

FACTUAL SUPPLEMENT
TO THE REPORT TO CONGRESS ON MEASURES TAKEN BY THE GOVERNMENT OF
SRI LANKA AND INTERNATIONAL BODIES TO INVESTIGATE AND HOLD
ACCOUNTABLE VIOLATORS OF INTERNATIONAL HUMANITARIAN AND HUMAN
RIGHTS LAW

This factual supplement explains, in greater detail, issues of international humanitarian law and international human rights law addressed in the Department of State’s March 2012 Report to Congress on Measures Taken by the Government of Sri Lanka and International Bodies to Investigate and Hold Accountable Violators of International Humanitarian and Human Rights Law. While this factual supplement draws attention to open questions regarding allegations of violations of international humanitarian law (IHL) and international human rights law (IHRL), it is not meant to be a legal determination confirming any of those allegations.

I. LEGAL FRAMEWORK

The United States recognizes a State’s inherent right to defend itself from armed attacks, including those by non-state actors such as terrorist groups. In the context of a non-international armed conflict—that is, an armed conflict that is not between states—common article 3 of the Geneva conventions of 1949 provides basic treatment protections to all individuals not taking part in hostilities, including civilians and detained members of the Armed Forces. Its core requirements are that individuals not taking part in hostilities must be treated humanely and without “adverse distinction” based on race, religion, or similar criteria. To this end, the article prohibits murder; cruel treatment; torture; the taking of hostages; outrages upon personal dignity; and the passing of sentences without judgment by a court providing recognized guarantees. Sri Lanka is neither a party nor a signatory to the Additional Protocol II to the Geneva Conventions, which includes more detailed rules relevant to non-international conflicts than those set forth in, article 3.

As with the two previous reports, our assessment of investigations undertaken by the Government of Sri Lanka (GSL) and international bodies is mindful of Sri Lanka’s pertinent international obligations. For example, Sri Lanka is a State Party to the International Covenant on Civil and Political Rights, the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, and the 1949 Geneva Conventions. In addition, Sri Lanka is subject to relevant customary international law obligations, which in the area of international humanitarian law include the principles of distinction and proportionality, which are intended to protect innocent civilians from harm. The principle of distinction holds that civilians and civilian objects (such as hospitals and schools) shall not be the object of direct attack, though civilians lose this immunity if they directly participate in hostilities. The principle of proportionality prohibits attacks that may cause incidental loss of life, injury, or damage to civilians that would be excessive in relation to the direct military advantage anticipated. The civilian population must not be used to shield military objectives or operations from attack, and parties must take all practicable precautions, taking into account military and humanitarian considerations, to minimize incidental death, injury and damage to civilians.

II. EFFORTS AT ACCOUNTABILITY

There are a variety of ways in which a government may undertake effective investigations and other accountability processes. While some international law conventions call for criminalization of certain human rights violations and serious violations of IHL, other routine administrative and special investigative processes, such as commissions of inquiry (COI), can play an important role in establishing a factual record of events. Although COIs and other investigative bodies are often implemented at the national level, in some instances governments seek international participation to bring specialized expertise into, and help foster public confidence in, so-called “hybrid” investigations. Fully internationalized processes undertaken without the relevant government’s consent have generally been pursued by the international community only when the State concerned lacks the capacity, political will, or both, to undertake an independent, credible, and effective inquiry. In the case of serious violations of IHL and human rights, including the type of atrocities alleged to have occurred in the final months of the conflict in Sri Lanka, however, such commissions do not obviate the need for criminal investigation and, if appropriate, prosecutions.

Whether domestic, international, or hybrid, investigative processes should operate consistent with best practices derived from extensive experience in order to be both credible and effective. There are several key criteria for evaluating the adequacy of a COI, including: independence and competence; adequate mandate and authority; witness and COI protection; adequate resources; a public report; and a timely and transparent government response.

