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**UNCHR and Sri Lanka – 2014  
- An Alternative**

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### Summary

In dealing with the resolution on Sri Lanka at the March sessions of the UNHRC, Sri Lanka has to choose between two options:

- 1. It can take the option followed in 2012 and 2013 and oppose any proposal to establish an international mechanism to inquire into war crimes allegations.*
- 2. It can seek an alternative course which directs the international initiative to examining the issue of war crimes within a framework which evaluates the sharply contrasting and divergent reports on war crimes that are available, thereby enabling Sri Lanka to counter the false propaganda on war crimes and gain international acceptance for the narrative of the war as presented by the LLRC.*

*This paper argues that it is essential for Sri Lanka to follow the second course of action if it is to lay at rest the war crimes issue and go forward with the process of reconciliation and national unity. Following the first course will leave us where we are. The issue of war crimes will continue to plague the country, impair its international standing and impose various restraints and disabilities on the Sri Lankan people, particularly the members of the armed forces. We owe it to the majority of the armed forces that made major sacrifices to secure the defeat of the LTTE, to relieve them of the suspicion of culpability for large-scale war crimes, which these allegations have brought.*

*In following the second course of action, Sri Lanka would need to act on three fronts.*

- First, domestically, it would have to strengthen and deepen the process of accountability by establishing an overarching mechanism that would monitor the implementation of the LLRC and complete the work of the LLRC which was left unfinished – particularly the war crimes allegations in regard to civilian casualties. The work of this mechanism would have to be based on evidence coming from the national census on the casualties of war and violence, the Disappearances Commission and the various studies and reports that are available. A decisive and credible action of this nature is essential if Sri Lanka is to muster support for the alternative it proposes. In order to have an impact on the UNHRC resolution, such a mechanism should be established before the 15<sup>th</sup> of March or a clear announcement should be made by the President regarding the establishment of such a mechanism.*
- Second, at the international level, Sri Lanka should call for an impartial and unbiased evaluation of the different and sharply contrasting narratives of the war as presented in the LLRC report and the report of the UNSG's Panel of Experts with the objective of gaining international acceptance for the narrative of the war as presented by the LLRC. Sri Lanka must take a bold and fearless stand on its own narrative of the war and invite a full transparent scrutiny of that narrative within a clearly defined framework that ensures a just and impartial evaluation.*

- *Third, it must draw the attention of the international community to the LLRC recommendation in Chapter 4 which argues that the issues pertaining to the Sri Lankan war are an integral part of the issues faced by states in combating non-state actors employing terrorist forms of aggression and violating all norms of IHL. The rules of war need to be re-examined and redefined to protect civilians in extreme situations such as the use of the human shields by the LTTE. The major transformation of the nature of war and the methods of war that have occurred after the second world war and the establishment of the UN regime have had far reaching implications for the application of IHL. A world Summit on IHL, Terrorism, War Crimes and Human Rights would be needed to review these changes and deal with all their implications.*

In all what Sri Lanka does it must be seen to stand firmly on the values of truth, accountability, restorative justice and reconciliation.

## **Introduction**

The international discourse on war crimes that is prevalent among a group of Western nations and the initiatives that are proposed in the UNCHR on the basis of this discourse are beset with serious contradictions. These contradictions arise from two sharply contrasting irreconcilable narratives of the last phase of the war against the LTTE. One is the narrative presented by the UNSG's panel; the other is that presented by the LLRC.

### **(I) The Two Contrasting Narratives of the War**

The UNSG's panel alleges that the war was conducted by the Sri Lankan government not only with the intention of eliminating the LTTE but also with the deliberate intention of killing a large number of Tamil civilians and in the process committing a variety of war crimes, targeting civilians in the no-fire zones, shelling hospitals and non-military locations, denying food and medical supplies to the civilians trapped in the war zone, extra judicial killings of surrenderees and involuntary disappearances.

The LLRC's narrative of the war amounts to a firm and full refutation of the main allegations regarding the nature of the war as made by the UNSG's panel. It describes the war in the Vanni – the part of the Northern Province that had been held by the LTTE – as the necessary sequel to the campaign to defeat and evict the LTTE from the Eastern Province, which had been successfully completed with minimum civilian casualties. The war in the Vanni is described as the war waged legitimately by the state against a non-state actor, the LTTE, with the objective of defeating the LTTE and liberating the civilians in the region from the control of the LTTE.

While the UNSG briefly describes the conditions of the last phases of the war – the human shield formed by the LTTE, the positioning of artillery among the civilians in the no-fire zone, the use of the no-fire zone by the LTTE as the battlefield, the continuing conscription of civilians for combat and fortification of their defenses – the panel does not draw the conclusions relevant to issues of distinction and proportionality and their bearing on the allegations of war crimes. The LLRC panel deals with these aspects in detail and raises important issues relevant to the application of IHL in the context of the human shields and the deliberate use of the no-fire zone as a battlefield.

