

# **RESPONSE TO THE LESSONS LEARNT AND RECONCILIATION COMMISSION REPORT**

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**TAMIL NATIONAL ALLIANCE**

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## Executive Summary

- i. As the elected representatives of the worst affected victims of the war, the Tamil National Alliance (TNA) has consistently maintained that genuine reconciliation in Sri Lanka is contingent on a credible accountability process that ensures the right of victims to truth, justice and reparations. On 15<sup>th</sup> May 2010, the President appointed the Lessons Learnt and Reconciliation Commission (LLRC) and held out to the world that this Commission would address accountability issues.
- ii. The LLRC's processes and practices have failed to win the confidence of the Tamil community. The Commission also falls dramatically short of international standards applicable to accountability processes.
- iii. The ethnic and gender imbalance in the membership, the conflicts of interest and patent lack of independence of the members, the general lack of competence of the majority of members in International Humanitarian Law (IHL) and International Human Rights Law, and the absence of any consultation whatsoever with the victims' representatives and the larger Tamil community with regard to its mandate, processes and practices, call the independence and competence of the LLRC into serious doubt.
- iv. Moreover, the LLRC's methodology assigned relatively lower importance to victims' perspectives. The LLRC was also under-resourced and understaffed for the task of pursuing genuine accountability for violations during the last stages of the war. For instance, the time the Commission spent gathering evidence in the North and East, relative to the time spent in Colombo, was woefully inadequate. The Commission spent a mere twenty-two days in the North and East in total, compared to the fifty-six days spent on hearings in Colombo. The Commission often cited the lack of time as the reason for cutting short the testimony of witnesses. In many cases, prospective witnesses were never given the opportunity to testify and were requested to merely send in their concerns to the Commission in writing.

- v. The LLRC did not have an effective witness protection programme. To make matters worse, the attitude of the members towards witness protection – reflected in the lack of concern when witnesses complained of threats, and in the failure to ensure confidentiality of *in camera* statements after the LLRC concluded its work – continues to severely undermine the safety of witnesses in tangible ways. For instance, one witness from Kalmunai, who complained of being tortured and sexually assaulted, was later summoned to the Fourth Floor of the Criminal Investigation Department. This incident confirmed that the government monitored the LLRC’s proceedings and that the anonymity of witnesses was easily compromised. The climate of hostility prevailing in Sri Lanka towards those who accuse the government of war crimes renders any accountability mechanism futile unless witnesses and victims are convinced that testimony implicating senior government functionaries in crimes will not be met with reprisals. Moreover, the failure to seek video testimony of witnesses now living overseas deprived the LLRC of the testimony of those who are relatively free of potential reprisals.
- vi. The LLRC’s interim recommendations, issued more than a year ago, are yet to be meaningfully implemented. The Progress Report released by the Inter-Agency Advisory Committee appointed to ensure such implementation reveals nothing but the lack of genuine progress. The failure of the government to implement these modest interim recommendations signals, if not confirms, the government’s lack of commitment to implement the Commission’s final recommendations.
- vii. The final report of the LLRC was released through Parliament on 16<sup>th</sup> December 2011, and purports to deal with a number of issues including those related to IHL. Yet the LLRC disregards credible allegations made against the government with respect to violations of IHL amounting to war crimes and crimes against humanity. These allegations include deliberately underestimating civilian numbers in the Vanni in order to deprive them of food and medicine; deliberately or recklessly endangering the lives of civilians in No Fire Zones (NFZs); targeting civilian objects including hospitals; and executing or causing the disappearance of surrendeers.

- viii. The LLRC's approach and methodology in dealing with the above allegations is flawed due to two main reasons: (1) the selective application of evidence, and (2) the failure to apply the law to the facts.
- ix. The Commission extensively cites the evidence of government doctors who worked in hospitals within the theatre of conflict without any reference to the context within which these doctors provided testimony to the LLRC (i.e. the fact that they were taken into custody, after which they publicly recanted their earlier statements on the situation during the final stages of the war). Thus, the credibility of the evidence provided to the LLRC by these doctors was heavily compromised. The Commission failed to call for crucial evidence in terms of Unmanned Aerial Vehicle (UAV) footage, videos of aerial attacks and military logs – particularly since military witnesses acknowledged that every attack was videotaped and received the official sanction of the commanders. The LLRC also failed to consider the significance of population estimates provided by the then Government Agent for Mullaitivu, or consider the authenticity of a letter sent by the Commissioner General of Essential Services to the Government Agents in the Vanni directing them to refrain from requesting international agencies for food. Crucially, the Commission failed to consider the fact that the Ministry of Defence had issued statements in mid-February 2009 grossly underestimating the Vanni population. Such vital evidence points towards a systematic attempt on the part of the government to prevent food from reaching the starving population of the Vanni, and thus ought to have been closely examined by the LLRC.
- x. The LLRC also fails to correctly apply the law to the facts. It neglects to examine the possibilities of violations of IHL and domestic law that are credibly alleged to have been committed.
- xi. The Commission erroneously concludes that the definitions of 'civilian' and 'civilian population' in IHL are unclear. First, the LLRC ought to have elaborated upon the definition of direct or continuous participation in hostilities and its implication on the Principle of Distinction in order to ascertain the proper definition of 'civilian' in IHL.

The law is clear that whoever does not fulfil the criteria of direct participation in hostilities is a ‘civilian’ and cannot be targeted. Instead of dealing with the law, the LLRC seeks to divert attention to the ‘unprecedented’ nature of the Sri Lankan experience. Yet the Commission does not justify why the criteria that have been adopted to define the concept of ‘direct participation in hostilities’ are not applicable to the Sri Lankan situation. Moreover, in defining the term ‘civilian population’, the Commission makes no attempt to apply the jurisprudence of the International Criminal Tribunal for the Former Yugoslavia (ICTY), which has held that the absolute ban on attacks against civilians extends to a population that is ‘predominantly civilian’, and that ‘the presence within the civilian population of individuals who do not come within the definition of civilians [i.e. combatants] does not deprive the population of its civilian character.’

- xii. The LLRC concludes that the government security forces did not deliberately target civilians within the NFZs. While there is credible evidence that the LTTE did in fact mingle with the civilians within the NFZs and prevented them from leaving, the only narrative that the LLRC accepts is that the security forces had no choice but to respond to LTTE attacks from within the NFZs. This analysis is flawed for a number of reasons.
- xiii. First, it ignores established IHL principles with respect to the Principle of Distinction, which hold that an attack remains unlawful if it is conducted simultaneously at a lawful military object and an unlawfully targeted civilian population.
- xiv. Second, the LLRC’s preferred narrative of ‘retaliation to LTTE attacks’ is an unreasonable generalisation that does not apply to numerous accounts by victims of the conflict, and particularly to the attack on the United Nations Hub at the Suthanthirapuram junction located inside the first NFZ.
- xv. Third, the Commission wrongly concludes that the actions of the security forces complied with the Principle of Proportionality. The LLRC reaches its conclusion that the attacks were proportionate without actually applying the test of weighing anticipated military advantage against civilian loss. This test could not have been adequately

performed without a reasonable estimate of civilian casualties and damage to civilian objects caused due to each attack. Moreover, the Commission does not examine in detail whether the security forces could have used alternatives to the use of heavy weapons in order to minimise civilian casualties, particularly in the case of the second and third NFZs, where the government's own stated position was that heavy weaponry was unnecessary. The LLRC chooses to cite an obscure and irrelevant precedent set in 1990 by the International Centre for the Settlement of **Investment** Disputes (emphasis added) to conclude that a re-construction of all the conditions under which the combat action took place is next to impossible. Yet it failed to cite the jurisprudence of the ICTY, which has unequivocally held that commanders must consider whether striking a target is expected to cause incidental loss of life, injury to civilians, damage to civilian objects or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated. Accordingly, the ICTY has held that if such casualties are expected to result, the attack should not be pursued.

- xvi. Moreover, the LLRC fails to evaluate the implications of the unilateral declaration of the second and third NFZs. In light of the experience with respect to the first NFZ and the LTTE's tactics of mingling with the civilian population, it could be easily inferred that the government, at the time of declaring the second and third zones, was well aware of the likelihood that civilians would be seriously exposed to harm. This inference gives credence to the allegation that the government deliberately or recklessly lured civilians into harm's way by repeatedly declaring NFZs with the knowledge that such zones would be subsequently attacked due to the LTTE's presence within them.
- xvii. The LLRC's overall analysis of the allegations against the government reveals a fatal contradiction. On the one hand, the LLRC unquestioningly accepts the narrative provided by the security forces – that they carefully and meticulously planned each attack and used sophisticated means to ascertain the precise location of civilians within the NFZs. The LLRC also accepts the position of the government that strict procedures were followed prior to each attack. Hence the military command was intimately aware of the nature and precise location of each and every target. On the other hand, the Commission concludes

that the civilian deaths, which did in fact occur, were unintentional, and resulted from an unprecedented situation where no other choice was possible. It also concludes that decisions to return LTTE artillery fire were made in the heat and confusion of an armed conflict by field commanders *in situ*, and thus could not be second-guessed. This narrative of field commanders being left with no option but to return fire despite the presence of civilians in the area that was being subjected to counter-attack contradicts the LLRC's position that attacks had been carried out within the NFZs only after careful planning and with possession of intimate knowledge of the precise whereabouts of civilians. Incidentally, it is also diametrically at odds with the internationally publicised position of the government during the last stages of the war, which was that the use of heavy weaponry was no longer necessary. If the location of civilians were known, then their deaths could not be simply dismissed as unintentional without further investigation. Hence the LLRC's analysis is, at best, self-contradictory, and reflects its reluctance to genuinely examine the allegations against the government.

xviii. A similar criticism may be levelled at the LLRC with respect to its analysis of the allegation that the security forces deliberately targeted hospitals. While admitting that hospitals were in fact shelled, the Commission concludes that, due to the non-availability of primary evidence of a technical nature, it was not possible to reach a definitive conclusion that one party or the other was responsible for the shelling. This position is difficult to maintain given the purported precautions taken by the security forces to minimise civilian casualties. Evidence before the Commission revealed that the security forces had at their disposal 'state of the art' surveillance devices that enabled them to closely monitor the conflict zone, often in 'real time', in order to monitor the movements of the civilians with a view to avoiding civilian casualties. Yet the Commission failed to call for such surveillance footage or to recommend further investigations into the shelling of hospitals.

xix. The LLRC admits to over a thousand cases of alleged disappearances of persons after surrender to or arrest by security forces. Hence it recommends that a Special Commissioner of Investigation be appointed to investigate alleged disappearances and



provide material to the Attorney General to initiate criminal proceedings as appropriate. However, the LLRC makes it clear that, in its opinion, these disappearances are isolated incidents perpetrated by a few. The Commission comes to this conclusion despite specifically conceding its lack of capacity to conduct investigations. In fact, during public hearings in Puttalam, the Chairman of the LLRC refused to interpret its mandate as contemplating any investigative functions. Without even so much as acknowledging an investigative function, the LLRC still went on to conclusively determine that over a thousand incidents, many taking place in the space of just a few days between 17<sup>th</sup> and 20<sup>th</sup> May 2009, were isolated and unconnected, and not systematic. Such a mischaracterisation is prejudicial to any future investigation, and is cynically aimed at countering allegations of war crimes and crimes against humanity with respect to the systematic practice of enforced disappearances and the execution of surrendeeds.

- xx. The LLRC does not adequately deal with the issue of the scale of civilian casualties during the final stages of the war, particularly given its own admission that it was a ‘key question’ confronting it and ‘crucial to its mandate.’ The LLRC heard specific evidence from two key sources – the Bishop of Mannar, Rt. Rev. Dr. Rayappu Joseph and Ms. Imelda Sukumar, who served as the Government Agent (GA) for Mullaitivu during the relevant time – in relation to the number of civilians trapped in the NFZs. While the Bishop of Mannar cited official figures from the Kachcheris of Mullaitivu and Kilinochchi placing the number of persons residing in the Vanni in early October 2008 at 429,059, the GA for Mullaitivu herself testified that there were approximately 360,000 civilians remaining in the NFZ in the Puthumattalan area in January 2009. Given that only 282,380 civilians came out of the Vanni into government-controlled areas, the number of persons unaccounted for remains between 75,000 and 146,679. Even in the light of this compelling evidence placed before it, the LLRC does not acknowledge the number of civilians unaccounted for, or the likelihood that a majority of these civilians died during the final stages of the war.
- xxi. The LLRC deals with a number of human rights issues including allegations concerning missing persons, disappearances and abductions, treatment of detainees, illegal armed

groups, conscription of children, vulnerable groups, Internally Displaced Persons, the Muslim community in the North and East, the freedom of expression and the right to information, and the freedom of religion, association and movement. However, the LLRC fails to consider some of the more sensitive issues, thereby revealing selectivity in its approach. For example, the alleged involvement of one Iniya Barathi in a number of human rights violations is not mentioned in the section on human rights in the LLRC's report. Many witnesses in fact identify Iniya Barathi as responsible for human rights abuses. Instead of mentioning the involvement of this individual in the disappearances that took place in the Eastern Province, the LLRC only makes vague references to him in the chapter on 'reconciliation'. The Commission makes no attempt to examine in any detail the evidence against this individual, nor to highlight his alleged connections to the TMVP and the SLFP.

- xxii. Given the circumstances, the LLRC has compromised its impartiality and credibility, and has reinforced impunity.
- xxiii. On countless occasions, the LLRC assured distraught witnesses that it would 'look into the matter,' thereby promising some form of follow up on individual cases of disappearance, detention, land grabs, assault, harassment, extortion and death. However, the LLRC report only provides a brief statistical analysis of so-called follow-up work, which would be of no use to the witnesses concerned. It is not clear as to how the LLRC proposes to communicate its specific findings to specific witnesses. It is, however, apparent that the Commission's final report, assuming it is even accessible to these witnesses, does not provide the answers that were promised to them during the public sittings.
- xxiv. The LLRC also failed to evaluate its own deficiencies in dealing with gender specific issues. The composition and approach of the Commission established an insurmountable barrier to women in terms of truth telling. In fact, it was reported that the LLRC had been 'desultory', 'curt' and 'dismissive' towards female witnesses. There are also reports that the Commission chastised women for crying and demanded written submissions in place

of oral testimony. Hence, women in general have encountered a distinct lack of sympathy when recounting their experiences before the Commission.

- xxv. Many of the LLRC's recommendations pertaining to human rights presuppose institutional independence of certain key institutions including the judiciary, the Attorney General's Department, the National Police Commission and the Public Service Commission. However, the Commission does not address the recent repeal – by the Eighteenth Amendment to the Constitution – of salient provisions in the Seventeenth Amendment that safeguarded the independence of public institutions. Moreover, the continued application of the Eighteenth Amendment places virtually insurmountable challenges to the implementation of the LLRC's final recommendations.
- xxvi. The LLRC also made recommendations on a number of issues that are not directly related to accountability. These recommendations have positive elements, and if implemented, would be welcomed and supported by the TNA. The TNA intends to closely monitor the implementation of these recommendations. However, these recommendations should not be mistaken for those addressing accountability issues.
- xxvii. Amongst the LLRC's recommendations unrelated to accountability are its recommendations on reconciliation and devolution of power. The Commission emphasises that a political settlement based on devolution must address the ethnic problem as well as other serious problems that threaten democratic institutions. The Commission recommends devolution to local government institutions to ensure greater peoples' participation at the grassroots level. Moreover, it recommends that the government take into account the shortcomings in the functioning of the Provincial Councils system. Yet the only concrete suggestion that the LLRC makes in terms of an actual model is the establishment of a Second Chamber comprising representatives from the Provinces, so as to generate a sense of confidence among the political leadership and people in Provinces. These sentiments on devolution are exceedingly vague, noncommittal, and do not measure up to past proposals including the majority report of the All Party Representative Committee's Expert Committee appointed by the President

in 2006. Yet, even the implementation of the LLRC's modest proposals remains uncertain, particularly given the non-implementation of the provisions of the Thirteenth Amendment to the Constitution and the recent views expressed by the President in relation to devolution of governance to the Provinces. These views validate strong fears amongst the Tamil community that the government is not genuinely prepared to deliver to the people a political solution premised on meaningful devolution.

xxviii. The LLRC in some way also acknowledges the intrusiveness of the military in the North – a fact that the TNA has already brought to the public's attention on numerous occasions. The Commission hence recognises the need to disengage security forces from all activities related to civil administration as rapidly as possible. The TNA welcomes this recommendation and intends to closely monitor and publicise the progress of its implementation over the next few months.

xxix. Despite these positive recommendations, the need for an accountability process that meets international standards while delivering on the right of victims to truth, justice and reparations (including guarantees of non-recurrence) is an urgent and important one. Given the government's failure to institute a process that meets these benchmarks, the TNA calls on the international community to institute measures that will advance accountability and encourage reconciliation in Sri Lanka in keeping with the recommendations of the UN Secretary General's Panel of Experts.

## List of Acronyms and Abbreviations

APRC	-	All Party Representative Committee
CID	-	Criminal Investigative Department
CIHL	-	Customary International Humanitarian Law
CoI	-	Commission of Inquiry
DIU	-	Disappearances Investigation Unit
EPDP	-	Eelam People's Democratic Party
FTR	-	Family Tracing and Reunification
GA	-	Government Agent
GoSL	-	Government of Sri Lanka
IAAC	-	Inter-Agency Advisory Committee
ICRC	-	International Committee of the Red Cross
ICTR	-	International Criminal Tribunal for Rwanda
ICTY	-	International Criminal Tribunal for the Former Yugoslavia
IDP	-	Internally Displaced Person
IGP	-	Inspector General of Police
IHL	-	International Humanitarian Law
IHRL	-	International Human Rights Law
IIGEP	-	International Independent Group of Eminent Persons
LLRC	-	Lessons Learnt and Reconciliation Commission
LTTE	-	Liberation Tigers of Tamil Eelam
MAP	-	Most Affected Persons' Scheme
PTA	-	Prevention of Terrorism Act
REPPIA	-	Rehabilitation of Persons, Properties and Industries Authority
RRAN	-	Rehabilitation and Resettlement Authority of the North
SLFP	-	Sri Lanka Freedom Party
TMVP	-	Tamil Makkal Viduthalai Pulikal
TNA	-	Tamil National Alliance
UAV	-	Unmanned Aerial Vehicles
WPF	-	World Food Programme

## Table of Contents

Preamble .....	xiv
<b>CHAPTER 1: ACCOUNTABILITY ISSUES.....</b>	<b>1</b>
Introduction.....	2
1. Process.....	5
A. Mandate.....	5
B. Composition, Competence and Lack of Independence .....	7
C. Treatment of Witnesses.....	9
D. Victim Protection .....	11
E. Resources.....	15
2. The Rights of Victims.....	18
A. Truth .....	18
B. Justice .....	19
C. Reparations.....	21
3. LLRC Interim Recommendations .....	23
4. LLRC Final Recommendations .....	26
A. Methodology and Approach.....	26
B. Violations of International Humanitarian Law.....	30
C. Civilian Casualties.....	57
D. Violations of Human Rights.....	61
Conclusion .....	70
<b>CHAPTER 2: ISSUES UNRELATED TO ACCOUNTABILITY.....</b>	<b>a</b>
Key Observations.....	b
Analytical Table of Recommendations.....	d

## Preamble

Having carefully analysed the Report of the Lessons Learnt and Reconciliation Commission (LLRC), and reiterating its initial response to the LLRC Report released on 16<sup>th</sup> December 2011 and;

Recalling the post-independence history of Sri Lanka and the systematic physical, structural and psychological violence that has consistently been directed at the Tamil-speaking people of Sri Lanka, particularly the Tamil people of the North and East;

Bemoaning the impunity with which gratuitous and targeted violence has been used against these constituent peoples of this country, and the role of the Sri Lankan state in directing, facilitating or colluding in that violence;

Asserting that the demands of the Tamil people on their inalienable right to self-governance, dignity, and full and equal enjoyment of their citizenship rights were strengthened by this continuous history of un-remedied violence;

Bearing in mind that violent uprisings against the State that culminated in civil war emerged for a multiplicity of reasons, chief of which was the disillusionment of the Tamil youth with the State after decades of un-remedied violence and stifling of Tamil political demands;

Stressing that a durable, permanent and just solution to the ethnic problem blighting this country must be built upon restoring the faith of the Tamil-speaking people, particularly of the North and East, in the State, and reconstituting those peoples' relationship with the Sri Lankan State;

Envisioning a future in which all constituent peoples of this country will enjoy access to State power, opportunity, access to justice and dignity in full and equal measure;

Mourning the heavy loss of life to government military personnel, LTTE cadres and particularly Tamil civilians during the last stages of the war in 2009;

Expressing disapproval of and regret for the loss of life and harm caused to civilians of Sri Lanka and to political leaders from both within and outside the country, by the activities of armed Tamil militant groups during the course of the civil war;

Reiterating the findings of the UN Secretary General's Panel of Experts on Accountability in Sri Lanka that the Sri Lankan government's military campaign conducted during the last stages of the war constituted persecution of the Tamil people of the Vanni;

Affirming that a process of genuine reconciliation with accountability for grave abuses is a necessary condition for restoring the faith of the Tamil people in the State and ushering in a lasting political solution;

Asserting that a process of genuine reconciliation must of necessity place victims of the war at the heart of the process, be directed at ascertaining the truth, render justice to victims and provide adequate reparations to them;

Recalling that the Government of Sri Lanka assured the world that the Lessons Learnt and Reconciliation Commission would fully address all accountability issues for alleged violations of International Humanitarian Law amounting to war crimes, and other human rights abuses;

Cognizant of the remedies in international law and of the Principle of Complementarity applicable to serious international crimes which States are unwilling or unable to address;

Disappointed with the failure of the Sri Lankan government to constitute an adequate and credible mechanism for reconciliation which would have enjoyed the confidence of the victims of abuses committed during the final stages of the war;

Acknowledging the inclusion of certain positive recommendations in the LLRC report, which do not pertain to accountability, and undertaking – without prejudice to the position that such



recommendations collectively fall short of advancing accountability in Sri Lanka – to support genuine endeavours to implement such recommendations;

The Tamil National Alliance (TNA) concludes for the reasons provided hereinafter that the Report of the Lessons Learnt and Reconciliation Commission does not address important questions of accountability; was designed to shield civilian and military leaders responsible for serious crimes from blame; and evinces the Sri Lankan State’s unwillingness to acknowledge and address issues of accountability.

Chapter 1

# Accountability Issues

## Introduction

1. The Tamil National Alliance (TNA) is the largest political party representing Tamils in the North and East of Sri Lanka. As the elected representatives of the worst affected victims of the war, our response to the war crimes and crimes against humanity committed by both the Liberation Tigers of Tamil Eelam (LTTE) and the Government of Sri Lanka has been unequivocal. In April 2011, we responded to the Report of the United Nations Secretary General's Panel of Experts on Accountability in Sri Lanka as follows:

We have consistently emphasized that the Sri Lankan government had a duty to ensure that unarmed Tamil civilians are protected and not harmed in the course of whatever military operations the Government conducts against armed combatants. However, the Sri Lankan government has persistently bombed civilian populated areas, used heavy artillery and multi-barrel rocket launchers in such areas, carried out attacks by deep penetration units resulting in the death of and serious injury to tens of thousands of unarmed Tamil civilians, displaced hundreds of thousands of such Tamil civilians from their homes, destroyed their homes and all their occupational equipment and other assets, reducing them to a state of destitution, deprived such unarmed Tamil civilians of shelter, food, medicines, drinking water and other essentials, shelled hospitals and relief centres and prosecuted their military operations with scant regard for the safety, well-being and dignity of the unarmed Tamil civilians in conflict areas. The extra-judicial execution and enforced disappearance of unarmed Tamil civilians and the scourge of the white vans have continued unabated. These and other accounts of horrendous incidents were contemporaneously placed on record in Parliament by the TNA and brought to the notice of all concerned.<sup>1</sup>

2. We have also consistently maintained that genuine reconciliation in Sri Lanka is contingent on a credible accountability process that ensures the rights of victims to truth, justice and reparations while meeting international standards. Further, we have welcomed the recommendations of the Report of the UN Secretary General's Panel of Experts of

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<sup>1</sup> See *TNA statement on UNSG Advisory Panel Report*, at [http://transcurrents.com/tc/2011/04/tna\\_statement\\_on\\_unsg\\_advisory.html](http://transcurrents.com/tc/2011/04/tna_statement_on_unsg_advisory.html)

Accountability in Sri Lanka<sup>2</sup> and the transmission of that Report by the Secretary General to the UN Human Rights Council.<sup>3</sup>

3. The Lessons Learnt and Reconciliation Commission (LLRC) was appointed on 15<sup>th</sup> May 2010. The Government of Sri Lanka assured the world that this Commission would address accountability issues. For example, in an interview held on 27<sup>th</sup> September 2010, Minister of External Affairs, Prof. G.L. Peiris was asked whether he could describe with as much precision as possible what he viewed as the mandate of the LLRC and specifically, whether the LLRC was empowered to investigate allegations of wrongdoing, perhaps even war crimes, by both sides, particularly at the end of the conflict in 2009. The Minister responded:

Yes, I will answer those questions directly. [A United States Congressional aide in a meeting with the Minister] had recently said, ‘The Commission does not have the authority to probe allegations against particular individuals for violations of human rights or international humanitarian law.’ I contested that. I said, ‘No, the mandate is wide enough to enable the Commission to do this.’<sup>4</sup>

4. Further, at a news conference held in December 2010, Channel 4 journalist, Jonathan Miller inquired from Prof. Peiris as to why the government has not allowed an independent and impartial international inquiry into allegations of extra-judicial killings of prisoners. The Minister responded with ‘[b]ecause we have put in place what we consider to be the best and the most effective and the most pragmatic mechanism.’<sup>5</sup> He reiterated this view in an interview with the *Daily Mirror* in October 2011.<sup>6</sup>

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<sup>2</sup> *Ibid.*

<sup>3</sup> See *TNA: Experience of the Tamil people in Sri Lanka does not support claims made by Hon. Minister Samarasinghe at UNHRC*, at <http://transcurrents.com/news-views/archives/4048>.

