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Background and Acknowledgements

The international engagement in a call for action on Sri Lanka’s accountability arising from the last stages of the war, and the upcoming resolution in this regard at the UNHRC sessions in March this year, brought together the Marga Institute and the Consortium of Humanitarian Agencies (CHA) in a joint endeavour to present an alternate narrative of the events of the last stages of the war. These two civil society partners mobilized a small group to represent its position both with the Government of Sri Lanka as well as the diplomatic community in Sri Lanka, and advocate an alternate narrative of events that had been left out of the dominant international discourse on the war in Sri Lanka. The subsequent resolution adopted by the UNHRC convinced the partners of the need to place the narrative in the domain of the public discourse on the last stages of the war.

This “Third Narrative” was the joint work of the Marga Institute and CHA. The work on the compilation of the “Third Narrative” was led by Godfrey Gunatilleke, Jeevan Thiagarajah and Asoka Gunawardene and supported with important contributions and insights from other members of the group who participated in the discussions. The compilation of the report proved to be intensive and the final product was very much their joint effort and responsibility. The group wishes to thank the civil society actors who provided insights and comments during the course of the work.

July, 2014
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Introduction

This narrative of the last stages of the war in Sri Lanka has been produced as a response to the United Nations Human Rights Council (UNHRC) resolution of March 2014. The report has been prepared as a logical sequel to the initiative that was taken by a group of concerned citizens in early March 2014 to propose an alternative to the UNHRC resolution. The alternative that was proposed by the group recommended a course of action which would be directed not as an inquiry into allegations of war crimes but as a full and impartial evaluation of the conflicting and contradictory accounts of the war available from different sources. Such an exercise would inform UNHRC and the international community more fully of all the circumstances pertaining to the issues of accountability and promote the domestic process of reconciliation more effectively.

The considerations which prompted this initiative continue to have the same urgency in the current situation. There are various accounts of the last stages of the war. These include the version of the war given by the army in its report on the humanitarian operation, the advocacy-oriented documents of the international non-governmental organisations (INGOs) such as Human Rights Watch, International Crisis Group and Amnesty International, which came out immediately after the end of the war and the more comprehensive eye-witness account of the (Jaffna) University Teachers for Human Rights (UTHR). But of all these the reports that have received most attention are the two that have been submitted by two officially accredited sources - a panel appointed by the UN Secretary General (UNSG) and a commission
appointed by the Government of Sri Lanka (GoSL)– the Lessons Learnt and Reconciliation Commission (LLRC). They present two sharply contrasting irreconcilable narratives of the last phase of the war against the LTTE. These reports provide the frame of reference for the international discourse on the war and the post conflict situation.

Unfortunately owing to the procedures that were followed, each of the two investigating bodies was unable to gain full access to the evidence available to the other. The witnesses who appeared before the UNSG’s panel, including the UN personnel, INGOs and others who claim to have relevant evidence refused to appear before the LLRC. The GoSL and the government armed forces did not participate in the proceedings of the UNSG’s panel and refused to permit the panel to conduct any investigations in Sri Lanka (although according to the Panel’s report, a government delegation made representations to the Panel in New York on 22 February 2011). Both bodies had therefore to manage without a critical part of the evidence that was necessary to reconstruct the whole story of the war. The UNSG’s panel was the party which was most disadvantaged in this situation as they had no first hand view of the ground situation and could not obtain the evidence of the main actors, the government officials the armed forces, the civilians who were in the No Fire Zones (NFZs) and the LTTE cadres who survived. However, the Office of the High Commissioner for Human Rights (OHCHR) and several members of the international community relied on the version presented by the UNSG’s panel and proposed action based on this report. Consequently the discourse on the war crimes has been dominated by the narrative presented by the UNSG’s panel and those who have come out in support of it. The GoSL and civil society groups have argued that this has resulted in an approach taken by the OHCHR and a group of Western countries which has been gravely unjust and unfair to the GoSL and armed forces.
The Conflicting Narratives

The GoSL launched the offensive in the Wanni in early 2008 with a clear military objective of defeating the LTTE fully and finally. The operation was aimed at recovering all the territory occupied by them, completely destroying their military capability and the illegal administrative apparatus they had established in this territory, and freeing the population who were forcibly held captive by them.

The international community did not at any stage contest this position. The group of western powers who had backed the ceasefire accepted the necessity of the war while cautioning the GoSL on the major humanitarian risks that the war entailed. The statement by the President of the UN Security Council issued a few days before the end of the conflict recognised GoSL’s right to combat terrorism, condemned the LTTE and did not pass any strictures on the GoSL except reminding it of its own unilateral commitment (given to India) not to use heavy weapons. It urged the LTTE to lay down arms, surrender and let the human shields go to safety (both of which the LTTE refused). It took note of the humanitarian efforts of the GoSL to look after civilians in the conflict zone.

The UNSG’s Panel of Experts (PoE) while it does not contest the GoSL’s right to conduct the war, alleges that the war was conducted by GoSL not only with the objective of eliminating the LTTE but also with the deliberate intention of killing a large number of Tamil civilians. In the process, it claimed that the GoSL committed a variety of war crimes, including indiscriminate shelling of the NFZs, targeting civilians in the NFZs, shelling hospitals and non-military locations, denying food and medical supplies to the civilians trapped in the war zone, extra judicial killings of surrenders and involuntary disappearances.

The LLRC’s narrative of the war presents detailed account of the progress of the war, the way in which the civilians were trapped into the NFZs and the efforts made to free the civilians. The LLRC describes the war in the Wanni – the part of the Northern Province that had been held by the LTTE – as the necessary sequel to the campaign to defeat and evict the LTTE from the Eastern Province. This part had been successfully completed with
minimum civilian casualties. It was the same army - which had acquitted itself commendably, minimizing civilian casualties and leaving no room for allegations of war crimes - which conducted the Wanni operation. The report describes the methods employed by the LTTE and the dilemmas facing the Sri Lanka Army (SLA). The unfolding of the narrative and the LLRC’s explanations and interpretations of the events become an implicit refutation of the interpretations that the UNSG’s panel (and later International Crimes Evidence Project IPEC et al) give to the strategy and actions of the GoSL and SLA.

While the PoE Report briefly describes the conditions of the last phases of the war - the human shield formed by the LTTE, the positioning of artillery among the civilians in the no-fire zone, the use of the no-fire zone by the LTTE as the battlefield, the continuing conscription of civilians (both adult and children) for combat and fortification of their defences, suicide killings by the LTTE - it does not draw the conclusions relevant to issues of distinction and proportionality and their bearing on the allegations of war crimes. This applies to IPEC report as well. On the other hand the LLRC panel deals with these aspects in detail and raises important issues relevant to the application of International Humanitarian Law (IHL) in the context of the human shield and the deliberate use of the no-fire zone as a battlefield.

The PoE Report has been compiled essentially as a prosecutor’s brief on the allegations of war crimes committed by the GoSL and SLA. There is no evidence that the panel sought or recorded testimony of persons who could have examined and produced evidence contrary to the representations made against the GoSL and SLA.

Another important sources of information on the last stages of the war are the reports No.32 and 34 of the UTHR, the Tamil non-governmental organisation (NGO) which monitored the conflict over a long period of time, The UTHR is strongly critical of both the LTTE and the government and takes the position that the SLA should not have advanced into the no-fire zones (NFZs) when it was clear that the LTTE’s tactics of converting the NFZ into a battlefield and using civilians as a shield would result in large scale civilian casualties. Quite apart from this position taken by the
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UTHR (which itself would receive attention in a later part of this report), the factual account it provides based as it is on what it claims as first hand evidence obtained from informants and witnesses within the conflict zone is invaluable for determining the conditions of the battle within the NFZ. Its report No.32 is a detailed account of the fighting from 9-18 May. Along with accounts of the SLA’s actions, which are severely criticized, it also cites eyewitnesses who say that the LTTE was responsible for most of the shelling and killing of civilians during this period. It cites witnesses who commend the SLA for their restraint in many instances and the assistance they gave the civilians to escape – an account incompatible with the PoE’s views regarding the strategy of the GoSL and SLA. Both The PoE report and the ICEP report do not examine this evidence that contradicts some of their main conclusions.

Most important of all, the PoE adopts a methodology which prevents them from engaging with the complexity of the issues of distinction and proportionality, as it applied to the war in Sri Lanka. They examine the actions of the LTTE and the SLA independent of each other. They overlook the evidence regarding the sequence of these actions taken by the LTTE and the SLA. They ignore the fact that it was the LTTE who continued to commit war crimes in the first instance using the civilians as a human shield, locating their artillery in the midst of the civilian population and firing into the advance positions of the SLA from within the NFZ. The LTTE’s actions were such that the SLA was left with limited military options. The UTHR report which comes to the conclusion that the SLA should not have chosen the military option it did, given the hazards to civilians is still quite impartial in describing the nature of the fighting and the LTTE’s actions against the civilians. In doing so, the UTHR’s report reveals the complexity of the situation that faced the SLA and the well-nigh insuperable problems relating to the application of the criteria of distinction and proportionality in such a context.

The issues raised in the foregoing analysis can be summarized as follows:

The method of analysis adopted in both the PoE and ICEP reports are seriously flawed. Both reports enumerate the crimes alleged to have been
committed by the GoSL and the LTTE. They are each analyzed in a manner which keeps them separate and independent of each other. They are not placed in the context of the war as a whole and the military strategies of each. The reports do not examine the military strategies of each party in relation to each other, the sequence in which the strategic responses were made by each party and the way in which this defines the accountability of each. The strategies and responses of the SLA in the last stages of the war were made in response to the tactics and actions of the LTTE. But the reports do not come to any conclusions about the primacy of the responsibility for what happened. The position taken by the reports is that each action must be judged independently under IHL and International Criminal Law (ICL); the main determinants and circumstances that gave rise to these actions are not taken into account. They do not ask the question whether these acts formed part of military action designed to bring the war to a speedy conclusion and minimize civilian casualties and examine the issues of distinction and proportionality in that context.

The reports of the PoE and ICEP unquestionably accept the allegation that the GoSL and the SLA had the objective of killing Tamil civilians on a large scale, independent of the military objective of destroying the LTTE and is therefore guilty of the crime of extermination. They argue that GoSL and the SLA engaged in systematic acts, widespread and extensive, calculated to destroy a portion of the population. This presumption is not tested against the evidence of a large number of eyewitness accounts that were available to the LLRC or the UTHR.

The Reviews and Critiques of the UNSG’s PoE Report

The report of the UNSG’s panel has been subjected to detailed and thorough analysis and evaluation by a wide variety of independent analysts with expertise in relevant fields. The evidential base for the sweeping allegations of massive war crimes and estimates of civilian casualties ranging from 40,000 upwards has been critically examined and the unreliable speculation underlying these allegations have been convincingly exposed. Most of these estimates have been simplistically derived from the estimates of population before and after the war and independent analysts have
taken great pains to expose the inconsistencies in the pre-war population estimates that had been provided under LTTE direction and are now being used to produce the highly exaggerated estimates of civilian casualties. Well-documented studies of the satellite imagery which provide evidence that refute the allegation of deliberate targeting of hospitals and civilians have been produced and are available now in the public domain. The allegations that the GoSL denied food supplies and medical supplies have been examined by the LLRC and other independent analysts. No credit is given by the PoE to the GoSL for fulfilling its moral obligations to its citizens regardless of the fact that they were in “enemy territory” nor is there an objective appraisal of the impact the war conditions had on the supply of food and medicine to the battle zone by providing food and medicine to the civilian population held by the enemy under the most difficult conditions. The shortcomings that are bound to arise in such an operation are reframed as war crimes. All these issues have come under expert scrutiny.

Much of the international discourse on war crimes in Sri Lanka takes place in compete ignorance of or indifference to this comprehensive body of knowledge. This is also true of the reports and initiatives promoted by the OHCHR. As a result, what has been circulating internationally is a biased account of the war. Documentaries financed and promoted by the LTTE, containing serious distortions and fabrication of evidence and are highly selective of their choice of material are being widely telecast. Governments of the countries in which extremist elements of the Tamil Diaspora are active have not dealt effectively with these campaigns which are openly threatening the territorial integrity and national sovereignty of a Member state. Consequently, the commitments made by countries for the peace and security of nations and enshrined in the UN charter are being violated.

Given this context, the narrative and analysis that follow are organised as follows:

**Chapter 1: How the war was fought.** This chapter provides a detailed analytical account of how the war was fought in the Wanni by both the Sri Lankan armed forces and the LTTE covering all aspects of the war stage by stage. This chapter will draw on the main sources available: the Army account of the war, the LLRC report, the UTHR reports, the accounts in the
PoE report supplemented by the ICEP report and other evidence available from the government, UN and INGOs. This narrative will relate to the versions given in other reports and attempt to fill the critical gaps in them. It will attempt to provide the right sequence of action and response by LTTE and Sri Lankan armed forces and help in determining how responsibility could be attributed to either party for war crimes and civilian casualties. The narrative should also help to resolve incompatibilities and contradictions in the available versions and provide the most reliable interpretations of the actions taken by the LTTE and the Sri Lankan military and the intentions motivating them.

Chapter 2: The accountability of the LTTE. This chapter will analyse the strategies and actions of the LTTE in resisting and fighting the SLA. The accounts given in all the main reports broadly agree on the strategies followed and actions taken by the LTTE. They differ significantly only when it comes to the impact these had on deciding the responses of the SLA and the extent to which the LTTE has to bear the responsibility for the civilian casualties in the war.

Chapter 3: The Accountability of the Government and Sri Lankan armed forces. This chapter deals with two sets of issues. One deals with the accountability of government arising from the policies that were followed in prosecuting the war – this would include the action taken or not taken to protect civilians, the establishment of the NFZ, the supply of food and medical supplies, the deployment of heavy artillery. The allegations of war crimes relating to these are based on the conclusion that they went beyond justifiable military actions to defeat the LTTE and had targeted the civilian population deliberately. The other set of issues relate to specific actions, such as shelling of hospitals and other non-military objectives, killing of surrendees and enforced disappearances. Many of these could be dealt with by examining the available evidence such as satellite imagery on which there are contradictory reports. At present, the evidence assembled by the PoE report and ICEP have not been subjected to verification as admitted by them.

Chapter 4: The Accountability of the International Community. This chapter will deal with the role played by the international community in the
last stages of the war. Several questions are dealt with in this chapter. What were the approaches adopted by the international community in relation to the war and actions of government and the LTTE? How effective were they in dealing with the LTTE and its strategy? Could more decisive action been taken after the fall of Kilinochchi when it became clear that the civilians were being used as a shield? How did the LTTE use the prospect of international intervention? Did the actions of the international community mitigate or aggravate the hazards to the civilians?

Chapter 5: The Accountability of the UN and its agencies. This chapter discussed the manner in which the relations of the UN and its personnel with the government on the one hand and the LTTE on the other affected the conduct of the war. There are two accounts – first, the account of UN personnel during the war and the other, the revised account and the critical review of the Petrie Report. This chapter assesses these accounts objectively and critically to review the role the UN played as well as to re-examine the obligations of the UN in the context of the war as it was fought. In contrast to the approach taken by Petrie it is necessary to ask whether the UN surveillance of the LTTE actions were adequate and whether more decisive action could have been taken by the UN to prevent the LTTE from using the civilians as a human shield.

Chapter 6: Conclusions - The final chapter provides a summary of conclusions and recommendations.
A fuller narrative of the military operations than what is provided in the PoE report or other documents in the public domain is vital for an objective appraisal of the events in the last stages of the war. Before any conclusions are drawn regarding the nature of the actions taken by the SLA or the LTTE we need to reconstruct as faithfully as possible the conditions of combat in which military decisions had to be taken and the sequence in which the actions of the LTTE and the SLA occurred. The events which have become the basis for the allegations of war crimes need to be placed in the context of the actions taken by both the SLA and the LTTE in the conduct of the military operations immediately preceding and leading up to these events. In this process many questions have to be addressed:

- What was the nature of the fighting and the conduct of both parties in different phases of the war and how did they change?
- What were the changes that occurred in the conduct of each party – LTTE and SLA – and in what sequence?
- What were the options available to the SLA when the civilians were held captive by the LTTE in the NFZ?
- Could and should the SLA have delayed their advance into the NFZ when it was clear that the LTTE and the civilians were inextricably held together as a result of the LTTE’s strategy of using civilians as a shield?
- Did the actions of the LTTE – suicidal killings and killings of civilians – portend a danger of a humanitarian disaster on a larger scale if the situation in the NFZ was allowed to continue without intervention?
• What role did the shelling of NFZs play in the fighting and in the achievement of the main military objectives? Were they wanton and indiscriminate acts? Were they errors committed in the fast changing environment? Or were they deemed necessary and unavoidable for achieving the main objectives?

• Did the expectation of international intervention play a significant role in the LTTE strategy and their refusal to surrender?

• Did the rapid deterioration of living conditions and the regular killing of escaping civilians by the LTTE demand the speedy entry of the SLA into the NFZ?

There is as yet no complete well-documented history of the war fought during the three-year period 2006-2009. The report titled Humanitarian Operation Factual Analysis (July 2006 – May 2009) produced by the Ministry of Defence is the one report which covers the military operations for the entire period. But as it has not been written with a view to addressing some of the issues of accountability that have arisen subsequently, as the narration does not contain all the information needed for the analysis of those issues. The narration proceeds on the premise that all the actions taken by the SLA were necessary for achieving the military objective of defeating the LTTE and freeing the civilians. Most of the other accounts that are available are reports commissioned for a specific purpose – that of identifying war crimes committed in the course of the war. Consequently they focus on the last stages of the war from the first NFZ to the final defeat of the LTTE and the escape of the remaining civilians on 20 May 2009. One important report which is the product of intensive gathering of information and analysis of eyewitness accounts is the UTHR Report No.34 issued in December 2009, which followed and ought to be read with Report No.32 issued in June 2009. These two deal with the last stages of the war in the NFZs. As stated in the introduction, the accounts that are available contain sharply conflicting narratives.

The PoE and the ICEP reports work on the premise that the rescue of the civilians and minimizing civilian casualties was not an objective of the SLA. They argue that from the inception the SLA had the intention of driving the civilians into a rapidly narrowing battle zone depriving them
of food and deliberately killing a large number of civilians. The evidence they present, including witnesses directly interviewed by them is limited in its reach and the sources are not divulged. As a result the narrative of how the war was fought on the ground and the account of the fighting itself is patchy and discussed within the framework of the allegations that are being investigated. They address their task as investigators who are required to make the best case for the prosecution.

Both the LLRC report and the UTHR reports contain the direct evidence of eyewitnesses on a much more extensive scale than the PoE and ICEP reports. The LLRC accounts were obtained through a fully transparent process of public hearing and the transcripts were made available on the website. The eyewitness accounts of shelling and fighting within the NFZs recorded by the LLRC contradict some of the accounts cited by the PoE and ICEP reports and the conclusions drawn by them. The LLRC presents a narrative which acknowledges that the objectives as stated by the GoSL – those of defeating the LTTE and rescuing the civilians – were in fact the main objectives of the war and that they were pursued consistently by the GoSL in very difficult circumstances. They identify a number of situations where the outcomes were tragic and those which need further investigation in terms of accountability.

The UTHR in their reports No.32 and 34 blames the GoSL and the LTTE almost equally and implies the SLA should not have entered the NFZ and fought the war as they did. Most of the UTHR witnesses are presented under pseudonyms. They narrate in harrowing detail the atrocities committed by the LTTE against the civilians, the brutal character of the fighting in NFZs, the heavy toll of civilian casualties as a result of the actions of both the SLA and the LTTE, the indiscriminate shelling by the SLA together with the efforts made by the SLA to enable citizens to escape and instances where the SLA acted with care and consideration for civilians which have been clearly acknowledged by civilians. Factually, the UTHR is an even-handed account of the killings done and acts committed against civilians by both the LTTE and the SLA.

At the outset, it has to be observed that the war that was fought in the Northern Province in 2008 and 2009 was somewhat unusual in terms of its
military character. If a chronicler of war were to look at it in purely military terms, it would be described as a phenomenon without parallel in recent times. When for a moment we forget the misery and the inhumanity of the war, the skill and military ingenuity that was displayed by the combatants would seem exceptional. The defence network of bunds, trenches and bunkers doggedly defended by the LTTE at every stage of the war were matched by fighting skills and methods of warfare of the SLA specially designed to break through them. On both sides, the combatants fought with rare courage and determination, with every small stretch of territory fiercely contested, each party inflicting heavy casualties on the other. Each side was driven by a psyche which was shaped by a long history of past wars and the more recent violence and inhumanity against each other. In the final analysis, actions in any war that lead to the killing of human beings, however much they may display their own variety of self sacrifice and heroism, individual and collective, must not be glorified. But the reconstruction of the war as truthfully as possible in all its human manifestations of courage and cruelty and a recognition of the shared guilt and suffering of the two communities could be one important part of the process of healing and reconciliation. The contentious issues of celebrating the war and honouring the heroes on each side would then be subsumed in the larger collective act of atonement, mourning and celebration of the peace.

The narrative that follows does not attempt to provide a detailed military history of the war – a task which would require the expertise of a military historian. What it attempts to do is to reconstruct the military operations as they progressed, focusing on the intensity of the fighting between the combatants, the way in which the character of the war changed as it progressed, and the plight of the civilians as the changes occurred. The narrative attempts to assemble and present as much information as possible on the conditions of battle and the changing ground situation at each stage, the LTTE’s increasing use of the civilians in their military strategy and its impact on the conduct of the war. The account also examines the responsibility of the various agencies for the civilians (other than the LTTE who were holding them captive) - the GoSL, the SLA, the UN and the countries who were actively involved in the ceasefire and the resolution of Sri Lanka’s conflict. Hopefully such an account would enable us to define the parameters of
accountability for what happened with greater impartiality and justice than hitherto displayed by reports such as those of PoE and ICEP.

The narrative that is presented here has drawn heavily from accounts in the public domain. In addition to the primary sources of witnesses, available in the LLRC and UTHR, the chronology of the war draws on communiqués issued by the Ministry of Defence, news releases by agencies such as BBC, TamilNet and other media, and the accounts of NGOs, scholars and journalists. Some of the factual statements are taken verbatim from some of the compilations available in the public domain.

The narrative is organized in three sections:

It begins with a brief section on the war in the Eastern province and its relevance to our evaluation of what happened in the Wanni war. This was a phase of the war in which civilian casualties were near zero.

The second section deals with the first phase of the Wanni war that was fought in recovering the LTTE-occupied territory in the Western part of the Wanni ending with the capture of Kilinochchi. This is the phase in which the military engagement was mainly confined to the combatants and civilian casualties were low.

The third part deals with the Wanni war from the fall of Kilinochchi to the conclusion on 20 May 2009. This phase witnessed increasingly intense fighting with civilians incorporated more directly into the battleground and mounting civilian casualties.

At this point, a comment on the training and ideological orientation of the two combatant forces would provide some insight to the way each party fought the war in the last stages.

The Ideology and Methods of the LTTE

Right from the inception, the LTTE appeared to have decided that it must gain a complete monopoly of political and military leadership and eliminate all dissent within the Tamil community in order to fight for a separate state. This they proceeded to accomplish by killing almost all its political rivals including both militant and moderate groups. The brutal methods they employed to come to power - suicide killings and assassinations - formed
the value system which guided all their actions and made them a dreaded fighting force. After the departure of the IPKF from Sri Lanka, the LTTE had emerged as the most powerful militant Tamil movement both in Sri Lanka and among the Tamil Diaspora. By then the LTTE had developed as a highly disciplined fighting force. All LTTE cadres had to carry a cyanide capsule and were indoctrinated to commit suicide rather than be captured by the SLA. As a matter of policy, Prabhakaran had decided that the new cadres should be conscripted at a very early age to undergo the ideological orientation in hate and suicidal violence needed for fighting the LTTE’s war for a separate state. Child soldiers formed a significant part of the fighting force. The LTTE had a core of fighters known as Black Tigers who would undertake suicide-killing missions. From all accounts the leader Prabhakaran wielded absolute power in making decisions. Punitive measures against dissidents within the LTTE ranks as well as civilians who opposed him such as parents who defied conscription of their children were extremely harsh ending often in execution.

The Development, Training and Methods of the SLA

The SLA had undertaken a wide range of initiatives at different stages of the war to produce the highly disciplined professionally trained fighting force that the SLA was on the eve of the final war. In the early 1980s there had been serious instances of indiscipline and reprisal killings of civilians. Thereafter the SLA strengthened the training in human rights and IHL and their application in conditions of combat. Foreign assistance was also directed at strengthening this component. The SLA was also trained in some of the essentials of successful counter-insurgency operations such as the need to win the hearts and minds of the non-combatant population. Most important of all, the SLA restructured some of the formations at the ground level and developed new methods of overcoming guerrilla operations which would minimise civilian casualties. Chapters 10 and 11 of “The Humanitarian Operation – Factual Analysis” provides a full account of the structure and organisation of the SLA and the training and innovative methods of combat that had been adopted.

It should be noted that immediately after the Presidential elections in November 2005 and the election of Mahinda Rajapakse as President, the LTTE clearly signalled their intention of launching their final offensive Eelam War 4 which would achieve their objective of an independent state. The Human Rights Watch in their report “Funding the Final War” issued in December 2005 documented in detail the activities of the LTTE in extorting funds from the Tamil Diapora in preparation for the war.

In late July 2006, the LTTE closed the sluice gates of the Mavil Aru Tank stopping the flow of water to the irrigated land and households in 20 villages with a population of over 20,000. The government launched a limited military operation to re-open the gates and take control of the area in which the tank was located. At the same time, the LTTE began attacking the SLA on several other fronts. They simultaneously launched offensives in and around Mutur town from Selvanagar to Mahindapura commencing a full-scale war in the Eastern Province. In the North they attacked army defences in Kayts Island and the SLA’s Forward Defence lines (FDLs) in Muhumalai. These attacks were successfully repulsed and the government FDLs were re-established by 27 August 2006.

At this stage, the GoSL decided to continue with the military operation and advance into the areas in the Eastern province in which the LTTE was operating. The objective was to capture and destroy the LTTE’s military bases in the Eastern Province evicting the LTTE from these areas and thus liberating the whole of the Eastern Province.

The entire military operation in the Eastern Province lasted for over a year. In the Trincomalee District, the Sri Lankan military gained control of the Sampur town of eastern Trincomalee district on 4 September 2006, where the area had been used by the LTTE as an artillery launching pad to attack the Trincomalee Port.

After prolonged fighting and fierce resistance by the LTTE, the SLA was able to advance steadily to the LTTE occupied areas in the Batticaloa District, capturing and destroying their bases. The military operation launched to gain the area leading to Vakarai from LTTE was conducted in two phases.
In the first, during the three months September to December, the SLA captured Trikonamadu, Kirimichchiya, Kadjuwatte and cleared a corridor of about 15 km across the Trikonamadu jungle. The first phase was designed to enable civilians to move into the area under the control of the SLA. The second advance of SLA started on 9 December 2006 from Mahindapura southwards and captured LTTE camps around Echchalanpaththuwa area. The third and fourth advances of SLA started on 10 December 2006 from Trikonamadu and Kadjuwatta onwards.

The SLA’s battle to take Vakarai lasted nearly 3 months from 30 October 2006 to 15 January 2007. It is in Vakarai that the SLA first encountered the LTTE’s strategy of using the civilians as a human shield and also using the hospital premises as an artillery launching pad. The counter-strategy however prevented a major humanitarian tragedy. Without a frontal assault on Vakerai, the Deep Penetration Unit of the SLA infiltrated the area under the LTTE and launched surprise attacks. This tactic caused the LTTE to engage with the SLA diverting some of the cadres from their task of holding the civilians captive and thereby providing opportunities to the civilians to escape into the area under SLA control. It is also reported by NGOs who were active in the area that the Mullahs defied the LTTE and led the Muslim civilians out of Vakarai. The LTTE cadres finally retreated from Vakarai and moved into the Lahugala jungles. The SLA took full control of Vakarai on 15 January 2007.

Among the items captured by the SLA were boats with name and logo of the NGO “Save the Children”, tents with the logo of “UNHCR” and a fully equipped hospital named by the Tigers as Thileepan Memorial Hospital reportedly built with INGO support. It appeared that the LTTE was using the protection given by the UN and NGOs for military purposes.

