A Factual Appraisal of the OISL Report: A Rebuttal to the Allegations Against the Armed Forces

Commissioned by - The Federation of National Organizations

Sponsored by – The Global Sri Lanka Forum

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Volume One

Federation of National Organizations
Colombo, Sri Lanka
27th January 2017

Dear Mr. Weerasekera,

Mandate

We wish to draw your attention to the following matters which form the background to our present request. On 9th February 2016, UN Human Rights High Commissioner Zeid Al Hussein ended his official visit to Sri Lanka with a statement where he said *inter alia*:

"Let me be as plain as I can: the international community wants to welcome Sri Lanka back into its fold without any lingering reservations. It wants to help Sri Lanka become an economic powerhouse. It wants Sri Lanka's armed forced to face up to the stain on their reputation, so that they can once again play a constructive role in international peace-keeping operations, and command the full respect that so many of their members deserve." ('Statement by UN High Commissioner for Human Rights Zeid Al Hussein, at the end of his mission to Sri Lanka,' 9th February 2016, www.reliefweb.int)

We are especially concerned by the High Commissioner's assertion that there is *a stain on the reputation of Sri Lanka's armed forces.* The aforesaid 'stain,' presumably, is the allegation that the armed forced are collectively responsible (i.e. where the purported acts can be imputed to the command structure of the armed forces and thereby the State itself) for war crimes and other serious crimes purportedly committed during the last phase of the war.

To the best of our knowledge, the *only* Report especially one with the imprimatur of the UN or any of its subsidiary organs to level the above allegation is the OISL Report (OHCHR investigation on Sri Lanka), released to the public on 16th September 2015.

The Government of Sri Lanka by note verbale UN/HR/1/30 dated 15th September 2015 endorsed and accepted without reservation the conclusions and recommendations of the said Report. In a one-and-a-half-page response (it should be noted that the OISL Report is a 260-page document) the GOSL said *inter alia*:

"Takes note of the Report of the OHCHR Investigation on Sri Lanka (OISL), recognizes fully that this Report represents a human rights investigation and not a criminal investigation, and will ensure that its contents as well as recommendations receive due attention of the relevant authorities including the new mechanisms that are envisaged to be set up" (Note Verbale Ref. UN/HR/1/30)

Meanwhile, on 29th September 2015, the GOSL co-sponsored UNHRC resolution A/HRC/30/L.29, which again endorsed without reservation the conclusions and recommendations of the OISL Report. The said resolution was subsequently adopted unanimously by the Council.

On the above occasion, Sri Lanka's Permanent Representative to the UNHRC stated *inter alia*:

"You have all seen our written response dated 15th September to the OHCHR on the Report of the Office of the High Commissioner for Human Rights and the Report of the OHCHR Investigation on Sri Lanka which set out clearly the path we intend to take. We stated that we take note of the Report of the OISL and that we will ensure that its contents as well as recommendations receive the due attention of the relevant authorities including the new mechanisms that are envisaged to be set up." ('Statement by H. E. Ravinatha P. Ariasinha Ambassador/Permanent Representative of Sri Lanka,' Geneva, 30th September 2015, www.mea.gov.lk)

To the best of our knowledge, at the time the GOSL issued note verbale UN/HR/1/30/ on 15th September 2015 or the above statement on 30th September 2015 it had not subjected the OISL Report to an official assessment with respect to its facts.

As far as we are aware, the OISL has not been subjected to such an assessment to this day. And yet, we note that there are renewed efforts to implement the recommendations of the OISL, in particular its calls for establishing special courts to pursue the allegations of war crimes and other crimes mentioned in the Report. Under the circumstances, we consider that there is a pressing need for a thorough assessment and analysis of the facts in the OISL Report.

We note with appreciation that you have been writing on the UN's seemingly relentless pursuit of 'accountability' in Sri Lanka since 2012, in particular the series of resolutions that culminated in the authorization of the OISL Report. We note that two of your essays, 'The Illegality of UN Secretary-General Ban Ki Moon's Approach to Sri Lanka,' and 'The UN's Sri Lanka Strategy and its Implications for International Law,' originally published in the *Foreign Policy Journal* have been posted *inter alia* in the website of the *Peace Palace Library*, the vast library attached to The Hague.

Therefore, on behalf of the Federation of National Organizations, and in the public interest, we request that you produce a factual appraisal of the OISL Report, in order to assist The Federation of National Organizations to:

a. Facilitate and encourage a wider public discussion of the OISL report

b. Help defend the interests of Sri Lanka before the United Nations Human Rights Council with respect to allegations of war crimes and other crimes stemming from resolution A/HRC/30/L.29;

c. Help clear the reputation of the armed forces from the allegations contained in the OISL report, and to produce a document that will be useful in establishing before the international community that there is no stain on the honour of the members of Sri Lanka's armed forces that they must first wipe clean *before* they can command the full respect that they deserve.

d. Explore possible avenues of legal and/or administrative action against officials, both Sri Lankan as well as foreign, responsible for the OISL report or connected thereto, in the event that the report is found to be compromised either with respect to its facts or the law.

We request further that in the aforesaid task you work under the guidance and advice of a panel of editors and consultants comprising of:

- Kalyananda Thiranagama, Senior Attorney-at-Law
- Raja Gunaratne, Attorney-at-Law and Senior Lecturer at the Open University Colombo
- Shamindra Ferdinando, Investigative journalist
- Shenali Waduge, Writer, and commentator on nationalist issues

The said report will be submitted for review to a distinguished panel of jurists.

We also propose to present the said report to the general public of Sri Lanka by way of a public resolution in order to seek their approval to deliver the said report to the UNHRC and the U.N. General Assembly for appropriate action.

This entire project will be coordinated and managed by Dr. K. M. Wasantha Bandara. The project will be sponsored by the Global Sri Lanka Forum.

We shall request all Patriotic Sri Lankan Organizations to extend their fullest cooperation to you and the team of editors in this endeavor.

Thank You,

Signed by Rev. Bengamuwe Nalaka Thero

Signed by Dr. Gunadasa Amarasekara

Signed by Rear Admiral (Retd) Dr. Sarath Weerasekara

Dharshan Weerasekera
Attorney-at-law
Thalawathugoda
7th March 2017

Dear Sirs,

Completion of Assignment

As per your request by letter dated 27th January 2017 I take pleasure in forwarding a brief factual appraisal of the OISL report. I would draw your attention to the following.

Since you indicate that one of the objectives of this report is to encourage wider public discussion of the OISL report I have presumed a reader who is relatively unfamiliar with the background as well as content of the said report.

Therefore, when rebutting the OISL's charges I have thought it best to quote at length from that report as well as the primary sources. Though this approach is not typical of reports of the present type I ask your indulgence given the exigencies of the task.

Second, you informed me that you wished the report completed by the end of February, which left me 3 – 4 weeks to complete the task. Therefore, the present report is not as comprehensive as I would have liked it to be. I was also compelled to draw heavily on work I had already done on this subject, particularly the two essays you mentioned in your letter, and a third published subsequently in my book, "The UN's Subversion of International Law: The Sri Lanka Story."

Within those constraints, I have done my best to produce an appraisal of the OISL report and I hope it will be of use in your various activities. I state categorically that I have performed the present work out of the personal regard I have for the three of you. I must confess, however, that the following thought has also pushed me to complete this work as soon as possible.

You indicate in your letter that the UN High Commissioner for Human Rights (and one must presume his speaks for his Office, as well as for the Human Rights Council) has said that there is a *stain* on the honour of the armed forces of Sri Lanka. If he said such a thing in my view it is an insult hurled not just at the armed forces but at the country itself. The armed forces are the guardians of the nation, and a stain acquired as a result of guarding the nation is necessarily a stain on the honour of the motherland itself.

Under the circumstances I consider it a moral duty of every citizen to stand up and counter such slurs and set the record straight, and for that purpose, contribute whatever they can of their labour and skill.

Dharshan Weerasekera

Executive Summary

By letter dated 27th January 2017, Ven. Bengamuwe Nalaka Thero, Dr. Gunadasa Amarasekera and Rear Admiral (Retd) Dr. Sarath Weerasekara on behalf of the Federation of National Organizations requested Attorney-at-law Mr. Dharshan Weerasekera to produce a factual appraisal of the OISL report. On 7th March 2017, Mr. Weerasekera completed the said task and forwarded the present report.

The OISL report levels seven charges against the Government of Sri Lanka (GOSL). Three of those charges deal with offences that fall under International Humanitarian Law (IHL), and four deal with offences that fall under International Human Rights Law (IHRL). The findings with respect to these charges are as follows:

Charges under IHL

1. **Impact of hostilities on civilians and civilian objects. (There are two separate charges under this topic – indiscriminate shelling of civilians, and shelling of hospitals)**

   a) **Indiscriminate shelling**
   It was found that the best available estimates of the number of civilians that died during the last phase of the war, coupled with testimony of outsiders including foreign journalists present at or near the conflict zone during the relevant times, negate the charge.

   b) **Shelling of hospitals**
   It was found that, the OISL Panel has among other things deliberately attempted to mislead the OHCHR with respect to the above charge, and this negates the charge.

2. **Denial of humanitarian assistance to civilians in the conflict-zone**
   It was found that, the Panel has completely neglected to interview crucial witnesses who had first-hand knowledge including documents as to exactly how much food and medicine was in the Vanni at the relevant times, therefore this negates the charge.

3. **Unlawful Killings**
   Four allegations of unlawful killings were analyzed, and it was found that, one, either the OISL Panel itself says that it doesn't have enough evidence to come to a definite conclusion as to who was responsible for those incidents, or, the Panel's evidence lends itself to interpretations that lead to conclusions other than the ones the Panel has drawn. Thus, the charge is negated.

Charges under IHRL

4. **Violations related to deprivations of liberty (arbitrary arrests, and so on)**

It was found that, the Panel's chief source of evidence for the above charge is anonymous witnesses, whose statements are not available to the public. The Panel compounds this problem in various other ways also, which tend to further negate the charge.

5. **Enforced Disappearance**

It was found that, the Panel engages in an obfuscation with respct to the number of complaints of purported enforced disappearances, and compounds this problem by certain other ways explained more fully later, the combined effect of which is to render the charge inconsequential.

6. **Torture**

It was found that, as with the charge of deprivations of liberty, the Panel's chief source of evidence for the charge of torture was also witnesses whose statements are not available to the public. The Panel compounds this problem in certain ways explained more fully later, the combined effect of which is to render the charge inconsequential.

7. **Sexual and gender-based violence**

Just a with the charges of deprivations of liberty and torture, the Panel's chief source of evidence for the charge of sexual and gender-based violence is also anonymous witnesses, witnesses whose statements are kept secret. The Panel compounds this problem in certain ways explained more fully later, the combined effect of which is to negate the charge entirely.

In spite of the aforesaid defects, the GOSL accepted and endorsed the conclusions of the OISL report on 15th September 2015. Meanwhile, the United Nations Human Rights Council, on 29th September 2015, adopted resolution A/HRC/30/l.29, which resolution in Operative Paragraph 1 endorsed and accepted without reservation the conclusions and recommendations of the OISL report.

The demands that the said resolution make of Sri Lanka including the call to establish special courts to try Sri Lanka's war time leaders for war crimes pursuant to the charges in the OISL report, are based on the recommendations of the latter report. It should be noted that, the GOSL co-sponsored resolution A/HRC/30/L.29.

Under the circumstances, the author has argued that the GOSL, the UNHRC as well as the UN General Assembly, have contravened both the spirit as well as letter of relevant laws, and have an obligation to inquire into how this could have happened, and accordingly, has recommended that:

1. The Federation of National Organizations and its affiliates are duty bound to the people of Sri Lanka to use their resources, influence and energy to pressure the GOSL to produce an official assessment of the OISL report.

2. The Federation of National Organization and its affiliates are duty bound to the people of Sri Lanka to use their resources, influence and energy to pressure the UNHRC to authorize an official assessment of the OISL report.

3. The Federation of National Organizations and its affiliates are duty bound to the people of Sri Lanka to use their resources, influence and energy to inform the UN General Assembly of what has been taking place at the UNHRC re Sri Lanka, and compel the UNGA to assign a Special Rapporteur to investigate this entire matter. Also, to impose a moratorium on the UNHRC from pursuing any further measures with respect to Sri Lanka based on resolution A/HRC/30/L.29, until such investigation is complete.

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Volume One

Chapter One

Section – 1: Introduction

Objectives:

01. The objectives of the present report are to:

a. Provide a factual appraisal of the OISL report in order to encourage wider public discussion of this important report which promises to have an enormous impact on the history and politics of Sri Lanka;[1]

b. Help defend the interests of Sri Lanka before the United Nations Human Rights Council with respect to allegations of war crimes and other crimes stemming from resolution A/HRC/30/L.29;

c. Help clear the reputation of the armed forces from the allegations contained in the OISL report, and to produce a document that will be useful to the Federation of National Organizations and its affiliates to establish before the international community that there is no stain on the honour of the members of Sri Lanka's armed forces that they must first wipe clean *before* they can command the full respect that they deserve.

d. Explore possible avenues of legal and/or administrative action against officials both Sri Lankan as well as foreign responsible for the OISL report or connected thereto, in the event that the report is found to be compromised either with respect to its facts or the law.

[1] The OISL report as shall be explained in the course of the present report is the basis for UNHRC resolution A/HRC/30/L.29 (September 2015) which called on the GOSL to take certain tangible steps including constitutional reforms to facilitate reconciliation among the various ethnic groups in the country, particularly the Sinhalas and the Tamils. The OISL's central claim (again, as shall be explained in the course of the present report) is that war crimes and other serious crimes were committed during the armed conflict with the LTTE particularly in its last phase and that the armed forces of Sri Lanka are collectively responsible for at least some of those crimes. To put it another way, OISL is suggesting that in conducting operations against the LTTE the security forces went beyond the exigencies of combat, and attacked the Tamil civilian population: i.e. that the war was not just against the LTTE, but against the Tamil community as such. If one follows this argument to its conclusion, then (according to the OISL's logic) the key to reconciliation is for the victors, the Sinhala, to first admit that crimes were in fact committed during the war, and consent to be held accountable for them. A glance at the devices for reconciliation suggested in resolution A/HRC/30/L.29—for instance, the recommendation for special courts with participation of international judges to try Sri Lanka's war-time leaders, both civilian and military for war crimes, a Truth Commission, and even the recommendation for a constitutional 'settlement' involving devolution of power to the provinces, which is premised on the view that the Tamils cannot live side by side with the Sinhalas because the Sinhalas in some fashion or other threaten the physical safety as well as the dignity of the Tamils—shows that they are based on the types of ideas that appear to inform the OISL report. So, if the GOSL follows the recommendations of the said resolution, and indications are that it is, the OISL's ideas as to the *rationale* for reconciliation will dictate the reform agenda in Sri Lanka for years to come.

Origins of the OISL

02. On 26th March 2014, the UNHRC by resolution A/HRC/25/L.1/Rev.1 requested the OHCHR to undertake a comprehensive investigation into "serious violations and abuses of human rights and related crimes"[2] allegedly committed during the period covered by the Lessons Learnt and Reconciliation Commission.[3]

03. The OHCHR thereon launched the said investigation in August 2014 by issuing a call for public submissions.[4]

04. The final report of the investigation (OISL report) was scheduled to be released in March 2015 but by special request of the High Commissioner was postponed to September 2015.[5]

05. The report was released to the public on 16th September 2015 and at the same time filed officially with the UNHRC.[6]

06. Meanwhile, on the 15th September 2015, the GOSL accepted and endorsed without reservation the conclusions and recommendations of the report, which had been forwarded to the Government on 10th September 2015.[7]

07. On 29th September 2015 the UNHRC by resolution A/HRC/30/L.29 also endorsed without reservation the conclusions and recommendations of the OISL report.[8]

08. The said resolution was sponsored by the United States and co-sponsored by the GOSL and adopted by the Council by consensus, without debate.

Developments subsequent to the adoption of resolution A/HRC/30/L.29

09. In the days following the adoption of the above resolution, the GOSL took a number of steps to implement its recommendations.[9] However, the most

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[2] A/HRC/25/L.1/Rev.1, 26th March 2014, para 10

[3] "The period covered by the LLRC" is defined as the time between 22nd February 2002 to 15th November 2011. (OISL Terms of Reference, OISL report, Annexes, p. 251)

[4] Call for Submissions, OISL Report, Annexes, p. 255

[5] See A/HRC/28/23, 27th February 2015

[6] A/HRC/30/CRP.2, 16th September 2015, www.ohchr.org

[7] Note Verbale No. UN/HR/1/30, 15th September 2015, www.mea.gov.lk

[8] A/HRC/30/L.29. 29th September 2015, www.ohchr.org

[9] For instance, in October, the GOSL arranged with Japan to send the well-known war crimes Mr. Mutoo Noguchi to Sri Lanka in order to advise the GOSL on setting up the prosecutorial and judicial mechanisms recommended in resolution A/HRC/30/L.29. (See "Japan to send top international judge to Sri Lanka next month," 1st October 2015, www.colombopage.com) Reference to Mr. Nuguchi's visit was made by the Japanese Prime Minister Mr. Abe in a Joint Declaration issued by him and the Sri Lankan Prime Minister Ranil Wickremasinghe during the latter's official visit to Japan in early October. (See "Joint Declaration on Comprehensive Partnership between Japan and Sri Lanka," 6th October 2015, www.mofa.gov.jp, para 14). The fact that the Japanese PM mentions Mr. Noguchi's visit in an official document means that the said visit was done at the behest of, or had the blessing of, the Japanese Government.

significant of such steps came in January 2016 with the establishment of a Consultation Task Force on Reconciliation Mechanisms.[10]

10. The purpose of the CTFRM was to facilitate public consultations on the recommendations of the OISL report and to generate an "action plan" for implementing those recommendations.

11. The CTFRM filed its final report on 17th November 2016, in which it recommended *inter alia* the establishment of a special court which would include foreign judges to pursue the allegations made in the OISL report.[11]

12. To the best of the author's knowledge, nowhere in the CTFRM's report is there an assessment of the evidence in the OISL report as to whether the OISL has in fact established its allegations to a degree that would *warrant* further pursuit through the mechanisms being envisioned.[12]

13. At present the official position of the GOSL with respect to the report of the CTFRM—indeed, to the recommendations of resolution A/HRC/30/L.29 in general—is not known.[13]

Methodology

14. It is the contention of the author that the evidence in the OISL report is seriously flawed, characterized among other things by contradictions, omissions, lies, obfuscations and half-truths, and also lacking in any consideration of exculpatory evidence, the cumulative effect of which is that the report fails to establish its primary claim, namely, that the State (i.e. the military as well as civilian leaders who oversaw the conduct of the war, and thereby the armed forces *collectively* as contra-distinguished from individual soldiers) is responsible for war crimes and other serious crimes allegedly committed during the relevant period.

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[10] See Consultation Task Force on Reconciliation Mechanisms, Call for Submissions (Press Release), 5th April 2016, www.scrm.gov.lk

[11] Final Report of the Consultation Task Force on Reconciliation Mechanisms, 17th November 2016.

[12] To the best of the author's knowledge the CTRM starts from the premise that the mechanisms suggested by the OISL are in fact *warranted*.

[13] For instance, the *Daily Mirror* of 7th January 2017 quotes Justice Minister Mr. Wijeyadasa Rakapakshe as saying: "No one is complaining about the independence of the judiciary anymore. We have reconciliation and peace process in place. This report [Reconciliation Task Force Report] at this juncture is totally unwarranted. Therefore, we don't have to follow these recommendations of the CTF." ("I have no confidence in it: no one can force us to have foreign judges," *Daily Mirror*, 7th January 2017. Meanwhile the *Daily Mirror* of January 13th January 2017 quotes Foreign Minister Mr. Mangala Samaraweera as saying, "The content of the Resolution [A/HRC/30/l.29] is based on commitments that we ourselves as a Government made to our people, and proposals that we presented to the Council based on the Lessons Learnt and Reconciliation Commission Report, the Paranagama Commission Report and the advice of our experts," ("We've a clear consensus on domestic mechanism: Mangala," *Daily Mirror*, 13th January 2017)

15. Because of the constraints of time, the author will not assess all of the allegations made in the OISL report, but will focus on a limited number of allegations representative of the others.

16. In this context, the methodology of the present report is to identify a paragraph or a series of paragraphs that deal with a single allegation or a number of allegations, and then assess the evidence in those paragraphs by subjecting it to interrogation according to four out the five recognized modes of evaluating evidence in criminal cases, namely spontaneity, consistency, plausibility, contradictions/omissions, plus exculpatory evidence.[14]

17. The author will introduce exculpatory evidence from the following sources;

    i. Eye-witness testimony:

        a. Reporters working in the conflict zone during the last phase of the war.

        b. Doctors working in the conflict zone during the last phase of the war.

        c. Published work of key persons who were either in the conflict zone at the relevant times or had first-hand information of what was happening there. For instance, Thamilini Jayakumaran, Head of the Women's Wing of the LTTE's Political Affairs Office (*Under the Shade of a Sharp-Edged Sword*) and Gordon Weiss, UN Spokeman in Colombo during the relevant times (*The Cage*).

    ii. Documentary evidence:

        a. ICRC reports

        b. UN reports

        c. The reports of the international experts retained by the Paranagama Commission.

        d. LLRC report

        e. Minutes of the Consultative Commission on Humanitarian Assistance

[14] The author is guided in the aforesaid matters *inter alia* by two practical manuals: Frederic John Wrottesley, *On the Examination of Witnesses*, Sweet and Maxwell, London, 1921; and also, U. R. De Silva, *Criminal Defence* (in Sinhala), Colombo, 2010.

iii. Miscellaneous sources: Wikileaks, relevant asylum applications, etc.

18. The author will also rely on the Lucas Principle recognized in the Criminal Law of England,[15] which holds that if an accused lies or misrepresents facts in the course of his statements with respect to matters relevant to an investigation, it may be presumed that he does so among other things out of "a realization of guilt and a fear of the truth"[16] and therefore an adverse inference as to his possible guilt can be drawn against him.

19. The author proposes to use the said principle especially in Part – 3 of the present report, in the submissions with respect to possible legal and/or administrative action against officials responsible for the OISL report or connected thereto.