<sup>4</sup> See Interview of Prof. G.L. Peiris by Asia Society Executive Vice President Jamie Metzl, on 27<sup>th</sup> September 2010, Asia Society, New York, available at <http://asiasociety.org/video/policy-politics/sustainable-peace-srilanka-complete>, at min.50.

<sup>5</sup> See ‘Sri Lanka ‘war crimes’ video: who are these men?’ *Channel 4*, 2<sup>nd</sup> December 2010, at <http://www.channel4.com/news/sri-lanka-war-crimes-video-who-are-these-men>, at min.2.41.

<sup>6</sup> See ‘Prof. G. L. Peries on Hot seat’, *The Daily Mirror*, 1<sup>st</sup> November 2011, <http://video.dailymirror.lk/videos/1129/prof.-g.-l.-peries-on-hot-seat>, at min.10.30.

5. The LLRC released its final report on 16<sup>th</sup> December 2011. On 19<sup>th</sup> December 2011, the TNA released its initial response to the report and concluded that it ‘categorically fails to effectively and meaningfully deal with issues of accountability.’<sup>7</sup>
6. This study represents the TNA’s assessment of the LLRC’s overall mandate, procedures and practices, and its final observations and recommendations, particularly from the perspective of accountability. Section 1 of the study outlines process-related benchmarks for a genuine accountability mechanism; Section 2 describes the rights of victims that ought to be fulfilled through a genuine accountability process; Section 3 recounts the LLRC’s interim recommendations and their state of implementation; and Section 4 critically examines the final recommendations of the LLRC from an accountability perspective. The standards for this assessment are based on the needs and expectations of victims as communicated to the TNA, and on relevant international standards.

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<sup>7</sup> See *Initial Response by Tamil National Alliance to LLRC Report*, at <http://transcurrents.com/news-views/archives/6827>.

## 1. Process

### A. Mandate

- 1.1 The text of the mandate received by the LLRC did not explicitly authorise it to investigate allegations of violations of International Humanitarian Law (IHL) and International Human Rights Law (IHRL) during the final stages of the war. However, the government repeatedly assured its citizens and the international community that the LLRC would in fact investigate alleged abuses during the final months.<sup>8</sup>
- 1.2 Despite these assurances, the LLRC failed to clarify the extent of its mandate, and was ambivalent on whether it would investigate alleged human rights abuses and war crimes. The LLRC Chairman revealed his own understanding of the mandate in his address at the inaugural session of the Commission on 11<sup>th</sup> August 2010, in which he did not refer to the investigation of alleged human rights abuses and war crimes. Instead, he urged people in areas affected by the war ‘to air their grievances and identify the problems that they encountered in the past and also that they encounter at present after the ending of the war.’<sup>9</sup> On other occasions, however, the Chairman exhorted witnesses to ‘forget the past’ and focus on more immediate existential and livelihood concerns.<sup>10</sup> As detailed later in this study, the LLRC’s understanding of its mandate appeared to include some investigative functions with respect to alleged violations of IHL and IHRL. Yet, in most cases, the LLRC denied possessing any investigative powers. In this context, it is clear that the lack of clarity in the LLRC’s mandate inhibited witness and victim participation in the LLRC proceedings.
- 1.3 Further, the Commission failed to adhere to the standards of objectivity and impartiality in summoning testimony by those implicated in the allegations of IHL and IHRL violations, particularly military personnel from military brigades and divisions alleged to have been involved in the commission of IHL violations during the latter stages of the war. Where

<sup>8</sup> See *Report of the Secretary-General’s Panel of Experts on Accountability in Sri Lanka*, 31<sup>st</sup> March 2010 [‘UN Panel Report’] at fn 177, 178 and 179.

<sup>9</sup> Amnesty International, *When will they get justice? Failures of Sri Lanka’s Lessons Learnt and Reconciliation Commission* (2011) [‘AI Report’], at 13.

<sup>10</sup> *Ibid.*

senior military officials did make representations to the LLRC, the Commissioners failed to probe into specific allegations and failed to summon testimony of subordinates to test the veracity of those representations. A recent report by Amnesty International notes:

The publicly available records of the LLRC's proceedings show that the Commissioners, instead of trying to investigate these claims, spent significant time arguing in defense of the Sri Lankan military. In contrast to the deferential attitude Commissioners displayed toward pro government witnesses, the Commissioners on occasion grilled witnesses claiming violations by government forces, trying to impeach their credibility or to direct them toward blaming the LTTE.<sup>11</sup>

- 1.4 The only known instance of the LLRC summoning the testimony of government officials was when officers of the Terrorism Investigation Department (TID) were summoned to give testimony regarding persons taken into custody.<sup>12</sup> As discussed later in this study, the Commission appeared not to have requested or received much of the documentation that would have assisted in judging the veracity of allegations of IHL violations, such as Unmanned Aerial Vehicle (UAV) footage taken during the last stages of the war, satellite imagery of the purported safe zones taken during the last stages of the war, internal reports of the forces relating to operations during the last stages, correspondence to and from government officials – notably between members of the National Security Council, overall commanders and battle front commanders, the decision making process leading to the starvation of the population of the Vanni in the last stages caused by grossly inadequate food supply, the civilian and military chain of command through which responsibility for crimes may be ascertained, and estimates and statistics maintained by government and military officials on the number of civilians trapped in the safe zones and civilian casualties.

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<sup>11</sup> AI Report, at 25.

<sup>12</sup> See 'LLRC summons TID officials', *The Island*, 2<sup>nd</sup> October 2010, at [http://www.island.lk/index.php?page\\_cat=article-details&page=article-details&code\\_title=8106](http://www.island.lk/index.php?page_cat=article-details&page=article-details&code_title=8106).

## B. Composition, Competence and Lack of Independence

- 1.5 The LLRC failed to win the confidence of the Tamil community. The ethnic and gender balance of the Commission and its staff was heavily weighted in favour of Sinhalese men. The Commissioners were mostly retired government servants, many of whom had previously defended the government on war crimes issues in international fora and had serious conflicts of interest. These factors undermined the Commission's independence. Moreover, most of the Commissioners did not have substantial experience in human rights or in IHL. Further, the LLRC was established without any consultation with victims' representatives or the Tamil community, nor were they consulted on the modalities, procedures and practices of the Commission subsequent to its establishment.
- 1.6 Given the serious nature of the allegations of violations of IHL and IHRL during the final stages of the war, any effective Commission must of necessity have been composed with at least a few members with significant experience and competence in IHL, IHRL or transitional justice. However, barring the former Legal Advisor to the Foreign Ministry, none of the members of the Commission possessed the necessary expertise or competence in either of these areas.
- 1.7 The composition of the Commission betrayed a heavy bias towards those who are male, Sinhalese and former government officials. This composition not only failed to transcend, but perpetuated the very factors that led to the alienation of the Tamil people from the Sri Lankan State in the first place.
- 1.8 Five of the eight members of the LLRC were Sinhalese men. The only two Tamil members were Mr. Chandirapal Chanmugam, a former Secretary to the Treasury and Mrs. Manohari Ramanathan, a former government servant and sitting member of the powerful Monetary Board to which appointments are made directly by the President. Incidentally, Mrs. Ramanathan was the only woman Commissioner. The only Muslim Commissioner, Mr. M.T.M. Bafiq, a former member of the Human Rights Commission, was also the only member with any experience in working on human rights issues.



1.9 Of the eight Commissioners, six of the members have been or continue to be government functionaries. Conversely, none of the members have a history of being involved in civil society human rights promotion and activism. Moreover, three of the eight Commissioners including the Chairman have defended the Sri Lankan government against allegations of war crimes in the media, in international fora or both. Mr. C.R. de Silva and Dr. Rohan Perera in their capacities as Attorney General and Legal Adviser to the Foreign Minister respectively were members of the Sri Lankan delegation to the UN Human Rights Council on a number of occasions during and immediately after the last stages of the war, at which concerns were raised about the conduct of the government. Mr. Perera has even gone on public record explicitly denying allegations that government forces committed war crimes prior to his appointment to the Commission.<sup>13</sup> Mr. H.M.G.S. Palihakkara, the Permanent Representative of Sri Lanka to the United Nations in New York, has also publicly defended the conduct of government forces during the latter stages of the war.<sup>14</sup>

1.10 It is noted that the Chairman of the LLRC, Mr. C.R. de Silva was party to a public feud between the Attorney General's Department and the International Independent Group of Eminent Persons (IIGEP) appointed to monitor the work of a previous Commission of Inquiry (i.e. the Presidential Commission of Inquiry Appointed to Investigate and Inquire into Alleged Serious Violations of Human Rights arising since August 2005). Mr. de Silva was then the Attorney General and was accused by the IIGEP of participating in the proceedings of the commission – and particularly in the examination of witnesses – while having a 'fundamental conflict of interest.'<sup>15</sup> The improper role of the Attorney General's Department later prompted the IIGEP to resign. In this context, Mr. de Silva's appointment as Chairman of the LLRC was highly inappropriate.

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<sup>13</sup> See 'Pillay's report: Govt. on diplomatic offensive', *The Sunday Times*, 15<sup>th</sup> March 2009, at [http://sundaytimes.lk/090315/News/sundaytimesnews\\_02.html](http://sundaytimes.lk/090315/News/sundaytimesnews_02.html).

<sup>14</sup> See <http://www.youtube.com/watch?v=eNIT5SIXQoM>; UN Panel Report, at fn 181.

<sup>15</sup> See International Independent Group of Eminent Persons, *The Final Report of the IIGEP*, April 2008. PAGE NUMBER?

## C. Treatment of Witnesses

1.11 There are a number of instances where the LLRC's selectivity and inherent prejudices are clearly demonstrated. At times, the LLRC failed to empathise with the victims of atrocities committed by the security forces or the police. For example, a Tamil witness in Kalmunai complained to the LLRC about the abduction of her sister by the Police.<sup>16</sup> The exchange between the Commission and the witness demonstrates a callous disregard for the witness's plight.

**Chairman:** Who abducted her?  
**Witness:** The Police.  
**Chairman:** Where is she now?  
**Witness:** I don't know where she is.  
**Chairman:** Give all those particulars and we will see what we can do. We have told earlier that all these details have to be given in writing.

1.12 The callousness and impatience with which the Commissioners dealt with some of the witnesses are on record. During the public hearing in Kilinochchi, Witness 9 reported that the Army had detained her son at the Welikanda Detention Camp. The recorded 'Q & A' exchange between the LLRC and the witness – i.e. where one of Commissioners questioned the witness – reveals startling indifference on the part of the Commissioners:<sup>17</sup>

**Q:** Tell her that we will be writing to the authorities.  
**A:** Please help us. We have registered a complaint... We have been spending quite a lot of time. We went to Vavuniya Police also several times to make a complaint. They promised to release them within 6 months, now it is more than a year.  
**Q:** Right, right.

<sup>16</sup> *Proceedings of public sittings of the Commission of Inquiry on Lessons Learnt and Reconciliation appointed by His Excellency the President in terms of Section 2 of the Commissions of Inquiry Act, 27<sup>th</sup> March 2011- Representations made by the public at the Divisional Secretariat, Kalmunai, LLRC/PS/27-03-11, Representation by Witness 12.*

<sup>17</sup> *Proceedings of public sittings of the Commission of Inquiry on Lessons Learnt and Reconciliation appointed by His Excellency the President in terms of Section 2 of the Commissions of Inquiry Act, 18<sup>th</sup> September 2010 - Representations made by the public at District Secretariat, Kilinochchi, LLRC/PS/18-09-10/01, Representation by Witness 9.*

1.13 Such reactions may be contrasted with the visceral reaction of the Chairman of the LLRC to one of the incidents recounted by a Sinhalese witness in Siyambalanduwa.<sup>18</sup> The Chairman's response was highly inappropriate and demonstrated selectivity in his empathy for victims. Having heard this witness's representation regarding the brutal killing of his children by the LTTE and his violent retaliation to the perpetrators, the Chairman of the LLRC observed:

The barbaric natures of these terrorist are revealed by these gruesome murders of these 1 ½ and 2 ½ old children, this is not something which any human being will not resort [*sic.*].

1.14 This statement cannot be criticised in isolation. Nor can the Chairman's follow-up statement:

I wish to say that you did a very good act and because of your act a lot of people in your village was [*sic*] saved.

1.15 Yet compared to the callousness, indifference and even irritation displayed by the LLRC to some of the witnesses making representations in the North and East, the above reaction casts serious aspersions on the sincerity of the LLRC.

1.16 Many of the victims in the North and East placed their trust in the LLRC. Instead of receiving a genuine platform to air their grievances and relate their experiences, these victims were often rudely cut short and asked to submit the relevant details in writing. It is not known why the LLRC decided to spend so little time in the North and East – a mere twenty-two days in total, compared to the fifty-six days spent on hearings in Colombo. Yet,

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<sup>18</sup> *Proceedings of public sittings of the Commission of Inquiry on Lessons Learnt and Reconciliation appointed by His Excellency the President in terms of Section 2 of the Commissions of Inquiry Act, 26<sup>th</sup> March 2011- Representations made by the public at the Siyambalanduwa District Secretariat, Mannar, LLRC/PS/26-03-11, Representation by Witness 9.*

the lack of time was often presented as an excuse for interrupting witnesses and instructing them to submit their testimonies in writing.<sup>19</sup>

## D. Victim Protection

1.17 Sri Lanka does not have a legislative or judicial scheme that provides for an effective witness protection programme. Several efforts to enact a modest legislative scheme, most recently in 2008, have failed. The LLRC did not establish any effective processes for witness protection either, other than to provide for testimony to be given *in camera*. However, no guarantees were made that testimony made *in camera* would be treated confidentially, including after the termination of the Commission's mandate. On the contrary, LLRC members demonstrated a casual and sometimes indifferent attitude towards the security of witnesses. Amnesty International's report on the LLRC notes that the LLRC's interim recommendations, presented to the President in September, 'did not reflect concern for the protection of witnesses, despite the fact that several people told the commission they had been threatened.'<sup>20</sup> The TNA was informed of a number of occasions, particularly in the Northern Province, where the presence of military intelligence officers and other groups<sup>21</sup> deterred witnesses from providing testimony before the Commission.

1.18 In Kalmunai, Witness 12 presented a harrowing account of the grave atrocities committed against her and her family.<sup>22</sup> The subsequent treatment of the witness is perhaps the best

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<sup>19</sup> See section on resources for examples of when the LLRC instructed witnesses to submit their testimonies in writing owing to the lack of time.

<sup>20</sup> AI Report, at 53.

<sup>21</sup> For examples of intimidation of witnesses by groups aligned to the government, see Center for Human Rights CHR-Sri Lanka, *The Wait for Justice: Critical analysis of Lessons Learnt and Reconciliation Commission* (November, 2011), at 18-19. According to the report: 'The intimidation of those who were interested in being part of the Commission sessions was not restricted to merely outside the Commission hearings [in Keytes Island, Jaffna]. Even during the sessions, the presence of the members of the EPDP were felt as they were taking photos of those who came forward to give evidence. A situation was created, when a photojournalist of the Yaal Thinakura took a photo of those individuals who were intimidating the public, a man who appeared to be the leader of the intimidators threatened the journalist with death. The situation was solved only on the intervention of journalists from Colombo, representatives of the several embassies and the LLRC commissioners which lead the Police to take action regarding the incident. However the person who was thus taken into custody was immediately released upon being warned by the police' [*sic.*].

<sup>22</sup> *Proceedings of public sittings of the Commission of Inquiry on Lessons Learnt and Reconciliation appointed by His Excellency the President in terms of Section 2 of the Commissions of Inquiry Act, 27<sup>th</sup> March 2011-*

illustration of how the LLRC's processes seriously compromised the protection of witnesses. The witness claimed that one 'Iniya Barathi' (a known supporter of the Tamil Makkal Viduthalai Pulikal (TMVP), who was later allegedly appointed as the Sri Lanka Freedom Party's (SLFP) organiser for Amparai) had come in a white van with ten other persons and seized Rs.500,000 and her jewellery. The witness had then been beaten, assaulted and sexually harassed. She had also been subjected to torture, as they had pricked her hands with nails and had given her urine to drink, when she had requested water. In contrast to the visceral outrage of the LLRC to incidents that took place in Siyambalanduwa,<sup>23</sup> the Commission's only reply to this horrific incident was, '[w]e have already dictated a letter to be sent to the Attorney General for investigation into her complaint.'<sup>24</sup>

1.19 It is noteworthy that Iniya Barathi was named by other witnesses from the Eastern Province as responsible for a range of atrocities.<sup>25</sup> Barathi is also specifically mentioned in the Mission Report of Major General (ret.) Patrick Cammaert, Special Envoy of the UN Special Representative for Children and Armed Conflict as a notorious abuser of children and a recruiter of child soldiers.<sup>26</sup> Yet the LLRC does not specifically acknowledge the identity of this individual even once in its final report.

1.20 Witness 12 was the only witness to provide evidence of torture and sexual assault during the LLRC's public hearings. In this context, her testimony is both unique and extremely important. Hence the subsequent events that took place reflect the serious security risks that the witnesses endured to relate their stories to the LLRC. It is also an indication that the

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*Representations made by the public at the Divisional Secretariat, Kalmunai LLRC/PS/27-03-11, Representation by Witness 12.*

<sup>23</sup> *Proceedings of public sittings of the Commission of Inquiry on Lessons Learnt and Reconciliation appointed by His Excellency the President in terms of Section 2 of the Commissions of Inquiry Act, 26<sup>th</sup> March 2011-Representations made by the public at the Siyambalanduwa District Secretariat, Mannar, LLRC/PS/26-03-11, Representation by Witness 9.*

<sup>24</sup> *Proceedings of public sittings of the Commission of Inquiry on Lessons Learnt and Reconciliation appointed by His Excellency the President in terms of Section 2 of the Commissions of Inquiry Act, 27<sup>th</sup> March 2011-Representations made by the public at the Divisional Secretariat, Kalmunai LLRC/PS/27-03-11, Representation by Witness 12.*

<sup>25</sup> See *infra*.

<sup>26</sup> Office of the Special Representative of the Secretary General for Children and Armed Conflict, *Visit of Major General (ret.) Patrick Cammaert, Special Envoy of the Special Representative for Children & Armed Conflict to Sri Lanka, 5<sup>th</sup>-11<sup>th</sup> December 2009, at 6-7.*

LLRC's processes were simply not conducive for more serious allegations, such as rape and torture, to be presented.

1.21 Witness 12 was subsequently identified in the media as Ratnam Poongothai. Hence, at the outset, it is clear that the identities of witnesses were easily compromised at the public hearings, and that the anonymous descriptions of witnesses in the transcripts of the LLRC public hearings were superficial. The witness was subsequently summoned to the Criminal Investigative Department (CID) to be questioned on her testimony before the LLRC.<sup>27</sup> It was reported that the witness was initially summoned to the Fourth Floor of the CID Headquarters. Incidentally, Manfred Nowak, the former UN Special Rapporteur on Torture lists the Fourth Floor as a place in which torture is alleged to have taken place.<sup>28</sup> It transpired that she was later summoned to the Kalmunai Police Station for questioning after she reported her summoning to the Fourth Floor to the media.

1.22 The entire incident is an indictment on the LLRC's processes in terms of witness protection. The incident also reveals that the CID amongst other government entities monitored the public hearings and was equipped to crackdown on witnesses who provided potentially damaging evidence against the government and its allies.

1.23 While specific examples, such as the summoning of Witness 12 to the Kalmunai Police Station, reveal the deep flaws in the LLRC's processes, it is also important to note that, in general, the political climate in Sri Lanka has been intensely hostile to allegations of serious crimes against government forces. This hostility is intensified by the cultivation of triumphalism by the government and its supporters, and by the fact that many of the allegations point to culpable actions and omissions by senior civilian and military leaders.

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<sup>27</sup> See 'LLRC witness rattled by CID summon', *BBC Sinhala.Com*, at [http://www.bbc.co.uk/sinhala/news/story/2011/11/111112\\_llrcwitness.shtml](http://www.bbc.co.uk/sinhala/news/story/2011/11/111112_llrcwitness.shtml).

<sup>28</sup> See UN Human Rights Council, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak: Mission to Sri Lanka*, 26<sup>th</sup> February 2008, A/HRC/7/3/Add.6, available at: <http://www.unhcr.org/refworld/docid/47d683cf2.html>, at paras.78-91.

- 1.24 Given this context, the need for an effective witness protection programme that ensures the safety and security of witnesses is a necessary condition for truth seeking and accountability.
- 1.25 The proceedings of the LLRC's public sittings reveal a clear pattern of members encouraging witnesses to present testimony *in camera* to prevent witnesses from testifying publicly on violations committed, particularly by armed paramilitary groups aligned with the government, even when the witnesses voluntarily opted to provide evidence in public.<sup>29</sup> These practices prevented witnesses from ventilating their frustrations in public – an important stage in the process of healing and reconciliation.
- 1.26 The Commission also failed to provide an opportunity for witnesses who are currently abroad – particularly those who were located in the North from January to May 2009 – to testify. Unlike the abortive effort by a previous Commission of Inquiry<sup>30</sup> to hear video evidence from witnesses living overseas, no effort was even made by the LLRC to obtain such testimony despite many accounts of such witnesses being highlighted in the international media.<sup>31</sup>
- 1.27 Finally, with the termination of the LLRC's mandate, all the documents in the Commission's possession would invariably be handed over to the Presidential Secretariat. Hence, details of the identities of all witnesses who made submissions *in camera* are likely to become known to the government. Such disclosure seriously undermines the security of these witnesses and irrevocably damages the trust they placed in the LLRC's processes.

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<sup>29</sup> See for example: Witness 1, Public Hearings in Chettikulam DS Office, 14<sup>th</sup> August 2010; Witness 15, Public Hearings in Ottamavadi DS Office, 10<sup>th</sup> October 2010; Witness 3, Public Hearings in Kilinochchi District Secretariat, 18<sup>th</sup> September 2010; Witness 1, Public Hearings in Vavuniya DS Office, 14<sup>th</sup> August 2010; Witness 9 [Attorney-at-Law], Public Hearings in Vavuniya DS Office, 14<sup>th</sup> August 2010.

<sup>30</sup> The Commission of Inquiry to Investigate and Inquire into Alleged Serious Violations of Human Rights Occurring since 1 August 2005, established on 3<sup>rd</sup> November 2006.

<sup>31</sup> See for example, 'Tamil refugees flee to India to escape fighting in Sri Lanka', *The Guardian*, at <http://www.guardian.co.uk/world/2009/apr/23/sri-lanka-civilians-flee-india>; 'Escape from Hell: Refugees Flee Sri Lankan War Zone', *Time World*, at <http://www.time.com/time/world/article/0,8599,1893981,00.html>.

