

Draft

REPORT OF THE SEMINAR
ON
**“ACCOUNTABILITY, RESTORATIVE JUSTICE AND RECONCILIATION:
REVIEW OF THE REPORT OF THE SECRETARY-GENERAL’S PANEL OF
EXPERTS ON ACCOUNTABILITY IN SRI LANKA – 31 MARCH 2011”**



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1. BACKGROUND TO THE SEMINAR

The Seminar organized by the Marga Institute to review the report of the UN Secretary General's Panel of Experts on accountability in Sri Lanka was held at the Marga Auditorium on 21.07.11. The seminar was the outcome of an initiative taken by a small group of citizens. The Marga Institute convened two meetings of this group in May and June 2011. After an exchange of views which helped to identify some of the main issues, participants agreed that the Marga institute should draft a position paper based on an objective and detailed analysis of the substantive content of the report. This draft paper prepared by Dr Godfrey Gunatilleke) served as the working document for the seminar.

The working paper followed the structure of the Panel's report .and provided a framework for organizing the seminar in a form which would provide sufficient time for a close examination of the main contents of the report. The seminar was organized in four sessions. The first session was devoted to a brief presentation of the working paper; the second session dealt with the Panels account of the last stages of the war and IDPs; the third examines the Panel's application of the law and the discussion of the approaches taken by the panel and government on restorative justice and accountability. The fourth session was devoted to the issues of post war reconciliation. The seminar concluded with a summing up. The substantive sessions 2, 3 and 4 were structured in the form of panel discussions and question and answer sessions followed by comments and questions from participants.

The participants at the seminar represented a multi-ethnic multi- religious cross section of civil society and included senior personnel from several civil society organizations, religious leaders, lawyers, academics, former public servants and diplomats. The panel discussants were persons with expertise, knowledge and experience in the relevant areas dealt with in the sessions.

2. APPROACH TO THE REVIEW OF THE REPORT: Setting the agenda for the Seminar

In session 1 of the Seminar, Godfrey Gunatilleke presented a summary of the working paper . Using the SWOT acronym- strengths, weaknesses, opportunities and threats - he submitted four broad propositions which might serve as guideposts for the discussions that were to follow:

- The Strength of the panel report is that it presents possibly the strongest case against the Government and the Army. It also thereby provides the Government with the foreknowledge of what it faces in terms of a prosecutor's case.
- The Weakness of the report is that it had to work within severe constraints which did not enable it to access the vital information available with the government on the last stages of the war. It does not adequately examine the implications of this lacuna for the adequacy of their report. Consequently the narrative of events given in the report is inaccurate and incomplete leading to serious misrepresentations.
- Nevertheless the Panel report opens the Opportunity to the government and all concerned groups to deal with the fundamentally important humanitarian issues of the events.
- The Threat lies in the refusal to respond to the report in an appropriate form that deals with the grave allegations that are made. This would leave the Panel's report to serve as the dominant version of the events, causing immeasurable harm to Sri Lanka's international relations and to the national process of reconciliation.

Gunatilleke stressed that the main focus of the seminar is not to engage in a critique of the Panel report per se. It is to gain a fuller knowledge of the human tragedy and the civilian deaths and casualties in the last stages of the war and help in the process of reconciliation.

Gunatilleke's presentation focused on the main issues raised in the working paper in its critical review of the Panel's report.

The Panel's account of the last stages of the war and the events that lead to the allegations of war crimes and violations of human rights:.

In assessing the Panel's narrative of the events there are two main criteria that have to be applied at every stage:

- Is the panel's account complete or if not complete, adequate, and has it been able to access all sources of information that are essential for coming to fair and just conclusions concerning the events and actions ?
- Has the panel examined all possible explanations and interpretations of the events and actions before coming to its conclusions?

In dealing with the strategies and actions of the LTTE the Panel has evidently obtained reliable and adequate information from various sources. The Panel's account covers most of the LTTE's actions which were observed during the war – use of civilians as buffer, shooting of civilians who were escaping, conscription of civilians and pushing them to the front line as cannon-fodder, fortifying the NFZ, using mobile artillery, shooting from proximity of hospitals. The Panel gives a graphic account of the manner in which the NFZ was being converted into a battlefield and the civilians were being integrated into it as part of a ruthless defence strategy.

In contrast, to deal with the GOSL's strategies and actions the Panel has no access to the GOSL's account of events. The panel does not openly admit this lacuna and admit its implications. In the absence of a full account from the GOSL it falls back on a few statements of the government which claimed that the war was a humanitarian operation directed at rescuing the Vanni population from the control of the LTTE with zero civilian casualties. It treats these public statements as the full account which the GOSL has to give of all its actions and dismisses these claims. It concludes that the GOSL denied adequate supplies of food and medicine to the civilian population, that there was deliberate shelling of hospitals and civilians and that there is a credible allegation that the GOSL committed a crime against humanity by actions calculated to bring about the destruction of a significant part of the Tamil civilian population in the Wannai.

How should the Panel have dealt with its inability to gain access to the GOSL's full account of what happened? It could have frankly admitted the constraints within which it had to work and acknowledged that it was presenting the allegations it had received from the sources to which it had access and also evaluated those sources of information in relation to the constituencies and agendas they represented.

Why does it ignore its own evidence of the LTTE's actions in integrating the civilians into the battlefield and its consequences for the options available to the Sri Lankan army? If it took account of the information they already have it would have had to reconsider its interpretation of the GOSL's strategy in regard to intentionality and proportionality.

There are other major flaws in the Panel's account:

- The dubious manner in which the Panel exceeds its mandate which does not include fact finding and investigation. What it actually does belies its statement that its work does not include fact finding and investigation leading to conclusions about culpability.
- The tendentious nature of presenting allegations as the true account of what happened.
- The lack of transparency in not disclosing the sources of information and assessing their reliability
- Excluding government actions which are not consistent with the Panel's interpretation,
- The untenable basis on which the charge of extermination is based.

- The refusal to examine other credible explanations relating to civilian casualties and the confusing speculation leading to the high estimate of civilian deaths and the significant omissions in the report that could provide a different explanation of the government's strategy and actions.

In its account of the IDPs the panel shows little appreciation of (a) the magnitude of the problem and government's efforts to deal with it (b) the need to balance security considerations with humanitarian concern. The Panel makes no reference to favourable assessments and accounts given by UN agencies and other organisations and observers of the IDP situation. Apparently it also had no information or knowledge of the outpouring of sympathy and the generous flow of essential goods to IDP centres from all parts of the country. It leaves out all facts which may contradict its own account of the inhuman treatment of the IDPs by an oppressive government.

All these issues are examined in greater detail and further elaborated in the working paper.

The Appointment of the Panel, Application of the Law and the Concept of Restorative Justice

Gunatilleke dealt briefly with the issues relating the *appointment of the Panel and its mandate*:

- The joint commitment made by the GOSL and the UNSG did not envisage an independent initiative by UNSG
- The selection of the Panel by the UNSG violated the standards that should have been applied
- The terms of the panel were ambiguous giving the panel the discretion to carry out an exercise which in fact became both fact finding and investigation.
- It was improper for the UNSG to release the report to the public

The presentation proceeded to deal with the *Issues Concerning the Application of International Law*. These include:

- The failure to define the true character of the war as a legitimate military operation to destroy the military capability of a terrorist organization which was in control of territory and population.
- The lack of relevance in the international experience selected for comparative analysis
- Failure to examine the wide ranging controversy of the applicability of the rules of conventional war to these extreme situations and the need to redefine the rules of war.

Consequently the panel makes no contribution to the definition and enhancement of the process of accountability and law pertaining to these extreme situations.

On *Accountability and Justice*, the following issues were highlighted :

- The government's concept of accountability and justice is guided by the philosophy of restorative justice
- The panel defines its own position as transitional justice which must contain an essential component of accountability for past criminal actions which would lead to prosecution and punishment.

The government responds to the Panel's position by stating that restorative justice will go through the process of uncovering the truth, followed by contrition on the part of the perpetrator, forgiveness, reparation of victims and reconciliation. It can include prosecution and punishment for heinous crimes but the punishment will be governed by principles of restorative justice that will include non-custodial sentences and processes of rehabilitation. The government takes the position that the army did not commit war crimes in conducting its military operation. It also appears that the GOSL would be ready to investigate allegations of crimes committed by individual members of the army. The government also argues that the process of reconciliation is best promoted through restorative justice.

The exchange between the Panel (through the UNSG and the GOSL on restorative justice points to the options that need to be considered for a genuine process of reconciliation. Can the process of restorative justice draw on the country's spiritual heritage. Could it draw on the core values which are shared by all four major religions which have co-existed peacefully in the midst of a fierce ethnic conflict? Is there greater wisdom and sustainability of justice in the more holistic approach preferred by the government? How does such an approach address the issue of impunity and what are the larger social and moral implications of such an approach in the Sri Lankan context

The critique of the Panel's conclusions about the *government's process of accountability covered* the following points:

- The Panel position is that the government's process of accountability is deficient because it does not include investigation of allegations of war crimes committed by the government. The government's position is that the LLRC is mandated to uncover the complete truth on the entire sequence of events up to May 19th; it does not inquire within an accusatory framework that holds the threat of prosecution and punishment but it is empowered to investigate any allegation of war crimes that is made to it in the course of its inquiry.
- The Panel states that "because the LLRC has not yet concluded, it is not possible to make a comprehensive and final assessment; admits that it did not have the opportunity of meeting with the LLRC and acquainting itself with the work directly. Nevertheless

goes on to criticise the work in progress for its quality and effectiveness based on information made available to it by third parties violating the basic norms of professional etiquette. It is tantamount to one judicial body commenting on how another judicial body is conducting a case while hearings are in progress.

- The comments the Panel makes on the independence and impartiality of the Commission are of a nature that would apply to any national Commission. The South African Commission was criticized on similar grounds. The LLRC has gained public acceptance; its independence will have to be judged on the basis of its final report.

Measures for Advancing Accountability – The Domestic Justice System and further Obstacles

The Panel's survey of the justice system and measures to strengthen the domestic process of accountability is useful as a framework for addressing shortfalls and making the necessary improvements. However the survey needs to be placed in the following context

- The Panel's review does not contain anything new. It reiterates the critical assessments and the recommendations that have been made in various other reports of civil society organisations and human rights activists.
- The ongoing policies and programmes of government are also addressing most of these issues.

In the section on "further obstacles" the Panel identifies triumphalism as an obstacle and makes comments which are gratuitous and outside its purview, showing a lack of knowledge and full understanding of what happened.

The panel identifies the Tamil Diaspora as one obstacle and states that it provided vital moral and material support to the LTTE over the decades and during the last stages of the war remained silent on LTTE "holding tens of thousands of Tamils hostage in the Wannai" and "protesting in support of the LTTE in the last stages". It states that the front organizations and businesses of the LTTE are continuing and the funds of the LTTE available abroad should be confiscated for use in making reparations to the victims. The Panel however makes no specific recommendation regarding accountability and international co-operation to deal with the problems of the Diaspora.

Recommendations :

The panel makes four main recommendations.

- The recommendation A that government should commence immediately genuine investigations into alleged violations of international humanitarian and human rights law committed by both sides. The government has made it clear that all the issues relating to the final stages of the war will be covered by the LLRC under its mandate within the framework of restorative justice.

