

## **Truth and Accountability : The Last Stages of the War in Sri Lanka**

*An Analysis and evaluation of the Report of the UN Secretary General's (UNSG) Panel  
of Experts on Accountability in Sri Lanka*

*(Working Paper prepared by Godfrey Gunatilleke for the Seminar on "Accountability, Restorative  
Justice and Reconciliation: A review of the Report of the UNSG's Panel of Experts on Accountability  
in Sri Lanka 21.07.2011)*

*"We looked into the eyes of our children and were overwhelmed  
We looked into the eyes of our parents and were dejected  
We looked into each others eyes and turned away  
We desire peace"*

*From the litany sung at the official opening of the South African Truth and Reconciliation  
Commission - St George's Cathedral Cape Town 13.02.1996.*



**MARGA INSTITUTE**

941/1, Jayanthi Mawatha,  
Kotte Road,  
Ethul Kotte.

## CONTENTS

	<b>Pages</b>
1. Introduction	3 - 4
2. Issues relating to the Appointment and the Status of the Panel	4 - 5
3 Analysis and Appraisal of the Report - Criteria	6
4. The Narration of Events and Allegations	7 - 18
5. Issues Concerning the Application of International Law	18 - 20
6 Issues of Accountability and Justice	20 - 25
7. Measures for Advancing Accountability - The Domestic Justice System and further Obstacles	25 - 26
8. The Recommendations of the Panel	26 - 28
9. Conclusions	28 - 33

*“What is ordered, laid down, factual is never enough to embrace the whole truth. Life always spills over the rim of every cup.” Boris Pasternak*

## 1. Introduction

The report of the UNSG’s advisory panel has had a mixed reception. It has been welcomed by a certain section of the international community including governments and human rights activists. Those who have criticized or rejected the report have focused mainly on the procedural issues concerning the status and legitimacy of the panel. There are other more sober appraisals of the impact of the panel’s report which express deep concern that the report and the manner in which it has gathered information and presented it will undermine the process of post war reconciliation in Sri Lanka. All these deal with selected aspects of the report. What we need however is a fuller assessment of the report, an assessment which judges it for its substantive worth. The panel was expected to assist the UNSG in advancing the process of accountability in regard to the last stages of the war in Sri Lanka, both at the global and the international levels. This was its principal task. We then need to inquire how impartially and how competently it fulfilled that objective. It is only such an appraisal that will help us to deal with some of the problems that have been created by the report, intentionally or unintentionally. The present paper is an attempt to make such an appraisal.

One set of responses to the report which seeks to reject it outright deals with issues concerning the appointment and status of the panel, the mandate given to the Panel and the way the Panel has interpreted it, the composition of the Panel and the capacity of the panel to arrive at fair and impartial conclusions particularly regarding the actions of the Sri Lankan Army(SLA) and the Government of Sri Lanka (GOSL). Many of these criticisms question the bona fides of the initiative taken by the UNSG.

A second category of responses deal with more substantive issues relating to the central part of the report – the issues of accountability and the case made against the government in particular. These issues relate to the methodology the panel has adopted, its transparency, the sources it has been able to access, its account of the last stages of the war based on these sources, the framework of accountability it has adopted and the conclusions it reaches.

A third category focuses on the parts of the report which deal directly with the process of domestic accountability and the Panel’s recommendation for improving that process.

For the purpose of analysis the report can be divided into the three components that relate to these three sets of issues – the first category covering the Mandate in paragraphs 5-23 ; the

second in paragraphs 24-260 and the third part in 260-444. The analysis in this paper is organized broadly in relation to these three components.

## 2. Issues relating to the Appointment and the Status of the Panel

The set of issues covered in the first category has been analyzed and discussed extensively by spokesman for the government. They can be summarised as follows:

- (i) The UNSG's justification of the Panel on the ground that it was in pursuance of a joint commitment is not correct. The joint statement did not contain any provision which envisaged or enabled the UNSG to take an independent initiative on "allegations of war crimes."
- (ii) The selection of the Panel by the UNSG violated the standards that should have been applied to the appointment of a panel that was wholly objective and impartial and without any prior involvement in Sri Lankan human rights issues in which positions were taken. From the evidence that was available and the objections raised by the Government of Sri Lanka (GOSL) the panel fell short of these standards. (The Chairperson Marzuki Darusman was a member of the International Independent Group of Eminent Persons (IIGEP) who was invited to serve as observers at the sittings of the Presidential Commission of Inquiry appointed to inquire into alleged violations of Human Rights. Having been present at some sittings, Mr. Darusman subsequently withdrew alleging that the Government of Sri Lanka did not have the will to improve the human rights situation in the country. Steven Ratner has been an advisor to an NGO called the Human Rights Watch (HRW) one of the organizations which had expressed disappointment that UNHRC had not passed a resolution calling for an international investigation on war crimes committed by the GOSL and LTTE. Ms. Yasmin Sooka is the Head of the Sooka Foundation, funded substantially by the European Union which had supported an investigation into war crimes and actions of the Sri Lanka government.)
- (iii) The UNSG has stated that the panel was an advisory panel appointed to advise him. The report should then have been treated as a document personal to the UNSG and not made public, particularly in view of the fact that the Panel had exceeded their mandate and presented a case against GOSL based on a process of information - gathering which was incomplete.
- (iv) The Terms of Reference of the Panel were worded in a manner that left the panel's mandate ambiguous enough to enable it to undertake what is in fact an investigation

into the allegations to establish what the panel termed their “credibility”, thereby permitting an activity which the UNSG could not authorize.

- (v) The appointment of the panel and the publication of its report was a questionable method of subverting the objectives of the UN Human Rights Council’s (UNHRC) resolution of 27.05.2011 which effectively thwarted the effort of several powerful countries to initiate an international inquiry into war crimes committed during the last stages of the military operation which ended in May 2009.

While these are valid observations on the processes relating to the appointment of the panel, the criticism of the UNSG’s actions has value only if the GOSL wishes to raise wider issues regarding the UNSG’s non-compliance with the established norms and procedures of UN and the unacceptable precedent it has created. Undoubtedly, these wider procedural issues have relevance for the conduct of the UN system as a whole and the rights of members. They would also give some leverage to GOSL in its diplomatic campaign to mobilise support for its position on the panel and the panel report as a whole.

The appointment of the panel has also to be seen in the global political context in which the initiative was taken. It is worth recounting the sequence of events which defined this context. Several Western powers who had been involved in the peace process in Sri Lanka were gravely disappointed at the unilateral action taken by GOSL to find a military solution to the armed conflict with the LTTE... They had warned the government on what they termed would be “devastating consequences” of such action. Most human rights organizations were also firmly opposed to the government opting for a military solution. Therefore from the outset it appeared that these parties were predisposed to see the outcomes of the operation in the light of their expectations. The complete defeat of the LTTE was also an unexpected outcome. The attempts made by these powers to rescue the LTTE were not supported by the government of Sri Lanka. Meanwhile the pro-LTTE Tamil constituency in these countries began agitating and exerting strong pressure. Finally the attempt made by these countries at the meeting of the UNHRC in May 2009 to investigate into war crimes alleged to have been committed during the final stages of the war was effectively thwarted. All these could have pre-determined the outcome of the Panel’s work. However placing the work of the panel in this global context is not to attribute any blame to it or impute any sinister conspiracy against Sri Lanka. The facts are straightforward and merely reflect the hard realities of a flawed system of global justice, a system which can readily attempt to hold small and vulnerable nations to account but has to acquiesce in the actions of the strong and powerful.

### 3. Analysis and Appraisal of the Report - Criteria

Regardless of the controversial nature of the Panel's appointment, our final appraisal of the value of the Panel's report depends on how it satisfies the essential criteria by which it has to be judged. These criteria have to be derived from the main objective which the panel was expected to fulfil. The panel report had to be an instrument for strengthening the process of accountability at both the domestic and international level. For this purpose it had to advise the UNSG on the modalities that were available to him and the international standards that were applicable to all the circumstances governing the actions and events during the final stages of the Sri Lankan war. In order to do this it had to have sufficient information on the scope and nature of the allegations which raised the issue of accountability and all the conditions pertaining to them.

The report covers four major areas - the armed conflict and the events which gave rise to the allegations, the law applicable to such allegations, the conceptual basis of accountability and justice in such situations and the domestic process of accountability that was available to deal with such allegations.

The parts of the report that deal with these elements have to be examined for the methodology and analysis employed to arrive at conclusions. The methodology has to be tested against the criteria of adequate coverage and completeness of information, impartiality and objectivity as evidenced by the presentation of all sides or versions of events and actions taken. The report has to be judged on its understanding and knowledge of the complexity specific to the Sri Lankan situation under scrutiny.