A. The Panel of Experts (POE)

On June 22, 2010, UN Secretary-General Ban Ki-moon appointed a three-member Panel of Experts (POE) to advise him on the nature and scope of allegations of violations of international humanitarian and human rights law during the final stages of the conflict, and the implementation of a commitment made in a joint statement by the President of Sri Lanka and the Secretary General on May 23, 2009, to address accountability. The POE consisted of former Attorney General of Indonesia Marzuki Darusman, former South African Truth and Reconciliation Commission Commissioner Yasmin Sooka, and American law professor Steven Ratner.

The GSL strongly opposed the establishment of the POE, and described it as “an unwarranted and unnecessary interference with a sovereign nation.” The POE and GSL were unable to come to agreement regarding the modalities of a visit of the POE to the country. The POE did receive written submissions in response to a set of questions provided by the POE to the GSL, and engaged with the GSL in a face-to-face dialogue.

On April 12, 2011, the POE submitted its report to the UN Secretary General, which he then shared with the GSL.¹ On April 13, 2011, the GSL issued a statement that decried the report as “fundamentally flawed” and “patently biased.” On April 25, 2011, the Secretary General’s office made the report public.

¹ *Report of the Secretary-General’s Panel of Experts on Accountability in Sri Lanka* (Mar. 31, 2011), available at http://www.un.org/News/dh/infocus/Sri_Lanka/POE_Report_Full.pdf [hereinafter POE Report].

The report highlights a number of allegations of violations by the GSL it describes as credible, including: large-scale shelling of “No Fire Zones,” systematic shelling of hospitals, and summary execution, rape, and torture of surrendering LTTE cadres and civilians fleeing the conflict zone. The report also highlights a number of allegations against the LTTE it describes as credible, including: using civilians as a strategic buffer, forced labor (including of children), and summary executions of civilians attempting to flee the conflict zone.² The serious allegations in the report regarding the conduct of both sides, if proven, would indicate violations of IHL and IHRL.

Based on its assessment that the LLRC was “deeply flawed” and did not meet international standards as an accountability mechanism, as well as other obstacles to accountability such as “triumphalism” and the eroded independence of the Attorney General and domestic courts of Sri Lanka, the POE recommended a series of steps to implement the joint commitment on accountability between the UN Secretary General and Sri Lankan President Rajapaksa. The report recommended that the GSL should immediately commence genuine investigations into alleged violations of IHL and IHRL committed by both sides in the conflict and that the GSL should issue a public, formal acknowledgment of its role in, and responsibility for, extensive civilian casualties during the final stages of the conflict. The report also recommends that the Secretary General immediately establish an independent international mechanism to monitor and assess the extent to which the GSL carries out an effective domestic accountability process, as well as to independently investigate credible allegations.

The POE was not a commission of inquiry and thus did not undertake fact-finding, nor did it reach factual conclusions regarding disputed facts or establish culpability for alleged violations. Therefore, the work of the POE did not directly result in a process to hold accountable the individuals alleged to be responsible for violations of international human rights law and international humanitarian law. However, by undertaking an assessment of the allegations against the GSL and LTTE in the public record “[i]n order to understand the accountability obligations arising from the last stages of the war...,” the POE established a strong case that such a process is needed.

The Secretary-General transmitted the POE report to the President of the U.N. Human Rights Council and the U.N. High Commissioner for Human Rights on September 12, 2011. In the announcement regarding the transmittal, the UN also announced the Secretary-General selected UN Population Fund Executive Director Thoraya Obaid to undertake the review of UN actions recommended by the POE. The UN has not completed that assessment.

