S. has faced as a result of perfidious conduct.

59) Under the facts in the instant case, one could find that the actions of the LTTE amount to perfidy. It is alleged that the LTTE has had a long history of engaging in perfidious conduct throughout the 30 year conflict with the GOSL. For years, it allegedly disguised its attackers as civilians to gain access to the SLA forces and then kill them through the use of suicide bombs. In 2002, LTTE suicide bombers accounted for "over one third of the total suicide bombings in the world."

60) According to the UN Secretary General's Panel of Experts Report on the conflict, the LTTE continued this practice during the last three months. of the war in 2009 by conducting numerous suicide missions against SLA forces, which resulted in the deaths of civilians as well. These allegations of suicide attacks represent clear illustrations of perfidy because the LTTE allegedly disguised themselves as civilians in order to obtain better access to GOSL forces for the purposes of increasing effectiveness of its attacks.

61) A number of those fighting for the LTTE failed to wear a recognisable military uniform thus blurring the difference between LTTE fighters and civilians. 112 Based on the above-mentioned state and international practice, an- act of feigning civilian status with the intent of gaining an advantage amounts to unlawful perfidious conduct.
62) As with most other war crimes, the party who intended the conduct to be carried

out, as well as all co-perpetrators who shared the same intent may be held liable for consequences which were natural and foreseeable results of that conduct. Therefore, it is likely that one could find that the LATE had committed perfidy during the last three months of the conflict, and could thus be held liable for an unknown number of deaths that resulted. As will be explained in the next section, this fact could potentially exonerate the SLA from liability for deaths resulting from their failure to precisely distinguish between lawful and unlawful targets.

63) As stated earlier, the customary principle of Distinction between civilian and military targets is one of the fundamental principles of IHL. The principle of Distinction prohibits indiscriminate attacks, that is, those attacks that are not directed solely against military objectives.

64) Such attacks usually take the form of inherently indiscriminate methods or means of combat which, by their very nature, cannot be directed at a specific military objective, such as the carpet bombing of an entire urban area.

65) Another obligation associated with the principle of Distinction which is possibly more illustrative of the customary obligation owed by all parties to a NIAC is the obligation to take "all practicable precautions, taking into account military and humanitarian considerations, to minimize incidental death, injury, and damage to civilians."

66) Put another way, "the general rule is that feasible precautions must be taken to avoid or minimize death and injury to the civilian population."'' Feasibility in this context is defined as "those precautions which are practicable or practically possible taking into account all circumstances ruling at the time, including humanitarian and military considerations" and is an obligation which belongs to both attackers and defenders in a NIAC.

67) Examples of one such feasible precaution is ensuring the attack was conducted using the most precise weapons available to the party in question. It is important to note that in determining the reasonableness of a commander's knowledge or belief that the death of civilians would not be excessive, the analysis is based on facts known to the commander at the time of the decision, not afterward.

68) As has been alluded to in several contexts throughout this Opinion, there is a troubling trend with regards to adversaries engaging in practices, such as human shielding, that make it more difficult for their opponents to comply with IHL. The same is true with regards to distinction and perfidy. Especially in conflicts where asymmetric warfare is present, the weaker adversaries have resorted to acts of perfidy by feigning civilian status in order to make it difficult for the other to distinguish between appropriate military targets and civilians, 12' and the instant case likely falls into this category of conflicts.

69) In other contexts this conduct has led to several instances in which the members of

the side complying with IHL face the choice of either not responding in the face of danger or risking the lives of innocent civilians.

70) For instance, the principle of distinction is usually violated in situations where the presence of members of an armed group in an area is used to justify the destruction of that entire area.

71) An illustration of this example of unlawful conduct can be found in a statement made by the Sudanese Minister of Defence in 2005 that the presence of even one rebel was sufficient for making the whole village a legitimate military target.

72) Another illustration comes from a statement made by Mr. Stephen Smith, the Australian Minister of Foreign Affairs regarding the actions of the LTTE during the last three months of the conflict in Sri Lanka. There, the Minister expressly condemned the numerous civilian deaths as a result of the LTTE's use of "bombs and artillery" in the NFZs and targeting of civilians that attempt to leave the conflict zones as a violation of the rules of war.

73) Moreover, in Blaskic, the ICTY held that the accused had committed grave breaches of IHL by indiscriminately killing Muslim women and children. 121 In that case, amidst combat in the Lasva valley in April 1993, the soldiers under the direction of the accused indiscriminately fired artillery shells "without regard for where the shells landed" and, even after the combat was over, the soldiers entered civilian houses while killing Muslim women and children.

74) On the other hand, in 2009, the Israeli High Court of Justice found that the principle of distinction was not violated during "Operation Cast Lead" when the IDF hit medical transports, buildings, and ambulances with its rocket attacks toward Hamas. The Court reasoned that, because Hamas militants had resorted to using such locations traditionally protected by IHL, they became legitimate military targets and that the civilian deaths that occurred as a result were the responsibility of Hamas.

C. Findings as to the Fourth Question:

75) With the LTTE's liability for perfidious conduct and forced recruitment of civilians; in addition to the execution of civilians who were trying to escape and the placement and firing of their weaponry from within civilian and hospital zones, 131 it is necessary to consider who properly bears liability for the civilian deaths that resulted from hostilities between the parties.

76) If the facts asserted above are true, it is most unlikely that the SLA could be held liable for incidental civilian deaths from any failure on the part of the SLA to distinguish lawful targets from civilians because the liability is more likely to fall upon the LTTE as the party intending to foster and exploit the environment which made distinction difficult in the first place.

77) This principle of liability was illustrated by the Israeli Supreme Court in 2009 when it held Hamas was liable for the civilian deaths resulting from IDF strikes on otherwise protected objects due to Hamas's decision to use those objects for their operations. It follows logically that civilian deaths area natural and foreseeable result of perfidious conduct intended to make it difficult to comply with the principle of distinction in the context of an armed conflict.

78) Based on the foregoing analysis, it is clear that, the LTTE's alleged engagement in perfidious conduct by feigning civilian status, blurring the distinction between combatants and civilians, compelling civilians into the front line, executing civilians who sought to escape, and generally putting civilians in harm's way as a part of their strategy results in the LTTE having to bear the principle liability for civilian casualties. As noted, the principle of distinction requires that adversaries conduct attacks with discrimination and take all feasible precautions to minimize the civilian casualties.

79) It is asserted that the GOSL attempted to minimize civilian casualties by setting up NFZs and scaling down the methods of attack so that they were more precise. The area of the first NFZ was a fraction of the territory then controlled by the LTTE. Instead of conducting its warfare from that territory, the LTTE moved into the NFZ, demonstrating their intent to conduct their war against the SLA whilst embedded amongst civilians and civilian structures. By engaging in perfidy and human shielding, it was the LTTE that failed to take the necessary precautions to minimizecivilian casualties and so it is the LTTE that was truly liable for failure to comply with the principle of distinction and thus for civilian deaths that resulted.

VII. CONCLUSIONS:

80) As unfortunate as it is, the civilian casualties should be considered collateral damage and the ultimate responsibility for their loss would rest on the LTTE due to their grave breaches of IHL.

81) First of all, the LTTE likely committed the international crime of using human shields during an internal armed conflict. According to principles derived from international court opinions like Mladic and Blaskic, any belligerent who conducts military operations in areas of high civilian concentration or forcefully places civilians in. danger to make it difficult for the other side to comply with IHL has committed the crime of Human Shielding.

82) By placing its military assets in the NFZs, attacking GOSL forces from therein, and forcing civilians to remain there at gunpoint, the LTTE is liable for the crime of Human Shielding. This is a very different picture to that which has been presented to the world by some commentators, namely, that the GOSL declared an NFZ in order to get civilians to locate themselves in that NFZ for the purpose of the SLA seeking to then eliminate them by shelling those very areas.

83) This unlawful use of human shields by the LTTE is a legally operative factor in

determining whether the GOSL's attacks against the LTTE were proportional. As discussed, what impact human shielding has on proportionality is an unsettled area of the law. Of the many opinions that exist, the Rubenstein approach, which diminishes the protection requirement in the face of clear and present danger, is the best approach. The SLA complied with proportionality by endeavoring to create NFZs, however, the LTTE's steadfast refusal to agree to such zones may be a clear indication that it was the LTTE's intention that there should be no safe zones for Tamil civilians so as to be able to exploit such civilians for their own military or political advantage.

84) Furthermore, it is noteworthy that if civilians willfully participate in a human shield with the intent to assist in the military objectives of the LTTE, they are considered direct participants and lose their protected status, taking them out of the proportionality assessment. It is important to emphasize that any voluntary human shields are legitimate targets.

85) In conclusion, as the nature of conflict changes, IHL needs to keep abreast with modern asymmetric warfare so as to allow a rethinking of the rules of war that does not favour the violators of international law. Currently the West is faced with these very problems with organisations such as ISIS operating out of civilian and urban areas and endangering the lives of civilians. With such threats continuing to present themselves, Sri Lanka and the situation it faced in the recent past should help pioneer thinking in this regard towards a favorable resolution of the existing lack of consensus in this area of international law. At the end of the day the rule of law must govern the battlefield and civilians ultimately protected.

Professor David M. Crane

Sir Desmond de Silva, QC

Advisory Council of Experts

Sir Geoffrey Nice QC and Rodney Dixon QC, "Review of "Report of the Secretary-General's Panel of Experts on Accountability in Sri Lanka",
24th July 2014

Review of "Report of the Secretary-General's Panel of Experts on Accountability in Sri Lanka"

Introduction

1. This is a Review of the Report of the Secretary-General's Panel of Experts on Accountability in Sri Lanka ("the Report")[1].

2. The Panel of Experts was appointed primarily to advise the UN Secretary-General on the implementation of appropriate accountability measures in the wake of the armed conflict in Sri Lanka that ended in May 2009 having regard to the alleged violations of international humanitarian and human rights law that occurred during the final stages of the conflict.

3. The Panel found that there are "*credible allegations, if proven*" which indicate that both the Government of Sri Lanka and the LTTE committed violations of international humanitarian and human rights law. In relation to the Government, the Panel found "credible allegations" of shelling in the Vanni (in northern Sri Lanka) during the final stages of the war between September 2008 and May 2009 which it is alleged caused civilian deaths, in particular in three No Fire Zones ("NFZs") which had been declared as safe havens by the Government and on certain hospitals in these zones and on the front lines.[2]

4. The figure for civilian deaths that the Panel relies on is "a range of up to 40,000" which it stated "cannot be ruled out", but which requires further investigation.[3]

[1] Report of the Secretary General's Panel of Experts on Accountability in Sri Lanka, 31 March 2011 (hereinafter "Darusman Report").
[2] For conclusions see Darusman Report, p. ii-ix, which are repeated at paras 421-442.
[3] Darusman Report, para. 137.

5. Sources for this 'up to 40,000' figure are not identified in the Report. The figure is widely disputed. There is no clear breakdown given in the Report of where and how these alleged deaths occurred and of how it might be verified that they were civilian deaths in each particular case or of who was responsible for each of these deaths. This shortcoming must be taken into account when the Panel's findings and the use to which they can legitimately be put are considered.

6. Set against these findings in respect of the Government, the Panel concluded in relation to the LTTE that there are "credible allegations" that approximately 300,000 - 330,000 civilians were kept hostage by the LTTE in the Vanni and prevented from leaving the area. They were used as human shields by the LTTE and as a "strategic human buffer" to the advancing Sri Lanka Army. The Report 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 were also shot by the LTTE, and the Report notes that the LTTE fired artillery "in proximity" to large groups of civilians and fired from civilian "installations" including hospitals. The Report concludes that "*many civilians were sacrificed on the altar of the LTTE case and its efforts to preserve its senior leadership*".[4]

7. The Report fails, however, to offer any figures for the number of civilians allegedly killed or injured by the LTTE and provides no analysis of any kind of the precise circumstances in which these deaths and incidents allegedly occurred.

8. The Report also details alleged violations by both sides that occurred outside the conflict zone and after the conflict had ended. They include alleged offences committed by Government forces during the screening and detention of those who left the conflict zone and, as against the LTTE, alleged attacks on civilians by the LTTE outside the conflict zone.[5]

[4] Darusman Report, pp. ii-iii.
[5] Darusman Report, paras. 138-167.

9. In light of these findings, the Panel goes on to conclude that the Government's efforts at the time of the Report to address accountability fell short of international standards in which the rights of victims to truth, justice and reparations should be central. The Panel makes certain recommendations for the investigation of alleged crimes and the adoption of measures to advance accountability in the short and longer term.

10. These recommendations are rooted in the Panel's findings in respect of the nature and scope of the alleged violations that are set out in the Report. Indeed, the Panel acknowledged that accountability standards "cannot be examined in a vacuum", and that its advice to the Secretary-General on appropriate accountability mechanisms had to be based on "*the nature and scope of the alleged violations*". The Panel said that it was thus required "*to gather information from a variety of sources in order to characterize the extent of the allegations*" and "*appraise them legally*".[6]

11. That foundation and sources for the Panel's advice and recommendations – the alleged violations themselves – must be closely evaluated.

12. Accordingly, this Review assesses the nature, the value, and -to the extent possible - the veracity of the findings in the Report, and the sources of these findings, which are central to the Panel's advice and recommendations. It does so by measuring the workings and findings of the Panel against well-established legal standards for the proper and fair assessment of evidence and information when it is used for assigning responsibility for crimes.

13. It can be borne in mind that the Panel, in a public document, purported to make such assessments of evidence and other information where it has indicated that the parties to the conflict, in particular the Government, have allegedly perpetrated widespread and very serious crimes.

[6] Darusman Report, para. 9.

14. This Review, however, will not mirror the approach of the Panel and will reach no conclusions on whether crimes of particular types were in fact committed by one party or the other. Nor will it venture into the area of policy by recommendations of what the Government should, or should not, do. Leaders in the Government will have well-formed opinions and / or beliefs as to whether offences were, or were not, committed by the parties in the ways alleged (without necessarily being dependent on evidence that may be available to third parties to establish such crimes) and have been and are reacting by political and other measures to the views they have formed.

Appraisal of the Panel's workings and findings in respect of the alleged violations

15. On review, the Panel's findings in respect of the alleged criminal violations fall well short of the legal standards usually associated with a rigorous and impartial inquiry into evidence in order to make such findings. The evidence and information on which the Report's findings are based are virtually all un-sourced, whether in the main body of the Report or in the footnotes and annexes. There are many examples of this deficiency, illustrations of which are set out below.

16. This is not to say that these sources do not exist, but to highlight that very few have been identified in the Report. The Report only refers in the most general terms to the categories of information that were relied on.[7] The reader of the Report cannot, thus, gauge the extremely serious allegations against sources and evidence that may exist in order to assess the strength of the allegations. Further, as the full body of evidence that was taken into account is unknown, it is alike 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.

[7] Darusman Report, paras. 9, 10, 16-19.

17. This makes the task of conducting any further investigation – as recommended by the Report – much more difficult. Without a 'starting point' of existing evidence where should the new investigator begin a search? To which witness or evidence should s/he turn?

18. Moreover, there is no analysis of any identifiable and verifiable evidence that may be relied on (mostly un-sourced as it is), by reference to the relevant legal elements of the offences, all of which would require proof of mental states in those committing or directing the allegedly criminal acts. The repeated assertion that civilians were shelled by the Sri Lanka Army in various locations and were *unlawfully* killed as a matter of international law is not deconstructed in order to allow the reader to form a reasoned opinion on whether the factual or mental state requirements of the alleged crimes may be the subject of available evidence. In particular, there is no analysis offered in the Report of (i) the evidence of the circumstances of each of these alleged attacks, (ii) the presence of any legitimate military targets and objects, (iii) how it can be determined on the evidence from where the attacks emanated, and (iv) whether any of those attacked were civilians, and if so in what proportion.

19. Analysis of the complex and intricate legal requirements for an unlawful attack under international humanitarian law and customary international law to the facts in each particular case is completely lacking in the Report. This deficiency is compounded by the lack of identifiable sources of evidence to substantiate factually the allegations that are made.

20. When allegations in the Report against both sides are viewed together, it is not clear on what basis the Panel makes conclusions about the responsibility of the Government for all, or any particular portion, of the civilian deaths that occurred, and is able to determine that any such responsibility is criminal as a matter of international law. The Panel acknowledges that the civilians in the Vanni were hostages of the LTTE, were used by them as human shield *and* as combatants to fight the Sri Lanka Army *and* were also targeted by the LTTE including in the very areas and hospitals that the Government is

accused of shelling. In these circumstances how is the Panel able to find that the Government was nevertheless responsible for killing these same civilians *unlawfully* or to make any necessary distinctions between who could have been criminally responsible in accordance with the standards under international law that render military attacks unlawful. The Panel's approach also assumes that the persons killed, whatever the number, were in fact civilians as opposed to persons who had taken up arms voluntarily or under compulsion on the side of the LTTE.

21. These are necessarily complex questions which the Panel does not address in its Report. The Panel has instead taken a 'broad brush' approach and ascribed responsibility in a general way to both sides in order to get on to its primary task of considering appropriate accountability mechanisms. Yet any discussion about these mechanisms can be of little relevance or use without an accurate account of the conflict and of the alleged violations that were committed in it.

22. This is unfortunate as it does not advance the inquiry to find the truth save by a generalised recommendation that these matters need to be investigated further. The Report does not confine itself to saying, as it should given its approach to the evidence, that there are many disputed allegations which require further investigation. On the contrary, it positively claims that the allegations are credible and reliable. It elevates them to trustworthy allegations that should be accepted and that now need to be refuted.

23. Indeed, as a result of publication of the Report there have been many subsequent statements, reports and recommendations which have regarded the Report's findings as conclusive.[8] The 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*

[8] 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, paras. 4, 62, 63, 66, 72; Yasmin Sooka, "An Unfinished War: Torture and Sexual Violence in Sri Lanka 2009-2014" ("the Sooka Report"), The Bar Human Rights Committee of England and Wales (BHRC) and The International Truth and Justice Project, March 2014, p. 12, 14, 21, 43, 49, 79, 80.

March 2011, documenting violations of international humanitarian law and international human rights law".[9]

24. Herein lies the danger – whether intended or not – of the claims that are made in the Report about the criminal responsibility of the Government and its forces. Without a robust and disciplined investigation with legal analysis of the evidence, properly sourced and carefully scrutinised, tested and weighed according to the highest legal standards, it can be very risky to *publish* findings of the sort set out in this Report, even if the Report states formally that any allegations made are not proven.

25. Panels of experts established by the UN should be 'on guard' against the risk that un-sourced 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.[10] Narratives develop in opinion-formers and decision-makers, none of whom may have the time to read, let alone rigorously to analyse, reports that, like the instant Report, are often hundreds of pages long.

26. Such reports can be relied on 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 a conflict and of those responsible for criminal behaviour without independent investigation and verification of the 'facts', let alone any judicial findings following a proper legal inquiry. A cornucopia made of insubstantial elements is itself insubstantial.

27. International 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.[11] As set out in the jurisprudence of these courts, the present Report would be

[9] Yasmin Sooka, "An Unfinished War: Torture and Sexual Violence in Sri Lanka 2009-2014", The Bar Human Rights Committee of England and Wales (BHRC) and The International Truth and Justice Project, March 2014, p. 49.

[10] Or that may, as with this Report and the Sooka Report, have a panel member in common.

[11] See for example, Prosecutor v. Gbagbo, Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute, ICC-02/11-01/11-432, 3 June 2013, para. 29; Prosecutor v. Bemba, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-

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.

Approach of the Panel to verifying allegations of violations

28. The shortcomings of the Report may be explained by the fact that, as it acknowledged, the 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".[12] The Report goes so far as to state that "*the Panel's mandate precludes fact-finding or investigation*".[13]

29. Yet, in order to advise the Secretary-General on accountability measures the Panel recognised that it had to make certain determinations about the violations for which such measures should be tailored. The Panel's mandate would come to nothing in the absence of the Panel finding clearly identified violations of a widespread and systematic character.

30. In consequence, perhaps, the Panel adopted a 'halfway house' solution. It did not conduct a full fact-finding investigation as the police would do in any national jurisdiction, but consulted various individuals and organisations and examined available 'information'. This approach, in the Panel's view, permitted it to make factual findings on the basis of its work but without the detailed inquiries that characterise a full investigation.

Pierre Bemba Gombo, ICC-01/05-01/08-424, 15 June 2009, para. 51; Prosecutor v. Mbarushimana, Decision on the confirmation of charges, ICC-01/04-01/10-465-Red, 16 December 2011, para. 78; Prosecutor v. Milutinovic, Decision on Evidence Tendered through Sandra Mitchell and Frederick Abrahams, IT-05-87-T, 1 September 2006, para. 16; Case Concerning Armed Activities on the Territory of the Congo (DRC v. Uganda), Judgment of 19 December 2005, para. 159.

[12] Darusman Report, para. 9.

[13] Darusman Report, para. 51.

31. This methodology arguably produced the worst of both worlds – no conclusions based on any detailed investigation according to recognised legal standards in a Report emboldened to reach clear findings which point the finger at those allegedly responsible.

32. The Panel described its work in the following terms:

- The Panel's programme of work was organized in two phases. In the first phase, the Panel gathered a variety of information regarding the armed conflict in Sri Lanka from individuals and institutions with expertise or experience related to its mandate. Some of this information came in written form, consisting of both public documents – e.g. governmental, United Nations or reports of non-governmental organizations (NGOs) – and material conveyed confidentially to the Panel. Other information was gathered through numerous meetings of the Panel of its secretariat. The Panel met with officials of the United Nations and international organizations as well as representatives of Governments and NGOs and individuals directly affected by the events of the final stages of the war. In the second phase of its work, the Panel drafted this report. The report was written in a manner that makes it suitable for publication.[14]

- The Panel's assessment is based on a careful examination and weighing of the allegations of fact that have been made regarding the final stages of the war. The Panel's examination included both written sources of information as well as interviews with various individuals. The written sources included reports, documents and other written accounts by the various agencies, departments, funds, offices and programmes of the United Nations, other inter-governmental organizations, NGOs and individuals, such as journalist and experts on Sri Lanka. It included satellite imagery, photographs and video materials of the final phase of the war. It also included submissions received by the Panel during the course of its work in response to its notifications posted on the United Nations website. While these could not be individually verified, at times they served to corroborate other sources. Some relevant media sources, referring, for example, to statements of the Government of Sri Lanka or other public statements, are cited in this chapter, but serve only to corroborate the information gathered by the Panel. A number of NGO reports exist on events in the Vanni. While the Panel reviewed some of these reports, it did not rely on them to compile these allegations, but rather carried out its own assessment of the nature and scope of allegations.[15]

- The Panel consulted a number of individuals with expertise or experience related to the armed conflict, including officials of international organizations, NGOs,

[14] Darusman Report, para. 16.
[15] Darusman Report, para. 49.