The evaluation of the report would therefore cover five main components:

- The narration of the events and the allegations of war crimes and violations of human rights as presented by the panel.
- The nature of the military operation and the application of the Law as defined by the Panel.
- The Issues of Accountability and Justice -the differences in the approaches taken by the Panel and the GOSL.
- The domestic justice system and further obstacles to accountability.
- The Recommendations made by the Panel.

#### 4. The Narration of Events and Allegations

*"The truth is more important than the facts" Frank Lloyd Wright*

The narration of the relevant events and actions is the vitally important centre of the report on which all the other parts depend and therefore should be the main focus of the evaluation. The narration has to be evaluated in terms of two fundamental questions

**Is the panel's account complete or if not complete, adequate , and has it been able to access all sources of information that are essential for coming to fair and just conclusions concerning the events and actions ?**

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

The Panel's narrative deals with the actions of both GOSL and the Liberation Tigers of Tamil Eelam ( LTTE )from September 2008 and the fall of Kilinochchi and Mullaitivu to the final defeat of the LTTE, the flight of civilians to government controlled areas and the arrangements made for them as IDPs. The main actions and events are reported in terms of the strategies which the Panel perceives as the strategies of the two main actors, GOSL and the LTTE, leading to the allegations of war crimes and violations of human rights.

#### *The Panel's Interpretation of the LTTE Strategy*

The Panel's analysis and understanding of the strategy of the LTTE can be summarized in the following excerpts from the report: "Retaining the civilian population in the area was crucial to the LTTE"; it gave "legitimacy to its claim of a homeland and provided a buffer against the army." "It (the LTTE) hoped that the worsening of the situation would result in a humanitarian crisis that would provoke international intervention". "Beginning in February the LTTE commenced a policy of shooting civilians who attempted to escape and to this end cadres were placed where they could spot civilians who tried to escape" "It used new and badly trained recruits as well as civilians as cannon fodder" "Some LTTE cadres would let fleeing civilians through, but others opened fire on them with AK47s killing men women and children alike" (paras 112 and 113). No estimate of the number of civilians killed by the LTTE is given but the report states the number was "significant". "In spite of the futility of their military situation the LTTE not only refused to surrender but continued to prevent civilians from leaving their area ensuring their continued presence as a human buffer." (Para 98) "It forced civilians to help build military installations or undertake other forced labour." The LTTE established a series of defensive earth bunds throughout the 2nd NFZ. Its positioning of mortars and artillery among IDPs often led to retaliatory fire, resulting in civilian casualties. (Para 97) It fired mobile

artillery from the vicinity of the hospital. (Para 94) “Forced recruitment by the LTTE including under-aged continued to the very end. These recruits were used in the first line of defence.” During the last week the LTTE was sending suicide missions in their defence. (Para 117) Some civilians tried to stage a mass breakout but were shot and shelled by the LTTE. Those who managed to escape were helped across by “individual” SLA soldiers. (119) on 16<sup>th</sup> May a large explosion rocked the LTTE area and a fire destroyed hundreds of IDP shelters. (120) . The Panel makes no attempt to discuss or assess the number of civilians killed.

The account of LTTE actions indicate that the LTTE was deliberately using civilians, protected institutions and their mobile artillery for their military purposes in the NFZs, making it increasingly difficult for the army to distinguish between non combatant civilians on the one hand and military targets and military cadres on the other. The account also clearly indicates that the LTTE were killing large numbers of the citizens both when they tried to escape and also by using them as canon fodder and pushing them to the front line. The Panel’s account of LTTE actions in the final stages of the war depicts the continuously changing unpredictable conditions in which the military decisions of the SLA had to be taken.

### *The Panel’s Interpretation of the GOSL Strategy*

The Panel has interpreted the government strategy in the Vanni as one which drove the citizens and the LTTE forward and trapped them in the narrow coastal region (paras 71 and 72). The strategy was not only aimed at defeating the LTTE but also “calculated to bring about the destruction of a significant part of the Tamil population.” para 251 (b )- Hence the crime of extermination – a crime against humanity. The shelling of the hospitals and the NFZs is placed in the context of such a strategy. In this part of the account little is said about how the LTTE systematically prevented civilians from escaping, using intimidation and force from the beginning of the Vanni operation. The Panel does not come to a clear conclusion of how the civilians were taken along by the LTTE as they retreated. There was a mixture of force, fear and voluntary action that drove the civilians.

The account of the operation prior to September 2008 does not receive any attention. It should be noted that this was the period when the Army was engaged in fierce battles in their efforts to capture territory in the Mannar District, Pooneryn and Elephant Pass. The report deals briefly with the capture of Kilinochchi (January 2<sup>nd</sup> ) and Mullaitivu (January 25<sup>th</sup>). The report does not contain adequate information on the operations and battles up to and including Mullaitivu. From the media reports and information available for that period it would appear there were no complaints regarding civilian casualties during this phase of the war. During the whole of the operation up to the capture of Mullaitivu the government was claiming that civilian casualties were minimal or “zero” and that they would adhere firmly to this policy. This claim was not contested and was generally accepted at the time. The Panel quotes in a



footnote the government statement made by the President after the fall of Kilinochchi that he was “ satisfied that zero civilian casualty policy had been implemented perfectly and that it would continue to be implemented.” The Panel makes no comment on the success of the “zero casualty” policy during this period of the operation. It would be however unrealistic to take the zero claim literally. While it is highly unlikely that no civilians were killed during the whole of the operation up to Mullaitivu, the government appears to have been successful in ensuring that civilian casualties were minimal and did not become the cause for an outcry or serious complaint. The efforts made by the GOSL to persuade the civilians to defy the LTTE and breakout are mentioned with the comment that no specific information was given on how the civilians should do this .

Most of the actions of the GOSL are interpreted in terms of the strategy of calculated killing of civilians which the Panel attributes to the GOSL. The Panel rejects the government claim that the objective of the campaign was to defeat the LTTE and rescue the Tamil civilian population who were being used as hostage by the LTTE. The request that the UN personnel media and the International Non-Governmental Organisations (INGOs) should leave after the fall of Kilinochchi is also viewed in the light of this strategy and interpreted as an action to ensure that “there were no international observers to report to the wider world what was happening in the Vanni,”. The Panel concluded that the GOSL did this in order to pursue freely their military objectives without adequate regard for its humanitarian consequences. The panel also claims that GOSL deliberately under-estimated the population in the Vanni to deny the population adequate food, medical supplies and other humanitarian assistance. “As the SLA shelled its way further into the Vanni after September the civilians in the conflict area “were pushed deeper and deeper into the LTTE controlled territory until they had nowhere to go”. Thereafter the report states that the government systematically shelled hospitals, one in Puthukkudiyiruppu (PTK ) and four other makeshift hospitals in the no-fire zones (NFZ) as well as the no fire zones themselves where the civilians were heavily concentrated, killing large numbers of civilians. While admitting that there is no accurate estimate of civilian deaths it opts for a high estimate of 40,000 civilian deaths as being credible. It does not attempt to give a breakdown of the deaths caused by the actions of the LTTE and the government. The Panel’s estimate is examined further in a later section of this paper.

When the two accounts are closely compared it is difficult to understand how the Panel ignores the facts given in its own account of the LTTE regarding its use of the civilians as buffer. The panel avoids the use of the term hostage, following the International Crisis Group’s ( ICG) report. The panel totally discounts the government’s version that rescuing the civilian population that was held hostage was one of its main objectives. It describes the LTTE activities in the NFZ which include mass scale conscripting of civilians for work on fortifications in the NFZ and use as front line defence and mobile artillery positioned in the midst of civilians, all clearly indicating that the LTTE deliberately integrated the civilians into the battlefield. In

several places in the narrative the shelling is reported in the context of the army making its advances across the lagoon to engage directly with the LTTE. In the opening part of the narrative it refers to the special Infantry Operation teams used for this purpose. The GOSL claims that the army formations at the ground level were restructured in this manner to engage the LTTE directly, minimize civilian casualties and release the hostages. The Panel states that some “army operations were designed to soften the ground and pierce LTTE defences with heavy artillery” It describes the army action in breaking into the NFZ and dividing it into two to separate the civilians from the LTTE cadres and freeing about 100,000 civilians. (para 109)It also reports how soldiers rescued civilians who escaped the LTTE killings during a mass attempt by civilians to break out. It also accepts that the eventual outcome of the operation was the release of the vast majority of civilians over 290,000 who were held by the LTTE. And after all this evidence which the Panel itself has collected , it concludes that the operation was aimed at the indiscriminate and systematic killing of a large section of the Tamil population and that the release of hostages was not an objective of government. The panel refuses to consider the government position that the military operation was launched with the objective of defeating the LTTE in order to free Sri Lankan citizens from LTTE control. In the panel’s view the government was operating in total disregard of the civilian population.