## E. Resources

- 1.28 The LLRC was woefully under-resourced for the task of investigating violations of IHL and IHRL during the final stages of the war. The government's own submissions to the UN Secretary General's Panel of Experts indicate that the LLRC was staffed by just twenty persons, of whom only four were researchers, with the remaining staff comprising translators, police officers and support personnel.<sup>32</sup> The LLRC does not appear to have hired a single investigator or lawyer with experience in inquiring into IHL violations, or identifying such violations in the narrative accounts of witnesses.
- 1.29 However, the LLRC did find the resources to obtain the services of Professor Evangelos Yfantis, Professor of Computer Science at the University of Nevada, Las Vegas, USA, to examine the Channel 4 footage. LLRC Member, Dr. Karunaratne Hangawatte, is also a Professor at the University of Nevada, Las Vegas. The amount of resources expended by the LLRC in responding to the Channel 4 footage is reflected in the fact that 168 of the 375 pages in the document containing Annexes to the LLRC report is dedicated to the analysis of the Channel 4 footage.<sup>33</sup>
- 1.30 As noted above, a key concern was the lack of time made available for witnesses and victims to testify before the Commission. In public sittings in the North and East, witnesses were frequently asked to cut short their evidence due to time constraints, while others were asked to merely submit in writing their testimonies to the Commission.
- 1.31 Moreover, the Commission's sittings in the North and East were not adequately publicised. For instance, Witness 1 from Chettikulam, Vavuniya observed that '[a]ll people do not know that this Commission is visiting us today. Only some know about it.'<sup>34</sup> Hence it is

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<sup>32</sup> UN Panel Report, at para.320.

<sup>33</sup> See Annex 4.18 to the LLRC Report, 'Technical Analysis on the Channel 4 Video Footage' by Dr. Chathura R. De Silva (pp.154-216); and Annex 4.19 to the LLRC Report, 'A Technical Report with Analysis and Measures for the Channel 4 Videos' by E.A. Yfantis (pp.217-322).

<sup>34</sup> *Proceedings of Public Hearings of the Commission of Inquiry on Lessons Learnt and Reconciliation appointed by his Excellency the President in terms of Section 2 of the Commissions of Inquiry Act, 14<sup>th</sup> August 2010 – Representations made by the public at the District Secretariat, Chettikulam, LLRC/PS/14-08-10, Representation by Witness 1.*



apparent that the LLRC's visits may not have been adequately publicised in many areas in which victims of war eagerly awaited an opportunity to recount their experiences. In another incident, which took place in Nedunkerny, Vavuniya, a witness who alleged the detention of her son and son-in-law claimed that she had only just heard about the Commission's public sittings and had come running from her shop in order to obtain assistance from the Commission.<sup>35</sup>

1.32 The Commission did not hesitate to interrupt witnesses in the midst of their testimonies and instruct them to submit the relevant information in writing. During one particular public sitting in Jaffna, the Chairman of the LLRC began proceedings by informing victims gathered there to tender written submissions, as the Commission had very little time to entertain oral testimonies.<sup>36</sup> In fact, the Chairman stated:

We are running against time. So, give us the written Memorandum, which you brought and give your presentation in a very summary form. 66 people are waiting in Guru Nagar.

1.33 This pattern was observed elsewhere as well. In Ariyalai, for instance, the Chairman of the LLRC made the following announcement during Witness 7's submissions: 'The others, if their problem is about missing children or somebody missing, ask them to hand over the particulars here because now we also have to go for another session, another meeting in Kopay.'<sup>37</sup>

1.34 The rushed nature of these public sittings stands in stark contrast to sittings in Colombo, where public figures, the vast majority of whom were neither witnesses nor victims, and

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<sup>35</sup> *Proceedings of Public Hearings of the Commission of Inquiry on Lessons Learnt and Reconciliation appointed by His Excellency the President in terms of Section 2 of the Commissions of Inquiry Act, 15<sup>th</sup> August 2010 – Representations made by the public at the Divisional Secretariat, Nedunkerny, LLRC/PS/15-08-10, Representation by Witness 10.*

<sup>36</sup> *Proceedings of public sittings of the Commission of Inquiry on Lessons Learnt and Reconciliation appointed by His Excellency the President in terms of Section 2 of the Commissions of Inquiry Act, 12<sup>th</sup> November 2010- Representations made by the Mrs. Sudhi Ommar and public at the District Secretariat, Jaffna, LLRC/PS/12-11-10.*

<sup>37</sup> *Proceedings of public sittings of the Commission of Inquiry on Lessons Learnt and Reconciliation appointed by His Excellency the President in terms of Section 2 of the Commissions of Inquiry Act, 11<sup>th</sup> November 2010- Representations made by the public at Ariyalai, LLRC/PS/11-11-10, Representation by Witness 7.*

whose presentations did not address IHL and IHRL violations, were given lengthy hearings, with extended question and answer sessions. Tellingly, the LLRC heard evidence from witnesses and victims in the North and East for a mere twenty-two days in total, whereas at least fifty-six days were allocated for sittings in Colombo.

- 1.35 The foregoing analysis clearly reveals that most of the LLRC's hearings in the North and East were superficial, and were carried out without any genuine will to uncover the truth and deliver justice to the victims of the war.

## 2. The Rights of Victims

### A. Truth

2.1 Principle 2 of the Updated Set of Principles on the Promotion and Protection of Human Rights through Action to Combat Impunity recognises that ‘[e]very people has the inalienable right to know the truth about past events concerning the perpetration of heinous crimes and about the circumstances and reasons that led, through massive or systematic violations, to the perpetration of those crimes.’<sup>38</sup> The right to the truth includes knowledge of the full and complete truth as to the events that transpired, their specific circumstances, and who participated in them, including knowing the circumstances in which the violations took place, as well as the reasons for them.<sup>39</sup> The right to truth is fundamental to the dignity of victims’ families, particularly mothers and wives of disappeared men and youth. Mothers and wives of disappeared persons have repeatedly told the TNA that the truth regarding the fate of the disappeared is important to enable them to mourn their loved ones with dignity if they are dead, or to relentlessly search for them if they are alive.

2.2 The right to truth also has a collective dimension. Society has the right to know the truth regarding the perpetration of crimes, as well as the circumstances and the reasons for which aberrant crimes came to be committed, so that such events do not reoccur in the future. The UN Secretary General’s Panel of Experts noted that the right to truth is ‘particularly important in situations where the truth is not fully known, where there is controversy about events as they unfolded, where denial by the State or historic revisionism have predominated or where there has been a systematic silencing of victims.’<sup>40</sup> The exclusion of independent aid agencies and media once military operations commenced in the Vanni, the refusal of the government to accept its share of the responsibility for tens of thousands of civilian casualties caused during the final stages of the war, and the atmosphere of

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<sup>38</sup> Updated Set of principles for the protection and promotion of human rights through action to combat impunity, 8<sup>th</sup> February 2005, E/CN.4/2005/102/Add.1.

<sup>39</sup> UN Commission on Human Rights, *Study on the Right to the Truth: Report of the Office of the United Nations High Commissioner for Human Rights*, 8<sup>th</sup> February 2006, E/CN.4/2006/91, at: <http://www.unhcr.org/refworld/docid/46822b6c2.html>, at 4.

<sup>40</sup> UN Panel Report, at para.273.

hostility prevailing in Sri Lanka towards those alleging the perpetration of war crimes by the government strengthen the demand for truth seeking.

- 2.3 To fulfil the expectations of victims and the Tamil community regarding truth-seeking, any accountability mechanism must seek and obtain information on and address: the causes, reasons and conditions pertaining to grave violations of IHL and IHRL, and not merely the causes for the breakdown of the ceasefire agreement; in the event of death, missing or enforced disappearance, the fate and whereabouts of the victims; the circumstances in which violations took place; the progress and results of the criminal investigation into and prosecution of suspects alleged to have committed grave violations of IHL and IHRL that amount to crimes under Sri Lankan and international law; and the identity of perpetrators (without prejudice to the rights of those so identified). These expectations are grounded in international law and therefore form the basis on which the final report of the LLRC is assessed.<sup>41</sup>

## B. Justice

- 2.4 The pursuit of criminal justice for grave violations of IHL and IHRL amounting to international crimes is a requirement of the law. From multi-lateral treaties,<sup>42</sup> to resolutions of UN bodies,<sup>43</sup> codifications of customary international law,<sup>44</sup> best practices recognised by

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<sup>41</sup> *Ibid.* at 11.

<sup>42</sup> See the Convention on the Prevention and Punishment of the Crime of Genocide, UN General Assembly, 9<sup>th</sup> December 1948, A/RES/260, at: <http://www.unhcr.org/refworld/docid/3b00f0873.html>, Articles 4 and 5; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UN General Assembly, 10<sup>th</sup> December 1984, United Nations, Treaty Series, vol. 1465, p. 85, at: <http://www.unhcr.org/refworld/docid/3ae6b3a94.html>, Articles 4 and 5; Geneva Convention Relative to the Protection of Civilian Persons in Times of War, (Fourth Geneva Convention), 12<sup>th</sup> August 1949, 75 UNTS 287, available at: <http://www.unhcr.org/refworld/docid/3ae6b36d2.html>, Articles 146 and 147; Rome Statute of the International Criminal Court, UN General Assembly, 17<sup>th</sup> July 1998, A/CONF. 183/9, at: <http://www.unhcr.org/refworld/docid/3ae6b3a84.html>.

<sup>43</sup> See, for example, UN Commission on Human Rights, 'Impunity', Resolution 2004/72; UN Commission on Human Rights, 'Situation of human rights in Rwanda', Resolution 2000/21; UN Commission on Human Rights, 'Situation of human rights in the Federal Republic of Yugoslavia (Serbia and Montenegro), the Republic of Croatia and Bosnia and Herzegovina', Resolution 2000/26; UN Commission on Human Rights, 'Situation of human rights in the Sudan', Resolution 2001/18; UN Commission on Human Rights, 'Situation of human rights in Sierra Leone', Resolution 2001/20; UN Commission on Human Rights, 'Situation of human rights in Burundi', Resolution 2001/21; and UN Commission on Human Rights, 'Situation in the Republic of Chechnya of the Russian Federation', Resolution 2001/24; UN General Assembly, 'Extradition and Punishment of War Criminals', adopted on 13<sup>th</sup> February 1946, G.A. Res. 3(1); UN General Assembly, 'Question of the Punishment of War Criminals and of

UN offices,<sup>45</sup> and decisions of international courts,<sup>46</sup> the principle that there is a duty to prosecute serious international crimes is now well-entrenched in international law. For this reason, amnesty provisions in domestic law that seek to shield those responsible for the most serious international crimes are void.<sup>47</sup>

- 2.5 Holding those responsible for atrocities and grave human rights abuses is a necessary step towards combating the culture of impunity in the Sri Lankan political and legal system. In the absence of accountability for the most egregious abuses committed by those exercising State authority, democratic and human rights norms ring hollow for victims, survivors and more generally, citizens. The prevailing culture of impunity in Sri Lanka where State officials have seldom been punished for the crimes committed by them perpetuates authoritarian trends and abuses of State power. It also undermines faith in institutions and the rule of law, and weakens public confidence in the value of democratic and human rights norms.
- 2.6 Combating a culture of impunity by ensuring that those responsible for atrocities and grave violations of human rights are held to account is critical for fostering respect for democratic values and human rights in Sri Lanka. It is a necessary ingredient for restoring public confidence in the legal system.
- 2.7 Accountability is also a necessary element in the transition towards a more peaceful society. Holding those most responsible for grave abuses to account will assist in moving

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Persons who have Committed Crimes against Humanity (Question of Punishment)', adopted on 15<sup>th</sup> December 1969, G.A. Res. 2583(XXIV); UN General Assembly, 'Question of Punishment', adopted on 15<sup>th</sup> December 1970, G.A. Res. 2712(XXV); UN General Assembly, 'Question of Punishment', adopted 18<sup>th</sup> December 1971, G.A. Res. 2840(XXVI); UN General Assembly, 'Principles of International Cooperation in the Detection, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes against Humanity', adopted 3<sup>rd</sup> December 1973, G.A. Res. 3074(XXVIII).

<sup>44</sup> See Rule 158 in the International Committee of the Red Cross, Customary International Humanitarian Law (Cambridge, UK: Cambridge University Press, 2005) ['ICRC Study'], at 607, also available at <http://www.icrc.org/customary-ihl/eng/docs/home>.

<sup>45</sup> UN Commission on Human Rights, Report of the independent expert to update the Set of principles to combat impunity, Diane Orentlicher, E/CN.4/2005/102/Add.1, February 8, 2005.

<sup>46</sup> See the *Velásquez Rodríguez Case*, Judgment of 29<sup>th</sup> July 1988, Inter-Am.Ct.H.R., (Ser. C) No. 4 (1988), at para.174; *Aksoy v. Turkey*, Judgment of 18<sup>th</sup> December 1996, European Ct. H.R, No. 100/1995/606/694, at para.98.

<sup>47</sup> See Elizabeth G. Salmón, Reflections on international humanitarian law and transitional justice: lessons to be learnt from the Latin American experience, *International Review of the Red Cross*, Vol. 88/862, June 2006, 332-333.

towards peace in a number of ways. First, by isolating those responsible for grave abuses, individual accountability prevents the perpetuation of harmful notions of collective blame being placed on an entire community. Second, individual accountability helps ensure that those most likely to cause a return to violence and those most likely to disregard the rights of the people are removed from positions of authority and power. This stabilises the gains of peace, and insures against a recurrence of violence and grave abuses. Third, individual accountability of those most responsible for crimes serves as a rehabilitative tool for victims and survivors of the atrocities. Successful convictions of those most responsible for crimes also help bring closure to victims.

- 2.8 In conclusion, the TNA considers it a matter of critical importance and urgency that senior civilian, military and other leaders most responsible for IHL and IHRL violations that constitute domestic and international crimes be investigated and prosecuted in a manner that reflects the full criminality of their actions.

## C. Reparations

- 2.9 Any victim-centered process of accountability must acknowledge the wrong done to victims, recognise their loss and suffering, and provide actual benefits to victims, whether in symbolic or material form.
- 2.10 Reparations can be provided to either individuals or communities and can take a wide variety of forms, including restitution of rights, monetary compensation, medical and psychological services, health care, educational support, return of property or compensation for loss thereof, as well as official public apologies, building museums and memorials and establishing official days of commemoration.<sup>48</sup>
- 2.11 Moreover, official guarantees of non-repetition and institutional reforms that address the causes for the crimes must be undertaken. In the Sri Lankan context, institutional reforms are necessary to restore the independence of the judiciary and police, to repeal laws that

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<sup>48</sup> See UN Panel Report, at para.277.

lead to and encourage human rights abuses, to ensure adequate checks and balances on the exercise of executive power, and to share power equitably between ethnic groups.

### 3. LLRC Interim Recommendations

- 3.1 In September 2010, the LLRC made interim recommendations relating to five distinct issues: detention, land issues, law and order, administration and language issues, and socio-economic and livelihood issues. These modest recommendations, such as the publication of a list of those in detention and the disarming of paramilitary groups, were already the subject of demands by the TNA and by Sri Lankan civil society groups for many years. Yet, such recommendations have not been implemented, despite the lapse of more than a year since they were made. The *Progress Report on the Implementations of the Interim Recommendations of the LLRC*, released by the Inter-Agency Advisory Committee (IAAC) appointed to ensure such implementation, reveals nothing but the lack of genuine progress.
- 3.2 In relation to detention, for instance, the LLRC recommended that a list of those in detention be published, in light of the fact that many people did not know of the whereabouts of their family members in detention. The TNA has raised this issue on a number of occasions with the government in public and in private, including at formal bilateral talks. Despite repeated promises that such a list would be made public, no such list has been made public nor have family members been given access to it. The IAAC, headed by the Hon. Attorney General, does not make even passing reference to a list of detainees in its Progress Report. The LLRC also recommended that persons who are discharged be given a certificate to prevent being re-arrested. This recommendation has not been implemented either.
- 3.3 Without going into much detail, the LLRC alludes to the lack of implementation of some of its interim recommendations pertaining to detainees:

...the Commission expresses concern over some detainees who have been incarcerated over a long period of time without charges being preferred. The Commission stresses again that conclusive action should be taken to dispose of



these cases by bringing charges or releasing them where there is no evidence of any criminal offence having been committed.<sup>49</sup>

3.4 In relation to land issues, while the Commission recommended that the government issue a clear policy that private lands would not be used for settlements by any government agency, no such policy statement has been made thus far. In fact, land appropriation by the military and by government functionaries has continued unabated. Many of these concerns were brought to the attention of the public in the TNA's *Situation Report: North and East Sri Lanka*, tabled in Parliament on 21<sup>st</sup> October 2011.<sup>50</sup> Nevertheless, the IAAC denies any 'policy of forced settlement by the GoSL.'<sup>51</sup> In fact, the IAAC makes no reference to the necessity to issue a clear policy statement that lands would not be used for settlements by any government agency. This was an explicit recommendation by the LLRC, which appears to have been disregarded by the IAAC.

3.5 The LLRC also recommended the disarming of paramilitary groups as a matter of the highest priority. Yet, armed paramilitary groups, such as the Karuna Group and the Eelam People's Democratic Party (EPDP) group, both of which are led by government ministers, continue to carry arms and commit acts of violence with impunity. In its final report, the LLRC expressed concern over the lack of implementation of this interim recommendation as well:

...the Commission strongly reiterates its Interim Recommendation seeking to disarm all illegal armed groups. While the Commission notes that some action has been taken in this regard, it regrets that no conclusive action has been taken. It is essential that conclusive action should be taken to address this issue as part of a time bound and verifiable process. The Commission is of the view that had timely action been taken with regard to the Commission's Interim Recommendations,

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<sup>49</sup> *Report of the Commission of Inquiry on Lessons Learnt and Reconciliation* (November 2011) ['LLRC Report'], at para.5.64

<sup>50</sup> Available at <http://www.tnamediaoffice.blogspot.com/2011/11/situation-report-north-and-east-21.html>.

<sup>51</sup> Inter-Agency Advisory Committee, *The Progress Report on the Implementations of the Interim Recommendations of the LLRC*, at 2.

serious incidents such as the recent attack on the Editor of the *Uthayan* Newspaper may have been averted.<sup>52</sup>

3.6 The failure of the government to implement these modest interim recommendations is telling evidence of the government's unwillingness to take minimal steps to restore a semblance of normalcy in the North and East. Such blatant disregard for the LLRC's interim recommendations, made more than a year ago, establishes an important indicator as to the fate that awaits the LLRC's final recommendations. Hence, failure to implement these modest interim recommendations signals, if not confirms, the government's lack of commitment to implement the Commission's final recommendations.

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<sup>52</sup> LLRC Report, at para.5.78.

## 4. LLRC Final Recommendations

4.1 The final report of the LLRC was released through Parliament on 16<sup>th</sup> December 2011. The report purports to deal with a number of areas including the ceasefire agreement, the security forces operations, humanitarian law issues, human rights, land issues and reconciliation. This section specifically deals with the manner in which the LLRC report approached issues of accountability.

### A. Methodology and Approach

4.2 At the outset, it is apparent that the LLRC disregards credible allegations made against the Government of Sri Lanka with respect to violations of IHL amounting to war crimes and crimes against humanity. These allegations include:

1. Deliberately underestimating civilian numbers in the Vanni in order to deprive them of food and medicine;
2. Deliberately or recklessly endangering the lives of civilians in No-Fire Zones (NFZs);
3. Targeting civilian objects including hospitals; and
4. Executing or causing the disappearance of surrendeers.

4.3 The government is also accused of illegally and arbitrarily detaining a large part of the displaced civilian population, destroying civilian property and means of livelihood, and rendering civilians destitute, all of which are violations of international law. The LLRC does not directly deal with these allegations from the perspective of IHL. Yet, these allegations remain the subject of domestic and international concern.<sup>53</sup>

4.4 It is noted that the LLRC confirms many of the factual allegations relating to civilian deaths, attacks within NFZs, shelling of hospitals and disappearances of surrendeers, which were characterized by the UN Secretary General's Panel of Experts as 'credible' allegations of IHL violations. Yet the findings and observations of the LLRC with respect

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<sup>53</sup> See UN Panel Report, at paras.221-222 and 421-422.

to the four above-mentioned credible allegations against the government are based on a flawed analysis of the law. The LLRC deals with many of these allegations only in a cursory manner, which exposes its true intention: to absolve the government of all responsibility with respect to war crimes and crimes against humanity. Moreover, in cases where strong evidence of violations by the security forces was presented to the Commission, it routinely characterised the crimes as ‘individual’ and ‘isolated’, or concluded that responsibility could not be determined due to lack of evidence.

- 4.5 Two general criticisms may be levelled against the LLRC’s approach and methodology in dealing with the above allegations: (1) the selective application of evidence; and (2) the failure to apply the law to the facts.

**a. Selective Application of Evidence**

- 4.6 The Panel fails to properly assess the factual situation relating to the allegations against the government and consistently places undue reliance on witness testimonies that lack credibility. The Commission sites the evidence of government doctors working in the North and East on at least twenty occasions when attempting to recount the factual situation during the final stages of the war.<sup>54</sup> Incidentally, the doctors – including Dr. S. Sivapalan, Dr. T. Sathiamoorthy, Dr. V. Shanmugarajah and Dr. T. Vartharajah – are quoted extensively without any reference to the context within which these doctors provided testimony to the LLRC. These witnesses provided an immense service to the people of the North and East, particularly during the final stages of the war. However, they were amongst the five doctors who were taken into custody in May 2009 after reporting extensively on civilian casualties, the desperate humanitarian situation, and the shelling of hospitals by government forces from within the NFZs during the final stages of the war. Following their arrests, these doctors recanted their earlier statements on the situation during the final stages of the war after being trotted out on public television whilst still in custody. Thus the

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<sup>54</sup> See for example, LLRC Report, at paras.4.47, 4.89, 4.92, 4.126 and 4.197 – Evidence of Dr. S. Sivapalan before the LLRC at Colombo on 24<sup>th</sup> November 2010; para.4.85, 4.179 and 4.187 – Evidence of Dr. T. Sathiamoorthy before the LLRC at Colombo 19<sup>th</sup> November 2010; paras.4.115, 4.117, 4.136, 4.186, 4.195, 4.209 and 4.212 – Evidence of Dr. V. Shanmugarajah before the LLRC at Colombo on 19<sup>th</sup> November 2010; para.4.127, 4.180, 4.184, and 4.192 – Evidence of Dr. T. Vartharajah before the LLRC at Colombo on 30<sup>th</sup> November 2010.

credibility of the evidence submitted to the LLRC by these doctors was heavily compromised owing to the context within which such evidence was submitted.<sup>55</sup> Yet, the LLRC neither makes reference to the detention of these witnesses nor to the possibility that they were speaking under duress. Hence extensive reliance on witnesses who recanted earlier versions of their experiences and who spent a considerable amount of time in government custody seriously calls into question the LLRC's interpretation of the factual situation.

4.7 This approach is particularly disconcerting given the voluminous evidence that the LLRC could potentially have called for in terms of UAV footage, videos of aerial attacks and military logs – particularly since the military witnesses acknowledged that every attack was videotaped and received the official sanction of the commanders.<sup>56</sup> It is unclear as to why the LLRC chose not to summon military officers to explain at least the attacks that the LLRC itself acknowledges to have taken place during the last stages of the war.<sup>57</sup>

4.8 Moreover, the LLRC appears to have discarded parts of the evidence contained in the representation by Ms. Imelda Sukumar, who served as the Government Agent (GA) for Mullaitivu from 2002 to 12<sup>th</sup> July 2009. For instance, when the Commission questioned her, the GA claimed that approximately 360,000 civilians remained in the NFZ in the Puthumattalan area when she left on 22<sup>nd</sup> January 2009.<sup>58</sup> The LLRC makes only a passing

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<sup>55</sup> See 'Sri Lanka doctors further detained' *BBC Sinhala.com*, 22<sup>nd</sup> July 2009, at [http://www.bbc.co.uk/sinhala/news/story/2009/07/090722\\_doctors\\_detained.shtml](http://www.bbc.co.uk/sinhala/news/story/2009/07/090722_doctors_detained.shtml); PAGE NO LONGER EXISTS Robert Templer, 'War Without End', 21<sup>st</sup> July 2009, *The New York Times*, at <http://www.nytimes.com/2009/07/22/opinion/22iht-edtempler.html>.

<sup>56</sup> LLRC Report, at paras.4.38-4.41.