- The UNSG has stated that it cannot take action on recommendation B (i) which calls for an independent international mechanism and will monitor the domestic process of accountability under existing UN processes and mechanisms.
- Recommendation 2 ABC - regarding short –term measures, for making reparation to victims restoring normalcy and dealing with disappearances are recommendations that government should have no hesitation in endorsing as they are already on the government agenda . The main problem would be one of speedy and effective implementation.
- Recommendation 3 Long–term measures: examining the root causes of the conflict a great deal already done how should we revisit it in a manner that is meaningful for the present process of reconciliation?
- Acknowledgement of the government role for extensive civilian casualties – this is not acceptable in the manner in which it is stated by the Panel but an expression of collective grief some form of collective expiation for the tragic human consequences of the war and the human cost of the atrocities and violations that preceded it may be needed to strengthen the process of reconciliation
- The Panel flags the issue of reparations. A consistent policy for reparations is an essential element of reconciliation It has to have two dimensions One the collective and community based dimension which promotes social and economic development and raises the living standards of the people in the conflict –affected regions; the other individual reparation for deaths disappearances and other disadvantaged conditions which require special support and assistance.
- The Panel recommends a full inquiry into the role and conduct of the United Nations staff during the Wanni military operation. This provides an opportunity for examining the norms of conduct of UN staff in the face of the complex dilemmas they face in certain extreme situations as in the Wanni.

Unresolved Critical Issues relating to the last stages of the war.

In concluding his presentation Gunatilleke stated that when the Panel’s interpretation of the Government military strategy is critiqued and discarded, we are still left with unresolved issues of a far-reaching nature. When we start on the premise that the main objective of the government’s military operation was the ending of the terrorism and brutality of the LTTE regime and freeing the civilians we still have to define the issues of accountability within that framework.

- After the initial phase of the operation the actions of the LTTE in using the civilians as shield and hostage placed new demands on the government and the army. How did the government meet this challenge?
- Could the civilians have been separated from the LTTE before they were compelled to move into the narrow coastal zone?
- By the mass conscription of civilians for military activity in the NFZ the building of fortifications with civilian conscripts and the use of all means available for military

purposes the LTTE had deliberately integrated the civilian population into their military effort and turned the NFZs to battle fields and effectively blurred the distinction between civilians and combatants. How is intentionality and proportionality of army actions to be judged in such a situation?

- The LTTE was refusing to surrender. It was becoming clear that the defeat of the LTTE and the rescue of the hostages would entail heavy human cost- deaths of the LTTE combatants, conscripted civilians, soldiers and non combatant civilians. What were the options available to the army?

We are then left with the human cost of the operation as it took place. The final estimate of civilian deaths would have to await the estimate of the persons dead or missing as given by the IDPs. This is a task that should be high on the agenda of the LLRC. The government has not given an estimate of all deaths in the last stages of the war. An estimate of zero civilian casualties is meaningless in the face of incontrovertible evidence that there were a large number of deaths of men women and children. We may spend a great deal of time trying to decide whether the events that caused these deaths fall into the category of war crimes or not. What is unquestionable however is that there is a deep moral obligation cast on all the key actors in this drama to acknowledge the human tragedy that was caused by the war, ascertain the full nature and extent of that tragedy and make reparation that would bring solace to the bereaved and heal the deep wounds that have been inflicted in the course of the war. It is within the conditions that have been described above that the issues of accountability as well as restorative justice may have to be framed and conclusions drawn. In that process the deaths of civilians and their plight in the battlefield have to be at the centre.

3. THE APPROACH TO THE TREATMENT OF EVENTS AND FRAMING OF ALLEGATIONS: Issues of Adequacy

In Session 2, the Seminar moved on to its substantive content and reviewed the Report in regard to its approach to the allegations and treatment of the events during the last stages of the war. At the outset it was noted that this section constitutes the base of the Report on the basis of which it goes on to make its recommendation. A series of questions regarding the narrative of the last stages of the war as presented in the Report sought to guide the deliberations of the session. The panelist followed these questions in making their presentations. The Seminar report presents the deliberations in that format in respect of the deliberations on the military operations. A brief presentation was made on the treatment of affected persons prior to and following the end of the war. This presentation did not cover the treatment of the displaced in the camps.

A. The Military Operation

- i. In the Panel's account of the last stages of the war, and the events that lead to the allegations of war crimes, is the panel's account complete, or if not complete, adequate, and has it been able to access all sources of information that are essential for coming to fair and just conclusions concerning the events and actions?***

The seminar panellists found that the account on the last stages of the war as rendered in the Report not complete, nor adequate, if it is taken as an objective narration of the events. They did not perceive the narrative being meant to be so, and to be a document comparable to a policeman's request for a search warrant, which sets out to show sufficient suspicion of guilt. However, since the report has been released to the public and is being treated and used as a historical account, its biases and subjectivity must be brought into account.

In order to be fair and objective, they considered that the panel would have needed to interview combatants as well as eyewitnesses to ascertain motive for some of the acts which are alleged to be criminal. It would need to examine the actual scenes of the crimes instead of merely examining photographs. Thus, in Part I of the report (Mandate, Composition, & Programme of Work), Section D (Interaction with the GoSL), paragraph 22, the panel says that visiting Sri Lanka "*was not essential to its work*", thereby confirming that an actual investigation was never its intention.

In spite of this statement, the seminar panellist noted that the laying out of the events takes the form of a narrative or historical account, suggesting that it is fact rather than allegation. Thus, footnotes are given to previously documented statements or reports, but there is no indication of where the other information came from. It is, of course, understandable that witnesses cannot be named at this stage, though it is still necessary to indicate the capacity of eyewitnesses, whether he or she a civilian IDP, an NGO worker, or a journalist? Often, allegations of the use of artillery, cluster munitions, white phosphorous, etc are made without any indication of the source, or what expertise that source may or may not have in determining whether these were indeed the weapons and munitions used.

The seminar panellists found this to be further compounded in the Executive Summary of the report which, for example says in the section Allegations Found Credible by the Panel, *“Some of those who were separated were summarily executed, and some of the women may have been raped. Others disappeared, as recounted by their wives and relatives during the LLRC hearings.”* Thus by lumping together the unattributed allegations of rape and execution with those made by identified witnesses before the LLRC, the Panel report gives the rape and execution allegations a higher credence which they may not deserve. There are many such similar examples, and it is a strategy subsequently used by the Channel 4 “documentary” *Sri Lanka’s Killing Fields*, in which footage of identifiable Sri Lankan soldiers committing shocking but non-criminal activities is shown alongside footage of unidentified persons committing obviously criminal acts, thereby implying that all the acts shown are criminal ones committed by identifiable SL Army personnel.

ii. Has the panel examined all possible explanations and interpretations of the events and actions before coming to its conclusions?

The seminar panellists found that the report analyzes certain events and draws conclusions which often do not take into account factors that the report itself acknowledges elsewhere. Thus, it was pointed out that while legally, the actions of the Tigers may not have any effect on the culpability of the Government of Sri Lanka or the SL Army, in a report which must examine motive, the refusal to examine the impact of Tiger actions on those of the GoSL and the SL Army is indicative of an unwillingness to acknowledge the possibility that there might be motives other than those alleged by the report.

Thus, in the Executive Summary’s conclusion to the allegations, it says, *“the Panel found credible allegations that comprise five core categories of potential serious violations committed by the Government of Sri Lanka: (i) killing of civilians through widespread shelling; (ii) shelling of hospitals and humanitarian objects; (iii) denial of humanitarian assistance; (iv) human rights violations suffered by victims and survivors of the conflict, including both IDPs and suspected LTTE cadre; and (v) human rights violations outside the conflict zone, including against the media and other critics of the Government.”*

It then goes on to say, *“The Panel’s determination of credible allegations against the LTTE associated with the final stages of the war reveal six core categories of potential serious violations: (i) using civilians as a human buffer; (ii) killing civilians attempting to flee LTTE control; (iii) using military equipment in the proximity of civilians; (iv) forced recruitment of children; (v) forced labour; and (vi) killing of civilians through suicide attacks.”*

The seminar panellist noted that however, there is no attempt to acknowledge the fact that allegations against the Tiger such as *“(i) using civilians as a human buffer”* and *“(iii) using military equipment in the proximity of civilians”* would contribute hugely to *“(i) killing of civilians through widespread shelling”* and *“(ii) shelling of hospitals and humanitarian objects”*, as the SL Army is alleged to have done.

It was noted that it is on very rare occasions that the Tiger actions are specifically mentioned in relation to SL Army action. For instance in paragraph 79 of the report it says, “During the ninth and tenth convoys, shells fell 200 metres from the road, and both the SLA and LTTE were using the cover of the convoys to advance their military positions,” and then goes on to say in paragraph 86, “The LTTE did fire artillery from approximately 500 metres away as well as from further back in the NFZ,” without acknowledging that it was this very tendency of the Tigers to fire artillery and other weapons from close proximity to the civilians that was bringing in counter-battery fire 200 metres away.

The seminar panellists noted that 500 metres is not a huge distance in such a restricted battle space, and it is very possible for even a single shell, or two or three, that could have devastating effect on concentrated civilians, to fall 500 metres off target. One or two shells could kill and injure a hundred civilians, and seem to indicate deliberate intent even when it isn't so intended.

iii. The strategies and actions of the LTTE – doesn't the Panel's account cover most of the LTTE's actions which were observed during the war – use of civilians as a buffer, shooting of civilians who were escaping, conscription of civilians and pushing them to the front lines as cannon fodder, fortifying the no-fire zones, using mobile artillery shooting from proximity of hospitals?

While the seminar panellist agreed with the question, they noted that these actions are not treated in a manner that indicates cause and effect. Hence one can only assume that the Secretary General, for whom the report is said to be intended, is intelligent and experienced enough to draw the appropriate conclusions. However, it comes across as quite strange that a Panel that allows itself to make the most tenuous of conclusions in certain areas, does not think it equally fitting to point out this factor even in passing. It is quite clear that the only reason there is even this solitary description of the Tiger artillery in action 500 metres from the civilians is because it was observed by a senior UN military officer, and that similar observations by IDPs and other less expert witnesses have been ignored. In contrast, the number of detailed descriptions of SL Army activities indicates that there was no such restriction in culling statements of non-expert witnesses.

iv. Why does the report ignore its own evidence of the LTTE's actions in integrating the civilians into the battlefield and its consequences for the options available to the SL Army?

The seminar panellists were of the view that the specific dismissal of Tiger military action in close proximity to hospitals and civilians must be treated in the same way as the entire report. Its purpose is to point out to the UNSG that the GoSL and the SL military look guilty enough for further in-depth investigation. Hence pointing to Tiger violations as a probable cause that might have directly contributed to the civilian casualties would be counterproductive.

It is for that reason that the report refers to the SL Army's attempts to help civilians escape as actions by "individuals", rather than as part of a plan, suggesting that these "individuals" were acting alone and in contravention of the actual policy, which was to kill as many civilians as possible. Similarly, using phrases like "human buffers" instead of "human shields" reduces the perceived severity of the Tiger violations, thereby keeping the focus on allegations against the SL Army.

v. The Panel had no access to the Sri Lankan Government's account of events, but does not openly admit the lacuna and state its implications. In the absence of a full account from the GOSL it falls back on a few statements of the Government which claimed that the war was a humanitarian operation directed at rescuing the Vanni population from the control of the LTTE with zero civilian casualties and dismisses these claims.

On this issue the seminar panellists were of the view that if the report is taken merely as an advisory to the UNSG, it is probably fair to say that the Panel felt it did not have to elaborate on the implications of the GoSL's non-cooperation, as the UNSG would be quite aware of these. However, as noted earlier, they were of the opinion that as a public statement, these need to be explained.

The few statements from the GoSL that the Report quotes (none of which are addressed to the panel, and most of which were made during the war and in its immediate aftermath) have also been taken as statements of fact, and not looked at in the context of political rhetoric and propaganda. The seminar panellists noted that the "humanitarian operation" and "hostage rescue operation" claims of GOSL, which the report tries to use to invalidate the actions taken by the SL military have as much credence as the United States calling the invasion of Iraq "Operation Iraqi Freedom". Indeed to take these literally would be to display incredible naivete at best, or a intent to use things out of context to prove a point. Actions must be compared against an objective model, and not the claims of one party or another.

vi. How should the Panel have dealt with its inability to gain access to the GOSL's full account of what happened?