The Panel reports the shellings of hospitals and civilians as separate incidents ; it does not place them firmly in the context of a fierce battle in which the military had to make advances into a heavily fortified stronghold such as the PTK. The allegations of targeting civilians start with the battle for PTK where the LTTE had retreated. The military accounts that were posted at the time, stated that LTTE had halted the military advance with waves of counter attacks and suicide missions. The army had to suspend ground attacks and launch artillery attacks. The Panel’s own account indicates that the army was attempting to penetrate the LTTE defences to reach the civilians from both the North and the South of PTK and that the LTTE was putting civilians forward as their first line of defence using suicide missions to halt the advance of ground troops and moving their artillery into the midst of civilians. It does not concede the possibility of the LTTE using protected institutions such as hospitals for military purposes and the army discounting messages from any source within the NFZ on the ground that these could have been controlled and dictated by the LTTE. If the Panel was ready to concede that all the actions taken by government were military actions calculated to defeat the LTTE as soon as possible and release the civilians, then they would have placed and evaluated the intentionality and proportionality of those actions in a strategy and context of battle entirely different from what they have adopted for the purpose of their exercise. The deaths of civilians in any context would have been profoundly tragic but the question would then have been: could/ should the army have avoided a strategy and actions that had to be undertaken with the foreknowledge that it would lead to a large number of civilian deaths?

**These serious deficiencies in the panel's narrative of the military operation of the GOSL are examined in greater depth in the sections that follow :**

*(i) The failure to obtain access to the vital information available with government and other local sources.*

The Panel for obvious reasons could not gain access to the full version of the government on these events and did not have before it the full case for the government. This leaves a large lacuna in the Panel's information gathering exercise. Here it should be noted that government had stated clearly that no war crimes were committed by the government or the army and that all the actions taken by it were military actions necessitated by the ground situation and satisfied all criteria of intentionality and proportionality. However it was not going to appear before an advisory panel to the UNSG to give explanations regarding its actions.

The panel should have faced up to this fact and admitted to the inevitable constraints that it imposed. The fact that the government decided not to deal with the panel does not alter the impact that this lacuna has on the worth and quality of the report that is produced. The panel does not examine the full implications of this lack of vital information for determining the nature of the allegations and the full complexity of the decisions that had to be made at the ground level. In short the panel's report cannot satisfy the essential criteria that were raised in the two questions that were posed at the beginning of this section. It has not been able to gather all the vital information relevant to the events and actions. It has not considered all the possible interpretations and explanations of these events and actions.

The Panel attempts to make good this omission by constructing its own version of the Government's account. This they do by referring to a few statements that Government spokesmen made to the effect that the military operation was a humanitarian operation aimed at the rescue of a large civilian population held as human shield and hostage. These were only general statements about the policy and objectives. It was not a full and detailed account of how the government acted to achieve its objective. The panel however decided that it has the full government version and then dismisses this version as not acceptable - all done curtly in four brief paragraphs 172-175. The panel says it does this after "a rigorous review and assessment of the information available to it," without admitting that this information did not contain the vital information available with the government. Even if the panel did not have the full government account of the events there was ample evidence available regarding the strategy and the methods of operation adopted by the government to minimise civilian casualties. The panel refers to these in several parts of the report. With a little effort the panel could have constructed the explanation government could have put forward for most of the events leading to civilian casualties and examined the explanation and evaluated it with a greater sense of responsibility and judicial acumen than have been demonstrated.

In the circumstances in which it worked the Panel had to fall back on the approach that is taken by human rights organizations: it had to depend on sources of information other than government. As in the case of human rights organizations, such a situation forces the Panel into an adversarial stance with the government and compels it to provide its own explanations for government actions as best as it could. It then assumes the role of the prosecutor and makes the best case against the government. The Panel's dismissal of the Government's position prevents it from making a more searching assessment of the military necessity claimed by the government. It prevents the panel from analyzing the crucial elements of intentionality and proportionality as should have been done in any investigation of alleged war crimes in the Sri Lankan situation. As would be seen later, the Panel's approach precludes them from making any worthwhile contribution to the interpretation and application of the rules of war in the context of extreme situations arising out of the methods employed by a terrorist organisation.

*(ii) The dubious manner in which the Panel exceeds its mandate*

The panel states explicitly that it "did not conduct fact - finding" as normally understood within the UN system, "nor did it carry out a formal investigation that draws out conclusions regarding legal liability or culpability of states, non-state actors and individuals." It recognises that it had no mandate to do so. It argues however that it had to gather as much information as possible on the nature and scope of the allegations to make meaningful recommendations to the UNSG on the modalities and international standards that can be applied to these allegations. This specious distinction between fact finding and investigation on the one hand and information gathering on the other enables the Panel to engage in its partial and one sided exercise in fact-finding and investigation that helps it to build up its case against the government and come to conclusions on its legal liability and culpability.

*(iii) The tendentious nature of presenting allegations as the true account of what happened.*

The mode of presentation in the report makes it tendentious. Although the panel states that the narration is a list of allegations it attempts to persuade the reader that the presentation of the allegations can be best made as a narration (para 53). With this linguistic sleight of hand the Panel weaves the allegations it has received from various sources into a consistent narrative and presents it as the version which the Panel has reason to accept as what actually happened. The method of presentation does not attempt to keep the reader constantly aware that what is presented are allegations nor is it made clear to the reader that the panel itself keeps a safe judicial distance from the allegations and examines them only for the purpose of advising the UNSG on the modalities if they proved to be true. The style of presentation makes it clear that the Panel intends to present the narrative as a true account of what happened. This intention of the panel which is manifest in the report is one reason for the grave reservations which the government and many other critics have had concerning the impartiality and judicial integrity

of the report. It is also responsible for the way the report is being used as a substantial piece of evidence of war crimes to suit the agendas of various stakeholders including the pro-LTTE constituency. The tone of the Panel report can be compared with the much more cautious tone in the US State Department's report of October 2009 which does not reach "conclusions as to whether the alleged incidents actually occurred"

*(iv) The Lack of Transparency in not disclosing the sources of information .*

There is a lack of transparency regarding the sources of information used by the Panel. All sources of information on the allegations are kept confidential most of which would have come from individuals and powerful lobbies with a stake in the outcome of the Panel report and most of whom would have been unfavourably disposed to the GOSL. The Panel appears to have drawn heavily on the reports of human rights organizations and activists particularly the ICG report which contains most of what is in the Panel report. Most of the ground level accounts have evidently come from UN officials and NGOs who had cause to be disaffected with government for the restrictions that were imposed on them. Pro LTTE constituencies appear to have given their own interpretation to events such as the allegation that government strategy was directed intentionally at killing a large part of the civilian population which the Panel apparently finds acceptable. For this lack of transparency, the Panel takes cover behind the need for confidentiality. Nevertheless, without divulging who said what, the panel could still have provided a list of the individuals and organizations who came before it, and dealt more openly and critically with the nature of the information available to it and the biases and pre-dispositions to which these sources of information may have been subject. This would have given more credibility to the Panel's statement that it is only presenting allegations and not a narrative of what actually happened.

*(v) Excluding government actions which are not consistent with the Panel's interpretation*

Throughout the narrative the Panel displays a predisposition to exclude any actions of government that are not consistent with its interpretation of the government strategy as aimed at the killing of a large number of civilians. The Panel does not perceive any intention or effort on the part of the government to respect humanitarian law or to rescue the hostages based on accounts of its conduct during the last stages of the war. The panel had not reviewed the policies and approaches of the military in conducting the battle field operations that would have given an insight, at least to how it set out to conduct the battles and war. It would have been instructive to have examined and noted the presence of absence of specific details of combat operations in the field manuals and instructions about dealing with the civilians and non-combatants. Other command and control issues of how instructions are relayed and feed back obtained in the battle field and during specific operations would have informed the panel better of intentions and how they were addressed through the military processes. . The denial of any humanitarian intention is

made despite the Panel's own account of how soldiers had helped civilians who were attempting to escape (apparently at the risk of their own lives) and their account of how the army penetrated the NFZ incurring heavy casualties and released over 100,000. This particular account in their narrative should have enabled them to gain a better understanding of the government's military operations. On the contrary the Panel reports these events in a manner which takes care to avoid any positive humanitarian motive on the part of the GOSL. In the case of the assistance given by soldiers, in order to keep this separate from what the Panel alleged was the overall government strategy of killing civilians, it specifically mentions that these were actions of individual soldiers (not the army as a whole). In the account of the escape of 100,000 civilians the reference is only to heavy civilian casualties.

*(vi) The untenable basis on which the charge of extermination is framed.*

The Panel frames the charge of extermination against the government on the basis that it was engaged in systematic killing of Tamils aimed at eliminating a significant portion of the Tamil population - an allegation made by pro-LTTE demonstrators in developed countries in the final stages of the war. This allegation is adopted by the panel for inclusion in its list without examining the ample evidence available to dismiss such an allegation. No estimate of the number of deaths is given in the charge but the discussion of the estimates of total deaths given elsewhere appears to be directed at making it consistent with this allegation.