> journalists, diplomats, academics, and other individuals, some of whom were in Sri Lanka or in the Vanni during the relevant period.[16]

33. It is evident from these general statements that the Panel consulted several sources, but the raw evidence from these sources is not made available in the Report.[17] In particular, the statements and other evidence (for example documents, videos etc 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 as can readily happen and as does happen in other authoritative reports of crimes committed in conflicts.[18]

34. The 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*".[19] 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.

35. The Panel was clearly alive to this problem. The generalised caution adopted by the Panel was expressed as follows:

> To determine whether an allegation is credible, the Panel considered the totality of the information in its possession, with careful regard to the relevance, weight and reliability of each of the sources as well as its relationship to the body of information, as a whole. Allegations are only included as credible when based on primary sources that the Panel deemed relevant and trustworthy. These primary sources were corroborated by other kinds of information, both direct and indirect. The allegations laid out below are based on credible and consistent sources of

[16] Darusman Report, para. 50.
[17] The 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 of the relevance of this material and the fact that it does not assist in establishing that any of the alleged attacks were unlawful.
[18] See for example HRW's Report into the Kosovo Conflict 'Under Orders' and OSCE's Reports into the conflict 'As Seen As Told, parts I and II'. Under Orders: War Crimes in Kosovo, Human Rights Watch, 26 October 2001 (http://www.hrw.org/reports/2001/10/26/under-orders-war-crimes-kosovo); Human Rights in Kosovo: As Seen, As Told. Volume I, October 1998 - June 1999, Organization for Security and Co-operation in Europe, 5 November 1999 (http://www.osce.org/odihr/17772); Human Rights in Kosovo: As Seen, As Told. Volume II, 14 June - 31 October 1999, Organization for Security and Co-operation in Europe, 5 November 1999 (http://www.osce.org/kosovo/17781).
[19] Darusman Report, para. 52.

information. In fact, many of the allegations would appear to meet a higher standard of proof. [20]

36. The Panel indicated that it did not rely on NGO reports and notifications posted on its website. However, without knowing from the Report which were the primary sources, and without being able to review this material and contrast it with the material that was relied on for purely corroborative purposes, it is of little, or no, use only to know the approach taken by the Panel to its work in such broad and undefined terms. The Panel has opened itself to being criticised for paying lip service to the caution it rightly identified.

37. The Report might have achieved greater credibility for its assessment of the unidentified evidence on which it has relied if it candidly acknowledged that it failed to reveal – or even intentionally obscured for some reason – its process of ratiocination.

Standard of proof adopted

38. This central weakness in the Report is exacerbated by the *standard of proof* that it professed to adopt. A non-legal analysis – as by a journalist or academic, a 'tinker, tailor soldier or spy' or anyone else – can use any standard s/he likes: 'I felt sure', 'I felt reasonably confident', 'I was absolutely convinced', 'I had my suspicions' etc. In a document dealing with alleged criminality on a major scale – that names those who may be responsible and who merit further judicial and other process – it might be thought better to turn to, and carefully to apply, the standards of proof recognised by international criminal courts. This is something the Report failed properly and consistently to do.

39. The Panel pointed out that it sought "to assess whether the allegations that are in the public domain are sufficiently credible to warrant further investigations".[21] To this end the Panel stated that it employed the 'reasonable basis to believe' standard of proof "*to characterize the extent of the allegations, assess which of the allegations are credible*

[20] Darusman Report, para. 52.
[21] Darusman Report, para. 51.

based on the information at hand, and appraise them legally".[22] The Panel said that it "*determined an allegation to be credible if there was a reasonable basis to believe that the underlying act or event occurred*"[23].

40. The Panel stated that it settled on this standard because it "gives rise to a responsibility under domestic and international law for the State or other actors to respond."[24] No authority or further explanation is given for this proposition; the authors of this Review are unable to fill in this glaring citation gap from their own knowledge.

41. The Panel also offered no definition of the 'reasonable basis to believe' standard it said it was applying and it is, thus, not possible to be certain whether they had in mind the 'reasonable basis to believe' test in international law for which authoritative definition does exist.

42. It should be noted that international courts and tribunals have confirmed that the 'reasonable basis to believe' standard – if that is what the Panel had in mind – is the lowest evidentiary standard of proof[25]. The standard does, nevertheless, require that there exists a proper foundation of identifiable evidence on which to form a reasonable belief that crimes have been committed. It allows for, and expects, an ability on the part of anyone applying the standard to be able to articulate why the standard has been met. That ability is not revealed by this Panel where it asks its readers to take its analysis of evidence – and its partition of primary from secondary / corroborative evidence – entirely on trust.

43. The highest standard of proof is that of 'beyond a reasonable doubt' which is required to convict an accused of a crime.[26] Below the standard of 'beyond reasonable doubt' is a

[22] Darusman Report, p. i.
[23] Darusman Report, p. i.
[24] Darusman Report, para. 51.
[25] Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, ICC-01/09-19-Corr, 31 March 2010, para. 27 (hereinafter "ICC Decision of 31 March 2010").
[26] Rome Statute, Article 66(3). Article 66(3) provides that: "*In order to convict the accused, the Court must be convinced of the guilt of the accused beyond reasonable doubt*."

standard of 'substantial grounds to believe'. At the ICC, this 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."[27]

44. 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. Although this standard does not require that the available evidence lead only to one conclusion,[28] it does demand that there is sufficient reliable and verifiable evidence available to establish "the criminal responsibility of an individual"[29] which can result in charges being brought and the person losing her / his liberty through arrest and detention pending trial.

45. The ICC has held that "the Chamber must be satisfied that there exists a sensible or reasonable justification" for the allegations after "*evaluating the available information provided by the Prosecutor.*"[30] The ICC has emphasised that the 'reasonable basis to believe' standard must be viewed in light of its purpose and the context in which it operates – "to prevent the Court from proceeding with unwarranted, frivolous, or politically motivated investigations that could have a negative effect on its credibility."[31]

46. The European Court of Human Rights has defined this standard (which it termed to be one of "reasonable suspicion") to require "the existence of facts or information which would satisfy an objective observer that the person concerned may have committed the offence."[32]

[27] ICC Decision of 31 March 2010, para. 28.
[28] See, Prosecutor v. Bashir, 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,' ICC-02/05-01/09-73, 3 February 2010, para. 33.
[29] ICC Decision of 31 March 2010, para. 29.
[30] ICC Decision of 31 March 2010, para. 35.
[31] ICC Decision of 31 March 2010, paras. 32, 35.
[32] See for example, ECHR, Case of Fox, Campbell and Hartley v. the United Kingdom, Application no. 12244/86; 12245/86; 12383/86, Judgment, 30 August 1990, para. 32; ECHR, Case of K. F. v. Germany, Application no. 144/1996/765/962, 27 November 1997, para. 57; ECHR, Case of Labita v. Italy, Application no. 26772/95, 6 April 2000, para. 155.

47. The Panel seems to have used the standard that is recognised under international law to be at the very lowest end of the calibration of proof of allegations, but which nevertheless requires clear and demonstrable evidence (which is open to examination) to support the allegations relied on. It is hard to understand why the Panel – that had legal expertise available to it – should have failed to articulate openly and precisely which recognised standard it was applying, and how. The fact that it did not do so makes it easier to look with skepticism at its work and to fear that it may be characterised by amateurism and enthusiasm. The advantage of applying known legal tests strictly to work that requires legal analysis is that anyone reviewing the product of that work will have more, not less, confidence in its reliability and trustworthiness. The reverse, as in this case, has also to be true.

48. The Panel's findings could have very serious consequences for Sri Lanka and its leaders but are based on the very lowest threshold of proof while using the language and discourse of international courts to introduce these findings without adopting – or seeming to pay any regard to – the practices of these courts that would reveal and explain the evidence on which the Panel has proceeded to its conclusions. The neutral observer might find it hard to overlook the fact that this has all been done in a time when – right or wrong – there has been substantial publicity adverse to the Sri Lankan Government. It would be naïve not to recognise that in such times it is easier to advance conclusions in line with publicity *without* proper evidential support but in the hope, and with the reasonable expectation, of a busy world accepting what is asserted.

49. The Panel does acknowledge that its findings require further investigation but it has not set out what human or documentary sources should form the subject of such an investigation. Moreover, the concession that further investigation is required is overshadowed by the Panel asserting that it has conducted its own inquiries, applied a legal standard of proof, and found the allegations to be credible. It is these claims which have allowed the Report to become much more than a record of allegations and counter allegations that require diligent investigation before any conclusions are reached. The

Panel has gone substantially further in concluding that its findings are reliable and trustworthy, and accordingly that the case put forward by the Government should be rejected.[33]

Primary source materials not identified

50. As noted above, although the Panel was at pains to stress that it only relied on primary sources to find that the allegations were trustworthy, the reader is left in the dark as to which were the primary sources.

51. It could be that confidentiality required that certain of these sources remained undisclosed. The Panel noted that,

> In some instances, the Panel received written and oral material on the condition of an assurance of absolute confidentiality in the subsequent use of the information. The Office of Legal Affairs (OLA) confirmed through formal legal advice that the provisions set out in the Secretary-General's Bulletin on "Information sensitivity, classification and handling' (ST/SGB/2007/6) could be applied to its records. This Bulletin provides for classification of a document as "strictly confidential" with correspondingly strict limits on any access for a period of 20 years, following which a declassification review may be undertaken that weighs the equities involved in retention or release. Moreover, OLA confirmed that, where necessary and appropriate for the Panel's work, the Panel could give an undertaking of absolute confidentiality in the subsequent use. As a result, nearly all of the Panel's substantive records will be classified as "strictly confidential" with, in some cases, additional protections regarding future use.[34]

52. These key sources therefore remain completely *anonymous*, which further weakens the weight that can be given 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. The reader has no idea about the quantity and scope of this evidence even in the most general of terms.

[33] Darusman Report, paras. 138-171.
[34] Darusman Report, para. 23.

53. There are very many instances in the Report in which strong allegations and statements are made with no sources to substantiate the findings put forward, for example:

- First NFZ: paras 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 on. The Report acknowledges that the LTTE were firing "from approximately 500 metres away" from the UN hub in the NFZ and "from further back in the NFZ".[35] No evidence is provided about these positions and what actions the LTTE were taking. As set out below, this is a repetitive shortcoming of the Report – it lacks analysis of the nature of the attacks and detailed consideration of their lawfulness as a matter of international law, particularly in respect of military necessity and proportionality.

- The Report claims that UN convoys into the Vanni were allegedly being used by the parties in the conflict, yet there is no evidence of the way in which this occurred, nor any analysis of the consequences for legitimate military action.[36]

- Alleged shelling of the PTK hospital – paras. 90-96 of the Report: there are some sources 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.[37] This occurs in other parts of the Report as well – certain sources report on the occurrence of an incident but without providing evidence of those who may have been responsible. It may be that these sources are in possession of such evidence, but without them being identified and made available it is impossible to assess their veracity. The overall value of the Report is undoubtedly diminished as a result.

[35] Darusman Report, para. 86.
[36] Darusman Report, para. 78-79.
[37] For example, Darusman Report, footnote 43.

- In this part the Report does note that the PTK hospital "was a strategic stronghold in the LTTE's fight against the SLA" and that the LTTE thus had a "sizeable presence" in the PTK.[38] The Report acknowledges that the LTTE were firing artillery from the vicinity of the hospital.[39] Once again, the significance of this evidence (which is not made available in any form) is unexplored. It is essential when considering the alleged attacks to take full account of these factors both to determine the source of the attacks and (depending in part on the answer to this question) the legality and proportionality of the return military action.

- 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. If they ever have been, questions over the reliability of such materials might arise; notoriously one particular series of news programmes (Channel 4) has drawn substantial, sustained and evidence-based criticism of unreliability from the Sri Lankan Government.

- Given that the UN had withdrawn from the Vanni by September 2008, as the Reports notes, there were virtually no international observers able to report on what was happening in the Vanni.[40] 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.[41] It is unclear from the Report the extent to which the information from these bodies has been relied on by the Panel and taken in account when shaping the Report.

- Second NFZ: paras 109-114 of the Report include allegations about the SLA inflicting civilian casualties "at the same time" as breaking through the LTTE defences.[42] UNICEF and ICRC reports are referenced, but it is not clear that

[38] Darusman Report, para. 94.
[39] Darusman Report, para. 94.
[40] Darusman Report, para. 76.
[41] Darusman Report, para. 76.
[42] Darusman Report, para. 109.

these reports contain any concrete evidence about the lawfulness of the alleged attacks and who was responsible for the particular deaths reported on. It is also not clear whether these are the primary sources relied by the Panel or whether there are witness statements or other confidential reports that constitute the underlying principal evidence.

- Other hospitals: the Report refers to attacks on other hospitals by the SLA, such as the Putimattalan hospital where only a single source is footnoted[43], an ICRC news release, which 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 when these allegations are reviewed about whether there is *any* primary evidence in existence on which the Panel based its conclusions. The extent to which the LTTE targeted the population and prevented injured persons from leaving the area, including via ICRC ships[44], 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.

- 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.[45] No source is provided for the wide-ranging allegations that are made about Government 'clandestine operations' against the LTTE.[46] 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.[47]

54. The lack of proper sourcing is a matter of particular concern when considering the Report's overall findings about the alleged shelling into the NFZs (which as noted above

[43] Darusman Report, paras 104-105.
[44] Darusman Report, para. 108.
[45] Darusman Report, paras. 138-171.
[46] Darusman Report, para. 63.
[47] Darusman Report, paras. 138-171.

forms a major part of the Panel's discussion of the alleged violations). The Panel acknowledged that the LTTE did not accept the NFZs as "binding".[48] 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.[49]

55. The Report records that as the LTTE suffered military setbacks in the final phases of the war, the NFZs were used as places to retreat with the civilian population being used by the LTTE to bolster their military campaign.[50] The extent to which the use of the civilian population – whether acting voluntarily or forced into action and whether this was known or not by the Government forces – should be taken into account when determining the lawfulness of any Government military action against the LTTE is not addressed at all in the Report. It could well be a critical issue. The truth may be – and it may be an underlying truth of greater significance than the Panel might like to be understood and known – is that the evidence of what occurred in these final phases in and around the NFZs is simply not available for analysis by the Panel and this has severely limited the Panel's ability to comment on these crucial questions.[51] Its failure properly and fully to acknowledge this limitation on its ability to do its work and to address a highly significant legal issue smacks of the same possible amateurism and enthusiasm referred to above. The issue would certainly be central to any full and robust legal inquiry into the alleged incidents, something the Panel has simply not undertaken.

[48] Darusman Report, para. 80.
[49] Darusman Report, para. 70.
[50] Darusman Report, paras 97-99.
[51] 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" (para. 76).

56. The civilians as LTTE fighters issue (above) is exacerbated as a problem for the Panel's conclusions by the Panel's failure to clarify the extent to which the civilian population – which was estimated to be about 300,000 - 330,000 persons – was itself targeted and killed by the LTTE. This may be an absolutely critical question given that the Report appears to allege that these same persons were unlawfully targeted by the Government. Once again, the lack of identified primary sources and analysis of these sources means that these vital questions are not addressed and the Report's credibility and integrity are much diminished as a result.

Alleged civilian deaths

57. This very same problem arises in the Panel's findings about the number of civilian deaths.[52] The Panel notes that "a number of credible sources" have estimated there to have been as many as 40,000 civilian deaths.[53] *None* of these sources is named in the Report, yet the figure is used in the Report and has been relied on repeatedly after publication of the Report as the correct figure with which to accuse the Government.[54]

58. It is well-known that there are other sources which estimate the figure to be much lower[55], but these are not mentioned in the Report. At the very least it would be expected that a UN report of this type should set out the various competing accounts. The Panel does acknowledge that only a proper investigation can lead to the identification of an

[52] Darusman Report, para. 132-137.
[53] Darusman Report, para. 137.
[54] Darusman Report, paras. 137. See also for example, U.N.: Sri Lanka's crushing of Tamil Tigers may have killed 40,000 civilians, Washington Post, 21 April 2011 (http://www.washingtonpost.com/world/un-sri-lankas-crushing-of-tamil-tigers-may-have-killed-40000-civilians/2011/04/21/AFU14hJE_story.html); Sri Lanka starts count of civil war dead, Aljazeera America, 28 November 2013 (http://america.aljazeera.com/articles/2013/11/28/sri-lanka-startscountingthecivilwardead.html); and Report of the Secretary-General's Internal Review Panel on United Nations Action in Sri Lanka, November 2012, para. 34. (http://www.un.org/News/dh/infocus/Sri_Lanka/The_Internal_Review_Panel_report_on_Sri_Lanka.pdf).
[55] See for example, University Teachers for Human Rights (Jaffina), "A marred victory and a defeat pregnant with foreboding", Special Report No. 32, 10 June 2009. Also see US Dept of State Report, Report to Congress on Incidents during the Recent Conflict in Sri Lanka, 2009, p. 15, which reported on the casualty figure being 6710 until 20 April 2009 without drawing any distinction between LTTE cadres and civilians killed.

accurate figure, but it has not provided the full range of views from which to begin this important task.

59. The UN Country Team figure of 7,721 (up until 13 May 2009) is mentioned in the Report but then disputed by the Panel without it explaining how it is that over 30,000 people could have been killed in the final days of the war up until 18 May 2009 if the figure of 40,000 is ever to be correct and accurate.[56] The Report provides no concrete evidence to support the considerable leap from the UN Country Team's figure of less than 10,000 to the substantial number of 40,000 adopted by the Report.

60. As noted above, the use of this figure by the Panel, over that of the UN Country Team, has been a central pillar in the argument of those who have accused the Government of being responsible for unlawfully killing civilians. The Report's reliance on such a high fatality figure has naturally drawn attention, condemnation, and the leveling of strong accusations. Hence, the need for scrupulous accuracy – which is lacking in the Report – before circulating any figures which can then be taken as credible when they are entirely unsubstantiated. Otherwise, the very real danger exists that those with genuine concerns about the truth of what happened can be misled and have their views fuelled and provoked by accounts that lack any truth and substance.

61. The Panel also refers to the numbers of persons who were able to leave the Vanni at different times (which it claims total approximately 290,000), but again without any reliable source materials.[57] It is thus hard to see how any of these figures can be relied on to try to support the very high fatality figures that are alleged.

62. An obvious gap in the Report's discussion of the number of deaths is how it can be said that these are all civilian deaths (whatever the number) or what portion of those who died were civilians entitled to the full protections of international humanitarian law. There is

[56] Darusman Report, para. 134.
[57] Darusman Report, para. 133.

no analysis of this vital issue which would plainly have to be at the centre of any assiduous investigation.

Lack of analysis of the alleged attacks under international law

63. The Report provides an overview of the law applicable to military attacks.[58] Yet it does not apply these intricate legal standards in any detail to the available evidence in reaching its conclusions about the unlawfulness of each particular alleged attack. The assertion is simply made repeatedly in the Report that the Government forces indiscriminately killed civilians, for example:

- Para. 100: "the SLA continuously shelled within the area that became the second NFZ from all directions. It is estimated that there were between 300,000 and 330,000 civilians in that small area". No source is provided for these figures other than a footnote that UN documents "generally reference this number".[59]

- Para. 105: "While individual incidents of shelling and shooting took place on a daily basis, destroying the lives of many individuals and families, the SLA also shelled large gatherings of civilians capable of being identified by UAVs [unmanned aerial vehicles]. On 25 March, an MBRL attack on Ambalavanpokkanai killed around 140 people, including many children". No sources are given for these claims and no evidence-based analysis is provided of the circumstances of the alleged incident.

- Para. 117: "The shelling within the third [and final] NFZ [declared on or about 8 May 2009] was such that it was impossible for the ICRC to conduct any more maritime rescues. As the SLA neared the hiding places of the senior LTTE leadership, its offensive assumed a new level of intensity, in spite of the thousands of civilians who remained trapped in the area". No study is made of

[58] Darusman Report, paras. 179-188, 181-208.
[59] Darusman Report, footnote 54.

the nature of the military actions involved, and no account is properly taken of the fact that, as noted by the Panel in the very next sentence, the LTTE leadership were sending many persons in to die in their defence, "including through suicide missions".

- Annex 3: the Panel attaches some examples of satellite imagery (of damage to certain sites) and diagrams of SLA artillery positions apparently derived from satellite images which purport to show the direction in which SLA artillery batteries were pointed at the NFZs over time. No expert report or evidence is provided with this material to explain its probative value and relevance to establishing whether any of the alleged attacks were unlawful. The Panel concedes that the images do not assist in showing *which* artillery hit any of the hospitals.[60] The materials are discussed briefly in the Report in order to accuse the SLA of adjusting their artillery to target the NFZs.[61] Yet no consideration is given to any evidence about whether these positions were used, and if so in what specific circumstances, to attack NFZs. The Report notes that the LTTE also had heavy weapons (although fewer and in less space from which to fire them).[62] No attempt is made in the Report to assess the extent of the LTTE's targeting of the NFZs and other areas with its heavy weapons and, most importantly, to juxtapose such evidence with any evidence of SLA artillery fire. The diagrams do not show or confirm any artillery fire.