The final phase of the military operation was conducted in the Ampara District. It was directed at capturing and destroying the remaining strongholds of the LTTE in the Lahugala jungles in the Ampara District. The Sri Lankan military launched their military operation to capture the area from LTTE on 25 April 2007. The SLA estimated that 500-700 LTTE cadres were fighting in the area in a network of trenches and tunnels. During May 2007, the Special Task Force of the Police (SLF) troops captured around 20 LTTE camps.
including major bases such as Janak, Stanley and the Jeevan base. During the period of 8–9 June 2007, the SLA army captured four LTTE military bases at Ibbanvila, Akkarathivu, Mawadi, and Veppanveli in Pankudavaella North, and Narakkamulla, South of the Thoppigala area. On 19 June 2007, three LTTE satellite camps East of Narakkamulla in the Thoppigala area were completely destroyed by the SLA. Fierce fighting erupted between the LTTE and the SLA at the final forward defence line (FDL) of LTTE, at their Beirut complex in Narakkamulla and the Thoppigala area between 22-24 June 2007. The FDL was fortified with six bunker lines and three minor camps. The LTTE held on to their positions despite SLA’s heavy barrage of artillery and tank gunfire. Finally, around 50 SLA commandos infiltrated the LTTE bunkers and killed 30 of the LLTE fighters. Three LTTE cadres committed suicide. This series of events turned the tide of the battle of Thoppigala against the LTTE. The fierce battle North of Narakamulla, in the Thoppigala area on 6 July 2007 morning, killed six SLA personal including an officer and injured seven. The Sri Lankan military retaliated with artillery and aerial bombardment to control the situation. The final stronghold of the LTTE in the East, Thoppigala (Baron’s Cap), was captured on the morning of 11 July 2007. With the capture of Toppigala the Eastern Province was fully cleared of the LTTE after nearly a year of military operations.

There are several important conclusions to be drawn from the war in the Eastern Province that are highly relevant for a full understanding of the events in the Wanni war.

- The defection of the Karuna faction and their active co-operation with the SLA facilitated the military operations and was one decisive factor in the defeat of the LTTE.
- The demographic features of the province and the multi-ethnic distribution of the population prevented the LTTE from gaining monolithic control of the territory and civilian population as they had in the Wanni. The conduct of the Muslims trapped in Vakarai is an example.
- The methods of warfare adopted by the LTTE in the Eastern Province in the case of Vakerai gave a clear indication that they would not hesitate to use civilians as a shield and hostage and
deploy their weapons and military establishments close to or within protected locations such as hospitals.

- The methods of warfare adopted by the SLA demonstrated the caution taken to avoid civilian casualties and efforts made to enable the civilians to escape into the government territory. An example of this is the way they handled the Vakerai situation and the opportunities they provided to the civilians to escape as in the clearing of the jungle in the first phase in Trikonamadu.

- There were no allegations of war crimes against the SLA. The fact that the war was fought in a manner designed to minimise civilian casualties and that civilian casualties were minimal was accepted by all parties and the question of civilian casualties never became an issue.

- The location of LTTE armour and equipment in a hospital and the use of UN property by the LTTE – boats vehicles tents – for their military purposes came to the notice of the SLA. This would have some impact on the way they conduct their operations in regard to non-military objects in the Wanni war and the suspicion and distrust with which they would view the protection afforded by UN symbols and designated humanitarian locations.

- Finally, the Eastern war, which lasted over a year, indicates how the SLA behaved in conditions of war where the LTTE did not violate IHL in the flagrant way they did in the Wanni war. In a situation where there was a reasonable observance of the rules of war by the adversary, the SLA was able to ensure that its military operations were strictly in compliance with the rules of conventional war.

The First Phase of the War in the Northern Province – From Madhu to Kilinochchi

The narrative of the Wanni war begins in January 2008 after the LTTE had been fully defeated in the Eastern Province and all the LTTE cadres had been evicted from the Province. After the completion of the operation in The Eastern Province the government formally withdrew from the Ceasefire
Agreement. The agreement had ceased to be operative from the time the President took office in November 2005. Along with the withdrawal, the government announced its intention of launching an offensive to defeat the LTTE, destroy its military capability and re-establish its authority in all the areas which had been occupied by the LTTE in the Northern Province.

At the time the government offensive was launched, LTTE was in occupation of approximately 6,792 km with a forward defence line (FDL) 11 km long in the Northern front and an 140 km long FDL on their Southern Front from Mannar in the West to Kokkuthuduwai in the East. There are various estimates of the total civilian population in this area ranging from 300,000 to 429,000. This estimate has become a subject of intense controversy as the estimate of civilian casualties in the Wanni war has been based on it. This aspect of the war will be dealt with in later chapters.
According to the Army estimates the LTTE cadres were between 25,000 to 30,000. The total number in the government security forces was around 300,000, enabling a regular rotation of troops in the battlefront. The Sri Lanka armed forces were vastly superior to the LTTE in numbers and military equipment. Its arsenal included heavy artillery battle –tanks, helicopter gunships Kfirs MIG 29 UAVs. The LTTE for its part had used the ceasefire to increase their military capacity and procure a wide range of heavy and sophisticated weapons which combined with their other ruthless tactics of warfare such as the suicide killings and the use of human shields enabled them to offer a formidable resistance to the army. Their weaponry included 130 mm canon type guns, 152 mm howitzer type guns, rocket artillery mortars, missiles and a large stock of RPGs. They also possessed naval craft and light airplanes which were used to launch attacks. They had constructed a large network of earth bunds bunkers and trenches highly fortified and strategically located in all parts of the Wanni to assist them in their method of guerrilla- type warfare and hinder the full use of battle tanks by the SLA.

At the time the offensive was launched the successes in the Eastern Province had greatly strengthened the morale of the SLA. The enhanced training the Army had received had increased its effectiveness in dealing with the LTTE’s methods of war and their deliberate and consistent violation of the IHL. The SLA’s enhanced capability included use of deep penetration units, the enhancement of night fighting skills, the use of snipers and deliberate fire instead of rapid fire, special hostage rescue troops, and small 4/8 fighting units providing flexibility in engaging LTTE cadres directly when mingling with civilians. These methods were tested and proved in the war in the Eastern Province.

The LTTE on the other hand had to contend with the defection of the Karuna faction, the defeat in the Eastern Province and the setbacks it suffered with the banning of their organization in UK, USA, EU and several other countries. With the co-operation extended to Sri Lanka by India and USA among other countries, their supply of arms was adversely affected and although they had acquired huge stocks of armaments, the replenishment of stocks of arms and ammunition had stalled. The UTHR provides an insightful analysis of the state of the LTTE at this stage. It
points to strong dissent within the LTTE camp in regard to the choice of options available, with one faction arguing for negotiations in what they rightly perceived as overwhelming odds. From the inception, Prabhakaran as leader had suppressed dissent in the most ruthless manner. The discovery of the prison in the outskirts of Puthukudiyiruppu where prisoners were held captive in chains in the most degrading and inhuman conditions is an example. Nevertheless the leadership was becoming restive. The frame of mind among the LTTE leadership and the growing sense of hopelessness at the inevitability of military defeat appears to have driven the LTTE to their most desperate and inhuman acts in this last phase of the war. In this context it appears that they had no compunction in deciding that the use of civilians as a human shield was the most effective option available to them.

The Military was already engaged in military operations in the Wanni during 2007. The 57th Division supported by Task Force 1 (which later formed the 58th Division) had made some territorial gains in the Mannar District and around Madhu and had captured the Silavaturai area. In early January 2008, the 59th Division South of Mullaitivu had begun operations. According to the account given in The Humanitarian Operation the major offensive in the Wanni commenced on 5 March 2008

The Army deployed its forces simultaneously on three fronts with six Divisions, 53rd, 55th, 56th 57th 58th and 59th and two task forces.

The 57th and 58th Divisions advanced from the Mannar front on the Southern FDL along the Western coast to Ponneryn and from Madhu towards Kilinochchi

The 59th division advanced from the south of Mullaitivu towards Oddusudan and Mullaitivu. The task forces supported the operations launched against the Southern FDL.

On the Northern FDL of the LTTE, the 53rd and 55th Divisions advanced towards Muhumallai and thereafter to Chundikulam Tharmapuram and Chalai on the East Coast joining with the 58th Division

In the South, SLA attacked both from the West and East advancing steadily on the LTTE controlled towns such as Adampam, Madhu, Mallavi
Pooneryn, Mankulam in the West, and Munugam Base and Nittikaikulam and Mullativu in the East.

As stated earlier the account that follows does not attempt to provide details of the military operations and the strategic significance of each advance made by the SLA. However it provides the broad chronology of the war in terms of the capture of strategic towns and the slow advance of the army on all three fronts - the Western part of the Wanni covering the coastal area up to Pooneryn and Paranthan and the operation from Madhu to Kilinochchi including Mankulam and Iranamadu; the Mullativu front covering the advance leading to Odusuddan and Mullaitivu; the offensive from the North Southwards to Elephant pass and the Eastern Coast down to Chalai. The details that are given in the narrative may make laborious reading but they are necessary to gain some understanding of the intensity of the fighting and the risk of civilian casualties, given the degree of intensity. They are relevant to the issues of accountability; particularly those of indiscriminate killing that have arisen.
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In the first phase of the war from March 2008 to January 2009, on the Southern FDL, the LTTE fought from highly fortified positions in jungle terrain. The LTTE had built a network of earth bunds, bunkers and trenches which were located strategically in the jungle and became formidable bases which they could defend and from which they could launch attacks. Time and again the LTTE fought back after losing ground and succeeded in recapturing territory. Consequently the progress of the army during the first phase was extremely slow. The first phase from Mannar to Kilinochchi lasted approximately 10 months with the army advance being restricted to an average of 2 to 3 kilometres a week. Both sides were suffering heavy casualties. Nevertheless civilians did not as yet function as a human shield for the LTTE in the same way they did in NFZs. The government had commenced the Wanni war with the declared objective of “zero civilian casualties”. In the first phase up to Kilinochchi SLA was successful in keeping civilian casualties to a minimum.

In its plans to wrest the Wanni from LTTE control, the SLA adopted new tactics and strategies. As stated earlier, the LTTE had built bunds, trenches and bunkers in the entire area as their main lines of defence against the advancing army. The terrain was heavily mined. In the first few weeks after the launch of the offensive army units were sent toward LTTE bunker lines in attempts to destroy LTTE defences. The SLA operated with small groups to infiltrate the bunds, engage LTTE cadres directly and call for accurate indirect fire when large military complexes were located. The SLA issued several calls to the LTTE to surrender before the Army's advances but these were ignored by the LTTE.

On 8 March, SLA troops, backed by helicopter gunships, pushed across the front lines using tanks, mortars and artillery. By the end of March, the SLA had destroyed at least 250 LTTE defence positions and were preparing the ground for a rapid advance into rebel territory. The SLA were simultaneously advancing to the North of the Vavuniya – Mannar road towards Madhu and the Mannar rice bowl and on the A-9 highway in the direction of Kilinochchi. During the early part of April the operations were stalled owing to heavy rains and an epidemic of dengue fever among the soldiers. In mid-April the operations were resumed and dozens of Tiger defence positions were overrun.
One of the first objectives of the SLA was the recapture of Madhu. The LTTE had built bunkers and positioned artillery in the church premises and was using the church to treat its wounded. The SLA was instructed to avoid offensive operations and ensure that no damage was caused to the church which was a place of great religious significance to Catholics. The Army was able to cut off all supply routes to the LTTE encampment. The religious leaders appealed to both parties to avoid any military engagement in Madhu. Finally the LTTE withdrew from Madhu driving the civilian population along with them further North into LTTE held territory away from the SLA and government territory. On the 24 April the SLA was able to take control of Madhu.

The events in Madhu and the plight of the civilian population deserve closer analysis. Madhu proved to be a decisive turning point in determining the fate of the civilian population trapped in the war zone. There was already evidence that the LTTE was intending to keep the civilian population captive.
in the territory controlled by them and use them for military purposes such as forcing them to work on constructing bunkers and digging trenches. They were also continuing to conscript civilians including children to increase their fighting cadres. The SLA reported that the LTTE was using force to prevent civilians from escaping into government territory and had placed armed cadres in Omamnthai and Uliyakkulam at the entry/exit points to control civilian movement. In March a very small number of civilians- 138 in all- had managed to escape. From the accounts of the events pertaining to the capture of Madhu including those of NGOs it is evident that there were a large number of civilians including IDPs in Madhu and the precincts of the Church. There was an opportunity for the religious leadership and the UN agencies to enable the civilians to move into government-controlled territory and afford them the protection to which they were entitled, as it happened during the Eastern Province war. However the SLA’s warnings regarding the plight of the civilians and the actions taken by the LTTE to use them as a human shield went unheeded. All the other parties who were monitoring the military operations – the international community, the UN agencies and the religious leaders in Mannar- failed to diagnose the true nature and proportions of the humanitarian crisis that would unfold if the LTTE were permitted to take the civilians with them and use them for military purposes. Had the UN agencies, religious leaders and the SLA acted together to separate the civilians from the LTTE it is most likely that they could have prevented the fate that overtook the civilians during the last stages of the war. A few writers who have described the capture of Madhu (e.g. DBS Jeyaraj) refer to the abandonment of the civilians and pointed to the tragic consequences that would follow.

In operations that followed the capture of Madhu, the SLA captured the Mannar rice bowl including the towns of Adampan, Anankulam, Alanakakulam and adjacent towns to the west of Madhu and advanced North to capture Palampiddi, blocking the LTTE supply route between northern Vavuniya and Mannar districts. During the rest of May and throughout June heavy fighting continued in which SLA air strikes resulted in the destruction of a major LTTE complex in the jungle. The SLA continued to advance along the coast in the direction of Pooneryn capturing the strategic coastal town of Vidattaltivu in the Mannar District on 16 July.
On 2 September, SLA forces penetrated LTTE defences and captured the town of Mallavi which was regarded as an important supply centre for the LTTE. Some 20 SLA soldiers and more than 100 LTTE cadres were killed during the battle for the town. The same day, the LTTE conducted a counter-attack against advancing SLA troops to regain their lost bunker lines. The Army claimed to have killed 52 and wounded 65 Tiger fighters. Seven soldiers were killed in the operation, seven missing and 50 wounded while the LTTE claimed to have killed 75 soldiers and wounded 100. After the capture of Mallavi the SLA advanced on Kilinochchi.

On 9 September, LTTE suicide fighters, known as Black Tigers, conducted a raid on a military base in Vavuniya deploying two planes and artillery. The raid left 25 people dead: 12 soldiers, 11 Tigers, one policeman and one civilian.

During September and October heavy fighting was raging for the town of Nachchikuda, both on land and sea. One of the major defences was a fortified ditch cum bund which ran from Nachchikuda to Therumurukandi via Akkarayankulam. The SLA reports that its aerial reconnaissance revealed that the LTTE was forcibly employing civilians for the construction of ditches and bunds and mobilizing earth-moving equipment forcibly taken from civilians and INGOs. The LTTE was putting up a stubborn resistance firing heavy artillery from this position and causing heavy casualties among the government forces. At least 35 soldiers were killed during the battle for Nachchikuda. The military estimated the LTTE casualties at between 100-200. The town was finally captured on 30 October. The Army went on to capture Akkarayankulam in November 2008.

By 12 October, the SLA had come within 2 kilometres from the outskirts of Kilinochchi. The LTTE were preparing to defend the city with a string of concrete bunkers and trenches in a heavily mined jungle surrounding the town. Between 18 and 20 October, heavy fighting raged on the outskirts of Kilinochchi, with SLA troops attempting to break through LTTE bunker lines. During these two days 36 SLA soldiers were killed and 48 were wounded; 12 Tamil Tiger fighters were killed. Meanwhile most of the troops were needed to secure rebel territory that was rapidly taken in the previous two months after the LTTE’s retreat to the north. Consequently the SLA forces were
extended and the captured territory was subjected to frequent hit and run attacks by the LTTE. The efforts of the Sri Lankan Air Force to drive the LTTE from their entrenched positions on the roads into Kilinochchi were also unsuccessful. According to reports available the LTTE were preparing defences within the town and had evacuated all the citizens.

By mid-November SLA forces had succeeded in bringing the entire North West coast under their control. By 17 November, the SLA captured three more strategic towns: Mankulam, Pannikankulam and Pooneryn. 54 soldiers were killed and another 350 wounded in the battle for Pooneryn, which fell after SLA forces advanced on the Pooneryn-Paranthan road. At the same time the SLA launched attacks on the Muhamalai front, attempting to break through the LTTE forward defence lines. The LTTE put up a strong resistance resulting in large casualties among government forces. Over 200 SLA soldiers were killed and another 700 wounded in battles across the north of the country. However, by the end of November the SLA succeeded in breaking through the LTTE's defences on the Muhamalai FDL.

On 10 and 16 December the SLA launched two offensives to capture Kilinochchi which the LTTE successfully resisted. The first offensive was repulsed with the deaths of 89 SLA soldiers. The second was an offensive on several fronts. That too was defeated by the Tigers with heavy casualties among the government forces. According to the Tigers the SLA lost two battalions of troops, 170 soldiers dead and 420 wounded. The SLA reported that only 25 soldiers were killed, 18 missing and 160 wounded while they killed 120 Tigers. On 20 December, a counter-offensive was mounted by the LTTE as SLA forces were preparing to attack and capture the village of Iranamadu, just south of the city. In the fighting that ensued the Tigers claimed to have killed 60 and wounded 150 SLA soldiers and pushed them back by two kilometres. The military again reported lower numbers of dead, 28 killed and missing. Meanwhile Division 55 was moving southwards after capturing Paranthan and converging on Kilinochchi. Finally on January 2, 2009, the Sri Lankan army troops entered the town of Kilinochchi from two sides. The SLA met with only minimal resistance once it entered the town. The entire town was evacuated and the LTTE was compelling the civilian population to move to Visvamadu.
Salient features of the First Phase

- The government started with the declared intention of conducting the war in a manner which would avoid any civilian casualties. They termed it a policy of zero civilian casualties. “Zero casualties” was an impossible goal and unfortunately the use of that term was held against the government as a deliberate effort to conceal the impact of the war on the civilians. From the above account it becomes abundantly clear that the war was fought with an unusual ferocity with use of artillery on both sides. The network of earth bunds and trenches erected by the LTTE effectively obstructed the use of tanks by the SLA and considerably slowed its advance. This also resulted in direct engagement of troops and penetration and breach of bunkers by small groups of the SLA. Consequently the casualties of combatants on both sides were very heavy.

- From all accounts, the civilian casualties were quite low although the ideal of zero civilian casualties was not achieved. The UTHR refers to two incidents of shelling during the advance to Kilinochchi which were reported which resulted in the killing of civilians. One was in Murukandy when the army was advancing towards Kilinochchi from the South the other in Murusamoddai from the army approaching Kilinochchi from the North. The TamilNet reports of these incidents placed the number of deaths at 2 and 10 respectively. The UTHR report cites a witness to the first incident who says that the dead could have been about 17. However the issue of civilian casualties was not raised in this phase of war. While the LTTE was using the civilians for conscripting young persons including children into the fighting cadres and employing them on building defences they were not as yet using them as a human shield and placing them in positions that enabled the LTTE to take cover among civilians with their weapons and direct fire at the SLA. Consequently the SLA did not face any impossible choices regarding the protection of civilians in conducting the fighting and were able to comply with the rules of war.

- The LTTE had already clearly demonstrated in Madhu what
they intended to do with the civilians. The LTTE wereflagrantly denying them freedom of movement and forcing the civilians to move along with them into the territory controlled by them. They were conscripting young persons and using them as forced labour and as fighting cadres; they were being denied their human rights as IDPs. Section 2.2 in the UTHR report No 34 gives a detailed account of “the methods of conscription and how the LTTE was forcing school children and adults to undergo mass military training.” Here is a passage from the report:

- The methods used were brutal and crude... Conscription first 18 years and then 17 finally dropped to even 12. ... During the height of displacement people saw young children calling their mothers upon being taken away and screaming parents turned back by violence and intimidations ... Parents desperately hid their children in bunkers and the reports speak of children so hidden dying due to suffocation.

- The UN and the international community seemed helpless to prevent these atrocities. The PoE and IPEC reports ignore this entire phase of the war and the violations of IHL by the LTTE that preceded the NFZs. The movement of the civilians with the LTTE is treated with an ambivalence which is difficult to comprehend. They suggest that some of the civilians may have gone voluntarily with the LTTE as they may have supported their cause. Some may have decided to stay with the LTTE as they did not want the children to be conscripted. They also suggest that they may have not responded to the SLA’s efforts to get them into government controlled areas as they did not trust the SLA. They also mention that escape routes were also dangerous owing to continuous shelling and mines. All these elements may have had some bearing on what happened. The last argument however is somewhat specious and tailored to ignore the significance of the LTTE violations and support the contention that the SLA intended to drive the civilians into pockets where they could be slaughtered. Safe corridors were provided by the SLA as in the
case of the Eastern Province. The UN agencies could have helped to dispel distrust of the GoSL among the Wanni civilians and pointed to the protection given to IDPs in government controlled areas. What is clear from all what happened is that UN agencies who at this stage were direct witnesses of the treatment of IDPs by the LTTE failed to take any meaningful action to prevent it. Whether they or the international community could have taken preventive action successfully is another matter. But there is no doubt that a full and thorough appraisal of the situation of the IDPs was needed at this stage and strategies should have been designed with the GoSL to separate civilians from the LTTE. Instead of undertaking this task the effort of UN agencies was directed exclusively at supplying food and other essential items to the civilians, reinforcing their conditions of captivity. These issues will be further examined in Chapter 4.

The Second Phase of the Wanni War from Kilinochchi to 20 May 2009

On 2 January, the SLA entered Kilinochchi and took control of the town. At this stage it was becoming clear that a large part of the LTTE’s military capability had been destroyed including most of its aerial and naval capabilities. It had been fully defeated in the terrain that had been elaborately prepared for conducting a guerrilla type war. The supporters of the LTTE including the expatriate Diaspora had expected the LTTE to demonstrate the resilience it had shown in past campaigns and effectively stall the SLA offensive and follow up by inflicting a severe reversal on the SLA. Kilinochchi had been heavily fortified for a formidable defence if that became necessary. However the LTTE evacuated Kilinochchi without offering any serious resistance and drove the entire population towards Visvamadu in the West.

The full reasons for this change of strategy have not been disclosed in any of the reports available. The decimation of some of the elite cadres and the steady diminution of the LTTE stock of weapons may be one of the reasons. The more important was probably the realization that the LTTE did not any longer have the capacity to offer the type of resistance needed to defend
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Kilinochchi. They may also have had a more important consideration. The LTTE may have also realized that any effort of this nature would have enabled the citizens to escape thereby denying them the use of the most powerful weapon they had- the human shield.

There are numerous and very diverse accounts of the last stages of the war from 2 January to 20 May 2009. The reports of the Human rights groups are focused on the events that occur during this period which could be defined as war crimes. The narratives are therefore organized around these events. The reports of the PoE and ICEP contain fuller narratives of this period and attempt to provide an account of how the war progressed mainly in terms of the offensive. There is very little on the action taken by the LTTE – the continuous effort of civilians to escape, the regular killing of civilians by such civilians, the suicidal attacks on the army regardless of their effect on the civilians, the shelling by the LTTE the forced labour of civilians on the construction of earth bunds and other defences.

The LLRC give us a more comprehensive lengthy account of how the war was fought providing eyewitness accounts from the civilians who were trapped in the NFZ (paras. 4.42 to 4.142 ). The UTHR provides an account of the last stages of the war in the NFZs on a daily basis supported by the detailed stories narrated by the civilians who experienced the fighting and witnessed it firsthand. The account that follows gives a brief account of the war in chronological sequence based on the information in the Defence Ministry report. It goes on to describe the methods of fighting employed by the SLA and the LTTE, the efforts of the civilians to escape and the responses of the SLA. For this account, it relies on the information available in the reports of the LLRC and the UTHR.

The character of the war had undergone a significant change. The civilians were now increasingly pushed into the battleground and caught between the exchange of fire between the SLA and the LTTE. Along with it, the LTTE’s relationship with the civilian population and the purpose they served in the war had also changed. There was no longer any question of winning Eelam IV. The LTTE began to focus on the possibility of international intervention and with that objective raised the spectre of a major humanitarian disaster. In that context the scale of civilian casualties
counted. The LTTE by positioning themselves and their equipment amidst the civilians and firing from these positions acted deliberately to draw the army fire on to the civilians and non military objects. Civilians attempting to escape, men women and children were indiscriminately killed by the LTTE. The UTHR estimates that a total of about 7000 civilians were killed by the LTTE at an average of 50 a day. The LTTE attacked food convoys and made the supplies of medical and other essential goods increasingly difficult, all with the objective of precipitating the humanitarian disaster. The LTTE had defined the role of the civilians as that of sacrificing themselves and facing death for the greater cause of Eelam.

The LTTE’s military operations were organized under three commanders. Ratnam Master was in command of the Visuamadu front to the West. PTK was under the command of Pottu Amman. The area in the middle around Udayarkattu was defended by the cadres under Soosai. According to accounts given in the UTHR report the fighting around Visuamadu and Udayakartu was a fiercely contested defensive operation with LTTE moving with the civilians towards the East. Groups of LTTE cadres fired at the army with small arms from bunkers and retreated. Army continued to advance. The shelling was directed at the retreating LTTE cadres. The civilians displaced from Kilinochchi were moving towards Visuamadu ahead of the LTTE. The LTTE were pushing the civilians forward into areas which would enable them to hold the civilians and prevent them from escaping. At this stage the displaced civilians who were caught in the battle zones around Visvamadu Udyarkattu and Puthukudiyruppu were exposed to shelling by both sides. There are numerous accounts of witnesses cited by the UTHR in their report No 34 which describe this plight of civilians in harrowing detail. Two such instances one where LTTE shelled on the civilians and the other where army shelling killed civilians is given below:

An exchange of shellfire was going on which most people learnt to ignore; The army was planning to take Puthukudiyruppu and was firing from the South. LTTE artillery was firing from Pachaipumodai just North of where Maniam (the witness) was. While listening to news from Sooriyan Radio he noticed that at 6.11 P.M. LTTE canon changed direction and fired three shells to the South East. He later learnt that the shells landed in Puttumalan
killing 17 civilians and injuring 23. Maniam confronted a strong LTTE supporter about this. The answer he got was that the whole of PTK must be displaced and the people must suffer. The suffering of the people for the cause was a regular LTTE refrain since the mid 1980s. A joint family from Mannar District who had for over two years been fleeing from place to place in search of safety got into a bunker, late January to take cover from a heavy exchange of shelling overhead. One shell fell right into their bunker killing everyone. Their only surviving sibling is an agonized Roman Catholic nun.

The UTHR reports the fierce fighting for the capture of Visuamadu on the 16th of January the Army suffered heavy losses estimated at 350 killed. The LTTE displayed the bodies of about 30 soldiers. The setback at Nethaliarea was followed by army shelling into areas further east where IDPs had taken refuge.

The Sri Lankan Armed forces operating on three fronts were now converging in the Eastern quadrant of the Mullaitivu District. The 55th Division was advancing from the Northern Front having captured Chundikulam on 9 January 2009, thereafter having advanced further and taken Chalai on 7 February it was closing in from the Eastern coast. The 59th Division which had taken Mullaitivu on the 25 January was advancing along the South East and had captured Udayakattukulam on 25 January. The 57th and 58th division moving from Kilinochchi Eastwards had captured Visuamadu on 28 January and Tharmakulam on the 3 February.

It is in the defence of PTK the LTTE put up its fiercest resistance since the fall of Kilinochchi.

On 3rd February The LTTE launched a counter-offensive with a group including suicide cadres in which encounter the SLA lost about 400 soldiers. The blow was so severe that the plans to capture PTK was delayed by 3 weeks (UTHR Report No.34).

Finally PTK was captured on 5 April 2009. The shelling in the PTK area which figures prominently in the charge of indiscriminate shelling by SLA in the PoE and ICEP reports occurred in the context of this intense fighting.

Meanwhile in January the SLA had made another effort to separate the civilians from the LTTE and move them into a safe area which would
be left outside the battle zone. The government declared a no fire zone in the outskirts of Thevipuram and Suthanthirapuram hoping that the LTTE would allow the civilians to move into this area and leave it free from any military engagement. A safe area of this type would then separate the civilians effectively from the LTTE, confining the exchange of fire and the fighting to the battle zone in which SLA and the LTTE cadres would be directly engaged in combat. The safe area as designed by the government would require the LTTE to abandon their strategy of using the civilians as a human shield. The government may have expected that by declaring the NFZ they would be posing a major problem to the LTTE. It may have surmised that if the LTTE openly violates IHL and uses the NFZ for military purposes the UN and international community would respond very strongly. The civilians knowing that a safe area was designated would be able to resist the LTTE, if they came into the NFZ with their weapons and forced the SLA to direct their military operations at the NFZ. However, these considerations did not in any way deter the LTTE from persisting in their strategy of holding the civilians captive and making use of the NFZ as their battleground. For these reasons the first NFZ was a total failure.