*(vii) The Panel refuses to consider the other credible explanations available for civilian casualties.*

As stated earlier the panel's own account of the fighting on the ground and LTTE's use of civilians for various military purposes in order to defend themselves were leading to high civilian casualties. At this point the options that were available for minimizing civilian casualties short of stopping the military operation, would have posed dilemmas of inconceivable proportions. The Panel does not grant that the GOSL might have acted on its judgment that if it did not move in to destroy the LTTE's military and defence capability as early as possible, the plight of the civilians would have deteriorated and the LTTE would have engineered a major humanitarian crisis. On such a premise, issues of intentionality and proportionality take on a different character and would have to be examined in much greater depth than what the Panel has been able to do, given its rejection of the government version and the circumstances in which it had to operate.

*(viii) The confusing and irresponsible manner in which the Panel opts for a high estimate of civilian deaths*

In its discussion of the estimate of civilians the panel grants that there is no accurate estimate. It cites the UN estimate which placed the number of civilian casualties at 7721 killed and 18,479 injured up to May 13, excluding the casualties in the last week of fighting . These were based on a count of civilian deaths caused by the war and would include deaths caused by the LTTE. The last days of the fighting witnessed a steep rise in the numbers of civilians killed. The Panel's account of the last days and how the civilian deaths escalated is not quite clear. Some accounts state that the final evacuation of the civilians occurred on the 15th. If so, the shelling that may have occurred after the 15<sup>th</sup> targeting the remnants of the LTTE, would not have caused civilian casualties if all civilians had in fact been evacuated. Several available estimates suggest that the civilian deaths in the last days of the battle after the 13<sup>th</sup> (up to which date the UN estimate is available) averaged a thousand a day and would cover about three days at most until the 16<sup>th</sup>. On the basis of reasonable assumptions, the Panel could have built on the UN estimate of 7721. They reject this estimate saying it is "likely to be too low" and "many casualties may not have been observed." The panel opts for a much higher figure of 40,000 without indicating the basis for this estimate. It derives this by saying that there should have been 330,000 civilians in the Vanni and only 290,000 came out as internally displaced persons (IDPs) . There is an egregious error in the calculation made in para 133 where a high estimate of 75,000 is derived by adding 35,000 civilians who entered the government controlled areas in the early stages of the war to the estimate of 40,000 deaths. Those who had entered earlier should normally be added to the 290,000 who finally escaped lowering the estimate of total deaths. There is a strong impression left that the Panel is not satisfied with a low estimate as that would call into question its interpretation of the government strategy.

*(ix) The significant omissions in the report that could provide a different explanation of the government's strategy and actions.*

There are significant omissions in the report. The report omits all mention of past actions and policies that may provide a more informed approach and better understanding of the actions of government in the Vanni operation than what is provided by the panel. There is no mention of the transformation the army had undergone and their visible improvement in discipline in respect of humanitarian rules of war. There is no reference to the war in the East immediately prior to the Vanni offensive and the very low level of civilian casualties in that operation which also had a hostage situation in Vakeneri. Such an account would have given credence to the government's policy of "zero civilian casualties". There is also no mention of government's uninterrupted delivery of social welfare services to LTTE controlled areas prior to the commencement of the operation. There is no mention of the fact that some UN agencies and INGOs had got into compromising situations in their relations with the LTTE and financial

and material assistance had gone to the LTTE creating suspicion and distrust between these organizations and the GOSL. The Panel does not take account of the fact that most NGOs, UN agencies and developed countries were against the government's military operation even though they admitted that the government was exercising the rights and responsibilities of a sovereign state in undertaking the operation. It is in this context of suspicion, distrust and avowed disapproval of the government's actions in opting for a military solution that the government itself had to come to judgments on how these agencies will act and make its own independent decisions regarding safety of personnel as well as security. It is in this context that we need to evaluate critically the whole of the Panel's account of the restriction of access to UN agencies INGOs and media as well as the problems government faced with the estimates of the population in the Vanni which were coming from the GAs who were under LTTE control. The Panel makes much of the government's under-estimate of the population under the control of the LTTE and states that it was part of a deliberate strategy to deny humanitarian assistance to the people. It does not place the action of the government in the context of other considerations - the evidence of the estimates of the GA being inflated on the dictates of the LTTE, the need to manage humanitarian assistance in a manner which will not prolong the hostage situation, the food stocks available within the District itself out of its own production and the net outcome in terms of starvation and under-nutrition given the conditions of war.

*(x) The Bias in the Account of Government actions in making provision for IDPs and resettlement*

The Panel is highly critical of government's handling of the IDPs and gives an entirely negative version of the reception given to the IDPs when they escaped from the battle zone. There are accounts and visual evidence which show the humane treatment the IDPs received from the army, the immense relief demonstrated by the IDPs and the outpouring of sympathy and generous donations of food and material assistance from all parts of the country. The Panel makes no reference to these.

The violations listed by the Panel can be classified into three categories First there are the violations linked to the security-related procedures - screening, separation of families arbitrary detention It lists a series of human rights violations commencing with the screening process ; second the panel lists the violations arising out the conditions in the camps - over crowding the failure to provide the essential services, violence among IDP groups. The third are the most serious allegations - disappearances, execution of prisoners, torture of detainees under interrogation, rape.

What is lacking in the entire account is a balanced appreciation of the formidable challenge that the government faced. The government's explanation for the allegations in the first category was that they were still facing unpredictable risks such as the suicide killings that occurred at a



check point and continued sabotage by the remaining LTTE cadres who were still among the IDPs. Some of the security procedures adopted were all based on the judgment of security risks arising from a ferocious war in which the LTTE had systematically used suicide killers. The SLA argued that the procedures were indispensable to deal with these risks and ensure the security of all IDPs. The panel shows hardly any appreciation of this context and does not attempt to separate justifiable derogation of rights that occurred in these extraordinary circumstances from derogations which would seem excessive even in these contexts.

The Panel's account of the detention of the IDPs and the conditions in the camps does not narrate the full story of how the government managed the situation after the initial problems caused by the massive inflow of IDPs were overcome. Several important considerations would have to enter into the evaluation of the government's actions and performance. These include the security risks posed by the remaining LTTE cadres, extensive de-mining that had to be done prior to resettlement and the search and recovery of weapons hidden by the LTTE in various parts of the Vanni for future use by them. We need then to inquire whether government was able to carry out these activities and prepare the land for resettlement and release the large majority of the IDPs from the IDP centres within a reasonable time span. Many human rights activists expressed their serious apprehensions that the government will detain the IDPs indefinitely. These apprehensions proved baseless. Had the panel taken all of this into consideration, its assessment of the allegations of human rights violations that did occur would not have been presented as deliberate government inaction. Again in the case of the camps we have a situation in which government made serious mistakes in underestimating the number of civilians in the conflict zone and was not fully prepared for the massive inflow. There were serious shortfalls in the early period. But thereafter the government's effort to mobilize the needed resources and provide the essential services including psycho-social support and the relative success with which all this was done has been well documented. The panel could have drawn on all these sources, and in judging the initial shortfalls the panel could have placed them in the context of what followed.

The most serious allegations are in the third category and of these the allegations that are vital for the process of reconciliation are those pertaining to disappearances. The issues relating to disappearances are examined in the final part of this paper. The allegation of the execution of LTTE cadres is strongly contested by the government on the ground that the evidence has been fabricated by pro-LTTE groups. The Panel does not refer to the government denial in their discussion of this allegation. It has to be noted that there is little or no information from government sources on the hardcore LTTE cadres who had survived the final battle and had fallen into the hands of the army.

The section of the Panels report which deals with rape calls for some comment. The panel makes a firm pronouncement that rape and sexual violence on Tamil women during the final

stages of the war and its aftermath are greatly under-reported. They come to this conclusion because “cultural sensitivities and stigma are associated with rape.” They go on to state that photos and videos showing naked dead bodies of female LTTE cadres are “suggestive” of rape or sexual violence. They say that the photos show soldiers loading dead bodies of females to a truck in a “highly disrespectful manner” and also a soldier is seen kicking the body of a female. Women were separated and taken away after screening. The Panel thinks they “may have been raped.” The Panel’s account is designed to give the impression that there may have been rape on a significant scale. These observations and conclusions regarding rape are typical of the Panel’s predisposition to come to the worst conclusions regarding the government and the army. It is difficult to understand how a loosely constructed piece of speculation of this type has come into a report which purports to be that of a responsible advisory panel to the UNSG.

## **5. Issues Concerning the Application of International Law**

The Panel’s treatment of the government version of the military operation has other serious consequences affecting the way in which the issues of criminality are framed against the government and the way international law and the rules of war are applied.