<sup>57</sup> LLRC Report, at para.4.286. The Commission observes: 'The Commission is faced with similar difficulties in attempting a re-construction of certain incidents involving the loss of civilian lives which have been brought to the attention of the Commission. While the Commission finds it difficult to determine the precise circumstances under which such incidents occurred (as described in Section II above, vide paragraphs 4.106, 4.107, 4.109, 4.110, and 4.111) the material nevertheless points towards possible implications of the Security Forces for the resulting death or injury to civilians, even though this may not have been with an intent to cause harm. In these circumstances the Commission stresses that there is a duty on the part of the State to ascertain more fully, the circumstances under which such incidents could have occurred, and if such investigations disclose wrongful conduct, to prosecute and punish the wrong doers. Consideration should also be given to providing appropriate redress to the next of kin of those killed and those injured as a humanitarian gesture that would help the victims to come to terms with personal tragedy, both in relation to the incidents referred to above and any other incidents which further investigations may reveal.'

<sup>58</sup> *Proceedings of public sittings of the Commission of Inquiry on Lessons Learnt and Reconciliation appointed by His Excellency the President in terms of Section 2 of the Commissions of Inquiry Act, 4<sup>th</sup> November, 2010*, Representation by Ms. Imelda Sukumar, at 5.

reference to this estimate<sup>59</sup> and thereafter concludes that it is unable to confirm the actual number of civilians who were trapped in the Vanni during the final stages of the war – an estimate that remains crucial to dispelling the allegation that the government deliberately underestimated the number of civilians in the Vanni in order to deprive them of food and medicine.

**b. Failure to Apply the Law to the Facts**

- 4.9 The LLRC's overall methodology in examining the facts and applying the law to the facts appears to be deeply problematic. The Commission consistently fails to test the credibility of the evidence it selects to apply. A good example of this failure is the routine acceptance of the evidence provided by the four doctors referred to above. Further, the LLRC also accepts the testimonies of senior government and military officials while making no attempt to verify such evidence by summoning subordinate officers.
- 4.10 The LLRC appears to be preoccupied with examining ambiguities and dilemmas in IHL when it is not clear as to why these ambiguities are even relevant. The main question that the LLRC should have focused on in greater depth is whether the parties to the conflict violated established, fundamental rules of IHL.
- 4.11 The LLRC also fails to rigorously analyse the evidence. In some cases, the LLRC made broad assertions and arrived at concrete conclusions without considering voluminous evidence before it. For example, it arrived at the conclusion that the government did not underestimate the civilian population in the Vanni solely on the basis that the government had cooperated with the International Committee of the Red Cross (ICRC) and the World Food Programme (WFP) in delivering food to the Vanni population.<sup>60</sup>
- 4.12 In other cases, the LLRC fails to draw vital conclusions from the evidence. For example, the LLRC fails to investigate or inquire into the question of government culpability or

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<sup>59</sup> LLRC Report, at para.4.171.

<sup>60</sup> LLRC Report, at para.4.304.

responsibility for crimes admittedly committed by armed paramilitary groups. The nexus between these groups and the government is never questioned. Moreover, the LLRC fails to engage in a legal inquiry into whether the crimes attributable to these groups render the government culpable through any of the established modes of liability in domestic or international law, such as aiding and abetting, conspiracy, joint criminal enterprise or command responsibility. In fact, the LLRC makes no reference whatsoever to the concept of command responsibility in its entire report.

4.13 Hence, the LLRC makes no genuine attempt to apply the law to the facts. It neglects to closely examine the possibilities of violations of IHL and domestic law that are credibly alleged to have been committed.

4.14 A more detailed analysis of this failure is presented in the next section.

## **B. Violations of International Humanitarian Law**

4.15 This section closely examines the LLRC's treatment of the allegations against the government with respect to violations of IHL.

### **a. Starvation of the Civilian Population**

4.16 The LLRC observes that during the final stages of the war, shelling by the LTTE made the transportation of food to the displaced population in the Vanni extremely difficult.<sup>61</sup> Accordingly, '[w]hatever shortages that prevailed during this period, had been mainly due to the absence of unloading facilities, without a proper port and the associated security risks.'<sup>62</sup> The LLRC opines that the government took every effort to supply food and medicine to the people who were trapped in the NFZs. However, it concedes that 'adequacy levels appear to have declined during the months of February, March, April and the first half of May 2009 as the conflict intensified....'<sup>63</sup> The LLRC report presents the

<sup>61</sup> LLRC Report, at para.4.159.

<sup>62</sup> LLRC Report, at para.4.165.

<sup>63</sup> LLRC Report, at para.4.298.

following table<sup>64</sup> in explaining the food delivered via sea route to Puthumattalan, Mullaitivu during this crucial period between 17<sup>th</sup> February 2009 and May 2009.

Food MTs	Food sent by Government (MTs)	WFP (MTs)	Remarks
February 2009	835.00	80.00	Commissioner General of Essential Services (CGES) also sent 1315 L. Vegetable Oil
March 2009	1650.00	1080.00	CGES also sent 24000 packets of milk powder, and 1232 bags of “thripasha”
April 2009	1190.50	1119.00	1049.37 MTs destined for Vanni was diverted to Jaffna due to inaccessibility to the Vanni
May 2009	615.00	50.00	

4.17 This table, however, does not indicate the approximate number of civilians for whom the food was delivered. The LLRC fails to address the central question of whether the government deliberately or recklessly underestimated the population in the Vanni. Instead, the LLRC observes that the material before it provided ‘varying estimates of the number of civilians who were held hostage by the LTTE in the NFZs.’<sup>65</sup> Moreover, despite its ‘best efforts to verify the estimates with documentary evidence from relevant civilian authorities,’<sup>66</sup> the LLRC concedes that it was unable to secure any original documentation with respect to population estimates.

4.18 This statement is facetious given the volume of documentation provided at the time by the GAs in Mullaitivu and Kilinochchi. Most crucial was the evidence provided by Ms. Imelda Sukumar, the GA for Mullaitivu during the final stages of the war.<sup>67</sup> She specifically mentions that approximately 360,000 civilians remained in the NFZ at the point of her departure in January 2009. This figure, she explains, reduced due to some civilians

<sup>64</sup> LLRC Report, at p.91.

<sup>65</sup> LLRC Report, at para.4.304.

<sup>66</sup> *Ibid.*

<sup>67</sup> *Proceedings of public sittings of the Commission of Inquiry on Lessons Learnt and Reconciliation appointed by His Excellency the President in terms of Section 2 of the Commissions of Inquiry Act, 4<sup>th</sup> November, 2010, Representation by Ms. Imelda Sukumar.*



escaping to government-controlled areas. Yet, what remains clear from the GA's testimony is that the figure could not have been as low as the official government estimates.

4.19 Moreover, the LLRC had in its possession detailed statistical data on the population of the Vanni during the time. For instance, the Bishop of Mannar, Rt. Rev. Dr. Rayappu Joseph made detailed representations to the LLRC on the number of civilians trapped in the Vanni during the final stages of the war.<sup>68</sup>

4.20 It is clear that the Commission paid no attention to the voluminous evidence before it confirming that the food intended for the Vanni population was grossly inadequate. Accordingly, the LLRC ought to have inquired into the question of whether the government had deliberately underestimated the number of civilians in the Vanni. The Commission observes: 'the non-availability of such documentation does not have a decisive bearing on the fact that what was practically feasible under the circumstances was undertaken.'<sup>69</sup> This observation clearly demonstrates the Commission's lack of regard for the importance of accurate population estimation in order to avoid major shortages of food. The LLRC emphatically concludes:

The strenuous efforts taken by the Government in coordination with international agencies such as the ICRC and WFP, as described above, does not warrant any possible inference that there was a deliberate intention to downplay the number of civilians in the NFZs for the purpose of starving the civilian population as a method of combat.<sup>70</sup>

4.21 The LLRC appears to ignore evidence of population underestimation by the government. Compelling data on population estimates is presented in the U.S. Department of State report to Congress on *Incidents During the Recent Conflict in Sri Lanka* (2009). The following table accurately depicts the possible extent of the violation, and confirms the

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<sup>68</sup> *Proceedings of public sittings of the Commission of Inquiry on Lessons Learnt and Reconciliation appointed by His Excellency the President in terms of Section 2 of the Commissions of Inquiry Act, 8<sup>th</sup> January 2011-Representations made by the public at District Secretariat, Mannar, LLRC/PS/08-01-11.*

<sup>69</sup> LLRC Report, at para.4.304.

<sup>70</sup> *Ibid.*

seriousness of the allegations against the government with respect to the deliberate starvation of the Vanni population.<sup>71</sup>

Month	GSL pop. (estimate)	Food needs (MTs)	Food delivered (MTs)	Accum Food deficit	International pop. estimate <sup>72</sup>	Food needs (MTs)	Food delivered (MTs)	Accum Food deficit
February	70,000	980	150	-830	250,000	3500	150	-3350
March	50,000	775	1080	-525	230,000	3565	1080	-5835
April	50,000	775	1119	-181	150,000	2325	1119	-7041
May (20 days)	20,000	200	50	-331	80,000	720	50	-7711

4.22 According to the U.S. State Department, there were numerous reports that the food shortage during the final four months of the conflict resulted in deaths due to starvation.<sup>73</sup> Hence, the LLRC ought to have dealt with the unavoidable questions of (1) whether the government had underestimated the population in the Vanni, and (2) whether such underestimation was deliberate and for the purpose of starving the population.

4.23 The U.S. State Department figures are consistent with a report published on 13<sup>th</sup> December 2009 by the University Teachers for Human Rights (Jaffna).<sup>74</sup> The report carefully documents the various estimates of the government with respect to the Vanni population during the final stages of the war. On 4<sup>th</sup> November 2008, the GAs of Mullaitivu and Kilinochchi estimated the total displaced population to be 348,103. Yet, the official government estimation during the time was reported to be much lower – approximately 100,000.<sup>75</sup> By early March 2009, approximately 37,000 civilians had escaped to government-controlled areas. Thereafter, the government estimated the number of civilians

<sup>71</sup> U.S. Department of State report, *Report to Congress on Incidents During the Recent Conflict in Sri Lanka* (2009), at 50. According to the report, ‘Food needs and deficit estimates are based upon the estimation of several organizations that one MT of food per day is needed for 2000 IDPs.’

<sup>72</sup> *Ibid.*

<sup>73</sup> *Ibid.* at 53-58.

<sup>74</sup> University Teachers for Human Rights (Jaffna), *Let Them Speak: Truth about Sri Lanka's Victims of War*, Special Report No: 34 (December 2009). See Part V - The Population Game: Disappeared on Paper and Killed with Cannon.

<sup>75</sup> *Ibid.* at section 5.1.

remaining in the Vanni to be 70,000. Yet as many as 103,000 civilians were said to have escaped to government-controlled areas from 20<sup>th</sup> to 22<sup>nd</sup> April 2009, which was 33,000 more than the government's estimation. On the morning of 30<sup>th</sup> April 2009, the Ministry of Defence claimed that only 15,000 to 20,000 people were left in the NFZ.<sup>76</sup> This figure also appeared to be a gross underestimation, as the IDP count in camps on 28<sup>th</sup> April 2009 was 172,000, whereas this figure increased to 290,000 on 25<sup>th</sup> May 2009 – presumably due to the fact that over 100,000 persons had come out of the conflict zone. The increase in this figure confirmed that more than 100,000 people remained in the NFZ after the April 20<sup>th</sup> to 22<sup>nd</sup> exodus.

4.24 Customary International Humanitarian Law (CIHL) is unambiguous on the prohibition of using starvation of a civilian population as a method of warfare.<sup>77</sup> In the circumstances, the allegation of deliberate underestimation of the civilian population in order to deprive civilians of food and medicine ought to have received more serious attention in the LLRC report. For instance, as early as September 2008, then Secretary to the Ministry of Foreign Affairs, Dr. Palitha Kohona maintained that the international community was 'exaggerating' the population figures in the Vanni. He contended that the figure was in the 'thousands' rather than in the 'hundreds of thousands'.<sup>78</sup> This estimate turned out to be a gross underestimation of the displaced population in the Vanni and ought to have received the attention of the LLRC.

4.25 The LLRC ought to have examined the numerous news updates and situation reports published by the Ministry of Defence, which appeared to grossly underestimate the population figures in the Vanni. For example, in mid-February 2009, the Ministry of Defence expressly stated that only 50,000-70,000 civilians remained in the war zone,<sup>79</sup> when in fact international aid organisations estimated the population to be more than three times that number.

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<sup>76</sup> See Ministry of Defence, *58 Div troops close-in on LTTE: hostage rescue operation enters final phase*, 30<sup>th</sup> April 2009, at [http://www.defence.lk/new.asp?fname=20090430\\_08](http://www.defence.lk/new.asp?fname=20090430_08).

<sup>77</sup> See Rule 53 of the ICRC Study, at [http://www.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule53](http://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule53).

<sup>78</sup> See Interview of Dr. Palitha Kohona conducted by OMNI 2 News, Canada on 1<sup>st</sup> September 2008, available at [http://www.youtube.com/watch?v=5\\_c-Ieq6Mes](http://www.youtube.com/watch?v=5_c-Ieq6Mes).

<sup>79</sup> See Ministry of Defence, *Civilian Safety is the top priority - Defence Secretary*, 17<sup>th</sup> February 2009, at [http://www.defence.lk/new.asp?fname=20090217\\_04](http://www.defence.lk/new.asp?fname=20090217_04).

4.26 Importantly, the LLRC does not examine the alleged role played by the then Commissioner General of Essential Services in blocking essential food and non-food aid to the Vanni, which was specifically requested by the GAs of the region. In a letter to the GAs of Vavuniya, Mullaitivu and Kilinochchi dated 20<sup>th</sup> November 2008, the Commissioner General of Essential Services, S.B. Divaratne stated the following:

It has been noted, that most of the INGOs and some UN Agencies requesting humanitarian assistances to be transported to Wann, are based on the request made by you...You, I believe, are more familiar with the untiring efforts of the government of Sri Lanka in this regard, than anyone else. Therefore, you are kindly requested to refrain from making any requests for food and non-food assistance from these organizations in future. All your requirements should be processed through the Commissioner General of Essential Services, even in the event of any urgent necessity.

4.27 This letter, if authentic, is evidence of a systematic effort on the part of the government to prevent the GAs of the Vanni from seeking outside assistance to feed a potentially starving population. Incidentally, the letter is copied to senior government officials including the then Senior Advisor to the President, Basil Rajapaksa, and the Defence Secretary, Gotabaya Rajapaksa. Hence government responsibility for the subsequent deaths by starvation that are alleged to have taken place in the Vanni may be established, if the letter was in fact authentic. Neither the contents nor the authenticity of this letter is considered by the LLRC.

4.28 The failure to examine this allegation against government officials – which, if proven, amounts to a grave breach of IHL – casts serious aspersions on the credibility of the LLRC.

**b. Targeting Civilians within the NFZs**

4.29 At the outset, it is strongly emphasised that the issue of NFZs does not change the core obligation of the government with respect to the protection of civilians. The government is

not accused of failing to respect the NFZs *per se*. The real crux of the allegations against the government is that, notwithstanding the existence or otherwise of legally recognised NFZs, the government violated IHL applicable under the common regime of law, i.e. the law applicable to all situations of war, as opposed to the law specifically applicable to NFZs. Moreover, it is noted that the allegations against the government are not limited to the targeting of civilians in NFZs, but in fact extend to the targeting of civilians in ordinary civilian populated areas. The full extent of such allegations is, however, not specifically dealt with by the LLRC.

4.30 In the circumstances, the general corpus of IHL would be applicable and forms the standards by which the actions of both parties are ultimately judged. Bearing this central caveat in mind, the analysis of the LLRC with respect to the issue of targeting civilians within the NFZs is examined in detail below.

4.31 The LLRC report addresses the allegation against the government with respect to targeting civilians and civilian objects in the three NFZs that the government unilaterally declared during the final stages of the war. The Sri Lankan experience is characterised as ‘unprecedented’,<sup>80</sup> as the LTTE had ‘no intention whatsoever of agreeing to a negotiated declaration of such zones providing for civilian protection.’<sup>81</sup> There is credible evidence that the LTTE endangered the lives of civilians within the NFZs. To this extent, the LLRC observes: ‘[t]he situation had become complicated by the fact that the LTTE had moved into the NFZ together with their heavy weapons and placed them amidst civilians. This had converted the NFZ into a virtual operational base from which the LTTE had directed fire against the Security Forces.’<sup>82</sup>

4.32 Yet the LLRC arrives at a flawed conclusion regarding the consequences of the LTTE’s actions within the NFZs. It concludes: ‘the State and Field Commanders [of the Sri Lanka armed forces] [we]re faced with the dilemma of protecting civilians on the one hand and

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<sup>80</sup> LLRC Report, at para.4.334.

<sup>81</sup> *Ibid.*

<sup>82</sup> LLRC Report, at para.4.268.

neutralizing the enemy fire power emanating from within the NFZ, on the other.’<sup>83</sup> IHL, however, governs this so-called ‘dilemma’, and provides a clear answer with respect to the obligations of the State.

4.33 One major lapse on the part of the LLRC is its failure to adequately discuss the IHL definition of civilians and civilian objects. The Commission observes:

From a legal perspective, the critical failure of the Protocols to provide a precise definition of the term “civilian”, “civilian population” and a similar lack of clarity with regard to the term “take a direct part in hostilities” has contributed to a substantial degree of ambiguity, leaving, vital terms which have a bearing on core IHL principles such as the Principle of Distinction...to be dealt with largely on a case by case basis. This aspect assumes a heightened degree of uncertainty in the context of the complexities involved and the challenges posed by the very nature of non-international armed conflicts involving non State armed groups. It is often the case that the non State armed groups do not intentionally, as a matter of strategy distinguish themselves from the civilian population and conceal their identity among the civilians until the very moment of attack, placing civilians in peril. This leads to a position where the civilian, either willingly or in some cases unwillingly, becomes part and parcel of an overall combat strategy of the non State armed groups, and thereby placing at risk the protection the civilian is entitled under IHL.<sup>84</sup>

4.34 It is simply not true that the definition of civilians is unclear in IHL applicable to non-international armed conflicts. The LLRC ought to have elaborated upon the definition of direct or continuous participation in hostilities and its implication on the Principle of Distinction.

4.35 In this respect, the analysis by the UN Secretary General’s Panel of Experts is authoritative. The Panel observes that IHL specifically prohibits attacks on civilians and civilian

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<sup>83</sup> LLRC Report, at para.4.334.

<sup>84</sup> LLRC Report, at para.4.5.

objects.<sup>85</sup> The Panel specifically addresses more ‘complicated’ situations where combatants mingle with civilians within protected zones. It cites the International Criminal Tribunal for the Former Yugoslavia (ICTY), which has held that the absolute ban on attacks against civilians extends to a population that is ‘predominantly civilian’,<sup>86</sup> and that ‘the presence within the civilian population of individuals who do not come within the definition of civilians [i.e. combatants] does not deprive the population of its civilian character.’<sup>87</sup> Several other authoritative statements by the ICTY may also be cited in this regard. In *Strugar*, the Trial Chamber of the ICTY held:

As regards the notion of civilians, the Chamber notes that members of the civilian population are people who are not taking any active part in the hostilities, including members of the armed forces who laid down their arms and those persons placed hors de combat by sickness, wounds, detention or any other cause.<sup>88</sup>

#### 4.36 Similarly in *Galic*, the ICTY Trial Chamber opined:

For the purpose of the protection of victims of armed conflict, the term ‘civilian’ is defined negatively as anyone who is not a member of the armed forces or of an organized military group belonging to a party to the conflict. It is a matter of evidence in each particular case to determine whether an individual has the status of civilian.<sup>89</sup>

#### 4.37 The uncertainty on the exact degree of involvement of LTTE members, whether in continuous combat function or in direct participation in hostilities, does not mean that the definition of direct participation in hostilities is not clearly recognised in customary

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<sup>85</sup> UN Panel Report, at para.196. See Rule 7 of the ICRC Study, at [http://www.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule7](http://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule7).

<sup>86</sup> *Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1-A (ICTY Appeals Chamber), Judgment, 12<sup>th</sup> November 2009, at paras.50-51, citing *Prosecutor v. Stanilav Galic*, (ICTY Appeals Chamber), Judgment, 20<sup>th</sup> November 2006, at para.144, and *The Prosecutor v. Dario Kordic and Mario Čerkez*, Case No. IT-95-14/2-A, (ICTY Appeals Chamber), 17<sup>th</sup> December 2004, at para.50.

<sup>87</sup> *Prosecutor v. Kordic et al.*, (ICTY Appeals Chamber), op. cit., at para.50; *Prosecutor v. Stanilav Galic (Trial Judgment and Opinion)*, IT-98-29-T, (ICTY Trial Chamber), 5<sup>th</sup> December 2003, at para.50.

<sup>88</sup> *Prosecutor v. Pavle Strugar (Trial Judgment)*, IT-01-42-T, (ICTY Trial Chamber), 31<sup>st</sup> January 2005, at para.282.

<sup>89</sup> *Prosecutor v. Galic*, (ICTY Trial Chamber), op. cit., at para.47.

international law.<sup>90</sup> In fact a clear definition has been applied by the ICTY and the International Criminal Tribunal for Rwanda (ICTR), and is detailed in the ICRC's interpretive guidance on direct participation in hostilities.<sup>91</sup>

4.38 The ICRC, in its interpretation on 'continuous combat function' observes:

In non-international armed conflicts such as civil wars, organized armed groups constitute the armed forces of a non-State party to the conflict. It can be difficult to tell the difference between members of organized armed groups and the civilian population. Civilians support insurgencies in many different ways including, at times, by directly participating in hostilities in a spontaneous, sporadic or unorganized way. **However, civilians cannot be regarded as members of an organized armed group unless they assume a "continuous combat function,"** i.e. unless they assume continuous function involving their direct participation in hostilities (emphasis added).<sup>92</sup>

4.39 The ICRC study on CIHL also deals with the issue of doubts over civilian status in its commentaries on Rule 6 of CIHL.<sup>93</sup> The commentaries clearly recommend that in the case of doubt, the solution is the same as for international armed conflict:

In the case of non-international armed conflicts, the issue of doubt has hardly been addressed in State practice, even though a clear rule on this subject would be desirable, as it would enhance the protection of the civilian population against attack. In this respect, the same balanced approach as described above [i.e. as discussed under Rule 6] with respect to international armed conflicts seems justified in non-international armed conflicts.

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<sup>90</sup> See Rules 5 and 6 of ICRC Study, at [http://www.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule5](http://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule5) and [http://www.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule6](http://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule6).

<sup>91</sup> International Committee of the Red Cross (ICRC), *Interpretive guidance on the notion of direct participation in hostilities under international humanitarian law* (May 2009), at: <http://www.unhcr.org/refworld/docid/4a670dec2.html>.

<sup>92</sup> See International Committee of the Red Cross (ICRC), *Direct participation in hostilities: questions & answers*, at <http://www.icrc.org/eng/resources/documents/faq/direct-participation-ihl-faq-020609.htm>.

<sup>93</sup> See Rule 6 of ICRC Study, at [http://www.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule6](http://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule6).



4.40 Accordingly, it is clear that whoever does not fulfill the criteria of direct participation in hostilities is a ‘civilian’. Therefore, there is no justification as to why the criteria that have been adopted to define the concept of ‘direct participation of hostilities’ are not applicable to the Sri Lankan situation. Thus, the LLRC fails to justify why the situation in Sri Lanka would render the acknowledged categories of IHL irrelevant.

4.41 The UN Secretary General’s Panel of Experts also cites CIHL, which prohibits parties from directing attacks on a zone established to shelter the wounded, the sick and the civilians from the effects of hostilities.<sup>94</sup> Moreover, the ICTY has clearly held:

The presence of certain non-civilians among the targeted population does not change the character of that population. It must be of a ‘predominantly civilian nature’.<sup>95</sup>

4.42 Yet the LLRC’s analysis of the actions of the armed forces within the NFZ runs contrary to the norms established by CIHL. The Commission observed, wrongly, that the conduct of the LTTE had ‘radically transformed the very character of the NFZ.’<sup>96</sup> Moreover, it was contended that the LTTE’s actions would have constituted a material breach of an agreement pertaining to the NFZs had the zones been established following the general practice in inter-state conflicts.<sup>97</sup> In those circumstances, the government ‘would have been entirely justified in terminating the agreement and ceasing the protection afforded to the NFZ....’<sup>98</sup> Applying these principles to the situation at hand, the Commission concludes that ‘the Security Forces had been compelled to resort to return fire in response to LTTE attacks from within the NFZ, thereby exposing the civilians being held hostage by the LTTE in the NFZ to danger.’<sup>99</sup> Hence, the picture painted by the Commission with respect to the government’s actions is one arising purely out of necessity and reasonable self-

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<sup>94</sup> See Rule 35 of ICRC Study, at [http://www.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule35](http://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule35).