The report of the UNSG panel has been compiled essentially as a prosecutor's brief on the allegations of war crimes committed by the government and the army. There is no evidence that the panel sought or recorded testimony of persons who could have examined and produced evidence contrary to the representations made against the government and the army. The crimes of the LTTE are enumerated without any specific recommendations for action against the LTTE and its accomplices. Most important of all, the UNSG's panel ignores the sequence of the actions taken by the LTTE and the Army. It suppresses the salient fact that it was the LTTE which committed the war crimes in the first instance and that the Army had to find ways of responding to them and minimising civilian casualties.

## **(II) The Nature of the Evidence**

The report of the UNSG's panel has been subjected to detailed and thorough analysis and evaluation by a wide variety of independent analysts with expertise in relevant fields. The evidential base for the sweeping allegations of massive war crimes and estimates of civilian casualties ranging from 40,000 upward has been critically examined and the totally unreliable speculation underlying these allegations has been convincingly exposed. Most of these estimates have been simplistically derived from the estimates of population before and after the war, and independent analysts have taken great pains to expose the inconsistencies in the pre-war population estimates that had been prepared under LTTE direction and are now being used to produce the highly exaggerated estimates of civilian casualties. Well-documented studies of the satellite imagery which provide evidence that refutes the allegation of deliberate targeting of hospitals and civilians have been produced and are available now in the public domain. The allegations that the Sri Lankan government denied food supplies and medical supplies have been examined by the LLRC and other independent analysts. Little attention has been paid to the fact that the Sri Lankan government fulfilled its moral obligations to its citizens by supplying food to the civilian population held by the enemy. The shortcomings that are bound to arise in such an operation are reframed as war crimes. All these issues have come under expert scrutiny. (See **Annex 1** for a comparative analysis of the report of UNSG's panel and the report of the LLRC and **Annex 2** for list of references to reports and studies on war crimes in Sri Lanka and **Annexe 2A** - excerpts from a critique of the report of the UNSG's panel).

What is particularly deplorable is that the international discourse on war crimes in Sri Lanka takes place in complete ignorance of or indifference to this comprehensive body of knowledge. This is also true of the reports and initiatives promoted by the UNHRC. As a result, what has been circulating internationally is a highly biased account of the war. This account has become part of the strategy of the pro-LTTE Diaspora which is campaigning for a separate state and the dismemberment of Sri Lanka. They have become strong lobbyists with the Western countries that are host to a large Tamil Diaspora who are able to exert pressure on politicians who need their electoral support. Documentaries financed and promoted by the LTTE, containing serious distortions and fabrication of evidence and are highly selective of their choice of material are being widely telecast. Governments of the countries in which the Diaspora are active have not dealt effectively with these campaigns, which are openly threatening the territorial integrity and national sovereignty of a Member state. Consequently, the commitments made by countries for the peace and security of nations and enshrined in the UN charter are being violated.

### **(III) The Impact of the War crimes Issue on Sri Lanka**

The process that has been described above has done grave injustice to Sri Lanka. The country's international image has suffered and its international participation weakened. The war crimes issue has deepened the distrust between communities and has become a serious impediment to the process of reconciliation. The Western initiatives on the war crimes issue are received by the majority community with grave suspicion and hostility as part of a hidden agenda. The open espousal of a separatist agenda and the support it has received from some politicians in Tamilnadu have added to the insecurity of the Sinhala community and obstructed the implementation of the 13<sup>th</sup> Amendment. Influential political groups regard the war crimes issues as an opportunity to push for a regime change in a manner that destabilizes the democratic processes in the country. While admittedly the Sri Lankan government should not make these conditions an excuse for delaying a political settlement, the process of reaching a consensus on the political solution has been made that much more difficult.

As the Sri Lankan delegations have repeatedly argued at the UNHRC sessions, the manner in which Sri Lanka has been singled out for scrutiny and investigation on the basis of allegations of war crimes and the processes that have been initiated, violate the spirit of the UN Charter and undermine the efficacy and integrity of the multilateral regime. If the injustice that is being done to Sri Lanka is to be remedied and fair and just treatment meted out, some of the steps taken would have to be retraced and the action taken at the international level reframed with all the knowledge and information available on the last stages of the war. For this the UNHRC would have to be fully informed of the contesting narratives of the war.

The Sri Lankan government is deeply conscious of the need to lay the war crimes issue at rest through a proper transparent process of truth seeking and accountability. Sri Lanka recognises that such a process is fundamental for both laying a stable basis for restoring trust and mutual confidence among the communities and promoting a viable political solution within a united Sri Lanka. The Sri Lankan government calls for such a process because it is certain that such a process will effectively refute the sweeping allegations of war crimes and killings of civilians that are current and confirm the narrative of the LLRC. Sri Lanka is also aware that it is only such a process that will restore the international image and stature of Sri Lanka and enable it to perform its legitimate role as it did in the past.