![No Fire Zone Map](image)

No Fire zones
Source: Ministry of Defence: Humanitarian Operation Factual Analysis
With the LTTE not accepting the NFZ, the fighting and shelling inevitably moved into the NFZ area pushing the civilians further east. Civilians moved in the direction of Puthumattalan. In order to make it more difficult for the civilians to escape, the LTTE pushed the civilians into the small coastal strip between the sea and the Nandikadal lagoon. In response, the SLA began demarcating fresh NFZs where the civilian population was concentrated. But this again had no effect on the LTTE’s strategy of using civilians as a human shield. By mid April the civilians and the LTTE were confined together in the small coastal strip from Puthumattalan in the North of the strip to Mullivaykal in the South.

The UTHR report is replete with accounts of the civilians continuously making efforts to escape from the control of the LTTE. They give grim accounts of the action taken by the LTTE to thwart these efforts, the regular shooting of civilians by the LTTE and the use of physical force against them. They also speak of the assistance provided by the army to help civilians to escape particularly in the last stages when they had to cross the Nandikadal lagoon. The accounts of witnesses in the LLRC report corroborate this evidence.
There is ample testimony in the UTHR report to support the claim that the SLA was making strenuous efforts to enable the civilians to escape. The report describes the first effort to enter the NFZ along the A 35 at Irrattivaikal. The UTHR report states that the LTTE “were expecting SLA to try to take out the civilian population in one go” “sensing this the LTTE fought tooth and nail to hold on to its positions. This original plan would have entailed considerably less civilian losses.” The army could not carry out this plan owing to LTTE’s successful defence at this point of entry. It had finally to make its entry at Pokkani on the 20 April which enabled the army to bifurcate the NFZ and free approximately 100,000 civilians in the Northern half of the NFZ. Based on accounts of witnesses the UTHR estimates the civilian deaths resulting from this operation at about 1000.

From 8 May onwards, the fighting continued in the Southern half of the coastal strip where approximately 70,000 civilians were trapped. From the accounts of witnesses who gave the testimony to UTHR the horror of the situation defied all description. The LTTE was fighting using all the
resources at their command which included artillery of various types. They had succeeded in building earth bunds and bunkers and had converted the NFZ into a battleground from which they could continue to resist the army. The advancing army and the LTTE behind their defence positions were continuously exchanging fire and shells were falling around the civilians. The accounts of witnesses speak of various incidents of shelling where civilian deaths ranged from three or four in one incident to 30 to 40 in some others and over 100 in the worst. A significant number of LTTE cadres were committing suicide and resorting to suicide killings of soldiers. One account describes how disabled LTTE cadres hiding in bunkers blast themselves killing SLA soldiers who attempt to enter the bunkers. The LTTE were continuing to prevent civilians from escaping and killing them in large numbers. On 14 May, the LTTE are reported to have killed as many as 400 civilians who had attempted a mass breakthrough. The SLA army who were taking no risks were firing at every object which they regarded as a threat. All witnesses agree that both the LTTE and SLA were engaged in their military operation and intent on achieving their military objectives without any concern for the effects it had on the civilians.

In the last days of the fighting there was an attempt to negotiate surrender but this proved to be abortive. The LTTE plans are reported to have aimed at three objectives- part of the LTTE leadership including Prabhakaran to breakthrough into jungles to the North West of the NFZ another part of the leadership to surrender to the SLA and the rest of the cadres to join the IDPs and move into the IDP camps. These plans failed. Most of the leaders who attempted the breakthrough including Prabhakaran were killed. The same fate befell the leaders who attempted to surrender. There are different versions of the events surrounding the death of the leaders. The issues of accountability arising from these events are discussed in Chapter 4.

Most of the LTTE leadership and the fighting cadres were killed in the last stages of the war. About 11,000 of the active members of the LTTE surrendered. The remaining civilians came out of the NFZ on the 19th and 20th. The military operations finally ended on 20 May 2009.
Conclusion

What emerges from the foregoing account is a profoundly tragic story. It was a war fought in the most extraordinary circumstances in which a large civilian population was held forcibly within a battle zone and deliberately positioned to gain military advantage. The story that unfolds is one in which the LTTE employs every method at their disposal to resist the SLA and the SLA attempts to overcome every obstacle that stands in the way of achieving their military objective of killing or capturing the LTTE leadership and freeing the civilian population. The issues of accountability and the norms of distinction and proportionality would have to be set within this context. Some of the salient features of the last phase of the war are highlighted below.

With the fall of Kilinochchi there was a significant change in the character and conduct of the war. The change arose mainly out of the strategy of the LTTE to use the civilians and position them in a manner that would give them a military advantage and provide them protection by making it difficult for the SLA to separate the civilians from military objects and targets. They did this by locating military equipment amidst civilians and close to protected locations such as hospitals and getting into civilian clothes and merging with the civilian population. Many of these cadres were armed with grenades which could not have been easily detected. The IPEC argument that the army had surveillance equipment to identify LTTE in civilian clothes carrying arms would not apply to LTTE’s armed with grenades.

At this stage the LTTE realized that they had no hope of winning the war militarily. They focused on the possibility of provoking international intervention with the threat of a major humanitarian disaster. The role of the civilian population and mounting civilian casualties became a part of the strategy. Civilians were deliberately exposed to army fire to increase the scale of civilian casualties and the magnitude of the humanitarian crisis.

The LTTE managed to retain a large stock of weapons which they carried with them into the NFZs. These included heavy artillery mounted on tractors that were moving military objects. Part of the SLA shelling had to be directed at these moving military objects. A full list of the weapons that
were used by the LTTE in this phase of the war is not available in any of the reports. The Humanitarian Operation gives a list of the weapons that would have been available at the commencement of the war. These included 130 mm Canon type guns, 152 mm Gun Howitzer type 140mm and 120 mm mortars, RPG missiles and missile launchers. This list gives an idea of the imminent danger to which civilians were exposed in the second phase of the war.

From Kilinochchi to the second phase the civilian population comprised the civilian population who were driven along by the LTTE from Madhu and Kilinochchi onwards as well as the population living in the Eastern part of the Mullaitivu District. The witnesses testifying to the UTHR include families from Mannar. The heinous nature of the LTTE actions and the magnitude of the suffering endured by the civilian population at their hands can be gauged from these facts.

After Kilinochchi the war became a moving battleground in which the LTTE was holding the IDPs closely and exchanging fire with the SLA. This would have inevitably resulted in civilian casualties. With the second NFZ all the civilians were packed into a narrow strip with combatants and weapons including mortars and heavy artillery all mixed together.

The nature of the fighting that took place in the last stages of the war including the methods employed by the SLA are described in detail in Sections VI and VII of the Humanitarian Operation. It gives an account of the nature of the challenges that had to be faced. “The LTTE had constructed earth bunds and multiple layers of obstacles creating twin complications to delay entry and hinder entrapped civilians access to freedom. In the rescue small groups on surprise landings under cover of night crawled inland and were met by earth bunds...behind the bunds were LTTE bunkers...small groups moved forward with scouts and navigators in the front...LTTE fire caused many civilian casualties that required evacuation. Civilians ran desperately towards the oncoming security forces and were directed in language and signals to move into safe positions. Sick and elderly with their baggage had to be carried and some required medical attention.”

The account in the “Humanitarian Operation” does not contain descriptions of the horrendous suffering of the civilians given in the UTHR.
In those accounts the civilians expressed the view that the civilians were left to their fate and that the SLA and LTTE were fighting without any concern for the deaths and injury to the civilians that were caused by the fighting. Nevertheless their testimony describes how the Army was constantly assisting them to escape and how the LTTE was shooting mercilessly at those who were trying to escape. It is clear that the conditions of the fighting in the last stages included all these elements.

The LTTE continued to thwart the efforts of the civilians to escape right up to the last stages. On 14 May, the UTHR reports a massacre of 500 civilians who were trying to escape. The following excerpts from the UTHR report indicate the nature of these atrocities:

There were many instances when Tigers waited for an escaping family to get into the water and fired bursts at the children, watching them writhe and die, in convulsions of hands and legs. A large group of civilians who went to a Palmyra nursery near the Nandikadal Lagoon before dawn on the 14th were shot at by the LTTE killing about 500 of them. We (UTHR) have had further confirmation of this.

The methods employed by the LTTE included suicidal attacks directed at killing as many soldiers as possible. Witnesses describe how disabled Black tigers blew themselves up in bunkers for this purpose.

Witnesses cited in the UTHR report state that the SLA responded to these threats by indiscriminate firing which resulted in civilian casualties.

It is quite clear from the accounts of witnesses that the shelling was intense and came from both sides. Witnesses who appeared before the LLRC and testified to the UTHR are emphatic that the shelling came from both sides. Some said that it originated from the LTTE and the SLA responded. One witness says that when the LTTE fired once from a position in the midst of civilians the SLA responded twice with shelling. One witness says that the shelling was mostly by the LTTE. In certain instances some witnesses are definite that the shelling came from the Army while others merely state that there was shelling but are not sure who was responsible for it. When all these accounts are pieced together it is clear that there was heavy shelling from both sides and that the exchange took place as a part of intense fighting.
The UTHR refers to certain incidents of shelling in which the SLA appear to have directed their shelling to locations where groups of civilians were present and state that the Army may have had the intention of causing panic and inducing civilians to stampede and breakthrough to escape. They argue that though this may have been the military objective it was callous in its disregard of the lives of civilians. The question that arises is whether the SLA shelling was always done with a military objective in view and solely for the purpose of gaining a military advantage. They require a military assessment of military decisions taken in a rapidly changing battleground. Therefore to extract particular incidents of shelling from this general context and examine them for accountability may lead to wrong interpretations and conclusions. The fighting in and around the PTK hospital and the makeshift hospitals was of the same intense character as occurred in all parts of the battle zone during the last stages of the war. The issues of accountability for indiscriminate shelling and shelling of hospitals are examined in greater depth in Chapter 4.1

The safe areas and NFZs was a final effort of the SLA to separate the civilians from the army. Given the nature of the fighting the SLA had to be constantly directing civilians to areas that were temporarily safe. The LTTE was responding by moving along with the civilians and effectively thwarting the SLA’s effort to separate the civilians from the LTTE. A safe area to be effective would have required an acceptance of the safe area by the LTTE and some means of enforcement. Enforcement might have had to come from the UN and the international community. The accountability of the UN system and the international community for the tragedy that occurred is discussed in Chapter 5 and 6.

The food and medical supplies are identified as major issues of accountability in the PoE and ICEP reports. These are dealt with in Chapter 4. What the factual analysis of the war itself indicates is that the land convoys had to be stopped as the fighting intensified and safe passage could not be guaranteed. There is no doubt that in the prevailing war conditions shortages would have occurred. The government claims that it made the best effort possible in the circumstances. The PoE argues that there was a deliberate attempt to deny food and medical supplies to the civilians by manipulating
population figures. The government points out that the quantities were agreed between the government and the UN, after taking account of food availability, local production and stocks and that population was only one factor in the calculation of requirements. These issues are further analyzed in Chapter 4.

There are conflicting accounts of an effort made by the US, Norway and other Western nations to negotiate surrender on the part of the LTTE in the final phase during 9-18 May. The information that is now in the public domain indicates that the US were discussing the possibility of evacuating the top leadership of the LTTE from the NFZ and releasing the citizens. Such a course of action would have thwarted the main objective of the military operation of the SLA – that of totally defeating the LTTE and eliminating the threat of terrorism. There is no indication that Prabhakaran himself agreed to such surrender. This is confirmed by a statement made by the US defence attaché who was serving in the US embassy at the time and would have been privy to the US efforts. The reports available suggest that the LTTE had in mind a strategy in which one group would attempt to breakthrough and move into the Wanni jungles while another group surrenders and the remaining LTTE cadres merge with the citizens and move into IDP camps. (see UTHR report ). Subsequent events appear to give credence this version and raise questions regarding the motives for the surrender of any of the LTTE leaders. There were also indications that there was considerable dissent among the top echelons of the LTTE on the course of action that should have been followed when it became clear that LTTE was facing total defeat. The white flag incident in which a small group of LTTE leaders had attempted to surrender would have to be investigated in this context. For all these reasons the government would have found the US proposal a totally unacceptable military option. It would have been seen as an option which would once again enable the LTTE to escape and continue to pose a terrorist threat to the sovereignty peace and stability of the country. Acceptance of such an option when the SLA was achieving its main objective of eliminating the LTTE as a terrorist organization would have been seen as wholly subversive of the national interests.

Finally, there is the question of civilian casualties of the Wanni war – an issue which has generated an extensive controversy.
There are various estimates of civilian casualties based on varying estimates of the Wanni population before the war and the estimates of the IDPs at the end of the war. The unaccounted difference between the two figures is taken as the estimate of civilian casualties. The estimates of civilian casualties on this basis range from a high of 140,000 to low figure of 7000. The provisional figure given by the PoE and UTHR is 40,000.

Most of the estimates of civilian casualties hinge on the estimate of population in the Wanni before the war. The estimates given by the government officials vary from 429,000 in September 2008, to 360,000 in January 2009, 330,000 in February and 300,000 according to a “rough census” carried out by the AGA in March. There are major inconsistencies in these estimates which have been pointed out by experts. They have been challenged on the ground that they have been prepared under the direction of the LTTE and are highly inflated for the purpose of obtaining rations and assistance under government welfare programmes as well as magnifying the scale of the humanitarian disaster that could occur. In June 2012 the Ministry of Defence settled for a total of 300,000 people before the war.

The estimate of the people who came out of the Wanni also raises a few questions. The figure of 290,000 is the verified total of IDPs who were registered in IDP camps. The ICRC has reported a total of 13,000 wounded and those accompanying the wounded who were evacuated by them by ship after January 2009 after the ICRC land operations ceased. It is not clear whether any or all of them are included among the 290,000 IDPs. The UTHR and LLRC reports contain several accounts of civilians escaping by boat and as well as moving into the jungles. These again will not be included in the figure of 290,000. Therefore civilians who survived are likely to be over 300,000.

The “Humanitarian Operation” states that the total fighting force of the LTTE at the beginning of the Wanni was in the region of 25,000 to 30,000. These must be included in the estimate of total population in the Wanni at the commencement of the war. The SLA in its submissions to the LLRC gives the casualties among the LTTE as 22,247 for the period 2006- May 2009. It is not clear whether this includes casualties in other battle zones such as the Eastern Province and Jaffna District. The Ministry of Defence
in June 2012 gives the LTTE casualties as 4,600. When this is added to the
11,000 LTTE cadres who were rehabilitated the total LTTE fighting force
would be in the region of 15,600. These figures do not tally with the total of
25,000 – 30,000 that has been estimated as the LTTE fighting force in the
“Humanitarian Operation”. All of this goes to demonstrate the unreliability
of the estimates that are being used by various reports when they subtract
the total population from the surviving population to derive an estimate of
civilian casualties.
CHAPTER 2

The Accountability of the LTTE

The main allegations of war crimes against the LTTE and the GoSL relate to the events in the last stages of the war after the capture of Kilinochchi by the SLA. Chapter 1 narrates how the war was fought in these last stages. The events that form the basis of the allegations of war crimes committed by the LTTE and the GoSL were the direct outcomes of the conditions of war that prevailed in the last stages. For the purpose of defining the accountability of the LTTE for the killing of civilians in the last stages of the war we need to identify clearly the responsibility of the LTTE for creating the conditions of war that led to these outcomes. These conditions of war which the LTTE intended to create and succeeded in creating were part of deliberate strategies and tactics that the LTTE employed to achieve their main military and political objectives.

The inquiry into the accountability of the LTTE would need to begin by defining the strategy that the LTTE had adopted from its inception as an insurgent movement waging an armed struggle against the Sri Lankan state. The allegations of war crimes would then have to be placed within the context of the violence of the insurgency and the counter-insurgency operation to suppress and defeat it. The war crimes committed by the LTTE during the last stages of the war have to be examined as a deliberate extension of the strategy and tactics which it pursued consistently in its entire campaign for Eelam.

The Strategy and Actions of the LTTE

Much has been written on the origins of the LTTE and its ideological roots. A brief reference was made to these in Chapter 1. From the time Prabhakaran took control of the LTTE, he demonstrated the ruthless
methods the LTTE would employ to achieve its objectives. These included:

- The assassination of almost all the leaders of rival political parties and militant movements;
- The mass murder of cadres of rival parties (as for example the killing of over 200 TELO cadres in Jaffna in April 1986);
- Reprehensible methods of recruiting members for the movement by demanding that every family should give at least one member to the movement;
- Deploying children as soldiers;
- Systematic unlawful extortion from Tamils to obtain funds for the movement;
- Indoctrination of members in an ideology of hate and suicidal violence and use of cyanide capsules for some of the fighters to take in case of capture;
- Training and developing a cadre of suicide killers who would blast themselves to destroy and kill the targeted objects;
- The specific practice of recruiting, training and deploying young females as suicide bombers. There is some evidence that the females recruited and trained for this task were from among orphans, or among those who had lost family members as a result of the conflict;
- Acts of terror resulting in the targeted killing of civilians, children women and men in majority Sinhala areas and in areas inhabited by Muslims in the Eastern Province;
- A policy of ethnic cleansing with the mass murder of Sinhala villagers in the Eastern province and the eviction of all Muslims and Sinhalese from the Northern Province;
- Total suppression of dissent within the organization and the Tamil community under LTTE control; and
- Imprisonment of opponents with bestial forms of torture, and execution without trial.
For all these reasons the LTTE had been classified and banned as a terrorist organization whose entire mode of operation was in violation of humanitarian law. In its campaign against the Sri Lankan state its actions were of such a reprehensible nature and widespread and systematic to an extent that most of them would be classified undoubtedly as crimes against humanity.

In the definition given to crimes against humanity in the Rome treaty on the ICC they were “odious offenses in that they constitute a serious attack on human dignity or grave humiliation or a degradation of human beings.” They are not isolated or sporadic events, but are part either of a government policy (although the perpetrators need not identify themselves with this policy) or of a wide practice of atrocities tolerated or condoned by a government or a de facto authority. Murder; extermination; torture; rape; political, racial, or religious persecution; and other inhumane acts reach the threshold of crimes against humanity only if they are part of a widespread or systematic practice. Isolated inhumane acts of this nature may constitute grave infringements of rights or—depending on the circumstances—war crimes, but are not classified as crimes against humanity.

Use of Civilians as Hostage and Human Shield

Given the LTTE’s record of using terror and crimes against humanity as a major weapon of war, the LTTE’s actions in using the civilians as part of their strategy in their last armed struggle was to be expected. The LTTE’s relationship with the civilian population had many aspects. The LTTE projected itself as a movement dedicated to the liberation of the Tamil people and the establishment of an independent state. The interest of the civilians themselves was subordinate to the main objective of achieving Eelam. Displacement deprivation deaths were inevitable consequences of the struggle and the civilians have to be ready for the sacrifice. The military capability that the LTTE was able to acquire and some of its spectacular military successes gained it the strong allegiance of sections of the Diaspora as well as the local population particularly the population in the North. From 1995 onwards the Wanni population came under the strict discipline and indoctrination of the LTTE. Therefore at the beginning of the Wanni
war the majority of the Wanni population may have had confidence in the ability of the LTTE to resist the Army and many of them may have been willing to go with the LTTE. But right from the inception of the war there was clear evidence that people were attempting to move into the government controlled areas and that the LTTE were taking drastic measures to prevent it. Children were being recruited, making families reluctant to leave their children. LTTE maintained a strong guard to prevent escape. According to witnesses, persons trying to escape were intimidated beaten or shot at.

With the fall of Kilinochchi and the prospect of the complete defeat of the LTTE the situation changed. The majority of the civilians sought a way of escaping from the battle zone. Simultaneously the LTTE’s attitude to the civilians hardened and became more ruthless towards the civilians. The civilians became an essential part of the LTTE’s military strategy in the last stages. The LTTE realized that they had been defeated militarily and that their only hope lay in an intervention by the international community that could bring about a ceasefire and leave them space for negotiation or escape. Such intervention would occur only if there was a threat of a major humanitarian disaster. The LTTE designed their strategy accordingly and defined the role of the civilians in the strategy. To achieve their purpose they used the civilians both as a human shield and as hostage. These two uses of civilians were closely interlinked.

- By holding civilians as hostage they were able to raise the spectre of a humanitarian disaster to provoke international intervention. The statements that the LTTE made to the civilians and the propaganda they conducted through their media and the expatriate community clearly confirm this part of the strategy.

- The human shield was an integral part of the strategy. The human shield slowed the army advance; it made it extremely difficult for the army to isolate the LTTE cadres and engage directly with them. But the human shield also achieved another objective. By exposing civilians to the direct impact of the battle and drawing army fire into the midst of civilians the LTTE was able to point to mounting human casualties and the unfolding humanitarian disaster.

- To achieve its objective LTTE had to maintain a tight control of the
civilians and prevent them from escaping. This they did by regularly killing civilians who tried to escape both in small and large numbers. As the UTHR states the LTTE tried to get the doctors, who continued to work with the civilians who were trapped by the LTTE, to count the civilians who were killed by them as victims of army shelling, who continued to work with the civilians who were trapped by with the LTTE.

- The LTTE also directed their shelling at food convoys and took action to obstruct the free flow of food and other essential supplies in order to intensify the humanitarian crisis.

The large number of major war crimes committed by the LTTE in the last stages of the war is the inevitable consequence of this strategy. Many of them are odious and reprehensible and carried out systematically and in a wide spread manner. They would fall into the category of crimes against humanity. The ICEP which refrains from concluding that the LTTE crimes are crimes against humanity and leaves them for further investigation has not taken into account the testimony of witnesses who were heard by the LLRC and the UTHR.

The crimes of the LTTE include:

- Preventing civilians from moving out of the battle zone which was done from the inception after the fall of Madhu
- Forcibly employing civilians on building fortifications bunds and bunkers
- Forcing civilians to move with them and positioning them so as to expose them to direct combat
- LTTE combatants wearing civilian clothes and merging with civilians to make it difficult for the army to distinguish between combatants and civilians and thereby provoke army shelling on civilians
- Pushing the population into a small coastal strip where they could be prevented from escaping and then moving into the No Fire zone with military equipment and making it the battleground in total disregard of civilian safety.
• Moving the artillery mounted in trucks in the midst of civilians and attracting army fire

• Positioning artillery close to non-military objectives to attract army fire

• Use of hospitals to house LTTE cadres to attract army fire

• Killing of civilians who were attempting to escape; specific instances such as incidents witnessed: killing of women and children crossing the lagoon; the large number approximately 500 killed on 14 May; total number killed by LTTE estimated at 7000;

• Indiscriminate shelling into the civilian population in the course of combat.

• Conscription of children in the last stages of the war

• Obstructing the supply of food medical and other supplies to civilians

• Diverting part of food and medical supplies intended for civilians for the use of the LTTE

The manner in which both the PoE and ICEP deal with the crimes of the LTTE raise serious questions about the overall approach taken in their reports. The reports do not seem to recognise the extraordinary nature of the crimes committed by the LTTE and the major challenge they posed to the entire regime of international humanitarian law. The way in which they were using a large civilian population to create conditions that would enhance the scale of civilian casualties and lead to a major humanitarian disaster was unprecedented. The LTTE thwarted every effort to separate civilians from the battle zone. By positioning the civilians in the midst of their military operations as they did, they ensured that the SLA was left with no military options other than those which could result in heavy civilian casualties. The PoE and ICEP neglect this aspect altogether when dealing with the accountability of the SLA.

Both the PoE and ICEP while being unequivocal about the culpability of the LTTE for heinous war crimes deal with them somewhat summarily as they assume that the perpetrators are all dead and cannot now be brought to
account. Consequently they do not assemble evidence and go into the LTTE crimes in the same depth and detail as in the case of the crimes alleged to have been committed by the GoSL and the Army.

Regardless of whether the perpetrators are alive or not, comprehensive and detailed investigations into the LTTE crimes are essential for a number of reasons.

First, the story that is unfolded by a detailed analysis of the actions of the LTTE is the opposite of the account given by the PoE and ICEP. According to their account, the GoSL and SLA pushed the civilians along the route depriving them of adequate food and medical supplies and locating them so as to be able to kill large numbers of civilians. The factual analysis of the LTTE strategy and actions show that the LTTE drove the civilians along with them preventing them from escaping injuring and killing those who attempted to escape and using them as hostage and human shield for their own military objectives.

Second, a full investigation of LTTE crimes will provide more detailed information on how, when and for what purpose the crimes were committed and how they are related to the actions that were taken by the SLA and the allegations of crimes committed by the SLA. Some civilian witnesses have stated that the LTTE were the first to shell and the army replied to the shelling and one witness states that to every one shelling by the LTTE the army replied twice with shelling. The accountability of the SLA will depend on the precise nature of the accountability of the LTTE. If for example the suicidal conduct of the LTTE cadres and the killings of civilians by the LTTE gave reasonable grounds to suspect that the LTTE would resort to mass suicide, the SLA may have justifiably moved into the NFZ risking a certain level of civilian casualties with the objective of saving the large majority. A full investigation of the LTTE crimes would throw light on all these aspects.

Third, an investigation will bring to light the support the LTTE received and the complicity of other parties in their crimes who are still living and are answerable to national and international processes. A large part of the expatriate pro-LTTE apparatus which assisted LTTE to mobilize funds through extortion and other illegal means with the full knowledge they were financing an organization engaged in acts of terrorism and crimes against
humanity is still functioning and persons who managed it are still living. A full investigation will bring these persons to account and enable the international community and host governments to take appropriate action to prevent any revival of LTTE terrorism.

Fourth, a full inquiry into LTTE crimes will also help to identify and trace hard-core LTTE cadres who managed to escape and get out of Sri Lanka. It may also provide information for follow up action on the large number of disappearances for which the LTTE is responsible.

Finally, it may enable the international community to re-examine how counter-terrorist military operations could be conducted to deal with the extreme conditions such as those created by the LTTE in the last stages of the war. Such an inquiry would need to address three sets of issues. First, it would need to examine how action should be taken by all parties including the international community and the UN system to prevent such conditions from arising when they are perceived as imminent. Second, if and when they arise what type of international intervention is desirable without thwarting the main objective of eliminating terrorism. Third, how best the rules of war should be applied to such conditions of achieving both the military objective and rescuing civilians with minimum casualties.
CHAPTER 3

The Accountability of the Government and Sri Lankan Armed Forces

This chapter deals with two sets of issues in examining allegations of intentionality in regard to how the war was prosecuted on the part of the GoSL. The first deals with the issues of accountability of the government arising from the policies that were followed in prosecuting the war, i.e., actions taken or not taken in the conduct of the military operations in terms of the use of heavy artillery and ensuing obligation to protect the civilians, especially the establishment of the NFZs and the supply of humanitarian relief, food and medicine. The allegations of war crimes relating to these are based on the conclusion that the use of policies in respect of these went beyond justifiable military actions to defeat the LTTE and had targeted the civilian population deliberately. The other set of issues relate to specific actions in the course of the prosecution of the war such as allegations of shelling of hospitals and other non-military objectives, killing of surrendees and enforced disappearances as well as inhumane and degrading treatment of civilians and surrendees. An important aspect of intentionality and accountability would then be whether the specific actions constituted essential elements of a policy of widespread and systematic attacks on the civilian population of the Wanni.

The Nature of the War, Protection of Civilians and approaches to Accountability

The narrative of the war presented in Chapter 1 raises many issues in regard to the situation in which the civilians were placed arising out of the circumstances in which hostilities took place and attacks were carried out.
The fundamental issue of accountability on the part of both the GoSL is about the actions, omissions or inadequate actions to provide for the protection of persons who are not or no longer participating in the hostilities. Such actions, omissions or inadequate actions take place in the context of particular circumstances that emerge where subjects engage in or may be compelled to engage in attacks with intent to gain a military advantage. The separation of each such action or omission from the context of the particular situation of the attack for purposes of post-conflict analysis of violations and framing of accountabilities is to place the action or omission in a reconstruction of the circumstances of the combat action that is only partial and does not take into account all the accompanying circumstances. Thus in framing accountabilities arising from such actions or omissions, the alleged violations must be placed in the context of the concurrence of the strategic interplay of such actions, omissions and inadequate actions where each party seeks a military advantage in framing accountabilities arising from such actions or omissions.