Section – 2: Overview of the OISL Report

The Purpose of the OISL Report

20. The purpose of the OISL report is to make a case for war crimes against the State, i.e. argue that the civilian as well as military leaders who oversaw the war against the LTTE are responsible for certain acts committed during the period 2002/2011, which if proved would amount to war crimes and crimes against humanity. That the purpose of the OISL report is to make a case against the *State* as opposed to individual soldiers is established beyond any doubt *inter alia* by the following:

21. On pages 5-6 of the introduction to the report the following two paragraphs appear.

> *"It is important at the outset to stress that the OISL conducted a human rights investigation, not a criminal investigation. The timeframe covered by the investigation, the extent of the violations, the large amounts of available information, as well as the constraints to the investigation, including lack of access to Sri Lanka and witness protection concerns posed enormous challenges. Nevertheless, the investigation report has attempted to identify the patterns of persistent and large scale violations of international human rights and humanitarian law that occurred, not only during the last phases of the armed conflict, but during the whole period covered by OISL and prior to it."*[17]

[15] The principles of English Criminal Law are followed in Sri Lanka, and in general are respected throughout the world because, among other factors, many people consider the said principles to be reasonable, not to mention compatible with common-sense.
[16] *Regina v Lucas (Ruth) [1981] QB 270*
[17] A/HRC/30/CRP.2, para 5

"These patterns of conduct consisted of multiple incidents which occurred over time. They usually required considerable resources, coordination, planning and organization, and were usually executed by a number of perpetrators within a hierarchical command structure. Such systemic acts, if established in court of law may constitute war crimes and crimes against humanity, and give rise to individual criminal responsibility."[18]

22. Also in the video-link statement by which the High Commissioner introduced the OISL report to the Human Rights Council on 30th September 2015 he says:

"The sheer number of allegations, their gravity and recurrence and similarity in their modus operandi, as well as the consistent pattern of conduct they indicate, all point to system crimes. Such acts cannot be treated as ordinary crimes; if established in a court of law they may constitute international crimes, which are of interest to the international community."[19]

Preview of the OISL report

23. The OISL report is arranged in 3 Parts: Part 1 contains the introduction, and also a discussion of the contextual background to the report along with discussion of the relevant legal framework. Part 2 contains eleven 'Thematic Chapters' which set out various allegations of wrongdoing under various headings such as, "Unlawful Killings," "Violations related to deprival of liberty," "Enforced disappearance," "Torture," and so on. Finally Part 3 summarizes the principal findings of the investigation, and gives its conclusions and recommendations.

24. The eleven 'Thematic Chapters' in Part 2 of the report, which form to bulk of the report, are as follows,

1. Unlawful killings	- pgs. 47-70
2. Deprivation of liberty	- pgs. 71-80
3. Enforced disappearances	- pgs. 81-108
4. Torture and degrading treatment	- pgs. 109-116
5. Sexual and gender-based violence	- pgs. 117-127
6. Abduction of adults	- pgs. 128-131
7. Recruitment and use of children in hostilities	- pgs. 132-144
8. Impact of hostilities on civilians and civilian objects	- pgs. 145-176
9. Constraints on movement	- pgs. 177-184
10. Denial of humanitarian assistance	- pgs. 185-201
11. Deprival of liberty in IDP camps	- Pgs. 202-218

25. Of the above, the author will analyze chapters 1, 2, 3, 4, 5, 8, and 10. Chapters 6, 7 and 9 pertain only to the LTTE and given the constraints of time the author will

[18] Ibid, p. 6, para 6
[19] Statement by UN High Commissioner for Human Rights Zeid Ra'ad Al Hussein via video-link to the Human Rights Council, 30th September 2015, www.ohchr.org

not analyze them here. Similarly chapter 11, "Deprival of liberty in IDP camps is not relevant at present because the IDPs have now been resettled.

Standard of Proof

26. The standard of proof of the OISL report is "Reasonable grounds to believe"[20] which in the law is recognized as the lowest threshold of proof that one needs to adduce in order to establish any particular allegation.

27. The author wishes to make three points about the standard of proof of the OISL report.

28. First, it should be noted that, in spite of the claim by the Panel that it conducted only a human rights investigation and not a criminal investigation, the Panel's conclusion is that criminal acts may have happened. More important, the Panel has recommended that special courts be established to try Sri Lanka's war time leaders for war crimes.

29. Under the circumstances, since the OISL's charges are designed to underpin criminal trials, the Panel should have set itself a higher standard of proof at the outset, and the choice of the "Reasonable grounds to believe" standard renders the Panel's conclusions null and void *ab initio*.

30. Second, it should be noted that, Sri Lanka's present-day courts are the product of, and reflect, a tradition going back nearly 200 years, to the Charter of Justice of 1833.[21] The Charter of Justice, meanwhile, incorporated into the legal tradition of Sri Lanka the Roman-Dutch law that had prevailed in the coastal regions of the island at the time the British took over in 1796. Thus, as Dr. L. J. M. Cooray, the leading authority on this subject says:

> *"The laws of Sri Lanka like those of South Africa have been influenced by the two great legal traditions the world has known – the civil and common law systems."*[22]

31. It should be noted further that, the Charter of Justice gave formal recognition to the customary laws of the land, that is, the laws that had prevailed in Sri Lanka long before the Europeans ever set foot on the island, and among those laws are the customary laws of the Sinhala, whose presence in the isle goes back over 2500 years.

32. Throughout the past 200 years, including during the 30-year conflict with the LTTE, the courts of Sri Lanka have demonstrated time and again that they will

[20] OISL Terms of Reference, OISL report, Annexes, p. 255
[21] L. J. M. Cooray, *An Introduction to the Legal System of Sri Lanka*, Stamford Lake, Colombo, 2003, p. 11
[22] Ibid, p. 11

not hesitate to rule against the State, including against the armed forces, where the interests of justice so demand it.

33. To name just one example: In the Chrishanthi Coomaraswamy case (1998)[23] the Supreme Court upheld a conviction of four soldiers for rape and murder of a Tamil girl, the murder of her mother, two brothers and a family friend.

34. When in the course of the hearings one of the appellants alleged that he had been framed by the army because he knew the location of mass graves, the court notwithstanding strong opposition by the State ordered that the allegation be probed, and in the magisterial inquiry that followed spot that the appellant claimed was a mass grave was dug up. (The 'grave' contained the remains of a dead bull.) The point is that, the court did not hesitate to order the inquest when it considered that the interests of justice demanded it.

35. Therefore, one should appreciate that, when the Panel recommends that the GOSL establish special courts in order to try Sri Lankans for war crimes, what the Panel is really saying is that it considers that the courts already in place, founded on the aforesaid traditions, are *incapable* of handling the Panel's charges.

36. Under the circumstances, it is asserted that the Panel had a duty to establish its charges at a higher standard than 'Reasonable ground to believe," the *lowest* standard known in the law. For this reason also the Panel's conclusions are null and void *ab initio*.

37. Without prejudice to the arguments in paragraphs 26 – 36 above, the author contends that, the Panel has failed to establish a prima facie case with respect to its charges even at the 'Reasonable grounds to believe standard," because of the following reasons.

38. "Reasonable grounds believe" or which is the same thing "reasonable grounds to suspect" cannot be interpreted as giving an evaluator of evidence a license to abandon critical analysis of evidence altogether. For instance if the same evidence suggests that event 'A' or event 'B' might have occurred and the evaluator of evidence wants to say that event 'A' and not 'B' happened, the evaluator is obliged to give reasons for picking 'A' over 'B.'

39. Sir Geoffrey Nice QC and Rodney Dixon QC, two of the six international experts retained by the Paranagama Commission under its second mandate, filed as part of their work a review of the Report of the Secretary-General's Panel of Experts of Accountability in Sri Lanka (2011), which report also followed the 'reasonable grounds to believe" standard. (The said Review is included in Volume Two (Supplementary Materials) of the present report.)

[23] *Samaratne and others v. Attorney General* (Chrishanthi Kumaraswamy rape case)

40. They discuss at considerable length the law relating to the said level of proof. Their comments are highly pertinent to the present task. They said *inter alia*:

[A] "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. 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.[24]

[B] The highest standard of proof is that of 'beyond a reasonable doubt' which is required to convict an accused of a crime. Below that standard of 'beyond reasonable doubt' is a 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.[25]

[C] 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, it does demand that there is sufficient reliable and verifiable evidence available to establish "the criminal responsibility of an individual' which can result in charges being brought and the person losing her/his liberty through arrest and detention pending trial.[26]

[D] The ICC 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". The ICC has emphasized 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."[27]

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[24] "Review of 'Report of the Secretary-General's Panel of Experts on Accountability in Sri Lanka," Sir Geoffrey Nice QC and Rodney Dixon QC, 24th July 2014, para 42
[25] Ibid, para 43
[26] Ibid, para 44
[27] Ibid, para 45

41. The author associates himself with the above remarks by Sir Geoffrey Nice and Mr. Rodney Dixon, and adopts them *in toto* for the purposes of the present discussion.

Preview of defences offered

42. It should be noted that, chapters 1, 8 and 10 of the OISL report deal with offences that come under International Humanitarian Law (IHL), while chapters 2, 3, 4 and 5 concern offences that come under International Human Rights Law (IHRL). For convenience, the author shall first address the allegations that concern IHL, and then move to the allegations with respect to IHRL.

43. The defence for the chapter on "impact of hostilities on civilians and civilian objects" (as shall be explained later, this chapter deals with two separate charges – indiscriminate shelling of civilians in the NFZ's , and shelling of hospitals) is that though it is true that civilians died in the course of the fighting, those deaths cannot be attributed to a deliberate policy of indiscriminate attacks on civilians, but that it was the result of collateral damage, and also that the defence of proportionality is available to the GOSL with respect to the said civilian casualties.

44. The above defence is the same one offered by Sir Desmond Silva QC one of the experts retained under the Paranagama Commission (2nd mandate) in a legal opinion filed as part of his work for that commission. (The said Opinion is attached as an annex to the present report). He concludes the said Opinion as follows:

> *"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 LTTE were legitimate military and humanitarian objectives and the collateral damage in my view was not disproportional to the military advantage and was not disproportional to the military advantage and was wholly consistent with the humanitarian imperatives that prevailed at that grim time."*[28]

[28] Sir Desmond Silva QC, *Legal Opinion re the Last States of the War*, 23rd February 2014

45. It should be noted that, the government's domestic mechanism, the Lessons Learnt and Reconciliation Commission (2011) came to a similar conclusion. The LLRC said inter alia:

> *"On consideration of all the facts and circumstances before it, the Commission concludes that the Security Forces had not deliberately targeted the civilians in the NFZ's, although civilian casualties had in fact occurred in the course of cross-fire…. It would also be reasonable to conclude that there appears to have been a bona fide expectation that an attack on LTTE gun-positions would make a relevant and proportional contribution to the object of the military attack involved."*[29]

46. With respect to the charge of denial of humanitarian assistance. The defence is that the charge is simply not true, and the evidence exists to prove it.

47. With respect to the charge of "unlawful killings" the defence is that the Panel fails to reach the "reasonable grounds to believe" thresholds, with respect to each of the incidents of unlawful killings that it discusses because, on the face of the evidence it is not clear whether;

    e. SLA troops were even responsible for the killings in question.

    f. The evidence lends itself to interpretations where the killings in question would have happened in the cause of combat, i.e. collateral damage.

48. With respect to the charges that come under IHRL the defence is that, the Panel has failed to adduce sufficient evidence to reach the "reasonable grounds to believe" threshold with respect to the allegations in question.

[29] LLRC, p. 328

Chapter Two: Rebuttal

i. Impact of hostilities on civilians and civilian objects

49. The chapter on "Impact of hostilities on civilians and civilian objects" deals with two separate charges: indiscriminate shelling of civilians in the NFZ's, and shelling of hospitals. The Panel begins the chapter as follows:

> *[A] "This chapter examines incidents of attacks on civilians and civilian objects that mostly occurred between January and May 2009 during the final stages of the Government's military campaign in the Vanni. Although there were civilian casualties in earlier phases of the armed conflict, OISL gave priority to investigate the final months because of the intensity of the hostilities and the extensive impact on civilians and protected objects."*[30]
>
> *[B] "The examples described in this chapter only represent some of the alleged attacks inside the three Government-declared No Fire Zones (NFZs) that caused civilian casualties. OISL selected these particular incidents because of the gravity of the alleged violations, including the extent of harm and damage caused in densely populated civilian areas. Most of the incidents examined took place inside the NFZ's because, as the SLA advanced, displaced humanitarian facilities moved into the NFZs. However, the shelling affecting civilians and civilian objects were not restricted to the NFZ's as highlighted in some of the examples."*[31]

and also,

> *"As shown below, according to military analysts who examined witnesses testimony, and reports received from diplomatic sources, NGO's and others, the Sri Lankan Armed Forces used indirect-fire weapons, including artillery shells and MBRLs on the three NFZs and surrounding areas, causing widespread damage to civilian infrastructure and loss of civilian lives throughout the final phases of the armed conflict. At least four medical facilities – PTK, Mullaivaikkal, Udayarkaadu and Putumattalan – were shelled with unguided weapons and ammunition such as MBRLs according to witness testimonies. Witnesses, including some with military expertise, described how they were able to hear the launch of the fire, estimate its direction of travel and, in some cases, determine*

[30] OISL report, para 729
[31] Ibid, para 731

the types of weapons being used. Others were able to determine the direction and type of fire from assessing the blast damage."[32]

50. The charges of indiscriminate shelling and shelling of hospitals are two of the three charges (the third being denial of humanitarian assistance) that have been leveled against the GOSL from the very start of the UNHRC's campaign for accountability in Sri Lanka. For instance, they were first leveled in the Report of the Secretary General's Panel of Experts (2011) which was the basis for the UNHRC's call for an international investigation in resolution A/HRC/22/L.1/Rev.1 (21 March 2013).[33]

51. Between 2011 – 2014, the GOSL commissioned a number of reports to refute the POE's charges.

52. Thus, there already exists a series of documents – in particular the six reports of the experts retained by the Paranagama Commission (2nd Mandate) – that provide detailed and technical rebuttals to the POE's charges. All six of the said reports are filed as annexes in Volume Two (Supplementary Material) of the present report.

53. Without prejudice to the arguments made in the said reports the author submits below separate arguments as to why the charges of indiscriminate shelling and shelling of hospitals cannot stand.

A. Indiscriminate shelling of civilians

54. The question is, "Going on facts in the OISL report, along with facts contained in the reports that preceded the said report such as the POE as well as the High Commissioner's reports on accountability in Sri Lanka – that is, facts considered incontrovertible by the critics of the government – can a reasonable person conclude that the government is guilty of indiscriminate shelling of civilians?" A reasonable person cannot do so, because of the following reasons.

55. What are the criteria that a normal and reasonable person could use to gauge or assess whether there was indiscriminate shelling of civilians during a given period of time? It is submitted that, the following two criteria are reasonable.

    a. First, numbers: for instance, the critics of the government have suggested that "tens of thousands" of civilians were killed during the last phase of the war.[34] When pushed for a specific figure, the number 40,000 is also

[32] Ibid, para 751

[33] The resolution welcomes the Report of the High Commissioner on Sri Lanka that had been filed with the Council just prior to the March sessions, a report in which the High Commissioner had called for an international investigation on Sri Lanka. The primary basis for the High Commissioner's recommendation for such an investigation was the POE.

[34] The POE specifically cited the 40,000 figure (page 40). To the best of the author's knowledge, the OISL Panel never offers a conjecture as to how many civilians it thinks were killed during the last phase. But,

usually given. If that figure is correct, it is safe to presume that war crimes may indeed have been committed, in the sense that civilians may have been indiscriminately targeted.[35] So the first question is whether, in fact, 40,000 or some such large number of civilians was killed.

b. Second, one can look at the testimony of outside observers. There is an impression in the outside world especially in the West that the Government simply expelled all foreigners including foreign correspondents from the conflict zone and then proceeded to carry out its military operations. This impression is wrong. Members of the Western press were certainly not present in the conflict zone in large numbers. But, members of the Indian press were present throughout, and, as for international organizations, the ICRC was also present throughout. It is simply inconceivable that these persons would not have got some inkling if mass and indiscriminate killings of civilians were in fact being committed, and not have said anything about it.

The numbers

56. As mentioned above, if "tens of thousands," or "40,000," or some such large number of civilians were killed in the space of about six months, it is reasonable to suppose that indiscriminate shelling of civilians took place. So, did 40,000 or some such large number of civilians die during the last stages of the war?

57. For months after the end of the fighting, it was not possible to give a definitive answer to that question. The last full census of the Northern Province was done in 1981, just prior to the start of the civil war, and since then it had been impossible to gain proper access to the region to do another census.

58. Fortunately, this shortcoming has now been remedied. In November 2011, the Department of Census and Statistics of Sri Lanka completed a full census of the Northern Province. The data is in their website, and the numbers are as follows: there were a total of 22,329 deaths between the years 2005-2009, about half of which (11,172) occurred in 2009.[36]

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from its discussion in the chapter on purported indiscriminate shelling it is clear that the Panel considers that tens of thousands, at any rate very large numbers of civilians were killed. In any event, the Panel's argument in the said chapter is premised on a large number of civilians being killed.

[35] It goes without saying that, if a smaller number of civilians were killed, that doesn't mean indiscriminate attacks did not take place. Clearly, that would depend on the specific evidence available as to such attacks, if any. The point, however, is that if large numbers of civilians were in fact not killed, it is less probable that there were indiscriminate attacks. Equally important, a lesser number of civilian casualties is consistent with alternative scenarios, for instance, where an army is fighting combatants operating from within a civilian population, and where civilians if any are killed, it is the result of "collateral damage" or damage *incidental* to the conduct of military operations.

[36] Department of Census and Statistics, Sri Lanka, Enumeration of Vital Events 2011, (Northern Provice), www.statistics.gov.lk , p. 19

59. Of the above, 2,523 were due to natural causes, while 7,934 are classified as "other deaths" meaning "accidents, homicides, suicides, etc."[37] However, the Census Department also goes on to say, "71% of deaths that occurred in 2009 are reported as due to extraordinary circumstances but majority of deaths prior to and beyond that are reported to be the results of natural causes."[38] It should be recalled that, the conflict ended in late May 2009.

60. The above means that, roughly 8,000 persons died in the first five months of 2009 as a result of the conflict, and this is inclusive of LTTE combatants.

61. It is generally understood that around 5,000 LTTE combatants died in the closing phase of the war.[39] That means that, at most 3,000 civilians died in the last phases of the war. That is the inescapable conclusion to which one is led if one starts with the Census Department's numbers.

62. It is always possible for a critic to say that the Government has fixed the numbers, in other words, that the Census Department has deliberately given a low-count of the total dead in 2009.

63. However, the fact remains that the Census Department at least on the face of it has conducted the most scientific and exhaustive survey of the population in the Northern Province to date, and if someone wants to question the Department's figures, it is not enough to give an argument along the lines, "Well, they are the Government's numbers."

64. The Census Department is run by professionals whose work can be evaluated and assessed by other professionals. If a critic disagrees with the Department's numbers, the thing to do is to conduct a technical evaluation of its numbers and methods, or have an expert do it, and then present a coherent argument as to why those numbers or methods, or both, are wrong. It is not enough simply to present alternative figures or numbers.

65. Meanwhile, there appears to be some independent corroboration for the Census Department's numbers. First, there is a UN Country Report, completed in 2009, during the conflict itself, that gives an estimate of the number of persons killed between August 2008-May 13 2009, as 7,721.[40] That number is very close to the one generated by the Census Department.

66. Second, there is a study by the American Association for the Advancement of Science of aerial photographs of the conflict-zone at the very peak of the

[37] Ibid, p. 20
[38] Ibid, p. 20
[39] See for instance, Michael Roberts, "The civilian death toll in early 2009: a flawed estimate," *The Island*, 23 November 2011
[40] POE, p. 40, para 134

fighting.[41] The purpose of the study was to find out, among other things, if there was evidence of a rapid expansion of gravesites, or evidence of mass graves, which would indicate that large numbers of people were in fact being killed.

67. The study found little or no expansion of gravesites, and no evidence of mass graves, leading to the obvious inference that large numbers of civilians were not being killed.[42] This establishes that the Census Department's numbers are correct, and should be the authoritative basis for estimates as to the number of civilians killed during the last phase of the war. What does that mean?

68. It means that 40,000 or even 30,000 or 20,000 civilians did not die. The actual number is roughly 3,000.

69. If the civilian death toll over 6 months was roughly 3,000, and that under the extremely trying conditions under which the last phase of the war was fought it is difficult to see how any reasonable person can say that there is a case to be made that civilians were indiscriminately attacked.

Conditions under which the last phase of the war was fought

70. The most important fact that a reasonable person must understand about the conditions under which the last phase of the war was fought is that the LTTE during this time had taken upwards of 300,000 civilians as hostages and was moving that enormous population from place to place as the SLA began to close in on it. For instance, as early as 2011, the POE admitted the following:

> *"Around 330,000 civilians were trapped into an ever decreasing area, fleeing the shelling but kept hostage by the LTTE."*[43]

71. And then again, specifically with regard to the purposes for which the civilians were used:

> *"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 provoke an international intervention and a halt to the fighting. It used new and badly*

[41] *High Resolution Satellite Imagery and the Conflict in Sri Lanka*, American Association for the Advancement of Science, August 2009, www.shr.aaas.org/geotech/
[42] The study found evidence of three gravesites with 1,346 *individual* graves between them, as of 10th May 2009, and that was at the height of the fighting. If 'tens of thousands' were being killed, why just 1,346 individual graves?
[43] POE, p. ii

trained recruits as well as civilians as "cannon fodder" in an attempt to protect its leadership."[44]

72. Finally, the following admission by the POE is also crucial:

> *"From February 2009 onwards, the LTTE started point-blank shooting of civilians who attempted to escape from the conflict zone, significantly adding to the death toll in the final stages of the war. It also fired artillery in proximity to large groups of internally displaced persons (IDP's) and fired from, or stored military equipment near, IDP's or civilian installations such as hospitals."*[45]

73. The above observations about the LTTE's strategy during the last phase of the war are corroborated by the OISL, Mr. John Holmes (U.N. Under-Secretary-General for Humanitarian Affairs and Emergency Relief Coordinator circa 20009), Gordon Weis (U.N. Spokesman in Colombo in 2009) and Thamilini Jeyakkumaran, former head of the Women's Wing of the LTTE's Political Office, and numerous others. For convenience, the author shall present representative quotes from the OISL, Mr. John Holmes, and Thamilini Jeyakkumaran.

c. OISL Report:

[A] *"Available information suggests that the LTTE put in place physical measures to prevent people from leaving its controlled areas, including the creation of checkpoints and sentry positions. These positions together with LTTE mobile patrolling units were seen stopping civilians attempting to cross into Government-controlled areas."*[46]

[B] *"Witnesses described how LTTE cadres blocked their path as they tried to leave the conflict area, forcing them to retreat. There were allegations that some were threatened and subjected to intimidation. In some instances people were beaten, following which some were forcibly recruited by the LTTE to participate in military work such as to build trenches along LTTE's frontline positions. Fear of reprisals was often sufficient to deter many from leaving."*[47]

[C] *"On 9 February 2009, a female suicide bomber crossed over and blew herself up at an IDP registration point at Vishwamadu, Mullaitivu District, killing a number of solders and at least eight civilians, including a child. The United Nations spokesperson in*

[44] Ibid, p. 19
[45] Ibid, p. iii
[46] OISL report, para 910
[47] Ibid, para 911

Sri Lanka at the time stated "the UN deplores the attack that killed and endangered the lives of innocent civilians, especially those fleeing the fighting."[48]

d. Mr. John Holmes, (Briefing to the Security Council on the humanitarian situation in Sri Lanka 27th February 2009) :

"As you know, the humanitarian situation in northern Sri Lanka has deteriorated significantly over the last few months, in particular since the beginning of this year. As Sri Lankan Government forces have advanced deep into the Vanni area, which had been under the control of the Liberation Tigers of Tamil Eelam, or LTTE, almost all the civilian population has been progressively displaced along with the LTTE. They are now in a rapidly shrinking pocket of land, and are increasingly being squeezed into a narrow coastal strip of 14 square kilometers, declared a 'no-fire zone' by the Sri Lanka Government, as shown in the map that I have distributed. Many of these people have been displaced many times in recent months, and indeed over the years, but they now face very great danger from fighting between the Sri Lankan Government forces and the LTTE. And there is strong evidence that the LTTE are preventing them from leaving."[49]

e) Thamilini Jeyakkumaran[50] (*Under the Shade of a Sharp-edged Sword*)

"The SLA began its advance to Sunandipuram. The LTTE notified the civilians in the area to move to Irannaipalai, and not to go to the territory being taken over by the SLA. Because of the constant fighting, civilians were being wounded, killed, and made homeless without end, it seemed. Many LTTE offices were located in the Sunandipuram area. LTTE fighting formations were stationed near the Sunandipuram school. I was with 3 female comrades and 3 male comrades in the civilian area. By this time much of the population had left, and the last remaining families had also begun to leave. I saw them in the dim moonlight as they made their way across the silent paddy fields....I saw a group of fighters from the Malathi Brigade next to the fence of the Sunandipuram school, getting ready for battle. The Commander of the Malathi Brigade, Vidusha, was with them, and I went there to speak with her."