### **(IV) A Possible Alternative**

*Some parts of the resolution on Sri Lanka sponsored in the US Senate, interpreted in constructive terms, provide a window of opportunity for a fresh approach. In its main recommendation, the resolution avoids the word "investigate" and calls "for an independent international accountability mechanism to evaluate reports of war crimes, crimes against humanity, and other human rights violations committed by both sides during and after the war in Sri Lanka." The word "evaluate" would suggest a process before deciding on "investigation". Such an interpretation creates the space for a more open-minded process that could do justice to Sri Lanka's case in a manner, which would deal effectively with what is palpably false in the current allegations that are made against Sri Lanka. Such a process could impartially examine the two contrasting narratives of the war and define the process of truth seeking and justice that would fulfill the objectives of accountability and reconciliation.*

An objective evaluation of existing reports of war crimes, crimes against humanity, and other human rights violations requires that all available information pertaining to these allegations be placed before an evaluative body. The UNHRC has resolved twice on “Accountability and Reconciliation in Sri Lanka” despite the fact that the UNSG’s panel report was not formally tabled before the Council. The member states should have received an opportunity – for instance through the well-established interactive dialogue model – to scrutinize and comment on the panel’s report, and to pose questions to its authors seeking clarifications on the various claims made in the report. Instead, the two previous resolutions on Sri Lanka appear to accept, without proper scrutiny, the narrative of the UNSG’s panel. The absence of such an objective evaluative process reflects the subjectivity with which accountability issues in Sri Lanka have been framed thus far. Only a holistic evaluation of all existing reports followed by an interactive dialogue would ensure that accountability issues in Sri Lanka are framed in a fair and objective manner.

#### (V) Contents of a UNHRC Resolution on Sri Lanka

The UNHRC resolution on Sri Lanka should take note of:

- The substantial progress made in the implementation of the national plan of action on the recommendations of the LLRC.
- The complexity of the problems of the post conflict conditions in Sri Lanka and the need for a reasonable time span for full implementation of the LLRC recommendations.
- The domestic processes and mechanisms of accountability established including a Disappearances Commission, a national census of casualties of war, military tribunals for investigating allegations of war crimes against members of the armed forces.
- The need to revive and further strengthen the domestic processes of truth seeking and accountability to address allegations of war crimes that could not be addressed by the LLRC, as certain parties refused or were unable to participate in its proceedings.
- Sri Lanka’s commitment to the process of restorative justice and its capacity to provide the moral and spiritual foundation for reconciliation and national unity, as exemplified in the rehabilitation programme of LTTE cadres (See **Annexe 3**).
- The sharply contrasting and divergent narratives of the last phase of the war against the LTTE contained in the report of the UNSG’s panel the LLRC’s report and the large number of other expert studies and reports which refute the evidence which is used by the UNSG panel and which disagrees with the conclusions of the UNSG panel’s report. .
- The need for the UNHRC to inform itself more fully of the current state of the evidence relating to the last phase of the war before deciding on any course of action.
- Sri Lanka’s concerns that the propaganda conducted by various groups on the war crimes issue against Sri Lanka, particularly by groups using the issue to advance their political agenda for separation, has caused serious damage to the process of reconciliation and national unity.
- The need for Sri Lanka to take speedy action to reach a political settlement which addresses the root causes of the conflict and is acceptable to all communities ,and for the international community to give Sri Lanka all possible support and assistance to achieve that objective .
- The fact that many of the issues raised in connection with the Sri Lankan case are an integral part of the transformation that has taken place in the nature of war and the methods of waging war in the post World War era, particularly the internal wars between states and non-state actors and that they merit the convening of a World Summit on IHL, Terrorism, War crimes and Human Rights.

The UNHRC resolution should recommend that:

- The Government of Sri Lanka be encouraged to strengthen the domestic process of accountability and reconciliation and in addition to action already taken urged to consider constituting a truth seeking and accountability mechanism somewhat in the form of a second LLRC to monitor the implementation of the LLRC recommendations and complete the tasks which could not be undertaken – particularly the allegations of large scale crimes and deliberate killings of civilians. In this process, member states should provide all assistance to the government of Sri Lanka, particularly in accessing sources of evidence.
- An intergovernmental expert group be established to evaluate the reports on war crimes with due regard to Sri Lanka's complaints regarding unfair and biased allegations of war crimes. An intergovernmental group would be the most suitable in a context where it is important to demonstrate clearly the multilateral character of the initiatives taken by the UN and guard against biases that could undermine confidence and credibility. This panel should be composed of experts nominated by the UNHRC.
- The UNHRC, in collaboration with other relevant UN international agencies, initiate action to hold a World Summit on IHL, Terrorism, War Crimes and Human Rights to deal with the major transformations that have occurred both in regard to the nature of wars as well as the methods of waging war and the devastating impact they have had on civilian lives.
- Sri Lanka to take speedy action to reach a political settlement which addresses the root causes of the conflict and is acceptable to all communities and for the international community to give Sri Lanka all possible support and assistance to achieve that objective.