*Context of the last stages*

The UTHR summarizes the conflict as a “bloody war”, one where international norms were breached by both sides, which by trapping people in the conflict zone wrought large-scale death and destruction. On the part of the GoSL, the UTHR opines that the GoSL blatantly lied about the real number of civilians trapped in the zone, and the number killed by the disproportionate use of force in the form of intense shelling and bombing. In fact a large civilian population was held captive in the conflict zone and positioned to gain military advantage by the LTTE. In this regard the UTHR also notes that the LTTE’s callous attitude towards the civilians, its forced conscription and the violent and coercive methods it used to prevent people from fleeing for their lives, further helped the government to successfully neutralize any criticism against their mode of operation.

The LLRC, commenting on the conduct of the war, draws attention to “the challenge confronting the security forces” in that “the military operation had to be conducted against an enemy who had no qualms in resorting to a combat strategy which paid little heed to the safety of the civilian population
and in fact made the civilian population very much a part of such strategy.” Accordingly the LLRC concludes that “the military policy must be carefully examined in the context of the multiple challenges arising from the ground situation which existed during the final phase of the conflict.”

Thus the Defence Ministry notes that “in different environments, and at different stages of the war, security forces adapted their tactics and the level of force used in achieving the overall goal of defeating terrorism.” The report goes on to state that “while the Security forces were able to change their tactics as they could not cease their offensive. The threat of the LTTE remained until the last hour, and certain success required continued, focused and disciplined force to meet the new challenge created by the LTTE: the thousands of civilians trapped by, and exposed to imminent harm and violence at the hands of a desperate LTTE, had to be skilfully extricated from a precarious situation. Security forces successfully met this challenge by using the right amount of force, and minimizing the resulting losses.”

**Protection of civilians**

The primary aim of the notion of accountability in the conduct of hostilities is to protect the civilians who are the victims of the armed conflict and to regulate the conduct of hostilities on the basis of a balance between the rights of civilians to protection and military necessity. Protection is afforded through the application of both the IHRL and IHL, formulating subjective rights of individuals as compared with the state and objective rules of conduct for states and armed groups. Thus states are under obligation to do something or abstain from doing something and they can be responsible for violation of IHRL and IHL through actions, omissions or inadequate action. However, while under IHRL all persons benefit from all human rights, under IHL the substantive protection received depends upon the category a person belongs to in terms of the distinction between civilians and combatants and between civilian objects and military objects. The principle of distinction is fundamental to the protection provided to civilians so long as they are not directly participating in hostilities. Civilians are protected by the principles of proportionality and precaution against the incidental effects of attacks against military objectives and combatants by restricting the means and methods of warfare. Together the principle of distinction
and the corollary notion of proportionality constitute the bedrock of civilian protection in armed combat and the violation of which constitutes the basis for accountability of the state and non-Stage groups.

While the legal rules are applied to the subjects of the rules, a distinction is made between duty bearers and rights holders, where duty bearers are bound by the rules to respect a series of positive and negative obligations. These obligations may differ on whether international law recognises a particular actor as the primary subject of international law (States and international organizations) or as a secondary subject (the non-state actor). Principles of distinction and proportionality are applicable equally to state and non-state actors. In fact while the application of human rights standards to non-state actors is considered particularly relevant in situations where they exercise some degree of control over a given territory and population, assumption of human rights responsibilities by non-state actors is seen as a pragmatic recognition of the realities of a conflict without which rights holders would lose out on practicable claims to their human rights. It is to be noted that the expectation of a non-state actor to observe certain human rights standards does not in any way lessen the state’s primary responsibility to protect and fulfil human rights.

The context of the fighting during the last stages of the war points to the inherent problems in defining the categories that the framework of accountability addresses. Thus the LLRC, from a legal perspective, notes that the critical failure of the Protocols to provide a precise definition of the terms “civilian” and “civilian population” and a similar lack of clarity with regard to the term “take direct part in hostilities” have contributed to a substantial degree of ambiguity, leaving vital terms which have a bearing on core IHL principles such as the principle of distinction to be dealt with largely on a case by case basis. This no doubt introduces much subjectivity into the application of the rules, especially of the principle of proportionality that addresses the question of the particular circumstances of the attack. It is in this context that legal obligation to ensure accountability for violations of IHRL and IHL must get addressed.

However, some of the narratives, the reports of the PoE12 and ICEP, in particular go on to consider alleged violations in the conduct of the
war by the government as qualifying to be considered as crimes under international law. International crimes can amount to genocide, crimes against humanity, and war crimes, with additional legal consequences for the state and individuals. The fundamental issue would seem to be as to what extent the context and conditions in which the last stages of the war was fought conforms to the model envisaged by IHRL and IHL for conflicts between states and non-state actors. The fundamental question is as to what circumstances defined the denial of protection to civilians as envisaged by IHRL and IHL during the last stages of the war. It would seem that to engage in a narrative of alleged violations applying the principle of distinction and of proportionality on the basis of a partial reconstruction of the circumstances of each combat action is to jump into the definition of contextual elements for war crimes, genocide and crimes against humanity on an incomplete first assessment of the violations.

Approaches to accountability

Narratives of the war present divergent analyses of the course of events and incidents relating to the conduct of the war, positing alternate accounts of the manner in which war was they were prosecuted, with implications for the violations of laws pertaining to civilian protection. An important aspect of intentionality and ensuing accountability would then be whether the specific actions constituted essential elements of a policy of widespread and systematic attacks on the civilian population of the Wanni. The reports on the alleged violations of IHRL and IHL in the conduct of the armed conflict in Sri Lanka available in the public domain present different approaches to application of the accountability regime. The GoSL position as set out in the report of the Ministry of Defence, “Humanitarian Operation Factual Analysis”, is underlined by the declared purpose and objective of pursuing a “humanitarian rescue operation” with a policy of “zero civilian casualties”, comprising comprising military procedures to safeguard and protect civilian rights in the conduct of the war. This report, however, does not address alleged violations of IHL and IHRL identified and dealt with by other reports in the public domain.

The dominant version of violations of civilian protection amounting to serious war crimes by the PoE find credible allegations indicating that
a “wide range of serious violations of international humanitarian law and international human rights law were committed by both the GoSL and the LTTE, some of which would amount to war crimes and crimes against humanity.” Further the Report finds that “Between September 2008 and 19 May 2009, the SLA advanced its military campaign into the Wanni using large scale and wide-spread shelling, causing large numbers of civilian deaths. This campaign constituted persecution of the population of the Wanni. Around 330,000 civilians were trapped into an ever decreasing area, fleeing shelling but kept hostage by the LTTE”. The Report lists five core categories of potential violations by GoSL, (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; and (v) human rights violations outside the conflict zone, including against media and other critics of government.”

A Report by International Crimes Evidence Project (ICEP) undertaken by the Public Interest Advocacy Centre on the final stages of the war reviews the contextual elements for accountability in terms of war crimes and crimes against humanity. The Report finds that its evidentiary material is consistent with the findings of the UNSG’s PoE that “wide range of serious violations of international humanitarian law and international human rights law was committed by both the GoSL and the LTTE, some of which would amount to war crimes and crimes against humanity”. The Report goes on to state that attacks (defined as “a course of conduct involving the multiple commission of acts” by the ICC statute) carried out by GoSL being “arguably constituted by the alleged serious mistreatment of the civilian population, particularly in the Wanni in the final months of the conflict, which in some cases amount to murder, torture, rape, and sexual violence, enforced disappearances, other inhumane acts, and possibly also persecution. The report goes on to state:

- That the attacks were directed against the civilian population; that the civilian population was the primary, rather than an incidental object of the attack; that the GOSL persistently refused to allow adequate food and medical supplies and that the civilians were tortured and subjected to rape and sexual violence during interrogations, screenings and at IDP camps.
• That the attacks were widespread and systematic given the geographical scale, the large number of victims as well as the organized nature of the incidents, and the regular patterns of alleged crimes and that it is improbable that they could have occurred randomly.

• That there is a reasonable suspicion that the GoSL regularly understated civilian population figures and restricted food and medical supplies.

• That military attacks were undertaken under the authority of the highest military and civilian command, and that GoSL attempted to conceal the effect of alleged attacks against the civilian population, requested all international staff of the UN and other NGOs to leave the conflict zone and did not permit international oversight of initial screenings.

The LLRC in “evaluating Sri Lanka’s experience in the context of the allegations of violations of IHL” states that the “Commission is satisfied that the military strategy that was adopted to secure the LTTE held areas was one that was carefully conceived, in which the protection of the civilian population was given highest priority”. The Commission also notes that “the movement of the Security Forces in conducting their operations was deliberately slow during the final stages of the conflict, thereby evidencing a carefully worked out strategy of avoiding civilian casualties or minimizing them. These factors are consistent with the position that protection of civilian life was a key factor in the formulation of a policy for carrying out military operations. They militate against any proposition that deliberate targeting of civilians was part and parcel of a policy”, and goes on to note that there are specific episodes which warrant further investigation that have been noted in the Report. In fact the LLRC application of the accountability regime takes into account “the rudimentary nature of the legal framework regulating internal conflicts involving non-state armed groups”. It argues” its application in the context of the issues that arise from the disregard by non-state armed groups of the protection of civilians leaves grey areas in the existing legal framework applicable to internal conflicts involving states and non-state armed groups. Thus as was the case in the last stages of the conflict such action by the non-state group placed the protection of civilians
in jeopardy where the state was compelled to take counter measures to deal with the combat strategy and to neutralize military positions which were violating the very principles designed to protect the civilians.

A report of the US Department of State to the US Congress draws attention to several open questions regarding allegations of violations of IHL and IHRL. The Report while taking note of the “significant observations and recommendations” made by the LLRC goes on to note several areas that are inadequately addressed by the LLRC. These include:

- IHL and IHRL violation by government security forces and LTTE cadres during the conflict
- The identification of only eight cases of alleged attacks against civilians by Sri Lankan security forces in contrast to the numbers of credible allegations examined by the PoE or civilian objects identified in the Department of State report to the Congress in 2009
- Failure to resolve questions about why the Second and Third NFZs were created after the LTTE used the first NFZ as part of the battle zone.
- Failure to address allegations of sexual and gender-based violence.

The Report notes discrepancies between the reports of the LLRC and the UNSG PoE and considers these merit further investigation.

The foregoing brief overview of the respective positions of the major narratives of the final phase of the war in Sri Lanka in regard to accountability under IHL and IHRL sets out the complexities arising out of the nature of the armed conflict that took place. There is a fundamental difference in the approach to the analysis of events as between the narrative of the PoE (as the dominant international version of the events) and the narrative of the LLRC. The narrative of the PoE deals with the accountabilities of the GoSL and the LTTE separately whereas the LLRC addresses accountabilities of each party arising out of the way in which the events comprising the conflict unfolded. The application of the legal regime for protection of civilians cannot reduce the combat to a set of static events for purposes of analysis. Each event represents an attack that must take into account the dynamic of
the strategies being adopted by the parties to the conflict. Indeed much of the discrepancies between the two narratives arise from the fundamental difference in approach adopted by them and the resulting incompleteness in the reconstruction of the combat actions. The analysis of the discrepancies is likely to involve a re-interpretation of the major events of alleged violations in terms of a narrative of the course of the conflict beyond the current discourse. The narrative of the war set in Chapter 1 sets the framework for the re-interpretation of the major events of alleged violations.

Accountabilities in the Context of the Prosecution of the War

We now move on to examining the issues of accountability arising from the policies that were followed by GoSL in the prosecution of the war. The fundamental issue is how far the principles of distinction and proportionality were applied in the planning and execution of military operations in order to ensure that such operations were conducted in accordance with the applicable law. The ICEP report found evidentiary material suggesting that civilians were the ‘object’ of GoSL attacks and that such attacks were ‘intentional’. It is important to note that the principle of distinction prohibits ‘direct attacks’ civilians, with secondary effects of military operations on civilians being subject to the principle of proportionality. It is also important to note that the co-mingling of the combatants with the civilians on the part of the LTTE violates the principle of distinction by failing to distinguish combatants themselves from those who are not fighting and thereby hence not ensuring or maximizing the protection of civilians. The distinction between combatants and civilians lies at the heart of regulating the conduct of hostilities and balancing principles of humanity and military imperative.

Conduct of military operations

The fundamental point of difference in the narrative of alleged violations of the civilian protection regime arises in regard to the policy intent of GoSL in the conduct of the war. It is about whether the specific combat actions constituted elements of a widespread and systematic attack on the people of Wanni. There are several aspects to the issue of intentionality. First, is that of distinction, whether civilians were deliberately targeted. The second, is
about proportionality, whether the means and methods used in the attacks were indiscriminate. The third, is whether the attacks caused the civilian casualties that took place. The fourth, is about the numbers of civilian casualties and the methods adopted for its estimation. It is noteworthy that in considering the number of civilian casualties there is the question of proportionality in the overall prosecution of the war in terms of protecting the civilians from the intense suffering they were subjected to by the LTTE who were restricting their movements and preventing them from leaving the conflict zone. The obligation to protect victims of armed conflict and to regulate the conduct of military operations so as to “strike a balance between principles of humanity and military necessity” should be practiced at the overall level of the total operation as well as the specific level of each combat operation.

a. Protection of civilians and the establishment of NFZs:

The post-Kilinochchi phase of the war was marked by the LTTE’s deliberate prevention of civilians from leaving the combat areas, using them as a human shield. As noted by the LLRC the situation assumed special significance in the context of the obligation on the part of the state to provide possible safety to citizens in terms of the principles of IHL. According to submissions placed before the Commission by the Defence Secretary, the GoSL, following discussion with the Security Council, took the step to declare areas as NFZs (NFZs), unilaterally, with a view to providing such security to civilians. The demarcation of NFZs would then allow civilians to come into those safe areas and to enable the Security Forces to conduct their operations respecting such zones. In fact the Defence Secretary, in this regard, stated that with the intensification of the conflict following the fall of Kilinochchi on 2 January 2009, the LTTE were (omit gradually) civilians as a human shield and not allowing civilians to come out of the conflict areas into government-held areas. The LTTE were gradually taking the civilians along with them.

It was then unlikely that NFZs would be able to separate the civilians from the zones of combat and it would be reasonable to assume that the GoSL would have expected such an eventuality. The question then arises as to why the GoSL did opt for a NFZ strategy in the conduct of the final stages
of the war. The answer to this question must be sought in an assessment of the options for the GoSL strategy at that point of the war.

The LTTE action was violating the international agreements for the protection of civilians on two counts: first, by bringing civilians into the combat area they were violating the principle of distinction, and second, by confining the civilians to the combat area and restricting their free movement they were deliberately exposing them to attack by the SLA. In dealing with these violations the Security Forces had to adopt every means available to protect civilians and minimise casualties while achieving their military objective. In these circumstances the Security Forces initially made successive efforts after the capture of Kilinochchi to separate the civilians and draw them out of the conflict zone. Due procedure was followed in this regard informing the people of the creation of NFZs through loudspeaker announcements and airdrops of leaflets and requesting them to assemble in the demarcated areas. The frontline troops were briefed of the corridors earmarked for civilians to move out and arrangements made to receive them and be brought to Kilinochchi.

However, only a few civilians were able to escape and move over to the government controlled areas. The government at that stage appears to have considered the feasibility of establishing a no fire zone which might have afforded protection to the civilians, with the expectation that the LTTE would have then faced a new set of problems in a context in which the international community was calling on them to allow citizens to move out of the battle zone. Such safe areas were and would necessarily have to be demarcated within the remaining un-cleared areas, to which the civilians had been moved to by the LTTE. They had also to be demarcated so as to enable them move into the designated areas to facilitate safe exit. The first of such NFZs was established on 20 January after the fall of Kilinochchi and the commencement of the battle for Puthukudiyruppu north of A35 road and several kilometres northwest Puthukudiyruppu. Thus the second was established on 12 February on the coastal strip spanning Puthumaththalan along the coastline. The third was established at the southern end of the second NFZ in Vellamullivaikkal on 8 May. The LTTE moved into the first NFZ and operated from there drawing fire from the SLA which resulted in
civilian casualties. This was part of the LTTE strategy. The civilians were also moved by them into the coastal strip with the sea on one side and the lagoon on the other to prevent them from escaping. The second NFZ appears to have been demarcated after the civilians began moving into the coastal strip. These were areas in the line of retreat of the LTTE to which they moved the civilians as well. If the civilians were to be able to move out, the SLA should get as close as possible to the concentrations of people. This meant that attacking LTTE military objects to neutralize LTTE firepower, was inherently prone to risks of collateral damage.

Several matters are noteworthy and should be taken into account in an inquiry into the intentionality of GoSL in declaring NFZs.

First is the location of the NFZs which, if they were to be accessible to civilians, had necessarily to be located where they could move into. However, these also were areas where the LTTE had retreated and hence the civilians were either in close proximity to or in the actual theatres of intense fighting. Thus the first NFZ established bordering the A35 and extending northwards ending two kilometres east of Puthukudiyiruppu was the un-cleared area to which the LTTE had retreated after the evacuation of Kilinochchi, taking the civilian population. Demarcation of the NFZ in an area that is accessible to the civilian population, however, placed the military offensive in a dilemma. The LTTE strategy of using the civilian population as a human shield was preventing the civilians from moving out. At the same time while it was imperative that the SLA isolate the LTTE’s military operations so as to target them with minimum collateral damage.

Despite efforts on the part of the LTTE to prevent civilians from moving out the numbers for whom SLA were able to provide safe corridors for moving out into government held areas were significant. Thus approximately 20,000 civilians were able to come out of the first NFZ during the ceasefire declared between 29 January and 1 February. Further, the increase in the number of IDPs between 29 January and end-March indicate that about 30,000 escaped from the LTTE during the period after NFZs were established. During the period of the second NFZ, by establishing secure launching pads for the military operations the SLA entered the second NFZ on 20 April and provided safe passages for evacuation which enabled rescue of 42,000
civilians on 20 April and over 60,000 civilians on 21 and 22 April\textsuperscript{23}

Thus as observed by the LLRC a critical situation presented by the ground realities which demanded particular attention was the civilian presence in the NFZs and the surrounding areas. The designation of safe areas to safeguard civilians and avoid civilian casualties in fact constitutes a key element of the operational framework for conducting the final phase of the Northern campaign. The critical accountability issue in regard to the declaration of NFZs flows from the issue of GoSL’s policy intent in the conduct of the war. The account of NFZs in the narrative of the war must be based on the totality of the ground situation and not in relation to individual incidents examined in isolation.

The NFZs were established without any formal agreement with the LTTE. According to the Army Commander as stated in a letter to the Head of ICRC, with intense fighting in the Wanni area, many civilians have moved from their original land and have become displaced mainly in an around Visvamadu and Puthukudiyiruppu. It is further observed that, with progress of operations deeper into LTTE held territory, the presence of IDPs and civilians had to be taken into account to guarantee their safety and security, in order to avoid collateral damage. The Army Commander’s letter recommends that considering the circumstances a “NFZ/Safe Area” be demarcated to keep the IDPs/Civilians away from fighting and to reduce greatly the number of potential casualties\textsuperscript{24}

The location of the first NFZ in fairly close proximity to the SLA frontlines, was in fact complicated by the LTTE moving into the NFZ together with their heavy weapons and placing them amidst the civilians, converting the NFZ into a virtual operational base from which the LTTE had directed fire against the Security Forces. It led to a situation where security forces were compelled to resort to returning fire. According to the UTHR, the major flaw in the NFZ plan was that the civilians were placed in the thick of the war, though ostensibly with the intention of effecting a hostage rescue. They find that the advancing army shelled them blindly as the LTTE cadres and gun-mounted vehicles moved among them.\textsuperscript{25} The LLRC, however, notes that on the basis of representations made it it appears tht the “the Army had never initiated attacks in the Safety Zones and the return fire was in
response to LTTE attacks”\textsuperscript{26}. While the creation of “safe corridors” was to facilitate the safe movement of civilians out of the NFZs into government-held areas, and in fact such movements did take place, the LTTE prevented the IDPs and civilians escaping, with a view to using them as a human shield. Thus the LLRC states that as a result the Security Forces had been compelled to re-demarcate boundaries of the NFZ, leading to the second and third NFZs.\textsuperscript{27} The LLRC, on the basis of representations made, concludes that the conduct of the LTTE is a gross violation of IHL obligations on the protection of civilians radically transforming the very character of the NFZ and making it an integral part of the LTTE’s combat operations to achieve their military objective.\textsuperscript{28}

Thus, the forced movement of the civilians by the LTTE into a narrow strip of land bounded on both sides by water introduced its own dynamics in the operation of the second and third NFZs. When taken together with the LTTE strategy of continuing to place mobile military artillery amidst civilians, the aggressive conscription of civilians including young children within the safe zones by the LTTE, the continued provision largely through coercion of a range of support services by civilians to the LTTE establishment, and the LTTE cadres fighting in civilian clothes in its totality challenged the full realization of the humanitarian objective underlying the creation of NFZs and demarcation of safe corridors for civilians to move out of the theatres of combat. In fact the LTTE’s forcible prevention of the free movement of civilians and their forced movement with the LTTE made for continued exposure of the civilian population to greater risks as the conflict intensified with the fighting being confined to smaller spaces. The civilians who would have expected conditions of safety were thus placed in jeopardy while neutralizing LTTE gun positions was necessary to preserve the NFZ and pursue the military objective.

The LLRC on the basis of the consideration of facts and circumstances concludes that the Security Forces did not deliberately target the civilians in the NFZs, although civilian casualties did occur in the course of crossfire. Further it would also be reasonable to conclude that there appears to have been a bona fide expectation that an attack on the LTTE gun positions would make a relevant and proportional contribution to the objective of
the military attack involved.\textsuperscript{29} Thus, the LLRC notes that there was no deliberate targeting of civilians by the Security forces in considering whether the action of the Security Forces returning fire into the NFZs was excessive in the context of the principle of proportionality, concludes that given the complexity of the situation the Security Forces were confronted with, they had faced an unprecedented situation when no other choice was available and all “feasible precautions” that were practicable had been taken.\textsuperscript{30}

The above position of the LLRC is in contrast to those of the PoE and ICEP, first about the location of NFZs and second about shelling of civilian positions in the NFZs. The ICEP report questions the locations of NFZs.\textsuperscript{31} They report findings that some LTTE military assets were already positioned in the first and second NFZs prior to their being so demarcated and that it is reasonable to conclude that the Security Forces could have identified such military targets prior to the declaration of each NFZ. The first NFZ encompassed both the LTTE’s western and southern defence lines, and in this context records a statement to the effect that “any engagement occurring along those lines between the LTTE and the Security Forces would likely spill over into the safe civilian areas which would be densely packed with civilians who were confronted with and increasingly reduced living space.” The evidentiary material that calls into question “the purported humanitarian purpose” of establishing NFZs records following concerns.

- Decision to place civilians right in the middle of an advancing army.
- Not close to any means for the civilians to escape.
- The civilians could not fit into the declared NFZ.
- The entire first NFZ fell within the safety templates of all weaponry currently being used by the Security Forces.
- It was dangerous as there was no exit from it.

The report goes on to note that as could have been expected, civilians moved into the NFZs based on assurances of the GoSL and Security Forces that they would be protected from attacks. The foregoing questioning of the location of NFZs presumably with the intent of supporting the fundamental position of the report that the war was an attack on the civilians appears to be based on an assumption that NFZs were areas which civilians would
continue to occupy rather than points from where they would move out into
government-held areas. They also ignore the circumstances preventing the
villagers from moving out. It is this ground reality that the LLRC takes note
of and finds that it transformed radically the character of a NFZ.

The second issue is about the shelling of civilian positions within NFZs.
The PoE concludes that there are credible allegations that suggest the GoSL
deliberately or negligently targeted civilians in the NFZs. The ICEP artillery
expert noted “the SLA practice of indiscriminate area bombardment”
and has characterized its military operations as “based on persistent and
widespread use of indirect fire weapons with what appeared to be increasing
deployment of artillery assets from February to May 2009.” The ICEP
Report goes on to document incidents of shelling of NFZs. These relate to,
in the first NFZ, Suthanthirapuram (shelling of the UN hub, food lines,
Puthukudiyruppu (hospital); in the second NFZ, Putumattalan (makeshift
hospital, UN compound), Ampalavanpokkanai (TRO food distribution
queue); and in the third NFZ, Karaiyamullivaikkal (makeshift hospital) and
Vellamullivaikkal (makeshift hospital).

In summary the ICEP Report concludes:32

- The conflict zone was under direct observation and surveillance of
  the Security Forces and its capabilities were sufficient to identify
  large groups of IDPs and protected objects and the presence and
  movements of large civilian populations was known to government
  and international community.

- The second and third NFZs were subjected to sustained area
  bombardment through the repeated and heavy use of indirect fire
  weapons that were inherently incapable of targeting specific military
  objects and appeared to make very little use of its precision capability
  using Air Force ground attack aircraft.

- The LTTE was largely immobilized in these NFZs with diminished
  capability to launch artillery attacks from within the shrinking conflict
  zone and hence unable to mount reasonable defensive and counter
  measures.
Security Forces had by May 2009 achieved complete dominance of the sea and air, and the SLA’s indirect capability built up to the north, west and south of the NFZs – almost all LTTE territory was captured and their supply routes were no longer available. The LTTE presence in the NFZs was around 0.5% in the second NFZ and 1.4% in the third NFZ.

On this basis the Report argues that civilians would be targeted in the course of employing indiscriminate area bombardment in the second and third NFZs. The Report considers reasonable grounds exist to suspect that the Security Forces gave little regard to the consequences of indiscriminate area artillery bombardment on civilians and that Security Forces members meant to engage in directing the indiscriminate attacks and intended to target the civilian population or protected objects, or were reckless as to whether civilians or protected objectives would be targeted. On this basis the Report finds reasonable grounds to “suspect that war crimes, or crimes against humanity, or both were committed by members of the Security Forces, or members of the GoSL, or both.”

Geospatial analysis of satellite imagery examined by UNOSAT, for the final stages of the conflict in respect of ten specific medical, humanitarian and religious facilities confirms repeated artillery shelling on the basis of the “damage signatures” left by small and medium calibre mortar fire and states that these could have conceivably been from LTTE or SLA and that it was not possible to attribute damage based on site-specific eyewitness testimony. However, based on analysis of larger shelling zones, it concludes that the damage to the specific protected sites were in fact not the result of isolated or misdirected artillery fire, but part of much larger shelling events such as area bombardment. Considering the volume of munitions employed over the large areas and the depleted state of LTTE forces only SLA was capable of such heavy and sustained artillery fire. A detailed review of probable air strike related damages during a five-month period identified over 130 separate locations directly attributable to the Sri Lanka Air Force. A significant majority of these indicated recent LTTE activity outside designated NFZs and removed from concentrations of civilian tents. There were over ten specific air strike impact craters identified immediately
adjacent to civilian tent concentrations and a functioning hospital.

The imagery also identified Sri Lanka artillery batteries based throughout the conflict zone and found that the SLA repeatedly rotated the fire bearing of their artillery towards the second NFZ and later the third NFZ tracking the movements of civilians and LTTE forces alike as they were forced into the southern section of a barrier island in late April and early May 2009. It appears that the UNOSAT found that the SLA erected mortar batteries along the western shore of Nanthi Lagoon without viable military targets except for locations clearly falling within the second and third NFZs.

At the same time the geospatial analysis finds a significant, if incomplete, body of compelling evidence against the LTTE during the final stages of the civil war where not only tactical deployment of artillery next to civilians, but also construction of military fortifications (earthen beams and trenches) adjacent to medical facilities, religious sites and other shelters filled with civilians. Further compelling and comprehensive evidence compiled against the LTTE involved the deliberate positioning of hundreds of heavy vehicles suspected of containing military equipment within areas of densely populated civilians.