<sup>95</sup> *Strugar* (ICTY Trial Chamber), op. cit., at para.282.

<sup>96</sup> LLRC Report, at para.4.274.

<sup>97</sup> *Ibid.*

<sup>98</sup> *Ibid.*

<sup>99</sup> LLRC Report, at para.4.269.

defence. In one solitary sentence, the Commission proceeds to disregard all allegations that government initiated attacks within the NFZ:

It further transpired from these and other representations that the Army had never initiated attacks in the Safety Zones and return fire was in response to LTTE attacks.<sup>100</sup>

4.43 This analysis is flawed for two reasons. First, as mentioned above, it ignores established IHL principles that apply to complicated situations of this nature. The UN Secretary General's Panel of Experts carefully analyses the argument that the Sri Lankan Army did not intend to make the civilian population the object of attack, but instead aimed to neutralise the LTTE. Citing a landmark decision of the International Criminal Court,<sup>101</sup> the Panel concludes that 'an attack remains unlawful if it is conducted simultaneously at a lawful military object and an unlawfully-targeted civilian population.'<sup>102</sup> Hence the simultaneous nature of any attack needed to be more closely examined by the LLRC.

4.44 Second, the LLRC's preferred narrative of 'retaliation to LTTE attacks' is an unreasonable generalisation that fails to tally with numerous accounts by victims of the conflict. One witness who made representations in at Kandawalai Divisional Secretariat claimed that the Sri Lanka Broadcasting Corporation announced on 2<sup>nd</sup> or 3<sup>rd</sup> February 2009 that Suthanthirapuram was a safe place. After civilians moved there, shell attacks killed nine members of one family. The witness claimed that approximately 300 people were subject to continuous shelling by *both* sides.<sup>103</sup> The LLRC in fact mentions this specific representation<sup>104</sup> but leaves out the reference to the Sri Lanka Broadcasting Corporation. Moreover, the witness's narrative does not suggest the close proximity of any LTTE gun

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<sup>100</sup> LLRC Report, at para.4.271.

<sup>101</sup> *Prosecutor v. Katanga*, ICC-01/04-01/07 (ICC Pre-Trial Chamber I), Decision on the confirmation of charges, 30<sup>th</sup> September 2008, at para.273.

<sup>102</sup> UN Panel Report, at para.199.

<sup>103</sup> See *Proceedings of public sittings of the Commission of Inquiry on Lessons Learnt and Reconciliation appointed by His Excellency the President in terms of Section 2 of the Commissions of Inquiry Act*, 19<sup>th</sup> September 2010, *Representations made by the public at Kandawalai Divisional Secretariat*, LLRC/FV/19.09.10/01.

<sup>104</sup> LLRC Report, at para.4.55.

positions to the location of the civilians. The narrative instead reveals an indiscriminate bombing of an area that was previously announced on national radio to be a 'safe area'.

4.45 Another crucial account that the LLRC does not deal with is the attack on the United Nations hub at the Suthanthirapuram junction inside the first NFZ. According to evidence reviewed by the UN Secretary General's Panel of Experts, on 23<sup>rd</sup> and 24<sup>th</sup> January 2009, the Sri Lanka Army continuously shelled the area in which the UN had established the hub.<sup>105</sup> It was mentioned that the coordinates of the hub had been relayed to the Vanni commander of the Sri Lanka Army. According to the evidence presented to the Panel, '[a] large number of civilians also relocated to the NFZ and set up their shelters around the United Nations hub' and the Additional GA had established a food distribution centre nearby.<sup>106</sup> The Panel recounts:

In the early morning hours of 24 January, hundreds of shells rained down in the NFZ. Those with access to the United Nations bunker dove into it for protection, but most IDPs did not have bunkers and had nowhere to seek cover. People were screaming and crying out for help. The United Nations security officer, a highly experienced military officer, and others present discerned that the shelling was coming from the south, from SLA positions. He made frantic calls to the head of United Nations Security in Colombo and the Vanni Force Commander at his headquarters in Vavuniya as well as the Joint Operations Headquarters in Colombo, demanding that the shelling stop, which sometimes resulted in a temporary adjustment of the shelling before it started again. Heavy shelling continued over night, and shells continued to hit the United Nations hub and the distribution centre, killing numerous civilians [*sic*].<sup>107</sup>

4.46 The gruesome details of what the UN staff discovered on the morning of 24<sup>th</sup> January 2009 as they emerged from their bunkers is presented in the next paragraph of the Panel's report. Crucially, the Panel's account dispels the generalisation that all attacks by the Sri Lanka Army within the NFZ were necessarily responses to LTTE attacks. The Panel observes:

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<sup>105</sup> UN Panel Report, at para.83.

<sup>106</sup> *Ibid.*

<sup>107</sup> UN Panel Report, at para.84.

Although LTTE cadre were present in the NFZ, there was no LTTE presence inside the United Nations hub. The LTTE did fire artillery from approximately 500 metres away as well as from further back in the NFZ, but the **area where the United Nations was based was very clearly civilian**. The Government never gave an explanation for its shelling of the United Nations hub, which was the only international presence in the NFZ (emphasis added).<sup>108</sup>

4.47 This account reveals that the LLRC categorically failed to examine the entirety of the evidence with respect to government shelling of the NFZs. The Commission instead concludes:

There was no material placed before the Commission suggesting any policy or incident of deliberately targeting civilian concentrations in the NFZs or elsewhere by the Security Forces, except for three incidents described by three persons: One alluded to by an LTTE inmate at the Boossa Camp and two incidents of alleged Navy fire, described by civilians who appeared before the Commission.<sup>109</sup>

4.48 On the one hand, incidents similar to the shelling of the UN hub may not have been brought to the LLRC's attention, perhaps owing to the gross inadequacy of the time spent in the North and East to gather evidence. On the other hand, the LLRC has been generally selective in its consideration of evidence, preferring to cite only anecdotes that support its premeditated conclusion:

On consideration of all facts and circumstances before it, the Commission concludes that the Security Forces had not deliberately targeted the civilians in the NFZs, although civilian casualties had in fact occurred in the course of crossfire...It would also be reasonable to conclude that there appears to have been a *bona fide* expectation that an attack on LTTE gun positions would make a

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<sup>108</sup> UN Panel Report, at para.85.

<sup>109</sup> LLRC Report, at para.4.352. Also see Representations made by civilians at Kudathanai East on 13<sup>th</sup> November 2010. Transcript No. LLRC/FV/13.11.10/01 and at Mullaitivu on 20<sup>th</sup> September 2010, Transcript No. LLRC/FV/20.09.10/01.

relevant and proportional contribution to the objective of the military attack involved.<sup>110</sup>

4.49 Additionally, the LLRC concludes that the actions of the security forces complied with the Principle of Proportionality.<sup>111</sup> It opines: ‘[g]iven the complexity of the situation that presented itself as described above, the Commission after most careful consideration of all aspects, is of the view that the security forces were confronted with an unprecedented situation when no other choice was possible and all “feasible precautions” that were practicable in the circumstances had been taken.’<sup>112</sup> This analysis is deeply flawed, as it fails to hold the government to the standards expected of it under IHL. It fails to take account the fundamental principle of avoiding civilian harm. Hence, any notion of military advantage including defense of the troops must be weighed against the loss of civilian lives. The LLRC reaches its conclusion that attacks were proportionate without applying the test of weighing anticipated military advantage vis-à-vis civilian loss. It is pertinent to note that this test could not have been adequately performed without a reasonable estimate of civilian casualties caused due to each attack – an estimate that the LLRC concedes it is reluctant to make.

4.50 The government certainly had the means to comply with the Principle of Distinction, one of the cornerstones of IHL. As specifically highlighted by the LLRC, UAVs were specially used in ‘real time mode’ in order to monitor the movements of the civilians and avoid civilian casualties.<sup>113</sup> The ‘real time’ surveillance of the conflict zone indicates that the security forces had the necessary means to distinguish between civilians and combatants in order to carry out concentrated attacks, thereby minimising civilian casualties. Leaving aside the legality of carrying out such attacks within specially protected zones, it is noted that only concentrated attacks with minimal civilian casualties could have ensured compliance with the Principle of Proportionality.

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<sup>110</sup> LLRC Report, at para.4.282.

<sup>111</sup> LLRC Report, at para.4.283.

<sup>112</sup> *Ibid.*

<sup>113</sup> LLRC Report, at para.4.41.

4.51 The UN Secretary General's Panel of Experts concludes that the government clearly failed to comply with the Principle of Proportionality, particularly with respect to attacking the second and third NFZs. The Panel observes:

Broadly speaking, once both the civilian population and the LTTE were confined to the very limited spaces of the second and third NFZs, the LTTE was no longer mobile as an armed force, and more precise means to defeat the LTTE than barrages of widely-spread artillery and mortar attacks could and should have been employed in order to ensure respect for international humanitarian law.<sup>114</sup>

4.52 The LLRC suggests that the government had 'restricted' the use of heavy weapons with the establishment of the NFZs.<sup>115</sup> However, the actual claim made by the government both on 27<sup>th</sup> February 2009 and 27<sup>th</sup> April 2009 was that the security forces had been instructed to cease the use of heavy artillery within the NFZs.<sup>116</sup> Moreover, in an interview on *BBC HARDtalk* dated 2<sup>nd</sup> March 2009, Minister for Disaster Management and Human Rights, Mahinda Samarasinghe responded to a question on the justifiability of using heavy weapons. The Minister stated:

There is absolutely no justification to use heavy weapons and, in fact, about ten days ago, the armed forces took a conscious decision not to use any heavy weapons. We have not been using heavy weapons; we are fighting man-to-man, door-to-door and street-to-street. This is the way that we are going to ensure that terrorism is wiped out because, as you know, the LTTE is now restricted in fact to a very small area of about 48 sq. km. and we cannot use heavy weapons.<sup>117</sup>

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<sup>114</sup> UN Panel Report, at para.317.

<sup>115</sup> LLRC Report, at para.4.282.

<sup>116</sup> See Official website of the Government of Sri Lanka, <http://www.priu.gov.lk/>, 'President reiterates Govt's cautious approach to avoid civilian casualties', 27<sup>th</sup> February 2009; and 'Combat Operations reach conclusion-Government', 27<sup>th</sup> April 2009. Both these articles have been removed from the website, but may be traced through alternative Internet sources.

<sup>117</sup> See Transcript of Interview on 'BBC HARDtalk' with Mahinda Samarasinghe MP, Minister of Disaster Management and Human Rights of the Government of Sri Lanka, Interviewed by Stephen Sackur on 2<sup>nd</sup> March 2009 (broadcast on BBC World News on 3<sup>rd</sup> and 4<sup>th</sup> March 2009), available at [www.slembassy-qatar.com](http://www.slembassy-qatar.com).

4.53 It is noted that the government declared the second NFZ on 12<sup>th</sup> February 2009.<sup>118</sup> Hence the Minister's reference to a decision to cease the use of heavy weapons coincided with the declaration of the second NFZ.

4.54 In any event, the LLRC fails to adequately deal with the allegation against the government pertaining to the disproportionate use of force within the NFZs. It also fails to consider the views of the UN Panel of Experts that 'more precise means' should have been used as alternatives to heavy weapons in order to minimise civilian casualties.

4.55 The countless anecdotal testimonies referenced in the UN Secretary General's Expert Panel Report, as well as some accounts of witnesses who came before the LLRC, confirm the continued use of heavy weaponry within the NFZs and suggest that civilian casualties did in fact take place as a result of the indiscriminate use of these weapons.

4.56 Instead of citing from the rich jurisprudence of the International Criminal Court, the ICTY and the ICTR, the LLRC chooses to cite an obscure and irrelevant precedent set in 1990 by the International Centre for the Settlement of Investment Disputes<sup>119</sup> to arrive at the following conclusion:

It would also be pertinent in this context to recall that, in determining questions of State responsibility in respect of death, injury or property damage in the course of military operations, international tribunals referring to doctrinal authorities, have described as "next to impossible", the obtaining of a re-construction in front of a tribunal of all the conditions under which the "combat action" took place with an adequate reporting of all accompanying circumstances.<sup>120</sup>

4.57 The LLRC consistently uses arguments of this nature to deflect credible allegations that the government used disproportionate force within the NFZs. The Commission ought to have

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<sup>118</sup> See Ministry of Defence, 'No fire zone' declared further facilitating civilian safety', 12<sup>th</sup> February 2009, at [http://www.defence.lk/new.asp?fname=20090212\\_09](http://www.defence.lk/new.asp?fname=20090212_09).

<sup>119</sup> *In the matter of arbitration between Asian Agricultural Products Ltd (AAPL) v. Republic of Sri Lanka*, International Centre for the settlement of investment disputes (ICSID), Case No. ARB/87/3, 27<sup>th</sup> June 1990.

<sup>120</sup> LLRC Report, at para.4.285.

considered the authoritative jurisprudence of the ICTY. In *Kordic and Čerkez*, the ICTY held:

It is...accepted that attacks aimed at military objectives, including objects and combatants, may cause ‘collateral civilian damage.’ International customary law recognises that in the conduct of military operations during armed conflicts a distinction must be drawn at all times between persons actively taking part in the hostilities and civilian population and provides that the civilian populations as such shall not be the object of military operations, and every effort be made to spare the civilian populations from the ravages of war, and all necessary precautions should be taken to avoid injury, loss or damage to the civilian population. Nevertheless, international customary law recognises that this does not imply that collateral damage is unlawful per se.<sup>121</sup>

4.58 Moreover, in *Galic*, the ICTY Trial Chamber made certain crucial observations with respect to the Principle of Proportionality. In the absence of any reference to this jurisprudence in the LLRC report, it is important that the entirety of the ICTY’s conclusions on the subject is reproduced:

The practical application of the principle of distinction requires that those who plan or launch an attack take all feasible precautions to verify that the objectives attacked are neither civilians nor civilian objects, so as to spare civilians as much as possible. Once the military character of a target has been ascertained, commanders must consider whether striking this target is ‘expected to cause incidental loss of life, injury to civilians, damage to civilian objectives or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.’ **If such casualties are expected to result, the attack should not be pursued.** The basic obligation to spare civilians and civilian objects as much as possible must guide the attacking party when considering the proportionality of an attack. In determining whether an attack was proportionate it is necessary to examine whether a reasonably well-informed person in the circumstances of the actual perpetrator, making reasonable use of the information available to him or

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<sup>121</sup> *The Prosecutor v. Dario Kordic and Mario Čerkez*, (Appeals Chamber), op. cit., at para.52.



her, could have expected excessive civilian casualties to result from the attack. The Trial Chamber considers that certain apparently disproportionate attacks **may give rise to the inference that civilians were actually the object of attack**...As suggested by the Defence, the parties to a conflict are under an obligation to remove civilians, to the maximum extent feasible from the vicinity of military objectives and to avoid locating military objectives within or near densely populated areas. However, **the failure of a party to abide by this obligation does not relieve the attacking side of its duty to abide by the principles of distinction and proportionality when launching an attack** (emphasis added).<sup>122</sup>

4.59 The unilateral declaration of the NFZs by the government appears to be deeply problematic in terms of its objectives and location.<sup>123</sup> The LLRC does not examine in any detail the causal link between the unilateral declaration of the NFZs, which amounted to an active encouragement of civilians to congregate within a given zone, and the subsequent bombardment of those very zones. In this regard, the actual declaration of the NFZs by the government seriously exposed civilians to subsequent harm. Importantly, the government unilaterally declared not just one, but three NFZs, notwithstanding the LTTE's widely known policy of mingling with civilians. Armed with this knowledge, it is difficult to maintain that the government was completely unaware of the imminence of carrying out attacks within the NFZs – and the civilian casualties such attacks would cause – at the time of unilaterally demarcating the zones as 'No-Fire'.

4.60 The LLRC alludes to the above causal link in its observation: 'by unilateral declaration of a No Fire Zone, the government *unwittingly* provided the LTTE an opportunity to consolidate itself amongst the civilian enclave for strategic purposes' (emphasis added).<sup>124</sup> It is astonishing that the Commission would choose to make this observation given the fact that the LTTE strategically mingled with the civilian population within the NFZs not once but on three occasions. Hence, even if the government 'unwittingly' provided the space for the LTTE to mingle with civilians when declaring the first NFZ, it could not be held out

<sup>122</sup> *Prosecutor v. Galic*, (ICTY Trial Chamber), op. cit., at para.58.

<sup>123</sup> LLRC Report, at para.4.335.

<sup>124</sup> *Prosecutor v. Kordic et al.*, (ICTY Appeals Chamber), op. cit., at para.50; *Prosecutor v. Galic*, (ICTY Trial Chamber), op. cit., at para.50.

that the government was unaware of the same likelihood when declaring the second and third NFZs. In the circumstances, the unilateral declaration of the second and third NFZs, and the active encouragement of civilians to move to these zones, are deeply problematic. In fact, it could be easily inferred that the government was, at the time of declaring the second and third zones, well aware of the likelihood that civilians would be seriously exposed to harm. This inferred awareness – described as a ‘cynical manipulation’<sup>125</sup> by the UN Secretary General’s Panel of Experts – gives credence to the allegation that the government deliberately or recklessly lured civilians into harm’s way i.e. by repeatedly declaring NFZs with the knowledge that such zones would be subsequently attacked due to the LTTE’s presence within them. The perceived refusal of the LLRC to carefully examine this issue is a serious lapse on its part.

4.61 Considering the foregoing analysis, the LLRC’s overall assessment of the allegations against the government reveals a fatal contradiction, which requires further reflection.

4.62 On the one hand, the LLRC accepts the government’s position that it meticulously monitored attacks carried out within the NFZs. The government’s narrative reveals that the military command was intimately aware of the nature and location of the target of each and every attack that took place within the NFZs and that every effort was taken to distinguish between civilians and the LTTE *before* the attack was carried out. The relevant paragraphs of the LLRC report that detail the procedure adopted by the government before an attack was carried out is worth reproducing:

The requirement for the proper identification of military targets and minimizing of civilian casualties is a cornerstone of the Principle of Distinction between civilians and combatants. In this context it has been stated before the Commission that Special Forces personnel had been deployed on long range reconnaissance patrols and given the specific task of ascertaining, confirming or reconfirming LTTE targets that had been given by the Directorate of Military Intelligence or the Sri Lanka Air Force Intelligence. It was further stated that these personnel had, in small groups, penetrated through LTTE defenses and had provided accurate

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<sup>125</sup> UN Panel Report, at para.205.

information with the help of Global Positioning Systems (GPS) and other sophisticated means. It was pointed out that through this process, the Security Forces had been able to clearly identify the LTTE targets and thereby avoid or minimize civilian casualties.<sup>126</sup>

Elaborating on the procedure followed by the Sri Lanka Air Force in carrying out air strikes, it was stated before the Commission that any air strike consequent to requests from the Intelligence branches of the Security Forces or the Ground Troops, had to be carried out only after following well laid out procedures. It was stated that when a target was planned, not only normal digital maps, but also aerial photographs had been used. Furthermore, it was stated that a thorough survey of the area of the target had been carried out by utilizing Unmanned Aerial Vehicles (UAVs). Beechcraft had also been deployed in the target area, in order to ascertain that civilians were not present in the location or to avoid protected places such as hospitals, kovils and churches etc. It was explained that air strikes could only be carried out with the approval of the Air Force Commander.<sup>127</sup>

4.63 The LLRC also heard the evidence of the Commander of the Air Force, which further revealed the meticulous planning that went into each attack. The Commission recounts:

He stated that the LTTE targets were observed for at least one week before initiating action. He explained the procedure as follows: “DMI (Director, Military Intelligence) confirmation, revalidation, day recce, night recce. We match our weapons to the target and then my approval is obtained, the air crew is briefed and then engagement under observation of the UAV or any other surveillance asset that we decide to use ...” He also went on to state “sometimes some of the targets – we know very well that there are certain terrorist leaders hiding here; there is a training camp there – but we had to stop operations, and wait without taking those targets because there were civilian habitations close to these targets...”<sup>128</sup>

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<sup>126</sup> LLRC Report, at para.4.37.

<sup>127</sup> LLRC Report, at para.4.39.

<sup>128</sup> LLRC Report, at para.4.40.

4.64 The LLRC presents this evidence in order to examine ‘the procedure adopted to engage identified LTTE targets in the No Fire Zone in the case of LTTE attacks’.<sup>129</sup> Hence the procedure cited by the Commission, i.e. Situation report from ground troops, identification of personnel with weapons only, UAV missions with help of SLAF, and target acquisition on precision guided mechanism,<sup>130</sup> was applicable to all divisions of the military, and not merely to the Sri Lanka Air Force.

4.65 Based on this evidence, the Commission later concludes that the security forces had in fact taken all ‘feasible precautions’ to avoid civilian casualties when carrying out attacks within the NFZs.<sup>131</sup>

4.66 On the other hand, the LLRC acknowledges that civilian casualties did in fact take place within the NFZs. Yet these deaths are characterised as ‘unintentional’, as the Commission concludes that the security forces ‘had not deliberately targeted the civilians in the NFZs, although civilian casualties had in fact occurred in the course of crossfire,’<sup>132</sup> and that such decisions to return LTTE artillery fire were made in the ‘heat and confusion of an armed conflict’ by field commanders *in situ*, and thus could not be second-guessed.<sup>133</sup>

4.67 This narrative of field commanders being left with no option but to return fire despite the presence of civilians in the area that was being subjected to counter-attack contradicts the LLRC’s position that attacks had been carried out within the NFZs only after careful planning and intimate knowledge of the precise whereabouts of civilians. Incidentally, it is also diametrically at odds with the internationally publicised position of the government during the last stages of the war that the use of heavy weaponry was no longer necessary.<sup>134</sup>

4.68 In a nutshell, the LLRC accepts that the security forces used sophisticated means to ascertain the precise location of civilians within the NFZs, but concludes that the civilian

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<sup>129</sup> LLRC Report, at para.4.38.

<sup>130</sup> *Ibid.*

<sup>131</sup> LLRC Report, at para.4.283.

<sup>132</sup> LLRC Report, at para.4.282.

<sup>133</sup> LLRC Report, at para.4.280.

<sup>134</sup> See *supra*.

deaths that did in fact occur were unintentional and resulted from ‘an unprecedented situation when no other choice was possible.’<sup>135</sup> This analysis is, at best, self-contradictory and reflects the LLRC’s reluctance to genuinely examine the allegations against the government.

### **c. Shelling of Hospitals**

4.69 The LLRC concedes that it was confirmed that shells had in fact fallen on hospitals causing damage and resulting in casualties.<sup>136</sup> Yet the Commission concludes that the material placed before it ‘points to a somewhat confused picture as to the precise nature of events, from the perspective of time, exact location and direction of fire.’<sup>137</sup> The following statement reveals the general attitude of the LLRC with respect to the shelling of hospitals:

The Commission’s task of reaching a definite conclusion as to who was responsible for the shelling of hospitals and loss of lives / damage to property is made extremely difficult by the non-availability of primary evidence of a technical nature and also the fact that supportive civilian evidence is equivocal in nature and does not warrant a definitive conclusion that one party or the other was responsible for the shelling.<sup>138</sup>

4.70 In light of this purported lack of evidence, the Commission concludes that it is not in a position to come to a definitive conclusion in determining responsibility that one party or the other was responsible for the shelling.<sup>139</sup> Nevertheless, the Commission acknowledges the large number of representations made by civilians that ‘shells had in fact fallen on hospitals causing damage to the hospitals and in some instances loss or injury to civilian lives...’<sup>140</sup> However, the LLRC feels no compulsion to recommend a further investigation into this issue. Instead, it makes the recommendation that ‘consideration should be given to the expeditious grant of appropriate redress to those affected after due inquiry as a

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<sup>135</sup> LLRC Report, at para.4.283.

<sup>136</sup> LLRC Report, at para.4.288.

<sup>137</sup> *Ibid.*

<sup>138</sup> LLRC Report, at para.4.293.