"I saw that Vidusha was under tremendous mental strain, and she began to cry when I went near her. "I am ashamed when I think of the

[48] Ibid, para 912
[49] Mr. John Holmes, Briefing to the Security Council, 27th February 2009
[50] Thamilini Jeyakkumaran was the head of the Women's Wing of the LTTE's Political office. She surrendered to the SLA on or around 19th May 2009. She was subsequently incarcerated for a short time, then rehabilitated, and released back to her family. She was later diagnosed with cancer, and passed away in 2015. *Under the Shade of a Sharp-edged Sword* is her memoir, written during the time she was being treated at the National Cancer Hospital in Maharagama.

Organization now. I have no answers to the questions these sisters pose," she said, with such frustration and anguish as I had never seen in her before. "The people are going to the SLA because there is nothing left to do. The Organization has ordered that people so leaving be shot below the knee. My God, how can I order these girls to shoot these people? And yet I have told a few of them that the Organization has ordered this. Then they ask me, "Tell us sister, how can we shoot our mothers, fathers, sisters and brothers? It is better to shoot ourselves." That's right isn't it? So, the Organization has come to the point of ordering this disgraceful act," she said and cried. When I left her, both my mind and body were numb."[51]

74. The above passages contain hearsay, but, when combined with certain other details Thamilini mentions, they provide powerful confirmation of what outside observers, including in the passages quoted above, have said about the LTTE's conduct towards civilians during the last phase of the war.

75. The important point that emerges from all of the above passages is that, the taking of 300,000-plus civilians was not something that happened spontaneously or on the spur of the moment—for instance, when a group of miscreants or criminals when they are being chased and cornered, and finding themselves out of options might grab a few hostages in order to negotiate their way out the situation—but was an integral part, indeed the cornerstone, of the LTTE's strategy of war during the last phase.

76. To return to the numbers, as explained earlier, the most reliable estimates indicate that roughly 3,000 civilians perished during the period in question. If the civilian death toll over 6 months was roughly 1%, and that under the extremely trying conditions described above, it is unreasonable for anyone to claim that civilians were shelled indiscriminately. The picture painted by the numbers is simply not consistent with that of an army on the rampage, committing atrocity after atrocity, including shelling civilians indiscriminately.

Testimony of outsiders

77. It is convenient to turn next to the testimony of certain outsiders who were either present in the conflict zone for extended periods of time during the fighting, or visited the conflict zone during the fighting briefly, but had a chance to make first hand observations.

78. This type of testimony is also very useful in gauging what may have been really going on in the conflict zone during the relevant period, particularly in gauging whether the picture painted by the numbers may be accurate or not.

[51] Thamilini Jeyakkumaran, *Under the Shade of a Sharp-edged Sword*, (Sinhala translation by Saminadan Wimal) 2016, p. 193 – 94.

79. As indicated earlier, members of the Western press were not present in the conflict zone in large numbers, but members of the Indian Press were present, particularly correspondents from *Frontline*, the respected Indian news magazine, and also from All India Radio/Doordarshan. And as for international organizations, ICRC was present throughout.

80. The author cites below three comments—two by the senior journalist B. Muralidar Reddy, of *Frontline*, who was present in the battlefield right up to the end of the war on May 19, 2009, and one from David Gray, a correspondent for *Reuters*, who was taken on a tour of the battlefield about a month previously, in April. (These comments have been taken at random from the internet. There are many others, but constraints of time and space don't allow citing them all here.)

81. The quotes give a dramatic and at times poignant glimpse into the realities of the war-zone, and for the most part need no additional commentary.

Muralidar Reddy (*Frontline*)

82. Reddy was part of a group of "embedded" reporters in the battlefield, which is to say, his visit was facilitated through the Defence Ministry and the SLA. A critic might see a problem with this. Reddy, however, prefaces his report with the following remark, is important not only with regard to assessing his credibility, but to certain inferences that the author wishes to draw from his statements. Reddy says:

> *"There were no conditions spelled out on the coverage from the war zone. We were allowed unfettered and unhindered movement up to 400 meters from the zone, where pitched battles were fought between the military and the remaining cadre and leaders of the LTTE….Most important was the fact that we had interference-free access to the internet, including Tamilnet, the website perceived to be pro-LTTE and based somewhere in Europe. Within the constraints of internet time available, and not-unexpected problems of connectivity and speed in a war zone, there was just enough time to read and absorb the reports on the websites before sending news dispatches to our headquarters. No questions were asked."*[52]

83. He then says, "Here is an account of what I saw and heard and otherwise sensed in the last 70 hours of Eelam War IV," and proceeds to give his narrative. He says:

> *"Information gathered by this correspondent from a group of the last batch of 80,000 civilians to flee the LTTE-occupied zone reveals that the Tigers made a determination on May 10 that they had lost the war and that no purpose*

[52] B. Muralidar Reddy, "An eye-witness account of the last 72 hours of Eelam War IV," *Frontline*, Volume 26 – Issue 12, June 6 – 9, 2009

would be achieved by holding on to the civilians. However, it is not clear on what note they wanted to end the war."

On May 11, the Tigers seemed to have deserted their sentry-points, dismantled their defense-lines, and destroyed everything they could. The exodus of the last batch of civilians started on May 12/13 and perhaps by the night of May 15 there were no civilians left in the 1.5 square-kilometer area the Tigers were boxed into.

The accounts of the last hours provided by the civilians by and large tallied with the evidence that has surfaced so far. The detention of Sea Tiger chief Soosai's family by the Navy on May 15/16 and the discovery of Prabakaran's aged parents in a camp by the military on May 27 provided the ultimate proof that the Tigers had decided to spare the life of the civilians.

The May 15 decision of the International Committee of the Red Cross (ICRC)—the only outfit present inside the war zone until four days before the war ended—to suspend humanitarian operations inside Tiger-held territory proved beyond doubt that the overwhelming majority of civilians were out of the battle-zone and that the military and the Tigers were engaged in a no-holds-barred fight. The beaming faces of the commanders and troops spoke volumes about the fate that awaited the Tigers."[53]

84. A number of important points can be highlighted from the above passages, read with Reddy's prefatory remarks. For instance, it is clear that he had an opportunity to speak to and interact with the civilians who were just coming out of the battle-zone. It is also clear, from the prefatory note, that he had access to the internet, and therefore would have been generally aware of the increasing clamor being made internationally, particularly by *Tamilnet* and other LTTE-friendly sources, that Government troops were massacring civilians.

85. It is reasonable to presume, therefore, that as an experienced journalist he would have been on the lookout for any statements by the civilians that might corroborate that such massacres were in fact being carried out.

86. Meanwhile, since he had the opportunity to actually interact with the civilians, it is also reasonable to presume that he would have taken the opportunity to ask them directly what they knew of any such massacres.

87. To the best of the author's knowledge, there is not the slightest indication in the article (or in any of Reddy's other articles) that he heard the civilians say Government troops were carrying out massacres, or that he felt or "sensed" the need to ask the civilians directly about such matters.

[53] Ibid

88. One can draw only one reasonable inference from the above: namely, his on-the-spot observation and "sense" was that no such massacres were in fact going on.

89. It is also important to consider in this regard that Reddy was interacting with civilians who had just come out of the war-zone—i.e. civilians who wouldn't have had time to reflect on or even digest the events they had experienced, or, more important, to be "coached" by anyone as to what they ought to say to reporters.

90. Such spontaneous and unvarnished testimony is generally considered the best and most credible form of eye-witness testimony, and is recognized as such in courts of law.

91. The fact that there is no record anywhere in Mr. Reddy's reports that people coming out of the battle-zone ever said massacres of civilians were going on is therefore doubly significant.

92. Second, the author wishes to focus on Mr. Reddy's observation: "The accounts of the last hours provided by the civilians by and large tallied with the evidence that had surfaced so far…that the Tigers had decided to spare the life of the civilians." What does this mean?

93. The above means that it was Reddy's assessment, based on his first-hand observations, that the threat to the civilians in this situation came, or had come, primarily from the Tigers: his comment, to repeat, is that it was the Tigers who had decided to spare the lives of the civilians, meaning that it was the Tigers who had held the power of life and death over them in the first place.

94. The inference one can naturally draw from this is that his observation and "sense" must have been that once the civilians were free from the grasp of the Tigers—i.e. once they had crossed over to Government lines—they were safe. The aforesaid is not a picture consistent with that of a Government indiscriminately attacking and killing civilians?

95. To turn next to the second set of quotes from Reddy—these are from his report for the period covering May 13-16, that is, still a few days prior to the end of the war (the passages quoted earlier were for the period covering May 16-19) — Reddy says:

> *"It was pitiable to see terror-stricken and emaciated mothers clutching onto their babies and running towards military check-points. In a brief interaction before boarding government buses that took them to the Omanthai checkpoint, a group of newly arrived civilians inside the NSZ narrated the travails they had endured in the past two months."*

"My 45-day child was born inside a bunker. After he came out of my womb, these are his first glimpses of the big bad world," said a mother who had covered the naked body of her child with a white towel to protect him from the blistering sun."

"My son-in-law managed to buy a tin of Lactogen for a price of Sri Lanka Rs. 3,000 as my two-year-old grandchild had to go without milk for nearly two months. We have been living in the bunkers for weeks with shells and gunfire exploding all around us. Late last night we decided to crawl our way out without being detected by the Tigers," a man who was successful in coming out with his entire family said."[54]

96. The author wishes to highlight only two points from the above passages. First, as with the previous passages, it is clear that Reddy had an opportunity to speak to and interact with the civilians.

97. And again, there is not the slightest indication that he heard any of these civilians ever saying that government troops were carrying out indiscriminate attacks and in general murdering civilians still trapped in the battle-zone. There is also not the slightest indication that. Reddy felt the need to ask them whether such murders were going on—all of which lead to the natural inferences mentioned earlier.

98. There is, however, an additional point which emerges from these passages. Reddy's impression appears to have been that the civilians were *glad* to cross over to government lines.

99. He says, for instance, that he saw mothers "clutching their babies and running towards military check-points." He also cites the statement of the man who says, "Last night we decided to crawl our way out without being detected by the Tigers."

100. Clearly these people were running *towards* the Sri Lanka army—presumably, expecting to find safety there. Would they have been running towards the army if they felt—either from what they had heard from other civilians, or from personal experience—that the army had been massacring civilians over the past days if not weeks? It doesn't make sense.

David Gray (*Reuters*)

101. The quotes from David Gray are from a "Photographer's Blog," and therefore of a more personal and informal nature than Reddy's observations. But, such informal observations are also important because sometimes they offer surprising insights into situations that more restrained coverage misses. The following is part of

[54] B. Muralidar Reddy, "A first-hand account of the war and the civilians' plight as Eelam War comes to a close," *Frontline*, Volume 26 – Issue 11, May 23 – June 5, 2009

Gray's narrative of what he saw when he was taken on a tour of the war-zone in April 2009:

> *"After what seemed like hours, but was actually only one, we arrived at the destroyed town of Putumatalan. Here, we got into jeeps. The troops that were escorting us got noticeably nervous. They held their guns at the ready now, looking more alert and more intently into the coconut groves as we passed. We must be close now, I thought."*
>
> *"After about 20 minutes driving down a dirt road, we turned a bend. Suddenly, there were thousands of exhausted and weary looking civilians. They were being given small amounts of food and drink by the soldiers, but only enough to last them a day or so. This was when our escorts really started to hurry us. It seemed they didn't want us to talk or view the civilians for too long, and after just 5 minutes, we were told to get back in the jeeps. Frantic calls were made on radios, and we were told we were now headed to the front."*
>
> *"In just 10 minutes, we arrived at a place where just days earlier the Sri Lanka government soldiers had pushed their way through the LTTE defenses, leading to a mass exodus of civilians. Smoke billowed less than a mile away, where, we were told, troops were continuing to fight."*[55]

102. What can one learn from the above observations? The author shall focus on only one point.

103. Gray says that he was being driven along a dirt road when the jeep rounded a bend and suddenly in front of him he saw thousands of civilians. From the context, it is clear that this was an area where his escort suspected there were Tiger fighters hiding in the surrounding coconut groves.

104. So, the encounter with the civilians was clearly not a "set up" or a pre-planned "photo-op": the escort simply did not know the civilians were around the bend.

105. What is the first thing that Gray noticed when he saw the civilians? He says that he saw the civilians "being given small amounts of food and drink by the soldiers." In other words, he saw the soldiers feeding the civilians.

106. A critic might point out that according to Gray's narrative the soldiers were giving only "small amounts" of food and drink. Obviously, soldiers in the battlefield cannot be expected to carry the massive amounts of food necessary to feed thousands of civilians (most probably they were sharing their own rations with those civilians). But, the inescapable fact, if we go by Mr. Gray's observation, is that he saw the soldiers *feeding* the civilians.

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[55] David Gray, "A Day at the Front Line in Sri Lanka' (Photographer's blog), www.blogs.reuters.com, 27th April 2009

107. Recall that, the general accusation being made against the GOSL is that it had ordered indiscriminate attacks on civilians. If these soldiers that Gray saw were either intending on or in the habit of attacking civilians indiscriminately, or were part of an army that had been tasked to carry out such attacks (which entails a certain callousness and disregard for the wellbeing of civilians generally, on the part of that army as well as the Government that was ultimately in control of the army) why would these soldiers be feeding civilians? Is that the sort of behavior one would expect from soldiers tasked with mistreating—i.e. including indiscriminately shelling—civilians?

108. The author reiterates that, in the above discussion he has considered only three sets of quotes: as indicated earlier, there are innumerable others. The point is that, the overall impression one gets from these quotes (and others), and especially the closer the testimony is in time and space to the battlefield, is that the army was taking as much care as was reasonably possible to protect the civilians, that the civilians themselves were aware of this, and took every opportunity they could to escape to government lines.

109. The above impression is entirely consistent with the picture painted by the numbers, and in fact corroborates the inference that the army was not targeting civilians deliberately or indiscriminately, as claimed by the critics.

B. Shelling of hospitals

110. The charge is that, the SLA shelled hospitals during the last phase of the war. Some of the hospitals that the Panel says were shelled are: PTK, Mullivaikkal, Udayakaardi, Putumattalan.[56]

111. The experts retained by the Paranagama Commission (2nd Mandate), in particular Sir John Holmes the former Commander of the British Special Forces, and also a report by the McKenzie Intelligence Institute that analyzes Satellite Photos of shell damage to various hospital buildings during the last phase of the war, present detailed technical arguments as to why, in their view, it is impossible to conclude that the SLA deliberately shelled hospitals. (Both Sir John Holmes's report along with the McKenzie Institute report are included in the Supplementary Material to the present report).

112. Without prejudice to the arguments presented in those reports, the author presents below separate arguments as to why the charge that the SLA deliberately shelling hospitals cannot stand the test of reason.

113. In page 152 of the OISL report, the Panel says,

56

[A] *"OISL received no information to indicate that Government-run or other hospitals and ambulances were used by the LTTE for military purposes. None of the medical or humanitarian personnel who were interviewed reported an attempt by the LTTE to carry out military operations inside the medical facilities. According to the information received by OISL, there were no LTTE military installations placed inside the hospitals."*[57]

[B] *"On the basis of this information, OISL does not therefore have reasonable grounds to believe that there were legitimate military targets inside the hospitals at the time of the attacks by the SLA. The fact that wounded LTTE military cadres were being treated in some of the hospitals does also not remove the protected status of the objects, since these individuals were not, at the time, taking direct part in hostilities."*[58]

[C] *"However, the information gathered by OISL indicates that there are reasonable grounds to believe that the LTTE launched attacks from the close proximity of hospitals. The incidents described below show that the LTTE constructed military fortifications (mostly earthen bunds and trenches) and positioned artillery and other weaponry close to, and sometimes adjacent to hospitals and the surrounding densely populated civilian areas, marked by a heavy presence of makeshift tents or shelters belonging to IDPs. In doing so, the LTTE failed to comply with its obligation to take all feasible precautionary measures to protect the civilian population from attacks."*[59]

114. The Panel's argument is that, it has no evidence that the LTTE used hospitals for military purposes, therefore (since there is no question that at some time or other during the last phase of the war hospital buildings were hit by SLA shells) the SLA is guilty of a war crime.

115. The Panel in making the aforesaid argument is:

e. Intentionally misleading the OHCHR when it says that the LTTE did not use hospitals for military purposes.

f. Engaging in a deliberate obfuscation by trying to draw a distinction between launching attacks from "inside hospitals" as opposed to, "in close proximity" to hospitals, to argue that the LTTE did not use hospitals for military purposes. Such a distinction makes no sense when trying to

[57] OISL report, para 772
[58] Ibid, para 773
[59] Ibid, para 774

determine if a party has used hospitals for 'military purposes' in the context of ongoing combat.

The Panel's misleading of the OHCHR

116. In order to establish that the Panel is misleading the OHCHR when it says that it had no evidence that the LTTE used hospitals for military purposes, the author shall rely on two types of evidence, which for purposes of convenience are designated "Primary Documents" and "Secondary Documents."

117. By "Primary Documents" is meant documents that are mentioned in the OISL report itself; by "Secondary Documents" is meant documents that to the best of the author's knowledge are not expressly mentioned in the OISL report, but were available in the public domain at the time the OISL report was being prepared, and were sufficiently well-known that it is reasonable to expect the members of the Panel to also have been aware of them.

Primary Documents

a) POE

118. On page 171 of the OISL report, the Panel says:

> *The GPS coordinates of the hospitals were reportedly relayed to the Sri Lankan security forces on or around 26 April.*[60]

119. The Panel has footnoted the above statement as 'WS on file; Report of the UN Secretary General's Panel of Experts on Accountability in Sri Lanka (footnote 910). Therefore, the Panel is clearly aware of the existence of the POE, and in fact has used it as a credible source to support its assertions.

120. If one turns to the POE, however, one finds the following, in page 3:

> *From February 2009 onwards, the LTTE started point-blank shooting of civilians who attempted to escape from the conflict zone, significantly adding to the death toll in the final stages of the war. It also fired artillery in proximity to large groups of internally displaced persons (IDP's) and fired from, or stored military equipment near IDP's or civilian installations such as hospitals.*[61]

121. Attention is drawn to the phrase, 'fired from, or stored military equipment near…hospitals.' The phrase 'fired from' obviously means 'fired from *inside* hospitals.'

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[60] Ibid, page 171

[61] Report of the Secretary General's Panel of Experts on Accountability in Sri Lanka, 31 March 2011, pg. iii, www.un.org

122. Thus, the Panel on page 152 of its report, makes a statement that it cannot make if one supposes that members of the Panel read the POE in its entirety, and the Panel undoubtedly had the POE in hand when it was preparing its report.

b) LLRC

123. The LLRC is cited on numerous occasions throughout the OISL report, especially in the section on purported shelling of hospitals. Here is an example:

> *"In its report, the LLRC stated that it was 'satisfied, on careful consideration of all the circumstances that shells had in fact fallen on medical facilities causing damage and resulting in casualties.' However, it was unable to reach a definive conclusion as to who was responsible."*[62]

124. Here, meanwhile, are two passages from page 76 of the LLRC report:

> *"A nursing officer who was attached to the Mullaitivu General Hospital and had served at several medical facilities during the last phase of the conflict stated with regard to the Vallipunam makeshift hospital that on 21st January 2009, after 7 pm, shells had fallen in the vehicle park at the hospital and a few patients had suffered minor injuries. When questioned further he stated that he did not know from where the shells came. He went on to say that there was a refugee camp close to the hospital which had been hit by the shells and around 40 people had died. He added that while there was no LTTE presence in the hospital premises, there was an LTTE presence about 500 meters away.*[63]
>
> *A nursing officer who served at the Anandapuram makeshift hospital stated that the facility had functioned for about 20 days in February 2009. There had been a large armoury located near the hospital and there had been a Kfir attack on the armoury which had destroyed it. He added that two days later there had been a similar attack on the makeshift hospital but by then the patients had been moved as the Medical Superintendent had decided to shift the hospital after the attack on the armoury.*[64]

125. The LLRC has footnoted each of the above statements as representations made before the Commission by particular civilians, and given the transcript number of the testimony (on file with the LLRC and accessible to the public).

126. Thus, again the Panel makes a statement on page 152 of its report that it cannot make if it had read the LLRC report in its entirety, a document that the Panel

[62] OISL report, para 789
[63] Report of the Lessons Learnt and reconciliation Commission (LLRC) November 2011, page 76, paragraph 4.119
[64] Ibid, paragraph 4.121

clearly had in hand when it was preparing its report and in fact treated as a credible source with respect to a number of assertions.

OISL Report

127. Astonishingly, on page 155 of the OISL report, the Panel makes the following statement, which shows that the Panel itself had come to the realization that the LTTE used hospitals for military purposes (which means the Panel is caught in a contradiction, and this throws beyond any doubt that the attempt to mislead the OHCHR is deliberate and calculated):

> *"Within the confines of the NFZ's it is unlikely that the LTTE could have fired on the hospitals with artillery given the short range involved. However, the location of LTTE military positions, occasionally in the vicinity of hospitals and United Nations premises, and used at times to fire from near hospitals calls into question the LTTE's own respect for their obligations to take all feasible precautions to protect the civilian population and civilian objects against the effects of attacks."*[65]

Secondary Documents

a) University Teachers for Human Rights (Jaffna), Special Report No. 34, 13 December 2009

128. Here are a few relevant passages from the aforesaid report:

> *"On 1st February afternoon between 3.00 and 4.00 PM Puthukkudiyiruppu Hospital was struck by two shells, according to ICRC statements, hitting first the kitchen and then the church. Two persons were killed. A statement on that day quoted Morven Murchison-Lochrie, an ICRC medical coordinator present in Puthukkudiyiruppu, 'The staff are under acute stress, surrounded as they are by the sound of ongoing fighting and the influx of new patients. Ambulances are constantly arriving, but people are also being brought in by wagon, tractor, and even motor scooter.' She added that despite this, the staff remained inventive and committed to caring for the injured and sick who had made the dangerous trip to the hospital."*

> *"ICRC reported that a few hours later at 10.20 PM the same day (1st February) a ward with women and children was hit. This time the hospital had more than 800 people sheltering there, including 500 in patients. In all nine persons were killed and twenty injured on that day. On 2nd February at 6.40 PM the hospital was hit again and a nurse was injured. One factor behind the shelling was that the Army's 59th Division, which advanced from Mulliavalai, eight miles south, was trying to fight its*

[65] OISL report, para 792

way and take Puthukkudiyiruppu. The Army was then not far to the south of the hospital. The LTTE had gun mounted vehicles which were used to fire at Kfir bombers coming in support of the Army, even though the firing had, if anything, no more than a slight deterrent effect.