- Para. 195: The Report asserts that "the Government of Sri Lanka did not respect the fundamental principle distinction [between combatants and civilians]". Yet it offers no examination of the particular circumstances in which this is said to have occurred *with the requisite intention to render the Government forces' conduct unlawful as a matter of international law*, or of the very real difficulties of making the distinction [between combatants and civilians] given the ways in which the LTTE was using the population in their final stand, and the fact that, as

[60] Darusman Report, p, 186.
[61] Darusman Report, para. 101.
[62] Darusman Report, para. 101.

the Report notes, uniforms were not always worn by the LTTE, its supporters and those who fought for them.[63] The Report accepted that the line between combatants and civilians was "blurred", but fails to apply this factual reality to any of the attacks under consideration.

64. This overly simplistic approach to characterising the alleged attacks represents a major flaw, as the Report simply does not grapple with the difficulties and intricacies of establishing whether any particular attack was justified militarily on all of the available evidence.

65. It is well-established under international law that military objects may be targeted and that an attack which causes loss of civilian life may be justified if it is not excessive in relation to the concrete and direct military advantage anticipated.[64] The range of factors to be taken into account when applying these legal standards to the evidence in question is sizeable and their application demands a meticulous study of all available evidence.

66. As the ICRC has noted:

> **"**Several States have indicated that in their target selection they will consider the military advantage to be anticipated from an attack as a whole and not from parts thereof. The military manuals of Australia, Ecuador and the United States consider that the anticipated military advantage can include increased security for the attacking forces or friendly forces.
> Many military manuals state that the presence of civilians within or near military objectives does not render such objectives immune from attack. This is the case, for example, of civilians working in a munitions factory. This practice indicates that such persons share the risk of attacks on that military objective but are not themselves combatants. This view is supported by official statements and reported practice. Such attacks are still subject to the principle of proportionality … and the requirement to take precautions in attack ... The prohibition on using human shields is also relevant to this issue".[65]
>
> "State practice often cites establishments, buildings and positions where enemy combatants, their material and armaments are located and military means of

[63] Darusman Report, para. 97.
[64] See, ICRC Commentary on International Humanitarian Law, Rule 14.
[65] ICRC Commentary on International Humanitarian Law, 'Interpretation' of Rule 8.

transportation and communication as examples of military objectives. As far as dual-use facilities are concerned, such as civilian means of transportation and communication which can be used for military purposes, practice considers that the classification of these objects depends, in the final analysis, on the application of the definition of a military objective. Economic targets that effectively support military operations are also cited as an example of military objectives, provided their attack offers a definite military advantage. In addition, numerous military manuals and official statements consider that an area of land can constitute a military objective if it fulfils the conditions contained in the definition."[66]

67. The ICRC has also clarified that in relation to the principle of proportionality and assessing the potential military advantage of any attack:

> "Several States have stated that the expression 'military advantage' refers to the advantage anticipated from the military attack considered as a whole and not only from isolated or particular parts of that attack. The relevant provision in the Statute of the International Criminal Court refers to the civilian injuries, loss of life or damage being excessive 'in relation to the concrete and direct overall military advantage anticipated' … The ICRC stated at the Rome Conference on the Statute of the International Criminal Court that the addition of the word 'overall' to the definition of the crime could not be interpreted as changing existing law. Australia, Canada and New Zealand have stated that the term 'military advantage' includes the security of the attacking forces."
>
> "Upon ratification of Additional Protocol I, Australia and New Zealand stated that they interpreted the term 'concrete and direct military advantage anticipated' as meaning that there is a bona fide expectation that the attack would make a relevant and proportional contribution to the objective of the military attack involved. According to the Commentary on the Additional Protocols, the expression 'concrete and direct' military advantage was used in order to indicate that the advantage must be 'substantial and relatively close, and that advantages which are hardly perceptible and those which would only appear in the long term should be disregarded'".[67]

68. It should also be taken into account that the ICTY Appeals Chamber has emphasised that the assessment of what constitutes an unlawful attack is a *complex* one that requires *several* factors to be taken into consideration.[68] The Appeals Chamber specifically rejected the Trial Chamber's standard for determining whether an attack was lawfully

[66] ICRC Commentary on International Humanitarian Law, 'Examples' of Rule 8.
[67] ICRC Commentary on International Humanitarian Law, 'Interpretation of Rule 14.
[68] Prosecutor v. Gotovina et al., Judgement, IT-06-90-A, 16 November 2012 (hereinafter "Gotovina Appeals Judgement").

carried out against a military target – "that all impact sites within 200 metres of a target … deemed legitimate could have been justified as part of an attack offering military advantage."[69]

69. Instead, the Appeals Chamber found that such a determination requires a much deeper and more detailed analysis of the facts and evidence. The Appeals Chamber noted that the Trial Chamber's standard failed to "explain the specific basis on which it arrived at a 200 metre margin of error as a reasonable interpretation of evidence on the record" and provided "no indication that any evidence" supported this standard.[70] The Appeals Chamber found that "detailed evidence" of such factors as "muzzle velocity, wind speed, air temperature and density" must be provided to ascertain the range of error compared to the location of impact.[71] In addition, the Appeals Chamber found that a rigid standard based on the impact site cannot be applied uniformly especially considering that the factors listed above "such as wind speed would affect range of error" and also that "increased distance from a target would increase range of error" as well.[72] The Appeals Chamber found that "detailed evidence" must be provided fully to evaluate these "crucial findings and calculations" before making a conclusion on the lawfulness of the attack.[73]

70. In addition, the Appeals Chamber found that evidence must be examined to determine whether there was "any indication that targets of opportunity existed" and whether the specific impact sites of the attack were "reasonably attributed to lawful attacks on opportunistic targets."[74] The Appeals Chamber found that any evidence supporting a conclusion that the alleged perpetrators "could identify tactical targets of opportunity, such as police and military vehicles" must be addressed and "discount[ed]".[75] If there is evidence supporting such a conclusion, the evaluation of the evidence must examine

[69] Gotovina Appeals Judgement, para. 57.
[70] Gotovina Appeals Judgement, para. 58.
[71] Gotovina Appeals Judgement, paras. 53, 58, 59.
[72] Gotovina Appeals Judgement, para. 60.
[73] Gotovina Appeals Judgement, para. 61.
[74] Gotovina Appeals Judgement, para. 63.
[75] Gotovina Appeals Judgement, paras. 62, 63.

"how, in these circumstances, it could exclude the possibility that … [the perpetrator's] … attacks were aimed at mobile targets of opportunity."[76]

71. The Appeals Chamber thus rejected the notion of "Impact Analysis" being critical in determining whether an attack was unlawful.

72. The Darusman Report, however, that was published without the advantage of the law as more recently articulated at the ICTY, appears to consider only the impact of the shelling, and does not identify, let alone consider in any detail, any of the various factors and issues set out above when addressing the particular attacks under consideration, or the final stages of the conflict as a whole. On the contrary, the Panel made sweeping and unsubstantiated conclusions based on its finding of "credible allegations" that "attacks on the NFZs were broadly disproportionate to the military advantage anticipated from such attacks."[77] This completely pre-judges the issue without any authentic and careful examination of all of the factors relevant to determining the lawfulness of military action.

Accountability mechanisms

73. The Report provides a very thorough overview of the different accountability mechanisms which could be adopted.[78] This part of the Report appears to be the primary purpose of the Report. However, as the Report itself recognises, the various potential avenues of accountability must by definition be shaped by the nature and extent of the alleged violations that were committed. It is here that the Report falls short in its assessment of the alleged violations which should be the subject of any accountability process.

[76] Gotovina Appeals Judgement, para. 63.
[77] Darusman Report, para. 203.
[78] Darusman Report, paras. 261-399.

74. This Review has thus focused on the Report's analysis, or rather its lack of rigorous analysis, of the underlying alleged violations by the parties to the conflict. The Report claims that the Government of Sri Lanka has failed to pursue effective accountability measures, but this is to put the 'cart before the horse' as any assessment of the Government's post-conflict inquiries and initiatives depends entirely on the what the available evidence shows about the nature and extent of any transgressions.

75. It is thus imperative that the proper precursor to any evaluation of the Government's accountability measures is a good faith and impartial examination of the available evidence of what actually occurred in the final stages of the war taking into account the developing and often complex legal standards applicable to armed attacks in times of armed conflict under international law.

76. There are at least four key issues that must be addressed on the available evidence, properly sourced and verified, in order that any appropriate accountability measures can be devised:

- The nature and extent of the LTTE's use of the population in the Vanni as part of their military campaign in the final phases of the war;

- The specific circumstances of the particular alleged attacks in the Vanni, analysed in light of the applicable legal requirements under international law including of distinction, necessity and proportionality to cover and compare both the actions of the Government and the LTTE (who the Report acknowledges were firing from and within the NFZs);

- The manner in which persons were treated after the conflict in order to ensure that hostilities were at an end and to guarantee the human rights of those on both sides under national and international law; and,

- The accurate numbers of deaths during the final period of the conflict (to the best extent possible), and the degree to which these were properly to be counted as civilian in all of the circumstances of the conflict. This figure must, of course, include the numbers killed by the LTTE as a result of their actions during and after the conflict.

77. The current work of the national authorities in Sri Lanka to investigate and prosecute any perpetrators, including prosecutions that have taken place, should also not be overlooked, based as they are on the available evidence.

Concluding remarks

78. A report of this kind, emanating from experts in the area, *could* have carried significant weight. The proper conclusion, on analyisis, may be that this Report chaired by Mr Darusman missed a great opportunity and has failed to do what it should, and could, have done in the interests of all the citizens of Sri Lanka.

79. This Review has highlighted the shortcomings of the Panel's work when measured against well-established legal standards for the assessment of evidence. The absence of identified and verified primary sources of evidence and information, susceptible to rigorous analysis, is a clear and substantial gap in, and weakness of, the Panel's workings. It dilutes / undermines / invalidates the Panel's conclusions and recommendations.

80. The Panel has, it is true, candidly indicated that further investigation would be required but the Panel has hampered – or perhaps rendered impossible – such an investigation by its Report's own – but unexplained – failure to reveal any of its primary sources, to the extent they exist in any useable form.

81. The work of the Panel has in many ways fallen between two stools. On the first stool the Panel accepted that it was not capable of conducting a full investigation. Despite that, and on its second stool, the Panel went on to make certain inquiries and to gather some evidence from sources (mostly unidentified) in order to make pronouncements of responsibility, however subtly expressed.

82. In a long (241 page) document such inconsistency might go undetected. This is why the Government's concern for a detailed analysis of the Panel's work was justified. It is also justification for how the Panel's work may now be exposed as having fallen between the two stools on which the Panel sought to stand.

83. Before starting its work the Panel should have sought a mandate to conduct a proper investigation in accordance with international legal standards, making plain that without such a mandate all it would be able to do was no more than to assemble allegations and counter allegations from all sides but without making any findings. It should have explained that without such a mandate it would inevitably be recommending further investigation in due course, investigation that would have to start from scratch, as is now the position. Instead, the Panel sought to reach conclusions and to make recommendations without showing any proper reservation about, or even understanding of, its willingly-accepted and very limited abilities.

84. Any future investigation – and any findings and recommendations by the UN or other bodies – will only be given any weight if it / they address this fundamental weakness and seek to contribute meaningfully to establishing an evidence-based, reliable record and only thereafter to identify appropriate accountability measures.[79]

85. Accepting – *without more* – the present findings of the Panel as reliable and as having been established (even though the Panel has stated that they are not proved) would be to subjugate cool reason and intelligence to what may be seen as an outcome popular for

[79] See, for example, Human Rights Council adopts a resolution on reconciliation, accountability and human rights in Sri Lanka, Office of the High Commissioner for Human Rights, 27 March 2014 (http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=14447&LangID=E).

those with limited understanding of the complex realities of the sort of armed conflict that was undertaken by the Government of Sri Lanka. The authors of this Review repeat that they have formed no conclusions, one way or another, about any of the issues central to the Darusman Report. Through this Review they note the incompleteness of the Report that, unhappily, purports to be what it cannot be.

Sir Geoffrey Nice QC
Rodney Dixon QC

24 July 2014
London

Sir Geoffrey Nice QC and Rodney Dixon QC, Review of "An Unfinished War: Torture and Sexual Violence in Sri Lanka 2009 – 2014",
6th June 2014

Review of "An Unfinished War: Torture and Sexual Violence in Sri Lanka 2009-2014"

Introduction

1. This is a Review of the Report titled "An Unfinished War: Torture and Sexual Violence in Sri Lanka 2009-2014" by Yasmin Sooka ("the Sooka Report").[1]

2. The Report alleges in forceful terms that the Sri Lankan Government and its security forces have committed appalling, widespread and systematic post-conflict crimes and crimes against humanity including abduction, arbitrary detention, torture, rape and sexual violence.[2] The Report claims to have established a *prima facie,* evidence-based case against the most senior officials in the Government and the security forces[3], and states that:

> *"[a]ction must be taken to bring the perpetrators to justice using the International Criminal Court and / or, an international tribunal as well as instigating national prosecutions under universal jurisdiction."*[4]

3. These are very serious allegations. The action proposed could have very serious consequences for the Government of Sri Lanka and might easily have an effect on processes of post-conflict reconciliation and adjustment presently being undertaken.

4. The Sooka Report was published by the Bar Human Rights Committee of England and Wales and the International Truth and Justice Project, which is trademarked as 'STOP'.

[1] Yasmin Sooka, "An Unfinished War: Torture and Sexual Violence in Sri Lanka 2009-2014", The Bar Human Rights Committee of England and Wales (BHRC) and The International Truth and Justice Project, March 2014 (hereinafter the "Sooka Report").
[2] See for example, Sooka Report, p. 6.
[3] Sooka Report, p. 6.
[4] Sooka Report, p. 7.

5. In addition to publishing the Sooka Report on its website, STOP has published several other reports concerning alleged crimes in Sri Lanka[5] including a report entitled "5 years on: The White Flag Incident 2009 – 2014."[6]

6. The same Yasmin Sooka was a member of the UN Secretary General's Panel of Experts whose report on was published in March 2011.[7]

7. This Review deals only with the Sooka Report, not with the UN report. It takes account, where appropriate, of the general approach adopted in other reports which will be examined in more detail in due course.

8. The Review does not assess the specific allegations that are set out in the 'evidence' in the Report. That would be a difficult, or impossible, task given that the underlying evidence of the Report has not been made available *in any assessable form. All* witnesses and *all* experts relied on in the Report remain anonymous on asserted security grounds.[8]

Standing of the Report given that it relies on anonymous witnesses and experts

9. There is a body of well-established case law from international courts dealing with such reports.

10. The International Criminal Court (ICC) has held that:

> *"Heavy reliance upon anonymous hearsay, as is often the basis of information contained in reports of nongovernmental organizations ("NGO reports") and press articles, is problematic … In such cases, the Chamber is unable to assess the trustworthiness of the source, making it all but impossible to determine what probative value to attribute to the information."*[9]

[5] See, http://www.stop-torture.com/#.
[6] 5 years on: The White Flag Incident 2009 – 2014 (http://white-flags.org/).
[7] Report of the Secretary-General's Panel of Experts on Accountability in Sri Lanka, 31 March 2011 (hereinafter the "Darusman Report").
[8] Sooka Report, p. 8, 16, 17.
[9] Prosecutor v. Gbagbo, Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute, ICC-02/11-01/11-432, 3 June 2013, para. 29.

11. The International Criminal Tribunal for the Former Yugoslavia (ICTY) found that reports created by non-parties "are hearsay in nature" and lack the reliability of the primary source material.[10]

12. The International Court of Justice (ICJ) refused to consider such reports based on the fact that they were second-hand accounts which were uncorroborated and potentially biased. The ICJ held that:

> *"The Court has not relied on various other items offered as evidence on this point by the DRC, finding them, uncorroborated, based on second-hand reports, or not in fact saying what they are alleged to say by the DRC, or even in some cases partisan. The Court has for such reasons set aside the ICG report of 17 November, the HRW Report of March 2001, passages from the Secretary-General's report on MONUC of 4 September 2000 (where reliance on second-hand reports is acknowledged); articles in the IRIN bulletin and Jeune Afrique".*[11]

13. The ICTY found in respect of NGOs that "these organisations' careful methods can at best assure the accuracy of the process for recording the information contained in the eventual report, not the reliability of the material contents for the purposes of use in criminal proceedings."[12]

14. The ICC has highlighted that the indirect evidence contained in reports must be approached with great caution.[13] It has emphasised that there are *"inherent difficulties in ascertaining the truthfulness and authenticity of such information."*[14]

15. It is also a general principle that evidence from anonymous witnesses is of extremely limited value and must be approached with the utmost caution. The ICC has highlighted

[10] Prosecutor v. Milutinovic, Decision on Evidence Tendered through Sandra Mitchell and Frederick Abrahams, IT-05-87-T, 1 September 2006, para. 16.
[11] Case Concerning Armed Activities on the Territory of the Congo (DRC v. Uganda), Judgment of 19 December 2005, para. 159.
[12] Prosecutor v. Milutinovic, Decision on Evidence Tendered through Sandra Mitchell and Frederick Abrahams, IT-05-87-T, 1 September 2006, para. 21.
[13] Prosecutor v. Bemba, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ICC-01/05-01/08-424, 15 June 2009, para. 51.
[14] Prosecutor v. Mbarushimana, Decision on the confirmation of charges, ICC-01/04-01/10-465-Red, 16 December 2011, para. 78.

that, *"Proving allegations solely through anonymous hearsay puts the Defence in a difficult position because it is not able to investigate and challenge the trustworthiness of the source(s) of the information".*[15]

Immediate conclusions

16. In consequence of these authorities - and as a matter of common sense - this Report can be said *at this stage* to be of no use or value to the Government of Sri Lanka or to any international body concerned to investigate the crimes said to have been committed.[16]

17. There is nothing - not one thing or person - to whom officials of the Government of Sri Lanka could turn as a result of this Report to start a proper forensic investigation of any of the crimes alleged. [17]

18. There is nothing in the Report, as now available, that could justify the ICC or any other criminal justice body starting an investigation – its investigators would have no identified person or document to turn to in order to start a proper investigation.[18]

[15] Prosecutor v. Gbagbo, Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute, ICC-02/11-01/11-432, 3 June 2013, para. 29.

[16] Organisations are free, subject to the laws of defamation, to publish whatever reports they choose. Reports that make allegations of misconduct by governments and their forces should always be considered by the government concerned and often should be taken seriously by that government. Where, as here, the report is connected to people of repute - such as Archbishop Desmond Tutu - then any government would probably want to give serious thought to the contents of such a report and to act on it if it could. Without detail attributed to identifiable, accessible individuals or documents the Government of Sri Lanka can do little or nothing to investigate in detail what is alleged.

[17] To react to this Report - beyond deconstructing it in the way achieved in a few paragraphs below - may be to give it more credit than it is worth, at least at this stage. It might also run the risk of protesting too much about something that *can* draw some protest, *should* stimulate investigation (to the extent any is possible on the basis of what is set out in the Report) but *should not* elicit concern.

[18] Of course the ICC might have more success approaching the Report's authors for detail - otherwise withheld as confidential / secret etc - that the Government of Sri Lanka could expect.

Examination of the Report and its Methodology

19. The Sooka Report states that its findings are based on the following evidence:

- "*40 sworn statements from witnesses - half men and half women - who testified to their experiences of abduction, torture, rape and sexual violence by the Sri Lankan security forces. The abductions and torture described all occurred within the time frame of May 2009 to February 2014, i.e. post-war. More than half of the abductions recorded in this report took place during 2013 and 2014. Almost all the incidents in this report occurred from 2011 onwards*."[19]

  COMMENT

  These statements, even in some redacted form, are not available with the Report. Instead, the author has selected certain anonymous extracts (seemingly the most striking passages) and quoted them in various places in the Report. The persons who interviewed these witnesses are not identified.

- "*The witness testimony is supported by detailed medical and psychiatric records in 32 of the 40 cases, but given some have only very recently arrived in the UK this was not always available*."[20]

  COMMENT

  None of these records is appended or even cited to in any way. It is not clear who prepared these reports and in what circumstances. It is not explained why these persons must also remain anonymous.

- "*The evidence of two internationally recognised experts on torture with experience in examining hundreds of Sri Lankan asylum claimants.*"[21]

  COMMENT

  These experts are not identified and their evidence is not made available - *in any form, redacted or otherwise* - with the Report. A very short extract from the

[19] Sooka Report, p. 6.
[20] Sooka Report, p. 7.
[21] Sooka Report, p. 7.

report of one of the experts is quoted in the Report. It does not appear that these experts have interviewed any of the 40 witnesses, and it unclear on what basis the experts have drawn, or are able to draw, any conclusions about their reliability. The methodology and work of these experts is not explained in the Report. No reason is given for why they must remain anonymous when they are 'internationally recognised experts'.

- "*In addition to the 40 statements, 57 medico-legal reports pertaining to different cases were made available by immigration lawyers (40 male and 17 female clients). All dealt with torture in the period 2006-12. Of these 28 also alleged they were raped or subjected to sexual violence by the Sri Lankan security forces*."[22]

COMMENT

None of these reports is made available, nor is any of them even summarised.

It is on the basis of these statements that the Report concludes that crimes against humanity have been committed and orchestrated from the highest levels of Government.

Yet, the immigration lawyers involved are not identified. It is not confirmed whether any or many of these 57 other 'cases' were resolved in favour of the clients concerned on the basis of allegations they made. It is not explained in the Report what comparison, if any, was undertaken between the 57 medico-legal reports and the 40 statements taken by the investigators. This should have been done as it is asserted that the 40 witnesses *are* a 'sample' of a much wider pattern of abuse, something impossible to assert without, as a minimum, checking for and recording consistency / inconsistency of the 40 statements with the 57 reports.

[22] Sooka Report, p. 7.

20. The Report's account of its methodology includes:

- *"All the witness interviews were conducted outside of Sri Lanka" because "[i]t would not have been possible to conduct this project inside the island, given the lack of effective witness protection measures there."*[23]

  "Witness protection was paramount throughout this project. Investigators ensured the anonymity of the witnesses and their current locations was maintained, as well as those of family members living in Sri Lanka and elsewhere. The names of witnesses and their family members, and any information that could lead to their identification, has purposefully been concealed in an attempt to minimise risks of retribution, given that the accounts contain allegations of ill-treatment and torture by members of the security forces."[24]

  COMMENT

  According to the Report alleged crimes described by witnesses were not random and isolated cases. This proposition supports the main argument of the Report that the alleged crimes were part of a well-planned policy emanating from the highest levels of authority.