B. Humanitarian Operation Factual Analysis: July 2006-May 2009

On August 1, 2011, the GSL released a report produced by the Sri Lankan Ministry of Defense entitled “The Humanitarian Operation Factual Analysis: July 2006-May 2009.” The report provides a detailed analysis of the types of atrocities committed by the LTTE, describes the organization’s structure and components, and describes the various failed negotiations with the LTTE and its failure to abide by cease-fire and other agreements with the GSL. The report also describes what it characterizes as the GSL’s “civilian rescue operation” during which it defeated the LTTE. In that context, the report outlines the military procedures used to safeguard civilian lives and protect civilian rights, including institutional frameworks, training, monitoring of

² POE Report, para. 237-43.

alleged violations and investigations/prosecutions. The report does not, however, address any of the alleged violations of IHL or IHRL identified by the POE or available in the public domain. Moreover, while the report contains a table summarizing major offenses committed by Sri Lankan security personnel between 2005 and 2010, the table identifies no recorded offenses for the year 2009, the period during which most of the allegations in the POE report fall.

C. The Lessons Learnt and Reconciliation Commission (LLRC)

On May 15, 2010, President Rajapaksa issued a proclamation establishing an eight-member commission under the Special Commission of Inquiry Law of 1978. Pursuant to this law, the Lessons Learnt and Reconciliation Commission was charged to “inquire and report within six months on the following matters that may have taken place during the period between February 21, 2002 and May 19, 2009:

- The facts and circumstances which led to the failure of the ceasefire agreement operationalized on February 21, 2002 and the sequence of events that followed thereafter up to May 19, 2009;
- Whether any person, group, or institution directly or indirectly bear responsibility in this regard;
- The lessons to be learned from those events and their attendant concerns, in order to ensure that there will be no recurrence;
- The methodology whereby restitution to any person affected by those events or their dependents or to heirs, can be effected; and
- The institutional administrative and legislative measures which need to be taken in order to prevent any recurrence of such concerns in the future and to promote further national unity and reconciliation among all communities, and to make any such other recommendations with reference to any of the matters that have been inquired into under the terms of this Presidential Warrant.”

Secretary Clinton welcomed President Rajapaksa’s establishment of the commission in her press appearance with Foreign Minister G.L. Peiris during his May 2010 visit to Washington and outlined U.S. expectations that the commission would follow established best practices.

Although initially given six months to report, the GSL extended the deadline for the LLRC report twice, each time for an additional six months. The LLRC commenced public hearings on August 11, 2010, and finished in March 2011. According to the LLRC website, the Commission held 41 field visits and 149 public sittings.

In mid-September 2010, the LLRC provided the GSL a set of interim recommendations that dealt with five topical areas: detention; land issues; law and order; administration and language issues; and socioeconomic and livelihood issues. Particularly relevant to the question of accountability were the recommendations relating to detention and administration and language issues. Although the GSL established an Inter-Agency Advisory Committee (IAAC) to facilitate the implementation of the interim recommendations, LLRC’s final report notes that the GSL has not fully implemented its interim recommendations.

On December 16, 2011, the GSL publically released the LLRC's final report. The GSL issues the entire report in English but only the executive summary in Sinhala and Tamil. The report makes significant observations and recommendations with respect to the origins of the conflict, land reforms, restitution, and other efforts to reconcile the various ethnic communities of Sri Lanka. In particular, the LLRC calls on the GSL to enact a uniform policy aimed at the resettlement of internally displaced persons (IDPs), to take steps to prevent harassment and attacks on media personnel and organizations, to ensure their freedom of movement and, to investigate alleged crimes against journalists, to prioritize compensatory relief in addition to economic development projects, and to undertake reconciliation projects to reunite the population of Sri Lanka. The report also suggests that the government investigate specific allegations of direct attacks on civilians, launch a full investigation into reports of enforced disappearances and abductions, fund an independent investigation into the veracity of the Channel 4 videos, and investigate allegations of detainee abuse, torture, and summary execution. The Commission's findings and recommendations regarding international humanitarian and human rights law issues are examined in greater detail in Section III.