<sup>139</sup> LLRC Report, at para.4.294.

<sup>140</sup> *Ibid.*

humanitarian gesture which would instill confidence in the reconciliation process.<sup>141</sup> Such a recommendation offends the dignity of the numerous witnesses that were directly affected by the indiscriminate shelling of hospitals. Many of the witnesses continue to suffer from the trauma and grief of witnessing the death of loved ones due to these attacks. The LLRC's suggestion that mere humanitarian gestures would instill confidence in the reconciliation process amongst the victims of the war is a reflection of either its utter insensitivity, or its complete lack of sincerity. As noted above, it is internationally accepted that reparations must be based on the acknowledgment of crimes.

4.71 It is difficult to maintain that primary evidence of a technical nature with respect to the targeting of hospitals was not available to the LLRC. As highlighted extensively by the LLRC – to establish that the government had taken precautions to minimise civilian casualties – the security forces had at their disposal ‘state of the art’ surveillance devices that enabled them to closely monitor the conflict zone.<sup>142</sup> Importantly, the government routinely used UAVs. According to submissions made before the LLRC, ‘UAVs were specially used in real time mode where the pilots, the Field Commanders and the Director Operations at the Air Force Head Quarters could all view the target simultaneously, in order to monitor the movements of the civilians with a view to avoiding civilian casualties.’<sup>143</sup> In fact, the Defence Secretary himself was quoted by the LLRC as stating: ‘the Air Force used the aerial vehicles extensively, to spot LTTE movements and to give the Army, Navy and Air Force valuable intelligence so that the attack took on only LTTE targets.’<sup>144</sup> Moreover, the ICRC sent the coordinates of each of the hospitals to the government. While in possession of such abundant information, it is difficult to understand how the LLRC concluded that there was a lack of primary evidence of a technical nature.

4.72 It is even more puzzling that the Commission found no reason to call for further investigations into the shelling of hospitals, so as to ascertain who was responsible for the death of civilians, a fact that is explicitly admitted by the LLRC. The reluctance of the

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<sup>141</sup> *Ibid.*

<sup>142</sup> See LLRC Report, at paras.4.39-4.41.

<sup>143</sup> See LLRC Report, at para.4.41.

<sup>144</sup> *Ibid.*

Commission to call for further investigations into the shelling of hospitals – a violation of IHL that may amount to a war crime<sup>145</sup> – may be contrasted against its recommendation to appoint a Special Commissioner of Investigation with respect to disappearances. In the case of shelling hospitals, what is at stake is the government's culpability in the possible commission of war crimes. In the case of disappearances, the LLRC frames the issue as isolated incidents for which the government cannot be held accountable. Hence, a Special Commissioner would only be tasked with investigating individual acts committed by 'a few'.<sup>146</sup> This contrast confirms that the LLRC's treatment of accountability issues is not only woefully inadequate but also palpably disingenuous.

#### **d. Disappearances of Surrendeers**

4.73 The LLRC considered representations with respect to alleged disappearances of persons after surrender to or arrest by security forces in paragraphs 4.241 to 4.260 of the report. The number of such incidents, particularly those that took place on 17<sup>th</sup> and 18<sup>th</sup> May 2009, is significant and gives rise to *prima facie* evidence of a systematic policy to disappear surrendeers. Annex 5.1 of the report in fact indicates that 1,018 incidents of disappearances took place following arrest by the Sri Lanka Army. Moreover, the LLRC recounts sixteen specific anecdotes relating to disappearance after surrender to the security forces on 17<sup>th</sup> or 18<sup>th</sup> May 2009.<sup>147</sup> Most significant is the general pattern of these disappearances, as the incidents appear to be very similar, thereby indicating the systematic nature of the alleged violations. The details of the entire list of 1,018 disappearances involving the security forces are not provided in the LLRC report. In fact, such a number is only a fraction of the total number of disappearances following surrender to or arrest by the security forces, as this number only accounts for incidents specifically brought to the attention of the LLRC. Given the woeful inadequacy of the time spent in the North and East and the general superficiality of the LLRC's public sittings in those areas, this figure of 1,018 only represents a fraction of a much larger problem. The figure of 1,018 constitutes more than 25 percent of the total number of disappearances, i.e. 3,596, reported to the LLRC. Despite

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<sup>145</sup> See Rule 35 of the ICRC Study, at [http://www.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule35](http://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule35).

<sup>146</sup> LLRC Report, at para.4.319.

<sup>147</sup> LLRC Report, at paras.4.242 to 4.257.

the lack of details on the disappearances reported *in camera* and through written submissions, there appears to be some consistency in the numbers. For instance, an analysis of disappearances reported at public sittings reveals that the army was implicated in nearly 27 percent of the alleged disappearances.

Alleged Perpetrator	District/Area of LLRC Public Sitting										%
	Amparai	Batticaloa	Jaffna	Kandawalai	Kilinochchi	Mannar	Mullaitivu	Trincomalee	Vavuniya	Total	
Army	2	8	39	1	8	4	2	6	2	72	26.9
LTTE		1	14		6	3	1	2		27	10.1
Navy			2				1	3		6	2.2
Paramilitary			1							1	0.4
Police	1	1	2			1		1		6	2.2
Politician								1		1	0.4
STF	1	3								4	1.5
TMVP	5	3						2		10	3.7
Unidentified	16	9	43		4	5	2	31	2	112	41.8
White Van	3	7	5			1		10	3	29	10.8
<b>Grand Total</b>	<b>28</b>	<b>32</b>	<b>106</b>	<b>1</b>	<b>18</b>	<b>14</b>	<b>6</b>	<b>56</b>	<b>7</b>	<b>268</b>	
%	10.4	11.9	39.6	0.4	6.7	5.2	2.2	20.9	2.6	100.0	100.0

4.74 Under the Rome Statute of the International Criminal Court, the systematic practice of enforced disappearance constitutes a crime against humanity.<sup>148</sup> Notwithstanding the fact that Sri Lanka has failed to ratify the Rome Statute, the principle is clearly recognised in CIHL and International Criminal Law, and is therefore binding on the government.<sup>149</sup>

4.75 In response to the undeniable spate of violations, the LLRC purports to recommend a comprehensive approach to address the issue of missing persons. It draws attention to the non-implementation of the recommendations of past commissions and suggests that the

<sup>148</sup> Statute of the International Criminal Court, Article 7(1)(i) (cited in Vol. II, Ch. 32, § 2372). Article 7(2)(i) defines enforced disappearance as ‘the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.’

<sup>149</sup> See rule 98 of International Committee of the Red Cross (ICRC) commentaries on customary international humanitarian law, at [http://www.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule98](http://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule98).



‘[c]ontinued failure to give effect to such critical recommendations of past commissions gives rise to understandable criticism and skepticism regarding government appointed Commissions.’<sup>150</sup> Hence it recommends that a Special Commissioner of Investigation be appointed to ‘investigate alleged disappearances and provide material to the Attorney General to initiate criminal proceedings as appropriate.’<sup>151</sup>

4.76 However, the LLRC makes it clear that, in its opinion, these disappearances are isolated incidents, and not systematic violations that may be part of an official policy. It concludes:

The launching of a full investigation into these incidents and where necessary instituting prosecutions is imperative also to clear the good name of the Army who have by and large conducted themselves in an exemplary manner in the surrender process and when civilians were crossing over to cleared areas, which conduct should not be tarnished by the **actions of a few** (emphasis added).<sup>152</sup>

4.77 The Commission reaches this conclusion despite specifically recognising its lack of capacity to conduct investigations. During public hearings, the LLRC refused to interpret its mandate as contemplating any investigative functions. In the Puttalam public hearing, the Chairman of the LLRC stated:

We do not have any investigative powers. Our Warrant does not invest us with any investigative powers. Representations were made to us about this incident and now we have given directions to the police to look into the matter and submit us a report. There is nothing more that we can do because we cannot investigate. We do not have the powers to investigate. We will only have to report the matter back to the IGP if we are not satisfied with the investigations that have been conducted... Our warrant is to bring about ethnic reconciliation. Our warrant does not permit us to go into these individual complaints [*sic.*].<sup>153</sup>

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<sup>150</sup> LLRC Report, at para.5.36.

<sup>151</sup> LLRC Report, at para.5.48.

<sup>152</sup> LLRC Report, at para.4.319.

<sup>153</sup> *Proceedings of public sittings of the Commission of Inquiry on Lessons Learnt and Reconciliation appointed by His Excellency the President in terms of Section 2 of the Commissions of Inquiry Act, 7<sup>th</sup> January 2011- Representations made by the public at the District Secretariat, Puttalam, LLRC/PS/07-01-11.*

4.78 Despite the above interpretation of its mandate, the LLRC reached the curious conclusion that over 1,000 complaints of disappearances involving surrender to or arrest by the security forces cannot be *prima facie* evidence of a systematic practice. Without even so much as acknowledging an investigative function, the LLRC was still able to conclusively determine that each of these incidents were isolated. Accordingly, the LLRC recommends that a Special Commissioner of Investigation be appointed to investigate the incidents further. If such an investigation is actually launched, it could very well reveal that widespread disappearances of surrendeers were part of an express or tacit governmental policy of executing surrendeers. Hence the mischaracterisation of the disappearances of surrendeers as ‘isolated’, as opposed to ‘systematic’, is prejudicial to any future investigation, and is specifically aimed at counteracting allegations of war crimes and crimes against humanity with respect to the systematic practice of enforced disappearances and the execution of surrendeers. This mischaracterisation also grants immunity to civilian and military leaders responsible for devising such a policy. In the circumstances, the LLRC has compromised its impartiality and credibility, and has reinforced impunity.

### C. Civilian Casualties

4.79 The LLRC does not adequately deal with the question of the scale of civilian casualties during the final stages of the war. The Commission’s response to the question of civilian casualties is evasive and non-committal.

4.80 The Commission admits that a ‘key question’ confronting it was the ‘the scale of civilian casualties, especially during the final phase of the conflict; January to May 2009.’<sup>154</sup> It also claimed that it ‘gave this matter the highest priority given the conflicting nature of statements made by various persons including media reports.’<sup>155</sup> In fact, the Commission specifically states:<sup>156</sup>

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<sup>154</sup> LLRC Report, at para.4.340.

<sup>155</sup> *Ibid.*

<sup>156</sup> *Ibid.*

The need to have an estimate of casualties was also crucial to the mandate of the Commission in addressing the question of possible violations of International Humanitarian Law and Human Rights Law during this period.

4.81 The Commission attempts to address the issue of civilian casualties by referring to the testimonies of civilian officials, including Chief Secretaries, District Secretaries and the Divisional Secretaries of the affected districts of Kilinochchi, Mullaitivu and Mannar as well as the senior officials of the Ministry of Health.<sup>157</sup> However, the Commission concludes:

The representations made by other civilian officials to the Commission indicate that they were not in a position, under the circumstances of conflict, to carry out any assessment of civilian casualties. Consequently, no estimated or verified figures of civilian casualties were available with them.<sup>158</sup>

4.82 The LLRC also considers the representations of officials from the Ministry of Defence on estimated LTTE deaths, though an estimate of civilian deaths was not available with these officials.<sup>159</sup> According to the Ministry officials, it was estimated that 22,247 LTTE deaths took place between July 2006 and May 2009, while 4,264 LTTE deaths were confirmed by name for the period January to May 2009.<sup>160</sup>

4.83 Apart from the above references to civilian casualties, the LLRC makes no attempt to closely examine the evidence of witnesses with respect to the number of civilians unaccounted for during the period January to May 2009. However, representations made before the Commission did in fact address this issue specifically. For instance, the Bishop of Mannar Rt. Rev. Dr. Rayappu Joseph testified (with supporting documentation) that information from the Kachcheris of Mullaitivu and Kilinochchi indicated that 429,059 persons resided in the Vanni in early October 2008.<sup>161</sup> Moreover, according to the

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<sup>157</sup> LLRC Report, at para.4.346.

<sup>158</sup> LLRC Report, at para.4.347.

<sup>159</sup> LLRC Report, at para.4.348.

<sup>160</sup> *Ibid.*

<sup>161</sup> *Proceedings of public sittings of the Commission of Inquiry on Lessons Learnt and Reconciliation appointed by His Excellency the President in terms of Section 2 of the Commissions of Inquiry Act, 08<sup>th</sup> January 2011-Representations made by the public at District Secretariat, Mannar, LLRC/PS/08-01-11, representation by Rt. Rev. Dr. Rayappu Joseph.*

submissions to the LLRC by Ms. Imelda Sukumar, who served as the GA for Mullaitivu during the relevant time, approximately 360,000 civilians remained in the NFZ in the Puthumattalan area when she left on 22<sup>nd</sup> January 2009.<sup>162</sup> The United Nations Office for the Coordination of Humanitarian Affairs issued an update on 15<sup>th</sup> July 2009 estimating that the total number of people who came out of the Vanni to government-controlled areas as at 10<sup>th</sup> July 2009 was only 282,380.<sup>163</sup> This figure effectively represents the number of civilians who survived the final stages of the war. It is noted that the UN estimate was based on reports by the relevant GAs, and that the government never disputed this figure. Thus, according to the Bishop's estimate of 429,059 persons residing in the Vanni in early October 2008, **146,679** (429,059 – 282,380) people appear to be unaccounted for.<sup>164</sup> Moreover, according to Ms. Imelda Sukumar's estimate of 360,000 civilians residing in the NFZ in January 2009, over **75,000** (360,000 – 282,380) civilians remain unaccounted for since January 2009.

4.84 It is unclear as to why the Commission preferred not to confront this issue, given the fact that Ms. Sukumar was a government official working in the Vanni at the time.

4.85 The Commission does, however, allude to a conflation between civilians and the LTTE. It asserts that a '[l]arge number of civilians, of all ages and gender, were conscripted by the LTTE to engage in active combat or coerced to provide support services to the LTTE.'<sup>165</sup> The Commission further asserts that a 'considerable number of LTTE cadre would have been among any estimate of casualty figures.'<sup>166</sup>

<sup>162</sup> *Proceedings of public sittings of the Commission of Inquiry on Lessons Learnt and Reconciliation appointed by His Excellency the President in terms of Section 2 of the Commissions of Inquiry Act, 4<sup>th</sup> November, 2010*, Representation by Ms. Imelda Sukumar, at 5.

<sup>163</sup> See United Nations Office for the Coordination of Humanitarian Affairs, *Jaffna, Kilinochchi, Mullaitivu, Mannar, Vavuniya, and Trincomalee Districts, Report # 01 | 03 – 10 July 2009*, at [http://www.humanitarianinfo.org/srilanka\\_hpsl/Catalogues.aspx?catID=74](http://www.humanitarianinfo.org/srilanka_hpsl/Catalogues.aspx?catID=74).

<sup>164</sup> *Proceedings of public sittings of the Commission of Inquiry on Lessons Learnt and Reconciliation appointed by His Excellency the President in terms of Section 2 of the Commissions of Inquiry Act, 08<sup>th</sup> January 2011-Representations made by the public at District Secretariat, Mannar, LLRC/PS/08-01-11*, representation by Rt. Rev. Dr. Rayappu Joseph. Also see 'It's "Lesson Learnt" — 146,000 Equal "Naught" — Equals "Reconciliation"', *The Sunday Leader*, at <http://www.thesundayleader.lk/?p=31994>.

<sup>165</sup> LLRC Report, at para.4.358.

<sup>166</sup> LLRC Report, at para.4.359, viii.

4.86 Even if it is assumed that the LTTE forcibly conscripted some of the civilians during the time, the Ministry of Defence confirmed only 4,264 LTTE deaths during the period January to May 2009. Hence the LLRC ought to have examined the issue in greater depth and acknowledged the potential scale of civilian deaths.

4.87 In this context, the estimate of the UN Secretary General's Panel of Experts with respect to the number of civilian deaths from January to May 2009 appears to be credible. The Panel concluded that civilian deaths were in 'the tens of thousands.'<sup>167</sup> Given the well-substantiated evidence before the LLRC, between 75,000 and 146,679 civilians who resided in the Vanni remain unaccounted for. It is reasonable to conclude that a majority of these civilians died during the final stages of the war.

4.88 The LLRC's reluctance to examine this issue must be viewed in the wider context of the government's own attempts to conceal the truth. The government adopted the following measures with the intention of concealing the truth with regard to civilian casualties during the war:

1. Grossly underestimating the Vanni population as 70,000 persons;<sup>168</sup>
2. Denying domestic and international media access to the conflict zone, thereby ensuring a complete media blackout on the subject of civilian casualties;<sup>169</sup>
3. Ejecting Non-governmental Organizations and International Non-governmental Organizations from the conflict zone in September 2008;<sup>170</sup>
4. Causing UN agencies and personnel to withdraw from the conflict zone;<sup>171</sup>
5. Denying Tamil Members of Parliament access to the conflict zone; and
6. Arbitrarily interning the civilians who came out of the conflict zone and preventing them from having contact with family or legal counsel.<sup>172</sup>

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<sup>167</sup> UN Panel Report, at paras.195, 391, 403, 421 and 442.

<sup>168</sup> See *supra*.

<sup>169</sup> See for example, the UN Panel Report, at para.64.

<sup>170</sup> See for example, the UN Panel Report, at paras.73-76.

<sup>171</sup> *Ibid*.

<sup>172</sup> UN Panel Report, at para.222.

4.89 These measures seriously call into question the government's claim that it adopted a 'zero civilian casualty policy' throughout the prosecution of the war.<sup>173</sup>

## 7. Violations of Human Rights

4.90 The LLRC acknowledges that a range of human rights were violated during the period of review and particularly during the final stages of the war. The specific human rights issues considered by the Commission include allegations concerning missing persons, disappearances and abductions; treatment of detainees; illegal armed groups; conscription of children; vulnerable groups – i.e. women, children and the elderly; disabled persons; Internally Displaced Persons; the Muslim community in the North and East; the freedom of expression and the right to information; and the freedom of religion, association and movement. The TNA has raised these issues on numerous occasions, most recently in the *Situation Report: North and East Sri Lanka*, tabled in Parliament on 21<sup>st</sup> October 2011.

4.91 Some of the positive aspects of the LLRC's recommendations with respect to human rights have been acknowledged in the second chapter of this report. The focus of this chapter, however, is to examine the LLRC's findings and recommendations on human rights from the perspective of accountability.

### a. Vagueness and Absence of Specificity

4.92 The LLRC concedes that an extreme culture of impunity has befallen Sri Lanka in terms of investigating and prosecuting offenses relating to the disappearance of persons. It concludes:

During the public sittings and its field visits, including to the conflict affected areas, the Commission was alarmed by a large number of representations made alleging abductions, enforced or involuntary disappearances, and arbitrary

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<sup>173</sup> UN Panel Report, at para.172. Also see Official Website of the President of Sri Lanka, 'Sri Lanka has lesson to world on defeating terror – President Rajapaksa', 18<sup>th</sup> June 2010, at <http://www.president.gov.lk/news.php?newsID=1049>; Ministry of Defence, 'My destiny with victory', 18<sup>th</sup> May 2010, at [http://www.defence.lk/new.asp?fname=20100518\\_03](http://www.defence.lk/new.asp?fname=20100518_03).

detention. In many instances, it was revealed that formal complaints have been made to police stations, the Human Rights Commission of Sri Lanka and the ICRC. In some cases, submissions had also been made to the previous Commissions of investigation. Yet, the next of kin continue to complain that the whereabouts of many of those missing persons are still unknown. The Government therefore is duty bound to direct the law enforcement authorities to take immediate steps to ensure that these allegations are properly investigated into and perpetrators brought to justice.<sup>174</sup>

4.93 However, the LLRC has characterised the large number of disappearances – particularly those which point to the involvement of the security forces – as isolated incidents. The veracity and consequences of this characterisation has been dealt with above. Additionally, the LLRC fails to consider some of the more complicated issues pertaining to disappearances, thereby revealing selectivity in its approach. For example, the alleged involvement of TMVP supporter, Iniya Barathi in a number of human rights violations is not mentioned in the section on human rights in the LLRC’s report. Instead of mentioning this important actor in the disappearances which took place in the Eastern Province, the LLRC only makes vague references to allegations against the ‘Karuna Group’<sup>175</sup> and then proceeds to make a reference to one ‘Bhareti’ [*sic.*] in the chapter on ‘reconciliation’.<sup>176</sup> The Commission makes no attempt to examine in any detail the evidence against this individual, nor highlight his alleged connections to the TMVP and the SLFP.

4.94 As discussed above, Barathi is specifically mentioned in the deplorable violations perpetrated against Witness 12 from Kalmunai.<sup>177</sup>

4.95 Barathi’s involvement is also alleged in the abduction of the son of Witness 5 at the Amparai hearings.<sup>178</sup> According to the testimony, persons who identified themselves as

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<sup>174</sup> LLRC Report, at para.5.34.

<sup>175</sup> See for example, LLRC Report, at paras.5.68-5.71.

<sup>176</sup> LLRC Report, at para.8.87.

<sup>177</sup> *Proceedings of public sittings of the Commission of Inquiry on Lessons Learnt and Reconciliation appointed by His Excellency the President in terms of Section 2 of the Commissions of Inquiry Act, 27<sup>th</sup> March 2011- Representations made by the public at the Divisional Secretariat, Kalmunai, LLRC/PS/27-03-11, Representation by Witness 12.*

from the Karuna group abducted the witness's son. Thereafter, the witness had met a person named 'Bharathi' in Karuna's office in Thirukovil, who had admitted to having the son in their custody. It is clear that this person is in fact Iniya Barathi, as the witness's interpreter later provided the following response to a question from the Commission as to the fate of Barathi:

He is alive. She says this Bharathi is been commonly mentioned in the village as the President's Coordinator for the Ampara District and he is called Iniya Bharathi.

4.96 Barathi is mentioned once again in the representation by Witness 7 from Amparai with respect to her husband's abduction.<sup>179</sup> It was alleged that the 'Karuna's group' had abducted the witness's husband. Prior to the incident, the Karuna group had questioned the victim as to whether he had any links with the LTTE. The witness claimed that when she made inquiries with the CID, they had asked her whether she had approached 'Bharathi' [*sic.*]. She in fact made inquiries from a person named 'Bharathi' [*sic.*] at the TMVP office. There is little doubt that this person was in fact Iniya Barathi. Curiously, the LLRC displayed indifference during the witness's submission. After it was revealed that Barathi denied that the witness's husband was in his custody, the Chairman of the LLRC simply dismissed the matter in the following terms: '[t]his case of course there is no prima facie case' [*sic.*].<sup>180</sup> The Commission subsequently assured the witness that the Attorney General would look into the matter.

4.97 The fact that Iniya Barathi is described as the President's organiser for Amparai is extremely important. Such a description, if accurate, clearly demonstrates the level of impunity enjoyed by those favoured by the ruling regime. In light of the complete absence of any specific reference to Iniya Barathi in the LLRC report, it may be concluded that the

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<sup>178</sup> *Proceedings of public sittings of the Commission of Inquiry on Lessons Learnt and Reconciliation appointed by His Excellency the President in terms of Section 2 of the Commissions of Inquiry Act, 25<sup>th</sup> March 2011-Representations made by the public at the District Secretariat, Ampara, LLRC/PS/25-03-11, Representation by Witness 5.*

<sup>179</sup> *Proceedings of public sittings of the Commission of Inquiry on Lessons Learnt and Reconciliation appointed by His Excellency the President in terms of Section 2 of the Commissions of Inquiry Act, 25<sup>th</sup> March 2011-Representations made by the public at the District Secretariat, Ampara, LLRC/PS/25-03-11, Representation by Witness 7.*

<sup>180</sup> *Ibid.*



Commission wished to avoid making any observations that could potentially embarrass the government. Yet, the absence of much needed specificity – in the face of clear evidence from numerous witnesses – validates the apprehension that the LLRC does more to perpetuate impunity than combat it.

4.98 Curiously, the LLRC has not hesitated to mention the names of alleged perpetrators where it is inferred that the perpetrator is fictitious. The Commission refers to two cases of abduction in which ‘the family members of the victims alleged that a person who presented himself by the name of “Major Seelan” engaged in an act of extortion, offering them to get the victims released from the 51 Division where he claimed that the victims were being detained.’<sup>181</sup> The Commission thereafter reported that ‘[p]ursuant to this representation and on the initiative of the Chairman of the Commission, the Deputy Inspector-General of that area conducted an investigation and subsequently reported that an accomplice of ‘Major Seelan’ has been taken into custody. It is later admitted that ‘the alleged principal offender still remains at large.’<sup>182</sup> The LLRC report does not indicate as to whether the Commission sought any clarifications from the military as to the existence of such an individual. However, the clear inference that may be drawn from the report is that this was an imposter, and that there was no real person by that name. In the circumstances, specific mention of ‘Major Seelan’ was noncontroversial. Moreover, such mention serves to detract from other instances where the LLRC neglects to mention specific perpetrators, whose mention could embarrass the government.