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Colombo, 20th February, 2014

**Annexes:**

1. Comparative analysis of the two narratives of the War - the report of the UNSG's panel and the LLRC report
2. The List of References.
- 2A Excerpts from a critique of the report of the UNSG's panel prepared by the Marga Institute.
3. The Value System recommended by the LLRC for Accountability and Reconciliation

**Annex 1: COMPARATIVE ANALYSIS OF ALTERNATE NARRATIVES OF ACCOUNTABILITY IN REGARD TO THE ARMED CONFLICT IN SRI LANKA**

Accountability Issues	UNSG Panel of Experts	LLRC	Comments
<b>1. Scope and Methodology</b>			
1.1 Definition of the scope	<p>Ascertaining the political, legal and moral responsibility of institutions and individuals for past violations of human rights and dignity, involving the achievement of truth justice and reparation for victims, integral to achieving sustainable peace after conflict.</p> <ul style="list-style-type: none"> <li>• Characterize the extent of the allegations, appraise them legally:</li> <li>• Advice UNSG on accountability.</li> </ul> <p>Timeframe is the “final stages of the war”.</p>	<p>Acknowledging a clear need to heal the wounds of the past and to make recommendations to reconcile the nation by recognizing all victims of conflict, providing redress to them and thereby promoting national unit, peace and harmony.</p> <ul style="list-style-type: none"> <li>• Inquire and report.</li> <li>• Address a broad range of complex issues of a multidisciplinary nature.</li> </ul> <p>Time frame, from the CFA, February 2002.</p>	<p>The primary purposes and methods differ, determining credibility of the outcome.</p> <ul style="list-style-type: none"> <li>• POE to prepare a brief on violations committed by the Government. Hence treatment of violations committed by the LTTE is incidental to the main issue. Negates fundamental issues arising in the application of IHL.</li> </ul>
1.2 Methodology	<p>Gathering expert information and calling for written submissions on allegations of accountability, and,</p> <ul style="list-style-type: none"> <li>• Assess whether credible to warrant further investigation.</li> <li>• Frame accountability issues on the basis of the allegations;</li> </ul> <p>Nearly all records classified as “strictly confidential”.</p>	<p>Calling for representations through:</p> <ul style="list-style-type: none"> <li>• Hearings</li> <li>• Consultations (Invitations not reciprocated by Human Rights Watch, Amnesty International, and International Crisis Group)</li> <li>• Sitings in situ</li> </ul> <p>Inquiry was transparent.</p>	<ul style="list-style-type: none"> <li>• LLRC to inquire and report on sufferings of all victims and redress needed. Captures the perspectives of all concerned parties except INGOs/NGOs that did not respond to the call.</li> <li>• IHL and HRL the framework of accountability</li> </ul>
<b>1. Conduct of the armed conflict</b>			
2.1 Strategy and operations	<p>Between September 2008 and 19 May 2009, the military campaign advanced into the Vanni using large-scale and widespread shelling.</p> <ul style="list-style-type: none"> <li>• In spite of the knowledge of the impact.</li> <li>• Caused large numbers of civilian deaths.</li> <li>• Constituted persecution of the population of 333,000 civilians trapped into an ever decreasing area, fleeing shelling but kept</li> </ul>	<p>The military strategy was carefully conceived, giving protection of the civilian population highest priority.</p> <ul style="list-style-type: none"> <li>• Operational movements of Security Forces were deliberately slow during the final stages.</li> <li>• Strategy of avoiding civilian casualties or minimizing them.</li> <li>• Protection of civilian life key factor in</li> </ul>	<p>The two widely divergent narratives of intent and purpose. The brief of the POE <u>suggest</u> total disregard of Government for the effect of its military operation on the Vanni population, amounting to persecution. On the other hand the LLRC <u>finds</u> a military strategy informed by concern for care and safety of the</p>