D. Assessment of the LLRC as a COI

The following sections evaluate the LLRC's establishment, mandate, composition, and activities compared to standards outlined by the Department of State in its August 2010 report to Congress.³

Independence and Competence:

The members of the LLRC included former Attorney General C. R. de Silva, former Assistant Secretary of the Ministry of Justice Karunaratne Hangawatte, former Legal Advisor at the Sri Lankan Ministry of External Affairs Rohan Perera, former Foreign Secretary and Sri Lankan Permanent Representative to the UN HMGS Palihakkara, former Secretary to the Treasury C Chanmugam, former Deputy Legal Draftsman Manohari Ramanathan, former High Court Judge M.P. Paranagama, and senior attorney at law M.T.M. Bafiq. There was no information that indicated that the GSL consulted with affected communities in selecting the commission members. Despite the high percentage of women and Tamils among those giving testimony, only one of the eight commission members was female (also the sole Tamil commissioner), and only one was from the Muslim community.

All but one of the members of the commission previously worked for the GSL, raising concerns about their independence and impartiality. Two of the commission members were senior government officials during the last months of the conflict, one of whom, Hewa M.G.S. Palihakkara, as Sri Lanka's Permanent Representative to the UN, publicly commented on behalf of the government on events surrounding many of the allegations raised. Meanwhile, the Chairman of the LLRC served as Attorney General during the period when the 2006-2009 Presidential Commission of Inquiry to Investigate and Inquire into Serious Violations of Human Rights was in operation. That commission was charged with investigating sixteen allegations of serious human rights violations. The International Independent Group of Eminent Persons (IIGEP) identified significant concerns regarding independence of that commission due to the

³ <http://www.state.gov/j/gcj/srilanka/releases/145884.htm>.

role of the then-Attorney General, the later-Chairman of the LLRC. These factors have fostered the perception that commission members had an interest tied to that of the government in a particular outcome of the commission's work.

Serious concerns have also been raised regarding the process of questioning witnesses before the LLRC. The POE report describes as "non-confrontational" the line of questioning used when dealing with members of the security forces and issues related to violations of IHL.⁴ The POE report goes on to relate that in some cases, commission members appeared to lead respondents with questions that contained the answers. The POE report also claims commission members failed in some cases to pursue important lines of questioning of government officials that could have revealed specific information relating to culpability for violations of IHL and IHRL.⁵

Adequate Mandate and Authority:

In terms of addressing accountability, the LLRC's mandate was, at least initially, unclear. Based on the phrase, "and to make any such other recommendations with reference to any of the matters that have been inquired into under the terms of the warrant" and verbal assurances by the GSL, the United States government interpreted the LLRC mandate to be sufficiently broad to allow it to address allegations of violations of human rights law and international humanitarian law. On March 4, 2011, in response to U.S. Senate Resolution 84, the Sri Lanka Ministry of External Affairs further clarified the mandate of the LLRC, stating that the Commission's mandate included consideration of violations of international humanitarian law and human rights law. The Ministry also stated that the Attorney General would have the power to institute criminal proceedings based on the LLRC's findings.

Witness and COI Protection:

Sri Lanka has no witness protection laws, and there is no information that indicates that the LLRC developed a discrete program for witness protection. According to the recorded testimonies on the LLRC's website, the commission did allow and take *in camera* testimony at the discretion of the witness. Meanwhile, experience in other countries has shown that, absent such a program, witnesses, especially those victimized by recent conflict, are unlikely to come forward due to fears of arrest, personal harm, or harm to their families. A number of Sri Lankans informed Department of State officers that they, or people they knew, had declined to appear before the LLRC out of fear of retribution. Additionally, those that come forward publicly in Sri Lanka also run the risk of being branded LTTE sympathizers, heightening the likelihood of reprisal. Reporting by the International Crisis Group (ICG) and other international organizations appears to confirm that some individuals who testified before the LLRC have since received threats by the military. The ICG has also described other situations in which the format of the hearings and the presence of security officials could have served to intimidate individuals appearing to provide statements. The Department of State has received credible first-hand information regarding efforts by the GSL to cause witnesses to alter the retelling of events related to international humanitarian law violation allegations, as well.