#### **b. Lack of Follow-up**

4.99 On countless occasions, the LLRC assured distraught witnesses that it would ‘look into the matter’ thereby promising some form of follow up on an individual basis. For example, the LLRC promised to trace the whereabouts of missing relatives of witnesses when it subsequently visited detention centres and military camps. Similar assurances were made with respect to cases of detention, land appropriation, incidents of assault and harassment,

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<sup>181</sup> LLRC Report, at para.5.17.

<sup>182</sup> LLRC Report, at para.8.188.

extortion and deaths. A breakdown of these assurances, based on an analysis of the LLRC public sittings, is presented below:

<b>Type of violation</b>	<b>Number of times the LLRC agreed to follow up</b>
Disappearances	209
Detentions	92
Land grabs	24
Incidents involving assault or harassment	19
Incidents of extortion	17
Deaths	9

4.100 The LLRC attempts to detail some of its follow up work in Annexes 5.1 and 5.2 of the Annexes to its final report. However, what is provided is a brief statistical analysis that would be of no use to the witnesses concerned. It is not clear as to how the LLRC proposes to communicate its specific findings to specific witnesses. It is presumed that the LLRC estimates that this information would be effectively communicated to witnesses if and when its recommendations are implemented. For instance, it may be presumed that the publishing of a detailed list of detainees would ensure that relatives would have access to information on the precise whereabouts of detainees. However, this presumption does not measure up to the explicit assurances that the LLRC gave to witnesses at public sittings. These witnesses placed their trust in the verbal assurances of the Commission that answers would be provided in due course. Yet the Commission's final report, assuming it is made accessible to these witnesses, does not provide the answers that were promised to them.

### **c. Gender Perspectives**

4.101 The LLRC deals with the problems faced by women in the North and East in paragraphs 5.102 to 5.117 of its final report. Amongst its findings, the LLRC emphasises the grief suffered by women due to the loss of their husbands, the deterioration of the livelihoods of women, and the increase in violence perpetrated against women. The LLRC recounts some of the vital representations made by women's groups and other commentators. One testimony cited by the LLRC contends:

[D]iscriminatory policies and practices, heavy military presence, lack of authority to control their environment, limited access to basic needs combined with weak institutional protection mechanisms and breakdown of traditional support networks, norms and prejudices against women in the society and attitudes and behavior of power players have lead [*sic.*] to a culture of violence and impunity....[S]uch a situation exposes women to various forms of sexual and gender based violence that compromise their dignity, security, well being and rights, and any effort to find durable solutions must take these issues into account.<sup>183</sup>

4.102 Unfortunately, the LLRC does little to acknowledge the gravity of the violence and insecurity faced by women in the North and East. Instead, the sixteen paragraphs dedicated to women in the report make only generic observations, with no attention to detail. In fact, the Commission does not explicitly acknowledge anywhere in its report that some female witnesses had reported that acts of sexual violence had been committed against them. One example that springs to mind is the testimony of Witness 12 from Kalmunai.<sup>184</sup>

4.103 The LLRC ought to have evaluated its own deficiencies in dealing with gender specific issues. As highlighted above, the inadequacy of female representation in the LLRC created an incredible barrier to women in terms of truth telling. These inherent difficulties faced by female victims and witnesses in accessing and engaging effectively with commissions such as the LLRC lead to a gross under-reporting of issues.<sup>185</sup>

4.104 The LLRC has already been accused of failing to adopt a victim-centered methodology and address the emotional needs of the victims. For instance, Amnesty International reported that the LLRC had been ‘desultory’, ‘curt’ and ‘dismissive’.<sup>186</sup> Moreover, the TNA has received reports that the Commission chastised women for crying. Women in

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<sup>183</sup> LLRC Report, at para.5.108.

<sup>184</sup> *Proceedings of public sittings of the Commission of Inquiry on Lessons Learnt and Reconciliation appointed by His Excellency the President in terms of Section 2 of the Commissions of Inquiry Act, 27<sup>th</sup> March 2011-Representations made by the public at the Divisional Secretariat, Kalmunai LLRC/PS/27-03-11, Representation by Witness 12.*

<sup>185</sup> For a sound analysis of the issue, see Jo Baker, *Women Left Behind: Truth Commissioning in Sri Lanka*, at <http://groundviews.org/2011/11/11/women-left-behind-truth-commissioning-in-sri-lanka/>.

<sup>186</sup> See AI Report, at 25.

general have encountered a distinct lack of sympathy when recounting their experiences before the Commission. As suggested by one commentator: ‘[t]hese are strong indications of a gender-related disregard for women’s experiences, and of bias in the methodology for selecting witnesses.’<sup>187</sup>

#### **d. Structural Challenges to Implementation**

4.105 In Chapter 8 of its report, while dealing with its observations on reconciliation, the Commission notes that it ‘heard submissions that some minority grievances stem from deficiencies in the system of administration and lack of good governance that affect all citizens regardless of ethnicity. These deficiencies require concerted action by all stakeholders.’<sup>188</sup> The Commission also notes: ‘over a period of time there has been a weakening of public institutions vital to the functioning of democracy thereby eroding the sovereignty of the people.’<sup>189</sup>

4.106 However, in recommending steps to be taken to address the problems arising from the observations on governance issues, the Commission recommends a ‘Special Institution to deal with Citizen Grievances’<sup>190</sup> together with other recommendations regarding the administration of the public service. Having commented on the weakness of public institutions and the impact of that weakness on minorities, the Commission does not engage in any meaningful analysis of the constitutional reasons and developments resulting in the politicisation and breakdown of public institutions.

4.107 Most tellingly, the Commission fails to identify the role of the Eighteenth Amendment to the Constitution, which became law in 2010 (and the failure to implement salient constitutional requirements of the Seventeenth Amendment by the incumbent government) in politicising and weakening public institutions such as the judiciary, police and public service.

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<sup>187</sup> See Jo Baker, *op. cit.*

<sup>188</sup> LLRC Report, at para.8.195.

<sup>189</sup> LLRC Report, at para.8.196.

<sup>190</sup> LLRC Report, at para.8.201.

- 4.108 The Seventeenth Amendment to the Constitution contained many salient safeguards against politicisation and vested significant control over the police, elections, public service and the judiciary in independent and non-partisan (or arguably multi-partisan) bodies. This Amendment was the only one in recent history to be passed unanimously by Parliament and was acclaimed as a significant step in ensuring good governance and the de-politicisation of public institutions.
- 4.109 The Eighteenth Amendment, however, which was rushed through Parliament as an urgent Bill, undid the Seventeenth Amendment, repealed all salient provisions providing for decisions to be made by independent bodies, and restored substantial powers to an already over-mighty President. The Eighteenth Amendment was opposed by the TNA in Parliament, and described by one of our Members of Parliament as threatening to ‘finally nail the coffin in which democracy of this country had been laid for some time now.’<sup>191</sup>
- 4.110 Notwithstanding the pervasive and corrosive effect of the Eighteenth Amendment on the political system and culture in Sri Lanka, the Commission does not mention the Eighteenth Amendment even once in its 388-page report. Not once is there even a mention of the overwhelming response of the Tamil people against the Eighteenth Amendment due to fears that anti-democratic measures would ultimately harm minorities.
- 4.111 Tellingly, the Commission does not identify the Eighteenth Amendment as posing a significant structural and constitutional barrier to many of its own recommendations. For instance, the LLRC recommends the establishment of an independent Public Service Commission without delay ‘to ensure that there is no political interference in the public service and that recruitment and promotions in the public service are in conformity with the equality provisions in the Constitution,’<sup>192</sup> without once acknowledging that salient provisions in the Seventeenth Amendment providing not merely for an independent Public

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<sup>191</sup> LLRC Report, at para.8.210.

<sup>192</sup> See speech made in Parliament by M. A. Sumanthiran, M.P. on 8<sup>th</sup> September 2010.

Service Commission, but also an independent Elections Commission, Police Commission and Constitutional Council, were repealed by the Eighteenth Amendment.

4.112 The LLRC therefore does not merely fail to address issues of accountability for violations of IHL and IHRL during the war; it also fails to address the obvious reasons for the failures in governance that are identified within its own report. Since the report fails to identify the real causes for failures in governance, the recommendations made in the report are merely cosmetic and unlikely to lead to genuine change, even in the unlikely event that they are in fact implemented.

## Conclusion

The LLRC has failed to fulfill the expectations of the Tamil community, while also falling dramatically short of international standards. However, accountability remains an urgent and important need to help victim communities overcome trauma and rebuild their lives, to bring closure to our collective and personal grief, to ensure genuine reconciliation, to break the cycle of impunity in Sri Lanka, to insure against a return to violence, and to prevent historical revisionism by narrowing the range of permissible lies about the last stages of the war.

Unless the truth is ascertained and the issue of accountability is frankly addressed there is no guarantee that this culture of unbridled impunity would not recur.

The TNA therefore calls on the international community to acknowledge the consistent failure of domestic accountability mechanisms in Sri Lanka and take steps to establish an international mechanism for accountability. The recommendations of the UN Secretary General's Panel of Experts on Accountability in Sri Lanka provide a useful and important starting point for further action.

The TNA is of the strong opinion that any future accountability mechanism must be firmly rooted in the principles of truth, justice and reparations to victims. Echoing the sentiments expressed in its initial response to the LLRC report, the TNA concludes that truth is the cornerstone of justice and is the only foundation on which true reconciliation can be achieved.

## Chapter 2

# Issues unrelated to Accountability

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## Key Observations

1. The LLRC made recommendations on a number of issues that are not directly related to accountability. These recommendations have positive elements, and if vigorously implemented, would be welcomed and supported by the TNA. In fact, the TNA intends to closely monitor the implementation of these recommendations and publish progress reports on implementation during the coming months. However, these recommendations should not be confused as addressing accountability issues. The central conclusions of the first chapter of this report thus remain unaffected by the analysis presented below.
2. Amongst the LLRC's key recommendations unrelated to accountability are its recommendations on the devolution of power. The Commission emphasises that a political settlement based on devolution must address the ethnic problem as well as other serious problems that threaten democratic institutions.<sup>193</sup> The Commission recommends devolution to local government institutions to ensure greater peoples' participation at the grassroots level.<sup>194</sup> Moreover, it recommends that the government take into account the shortcomings in the functioning of the Provincial Councils system.<sup>195</sup>
3. Yet the only concrete suggestion that the LLRC makes in terms of an actual model for power sharing is the establishment of a 'Second Chamber comprising representatives from the Provinces, so as to generate a sense of confidence among the political leadership and people in Provinces.'<sup>196</sup>
4. These sentiments on devolution are exceedingly vague, mostly rhetorical and certainly fail to measure up to past proposals including that of the majority report of the All Party Representative Committee's Expert Committee appointed by the President in 2006.<sup>197</sup> Yet, even the implementation of the LLRC's modest proposals remains uncertain, particularly

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<sup>193</sup> LLRC Report, at para.8.215.

<sup>194</sup> LLRC Report, at para.8.220.

<sup>195</sup> *Ibid.*

<sup>196</sup> LLRC Report, at para.8.221.

<sup>197</sup> R. Yogarajan M.P. and M Nizam Kariapper (eds.), *Proposals made by the All Party Representatives Committee to form the basis of a new constitution* (July 2010).

given the non-implementation of the provisions of the Thirteenth Amendment to the Constitution and the recent views expressed by the President in relation to devolution of governance to the Provinces.<sup>198</sup> The TNA recalls the previous commitment made by the government in 2009 to deliver a political solution that goes beyond the Thirteenth Amendment. The most current views of the President, however, reflect the government's unwillingness to even implement the provisions of the Constitution vis-à-vis the Thirteenth Amendment.

5. These views validate strong fears amongst the Tamil community that the present government is not genuinely prepared to deliver to the people a political solution premised on meaningful devolution.
6. Apart from the issue of devolution, the TNA notes the LLRC's recommendations on demilitarisation of the North. The Commission appears to acknowledge the intrusiveness of the military in the North – a fact that the TNA has already brought to the public's attention on numerous occasions.<sup>199</sup> The Commission hence recognises the need for security forces to 'disengage from all civil administration related activities as rapidly as possible.'<sup>200</sup> The TNA welcomes this recommendation, and intends to closely monitor and publicise the progress of its implementation over the next few months.

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<sup>198</sup> 'President denounces Tamil National Alliance's call for international inquiry', *DailyFT*, 21<sup>st</sup> December 2011, at <http://www.ft.lk/2011/12/21/president-denounces-tamil-national-alliances-call-for-international-inquiry>.

<sup>199</sup> See for example, Tamil National Alliance, *Situation Report: North and East Sri Lanka*, tabled in Parliament on 21<sup>st</sup> October 2011, at <http://www.tnamediaoffice.blogspot.com/2011/11/situation-report-north-and-east-21.html>.

<sup>200</sup> LLRC Report, at para.9.134.

## Analytical Table of Recommendations

The following analytical table lists out some of the LLRC's key recommendations unrelated to accountability. The table also evaluates these recommendations in the light of corresponding recommendations made by past commissions of inquiry and state-appointed bodies.\*

LLRC Recommendation	Ref. Para	Whether Previously Recommended	Comments on Implementation
Investigation and Prosecution of Crimes			
To investigate, prosecute and punish wrongdoers including members of security forces who were implicated in death or injury to civilians.	9.9	<p>The 1994 Western, Southern and Sabaragamuwa Disappearances Commission Report (1997) ['Southern CoI'], at p.175:</p> <p>Human Rights Commission to be empowered to deal with complaints against Police/Army personnel.</p> <p>Southern CoI, at p.175:</p> <p>Also provides for disciplinary action against members of forces responsible for disappearances. The human rights records of these forces should be taken into account when considering promotions.</p>	<p>The previous recommendation for serious repercussions in respect of wrongdoing on the part of the Forces was not implemented.</p> <p>Crucially, the Presidential Commission of Inquiry Appointed to Investigate and Inquire into Alleged Serious Violations of Human Rights arising since August 2005 ['2006 CoI'] never resulted in the prosecution of those responsible for the human rights abuses considered by that CoI.</p>
Appropriate redress to the next of kin of those killed and those injured.	9.9	<p>Southern CoI, at p.169:</p> <p>Provided for expeditious compensation payments in respect of members of families of disappeared persons.</p>	<p>A 'Most Affected Persons' Scheme (MAP) scheme is presently run by the REPPIA (Rehabilitation of Persons, Properties and Industries Authority). However, this body is admittedly underfinanced.</p> <p>Therefore, the changes in funding for this body could be an early indicator of intent to take this recommendation forward.</p>

\* LLRC Recommendations that are unprecedented are highlighted in a darker shade of gray.

			<p>Further, there is a concurrent scheme, RRAN (Rehabilitation and Resettlement Authority of the North) whereby compensation is paid to dependents of persons killed due to terrorist activities.</p> <p>However, acknowledgement of loss is a necessary precondition for payment. It would require the government to break from the past practice of denial and acknowledge that a large number of civilians were killed or disappeared due to the war, particularly through the actions of the security forces.</p>
Investigation and prosecution of cases of disappearance after surrender to official custody.	9.23	<p>All Island CoI, at p.85:</p> <p>Recommends that Officers with Chain-of-Command Responsibility who order or tolerate disappearances by those under their command be made criminally liable.</p>	<p>Past recommendations pertaining to this issue have not been fully implemented.</p> <p>The government would need to make a decisive break from the past track record in order to implement this recommendation.</p>
Investigation into specific instances referred to in observation 4.359 vi (a) & (b) and reported cases of deliberate attacks on civilians and appropriate legal action to prosecute/punish the offenders where necessary.	9.37		<p>The 2006 CoI never resulted in the prosecution of those responsible for the specific human rights abuses considered by that CoI, including the death of five students in Trincomalee in January 2006 and seventeen aid workers of the ACF in August 2006.</p> <p>Therefore, once again, a decisive break from the past would be needed in implementing this recommendation.</p>
Professionally designed household survey (covering all affected families in all parts of the island) – to assess the scale and circumstances of death and injury to civilians and damage to property.	9.37		

<p>Independent investigation to verify the truth or address the allegations of the Channel 4 video and take appropriate legal action.</p>	<p>9.41</p>		<p>The LLRC has already obtained the purportedly independent opinions of two experts. 168 of the 375 pages of the document containing Annexes to the LLRC report are dedicated to investigating the Channel 4 footage.</p>
<p>To ensure proper investigation by law enforcement authorities, into disappearance and ensure that the perpetrators are brought to justice.</p>	<p>9.46</p>	<p>All Island CoI, at pp.10, 82 and 85:</p> <p>Previous recommendations were for investigations to be undertaken by the Inspector General of Police (IGP) under the supervision of the Attorney General and appropriate legal proceedings to be determined by the Attorney General, in the case of those persons against whom there is credible material evidence of their responsibility in disappearances.</p> <p>Steps to be taken without delay against miscreants identified by the Commissions of Disappearances.</p> <p>Southern CoI, at p.175:</p> <p>Vigorous prosecution for those responsible for disappearances.</p>	<p>A Missing Persons Unit had been established in 1998 at the Attorney General's Department to advise on investigations and to conduct prosecutions in cases of Disappearances. By 1<sup>st</sup> January 2000, this unit had initiated 213 prosecutions in the High Court and 79 non-summary inquires in Magistrate's Courts.</p> <p>Between 2004 and 2008, the Attorney General forwarded over 200 indictments to the High Court in respect of approximately 600 members of the armed services and police.<sup>201</sup></p> <p>However, the actual number of convictions secured against perpetrators of human rights violations is reported to be extremely low.</p>
<p>Immediate implementation of recommendations by past Commissions which consist of a special mechanism to address the issue of disappearances and deter future occurrences.</p>	<p>9.48</p>	<p>All Island CoI, at pp.15 and 82:</p> <p>Recommended that investigations are to be done in accordance with the recommendations of the 1994 Presidential Commissions on Disappearance and to be conducted in a manner as to give</p>	<p>Most recommendations have not been implemented. A notable exception is the Disappearances Investigation Unit (DIU) set up under the Deputy Inspector General of Police of the Criminal Investigations Department.</p> <p>However, this unit has not resulted</p>

<sup>201</sup> National Report Submitted in Accordance with Paragraph 15(A) of the Annex to Human Rights Council Resolution 5/1: Sri Lanka, A/HRC/WG.6/2/LKA/1, 2<sup>nd</sup> May 2008, at para.68.

		the victim confidence in their impartiality.	in a satisfactory rate of convictions or in deterring future occurrences of disappearances.
Appointment of Special Commissioner of Investigation to investigate alleged disappearances and provide material to Attorney General to initiate criminal proceedings where appropriate.	9.51	Southern CoI, at p.171:  Recommended a Special Investigative Unit, where police investigations are to be by a special unit under the direct supervision of an officer not below rank of Deputy Inspector General.	The previous DIU was set up as a response to past recommendations.  However, the DIU's investigations have not translated into a high rate of indictments, and have certainly not resulted in the successful prosecution of perpetrators.
Experience investigators provided for the Office of the Special Commissioner to collect and process information necessary for investigations and prosecutions.	9.51	All Island CoI, at p.82:  The unit is to be well equipped and provided with all logistical support necessary for them to perform their duties of proceeding against those responsible, effectively.	Notwithstanding any experienced investigators provided to the office of the Special Commissioner, the institutional structure of law enforcement in Sri Lanka currently lacks independence. Hence, such experience alone will be insufficient to ensure the proper collection and processing of information necessary for investigations and prosecutions.
Devise a centralised system of data collection at the national level, in order to integrate all information with regard to missing persons currently being held by different agencies.	9.51		
Death Certificates			
Address the issue of death certificates.	9.52	Southern CoI, at p.170:  Recommended difficulties encountered in securing death certificates of disappeared persons be addressed through amendments to the Registration of Death to persons (Temporary Provisions) Act, No. 2 of 1995  Circular to be issued to District	Although amendments were enacted following previous recommendations, there are still procedural difficulties faced by the displaced families of the victims.  Moreover acknowledging a large number of deaths or disappearances would be a necessary prerequisite for the issuance of death certificates. This is yet to take place.

		<p>Registrars regarding their power to issue death certificates.</p> <p>The 1994 Central, North Western, North Central and Uva Disappearances Commission Report (1997) ['Central CoI'], at p.14</p> <p>Recommended issuance of death certificates for those disappeared.</p>	
Address issue of monetary compensation where necessary.	9.52	<p>Southern CoI, at p.169:</p> <p>Payment of fair and adequate compensation to dependents of disappeared persons.</p> <p>Scheme to provide monetary assistance to families affected due to damage to property</p> <p>All Island CoI, at p.86:</p> <p>Payment of compensation to all affected families, in the case of disappeared persons, regardless of whether they are terrorists or not.</p>	<p>The REPPIA provided for a scheme where persons could claim compensation under the MAP scheme, after the death certificate was obtained.</p> <p>However, this body is admittedly underfinanced. Therefore, the changes in funding for this body could be an early indicator of intent to take this recommendation forward.</p> <p>Moreover acknowledging a large number of deaths or disappearances would be a necessary prerequisite for granting compensation. Such acknowledgment is yet to take place.</p>
Detention			
Law enforcement authorities to adhere to applicable legal provisions when taking persons into their custody, such as issuing of a formal receipt regarding the arrest and providing details of the place of detention etc.	9.53	<p>Southern CoI, at p.173 and All Island CoI, at p.84:</p> <p>Recommends that receipt of the arrest be given by arresting officer to a family member or friend of the person arrested and a copy of receipt be given to detainee.</p>	<p>There are no known instances of such receipts being issued in the past, despite the law, even under emergency rule, stipulating that such receipts be issued.</p> <p>Hence, a decisive break from the past would be needed in implementing this recommendation.</p>

<p>Persons to be detained only at formal places of detention declared under the law and adequate publicity should be given to such authorised places of detention, with access to next of kin.</p>	<p>9.53</p>	<p>Southern CoI, at pp.173 and 177, and All Island CoI, p.84.</p> <p>Both commissions made the identical recommendation.</p>	<p>The LLRC's interim recommendations on detention are yet to be implemented.</p> <p>Moreover, there are numerous reports that former combatants were kept in <i>incommunicado</i> detention at unspecified locations. This claim has not been verified.</p>
<p>Due process:</p> <p>a. An arrested person should be promptly produced before a Magistrate to be dealt with in accordance with the law.</p> <p>b. Any change of the place of detention should be promptly notified to the family of the arrested person and the Human Rights Commission of Sri Lanka.</p> <p>c. Magistrates should visit the places of detention every month.</p> <p>d. Release from detention should be done through courts.</p>	<p>9.54</p>	<p>a. Southern CoI, at p.177 and All Island CoI, at p.84.</p> <p>b. Southern CoI, at p.177:</p> <p>Provides for informing the Human Rights Commission.</p> <p>All Island CoI, p.84:</p> <p>Provides for informing the family of the arrested person.</p> <p>c. Southern CoI, at p.173 and All Island CoI, at p.84.</p> <p>d. Southern CoI, at p.174 and All Island CoI, at p.84</p>	<p>None of the past recommendations were implemented.</p>
<p>Failure or refusal by the Police to record an arrest, detention and transfer or to record complaints of abductions and failure to investigate the same would constitute a criminal offence and steps should be taken to prosecute such wrongdoers.</p>	<p>9.55</p>	<p>Southern CoI, at pp.173 and 177:</p> <p>Recommended that written record of arrest, detentions, transfers be maintained at place of detention/police station/district secretary/magistrate's court.</p>	<p>Although, the previous recommendations did not provide for a criminal offence in the event these requirements are not complied with, they provide for the need to ensure such records are maintained.</p> <p>However, even these recommendations have not been implemented.</p> <p>Hence, a decisive break from the past would be needed in</p>



			implementing this recommendation.
Independent Advisory Committee to be appointed to monitor and examine detention and arrest of persons taken into custody under any regulations made under the Public Security Ordinance or the Prevention of Terrorism Act (PTA).	9.57		
Assistance to families to deal with the trauma of not knowing the whereabouts of their family members, in some cases for years.	9.58	Southern CoI, at p.170:  Recommended emotional rehabilitation through counseling services.	This recommendation was not implemented. Moreover, the Ministry of Health established its Mental Health Programme only in 2002. However, the programme does not specifically target women or any other particular group.
Legal Aid provided as and when necessary	9.58	Southern CoI, at p.175:  State aided legal aid service for petitioners seeking to file writs of habeas corpus.  All Island CoI, at p.85:  Recommended that legal aid organisations providing their services to habeas corpus applicants be made recipients of State Grants.	No specific legal aid service had been created for the purpose of assisting petitioners in habeas cases relating to disappearances, although the State-run Legal Aid Commission does operate a human rights division.  Hence, a decisive break from the past would be needed in implementing this recommendation.
Domestic legislation be framed to specifically criminalise enforced or involuntary disappearances	9.59	Southern CoI, at p.172:  Recommendations were to utilise civil proceedings, whereby dependents of victim were given the right to institute civil proceedings to claim damages if a person is found guilty for involuntarily removing or disappearing another, on the basis of the order of the Criminal Court notwithstanding the provisions of the Prescription	No such legislation was ever enacted despite being previously recommended.