	<p>hostage by the LTTE.</p> <ul style="list-style-type: none"> <li>• Intimidation and silencing of media and other critics of the war.</li> </ul>	<p>operational policy.</p> <ul style="list-style-type: none"> <li>• Specific episodes warrant further investigation (referred to in Chapter 4 Section II)</li> </ul>	<p>Vanni people with specific episodes that warranting further investigation..</p>
<p>2.2 Civilian casualties</p>	<p>Killing of civilians through widespread shelling.</p> <ul style="list-style-type: none"> <li>• The Government shelled on a large scale in three consecutive No Fire Zones, where it had encouraged the civilian population to concentrate, after indicating that it would cease the use of heavy weapons.</li> <li>• Most civilian casualties in the final phases were caused by Government shelling.</li> <li>• A number of credible sources estimate that “there could have been as many as 40,000 civilian deaths.</li> <li>• Only a proper investigation can lead to the identification of all the victims and to the formulation of an accurate figure.</li> </ul>	<p>Measures were taken to safeguard civilians and avoid civilian casualties.</p> <ul style="list-style-type: none"> <li>• NFZs established to provide maximum safety to civilians. <ul style="list-style-type: none"> <li>○ However, the LTTE used NFZs as a human shield; kept shifting positions taking civilians with them; constructed earth bunds to prevent civilians from moving into safe areas.</li> <li>○ Dilemma of protecting civilians and neutralizing the enemy fire power emanating from within the NFZs.</li> </ul> </li> <li>• No deliberate targeting of civilians in NFZs, however. <ul style="list-style-type: none"> <li>○ Cross-fire causing civilian casualties; LTTE killing civilians attempting to move out; Threats posed by landmines and Perils of crossing Nanthi Kadal Lagoon.</li> </ul> </li> <li>• Incidents involving the loss of civilian life, though difficult to determine the precise circumstances. Points towards possible implication of the security forces, though may not have been intentional.</li> <li>• There was no process for verification of civilian casualties resulting in unverified sweeping generalizations of highly speculative casualty figures. <ul style="list-style-type: none"> <li>○ Considerable civilian casualties had occurred during the final phase.</li> <li>○ No representations made by</li> </ul> </li> </ul>	<p>Whereas the NFZ constitute an integral element of Government’s military strategy in the final stages, the POE allegation that they were a means of concentrating civilians for targeted attacks constitutes a key allegation of its brief to account for large scale civilian casualties. The LLRC found no deliberate targeting of NFZs rather the Government having to neutralize the LTTE using NFZs for attacking Government positions, leaving numbers and causes of civilian casualties open and POEs sources speculative. Indeed this reality of the military operations in the final stages raises fundamental issues regarding the accountability framework</p>

		organizations quoting own sources .	
2.3 Hospitals	<p>“The Government systematically shelled hospitals on the frontlines.”</p> <ul style="list-style-type: none"> <li>• All hospitals in the Vanni were hit by mortars and artillery, some of them were hit repeatedly.</li> <li>• Their locations were well-known to the Government.</li> </ul>	<p>Shells had in fact fallen on hospitals though material before the Commission points to a confused picture as to the precise nature of events.</p> <ul style="list-style-type: none"> <li>• Representations not able to confirm that shells fell on the hospitals, or from which side they originated.</li> </ul>	<p>The situation regarding alleged attacks on hospitals conforms to the emergent storyline of the two narratives.</p>
2.4 Humanitarian relief	<p>Denial of Humanitarian assistance. The Government systematically deprived people in the conflict zone of humanitarian aid, in the form of food and medical supplies, particularly surgical supplies, adding to their suffering.</p> <ul style="list-style-type: none"> <li>• The government purposefully underestimated the numbers of civilians who remained in the conflict zone.</li> <li>• Food delivered to the Vanni by WFP was a fraction of what was actually needed.</li> <li>• Medical supplies allowed into the Vanni was grossly inadequate to treat the numbers injured by shelling imposing “enormous suffering and unnecessarily cost many lives”.</li> </ul>	<p>Adequate measures were taken to supply humanitarian relief including food and medicine in conflict areas.</p> <ul style="list-style-type: none"> <li>• Supply of food to civilians up to early 2009 was up to internationally accepted nutrition intake for refugees.</li> <li>• Adequacy levels declined from February 2009 as the conflict intensified and compelled to resort to sea supply routes.</li> <li>• Collective efforts of Government and International Agencies as well as civil society groups had taken all possible steps in getting food and medical supplies and other essential items across despite enormous logistical difficulties. <ul style="list-style-type: none"> <li>○ Central logistics hub established in Vavuniya managed by WFP.</li> <li>○ Government Agents maintain 3 months buffer stock of essential food.</li> <li>○ Military operations suspended at regular intervals to provide safe passage despite risks of LTTE attacks.</li> <li>○ LTTE attacks on convoys carrying essential food to Killinochchi and Mullaitivu.</li> </ul> </li> <li>• Possible paucity of medicines and medical facilities, which must be placed in the context of intensity of the conflict</li> </ul>	<p>The POE’s assessment of supply of humanitarian relief to entrapped civilians is most serious as it leads to the alleged use of starvation and denial of medical assistance as the means of Government’s military campaign. The LLRC rejects this allegation of the POE brief, recognizing a possible paucity of medicines in the context of the intensity of the conflict.</p>