  However, it appears from the narrative of the Report that witnesses were, in fact, well-known to the security forces, easily identified and had all been monitored by the authorities. Despite that, and notwithstanding the gravity of the alleged crimes, families of the witnesses in Sri Lanka were able to pay bribes to the security forces for the witnesses' release and for them to be allowed to leave Sri Lanka.

  With the most important witnesses of the allegedly gravest crimes being known to the authorities but also being allowed to leave Sri Lanka for a mere bribe, it is hardly surprising that the effectiveness of the witness protection claimed by the witnesses is not discussed in the Report.

[23] Sooka Report, p. 16.
[24] Sooka Report, p. 16.

The Report does not address whether redacted statements could be made available so that full witness statements (but for any identifying information) could be examined.

- *"The detailed statements were taken by nine independent lawyers from Western and Asian countries. The majority of these lawyers have many years of experience in criminal and international litigation, and some are familiar with the Sri Lankan conflict and its aftermath. It took an average of two and a half days to complete each witness statement."*[25] *... the investigation team "cannot be named for the protection of the witnesses."*[26]

  COMMENT

  The Report offers limited detail about the investigative team who conducted the witness interviews.

  It is most unusual for those who investigated crimes also to remain anonymous.

  The Report does not explain the reasons for this measure other than that it is required for the protection of the witnesses.

  The Report does not say why the identities, backgrounds and professional reputations of the investigators would in any way expose the witnesses to risk. Any genuine reason - if one exists - for obscuring identities etc could assist a reader of the Report in assessing its reliability.

- *"Naturally, it was critical that investigators did not take at face value and uncritically the accounts that were given to them, and the credibility of the accounts was carefully assessed and probed. The witnesses were asked open-ended questions about their experience in order to enable a full account to be taken, and to ensure that an account untainted by any preconceptions from an individual investigator emerged - effectively to ensure that the witness gave their account without detailed prompting and in their own words. The investigators assessed the credibility and demeanour of each witness and sought to identify*

[25] Sooka Report, p. 16.
[26] Sooka Report, p. 8.

inconsistencies within their statements as well as any external inconsistencies based on facts proven independently."[27]

COMMENT

Without knowing the identities and backgrounds of the investigators no value of any kind can be placed on this passage.

It is impossible to know whether guidelines were followed without seeing the witness statements produced and all other relevant materials.

The Report does not say whether or how interviews were recorded. Tape recordings, for example, are a sure way of verifying that questioning is conducted properly.

Nothing is said of what documents the witnesses may have relied on, and whether they had in fact given any statements previously. (It is noted in the Report that witnesses were asked whether they had provided statements previously to other organisations without then saying whether such statements had in fact been given, or whether any pre-interview discussions about these events had previously taken place in any form[28]).

- *"Sworn statements were also provided by two independent international medical experts who have assessed hundreds of torture claims from Sri Lankans, and many more from other countries, and who have served as qualified experts for courts, tribunals, immigration boards and commissions of inquiry panels."* [29]

COMMENT

No reason of any kind is given for the identities of the two international experts being withheld. Expert opinions add value to reports, or to evidence in courts, because of their publicly known and verifiable records *as experts*. Without this

[27] Sooka Report, p. 17.
[28] Sooka Report, p. 17.
[29] Sooka Report, p. 16.

information there is simply no way of knowing whether the expert is worth anything or adds anything.

The medico-legal experts in the UK are similarly all unnamed. The Report merely asserts that they followed internationally recognised methodologies and that their examinations corroborate the primary accounts of the witnesses, with no further details provided.

- "*Witnesses were identified through networks of journalists, law firms, social workers, aid workers, human rights researchers and doctors. The witnesses are unknown to each other. Some witnesses have refugee status; others had asylum applications that were pending at the time of their statements."*[30]

COMMENT

None of these persons is identified.

The 'network' system is not explained.

Without this information the true independence of witnesses and their freedom from contamination by 'journalists, law firms, social workers and the like' is impossible to assess.

The Report claims that witnesses "*are unknown to each other*", without any further explanation. It is critical to know the extent to which witnesses had had contact with each other or others (like lawyers, social workers) who have been in contact with other witnesses.

Given that the Report notes "the purpose" of the investigation was "to ascertain if the individual case might form part of a pattern of abuse and whether it was organised", then this information is even more important. Similarities of account can reflect, at one extreme, contamination of witnesses or, at the other, honesty of

[30] Sooka Report, p. 16.

witnesses giving evidence of a repeated pattern of criminal conduct. Assessing what the significance of similarities between witness accounts may be requires having maximum material about the witnesses concerned. The Report does note that "investigators looked for any evidence of collaboration among the witnesses" without saying whether any was found.[31] Without detail of how witnesses were discovered, handled and interviewed, no assessment of any kind can be made of whether witnesses were independent of each other or of other influences.

- *"Most of the torture and sexual abuse alleged by the witnesses took place as recently as 2012, 2013 and 2014, with alleged involvement of, high-ranking officers in the Army, members of the Criminal Investigation Department (CID), Terrorist Investigation Division (TID) and other members of the police force."* [32]

COMMENT

This key assertion that specific branches and divisions of the Army, police and security forces were involved is a central plank in the Report's conclusion that the alleged crimes were planned at the highest levels of Government.

There is no explanation of how the witnesses were able to say that the alleged perpetrators were members of particular forces or divisions.

As noted above, the Report states that witnesses were released in exchange for bribes paid by families. Until that moment, it seems, the locations of, and persons allegedly involved in, detention, torture, and rape had remained concealed. However, according to the Report, the captors were then prepared to expose their identities, and possibly thereby the identities of their units, to the families of those who had been abused and to release their captives.

Review of witness statements and other relevant materials is essential for an understanding of these and other oddities in the summarised accounts of events given in the Report.

[31] Sooka Report, p. 17.
[32] Sooka Report, p. 16.

- *"Some witnesses whose previous asylum applications were unsuccessful reported being abducted upon their return to Sri Lanka by the security forces, who knew of their failed asylum applications. Once in detention, they were subsequently repeatedly tortured and sexually assaulted until, in cases documented in the study, bribes could be used to procure release and they managed to leave the country again"* [33]

  COMMENT

  Asylum seekers have an obvious interest in showing that they have been the subject of severe abuse to guarantee the success of their applications to remain in the UK.

  The Report notes that "some" of the witnesses' previous asylum applications had been rejected (without specifying a number). It cites to one of these witnesses who claims that her application was rejected because the UK Home Office acted improperly in the conduct of her case. She went as far as to claim that the Home Office interrogated her in a way which reminded her of being interrogated in Sri Lanka.

  This is a very serious allegation to level against the Home Office. The Report does not state whether any complaint has been made, and whether the matter has been followed up and determined. No further details are given in the Report about the basis on which this application and the applications of other witnesses have been rejected.

  These matters are plainly relevant to the credibility of the accounts given by the witnesses as asylum applications are most often rejected on the basis of inconsistencies and untruths in the applicants' statements.

- *"Only a small number of this group had been involved in active combat, with the vast majority having worked as medics or aid workers or low level operatives*

[33] Sooka Report, p. 19.

functioning as couriers and messengers and not being involved in active combat at all. At least 10% had members of their families in the LTTE but were not personally involved. In terms of those who joined the LTTE, many of them were forcibly recruited at a very young age and most indicate that they tried to leave the LTTE before the final phase of the conflict. It is clear that witnesses in this sample posed a very low security risk." [34]

COMMENT

The Report is silent on whether these matters were raised in the asylum applications. No justification is given for the 'low security risk' conclusion, beyond an assertion that although some of the witnesses had been involved in active combat, most had only been assisting the LTTE without being engaged in combat at all.

Active involvement in the LTTE is perhaps the single factor most likely to lead to a witness lying about his / her experience. The Report provides no material of any kind to allow the reader of the Report to know whether one, many or all of the witnesses were in fact active in the LTTE.

This central issue can only be properly examined by having access to all of the available evidence and being able thoroughly to investigate the assertions made.

21. The above shortcomings of the Report are blindingly obvious. They constitute very serious gaps in the Report, but they are gaps that have been left there by choice; they could have been filled in many ways. They render the Report more or less valueless as a tool for the Government of Sri Lanka to use in making inquiries that it would *want* to make, or for an international court to use in investigating whether to start a proper investigation into criminal wrongdoing by the Government.

[34] Sooka Report, p. 31.

The right to publish – the duty to be responsible – the presumption of innocence

22. It is worth having in mind that the presumption of innocence is not just a rule that is applied to individual defendants on trial for specific offences. The fundamental principle of the presumption of innocence applies both within national jurisdictions and internationally. It should serve to protect institutions and individuals from any statements or conclusions made in public as to their guilt before the allegation has been tested in a court of law.

23. Jurisprudence from the European Court of Human Rights and the European Commission has found that a person's right to the presumption of innocence is violated if opinions are made in public which indicate that the person is guilty of crimes before such accusations have been proven in court.

- In *Krause v. Switzerland*, the European Commission stated that all individuals are "against being treated by public officials as being guilty of an offence before this is established according to law by a competent court."[35]

- The European Court of Human Rights found that the presumption of innocence will be violated if:

  "a statement of a public official concerning a person charged with a criminal offence reflects an opinion that he is guilty before he has been proved so according to law. It suffices, even in the absence of any formal finding, that there is some reasoning to suggest that the official regards the accused as guilty."[36]

24. Conclusions made in public concerning the possible guilt of an individual for alleged crimes must be made carefully and with the necessary discretion in order to avoid even a misunderstanding about the guilt of the person implicated:

- In *X. v. the Netherlands*, the European Commission emphasised that:

[35] Krause v. Switzerland, Decision, application no. 7986/77, 3 October 1978, p. 75.
[36] Daktaras v. Lithuania, Judgment, Application no. 42095/98, 10 October 2000, para. 41.

"*in its view, public authorities, in particular those involved in criminal investigations and proceedings, should be most careful when making statements in public, if at all, about matters under investigation and on the persons concerned thereby, in order to avoid as much as possible that these statements could be misinterpreted by the public and possibly lead to the applicant's innocence being called into question even before being tried.*"[37]

- The European Court of Human Rights affirmed that information about investigation must be released to the public "with all the discretion and circumspection necessary if the presumption of innocence is to be respected."[38]

25. As is obvious - see footnote 16 above - STOP can publish what it likes and in whatever form subject to the law of defamation. Whether it is responsible to publish a report that broadcasts grave allegations against a government that cannot then be investigated by the government is another matter. It is hard to think that the authors - and even the endorsers - of the Report were unaware of its limitations and its likely longer term effects. If the Report is turned to by authorities outside Sri Lanka then the authors could provide such detail as they may have to advance the attack on Sri Lanka implicit within the Report. If for whatever reason, no further action is taken by international authorities then the Sri Lankan Government will be unable to respond in detail to what the Report contains. But the Report will stand as a report of apparent authority. It will have made mud stick.

Concluding observations

26. The stated objective of the Report is to show that the Government of Sri Lanka and its authorities have perpetrated very serious international crimes. It makes robust conclusions on culpability:

"*This legal analysis is based on the sworn testimony of forty recent survivors of torture and sexual violence in Sri Lanka. It indicates that the Government of Sri*

[37] X. v. the Netherlands, Decision, application no. 8361/78, 17 December 1981, p. 43.
[38] Case of Allenet de Ribemont v. France, Application no. 15175/89, Judgment, 10 February 1995, para. 38.

Lanka is today operating a policy of systematic and widespread torture, rape and sexual violence, well after the end of the civil war in 2009."[39]

27. The Report aims and serves to brandish the Sri Lankan Government and all of its authorities as being criminally responsible for heinous crimes, without recognising any of the limitations of the Report. Indeed it goes so far, it might be thought, as to imply that all ordinary citizens who could support such a Government and who are not part of the targeted Tamil minority, are complicit in permitting these violations to continue in their country.

28. Yet, as explained above this Report would be assigned virtually no weight in a court of law as lacking probative value, despite the claim of being assembled in accordance with unassailable legal rigour.

29. The Sri Lankan Government and public, and the wider international public, need to assess the Report's integrity and reliability but cannot do so. The Report stands - or falls - on its own unexplained processes, unrevealed witness statements and the findings of anonymous individuals. These expressed as neutrally as possible are grave limitations.

30. Yet the Report has not addressed these limitations and, it appears, none of its recipients or endorsers has chosen to face up to them. The findings of the Report have instead been advanced as being, and have been endorsed as being, conclusive - for example the statement from Archbishop Tutu that is cited in the Report says:

> "This indicates the Sri Lankan government has achieved its aim in destroying these souls [referring to the witnesses who the Reports states have sought to kill themselves after leaving Sri Lanka]".

With respect to the Archbishop a report lacking any detail susceptible to further testing or inquiry is unlikely to merit such a ringing, unqualified endorsement and it is perhaps

[39] Sooka Report, p. 110.

unfortunate that he was persuaded by what is rhetoric, not analysis, in the report to write as he did.

31. Reports like the Sooka Report are, as a general rule, not given any weight before international courts. The Report itself would be regarded as hearsay and secondary evidence to which little weight, if any, could be attached for the purpose of proving its contents.[40] It is, of course, a different matter if the underlying evidence is available to the court to be scrutinised.

32. Another Report by STOP on the 'White Flag Incident' makes similar far-reaching claims, including that "An analysis of the available evidence [which is not identified or made available] points to an organised government plan at the highest level not to accept the surrender of the top civilian, administrative and political leadership of the LTTE - but rather to execute them."[41]

33. The review and measurement of the Sooka Report (and other reports) against proper legal standards is vital. It is these legal standards of fairness and due process which underpin the human rights norms on which the Report draws to condemn the Sri Lankan Government. Our review of the Sooka Report shows that it does not meet those standards.

Sir Geoffrey Nice QC

Rodney Dixon QC

6 June 2014

London

[40] Prosecutor v. Bemba, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ICC-01/05-01/08-424, 15 June 2009, para. 47.

[41] See White Flag Report on STOP website. Contrast, to an extent, The Darusman Report, which concedes that its "mandate precludes fact-finding or investigation"[41] and that, therefore, much of the evidence relied upon was not collected first-hand, particularly statements from witnesses. This Report notes that its examination included "submissions received by the Panel during the course of its work in response to its notifications posted on the United Nations website" but that "these could not be individually verified."[41]

Sir Geoffrey Nice QC and Rodney Dixon QC, "Legal opinion concerning the law applicable to Military Operations in the Final Stages of the Armed Conflict between the Government of Sri Lanka and the LTTE that ended on 19th May 2009 following intense combat in the Vanni Area of Northern Sri Lanka," 22nd August 2014

LEGAL OPINION

Introduction

1. We have been asked to provide a legal opinion concerning the law applicable to military operations in the final stages of the armed conflict between the Government of Sri Lanka and the LTTE that ended on 19 May 2009 following intense combat in the Vanni area of Northern Sri Lanka.

2. Our Opinion reflects known factual circumstances of the final months of the conflict and does not address other hypothetical conduct by either side of the conflict.

3. Various reports produced to date have blamed the Government of Sri Lanka for its armed forces unlawfully attacking civilians, particularly in so-called No-Fire Zones which were set up by the Government to seek to protect civilians, in the final stages of the conflict. However none of these reports has considered properly, or at all, the complex legal standards applicable to military operations at the stage in a conflict that had been reached in this conflict in early 2009.[1]

4. As a minimum, principles of distinction and legitimate targeting, military necessity and proportionality have to be addressed before judgment about the rights and wrongs of a military attack can be made. The law in this field is not at all settled in many respects and may be regarded as generally undefined. 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. The relevant law, it can be argued, should not be discussed in a casual way – in the press, on television, in international organisations etc – if its possible application to parties in armed conflict is going to lead

[1] See for example, Report of the Secretary General's Panel of Experts on Accountability in Sri Lanka, 31 March 2011 (hereinafter "Darusman Report"); and, Yasmin Sooka, "An Unfinished War: Torture and Sexual Violence in Sri Lanka 2009-2014", The Bar Human Rights Committee of England and Wales (BHRC) and The International Truth and Justice Project, March 2014 (hereinafter the "Sooka Report").

to lasting condemnation of one side and exoneration of the other. Such discussion may reflect *instinctive* reactions to the horrifying consequences of battle quite without recognition of the inevitability of grave loss of civilian life being caused where a losing party takes desperate measures to avoid defeat and surrender at a time when defeat and surrender is unavoidable.

5. As far as is known, no report to date has sought to provide a thorough analysis of the application of the law, as presently defined and understood, to the specific factual circumstances of the latter stages of the Sri Lanka - LTTE conflict. Nor has any report – so far as is known – proposed alternatives to the military approach taken by the Government of Sri Lanka and backed up such proposed alternatives by expert military opinion.

6. This Opinion seeks to be a milestone in the process of rigorously defining the 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. Our opinion would, of course, be subject to adjustment if further investigation reveals other significant occurrences that should be taken into account.

7. If the approach taken in this Opinion is followed, well-reasoned and dispassionate findings can be reached in the best interests of all concerned, particularly the victims and citizens of Sri Lanka. Only in this way can we at least *approach* the truth – elusive though that may always be – of the closing phase of this long and bloody conflict.

8. The Opinion sets out the applicable legal framework within which to assess the conduct of the parties in the final months of the conflict. Our conclusion is that, subject to the full factual circumstances being established, the applicable legal standards *did* allow Sri Lanka Government forces to attack the LTTE and its military locations wherever those were established including within No-Fire Zones. 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 protected by civilian 'human shields' in embedded positions, particularly in the No-Fires Zones which were not recognised by the LTTE. In the cascade of difficulties facing the Government in its attempt to end a civil war, assessments had to be made from a distance about whether the human shields were (i) voluntarily involving themselves in the hostilities and thus to be treated as legitimate targets under International Humanitarian Law (IHL), or (ii) were 'hostages' who had been forced to act as shields and / or perform military tasks.

9. Merely to identify the problem is to articulate its scale. But it was not a problem that the legitimate government of the country could overlook / postpone indefinitely / ask others to solve for it. The Sri Lankan Government had a responsibility to recover its proper lawful authority but it had to comply with relevant international law.

10. 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. As explained below, the peculiar circumstances of the final months of the conflict – which are largely not contested – were ones in which the Government's forces 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 civilians by the LTTE.

11. The problem the Government 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* - in this Opinion or elsewhere - that what was done was lawful or unlawful. As revealed in the analysis of law and practice that follows, this is an area of 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 necessarily 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 prosecuting a case against the Government for 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 condemning of the Government – has failed to reflect this proper practice by seeking independent *military* analysis of what was done. Instead it has generated an emotional response by presenting emotionally charged visual imagery and a simple explanation of the law (at best), all coupled to statistical information that is usually or always highly controversial.

Outline of key factual circumstances

12. The overall factual circumstances of the final months of the conflict are distinctive and possibly unique. No other known conflict has mirrored the characteristics of this decisive stage of the conflict in Sri Lanka when the LTTE was on the verge of being conquered after over 30 years of war but sought, in a compacted period of time and territory, to take every possible step to avoid being completely overwhelmed.

13. It is not disputed that the LTTE in the final stages of the conflict exerted considerable control over large sections of the civilian population, many of whom were its supporters in the broadest sense, in the Vanni in order to seek to protect the LTTE and advance its military cause. The LTTE 'deployed' the civilian population in various ways to support its military objectives including by using them as 'human shields' and compelling them to serve as part of its armed forces and to perform military tasks. Much of this activity occurred in the Government's designated No-Fire Zones where the civilian population had gathered to seek protection, but which were not recognised by the LTTE. It is reported that the LTTE deliberately moved its forces and materials into these areas to embed itself in the civilian population. To the extent that it is shown that these zones

were a small part of the overall territory that was controlled by the LTTE at any given time, it would further demonstrate that the LTTE was intent on shielding its forces in civilian areas as opposed to fighting in areas less populated by civilians. This strategy was employed by the LTTE in an attempt at any cost to prevent the Government from obtaining an outright military victory in the final months of the conflict as the LTTE faced a comprehensive defeat.

14. The Report of the Secretary-General's Panel of Experts on Accountability in Sri Lanka[2] found that there were "credible allegations" that in the time period between September 2008 and 19 May 2009 around 300,000 to 330,000 were held as hostage in the Vanni area by the LTTE and used as human shields at times to seek to avoid being vanquished.[3] The Report states, *inter alia*, that:

> "*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.*"[4]

15. This specific pattern of conduct by the LTTE in the final months was allegedly used to attempt to draw international attention and intervention, as well as to try, at least, to arrange a cease-fire to prevent the LTTE's demise and to allow it to re-group. It is confirmed in various reports that commented in particular on the use of human shields by LTTE forces:

[2] Report of the Secretary General's Panel of Experts on Accountability in Sri Lanka, 31 March 2011.
[3] Darusman Report, p. ii.
[4] Darusman Report, p. iii.

- In 2011, Amnesty International published a report that concluded that, based on information independently gathered such as eyewitness testimony and information from aid workers, "*the LTTE used civilians as human shields and conscripted child soldiers*."[5]

- 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 cable of de Maio's information states that the LTTE "*saw the civilian population as a 'protective asset' and kept its fighters embedded amongst them.*"[6]

- On 26 March 2009, the UN Under Secretary-General for Humanitarian Affairs and Emergency Relief Coordinator, 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*."[7]

- 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 be used by the LTTE forces to bolster their military campaign.[8]

[5] When Will They Get Justice? Failures of Sri Lanka's Lessons Learnt and Reconciliation Commission, Amnesty International, 2011 (http://www.refworld.org/docid/4e69a9969.html).
[6] Subject: Sri Lanka: Declared Safe Zone Inoperative; ICRC Contemplates Full Withdrawal, US Embassy cable, 27 January 2009 (http://dazzlepod.com/cable/09COLOMBO95/).
[7] UN Security Council briefing of Under Secretary-General for Humanitarian Affairs and Emergency Relief Coordinator, 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).
[8] 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).