		Ordinance.	
Special mechanism to examine detention cases on a case-by-case basis and recommend a course of action in terms of disposal of each case of detention.	9.62		This was one of the LLRC's interim recommendations, and is yet to be fully implemented.
Centralised comprehensive database containing a list of detainees, which should be made available to the next of kin with names, place of detention as well as record of transfers so that families have access to such information.	9.63	Southern CoI, at p.173.	The previous recommendation was to have records, lists and registers to be available for perusal by lawyers, courts, and persons/organisations with a legitimate interest in the information.  This was also one of the LLRC's interim recommendations, and is yet to be implemented.
Current facilities for transportation of next of kin to visit their family members at places of detention to be enhanced by relevant authorities in cooperation with the ICRC and voluntary organisations.	9.65		
Priority given to the investigation and speedy disposal of cases of young detainees, in particular those whose education has been disrupted due to conscription by the LTTE and who expect to complete their formal education.	9.68		
Proper screening process in place to identify special cases such as those with young children, the physically disabled and those who are recovering from injury, and medical interventions.	9.69		
Conclusive action to be taken to	9.70		The TNA has repeatedly brought

dispose of cases of detainees who have been incarcerated over a long period of time without charges being preferred, by bringing charges or releasing them where there is no evidence of any criminal offence having being committed.			<p>this issue to the attention of the government. Yet, detainees continue to be held for long periods of time without charges being preferred.</p> <p>Moreover, the recently issued regulations under the PTA provide that persons previously held under Emergency Regulations would be deemed to be detained under the PTA. This will no doubt facilitate the further incarceration of detainees without charges.</p>
<b>Illegal Armed Groups</b>			
Proper investigations into allegations against illegal armed groups in order to ascertain the truth and to institute criminal proceedings against offenders in cases where sufficient evidence can be found.	9.73		The actions of illegal armed groups have been brought to the attention of the government on numerous occasions with no resulting investigations.
<b>Child Recruitment</b>			
Rehabilitation of the ex-child combatants, in accordance with the community based correctional programme of the Commissioner General of Childcare and Probation, in cooperation with NGOs and civil society organisations.	9.77		
The relevant rehabilitation authorities to ensure that as soon as the rehabilitation programme is completed, the children are allowed to live with their families and help them earn a living and to assist them to continue their formal or informal studies.	9.78		
Investigations into cases of conscription of children as combatants, and offenders must be	9.79		The Special Envoy of the UN Special Representative for Children and Armed Conflict previously

brought to justice.			brought the actions of Iniya Barathi to the attention of the government. However, Barathi has never been investigated and is in fact reported to have been appointed the SLFP organiser for Amparai.
Relevant authorities in consultation with the private sector to provide for increased employment opportunities in the former conflict affected areas.	9.80	<p>The 1994 Northern and Eastern Disappearances Commission Report (1997) ['NE CoI'], at p.64:</p> <p>Recommended that one person in affected families who has the minimum qualifications be provided employment either in the State Sector or in the Private Sector.</p> <p>Southern CoI, at pp.169 and 170:</p> <p>Members of affected fisher families to be given assistance through existing self-employment schemes.</p> <p>Unemployed youth of affected families to be considered on a priority basis for recruitment in government employment.</p>	<p>To the TNA's knowledge, none of these recommendations have been implemented.</p> <p>Hence, a decisive break from the past would be needed in implementing this recommendation.</p>
To ensure actual reunification of children with their families through matching data on children, by encouraging and supporting the establishment of the Family Tracing and Reunification (FTR) Unit with UNICEF's assistance and all agencies, especially the security agencies.	9.81		
Establish a national, government led, multidisciplinary task force to develop and implement a comprehensive child-tracing programme.	9.81		

Women			
Economic assistance for women who are made to become the heads of households, by way of providing them with means of livelihood and other income generating means.	9.87	Southern CoI, at p.171:  Recommendations were to provide employment and financial assistance for female-headed families, assistance/training on home-based self-employment for women, and counseling on savings.	There were no specific programmes in place for women of families who have disappeared.  It is reported that there are certain programmes initiated by the Women's Bureau in this regard, but none of these programmes have been properly implemented in the North and East.
Post-conflict environment, opportunities and options should be provided to women to continue with their formal education or pursue other forms of informal education and/or vocational training that may facilitate in finding employment and/or engaging in other livelihood activities.	9.89	Southern CoI, at p.171.	The Women's Bureau conducts programmes to educate and empower female-headed households and also conducts poverty reduction programmes for rural women providing them training and credit facilities. Yet none of these programmes have been properly implemented in the North and East.
The government has a responsibility to create such a conducive environment in all areas of the country, especially the conflict affected areas, so that women feel that they live in a secure environment and their basic human dignity is safeguarded and protected.	9.90		The LLRC has not adequately analysed the situation with respect to physical and sexual violence against women. This recommendation is vague and incapable of being properly implemented at the policy level.
Establishment of an Inter-Agency Task Force mandated to addressing in a comprehensive manner, the needs of women, children, elderly and other vulnerable groups such as the disabled affected by conflict, and providing necessary relief.	9.92		
Children			
Educational support for children to	9.93	Southern CoI, at p.170, Central	This recommendation was not

be provided through schools, teachers, school supplies, financial and other forms of support such as scholarships should be considered in this regard.		CoI, at p.14, and All Island CoI, at p.86:  Recommendations were mainly to provide scholarship programmes for affected children.	implemented. To the TNA's knowledge, no instructions have been issued to the School Activities Unit, which administers scholarship programmes for school children, to implement such a programme, and no funding has been specifically set aside.
Special attention and care (including professional counseling) to be provided to children who have been identified as suffering from trauma and other psychological disorders.	9.94	Southern CoI, at p.170.  Recommended that measures be taken to address the psychological trauma of children.	The TNA received reports that NGOs have been prevented or obstructed from providing psychosocial support to people in the North and East.  Thus a decisive break from the past would be needed in implementing this recommendation.
Elderly			
Provisions to reduce the burden on the elderly in maintaining and taking care of their extended families.  Attention to the special needs of the elderly due to disability and other long-neglected health issues, including conflict-related trauma.	9.96	Southern CoI, at p.170:  Recommended that a counseling Service be set-up for the purpose of emotional rehabilitation of members of affected families.	This previous recommendation was not implemented.
Persons with Disabilities			
Encouraging people with disabilities to organise themselves as community groups that will help facilitate mutual support and obtain necessary assistance for them through international organisations and civil society groups who have expertise and resources in this area.	9.99		This recommendation is extremely vague, as it is unclear as to what steps should be taken to encourage persons with disabilities to organise themselves.
National legislation to realise the rights of persons with disabilities in line with the UN Convention on Rights of Persons with Disabilities.	9.100		

Internally Displaced Persons			
Assistance for returnees to repair and build permanent houses, by encouraging self-help and mutual assistance programmes such as 'Shramadana'.	9.103		This recommendation is vague, as it is unclear as to what steps should be taken to encourage self-help and mutual assistance programmes.
Provisions to provide infrastructure needs such as roads, schools and hospitals in resettlement areas.	9.103		
Grant legal ownership of land to those who have been resettled.	9.104		The TNA welcomes this recommendation and intends to closely monitor its implementation.
Clearer government policies regarding areas available for resettlement and more awareness created among people on this matter, and options made available to them, so that people will be able to resettle in their places of origin.	9.106		
Facilitation and encouragement by government, for displaced persons living in India who wish to return and resettle in Sri Lanka. In doing so, there will be no discrimination in facilities available to returnees from India and local IDPs returning to their lands.	9.108		
Address the plight of the Muslim Community through the creation of a uniform State policy aimed at resettlement of these IDPs and/or integrating them into the host community.	9.111		The TNA welcomes this recommendation and calls upon the government to take expeditious action to resettle all Muslims displaced from their places of origin.
Appointment of special committee to examine durable solutions and to	9.113		The TNA welcomes this recommendation and intends to

formulate a comprehensive State policy on the issues faced by the Muslim Community, after extensive consultations with the IDPs and the host communities.			closely monitor its implementation.
Livelihood assistance extended to 'new IDP' families as needed, on an area-by-area basis for a longer period of time than that planned by the government with the assistance of the development partners.	9.143		The TNA has consistently complained of the lack of a cohesive and coordinated effort to address the concerns of IDPs. We call upon the government to formulate a roadmap and deal with this matter on an urgent basis.
Freedom of Expression and the Right to Information			
Steps taken to prevent harassment and attacks on media personnel and institutions, and imposition of deterrent punishment on such offences.	9.115		The TNA welcomes this recommendation and intends to closely monitor its implementation.
Conclude investigations into past incidents of such illegal action against media personnel and institutions.	9.115		The TNA welcomes this recommendation and intends to closely monitor its implementation.
Ensure freedom of movement of media personnel in North and East, in order to help the exchange of information so as to help the process of reconciliation.	9.115		The TNA welcomes this recommendation and intends to closely monitor its implementation.
Legislation to provide for right to information.	9.115		Several attempts to enact legislation on the right to information have been unsuccessful, and in fact, have been blocked by the government.  Therefore, a decisive break from the past would be needed in implementing this recommendation.



Freedom of Religion, Association and Movement			
Access to places of worship, including those in HSZs, by removing remaining restrictions, with the exception of restrictions needed due to mine-clearance activities.	9.117		The TNA maintains that all HSZs, <i>de facto</i> HSZs and restricted zones must be dismantled forthwith and that the people must have free access to these places.
Access granted to visitors from overseas to visit their friends and relatives in resettled areas without undue restrictions.	9.119		
Follow up Action on the Reports of Past Commissions of Inquiry			
Implementation of recommendations of the Report of the Presidential Commission of Inquiry Appointed to Investigate and Inquire into Alleged Serious Violations of Human Rights arising since August 2005. In particular, the investigation and prosecution of offenders involved in the incidents of the death of 5 students in Trincomalee in January 2006 and 17 aid workers of the ACF in August 2006.	9.120		<p>The recommendations of this CoI have not been made public. The International Independent Group of Eminent Persons (IIGEP) appointed to monitor the work of the CoI resigned on the grounds that its observations regarding the defects of the CoI had been disregarded.</p> <p>The IIGEP in concluding that the CoI lacked independence highlighted the government's lack of political will and its institutional inability to investigate grave human rights violations in keeping with international norms and standards.</p>
Land			
Distribution of State Land to continue as provided for in the Constitution of Sri Lanka, and in the case of inter provincial irrigation or land settlement schemes.	9.124	<p>Southern CoI, at p.169:</p> <p>Recommended that the government settle homeless families in State Owned Land; and allocate State Land for cultivation.</p>	The TNA's position is that the distribution of State Land must be in conformity with the provisions of the Bandaranaike-Chelvanayakam Pact.

<p>Clarify and assure that the programme proposed in July 2011, i.e. 'Regulating the Activities Regarding Management of Lands in the Northern and Eastern Provinces' is not a substitute for recourse to the Court of Law in instances where persons had valid proof of their claim to land and instead is to make available land to all returning IDPs, in particular to those who do not have documentary proof due to conflict related reasons.</p>	<p>9.126</p>		<p>The TNA's position is that the new programme as described in the Land Circular No. 2011/04 issued on 22<sup>nd</sup> July 2011 is unconstitutional.</p> <p>TNA M.P., M.A. Sumanthiran challenged the Land Circular in the Court of Appeal and Supreme Court. The Court of Appeal has issued a stay order with respect to the implementation of the said Circular in the North and East.</p>
<p>Effective and expeditious resolution of the land issues of Muslim families who were ejected by the LTTE from their agriculture land in the Eastern Province.</p>	<p>9.144</p>		<p>The TNA maintains that all Muslim families that were ejected from their agricultural lands in the Eastern Province must be restored to possession after due investigation.</p>
<p>Amendment of law pertaining to prescription in its application to land transfers/occupations effected during the period of conflict, so as to prevent legitimising of forced eviction and secondary occupation of private lands in the North and East.</p>	<p>9.148</p>		<p>The TNA welcomes this recommendation and intends to closely monitor its implementation.</p>
<p>Expedite the establishment of a National Land Commission in order to propose appropriate future national land policy guidelines, and in doing so, the Commission should include guidelines for the equitable distribution of State land.</p>	<p>9.150</p>		<p>The TNA's position is that the powers of the National Land Commission should be restricted to making recommendations based upon technical criteria in regard to the use of land.</p>
<p>Militarisation</p>			
<p>Disengagement of security forces from civil administration related activities as soon as possible, and in the case of their participation in the land restitution process, for it to be confined to and used to expedite releasing maximum extents of such</p>	<p>9.134</p>		<p>The TNA welcomes recommendations for the rapid disengagement of the military in the North and East and intends to closely monitor the implementation of such recommendations.</p>

land, while taking into account security considerations.			
<p>Review of the two existing HSZs in Palaly and Trincomalee-Sampoor, as well as small extents of private land currently utilised for security purposes in the districts, so as to release more land while taking into account national security perspectives.</p> <p>Alternate lands or compensation for families who have lost lands and / or houses due to formal HSZs or to other informal or <i>ad hoc</i> security related needs. This is to be done within a specific time frame.</p>	9.142		The TNA maintains that all private lands in the North and East presently under the control of security forces, including private lands in the HSZs, <i>de facto</i> HSZs and restricted zones, should be forthwith restored to those in whose possession such lands were.
Revert to civilian administration in the Northern Province in matters relating to the day-to-day life of the people, in particular with regard to matters pertaining to economic activities such as agriculture, fisheries, land etc.	9.227		The TNA welcomes recommendations for the rapid disengagement of the military in the North and East and intends to closely monitor the implementation of such recommendations.
Compensatory Relief			
REPPIA to be responsible for providing compensatory relief for the persons who have suffered loss or damage due to terrorist violence and operations of the government security forces.	9.158	<p>Southern CoI, at p.169:</p> <p>Provision of monetary assistance in respect of damage to property.</p>	<p>REPPIA has thus far provided some compensation for property loss.</p> <p>However, acknowledging that the security forces were responsible for the loss or damage would be a necessary prerequisite for the granting of compensatory relief. Such acknowledgement is yet to take place.</p>
Time limit set for completion of compensatory payments for losses suffered up to the end of the conflict.	9.159	All Island CoI, at p. 86.	The previous recommendation in this regard was not implemented.

Decision to be taken on provision of compensatory relief for death and injury of those involved with the LTTE (Commission's perspective is that ex-combatants and next of kin should be considered eligible for compensation).	9.164		This is an important aspect of the process of reconciliation. Thus the TNA welcomes the early and proper implementation of this recommendation.
Reconciliation, Governance and Political Solution			
Ensure even handed resource allocation and development of villages to prevent frustration and communal tension in clusters of villages dominated by different ethnic communities.	9.199		<p>The TNA draws attention to the specific destruction of villages in the North and East, and hence recommends that special attention be paid to those villagers affected by the war to ensure proper resource allocation and development.</p> <p>This recommendation also applies to border villages of the North and East so affected.</p>
Improvement of health and educational facilities and better living conditions in estate areas.	9.200		<p>The TNA maintains that these areas have been long neglected and require urgent attention with respect to health, education, housing and other living conditions.</p> <p>Longstanding structural injustices with regard to the community in the estate sector – who have substantially contributed to the development of this country – must be rectified.</p>
Larger post-conflict development agenda and programmes for reconciliation to take account of the essential needs of the Tamils of Indian origin.	9.201		The TNA welcomes this recommendation and is of the view that the essential needs of Tamils of Indian origin must also be included in the larger post-conflict development programme and the agenda for reconciliation.

<p>Joint declaration by all leaders (of all sides) to apologise to innocent citizens who fell victim to conflict due to collective failure of political leadership.</p>	<p>9.248</p>		<p>The TNA welcomes this recommendation and is willing to participate in such an endeavour.</p> <p>The TNA is also of the view that such a declaration should be accompanied by meaningful steps to address the causes of such collective failure.</p>
<p>Separate event to be set apart on the National Day to ‘express solidarity and empathy with all victims of the tragic conflict and pledge our collective commitment to ensure that there should never be such bloodletting in the country again’.</p>	<p>9.285</p>		<p>The TNA welcomes this recommendation and intends to closely monitor its implementation.</p>
<p>Investigation into allegations against the EPDP.</p>	<p>9.208</p>		<p>The government has thus far failed to display any commitment to disarming paramilitary groups and investigating alleged crimes and violations of human rights perpetrated by these groups.</p> <p>Therefore, a decisive break from the past would be needed in implementing this recommendation.</p>
<p>Legal expertise to be provided to police officers regarding criminal investigations, prosecutions and other matters touching upon the criminal justice system, by setting up units of the Attorney General’s Department in the Provinces.</p>	<p>9.212</p>	<p>Southern CoI, at p.174:  Provision of training programmes in investigations for police officers.</p>	
<p>Independent Police Commission to monitor performance of Police Service and ensure that all Police officers act independently and maintain a high degree of professional conduct.</p>	<p>9.215</p>		<p>The TNA welcomes this recommendation and intends to closely monitor its implementation.</p> <p>However, the recommendation is inconsistent with the Eighteenth Amendment and would therefore</p>

			require a constitutional amendment in order to be properly implemented.
Establishment of an Independent Institution with a strong investigative arm, to address the grievances of all citizens, in particular the minorities, arising from the abuse of power of public officials and other individuals involved in the governance of the country.	9.218	Southern CoI, at p.175, All Island CoI, at pp.16 and p.83.	Past recommendations, which focused on an independent prosecutor to deal with complaints of human rights violations, have not been implemented.  Hence, a decisive break from the past would be needed in implementing this recommendation.
Development activities to be carried out in consultation and with participation of local people.	9.223		The TNA welcomes this recommendation and intends to closely monitor its implementation.  However, it is noted that this recommendation is vague and requires further elaboration.  The TNA is of the view that development activities must be carried out by the people through constitutional arrangements that effectively empower their democratically elected representatives.
Specific programmes conceived and implemented to bring about changes in attitudes to enhance work ethics of the Public Service such as through training programmes.	9.224		
Establishment of Independent Public Service Commission so as to ensure that there is no political interference in the Public service, and to ensure that equality provisions in the Constitution are employed.	9.226		The TNA welcomes this recommendation and intends to closely monitor its implementation.  However, the recommendation is inconsistent with the Eighteenth Amendment and would therefore require a constitutional amendment

			in order to be properly implemented.
Constitutional amendments to provide for provisions in the Constitution to allow for judicial review of proposed legislation.	9.228		<p>The TNA is of the view that judicial review of legislation should include post enactment review of all legislation, including those currently in existence.</p> <p>The government has consistently sought to pass controversial laws by using the urgent Bill process. E.g. the Eighteenth Amendment.</p> <p>Hence, a decisive break from the past is urgently needed.</p>
<p>Devolution of power by:</p> <p>a) Empowering local government institutions to ensure greater peoples' participation at grass roots level.</p> <p>b) Taking into account the shortcomings in the functioning of the Provincial Councils system.</p>	9.31	<p>A host of previous proposals have recommended various models of devolution.</p> <p>These proposals include those made by the Mangala Moonesinghe Parliamentary Select Committee, the Constitutional Proposals of 1995, 1997 and 2000 and the proposals of the majority report of the Expert Committee of the APRC of 2006.</p>	<p>Previous proposals have not been implemented.</p> <p>It is noted that empowering local authorities should not be viewed as a substitute for genuine power sharing with the provinces.</p> <p>The inadequacy of the present arrangements to ensure meaningful power sharing has not been referred to by the LLRC. The TNA is of the view that there needs to be constitutional arrangements to enable the Tamil-speaking people to have access to powers of governance as a foundation for genuine reconciliation.</p>
Consider establishing a Second Chamber comprising Representatives from the Provinces so as to generate a sense of confidence among the political leadership and people in Provinces.	9.232	The majority report of the Expert Committee of the APRC, at Art.5.1.c.	<p>The proposals contained in the majority report of the Expert Committee of the APRC were not implemented.</p> <p>It is noted that a second chamber – which provides for power sharing at the Centre – cannot in any event be a substitute to effectively sharing powers of governance in the provinces.</p>

Language			
Implement the LLRC's interim recommendation of recruitment of Tamil-speaking Police officers.	9.240		<p>The LLRC's interim recommendations on this issue are yet to be implemented.</p> <p>This measure should not be viewed as a substitute to the provinces exercising police powers.</p> <p>In any event, it is reported that many Tamil-speaking police officers that are presently being recruited in the North and East are drawn from paramilitary groups. This pattern only exacerbates the lawlessness that prevails in the North and East.</p>
Adequate representation of Tamil speaking people and Tamil speaking regions in official bodies executing language policies and monitoring performance.	9.241		The TNA welcomes this recommendation and intends to closely monitor its implementation.
Full implementation of language policy to include action plans broken down to community level and covering Divisions and Local Bodies with targets that can be monitored with citizen participation.	9.241		
Compulsory provision for learning 'each others' languages' in the school curriculum.	9.243		
Government Service Officers to possess language skills to serve in any part of the country.	9.246		
Compulsory to have Tamil speaking officers in all government offices at all times and bi-lingual officers on a	9.247		The TNA welcomes this recommendation and intends to closely monitor its implementation.



24 hours basis in Police Stations, so that complainant can record statement in their own language or the language they choose to use.			It is noted, however, that the requirement to have Tamil speaking officers at all government offices, and bi-lingual officers in Police stations, is a requirement of the law, but has never been implemented.
Language Commission to be an authority with effective powers of implementation, and with branches in every province.	9.248		
Education			
Review of quota system with a view to introducing a merit based admission system, in order to ensure equal opportunities in education.	9.251		
Policy to encourage mixed schools with children from different ethnic and religious backgrounds, through development of admission policy and discouraging of practices which disqualified students on ethnic and religious grounds.	9.253		
Diaspora			
Engage the elected representatives of the minority parties in a meaningful dialogue on devolution and other grievances, and to take action to engage groups that still harbour adversarial attitudes and the LTTE approach of separation.	9.260		
To engage in a proactive diplomatic initiative with the international community, especially the countries that host these Diaspora groups.	9.260		

Liberal policies and attitudes towards expatriates who wish to work and invest in Sri Lanka, such as making it easier to obtain dual nationality status.	9.260		
Religion and Culture			
Prevent incidents where places of worship are vandalised by unknown mobs.	9.267		<p>This recommendation is too vague, as it is unclear as to what is entailed by 'prevention'.</p> <p>Numerous incidents where Hindu places of worship have been desecrated are yet to be fully investigated. For example, the renowned temple of Lord Shiva, over 2500 years old, called 'Agasthiyar Sthapanam', and several other temples have been so desecrated.</p> <p>Moreover, recent incidents, such as the destruction of the Sikkandar Oliulla Dharga (a Muslim place of worship in Anuradhapura) by a mob describing itself as the 'Sinhala Ravaya', are yet to be properly investigated.</p>
Establishment of a mechanism to serve as an 'early warning and early diffusing procedure', in consultation with inter-faith groups, to prevent communal or religious tension or friction from leading to conflict.	9.270		
Priority given to creating awareness of linguistic and cultural affinities among different communities, and made part of a proactive State policy and program.	9.274		

<p>Maintenance and support of the practice of the National Anthem being sung simultaneously in two languages to the same tune.</p>	<p>9.277</p>		<p>The TNA notes that this recommendation would require a reversal of the purported Cabinet decision that the National Anthem should be sung only in the Sinhala language. This purported decision has been communicated to all government institutions.</p>
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