### ***(i) Failure to define the armed conflict as a legitimate operation to counter terrorism.***

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

### ***(ii) Failure to define the special character of the armed conflict.***

For the purposes of the Panel the armed conflict they were examining for war crimes is not different from any other armed conflicts where the behaviour of both warring parties has been such that they can be expected to act in compliance with the international rules of war. The Panel takes the position that the terrorist character of the LTTE does not make any difference to the nature of the actions taken by the government to deal with the LTTE. In the Panel’s view the fact that government must be guided by the knowledge that LTTE as terrorists are capable of actions that are in fundamental violation of the rules of war are not relevant for judging the army’s actions. The panel also does not consider the problem of civilians being used as buffer or hostage relevant to the issues pertaining to the actions of the government and the military. They had already come to the conclusion that the government’s actions did not have the rescue of the hostages as one of its main objectives.

*(iii) The lack of relevance in the comparative international experience surveyed.*

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

Framing the issues in this context of extreme situations caused by terrorism would have required the panel to examine much more carefully the issues of intentionality and proportionality in regard to government actions, especially in the light of its own description of the actions of the LTTE in the NFZ. The Panel would have had to examine a set of questions which they have ignored : how exactly were the LTTE operating within the NFZ? What is the nature of criminality in using civilians as a human buffer?( if this does not fall within the existing law relating to hostages and human shields as argued in the ICG report ) whether protected institutions were being actually used for military purposes by the LTTE ( the available information on this matter is insufficient, );whether the civilians men women and children whom the LTTE was conscripting for military tasks became military targets as a result ; whether the military calculus of the army had to take into account the possibility that the LTTE in their desperation would have escalated the killing of civilians or forced them to forms of mass suicide and whether the military had to design speedily a strategy to avoid such a catastrophe; and many more on similar lines.

The panel would have needed to examine the wide ranging controversy of the applicability of the rules of conventional war to these extreme situations and the need to redefine the rules of war. Their excuse for not doing so is that the established law has little to offer to deal specifically with situations arising out of terrorism. But the fact was that the Sri Lankan government and army were dealing "specifically with situations arising out of terrorism" whereas the panel was applying the rules of conventional wars to judge their actions. Both the ICG and the panel suggest that the use of civilians as a human buffer does not strictly fall into the category of war crimes defined as human shields or hostages in the existing law. If so the panel should have addressed the unprecedented character of the crimes that the LTTE were committing and examined their implications for the military actions taken by the army. Evidently the Panel did not wish to explore in territory which was highly sensitive in political

terms. They would have had to deal with the conduct of more powerful countries who were engaged in the global war on terror and were also those who had sponsored their appointment as an advisory panel to the UNSG.

Consequently the Panel has little of worth to contribute to the most important issues that the Sri Lanka case has posed in conditions that have no precedent in the recent history of war against terrorists. In that sense the Panel report is a non starter . It only applies the available law to actions which it has framed as conventional war crimes. Here the Panel has no problem; it merely lists and enumerates the available law in all its ramifications.

*“ The opportunity to surrender is a cherished, civilized and valuable part of warfare. But accepting an enemy's white flag in the heat of battle is a life-endangering proposition: The flag could be a ruse; a bomb could be hidden; the captors could end up dead. We give enemy soldiers the benefit of this dangerous doubt for two reasons. First, because soldiers who have fought honorably, complying with the laws of war, have earned it. And second, because we want the enemy to treat our soldiers the same way. Neither reason applies, however, to enemies who flagrantly violate the laws of war, targeting civilians for death, hiding bombs behind bunkers, using children as shields or yes, faking a Red Cross, upraised hands or other symbolic white flags to perpetrate lethal attacks.” Jed Rubenfield Professor of Law Yale University.*

## 6. Issues of Accountability and Justice

*“The weak can never forgive. Forgiveness is the attribute of the strong” Mahatma Gandhi*

The Panel's Chapter on Sri Lanka's concept of accountability and discussions of restorative justice provides the best opportunity for constructive engagement with the report. It deals with the foundational issues that apply to the process of accountability.

### *The Government's Concept of Accountability and Justice*

On accountability the government stated that it would be guided by the philosophy of restorative justice. The government clarified its position on accountability in its exchange with the UNSG which is contained in the Annexes to the Panel's report. It defined accountability as a combination of two processes: (a) individual accountability and criminal liability for wrong actions and (b) political responsibility for the processes which led to the breakdown of the ceasefire and the sequence of events up to the end of the military operation. On individual accountability the government said it would draw on the experience of the South African Truth

Commission which applied the process of restorative justice directed at reconciliation , for political responsibility it cited the example of the UK Chillicot inquiry on the involvement in Iraq. In defining political responsibility the Government includes the state's responsibility to protect its citizens. It includes the state's responsibility for the citizens in the Vanni under the LTTE's unlawful regime . Hence the relevance of CFA and its lessons. The Lessons Learnt and Reconciliation Commission (LLRC) was to examine how the Government of Sri Lanka exercised this responsibility (during the period under review ) and how the political processes and actions of all involved in what was termed the "peace process" in Sri Lanka culminated in the military operation against the LTTE and what followed.

None of the statements issued by the government contain a detailed exposition of the concept of restorative justice and its principles and their application to the post conflict situation. However there are various observations that the government makes on different issues that help us to identify some of the main elements of the process the government has in mind. At one point the Government affirms "that the work of the LLRC has to uncover the complete truth". Therefore knowledge of the truth becomes the foundation of restorative justice and reconciliation. But in restorative justice the truth is important not for the punishment of offenders but for the acknowledgement of wrongs by the offenders and the full expression of "contrition" for the wrongs done. The term used in the government statement is "contrition." Contrition becomes the next step in restorative justice. While the uncovering of the truth "requires a focus on the past," (again the words in the statement) the past once uncovered and expiated through a process of genuine contrition "must be relegated to history" through forgiveness. Contrition is followed by forgiveness and reparation. All communities who have been responsible for this past must participate in the process. Punitive or retributive justice is shaped and modulated by the application of the principles of restorative justice through such measures as rehabilitation and moral regeneration, "restrictive sentencing and non-custodial sentences". This would be the process of restorative justice applied to individual accountability. Uncovering the truth in term of political responsibility would imply all parties acknowledging their share of the responsibility for what happened, learning from the lessons of the past and moving forward to a durable process of peace and reconciliation.

### *The Panel's Concept of Accountability and Justice*

In responding to the Government's concept of restorative justice, the Panel draws on the concept of "transitional" justice. It agrees with the government that processes of justice should be aimed at breaking the cycle of violence but stresses that accountability should ensure a process of accountability for past crimes. It also grants that the South African Truth Commission "did not lead to prosecutions" but states that the process of truth, of public acknowledgement of wrong actions which was its unique feature was not emulated in the Sri Lankan case. Referring to the more recent International Criminal Tribunal for the former Yugoslavia (ICTY) ,it also argues that the "global legal landscape has changed and that

amnesties for certain crimes are no longer permissible.” The Panel therefore insists on a process of accountability which identifies those who committed crimes and ensures that they are brought to trial and duly punished. The concept of contrition and forgiveness which is a religious and moral principle different from a legal amnesty or pardon has no part in the system of accountability upheld by the Panel.

The Panel makes pointed reference to the accountability of the government for the events in the last stages of the war and states that the process of accountability set in motion by the government makes no mention of the accountability of government. To this charge, the government, of course, has consistently given the answer that the government and SLA were not guilty of any criminal acts. This would also be the answer of government to the Panel’s observation that Sri Lanka did not emulate the South African example. Given the government’s position, public acknowledgement and expiation of war crimes on the part of the government and SLA did not arise. Uncovering the truth about all that happened and the acknowledgement of the tragedies that occurred and the expression of collective grief had to take other forms.

### *The Differences in Approach*

The approaches taken by both the GOSL and the Panel agree on the need for uncovering the truth about the past but from thereon the differences in approach are of a fundamental nature and affect even the approach to the truth itself. The Panel’s approach is straightforward; it is that of the secular law giver who must uphold the process of accountability in society by identifying the offender, establishing guilt and meting out punishment with a due sense of proportionality. It has to arrive at a single version of the truth. To the GOSL the process of accusation conviction and punishment is inadequate for dealing with accountability for any of the actions taken. It seeks guidance from the religious teacher and the moral philosopher for a more holistic approach which is directed primarily at a process of human restoration at a deeper level that would include both the individual and the larger society. The truth itself has to be approached with humility as humans have many versions of the truth. The government’s main focus is a durable process of reconciliation in which there is forgiveness and a conscious relegation of the past to a chapter of history that is closed, a process of forgiveness and closure in which the government states all communities must participate. Although the government has not elaborated on the moral and spiritual foundations of restorative justice it mentions in passing that the process of restorative justice draws on the country’s spiritual heritage. Here it could draw on the core values which are shared by all four major religions which have co-existed peacefully in the midst of a fierce ethnic conflict This again is a special feature of the Sri Lankan situation in which the Buddhist ethos of tolerance has played a decisive role. While the relative worth and practicality of these two approaches could be a subject of interminable debate, the greater wisdom and sustainability of justice in the more holistic approach adopted by the government is undeniable. However the government would need to demonstrate the practice of restorative justice and how it is concretely manifested in all its aspects.