Reviewing the applicable international legal framework ICEP notes that to direct an attack against a zone established to shelter the wounded, the sick and civilians from effects of hostilities is prohibited under customary IHL. At the same time deliberately using civilians to shield military operations is contrary to the IHL principle of distinction and violates the obligation under IHL to take reasonable precautions to separate civilian and military objectives. Customary IHL principles require that parties to conflict must remove civilian and civilian objects from the vicinity of military objectives. Furthermore parties are obliged to protect the civilian population under their control. It extends to an obligation not to prevent civilians from leaving the conflict zone if they chose to do so and not using civilians as human shields.35

Arising from the applicable legal framework the incidents referred to above are considered to relate to attacks on and around NFZs and hence as pointing to violations of IHL and the possible commission of war crimes, crimes against humanity or both. Direct attacks against civilian population
and civilian objects intentionally are war crimes. In addition these attacks also amount to crimes against humanity, in particular murder, extermination, persecution or other inhumane acts if committed as part of a widespread or systematic attack on the civilian population pursuant to a state policy. 36

The burden of the ICEP argument is that the above use of force by the SLA was disproportionate, the LTTE being immobilized and the Security Forces dominating the theatre of the conflict. On the contrary it has been found that the LTTE were using until 17 May, from within the second NFZ heavy weapons with a range of 1 – 2 km (rocket mortars), 17 – 27 km (mortar gun and artillery) against the SLA. These were in addition to several dozen 81 mm and 120 mm projectile weaponry till the very end. According to the SLA these weapons were officially killing, on an average, 40 – 60 soldiers a day. In this regard an independent analysis of the ground situation and the satellite imagery has pointed out the serious flaw in the PoE’s assessment of the direction of SLA artillery/mortar barrels were pointing and that artillery batteries were constantly adjusted to increasingly target the NFZs. PoE has ignored the underlying ground situation and the changing location of the front lines where the ground troops required fire support. The fundamental flaw in the assessment is that the weapons were at all times firing up to maximum permissible range and overlapping the NFZ. 37

The GoSL’s policy intent in declaring successive areas as NFZs was to provide maximum safety to civilians. There is no indication that the policy intent changed during the course of declaration of the second and third NFZs. In assessing the accountabilities, ICEP states that it has not analyzed whether attacks on the NFZs per se, and in particular third NFZ, were unlawful and notes that the conduct of both parties in respect of the NFZs is a cause of grave concern particularly in the light of their status. The Report notes the need for examination of the conduct of the LTTE as there is an obligation on parties to the conflict to protect civilians under their control. It is also prohibited to co-locate military objectives and civilians with the intent to protect military objectives. However, ICEP concludes that even if LTTE is found to have violated these principles of IHL, it would not annul the GoSL’s targeting obligations. 38 Thus while proportionality considerations are about precautions in targeting, targeting obligations in taking care of
means and methods in a situation of consistent patterns of conduct on the part of the LTTE making status-based targeting not an option is to place such obligations in the way of the combat operations. Targeting obligations on the part of the Security Forces cannot and should not relieve the LTTE of their obligations. A balance between principles of humanity and military necessity is necessary on the part of both.

Thus, the accounts rendered in respect of the final phase of the war bring out many discrepancies in accounting. The resolution of these requires a narrative that takes into account the complexity of the ground situation which in fact created three parties in the conflict, the GoSL, the LTTE and the civilian population, which was pushed into becoming a party to the conflict by default. There are several contextual realities that such a narrative should take into account.

- The GoSL did make known to all parties the demarcation of NFZs and informed the civilians through dropping of leaflets and public announcements through loudspeakers. These preceded attacks on military objects.\(^{39}\)

- The actions of the LTTE radically transformed the character of NFZs from a GoSL humanitarian objective to the LTTE’s military objective thereby merging the NFZs into the theatre of military operations.

- The situation in the NFZs was confused, especially the second and third, with, the placing and using of military equipment amidst civilian centres, the use of civilians to carry out military objectives, combatants appearing in civilian clothes. All these actions of the LTTE resulted in lack of clarity in the field situation for the application of the principles of distinction, proportionality, and discrimination.

- Crossfire did take place with the weight of testimony being that GoSL indirect attacks were return fire to neutralize LTTE gun positions. The use of artillery raises questions about its use in that these are considered to be area weapons not providing precision capability. However, given the fact that the targets were constantly moving and not clearly distinguishable and identifiable, there is also the question of what options available to gain a military advantage.
• While shelling did take place it is necessary to establish the origin of attacks.

• While the military capability of the LTTE during the later stages raise questions about the nature of GoSL attacks it is necessary to examine closely the ground reality in terms of military actions being carried out by the LTTE in each of the NFZs. The fact that a large quantity of arms and ammunition which were in their possession was destroyed by the LTTE during May 15th to 18th is evidence of considerable fire power up to the final stages.

The above operational realities of the war raise fundamental issues regarding the application of the notion of proportionality. To start with, the demarcation of NFZs must be placed in the context of the LTTE’s violation of civilian protection, by drawing them into the conflict zone, thereby invariably exposing the military operations of the Security Forces to collateral damage. By demarcating NFZs the GoSL sought to neutralize the advantage the LTTE had through the violation of the international guarantees of civilian protection. Therefore the proportionality of the ground reality that emerged in engaging with the LTTE in NFZs must be placed within the context of the overall military objective of GoSL. Thus contextualization of the application of the principle of proportionality to different military situations is necessary to ensure that application of the very principle established to regulate the conduct of hostilities does not give an undue advantage to either party. International guarantees of civilian protection failed in holding the LTTE accountable to the rules of hostilities.
b. Means and methods:

The point at issue is that as documented in the “Humanitarian Operation Factual Analysis”, the GoSL’s declared intent was a “humanitarian operation” undertaken “to free the country from the Liberation Tigers of Tamil Eelam”. The SLA placed in position operational procedures involving a “level of force” to minimize targeting of civilian casualties. However as noted above the position of the international fact finding missions is that the war “constituted persecution of the population of the Wanni” (PoE) and was “directed against the civilian population, that the civilian population was the primary, rather than an incidental object of the attack” (ICEP).

On the other hand the LLRC finds that “the military strategy that was adopted to secure the LTTE held areas was one that was carefully conceived, in which the protection of the civilian population was given highest priority.” The point at issue would seem to be based on the alleged indiscriminate use of indirect fire by the SLAF in conducting the military campaign. In this regard it is pointed out “the fact that it did so almost daily points to a deliberate intention.” The UTHR cites several witnesses who have confirmed that “one shell from the LTTE or even its firing small arms into the air brought indiscriminate return shelling multiplied scores of times and goes on to state that in the final safe zone shells were directed into civilians every three or four hours...Shells came by turn from surrounding army artillery positions: Alampil, Ampankamam, Oddusudan, Kilinochchi, Visvamadu and Theravil.”

The PoE and ICEP reports observe that the government engaged in large scale shelling of the NFZs. Specifically the ICEP notes the SLA practice of indiscriminate area bombardment characterizing the military operations of the Security Forces as based around persistent and widespread use of indirect fire weapons with what appeared to be increasing deployment of artillery assets from February to May 2009. Differentiating between types of shells used (the type of shell used having a direct bearing on the number of casualties, killed and injured) on the basis of satellite imagery used by the PoE and contrary to the generalized position taken by the PoE, the vast majority of the impact craters in the second and third NFZs are identified as being from 81mm and 120mm mortar shells. Significantly these mortars
fall under the category of “infantry weapons” and hence are not classed as heavy weapons.\textsuperscript{43}

In order to bring clarity to the issue of GoSL’s intent in conducting the military campaign it is necessary to place the final phase of the war (in respect of which the issues of accountability have been framed) in perspective. The central issue in the final phase was the build of displaced civilians becoming confined to decreasing territorial spaces to which they had moved with the retreating LTTE. The battle for Kilinochchi\textsuperscript{,} though the UTHR in their report hastens to add that “when people were spread out, deaths also went easily unreported.”\textsuperscript{44} The point at issue is as to whether the military campaign combined multi-pronged attacks backed by indirect fire to deliberately box in civilians into decreasing territorial spaces with the intent of attacking the civilians or whether the situation was created by the LTTE in retreating into areas heavily fortified to resist the advance of the Security Forces with the civilians being pushed into these areas as a part of the combat strategy.

The PoE seeks to explain the build-up of displaced civilians as resulting from the SLAF advancing into the Wanni from multiple directions, trapping increasingly large numbers of civilians who were not able to leave the area. The Report also states that while the GoSL regularly dropped leaflets urging civilians to leave the area, most remained. The explanation of the PoE is interesting and notes that apart from the LTTE pass system, “numerous other factors contributed to civilians becoming trapped in LTTE-controlled areas”. The Report goes on to say that “for most of these people Wanni was their home. From experience they feared what would happen to them if they crossed into government-controlled areas, knowing that they would be subject to internment”. The Report continues to state that, “as the SLA shelled its way into the Wanni, internally displaced people (IDPs) moved deeper and deeper into LTTE-controlled territory, until they had nowhere left to go.”\textsuperscript{45} In this regard the account of the UTHR would also suggest that displacement of people in the Wanni was caused by SLA shelling making people follow LTTE’s retreat. It does not seek to explain why people followed the retreating LTTE with their belongings through several temporary homes except to say that “the people would not have followed the LTTE’s retreat without the cannons of the advancing Army pounding remorselessly.”\textsuperscript{46}
Indeed the build-up of IDPs as the war moved to the East constitutes a significant factor in defining the circumstances under which the war would be prosecuted in the final phase. Perhaps the emergent situation is aptly described as one where the “Government forces continued to pursue their military offensive while the LTTE refused to allow citizens to leave the conflict zone, effectively using them as shields.” Indeed in this context PoE’s finding of LTTE “using civilians as a human buffer” is pertinent. The PoE continues to state that “despite grave dangers and the terrible conditions in the conflict zone, the LTTE refused civilians permission to leave, using them as hostage and at times using their presence as a strategic human buffer between themselves and the advancing SLA. The LTTE’s refusal to allow civilians to leave the area added significantly to the death toll of the conflict.” Robert Blake Former USA Ambassador and Assistant Secretary of state states:

As the Sri Lankan army was pushing north into the Tamil areas, the predominantly Tamil areas that were controlled by the LTTE for more than two decades, they displaced, the Sri Lankan army displaced a large number of Tamil civilians and they all began to move northwards. The LTTE systematically refused international efforts to allow those internally displaced persons to move south. To move away from the conflict areas where they could have been given food and shelter and so forth. So they systematically basically refused all efforts and in fact violated international law by not allowing freedom of movement to those civilians. So had the LTTE actually allowed people to move south, none of this would have happened in the first place, so it’s important to make that point. I think that often gets lost in the debate on this.

The UTHR reports a specific instance related to shelling (on 5 and 8 February) when the 58th Division entered the first NFZ. The report states that the Security Forces had through loudspeakers requested people to come into government-controlled areas. An estimated 20,000 who were at Iruddamadu went over as the LTTE had withdrawn. Many civilians had fled east because of the shelling. Others who tried to escape were shot at by the LTTE, a phenomenon that lasted till 16 May. The Report adds that at Iruddamadu the civilians commended the SLA. The bearing witness
of the Report is quoted as stating that the SLA was shelling but on being informed of people coming along the road was careful not to shell the road.\textsuperscript{51} The incident is illustrative of the dynamics of the means and methods that were adopted during the last stages of the war on both sides, especially the pattern of conduct of the LTTE and the nature and purpose of shelling by the Army in a situation where hostage rescue was being resisted by the LTTE by shooting civilians attempting to escape.

Thus, in this context the question arises as to the absence of effective third party measures to hold the LTTE accountable. With the onset of the Northern campaign the UN had agreed with the GoSL and the LTTE on a conflict free zone, designated as the “Kilinochchi box”. “The LTTE repeatedly abused the principle of the box by placing strategic offices and equipment not only within the box but sometimes also close to UN premises. The government sometimes launched attacks within the box...apparently targeting offices of the LTTE political wing”.\textsuperscript{52} Indeed this incident sets the pattern for what was to follow in the final phase.

It would therefore appear that to allege GoSL’s intent in the conduct of the military campaign as being to persecute the population of the Wanni or being primarily directed against the civilian population is to deliberately ignore the actual circumstances that exposed the civilian population to the immense suffering they underwent during the course of the war. Indeed the alleged intent of the GoSL to persecute and attack the civilians raises many issues regarding the application of accountability that have not been admitted or answered by the dominant narrative of the war, notably the systematic and widespread violation of distinction by the LTTE setting the pattern for the conduct of the war. In this context it is indeed pertinent that during the Eastern Operation, there were no complaints that the military caused harm or killed civilians, where in fact the military operation was able to rescue 200,000 civilians that were caught up in the war in LTTE held areas\textsuperscript{53}. How the Northern Operation turned out to be different has indeed not been addressed by any of the accounts raising allegations of persecution or civilian attacks.

c. Civilian casualties:

All accounts of the war accept that considerable civilian casualties had
occurred during the final phase of the conflict. Numbers of casualties estimated range from + 7,000 to 147,000.\textsuperscript{54} The fundamental flaws in the estimates that go into tens of thousands, starting from the Report of UTHR,\textsuperscript{55} arises from the adoption of a baseline of a figure of displaced numbering 330,000 persons minus the final number of registered IDPs in government camps by May 2009 of + 290,000. “Thus for the most part the weight of all the evidence of mass scale casualties – these alleged numbers killed being the primary drivers behind the need for an international investigation, rests on the accuracy of a single figure – 330,000.\textsuperscript{56}

The numbers of civilian casualties and when, where and under what circumstances they took place, is central to answering the first aspect of the accountability issue regarding the proportionality in the conduct of the military operation. The LLRC notes that on the basis of accounts of affected civilians and detainees, despite the efforts by the Security forces to avoid harm to people, there have been instances of exchanges of fire over the civilian areas including NFZs causing death and injury to civilians.\textsuperscript{57} While the question of numbers is critical to an assessment of the proportionality in the use of means and methods in the conduct of the military operation, the numbers of civilian casualties also includes killings by the LTTE of civilians attempting to flee the conflict zone. In this regard UTHR considers the numbers of civilians killed by the LTTE would also run into ‘several thousands’. Further, UTHR estimates LTTE cadres and conscripts killed based on a working estimate of 50 a day work out to nearly 7,000 from January to May 2009.\textsuperscript{58} It is reasonable to consider the conscripts to have been civilians in the successive NFZs.

Thus, it is not possible to assume a simple arithmetical relationship between the numbers of civilian casualties and the proportionality of the means and methods of war during the last stages. It requires carefully working out the numbers of casualties arising from LTTE induced factors responsible for the overall numbers. The view of the LLRC is that civilian casualties appear to have been due to cross-fire, LTTE’s targeted and deliberate firing at civilians, as well as due to the dynamics of the conflict situation, the perils of the geographic terrain, the LTTE using civilians as human shields and LTTE’s refusal to let hostages get out of harm’s way. In fact significantly
lower figures of casualty have been suggested by close scrutiny of the basis of some of the international computations, which would suggest a totally different narrative of the events of the final stages of the war.

Supply of humanitarian relief

The protection of civilians during hostilities extends to the parties to the conflict allowing regular and unimpeded passage of humanitarian relief. Thus, IHL prohibits the starvation of the civilian population as a method of warfare. Corollary to the prohibition is the requirement of respect for and protection of humanitarian personnel and relief objects, the safety and security of relief personnel being a necessary condition for the delivery of humanitarian relief to civilians in need and under threat of starvation. There is no doubt that the humanitarian situation after January 2009 deteriorated correspondingly with increasing intensity of fighting. The fundamental issue is as to whether there was a deliberate intent to deny humanitarian relief.

The delivery of humanitarian assistance requires the cooperation and consent of the parties concerned, and such consent cannot be withheld arbitrarily, the sole purpose of which is to alleviate human suffering. It requires protection of humanitarian relief personnel and objects. Three questions arise regarding supply of humanitarian assistance.

- Were there attacks on humanitarian relief personnel?
- Whether there was a denial of humanitarian relief by the GoSL that amounted to an intentional act or omission, is deliberate and not accidental, which caused serious mental or physical suffering or injury or constitutes a serious attack on human dignity.
- Was such denial part of a broader or widespread or systematic attack on the civilian population of the Wanni the vast majority of whom, were Tamil, thus establishing reasonable grounds to suspect committing crimes against humanity.

In this regard the institutional mechanisms established by GoSL constitute the necessary background to consider the decision-making and implementation processes in place to provide humanitarian relief to internally displaced persons. Thus since 1983, displacement focused institutional
mechanisms has been in place including the Office of the Commissioner General Essential Services, the Relief and Rehabilitation Authority for the North, Presidential Task Force for Human Disaster Management, Framework for Relief, Rehabilitation and Reconciliation and Resettlement Authority with accompanying legislation. A dedicated line Ministry was created to deal with resettlement issues and has been successfully functioning for a considerable length of time effectively ensuring the provision of immediate, medium, and long-term reliefs to IDPs. The Ministry continues to utilize the well-established network of Government Agents (GAs) and Divisional Secretaries operating at national and sub national levels.

In addition to the above, the government also developed rapid response capabilities in dealing with sudden surges of IDP population due to manmade or natural disasters. There were in fact four occasions between 1990 and 2004 where the institution of Commissioner General of Essential Services (CGES) was created to plan coordinate and implement humanitarian assistance to IDPs in the Northern and Eastern Districts. The Ministry of Resettlement functioned as the policy making and overall coordinating body. During this period, Rehabilitation and Resettlement Authority for the Northern Province (RRAN) was also established. Food and non-food requirement of the Jaffna peninsula was supplied by sea, and supplies to Vavuniya by road under the supervision of GA Vavuniya.

The GoSL in September 2006 established a consultative apex body, the Consultative Committee on Humanitarian Assistance (CCHA) to provide humanitarian assistance to the conflict affected population in a centrally coordinated manner in response to a request made by the co-chairs of the peace process; i.e. Japan, United States, European Union and Norway. CCHA was chaired by the Minister of Disaster Management and Human Rights with representatives from Ministries of Nation Building, Resettlement and Disaster Relief Services, Health, Education, and Foreign Affairs. Commissioner General of Essential Services (CGES) and the government Agents of the districts of the Northern Province together with Mr. Robert O. Blake (at that time the Ambassador to United states and President of Co-chairs to the peace process), Representatives of the EU Presidency, Ambassador to Japan, UN Resident Representative, all Heads
of UN Agencies, Heads of ICRC and ECHO were also represented. The CCHA was kept fully appraised of the humanitarian situation developing on the ground and the measures taken by the government to provide relief on an immediate, medium and a long-term basis. Based on that feedback the CCHA provided policy guidelines.

Thus a well-laid out, open and accountable institutional mechanism was in place to exercise oversight of all humanitarian relief operations during the last stages of the conflict.

a. Supply of food to civilians:

陆地供应路线

The supply of food items to the un-cleared areas was decided in consultation between the World Food Programme (WFP), the Ministry of Nation Building and the Ministry of Resettlement as well as the government
Agents operating in the affected areas. The distribution of food and other essential items in respective districts were carried out through the network of MPCSs under the supervision of the government Agents and the relevant UN staff, while the distribution of food and dry food among the displaced families was based on ration cards issued by the WFP or GoSL. The process in un-cleared areas was monitored by the ICRC in consultation with the respective GAs.

A special logistical hub set up in Vavuniya by the GoSL and WFP and UN agencies sought to speed up supplies. The supply process continued in operation until January 2009 when road transport was halted due to problems of securing safe passage. Following discontinuance of supply by road from 23 January 2009 humanitarian assistance was continued through the hazardous sea route to the second NFZ involving unloading of cargo mid-sea and mostly handled manually and in the face of possible LTTE attacks.
The Presidential Task Force for Resettlement, Development and Security in the Northern Province in its report on “Sri Lanka’s Humanitarian Effort” (2011) states that “the quantity of food agreed for delivery did not change in spite of conflicting estimates of numbers. The WFP continued to supply essentials to an IDP population estimate of above 210,000 during the later stages of 2008. This was in addition to the essential items supplied by the cooperatives to the general public”. The LLRC notes statements of government officials regarding the number of persons in the conflict-affected area during the final phase. One estimates numbers from the districts of Kilinochchi, Mannar, Vavuniya and Mullaitivu by end of January to have been nearly 350,000 people. Another estimate based on ration cards issued to people who were given food stamps found the numbers in Mathalan, Ampalavanpokkanai, Mullivaikkal area (areas of the NFZ period) to have been about 333,000 people. Further on the basis of an estimate of a civilian census there were approximately 319,000 people in Puthumattalan, Mullivaikkal area. The report notes that in April 2009 when the SLAF gained control of the area between Mathalan and Pokkani about 150,000 people had moved into government held areas. The estimate of the UN RC/HC as stated at a meeting held on 30 March 2009, the number of civilians was between 120,000 – 180,000 people.

On the basis of statements recorded by the LLRC, while food supplies after land route was abandoned were not adequate, the food distribution system also had broken down resulting in the experiencing of shortages. The situation had become very difficult after 9 May. The ICEP summarizes evidentiary material regarding the denial of humanitarian assistance as follows.

- The GoSL understated the number of civilians remaining in the conflict zone as well as the demand for food and basic medical supplies.
- Security Forces did not call for a ceasefire to allow for the delivery of food and medical supplies.
- UN humanitarian convoys ceased to operate in January 2009 due to repeated incidents of shelling in proximity to those convoys, allegedly by government forces.
• Amount of food provided was approximately 2% of the required amount, based on calculations of the WFP.

• Ongoing fighting between the Security Forces and the LTTE seriously impeded the ICRC in its ability to aid wounded civilians.

The above issues relate to two possible areas of actions or omissions that could constitute denial of relief.

First, is about underestimation of the need of the civilian population for humanitarian relief and thereby providing less than what was required. At the outset it must be noted that the quantity of food agreed for delivery did not change in spite of conflicting estimates of numbers. The correct estimation of the numbers of IDPs in the un-cleared areas is central to ascertaining the adequacy of the supply of humanitarian relief. However several factors made any effort to determine population numbers within the Wanni a complex task, including LTTE’s influencing of local officials to artificially inflate estimates, the numbers being displaced continuing until the final months, different government and UN actors using widely differing figures. According to the PoE at the outset of the final phase, on 13 January 2009, the government website reported that according to independent verifications the number of civilians in the Wanni was between 150,000 and 250,000. The Report notes that later January 2009 the Ministry of Defence placed the number of civilians present in the Wanni between 75,000 and 100,000. While arguing that the government had sufficient information at its disposal during the final stages of the war to accurately estimate the numbers of IDPs through information collated by the government Agents to make requests for dry rations from the WFP, the government “deliberately used greatly reduced estimates, as a part of the strategy to limit supplies going into Wanni”.

The LLRC has recorded on the basis of a statement by a senior government official serving in the Wanni there were nearly 350,000 people by the end of January 2009. Another estimate on the basis ration cards issued to people who were given food stamps placed the population at 330,00 people. In April 2009 when the SLA gained control of the area between Mathalan and Pokkanai about 150,000 people had moved to government held areas. As noted earlier the UN RC/HC had at a meeting on 30 March estimated
the number of civilians to be between 120,000 to 180,000. In this regard both PoE and ICEP refer to a letter written by the Secretary to the Ministry of Nation Building and Estate Infrastructure (18 March) responding to an estimate of an AGA based in NFZ - 2 contained in a report to the Ministry of Public Administration and Home Affairs (2 February 2009) that there were about 81,000 families present in Mullaitivu totalling 330,000 people, stating that the figure was “arbitrary and baseless” and that the government would be “reluctantly compelled” to take disciplinary action for providing “wrong information to any source especially in regard to IDP figures”.

Thus, despite the establishment of an apex instrument in the CCHA as a joint mechanism for deciding on all issues pertaining to humanitarian assistance to conflict affected areas, the issue of the number of persons for whom humanitarian assistance should be provided does not appear to have been sorted. However, as noted earlier the WFP continued to supply essentials to an IDP population estimate of above 210,000 up to the latter stages of 2008. It is stated that from September 2008 to May 2009 UN food assistance dropped from an estimated 20 per cent of requirements to almost zero. UN food assistance between September 2008 and May 2009 is calculated as having totalled an average of 10% of needs, based on the assumption of a total beneficiary population of 350,000 in January 2009.66

However, according to the LLRC a total of 18,385 metric tons of food had been sent by government and WFP convoys during the period October 2008 to January 2009 by the land route whereas the amount sent by sea route from 17 February up to May 2009 was 4,619 metric tons. The LLRC refers to the UN Guidelines for calculating food rations for refugees. On the basis of a required calorie intake the food requirement translates into approximately 0.5kgs per day per person, 15kgs per month and 1,500 metric tones for every 100,000 persons per month. On this basis the supplies during October 2008 to January 2009 meet this requirement without locally available food supplies and buffer stocks the government Agents were required to maintain. The UTHR reports a UN briefing (9 March) stating 3,000 metric tons of food being required for a month for a caseload of 200,000 people and that the UN had been delivering more than this by road until mid-January. From mid-February to mid-May the ICRC was
allowed to deliver only 2,350 metric tons of food.\textsuperscript{67} The ICEP records the statement of a senior government Official that the government provided less than 100 metric tons of food to feed in excess of 330,000 people or about 3 Kg per person in February.\textsuperscript{68} The LLRC has recorded that a total of 915 metric tons (consisting of 835 metric tons by government 80 metric tons by WFP) food being sent in February. The situation in regard to the delivery of humanitarian aid presented by government states that during the period January 2008 and early May 2009 a total of 58,393 metric tons of essential items were sent to Kilinochchi and Mullaitivu districts in addition to the excess paddy available in the districts and buffer stocks maintained on location and 33,383 metric tons supplied to cooperative outlets during 2008 up to January 2009\textsuperscript{69}. However UN entities had informed the PoE that during the conflict, other than UN deliveries in UN convoys, they had very little information on assistance being delivered by the government and the testimonies to the effect that the shortages of food and medicines were so acute that they led to many deaths.\textsuperscript{70}

Essential supplies into the Wanni were categorized into three groups:

a. Monthly rations to the IDPs under the World Food Program (WFP)

b. Supply of essential items to IDPs displaced prior to 2005 by the MRDRS

c. All supplies to Co-operative Societies for commercial purposes.\textsuperscript{71}

\textit{Food Delivery Mechanism into the Un-cleared areas in Vanni by Land until January 2009}
Security imperatives necessitated the verification of supplies at the Entry/Exit, prior to the vehicles entering the conflict zone. GoSL staff was available seven days of the week for this purpose. However when the ICRC restricted its presence to 4 days of the week it severely hampered supply vehicle movements. The necessary food quantities were decided in consultation with the respective GAs, WFP, Ministry of Nation Building and Ministry of Resettlement. Regional Directors of Health provided the necessary data, based on the ground situation, in order to decide the medical supplies to be sent. Essential supplies to the Wanni were sent under three categories; (1) monthly rations to the IDPs under the WFP; (2) supply of essential items to IDPs displaced prior to 2005 by Ministry of Resettlement and Disaster Relief Services (MRDRS); and (3) through the network of Multi Purpose Cooperative Societies to be sold in the open market.

The distribution took place under the supervision of the GAs and in the case of WFP delivered rations, by its officers stationed in the districts. In addition to using sea and air routes, a special logistical hub was setup in Vavuniya by GoSL with WFP and UN, to facilitate the storage of almost 5000 metric tons of food and non-food items to accelerate supplies and to ensure that supplies were maintained. In spite of reports of supplies falling into the hands of LTTE cadres, the GoSL continued to supply to un-cleared areas.

When the population in Kilinochchi was forced by the LTTE to move with their cadres towards Mullaitivu in January 2009, the buffer stocks of food in Kilinochchi district was transported and handed over to GA
Mullaitivu to be distributed to the civilians. The buffer stocks were adequate for a period of three months. By October 2008, the WFP along with other agencies left Kilinochchi and relocated to Vavuniya. CGES enhanced supplies to Kilinochchi and Mullaitivu districts and arranged special convoys of supplies every week to the Wanni in consultation with WFP. As requested by CCHA, extra long trucks were purchased by WFP in 2008 and priority lanes at government checkpoints were established for ICRC and UN vehicles to expedite the food delivery operation.

From the time the displaced families who were located in the Northern districts were to be supported by the government through the MRDRS the quantity of rice for them were purchased from the local production. This initiative was taken exclusively to support the farmers in those areas. Similarly, the GoSL insisted that WFP purchase its requirement of rice for the displaced from the respective districts in order to ensure livelihood support to the people and to reduce the pressure on logistics. When the GAs were requested to purchase essential food items in emergency situations they were specifically instructed to purchase rice locally. During April 2008 Minister of Trade and Marketing made arrangements to purchase over 100MT of rice from Karachi MPCS in Kilinochchi, to facilitate the sale of their harvest. Further the government also facilitated the sale of excess paddy from Kilinochchi notwithstanding security concerns allowing the local farmers of Kilinochchi and Mullaitivu to benefit from their harvest. Even in September 2008 the GoSL made special efforts for farmers of Kilinochchi district to sell their excess paddy around 1550MT through their local cooperatives to the Co-operative Marketing Federation in Colombo.