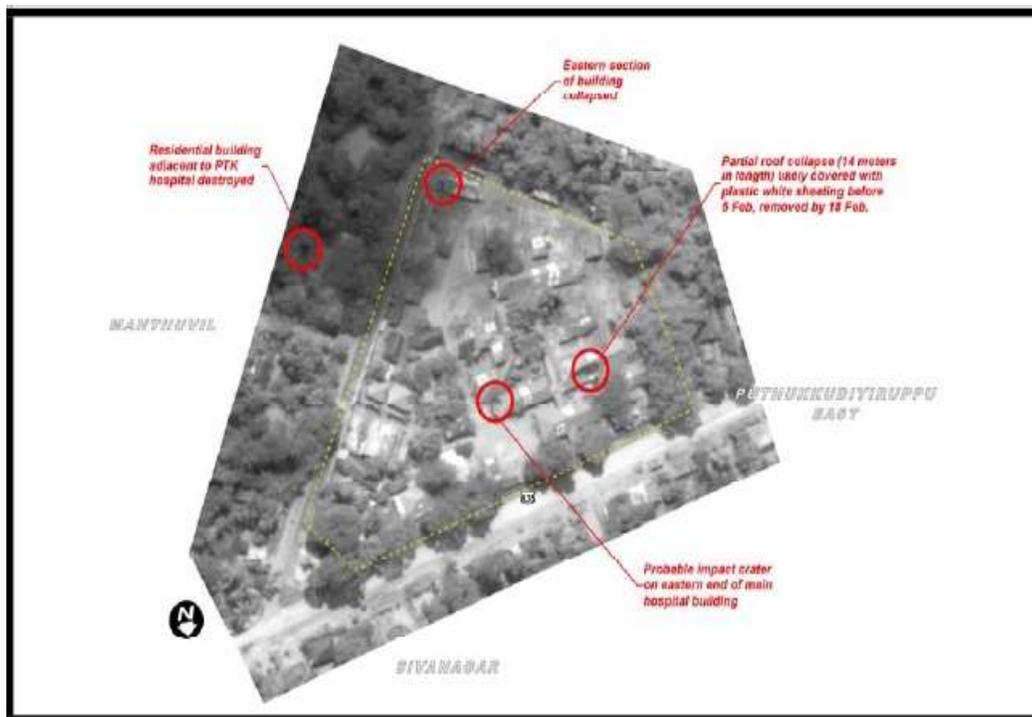
It was noted that the Panel could also have corresponded with the GoSL in a more detailed manner and asked specific questions pertaining to specific incidents. If these had been ignored by the GoSL, it would have been possible for the panel to at least claim to have attempted to get the full picture. But as noted earlier by the seminar panellists, such an advisory report, which isn't supposed to be an investigation has no obligation to be that fair.

vii. The report concludes that the GoSL denied adequate supplies of food and medicine to the civilian population, there was deliberate shelling of hospitals and civilians and that there is a credible allegation that the GOSL committed a crime against humanity by actions calculated to bring about the destruction of a significant part of the civilian population.

The seminar panellists on the military operation did not go into this issue, but noted that there was a lot of confusion and contradictory claims by various organizations. Coupled with the movement of large numbers of civilians right across the Wannu they were of the view that it would be hazardous to conclude that the GoSL simply got the numbers wrong.

On the subject of deliberate shelling of civilians and hospitals, the seminar panellist found that on the basis of the Panel Report, it is difficult to ascertain how this conclusion of intent was arrived at. They noted that as stated earlier the movement of Tiger units and artillery within the NFZs and in close proximity to the civilians would indicate that even with the civilians best interests in mind, it would be very hard to avoid casualties amongst them, simply because of the restricted battle space. The report focuses only on civilian casualties and gives no information of Tiger units coming under fire in close proximity to the civilians, something which many eyewitnesses have admitted to seeing themselves. Leaving this out of the Panel's narrative suggests that there was very little or no military activity in the areas around the civilians, and that therefore there was no reason for any shelling by the SL Army.

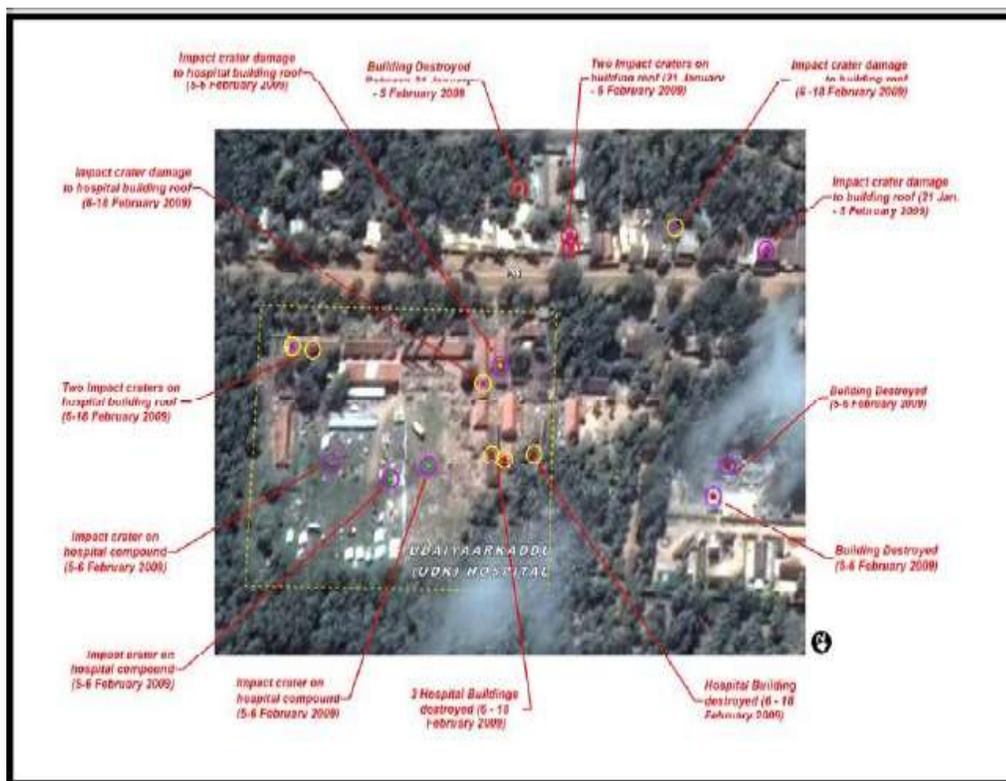
The facts however are different, and a lot of UAV footage as well as SL military statements point to the fact that the Tiger units were actively fortifying and defending terrain even in the NFZs, often relocating high value weapons and ordnance within the NFZs and in close proximity to the civilians, and that far from the civilians and hospitals being easily recognizable islands in a sea of calm, they were right in the middle of an intensely contested battlefield. On this issue the seminar panellists made the following points of clarification.



PTK Hospital (image 3.1 of Annex 3 of the Darusman Report)

The Panel Report also carries a number of satellite images of some of the damaged hospitals, with individual holes marked as shell craters. The pictures themselves don't indicate who fired the shells, what calibre they are, or which direction they came from; and it is left to the narrative to explain this. The seminar panellist noted that several of these images have been cropped very tightly to show only the hospital grounds, and in the case of the PTK Hospital (Image 3.3 in Annex 3), it has been cropped to precisely follow the contours of the pentagon-shaped grounds. Such cropping makes it impossible to see what might have been in immediate proximity to the hospital, or to ascertain by counting shell craters, whether a larger percentage of the rounds were aimed at targets in the immediate vicinity, and not in fact at the hospital itself.

In spite of this attempt to be selective in what they present, it is possible to see that in five of the six images (the Udaiyaarkaddu, Vallipunam, PTK, Ponnampalam, and Puttumatalan hospitals) a major road or highway ran alongside the hospitals and, very likely were routes of movement for Tiger units.

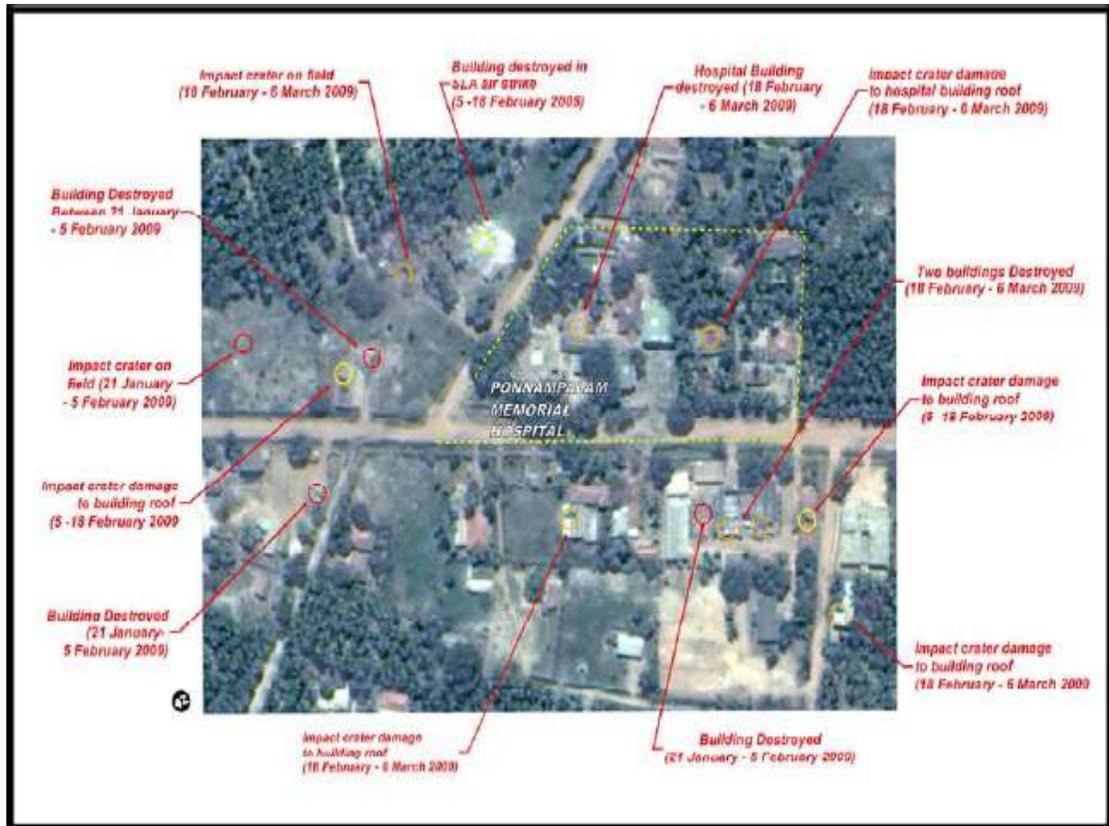


Udaiyaarkaddu Hospital (image 3.1 in Annex 3 of the Darusman Report)

It is also clear in Image 3.1 of the Udaiyaarkaddu Hospital, that of the 17 craters marked, as many as seven have landed to the west and southwest of the hospital, many targeting buildings on the far side of the A35 Highway. It is possible that an examination of a more complete image would show impacts even further away, indicating that the hospital itself wasn't the target, and simply unfortunate collateral damage.



Vallipunam Hospital (image 3.2 in Annex 3 of the Darusman Report)



Ponnampalam Hospital (image 3.4 of Annex 3 of the Darusman Report)

Image 3.4, of the Ponnambalam Hospital shows 13 instances of damage by what is claimed as artillery fire, and one SLAF airstrike. Of these 14 instances, only two occur within the hospital premises, and most hits are recorded to the north and northeast of the hospital. The date of the airstrike isn't exact, but is indicated as prior to 18 February. The 13 artillery hits are dated between late January and early March 2009, indicating a hit every 3-4 days, which is hardly the sort of strike rate compatible with an allegation of deliberate targeting.