Two excerpts from an article by a Buddhist scholar on Healing Justice the Buddhist Perspective ( David Loy ) are relevant for our understanding of the concept of restorative justice

*The Buddhist approach to punishment, like any other approach, cannot really be separated from its understanding of human psychology and its vision of human possibility. This suggests that criminal justice is not solely a secular issue, for questions of fairness and justice cannot be completely separated from the religious perspectives they historically derive from: for the vast majority of humankind, crime, punishment and reform are still inextricably bound up with religious views about sin, judgment and forgiveness. Justice is one of those ultimate issues that bridge whatever distinction we try to make between sacred and secular, and our criminal justice system will always be subordinate to our larger vision of how people should relate to each other*

*The goal of a legal proceeding in the Tibetan Buddhist judicial system was to calm the minds and relieve the anger of the disputants and then - through catharsis, expiation, restitution, and appeasement - to rebalance the natural order. . . . A primary purpose of trial procedure was to uncover mental states if possible, and punishment was understood in terms of its effect upon the mind of the defendant"*

***The Panel's conclusions about the government's process of accountability.***

The entire tenor of the Panel's criticism is based on the premise that the government's process of accountability is deficient because it does not include investigation of allegations of war crimes committed by the government. The government's answer as stated earlier is that such an approach to accountability for the last stages of the war is wholly unwarranted. In response to the Panels criticism that the LLRC has no mandate to investigate war crimes the government states that the LLRC is mandated to uncover the complete truth on the entire sequence of events up to May 19<sup>th</sup> including the period when the SLA is alleged to have committed war crimes and it is empowered to investigate any allegation of war crimes that is made to it in the course of its inquiry. The difference between the approach of the government and that of the Panel is that the government does not inquire into what happened in the last stages of the war within an accusatory framework that holds the threat of prosecution and punishment. It does not do so because it considers such an approach both inappropriate and unwarranted on the information that is already available to it regarding the discipline maintained by the army and the actions taken in the extreme conditions faced in the battlefield. However the panel refuses to deal with the position as stated by the government. On the assessment of the panel the main deficiency of the LLRC is that it is not the investigative body that the Panel would like to have. Here there is no meeting ground for the government and the panel. Although government has not expressly stated it , the work of the LLRC in uncovering the complete truth will describe what happened

in the battlefield and hopefully will answer the misdirected judgments made by the Panel and human rights activists.

The Panel makes a series of criticisms on the way that the LLRC has functioned up to date. It admits that it did not have the opportunity of meeting with the LLRC and acquainting itself with the work directly. The Panel's observations are based on what it has gathered from various secondhand sources and the LLRC website. The Panel raised several questions regarding the LLRC to which the Government provided detailed answers which apparently the Panel decided were not adequate and has proceeded to make its critical observations on the same issues – the procedures for truth seeking, witness protection, lack of a victim- centred approach. It admits that it “ was not able to discern fully the overall methodology” of the LLRC but goes on to state its conclusions on the partial information it has gathered and makes statements such as “the panel has received reports suggesting manipulation of witnesses ” “ the panel is unable to conclude that sufficient practical measures are in place etc ...”- all indicating that they did not have adequate information on the working of the LLRC. The criticisms the Panel makes are however followed by concluding comments which are inconsistent with the main thrust of the Panel's assessment. “The LLRC offers a potential useful opportunity for the beginning of a national dialogue regarding the final stages of the war” “Because the Panel has not yet concluded, it is not possible to make a comprehensive and final assessment”. Despite the reservation expressed in the last comment the panel has pre-judged the outcome by extensively criticizing the work in progress for its quality and effectiveness. The Panel's inability to obtain adequate information is of course understandable as the LLRC had no contact at all with the Panel. In the circumstances it is difficult to understand how a responsible group such as the panel could have taken on itself to list these shortcomings when it was not able to have a full discussion with the LLRC on all the relevant issues. It is tantamount to one judicial body commenting on how another judicial body is conducting a case while hearings are in progress.

The comments the Panel makes on the independence and impartiality of the LLRC have to be considered in the light of their admittedly incomplete knowledge of the Commission. The members of the LLRC have admittedly the knowledge expertise and first hand experience to deal with the matters which come under the mandate of the Commission. The involvement some of them have had with government as public officials during the period reviewed could be an advantage taken together with the fact that these are officials who have won high regard for their professional integrity. The representation in the panel is also diverse enough to provide the checks and balances that are needed for an impartial outcome. It is ironic that this charge is made by a Panel against whom serious charges of conflict of interests are brought.

To say the least, the Panel's assessment of the LLRC stands out as a regrettable violation of professional norms. It appears to have the explicit intention of detracting from the



Commission's standing and undermining the domestic process of accountability which Sri Lanka had set in motion.

## **7. Measures for Advancing Accountability – The Domestic Justice System and further Obstacles**

The panel's survey of the justice system and measures to strengthen the domestic process of accountability is useful as a framework for addressing shortfalls and making the necessary improvements. It should be noted however that the Panel's review does not contain anything new. It reiterates the critical assessments and the recommendations that have been made in various other reports of civil society organisations and human rights activists. The ongoing policies and programmes of government are also addressing most of these issues. The problems relating to detainees and their access to remedies has been raised by human rights lawyers and organizations over a long period of time and government has repeatedly referred to the problems which result in prolonged detention. The defeat of the LTTE has now created conditions that would be conducive for speedier disposal of these cases. In presenting its account the Panel does not examine some of the causes that have resulted in the pervasive derogation of human rights in Sri Lanka – the activities of the LTTE during the last 25 years and its impact on governance. Had it done so its critique and its recommendations for correcting the shortfalls would have found greater acceptance and the urgency of making the corrections in the post war context more compelling. The LLRC would need to give close attention to this section of the Panel's report as the full restoration of civil and political rights and a sound system of justice which protects them would be the bedrock of the process of reconciliation.

In the section on further obstacles to accountability the Panel has a brief section on triumphalism. To begin with, given the nature of the mandate, the panel would have been advised to avoid pronouncing on matters outside its purview and on which it was not in a position to inform itself fully. It was to be expected that the defeat of the LTTE would become a cause of celebration for the average citizen who had suffered for thirty long years from its acts of terrorism. The spontaneity of human responses in situations of this kind are inevitable. The American response to the killing of Osama Bin Laden is an example. It was also to be expected that the achievement of the army and its dedication to its task would be duly appreciated by the government and the people. What the Panel fails to mention is that all these celebrations were peaceful and free of incidents. The danger of "triumphalism" and its impact on the process of reconciliation was repeatedly pointed out by religious leaders and citizens alike and the initial outburst of jubilation settled down in time. The panel also appears to be ignorant of the concern the government and people of Sri Lanka have demonstrated regarding the human cost of the war. The complacency of the panel, its stubborn conviction that its own version of events is the correct one and the journalistic fervour with which it is communicated is undignified and have no place in a responsible document. What the Panel has apparently

not realized is that a report written in a manner calculated to antagonize and offend the government as well as the people of Sri Lanka would serve no constructive purpose. The UNSG himself should have taken note of the gratuitous nature of the remarks that his advisory panel thought fit to address to a member state and advised them to expunge them.

Sections and C makes recommendations in regard to “exclusionary policies based on ethnicity” and “continuation of war time measures”. What would be probably of concern and cause consternation to government is that the Panel gives no hint that these are already high on the government agenda and action is being taken. These may be too slow for the Panel’s liking but then their comments should have been formulated to reflect that view.

The panels account of media restrictions refers to the grave human rights violations that have taken place which include killings disappearance and intimidation. The panel states that remedial measures need to be taken to guarantee press freedom and safety of journalists. The need for these fundamental conditions are beyond dispute.

The section on the Diaspora makes some important recommendations. It points out that the Diaspora gave vital material and moral support to the LTTE. It says that they remained silent on LTTE “holding tens of thousands of Tamils hostage in the Vanni” and that they protested in support of the LTTE in the last stages. It does not discuss the implications of these actions for accountability under war crimes. The Panel also does not discuss the accountability of the host countries for their role in enabling the Diaspora to act in this manner. The panel’s recommendations that are worth pursuing are those relating to the front organizations and businesses of the LTTE which are continuing and the confiscation of the LTTE funds available abroad for use in making reparations to the victims.