⁴ POE Report, para. 323.

⁵ POE Report, paras. 323, 326.

Adequate Resources:

While the LLRC heard testimony a number of times and in a number of locations, those hearings may not have provided adequate opportunities for victims to testify. Although the LLRC allocated at least 56 days for sittings in Colombo and 22 days in the North and East of Sri Lanka, the State Department received several complaints from people in the North who wished to testify but were unable to do so because of the rushed sittings of the LLRC in those areas. Such persons often were told to make written submissions to the Commission, although in some cases witnesses lacked resources to do so or were illiterate. In addition, while the LLRC may have had adequate resources to conduct hearings, its staff had no investigators or lawyers with experience investigating IHL violations.

Government Response:

In submitting the LLRC report to Parliament, Leader of the House Nimal Siripala de Silva, on behalf of the government, stated that the proper way to respond to the report was to establish a mechanism to gather information, investigate accusations, and refer possible charges to the Attorney General. President Rajapaksa has not publicly commented on the LLRC Report. However, the GSL has informed the Department of State of three entities within the government created to respond to the LLRC. The first is a cabinet sub-committee created to address the recommendations within the LLRC report regarding demilitarization, land reform, and freedom of expression. The second group is a board of inquiry within the Sri Lankan Army (SLA) that will address demilitarization of the North and other general reforms to the military. Finally, a five-member court of inquiry led by a Major General in the SLA has been established to investigate the specific allegations of serious violations identified in the LLRC report. News reports have indicated that this court will also investigate the Channel 4 video. This court will refer any cases it finds credible to the Attorney General for prosecution. Sri Lankan officials also made clear to Department of State officials that individuals can bring additional allegations to the SLA court of inquiry or the Attorney General. The Department of State is not aware of any formal action plan to implement the LLRC's final recommendations from November 2011 or its interim recommendations from September 2010. In its report, the LLRC expressed its fear that its recommendations would suffer the same fate as past recommendations by Sri Lankan COIs and go unanswered by the GSL. The LLRC concluded that its recommendations should be "implemented expeditiously."⁶

III. EVALUATION OF THE LLRC FINDINGS & RECOMMENDATIONS REGARDING ACCOUNTABILITY

A. Civilian Casualties

The LLRC report recognizes that significant civilian casualties occurred during the final stages of the conflict. In particular, the report details the testimony of witnesses reporting eight attacks by GSL Security Forces against civilians that the witnesses describe as intentional. Those allegations include: three reports of shelling civilians; two reports of the Navy targeting civilian boats; one report of the Army forcing civilians to retrieve the body of an Army soldier while

⁶ LLRC report, para. 8.305.

under fire; one report of 35-40 civilians dying when a food line was shelled; and one report of the Army shelling 40-45 expectant mothers. Regarding these specific instances, the report states, “[T]he 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.”⁷ However, the Commission’s final recommendations only call for further investigation into “observation 4.359 vi. (a) and (b) and any reported cases of deliberate attacks on civilians.”⁸ The relevant sections of 4.359 to which this recommendation refers list two reported attacks by the navy and the incident involving the forced retrieval of an Army soldier’s body, meaning that the report does not ultimately recommend investigation into the other five instances reported by the Commission.