A senior educator familiar with the hospital told us that the LTTE largely disregarded the ICRC's request not to drive or park its vehicles in front of the hospital, as these could be spotted by the UAV's leading to shell attacks."[66]

b) <u>Wikileaks revelation of a cable sent by US Ambassador to Geneva Clint Williamson to Washington</u>:

129. US Ambassador to Geneva (UNHRC) was reporting to Washington the gist of an interview with the ICRC's then head of operations for Sri Lanka, Jacque de Maio. Here is a particularly relevant passage:

> *"On the LTTE, de Maio said that it had tried to keep civilians in the middle of a permanent state of violence. It saw the civilian population as a 'protective asset' and kept its fighters embedded amongst them. 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 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."*[67]

c) <u>Affidavit of Dr. V. Shanmugarajah, Medical Superintendent of the Mullaitivu General Hospital (January – May 2009)</u>

130. The following is a relevant passage from the said affidavit:

> *"I had at various points in the conflict remonstrated with LTTE commanders about munitions being placed near to hospital buildings. Sometimes they were sensitive to the need to remove these munitions and at other times my objections were ignored. During the last two weeks of the fighting there was a breakdown in the command structure of the LTTE and no request that I made to move munitions away from the hospital were listened to."*[68]

131. Even if the Panel were to suggest that some of the documents—for instance the LLRC and Dr. Shanmugarajah's statement—cannot be trusted because both the

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[66] UTHR (Jaffna) Special Report No. 34, 13th December 2009, paragraph 2.6
[67] "Sri Lanka: S/WCI Amb. Williamson's Geneva Meetings," www.aftenposten.no
[68] See Appendix 2, in *Corrupted Journalism: Channel 4 and Sri Lanka*, 2013, www.corruptedjournalism.com

LLRC and Dr. Shanmugarajah were connected in one way or another with the Government, the Panel cannot say the same thing about the other documents. For instance, what reason would the POE, UTHR, or the head of the ICRC, have to favour the GOSL?

132. It is entirely implausible that the LLRC, the UTHR (Jaffna), the head of the ICRC in Sri Lanka, and Dr. Shanmugaraja, all got together and conspired to whitewash the conduct of the GOSL.

133. Under the circumstances, the Panel had absolutely no grounds to question the prevailing view at the time, a view held by all the experts as well, that the LTTE used hospitals for military purposes, and the Panel's attempt to twist the truth can be taken as an unfortunate though especially striking example of mendacity.

ii) <u>Denial of humanitarian assistance</u>

134. The charge is that during the last phase of the war (January - May 2009) the government pursued a policy of deliberately denying humanitarian assistance to the civilians trapped in the conflict zone. The essence of the charge is captured in the following paragraphs:

[A] *"The provision of food assistance became more difficult after the relocation of the United Nations and humanitarian organizations from Kilinochchi. During the four months when United Nations road convoys had operated (October 2008 to January 2009), despite the various security incidents, the average shipment of food had been 3,639 metric tons per month. This figure included Government food contributions, as well as contributions from the Government of India and NGOs."*[69]

[B] *"After 16 January 2009, however, the amount of food allowed into the Vanni plummeted, in March 2009, the United Nations Resident Coordinator's Office indicated that at least 3,000 MT was needed per month for between 150,000 and 200,000 people. Between 17 February 2009 – when aid delivery resumed by ship – and the last ship delivery on 9 May, authorized and delivered food shipments totaled only 2,442 MT for the whole period, according to the Ministry of Disaster Management and Human Rights. A table prepared by the Ministry and detailing the shipments between February and May 2009 showed that most of the food was provided by WFP. While the Minister of Disaster management and Human Rights stated on 17 February that the Government was "to send food to people in the Mullaitivu No Fire Zone", it only provided 105 MT for the whole five-month-period. In a press*

[69] OISL report, para 987

release dated 7 May, ICRC stated that it had delivered over 2,300 MT of WFP food by ship during this period. This was included in the above mentioned Government list of shipments."[70]

Analysis

135. It is not in depute that, UN food convoys to the conflict zone were halted as of late January 2009.[71] However, the ICRC and the GOSL continued to transport food and medicine to the conflict zone by ship until the end of the war. ICRC also evacuated patients out of the conflict zone by ship. All in all 13,000 patients were evacuated by the ICRC.

136. The issue is not whether there may have been a shortage of food and medicine at certain times during a last phase of the war. The issue is whether the Panel has managed to establish at a standard of "reasonable grounds to believe" that the GOSL pursued a deliberate policy of denying humanitarian assistance to the civilians in the conflict zone during the period in question.

137. The Panel fails to establish the above because of the following reasons.

a) The Panel states that 2442 MT's of food were delivered by ship between February and May. The Panel has cited a document titled, "food and essential items sent to Mullaitivu by sea, Human Rights Unit, Ministry of Disaster Management and Human Rights, 2009" (footnote 10,154 of the OISL report) in support of this figure. The author has not been able to access that document on the internet or in other public sources and therefore is unable to confirm if in fact such a document exists and gives the figures that the Panel claims. However, even if one takes the 2242 MT's figure as the amount of food that was transported by sea during the relevant period, it appears there is documentary as well as witness evidence that there were stocks of food already in the area.[72] If this was indeed the case, the Panel is deliberately obfuscating the truth when it says that there was only 2442 MT's of food for the civilians during the five months between February and May.

b) The Panel completely ignores highly reliable witnesses—including Neil Buhne, the UN Resident Coordinator in Sri Lanka at the relevant period, and also U.S Ambassador Robert Blake – who had first-hand knowledge of exactly how much food and medicine was transported to the conflict-zone, as well as the quantities of food and medicine that may have been kept as buffer stocks in towns close to the conflict-zone.

[70] Ibid, para 988
[71] According to the GOSL the fighting had reached a point where the GOSL could no longer guarantee the safety of the convoys
[72] CCHA Minutes of 16th October 2008: "WFP had informed that there is a stock for 2009 which can be distributed." CCHA Minutes 16th October 2008

138. In order to establish the two claims above, the author relies on two documents

a) The Minutes of the Consultative Committee on Humanitarian Assistance (CCHA)

b) The Report of the Committee Appointed to Study the US Department of State Report on Incidents During the Recent Conflict in Sri Lanka

a) <u>Consultative Committee on Humanitarian Assistance</u>

139. The CCHA was a mechanism established by the GOSL to facilitate dialogue between GOSL officials representing the Ministry of Defence, the Ministry of Disaster Management, and other departments responsible for the welfare of the civilians in the conflict-zone, with key representatives from the international community in order to keep them updated on the humanitarian situation and for those representatives to inform the relevant GOSL officials of concerns they may have with respect to the provision of humanitarian assistance to civilians in the conflict zone and related matters, and to have those concerns addressed.

140. The CCHA was started in mid 2006, and continued until May 2009. Meetings were held roughly once every two months, always Chaired by the Minister for Disaster Management Mahinda Samarasinghe. The following is a list of the attendees at a typical meeting (this is from the minutes for 19th January 2007):

"Representatives:
***<u>Government of Sri Lanka</u>**: Mr. Gotabhaya Rajapaksa, Ministry of Defence (MoD), Mr. Rathnayake, Addl. Secretary, MoD; Mr. Lianarachchi, Acting CGES; Ms. Geetha De Silva, Addl. Secretary and Mr. Samantha Pathirana, Deputy Director. UN/ Mr. M.R. Hassen, Assistant Director, Public Commuinication; Ministry of Foreign Affairs (MOFA); Mr. M.S. Jayasinghe, Secretary, Ministry of Nation Building and Development (MNB&D); Mrs. S.M. Mahomed, Addl. Secretary, Ministry of Resettlement; Mr. Senaka Weeraratne, Deputy Director Economics, Secretariat for Coordinating the Peace Process (SCOPP); Ms. Suki Nagra, Human Rights Officer and Ms. Nishanie Jayamaha – Liason Officer for Humanitarian Affairs – Ministry of Disaster Management and Human Rights (MDM & HR)*

***<u>Non government representatives</u>**:*
H.E. Mr. Robert Blake, ambassador to the United States of America; H.E. Mr. Julian Wilson, Head of Delegation, European Commission; Mr. Frederick Lyons, Acting Resident Coordinator/Humanitarian Coordinator for the UN; Mr. Toon Vandenhove, Head of Delegation, International committee of the Red Cross (ICRC); Mr. Jeff Taft-dick, Country Director, World Food Programme (WFP); Mr. Valentin Gatzinski, Head of Office, UN Office for the Coordination of Humanitarian Affairs (UNOCHA); Ms. Joanna Van Gerpen, Country

Representative, United Nations International Children's Fund (UNICEF); Dr. Agostino Borra, Representative, World Health Organisation (WHO); Ms. Tine Staermose, Director, International Labour Organization (ILO); Ms. Chris du Toit, Country Security Advisor, UN Department of Safety and Security (UNDSS); Mr. Axcel Bisschop, Senior Programme Officer, UN High Commissioner for Refugees (UNHCR); Mr. Marc Bellemans, Senior Emergency Coordinator, Food and Agriculture Organization (FAO) ; Mr. David Verboom, Head of Office, European Community Humanitarian Office (ECHO); and Mr. F. Hashim, Deputy Executive Director, consortium of Humanitarian Agencies (CHA)"[73]

141. A point is that, throughout the duration of CCHA the US, the European Commission along with all of the relevant UN agencies operating in Sri Lanka were represented at the CCHA. The specific persons representing these countries or organizations at different times may have varied, but the countries and organizations were *always* represented.

142. A reasonable inference one can draw from the above is that, between 2006 and May 2009 particularly during the last phase of the war the international community had access to the highest GOSL officials responsible for providing humanitarian assistance to civilians in the conflict zone.

143. It is reasonable to suppose further that those internationals will have been able to form a judgment, whether from their interactions with the relevant GOSL officials, from documents made available to them at the CCHA meetings, or from documents they could have requested from those relevant officials, as to the approach or policy of the GOSL towards providing humanitarian assistance to the civilians.

144. Therefore the international attendees at the CCHA meetings would have been the best source of evidence for the Panel to find out whether the government pursued a deliberate policy of depriving civilians in the conflict zone of humanitarian assistance.

145. The Panel does mention the CCHA in passing in its report. It says:

"While these meetings provided an opportunity for humanitarian agencies and others to raise concerns and formulate requests related to the provision of humanitarian aid, humanitarian officials cited instances when their requests to send what they considered to be essential life-saving assistance were refused."[74]

146. In the above the Panel is trying to dismiss the CCHA as an ineffective mechanism or worse as a devise used by the GOSL to hoodwink the international community.

[73] CCHA Minutes, 19th January 2007
[74] OISL report, para 946

147. When one peruses the minutes of the CCHA however the picture that emerges of the type of interaction that appears to have taken place between the GOSL officials and the internationals is quite different: The minutes show that there were substantive and extensive discussions and negotiations over various matters between the GOSL officials and the international representatives. The internationals did not always get everything they asked for. There were times when the GOSL officials refused to concede to the request made by the international representatives. But where they did so they give reasons.

148. To convey an idea of what it typical CCHA meeting was like the author shall quote at length from the Minutes of two meetings in 2009. The first in January and the second in March, that is, at the very height of the fighting.

CCHA Minutes for 30th January 2009

"Joint UN Rapid Needs Identification Mission to the Vanni 29 December 2008

The UN Resident and Humanitarian Coordinator Mr. Neil Buhne provided an update of the Joint UN Rapid Needs Assessment Mission which went in with the 9th food convoy carrying 815 MT of food to Kilinochchi and Mullaitvu. The Assessment Team comprised of WFP, UNICEF, UNOCHA, ICRC and Government Agent staff assessed the situation in Tharmapuram and Puthikudiyiruppu (PTK). There were needs for supplementary food such as onions as not as many convoys could go in due to the security situation.

Shelter: *the needs were identified for more shelter material such as plastic sheets and tarpaulin especially with the on-set of rains in December expected.*

Wash: *while the water supply was satisfactory, sanitation facilities were considered critical due to limited latrines and the risk of water borne diseases. Privacy for women was also a concern.*

Health*: while health services were fully functioning at the PTK hospitals, the capacity of 200 had exceeded to around 500 patients. With limited staff and the3 movement of IDPs there was concerns of sustainability. There were noted cases of dysentery, acute malnutrition, water borne diseases and respiratory diseases in December. More evacuations by the ICRC and medical supplies especially for surgical needs is required.*

Education: *schools were functioning with a high level of attendance of children and teachers. There is a need for temporary school material, food for school feeding programmes and psychosocial support for children and teachers alike. Though examinations were held in the areas, special sessions and catch up classes will be required.*

While more convoys were needed with a longer period of time allocations for the movement of the convoys, Mr. Buhne applauded the good work done through the Government Agent structures in delivery relief and assistance to IDPs in such circumnutates and noted that they should be given a gold medal for the work done."[75]

CCHA Minutes for 30th March 2009

"Humanitarian Situation in the Wanni

The UN Resident and Humanitarian Coordinator Mr. Neil Buhne raised concerns of the safety and security of civilians in the No Fire Zone. The UN estimates approximately 120,000 to 180,000 civilians to be trapped, while many are trying to leave, they are leaving at own risk. Mr. Buhne mentioned of a staff members wife who had stepped on a landmine. Mr. Buhne informed that their shelters have been damaged by floods and only 500 wells were functioning providing water covering 1/5 of needs. A shipment of food and other items is to leave tonight or on 01 April since the last shipment on 21st March. The RC/HC reiterated that medical items, shelter materials and chlorine tablets are urgent requirements to be sent. These needs to be cleared including the hygiene kits. ICRC evacuations have brought over 7,000 patients and bystanders and have been received by the GOSL.

The following concerns and requests were highlighted by the RC/HC

- *UNHCR was present and Omanthai more contact with the IDPs is required and requested access for UNHCR and ICRC to Kilinochchi transit points.*
- *A confidence building and stabilization measures if older people and children can go and live with friends and host families.*
- *A request for UN staff members and their families to come out and assist in camps.*
- *A request for less military presence at the camps and for the Ministry of Resettlement and Disaster Relief Services (R & DRS) to take on more of the management role.*
- *A request for the database of registered IDPs to be shared with the UN*
- *More land has to be allocated in Vavuniya and additional sites may have to be identified in Trincomalee and Mannar in the light of preparedness for IDPs.*
- *Easing of restrictions at Medawachchiya for UN and INGOs staff traveling to Vavuniya to provide assistance*
- *MOUs with the line Ministries – the UN can share agreements made in other countries*

[75] CCHA Minutes for 30th January 2009, Document on File

- *Demining tasks already allocated, more to be allocated especially in Musali*
- *Sharing of information data and especially return plans for the North as national and international confidence building measures*

The US Ambassador H.E. Robert O. Blake while acknowledging the transfer of camps to MR & DRS, gave the US perspective on the need to

- *prepare and for other sites especially while urging the LTTE to let the civilians go*
- *De-militarization of camps and freedom of movement of people*

Hon. Basil Rajapaksa, M.P. said that MOUs can be discussed further. On the request for more presence at the FDL, he said that even Government officials have been restricted in the areas by the military due to security concerns. On the issue of freedom of movement, as a policy the GOSL acknowledges them as citizens of Sri Lanka but due to security concerns, by allowing the people to move out of camps they may go to other areas and disappear and the GA's and the GOSL are responsible for these people as there are many allegations leveled against the GOSL on disappearances. There have been instances when IDPs have registered twice. Ambassador Blake requested that the list of registered be shared with the UN and ICRC."[76]

149. To repeat, the discussions at these sessions were detailed, substantive and extensive. The internationals had been briefed thoroughly, and there was extensive give-and-take between them and the Sri Lankans.

150. There is no indication anywhere in the OISL report that the Panel interviewed any of the international who had participated in the CCHA meetings to ask them whether in their judgment, based on facts, the GOSL pursued a policy of depriving civilians in the conflict zone of humanitarian assistance.

151. The Panel's failure to do the above constitutes a material lapse in its part which has fatal consequences to its arguments about the GOSL's provision of humanitarian assistance to the civilians during the last phase of the war.

152. This point is strengthened when one considers certain facts contained in the "Report of the Committee Appointed to Study the US Department of State Report on Incidents During the Recent Conflict in Sri Lanka," commissioned by the GOSL in November 2009.

[76] CCHA Minutes for 30th March 2009, Document on file

The Report of the Committee Appointed to Study the US Department of State Report on Incidents During the Recent Conflict in Sri Lanka

153. In October 2009, the U.S. Department of State filed a report in the U.S. Congress detailing purported abuses of humanitarian law during the last phase of the war in Sri Lanka. That report contained a section on purported denial of humanitarian assistance to civilians.

154. In November 2009, the GOSL appointed a committee of respected lawyers to study the said report.[77] The Committee filed its own report in October 2010. The following is part of what the committee says with regard to the charge of denial of humanitarian assistance:

> *"There are over 50 allegations pertaining to food shortages, shortage of medical supplies, malnutrition etc. However the most serious allegation appears to be the deprivation of food to the civilians in the NFZ. The material elicited by the Committee makes it quite clear that the Government has dispatched the requisite quantities of foodstuffs but if there was a shortage that was due to LTTE appropriating the food and preventing it being distributed amongst the civilians."*
>
> *"Ms. Ann Marie Imelda Sukumar, District Secretary, Mullaitivu had all the records which clearly established that though there may have been some food shortages, she, as the District Secretary, had ensured that the shortages were not so severe as to cause deaths. The documentation produced before the Committee by Ms. Sukumar makes it quite clear that there were buffer stocks under the World Food Programme to last for three months. Ms. Sukumar had ensured that one month's buffer stocks was available at all times. The food stocks will depend on the number of people in the area. They assessed the number of people in the area through the Divisional Secretaries Offices. The Divisional Secretaries sent daily information on the influx of people coming into the district. This information was sent in writing by the DSOs to the AGAs and the AGAs forwarded the reports to her as the GA. She has filed these reports and they are available in her office. She had written instructions from Mr. Divaratne, Commissioner General of Essential Services to maintain food stocks for one month at all times."*
>
> *"Chapter IX of the Report under the category Humanitarian Conditions depicts the following graph under the caption:-*
>
> ***NFZ Estimated Population, Food Needs, Food Delivered, and Food Deficit.***

[77] The Committee was comprised of Mr. D. S. Wijesinghe PC, Mr. Nihal Jayamanne PC, Mrs. Jezima Ismail, and Mr. Anura Meddegoda.

Month	*GSL Pop (estimated) **	*Food Needs***	*Food Delivered*	*Accum Food deficit*	*International Pop estimate*	*Food needs*	*Food delivered*	*Accum Food deficit*
February	*70,000*	*980*	*150*	*-830*	*250,000*	*3,500*	*150*	*-3,350*
March	*50,000*	*775*	*1,080*	*-525*	*230,000*	*3,565*	*1,080*	*-5,835*
April	*50,000*	*775*	*1,119*	*-181*	*150,000*	*2,325*	*1,119*	*-7,041*
May (20days)	*20,000*	*200*	*50*	*-331*	*80,000*	*720*	*50*	*-7,711*

** It has been alleged that the GOSL used low civilian estimates in the NFZ to reduce the amount of food disbursed in an effort to pressure civilians to escape.*

*** Food needs and deficit estimates are based upon the estimation of several organizations that one MT of food per day is needed for 2000IDPs.*

"Mrs. Imelda Sukumar GA Mullaitivu in the course of her statement flatly denied the accuracy of the figures given in the graph. She provided records of the food dispatched and stated that there was always a surplus available in reserve. She stated that "you can check as to how many lorry loads of paddy we recovered after the war. They sold for millions. I can give that record also."

"The distribution of food was done through the Multi Purpose Cooperative Societies. The last convoy of food by road was on the 15th of January 2009. Thereafter food was dispatched by sea. Food was dispatched by the Government to the Port of Trincomalee and thereafter it is sent to Mullaivaikkal. The Additional GA receives the food which is sent by sea and dispatches the stocks to the Multi Purpose Cooperative Societies".

"Mrs. Sukumar elaborated in detail the ruses adopted by the LTTE in siphoning the food stocks from the Multi Purpose Cooperative Societies."

[Meanwhile] Mr. S.B. Divaratne, Commissioner-General of Essential Services stated that –

> *The World Food Programme Representative in Sri Lanka had monitored the food supplies sent to the conflict zone, and he would have records of the exact figures of the amount of food sent and efforts made by the GOSL to feed the civilians.*
>
> *Mr. Amin Awad, Representative/UNHCR had expressed the view that Sri Lanka was a role model to the rest of the world, in the*

manner in which the Government of Sri Lanka had handled the humanitarian crisis caused by the LTTE using civilians as a human shield in the theatre of war, by ensuring that uninterrupted provision of food and medical supplies reached the people. The Government of Sri Lanka was always mindful of the fact that the civilian population in the Vanni were citizens of Sri Lanka, with equal rights to protection and security.

The statistics given at page 50 of the Report captioned "NFZ Estimated Population, Food Needs, Food Delivered and Food Deficit" are totally incorrect as the figures quoted have not been obtained through a proper census."[78]

155. The point is that, if the OISL had interviewed persons such as Ms. Sukumar, S. B. Divaratne, or Amin Awad was the UNHCR representative in Sri Lanka at the relevant times, as witnesses, the Panel could have asked them directly how much food was sent to the conflict zone during the time in question, whether or not there were buffer-stocks available, and if so in what quantities.