## **8. The Recommendations of the Panel**

In part A of its first recommendation, the panel recommends that the Government should initiate an effective domestic accountability process to investigate into the alleged violations. It is unlikely that the government would pay any attention to this recommendation in view of its stand that an investigation of this nature is not warranted and the present process of restorative justice is better suited to deal with all issues of accountability than the approach recommended by the Panel .

In part B it recommends that the UNSG proceed immediately to establish an international mechanism which should monitor the domestic process and conduct independent investigations into the alleged violations. First the arrangement suggested by the panel of concurrent independent investigations shows little knowledge of what is administratively feasible; it is unprecedented in the UN system and totally impractical. Second, the UNSG cannot

“immediately” establish an international mechanism. He simply does not have the authority to do so. The Panel which is the expert body on these issues should have known better than to recommend a mechanism which was not a modality that could be adopted under the UN system. The manner in which it has made this recommendation seriously calls to questions its commitment to perform its task adequately.

Recommendation 2 deals with other immediate measures to advance accountability. Most of these are based on its survey of the justice system. These all form part of the government agenda for restorative justice peace and reconciliation.

Recommendation 3 part A calls for initiating a process to inquire into the root causes of the conflict. It is not clear what the Panel means by “root causes”. The panel also does not seem to take into account the vast body of scholarly and analytical work done on the ethnic conflict as well as the documentation that is available from the political processes such as the All party conferences and negotiating processes. The process of searching for an acceptable political solution necessarily draws on all this knowledge. One task of the LLRC is to make available to itself a distillation of this knowledge in making its recommendations for dealing with Tamil grievances. The use of the term “root causes” which has become a catch phrase can also be misleading when dealing with the dynamics of the ethnic conflict. We need to take account of its changing character as it moved into the 1970s and the 1980s when a new generation took up the cause and the conflict sprung new roots in foreign countries with their support that enabled the LTTE to grow into a major terrorist organisation.

Recommendation B which recommends a formal acknowledgement by government of its role in and responsibility for extensive civilian casualties in the final stages of the conflict is based on the Panels conclusions regarding the Government’s culpability. For reasons which have been discussed elsewhere it is a meaningless recommendation in the form in which it is made. The concluding section of this paper discusses how government might face the truth of the final stages of the war.

The recommendation 4 says that the UNHRC should be invited to reconsider the May 2009 resolution. This is not a modality which the UNSG can adopt and the recommendation is out of place. The Panel gives the impression that it is seeking ways and means of pressing the UN system to take action against the Sri Lankan government.

The recommendation regarding the actions of the UN system is important. If action is pursued on their recommendation it would reveal the dilemmas the UN bureaucracy faces when it works with a terrorist organization and has to watch and acquiesce in all their violations of human rights. A searching analysis of the conduct of the UN personnel is also an essential corollary to the analysis the panel makes of government’s action in dealing with UN personnel

and the government's resolve to keep full national control of the developments in the last stages of the war and its aftermath when dealing with the IDPs. The UN may have to design new codes of conduct for UN personnel in these situations.

All these issues point to an overriding concern that the panel may have done well to discuss and inform the UNSG. The UN system is not immune to manipulation, neither are governments. In a complex national crisis such as the one faced by Sri Lanka, it is important that the UNSG also institute mechanisms to examine the integrity of UN operations, failures and manipulations. Member nations may and should institute action to verify UN activities that have grown bureaucracies whose accountability cannot be easily verified in real time. The UN operations have to be subject to the same standards that member countries may subject their own judiciaries, police departments, etc, in the face of collusion and criminality, media involvement and large scale non-competitive finance.

It should be noted that apart from the recommendation regarding the UN all three recommendations deal with the government. There is nothing mentioned regarding the process of accountability for the crimes committed by the LTTE leadership as all of them are dead. Nevertheless a full process of investigation into these crimes from all existing sources and a full documentation of these crimes would be essential to define the context in which the government actions were taken and to complete the account of the final stages of the war. It would be useful for determining the process of reparation to their victims. The victim-centred approach the panel recommends will be meaningless if it neglects the large number of victims of LTTE crimes. In the panel's almost frenzied effort to focus on the government's accountability, it forgets the victims of the LTTE.

The panel makes no specific recommendations to advance the process of accountability in respect of the remnants of the LTTE organization abroad, the Diaspora and the host countries which contain the Diaspora. In the conclusions the Panel suggests some courses of action against the LTTE front organizations and the Diaspora such as the confiscation of funds. Some developed countries are investigating into crimes committed by the LTTE and taking action. The panel could have taken all these into consideration and proposed an appropriate framework of accountability that will deal with all the relevant actions and omissions on the part of these external agents who had a crucial role to play in the conflict.

## 9. Conclusions

### *(i) The Main Deficiencies in the Panel's Report*

A wise judge knows that in the imperfect domain of human knowledge there are many versions of the truth and steers himself conscientiously through all these versions, seeking the truth. The outcome of the Panels report falls far short of such wisdom.

The conditions in which the panel was constrained to work and its inability to gain access to vital sources of information render the report practically worthless as an account of the final stages of the war. If this is all that has to be said we might lay aside the report as a harmless exercise but this is certainly not the case. The panel has to be faulted for very serious deficiencies in the report that could have fallout of a very negative character for the process of accountability both at the global as well as the local level. Had the Panel kept steadily in view that they were missing the information from the government side and had they examined the full implications of this lacuna they could have produced a credible report. Had the panel done so they would have had to produce a different report. The tone of their report would have reflected both the humility and the professional integrity that it lacks in its present form. What we would have is a statement to the effect that the panel has been able to gather a great deal of information from sources other than the government concerning allegations of war crimes of both the government and the LTTE which have not been verified and that they have not been able to get the government version which is vitally important for their task. They would have then had to list the allegations in a neutral objective tone and would have not written the dramatic account of what they thought had actually happened. They would have then proceeded to advice the UNSG regarding the international law applicable and recommended that the UNSG should use his good offices to induce the government to provide a full version of the last stages of the war and strengthen the domestic process of accountability. This of course was far from what was expected from the panel by the constituencies which pressurized for the appointment of the panel after their effort in the UNHRC in May 2009 was thwarted.

What has been stated above is a somewhat lenient verdict on the report. The verdict would be sterner when we list the flaws in more specific term. There is a selective approach to the gathering of the information with exclusions and omissions which give a blatantly tendentious character to the report. The Panel has set out to prepare a prosecutor's brief . Even the evidence before them is not analysed with an open and impartial mind. For example the panel had enough information on the LTTE's activities in the no fire zone which it chooses to ignore when it concludes that the SLA were deliberately targeting civilians and hospitals. Some parts of the report reveal a curious pettiness of spirit as when they describe the assistance given by soldiers using the term "individual soldiers" so as to take care not to associate the humanitarian approach with the army as a whole because the soldiers actions were not consistent with their interpretation. The root of the problems in the report lie in their outrageous interpretation of the government's military strategy as designed at the extermination of Tamils without any humanitarian intention or effort at rescuing hostages. With this interpretation the panel puts on the blinkers that distort all their perceptions of the government's actions. The report also gives a deliberately truncated view of the government's action by excluding what would have provided a different and more positive explanation of these actions. This deficiency is seen in every part of the report that deals with government actions.

The Panel's application of international law to government's actions is based on its faulty interpretation of the character and the nature of the war as well as the government's strategy and actions. For the panel the war in Sri Lanka was like any other armed conflict. The panel does not ask how a war on a terrorist organization is different from any other armed conflict and what that distinction signifies to the assessment of intentionality and proportionality of government actions. It does not ask how a government could or must respond to a hostage situation. It does not make any distinction between the army of a democratic state carrying out a legitimate military operation and a terrorist organization whose strategy has been one of terrorism which included massacres of rival Tamil groups, assassinations of leaders, conscription of children, suicide cadres and missions as a regular part of their operation and finally using civilians as human shields and hostages.

Given the Panel's interpretation, the Panel positions itself comfortably on what it describes as "the existing law". It avoids examining the implications that the war on terror has on the existing law. It has not taken the trouble to refer to the available body of scholarly work and practical knowledge relating to the war on terror. The comparable international experience it cites has little in common with the Sri Lankan case to provide any guidance for the process of accountability. Consequently the panel's painstaking work on the application of international law to war crimes in armed conflicts of a conventional nature have little relevance or value in the Sri Lankan context. The Panel has shown no capacity to frame the more challenging issues arising out of the unique conditions of the Sri Lankan case. By shutting itself within the framework they have selected, the Panel is unable to make any worthwhile contribution to advancing the process of accountability that takes into account the extreme conditions generated in a war on terrorism. The Panel's final output is for that reason sadly disappointing.