Overall there is no doubt that the quantity and timeliness in the supply of humanitarian relief was affected with the intensification of the war, especially after January 2009. However as noted earlier arrangements for the supply of food involved the respective government Agents on ground, who were required to keep a three-month buffer stock of 750-1000 metric tons of essential food items in their districts for distribution amongst civilians. A former government Agent in representations made to the LLRC confirmed the instructions given by the CGES and confirmed having maintained a three-month buffer stock in the government warehouses in Puthukudiyiruppu until when leaving on 22 January 2009.
Therefore the supply of food was more than a question of the estimation of numbers and leads to the second issue of the availability of food locally for the people. There is no doubt that supplies were adequate until January 2009. In fact with buffer stocks and locally available produce there is every likelihood of a surplus being available that would have been carried over on to the final stages of the war. It leads to the second issue of obstruction of the dispatch of relief to civilians. It is a question about logistics in the supply and distribution. While transportation of food had been undertaken by the CGES with the assistance of the SLA and the ICRC, the distribution of food was channelled through MPCS under the direct supervision of the government Agents, WFP and ICRC. The LLRC records the statement of high ranking Defence official that the government suspended military operations at regular intervals in order to provide safe passage for convoys of food and medical supplies that were subject to LTTE attacks on many occasions. In fact following the relocation of the UN staff to Vavuniya in September 2008 agreement was reached with the government that one humanitarian convoy per week would be allowed to the Wanni. Altogether 11 convoys entered the Wanni between October 2008 and January 2009. Land convoys stopped in January 2009 due to the difficult security situation, difficulties of coordinating clearances for movement due to intensity of fighting and incessant shelling. The shelling has been attributed to Security Forces and the LTTE reflecting the intense fighting in the battle for Puthukudiyiruppu as illustrated by the situation encountered by the 11th convoy.

From 17 February, humanitarian assistance was transported by sea from Trincomalee to Mullivaikkal though port facilities were not available for unloading. The LLRC notes that private vessel owners were reluctant to deploy their ships due to security risks and sea operations were commenced with two tugboats hired from the Sri Lanka Ports Authority on 17 February 2009.
Essential Supplies being unloaded in the no fire Zone, Puthumattalan. The cargo Ship ‘City of Dublin’ can be seen in the background.

Goods were unloaded in mid-sea into fishing craft, point of unloading being changed on many occasions due to threats by LTTE. There were occasions that required changes in unloading points due to increasing
threats by the LTTE. The food and medical supplies delivered on shore was taken over by the Additional Government Agent for Mullaitivu district for distribution among civilians. Appropriation of some part of the supplies by the LTTE who were in control of the area was regular practice. The LLRC was briefed that whatever shortages that prevailed during this period has been mainly due to the absence of unloading facilities, without a proper port and associated security risks.\textsuperscript{76}
Further with the disruption of civilian life in the second and third NFZs and the civilians being confined to the theatres of fighting, the supply of food to people entrapped by the war was increasingly from impromptu venues since the regular channels of the network of Multi Purpose Cooperative Societies was no longer available. The shortages in supplies resulted in the scarcity of food which was exacerbated by the breakdown in the distribution system. LLRC records civilian submissions that people did not have enough food and had to share food. The ICEP records accounts of people suffering from starvation or malnutrition. The overall issue is about the extent of the incidence of starvation and malnutrition and whether they resulted from problems of supply than denial of supplies.

b. Medical facilities and supplies:

A system of comprehensive health coverage was available in the north as in the rest of the country. The health institutions including the Teaching Hospital Jaffna, District General hospitals Kilinochchi and Mullaitivu, Base hospitals in Mullankavil, Puthukudiyiruppu, Mankulam, Mallavi and Central Dispensaries were all functioning prior to the displacement of the people in these areas. All these hospitals were supplied, maintained and their staff paid for by the GoSL throughout. Following civilian displacement, government health services in the area moved towards Mullaitivu together with health staff, equipment and supplies. There were approximately 900 government health staff in Mullaitivu and Kilinochchi including doctors, nurses and other staff. They were supplemented by ICRC staff up to March 2009. Health administrators of the area were in constant contact with the Ministry of Health despite their own constant forced displacement, and regularly informed the MOH of their requirements. Medical supplies were dispatched at regular intervals through the CGES to the health facilities maintained by RDHSs. A survey of children under 5 years at Manik farm in June 2009 found “that 91% of children had BCG scar and 82% had the Child Health Development Record (CHDR)” issued by GoSL for all children island wide signifying the medical coverage that was available to the displaced prior to being caught up in the conflict.

The supply of medical items was the responsibility of the Ministry of
Healthcare and Nutrition, through quarterly supplies to Kilinochchi and Mullaitivu districts in consultation with the Regional Directors of Health (RDHS) of the respective districts. Medical supplies were received by the respective RDHSs and distributed to all functioning government hospitals. Additional supplies were sent on request. On road convoys for humanitarian supplies being abandoned medical supplies were shipped along with other essential items. The sea supply route was able to ensure the dispatch of medicine, surgical items, equipment and other life saving supplies requested by the RDHS, with the supply operation continuing till 9 May, 2009.78

Statements from Doctors serving in the conflict area have recounted the difficulties experienced both in terms of the availability of medical supplies as well as the organization of medical care with frequent changes in points of service delivery and the attendant difficulties with arranging for the storage of drugs requiring cold room facilities.79 After January 2009 with the abandoning of the Puthukudiyiruppu, all hospitals had been makeshift hospitals mostly located in government school buildings with no proper infrastructure and shortages of medical staff for the proper care of patients. In Mullaitivu with the progress in fighting and advancing closer to hospitals patients gradually moved out making it necessary to transfer to a makeshift hospital in Vallipunam. Later the makeshift hospital was moved to Puthumathalan, then to Mullivaikkal and finally to Vellamullivaikkal.

With civilian displacement and movement, the government health services that were provided also moved to the successive makeshift hospitals. Patients requiring further treatment were evacuated initially by road and once road travel had to be abandoned by sea for treatment at Trincomalee and Padaviya hospitals which were upgraded with supplies and equipment to accommodate the inflow of patients. An Indian field hospital was established at Pulmodai providing emergency treatment.80 The facilities and the capacity available in makeshift hospitals were not sufficient to provide adequate and especially continued care to all injured. However despite combat conditions immediate medical care continued through makeshift hospitals and those needing continued care being evacuated by ICRC ships.
Patients who required further medical care were initially transferred via road. In 2008, 2433 patients along with 1157 bystanders were transported through Omanthai in 306 ambulance journeys from un-cleared areas. In January 2009, 97 patients with 45 bystanders were transported through Omanthai. They were treated at the Vavuniya hospital. This was followed by evacuations by sea until 9 May 2009. These patients were treated at Trincomalee and Padaviya hospitals. It should be noted that, of the 12,820 evacuated, only 4740 were patients. The rest, around 8080 were bystanders accompanying the patients. The Padaviya hospital was upgraded with the necessary facilities and manpower was provided. In addition an Indian field hospital (assistance provided by the Indian government) established in Pulmudai provided emergency treatment. A patient referral mechanism from Mullaitivu was established. Thirteen hospitals across the country were identified and a referral plan was established for patients who needed specialized care.
Prior to the displacement of people in the conflict zone, health institutions including district general hospitals of Kilinochchi and Mullaitivu, base hospitals in Puthukudiyiruppu and Mallavi were functioning supplied and maintained by government. With intensification of fighting after January 2009 medical services moved with the movement of IDPs and curative care was provided out of makeshift hospitals. The LLRC recording the experience of doctors serving in conflict areas during the last stages of the war record difficulties faced in providing medical care out of makeshift hospitals particularly in respect of medical equipment, cold rooms and storage of drugs. The LLRC was briefed that the Ministry of Health had already provided the medicines for 2009 in 2008 and the doctors were able to preserve these drugs and medications used for children and were able to provide medical facilities particularly to children until April 2009 a government doctor who served in a makeshift hospital in NFZ – 3 had
stated that drugs had been received eight times during the three month period from 10 February to 8 May, transported by ICRC ships. When road access for aid convoys into Wanni was no longer possible due to escalation of the conflict, medical supplies were shipped along with other essentials including medicine, surgical items, equipment and other life saving supplies requested by the RDHSs. This continued until 9 May 2009. In addition emergency health kits were dispatched via sea during this period.

However, according to ICEP the government doctors working on ground regularly informed government of the urgent need for medical aid and in late February the UN RC/HC had informed the Special Adviser to the President that the supplies provided have been used and there remains an urgent need for antibiotics, dressings, sutures and disinfectants. According to an ex-LTTE cadre making a submission to the LLRC has stated that from 6 January LTTE cadres also had been treated at government hospitals. Medical supplies and medicines from government hospitals had been utilized for the treatment of LTTE cadres. A doctor who was serving in a makeshift hospital stated that they could not differentiate between an LTTE cadre and a civilian and treated all alike. The UTHR reports that the government was sending far too little medicine in relation to what was needed and that a proper inquiry should be easily able to compare the quantity of medicines brought by the ICRC with what was required on ground. The report goes on to state that the people also perceived that LTTE cadres were being treated better than civilians. The LLRC concludes that there appears to have been a paucity of medicines and the medical facilities appear to have been inadequate which must be placed in the context of the intensity of the war and the proximity of the hospitals to the theatre of conflict. In regard to medical supplies to civilians during the final days of the conflict the LLRC considers that it requires further examination given the humanitarian considerations involved.

It is important to note that the civilian population in respect of whom humanitarian relief was targeted were in fact held hostage by the LTTE, prevented from leaving the NFZs, demarcated by the government also with the humanitarian objective of reaching them. The period during which humanitarian supplies were affected was precisely during the periods
when the conflict entered the NFZ period, after January 2009. Prevention of civilians from moving out of the conflict area amounted to a denial of humanitarian assistance, as the civilians were prevented from accessing available supplies. Every act of the LTTE in preventing the free movement of the civilians held hostage in successive NFZs constituted the ground context in which extreme conditions including starvation could have taken place. In the context of LTTE’s denial of right of free movement to civilians out of NFZs they became exposed to several hardships that in certain situations may have amounted to inhumane conditions.

In this regard the LLRC states that, despite the best efforts to verify estimates of civilians held hostage by the LTTE, it is of the view that non-availability of verifiable estimates of numbers does not have a bearing on the fact that what was practically feasible under the circumstances was undertaken. In particular efforts of the government in coordination with international agencies do not warrant any possible inference that there was a deliberate intention to downplay the number of civilians in the NFZs for the purpose of starving the civilian population as a method of combat. As far as medical supplies were concerned there is no doubt that the necessity to move from the permanent to makeshift infrastructure seriously restricted the capacity to provide medical assistance. The situation was exacerbated by the ground reality of available supplies being shared in the treatment of civilians and LTTE cadres. However the fact remains that medical attention continued to be provided through the makeshift hospitals to the extent possible amidst an ongoing conflict. Evacuation of patients continued despite restrictions placed by the LTTE on the movement of injured civilians and medicines continued to be supplied until end of May. In this context, it would be appropriate, as recommended by the LLRC, to examine the factual situation taking into account relevant factors such as number of civilians injured, types of injuries, number of LTTE cadres injured and treated and capacity to treat injured in makeshift hospitals against which actual supplies could be assessed.
Violations in the Prosecution of the War

This section examines specific actions in the course of the prosecution of the war. Several such actions are examined.

a. Shelling of hospitals and other non-military objectives:

The principle of distinction extends to parties to a conflict at all times to distinguish between civilian and military objectives. Military objects are defined as those that by their nature, location, purpose or use make an effective contribution to military action and the total or partial destruction, capture or neutralization of which in the circumstances of the attack contributes to a definite military advantage. Precautionary measures should be taken to minimize the effect of the attacks and IHL prohibits indiscriminate attacks. Specifically, attacks on hospitals as zones established to shelter wounded and sick from effects of hostilities is prohibited. Thus while the use of civilians to shield military operations by the LTTE contravene the principle of distinction and violates obligation to take reasonable precautions to separate civilian and military objectives, the LTTE was also under obligation to remove all military objects from the vicinity of civilians and civilian objects. The narrative of the war presented in Chapter 1 and of the fighting in the NFZs examined earlier in this Chapter outlines the context in which the war was conducted in its final stages. This ground reality constituted the context in which hospitals were caught up in the fighting.

The LLRC heard representations regarding the impact of the conflict on hospitals and makeshift facilities.

- Vallipunam: ICRC informed Commander of the Army of shelling on 21 and 22 January. Shells had fallen in the vehicle park. The hospital was evacuated and patients transferred to Puthukudiyiruppu.

- Anandapuram: A large LTTE armoury had been located near the hospital which was targeted by a Kfir attack that destroyed the armoury. There was no damage to the hospital. Two days after the attack the Medical Superintendent had decided to shift the hospital.

- Udayarkattu: There was an LTTE operation against the Security Forces from the side of the hospital when a bomb attack took place with
damage to hospital and injury to civilians. There were no military installations but witness stated that the “LTTE was staying near important places and did their armed operations”.

- Puthukudiyiruppu: There was shelling that caused damage to the outside of the hospital and few people suffered injuries, not major. Witnesses not able to identify origin though fighting was going on very close to the hospital premises within about 1 km. There were LTTE gun positions very close to hospital premises about 200 – 300 metres away. A doctor working at the hospital stated that he received an injury from shells which fell on his residence which was about 500 metres from the hospital on the 1 February. Shells fell on the theatre on 3 February and the entire theatre was damaged. Witness stated that “when a shell lands the general expectation is that it had been fired by the Army”.

- The UTHR records the testimony of a senior educator familiar with the hospital that the LTTE largely disregarded the ICRC’s request not to drive or park its vehicles in front of the hospital, as these could be spotted by UAVs and lead to shell attacks. The ICRC in a letter addressed to the Army Commander had stated that on 13 January the hospital had been attacked with artillery and the incident had resulted in injury to one patient and a bystander. Further the ICRC had informed the Army Commander that a shell had hit the southern end of the compound on 1 February. Another witness had stated that there was an LTTE camp at the rear of the hospital, approximately 50 – 100 metres away and it is possible that military operations were being carried out from there.

- Puthumaththalan: Witnesses have stated that shells had been falling around the hospital, but there had been no damage to the hospital. A hospital employee who had worked at the hospital has stated that there were LTTE positions outside the hospital and that they were using weapons including those mounted on vehicles.

- Mullivaikkal: A doctor serving at the hospital stated that the LTTE had artillery guns about 300 – 500 metres away from the hospital. There were two blasts that hit containers and trucks that were parked in the
hospital which were used to transport their arms and personnel. Four or five people had died when the shell hit the hospital entrance. Until end of April there was shelling in the vicinity of the hospital.

Evidently intensive fighting was going on in close proximity to the hospitals and the LTTE had merged with the protected premises to make its presence an integral part of their combat strategy. In fact the makeshift hospitals though under the formal supervision of the government Medical Superintendent, the LTTE exercised, de facto, considerable control over them. This situation was described by a doctor as working in a “hostile environment” where it was necessary to satisfy two governments, the LTTE and the government and at the same time provide services to people.

The overall picture according to the LLRC is that intensive fighting was taking place in close proximity to hospitals. The LTTE had gun positions in close proximity to hospitals, including within a radius of one kilometre usually demarcated as the safe area for most hospitals. In one instance it had been stated that the LTTE had mounted heavy artillery at the boundary of the hospital. However, while being satisfied that shells had in fact fallen on hospitals the LLRC finds the material placed for consideration by witnesses to present a confused picture as to the precise nature of events, from the perspective of time, exact location and direction of fire. None of the persons making representations was able to state with certainty that they were in a position to definitely confirm that shells which fell on the hospitals originated exclusively from the side of the SLA or from the side of the LTTE. The determination of the precise source of shelling or direction of artillery fire would depend primarily upon crater analysis being undertaken along with witness testimony.

The position of ICEP is that even if the LTTE violated the principle of distinction by failing to distinguish the military objects from civilian objects especially in the second and third NFZs, it does not absolve the Sri Lanka government from its obligations. This issue was examined earlier on in this Chapter. The obligation on the part of the Security Forces requires verification that targets are in fact military objects and that for each attack a legitimate military objective must be identified. All narratives of the war agree that the LTTE had gun positions within one kilometre radius of safe
area demarcated for most hospitals. The fundamental problem with ICEP’s analysis is, that while recognizing the ground reality of the co-location and co-mingling of the LTTE with the civilians within the spatial area available to the second and third NFZs while preventing the civilian population to move out, placing the combat actions of the Security Forces in a legal straight jacket. There is also the question of a medical object displaying distinctive emblems of the Geneva Conventions in conformity with international law being allowed to be merged into the means and methods of combat operations of the LTTE. The testimony recording the LTTE disregarding ICRC’s request to refrain from driving or parking combat vehicles in front of the Puthukudiyiruppu hospital is a case in point indicating the dilemma of targeting. The proportionality of the means and methods used by the Security Forces must be assessed in this context.

b. Receiving IDPs and surrendering combatants:

The second aspect of the conduct of the war relates to the movement of displaced civilians and surrendering combatants into cleared areas. An essential principle in the treatment of persons protected including those no longer in combat is humane treatment, respect for and protection of persons who are in the power of an adverse party. With the movement of civilians into government controlled areas a system of reception centres with screening locations were established to receive surrendees, especially following the incident of the LTTE suicide bombing at Visvamadu in February 2009. Medical teams from the SLA Medical Corps examined all those being received for injuries and illness and were evacuated to medical stations for treatment. Female soldiers were deployed to help female IDPs and surrendees. All followed a system of registration initially located with the field headquarters and later with increasing numbers and for security reasons moved to Omanthai. The screening was carried out prior to registration and involved separation of males and females and being body checked. Screening also involved the identification of persons involved with the LTTE through announcements to identify themselves. Thereafter
IDPs were sent to camps and surrendees to detention centres. Registration information was transferred to databases.\textsuperscript{88}

The LLRC notes the many difficulties experienced in the process of receiving IDPs and surrendees. There were concerns on the part of the Military in receiving surrendees, there having been three suicide attacks in the midst of surrendering civilians, killing several of them. It further records an incident during the last stages, evening of 17 May when the civilians were trying to take their vehicles towards Mullaitivu, the LTTE had sent the last suicide vehicle into army lines and had exploded it.\textsuperscript{89} The LLRC also notes several concerns of surrendees, who had voluntarily identified themselves and were detained even though at the time of surrendering they were not involved with the LTTE, but continued to remain in detention/rehabilitation centres.\textsuperscript{90}

Representations were made to the LLRC by civilians and ex-combatants regarding the treatment by the Security Forces when crossing over to government held areas. Several former combatants had surrendered with civilians as civilians, having changed into civilian clothing. They have stated that Security Forces assisted them when crossing over, and were given food and drink and medical attention. In regard to crossing over with a white flag a senior public servant is on record having stated that there were no incidents of shooting by the SLA in such instances. Statements by civilians as well as detainees confirm having crossed over with a white flag.\textsuperscript{91} At the same time, representations have been made by relatives of former LTTE cadres regarding disappearances of LTTE cadres who had surrendered to the Security Forces.\textsuperscript{92}

c. Killings and enforced disappearances:

The principle of humane treatment of civilians and persons not taking an active part in hostilities, including members of armed forces who have laid down their arms, and those placed as hors de combat, prohibits violence to life including murder, cruel treatment and torture, which when carried out in the context of an armed conflict, would constitute war crimes. When committed as part of a widespread or systematic attack against the civilian population, such treatment constitutes a crime against humanity.
According to evidentiary material with ICEP:

- Alleged killings relate to those of the political wing leaders (Nadesan and Pullidevan, Ramesh, Isaipriya, Balachandran)
- Alleged incidents relate to disappearances at surrender and screening sites, disappearances from IDP camps, disappearances of senior LTTE leaders who surrendered to Security Forces.

The LLRC notes representations made in regard to alleged abductions, enforced or involuntary disappearances, and arbitrary detention where in many cases formal complaints have been made to police stations, Human Rights Commission and the ICRC. The LLRC has also referred to the “white van abductions” and received representations regarding alleged abductions by the “Karuna Group” and the “EPDP”. It has concluded that the “Government is duty bound to direct the law enforcement authorities to take immediate steps to ensure that these allegations are properly investigated into and perpetrators brought to justice.  

Commenting on the findings and recommendations of the LLRC in this regard, the Army Board Report states that “it is common practice by LTTE to classify LTTE cadres killed in combat, civilians killed by LTTE for various reasons, civilians killed by LTTE whilst fleeing to government held areas, civilians who died in their flight to freedom for reasons such as drowning, exhaustion, land mines etc. and LTTE cadres and civilians who illegally left Sri Lanka and presently domiciled abroad as missing persons to evoke international sympathy. In this backdrop, doubts exist as to the alleged incidents of abductions and disappearances submitted to LLRC by various persons and the numbers indicated as disappeared.

- d. Torture, rape and sexual violence:

Obligation to protect civilians extends to prohibition of cruel, inhuman and degrading treatment. It was alleged that such inhumane treatment was widespread having occurred in police stations, IDP camps, rehabilitation centre, government hospitals and during screening processes.

The ICEP finds that available evidentiary material points to rape and sexual violence was perpetrated during the final months of the conflict. However, while the witness accounts available to ICEP provide mainly second-hand
information, it has not been able to analyze any specific incidents of rape or sexual violence. The findings of PoE in this regard rely on indirect accounts as well as photos and video footage provided by Channel 4.

The ICEP report refers to a report compiled by the Human Rights Watch (HRW) on alleged violations of rape and sexual violence committed by Security forces against men and women in state custody between 2006 and 2012. The report is based on interviews with sixty-eight alleged victims conducted in Sri Lanka, Australia, the United Kingdom, Germany, India, Malaysia, and Indonesia and seventy-five cases that have been documented. The report concludes that “rape appears to have been a key element of broader torture and ill-treatment of suspected LTTE members and others believed linked to the LTTE. This torture was intended to obtain confessions” and, “it appears, to instil terror in individuals and the broader Tamil population”. At the same time the report notes that “however, not all the cases of rape we documented were necessarily politically motivated: we have a few cases where it does seem to have been the depravity of a rogue officer acting on his own, but, even in those cases, the officers acted with complete impunity in a context in which rape and sexual violence were also used for extracting confessions”.

Significantly, the LLRC does not record any submissions made in respect of allegations of rape and gender-based violence. However, there is some evidence to suggest that rape and sexual abuse was in fact reported to the LLRC.96

The contrasting positions emerging in regard to the incidence of rape and sexual violence on the basis of international reporting and the domestic enquiry point to the inconclusive nature of the scale and intent in the findings and of conclusions that suggest violations at the level of the Tamil community. In an area of human interaction that is culturally sensitive in normal situations, and is even more so in armed conflict, reporting rape and sexual violence should be cautious and evidence-based.

Notes

Ministry of Defence, Humanitarian Operation Factual Analysis, p 86.

Ibid, p 86.


Ibid, p. 5.

Ibid, p.23.


Ibid, p. 25.


UN Secretary General’s Panel of Experts, Report, March 2011.

International Crimes Evidence Project (ICEP), Island of Impunity? Investigation into international crimes in the final stages of the Sri Lankan civil war, February, 2014.


International Crimes Evidence Project (ICEP), Island of Impunity? Investigation into international crimes in the final stages of the Sri Lankan civil war, February, 2014.


Ibid, para.4.327.

UD Department of state, Office of Global Criminal Justice, Report to Congress on Measures Taken by the GoSL and International Bodies to Investigate and Hold Accountable Violations of International Humanitarian and Human Rights Law, April, 2012.


Ibid.


Ibid, para.4.267.


Ibid, para.4.271.


Ibid, para.4.274.

Ibid, para.4.282.

Ibid, para.4.283.


Ibid, para.6.308.

Ibid, paras. 6.309, 6.310, 6.311.

Ibid. para.6.36.

Ibid. para.6.37.


Ibid. paras..6.271 – 6.273.

The PoE notes in this regard that subsequent shelling by the SLA disregarded the requirement for precautions before and during attacks in fact amounted to a cynical manipulation of it.


Ibid, section 1.7.


Ibid, p. 38.


Op.cit. Interview with Former Director Operations of SLA.


OP. cit., LLRC, para.4.359.


Op. cit. Numbers Game, Section 4.4.6 – Final Tally, the death toll is as a result of the conflict is estimated to be potentially anywhere between 10,000 and 18,000.


Ibid. Para.49.

LLRC, paras.4.171 – 4.174.

Ibid, paras..4.175, 4.176, 4.177.

Ibid. Section 8, p.98.


Ibid, para.46.
Mr Mohamed Salaheen, Country Director WFP, informed the Committee that rice for IDPs is being purchased in Kilinochchi and Mullaitivu but there are other items being transported into the Wanni. He further said that in 2007, 6,638T of rice was purchased from Kilinochchi and 800T has been already purchased for this year.”

CHAPTER 4

The Accountability of the International Community

Introduction

In the narrative of the last stages of the war that is recounted in the preceding chapters there is one other international dimension of accountability that needs to be addressed. The evidence clearly indicates that the suffering of civilians and the casualties that resulted from the intense fighting in the NFZ were caused primarily by the LTTE and their military strategy of holding civilians captive and using them as a human shield. As discussed in Chapter 5 the UN system as a whole made little effort to prevent the humanitarian tragedy that ensued. They failed to diagnose the nature of the problem at the early stages and were incapable of designing a coordinated strategy to separate the civilians from the LTTE and enable them to move into the government controlled areas. However, to put any such plan into action the UN system would have needed strong support from the powerful governments of the member states of the UN who were already closely involved in playing a mediating role in the ethnic conflict in Sri Lanka. Could these nations have acted in a timely and decisive way to prevent the LTTE from committing what amounted to a crime against humanity, resulting in large-scale civilian casualties?

The Role of Foreign Governments and their Perspective on the War

The foreign governments that had been playing this mediating role had a perspective on the Sri Lankan war and the desired outcome which turned out to be very different from that of the GoSL. This approach contained several elements.97
First, the historical context in which the LTTE developed as a powerful military outfit. While the Indian intervention in the 1980s gave birth to and consolidated Tamil militancy it is the Tamil Diaspora in the Western countries that established the international infrastructure and provided the resources for the procurement of arms and the maintenance of its military establishment in Sri Lanka. The LTTE was able to mobilize the Diaspora for this purpose through processes of intimidation and extortion. Owing to their unusually larger size due to the generous policies of the host countries towards asylum seekers the Diaspora became a strong political constituency for the LTTE within the Western countries. The propaganda of the Diaspora had an important impact on the attitudes and policies of Western governments in regard to the war in Sri Lanka. This aspect became evident in the last stages of the war when the defeat of the LTTE was imminent and the Tamil Diaspora held large demonstrations in Western capitals in open support of the LTTE calling for a cessation of hostilities.

- At the commencement of the Wanni war, the attitude of the Western nations towards the LTTE was influenced by the fact that they had sponsored and supported a negotiated settlement of the conflict. The information available from various sources indicate that although these governments recognised the right of the GoSL to launch the military offensive against the LTTE they expressed their apprehensions regarding the humanitarian consequences of such an offensive.

- They were also sceptical of the outcome. As would be seen from the statements made by an official spokesman of the US, most of them did not expect that the SLA would be able to defeat the LTTE military. The Western nations and human rights activists had propagated the myth that was no military solution to the terrorism in Sri Lanka and that the LTTE could not be defeated militarily.

- At the same time these governments had taken action to proscribe the LTTE as a terrorist organization in their own countries. It was first banned by India in 1992 followed by USA in 1997 UK in 2000 Canada 2005 and EU in 2006. By the time Canada UK and EU banned the LTTE they had established their strongest constituencies in these countries.
The inner contradictions in the approach of the Western nations to the LTTE became evident in their flawed diagnosis of the nature of the war in Sri Lanka 2008-2009. They are contradictions that are reflected in the way in which the war crimes allegations have been framed in the PoE report as well as by the Western nations. In the eyes of these governments the LTTE and the GoSL were treated as equal parties in a combat in which third parties must not intervene. Actions taken by the SLA to deal with the LTTE are perceived and treated as crimes of equal gravity as the crimes of the LTTE themselves. It was only at the last stages that these nations recognised the true nature of the LTTE’s military strategy and their use of the civilians as a buffer and a human shield. There was an attempt to obscure the reality by arguing that civilians may have gone with the LTTE voluntarily and may not have wanted to escape. The PoE and ICEP reports continue to argue in similar vein. This line of argument provides the Western nations a means of absolving themselves of any culpability for ignoring the atrocity of the human shield when it was occurring.

As the war progressed the western nations could not ignore the evidence of civilians being kept forcibly by the LTTE in the battle zone and being used as a human shield. In the final stages when it became clear that the LTTE was defeated the Western nations asked the LTTE to lay down arms and surrender. The precise conditions of surrender and the future of the LTTE leadership which these governments had in mind were not clear. The statements made by senior US state officials indicate this ambiguity. Sri Lankan scholars (Michael Roberts, Daya Gamage) have drawn attention to what seemed to be an agenda that envisaged the top LTTE leadership continuing in a role which was not clearly defined. More than one US spokesman admitted that they were not clear as to how they should deal with the leadership. Reproduced below is a statement of a senior US official Owens Deputy Secretary of state made on 6 May 2009 on the efforts to mediate a surrender:

We are trying quietly - and I can't talk too much about this- but we are trying quietly behind the scene to find a way to bring an end to the fighting. It's very difficult to see exactly how that's going to
happen, but we think there are a couple of elements that need to be involved, and we need to find a way for the LTTE to surrender arms possibly to a third party in the context of a pause in the fighting, to surrender their arms in exchange for some sort of limited amnesty to at least some members of the LTTE and the beginning of a political process.