In paragraph 91, the report claims that the PTK Hospital was hit every day by multiple-barrel rockets (MBRL) and artillery fire between 29 January and 4 February and suffered nine hits, which is not more than one or, at most, two a day, which is more in line with accidental hits rather than deliberate ones. It is also very unlikely that the allegation of MBRL fire is true as this is a saturation weapon which doesn't fire single rounds. In addition, Image 3.3 of the PTK Hospital, only shows three areas of impact, and it is unlikely that all nine claimed hits impacted so precisely in three areas.

In paragraph 94, the report says that the Tigers fired artillery from the vicinity of the PTK Hospital, but that they did not use the hospital for military purposes, clearly not seeing the incongruity of that statement. It also goes on to say that the Tigers used the hospital for military purposes after it had been evacuated.

These examples of incomplete reporting by the Panel indicates that the damage and casualties in the hospital premises were far less severe, and more in line with the damage visible in the satellite images.

The Report also attempts to use dramatic prose to paint a picture and lend emotion to a narrative that often takes a tangential path to that of the actual dry facts. Even when describing the shelling of the UN personnel of Convoy 11 in late January 2009, the report calls their overnight camp at Susanthipuram Junction, on the A35, as a “UN hub”, suggesting that it was some sort of permanent facility, when it was nothing of the sort. The narrative uses words like “pounded” and “heavy” when describing even the landing of just several shells, and this seems intended to use a tone of voice to suggest prolonged and deliberate shelling rather than random ones.

If one examines the fighting both in northwest SL, the central Wanni west of the A9 Highway, and even in the Eastern Province, there is no indication of any such deliberate targeting of civilians in those areas. The civilian casualties mounted only after Kilinochchi fell in January 2009 and the SL Army divisions crossed the A9. This rather obvious aspect, which would be in contrast to the allegations is never commented on by the report. The fact is the casualties increased as the battle space shrank dramatically, and the Tigers started to replace their own casualties with conscripted civilians and increasingly used slave labour on the front lines.

When considering all of this, it's clear there are major flaws in the Panel's account. The dubious manner in which the Panel exceeds its mandate which does not include fact finding and investigation. The tendentious nature of presenting allegations as the true account of what happened. The lack of transparency in not disclosing the sources of information. Excluding government actions which are not consistent with the Panel's interpretation. The untenable basis on which the charge of extermination is based. The refusal to examine other credible explanations relating to civilian casualties. The confusing speculation leading to the high estimate of civilian deaths. The significant omissions in the report that could provide a different explanation of the government's strategy and actions.

As pointed out before, the purpose of the report is to give the UNSG enough information to take whatever fresh action as is possible. It is not supposed to be the results of an investigation, nor is it supposed to be an indictment that can stand up in a court of law. It is simply put together to show enough credible allegations that serious war crimes and crimes against humanity have been committed by the GoSL, and to overcome the resistance of the latter and its international allies to an independent investigation.

viii. The Panel's account of the government strategy as being the destruction of the LTTE along with the extermination of a considerable section of the Tamil population. Would it be correct to say that from the information given by the panel, the LTTE's strategy was to integrate the civilians into the battlefield and

as far as possible, obliterate the distinction between the combatant and non-combatant, military and non-military objects?

The seminar panellists agreed that it has always been the strategy of the Tigers, and all guerrilla/terrorist organisations. The fact that the LTTE had gradually transformed itself into a conventional force doesn't change that. In the last stages of the war, particularly in 2009, after its units had been broken in battles like Aanandapuram, the Tigers were forced to revert back to a guerrilla force; unfortunately, they didn't have the terrain area to manoeuvre in and had to instead manoeuvre amongst the civilians.

ix. The Government's and Army's handling of the civilian situation regarding the necessity of separating civilians from the LTTE; what were the options; what were the efforts made?

The seminar panellist were of the view that it would be difficult to answer the question without being privy to the actual strategy and policy discussions the GoSL and its military would have obviously had. On the face of it, it is clear that the SL military did try to separate the civilians from the combatants, and that is a basic in modern warfare, particularly since most wars in the second half of the 20th century have been unconventional. In the few occasions where we have seen conventional warfare, there has been a tendency to revert to the unconventional when defeated in conventional battle; case in point being Iraq, where a conventional uniformed army reverted to the guerrilla/terrorist role with the onset of defeat. All of this has made it policy to separate civilians from combatants as quickly as possible in order to fix and destroy the combatants unhindered.

If the GoSL instead had a different policy, namely of lumping everyone together and killing them all, it is hard to see why there was no indication of that policy in either the East nor in the Northwest, and not even in the fighting west of the A9. The SL military also dropped leaflets telling the civilians to come over to the GoSL side; an act that the report states, albeit not in the form of an acknowledgment; something that would be counterproductive to a policy of murder.

It is possible to say that perhaps the GoSL didn't try hard enough in the offensive east to Kilinochchi in late 2008, but perhaps the magnitude of what was to come was not something they thought was possible. Perhaps they didn't believe that such large numbers of civilians would accompany the Tigers.

It is also possible that the SL Army's inability to pin down large Tiger units in the east and even the western Wanni, made them preoccupied with manoeuvre warfare where speed was of the essence to cut off Tiger units from the A9 while keeping others pinned down on the Jaffna Peninsula, holding the diversionary "National Front" on the Muhamalai-Nagarkovil line. Until the loss of the A9 highway, Tiger units were fairly cohesive, and fighting conventionally, and the SL Army would have been concentrating on that problem. It

was after Kilinochchi, Aanandapuram, etc that the Tigers collapsed and started to use the civilians so actively.

x. On the two main war crimes mentioned in the report — civilian casualties, were they intentional? Shelling of hospitals, what were the circumstances? Were they avoidable, indiscriminate, unjustifiable?

The seminar panellist were of the view that it would seem very difficult to find instances of either deliberate killing by the SL military, or even reckless endangerment. They were fighting in difficult conditions against an enemy who was actively using civilians as cannon fodder. Many of these conscripts were killed in droves, but they cannot be said to be civilians if they were armed and manning fortifications. They put down the shelling of hospitals as purely accidental. The damage presented is just not consistent with deliberate targeting. It was noted that anything in war is avoidable if one is willing to stop fighting. But the purpose of war is to achieve certain objectives, and often those do not permit a pause in the hostilities so that every single blurred line may be sorted out.

xi. Government's statements that they had stopped the use of heavy artillery and that they were maintaining the zero civilian casualty objective?

As said earlier, many statements by governments in wartime are merely for purpose of propaganda or for political reasons. The seminar panellists were of the view that it is naïve and wilfully ignorant to take these as literal and expect the battlefield realities to conform to these statements. It is therefore to be presumed that the GoSL meant well with its "zero civilian deaths policy", though the policy cannot stop an RPG-7 where necessary.

The statement that the SL military had decided to cease the use of heavy weapons seems to have been a short-termed decision. It is also highly likely that either this was mere propaganda meant to demoralize the Tiger supporters by suggesting that defeat was imminent, or that the GoSL actually thought the Tigers were closer to defeat than they actually were. If the latter, the GoSL would have reverted back to the use of such weapons. However, it's clear that towards the latter stages, the use of fixed wing aircraft was severely curtailed. Even the report hasn't many descriptions of airstrikes.

x. The Panel does not give us any estimate of the numbers engaged as combatants on both sides to gain some understanding of the scale and intensity of the fighting. What is your estimate of the number of combatants engaged on both sides and the combatant casualties?

The report does make an approximate estimation of the numbers. In paragraph 62, the report names the SL Army units as six divisions (the 53rd, 55th, 56th, 57th, 58th, and 59th). While they are right that there were six division-sized units in action in the Wannu after the fall of Kilinochchi, in reality the units were the 57th, 58th, and 59th Divisions and Task Forces 2, 3, and 4; which would be approximately 60,000 troops. The 53rd and 55th

Divisions which had been on the Nagarkovil-Muhamalai line until the end of 2008 subsequently broke through, while the 53rd secured Elephant Pass, the 55th joined the battle on the mainland in January, adding around 10,000 troops.

The Tigers were thought to have between 10-15,000 troops at the fall of Kilinochchi, but not all of them were of the same fighting standard, and perhaps half that number survived to the final stages. The report estimates, in paragraph 66, the Tiger fighting strength at 5,000 by April 2009.

xii. Given the conditions in the last stages where the LTTE had tried to integrate the civilians into the battlefield and as far as possible obliterate the distinction between the combatant and non-combatant, military and non-military objective what do you think were the options available to the army?

The seminar panellists noted that one option open to the SL military was to slow down and use probing attacks to get the civilians out. However, the use of artillery would still have been necessary to keep the Tigers pinned down and prevent a breakout. Personally very few options were open to the GoSL if they wished to both ensure that the Tigers didn't escape, while still minimizing civilian casualties.

From a purely military perspective, it's possible to say that a slowing down and a laying siege might have been effective. However, given the conditions that the civilians were in, and the intense international pressure to cease hostilities, such a slowing down would not have been practical if victory was to be achieved.

xiii. How would you comment on the Panel's estimate of civilian casualties.

In paragraph 137, the report says that *"Two years after the end of the war, there is still no reliable figure for civilian deaths, but multiple sources of information indicate that a range of up to 40,000 civilian deaths cannot be ruled out at this stage,"* which is a very ambiguous statement, and without any explanation of why other estimates quoted in the same paragraph have been rejected. So that even figures as low as 2,800 (the UNHCHR figure) similarly cannot be ruled out on the same grounds.

B. The Care of the IDPs

At this stage the Session moved on to examine the treatment of civilians displaced by the war. The seminar panelist opened the discussion tracing the history of GOSL efforts to take care of the humanitarian fallout of the war with the establishment of dedicated institutional arrangements to manage resettlement and rehabilitation operations. Thus the establishment of a Ministry for Resettlement and the current Presidential Task Force underlines GOSL commitment to a policy of protecting persons affected by the war.

Thus it is relevant to note the GOSL's efforts for the provision of services to persons affected by the war, first organized through the land route and when it became hazardous due to war conditions, by sea. Thus Jaffna was supplied by sea when the land route was cut-off, including

power, purchased at the highest unit price and at double the rate at which electricity was supplied elsewhere. The services provided by GOSL included medicine, food and transportation of people.

As the war moved to Wannai there were about five hundred staff of humanitarian NGOs staying behind, excluding the UN related staff and the Government machinery at work. Towards the third quarter of 2008 the non-government staff was requested to leave for their personal safety, though interpreted as a deliberate move to get rid of witnesses. The departure of UN staff is determined by the security conditionalities they are required to observe, leaving behind the local staff that stayed on as volunteers. While they could have gone on, the respective employers terminated their contracts making their positions “non-official”. Only the ICRC was requested to stay.

The supplies to Wannai were organized in three ways. There were the monthly rations to IDPs distributed through the World Food Programme (WFP). There were supplies by GOSL to IDPS who became displaced prior to 2005 through the Ministry of Resettlement. Third was stocks provided to multi-purpose cooperative societies. In addition service deliveries such as education and health continued to function until about August 2008. The supply of essentials continued to be provided by the land route until it became impossible due to war conditions, when the sea route was opened up. It is also important to note that the District Secretaries were required to maintain buffer stocks of basic food items. At this point insurance companies refused insurance between Trincomalee and Mullaitivu unless the GOSL took over the cost of the vessel if damaged or destroyed. These were the conditions under which humanitarian supplies were maintained in the war affected areas.

Regarding the issue of civilians coming out of the war area, the seminar panelist noted that in the context of the living conditions that existed in the LTTE controlled areas, the civilians would have come out if there was a way. The panelist was also of the view that there were no attempts to deliberately short supply food and relief supplies, whereas there were severe logistical problems in maintaining the supplies and operational problems in keeping the supply routes open. The panelist also commented on the possible numbers of persons trapped in the Wannai. The most feasible assessment would be in terms of the numbers of ration cards on the basis of which WFP supplies were being distributed, which were in the region of 300,000 towards the latter part of the war. In regard to medicine and medical supplies it is possible that enough was not going into the affected areas. The situation regarding the use of medical services was a complicated one and towards the end both the LTTE and civilians were getting hurt and being treated without distinction. The hospitals were treating both.