156. Answers to such questions will undoubtedly have been useful to the Panel in assessing whether the GOSL pursued a *policy* of trying to starve the civilians. There is absolutely no indication that the Panel took steps to do any of this. And yet, the Panel has seen fit to pronounce unequivocally that the GOSL during the period in question followed a deliberate policy of depriving civilians in the conflict-zone of humanitarian assistance.

iii. <u>Unlawful Killings</u>

157. The OISL Report's chapter on the above title deals with offenses that fall into the category "deliberate killings" under International Humanitarian Law.[79]

158. The present section will focus on four of the Panel's main allegations of unlawful killings, allegations which figured prominently in a number of Reports of the High Commissioner submitted to the UNHRC, and also in the Report of the Secretary General's Panel of Experts on Accountability in Sri Lanka, prior to the OISL report. The allegations in question are :

g. The purported killing of Nadesan, Pulidevan and Nadesan's wife (the so-called "white flag" incident)

[78] Report of the Committee appointed to study and report on the U.S. Department of State Report on incidents during the recent conflict in Sri Lanka, 30th October 2010, pages 83 – 85, Document on file

[79] It should be noted that, IHL recognizes two types of killings, "deliberate Killings" and "Indiscriminate Killings," the latter of which refers to killings that occur as a result of an attacker failing to discriminate between military and civilian objects. The OISL addresses this second category of killings in a separate chapter, which shall be analyzed later.

h. The purported killing of Colonel Ramesh

i. The purported killing of Balachandran Prabakaran (Velupillai Prabakaran's son)

j. Isaipriya

a) <u>Purported killing of Nadesan, Pulidevan and Vineetha</u>

159. The allegation is that, sometime in the early morning hours of the 18th of May 2009, LTTE Political Wing Leaders Nadesan, Pulidevan and Nadesan's wife Vineetha surrendered to the Sri Lanka Army at some point along the FDL, and were subsequently killed by the SLA.

160. It is alleged that Nadesan had informed GOSL officials of his intention to surrender, and that he and his group had been instructed to proceed to a particular spot along the FDL. OISL says it has testimony from several witnesses who say they saw the group carrying a white flag and surrendering to persons wearing SLA uniforms.[80]

161. Then, the Panel says:

> *[A] OISL is in possession of high resolution electronic photos of a group of dead bodies, among them clearly identifiable are Pulidevan, Nadesan and Vineetha Nadesan, as well as a number of recognizable but unidentified men and possibly a young woman. (face outside the frame of the photo). According to a forensic pathologist, the colour digital photographs are all amateur trophy-type images which show groups of bodies, individual bodies and include images of head and shoulders. Despite their amateur nature these photographs capture many injuries, patterns of blood flow, disturbance of clothing and post-mortem changes. The resolution of the images is mostly sufficient for professional diagnostic purposes, particularly where there are images documenting the same scene from different angles. The information provided by the images is inevitably incomplete because in no case has the entire surface of the body being photograph in a manner to photo-document the totality of the injuries present in the bodies. Nevertheless the injuries that are visible can be seen clearly and are undeniable.*[81]
>
> *[B] Estimates based on these photos indicate there were about a dozen bodies lined up. This, together with plastic sheeting laid on the ground nearby, suggests that the location is a temporary site for the collection*

[80] Ibid, p. 64, paras 300, 301
[81] Ibid, p. 65, para 303

of the dead rather than the place of death. The matting beneath one of the bodies (Nadesan) may have been used to carry the body to this location. All male bodies are in undergarments, one has a prophetic leg next to his body. Various brightly coloured clothing items are partially covering bodies or around bodies.[82]

[C] Although the exact time and cause of death cannot be definitively determine based on the photographs, the following are some of the conclusions suggested by the forensic observations related to the bodies of Nadesan, and Pulidevan: photographs of Nedesan's body showed that cause of death would be at least one and possibly three gun shots to the front torso. With regard to Pulidevan, the analysis identified multiple gunshot wounds to the torso entering from the back and exiting the front, as well as gunshot wound to both arms. Given that the multiple gunshot wounds to the torso are from back to front the forensic analysis suggest that a similar trajectory for the right arm wound could only be achieved with the arm twisted, with the right hand behind the back. The analysis also noted that the left wrist appears to show a ligature impression mark associated with bright red bruising of the skin. According to the analysis, taken together, the pattern of injuries indicates that Pulidevan was shot multiple times in the back, almost certainly whilst his arms were restrained behind his back. Based on this forensic analysis of photographic as well as video material, witness testimonies and open sources, OISL concludes that there are reasonable ground to belief that LTTE senior political wind leaders Balasingham Nadesan and Seelarathnam Pulidevan as well as Nadesan's wife Vineetha Nadesan may have been executed by the security forces sometime after 6.00 on 18th on May. However, further investigation is required to determine the full facts as to what happened and who was responsible for the killings.[83]

Analysis

162. Most assuredly, Nadesan, Pulidevan and Vineetha are dead. The question is, "based on the evidence presented by OISL, is it reasonable to conclude that they were 'executed" by the SLA as suggested by the Panel?" Such a conclusion is untenable, because of the following reasons:

163. First, in the final sentence of paragraph [c] quoted above, the Panel says that, "*further investigation is required to determine the full facts as to what happened and who was responsible*."

164. It should be noted that, the mandate given to OHCHR by resolution A/HRC/30/L.29 is to conduct a comprehensive investigation into allegations of

[82] Ibid, para 304
[83] Ibid, para 305

war crimes and other crimes committed *inter alia* during the last phase of the war. And the Panel admits that it was in possession of a vast body of evidence including witness testimony, photographic and video material, and so on, pertaining to alleged offences.

165. In spite of all that, if the best that the Panel can do with the 'white flag incident' is to say that it doesn't know what exactly happened or who was responsible, and to recommend a further investigation to find out what happened, the Panel has no right to suggest that Nadesan, Pulidevan and Vineetha were *executed* by the SLA.

166. Under the circumstances, the most that the OISL's evidence on the face of it allows is a conclusion that one simply does not know what happened, and this is what the Panel should have said.

167. Second, there are intrinsic problems with the OISL's evidence. For instance, the Panel says that the photographic and video material in question was subjected to analysis by a forensic pathologist.[84] However, the Panel does not cite the said forensic analysis in the footnotes, nor is it attached in the annexes to the report. So, it is impossible for an independent evaluator to say whether the forensic pathologist in question drew the conclusions that the Panel says he drew, and even if he did, to assess whether the conclusions are reasonable.

168. Third, even if one concedes for the sake of argument that Nadesan, Pullideval and Vineetha surrendered to the SLA at a spot along the FDL in the early morning hours of 18th May, there is an alternative interpretation of the evidence that can explain their deaths by gun shot wounds, other than as an execution.

169. The said alternative interpretation is: in the darkness of the predawn hours Nadesan's group approached the FDL saying they wanted to surrender, but when they neared the troops there was a miscommunication or someone in the group made a wrong move or the surrender was in fact a ruse and an attempt was made to attack the troops.

170. The above conclusion is a more likely scenario than the one suggested by the OISL, particularly in light of the OISL's conclusion being based on a purported forensic analysis which is not available to the public.

171. It is contended further that, the above conclusion is bolstered when one considers the following exculpatory evidence: namely, the innumerable occasions – Thamilini being a case in point – where the government did not execute surrendering LTTE cadres, including senior leaders, but took them into custody.[85]

[84] For instance in paragraph 305 it is explicitly stated : "according to this analysis taken together the pattern of injuries indicates that Pulidevan was shot multiple times in the back, almost certainly whilst his arms were restrained behind his back"

[85] Thamilini's memoir, *Under the Shade of a Sharp-edged Sword*, contains the following poignant passage about the day she surrendered to the Army: "It was getting dark when I reached the Mullaitivu playground.

172. In this regard one must take into account the undisputed fact that the government took into custody roughly 12,000 LTTE carders, rehabilitated them, and released them back to their families, efforts praised by among others UN Secretary General Ban Ki Moon.

b) <u>Purported killing of "Col. Ramesh"</u>

173. The allegation is that LTTE Commander Col. Ramesh surrendered to SLA troops sometime in the morning on the 18th May 2009 and was subsequently executed. The following are the relevant passages where the OISL discusses this incident:

[A] "OISL received several witness testimonies describing LTTE Commander Thambirasa Thurairajasingham alias Col. Ramesh wearing civilian clothing and unarmed on the road on the north side of the Vadduvakal bridge and walking across the bridge with a small child in his arms. Witnesses state that around 0700 hrs on 18th May Col. Ramesh accompanied by a group of his relatives passed through the SLA sentry points on the south side of the Vadduvakal bridge and proceeded to the large holding areas south of the bridge along with thousands of other civilians. Here he was identified and approached by Tamil military intelligence officers working for the security forces. Two witnesses independently identified one of the military intelligence officers (former LTTE turned informer) by name. One witness says this intelligence officer was a Karuna cadre well known to Ramesh and Piraba, an Eastern LTTE cadre traveling in the same group with Col. Ramesh. The other witness states that the intelligence officer was a former bodyguard of Piraba. Both witnesses state that Piraba and Ramesh were escorted away by the SLA and military intelligence officers. The relatives accompanying them on 18 May across the bridge never saw the two men again."[86]

[B] "Although the chronology of events cannot be firmly established on the basis of available information, photographic and video information indicate that after Col. Ramesh, dressed in civilian clothes, was separated from his family inside a holding area, he was taken in a military vehicle and at some stage made to change his clothing. In some images Col. Ramesh is wearing a green army uniform, in others he is in LTTE camouflage trousers. In video images

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A wire fence had been put around it, and there were soldiers standing at guard at various places. The people, exhausted by hunger, had begun to bunch into small groups and sit on the ground. These people, along with thousands of LTTE fighters mixed in with them, had handed over their fate to the Sri Lanka Army, and were now waiting with dread for what might happen next…Soldiers of the Sri Lanka army were handing out water bottles, and food parcels. I and some others were sitting in the middle of the field. To be sure, I was not in a state of mind to think of food or drink. I was gripped by an overwhelming feeling of guilt. The army was looking into the needs of the people with great thoughtfulness." (p. 212)

[86] Ibid, para 307

he is seen being interrogated in several locations by security forces in Tamil as well as English, at one point his shirt is removed exposing an injury with medical dressing around the right shoulder blade."[87]

[C] "OISL finds that witness testimonies in conjunction with the video and photographic material constitute a reliable body of information to establish reasonable grounds to believe that T. Thurairajasingham alias LTTE Col. Ramesh was alive and was in the custody of security forces after witnesses saw him on 18 May 2009 that he remained in their custody until he was extra-judicially executed sometime between 18th and 22nd May 2009."[88]

Analysis

174. The question is, 'Based on the evidence presented by OISL, can one reasonably conclude that Col. Ramesh was executed by troops belonging to the SLA, that is, soldiers wearing the uniform of the SLA and who have taken an oath of loyalty under the requisite laws to protect and defend the country including the constitution of Sri Lanka?" Such a conclusion does not follow because of the following reasons:

175. First, according to paragraph [A] above the Panel says that Col. Ramesh was apprehended by "Tamil military intelligence officers" working for the security forces. The sole witness cited by the Panel has identified by name one of these Tamil officers as a former LTTE turned informer.

176. It is not in dispute that the SLA used informers (LTTE turned informers) to *inter alia* identify surrendering LTTE cadre, especially LTTE leaders, who were mixed in with the civilians.

177. It is reasonable to suppose that, these informers had perhaps in the past fought side by side with the LTTE'ers whom they were identifying, and had reason either to fear them (for what they might reveal about the informers themselves) or for some other reason had grudges or personal animosities against them.

178. It should be noted that, paragraph [A] indicates that the informer identified as one of the officers who apprehended Ramesh was a Karuna cadre, and it is known that the LTTE undertook a murderous campaign against the Karuna faction when it left the LTTE in 2004.[89]

179. A consideration of the above matters leads one to suspect that Col. Ramesh may have been killed by LTTE turned informers who either had a grudge against him,

[87] Ibid, para 309
[88] Ibid, para 311
[89] See for instance, "A split in the LTTE heightens danger of war in Sri Lanka," K. Ratnayake, 18th March 2004, World Socialist Website, www.wsws.org

or for some other reason had reason to fear him: at any rate it is as likely a scenario as the one suggested by OISL in paragraph [C]

180. Under the circumstances a reasonable doubt arises as to whether Col. Ramesh was in the company of SLA soldiers at the time of his death. If there is doubt as to whether SLA soldiers were even present when Ramesh met his end it is impossible based on the evidence cited by the Panel to impute Ramesh's death to SLA soldiers.

181. If it is impossible to impute Ramesh's death to SLA soldiers, how can one suggest (as the Panel seems to do) that the command structure of the SLA had anything to do with Ramesh's death?

c) <u>Purported killing of "Balachandran Prabhakaran"</u>

182. The allegation is that Balachandran Prabhakaran (Velupillei Prabhakaran's son) was captured alive by SLA troops, and later killed. The following is the Panel's entire discussion of the purported incident:

[A] "OISL is in possession of photographic and video material that show Balachandran Prabhakran, the 12-ear-old son of Villupillai Prabhakaran, sitting in a bunker, alive and in the custody of Sri Lankan troops as well as images of the dead body of Balachandran lying on the ground beside the dead bodies of five semi-naked men. Based on the assessment of an independent forensic pathologist of the photographs, Balachandran appears to have been killed with five gunshots to the chest. One gunshot wound with soot markings indicate the weapon was fired from a distance of 60-90 cm. A witness stated he saw Balachandran alive and then saw his body with bullet wounds; he did not see Balachandran being killed."[90]

[B] "The Sri Lankan authorities have maintained that Prabhakaran's son was killed in crossfire. OISL finds there are reasonable grounds to believe that Balachandran Prabhakaran was captured or otherwise taken into custody by the security forces who subsequently extra-judicially executed him."[91]

<u>Analysis</u>

183. The question is, "Based on the evidence in paragraphs [A] and [B] above, can one conclude, as the Panel does, that Balachandran was *executed* by SLA troops?" Such a conclusion is untenable, because of the following reasons.

[90] Ibid, para 313
[91] Ibid, para 314

184. First, in the last sentence of paragraph [A] the Panel admits that its witness "saw Balachandran alive and then saw his body with bullet wounds; he did not see Balachandran being killed." (In the opinion of the author, if the Panel had a witness who saw Balachandran being killed, the Panel would obviously have cited such a witness.)

185. Therefore, it is reasonable to suppose that the aforesaid witness is the *only* witness the Panel has with respect to the Balachandran incident, or at any rate the only witness the Panel is prepared to introduce.

186. If the Panel's only purported eye-witness to the Balachandran incident says he did not see the boy *being killed*, it means the Panel has no basis to claim that SLA troops killed him.

187. However, in paragraph [B] the Panel says that the GOSL has said that Balachandran died in crossfire. Therefore, one is compelled to ask a second question, namely, "Given the evidence cited in paragraph [A] is there a plausible scenario where Balachandran could have been in the custody of SLA troops either at the time of his death or shortly before, but his death came about in a way other than an execution?" There *is* such a scenario, because of the following reasons.

188. In paragraph [A] the Panel says that it has photographic and video evidence that show Balachandran sitting in a bunker alive and in the custody of Sri Lanka troops. The Panel does not say whether the bunker in question is a SLA bunker or a captured LTTE bunker. The Panel has not annexed the forensic report to which reference it made in Paragraph [A] so it is impossible to know whether such analysis identified the bunker either.

189. Even if one presumes that the men seen in SLA uniforms in the video and photographic material are SLA soldiers and not LTTE dressed in SLA uniforms, something which they were known to do at times as a tactic,[92] it is still impossible to determine with any degree of certainty whether Balachandran's death was an execution or the result of close fire without identifying whether the bunker in which he is seen is SLA or LTTE.

190. If the bunker in question is LTTE, it is likely the very bunker in which Balachandran had been hiding until the last, which means it is a bunker situated in the last patch of ground in Nandikandal controlled by the LTTE. It is possible that, even if SLA troops had stormed the bunker and taken it, there were hard-core LTTE fighters still lurking nearby.

[92] See the discussion of the crime of "Perfidy" in relation to the LTTE by Professor David Crane and Sir Desmond de Silva in, "Legal issues pertaining to the use of human shields and hostage taking by the LTTE," submitted as part of their work for the Paranagama Commission, 2nd Mandate. Paras 56 – 62. (The said document is included in Volume 2 – Supplementary material to the present report.)

191. Under the circumstances it is plausible (at any rate as plausible as the claim of an execution) that the SLA had had the boy in their custody for a short time, but LTTE fighters nearby—the last remnants of the LTTE—attacked the bunker either to rescue the boy, or to kill him so that he will not become a trophy for the SLA, and in the crossfire he was indeed killed.

d) Purported killing of "Isaipriya"

192. The allegation is that Shobana Dharmaraja alias Isaipriya an LTTE news-presenter was taken into custody by Sri Lanka security forces and later killed. Thtelevant passage where this matter is discussed in the OISL is as follows.

> *OISL has viewed photos and video footage consistent with witness accounts showing Isaipriya pulled out of the Nandikandal lagoon alive but mistaken by the security forces for being the daughter of Prabhakran. In the video sequence Isaipriya is wearing khaki/green trousers and a flesh-coloured bra. The solders in this footage are handing her a white cloth to cover her upper body and generally behave in a respectful manner. In other photographic images, Isaipriya is seen with the white cloth wrapped around her sitting or lying next to another young woman. In stark contrast to these images, another video as well as a number of photographs show Isaipriya's dead body among a group of male bodies, many naked, blindfolded with hands tied behind their backs. In this video, Isaipriya is half-naked, with her trousers pulled down exposing her upper thighs, genital area and lower abdomen. Her midriff is covered with the now bloodied white cloths and her bra appears to have been deliberately moved to expose her breasts. Her hands appear to be tied behind her back. A cloth similar to the blindfold worn by other victims appears to have been pulled away exposing her entire face.*[93]

Analysis

193. If Isaipriya was captured alive by troops (as indeed the witness testimony plus the video footage indicate), and later turned up dead, a reasonable inference can be drawn that she died in the custody of SLA troops and there's no question that the particular troops in whose custody she was at the time died can be held accountable for her death.

194. It would be relatively easy to identify the troops who came in contact with Isaipriya, either from the video footage, or by reviewing army records to see what units were in the vicinity where she was reportedly captured, and then by interviewing relevant commanders to narrow down who may have actually pulled her out of the water.

195. The pertinent question for present purposes, however, is whether, even if Isaipriya was captured and killed by certain troops, this indicates a general pattern or style

[93] Ibid, para 316

of conduct on the part of the army as a whole, that ties the offence to the chain of command and ultimately to the Government.

196. This second question must be answered in the negative, because of evidence cited by the OISL itself. The Panel says that the video sequence showing Isaipriya being captured also shows troops behaving respectfully towards her. (OISL has absolutely no video footage that shows Isaipriya, while alive, being treated disrespectfully by troops.)

197. If the chain of command has endorsed a policy of wanton rape and murder of female captives, then how is it that the troops who fished Isaipriya out of the lagoon were behaving respectfully towards her, going to the extent of giving her a cloth with which to cover herself?

198. One has to also balance the OISL's evidence with other known facts, including published testimonials, where captured LTTE cadres say they were treated kindly by SLA troops,[94] and in fact, on a number of occasions troops had saved wounded LTTE cadres on the brink of death by treating them on the battlefield itself, and transporting them to safety behind Government lines.[95]

199. OISL should have consulted some of these testimonials, available in public sources, before coming to its conclusion on the likelihood of the chain of command endorsing a policy of wanton rape and murder of female captives.

200. So, all that the OISL's evidence shows is that at best even if criminal charges are possible against the specific troops who may have killed Isaipriya while in their custody, no responsibility can possibly be attributed to the GOSL in respect of such incident.

iv) <u>Violations related to the deprivation of liberty</u>

201. The allegation is that during the relevant period (2002-2011) there were innumerable arbitrary arrests and other unjustified deprivations of liberty of civilians especially Tamils perpetrated by the security forces and related

[94] The LLRC report contains the following passage: "A detainee at Omanthai Detention Centre who had crossed to Army lines on 16th May 2009 at Mullaivaikkal stated that: "We moved through the main road, there was a bund at the main road but that bund was demolished. There was Army on both sides of the road and Army advised us to take the route on the road and not to get down because of the mines. As we proceeded taking this route the Army was there and provided us water and meals." LLRC report, para 4.99

[95] See Humanitarian Operation Factual Analysis July 2006 – May 2009, Sri Lanka Ministry of Defence. In its section on "Reception of civilians," the document says, "Medical teams from the Sri Lanka Army Medical Corps evaluated all those received for injuries and illness, and evacuated them to medical stations for treatment. Dehydration and hypoglycaemia were treated at the initial point of contact, and anyone with bleeding was given emergency treatment to arrest the flow of blood. No distinction was made between civilians and combatants in the services provided." (p. 69). Since the Ministry has gone on record with the aforesaid statement, the Panel could have asked for the relevant records to confirm if in fact what the Ministry was claiming was true, and drawn the necessary inferences.

paramilitary groups, and that these acts were done with the knowledge and approval of the command structure of the security forces including the relevant civilian leader. The Panel begins the Chapter as follows:

> *"This chapter reviews the modus operandi of the security forces with respect to patterns of unlawful and arbitrary arrest and detention. It describes how Sri Lankan legislation provided a quasi-legal framework for practices that are in clear violation of international legal safeguards related to the deprivation of liberty of any person. This chapter also examines security operations where individuals or groups were specifically targeted, in incidents that occurred before, during and beyond the OISL investigation period, and which are often referred to as "white van" cases. The chapter also documents violations related to the mass detentions that occurred at the end of the conflict."*[96]

202. The present section will focus on the so-called "white van" cases. The OISL relies for this allegation on 50 interviews it had conducted with persons who claimed to have been abducted in the aforesaid manner.

203. The following are the crucial paragraphs in which the OISL discusses the purported *modus operandi* of "white van" abductions.

> *[A] "In most of the cases documented by OISL, unlawful and arbitrary arrests were carried out by members of the security forces, including CID, TID, STF, members of SLA (especially Military Intelligence) and SLN."*[97]
>
> *[B] "One victim described his arrest in Vavuniya, in 2009, typical of many others documented by OISL: "I was at home with my mother and sister. At around 8 or 9 p.m., I heard dogs barking outside. I went out to see if there were thieves. I was wearing a T-shirt and shorts, without shoes. I saw three men outside, two of whom were wearing civilian clothes; one was wearing a green army uniform. Two of the men had guns, and one of them pointed a gun at my mother and sister. I began to shout and scream. The men told my mother and sister not to make any noise and that I was being taken away for purpose of investigation. Nobody said anything about an arrest warrant, It all happened very quickly. The men put me in a white van that they had parked outside the gate. It was a normal white van, not a military vehicle. They dragged me to the van and pushed me into the back. They beat me and I fell unconscious. When I regained consciousness, I had pain in my head and in my back. I was in a small room, a cell, with a toilet in the corner and no windows."*[98]

[96] Ibid, para 328
[97] Ibid, para 347
[98] Ibid, para 350

[C] "Arbitrary arrests were generally perpetrated against pre-determined individuals, often after a period of surveillance and thus pre-planned. For example, several victims reported that in the days preceding their arrest, they had been followed in the street or saw suspicious vehicles parked outside their homes or places of work. On many occasions, victims were asked for their identity papers immediately prior to their arrest, and the alleged perpetrators would present victims with information they had on them. One victim described to OISL how, in Vavuniya in 2010, he was the victim of an arbitrary arrest. Someone he did not know came to his workplace, asked for him and left. The next day, the victim was in a shop near his office, when someone called his name, and a second person struck him on the head with the butt of a rifle. He woke up in a dark place, naked, with bruises and bleeding. He was interrogated by a group of seven or eight individuals who were beating him. He alleges he was severely tortured and raped during six weeks in detention by the security forces."[99]

204. Finally OISL's summation of the evidence including it's attribution of responsibility for the abductions to the Sri Lanka Defence Ministry is as follows.