Now, those are pretty vague - that's a pretty vague outline, and we realize that. It's going to require a lot of negotiation with the parties involved to bring that to fruition in a really a coherent way, but that is something that is underway behind the scenes to try to find a way to reach that point.

I just want to emphasize this is what we would like to see happen, but we don't have any illusions that this is easy to engineer. It's something that we've been working on very hard and quietly behind the scene, because we see - the only potential we see to bring this to an end is to have a package in which we have a pause, and the civilians were allowed to leave. And now it's very clear that many civilians do want to leave in spite of the fact the LTTE has said earlier they do not want to leave. They do in fact want to leave.

So what we would like to see is a package, in which there is a pause, and then during that pause, not only do the civilians leave but we also make some arrangements between the government and the LTTE that would involve trading off surrender of arms for a limited amnesty. The Government of Sri Lanka has previously offered a limited amnesty. This would be for the lower level LTTE cadre, not the leadership.

And so I think one of the big questions is what to do
about the leadership, and that's certainly not easy to answer. This is a very complex and very difficult sort of thing to orchestrate. There are many problems, and we are running out of time.

We really, literally, have a matter of a couple of days maybe in which we can try to get this finalized.

So we are working on it, but I don't want to raise expectations that we're close to a comprehensive agreement.

The disturbing part of this diplomacy of “working behind the scene” is “the package that is being is being considered. The US was attempting to decide on a package which would have produced an outcome which would have thwarted the legitimate objective of the military operation launched by the GoSL – the total defeat of the LTTE and the eradication of terrorism.

The Humanitarian Crisis and International Intervention

These ambiguities in the position taken by the international community as represented by these Western nations, primarily US, had two significant consequences. First, it enabled the LTTE to continue with their strategy of holding the civilians captive with the threat of a humanitarian disaster that would force international intervention. The testimony of witnesses (both to the LLRC and the UTHR) indicate that the LTTE had held out this expectation to the civilians. This was consistent with the callousness they displayed in their treatment of civilians; the mounting civilian casualties were part of their strategy. Second, the GoSL reacted strongly against any initiative which called for a cessation of hostilities just at the moment when they were achieving their military goals and were at the point of defeating the LTTE and eradicating terrorism from Sri Lanka. It was only the indefatigable efforts of the Sri Lankan diplomats in New York that prevented the senior politicians of the Western nations such as Milliband and Solheim from persuading the UN Security Council to call for a ceasefire. The press statement, which was finally issued by the Security Council contained these two key pronouncements:
The members of the Security Council strongly condemn the Liberation Tigers of Tamil Eelam (LTTE) for its acts of terrorism over many years, and for its continued use of civilians as human shields, and acknowledge the legitimate right of the GoSL to combat terrorism. The members of the Security Council demand that the LTTE lay down its arms and allow the tens of thousands of civilians still in the conflict zone to leave.

Not all the Western nations shared in this unequivocal condemnation of the LTTE and its treatment of civilians. The ambiguity on the part of the Western nations contributed to the intransigency of the LTTE. The Security Council statement itself was issued only on the 13th May. By then the LTTE’s use of civilians as a human shield had already resulted in a large number of civilian casualties.

- Had the foreign governments made a timely and realistic diagnosis of the ground situation and unequivocally condemned the LTTE strategy and made it clear that the leadership would be brought to account in an international tribunal for their war crimes the outcomes of the last stages of the war might have been different.

- The stage at which the initiative was needed was the period immediately following the fall of Kilinochchi when the GoSL was providing escape routes to the civilians and calling upon the LTTE to surrender.

How Western Nations viewed the Final Outcome

A total defeat of the LTTE by the Sri Lanka army does not appear to have been part of the calculus of the international community who had always argued for a negotiated settlement that would provide a political solution to the ethnic conflict. The Western nations were not fully sensitive to the situation the GoSL faced in the last stages of the war and failed to acknowledge that the government had no alternative but the military option of totally defeating the LTTE. The evidence of what was happening in the NFZ was too ominous to be ignored. Civilians who were attempting to escape were being shot ruthlessly. Large-scale suicide by LTTE cadres
voluntary or induced was a real possibility. Moving into the NFZ battling with the remaining LTTE cadres and releasing the civilians became a pressing necessity. In these circumstances the moves by the US and its allies to find an escape route for the top leadership was viewed with suspicion and resisted firmly by the GoSL. It drew the justifiable conclusion that any such move would have given a further lease of life to the LTTE to continue their struggle employing terrorist methods at immeasurable human cost to the Sri Lankan people as a whole – Tamils, Muslims and Sinhala. Political analysts have argued that the strategy of enabling the LTTE to continue to play an active role in the ethnic conflict in Sri Lanka would have served larger geopolitical strategic interests of the US.

There is very little information available on the discussions that may have taken place among the concerned Western countries on the situation in Sri Lanka on the various stages of the war. In an interview in the Campbell Conversations Programme Robert Blake, Assistant Secretary of State, who had been Ambassador in Sri Lanka at the time Sri Lanka decided to leave the peace process and launch a military offensive to put an end to the LTTE admitted that “most of us” (the Western nations) did not believe that the Sri Lankan army would succeed. This indicates the mindset with which the Western nations approached the war. They had not planned for the outcome as it turned out. Blake refers to what he describes as “the very very difficult situation” the Western countries faced. On the one hand they wished to see an end to the LTTE which in his words was “one of the most lethal... one of the most brutal terrorists organisations that the world has seen...responsible for thousands of civilian deaths...and on the other hand they wanted to see that there were no large scale civilian casualties in the process”. He goes on to say that as the displaced persons moved northwards “the LTTE systematically refused international efforts to move them to the government controlled areas where they would have food and other services, systematically denied them freedom of movement and violated international humanitarian law”. He points out that the LTTE deliberately planted their artillery and other equipment amidst the civilians “to draw fire from the Sri Lankan army and use the resulting civilian casualties to provoke international outrage”. He is emphatic that “if the LTTE had allowed the citizens to leave none of this would have happened”. He also mentions that the government
was resolved not to resume the peace process and was probably justified in arguing that the LTTE did not believe in a peace process and would have used ceasefires to consolidate themselves. Although Blake makes reference to international efforts to get the LTTE to allow civilians to leave the battle there is no evidence that any well designed effort was made to bring pressure on the LTTE after the fall of Kilinochchi when it became apparent that an essential part of the LTTE strategy was to use the civilians as a human shield.

From information available in the public domain it would appear that there was some difference of opinion between the embassy staff of Western nations who were aware of ground realities and other human rights–oriented groups at the policy making levels. From the balanced position expressed by Blake in the reported interview where the primary responsibility for the humanitarian disaster is placed on the LTTE, the discourse on war crimes begins to shift and increasingly focus on war crimes committed by the government. Blake’s analysis, its tone, its sensitivity to the dilemmas faced by the Sri Lankan army is in sharp contrast to the egregious reasoning in the PoE Report. This can be observed in another instance where the defence attaché who served in the US embassy in Sri Lanka during the war and closely monitored the developments affirmed that there had been no genuine desire on the part of the LTTE to surrender. Soon thereafter the US state acted quickly to disown this statement. Reproduced below are the statements made by the defence attaché Colonel Lawrence Smith at a conference organized by the Ministry of Defence in May 2011 and the statement made by the state department official contradicting it:

Hello, may I say something to a couple of questions raised. I’ve been the defence attaché here at the US Embassy since June 2008. Regarding the various versions of events that came out in the final hours and days of the conflict – from what I was privileged to hear and to see, the offers to surrender that I am aware of seemed to come from the mouthpieces of the LTTE – Nadesan, KP – people who weren’t and never had really demonstrated any control over the leadership or the combat power of the LTTE.
So their offers were a bit suspect anyway, and they tended to vary in content hour by hour, day by day. I think we need to examine the credibility of those offers before we leap to conclusions that such offers were in fact real. And I think the same is true for the version of events. It's not so uncommon in combat operations, in the fog of war, as we all get our reports second, third and fourth hand from various commanders at various levels that the stories don't seem to all quite match up. But I can say that the version presented here so far in this is what I heard as I was here during that time. And I think I better leave it at that before I get into trouble.

This statement was contradicted by a state Department official Mark Toner who takes a hard line with the Government of Sri Lanka:

Mr. Toner: Well, just to clarify, the U.S. did decline invitations to participate in that conference as either a conference speaker or panellist. My understanding is that the defence attaché was there as an observer and a note taker. His comments reflected his personal opinions. There’s no change in the policy of the United states, and his remarks do not reflect any change in our policy.

Question: So that was a personal opinion?

Mr. Toner: Personal opinion. The United States – and just to reiterate that policy – remains deeply concerned by the allegations in the panel of experts report, and we’re committed to seeing a credible accounting of and accountability for violations of international human rights law and international humanitarian law. And we believe that the GoSL must act quickly and credibly to address these allegations.
Lord Naseby’s critical comments on the lack of transparency on the part of the British government points to a similar dissonance between the views of the personnel close to the ground situation and official positions taken at higher levels. Parts of Lord Naseby’s speech is cited extensively below for the purpose of highlighting a responsible plea for more balanced judgement of the actions taken by the GoSL. If the official position of the Western nations had been closer to what is presented by Lord Naseby they would have been able to take timely and decisive action in close co-operation with the GoSL to prevent the tragic events in the last stages of the war.

It will not surprise your Lordships that I want to say a few words about Sri Lanka. I have been involved with that country for more than 50 years, and I think I know its ins and outs pretty well. I am the elected leader of the all-party group. I do not support any particular ethnic group, political party or government. I have no business interests there – but I do fervently support the ordinary people in Sri Lanka and I wish to ask a few questions of Her Majesty’s government.

First, Sri Lanka – a former colony, a founder member of the Commonwealth and one of the few countries that supported the United Kingdom over the Falklands situation-finds today that we, the United Kingdom, are exceedingly unhelpful to it. Why is it that we are so anti the democratically elected government? Why can we not work with them? Why at every turn must we just listen to the vociferous Diaspora, which is usually led by former Tamil Tigers? Why do we not understand that the Tigers were -terrorists who murdered every moderate Tamil leader they could find, along with two presidents and thousands of other Sri Lankans-all in the cause of a separate state called Eelam. It was rather similar to Pol Pot.

Can we not understand that after 28 years of fruitless negotiations, it was necessary for a view, democratically elected government to act to destroy the Tigers? Yes, that
meant a bloody war, as the Tigers refused to surrender. However, I know that that government tried hard to minimise casualties. Why do we refuse to publish the dispatches from our own defence attaché, who was an objective assessor? Why do we think that the Sri Lankan army, which we helped to train, is so different from our own Army? After all, there were allegations against our Army in Iraq, as there were against the Sri Lankan army.

International Accountability and Responsibility

The failure to take timely and decisive action on the part of the Western nations to prevent the tragedy of the human shield does not come within the ambit of the IHL and issues of accountability arising from violations of IHL. The failure was essentially a failure of policy arising from a mistaken diagnosis of the LTTE and its action and delay in responding to the emerging situation. The phrase timely and decisive action is taken from the articles of the UN declaration in 1995 on the responsibility to protect. The analysis in this chapter draws on the normative framework that has gained the commitment of the Member states of the UN as declared in the Outcome Document of the UN World Summit in 1995 paragraphs 138 and 139 and reaffirmed in UN Security Resolutions 1676 and 1894 of 2006 and 2009 respectively:

138. Each individual state has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means. We accept that responsibility and will act in accordance with it. The international community should, as appropriate, encourage and help states to exercise this responsibility and support the United Nations in establishing an early warning capability.

139. The international community, through the
United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities manifestly fail to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity. We stress the need for the General Assembly to continue consideration of the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity and its implications, bearing in mind the principles of the Charter and international law. We also intend to commit ourselves, as necessary and appropriate, to helping states build capacity to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity and to assisting those which are under stress before crises and conflicts break out.


Responsibility to Protect (R2P) as currently defined does not provide the scope for addressing a situation in which protection has to be afforded to the people against systematic violations of IHL and HRL that are committed by a non-state party as happened in the case of the LTTE. But the extraordinary situation that arose in the case of Sri Lanka provided an opportunity for the international community to work out modalities whereby the GoSL and the SLA could have been effectively assisted at a crucial juncture of the Wanni
war to prevent the LTTE from using the civilian population as a human shield. Even when the human shield was a fait accompli the international community could have co-operated more effectively to neutralise the LTTE actions that jeopardised civilian life and assist the SLA to minimise civilian casualties. For this to happen there had to be agreement on the final outcome of the war. The relations that had developed between the Sri Lankan state, the UN agencies and the Western nations had a strong element of distrust and mutual criticism. An operation to protect the civilians in the last stages of the war require a firm foundation of mutual trust and confidence in the goals and objectives that were being pursued by GoSL the UN and the Western nations, the mutual trust and confidence that all three parties were sincerely committed to the goal and objective of defeating the LTTE eradicating terrorism and protecting the civilians. The failure to build the necessary trust and confidence for co-operative action had profoundly tragic consequences for the civilians.

Conclusion

An inquiry into the war crimes and civilian casualties in the last stages of the war in Sri Lanka would be incomplete without a full and transparent examination and assessment of the role played by the international community and the initiatives taken by them during the last stages of the war. The extraordinary conditions that had developed during the last stages of the Sri Lankan war provided a test case for developing effective modalities for the international community to deal with extreme situations in which a terrorist group was violating IHL on a massive scale. As stated earlier, such effective modalities require a firm foundation of mutual trust and confidence between the main actors. A firm foundation of this nature require well defined codes of conduct on the part of the international community, the UN and the national government concerned. Such a foundation was obviously lacking in the Sri Lankan case and in probability all three parties the Western nations, the UN and the GoSL - contributed to that situation. A full inquiry into all the circumstances that led to that situation could help to define the codes of conduct that each party must observe in dealing with extraordinary and extreme cases such as the LTTE in Sri Lanka. The findings and recommendations coming out of such an inquiry would consequently
strengthen the international framework for the implementation of IHL and IHRL and R2P.

Notes

For much of the information and analytical content in this chapter, the Report has drawn heavily on the articles written by Dr Michael Roberts on role of the international community in the last stages of the war. http://thuppahi.wordpress.com/2012/04/12/blackmail-during-the-endgame-in-eelam-war-iv/
CHAPTER 5

The Accountability of the UN and its Agencies

Introduction

This chapter examines the conduct of the UN organisations during and immediately after the final stages of the war between the GoSL and the LTTE. The chapter is presented in three sections. The first section briefly discusses the standards and best practices applicable to the UN in armed conflicts, including non-international armed conflicts. The section also analyses, to an extent, the adequacy of existing norms within the UN framework. The second section delves into the chronology of UN decision-making during the final stages of the war. It pays particular attention to the account provided by the Petrie Report published in November 2012. The final section assess the conduct of the UN and critically examines its decision-making during the period of review.

Prior to delving into the question of standards and the extent to which the UN complied with them in Sri Lanka, it is perhaps necessary to briefly outline the decision-making structure of the UN in relation to action in Sri Lanka. The coordination of the UN response in Sri Lanka took place through a number of mechanisms. The UN development engagement was framed through the UN Development Assistance Framework (UNDAF) for the period 2008-2012, and two Consolidated Humanitarian Appeals (CHAPs) for the years 2008 and 2009. The overall coordination of UN Headquarters (UNHQ) analysis and engagement on the crisis in Sri Lanka was carried out initially by the Department of Political Affairs (DPA) until 2008, and later by the Secretary-General’s Chef de Cabinet. Moreover, the Under Secretary General (USG)-Humanitarian Affairs participated in UN decision-making during the final stages of the war. Sri Lanka was also on the agenda of the UNHQ Policy Committee, the Executive Committee on Humanitarian Affairs (ECHA), and an Inter-Agency Working Group on
Sri Lanka (IAWG-SL). At the national level, the senior most UN official was the Resident Coordinator, who was head of the UN Country Team and reported to the Secretary-General through the Administrator of the UN Development Programme (UNDP). The Resident Coordinator also functioned as the Humanitarian Coordinator responsible for coordinating humanitarian activities with support from the Office for the Coordination of Humanitarian Affairs (OCHA).

**Standards**

UN priorities during the past two decades could be distilled into three main themes: peace, development and the protection of basic rights. These priorities are often interlinked, and influence all UN programming and action. In the context of armed conflict, the following range of ‘interlinked standards’, govern UN conduct:

1. The framework on international human rights law (IHRL) pertaining to civil and political and economic, social and cultural rights;
2. The framework on the ‘Responsibility to Protect’; and
3. UN Security Council resolutions on protecting civilians in armed conflict through the protection of IHRL and IHL.

The action of the UN Country Team in Sri Lanka and the UN Secretariat during the period of review may be assessed and measured on the basis of these essential standards. We note that the Petrie Report measures the conduct of UN organisations and staff against these standards.\(^{99}\)

**International Human Rights Law**

The UN Charter recognises that protecting and encouraging respect for human rights is one of the fundamental purposes of the United Nations. The body of international human rights treaty law sets out a framework under which the UN could ensure that its conduct complies with IHRL.\(^{100}\) The process of ensuring such UN compliance with IHRL has emerged in the development context. The UNDP and the OHCHR have been instrumental in mainstreaming human rights throughout development programming, which culminated in the UN Common Understanding of a
Human Rights-based Approach to Development Cooperation. However, a similarly successful process of mainstreaming is not evident in the context of armed conflict.

Legal scholars have grappled with the distinction between IHRL and IHL for decades, often arguing that IHRL applies in times of peace and IHL in times of war. More contemporary thinking on the subject has disputed this distinction.\(^\text{101}\) Hence there is considerable consensus over the application of IHRL to armed conflicts. However, there is no clear discourse on whether the UN itself has direct human rights obligations. While there is some discussion on the human rights obligations of UN peacekeeping forces,\(^\text{102}\) that discourse is not entirely relevant to the present inquiry in the Sri Lankan context. It is instead only possible to interpret the responsibility of the UN to protect and promote human rights broadly so as to hold UN organisations accountable for acts and omissions relating to the violation of human rights. As pointed out by Frédéric Mégret & Florian Hoffmann: ‘There is a gap...between theories of how international human rights law binds the United Nations, and explanations of how the United Nations might violate human rights.’\(^\text{103}\) The authors offer a convincing framework for determining the extent and scope of human rights obligations of UN actors. The framework is dependent on the degree of ‘control’ exercised over the population. They conclude:

Clearly, not all the UN’s activities will or should fall within a “human rights violations” framework, if only to avoid further demobilizing the state...One might envisage...a three-tier system allocating human rights responsibility on the basis of the degree of control exercised. At the apex of that system are international administrations and perhaps a few other cases of intense, “all-round” exercise of sovereignty. In those cases, guaranteeing human rights is a matter of the greatest urgency, deriving its force not only from constitutional injunction, but also from the very essence of human rights jurisprudence and positive international human
rights law. One might conceive of a middle category where the United Nations activity, although it has a strong impact on local populations, nonetheless falls short of ultimate control. In those cases, attention to human rights would be seen as a very strong constitutional and policy imperative. Finally, one would have a residual category of promotional activities fitting in the traditional intergovernmental framework, where the United Nations would “only” be submitted to the constitutional obligation to “promote and encourage respect” for human rights.104

Based on this framework, it is possible to argue that the UN’s conduct in Sri Lanka during the period of review fell, at a minimum, within the second category—where UN actions ‘had a strong impact on local populations.’ Hence there remains a strong constitutional and policy imperative for the UN to pay attention to IHRL within its sphere of influence.

The Responsibility to Protect

The outcome document of the World Summit of 2005 recognised the concept of the Responsibility to Protect105. The following three pillars of this concept were outlined in the Secretary-General’s 2009 Report on Implementing the Responsibility to Protect:106

1. The state carries the primary responsibility for protecting populations from genocide, war crimes, crimes against humanity and ethnic cleansing, and their incitement;
2. The international community has a responsibility to encourage and assist states in fulfilling this responsibility; and
3. The international community has a responsibility to use appropriate diplomatic, humanitarian and other means to protect populations from these crimes. If a state is manifestly failing to protect its populations, the international community must be prepared to take collective action to protect populations, in accordance with the Charter of the United Nations.
The second and third pillars of the doctrine appear to place an obligation on the UN to play a passive, and in some cases an active, role in promoting the Responsibility to Protect. Hence UN action, in a context in which international crimes including war crimes could potentially take place, ought to be assessed by reference to the UN’s duty to promote the Responsibility to Protect.

In practice, however, the Responsibility to Protect framework has been applied cautiously, mainly due to continued resistance by some Member states to such application. In fact, in the Sri Lankan context, the concept was scarcely cited owing to the prevailing view amongst UN staff that ‘making references to the Responsibility to Protect was...likely to weaken rather than strengthen UN action.’

Security Council Resolutions on Civilians in Armed Conflict

The Security Council has adopted a number of resolutions pertaining to the protection of civilians in armed conflict. These resolutions serve to define the nature and scope of UN action in the context of an armed conflict. The resolutions often relate to IHRL. Yet they also reinforce principles of IHL and attempt to shape the conduct of belligerents in warfare. Three of the key resolutions adopted by the Security Council in this regard include Resolutions 1265 (1999), 1296 (2000) and 1631 (2005). The main resolution that governs UN conduct in this regard is, however, Resolution 1674 of 28 April 2006. Several key paragraphs of the latter resolution warrant mention.

Paragraph 2 outlines the principal responsibility of UN organisations to adopt a coherent, comprehensive and coordinated approach, which ensures cooperation with one another and within their respective mandates. The Resolution further strengthens the application of the Responsibility to Protect doctrine by reaffirming the outcome document of the World Summit of 2005.

Paragraph 10 of the Resolution requires countries to fully cooperate with UN Country Teams, and for the UN Country Teams to play an active role in ensuring compliance with Security Council directives. Hence UN conduct in Sri Lanka may also be assessed in relation to state’s compliance...
with Security Council directives and the extent to which the UN Country Team monitored and reported on such compliance.

Finally, paragraph 16 of the Resolution is critical to understanding the responsibility placed on UN Missions in the context of armed conflicts. In this paragraph, the UN Security Council:

Reaffirms its practice of ensuring that the mandates of United Nations peacekeeping, political and peacebuilding missions include, where appropriate and on a case-by-case basis, provisions regarding (i) the protection of civilians, particularly those under imminent threat of physical danger within their zones of operation, (ii) the facilitation of the provision of humanitarian assistance, and (iii) the creation of conditions conducive to the voluntary, safe, dignified and sustainable return of refugees and internally displaced persons, and expresses its intention of ensuring that (i) such mandates include clear guidelines as to what missions can and should do to achieve those goals, (ii) the protection of civilians is given priority in decisions about the use of available capacity and resources, including information and intelligence resources, in the implementation of the mandates, and (iii) that protection mandates are implemented.

Chronology of UN Decision-Making

Protection of Civilians

In 2007, the GoSL launched its military campaign in the Wanni to capture the remaining territory held by the LTTE. During the next 18 months, the fighting gradually intensified and in September 2008 the government informed the UN that ‘it could no longer guarantee the safety of staff in the Wanni.’ In fact, on 3 September 2008 an incident took place where several artillery shells hit within the Kilinochchi box close to
UN compounds. The same night, UNHCR and WFP received written communications from the SLA informing them that the government could not guarantee the safety and security of aid workers within the Wanni and that any movements would be at their own risk.\textsuperscript{109} According to the findings of the Petrie Report, the government’s announcement came after ‘many months during which the UN perceived the government to be trying to restrict the access of NGOs to the area.’\textsuperscript{110}

There appears to be a slightly differing account emerging from the minutes of the Consultative Committee on Humanitarian Assistance (CCHA). Incidentally, this Committee was referenced only once in the entire Petrie Report and not even once by the UNSG’s PoE. The Resident Coordinator attended the CCHA meetings and his updates and observations are recorded in the minutes. There appears to be no justification for the lack of reference to these minutes as a source of information in assessing UN conduct during the final stages of the war, nor any justification for the lack of any attempt to refute the information flowing from the CCHA minutes. The CCHA meetings were attended by the Minister for Disaster Management and Human Rights, Ambassadors of the USA, Germany and Japan, the Head of the Delegation of the European Commission, representatives of relevant UN agencies such as UNHCR, OCHA and WFP, the Chairman of the NGOs Committee, the Commissioner General of Essential Services, Government Agents and Senior Officials of relevant Ministries.\textsuperscript{111} According to the CCHA Meeting minutes of 8 September 2008, a decision had been taken by the government to relocate the UN and INGOs to Vavuniya. According to the UTHR report in October 2008, a UN statement dated 9 September 2008 had ‘little hint of protest or alarm’ and acknowledged ‘the announcement by the GoSL that they can no longer ensure the safety of aid workers in the [W]anni, and their request that UN and NGO staff should relocate to government-controlled territory.’\textsuperscript{112} The UTHR report also referred to the fact that the UN readily complied with the government’s request in just eight days, despite the fact that the government had given UN staff three weeks to evacuate. The UN’s attitude to its protection mandate was perhaps best captured in a statement on 10 September 2008 by Gordon Weiss, UN spokesman in Colombo:
It is the prime responsibility of the government to provide security to humanitarian workers and if they cannot give it to us then we will leave...The UN cannot do any thing about the safety of the civilians as this is once again the responsibility of the government.\textsuperscript{113}

The Petrie Report does not comment on the inordinate speed in which the UN evacuated without even attempting to negotiate with the government. It states that within three weeks, the UN withdrew all international staff, effectively ending UN assistance operations from within the Wanni.\textsuperscript{114} Another curious piece of information cited in the UTHR report was the Peace Secretariat’s statement in early October that the government wanted UNHCR and WFP to continue work in the Wanni. According to the statement: ‘When [the UN staff] were guaranteed safe passage to Wanni in mid-September, all of them refused the offer on security grounds. Sri Lankan NGOs were the only ones to travel.’

The Petrie Report also states that ‘the relocation of international staff out of the conflict zone made it much harder for the UN to deliver humanitarian assistance to the civilian population, to monitor the situation and to ‘protect by presence’.\textsuperscript{115} Yet this position remains at odds with the UN Spokesman’s statement on 10 September 2008.

On 20 January 2009, the government informed civilians that a safe zone had been demarcated within which the security forces were committed to provide maximum safety for civilians trapped or forcibly kept by the LTTE.\textsuperscript{116} On 23 January 2009, the UN staff relocated to this NFZ and set up a hub near Suthanthirapuram Junction.\textsuperscript{117} A large number of civilians also relocated to the NFZ and set up shelters around the UN hub.\textsuperscript{118} According to the accounts of UN staff stationed at the hub, the hub was shelled on 24 and 25 January 2009 causing civilian casualties. The UN staff occupied a bunker during the attacks and escaped injury. The staff along with ICRC staff thereafter relocated to PTK.

The UN’s presence in the first NFZ and later in PTK was instrumental in shaping the views of the UNSG’s PoE with regard to events during late January 2009. However, this information did not inform top-level UN
decision-making at the time.

In February 2009, the UN Country Team established a system for information gathering and analysis, particularly using information from two international staff members who remained in the Wanni until 29 January 2009. Yet, according to the Petrie Report, ‘there was no established reporting process into which this testimony could be usefully fed.’ A UN Crisis Operation Group (COG) comprising representatives from several UN organisations was eventually appointed. The COG was meant to gather information from a range of sources and inform decision-making. Yet, the UN Human Rights Adviser was not included in this group. The Petrie Report notes that ‘at some point in early 2009, the [Resident Coordinator] excluded [the] Human Rights Adviser from key meetings and from providing inputs on correspondence with the government and UNHQ on human rights violations.’