		and the proximity of the hospitals to the theatre of conflict.	
2.5 Treatment of victims	<p>Human rights violations suffered by victims and survivors of the conflict, including both IDPs and suspected LTTE Cadre after they left the conflict zone.</p> <ul style="list-style-type: none"> <li>• Screening for suspected LTTE took place without any transparency or external scrutiny.</li> <li>• “Some of those who were separated were summarily executed, and some of the women may have been raped”.</li> <li>• Others disappeared as recounted by their wives and relatives during LLRC hearings.</li> <li>• IDPs were detained in closed camps, overcrowding led to breaches of social and economic rights of the detainees.</li> </ul>	<p>Clear instructions given regarding receiving surrendeers, attending to immediate medical and food needs and registering them. Female soldiers were employed to help female IDPs.</p> <ul style="list-style-type: none"> <li>• Registration of surrendeers initially at field headquarters in the frontline later moved to Omanthai. <ul style="list-style-type: none"> <li>○ All registration information was transferred to computers and entered in a data base maintained at Army Headquarters. Photographs of all IDPs and surrendeers were taken and transferred to the data base.</li> <li>○ Hazards of screening due to risk of suicide attacks (three had taken place in Puthumatthalan).</li> <li>○ LTTE cadres changing into civilian clothes when crossing over; Civilians crossed over carrying white flags;</li> <li>○ Screening through announcements at different points for those with LTTE involvement to identify and surrender.</li> <li>○ There were no INGOs or other independent organizations on the spot who would have witnessed surrenders</li> </ul> </li> <li>• Commission found cases of detainees languishing in detention/rehabilitation centres. <ul style="list-style-type: none"> <li>○ Task of interrogating and profiling 10,000 ex-LTTE cadres.</li> </ul> </li> </ul>	<p>While the LLRC found violations of Human Rights on both sides, in regard to receiving civilians and surrendeers entering government held areas the arrangements and procedures in place do not find any reference in the POE brief, except that screening of suspected LTTE cadres took place without external scrutiny. However it is noteworthy that the LLRC addresses the concerns of representations made regarding alleged violation of human rights in its recommendations.</p>
2.6 Human rights issues	Human rights violations outside the conflict zone against media and critics of the Government	<p>Representations were made alleging violation of fundamental rights and freedom of people affected by the conflict.</p> <ul style="list-style-type: none"> <li>• Violations on the Government side</li> </ul>	

		<p>included, Loss of family members, including women, children and elderly during conflict; Human rights violations by Security forces; Persons voluntarily surrendered to the Security Forces being untraceable.</p> <ul style="list-style-type: none"> <li>• On the LTTE side violations included; extrajudicial killings, abductions, arbitrary arrests and detentions and disappearances.</li> </ul>	
<b>2. Application of IHL and IHRL</b>			
<p>3.1 Asymmetric warfare and IHL</p>	<p>IHL applies because the hostilities clearly meet the threshold for an internal armed conflict, i.e., one involving requisite intensity of armed violence between the Government and an organized armed group.</p> <ul style="list-style-type: none"> <li>• IHL applicable to both parties irrespective of causes espoused or tactics employed by the either sides.</li> <li>• While the State has a right to ensure its national security and to defend all actions for the legitimate purposes must comply with requirements of international law.</li> <li>• IHL is thus applied to credible allegation linked to the armed conflict, many of these also constituting violations of HR</li> <li>• Since the conclusion of the war on 19<sup>th</sup> May 2009 IHRL becomes applicable;</li> <li>• HR violations are addressed materially or temporally outside the conduct of the war.</li> </ul>	<p>Primary aim of IHL is to protect the victims of armed conflict and to regulate the conduct of hostilities based on striking a balance between principles of humanity and military necessity. “Failure of the Protocols to provide a precise definition of the term <i>civilian</i>, <i>civilian population</i> and a similar lack of clarity with regard to the term <i>take part in hostilities</i> has contributed to substantial degree of ambiguity, leaving, vital terms which have a bearing on core IHL principles to be dealt with largely on a case by case basis.</p>	<p>An important basis for divergence in the narratives of the POE and the LLRC would appear to lie in the treatment of the application of IHL as the framework for accountability for an assessment of the conduct of the hostilities between the Government of Sri Lanka and the LTTE as a non-state actor. Thus whereas the POE subjects actions of both parties to IHL, there is no recognition of the effect of the nature of hostilities on ground in its application of the law to the assessment of accountabilities of the two parties. The entire onus is on the State. It is in this context that the LLRC calls for the formulation of an effective legal framework drawing from the Sri Lankan experience as obligation the International Community owes to victims of conflict. Legal violations flow from the</p>
<p>3.2 Forms of responsibility</p>	<p>Considered three forms of responsibility.</p> <ul style="list-style-type: none"> <li>• State responsibility</li> <li>• Organizational responsibility</li> <li>• Individual responsibility</li> </ul>	<p>Framework of responsibility in the conduct of hostilities.</p> <ul style="list-style-type: none"> <li>• Allow and facilitate rapid and unimpeded passage of humanitarian relief. Starvation as a method of warfare is prohibited.</li> </ul>	