> *"According to the information gathered by OISL, the different branches of the Sri Lankan security forces worked together in perpetrating unlawful and arbitrary arrests, demonstrating a high degree of coordination, joint intelligence and information sharing, as well as joint planning, which continued throughout the period of detention, interrogation, torture and release or transfer prison. Where identified, the security forces carrying out the arrest were often members of the SLA, TID or CID, sometimes with the support of SLA, especially Military Intelligence. The security forces had at their disposal information gathered through informants, including former LTTE cadres, some of whom had been detained prior to becoming informants, and that information had been extracted under torture of threat of torture."*[100]

205. Attention is drawn to the portion in the above that reads:

> *According to the information gathered by OISL, the different branches of the Sri Lankan security forces worked together in perpetrating unlawful and arbitrary arrests, demonstrating a high degree of coordination,*

206. The Panel has footnoted this portion as: "See interviews with police officials in *Business Today*, April 2009, where they describe the close coordination, weekly meetings and the Secretary of Defence to plan counter-terrorism investigations and operations (Footnote 279 of the OISL report.)

[99] Ibid, para 351
[100] Ibid, para 353

Analysis

207. The defects with the Panel's argument about purported "deprivations of liberty" can be discussed under three heads:

a) Intrinsic problems with relying on witnesses whose statements are not available to the public for scrutiny;

b) The basis for the Panel's basis conclusion that the security forces hierarchy colluded to carry out arbitrary arrests and such like things is a series of interviews of police officials that had been published in *Business Week*. From the context, it is clear that the officials in question are discussing steps taken to enhance coordination and cooperation among the different branches of the security forces with respect to counter-terrorism operations, that is, perfectly legitimate and lawful activities for the security forces, if one supposes that part of the job of the security forces of any country is to protect its citizens from terrorists. Therefore, from the fact that senior officials in the security forces had *met frequently* in order to improve the coordination and cooperation between the different branches for counterterrorism operations, the Panel enthusiastically jumps to the conclusion that they met in order to collude on unlawful activities including 'white van abductions.'

c) Finally, the Panel fails to consider the possibility that the witnesses, even if they said what the Panel claims, may be lying in order to obtain asylum or some other benefit from the OISL.

Intrinsic problems with relying on witness statements that are not available to the public

208. Sir Geoffrey Nice QC and Mr. Rodney Dixon QC, two of the experts retained by the Paranagama Commission under its second mandate, produced a review of a Report by Yasmin Sooka titled, "An Unfinished War: Torture and Sexual Violence in Sri Lanka 2009 – 2014."[101] (The said Review is included in Volume Two of the present report.)

209. They discuss at length the law relating to the use of anonymous witnesses and experts. Their remarks are relevant not just to the argument in the present chapter but the arguments in the three chapters that follow—i.e. "Enforced Disappearances," "Torture," and "Sexual Violence":

[101] Yasmin Sooka, "and 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 (Trade marked as STOP), March 2014. Sooka was a member of the UN Secretary General's Panel of Experts on Sri Lanka whose report was published in March 2011.

"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. The Report claims to have established a prima facie, evidence-based case against the most senior officials of the Government and the security forces."[102]

"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."[103]

210. Then, under a section titled, "Standing of the Report given that it relies on anonymous witnesses and experts," they say:

[A] "There is a body of well-established case law from international courts dealing with such reports."[104]

[B] "The International Criminal Court (ICC) has held that:

> *"Heavy reliance upon anonymous hearsay, as it 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."*[105]

[C] "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."[106]

[D] "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*

[102] Review of 'An Unfinished War: Torture, and Sexual Violence in Sri Lanka 2009 – 2014,' Sir Geoffrey Nice QC and Rodney Dixon QC, para 2
[103] Ibid, para 8
[104] Review of Jasmin Sooka Report, Sir Geoffrey Nice and Rodney Dixon, para 9
[105] Ibid, para 10
[106] Ibid, para 11

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".[107]

[E] "The ICTY found in respect of NGOs that "these organizations" careful methods can at best assure that 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."[108]

[F] "The ICC has highlighted that the indirect evidence contained in reports must be approached with great caution. It has emphasized that there are "inherent difficulties in ascertaining the truthfulness and authenticity of such information."[109]

[G] "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 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".[110]

211. The author intends to adopt the above observations of Sir Geoffrey Nice and Mr. Rodney Dixon *in toto* not only for the purposes of the present discussion but also for the discussion in the three sections that follow.

212. With this background, one can turn to passages [B] and [C] quoted in paragraph 86 hereinbefore. It suffices to make just two observations. These are the only two paragraphs where the Panel gives details about what particular witnesses had said.

213. The testimony of the victim quoted in paragraph [B] does not contain a single detail that can be independently verified or collaborated. For instance the victim gives details about what he was wearing, that he heard dogs barking, and so on, when the abductors came to his house, but never mentions whether he made a complaint to the police about the incident (since he escaped alive from the alleged abduction he had an opportunity to report it into the police).

214. Also there is no mention of any medical report of his injuries. Since he says that his abductors beat him until he fell unconscious, it is reasonable to suppose that

[107] Ibid, para 12
[108] Ibid, para 13
[109] Ibid, para 14
[110] Ibid, para 15

when he was released he visited a hospital in order to have his wounds treated, and there ought to be a report of such treatment.

215. In paragraph [C] the Panel paraphrases the testimony of a purported 'white van victim' in Vavuniya, in 2010. According to the Panel, the victim said *inter alia* that, "he was severely tortured and raped during six weeks in detention by the security forces."

216. The Panel does not say whether, in the six weeks he was held in detention he made note of any details about his surroundings or of his tormentors from which it would be possible to connect either the location where he was held or the alleged torturers to the security forces.

217. Furthermore the Panel does not say if there is a medical report that corroborates at least some portion of the witness's statement. Since he says he was severely tortured and raped for six weeks on end, one must presume that he would have visited a hospital after such an ordeal.

218. It is not in dispute that the security forces of a country must necessarily be efficient and competent if they are to accomplish their purpose, namely the protection of the country.

219. It is also reasonable to suppose that, in order to ensure efficiency and coordination among the different branches, key officials in those branches must *meet frequently*.

220. The evidence cited by the Panel clearly indicates that the meetings referred to in the articles in *Business Week* were meetings to coordinate *lawful* activities. (It is impossible to suppose that police officers would give interviews to *Business Week* about coordinating *unlawful* activities.)

221. Therefore, from the fact that key officials from different branches of the security forces had met frequently it does not follow automatically that they met in order to collude on unlawful activities: if the members of the Panel wish to claim that they did, they have to adduce some evidence as to those facts.

222. To repeat, other than the Panel's witnesses (whose statements are subject to the infirmities that have already been discussed) the Panel's argument that the security forces are behind the deprivations of liberty in question appears to be the insinuation that the fact that key officials in the security forces met frequently means they were planning unlawful activities.

Is it possible that the witnesses are lying in order to gain some benefits from the Panel or an interested party connected to the OISL?

223. If at the time the OISL report was being produced there was information available in public sources from which reasonable inferences could be drawn that Sri Lankans have not infrequently lied about being abused by the security forces in order to gain asylum and various other benefits, especially in Western countries, it was incumbent on the Panel to consider whether the witnesses who were testifying before them may also be lying in order to gain such a benefit, or at any rate to consider that perhaps Sri Lanka may not be as horrid a place as alleged by the witnesses.

224. The question is, "At the time the Panel was reviewing the testimony of its witnesses, were there known instances where persons had claimed that they were abducted and/or abused by security forces, or where the media had reported that a particular person was abused and/or killed by the security forces, but subsequently those claims were found to be wrong?" In the opinion of the author, there were, and the author shall points to two incidents, both reported in mainstream Sri Lankan newspapers.

k. Alleged abduction of Kumar Gunarathnam and Dimuthu Atigala

i. Shamindra Ferdinando, the well-known journalist for *The Island*, narrates the essential details of the story, as follows:

The case of Gunaratnam, one-time Central Committee member of the JVP and the only CC member to survive the government crackdown except Somawansa Amarasinghe, is definitely not an isolated one. Having arrived secretly in Sri Lanka, Gunaratnam formed a breakaway JVP faction, called the Frontline Socialist Party (FSP). When Gunaratnam disappeared along with another activist, Ms. Dimuthu Attygalle, the FSP accused intelligence services of holding him at a secret detention facility. But when he suddenly emerged without a scratch and wanted to leave the country, no less a person than Australian High Commissioner in Colombo, Robyn Mudie, produced Gunaratnam's passport issued courtesy the government of Australia bearing the name Noel Mudalige….Sri Lanka requested the Australian diplomat to prove Gunaratnam's arrival in Sri Lanka as records at Bandaranaike International Airport didn't show any Australian passport holder by that name entering the country.

After returning to Australia, Gunaratnam/Mudalige alleged that he was handcuffed, blindfolded and physically and sexually tortured during the three-day detention. The Australian never made such allegation when the police recorded his statement in the presence

of Australian diplomatic staff at the CCD headquarters at Dematagoda.[111]

l. Kathiravel Thayapararaja

ii. Shenali Waduge, the freelance writer and nationalist activist, in an article published in the *Daily News*, describes the curious case of Mr. Kathiravel Thayapararaja, as follows:

The Indian Newspapers reported that ten Sri Lankan Tamils, including five children, illegally landed at Arichamunai, Dhanushkodi, Tamil Nadu, in the early hours of Monday, May 5, 2014….One of the refugees was Kathiravel Thayayapararaja, said to have been tortured and killed by the Sri Lankan Security Forces on September 13, 2009, a story confirmed by the respected University Teachers for Human Rights Jaffna (UTHR – J) in their special report. His supposed death was also mentioned in the 2010 report by the Australian Government Refugee Review Tribunal.[112]

iii. Ms. Waduge goes to the length of quoting the relevant passage in the UTHR – J report which had mentioned Thayapararaja. The following is what the UTHR – J had said:

K. Thayapararaja, a brilliant product of the Engineering Faculty at Peradeniya was the head of the Vanni Tech, as both a civilian teacher and administrator. He would have met Charles Anthony, now dead, and a few other LTTE figures at board meetings. He fell out with the LTTE and came out of the NFZ with his family in late March, identified himself to the Army and was questioned before being sent on. He joined his family in Vavuniya for some time, went to Colombo to find his way abroad. He was arrested in September 2009 in Colombo and tortured at a security camp in Avissawella, was shot and injured on September 13 while being taken to court under escort and died at Kalubowila Hospital two days later. Such actions introduce a needless element of insecurity into the life of every Tamil. The government did not even acknowledge the incident, leave alone investigate it nor did the Press report it.[113]

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[111] 'Sri Lanka: The war on terror revisited,' Shamindra Ferdinando, 29th April 2014, www.slwaronterror.blogspot.com

[112] "Kathiravel Thayapararaja was never killed…but he rose from the dead," Shenali Waduge, 20th May 2014, www.dailynews.lk

[113] Ibid

Is the Gunarathnam affair and the Thayapararaja matter isolated incidents or do they represent a larger phenomenon?

225. The next question is, "If members of the Panel were aware of either the Gunaratnam or the Thayapararaja incident, or at any rate of even a single such incident, was there information in the public domain that would have indicated to them that incidents such as that of Gunaratnam and Thayapararaja are not isolated, but represent a larger and persistent phenomenon?"

226. The answer to the above question is in the affirmative, and in support of this the following evidence is presented:

m. A statement in the British Parliament in February 2012 by Alistair Burt, at the time the Minister in charge of Sri Lanka at the Foreign and Commonwealth office, about Sri Lankan asylum-seekers who were being deported. (Starting in mid-2011, the British Government started sending failed Sri Lankan asylum-seekers back to Sri Lanka. In early January 2012, when a plane-load of such returnees was scheduled to leave, LTTE-sympathizers in the UK Parliament raised a ruckus. As a result there was a debate in Parliament about the Human Rights situation in SL. Mr. Burt was responding to a question by a Member about the possibility that the returnees would face abuse when in SL) He said, *inter alia*:

"The Foreign Office follows the human rights situation in Sri Lanka closely. For chartered flight operations, we currently make a small payment to enable returnees to travel to their home town or village. We also ensure that UK Government representatives are present at the airport. Every returnee, whether on scheduled or chartered flights, is provided with the contact details of the British high commission in Colombo, should they want to make contact with the migration delivery officer based there. We are aware of media allegations that returnees are being abused. All have been investigated by the high commission, and no evidence has been found to substantiate any of them"[114].

n. Comments in two Canadian newspapers, the first by Martin Collocott, a former Canadian High Commissioner to Sri Lanka (during the 80's) and subsequently a distinguished academic and political commentator; the second by respected Canadian journalist Barry O'Regan. The following is Mr. Collocott's observation:

iv. "*Here's one indication of Canadian generosity and even laxity in our treatment of refugee claimants. In order to be successful, the claimants have to be able to make the case that they fled their countries of origin because it was not safe to remain their. Yet in one year along, 8,600 Sri Lankans with refugee claims pending in*

[114] Hansard Records, 22nd February 2012, www.parliament.uk

Canada applied to the Sri Lankan High Commission in Ottawa for travel documents so they could go back to Sri Lanka for visits"[115].

Meanwhile, Barry O'Regan says:

v. *"Internal government documents show 70% of Tamils who claimed refugee status in Canada continue to take holidays in Sri Lanka, a country which they claim is genocidal towards Tamils."*[116]

o. A quote from the dissenting judgment of Justice Moldaver in the landmark Canadian case Jeyakannan Kandasamy v. Canada (2015). Kandasamy, a Tamil refugee from Sri Lanka was denied asylum by the Canadian Immigration tribunal and ordered to be deported back to Sri Lanka on grounds that he had not established that he was in danger of being persecuted on his return on account of his ethnicity. Kandasamy appealed from this ruling to a number of higher tribunals, all of which refused him relief. The case went all the way to the Canadian Supreme Court, and the court granted the appeal on a technicality. The court did not question the basic facts that the State had put forward about the likelihood of Kandasamy being subjected to persecution on account of his ethnicity. Justice Moldaver in his dissenting judgment mentions that fact. He says, *inter alia*:

"The record contains conflicting evidence about conditions in Sri Lanka and the extent to which the treatment of Tamils had improved since the end of the civil war and the defeat of the LTTE in 2009. Mr. Kanthasamy put forward evidence suggesting that young Tamil men in northern Sri Lanka still faced "frequent harassment" and "abusive behaviour" by government and paramilitary forces, and that security measures targeted Tamils in a disproportionate and discriminatory manner. He also submitted evidence that the Sri Lankan government continued to engage in torture and that some failed Tamil asylum seekers had faced arbitrary arrest and torture upon their return to Sri Lanka. On the other hand, two research packages prepared by the Immigration and Refugee Board, which summarized reports from news, academic and other sources on the treatment of Tamils in Sri Lanka, contained evidence that the harassment and government surveillance of Tamils had decreased since 2009."[117]

p. Finally, an extended quote from a key ruling by the Swiss Immigration Appeals Tribunal (BFM) in a case where they rejected the appeal of a failed asylum-seeker, and upheld the order of the lower court to send him back:

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[115] "Slow down you're granting asylum too fact," Martin Collacott, www.nationalpost.com

[116] "Tamil Refugees Still Going Home for Holidays," Barry O'Regan, www.examiner.com, 25th October 2010

[117] Kanthasamy v. Canada 2015 SCC 61 (2015) 3 SCR 909, 16th April 2015, www.csc.lexum.com

[A] "*As part of this judgment, it is therefore appropriate to deal with the current situation in Sri Lanka and namely to enlarge upon the incidents which took place after the latest analysis of the situation of February 2008 (see leading decision/Grundsatzurteil of February 14 2008, published in BVGE 2008 Nr. 2) and the resulting developments (contemplation/Erwägung 7) and namely to check, if necessary, if there are any groups of people which are subjected to a particular danger to be persecuted or cannot use state protection in this context by security forces or other groupings (contemplation/Erwägung 8).*"[118]

For the following compilation of development since the ending of the civil war in May 2009 and for the presentation and assessment of the current situation in Sri Lanka, a variety of national and thematic reports as well as international, foreign and Swiss non-governmental and governmental organizations, as well as foreign and domestic press reports."[119]

[B] "*On May 19 2009, the government of Sri Lanka officially announced the victory of government forces over the LTTE, and president Rajapakse declared the war, which has been going on for 26 years, to have ended. In August 2009, the Sri Lankan government started organizing the release and return of about 280 000 people from the camps of internally displaced people, who were forced to leave their ancestral homelands during the final phase. It is estimated by the UNHCR that until Mid-June 2010 nearly one quarter of a million people had left the camps for internally displaced people, to return to their places of origin or to find shelter with host families, relatives or friends. Several people, who were able to leave the camps, are still living as internally displaced people in the country after their homes are destroyed or mine clearances are conducted and in some cases a return is hindered by disputes over land ownerships. Approximately 11 000 people, who are suspected to have connections to the LTTE, were situated in rehabilitation centres (see UNHCR 2010 [Source 9]. p.1 and 2; UNHCR Global Report 2009, Sri Lanka, p. 230).*"[120]

[C] "*In summary it is held that according to far reaching agreeing reports, overall the situation since the end of the military conflict between the Sri Lankan Army and the LTTE in May 2009, has improved considerably. The LTTE is considered militarily*

[118] Translation of Swiss ruling on categories of threat, Tamils Against Genocide Legal Team, 25 February 2012 (Original in German is available at www.unhcr.org), Verdict of 27th October 2011, para 6.2
[119] Ibid, para 6.2
[120] Ibid, para 7.1

destroyed. The security situation has significantly stabilized (vgl. UNHCR 2010 [Quelle 9], S. 1), even though the country is still in a development process. However, at the same time, the human rights situation has deteriorated considerably, especially in regards to freedom of speech and media freedom. Political opponents of any distinction are regarded as enemies of the state and have to put up with persecution"[121].

[D] "*According to the current general political, security and human rights situation in Sri Lanka, the Federal Administrative Court comes to the conclusion that, in respect to groups at risks, personal circles have to be defined; whose members have a higher risk of persecution."*[122]

227. Even if one supposes that the members of the Panel were unaware of some of the aforesaid matters it is impossible to suppose that they would have been unaware of all of them.

228. One must presume that officials who are entrusted with investigating a country and reaching conclusions based on which the OHCHR as well as the UNHRC can take action, with long-standing consequences to the country concerned, do not act in a vacuum but approach their task with a certain background knowledge about current events particularly about the country they are investigating.

229. Therefore, the panel should have been doubly cautious about basing its allegations of purported deprivations of liberty in Sri Lanka purely on the testimony of witnesses, testimony that the Panel knew that members of the public were never going to be able to examine.

v) <u>Enforced Disappearance</u>

230. The allegation is that, "enforced disappearance" is a common phenomenon in Sri Lanka and has been carried out with impunity by successive governments. The Panel says *inter alia*:

[A] "The scale of enforced disappearances in Sri Lanka has long been exceptional. In its 2014 report, for example, the Working Group on Enforced or Involuntary Disappearances (WGEID) reported a total of 12,536 complaints of enforced disappearances registered over the year, the second highest number of disappearances on the list of the Working Group from any country in the world, all the more significant given the relatively small population of Sri Lanka. In 2007, the Working Group stated that it transmitted more cases of

[121] Ibid, para 7.6
[122] Ibid, para 7.7

"disappearances" as urged appeals to the Sri Lankan Government in 2006 than to any other country in the world.[123]

[B] *"The complex nature of enforced disappearances requires demonstrating multiple elements, including the deprivation of liberty: the involvement of State officials; and the refusal to acknowledge the deprivation of liberty or concealment of the fate or whereabouts of the disappeared person, placing the person outside the protection of the law."*[124]

[C] *"Nevertheless, OISL gathered consistent information amounting to patterns of enforced disappearances and impunity, In the course of its investigation, it reviewed large amounts of existing information gathered by international and Sri Lankan NGOs and other mechanisms, such as WGED which have extensively documented such cases. OISL interviewed members of organizations working directly with relatives of the disappeared, as well as relatives of those who disappeared, and witnesses to arrest, detention or abductions where the victim remains disappeared. For example, a number of former detainees interviewed by OISL said they had seen individuals in army custody who subsequently disappeared. Such information was further corroborated through the review of written submissions sent to OISL."*[125]

Analysis

231. The defects with the Panel's argument with respect to enforced disappearance can be discussed under three heads;

a) An attempt to suggest that there is an enormous number of enforced disappearances when in fact there is an enormous number of *complaints* of disappearances;

b) An attempt to suggest that the Presidential Commissions and other mechanisms appointed to investigate enforced disappearances were all biased in favour of the government;

c) Finally, a failure to consider the conclusions of the Paranagama Commission (1st Mandate). The latter is the latest Commissioner to look into alleged enforced disappearances, and has collected a vast database of complaints of disappearances. Its preliminary conclusions, with respect to the complaints that the Commissioner had had time to investigate, was, one, that is a large number of repeat complaints, and second, that

[123] Ibid, para 388
[124] Ibid, para 394
[125] Ibis, para 395

significant numbers of the "disappeared" were found to be living abroad, or in Sri Lanka under different names.

The number of enforced disappearances verses complaints of enforced disappearances

232. In paragraph [A] quoted above the panel says that according to a report by the WGEID Sri Lanka had 12,536 complaints of enforced disappearance registered against it, the second highest number of disappearances of the list from the Working Group from any country in the world. Clearly the panel is trying to convey the impression that Sri Lanka is one of the world's worst, if not *the* worst, offender when it comes to enforced disappearances.

233. It is pertinent to note that the number 12,536 refers to *complaints* of disappearances and not to actual or verified disappearances.

234. If one recalls the curious case of Mr. Kardivel Thayapararaja from the previous section it is not difficult to see how there could be a large number of complaints of enforced disappearances against Sri Lanka without those disappearances necessarily corresponding to real disappearances.

235. The Panel also says that in 2006, WGEID transmitted more cases of disappearances as urgent appeals to the GOSL than to any other country in the world. The panel does not mention what the GOSL's response if any to the said transmissions was, for instance, whether the GOSL had informed the WGEID that the alleged disappearances were fakes, or could not be verified.

236. However, in paragraph 532 the Panel says:

> *From 2008, the Government consistently provided a high number of replies to WGEID in relation to pending cases. However, for most of them, the information was considered not sufficient to clarify the cases. In addition, the Government has not provided adequate responses to general allegations detailing the Working Group's concerns relating to enforced disappearances in Sri Lanka which occurred from 2006 to 2009.*[126]

237. When the Panel says that the GOSL's response to WGEID's queries "was considered not sufficient to clarify the cases," the Panel is referring to the WGEID's assessment that the information was insufficient for the said purpose. The Panel doesn't say whether the Panel considered the information in order to decide for itself whether the information in question was insufficient.

238. The mandate of the Panel was to carry out a 'comprehensive investigation" into purported serious abuses of human rights and other crimes in Sri Lanka, which

[126] Ibid, para 532

entails that the Panel must do something more than merely repeat the conclusions of other agencies and groups.