The lack of specific human rights law and humanitarian law expertise in the gathering, analysis and dissemination of information resulted in the breakdown of UN credibility during the months to follow. On 9 March 2009, the Resident Coordinator and some UN Country Team members presented an estimate of casualties to the diplomatic corps in Colombo. According to the COG briefing, ‘the total minimum number of documented civilian casualties’ between 20 January and 2 March 2009 in Mullaitivu District was 2,683 deaths and 7,241 injuries. According to the information provided at the briefing, two-thirds of the casualties had occurred in the second NFZ that had been declared by the government on 12 February 2009. These figures prompted the OHCHR to issue the only public statement by the UN during the time. The statement dated 14 March 2009 listed the COG statistics, describing them as credible, and stated that actions by the government and LTTE ‘may constitute international crimes, entailing individual responsibility, including for war crimes and crimes against humanity.’ On 12 March 2009, a few days prior to the release of the statement, the Policy Committee at UNHQ met to discuss the Sri Lankan situation. The Petrie Report observes that ‘[m]ost senior UN officials opposed the statement’s publication.’ In fact, the Chef de Cabinet, the USG-Humanitarian Affairs, and the Resident Coordinator all recommended that substantive changes be
made to the statement. However, the DPA supported the statement, and it was released without substantive changes.125

On 24 March 2009, the Resident Coordinator was summoned to meet with the Minister of External Affairs. Following the meeting, the government released a statement claiming that the Resident Coordinator had stated that ‘he is unable to confirm the veracity of the figures of civilian casualties... [as they had] not been attributed to any reliable or independent source.’126 Hence the release of statement over which there was no consensus at UNHQ and the retraction of estimates thereafter rendered UN decision-making at the time inconsistent and its information unreliable.

During the final weeks of the war, civilians emerging from the conflict zone were housed in camps called ‘welfare villages’ secured by the military. Suspected LTTE cadres who were identified were thereafter transported to ‘surrendee’ camps. It is useful to recall two documents issued by UNHCR during the time, which highlight the dramatic shift in the UN’s attitude to its protection mandate127. In September 2008, UNHCR’s Aide Memoire set out certain conditions under which it was prepared to support IDP sites. The conditions of engagement included:

1. The preference for host family accommodation over camp-based shelter;
2. IDP freedom of movement;
3. Unhindered access by humanitarian actors to camps;
4. Ensuring the civilian character of IDP sites; and
5. The transparency, legality, and expediency of screening.128

However, the Petrie Report notes that ‘there was never to be any sustained improvement in the government’s respect for the principles of protection and assistance afforded to IDPs.’129 In January 2009, the government presented a plan for the establishment of IDP sites in Vavuniya, Mannar and Jaffna, wherein IDPs would be placed in ‘semi-permanent camps run by the security forces, with an initial focus on a three-year internment period.’130 The UNHCR presented a second document at this juncture—a Guidance Note ‘to consolidate inter-agency assistance and advocacy strategies for existing and future IDP sites’.130 However, the note amounted to a retraction, and
reduced the conditions for UN engagement to ‘safety and security (including the civilian character of camps) and unrestricted humanitarian access.’\textsuperscript{132} It conceded on the question of freedom of movement and accepted that ‘general control mechanisms will be put in place to limit IDP freedom of movement, with certain IDPs being allowed freedom of movement based on security clearance.’\textsuperscript{133} According to the Note, the issues of freedom of movement and the screening of IDPs would be addressed through ‘bilateral discussions and advocacy’, and non-adherence with the principles of the Aide Memoire would not result in a withdrawal of engagement.\textsuperscript{134} In April 2009, a Special Representative of the UNSG on Human Rights for Displaced persons, Walter Kälin, issued another set of guidelines which the GoSl would need to follow. This made no reference to previous UN statements. What transpires from these different statements is the inconsistency and indecisiveness of the UN in balancing security considerations with those pertaining to the human rights of the displaced civilians.

\textit{Provision of Humanitarian Assistance}

The Petrie Report mentions the complex and demanding context in which humanitarian assistance was delivered to the Wanni from October 2008 onwards. It was also observed that there was ‘competition between UN agencies for visibility at the expense of providing the assistance needed.’\textsuperscript{135} The delivery of humanitarian assistance appears to have taken place reasonably efficiently during the month of October 2008 despite the complexity inherent in the operations. The CCHA Meeting Minutes of 16 October 2008 recorded the UN Resident Coordinator thanking the government and the government Agents of Vavuniya, Mullaitivu and Kilinochchi for their assistance in sending the food convoys to the Wanni.\textsuperscript{136}

The PoE acknowledges an agreement between the Resident Coordinator, the head of WFP and the government, which allowed the UN to deliver humanitarian assistance with weekly convoys to the Wanni to deliver food, shelter and medicine. The first of these Convoys entered the Wanni on 3 October 2008 and was followed by a further ten convoys during the next few months.\textsuperscript{137}
By late November 2008, the Resident Coordinator began to draw attention to the risk of food shortage. At the CCHA Meeting on 21 November 2008, he presented the report on the UN assessment mission following the Second WFP Convoy to the Wanni in October 2008. According to the Report, ‘the top need’ at the time had been food, shelter, water and sanitation facilities. However, an actual shortage was not reported at that stage.

The Eleventh (and final) Convoy was deployed to Puthukudiyiruppu (PTK) on 16 January 2009. The Convoy included seven international staff and comprised approximately 50 lorries carrying essential goods such as rice, sugar, oil and wheat. According to the PoE, ‘the convoy off-loaded the supplies, but was not given permission to leave due to heavy fighting along the road to Vavuniya, which continued for four days.’ The Convoy returned to Vavuniya on 21 January 2009 leaving behind two international staff members. These international staff members chose to remain with the national staff members who were prevented by the LTTE from leaving PTK. They eventually returned to Vavuniya on 29 January 2009 without the national staff and no further Convoys were deployed following the incident.

The Petrie Report states that ‘from September 2008 to May 2009 UN food assistance dropped from an estimated 20 per cent of requirements to almost zero.’ It confirmed that land convoys stopped in January 2009, primarily because of government forces’ shelling, and the unwillingness of the parties to issue temporary ceasefires. Meanwhile, several UN Joint Humanitarian Updates released in March, April and May 2009 drew attention to food shortages in the Wanni. Moreover, at a briefing on 26 March 2009 on the humanitarian situation in Sri Lanka, John Holmes, USG–Humanitarian Affairs and Emergency Relief Coordinator stated that quantities of food and medical supplies were not adequate.

A slightly differing account of the situation in January is provided in the CCHA Meeting Minutes. The CCHA Meeting Minutes of 30 January 2009 discloses that another Joint UN Rapid Needs Identification Mission had visited the Wanni in late December 2008. An assessment Team comprising WFP, UNICEF, OCHA, ICRC and government Agent staff found that there was a need for supplementary food, since fewer convoys as were required...
could go into the conflict zone due to the security situation.\textsuperscript{146} Even during this meeting the Resident Coordinator is on record for commending the government Agent structures in delivery of relief assistance.\textsuperscript{147}

The PoE later concluded that the government’s low estimates resulted in the inadequacy of the food delivered by WFP to the Wanni, which in turn resulted in ‘widespread malnutrition, including cases of starvation.’\textsuperscript{148} The UN’s own estimates at the time ranged from 150,000-190,000 (according to the USG–Humanitarian Affairs and Emergency Relief Coordinator at a briefing on 26 March 2009) and 120,000-180,000 (according to the Resident Coordinator at a CCHA meeting on 30 March 2009). It is unclear as to whether the food supplied during the time resulted in starvation—a matter that perhaps requires further scrutiny. However, the UN PoE’s finding is inconsistent with WFP’s own views expressed as late as May 2009. The WFP appeared to have a held the view that there was no food shortage whatsoever. In a statement released on 4 May 2009, Aseb Asrat, the Deputy Country Director of WFP refuted what was described as ‘baseless assumptions of inadequate food supplies to the civilian hostages in the 4.5sq.km No-Fire-Zone’. It was claimed that there was ‘no let down in food distribution to hostages in the NFZ’ and that ‘[s]ince February till end of April, the WFP in collaboration with the GoSL has send over 3000MT of food supplies’.\textsuperscript{149} The statement reads as an outright contradiction of the UN Joint Humanitarian Updates and other prevailing views on food shortages. In this context, there appears to be serious inconsistencies in the UN’s decision-making during the final stages of the war.

Analysis of UN Conduct

Over the past two decades, the UN has placed peace, development and the protection of basic rights high on its agenda. The Member states have viewed these priorities as ‘deeply intertwined and mutually reinforcing’ and have agreed that that they must be tackled together.\textsuperscript{150}

This section first deals with the adequacy of systems and structures adopted by the UN to cope with the challenge in Sri Lanka, and second with the more specific decisions taken during the final stages of the war.
Systemic Failure

According to the Petrie Report, ‘the overall framework for UN action in Sri Lanka was not well adapted to the Organization’s responsibilities, given the situation.’ The Report also highlighted the fact that all UN entities, whether in the Secretariat or the UN Country Team, were expected to support follow-up and implementation of the three identified standards. In this context, the UN appeared to have fallen short of meeting its responsibilities in terms of each of the three standards.

The Petrie Report’s analysis of the UN’s performance in respect of protection is instructive. The Report concludes that ‘events in Sri Lanka mark a grave failure of the UN to adequately respond to early warnings and to the evolving situation during the final stages of the conflict and its aftermath...in contradiction with the principles and responsibilities of the UN.’ Several observations relating to this ‘systemic failure’ in the Report warrant mention:

1. The UN system lacked an adequate and shared sense of responsibility for human rights violations;

2. The internal UN crisis-management structure failed to conceive and execute a coherent strategy in response to early warnings and subsequent international human rights and humanitarian law violations;

3. The dispersal of UNHQ’s structures to coordinate UN action and to address international human rights and humanitarian law violations across several different UNHQ entities was ineffective; and

4. The UN staff deployed during the final stages of the war lacked the experience and expertise to deal with the situation effectively.

The most senior position in the field was graded at a D1 seniority, which was below the heavy responsibilities required of the position. Moreover, the corps of senior UN staff did not possess the armed conflict, political, human rights and international humanitarian law and related management experience required to deal with the challenge in Sri Lanka. Hence the UN Country Team leadership simply lacked the capacity to deal with the crisis.

The UN’s systemic failure may also be located within the UNHQ’s
structure of decision-making. As pointed out in the Petrie Report, it was unclear who had overall leadership or responsibility for the UN response to the escalating crisis. The most senior actor on Sri Lanka at UNHQ was the Chef de Cabinet and he was in theory supported by the USG-Political Affairs. The UNHQ coordination took place through meetings of the Policy Committee, the ECHA and the IAWG-SL. While the Policy Committee, which was a decision-making body, discussed Sri Lanka just once (i.e. in March 2009), the IAWG-SL functioned as an information-sharing body rather than a decision-making one. Moreover, the Chef de Cabinet did not participate in IAWG-SL meetings. Hence the Petrie Report concludes correctly that ‘overall, decisions were made in a manner that did not give rise to comprehensive ownership or responsibility for their impact.’

**Premature Relocation**

The relocation of staff due to the government’s safety warning was a decision that did not receive close scrutiny by the UN hierarchy. First, there appears to be contrasting accounts of precisely how and why the government communicated its request to the UN to withdraw from the Wanni and relocate to Vavuniya. The account provided by the Peace Secretariat that the UNHCR and WFP were invited to continue work in the Wanni must be examined further to ascertain the veracity of the UN Spokesman’s account in his statement on 10 September 2008. Second, the UN’s decision to withdraw itself lacked transparency and appears to have been premature. As noted in the Petrie Report, by contrast, the ICRC chose to remain in the Wanni despite the government’s warning.

Once again, the Petrie Report provides a sound critique of the UN’s decision to relocate. In the context of both the lack of contestation of the government’s request and the absence of any negotiation for further time to be provided, the Report concludes that the UN failed in its protection mandate by relocating.

**Protection of Civilians during the War**

As evident in the UN Spokesman’s statement on 10 September 2009, the UN’s approach to protection appears to have been somewhat cynical. There
are perhaps two explanations for the UN’s failure to discharge its overall responsibilities in respect of protection.

First, its operational scope in terms of protection was overly broad, which led to the dilution of priorities. Protection was defined in incredibly broad terms to include psychosocial care, food and shelter gaps, recreational activities, and staff training. As pointed out in the Petrie Report, the fact that protection was defined so broadly ‘obscured the very limited extent to which the UN’s protection actions actually served to protect people from the most serious risks.’

Second, the UN lacked a strategic approach to minimising civilian casualties. This lack of strategy was particularly evident during the period between March 2008 and January 2009. During this vital period, the UN remained unable to formulate a comprehensive plan aimed at convincing civilians to move into government-controlled areas. The major offensive in the Wanni was launched on 5 March 2008 and continued for approximately ten months until the capture of Kilinochchi in early January. The preceding chapter on the narrative of the war observes that civilian causalities were not significant during this ten-month period. The low levels of civilian casualties were largely attributable to the military tactics adopted by both sides—where the government engaged mainly in precision attacks and the LTTE engaged in conventional warfare and refrained from using human shields. The situation changed dramatically in January 2009 when the territory held by the LTTE became smaller and the concentration of civilians within that territory was much greater. The UN did very little during the preceding ten-month period to encourage civilians to crossover to government-held territory. Reports were being constantly released of civilians moving with the retreating LTTE—some out of coercion and others out of their own volition. The government’s strategy of encouraging civilians to move into government-controlled territory may have been unconvincing, given the influence of the LTTE and the general (though in most cases, passive) support the LTTE enjoyed during the time.

In this context, civilians may have been undecided about crossing over to government-controlled areas. However, a clear and decisive endorsement of this option by the UN during this ten-month period would have certainly
convinced many civilians to crossover to safer government-controlled areas. The UN’s protection mandate (both in terms of the Responsibility to Protect, and its obligation under Security Council Resolution 1674 to anticipate imminent threats of physical danger to civilians within its zones of operation) necessitated such an endorsement. There was little evidence to suggest that the civilians would have been in serious danger in the event of their crossover. Moreover, a properly designed UN-plan for early evacuation could have included UN monitoring of the government’s reception of civilians and reassured the civilians of their eventual safety. Yet the major focus of UN operations between March 2008 and January 2009 was the delivery of humanitarian assistance within an environment of inter-agency competition for visibility. A vital opportunity to reduce the number of civilians in the conflict zone (and eventually reduce the number of civilian causalities in the post-January 2009 period) was therefore missed.

Even after the UN missed its opportunity to influence civilian decision-making it had a limited opportunity to engage more constructively with the government to minimise civilian casualties in the post-January 2009 period. The UN limited presence in the first NFZ and thereafter in PTK until 29 January 2009 ought to have been leveraged better to advise the government on the extent of civilian casualties and on possible alternative approaches to achieving military objectives. Yet this opportunity was not exploited adequately, and there was no evidence of such strategic engagement cited in the Petrie Report.

At least two factors may explain the UN’s lack of strategic thinking. First, as highlighted frequently in the Petrie Report, there was a serious lack of expertise within the UN to analyse military strategies and advise security forces on minimising civilian casualties and complying with IHL. There may have been two reasons for this lacuna: (1) the denial of visas to UN personnel with relevant expertise; and (2) the general reluctance of UN staff to engage with the government’s defence establishment to avoid being declared persona non grata. Yet there is little evidence to suggest that the UN contested the government’s decisions in this regard by engaging at a higher level and securing admission of more experienced staff. There appeared to have been little effort by UNHQ to pressure the government
to admit more experienced staff given the anticipated challenges in Sri Lanka. Instead, less experienced staff, with little or no expertise in analysing military operations in terms of their humanitarian risks or in strategising civilian safety, were stationed in Sri Lanka.

Second, the complex bureaucracy and decision-making processes within the UN system prevented vital information from being channelled to those who may have had the expertise to provide the abovementioned analyses and advice. For instance, during the ten-month window of opportunity for the UN to roll out a comprehensive plan for civilian evacuation, no information on the potential risks that civilians would eventually face was transmitted to UNHQ—where appropriate decisions could have been made. Had the situation been accurately analysed using operational knowledge of both the government’s and LTTE’s strategies, the option of encouraging civilian crossover to safer government-controlled areas would have been obvious. However, the UN bureaucracy and parochial decision-making processes at the time prevented such a plan—a plan that could have significantly reduced the number of civilian casualties during the latter stages of the war.

The foregoing analysis reveals that the UN staff stationed in Colombo and Vavuniya ultimately lacked operational decisiveness to execute their protection mandate. Instead of engaging civilians and later the military constructively, what ensued was a range of indecisive and often inconsistent decisions, only exacerbated by contradictory statements made at various points of time by various UN organisations. Perhaps the most serious contradiction came from the WFP in its strange statement on 4 May, 2009. The statement is yet to be examined in any detail, since both the PoE and the Petrie Report fail to mention it.

Post-war Protection Issues

The UN’s engagement with the government with respect to the IDP camps has already been discussed to some extent in the preceding section. The significant shift in UNHCR’s approach to conditional assistance evinces a relaxation of the UN’s strict adherence to international standards. It is noted that the government could have justified the detention of IDPs on the grounds of national security, since the prevailing Emergency Regulations of
2005 arguably permitted detention on such grounds. However, government did not evoke these regulations and apply them. Instead it appeared to be guided by the conditions specified and benchmarks set by the US Special Representative Walter Kalin after his visits in December 2008 and April 2009. The procedures that had to be put in place on the one hand had to take full account of the extraordinary situation in which the LTTE cadres had merged with surrendees and suicide attacks had emanated from within the IDP group. On the other hand, the derogation of international standards for the protection of IDP’s such as detention and restriction of movement had to be minimal. The complexity of this situation warranted a more thorough analysis of the nature and purpose of the camps by the UN, prior to any action on their mandate regarding IDPs and IDP camps. Had there been such an analysis there would have been closer co-operation between the government and the UN agencies in the monitoring and management of the IDP camps and the resettlement of IDPs.

**Conclusion**

The foregoing analysis attempts to put into perspective the UN’s conduct in Sri Lanka during and immediately after the final stages of the war. The critique is in no way meant to undermine or devalue the efforts of the UN and its staff during the war, which were instrumental in providing humanitarian assistance to civilians. Individuals working for the UN were no doubt dedicated to their mandates and discharged their responsibilities with courage and commitment within an extremely challenging environment. The critique instead intends to uncover some of the institutional failings of the UN in relation to essential standards that guide its conduct during an armed conflict. From this perspective, the UN clearly failed in its protection mandate.

In conclusion, what emerges from UN decision-making during the period of review is a distinct institutional culture of trade-offs. The Petrie Report points to this culture and observes that in the case of Sri Lanka, the UN staff consistently preferred to err on the side of caution in responding to the crisis. This general indecisiveness was fundamental to the UN failure on numerous counts. It may be necessary to acknowledge the fact that remedying the UN bureaucracy and institutional lassitude may be a more long-term
challenge to overcome. Thus in reviewing UN policies in the short-term, it is perhaps vital that the deployment of competent personnel, with appropriate experience and expertise and with the capacity to think strategically within the context of armed conflict, be prioritised at all levels.

Notes

99 Petrie Report, para.78.
100 Such treaties include the International Covenant on Economic, Social and Cultural Rights (ICESCR) and its Optional Protocol; The International Covenant on Civil and Political Rights (ICCPR) and its two Optional Protocols; The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD); The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and its Optional Protocol; The Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) and its Optional Protocol; The Convention on the Rights of the Child (CRC) and its two Optional Protocols; The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families; The International Convention for the Protection of All Persons from Enforced Disappearance; and The Convention on the Rights of Persons with Disabilities and its Optional Protocol.
102 OHCHR op.cit. p.28.
104 Ibid. p.341.
105 (A/RES/60/1, para.138-140).
106 (A/63/677).
107 Petrie Report, para.74.
110 Ibid. para.14.
112 University Teachers for Human Rights (Jaffna), Special Report No. 31, 28 October 2008.
113 Ibid. citing the Daily Mirror, 10 September 2008.
115 Ibid. at para.16.
117 PoE Report, para.83.
118 Ibid.
119 See discussion on UN Convoys below.
121 Ibid. para.66.
122 Ibid. para.25.
123 Ibid. para.26.
124 Ibid. para.53.
125 Ibid. para.26.
126 Ibid. para.27.
127 Ibid. para.32.
129 Ibid. para.122.
130 Ibid.
131 Ibid. para.123.
132 Ibid.
133 Ibid.
134 Ibid.
135 Ibid.
136 LLRC Report, para.4.151.
138 LLRC Report, para.4.155.
139 PoE Report, para.79.
140 Ibid. para.82.
141 Ibid. para.91.
142 Petrie Report, para.46.
143 Ibid.
144 LLRC Report, para.4.168.
145 LLRC Report, para.4.174. The Regional Directors of Health Services of Mullaitivu and Kilinochchi echoed these views at the time. In a letter to the Secretary of the Ministry of Health dated 16 March 2009, the Directors stated that ‘less than 5 percent of the combined quota of drugs and dressings that are meant for the last quarter of last year and for the first quarter of this year’ had been sent to the Wanni, with the remainder kept in Vavuniya for clearance from the Ministry of Defence. See Petrie Report, para.111.
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146 LLRC Report, para.4.160.
148 PoE Report, para.128.
150 Petrie Report, para.78.
151 *Ibid*.
154 *Ibid*.
155 *Ibid*.
158 Petrie Report, para.75.
CHAPTER 6

Conclusions

This narrative attempts to grapple with issues of truth and accountability during the final stages of the war in Sri Lanka. It deals with the divergent narratives on the war and arrives at certain key conclusions on the truth and on the accountability of key actors.

Divergent Narratives

Several narratives of the war currently exist. The first was the government’s initial version put forward by the Ministry of Defence, which provides details of the nature of the military operations, but does not deal with issues of accountability per se. The UNSG’s PoE provides a vastly different narrative, which alleges that the war was conducted by the GoSL not only with the objective of eliminating the LTTE but also with the deliberate intention of killing a large number of Tamil civilians. The LLRC’s narrative of the war presents a detailed account of the progress of the war, the way in which the civilians were trapped in the NFZs and the efforts made to free the civilians. This narrative denies the existence of systematic violations of international law, but acknowledges that some violations had taken place. Finally, the UTHR provides a detailed account of events during the war, with a particular emphasis on the last stages. This narrative paints both parties as equally culpable for gross rights violations and abuses.

What emerges from a detailed study of these narratives is that the war was fought in the most extraordinary circumstances in which a large civilian population was held forcibly within a battle zone and deliberately positioned to gain military advantage. The story that unfolds is one in which the LTTE employs every method at their disposal to resist the SLA and the SLA
attempts to overcome every obstacle that stands in the way of achieving their military objective of killing or capturing the LTTE leadership. The issues of accountability and the norms of distinction and proportionality need to be set within this specific context. Thus the accountability of actors must be assessed on the basis of this unique context.

Ambiguity in IHL

The primary aim of the notion of accountability in the conduct of hostilities is the protection of civilians and the regulation of the conduct of hostilities on the basis of a balance between the rights of civilians to protection and military necessity. Yet the context of the fighting during the last stages of the war points to the inherent problems in defining the categories that the framework of accountability addresses. Thus the critical failure of existing IHL to provide a precise definition of the terms “civilian” and “civilian population”, and a similar lack of clarity with regard to the term “take direct part in hostilities” have contributed to a substantial degree of ambiguity. Vital terms which have a bearing on core IHL principles such as the principle of distinction is left to be dealt with largely on a case by case basis.

Accountability of the LTTE

Regardless of whether the perpetrators are alive or not, a comprehensive investigation into the LTTE’s crimes is essential for a number of reasons. A full investigation of LTTE crimes will provide more detailed information on how, when and for what purpose the crimes were committed and how they are related to the actions that were taken by the SLA and the allegations of crimes committed by the SLA. It will also shed light on the complicity of other parties in LTTE crimes including those who have fled the country. Finally, such an investigation may enable the international community to re-examine how counter-terrorist military operations could be conducted to deal with the extreme conditions such as those created by the LTTE in the last stages of the war. This report concludes that a comprehensive inquiry into LTTE crimes has not been undertaken to date, and ought to be undertaken for the reasons enumerated above.
Accountability of the Government

In considering the GoSL’s accountability for acts and omissions during the war, it is important not to separate each action or omission from the context of the particular situation of the attack. To do so, is to place the action or omission in a reconstruction of the circumstances of the combat action that is only partial and does not take into account all the accompanying circumstances. The alleged violations must therefore be placed in the context of the concurrence of the strategic interplay of such actions, omissions and inadequate actions where each party seeks a military advantage. In any event, where state and non-state actors are involved in a conflict, the expectation of a non-state actor to observe certain human rights standards does not in any way lessen the state’s primary responsibility to protect and fulfil human rights.

On the matter of NFZs, the totality of the situation – i.e. the LTTE strategy of continuing to place mobile military artillery amidst civilians, the aggressive conscription of civilians including young children within the safe zones by the LTTE, the continued provision largely through coercion of a range of support services by civilians to the LTTE establishment, and the LTTE cadres fighting in civilian clothes – challenged the full realization of the humanitarian objective underlying the creation of NFZs and demarcation of safe corridors for civilians to move out of the theatres of combat. The civilians who would have expected conditions of safety were thus placed in jeopardy while neutralizing LTTE gun positions was necessary to preserve the NFZ and pursue the military objective. Therefore the proportionality of the ground reality that emerged in engaging with the LTTE in NFZs must be placed within the context of the overall military objective of the GoSL.

On the question of intentionality, it would appear that to allege the GoSL’s intent in the conduct of the military campaign as being to persecute the population of the Wanni or being primarily directed against the civilian population is to deliberately ignore the actual circumstances that exposed the civilian population to the immense suffering they underwent during the course of the war. In any event, the intent of the government must be gathered from the proportionality of its actions. On the issue of proportionality, it is not possible to assume a simple arithmetical relationship between
the numbers of civilian casualties and the proportionality of the means and methods of war during the last stages. Hence a precise and credible assessment of causalities, which no mainstream analysis has succeeded in doing thus far, must precede a genuine evaluation of the proportionality of the GoSL’s military actions.

The allegations of specific violations committed by the GoSL include the denial of food, and medical facilities and supplies to civilians. The supply of food was more than a question of the estimation of numbers. There is no doubt that supplies were adequate until January 2009. In fact with buffer stocks and locally available produce there is high likelihood that a surplus was available that would have been carried over on to the final stages of the war. Hence the real issue pertaining to food distribution was perhaps the obstruction of the dispatch of relief to civilians. It is a question about logistics in the supply and distribution. It is important to note that the civilian population in respect of whom humanitarian relief was targeted were held hostage by the LTTE, and were prevented from leaving the NFZs. The period during which humanitarian supplies were affected was precisely the period when the conflict entered the NFZ – after January 2009. Prevention of civilians from moving out of the conflict area amounted to a denial of humanitarian assistance, as the civilians were prevented from accessing available supplies. Hence the denial of humanitarian assistance must be assessed in light of the LTTE’s actions of preventing civilians from leaving the conflict zone.

Specific allegations were also made with regard to the treatment of IDPs and surrendees, extrajudicial killings and disappearances, and torture, rape and sexual abuse. The narrative of the LLRC does not indicate evidence of systematic violations. Yet conflicting accounts continue to emerge from witnesses, which warrants further investigation into individual cases.

The obligation on the part of the Security Forces requires verification that targets are in fact military objects and that for each attack a legitimate military objective is identified. All narratives of the war agree that the LTTE had gun positions within one kilometre radius of safe area demarcated for most hospitals. Hence there was a consistent policy on the part of the LTTE to comingle with civilians, which dramatically changed the nature of the safe
zones. There is also the question of a medical object displaying distinctive emblems of the Geneva Conventions in conformity with international law being allowed to be merged into the means and methods of combat operations of the LTTE. The testimony recording the LTTE disregarding ICRC’s request to refrain from driving or parking combat vehicles in front of the Puthukudiyiruppu hospital is a case in point indicating the dilemma of targeting. The proportionality of the means and methods used by the Security Forces must be assessed in this context.

**Accountability of the International Community and UN**

As far as the accountability of the international community is concerned, the extraordinary conditions that had developed during the last stages of the war provided a test case for developing effective modalities for the international community to deal with extreme situations in which a terrorist group was violating IHL on a massive scale. A firm foundation of mutual trust is needed between the international community and the state concerned, and such trust requires well-defined codes of conduct on the part of the international community, the UN and the national government. Such a foundation was obviously lacking in the Sri Lankan case and in probability all three parties – the Western nations, the UN and the GoSL – contributed to that lack. A full inquiry into all the circumstances that led to that situation could help to define the codes of conduct that each party must observe in dealing with extraordinary and extreme cases such as the LTTE in Sri Lanka. The findings and recommendations coming out of such an inquiry would consequently strengthen the international framework for the implementation of IHL and IHRL and R2P.

Finally, UN accountability must also be carefully considered. What emerges from an analysis of UN decision-making during the period of review is a distinct institutional culture of trade-offs. The Petrie Report points to this culture and observes that in the case of Sri Lanka, the UN staff consistently preferred to err on the side of caution in responding to the crisis. This general indecisiveness was fundamental to the UN failure on numerous counts. In reviewing the UN’s approach to similar crises in the future, it is crucial that the deployment of competent personnel, with appropriate
experience and expertise and with the capacity to think strategically within the context of armed conflict, be prioritised at all levels.

Notes

159 Petrie Report, para.75.
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