The Panel dismisses the government's policy of restorative justice without a full understanding of its conceptual underpinnings and its moral and spiritual foundations. It opts for the secular process of accountability which is essentially based on the principles of punitive justice. It rejects the deeper effort of restorative justice at uncovering truth for the purpose of contrition, forgiveness, reparation and reconciliation. It misses altogether the greater capacity of the restorative approach to heal past wounds, bring a closure to the past and promote a genuine process of reconciliation and peaceful co-existence. While granting that the processes of dealing with the truth will not be the same for all countries and there is no single template for all situations it invokes the template of the ICTY as though it is final and unquestionable. There is no awareness that international humanitarian law like any other law is a dynamic process responding creatively and imaginatively to changing human conditions and that "man is not made for the law but the law is made for man".

*[The eleventh chapter of the Mahabharata, Sthreeparva, depicts women, led by Gandhari, mother of the evil Kauravas, mourning those who died in the battle of Kurukshetra. Husband, brother, son, uncle, lover, demon lover - the identity of the lost one varies for the women who lament. One woman's pain is as searing, the void scooped out in her life as raw, as the next one's, regardless of whether the man she cries over fought on the 'good' side or the 'bad' side. Some tragic facets of the human condition are common, regardless of which side you are on.*

*This simple fact is lost on those who are distraught at Prime Minister Manmohan Singh's empathy with the plight of the relatives of terror suspects rounded up by the police. Dr Manmohan Singh's humanitarian mettle is not the point. The point, rather, is that underlining protection of what is humane as the central objective of the war on terror is integral to its success. Revenge is not, should not be, the goal of any modern criminal justice system K. N Arun Economic Times of India ].*

Panel's recommendations , judged from the criterion of what they do to advance the process of accountability produces little of substantive value. Its main recommendation on the appointment of an international mechanism by the UNSG cannot be implemented by the UNSG. Its recommendations for a separate mechanism for domestic accountability again is based on the premise that the government and the Sri Lankan army must faces charge of war rimes based on its interpretation of the government strategy and the events during the last stages of the war. The government had already made it clear that the mandate of the LLRC while it is framed within a policy of restorative justice which allows for investigation of individual violations does not begin on an accusatory basis for the purpose of prosecution and punishments. In this context the Panel's recommendation is not likely to serve any constructive purpose. What is missing in the Panel's recommendation is any set of specific recommendations for follow-up on LTTE crimes and its residual organization abroad, the accountability of the Diaspora and the responsibility of the developed countries. Again this is characteristic of the bias that flaws the entire report.

The panel in many parts of its report adopts a tone towards the Sri Lankan government which is unseemly for a Panel assigned a task by the UNSG. Its comments on triumphalism, its recommendation for a public acknowledgement by the government are characteristic of this tone. It is these emotive eruptions found in several parts of the report that confirm the impression that the panel is driven by a personal animus and "righteous indignation" against the government While these have their place in the category of advocacy documents of the human rights activists, in the case of the Panel, it has seriously inhibited the full impartial gathering of information and disinterested adjudication.

Although assessed on its substantive worth the Panel's report has little to contribute to the process of accountability at the global or domestic level, the publicity and accolades it has received from the like minded and the way it is being used for advocacy purposes by certain groups particularly the pro-LTTE groups demands serious attention. Action has therefore to be taken at all levels, domestic regional and global, to counter its pernicious fall out. In this context the UNSG could revisit the Panel's report and, in consultation with the Sri Lankan Government and the Panel, respond constructively to the issues raised regarding its major deficiencies. The UNSG could take into account the constraints within which the Panel worked and the circumstances in which it was denied access to vital sources of information and on the basis of such a reappraisal withdraw the report from the public domain while retaining it for his personal reference as he may consider fit.

*(ii) Accountability in Terms of the Government's Military Strategy*

*"Ofcourse we have to close the books. But the books have to be opened before they can be closed for the last time" Archbishop Tutu in a televised address on the South African Truth and Reconciliation Commission.*

When all this has been stated about the Panel's report it should be noted that laying aside the Panel's report and its story of what happened is certainly not the end of the whole story. The commitment of the government, as stated in its explanations of the mandate of the LLRC, is for uncovering the complete truth through a process of restorative justice. The panels report and the allegations that have been made may be seriously detrimental to the process of reconciliation. If they are not examined and dealt with appropriately, here a hard core of wrongs not atoned for and a deep-rooted sense of grievance on the part of the victims of the final stages of the war would remain to undermine the process of reconciliation and undo what has been achieved by the defeat of the LTTE.

The Panel report begins with the dramatic statement that "the war in Sri Lanka ended tragically". It goes on to say that there was relief that the LTTE "renowned" (unfortunate choice of word! probably a Freudian slip) for its brutality was defeated but "many people were deeply disturbed about the means that were used by the Sri Lankan army to achieve the victory". These sentences encapsulate the tragedy as perceived by the Panel and would have been a good starting point to explore the nature of the tragedy that occurred in the Sri Lankan situation. Regrettably the Panel goes on a different track without keeping at the centre of its attention the LTTE brutality and the way in which it shaped the means that were used to end it. The Panel uses the word tragic in its clichéd sense to evoke the sense of a great calamity, but the end of the war was also tragic in the deeper sense of the term - tragic for the impossible dilemmas that were created, the inevitable choices that had to be taken and for the human cost it involved. The government has consistently denied that any war crimes were committed by the government or



the Sri Lankan army and have not responded to the specific allegations that have been made. They have stated that the process of accountability and restorative justice is adequate to deal with all the issues pertaining to the final stages of the war including the allegations that have been made. This would mean that the Government expects the final report of the LLRC to provide an adequate response to the concerns that have been expressed by a section of the international community regarding the actions taken in the final stages of the war.

When we discard the interpretation of the Government military strategy as given by the Panel we are still left with unresolved issues of a critical nature. When we start on the premise that the main objective of the government's military operation was the ending of the terrorism and brutality of the LTTE regime and freeing the civilians we still have to define the issues of accountability within this framework. After the initial phase of the operation the actions of the LTTE in using the civilians as shield and hostage placed new demands on the government and the army. How did the government meet this challenge? Could the civilians have been separated from the LTTE before they were compelled to move into the narrow coastal zone? The search for the truth about the hostage situation would have to go further. Analysts of the situation have pointed out that the civilian population consisted of a hard core of about 15% to 20% who were strong supporters of the LTTE and that the expectation that foreign countries might intervene encouraged the LTTE to adopt the hostage strategy. Could the impossible situation that arose in the coastal area have been averted? Could the international community have been more active at this point and provided strong material and moral support to the Sri Lankan government to rescue the civilians? Examining these and similar issues would mean a critical evaluation of the operation and eliciting the lessons to be learnt from it.

Finally however the final stages of the war in Puthukuddiyiruppu and the NFZs have to be examined independent of all what went before. The LTTE had deliberately integrated the civilian population into their military effort and turned the NFZs to battle fields. By the mass conscription of civilians for military activity in the NFZ the building of fortifications with civilian conscripts and the use of all means available for military purposes, the LTTE had effectively blurred the distinction between civilians and combatants. How is intentionality and proportionality of army actions to be judged in such a situation? The LTTE was refusing to surrender. It was becoming clear that the defeat of the LTTE and the rescue of the hostages would entail heavy human cost- deaths of the LTTE combatants, conscripted civilians, soldiers and non combatant civilians. At this point the army after weighing the options available and their likely consequences had apparently decided that it could not halt the offensive and had to go ahead and put a speedy end to the resistance of the LTTE. It has to be noted that the government would have had to take into account that the LTTE in their desperation might resort to acts of the utmost brutality that might involve deaths of civilians on a massive scale.

We are then left with the human cost of the operation as it took place. The final estimate of civilian deaths would have to await the estimate of the persons dead or missing as given by the IDPs. This is a task that should be high on the agenda of the LLRC. But until such an estimate is available we have to rely on the well considered estimates that are available which place all deaths including those caused by the LTTE from 8<sup>th</sup> August up to 13<sup>th</sup> May at around 7700 and all deaths from 13<sup>th</sup> to the 16<sup>th</sup> May when the civilians finally escaped, at about 1000 a day. More reliable estimates could be constructed by gathering information from the surviving families and making a thorough search for the remains of the dead.

The government has not given an estimate of all deaths in the last stages of the war. An estimate of zero civilian casualties is meaningless in the face of incontrovertible evidence that there were a large number of deaths, unless it is argued that all those who died were combatants by virtue of the fact that they were conscripted for military work and resisted the advance of the army. These questions point to the indefinable plight of the helpless civilians caught in the battlefield and the humanitarian issues that are involved. The truth about the deaths of civilians is therefore vital to the process of reconciliation regardless of all other issues of accountability.

It is within the conditions that have been described above that the issues of accountability as well as restorative justice may have to be framed and conclusions drawn. In that process the deaths of civilians and their plight in the battlefield have to be at the centre.