239. The imperative to carry out a "comprehensive investigation" means that the Panel is obliged to come to independent conclusions with respect to the available evidence, that is to say, to assess the conclusions of other reports or documents on which the Panel wishes to rely, in order to first to determine if the said conclusions are themselves reasonable, and correct.

240. Under the circumstances, the Panel cannot draw the inferences that it is seeking to draw from the purported fact that there is an enormous number of complaints of disappearances with respect to Sri Lanka.

Criticism of the Presidential Commissions

241. From pages 96 to 108 of the OISL report, in a section titled "Justice and accountability for enforced disappearances" the Panel reviews various Presidential Commissions and other mechanisms that the GOSL had used over the years to investigate allegations of enforced disappearances. The general theme of these reviews is that the mechanisms in question were all biased in favour of the government, and therefore their conclusions cannot be trusted.

242. A typical example is the Panel's discussion of the Mahanama Thilakarathne Commission (September 2006 and May 2007). The Panel says, *inter alia*:

> *[A] "In September 2006, in response to increasing criticism about the resurgence of abductions and disappearances after 2005, President Rajapaksa set up a Presidential Commission on Abductions. Disappearances, and Killings, headed by former judge Mahanama Tillakaratne. His final report was submitted in May 2007 but not made public. However, OISL has also reviewed a copy of the unpublished report."*[127]
>
> *[B] "While highly critical of police failure to investigate and even ignoring evidence of "certain powerful persons" behind the incidents, the report appeared to undermine allegations of disappearances linked to the security forces, suggesting that they were the result of criminals, family disputes, "abductions ..... to win over young girls", and heroin addicts involved in disputes. The involvement of security forces was underplayed : "It came to light that at times military personnel and police officers too had carried out abductions. They should be treated as persons who have performed an illegal act."*[128]

[127] Ibid, para 486
[128] Ibid, para 487

[C] *"Statements made by Justice Tillakeratne demonstrate the lack of serious and credible investigations by his commission. For example, in May 2007, he reportedly claimed that "some invisible hand" in Jaffna and Batticaloa was responsible for abductions and that "no one said a single word against anyone in the army or police". He also noted that "a majority of the abductions were not exactly abductions as [the persons concerned] have left their homes temporarily over trivial matters like family disputes among other. He also stated that, according to the evidence gathered by the Commission, some of the abductees when they were last seen seemed to have gone with the people whom they knew and of their own free will. The Report noted that only a few people had been taken away by force.*[129]

243. The Panel's complaint in paragraph [B] above is that the judge had failed to conclude that the security forces were behind the disappearances, and instead has said that they were the result of criminal activity, family disputes, 'abductions…to win over young girls," and so on.

244. Clearly, the Panel doesn't like the judge's conclusions. But, what if the judge is right? The Panel does not say *why* it considers the judge's conclusions to be wrong, only that it *disagrees* with him, which is merely an unsubstantiated opinion.

245. Meanwhile, in paragraph [C] the Panel says that statements made by the judge demonstrate a lack of serious and credible investigation by the commission. What are the things that the judge is supposed to have said to warrant such ire on the part of the Panel?

246. The Panel says that the judge had said *inter alia* that according to the evidence, "*some of the abductees when they were last seen seemed to have gone with the people whom they knew and of their own free will."*

247. Again, The Panel does not say why in its view the judge's statement is prejudicial. For instance what if the conclusion he had drawn is indeed the most reasonable one given the evidence?

248. The Panel's position appears to be that if a person says something that is inconvenient for the Panel's purposes, it necessarily means that he cannot be believed.

249. It is reiterated that the same mode of reasoning is repeated in the Panel's reviews of the other mechanisms in the relevant section.

[129] Ibid, para 488

The Paranagama Commission (1st Mandate)

250. The Paranagama Commission (1st Mandate) was established in August 2013 and tasked with inquiring into all alleged disappearances in the North and East during the period January 1983 – 19th May 2009.

251. The Commission took direct testimony from members of the public for over three months. The Commission received 20509 complaints, out of which 4032 were found to be duplicates. Therefore, the Commission received a total of 16477 from the public. Meanwhile, the Commission also received 5400 complaints from the armed forces.

252. The mandate of the Commission expired in July 2016, and the GOSL chose not to extend that mandate, and instead launched the Office of Missing Persons.

253. In the opinion of the author, the Paranagama Commission could have been a vital source of information for the OISL Panel because of the following reasons.

254. Even though the Commissioner could not investigate all of the complaints that it received (because of the expiry of the mandate) it did investigate a number of those complaints. More important, it compiled a vast data base of the complaints and made it available to the GOSL, along with any other institution or agency that might be interested in investigating those complaints.

255. The Commission's preliminary conclusions (with respect to the complaints that it had had time to investigate, was that, in a significant number of cases, the 'disappeared" had either gone abroad or was living in Sri Lanka under a different name. The following are a few of the Commission's findings:

"Findings of the investigation team in respect of the following cases up 15th July 2016

1. *File number – 5388:*

Missing persons – Ramakrishnan Rohini

According to the Department of Immigration and Emigration she has left to Jordan on 26th July 2011 and returned back on 19th August 2013.

2. *File number – 486:*

Missing persons – Sivasothy Sivaraman

According to the Report given by the Department of Immigration and Emigration he had gone abroad on 31st January 2003, and did not return back.

3. File number – 4102:

Missing persons – Thurairasa Rasu

He was arrested by Army and released in 2010.

4. File number – 96:

Missing person – Vinayagam

Former LTTE Political Wing Leader went abroad in 2010 and now living in France according to his wife's statement he was in 2015 at Varani, Chavakachery

5. File number –

Missing person – Kumaran and his wife Yaso Balachandran went missing from Kombamadu Army Camp now traced to Schaffhausen, Switzerland where they are now living .

6. File number – 18811

Missing person – Y.J.B. Karunathilaka who went missing in 9th February 2013 has gone to Dubai on 16th February 2013 according to Department of Immigration and Emigration.

7. File number – 4102

Missing persons – Thurairasa Suman was arrested by army and later they have released him in Kandy.

8. File number – 4915/3821

Missing person – Thiyagu Karunadasan was later Rehabilitated and freed

9. File number

Missing person - M. Anbugam from Thalaimannar was later found to be living in Talawakalle with his fiancée."[130]

256. Since the main plank of the Panel's argument is that the enormous number of complaints of disappearances (for instance as purportedly recorded by WGEID) reflect an underlying reality that Sri Lanka is one of the world's worst offenders

[130] *Report of the completed work up to 15th July 2016 on the first mandate by the Presidential Commission of inquiry into complaints of abductions and disappearances*, July 2016, pages 14 – 16, Document on file

when it comes to enforced disappearances, the Panel had a marvelous opportunity with the Paranagama Commission's database of complaints (the most recent database to be compiled, of complaints taken directly from members of the public in the North and East) to test the said hypothesis.

257. For instance, the Panel could have investigated a number of the complaints that the Commisision had had no time to pursue, in order to find out if they *confirm* the Panel's hypothesis.

258. There is not the slightest indication that the Panel made any attempt to investigate any of the complaints in the Paranagama Commission's database.

259. Thus, the Panel's argument about Sri Lanka being one of the world's worst if not the worst offender when it comes to enforced disappearance hangs entirely on its criticisms of the Presidential Commissions and other mechanisms that the GOSL had launched in order to investigate purported disappearances, criticisms that, as explained earlier, are based on mere unsubstantiated opinions.

vi. <u>Torture</u>

260. The allegation is that, the Sri Lanka security forces have a long tradition of torturing suspects especially LTTE cadres they have taken into custody. The Panel says:

> *[A] OISL conducted 48 extended and detailed interviews with Sri Lankans, ages 23 to 58, including 12 women, who were direct victims of torture and other cruel, inhuman or degrading treatment by the security forces. These confidential interviews took place in six different countries. The high number of detailed testimonies given independently in these different locations provided extensive corroboration for the findings below.*[131]
>
> *[B] Additional information was gathered through interviews with other sources, including organizations who work with victims of torture, as well as from medical files of victims (who consented to share these files with OISL). The findings were further corroborated through the review of written submissions sent to OISL and of other reports and documentation.*[132]
>
> *[C] All the victims of torture interviewed gave their testimony voluntarily. This meant reliving traumatic events that many found distressing. For this reason, interviews were interrupted for breaks and, on some occasions, certain details of victims' experiences were not explored in*

[131] Ibid, para
[132] Ibid, para 538

depth. Investigators witnessed visible physical scarring and the psychological trauma of the interviewees. Medical reports seen by OISL and interviews with medical doctors highlighted physical scarring that can last for years, as well as traumatic symptoms, including suicidal thoughts, sleeplessness, intrusive thoughts, inability to concentrate, depression and other symptoms of PTSD.[133]

261. Meanwhile the following are crucial paragraphs where the OISL describes the types of acts that were perpetrated on victims :

[A] *"Detainees were also subjected to acts of degrading treatment, such as being forced to drink urine, lick blood off the floor, being spat on or urinated on, or being made to eat food "like a dog". OISL also documented cases where victims were subjected to non-physical acts of torture and ill-treatment. Methods included threats, including death threats to victims or members of their family, threats that family members would be raped, or victims being forced to watch others being tortured and being threatened with similar treatment. Detainees were also frequently subjected to ethnic slurs, for example being called a "Tamil dog".*[134]

[B] *"Torture normally took place during the interrogation of suspected LTTE cadres or supporters. Victims described being taken into rooms by groups of three or four officials. While one or two of the group – often wearing civilian clothes and introduced as belonging to the CID or TID – would lead the interrogation, sometimes in possession of a "file" on the accused, the other – often wearing military or police uniforms – would perpetrate acts of torture. Sessions would typically last between 30 minutes and two hours, and different methods of torture were used during this time."*[135]

[C] *"Sessions were repeated daily, or several times per week throughout the first weeks and months of a victim's detention. One witness described being beaten after each question. Witnesses describe that eventually, over time, interrogation and torture became less frequent and less severe. Interrogation related to suspected LTTE activities, such as the location of weapons caches, information on commanders or foreign support networks, or on planned attacks. Suspected high-ranking LTTE cadres, and those suspected of having belonged to "elite" units such as the LTTE Sea Tigers or intelligence service were singled out for particularly brutal torture. Accusations of lying or hiding information often led to the intensification of torture. Torture was frequently used to make victims sign "confessions" – pre-*

[133] Ibis, para 539
[134] Ibid, para 561
[135] Ibid, para 562

prepared documents written in Sinhalese, which many victims were not able to understand. On some occasions, victims were forced to sign blank sheets of paper."[136]

Analysis

262. The defects with the Panel's arguments about torture can be discussed under three heads:

a) Intrinsic problems with relying on the testimony of victims whose statements are not available for scrutiny;

b) The absence of certain things that one can reasonably expect to find in a country if its security forces have a long tradition of torturing suspects in custody—for instance, photographic or video material depicting instances of torture by members of the security forces, confessions by security forces officers who for reasons of conscience or some other reason come forward and admit to torturing suspects, finally, documentary evidence such as e-mails, memos, manuals, and so on, that show that the security forces hierarchy endorsed or condoned torture.

c) Finally, failure to mention anywhere in the chapter on torture that ICRC personnel have had access to detainees in Sri Lanka's prisons including LTTE suspects and any observations or assessments by such Red Cross personnel as to the likelihood of the torture of suspects.

Intrinsic problems with relying on the testimony of alleged victims

263. The Panel's allegations of torture are contained in pages 109 – 115 of the OISL report in a section titled, "Patterns of Torture by Security Forces." To the best of the author's knowledge, that section contains 69 footnotes. Of those footnotes, except for two, which refer to two UN-affiliated reports, the rest refer to witness statements on file with the OISL, and all those statements are classified for 20 years.

264. The general problem with witness statements that are kept secret were discussed at length in the chapter on "deprivations of liberty' and those arguments apply here also. The author only wishes to add the following additional comment.

265. Unlike in the chapter on deprivations of liberty, in the chapter on torture the Panel has said that it has medical reports to corroborate at least some of the witness statements—i.e. medical reports that purportedly confirm physical scars on the victims from which one can infer torture.

[136] Ibid, para 563

266. So, the question is, "Does this additional information makes the allegations of torture more credible than the allegations of deprivations of liberty?" It doesn't, because the medical reports are also classified.

267. Since OISL's primary source of evidence with respect to torture is the testimony of the witnesses plus the purported medical reports that confirm torture it is difficult to see why OISL could not have released at least part of the transcripts of the witness statements including the medical reports with relevant private details of the witnesses appropriately blacked out, in order to provide for verification.

The absence of cogent corroborative evidence to prove the practice or torture by the security forces

268. It is reasonable to suppose that, if the security forces have been torturing suspects over a long period of time, at least some of the torturers and their accomplices will have taken photographs and other such 'mementos' of their work (i.e. there ought to be some evidence such as the Abu Ghraib photos depicting torture by Americans of Iraqi prisoners).

269. It is also reasonable to suppose that, if successive Governments made it a practice to torture suspects, which is to say the practice was endemic, that sooner or later there will be officers in the security forces who for reasons of conscience or some other reason come forward and reveal some of the things they had done or had seen being done.

270. Finally, it is reasonable to suppose that, such officers will have collected documentary evidence of the use of torture, for instance, memos and other documents sent by their superiors, in order to corroborate their allegations.

271. The respected American investigative journalist Seymour M. Hersh first broke the Abu Ghraib story in an article published in the New Yorker.[137] In that article, he discusses the Taguba Report, a report by an American Army investigator, which had uncovered abuse at Abu Ghraib.

272. General Taguba had among other things relied on three types of evidence to support his charges. As a point of contrast with the Panel's methods, it is useful to briefly consider how General Taguba's had gone about establishing that prisoners had in fact been tortured at Abu Ghraib, and that those acts could be tied to the command structure of the U.S. army along with the relevant civilian leaders.

A. **Photographs depicting acts of torture**

Hersh says:

[137] "Torture at Abu Ghraib," Seymour M. Hersh, 10 May 2004, www.newyorker.com

"There was stunning evidence to support the allegations. Taguba added – "detailed witness statements and the discovery of extremely graphic photographic evidence." Photographs and videos taken by the soldiers as the abuses were happening were not included in his report, Taguba said, because of their "extremely sensitive nature."[138]

The photographs—several of which were broadcast on CBS's "60 Minutes 2" last week—show leering G.I.s taunting naked Iraqi prisoners who are forced to assume humiliating poses."[139]

B. **Testimony by security forces officers that they engaged in or witnessed torture of suspects.**

Hersh says:

"The abuses became public because of the outrage of Specialist Joseph M. Darby, an M.P. whose role emerged during the Article 32 hearing against Chip Frederick. A government witness, Special Agent Scott Bobeck, who is a member of the Army's Criminal Investigation Division, or C.I.D., told the court, according to an abridged transcript made available to me, "The investigation started after SPC Darby . . . got a CD from CPL Graner. . . . He came across pictures of naked detainees." Bobeck said that Darby had "initially put an anonymous letter under our door, then he later came forward and gave a sworn statement. He felt very bad about it and thought it was very wrong."[140]

C. **Documentary evidence that shows that the torture in question was sanctioned by the chain of command.**

For instance, Hersh (citing Taguba) says that Chip Frederick, one of the accused torturers, had written letters and e-mails to family members discussing some of the things that were happening in Abu Ghraib. Hersh says:

"In letters and e-mails to family members, Frederick repeatedly noted that the military-intelligence teams, which included C.I.A. officers and linguists and interrogation specialists from private defense contractors, were the dominant force inside Abu Ghraib. In a letter written in January, he said:

> *"I questioned some of the things that I saw . . . such things as leaving inmates in their cell with no clothes or in female underpants, handcuffing them to the door of their cell—and the*

[138] "Torture at Abu Ghraib," Seymour Hersh
[139] Ibid
[140] Ibid

> *answer I got was, "This is how military intelligence (MI) wants it done." . . . . MI has also instructed us to place a prisoner in an isolation cell with little or no clothes, no toilet or running water, no ventilation or window, for as much as three days.*
>
> *The military-intelligence officers have "encouraged and told us, 'Great job,' they were now getting positive results and information," Frederick wrote. "CID has been present when the military working dogs were used to intimidate prisoners at MI's request." At one point, Frederick told his family, he pulled aside his superior officer, Lieutenant Colonel Jerry Phillabaum, the commander of the 320th M.P. Battalion, and asked about the mistreatment of prisoners. "His reply was 'Don't worry about it."*[141]

273. To turn to the OISL report, the question is, "if as the Panel claims the Sri Lanka armed forces have been torturing suspects for years, how is it that the Panel has not been able to find any of the above types of evidence (or if it did, has chosen not to introduce it)?"

274. The conclusion is inescapable that, at the time the Panel was producing its report, it did not *have* such evidence. Under the circumstances, and given also the fact that the only other evidence the Panel adduced to support the allegations of torture are witness statements which in turn are kept secret, it is difficult to understand how the Panel can make sweeping statements about torture being endemic in Sri Lanka.

Failure to consider the testimony of ICRC personnel who had access to prisoners

275. In page 229 of the ICRC's annual report for 2009, in the section on detainees visited by ICRC, it is stated *inter alia*:

> *"Government-held detainees: 34,423 visited, of whom 13,490 monitored individually….during 643 visits to 173 places of detention."*[142]

276. Since the contention of the Panel is that the security forces of Sri Lanka have been torturing suspects especially LTTE cadres in their custody for years, the Panel had a marvelous opportunity to establish its allegations with solid evidence by asking the ICRC personnel who monitored the aforesaid 13,490 detainees about their observations of how detainees in this country are treated, and also by considering documents those ICRC personnel may have had, for instance, notes, reports and other such records produced in the course of their field work.

277. There is not the slightest indication that the Panel made an effort to interview any of the aforesaid ICRC personnel, or to retrieve any such documents, which further weakens the Panel's assertions about torture in Sri Lanka.

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[141] Ibid
[142] ICRC annual report 2009, p. 229, www.icrc.org

vii. <u>Sexual and gender-based violence</u>

278. The allegation is that, the Sri Lanka security forces have a tradition of extensive and pervasive sexual and gender-based violence against suspects. The following is the manner that the Panel introduces the subject.

> *[A] "One of the most disturbing findings of the OISL investigation has been the extent to which sexual violence was committed, often extremely brutally, by the Sri Lankan security forces, with men as likely to be victims as women. The prevalence of rape, often on repeated occasions, was particularly shocking. OISL did not find any information to suggest that the LTTE was responsible for sexual violence, and different sources indicated that anyone found responsible for sexual abuse or violence risked harsh punishment by the LTTE."*[143]
>
> *[B] "Prior to OISL's investigation, a growing body of evidence had been emerging about the use of sexual violence by the Sri Lankan security forces against individuals they suspected of links with the LTTE. In the context of its mandate, OISL focused primarily on allegations of sexual violence committed during the final phase and aftermath of the armed conflict. The sessions below describe the sexual torture which occurred during interrogation sessions, and also patterns of rape, much of which appeared to occur outside of interrogation sessions. This chapter also looks into reports of sexual abuse committed during the various screening processes as civilians and LTTE cadres who had laid down their arms crossed over into Government-controlled territory, as well as reports of such abuse inside the IDP camps making up Manik Farm. A final section also examines justice and accountability for sexual violence."*[144]

279. As with the chapters on "deprivation of liberty" and "enforced disappearances" the OISL's primary basis of evidence for sexual and gender- based violence is the testimony of purported victims of such abuse. OISL says:

> *"As part of its investigation, OISL interviewed 30 survivors of sexual violence which occurred during OISL's mandate period. Eighteen were men and 12 were women. OISL also received detailed information on cases from other sources, which corroborated much of the information gathered in the course of its own interviews. OISL also interviewed a dozen other sources who had indirect information about such incidents, either because they had witnessed them because of their work documenting such cases, or because of*

[143] OISL report, para 572
[144] Ibid, para 573

their alleged involvement with the security forces. In addition, OISL was given access to medical reports (with the consent of the victims concerned) which corroborated the allegations of sexual violence."[145]

Analysis

280. The defects with the Panel's arguments about sexual and gender-based violence can be discussed under three headings. First, intrinsic problems with the use of witness statements that are not available for scrutiny by members of the public; second, the Panel's failure to critically analyze its documentary evidence, i.e. a series of reports by various NGO's; finally, the dismissal by the Panel of the GOSL's written responses with regard to allegations of sexual violence without giving any reasons.

Problems with OISL's witness evidence

281. The chief problem with OISL's witness evidence is that the testimony of the purported victims, along with the purported medical reports confirming sexual abuse, are kept secret. So, the arguments made in the chapters on deprivations of liberty and enforced disappearances apply with equal force in the present chapter also.

Problems with OISL's documentary evidence

282. In paragraph [B] quoted above the Panel says that, there is a "growing body of evidence" of sexual violence by the security forces. What is this "growing body of evidence?" It is described in footnote 533 of the report, and consists of six reports by various NGOs. They are:

1) "We will teach you a lesson" – Sexual violence against Tamils by Sri Lankan security forces. HRW. February 2013

2) An unfinished War: Torture and Sexual Violence in Sri Lanka 2009-2014", Yasmin Sooka. Bar Human Rights committee of England and Wales, and the International Truth and Justice project, Sri Lanka, March 2014

3) Freedom from Torture up-dated submission to the Human Rights Committee for the 5th periodic review of Sri Lanka in October 2014

4) "Women's Insecurity in the North and East", ICG, 20 December 2011

[145] Ibid, para 577

5) "Island of Impunity", International Crimes Evidence Project, February 2014

6) "Crimes Against Humanity in Sri Lanka's Northern Province". Sri Lanka Campaign for Peace and Justice, 4 March 2014

283. Recall that, Sir Geoffrey Nice QC and Rodney Dickson QC have produced a review of the Sooka Report, (the said review is included in the Supplementary Material to the present report.) Therefore, for purposes of the present discussion, it suffices to examine just one more report from the above list, and in this case the author shall pick the HRW report, "We will teach you a lesson."

284. The gist of what the HRW report says is that in the period between 2006 - 2012 HRW detected a pervasive pattern of sexual violence by security forces against persons in state custody.[146] The basis for this claim is that HRW had conducted 75 interviews with purported victims of such abuse.[147] The report has annexed the said 75 statements to the report.

285. The question is whether, from a sampling of 75 purported rapes, one can infer as HRW does a pervasive culture of rape by the security forces.

286. The only way such an inference is possible is if HRW delved into the facts and circumstances behind each of the 75 *allegations* of rape, and determined, first, that they were in any way credible, and two, that the rapist was in fact a member of the security forces.

287. More important for present purposes, the only way that the Panel can accept the HRW's accusations against the Security Forces is if the Panel also reviewed the 75 allegations in question (and that would have been easy enough, since HRW has annexed all of them in their report) and reached an independent conclusion that the allegations were legitimate. There is no indication in the OISL report that the Panel engaged in any such assessment.

288. Therefore, the Panel's reliance on the HRW report in question to bolster its case against the security forces on the issue of sexual violence is illegitimate and unjustified. This point is strengthened further when one considers the approach that the Panel has taken when it some to the responses that the GOSL had given to the UNHRC over the years, regarding various allegations that the security forces are guilty of widespread sexual violence.