C. Discussion:

At this stage the session went into open discussion.

The major issue that was addressed during the discussion was that of the intent attributed to the GOSL military operation by the Panel Report in regard to exterminating a section of the Tamil population constituting a part of our own population due to ethnic reasons. The seminar panelists noted that it is necessary to examine this attribution of intent also in the context of the

military strategy and operation, particularly in terms of the professionalism with which it was conducted. Several considerations pertinent to the issue were noted.

- First is the technological improvement in the conducting of the operation. The charge has been made of indiscriminate shelling, however the seminar panelists noted that the Sri Lankan military had acquired and used UAVs very early during the war reducing the information time gap making the targeting of fire quite accurate. Indeed it has already been pointed out that there is no evidence to suggest indiscriminate shelling.
- Second was the adaptation of the operation to fighting with the non-conventional strategies adopted by the LTTE, though the LTTE in turn seemed to have adopted more conventional modes of war. However the tactics of the military proved more effective as the fighting got confined to smaller areas where conventional fighting becomes increasingly difficult and the military was able to use the tactics adopted and adapted to its advantage.
- Further aspect of professionalization of the military was the extensive training exposures of the senior personnel to humanitarian laws in the conduct of the war. They knew what was right and wrong and also knew the consequences of the action, and that one got to be more careful about what you do.

Therefore basically from a military point of view it does not make sense to conclude that it would have to conduct an operation that required ever indiscriminate killing amounting to extermination of Tamil people that got caught up in the battle.

Nor do we have evidence of such killing. There are no statements of soldiers lining up and shooting people. It would be just impossible to hide that kind of actions in the modern day. In fact if the intent was to eliminate Tamil people the question arises as to why the military used only artillery. Indeed the question also arises as to why when the combat stops civilians keep coming out of the area whatever the conditions into which they would be walking into if there was a policy of killing them off and there was no reason for the military to say that the combat operations have now stopped.

Commenting on no-fire-zones the seminar panelists noted that the military objective of war is to find the enemy and destroy. In the context of the ground situation in the last stages of the war, with the fighting getting confined to increasingly smaller spaces, the military objective of destroying the enemy became more and more complicated and the same number of civilians being pushed along with the combatants occupying the same restricted spaces. That was probably an important reason for the Government to state that they would not use heavy weapons in the last stages of the war.

It would seem that the military campaign on the government side was not to take any civilians, because from Mannar they kept pushing civilians up to Punarin, into Kilinochchi and then moved down into Mullativu. They seemed to have followed a policy of pushing everyone out with the result that a very large number of people were trapped in Mullativu. It is difficult to hypothesize the reasons for not settling people in areas that were captured as opposed pushing everybody

out as it would seem to be a part of the military strategy. In contrast in the east the civilians were taken into the government areas.

It is perhaps true to say that the focus on civilians was less important as against destroying the tigers. Probably not much attention was paid to the fact that this would eventually lead to becoming a huge problem at the end, which some saw but only at the latter stages of the movement towards the A9. Even at that stage it was a case of trying to understand which way the battle would go. It is likely that the military was focusing on eliminating the core tiger units first and dealing with civilian concerns later. It serves to bring out the uncertainties that were associated with the war in the north unlike in the east.

It is also important to note the difference in the civilian context in the east and in the north where the Wannu population had been under LTTE control for a long time. They would have family member in the LTTE fighting cadre. The east is also ethnically more heterogeneous. It would have taken a lot of determination for the civilians to go towards the fighting and through that fighting on to the army side in the Wannu which was not the case in the east.

The issue of the use of heavy weapons was raised in terms the question of proportionality. The Panel Report attempts to make a military assessment of the government strategy and it is important to consider as to what alternatives were available at the time to the government forces. Specifically the issue is about that in the context of the civilian population and the LTTE being confined to a very limited space of the 2nd and 3rd no fire zones and the LTTE being no longer mobile, whether the armed forces had other means to defeat the LTTE without the use of artillery and mortar attacks. Commenting on the issue the seminar panelists stated that it is difficult to interpret Government's announcement of ceasing the use of heavy weapons.

However what we do know is that heavy weapons were used right to the end. About the tiger units becoming less mobile what is important is that it is when units are less mobile that the use of artillery becomes even more necessary. Artillery is something that goes very well against fixed positions rather than a mobile unit. It is difficult to say how much of artillery fire is indiscriminate.

In terms of options, the issue is also as much military. But it is also important to understand that there was a certain amount of political pressure, for one thing civilians were continuing to be in an extremely precarious condition without sufficient food and medicine. There is no reason to think that any delay in the conclusion of the operation would have made it better for the civilians. At the time the Government was under pressure to come into a cease fire to negotiate may be for the escape or the movement out of the tiger leadership. That is outside of the military strategy. While these factors too should have weighed in the considerations of strategy, there is always cost implications when you do things quickly.

On the issue of targeting of hospitals it was suggested that at least two narratives are possible, one being that these were accidental and the other being that they were strategic because of the buildings being occupied by combatants. The specific question then is as to what is the usual protocol that is adopted by Government as well as humanitarian agencies in terms of

ascertaining information. What is the situation of a facility such as a hospital if on the basis of available information is occupied by combatants? The response of the seminar panelists was that during the last stages there was no doubt that both civilian and combatant casualties were treated in hospitals. However the story of hospitals being deliberately targeted is highly unlikely as there is no substantive evidence to suggest such military actions and the shelling of mortars are not very accurate. A more important factor to be taken into account is the density of civilians in these areas and as such that some civilian casualties would be inevitable. While there have been Government reports to say that hospitals were never hit, what is important is that it is not military strategy or tactics or standard operation practice.

Thus it is stated that whenever informed that hospitals and civilians are in line of fire, the firing momentarily stopped for a period of time and gradually increased again. This action could be understood as an indication that the Government, acknowledging that the fire was hitting something by mistake, shifting the fire. In regard to question about the mechanism to find out whether there are combatants in civilian areas and installations, the usual mode would be to deploy special forces which became increasingly difficult and risky as the battle occupied fast decreasing extents of territory. Increasing reliance was placed on direct observation. Further during the last stages of the war tiger combatants became increasingly indistinguishable by dress with more being dressed in civilian attire, as is demonstrated by a particular tiger footage of an armored vehicle where out of about four to five crew members only one or two are in uniform.

The issue of numbers was discussed extensively. It was stated that there is no authoritative information on the number of unaccounted civilians. There are estimates of three hundred and sixty thousand people around 2007 and 2008 in the war affected areas out of which two hundred and ninety thousand have been accounted for as displaced. There are guesses of about twenty to thirty thousand that might have got out of the war zone before Kilinochchi fell. There is no account of the rest. The participant raising the issue considered it the duty of the State to account for the numbers. It was pointed out that the administrators in that area would have known how many people there were, because they were distributing food. It was also noted that this is not the first time this has happened. From 1958, 1961, 1971 and 1987-1987 we have never counted the people who died and who were the victims. If we are move towards reconciliation it is the duty of the State to fulfill the feelings of those the people who have lost the members of their family.

The participant noted that when the LLRC was moving around hundreds may be thousands wanted to go and meet the Commission, though all of them were not given an opportunity. The wives of Yogi and Balappa raised the question of their surrender before the LLRC. They stated that they surrendered together as a family but no one knows that happened to them. We need to know what happened to them. Questioning why the disclosure moved out of the country to the Panel Report and Channel 4 etc., the participant opined that there is no space for dissent especially so far as the Tamil people are concerned. Moving on to IDPs, and questioning “why were they held so long”, the view was expressed that in comparison with the treatment of persons affected by the Tsunami the State has not demonstrated the same concern to sort out issues of survivors in respect of war-displaced persons.

On the issue of comparing the State response to the persons affected by the Tsunami and the War, the point was made that it is a comparison of totally different kinds of displacement and as far as war affected IDPs are concerned the imperative of balancing humanitarian and security consideration as well as the unprecedented scale of displacement must be taken into account in assessing the rehabilitation operation. It was pointed out that there was no way that the security considerations could be ignored as up until the end of the year there were mopping-up operations and in that context the separation of civilians from combatants was imperative before IDPs could be released.

On the issue of the conditions of IDP camps a participant made reference to a report of the World Health Organization (WHO) by a team of Sri Lankan medical personnel on the basis of which the Government did take remedial action as recommended. The report and Government's action thereon was confirmed by the seminar panelist. In fact the panelist stated that the Government had set a 180 day timeline to start the process of releasing IDPs. While there was pressure on the civilian side for releasing of the IDPs the panelist stated that the Government had briefed UNHCR on the programme for the release of IDPs. It was also noted that a major concern the Government was called upon to consider in releasing IDPs was the de-mining of the war affected areas.

The participants agreed that an account of numbers is necessary and is a responsibility by the families that lost some of their members, while at the same time recognizing the complexity of the task, not the least the appropriate modality for counting the numbers. In this regard reference was made by a participant to a household level survey being currently carried out and the relevance from the point of view of establishing numbers unaccounted for in view of the fact that there are families where there are no survivors and in such cases it would not be possible to identify persons who lost their lives on account of the war. In this regard the point was also raised as to the numbers of LTTE cadres and the number of combatants killed. While noting there is no account of such numbers it was observed that during the last stages of the war differentiating combatants and civilians became extremely difficult as civilians were being indiscriminately conscripted for operational purposes by the LTTE.

The discussion while noting that genocide intent would not be tenable questioned as to why the Government was reluctant to make a statement in regard to the unaccounted civilians in the context of the operational imperatives of defeating the LTTE. The suggestion was made by the participant raising the issue that in the real last days of the battle field executions did take place which were beyond the military operations of the war. While such killings have taken place elsewhere in other battles and cannot be condoned, the participant opined as to whether the Government while not being guilty of a policy of genocide was reluctant to enter into an area of accountability that could have led to a chain of accounts in respect of individual acts that could have been construed to have taken place on a sufficiently large scale. However reference was made to the earlier discussion where panelists noted that there were no stories of indiscriminate killings in the battlefield being related by survivors.

The discussion of the theme of the military operation and care of IDPs ended on this note.

4. THE APPLICATION OF INTERNATIONAL LAW: Issues of Relevance

This session sought to capture some of the salient legal aspects emerging from the United Nations Panel of Experts' Report on Accountability in Sri Lanka. The session was divided into two sub-sessions. The first sub-session was on the authority of the UN Secretary General (UNSG) to appoint a Panel of Experts, and to publish the Panel Report. The second undertook a legal analysis of the Panel Report.

The moderator of the session set out certain key questions that arise in respect of the authority of the UNSG to appoint the Panel of Experts. It was observed that the UNSG is empowered under Article 99 of the UN Charter to bring to the attention of the UN Security Council any matter that could in his opinion threaten international peace and security. Such power may be exercised unilaterally without the consent of the UN member states. In such a context, it was well within the power of the UNSG to appoint a Panel of Experts to advise him on a matter that could potentially threaten international peace and security. However, it was pointed out that the UNSG sought to invoke his implied powers under the Charter instead of proceeding under Article 99. The exercise of such implied powers requires the consent of the member states. This could explain why the UNSG publicly stated that he would not proceed any further unless and until he obtains the consent of the member states or the state concerned. The importance of the May 2009 Resolution in the UN Human Rights Council (UNHRC) was also highlighted. The UNHRC member states appeared to have rejected the proposal for an international investigation when the matter was discussed in 2009.

The release of the Panel Report into the public domain raises certain questions of propriety and international impartiality expected of the office of the UNSG. Article 100 of the Charter appears to place an obligation on the UNSG to refrain from any actions that may influence member states or undermine the international nature of his office. The release of the Panel Report could be understood as part of the UNSG's strategy to obtain the necessary consent from the member states to exercise his implied powers to establish a mechanism for international monitoring and investigation. Hence the release of the Report was intended to shift the opinion of the states from that which appeared to have been articulated in the UNHRC in May 2009.