- The testimony of eyewitnesses like Dr. Shanmugarajah before the Commission of Inquiry on Lessons Learnt and Reconciliation in November 2010 may also be relevant. Dr. Shanmugarajah's testimony described the time period from January to May 2009. He stated that his work at Kilinochchi and Mullaitivu hospitals, that was affected by the nearby fighting, included the treatment of both civilians and LTTE combatants who sustained injuries from shelling attacks nearby the hospital. He also stated that civilians would come to the hospital after being shot by LTTE forces for trying to move to safer areas.[9]

16. It has also been recorded, and it does not appear to be disputed, that LTTE combatants fired artillery from civilian areas and from civilian installations in the No-Fire Zones in order to seek to shield themselves from attack by Government forces:

- 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.*"[10]

- On 26 March 2009, the UN Under Secretary-General for Humanitarian Affairs and Emergency Relief Coordinator, 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*."[11]

- 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*

[9] Commission of Inquiry on Lessons Learnt and Reconciliation, Testimony of Mr. Dr. V. Shanmugarajah, 19 November 2010.
[10] Darusman Report, p. iii.
[11] UN Security Council briefing of Under Secretary-General for Humanitarian Affairs and Emergency Relief Coordinator, 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).

concentrations."[12] 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"*.[13]

- 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.*"[14]

- A US cable relaying information obtained from the ICRC Head of Operations for South Asia, Jacques de Maio stated that "*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.*"[15]

- It is also reported that the LTTE continued to pursue its policy of using suicide bombers to target the civilian population during the conflict and even after it had ended.[16]

[12] Ambassador Publicly Urges Protection of ICPs (https://www.wikileaks.org/plusd/cables/09COLOMBO95_a.html).
[13] Ambassador Publicly Urges Protection of ICPs (https://www.wikileaks.org/plusd/cables/09COLOMBO95_a.html).
[14] 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).
[15] Subject: Sri Lanka: Declared Safe Zone Inoperative; ICRC Contemplates Full Withdrawal, US Embassy cable, 27 January 2009 (http://dazzlepod.com/cable/09COLOMBO95/).
[16] Darusman Report, para. 117.

17. It has been emphasised that the lack of uniforms worn by LTTE forces often made it very difficult to be able to draw clear distinctions between civilians and armed forces. It was noted in the Darusman Report that the LTTE's "positioning of mortars and other artillery among IDPs" and the fact that "LTTE cadre were not always in uniform" led to "retaliatory fire by the Government, often resulting in civilian casualties."[17] The Darusman Report further found that forcefully using civilians to dig trenches and other military facilities contributed "*to blurring the distinction between combatants and civilians and exposing civilians to additional harm.*"[18] As set out below, this is a matter of particular importance when considering the application of the law on distinction and proportionality, particularly in circumstances when human shields are being employed either voluntarily or under compulsion.

18. An obviously vital issue - which is disputed - is the number of civilians who were killed in the final months of the conflict, and in particular (leaving aside who was responsible for these deaths) what proportion of these persons could be regarded as directly participating in hostilities which would have allowed them to be legitimately targeted under IHL.

19. The Darusman Report claims that the figure for civilian deaths is "a range of up to 40,000"[19] but concedes that further investigation is required.[20] Although the Darusman Report asserts that there are a "number of credible sources" for this figure, none is identified and the Report fails to give any description or breakdown of the circumstances of each of these deaths, the basis for their alleged 'civilian status', or who may be responsible. Other sources estimate the figure to be much lower including a US State Department Report which stated that between January and April 2009 a figure of 6,710 casualties represented deaths of both LTTE cadres and civilians.[21] It also has to be taken

[17] Darusman Report, para. 97.
[18] Darusman Report, p. iii.
[19] Darusman Report, para. 137.
[20] Darusman Report, para. 137.
[21] US Dept of State Report, Report to Congress on Incidents during the Recent Conflict in Sri Lanka, 2009, p. 15 (http://www.state.gov/documents/organization/131025.pdf).

into account that there is evidence that the LTTE sought to exaggerate the number of civilian casualties.[22]

20. The true number of people killed in the conflict is of critical significance to the application of the laws of war, especially in respect of whether any *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).

Applicable legal standards under International Law

21. The relevant legal rules – which constitute the prevailing law - are dealt with in two parts: (i) an outline of the core principles of distinction, military necessity and proportionality, and the complexities of their application, and (ii) an explanation of whether the use of civilians in the hostilities and particularly as human shields (as part of a deliberate and widespread policy) prevents military objectives from being attacked lawfully, and if not, under what circumstances are attacks permissible – a critical question which lies at the heart of the inquiry into the final period of the Sri Lankan conflict.

i. *Protection of civilians and the principle of proportionality*

22. A central tenet of IHL is that the parties to a conflict may not directly target and attack civilians and the civilian population. Article 51(1) and (2), and Article 57(1) of Additional Protocol I prohibit attacks on civilians.[23] Article 52(1) provides the same

[22] Darusman Report, para. 130, 134. See also, Commission of Inquiry on Lessons Learnt and Reconciliation, Testimony of Mr. Dr. V. Shanmugarajah, 19 November 2010.

[23] Geneva Conventions, Protocol I, Article 51(1) and (2) provide that:
(1) The civilian population and individual civilians shall enjoy general protection against dangers arising from military operations. To give effect to this protection, the following rules, which are additional to other applicable rules of international law, shall be observed in 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.
Geneva Conventions, Protocol I, Article 57(1) provides that:
(1)In the conduct of military operations, constant care shall be taken to spare the civilian population, civilians and civilian objects.

protection for civilian objects; stating that: "Civilian objects shall not be the object of attack or of reprisals."[24]

23. Military objects (whether individuals, equipment, locations etc), on the other hand, may be attacked. Article 52(2) of Additional Protocol I provides that "*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.*"[25]

24. As part of the obligation to protect civilian populations, Article 51 of Additional Protocol I prohibits parties from carrying out indiscriminate attacks which do not specifically strike a military object or employ a method or means of combat which can be specifically directed at a military object only. In particular, any attack which strikes both military and civilian objects without distinction constitutes an indiscriminate attack and is prohibited.[26] Therefore, a party 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."[27]

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[24] Geneva Conventions, Protocol I, Article 52(1).
[25] Geneva Conventions, Protocol I, Article 52(2).
[26] Geneva Conventions, Protocol I, Articles 51(4)-(6) provide that:
(4) Indiscriminate attacks are prohibited. Indiscriminate attacks are: (a) Those which are not directed at a specific military objective; (b) Those which employ a method or means of combat which cannot be directed at a specific military objective; or (c) Those which employ a method or means of combat the effects of which cannot be limited as required by this Protocol; and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction.
(5) Among others, the following types of attacks are to be considered as indiscriminate: (a) An attack by bombardment by any methods or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects; and (b) 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.
(6) Attacks against the civilian population or civilians by way of reprisals are prohibited.
[27] See, Geneval Conventions, Protocol I, Article 57(2)(a)(i). Article 57(2)(a)(i) provides that: *(2) With respect to attacks, the following precautions shall be taken: (a) Those who plan or decide upon an attack shall: (i) Do 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 within the meaning of paragraph 2 of Article 52 and that it is not prohibited by the provisions of this Protocol to attack them.*

25. These core provisions on distinction must be implemented alongside two equally key principles of 'military necessity' and 'proportionality'. The concept of military necessity requires a balance to be struck between protecting civilians and the necessities of military operations. It is described as a "symbiotic relationship"[28] where *"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 … winning the war or battle is a legitimate consideration, though it must be put alongside other considerations of IHL."*[29]

26. In its commentary on the Geneva Conventions, the ICRC notes that: "*The entire law of armed conflict is, of course, the result of an equitable balance between the necessities of war and humanitarian requirements. There is no implicit clause in the Conventions which would give priority to military requirements. The principles of the Conventions are precisely aimed at determining where the limits lie; the principle of proportionality contributes to this."*[30]

27. The rule of proportionality is set out in Article 57 of Additional Protocol I.[31] It is accepted that the loss of civilian life may be incidental and unavoidable during attacks on military objects, but a party to the conflict is obligated to refrain from launching an attack which would result in the "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*."[32] An attack anticipated to cause collateral damage which is excessive in relation to the military advantage must be

[28] Michael Schmitt, Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance, Virginia Journal of International Law, Vol 50:4, p. 795.
[29] Françoise Hampson, Military Necessity (http://www.crimesofwar.org/a-z-guide/military-necessity/).
[30] ICRC, Commentary on Geneva Conventions, Protocol I, Article 57(1)(a)(iii), para. 2206.
[31] ICRC, Commentary on Geneva Conventions, Protocol I, Article 57(1)(a)(iii), para. 2204.
[32] Geneva Conventions, Protocol I, Article 57(2)(a)(iii) (emphasis added). Article 57(2)(a)(iii) provides that: *(2) With respect to attacks, the following precautions shall be taken: (a) Those who plan or decide upon an attack shall: (iii) Refrain from deciding to launch any 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.*

cancelled or suspended[33], and if carried out could be categorised as a prohibited 'indiscriminate attack'.[34]

28. Most significantly for present purposes, there is no clear rule on what constitutes 'excessive' collateral damage or what is considered appropriate 'military advantage'. In other words, there is no set formula or ratio (of civilian losses to the intended military advantage) to determine the proportionality of any given attack. The UK Manual on the Law of Armed Conflict notes that "[t]he law is not clear as to the degree of risk that the attacker must accept."[35] The ICRC accepts that it is a "subjective evaluation, the interpretation must above all be a question of common sense and good faith for military commanders. In every attack they must carefully weigh up the humanitarian and military interests at stake."[36]

29. Evaluation of the proportionality of an attack, and whether the resulting collateral damage could be 'excessive' should thus be based on a thorough assessment of the prevailing facts:

    - The ICTY has held that "[i]n 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."[37]

[33] Geneva Conventions, Protocol I, Article 57(2)(b) provides that: *(2) With respect to attacks, the following precautions shall be taken: … (b) An attack shall be cancelled or suspended if it becomes apparent that the objective is not a military one or is subject to special protection or that the attack 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.*

[34] Geneva Conventions, Protocol I, Article 51(5)(b) provides that: (*5) Among others, the following types of attacks are to be considered as indiscriminate: (b) 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.* See also, ICJ, Legality of the Treat or Use of Nuclear Weapons, Advisory Opinion of 8 July 1996, Dissenting Opinion of Judge R. Higgins. Noting the provisions of the Geneva Conventions, the Judge Higgins stated that "*even a legitimate target may not be attacked if the collateral civilian casualties would be disproportionate to the specific military gain from the attack*."

[35] Manual on the Law of Armed Conflict, UK MOD (2005), para. 2.7.1.

[36] ICRC, Commentary on Geneva Conventions, Protocol I, Article 57(1)(a)(iii), paras. 2207-2208.

[37] ICTY, *Prosecutor v. Galic*, Judgement and Opinion, IT-98-29-T, 5 December 2003, para. 58.

- 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."[38]

- The Israeli Ministry of Foreign Affairs has stated that "the core question, in assessing a commander's decision to attack, will be (a) whether he or she made the determination on the basis of the best information available, given the circumstances, and (b) whether a reasonable commander could have reached a similar conclusion."[39]

30. A fundamental part of the equation is that the 'military advantage' of an attack must be weighed in the calculation against the civilian loss of life to determine whether the loss incurred was excessive and thus unlawful. The military advantage anticipated from a particular attack should be assessed from the standpoint of the overall objective of the military operation. The ICRC has observed that the military advantage "*can only consist in ground gained and in annihilating or weakening the enemy armed forces*."[40] Military advantage may legitimately include protecting the security of the commander's own

[38] Report to Congress on Incidents During the Recent Conflict in Sri Lanka, US Statement Department, 2009 (http://www.state.gov/documents/organization/131025.pdf).
[39] The Operation in Gaza, Factual and Legal Aspects, Report, Israeli Ministry of Foreign Affairs, July 2009, para. 125 (http://www.mfa.gov.il).
[40] ICRC, Commentary on Geneva Conventions, Protocol I, Article 57(1)(a)(iii), para. 2218.

forces.[41] In the ICJ's Advisory Opinion on the use of nuclear weapons the Court did not rule out the use even of nuclear weapons in seeking a military advantage, stating:

> "*the Court is led to observe that it cannot reach a definitive conclusion as to the legality or illegality of the use of nuclear weapons by a State in an extreme circumstance of self-defence, in which its very survival would be at stake*."[42]

31. Given that the conflict in Sri Lanka was an internal armed conflict, and not an international conflict, it should be noted that Additional Protocol II, which applies to internal armed conflicts, also prohibits the civilian population from being the subject of attack. Article 13 of Protocol II sets out similar protections as those provided in Protocol I.[43]

32. Although the provisions of Additional Protocol II do not expressly include the principles of proportionality as set out in Additional Protocol I, they should be taken into account when considering the present conflict. It has been held that these rules apply in all conflicts irrespective of the nature of the conflict.[44] In any event, in order to assess the lawfulness of the military operations in the present case, it is appropriate to draw on these principles and rules of IHL.

ii. *Use of civilians in the military campaign and as human shields*

33. The use of human shields by parties to a conflict is specifically prohibited under IHL. Article 51(7) of Additional Protocol I provides that: *"The presence or movements of the*

[41] 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).
[42] ICJ, Legality of the Treat or Use of Nuclear Weapons, Advisory Opinion of 8 July 1996, para. 97.
[43] Geneva Conventions, Protocol II, Article 13 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.*
[44] ICTY, *Prosecutor v. Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, paras. 68, 69, 74, 75, 117.

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."[45]

34. The use of civilian objects as shields is similarly prohibited in Article 12(4) of Additional Protocol I which provides that: "*Under no circumstances shall medical units be used in an attempt to shield military objectives from attack*."[46] The ICRC commentary on the Geneva Conventions notes that this prohibition applies in both international and non-international armed conflicts.[47]

35. A distinction must immediately be drawn between those civilians who *voluntarily* act as shields, as opposed to those who are forced to participate in this unlawful activity. The former category can be regarded as persons who take part in the hostilities and who thus lose their status and protections as civilians while participating in the hostilities. They may be legitimately targeted while taking part in hostilities and are not to be "taken into account when assessing collateral damage."[48] Article 51(3) of Additional Protocol I and Article 13(3) of Additional Protocol II both provide that civilians enjoy protection "*unless and for such time as they take a direct part in hostilities*." The ICRC commentary notes that once the civilian ceases to take part in the hostilities, the civilian regains his right to protection.[49] However, although a person is not allowed to be both a

[45] The same prohibition, although not expressly provided for in Additional Protocol II, would apply during internal armed conflicts.
[46] Geneva Conventions, Protocol I, Article 12(4).
[47] ICRC Commentary, Chapter 32. Fundamental Guarantees, Rule 97. Human Shields.
[48] Joint Targeting, Joint Chiefs of Staff, Joint Publications 3-60, 3 January 2013, A-2 (file:///C:/Users/Haydee/Downloads/Joint_Chiefs_of_Staff-Joint_Targeting_31_January_2013.pdf)
[49] ICRC Commentary, Geneva Conventions Protocol I, Article 51(3), para. 1944, stating: "*It is only during such participation that a civilian loses his immunity and becomes a legitimate target. Once he ceases to participate, the civilian regains his right to the protection under this Section, i.e., against the effects of hostilities, and he may no longer be attacked.*"

combatant and civilian at the same time, he cannot "constantly shift from one status to the other".[50]

36. Involuntary or forced human shields, on the other hand, retain their civilian status and protections under IHL at all times. In a situation where civilian or civilian objects 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 [cited above]".[51] 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.[52]

37. Accordingly, the "use of [involuntary] human shields does not necessarily bar attack on a lawful target"[53] 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 enemy's unlawful conduct in the 'proportionality' calculation as it is inevitable that civilian casualties will be higher in these circumstances.

38. 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

[50] See Yoram Dinstein, *The Conduct of Hostilities*, (Cambridge University Press, 2004), p. 28.
[51] Geneva Conventions, Protocol I, Article 51(8).
[52] ICRC Commentary, Geneva Conventions, Protocol I, Article 51(8).
[53] Michael N. Schmitt, Human Shields in International Humanitarian law, Israeli Yearbook on Human Rights, p. 47.

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.*"[54]

- 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."[55]

- 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."[56]

- 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."[57]

- In addition, leading 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

[54] U.K. Ministry of Defence, The Manual of the Law of Armed Conflict (2004), paras. 2.7.2 and 5.22.1.
[55] ICRC, Fight it Right: Model Manual on the Law of Armed Conflict for Armed Forces,1999.
[56] International Humanitarian Law Issues in a Potential War in Iraq, HRW, 20 February 2003 (http://www.hrw.org/sites/default/files/reports/Iraq%20IHL%20formatted.pdf).
[57] Joint Targeting, Joint Chiefs of Staff, Joint Publications 3-60, 3 January 2013 (file:///C:/Users/Haydee/Downloads/Joint_Chiefs_of_Staff-Joint_Targeting_31_January_2013.pdf).

human shields."[58] 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*."[59] The principle of proportionality must be applied but "*the appraisal whether 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 objective with civilians – civilian casualties will be higher than usual*."[60]

- 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 titled in favour of the unscrupulous."[61]

39. 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.

[58] Rubinstein and Raznai, Human Shields in Modern Armed Conflicts: The Need for a proportionate Proportionality, Stanford Law & Policy Review, Vol. 22, No. 1, p. 121.
[59] Rubinstein and Raznai, Human Shields in Modern Armed Conflicts: The Need for a proportionate Proportionality, Stanford Law & Policy Review, Vol. 22, No. 1, p. 121.
[60] Y. Dinstein, The Conduct of Hostilities Under the Law of International Armed Conflict, 131 (2004). See also, A.P.V. Rogers, Law on the Battlefield 129 (2nd ed., 2004).
[61] A.P.V. Rogers, Law on the Battlefield 129 (2nd ed., 2004).

40. It is strongly contended by some scholars that "this adjustment is necessary precisely to achieve greater protection for civilians"[62]:

- Rubenstein and Raznai identify that use of human shields by a party "can - in order to compensate for its military disadvantage, or, alternatively, to enhance its military capacity - effectively immunize a military objective from an attack by placing enough civilians at risk, thereby gaining a direct benefit from violating international law." They explain that in these circumstances the application of the proportionality requirement should not shift "the responsibility from the shielding party to the impeded one" as this "increases - and perhaps even legitimizes - the danger to civilians during hostilities, rather than reducing it". They add that "if one party continuously and persistently uses civilians as shields, the adversary would eventually and inevitably forsake its commitment to spare civilians and would attack enemy combatants and targets despite the human shields' presence. *Ongoing and systematic use of civilians as human shields would justify this adjusted assessment, since it would also create an incentive to lessen the use of the human shields tactic, ultimately enhancing civilian protection during armed conflicts.*"[63]

- W. Hays Parks emphasises that "*While an attacker facing a target shielded from attack by civilians is not relieved from his duty to exercise reasonable precautions to minimize the loss of civilian life, neither is he obligated to assume any additional responsibility as a result of the illegal acts of the defender. Were an attacker to do so, his erroneous assumption of additional responsibility with regard to protecting the civilians shielding a lawful target would serve as an incentive for a defender to continue to violate the law of war by exposing other civilians to similar risk.*"[64]

[62] Rubinstein and Raznai, Human Shields in Modern Armed Conflicts: The Need for a proportionate Proportionality, Stanford Law & Policy Review, Vol. 22, No. 1, p. 120-124.
[63] Rubinstein and Raznai, Human Shields in Modern Armed Conflicts: The Need for a proportionate Proportionality, Stanford Law & Policy Review, Vol. 22, No. 1, p. 120-124.
[64] W.H. Parks, Air War and the Law of War, 32 *Air Force L. Rev.* 1, 162 (1990).

- The ICRC has stated that "*if one of the Parties to the conflict is unmistakably continuing to use this unlawful method for endeavoring 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.*"[65]

41. An appropriate adjustment must therefore be made in determining whether the civilian loss is justified in circumstances in which the other side has violated IHL to itself seek to gain a military advantage. As has been noted, in these circumstances, 'proportionality' must itself be proportionate.[66]

Application of these legal standards to factual circumstances

42. As noted above, it was widely reported that LTTE forces systematically used civilians as human shields in the final stages of the conflict in an attempt to survive as a military force and thus to gain a military advantage. The taking of an estimated 300,000 to 330,000 civilians as hostages and their use as human shields at times for military purposes so as to defend the LTTE's military objectives may, on any view, be said to have constituted widespread violations of the prohibition on the use of civilians and civilian objects as human shields.[67]

43. 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 the 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' consequences of their attacks, given the military objective of the attacks.

[65] ICRC Commentary, Geneva Conventions, Protocol I, Article 12(4), para. 540.
[66] Rubinstein and Raznai, Human Shields in Modern Armed Conflicts: The Need for a proportionate Proportionality, Stanford Law & Policy Review, Vol. 22, No. 1, p. 120, 121.
[67] See para. 14 above.

Such terrible losses, of course, must not have outweighed the military objective, sought and eventually achieved, by the Government's conquering of the LTTE in order to end the conflict once and for all. This issue may well be the focus of any and every proper review of the lawfulness of the actions of Sri Lankan Government forces in the later stages of the conflict.

44. This is of course not a straightforward calculation to make but the Government forces would have been assisted by the rules of IHL which permitted commanders to adjust the ratio of civilian deaths as set against the intended military advantage in favour of the attainment of the military objectives given that the forces they opposed pursued a widespread unlawful policy of using civilians to seek to press their own military advantage and to undermine the military mission of the advancing forces. It might also be argued as reasonable for Government forces to have assessed the specific circumstances (involving tens of thousands of civilians being marshaled by the LTTE to avoid defeat at any cost in the final weeks of the conflict) to be at that end of the spectrum which would most favour a marked adjustment in the 'proportionality' calculation to take account of the widespread unlawful conduct of the LTTE and of the revealed past conduct of the LTTE to expose innocent civilians to death, for example by its policy of suicide bombings. As noted above, this policy continued in the final phases of the conflict and thereafter. The military objective of putting an end to the implementation of this policy and the obvious danger it caused to citizens, would be a factor that Government forces could have taken into account when assessing the proportionality of any attacks aimed at destroying the perpetrators of this policy and the collateral effects of such attacks on any civilians.