The LLRC’s recommendations fall short of fully acknowledging all credible allegations of intentional attacks on civilians by the GSL and LTTE. The LLRC report does not call for investigations into allegations of deliberate attacks on civilians in the Vanni other than the three instances briefly discussed in the report. For other civilian casualties, the report concludes that they “appear to be due to cross fire, the LTTE’s targeted and deliberate firing at civilians, as well as due to the dynamics of the conflict situation, the perils of the geographical terrain, the LTTE using civilians as human shields and the LTTE’s refusal to let hostages get out of harm’s way.”⁹ The LLRC report details the technological capabilities of the GSL to detect and distinguish civilians from the LTTE, including GPS and special reconnaissance missions into the Vanni, and concludes that the “the military strategy that was adopted to secure the LTTE-held areas was one that was carefully conceived, in which the protection of the civilian population was given the highest priority.”¹⁰

This conclusion, however, does not consider whether the government security forces properly used the capabilities examined in the report, whether attacks were directed at LTTE forces rather than civilians, or whether those attacks were proportional. The report also calls for a professionally-administered household survey in all parts of the island to determine the full scale and circumstances of death and injury to civilians in order to resolve the “unverified sweeping generalization of a highly speculative nature as regards casualty figures.”¹¹ In late February 2012, the GSL Department of Census and Statistics published “Enumeration of Vital Events, 2011, Northern Province, Sri Lanka,” a report of a census the department conducted in June and July 2011 of households in the former conflict region. Amongst many figures on population statistics during the last five years of the conflict, the report noted 7,934 deaths in the Northern Province in 2009 due to non-natural causes, with an additional 2,635 persons reported as untraceable. These figures, however, have been widely criticized by international non-governmental organizations, such as the International Crisis Group, as misrepresentative and not in conformity with professional standards.

The handful of incidents noted in the LLRC report stands in stark contrast to the vast number of credible allegations examined in the POE report. While the GSL’s public statements indicate it

⁷ LLRC report, para. 4.286.

⁸ LLRC report, para. 4.360.

⁹ LLRC Report, para. 4.359xii.

¹⁰ LLRC Report, para. 9.4

¹¹ LLRC Report, para. 9.35.

maintained a policy of “zero civilian casualties” and the only civilians killings occurred during crossfire, the POE estimated that civilian casualties range from 10,000 to 40,000 for the final months of the conflict.¹² Based on verified reports from civilians, seasoned aid workers, and doctors in the conflict zone, the POE concluded that in many cases, GSL security forces shelled areas it knew to be principally occupied by civilians.¹³ In addition, the Department of State’s 2009 Report to Congress listed 208 instances of harm to civilians or civilian objects, which strongly suggests that the LLRC’s conclusion that only three allegations of attacks against civilians deserve further investigation is a gross underestimation. These instances, as well as those allegedly perpetrated by the LTTE in both the LLRC and POE reports, merit further investigation. Hence, the notable gap between LLRC and POE findings regarding civilian casualties suggests that the GSL should establish an accountability mechanism to ensure that all allegations, not just the three identified in the LLRC report, are fully investigated.

With respect to LTTE attacks against civilians, the LLRC concluded that the LTTE was guilty of “grave violations of core Principles of IHL.”¹⁴ Specifically, the Commission found that LTTE cadres used civilians as human shields, shot at civilians attempting to escape to safe areas, forced civilians to provide support services, used military equipment in civilian areas, and forcibly conscripted child soldiers.¹⁵ The POE report found credible allegations for all of these same crimes.¹⁶ The LLRC report contemplates “framing charges against LTTE cadres,” but fails to make specific recommendations about investigating and prosecuting LTTE crimes.¹⁷ Accountability for violations of IHL and IHRL by both sides of the conflict is important to ensure justice for victims, to prevent a resurgence of violence, and for rebuilding Sri Lanka. The GSL should therefore fully investigate abuses committed by the LTTE and hold individuals accountable for such crimes.