It was concluded that this course of action was not prohibited under the Charter. Thus the UNSG did have the authority to appoint the Panel and release the Panel Report. However, serious questions about the propriety of releasing the Report into the public domain will continue to be asked.

During the discussion that ensued, one participant questioned the usefulness of splitting hairs over the authority of the UNSG to appoint a Panel and release the Report. It was contended that no other state had raised an objection to the appointment of the Panel. It was agreed that the

UNHRC had not objected to the Panel's appointment even though several sessions were held after the appointment was announced. Such circumstances could reveal the tacit consent of the member states to the appointment of a Panel. However, the UNSG would still require the consent of the member states if he wished to act outside his express powers under Article 99. One of the session Panelists responded stating that even though the issue was somewhat technical, it is still important to discuss the nature and scope of the UNSG's powers. Moreover, it was appreciated that the UNHRC is not always the best reflection of the will of the member states, as voting patterns within the UNHRC are deeply politicized.

The session concluded with a sentiment expressed by one participant that Sri Lanka should not lose sight of the *realpolitik* elements of the issue. It was observed that international pressure was largely a response to the present government's reluctance, or perhaps apathy, to find a sustainable political solution to the ethnic question. Hence a viable power sharing arrangement with the Tamils was seen as a means of reducing, if not completely neutralizing, the threat of international investigations into war crimes in Sri Lanka.

In the next sub-session, the moderator posed several questions to the participants concerning international humanitarian and criminal law. The first question related to the precise body of international law that was applicable to the armed conflict in Sri Lanka. Since Sri Lanka has not signed the second Optional Protocol to the 1949 Geneva Conventions, there was no international humanitarian law convention that was directly applicable to the non-international armed conflict that took place. However, customary international law remains applicable, as this body of law binds all states. The fascinating feature of customary international humanitarian law is that it is not precisely laid down anywhere. Customary law is discovered by reference to state practice and *opinio juris*, which relates to authoritative opinions of law.

The second question concerned the applicability of the Rome Statute of the International Criminal Court. It was observed that Sri Lanka had not ratified the Rome Statute. Moreover, both the ICC Prosecutor Luis Moreno-Ocampo and President of the Court Sang-Hyun Song had publicly stated that no investigations could take place without a UN Security Council resolution. Professor Lakshman Marasinghe later discussed the issue in greater depth during his presentation.

Next, the moderator raised the issue relating to the standard or benchmark used by the Panel to determine the necessity of investigation. It was observed that the necessary standard was that of a 'credible allegation'. The question of what criteria could be used to deem some allegation 'credible' was also raised. The criterion cited in the Panel Report appears to be 'reasonableness'. This aspect was also discussed during Prof. Marasinghe's presentation.

Finally, the Moderator referred to more specific legal issues such as the principle of distinction, an issue that emerged during the previous session on the counter narrative. The principle of distinction concerns the fundamental obligation on all participating forces to distinguish between civilians and combatants. International humanitarian law prohibits the targeting of civilians. However, the law becomes more complicated where civilians and combatants are found in close proximity. The standard used to determine the legality of action is twofold: first, no party could willfully cause the death of civilians; second, the unintentional killing of civilians cannot be

disproportionate compared to the military advantage gained by targeting military objectives in close proximity to the civilians. It was observed that the legal concept of willfulness also encompassed the concept of recklessness. Hence, even if the killing of civilians was unintentional, such killing could be unlawful where the party acted recklessly.

Prof. Marasinghe presented an interesting argument relating to the ICC Prosecutor's powers under Article 15 of the Rome Statute. He contended that the procedure laid down in the Statute permitted the Prosecutor to begin a preliminary investigation *proprio motu* on the basis of information on crimes within the jurisdiction of the Court. Relying on the *travaux préparatoires*, it was argued that such a procedure could in fact be adopted against a non-party state and without a UN Security Council resolution. Hence, Prof. Marasinghe opined that notwithstanding that such a course of action has not been adopted thus far, the ICC Prosecutor could initiate a preliminary investigation on his own.

Next, Prof. Marasinghe criticized the Panel for adopting an inadequate methodology for assessing facts and allegations. It was argued that if the methodology is flawed, the conclusions of the report are also fundamentally flawed. Prof. Marasinghe questioned the adequacy of the 'reasonableness' standard to determine the credibility of allegations contained in the report and to recommend further investigations. The reasonableness standard was described as being too subjective under the circumstances. It was also contended that a more appropriate methodology would have included the opinions and explanations of the parties who stand accused. Hence the methodology found in the Panel Report was described as seriously flawed.

During the discussion that ensued, one participant inquired as to why Prof. Marasinghe viewed the reasonableness standard as inadequate, particularly given the fact that Article 15(3) of the Rome Statute itself refers to a 'reasonable basis' when discussing the Prosecutor's powers to proceed with an investigation. The participant argued that the reasonableness standard was the only standard that could be legitimately applied when determining the appropriateness of launching further investigations. As the standard of 'beyond reasonable doubt' only applied to the finding of guilt, a much lower standard could be adopted when dealing with more preliminary questions such as the question of whether to proceed with investigations or not. Prof. Marasinghe responded to this contention by observing that prosecutors have a duty to assess the chance of a case being proved beyond reasonable doubt before proceeding to investigate further.

At the conclusion of this short session on the legal aspects of the UNSG Panel Report, some sentiments were expressed in relation to the likelihood of Sri Lankan war crimes trials ever taking place. Though such trials remain unlikely, neither the counter narrative nor the legal analysis of the Panel Report dispel the need for a more sincere discourse on the events that took place during the final stages of the war. For instance, the counter narrative does not adequately deal with the specific issue of recklessness, particularly when heavy artillery was allegedly used in the second and third NFZs. Such issues amplify the need for domestic accountability and highlight the value of more detailed independent investigations in the future.

5. THE ASSESSMENT OF ACCOUNTABILITY: Implications for National Reconciliation

The seminar session on reconciliation was a preliminary discussion on this challenging task. The panel of three members made short statements and expressed views on different aspects of processes underway and the challenges ahead. Papers and written statements were neither commissioned for, nor provided at this session. The discussions did not address directly some of issues related to reconciliation that come out of the specific events of the last stage of the war mentioned by the Panel Report to the Secretary General of the UN (POE Report). The allegations examined by the POE Report form a narrative that warrants examination for content and truth and has implications for reconciliation and healing that is needed. The manner in which the military conflict was concluded, the government narrative of its purposes and methods used for a humanitarian effort to release the civilians as well as inflict a decisive defeat on the LTTE, and the examination of events from a different perspective, have the possibility to contribute in their own ways to processes of reconciliation. The government's claim of purpose and the counter claim alluded to in the POE report are so divergent and place the civilians in somewhat different positions; as beneficiaries of release and rescue or victims of deliberate harm.

The challenges for reconciliation are clearly many and varied and could not be examined as part of a discussion that was seeking to be better informed and asking questions about the two opposed narratives. As much as the citizens, who out of necessity prefer the government narrative of need and intent to rescue, there are those who would have accommodated the LTTE and their fight to establish a separate state. And there are others who would need a more complex narrative that sees both polarized narratives as flawed and likely to unwittingly cause harm and requiring modifications. A proportion of population that was concentrated in the designated no-fire zones (NFZ) at the last stage of the war is likely to have feelings of a defeated and vanquished people. It is also likely that parts of the population were coerced, trapped, fearful or confused, and the POE report narrative acknowledges their existence with reference to killing by the LTTE of civilians attempting to flee the NFZ. The distinctions between the LTTE fighters and civilians were blurred and thus the difficulty of establishing the civilian identity of casualties.

The discussions in the previous sessions seemed to indicate that a wholesome reconciliation process would not begin from a single starting point nor be based on a single overarching narrative, especially with regards to the actions taken by GOSL and the LTTE throughout the conflict and during the last phases of the military action. Furthermore, it was also evident that the interpretations of the causes of the conflict, or the *root causes*, and their changes over time would be a necessary and on-going conversation within and across various groups. Some held

that many causative factors had changed in character over time and new ones had emerged. How this discourse unfolded was also important for the reconciliation process.

The simplistic and post 11 September 2001 language of a *war against terrorism* and placing Sri Lanka's conflict in that frame robbed the situation of some of its essential features. Terrorism as an instrument had been used extensively by the LTTE during the nearly decades long armed conflict. A large effort had been made by the LTTE to portray the actions of GOSL forces as state led terrorism warranting responses. That the war had been brutal in the end, in the middle and at the start with untold misery heaped on civilians by actions and missteps of all protagonists is unlikely to provide much comfort for the victims and survivors. The essential message of the first session had to be kept in mind when thinking of healing and reconciliation; war is about killing, maiming and breaking the spirit of a people. The military defeat of the LTTE and the flow of civilians from the confined NFZs have not altered some factors that drove the conflict. Perhaps included in this is the continuing low trust between elites and political leaders of the Tamils and the Sinhalese regarding each other's motives and objectives. Also of possible importance is the difficult journey that Tamils will have to make regarding how various groups representing their interests acted to bear that responsibility. Leadership and representation will continue to be a vexed issue for the Tamils, as well as for all other ethnic groups in the country.

Different types and forms of reconciliation are likely to be needed with many possible paths for each of them. There is a danger in perceiving the processes of and actions towards reconciliation as though it were some thing that can be apprehended and delivered. Also compounding the danger might be the discourse on the political solution as a necessary precursor to reconciliation, and viewing it as some special arrangement, hitherto unknown that can be established within Sri Lanka when discovered or found. The discussion in this session touched briefly on these issues but highlighted the need for further, informed conversation involving those who are engaged in various aspects of reconstruction, rebuilding and reflecting on the long and destructive journey the country had taken to enable healing and reconciliation.

The panel comments and the discussion that followed provided hopeful signs as well as serious cautions that both the present government as well as citizen's groups and private institutions may do well to heed.

We should expect the perceptions about the processes for reconciliation and rehabilitation to be diverse and depending on realized outcomes and therefore changing over time. The perceptions of what is taking place and its pace and content seems to cause consternation among those who view that the will, interest and resources available to government are not being applied effectively. The pace of activity and rebuilding appears to be slower that what seem possible and the participation and awareness at the local level of what is being done inadequate. This is a missed opportunity. Unless the basic infrastructure and social services are provided quickly and at a standard comparable to the rest of the country, the perception will grow in some quarters especially in the north, that the ruling party at the center is first calculating its political advantage and positioning itself before considering the need to move the people of the north rapidly towards integration with the rest of the country. This prospective perception is unfortunate and will tend to mask the positive feature the expression of wanting

the central government to be strongly involved in playing a leadership role by providing guidance and resources for development.

What is possible should be done quickly and done well and the people in the areas being reconstructed should be engaged and involved. The reasons why the physical and social infrastructure cannot be built and upgraded rapidly is also part of the on-going discourse. Bringing the reasons for the conflict, the narrative of neglect and inadequate public investment into the present situation means that the features of the present context cannot be ignored. Also what cannot be ignored is that it is the very reason then that public investments might take time to take root, systems have to be built after a long period of poor maintenance and this would apply to the physical as well as social infrastructure. The manner in which the citizens in the war and conflict affected areas engaged with the public service with private business, with agencies of authority was different among them and different from that of other less affected parts of the country.

The perception of government tardiness and relative lack of interest, even a form of *benign neglect*, becomes a convenient narrative, an ascribed motive, that is amplified in narrative making solutions more, not less difficult. The tendencies that developed over time in a population harried and hampered and devastated by armed conflict and warfare will not be shed forthwith. Habits may be ingrained. And those that have access to willing listeners may underplay their advantages to prospective resource providers about what is not done. Circumstances, habits and incentives may inadvertently promote a culture of complaint missing the opportunity to quickly engage government at various levels and participate in finding equitable and feasible solutions to pressing needs.