45. It would seem 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:

- There were undoubtedly LTTE military objects situated throughout the Vanni including in the No-Fire Zones which could be legitimately targeted with the aim of completely overwhelming and destroying the LTTE to bring to a conclusive end to this extended conflict.

- As was widely known, the LTTE's strategy was to use the civilian population of the Vanni (whether voluntarily or not) for the sole purpose of defeating the Government's military campaign to conquer the LTTE and for the LTTE to continue to exist and be able to fight against the Government.[68] In particular, the LTTE had positioned its forces and artillery in the No-Fire Zones where civilians had gathered.

- As already highlighted, any assessment of the portion of civilians who were voluntarily assisting the LTTE, and hence participating in the hostilities, would have been extremely difficult or impossible to make accurately; but this could not of itself free the Government forces from their duty to act with the legitimate military objective of ending the conflict.

- Moreover, the LTTE had conscripted civilians of all ages into the LTTE forces[69] making it very difficult for the Government forces to differentiate between civilians and combatants, as well as between fighters and human shields.

- The absence of any uniforms worn by the LTTE combatants would have made the distinctions to be drawn between civilians and those involved in hostilities even harder for the Government forces.[70]

- As noted above, civilians are not permitted constantly to shift from one status to the other, and thus to the extent that the Government forces might have known or

[68] Darusman Report, p. ii, iii. See also, paras. 14, 15 above.
[69] See paras. 14, 15 above.
[70] See para. 17 above.

believed that civilians were shifting their status, the Government forces *might* have considered that these persons had converted to being combatants.

- 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.[71] LTTE forces also stationed weaponry in civilian locations such as hospitals.[72]

- It was known that the LTTE forces were using heavy artillery which was fired from locations in the Vanni, including the No-Fire Zones.[73] These weapons and locations would have been regarded as legitimate military targets and could themselves have been targeted with weaponry appropriate and proportionate to seeking the destruction of the LTTE's weapons.[74]

46. The conduct of the Government would have to be measured by considering each of these and all other relevant factors. As a starting point, at least, it would have to be taken into account that the Government of Sri Lanka stated throughout the conflict that it was actively distinguishing between civilians and those involved in hostilities in its planning of attacks. For example, in suggesting the demarcation of a 'No-Fire Zone' for keeping civilians and IDPs away from the fighting, the Government directed that "the presence of Internally Displaced Persons (IDPs) and civilians should be taken in account, to guarantee their safety and security, in order to avoid any collateral damage."[75] A US cable dated 27 January 2009 noted that the "Government has gained considerable credit

[71] See para. 16 above.
[72] See paras. 15, 16 above.
[73] See for example, Darusman Report, p. iii, and paras 69, 97.
[74] For example, in the *Nicaragua v. United States of America*, ICJ in noting Article 51 of the UN Charter set out that "self-defence would warrant only rneasures which are proportional to the arrned attack and necessary to respond to it, a rule well established in custornary international law." See, *Nicaragua v. United States of America, Military and Paramilitary Activities in and against Nicaragua*, 27 June 1986, para. 176. The ICJ found in the *Legality of the Threat or Use of Nuclear Weapons* case that the use of nuclear weapons could not be ruled out as an acceptable method of self-defense. See, *Legality of the Threat or Use of Nuclear Weapons,* 8 July 1996, p. 265.
[75] Letter from Brigadier for Commander of the Army to the Head of Delegation, ICRC, 'Safe Area for Displaced Civilians in Unclear Area of Wanni', 19 January 2009.

until this point for conducting a disciplined military campaign over the past two years that minimized civilian casualties."[76]

47. This would only be a starting point as the factors that then arose in the conflict – certain of which have been outlined above – would have to be appraised as those which characterised the subjective conditions faced by the commanders in the field. No definitive ratio for acceptable civilian losses under IHL (even though all losses are lamentable) exists or can be pinpointed in this Opinion. Indeed, there is no known case law that assists on the specific subject of proportionality in the context of human shields.[77]

48. Particular attacks and the overall pattern of attacks must fall to be assessed on the particular circumstances at the time and how they would have been known to the commanders charged with the mission of winning (and ending) the war. It is clear that a well-established set of rules under IHL would permit some loss of civilian lives in the specific circumstances of the final phase of the conflict in the Vanni. It may also be argued that the justifiable number of such losses could take account of the opposing party's unlawful reliance on the civilian population, which in the present case was by all accounts substantial and widespread and likely in the mid- and longer- term to lead to yet more substantial loss of life.

49. It is clear from the above analysis of the law and from authoritative commentary (from the ICRC and from legal authorities of the ICTY and other courts) that assessments of the lawfulness of attacks must take account of the reaction of commanders on the ground to the situations they faced. *Post facto*, such 'would-be' assessments can only be

[76] Ambassador Publicly Urges Protection of IDPs (https://www.wikileaks.org/plusd/cables/09COLOMBO95_a.html).

[77] 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, para. 36 (http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G93/856/23/PDF/G9385623.pdf?OpenElement).
See also, the use of human shields by al-Qaeda in Afghanistan: U.S. Says Al-Qaeda Used Afghan Children as Human Shields, Radio Free Europe Radio Liberty, 18 June 2007 (http://www.rferl.org/content/article/1077179.html).

reconstructed by top-level military personnel from countries completely uninvolved in the conflict. This is an exercise those criticising the Government of Sri Lanka have not performed.

Conclusion

50. The conclusions expressed in this Opinion are unavoidably confined by the available evidence about the factual circumstances and are without the benefit of a full investigation into the particular circumstances of each attack.

51. However, the Opinion sets out a legal framework within which the Government forces could have been permitted to act without transgressing the limits of IHL, and against which their actions can be measured in accordance with properly defined legal standards.

52. Any future inquiry, whether by the UN or any other body, is strongly encouraged to draw on this legal framework for its work, and to avoid making findings based on generalised statements about the law that lack rigorous analysis. Similarly unfortunate would be any such inquiry failing to understand the need for calculations to be made of what, for any particular attack, would have been the assessments of the putative reasonable commander in the field. Detached independent experts would be required to make these assessments. We assume that the Government of Sri Lanka would be willing to retain such experts on its own behalf given that the international community and various NGOs and Governments that have thought fit to condemn Sri Lanka have not bothered themselves to take this basic step, essential to ensuring that Sri Lanka is judged fairly in the world of which it is a significant part.

Sir Geoffrey Nice QC

Rodney Dixon QC

London

22 August 2014

Professor Michael Newton, Professor of the Practice of Law, Vanderbilt University School of Law, “A Legal opinion for the Commission Inquiring into Disappearances”, 28th September 2014

The Island March 4, 2015

A Legal opinion for the Commission Inquiring into Disappearances

Prof. Michael Newton,
Professor of the Practice of Law, Vanderbilt University School of Law

September 28, 2014

1. The purpose of this memorandum is to provide my expert assessment regarding the widespread use of civilian human shields by LTTE forces in the final stages of the Sri Lanka civil war, which ended in May 2009. In particular, this opinion focuses on the intentional use of artillery fire directed to specifically respond to LTTE artillery fire emanating from within civilian areas. As you know, the LTTE refused to permit some 330,000 fellow Tamils to flee towards safer areas away from the zone of conflict, and in essence used them as human shields to deter offensive operations by the Sri Lanka Army. The Government of Sri Lanka previously declared the entire area as a safe civilian or no fire zone (NFZ) in order to protect the innocent civilians, which had the incidental effect of incentivizing international organizations to remain in that area. Aside from refusing to agree to the creation of such a safe zone, which itself constitutes prima facie evidence of its intent to use civilians and civilian objects as an impermissible extension of its military campaign, the LTTE embedded its heavy artillery within the NFZ and intentionally shelled Sri Lankan positions from the midst of the civilian population.

2. The use of the civilian population in that manner is roughly comparable to the war crime of perfidy because the LTTE sought to use the government's compliance with the laws and customs of warfare in order to gain an unwarranted military advantage. This leveraging is precisely why the laws and customs of war uniformly reject the use of human shields in a variety of specific places. Civilians who would otherwise have spread out into areas remote from the conflict or sought shelter with family in other regions were prevented from doing so in order to dissuade the government from attacking lawful targets using lawful weapons. Intentional efforts to use the presence of such civilians to shield military operations constitutes a war crime in its own right, and this opinion therefore also addresses the law regarding the use of force directed against military objectives when one party to the conflict has attempted to insulate those targets through manipulation of the laws and customs of warfare.

3. At the outset, I wish to note two provide two preliminary observations that inform the analysis of the underlying issues. Firstly, the obligation to protect civilians within the zone of conflict is perhaps the most deeply embedded premise of the entire corpus of the laws and customs of warfare. In the language of Article 57(1) of Protocol I to the Geneva Conventions of 1949 the participants to an armed conflict must ensure that "in the conduct of military operations, constant care shall be taken to spare the civilian population, civilians and civilian objects." No responsible commander ever intentionally targets civilian populations during either international or non-international armed conflicts, and the law prohibiting such deliberate harm to civilians is clearly stated in a variety of forms and fundamental. 3

There is no evidence to suggest that Sri Lankan commanders ignored this fundamental obligation. As reported by the U.S. Embassy, the Sri Lankan military expressly took "the utmost care" to avoid civilian casualties, despite the intentional warping of its operational environment by the LTTE. This is reminiscent of the difficult operational balancing faced by NATO during operations in 'Kosovo, during which international media and diplomatic engagement highlighted the balance between the loss of civilian lives and the absolute prerogatives of commanders to seek to end the conflict lawfully. NATO repeatedly briefed the public and diplomatic communities on efforts to minimize civilian casualties. Even when confronted with the presence of human shields, the commander of air operations vehemently maintained that "every day we did our very very best to limit collateral damage and limit the loss of life on the adversary's side." Similar statements were made by Sri Lankan officials and there is no evidence to contradict that assertion. Thus, the nub of the issue at hand is whether government forces used a lawful weapon (artillery) against lawful military objectives (in this instance identified as the points of fire from LTTE batteries) in a lawful manner (remaining cognizant of the multiple provisions of law aimed at protecting the civilian population from the effects of hostilities insofar as possible).

4. Secondly, in distinguishing between "the civilian population and combatants and between civilian objects and military objectives" and directing military operations "only against military objectives" as required by Article 48 of the Protocol, the law is clear that the extensive obligations to protect innocent civilians enshrined in Article 57 of Protocol I apply to any "acts of violence against the adversary, whether in offence or in defence."4 In my expert opinion, these principles constitute customary international law that is unquestionably binding on all states and all parties to all conflicts. Thus, assuming that the operational goal of the LTTE was to effect a military advantage against the Sri Lanka government (which seems clear from the facts provided and the assessment of the U.S. Ambassador at the time), the very act of forcibly preventing the evacuation of civilians who wished to leave the declared safe zone constituted an independent war crime on the part of LTTE authorities. This tenet coincides perfectly with the internationally accepted basis for finding that the war crime of using human shields has been committed. The Elements of Crimes for the Rome Statute, which were adopted by widespread international consensus on June 30, 2000, are clear that any action by a perpetrator committed with the intent "to shield a military objective from attack" or to take advantage of one or more civilians to "shield, favour, or impede military operations" constitutes the completed war crime.5 Against that backdrop, Sri Lanka Panel of Experts suggestion (T 237) that the war crime of using human shields requires "credible evidence of the LTTE deliberately moving civilians towards military targets rgets to protect the latter from attacks" is unfounded as a matter of law. The elements of crimes to the International Criminal court make it plain that the crime of using human shields is committed by any perpetrator that intentionally "moved or otherwise took advantage of the location of one or more civilians or other persons protected under the international law of armed conflict." (emphasis added) The LTTE committed the war crime of using human shields on any occasion that it took advantage of the presence of innocent civilians with the intent of protecting its military assets from any attack or to "shield, favour or impede military operations." In other words, the war crime of using human shields was a completed offense with or without the deliberate moving

of civilians, so long as the LTTE collocated equipment in an effort to gain an inappropriate military advantage from the presence of civilians and/or civilian objects.

5. In my expert opinion, it is wholly inconsistent with the broader legal and moral principles to reward such intentional misconduct by requiring the attacker to ignore the changed role of the otherwise protected civilians. In other words, there is no per se prohibition against attacking targets protected by human shields. Rather than summarily condemned, the government artillery strikes must be assessed under the established duties to comply with the principle of proportionality and the accompanying obligation to take "all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects.

6. Human shields - the difference between Hamas/LTTE On the surface, many commentators might be willing to analogize the situation of Hamas in the Gaza Strip with the tactics of the LTTE at the end of war. In both instances, the record is replete with instances of human shields being used unlawfully to favour military operations. There is much to be said of the specific tactics employed by Hamas to conduct indiscriminate rocket attacks against Israeli citizens, particularly in comparison to the tactics employed by the LTTE. I have seen little evidence that the LTTE specifically emplaced artillery in the homes of civilians as Hamas has repeatedly done. If necessary, I will conduct extensive research to document the tactics employed by Hamas and analyze the contradistinctions between the two situations.

7. However, there are at least two clear points of contrast where juxtaposition of the contexts helps to justify the actions of the Sri Lanka government forces. In the first place, the evidence is clear that targets were specifically attacked in response to LTTE fire emanating from within the civilian areas. This correlates to Israeli practice of course. It is noteworthy, however, that no government has declared the illegality of Israeli strikes simply because they were directed into civilian areas. In other words, the law is clear that artillery fire into civilian areas cannot be deemed per se unlawful in its own right, but must be subjected to the traditional analysis drawn from the principles of distinction, military necessity, and proportionality. The ICRC Customary Law study recounts many such instances of state practice in support of this proposition, to include the response of the German government following the 2009 Israeli incursion into Gaza.7 The Bundestag asked the following: How does the Federal Government assess the use of artillery ammunition, fin-stabilized ammunition, shrapnel shells, and other imprecise weapons in the densely populated residential areas in Gaza, documented by Amnesty International under international law? The response is telling because it supports the assertion that there is no per se prohibition on the use of artillery shells in urban areas: The Federal Government has no reliable information on the use of such ammunition. The use of means of warfare which cannot be directed against a specific military objective, so called indiscriminate attacks, would be prohibited ...This would depend not only on the type of ammunition, but also on the circumstances of their use.

8. By the same token, in their respective decisions in the Gotovina Case, neither the ICTY Trial Chamber8 (¶ 1904-1910) nor the Appeals Chamber (¶ 58-67) asserted

that the use of artillery fire directed against purported military objectives located in civilian urban areas is in itself dispositive of illegality. Though they reach opposite conclusions for other reasons, both Chambers based their legal conclusions on assessments of the military value of targets, the evidentiary basis for concluding that attacks were (or were not) indiscriminate as conducted, or violative of the proportionality standard. The Appeals Chamber, for example, cites the location of artillery batteries as affecting the accuracy of fire into urban areas, but in no way suggests that there is any tenet in modem international law that such fire is- always prohibited as a matter of overarching international law.

9. Conversely, there is one vital distinction between the two situations. In the Gaza conflict, there has been much international criticism directed against the Israeli Defense Forces because of the implication that widespread military strikes directed in the urban areas of Gaza can warrant the inference that such strikes in actuality constituted an unlawful attack directed against the civilian population as such. The law is clear, however, that there is no cognizable tenet of international law that treats the status of an entire area as being legally relevant. In the case against Dragomir Milosevic, the perpetrator attempted to argue that the presence of military targets in a designated zone warranted military strikes with no further analysis. In rejecting that claim, the Appeals Chamber of the ICTY9 reinforced the principle that the designation or functional description of a zone or area can never serve as a legal basis for attack:

53. The Appeals Chamber recalls that it is well established that the principle of distinction requires parties to distinguish at all times "between the civilian population and combatants, between civilian and military objectives, and accordingly direct attacks only against military objectives". There is an absolute prohibition against the targeting of civilians in customary international law, encompassing indiscriminate attacks.' Asstated in the Galic Appeal Judgement, "Article 51(2) of Additional Protocol I "states in a clear language that civilians and the civilian population as such should not be the object of attack", that this principle "does not mention any exceptions", and in particular that it "does not contemplate derogating from this rule by invoking military necessity." Article 51(2) "explicitly confirms the customary rule that civilians must enjoy general protection against the danger arising from hostilities" and "stems from a fundamental principle of international humanitarian law, the principle of distinction, which obliges warring parties to distinguish at all times between the civilian population and combatants and between civilian objects and military objectives and accordingly to direct their operations only against military objective.

54. There is no requirement that particular areas or zones be designated as civilian or military in nature. Rather, a distinction is to be made between the civilian population and combatants, or between civilian and military objectives. Such distinctions must be made on a case-by-case basis. Further, considering the obligations incumbent upon combatants to distinguish and target exclusively military objectives, the Appeals Chamber finds Milogevic's argument regarding the proportion of civilians present in areas "replete with military objectives" unpersuasive. In fact, Milos'evic, does not even attempt to argue that the civilian victims in Sarajevo were proportional casualties of lawful military attacks launched by the SRK. A general

assertion that the attacks were legitimate because they allegedly targeted "military zones" throughout the city is bound to fail. (emphasis added, citations omitted)

10. The holding of Milosevic in conjunction with Article 51(5)(a) of Protocol I10 definitively establishes that under modern international law, a number of distinct military objectives located within an urban area cannot lawfully be aggregated to constitute one single military objective. Just as the Israelis are required to make individualized assessments of the proportionality grounds for attacking any target within Gaza, the Sri Lanka government had that same duty. In other words, the mere labeling of an area as a safe area or protected zone had no legal effect on the underlying authority of the Sri Lanka forces to attack lawful targets using lawful weapons in a lawful manner as permitted under the laws and customs of warfare. While Hamas gains no higher degree of automatic protection from attack merely by the terminology attached to the urban areas within the Gaza Strip, the legal authority of Sri Lanka to respond to attacks initiated by the LTTE was similarly unaffected by the semantic designation of the NFZ. The legality of specific artillery strikes conducted by Sri Lanka in the so-called safe zone are thus entirely dependent upon the case by case, target by target, analysis common to the assessment of any operational decisions in the context of an armed conflict.

11. The need to rethink Proportionality in the light of modern human shielding -- The problem of human shields presents military decision-makers with one of the most potent challenges to the implementation of international humanitarian law in the world today. 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."" 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, when one side violates its obligations "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 I have 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. If the law is warped to permit the enemy to unlawfully exploit human shields with no possibility of recourse, then it becomes irrelevant and essentially obsolete. Good faith application of the law of proportionality is the only way to balance these competing but equally important priorities.

12. No military commander in the world, and by extension no political official that authorizes the use of military force, should accept a legal premise that military forces must suffer the lethal force of the enemy while under a legal obligation not to respond using lawful force in self-defense. Because the LTTE enemy deliberately misused civilians to protect military targets, and ignored governmental efforts to establish safe areas for civilians while hindering their ability to seek safety, the only way to ensure respect for the overall fabric of the laws and customs of warfare is to recognize the right of the Sri Lankan government to respond using lawful (i.e. discriminate) weapons against identifiable military targets,

13. Nations should be alert to oppose any efforts to create or reinforce legal rules that would become tactically irrelevant on modem battlefields. Commenting on the impractical aspects of Additional Protocol I, the eminent Dutch jurist Bert Roling — who served on the bench of the Tokyo International Military Tribunal—observed that treaty provisions ought not "prohibit what will foreseeably occur" because the "laws of war are not intended to alter power relations, and if they do they will not be observed." 12 When one side in an armed conflict deliberately ignores its own legal duties, disconnects between aspirational legal rules and human experience are borne out in operational experience. This is a growing and troubling trend in modern operations, and the LTTE mastered the art in the final stages of its multi-generational conflict. States that act decisively to protect the lives and property of innocent citizens even when faced with human shields risk widespread but simplistic condemnation. Such lawful responses, even in the face of enemy war crimes, accord with their own legal obligations, yet inevitably feed an undercurrent of suspicion and politicization that could erode the very foundations of humanitarian law. This gap in turn leads to a cycle of cynicism and second-guessing that could weaken the commitment of some policy makers or military forces to actually follow the law. Phrased another way, if the laws and customs of war embed a presumption against the rights of individual or unit self-defense, then they will inevitably atrophy into disrepute and eventual disuse. The law of proportionality provides the intellectually consistent and time-tested framework for reconciling the competing priorities at hand when faced with human shields.

14. The warning of the U.S. Ambassador that strikes should not be undertaken against clearly identified military objectives when the LTTE used the presence of civilians in the so-called NFZ to launch military strikes is both naive and unfounded in modern international law. The law of armed conflict is integral to military professionalism, and the proportionality principle is at its core. Just as there should be no safe harbor for warfighters accused of clearly disproportionate war crimes, so to should the world remain united in its support for the appropriate range of discretion duly accorded to military commanders faced with the most difficult operational challenges who continue to apply the law in good faith to the best of their abilities. Policymakers and military practitioners should be absolutely clear that the law of proportionality itself provides an essential protection to noncombatant lives and property. rty. Permitting one side to completely preempt the military prerogatives of its opponent through the use of human shields would endanger proportionality by transforming it into the property of the adversary with the most compliant media and the most well-tuned propaganda machine. Unless the law of proportionality is understood to apply even in the face of human shields, then war fighters may well begin simply to discount the constraints of the laws and customs of war because they have been twisted to provide an undue and essentially insurmountable military advantage to one side based solely on its own unlawful actions. The laws and customs of war cannot countenance such undue military leverage to the side that willfully ignores the reciprocal obligation to protect innocent civilians insofar as possible.

15. Modern international law remains unsettled on the precise application of the proportionality principle in the face of human shields. All forms of human shields

pose the challenge of artificial, contrived circumstances under which a party must decide between two unappealing prospects that would not be the only options but for the human shields. This artificiality in turn affects the hostilities in profound ways. Whereas human shields force a choice upon the party that seeks to pursue an otherwise lawful military goal, civilians that voluntarily seek to use their own protected status to provide an undue military advantage to one side actually impose the unpalatable choice onto an opposing party that seeks to accomplish its military objectives while continuing to abide by its obligations never to intentionally direct attacks against the civilian population. Voluntary human shields seek to assist the military efforts of one of the belligerent states, but absent evidence of coercion or state coordination, it is difficult to directly attribute their actions to the responsibility of the LTTE.