289. The Panel's approach is to dismiss the GOSL's responses out of hand.

[146] "We will teach you a lesson," Human Rights Watch, 2013, p. 2
[147] Ibid, p. 2

Dismissal of the government's responses without giving any reasons

290. In paragraph 585 and 586 of the OISL report the Panel says:

> *[A] The Government, in its statement to the 24th session of the Human Rights Council, highlighted that a survey covering the period 2007-2012 had revealed that of the reported incidents of sexual violence in the North a large majority were carried out by close relatives/ neighbours and only a very few could be attributed to the Security Forces. It again claimed that in all cases involving security forces personnel disciplinary and legal action has been taken. "The military has taken strict action to either discharge or award other punishments to these personnel. Furthermore, cases have been filed in civil courts, come of which are pending in Courts and with the Attorney-General's Department……" In its response to the High Commissioner's report to the Human Rights Council in March 2014, the Government reiterated that "there exists no basis for concerns as expressed by the High commissioner with regard to presence of the security forces contributing to the vulnerability of women to sexual violence in the North. The Government deplores all acts of violence against women and girls and has taken concrete action against reported cases and will continue to do so."*[148]
>
> *[B] In its response to concerns raised by the Special Rapporteur on the Human Rights of IDPs, Chaloka Beyani, about continuing allegations of sexual violence in the North, the Government stated that such violence was "a relic of the conflict": "The references in the (Special Rapporteur's) report to the alleged gross violations of human rights of internally displaced women including sexual violence is unsubstantiated and incorrect. Strict legal action has been taken to combat sexual violence. There have been no allegations of gross violations of human rights of Internally Displaced women.* [149]

291. In the above two paragraphs, the Panel refers to three responses that the GOSL had given since 2012 to the allegations concerning purported sexual violence by the security forces, and it is clear from the context that the "survey" referred to in paragraph [A] was specifically to address the HRW's allegations with respect to purported incidents during the 2006 – 2013 period.

292. Be that as it may, if the GOSL had a survey which refuted the allegations that HRW and others were making, it seems reasonable to suppose that the Panel had a duty to peruse that document and assess its evidence before dismissing it, since,

[148] Ibid para 585
[149] Ibid, para 586

if the GOSL's claims are correct, it would decisively counter the charges leveled by HRW and others.

293. Also in paragraph [A] the Panel refers to the GOSL's formal response to the High Commissioner's report in March 2014. The said High Commissioner's report (A/HRC/) was the basis for the Council's subsequent authorization of the OISL report at the March 2014 session.

294. In paragraph [A] above, the Panel quotes from the response of the GOSL specifically to the allegations of sexual violence leveled by the High Commissioner. It should be noted that, the Panel has omitted a crucial sentence in the passage in the original document from which the Panel has taken the lines quoted in paragraph [A] above.

295. The full paragraph in the original document reads as follows:

> *"[Furthermore] the GOSL wishes to reiterate that there exists no basis for concerns as expressed by the High commissioner with regard to presence of the security forces contributing to the vulnerability of women to sexual violence in the North. The Government deplores all acts of violence against women and girls and has taken concrete action against reported cases and will continue to do so.* ***The GOSL requests the High Commissioner to provide factual evidence to substantiate the allegation and to refrain from making general comments without a degree of specificity which would allow the GOSL to investigate and respond in a comprehensive manner (emphasis added)"***[150]

296. So, the GOSL had requested the High Commissioner to provide specific factual evidence with regard to her allegations so that the GOSL could presumably investigate the purported and get back to the High Commissioner. The point is that, Panel does not say whether the High Commissioner had in fact forwarded the specific information that the GOSL had requested, and if so, whether the Panel knows whether the GOSL took any steps to follow-up that information.

297. If the Panel does not know the answers to the above questions, or is unwilling to reveal the answers if it does know, it is unreasonable and unjustified for the Panel to simply dismiss the GOSL's claims with respect to the allegations of sexual violence by the security forces.

[150] "Comments received from the Permanent Mission of Sri Lanka on the Draft Report of the Office of the United Nations High Commissioner for Human Rights on Promoting reconciliation and accountability in Sri Lanka," A/HRC/25/23, 24th February 2014, para 15

Chapter Three

Section 1: Principal Findings

298. The principal findings of the present report are as follows:

I. Impact of hostilities on civilians and civilian objects

a. Indiscriminate shelling of civilians in the NFZ's.

299. Based on the preceding analysis it is contended that, with respect to the charge that the SLA carried out indiscriminate shelling of civilians in the NFZ's, the best available estimates of the numbers of civilians that were killed during the relevant period (roughly 8,000 civilians) combined with the testimony of eye-witnesses present at or near the battlefield during the relevant times, and the reasonable inferences that can be drawn from those facts are sufficient to counter the charge.

300. It is contended further that, when the above is combined with the detailed legal analysis of the relevant issues by the six experts retained by the Paranagama Commission (2nd Mandate), particularly their assertion that the defences of collateral damage and proportionality are available to the GOSL with respect to the civilians who may have been killed in the NFZ's during the relevant period, conclusively rebuts the charge in question.

b. Shelling of hospitals

301. With respect to the charge that the SLA deliberately shelled hospitals, the preceding analysis found that the Panel, one, is misleading the OHCHR when it says that it did not have information that the LTTE fired from inside hospitals, and two, has engaged in an obfuscation, i.e. sought to posit a false dichotomy between firing from inside hospitals as opposed to firing from close proximity to hospitals, as a valid criteria to determine whether hospitals have been used for military purposes.

302. If one applies to the above circumstances the Lucas Principle in criminal law (i.e. that if an accused lies one can presume that he does so among other things out of "a realization of guilt and a fear of the truth"[151]) *a fortiari* the Panel is trying to hide something, and the benefit of the inferences that flow from this must accrue to the GOSL.

II. Denial of humanitarian assistance to the civilians in the conflict-zone.

303. With respect to the charge that the GOSL deprived civilians trapped in the conflict-zone of humanitarian assistance—i.e. that the GOSL followed a

[151] Regina v. Lucas (Ruth) [1981] QB 270

deliberate policy of trying to starve the civilians—the preceding analysis found that the Panel has failed to consider material evidence including unimpeachable witnesses (for instance, Neil Buhne, the UN Resident Coordinator in Sri Lanka at the time, and also U.S. Ambassador Robert Blake, Ms. Sukumar GA Mullaivu, and others) who had first-hand knowledge of the GOSL's efforts in providing humanitarian assistance during the relevant period.

304. The aforesaid witnesses, along with relevant documents in their possession, or which could have been obtained from the GOSL, would have provided the Panel with crucial insights into the conduct of the GOSL during the period in question.

305. As with the charge of shelling of hospitals, with the charge of denial of humanitarian assistance also the behaviour of the Panel betrays an attempt to hide the truth, and the benefit of the inferences that flow from this must accrue to the GOSL.

III. Unlawful Killings

306. With respect to the charge that the GOSL carried out 'Unlawful Killings" during the last phase of the war, the preceding analysis found that, out of the four allegations that were scrutinized, in two (i.e. the "White Flag' incident, and Balachandran Prabakharan) the Panel itself says that it does not have enough evidence to come to any definite conclusion as to what happened, or who was responsible. In other words, the Panel can't say for sure whether SLA troops were even involved.

307. With respect to one (Col. Ramesh) the Panel's own evidence suggests that he may have been killed if at all by former-LTTE-turned-informers temporarily working with the SLA. There are plausible reasons—reasons that can be extracted from the Panel's evidence itself—that such former LTTE'ers may have had to fear or to hate Ramesh.

308. With respect to Isaipriya, the author has conceded that if SLA troops are responsible for her death, the individual or individuals so responsible should be identified, and tried. However, the Panel has provided absolutely no evidence to suggest that the chain of command of the SLA is responsible for Isaipriya's death.

309. In sum, there is nothing in the Panel's evidence with respect to these four alleged incidents to show that they happened as a result of orders relayed by the chain of command of the SLA, or the necessary consequence of war plans or policies adopted or set in motion by the civilian and military leadership that oversaw the war.

IV. Violations related to deprivations of liberty

310. The chief defect with the charge of deprivations of liberty – as well as the charges of enforced disappearance, torture and sexual violence – is that the Panel's primary source of evidence is testimony of witnesses whose statements are not available to the public for scrutiny. In short, it is impossible for members of the public to check whether the witnesses actually say what the Panel claims they say.

311. In addition to the aforesaid defect, it was found that the Panel's assessment of the evidence suffered from three further infirmities: first, a failure to supplement the witness statements with corroborative evidence such as police statements, medical records, etc.

312. Second, the Panel's conclusion that the security forces hierarchy colluded to commit unlawful acts is based on interviews of police officers that had appeared in *Business Week*. However, it appears the interviewees had only said that senior officials of the different branches of the security forces met frequently to coordinate anti-terrorism operations. From this, the Panel concludes that the security forces officials in question met in order to plan unlawful activities, an absurd leap in logic.

313. Finally, the Panel has failed to consider certain general facts such as the context in which claims of abuse by the security forces is often made (i.e. where persons have often claimed that they were abused by security forces in order to gain asylum and other benefits especially in western countries). In the opinion of the author, such considerations help to put in proper perspective the claims being made by the Panel's witnesses.

V. Enforced disappearances

314. With respect to the charge of enforced disappearances the chief defect is that the Panel indulges in obfuscation by suggesting that the number of complaints of enforced disappearances reflects the real or genuine number of such disappearances if any that may have happened.

315. The Panel compounds this initial defect by engaging in one-sided and blatantly prejudiced criticism of the Presidential Commissions and other mechanisms that the GOSL had used in order to inquire into alleged enforced disappearances over the years.

316. For instance, when the head of one of these Commissions, a highly respected Sri Lankan judge says that the evidence led him to conclude that the majority of disappearances were the result of family disputes, love affairs, private criminal activity and so on – i.e. that the disappearances in question could not be tied to the security forces – the Panel accuses the judge of being biased in favour of the GOSL and the security forces, without giving any reasons as to why the Panel

thinks that given the evidence the judge had presumably considered his conclusions are wrong.

317. Finally the Panel pays no attention whatsoever to the conclusions of the Paranagama Commission (1st Mandate) the latest commission to look into allegations of enforced disappearances. The Commission had taken direct testimony from members of the public, and had recorded over 20,000 complaints which it put into a database available to the public.

318. The Commission's preliminary conclusions were *inter alia*, first, that there were a large number of repeat complaints, and second, that a significant number of the alleged "disappeared" had gone abroad or were living in Sri Lanka under different names.

319. The Panel does not have to accept those findings, but the Commission's data is relevant to the Panel, given that the main plank of the Panel's argument that the security forces are behind the disappearances is the number of complaints of disappearances.

320. The Panel has put absolutely no effort either into assessing the Commission's data or to pursue some of the complaints that the Commission had received, but had had no time to investigate further. This would have helped corroborate or dispel as the case may be, the Panel's suspicions that the security forces are behind the purported disappearances.

VI. Torture

321. With respect to the charge of torture the chief problem is that, as with the charge of deprivation of liberty, the Panel's principal source of evidence is witness statements that the public cannot scrutinize.

322. The Panel compounds this initial problem by failing to adduce corroborative evidence that one can reasonably expect to find if the security forces of a country have a long tradition of torturing suspects—for instance, photos or videos depicting members of the security forces torturing suspects, confessions by security forces officers who for reasons of conscience or some other reason come forward and disclose the things they have done, documentary evidence such as memos, e-mails and manuals from which reasonable inferences can be drawn that the security forces hierarchy endorsed torture.

323. Finally, the Panel completely ignores a vital source of evidence, namely, ICRC officials who have had access to inmates in Sri Lanka's prisons, including hard-core LTTE cadres in custody. It is reasonable to suppose that such officials will have first-hand knowledge about how prisoners are treated in Sri Lanka, including whether they are tortured.

324. The Panel could have interviewed some of these ICRC officials, or scrutinized documents that they may have in their possession, including field notes of their visits to various prisons, in order to corroborate if possible the claims made by the Panel's witnesses—witnesses whose statements the public cannot scrutinize.

VII. Sexual and gender-based violence

325. With respect to the charge of sexual and gender-based violence the chief defect is, again, that the Panel's primary source of evidence is anonymous witnesses.

326. The Panel compounds this initial problem by failing to subject its documentary evidence—i.e. six reports produced by various NGO's alleging sexual violence by the security forces—to any critical analysis.

327. The Panel compounds the said problem even further by dismissing out of hand the GOSL's responses, including formal responses filed with the UNHRC, addressing the aforesaid allegations.

328. The combined effect of the above factors completely negates the said allegation, and in fact betrays a deliberate effort to paint the GOSL and the security forces in a bad light, and the inferences that flow from this must accrue to the benefit of the GOSL.

329. Such then is the Panel's performance with respect to its several charges. What can one say about it as a whole?

Conclusions

330. The author takes as a premise that the concept of "Presumption of innocence" universally recognized is necessarily valid for the UN and its subsidiary organs including the OHCHR.

331. The "Presumption of innocence" means that the burden is on an accuser to prove his charges – the standard of proof may vary, for instance "beyond reasonable doubt" "balance of probability" "reasonable grounds to believe" and so on – but the burden of proof is always on the person making an accusation, and there is no burden on the person who is being accused to prove his innocence.

332. Under the circumstances, the Panel has failed, and failed miserably, to establish that the State is guilty of the any of the charges that the Panel presumes to level against it.

333. What is extraordinary, however, is that on or about 15th September 2015—that is, even before the OISL report was officially released to the public—the GOSL unreservedly accepted and endorsed the conclusions and recommendations of the said report.

334. Based on the GOSL's said acceptance, the UNHRC also accepted and endorsed the conclusion and recommendations of the said report, and subsequently adopted resolution A/HRC/30/L.29 without a vote (i.e. without debate), because the GOSL had seen fit to co-sponsor the resolution.

335. It is not in dispute that, resolution A/HRC/30/L.29 contains provisions—for instance, a recommendation that Sri Lanka institute special courts with the participation of foreign judges to try the country's war-time leaders for war crimes (as per the OISL's charges),[152] also a recommendation that the GOSL institute constitutional changes to devolve power to the provinces[153]—that concerns matters that by definition come under the domestic jurisdiction of States, and thus are *ex facie* invasive of Sri Lanka's sovereignty.

336. Under the circumstances the following three questions arise:

b. Should the GOSL have endorsed the conclusions and recommendations of the OISL report without subjecting the said report to an official assessment?

c. Should the UNHRC have endorsed the conclusions and recommendations of the OISL report without debate, regardless of the fact that Sri Lanka had co-signed resolution A/HRC/30/L.29?

d. Is there a legal obligation on the United Nations General Assembly to inquire into this entire matter of the campaign for "accountability and reconciliation in Sri Lanka" at the UNHRC, culminating in the OISL report?

337. It is asserted that, the answer to the first two questions is in the negative, and the third in the affirmative, because of the following reasons.

Section 2: Legal Submissions

Culpability of the GOSL

338. Section 114 (d) of the Evidence Ordinance of Sri Lanka states:

"[The court may presume] that judicial and official acts have been regularly performed."[154]

339. By 'regularly performed" is meant among other things that the acts in question are done in good faith and diligence.

[152] Para 6
[153] Para 16
[154] Evidence Ordinance, Section 114(d)

340. At the time that the GOSL endorsed the OISL report the GOSL had in its possession a series of official reports starting with the LLRC and including the six reports of the experts retained under the Paranagama commission (2nd mandate) that stated clearly and unequivocally that there is no case to be made that the *State* is responsible for war crimes.

341. Under the circumstances as of 15th September 2015 if the GOSL wished to endorse the conclusions of the OISL report, which conclusions were that the state *may be* responsible for war crimes, the GOSL had an obligation either to show that the conclusions reached by the LLRC as well as the other reports are wrong, or in any event that the GOSL considers that the OISL's conclusions to be better.

342. Obviously, for the GOSL to come to such a determination it must first subject the OISL report to an official assessment.

343. To the best of the author's knowledge no such official assessment has been performed to date. If it has, it has not been made public.

344. It is well established in the constitutional jurisprudence of Sri Lanka that the Public Trust Doctrine applies to the acts of State officials i.e. State officials exercise power in trust for the people, and can be held accountable if they misuse or exceed those powers. (vide *Re: 19th Amendment to the Constitution, (2002) 3 SLR 85*)

345. Therefore, in the opinion of the author, the officials who endorsed the OISL report on or about 15th September 2015, and subsequently also co-sponsored resolution A/HRC/30/l.29, which contains provisions inimical to the sovereignty of the country, have shirked their duties and responsibilities under the Public Trust Doctrine, and thereby also the Constitution.

Culpability of the OHCHR

346. The Charter of the OHCHR, U.N. General Assembly resolution 48/141, has the following two paragraphs, one preambular and the other operative. The preambular paragraph is as follows:

> *"Emphasizing the need for the promotion and protection of all human rights to be guided by the principles of impartiality, objectivity and non-selectivity, in the spirit of international dialogue and co-operation."*[155]

The operative paragraph is as follows:

> *"[Decides that the High Commissioner for Human Rights shall:] Function within the framework of the Charter of the United Nations, the Universal Declaration of*

[155] General Assembly resolution 48/141, 20 December 1993,

Human Rights, and other instruments of human rights and international law, including the obligation, within this framework, to respect the sovereignty, territorial integrity and domestic jurisdiction of states, and to promote the universal respect for an observance of all human rights, in the recognition that, in the framework of the purposes and principles of the Charter, the promotion and protection of all human rights is a legitimate concern of the international community."[156]

347. The gist of the above two paragraphs is that, though the promotion and protection of human rights is a legitimate concern of the international community, when the High Commissioner asserts himself or herself in promoting such rights, he or she must always function within the framework of the UN Charter, the Universal Declaration of Human Rights and other relevant statutes, including the injunction in such statutes to respect the sovereignty, territorial integrity and domestic jurisdiction of States.

348. As pointed out earlier, resolution A/HRC/30/L.29 contains provisions inimical to the sovereignty of Sri Lanka.

349. The basis for the recommendations made in the said resolutions is the OISL report.

350. It is asserted that, the present report establishes a prima facie case that the OISL report is deeply flawed, and biased against Sri Lanka.

351. The High Commissioner is ultimately responsible for the OISL report.

352. Therefore, by filing the said report officially with the UNHRC, and allowing it to underpin a subsequent resolution of the UNHRC, a resolution adopted without debate or discussion, the HC has violated both the letter as well as spirit of the two paragraphs in the OHCHR's Charter quoted above.

Culpability of the UNHRC

353. The Charter of the UNHRC, U.N. General Assembly resolution 60/251 has the following two paragraphs, the first preambular and the second operative. The preambulalr paragraph says:

"Recognizing also the importance of ensuring universality, objectivity and non-selectivity in the consideration of human rights issues, and the elimination of double standards and politicization."[157]

The operative paragraph states *inter alia*:

[156] Ibid, operative paragraph 3(a)
[157] Resolution 60/252, 3rd April 2006

"Decides also that the work of the Council shall be guided by the principles of universality, impartiality, objectivity and non-selectivity, constructive international dialogue and cooperation."[158]

354. Therefore, for very much the same reasons explained earlier with respect to the OHCHR's culpability, the UNHRC's adoption of resolution A/HRC/30/L.29 without a vote and without debate is a violation of both the letter as well as spirit of the aforesaid two paragraphs.

Does the fact that the GOSL co-sponsored the said resolution make any difference to the UNHRC's liability?

355. The answer to the above question is in the negative, because of the following reasons.

356. Any measure taken by the U.N. or its subsidiary organs against an individual nation has the potential to affect the lives of the citizens of that nation.

357. However, those citizens, in their private capacity, do not have a direct voice at the U.N (only Governments have a voice at the U.N.)

358. Therefore, it is possible that the *Government* of a country—whether out of pressure by the *Governments* of other countries, or for some other reason—might agree to a measure by the UN or one of its subsidiary organs, but the majority of the citizens of that country disagree with or reject the actions of their government (on that particular issue), but they cannot have their voice heard until, say, the next elections.

359. The measure in question, moreover, is *ex facie* invasive of the country's sovereignty.

360. It is not in dispute that, to compromise the sovereignty of a country is by definition to cause irreparable harm to its citizens: not just to the citizens who suffer the loss in person, but to future generations as well.

361. Under the circumstances, it is reasonable to suppose that the UN and its subsidiary organs have a duty to review the basis for the measures they intend to take against a particular country (for instance, if a particular resolution is based on a report, to discuss the report) regardless of whether or not the country affected accepts and endorses without reservation the conclusions of that report.

362. It should be noted that, the aforesaid obligation also arises independently as a result of Articles 2(1) and 2(7) of the U.N. Charter, particularly Article 2(7) which prohibits the UN from interfering (unfairly) in the internal affairs of states.

[158] Ibid, para 4

363. On account of the aforesaid matters, the author reiterates that the UNHRC in allowing resolution A/HRC/30/L.29 to be adopted without a vote and without debate has been negligent in its duties and obligations under GA resolution 60/251, and also more importantly the U.N. Charter.

Obligations on the UNO

364. The United Nations Organization was established in 1945 following the Second World War because the nations of the world decided that they will never again allow for relations among nations to deteriorate to a point where it would lead to a catastrophe as the one that had just ended, and out of a firm belief that what was needed was a forum where the nations of the world could meet as equals and iron out their differences without resorting to war.

365. It is axiomatic that for the UN to accomplish the said purpose it must first be credible, that is, it must be seen as being fair, just and equitable in its various dealings.

366. The principles that underpin the UNO are set out in Article 2 of the Charter, and it is safe to presume that those principles are intended more than anything to ensure the matters set out in the two preceding paragraphs.

367. Article 2(7) prohibits the Organization from interfering (unfairly) in the internal affairs of nations, and is one of the fundamental principles of the UNO.

368. If there is *prima facie* evidence that the UNHRC and the OHCHR, two subsidiary organs of the UN, are behaving in an unfair, unjust and inequitable way with regard to a fellow member, there is a duty on the UNO to look into the matter, and a failure to do so is a material breach of its obligations under the U.N. Charter.

369. Such a failure goes to the root of the U.N. Charter. It renders nugatory the principles that underpin the Organization, and thereby renders nugatory the Organization itself.

Recommendations

370. The Federation of National Organizations and its affiliates are duty bound to the people of Sri Lanka to use their resources, influence and energy to pressure the GOSL to produce an official assessment of the OISL report.

371. The Federation of National Organization and its affiliates are duty bound to the people of Sri Lanka to use their resources, influence and energy to pressure the UNHRC to authorize an official assessment of the OISL report.

372. The Federation of National Organizations and its affiliates are duty bound to the people of Sri Lanka to use their resources, influence and energy to inform the UN

General Assembly of what has been taking place at the UNHRC re Sri Lanka, and compel the UNGA to assign a Special Rapporteur to investigate the entire sordid affair. Also, to impose a moratorium on the UNHRC from pursuing any further measures with respect to Sri Lanka based on resolution A/HRC/30/L.29, until such investigation is complete.

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