		<ul style="list-style-type: none"> <li>• Directing an attack against a zone established to shelter civilians, the wounded and the sick is prohibited.</li> <li>• Respect for and protection of persons who are in the power of an adverse party.</li> </ul>	POE's framework of accountability.
3.3 Sri Lankan context	That the conflict in Sri Lanka was beyond the reach of IHL is incorrect as a matter of international law.	The rudimentary nature of the legal framework regulating conflicts involving non-state armed groups leave grey areas placing the civilian in jeopardy when compelled to deal with the combat strategy of the non-state armed groups to neutralize taking positions within "safety zones".	
3.4 Legal violations by the Government	<p>Credible allegations concerning the conduct of the war constitute legal violation of IHL and HRL.</p> <ul style="list-style-type: none"> <li>• Killing of civilians through widespread shelling. (Violence to life and person; Violation of the principle of distinction; Violation of the ban on attacks directed against civilians; Violation of requirement to provide sufficient advance warning of attacks to civilian population)</li> <li>• Shelling of hospitals. (Violation of duty to provide care for the sick and wounded)</li> <li>• Denial of humanitarian assistance. (Violation of the obligation to provide care for the sick and the wounded; Violation of the obligation to allow and facilitate rapid and unimpeded passage of humanitarian relief for civilians in need without distinction)</li> <li>• Human rights violations suffered by victims and survivors of the conflict both</li> </ul>		

	<p>under IHL and HRL.                  (Possible violation of ban on “outrages upon personal dignity; Violation of law prohibiting enforced disappearances; Violation of the requirement to provide those detained with adequate food, water, clothing, shelter and medical attention; Violation of the requirement to search for dead, treat them with respect, record locations of graves and take all feasible measures to notify family; Violation of protection against arbitrary deprivation of the right to life and right physical security; Violation of the guarantee to all persons freedom from arbitrary and unlawful detention on a systematic basis; Violation of the guarantee to all persons of the right to adequate food, clothing and housing; Violation of the freedom of assembly and association; Violation of obligation to ensure equal rights to women without distinction; Violation of the obligation to protect and promote the family unit; Violation of the obligation to take special measures to protect children;</p> <ul style="list-style-type: none"> <li>• Human rights violations outside the conflict zone                      (Violation of law prohibiting disappearances carried out by a State party; Violation of the freedom to impart and receive information and to hold and express opinions)</li> </ul>		
<p>3.5 Individual criminal responsibility</p>	<ul style="list-style-type: none"> <li>• Under International Law                         <ul style="list-style-type: none"> <li>○ War crimes</li> <li>○ Crimes against humanity</li> </ul> </li> <li>• Under Sri Lankan Law</li> </ul>		

	Penal Code as well as Army Act.		
<b>3. Nature of Accountability</b>			
4.1 Standards of accountability	Global expectations expressed in international standards regarding necessary responses to allegations of violations potentially amounting to war crimes and crimes against humanity with a duty to investigate.	The specificity of the Sri Lankan case involving state and non-state armed groups leave grey areas in the application of IHL requiring application on a case by case basis.	The accountability framework invoked by the POE is highly legalistic and rejects the moral and ethical basis of post conflict reconciliation.
4.2 Approach to Accountability	Sri Lanka should seek to guarantee the rights of victims to truth, justice and reparations. Transitional justice based on legal duties and standards of international law is invoked as the approach to addressing challenge of post-conflict accountability.	Acknowledgement of a clear need to heal wounds of the past, to reconcile the nation by recognizing all victims of conflict, providing redress to them and thereby promoting national unity , peace and harmony.	

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**Annex 2 A: Excerpts from a critique of the report from the UNSG panels made by the Marga Institute.**

The Panel for obvious reasons could not gain access to the full version of the government on these events and did not have before it the full case for the government. This leaves a large lacuna in the Panel's information gathering exercise. The Panel's dismissal of the Government's position prevents it from making a more searching assessment of the military necessity claimed by the government. It prevents the panel from analyzing the crucial elements of intentionality and proportionality as should have been done in any investigation of alleged war crimes in the Sri Lankan situation.

The report omits all mention of past actions and policies that may provide a more informed approach and better understanding of the actions of government in the Vanni operation than what is provided by the panel. There is no mention of the transformation the army had undergone and their visible improvement in discipline in respect of humanitarian rules of war. There is no reference to the war in the East immediately prior to the Vanni offensive and the very low level of civilian casualties in that operation which also had a hostage situation in Vakeneri. Such an account would have given credence to the government's policy of "zero civilian casualties".

The Panel quotes the EU response to the military operation in which it recognizes the government's right to undertake operations to counter terrorism on its territory – para 47. But the Panel does not examine the implications of this statement and does not explicitly deal with the character of the military operation undertaken by the government.

The Panel deals with comparable international experience in conflicts which have little relevance to Sri Lanka – Yugoslav experience, Rwanda, Truth Commissions in varying situations very dissimilar to the case of Sri Lanka. The closest would have been the Peru Government's war on the Shining Path. (The issue of war crimes committed by government troops in crushing the Shining Path may have been raised and it would be useful to examine how they were dealt with. Human rights organizations organized protests against the Peruvian president when he came to San Francisco.) For the comparable experience dealing with similar extreme military situations, the panel would have to go to the recent experience coming out of the global war on terror – issues of civilian killings in the wars in Iraq Afghanistan and Chechnya and military operations mounted against terrorists in Pakistan - and inquire, how or whether at all, these have been dealt with under the UN system .

