



## **Major flaw in Ban-Ki-moon report renders it unacceptable**

7 May 2011, 6:51 pm

**by Prof. Lakshman Marasinghe**

I thank you in advance in the hope that you might be able to allow me a few lines to point out a fatal flaw in the Ban Ki-moon Report. In Paragraph 51 of the Report the Panel sets out the burden of proof that they utilized to determine the difference between fact and fiction from the voluminous material both oral and documentary provided to them. The panel wrote in this regard:

“The Panel has determined an allegation to be credible if there is a reasonable basis to believe that the underlying act or event occurred. This standard used by the panel – that of a reasonable basis to believe that the underlying act or event occurred – gives rise to a responsibility under domestic and international law for the State or other actors to respond”.

My short comment is that neither domestic law nor international law that I know of adopts such a test pregnant with subjectivity as a basis upon which the guilt of a party is found. The domestic law finds two tests. The “Balance of Probabilities” test used only for civil matters and the “Beyond Reasonable Doubt” test for criminal matters. Article 66 of the Rome Treaty reiterates this well established position in both the domestic laws and in international law.

That Article clearly states that the presumption of innocence could only be refuted by proof beyond reasonable doubt. The final conclusion of the panel found stated in Paragraphs 259 and more particularly in paragraph 260 amounting to a finding of criminality found specifically upon the use of a purely subjective criteria, as stated in paragraph 51, sets a most unacceptable standard for finding “credibility” from a catena of facts presented to the Panel.

Continuing from there if one reads paragraph 53 one comes across a most disturbing revelation. There it is said that:

” The Panel has chosen to present the allegations it finds credible in a narrative account rather than listing the various allegations under their legal classification, so as to provide

a greater sense of context and perspective. This account should not be taken as proven facts, and any effort to determine specific liabilities would require a higher threshold”.

My equally short comments are that, the panel admits that the facts detailed in paragraphs 55 to 245 are not proven facts. In those paragraphs the panel presents a harrowing list of events upon which it concludes in paragraphs 246 – 248 that the facts indicate the commission of War Crimes and in paragraphs 248 – 251 that the facts detailed above (paragraphs 55 to 245) indicates the commission of “Crimes against humanity”.

May I emphasize that these are the very same facts that the panel admits in the above quoted paragraph 53 as facts that are ” not to be taken as proven facts, and any effort to determine specific liabilities would require a higher threshold’. Notwithstanding this caution, it is lamentable that the panel in paragraphs 259 (g) and 260, found it possible to conclude that the government of Sri Lanka had committed War Crimes and Crimes against humanity and must be prosecuted. I had some difficulty in believing that a panel seriously established would advise the most senior official of a supra national body as the UN, on facts, in its own submission as not proven that:

” — in the case of both war crimes and crimes against humanity, credible evidence points to the responsibility of superiors for their subordinates ( Paragraph 259 (g)). That these credibly alleged violations demand a serious investigation and prosecution of those responsible”. (paragraph 260).

This short comment is to point out that the Report based on such facts as those which the panel had itself cautioned not to accept without more (Paragraph 53) had been provided with the undeserving imprimatur of the U.N. by releasing it to the public. This Report therefore is a classic non-event which has been made into an event by the Secretary-General himself by releasing it. Either the Secretary – General had not properly understood that the Report itself is based on such tenuous conclusions and deserves to be shelved or he has chosen not to act on that fact.

Finally, may I suggest that any response addressed to the UN-SG should enlarge on these flaws which make the Report in all fairness, unacceptable.

*(The writer is Emeritus Professor of Law, University of Windsor, Windsor, Ontario, Canada)*