The diagnosis of post conflict problems also raises many issues and is particularly important to the processes of reconciliation. They highlight some of the intrinsic and embedded challenges in the Sri Lankan situation. Specific needs have to be addressed, people have to be involved and engaged, solutions have to be appropriate and outcomes sustainable. In the recent past, many struggles have ensued in establishing control over both the identification of problems and the feasible solutions to be provided with national sovereignty and a high degree of local level control. The services needed in the healing process are illustrative. There is no agreement about the extent and nature of the problems of trauma. This discussion requires, as in other cases related to reconciliation and reconstruction, a sensitive and considerate approach. The issue may not be of a well-defined problem that only requires the application of more of known resources. Some argue that the need for counseling is not as acute as made out and the modes of counseling needed are different than in developed countries. This is an on-going discussion among professionals and practitioners who are struggling to arrive at feasible solutions within resource constraints and not opt for off-the shelf solutions that may not be efficacious and cannot be delivered effectively. There might be an important lesson here for other aspects of reconciliation; review other experiences, be strong in awareness of the particular and specific features of the situation, and do not lose control of the processes or control of agency.

Enabling local governments to perform well and be receptive to the needs of their constituents will be a major challenge. If these local bodies are able to quickly engage the citizenry, mobilize resources and expend them with a relatively high degree of accountability, it will, perhaps, demonstrate powerfully what can be achieved under the prevailing constitutional arrangements. The demonstration of the principle of *subsidiarity* in action could have a powerful effect on community, on purposive representation and build a sense of ownership of institutions of government from the foundation. Of course, much of this will be contingent on the involvement of the local government in the post war development, a patient trust in these institutions while they develop and gain in capacity and a willingness to prevent them being undermined by institutions of central government. The role of security and military will continue to pose challenges and they cannot be dismissed, as some tend to do, as unnecessary or as inevitable and to be tolerated. Awareness and consideration is needed of both the realities and fears of the people in the war affected areas as well as the concerns of the government to prevent reassembly of militancy and armed violence. There does not seem to be a simple solution but awareness and vigilance is needed of the dangers of the prevailing arrangements, the possible adverse and beneficial consequences to different groups. The roads to reconciliation will also require that all parties, all citizen groups are reflective and careful in their conduct in advancing towards truth.

In Reconciliation every step is important. Joe William opened the panel with an overview titled “The Challenges of Reconciliation”. He made the point of the need to understand the well-ground realities related to reconciliation. He noted that the analysts and writers on reconciliation, including the work of John Paul Lederach, tend to view reconciliation not as a goal but as a process and “a long and frequently arduous journey where every step is important”. There are misconceptions about the reconciliation process that we have to keep in mind. Those working in the field have to be aware that no step in the process demands that victims forgive and forget and go on. Governments have used the notion of reconciliation for the wrong type of activities, calling reconciliation by various terms to support their work that promotes a ruling party agenda. Reconciliation is necessary for both a sustainable democracy and for developing a culture of respect for human rights. The short term goals of policy makers, sometimes, is to promote reconciliation when the challenge is how to achieve that end. This will take time and might encounter disappointments. Another starting point is to address some of the “structural injustices” that existed prior to the conflict.

The state of the art from the review of current thinking on reconciliation calls for healing, justice, truth telling, reparations and education. Joe commented on two specific areas, healing and education. After a long period of political violence, healing is needed at individual and societal levels. Surprisingly, it seemed that this is not taking place as needed. Healing is promoted by counseling. Counseling for those who have been affected by war and conflict is largely unavailable and what is provided is inadequate. Capacities have to be developed and improved to provide the assistance to those in need. Surprisingly, the government is not encouraging this activity at present.

For too long, education has been perceived as an instrument of domination subjugation and subordination of populations. We have had segregated education, dramatically different views of

history and these perceptions are a source of potential conflict and have to be kept in mind. Education can also be an important focal area for reconciliation. In order to have a reconciled society we can make a start and students at all levels, primary, secondary and university levels can gain an understanding of different interpretations of history, examine negative aspects of narratives and their potential adverse effects. In order to have a reconciled society we might do well to focus on this area. This will enable people to gain a mutual understanding of the consequences of the conflict, consequences of negative historical interpretations and help to rebuild relationships. Language is another entry point with possible engagement with central government ministries. Bilingualism to enable people to understand each other and bring them together is promoted by the Ministry of National Languages and Social Integration and this opportunity should be seized and advanced.

There is a resistance to the concept of reconciliation. Some dismiss it as being a Christian concept, some that the South African experience is not useful and that endeavor was not successful. This has to be kept in mind. Reconciliation is crucial at the political level. This gathering might have done well to have had people with differing political perspectives. That might have given us an opportunity to address the varied approaches to the issues of reconciliation that also have to be addressed. “A peace builder must have one foot in what is and the other foot beyond what exists” and it is in this direction that we might travel when considering the challenges of reconciliation.

There is a perception among some, noted Mrs. Gnana Moonesinge, the second member of the panel, that reconciliation is an easy objective. There is a facile use of the term while it is likely to have different meaning to different groups. We have to reconcile the LTTE combatants, the government and civil society and then examine how we can approach this process. The government has to take a positive approach. An acrimonious war went on for many years and Tamils have faced many problems, and discriminations of many forms since 1956. The end of the war does not directly open up space for reconciliation. A well planned deliberate move has to be undertaken, so that we can meet at some point and the “air cleared”. This will have to be handled with a great deal of sensitivity and require concerted effort in building confidence and trust. The north has the impression of a place of siege with heavy military presence, increasing symbols of Buddhism when only the military is likely to have Buddhist adherents. The Tamils in the war affected areas are likely to have a sense of being the vanquished foe and hence warrant sensitive engagement, even some degree of magnanimity and conciliatory pampering. We also have the victims of terrorism, they too need careful and sensitive handling.

Mr. Javed Yusuf, the final member of the session panel, said that although there is a broad sense of what needs to be done, reconciliation means different things to different people. It is clear that isolated and small scale interventions might be insufficient to meet this need and that the state must take the leading role. The state must create the enabling environment so that the efforts from various sources can be fruitful. The Tamil community has suffered the most. He also expressed the view that, considering the events that unfolded, it was a grave mistake that the Tamil community made, despite the conditions they faced to embark on an armed struggle to redress their grievances. Some of the problems that they face now are also related to that decision. Those who initiated the struggle lost control of it. Now the state has to actively and

sensitively reach out to a community that feels victimized and marginalized, give them confidence and hope. Some people also draw attention to the feelings within the Tamil community of being treated as a vanquished and defeated group and that has to be handled with great care. Civil society has a responsibility to nudge the state in this direction. While the Tamil community suffered the most, the Muslim community that was almost a by-stander to the conflict got drawn in, and they too have to be integrated in the reconciliation processes. The Tamil community expressed a sense of grievance that the Sinhalese were dominating the structures of state and government. A voice within the majority Sinhalese, characterized by some as the Sinhala nationalists, is also one of grievance that too are victims in this conflict and this has to be addressed and not dismissed as unrealistic if a process of reconciliation is to achieve any success. The conflict developed into an armed struggle, that phase is over and now communities are more polarized than when they started.

6. CONCLUDING REMARKS: Beyond the Report of the UNSG's Panel

The seminar concluded with a session in which Godfrey Gunatilleke briefly reviewed some of the main conclusions of the seminar. What follows is a summary of his review supplemented with comments on some of the issues which were raised during the discussions and need to be more fully explored.

The seminar discussions had dealt with the critique of the Panel report presented in the working paper in three substantive sessions – Session 2 ,3 and 4 . The presentations made by the main discussants David Blacker and Arjuna Gunawardena and their detailed analysis of specific actions which the Panel had presented as war crimes highlighted the serious shortcomings in the Panel's report. They strongly argued that the Panel's version of the government strategy and the account of events during the last stages of the war displayed a lack of information and understanding of the full nature of the military operation and the options available to the Sri Lankan army.

The rejection of the panel's version of events does not however resolve the main issues that have arisen regarding the last stages of the war. These issues concern the immense human suffering caused to civilians who were trapped in the battlefield and were victims of the ruthless character of the last stages of the battle. The complaints of survivors regarding disappearances and deaths that were made to the LLRC reflect only a small fraction of the human tragedy. The discussants provided a robust case for a narrative of events which is contrary to the war crimes approach of the Panel. But this narrative by itself is not adequate for the purpose of dealing with the anguish of the victims who have survived and who are still seeking information on the deaths and disappearances that have occurred.

A satisfying answer to these questions may be found only through processes which achieve two objectives and need to be undertaken concurrently – first a process which unfolds the full account of the military operation and effectively provides answers to the version presented by the UNSG's panel and second a process which listens to and investigates the stories of the victims and follows with adequate reparation. Mention was made of the Disappearances Commission that was established to deal with the complaints of victims of the 1987-89 JVP insurgency. This could serve as a model with modifications to suit the special conditions arising out of the Wanni military operation. When dealing with the victims, the victims of the LTTE would have to be one important category that would require the attention of such a body.

Session 3 selected some key legal issues for analysis. The discussion on the appointment of the Panel and the UNSG's powers under the Charter to take an initiative of this type came to the conclusion the existing rules and practices in this regard are ambiguous and could be interpreted to uphold the UNSG's action. Nevertheless the action of the UNSG in releasing the report to the public domain was unwarranted, considering the fact that he had decided that no further action could be taken by him to initiate an investigation as recommended by the Panel. The UNSG's action also raises issues of a wider nature that go beyond the individual Sri Lankan case. The UNSG's action has to be examined for the unusual nature of the action taken by the UNSG after the UNHRC had passed a resolution on the same matter, for the pressure exerted on him by a group of powerful states and for the unhealthy precedent it sets for the relations between the UNSG and member states. This is a matter that could be pursued further by the Government of Sri Lanka not in a spirit of acrimony but with the objective of upholding the principle of non-discrimination and impartiality in the UN system.

The discussion on the application of the law dealt for the most part with the potential threat of prosecution for war crimes under the existing international law on war crimes. Professor Marasinghe cautioned that we should not ignore article 15 of the Rome Statute which empowers the Prosecutor ICC to initiate investigations and that the recent statements made by the Prosecutor and the Chairman of the ICC to the effect that they cannot initiate action in Sri Lanka's case should not be taken as final.

The session did not give much time to the issues relating to the nature of the war and the Panel's characterization of the war and the Panel's failure to give any special significance to the terrorist dimension which ab initio abjures the rules of conventional war. Another more crucial issue was whether humanitarian law as it exists is adequate to deal with the military actions taken in situation such as in the Sri Lankan case which the moderator raised but could not be pursued in depth. The presentation in the first session had stressed that the Panel had failed "to examine the wide ranging controversy of the applicability of the existing humanitarian law and rules of conventional war to these extreme situations and the need to redefine the rules of war; consequently it had made no contribution to the definition and enhancement of the process of accountability and law pertaining to these extreme situations." This is a task that may have to be undertaken as follow up to the Seminar.

The discussant's presentation on restorative justice clearly defined its main elements. Restorative justice was the right approach if the process of reconciliation is to be inclusive and sustainable. The main issue that emerged in the course of the discussion was the application of restorative justice to the Sri Lankan situation. The government's process of restorative justice followed by the government is limited to the LTTE, its cadres and the leaders who have survived and support the government. The government states clearly that restorative justice is not applicable or relevant to the army or the government as they were not guilty of any actions that would combat within the ambit of restorative justice.

The last stages of the war does not provide the conditions for the type of Truth Commission in South Africa which dealt with crimes and atrocities committed by both parties over a long period

of time. Nevertheless acknowledgement of the human tragedy that occurred and a profound Asokan act of contrition for the war itself that led to the tragedy is needed. The process of unfolding the truth could take different forms that would include both narratives of civilian victims and combatant soldiers and surviving LTTE combatants. Such a process requires religious leadership which draws on the core values of the four religions in Sri Lanka. Properly conducted it could be a profoundly healing experience.