Framing the issues in this context of extreme situations caused by terrorism would have required the panel to examine much more carefully the issues of intentionality and proportionality in regard to government actions, especially in the light of its own description of the actions of the LTTE in the NFZ. The Panel would have had to examine a set of questions which they have ignored: how exactly were the LTTE operating within the NFZ? What is the nature of criminality in using civilians as a human buffer?( if this does not fall within the existing law relating to hostages and human shields as argued in

the IGC report ) whether protected institutions were being actually used for military purposes by the LTTE ( the available information on this matter is insufficient, );whether the civilians men women and children whom the LTTE was conscripting for military tasks became military targets as a result ; whether the military calculus of the army had to take into account the possibility that the LTTE in their desperation would have escalated the killing of civilians or forced them to forms of mass suicide and whether the military had to design speedily a strategy to avoid such a catastrophe; and many more on similar lines.

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**Annex 3 : The Ideology of Reconciliation and the Framework of Values. In the LLRC report.**

The Report's approach to the grievances of communities articulate the overarching values that should guide the re-adjustments that all communities need to make in their relations with each other. Truth is the first prerequisite. This involves the full uncovering of all that happened in the past and acknowledgement of the past. Second uncovering the truth requires searching self-appraisal on the part of all communities and the acceptance of the share of responsibility that each community must bear for the conflict and the suffering that it caused. Third there must be genuine contrition on the part of all participants in the conflict for their share of responsibility. Fourth, this has to be followed by a concrete expression of that contrition. Finally there has to be accountability and justice. The LLRC approach to accountability and justice is principally one of restorative justice in which forgiveness and rehabilitation, punitive action, full reparation and restitution for the victims, all have their appropriate roles to play in the given context, with all the elements contributing to reconciliation and peaceful co-existence of all communities.

**Values Goals and Attitudes**

On each of the issues the LLRC sets out the actions that need to be taken to address the existing problems and grievances arising out of the conflict. These actions relate to the recommendations that have already been made in the preceding chapters of the report. All these actions and their outcomes are a necessary condition for a full process of reconciliation. But what the LLRC emphasises in its approach to reconciliation is that the actions by themselves are not a sufficient condition for reconciliation. The attitudes values and goals that guide the actions are equally important. The focus has to be not only on what needs to be done; it has to be equally on how it is done. All the actions must be done in a manner that restores confidence, heals the wounds of the past and restructures the relationships between communities. The process of healing requires empathy with the victims, care and compassion for their hardships and suffering (8.303).

LLRC points out that the main instruments of reconciliation will be the initiatives and measures taken to address the issues that have been listed. If these initiatives and measures are to be effective as instruments of reconciliation, the values goals and attitudes that guide the implementation will be crucial. Their effectiveness as instruments of reconciliation would have to be judged by the values that the LLRC upholds when dealing with the different issues and making its recommendation.

The value framework that guides the approach taken by the LLRC to all matters dealt with by it is derived from three main sources.

- The first source is the human rights value system adopted by the UN in the seven core instruments that have been ratified by countries.

- The second is the democratic value system which focuses on the practices and institutions and processes of good governance as they give expression to the sovereignty of the people, people-centered governance and the principle of subsidiarity.
- Third is the moral and ethical foundation which is anchored in the core spiritual values of the four great religious traditions in Sri Lanka.

These find expression throughout the report in the treatment of the grievances of different communities, the acknowledgement of contrition for the past, forgiveness and tolerance, compassion for and empathy with the victims, the special attention to the weaker and vulnerable segments of society. These three value systems constantly interact and provide the basis for the various prescriptive responses and recommendations in the LLRC report. The complex issues of accountability for past crimes and violation, protection of human rights in prevailing conditions, resettlement, recovery and development are all considered within this framework.

#### **Removal of mistrust and suspicion and building of trust and confidence.**

LLRC observes that past relationships between the ethnic communities particularly between the Sinhala and Tamil communities have been grounded in mutual suspicion and distrust of each other's action. This context has to be kept in mind unfailingly by both parties and all actions taken and pronouncements made need to be tested for their impact on building mutual trust and confidence. This requires constant application of the values that have been defined in the preceding section, specially those which have a bearing on the majority-minority relationship in the Sri Lankan situation.

#### **Consensual approaches to problem solving as against adversarial approaches.**

The LLRC argues that the effort to dispel mistrust must be governed by a consensual approach to problem solving. The political processes and institutions that have evolved have encouraged adversarial approaches that are divisive and prone to conflict.

Parties need to move towards a consensual approach in which they agree on fundamentals, analyze their problems and grievances together in a spirit of objective inquiry and seek solutions that are fully equitable.