16. Voluntary human shields, even though they do not wear uniforms, carry guns openly, or follow a chain of command, seem to have chosen directly to participate in the war effort. Indeed, by placing themselves in the line of fire, voluntary human shields move onto the battlefield and even directly to the precise point where the effects of hostilities are anticipated. It is true that once they are on the battlefield they are passive rather than active, but they intend to affect the war by their passivity, and the passivity is often even more efficacious than those soldiers who are carrying weapons and are actively ready to fire them. To be a voluntary human shield, a person must intentionally seek to put herself or himself between a likely attack and a military target. This volitional conduct epitomizes the essence of the principle from Article 51(3) of Protocol I that civilians enjoy express protections "unless and for such time as they take a direct part in hostilities." Indeed, the temporal caveat in Protocol I that such civilians may be targeted "for such time as" they participate in hostilities seems particularly appropriate for the human shields that forsake the safety of their homes in order intentionally to endanger their safety in an effort to serve the military interests of a party to the conflict. Voluntary human shields have acted, though the very act of shielding a military target is defined by inactivity, i.e. simple presence suffices.

17. Voluntary human shields risk their own lives for a particular military or political objective. They are therefore intellectually identical to unlawful belligerents or other insurgents in the sense that they participate in hostilities but do not enjoy combatant immunity or benefit from the full range of rights that accrue to lawful combatants. If we think of proportionality as only calculating likely casualties or harms to civilians, then the likely deaths to voluntary human shields are not properly part of the proportionality calculation. Neither the principle of discrimination nor the principle of proportionality applies to persons no longer legally categorized as civilians. Though the attacking force must comply with its overall obligations under the laws and customs of war, the express right to protection derived from civilian status is forfeited by voluntary participation in the conflict. Voluntary human shields may reclaim their protections at any time by renouncing any role in the conflict and returning to their civilian homes to live and act as protected non-combatants.

18. At the same time, 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 recognizing 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). There may be some sense in which it is indirect rather than direct targeting because the lives of protected civilians are foreseeably endangered, but that aspect of proportionality is no different with respect to human shields than it is for any other application of proportionality. Killing innocent civilians may often be an integral part of the destroying of the military target and the proportionality principle thus hinges on the anticipated extent of civilian casualties as well as the degree of military advantage forecast. Hence, it may appear that in cases of involuntary human shields, the principle of discrimination or distinction is primarily implicated because the attacker must endeavor by all feasible means to direct attacks at military objectives while employing all feasible measure to minimize or to eliminate civilian deaths.

19. Involuntary human shields should not be understood to have waived or forfeited their human right to life. Yet, we can still discount the human shields' lives during the, proportionality analysis because of the wrongful way, if it is demonstrably wrongful, that the enemy adversary has acted even as we keep the larger framework of humanitarian law intact. Hence, the attacking commander must do his best to avoid harming them, perhaps by changing the choice of weaponry or the time of attack, or by vigorous advance warning." In this context the actions of the LTTE had the effect of nullifying any advance warnings by government forces by preventing them from leaving. Indeed, but for the LTTE use of artillery fire from civilian areas, the civilians were perfectly safe based on the government declaration of the area as protected. But that does not mean that the rights of involuntary human shields trump every countervailing consideration. If the lives of combatants have inherent value, as I believe that they both under the human rights regime and the laws and customs of warfare, undue constraints on the ability of an adversary to respond to hostile actions could undermine respect for the fabric of jus in hello by creating a fatalistic sense of unavoidable death at the hands of an adversary that uses human shields to enhance the enemy war effort.

20. Emer de Vattel was absolutely correct in my view by maintaining that the law should not be fashioned or applied in order to favor oppressors, 14 which in turn logically requires the conclusion that the use of human shields should not be permitted to provide an automatic asymmetric advantage to one adversary. This is particularly appropriate because of the extensive listing of explicit precepts built into the law that the LTTE ignored in its actions in the safe zone. Vattel's logic applies perfectly to the LTTE attempts to exploit the presence of civilians in order to favour military operations because unduly tilting the application of proportionality to disfavor the lawful and limited responses of the government would be rewarding its own illegality. In other words, if the law exists to protect innocent civilians to the greatest degree possible given the realities of modern conflicts, it cannot be construed to reward the party that intentionally endangers civilians.

21. In my view, the Sri Lanka government military responses to illegal LTTE actions should be seen as proportionate for the following reasons:

a. In psychological terms, the Sri Lanka strikes directed at military objectives, despite the presence of human shields should be categorized as a form of positive punishment designed to end the unwanted behavior. The humanitarian concerns of innocent civilians ought to be equally shared by all parties to the conflict at all times. Responding to the deliberate attacks of the LTTE helped to signal to the LTTE and to the world that an asymmetric advantage secured using unlawful means should not be rewarded. 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 likely saved many more civilian lives.

b. Similarly, even in circumstances when the Sri Lanka forces were able to issue effective warnings to the civilian population, the effect of those warnings was nullified by the demonstrated ability of the LTTE to prevent the flow of civilians to safety. This had the effect of making the anticipated civilian casualties essentially unknowable. In other words, by rejecting the declaration of the area as a safe zone and then nullifying the effect of warnings, the military advantage anticipated through targeting specifically identified military targets was enhanced while the foreseeable collateral damage remained inherently imprecise. Thus, the LTTE bears responsibility for civilian deaths because their own conduct was the causal factor in such deaths and because only the LTTE was properly positioned to accurately assess the precise likelihood of death or injury to civilians located in the area.

c. There is no evidence in the record to suggest that the government used inherently indiscriminate weapons such as barrel bombs or Grad rockets 15, that are typically used for their capacity to affect a wide area at great range but have been shown in a number of conflicts to result in unacceptably high levels of harm to civilians when fired into a populated area. This prima facie evidence of governmental efforts to defend its own military forces by applying the laws and customs of war in good faith indicates that the proportionality principle was similarly respected so far as the circumstances permitted.

d. The SLA can almost certainly produce evidence that it undertook artillery strikes in compliance with the best practices designed to minimize or to eliminate civilian casualties. For example, artillery experts will attest that frequent adjustments to equipment are needed to account for wind changes, humidity changes and temperature changes that affect the predictability of artillery round trajectories. These practices in turn served to decrease the foreseeable civilian casualties by ensuring that rounds were directed specifically to the lawful LTTE targets.

e. Similarly, commanders are experts at using the artillery batteries that are best positioned to respond to a given attack. Use of on-scene observers whenever possible and stringent rules of engagement to require higher level approval under specific operational conditions for the return of artillery fire into the safe zone served to minimize civilian casualties.

f. 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 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." (§§60-65, Gotovina et al., ICTY, Appeals Chamber Judgment, 16 November 2012.)

g. The legal standard in very clear that the strikes must have been intentionally launched in the knowledge that they were "clearly excessive" in relation to the anticipated gave – that standard cannot be met with supposition or speculative predictions of the adverse publicity that the LTTE sought by instigating the strikes.

22. Civilians, Combatants and the loss of civilian status -- Faced with a widespread pattern of human shields, the NATO Air Commander in Kosovo noted that despite the best efforts of the coalition, every time civilians were killed in air strikes "the reaction by political leaders was hysterical." 16 The case of involuntary human shields is much more difficult than the case of voluntary human shields at least in part because involuntary human shields clearly remain civilians and noncombatants. You do not lose your status as a civilian because of what someone else does to you. Involuntary human shields are civilians who have been victimized even more than regular civilians are during wartime because they are endangered by the government that has the legal and moral duty to protect them from the effects of hostilities. Sri Lankans caught in the so-called protected zone still benefited from a dual set of legal protections because their lives and safety were protected from government strikes under both the laws and customs of warfare and the law of domestic human rights.

23. It may be the case that some involuntary human shields are endangered by an organization or political party within a state at war, but in those circumstances the government still has the overarching obligation to protect civilians. 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 United Nations (UN) Security Council unanimously condemned." Yet, while it may be that involuntary human shields find themselves in harm's way contrary to their intentions, they are no less an impediment to the attacking forces who would never have asked for such a situation of forced choice. Indeed, the situation of involuntary human shields creates risks both for the civilians who are forced to be shields as well as for the political community that finds it necessary to attack a military target guarded by the shields and is made more reluctant to do so than might be good for the community in question.

24. For the reasons specified above, I take the position that the civilians that intentionally shielded LTTE targets forfeited their otherwise protected status by

virtue of having directly participated in hostilities. Involuntary human shields, by contrast, remain protected by virtue of their civilian status. In both instances, the concurrent obligations of the attacking force remain fully in effect such as the duty to issue effective warnings, the obligation to refrain from launching any attack deemed to be clearly disproportionate in its anticipated effects, and the duty to take all feasible measures to minizime or to eliminate civilian death or injury under all circumstances. In the memorable phrasing of Article 14 of the Leiber Code "Military necessity, as understood by modern civilized nations, consists in the necessity of those measures which are indispensable for securing the ends of the war, and which are lawful according to the modern law and usages of war. The actions of the Sri Lanka military in specifically targeting illegal enemy artillery fire as a responsive measure using the most discriminate weapons available and reiterating the desire to grant all civilians complete safety through mutual respect the NFZ complied with the principle of proportionality.

25. Proportionality explained and the impact of hostages on proportionality -- Jus in hello proportionality is best preserved when it is understood to be an integral dimension of the mission. Accomplishing the mission is a nonnegotiable necessity for professionalized armed forces around the world, which in turn breeds a military culture that prizes the selfless pursuit of duty. Correctly applying the precepts of proportionality should seldom if ever force good-faith war fighters into an absolute choice. This is why the law of armed conflict in general, and the law of proportionality in particular, is designed to fully accommodate both competing demands. The Israeli Supreme Court summarized this notion by noting that the authority of military commanders "must be properly balanced against the rights, needs, and interests of the local population: the law of war usually creates a delicate balance between two poles: military necessity on one hand, and humanitarian considerations on the other."' 18

26. In modem international law, it is inarguable that the principle of proportionality applies to all conflicts, whether international or non-international The ICRC categorically maintains that State practice has proven the principle of proportionality to be a norm of customary law applicable in both international and non-international armed conflicts. 19 Proportionality becomes an embedded aspect of war fighting on both the horizontal level (by linking disparate units and national contingents) and on the vertical (by virtue of its binding effect on the strategic, operational, and tactical goals of a military operation). The ICTY Trial Chamber in Kupregkic (though only in dicta) further underlined the principle of proportionality as a transcendent norm in noting that "certain fundamental norms still serve unambiguously to outlaw (widespread and indiscriminate attacks against civilians), such as rules pertaining to proportionality. "20 In addition, the ICTY noted in Galic that "an attack on civilians can be brought under Article 3 by virtue of customary international law." 21

27. Proportionality provides no license to recklessly destroy civilian lives and property; neither should it serve as an impenetrable cipher designed to ensnare commanders attempting to perform their mission with endless allegations of criminality and interminable investigations. The non-derogable right to life of innocent civilians is balanced against the mandate to accomplish the mission, for which one must be prepared to sacrifice selflessly. Theorists have long noted that

insurgent propagandists make the most of government excesses, "so that the burning of a few shops and homes [becomes] magnified into the rape of entire villages. "22 In one of his most poignant observations from the context of the Algerian insurgency, David Galula noted that the "asymmetrical situation has important effects on propaganda. The insurgent, having no responsibility, is free to use every trick; if necessary, he can lie, cheat, exaggerate. He is not obliged to prove, he is judged by what he promises, not by what he does."23 This prescient forecast described the actions of the LTTE in the NFZ perfectly.

28. The law of armed conflict prohibitions on taking of hostages are as all-encompassing as the application of the proportionality principle. Apart from the plain language of Common Article 3, which prohibits the taking of hostages by all participants to during armed conflicts under all circumstances, the taking of hostages is an enumerated crime in the Rome Statute in both international and non-international armed conflicts (Articles 8(2)(a)(viii) and 8(2)(c)(iii) respectively), as well as in Article 4(2)(c) of Protocol II Additional. The Blaskic, 25 Trial Chamber reiterated the importance of the prohibition against the taking of hostages:

187. The taking of hostages is prohibited by Article 3(b) common to the Geneva Conventions which is covered by Article 3 of the Statute. The commentary defines hostages as follows:

hostages are nationals of a belligerent State who of their own free will or through compulsion are in the hands of the enemy and are answerable with their freedom or their life for the execution of his orders and the security of his armed forces

Consonant with the spirit of the Fourth Convention, the Commentary sets out that the term "hostage" must be understood in the broadest sense. The definition of hostages must be understood as being similar to that of civilians taken as hostages within the meaning of grave breaches under Article 2 of the Statute, that is - persons unlawfully deprived of their freedom, often wantonly and sometimes under threat of death. The parties did not contest that to be characterised as hostages the detainees must have been used to obtain some advantage or to ensure that a belligerent, other person or other group of persons enter into some undertaking. In this respect, the Trial Chamber will examine the evidence as to .whether the victims were detained or otherwise deprived of their freedom by the Croatian forces (HVO or others) (emphasis added, citations omitted)

29. The synergy between these parallel protections can only be fully respected by virtue of their simultaneous application. In other words, I am of the firm opinion that the presence of hostages, unlawful by every measure of human rights law and the law of armed conflict, in no way decreases the prerogatives of one party to the conflict to strike lawful targets using lawful means. Applying the "broadest" understanding of the term hostage as recommended by the ICRC and accepted by the ICTY, the LTTE attempted to keep the civilians inside the NFZ as hostages. The reported inflation of estimated civilian casualties sought to aggrandize the wrongfulness of the military responses, and to obscure the prior war crimes committed by the LTTE precisely to achieve a propaganda victory that might translate into strategic success. In my opinion, the Sri Lanka military had every right

to respond to those provocations with artillery fires targeting the LTTE positions, provided that the estimate of civilian casualties was not "clearly excessive" in relation to the anticipated military value.

30. Evaluations of Proportionality (military commanders taking into account the security of their own forces) — Military commanders are vested with the broadest possible discretion to determine the combination of means needed to accomplish the military mission subject to the outer boundaries of permissiveness established by the applicable provisions of the laws and customs of warfare. This includes the latitude to expressly take the lives and safety of their own personnel into account when making the proportionality analysis. In his seminal work War and Law Since 1945, Geoffrey Best pointed out that "proportionality is certainly an awkward word. It is a pity that such indispensable and noble words as proportionality and humanitarian(ism) are in themselves so lumbering, unattractive and inexpressive. "26 Proportionality is, nevertheless, a deeply embedded and indispensable aspect of decision-making during war or armed conflict for many decades. Although the textual incarnations of proportionality came after more than a century of development within the field that gap should not be attributed to unfamiliarity with the basic precepts of the precautions expected to be taken by attackers and defenders alike. The developmentally delayed formulation of the treaty language was "because it was thought to be too slippery and in its potential implications embarrassing to commit to a set form of words."27 In particular, the DUTY of military commanders to achieve military victory while minimizing casualties to units under the effective control of the commander is so intertwined in the development of the law of proportionality as to be inseparable.

31. The Rome Statute describes proportionality in a manner consistent with modern State practice following the adoption of Protocol I as:

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." (emphasis added to note the words added to align the Rome Statute with state practice following Protocol I)

In addition, the Elements of Crimes (adopted by consensus as mentioned above) included a key footnote that reads as follows:

The expression "concrete and direct overall military advantage" refers to a military advantage that is foreseeable by the perpetrator at the relevant time. Such advantage may or may not be temporally or geographically related to the object of the attack. The fact that this crime admits the possibility of lawful incidental injury and collateral damage does not in any way justify any violation of the law applicable in armed conflict. It does not address justifications for war or other rules related to jus ad bellum. It reflects the proportionality requirement inherent in determining the legality of any military activity undertaken in the context of an armed conflict.

32. The inclusion of a proportionality requirement to mark off a specific war crime under the Rome Statute is significant because unlike the grave breach formulation found in Protocol I, the criminal offense in the Rome Statute is completed based on the intentional initiation of a disproportionate attack. The highest possible mens rea standard implicitly concedes that some foreseeable civilian casualties are lawful. Thus, the Rome Statute standard strongly mitigates against the inference of a criminal intent based on after the fact inferences that the commander might have had knowledge that a particular attack might cause some level of damage to civilians or their property, or indeed might have selected another mode of attack likely to engender more casualties to one's own force.

33. The modem articulation of the proportionality principle in Article 8(2)(b)(iv) (the crime of disproportionate attack) 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). These revisions to the treaty terminology employed by the drafters of Protocol I could be discounted as a sui generis necessity based on diplomatic convenience, but the reality is that the standard of Article 8(2)(b)(iv) accurately reflects the state practice that established the meaning of proportionality under customary international law at the time that the LTTE launched its artillery fire from within the NFZ. To be more precise, the text of the Rome Statute, as understood in light of the Elements footnote adopted by consensus, accurately embodies preexisting customary international law.

34. The governments of the United Kingdom, the Netherlands, Spain, Italy, Australia, Belgium, New Zealand, Germany, and Canada each published a virtually identical reservation with respect to Articles 51 and 57 as they acceded to Protocol 1.28 The overwhelming weight of the reservations made clear that state practice did not intend to put the warfighter into a straightjacket of rigid orthodoxy. The New Zealand reservation for example (virtually identical to those of other states listed above) reads as follows:

In relation to paragraph 5 (b) of Article 51 and to paragraph 2 (a) (iii) of Article 57, the Government of New Zealand understands that the military advantage anticipated from an attack is intended to refer to the advantage anticipated from the attack considered as a whole and not only from isolated or particular parts of that attack and that the term "military advantage" involves a variety of considerations, including the security of attacking forces. It is further the understanding of the Government of New Zealand that the term "concrete and direct military advantage anticipated", used in Articles 51 and 57, means a bona fide expectation that the attack will make a relevant and proportional contribution to the objective of the military attack involved.

35. Furthermore, commanders have every right to consider the safety of their own forces in making proportionality determinations because, the perspective of the commander (or other warfighting decision maker) is entitled to deference based on the subjective perspective prevailing at the time. The Italian declaration with respect to Protocol I states that in "relation to Articles 51 to 58 inclusive, the Italian Government understands that military commanders and others responsible for

planning, deciding upon or executing attacks necessarily have to reach decisions on the basis of their assessment of the information from all sources which is available to them at the relevant time." This understanding is replicated in a number of other State pronouncements. Another reservation from the government of Austria declares that "Article 57, paragraph 2, of Protocol I will be applied on the understanding that, with respect to any decision taken by a military commander, the information actually available at the time of the decision is determinative." The language of the United Kingdom Law of War Manual summarizes the state of the law which was captured in the prohibition of Article 8(2)(b)(iv) as it should be understood in light of the Elements of Crimes,29

The military advantage anticipated from the attack refers to the advantage anticipated from the attack considered as a whole and not only from isolated or particular parts of the attack. The point of this is that an attack may involve a number of co-ordinated actions, some of which might cause more incidental damage than others. In assessing whether the proportionality rule has been violated, the effect of the whole attack must be considered. That does not, however, mean that an entirely gratuitous and unnecessary action within the attack as a whole would be condoned. Generally speaking, when considering the responsibility of a commander at any level, it is necessary to look at the part of the attack for which he was responsible in the context of the attack as a whole and in the light of the circumstances prevailing at the time the decision to attack was made.

36. In the circumstances prevailing at the time, it is my unqualified opinion that the overarching necessity of ending the multi-generational struggle against the LTTE permitted Sri Lanka commanders to consider means of attack that accomplished the vital goal of "final victory", even as they sought to protect their own forces. It would be ludicrous to suggest that there is some precept of international law that required them to send ground forces into the NFZ to respond to the LTTE artillery fire. I cannot imagine a knowledgeable expert in my field that would suggest otherwise.

Major General John Holmes DSO OBE MC,
Expert Military Report,
28th March 2015

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 Sierre Leone in 2000. This was a highly complex and challenging hostage rescue operation in the Sierre Leone jungle. Its ultimate success acted as part catalyst to the successful conclusion of the Sierre 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.

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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*". [1] 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".* [2]

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[3]. 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 Wanni'). By Nov 2008 the Western Wanni 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:

[1] *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 >. para 31.
[2] Translated copy of an LTTE oath, undated, as found in document recovered by SLA.
[3] Ministry of Defence (MOD), Democratic Republic of Sri Lanka, *Humanitarian Factual Analysis Sri Lanka, July 2006- May 2009* (July 2011), para 125.

"*The Government has gained considerable credit until this point for conducting a disciplined military campaign over the past two years that minimized civilian casualties'"*[4].

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 Wanni. 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)5.
    - The report of the Secretary-General's Internal Review Panel on UN Action in Sri Lanka dated November 2012 (The Petrie Report).6
    - The University Teachers for Human Rights (Jaffna) Special Report No 32 dated 10.06.09.7 – 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.[8]

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.

[4] 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 >.
[5] Darusman Report, (31 March 2011)
[6] *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 >.
[7] 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 >.
[8] Human Rights Watch, War on the Displaced, 19 February 2009 <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.[9] 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. [10] Additionally GoSL were aware that the LTTE were using the protracted ceasefire to rearm. [11]

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. [12] This allowed General Fonseka to revitalise the SLA by increasing both its remuneration and its manpower to 300,000 troops over 3 years[13], which created 5 new divisions[14] 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.

[9] 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 >.
[10] K.M. de Silva, *Sri Lanka and the Defeat of the LTTE* (Colombo: Vijitha Yapa Publications, 2012), p. 2.
[11] MOD, *Humanitarian Factual Analysis Sri Lanka*, para 88.
[12] 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 >.
[13] 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
[14] Ibid

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. [15] 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 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. [16] 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 [17]. His memoires, 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".* [18]

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:

[15] Ibid. at pp. 31-32
[16] Fish, *Sri Lanka learns to counter Sea Tigers' swarm tactics*
[17] MOD, *Humanitarian Factual Analysis Sri Lanka*, para 248.
[18] General Cyril Ranatunga, *Adventurous Journey: From Peace to war, Insurgency to Terrorism* (Sri Lanka: Vijitha Yapa Publications, 2009), p.92

"*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"*[19].