The session on reconciliation took forward many of the themes that had been addressed under restorative justice. The focus was more on the values norms and mutual understanding that must guide the process of reconciliation than on the actions on specific issues. Discussants pointed out that the actions of the government and the Sri Lankan society as a whole should be directed at restoring a full sense of dignity and equality of citizenship to the Tamil community particularly to the community in the North. The defeat of the LTTE had evoked mixed reactions. The sense of relief was also underlaid with a sense of resignation to a state of being “vanquished”. Some of the post war actions ignored these sensitivities that are inherent in the current situation. Reference was made to the strong military presence and role as well as actions which have a symbolic effect of projecting the Sinhala Buddhist culture in a predominantly Tamil environment. Along with the restoration of democratic institutions government needs to demonstrate clearly that demilitarization is high on the agenda and will proceed according to targets that are made public. The other concerns of a religious and cultural nature are of a complex nature and could be addressed appropriately by the religious leadership who could create the necessary environment for mutual understanding.

Discussants also emphasized the need for self appraisal and acknowledgement of errors and wrongs on the part of all communities. All communities have been the victims of the process of violence and the war and all communities have suffered. It is a truth that has to be recognized with a due sense of contrition by all communities. But in this common narrative, the Sinhala majority has also to acknowledge that the burden of suffering the human cost of war has been heaviest on the Tamil community and within it the Tamils of the Northern Province. Coming together to compose this common narrative would be one important part of the process of reconciliation.

Both discussants and participants emphasised that a political solution which provides the Tamil community and other minorities with an equitable sharing of power and participation in decision making is the key to lasting reconciliation and peaceful coexistence. While all are agreed that a political solution is central to the process of reconciliation, but participants also asked: “what kind of political solution is acceptable and sustainable and how do we get there?” How do we deal with the problem as defined by the Soulbury Commission at the beginning of our journey as an independent state – the problem of a “permanent majority” and a “permanent minority” which is inevitable in Sri Lanka’s demographic context. In this situation how do we agree on a sharing of political power that gives the minority a full sense of equality and the majority a just sense of proportionality?

There is still no consensus in sight as to what kind of political solution will find the degree of acceptance that will ensure peaceful co-existence. In the past whenever we tried to implement a political solution we only succeeded in exacerbating the divisions and conflicts between communities and within communities. The present international environment, the role played by the Diaspora and developments in Tamilnadu do not augur well for a political solution that will be fully acceptable to both Tamils and Sinhalese. In our present approach we have put the political solution as a condition of building mutual trust and promoting reconciliation. We may have to do the reverse and concentrate much more on the process leading to a political solution and create the conditions of mutual trust for a political solution to become acceptable.. We may have to agree on compromises and work together for a long time as best as we can and move slowly to the political system which is acceptable both to the Tamils and Sinhalese and will become the sustainable inheritance of future generations.

In the process of post war reconciliation what are the relative roles of the state and civil society? This was a major theme in the discussion. Some participants felt that the prevailing conditions were not propitious for civil society to play a leading role. The initiative had to come from government. Against this approach participants argued that people's initiatives for promoting reconciliation are already making a substantial contribution. Participants cited examples of initiatives which bring communities together covering children, youth, religious groups and regions. These should be strengthened and further developed to provide a firm foundation for the process of reconciliation which is inclusive and brings all communities together. There is no question that both state and civil society must play key roles. The people's initiatives must go together with the state's measures to deal with the structural injustices and systemic shortcomings that are obstacles to the process of reconciliation. The discussion pointed to the need for further work on the issues that had been explored. What might be needed is a forum or institutional framework in which these different agents from civil society, state and private sector could draw strength and knowledge from each other and contribute towards a better coordinated national movement for peace and reconciliation.

Given the time available the seminar discussion had to be selective. Some issues which were flagged in the first session could not be discussed in depth. One such issue was the issue of the Tamil Diaspora. Reference was made to the Panel's report and its conclusion that the Diaspora is accountable for what may amount to war crimes and that action needs to be taken against the LTTE front organizations which continue. There is also need for a more constructive engagement with the Tamil Diaspora including its hard core elements directed at the long term objective of reconciliation. Both the government and civil society should work towards opening avenues of communication and facilitating exchanges that enable Tamils overseas to observe, come to impartial appraisals of conditions in Sri Lanka and contribute to the process of reconciliation and reconstruction.

7. RECOMMENDATIONS: Reaching out to National Reconciliation

One of the fundamental objectives of the seminar was to examine courses of action open to move beyond the UNSG's Panel Report in regard to issues of accountability that Sri Lankans must address in moving towards reconciliation. The seminar noted the action of the GOSL in setting up the LLRC to address these issues. While the seminar was intended to contribute to this overall process it was organized as a civil society initiative. There is a fundamental need to forge the conscience of society that would enable move beyond the human tragedy caused by the war. Several areas of action in making the process of accountable to the citizens of Sri Lanka arise from the deliberations of the seminar.

- a. As noted above the alternate narrative outlined in the course of the seminar in no way resolves the issues of accountability that have arisen out of the war, especially its last stages. Substantive accountability actions are required to move towards the fundamental concern of reconciliation. In this regard it is necessary to undertake concurrently processes that would unfold a full account of the military operation complemented by a process of listening and investigating stories of victims. The latter should lead to making of adequate reparation.
- b. A second area for follow-up action is on the relevance and applicability of the existing humanitarian law and rules of conventional war to extreme situations as in the case of Sri Lanka and the need to redefine the rules of war so as to clarify and enhance rendering of accountability in such situations.
- c. Working out the modalities for the application of restorative justice is a third area for follow-up. The scope of the application of restorative justice by the Government is limited, extending only to the LTTE, its cadres and the leaders who have survived and support the government. This is inadequate to unfold all of the circumstances relating to the last stages of the war. There is a need to recognize the overall tragedy of the war. It requires all parties to the conflict opening up with narratives of their involvement and actions. It is a process that should take place outside of the State apparatus and be led by the religious leadership drawing on the core values of the four religions in Sri Lanka so as to be a meaningful healing experience.
- d. A related aspect is the need for self appraisal and acknowledgement of errors and wrongs on the part of all communities. All communities have been the victims of the process of violence and the war and all communities have suffered. It is a truth that has

to be recognized with a due sense of contrition by all communities and is the necessary basis for reconciliation.

- e. The seminar underlined the importance of a political solution which provides the Tamil community and other minorities with an equitable sharing of power and participation in decision making towards bringing about lasting reconciliation and peaceful coexistence. The Sri Lankan experience in working out “political solutions” has been to either enact laws without a process of consultation or to go through a process of consultation to be eventually rejected as not acceptable to all. It is therefore important to set a framework of guiding principles against which the process and the outcome could be validated and accepted.
- f. The seminar considered the relative roles of the state and civil society in guiding the process of reconciliation. There was consensus that both state and civil society must play key roles. Working out the form of an institutional framework in which these different agents from civil society, state and private sector could draw strength and knowledge from each other and contribute towards a better coordinated national movement for peace and reconciliation is a further area for follow-up.
- g. The seminar noted that need for a constructive engagement with the Tamil Diaspora including its hard core elements directed at the long term objective of reconciliation. It would be important for both the government and civil society to work towards opening avenues of communication and facilitating exchanges that enable Tamils overseas to observe, come to impartial appraisals of conditions in Sri Lanka and contribute to the process of reconciliation and reconstruction.

Seminar Programme

Registration : 8.45 am to 9.00 am

Session 1 : 9.00 am to 9.30 am

Introduction to the Framework and Analysis of the Report

Session 2 : 9.30 am to 10.30 am

Theme: The Approach to Allegations and Treatment of the Events

Moderator : *Asoka Gunawardena*

Part 1: The Military Operation

Discussants :

Mr. David Blacker

Mr. Arjuna Gunawardena

Tea : 10.30 am to 10.45 am

Session 2 : 10.45 am to 1.00 pm (Continuation)

Part 2: The Care of IDPs

Discussants :

Mr. Jeevan Thyagarajah

Lunch : 1.00 pm to 2.00 pm

Session 3 : 2.00 pm to 3.15 pm

Theme: The Panel and its Appointment

Moderator : *Mr. Gihan Gunatilleke*

Presenter : *Mr. Mangala Moonesinghe*

Theme: The Application of International Law and Restorative Justice

Moderator : *Mr. Gihan Gunatilleke*

Theme : Application of International Law

Discussants :

Prof. Lakshman Marasinghe

Theme : Restorative Justice:

Discussants :

Mr. Somapala Gunadeera

Fr. Noel Dias

Tea : 3.15 pm to 3.30pm

Session 3 : 3.30 pm to 4.30 pm (Continuation)

Theme : Reconciliation:

Moderator : *Dr. Nimal Gunatilleke*

Discussants :

Mrs. Gnana Moonesinghe

Dr. Vinya Ariyaratne

Mr. Javid Yusuf

Mr. Joe Williams

Session 4 : 4.30 pm to 5.00 pm

Summing-up and Overview of Discussion:

Chair :

Mr. Mangala Moonesinghe

Review :

Dr. Godfrey Gunatilleke

Annex 2**List of Participants**

	Name	Designation
1.	Mr. David Blacker	Defence Analyst
2.	Mr. Arjuna Gunwardena	Security Consultant
3.	Mr. Somapala Gunadeera	Former –Government Agent of Colombo
4.	Ms. Gnana Moonesinghe	Chairperson – SRAMAYA
5.	Mr. Joe William	Chairman, Board of Directors – National Peace Council
6.	Mr. Jehan Perera	Executive Director – National Peace Council
7.	Mr. K.H.J. Wijayadasa	Former Secretary to the President
8.	Mr. John Gunaratne	Former Ambassador
9.	Mr. Gehan Gunatilleke	Attorney at Law
10.	Mr. Nimal Gunatilleke	Governing Council Member – Marga Institute
11.	Ms. Lynn Ockersz	Chief Editor – Daily News
12.	Prof. Sudatta Ranasinghe	Open University of Sri Lanka
13.	Mr. S.H.M. Jameel	Former Addl. Secretary – Ministry of Cultural & Religious Affairs

14.	Mr. Silan Kadirgamar	-
15.	Fr. Mervyn Fernando	Chairman, Subodhi Institute
16.	Rt. Rev. Duleep de Chikera	Former Bishop of Colombo
17.	Ms. Manauri Muttettuwegama	Attorney at Law
	Name	Designation
18.	Ms. Shakya L. Pathmalal	Programme Coordinator - ICES
19.	Prof. Lakshman Marasinghe	Emeritus Professor of Law -Toronto University
20.	Mr. Jeevan Thyagarajah	Executive Director – Consortium of Humanitarian Agencies
21.	Prof. W.D. Lakshman	Emeritus Professor of Economics - Colombo University
22.	Mr. Niran Anketell	Attorney-at-Law
23.	Fr. Noel Dias	Professor of Law, Colombo University
24.	Mr. Javid Yusuf	Former Ambassador
25.	Ms. Salma Yusuf	Legal Researcher
26.	Dr. Lloyd Fernando	Former Chairman – Marga Institute
27.	Dr. Godfrey Gunatilleke	Chairman Emeritus – Marga Institute
28.	Mr. Mangala Moonesinghe	Chairman Marga Institute
29.	Mr. Asoka Gunawardena	Executive Governor – Marga Institute
30.	Ms. Myrtle Perera	Vice Chairperson – Marga Institute
31.	Mr. Newton Fernando	Manager, Administration & Finance - Marga Institute
32.	Ms. Deepali Talagala	Librarian – Marga Institute
33.	Mr. Amar Gunatilleke	Marketing & PR Consultant - Marga Institute

34.	Mr. P.B. Wijayatileke	Consultant - Marga Institute
35.	Mr. E. Dissanayake	-