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. [20] 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.[21] 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.[22] 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

[19] *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 >. para 4.36

[20] 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

[21] Ibid, para. 16.128.

[22] Ibid, para. 16.134.

Velupillai Prabhakaran. Following the example of the bombing of the US Embassy in Beirut by Islamic Jihad in 1984[23], 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*"[24]. They also endeavoured to consolidate their political and administrative organisation in the territories that they held and attempted 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. [25]

> "*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*"[26].

14. However, there were setbacks. In 2004, the second in command of the LTTE, Vinayagamoorvthi 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[27]. 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.[28] These logistic issues manifested themselves in the last months of the war when the LTTE allegedly ran short of artillery ammunition. [29] 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

[23] '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
[24] MOD, *Humanitarian Factual Analysis Sri Lanka*, para 121.
[25] Ibid para. 120.
[26] Darusman Report, para 33.
[27] Malik Jalal, 'Think Like a Guerrilla, Counterinsurgency Lessons from Sri Lanka', *Harvard Kennedy School Review* (2011), p. 6
[28] Jane's Intelligence Review
[29] ICEP, *Island of Impunity*, para 16.126.

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."*[30]

Training

16. The training given to front line LTTE fighters fell broadly into three categories. Basic training, which lasted approximately 4 months[31] and took place in LTTE bases which were established in almost every village[32]: special operations training, which included special reconnaissance, sniping, mine laying, artillery[33] : and last, but by no means least, refresher training[34] for all of the above. The LTTE,

> "*invested heavily in training and discipline, command and control, communications, ideological indoctrination and psychological warfare instruction*". [35]

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*"[36].

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*"[37].

[30] US Ambassador Robert Blake, 'Co-chair Meeting with UN Special Envoy to Sri Lanka', Embassy Colombo, *WikiLeaks*, 5 February 2009, para 4.
[31] 'Liberation Tigers of Tamil Eelam (LTTE)', *Jane's World Insurgency and Terrorism* (6 Jun 2012), p. 11.
[32] Paul Moorcroft, *Total Destruction of the Tamil Tigers* (South Yorkshire: Pen & Sword Military, 2012), p. 94.
[33] MOD, *Humanitarian Factual Analysis Sri Lanka*, para. 49.
[34] Ibid, para. 51
[35] ICEP, *Island of Impunity*, para 16.120.
[36] Translated Copy of LTTE training document handed to author by SLA, undated.
[37] Darusman Report, para 68.

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.[38] 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*"[39]

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.[40] 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,[41] 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*".[42]

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*".[43] 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

[38] MOD, *Humanitarian Factual Analysis Sri Lanka*, para 35.
[39] Darusman Report, para 31.
[40] MOD, *Humanitarian Factual Analysis Sri Lanka*, para 173
[41] Human intelligence sources
[42] Darusman Report, para. 70
[43] Darusman Report, p. ii.

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.[44] 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 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*".[45]

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 Wanni 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

[44] Darusman Report, para. 71.
[45] 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

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*".[46] Indeed, the Darusman Report makes it clear that in the last phase stage of the conflict *"LTTE cadre were not always in uniform…".*[47] 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.

21. All the available evidence shows that the LTTE were using civilians as human buffers/shields to obtain a military advantage. [48]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

[46] Frances Harrison, *Still Counting the Dead: Survivors of Sri Lanka's Hidden War*' (London: Portobello Books, 2012), p. 245.
[47] Darusman Report. Para97. pp27-28
[48] Darusman Report. Para98. p28

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,[49] 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 saying that the SLA was involved in "*the world's largest hostage rescue*" operation.[50] 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*".[51] 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. [52]

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

[49] The LTTE did not agree the terms of any NFZ in the final phase.
[50] Darusman Report, para. 174
[51] Moorcroft, *Total Destruction of the Tamil Tigers*, p. 144
[52] Heavy Artillery are guns of 155m and the SLA neither used, nor were in possession of heavy artillery during the conflict.

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

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.[53] 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."*[54] I have adopted this observation to conclude that the prevailing weather conditions made contemporaneous and accurate satellite imagery difficult.

[53] Paul Moorcroft, Ibid, p. 134.

[54] *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

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*".[55] 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.[56] For operations in the Eastern Wanni, one SFHQ was involved, SFHQ-Wanni based at Vavuniya.[57] 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 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.[58] 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, [59] 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

[55] ICEP, *Island of Impunity*, para 16.7.
[56] Ibid, para 16.27.
[57] Ibid, para 16.34
[58] Ibid, para 16.46
[59] Moorcroft, *Total Destruction of the Tamil Tigers*, p. 135

numerous accounts were highly effective.[60]. 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*".[61]

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 .[62]

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.[63] 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.

[60] Ibid, p. 130.

[61] 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."*

[62] "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."

[63] ICEP, I*sland of Impunity*, para 16.74.

33. The Sri Lankan Navy possessed some 50 combat and support ships and in excess of 100 inshore patrol craft.[64] They were supported by the Sri Lankan Special Boat Service (SBS) which by 2009 numbered some 600 personnel.[65] The SBS's role was to penetrate LTTE territory to provide reconnaissance, surveillance and direct action operations. According to official accounts[66] 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 [67]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 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*". [68]

Although reduced to some 5,000 hard-core fighters[69] 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*".[70]

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*

[64] ICEP, *Island of Impunity,* para. 16.89
[65] Ibid.
[66] MOD, *Humanitarian Factual Analysis Sri Lanka*, para 229.
[67] Ibid, para. 234-235
[68] 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.
[69] Darusman Report, para. 66.
[70] Ibid, para 68.

one section of it".[71] 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".*[72]

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*".[73]

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[74]:

- 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 [75] 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".*[76]

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[71] Moorcroft, *Total Destruction of the Tamil Tigers*, p. 131
[72] Darusman Report, para. 97
[73] 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
[74] Extracted from GoSL press releases between January – May 2009
[75] Moorcroft, *Total Destruction of the Tamil Tigers*, p.137
[76] Ibid, p. 130.

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[77] 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 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".*[78]

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.

[77] Interview Author and (Maj) Subramaniyam Sathyamoorthi Ex LTTE, 19 December 2014..
[78] Darusman Report, para. 69

- 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 Wanni. 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[79], 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.".*[80]
>
> *"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".*[81]

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*".[82] 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*".[83]

[79] Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, ICRC, 12 August 1949.
[80] Darusman Report, para. 94
[81] US Ambassador Robert Blake, 'Northern Sri Lanka SitRep 35', Embassy Colombo, *WikiLeaks*, 19 March 2009, para. 5.< http://www.cabledrum.net/cables/09COLOMBO310 >.
[82] Darusman Report, para. 97.
[83] Ibid, para. 99.

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 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 '*auftragstakik*' or mission command, which encourages initiative at lower rank levels. It is the opposite of '*befehlstakik*', 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 Wanni.

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 astonishing that 290,000 Tamil civilians survived to be rescued by the SLA. It is also of note that 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".*[84]

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,[85] supports the contention that there was neither a systematic policy to kill surrendering LTTE, nor civilians. [86] 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.

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[84] Gordon Weiss, *The Cage*, p. 216

[85] 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 >.

[86] http://dbsjeyaraj.com/dbsj/archives/15251, As an aside, this article by a respected Tamil journalists, suggests that following a rehabilitation programme former cadres have been trained with vocational skills and reintegrated back into society.

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 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".*

<u>Proportionality</u>

47. In everything the author has had access to and reviewed there is no indication that SLA deliberately or disproportionally 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*" [87] 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*".[88]

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*

[87] Darusman Report, para. 251.
[88] US Ambassador Robert Blake, 'Northern Sri Lanka SitRep 46 ', Embassy Colombo, *WikiLeaks*, 3 April 2009, para. 2< http://www.cabledrum.net/cables/09COLOMBO393 >.

too soft and wet in which case the crater may fill with water".[89] 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 Wanni, 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"*.[90]

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 Wanni:
    - The weather; *'...emerging monsoon season resulting in increased cloud cover…"*[91]
    - The soil, light to sandy.
    - The number of civilians in the area.

[89] 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'
[90] 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'
[91] 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[92] *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

[92] direction of fire

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.

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 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*".[93] 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*."[94]

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[95], 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 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.

[93] Available at < http://www.oxforddictionaries.com/definition/english/hostage >.
[94] Article 1 of the UN International Convention Against the Taking of Hostages, 1 December 1979.
[95] Darusman Report, para. 101.

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.[96] Given the reported strength of their fortifications and an 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

[96] US State Department Report, 2009. p24.

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.[97] 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 Wanni 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 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

[97] 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 >.

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.

J.T. Holmes

London

Date 28th March 2015

ANNEXES:

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N: McKenzie Intelligence Services Report No 1.
O: McKenzie Intelligence Services Report No 2.

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Report Submitted by Mr. Shamindra Ferdinando[1] to Federation of National Organizations on War Crime Allegations against the Armed Forces of Sri Lanka

[1] Having joined *The Island* in June 1987, Shamindra Ferdinando has covered the conflict in the North-East as well as the JVP insurgency in the South. During 1987-1990, Ferdinando had the opportunity to report the Indian Army deployment in N-E Provinces. As the News Editor of *The Island*, the writer has discussed the war and conflict-related post war issues and was among those who had accompanied the government delegation to Geneva sessions during the previous administration.

Resolution 30/1 and Evidence to Counter Accusations

1. Introduction

In the wake of the United Nations Human Rights Council (UNHRC) reiterating its commitment to accountability process in line with Resolution 30/1 co-sponsored by the incumbent government in Oct 2015, Sri Lanka's response to war crime allegations should be re-examined.

1.1 Main Allegations

(A) The Government of Sri Lanka (GoSL) ordered UN/INGOs to vacate Kilinochchi in September, 2008 to conduct 'a war without witnesses'.

(B) Vanni population denied medicine, food and other basic needs.

(C) Coordinated mortar/artillery/MBRL (multi barrel rocket launchers) attacks on civilian population. Channel 4 News alleged the then Secretary Defence and the then Army Commander executed the operation.

(D) Massacre over 40,000 civilians.

(E) Rape of combatants/civilians. Subsequently, the military was accused of abusing men.

(F) The use of cluster bombs

2. Primary Evidence

Geneva was moved on the basis of about 4,000 submissions received by three-member Darusman Panel. About 2,300 persons furnished information to the panel. But UN directed that these accusations cannot be verified until 2031. Even then, verification has to be approved by the UN.

2.1 Critical Evidence

The following critical evidence is very important in disproving the above allegations;

(A) In June, 2011 (over two years after the successful conclusion of the war) the then Colombo based US Defence Attaché Lt. Colonel Lawrence Smith defended GoSL at a seminar organized by the Army. The seminar dealt with **'Defeating Terrorism: The Sri Lanka Experience.'** In response to a question regarding the alleged move by some LTTE cadres to surrender during the

last few days of the war, the US official denied that possibility, thereby effectively contradicting those propagating massacre of surrendering persons. The US official was responding to a query posed by retired Indian Maj. General Ashok Metha. (Metha served in Sri Lanka during the deployment of the Indian Army in the 80s in accordance with the Indo-Lanka accord).

This is what Lt. Col. Lawrence Smith had to say:

> *"Hello, may I say something to a couple of questions raised. I've been the defense attaché here at the US Embassy since June 2008. Regarding the various versions of events that came out in the final hours and days of the conflict-from what I was privileged to hear and to see, the offers to surrender that I am aware of seemed to come from the mouthpieces of the LTTE – Nadesan, KP – people who weren't and never had really demonstrated any control over the leadership or the combat power of the LTTE.*
>
> *So their offers were a bit suspect anyway, and they tended to vary in content hour by hour, day by day. I think we need to examine the credibility of those offers before we leap to conclusions that such offers were in fact real. And I think the same is true for the version of events. It's not so*
> *uncommon in combat operations, in the fog of war, as we all get our reports second, third and fourth hand from various commanders at various levels that the stories don't seem to all quite match up.*
> *But I can say that the version presented here so far in this is what I heard as I was here during that time. And I think I better leave it at that before I get into trouble."*

The US State Department asserted that the US military official hadn't been at the Defence Seminar on an official capacity. The State Department NEVER contradicted the statement. Instead it disputed the military official's right to make that statement.

(B) Other critical evidence is the leaked US diplomatic cables (Wikileaks) in spite of them being crucial for its defense. One leaked cable dealt with a discussion Geneva-based US Ambassador Clint Williamson had with ICRC Head for Operations for South Asia Jacques de Maio. The US

envoy declared on July 15, 2009, that the Army actually could have won the battle faster with higher civilian casualties, yet chose a slower approach which led to a greater number of Sri Lankan military deaths.

The Army lost nearly 2,500 officers and men during January-May 19, 2009. Thousands suffered injuries. The Paranagama Commission, in its Second Mandate perused Wiki leaks. The Paranagama Commission pointed out that Wiki leaks were admissible in court in accordance with a ruling given in the UK.

Both ICRC and US officials should be able to explain the ground situation before the proposed war crimes court.

2.2. Other Evidence

Deployment of Indian medical team at Pulmoddai, north of Trincomalee to receive the wounded transferred from Puthumathalan under ICRC supervision. The Indian team remained there until the conclusion of the war. The Indian team received several thousand wounded civilians during February-May, 2009 via sea. The government commenced transferring war wounded by sea soon after fighting blocked overland routes to and from Vanni east. Both ICRC and India can furnish details regarding evacuations by the sea. The vessels deployed to evacuate the wounded transported several thousands of essential supplies to Puthumathalan. Foreign relief workers were also allowed to go ashore. Allegations in respect of Vanni population denied medicine, food and other basic needs should be probed against the backdrop of supplies made available to Puthumathalan until the second week of May, 2009. The war ended the following week.

India and ICRC, too, should be able to corroborate those evidence and explain their roles in the operation. The World Food Programme (WFP) can establish the amount of supplies moved to the area held by the LTTE during Feb-May 2009 period.

2.3 Contradictory Claims In Respect of Killing of 40,000 Civilians

The GoSL should seek an explanation from Geneva in respect of the number of civilians perished during the "eelam" war IV. The following examples provide ample evidence as to the contradiatory nature of those calims.

*British Labour Party MP Siobhan McDonagh (Mitcham and Morden-Labour) told House of Commons in September, 2011 that 60,000 LTTE cadres and 40,000 Tamils

perished during January-May 2009. The MP made the only specific reference to the number of LTTE cadres killed during a certain period. The politician ignored the writer's emails seeking a clarification regarding her sources. The British HC in Colombo declined to comment on the MP's claim.

*Special Amnesty International report titled When will they get justice: Failures of Sri Lanka's Lessons Learnt and Reconciliation Commission also released in September 2011 estimated the number of civilian deaths at 10,000.

* A confidential UN report placed the number of dead and the wounded, including LTTE combatants at 7,721 and 18,479, respectively. The report dealt with the situation in the Vanni from August 2008 to May 13, 2009. The War ended a week after the UN stopped collecting data due to intensity of fighting. The vast majority of the wounded civilians were evacuated by the ICRC. The Indian medical team tasked with receiving them should be able to explain specific measures taken by India to assist the war wounded.

The UN is yet to release the report though it was made available to Darusman. It would be pertinent to mention that the UN report had been based on information provided by those who were trapped in the war zone and even today further verification can be made as the identities of those who had provided information are known to the UN. Darusman refused to accept the report as it contradicted his own claims.

The Amnesty International, UK MP as well as the wartime UN head should be able to give evidence before the proposed judicial inquiry.

2.4 US Defence Advisor Confirms Norwegian Assessment

Wartime Norwegian Ambassador in Colombo Tore Hattrem on February 16, 2009 asserted that the LTTE was unlikely to release civilians held on the Vanni east front. The following is the text of the Norwegian's missive addressed to the then presidential advisor Basil Rajapaksa: *"I refer to our telephone conversation today. The proposal to the LTTE to release the civilian population*

now trapped in the LTTE controlled area has been transmitted to the LTTE through several channels. So far there has regrettably been no response from the LTTE and it does not seem to be likely that the LTTE will agree to this in the near future."

The US Defence attaché in June 2011 (over two years after the war) confirmed there had never been an agreement or an understanding regarding organized surrender between the GoSL and the LTTE through the intervention of the UN or Western governments.

3. UN Role in LTTE Human Shield

The UN remained silent and engaged in secret negotiations with the LTTE even after the group detained Tamil UN workers for helping Tamils to leave Vanni west in early 2007. The LTTE made its move in the wake of the GoSL opening up a new front in the Vanni (west of Kandy-Jaffna A9 road).

Co-Chairs to Sri Lanka Peace Process knew what was happening. They, too, remained silent.

The UN mission in Colombo kept UN headquarters in the dark. UN Colombo never contradicted exclusive *The Island* reports in this regard. Other print and electronic media ignored the issue. However, UN New York confirmed *The Island* reports.

Had the UN, Western powers, the TNA and foreign funded civil society organizations intervened on behalf of the Vanni population in early 2007, they wouldn't have ended up as human shields on the Vanni east front.

Response to UN accusation that Vanni population denied food and medicine; the minutes of Consultative Committee on Humanitarian Assistance (CCHA) meetings can prove UN and Western governments never complained about food and medicine shortage. The then President established CCHA in Oct 2006 to ensure essential supplies to the Northern Province. CCHA included UN, US, UK and all key international NGOs operating in Sri Lanka at that time. The CCHA minutes provides strong evidence to disprove the claim of denial of foods and medicine

4. India's Accountability

In January 2004, one-time Indian High Commissioner in Colombo J.N.Dixit faulted former Indian PM Indira Gandhi for intervening in Sri Lanka. Now, the issue is whether reference can be made to India's role in the proposed war crimes court to be set up under the Geneva Resolution.

5. Office for Missing Persons

ICRC, Foreign Ministry, Paranagama Commission have furnished vastly different numbers with regard to missing persons. UN, too, discusses the issue. They ignore the issue of thousands of Sri Lankan Tamils living overseas though being listed missing. A comprehensive investigation will expose those hiding overseas. Let me highlight three cases.

(a) Front line Socialist Party leader Kumar Gunaratnam received Australian passport bearing the name Noel Mudalige

(b) The Army was accused of killing wartime Vanni Tech Director Thayapararajah in Sept. 2009. Thayapararajah was arrested along with his wife and children in Tamil Nadu in May, 2014

(c) Ex-LTTE cadre Anthonythasan declared missing since early 90s appeared in an award winning French move Dheepan a few years ago. The media quoted the ex-Tiger as having said: "I came to France because at the time I was able to only find a fake French passport and not a fake British or Canadian passport."

6. Lack of Evidentiary Sources to UN

Having failed to obtain sufficient number of complaints, the Darusman panel or the Panel of Experts (PoE) issued 25 sample letters online to attract the socalled victims. The following is the first sample of the letter:

" To: Mr. Marzuki Darusman, Chairman

To: Mr. Steven Ratner, Panel Member

To: Ms. Yasmin Sooka, Panel Member

Re: Through U.N. investigation Sri Lanka's war criminals must be brought to books

Tamils in Sri Lanka have gone through several rounds of communal violence tacitly supported by successive Sinhalese lead governments and its armed forces since Independence. Since 1956, Tamil minority rights and Tamils were used as political pawn in Sri Lankan polity to hold on to the power. The minority Tamils were systematically and routinely subjected to all kind of

atrocities, including 'war crimes', 'crimes against humanity' and 'genocide' in order for the Sinhala political parties to woo the Sinhala masses in the name of majority hegemony.
Meanwhile, in another development, Gotabaya Rajapaksa, the Defence Secretary of the Sri Lankan government has threatened to execute Sarath Fonseka, the army commander who delivered victory over the Tamil Tigers, if he continues to suggest that top officials may have ordered war crimes during the final hours of the Tamil war. During an interview with BBC's Stephen Sackur, Sri Lanka's defence secretary Gotabaya Rajapaksa said General Fonseka was a liar and a traitor.
A US-based activist group, claimed, that it has obtained a 100-page long sworn affidavit from a senior commander of the Sri Lanka Army (SLA) who has fled Sri Lanka seeking asylum for himself and his family. SLA Commander's affidavit contains incriminating information in several areas.
But more than that, there is substantial body of credible evidence pointing to the commission of war crimes by government forces including attacks on humanitarian operations, attacks on hospitals and deliberate shelling of civilians enticed by the government to seek protection in the safety of the "No Fire Zones."

I appeal to the panel of experts to ask the U.N. in no uncertain term that Sri Lanka should be investigated for 'war crimes', 'crimes against humanity' and 'genocide'.
Yours truly,
Your Name, Contact Postal Address with the Residing country."

7. Further Evidence

Judge Richard Goldstone, who accused both Israel and Hamas of war crimes in his report on the 2008-09 conflict, revealed in a newspaper article that subsequent internal Israeli inquiries had made him revise his opinion."If I had known then what I know now, the Goldstone Report would have been a different document," he said. UNHRC accepted Goldstone's stand though other members of the panel strongly stood by the report.

8. TNA Role and Association with LTTE

Having met UNSG Ban Ki-moon in Jaffna, TNA MP M.A, Sumanthiran declared that they had received an assurance from Ki-moon that Geneva Resolution would be implemented. Before

attorney-at-law Sumanthiran threw his weight behind the TNA, the outfit worked closely with the LTTE. Can war crimes investigation take place without inquiring into the TNA's wartime conduct? Today, TNA plays a significant role in pursuing the alleged war crimes investigation. TNA deals directly with the US and Geneva in spite of its sordid operations with LTTE.

In early Nov. 2005 TNA on behalf of the LTTE ordered Tamil speaking people to boycott the presidential polls. The TNA action should be studied against the backdrop of Sampanthan declaring the LTTE as the sole representative of Tamil speaking people in the run-up to the April, 2004 general election. The EU Election Observation Mission in its final report alleged that the TNA won the Northern and Eastern electoral districts with the help of the LTTE. The TNA never challenged the EU report.

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