B. Shelling of the No Fire Zones (NFZs)

At the end of the conflict with the LTTE, the GSL created a series of “No Fire Zones” (NFZs) aimed at providing civilians trapped in LTTE territory a safe haven into which government forces would not fire. On January 20, 2009, the GSL unilaterally declared the first NFZ (NFZ-1) located about 800 meters from the frontline. Even though the LTTE did not recognize any of the NFZs, the government claimed that it would continue to recognize the humanitarian spaces. Within days of establishing NFZ-1, however, government forces began shelling within the safe area, reportedly because they had taken fire from LTTE forces within NFZ-1. A pattern soon developed in which the LTTE would use NFZ-1 to fire on GSL forces, and then GSL forces would respond with heavy shelling into NFZ-1. Once it realized that NFZ-1 was not protecting civilians and was being used by the LTTE for cover, the GSL created a second NFZ (NFZ-2) on February 12, 2009. The same pattern of violence emerged in NFZ-2, however, and the government established a significantly smaller third NFZ (NFZ-3) on May 8.

¹² POE Report, para. 137.

¹³ POE Report, p. ii.

¹⁴ LLRC Report, para. 4.321 & Chapter 5.

¹⁵ LLRC Report, para. 4.321.

¹⁶ POE Report, pp. iii-iv.

¹⁷ LLRC Report, paras. 4.321 & 9.26.

The LLRC report concludes that Sri Lankan security forces did not deliberately target civilians in the NFZs. The report states that although civilian casualties occurred “in the course of crossfire,” “there appears to have been a *bona fide* expectation that an attack on LTTE gun positions would make a relevant and proportional contribution to the objective of the military attack involved.”¹⁸ The LLRC concluded that returning fire into the NFZs was not a violation of the IHL principles of distinction or proportionality because “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.”¹⁹ According to the LLRC, making determinations about the units responsible for the contested shelling would be nearly impossible.²⁰ Despite the purported impossibility of investigating shelling in the NFZs, the LLRC nonetheless concluded that the LTTE was responsible for the majority of civilian deaths in the NFZs. The LLRC did not make any recommendations to investigate who was responsible for the shelling of civilians in the NFZs, but does call for compensation to be provided to all affected parties.

Reports from the POE and the UN directly contradict the conclusions of the LLRC with respect to civilian casualties in the NFZs. The POE report concludes that credible allegations suggest that the GSL deliberately or negligently targeted civilians within the NFZs.²¹ For instance, in one incident on January 24, 2009, civilians and medical workers reported that hundreds of civilians died at a UN hub amidst intense shelling coming from government positions. LTTE cadres reportedly never fired within 500 meters of the UN hub, and because of GPS and reports to the GSL by the UN and ICRC, the government security forces were aware of the hub’s location. In other reported incidents, GSL forces shelled food distribution lines, hospitals, and IDP encampments known to the GSL.²² In another incident, the POE report found that 140 civilians were killed on March 26 in Ambalavanpokkanai by artillery fire from government positions.²³ The report also states that the civilians were capable of being identified by Unmanned Aerial Vehicles (UAVs) often used by the GSL. Furthermore, the POE report states that the Sri Lankan Security Forces repeatedly used Multi-Barrel Rocket Launchers (MBRLs) and other large artillery, which are used to shell large areas of land rather than return fire on specific locations, against targets in the NFZs.²⁴

Another report done by the UNITAR Operational Satellite Applications Programme (UNOSAT) for the Panel of Experts used satellite time-series imagery to conclude that the Sri Lankan Army (SLA) established and maintained capabilities to fire substantial quantities of artillery munitions into areas heavily populated with IDPs, specifically NFZ-2 and NFZ-3. The UNOSAT report found that that the SLA repeatedly rotated the fire bearing of heavy caliber howitzers towards NFZ-2 and later NFZ-3. The report also states that the SLA erected mortar batteries along the western shore of Nanthi Lagoon without viable military targets except for locations clearly falling with NFZ-2 and NFZ-3, both of which remained populated with tens of thousands of IDPs. UNOSAT also found over ten specific air strike impact craters identified immediately

¹⁸ LLRC Report, para. 4.282.

¹⁹ LLRC Report, para. 4.283.

²⁰ LLRC Report, para. 9.13.

²¹ POE Report, p. ii.

²² *Id.*

²³ POE Report, para. 105.

²⁴ POE Report, para. 100.

adjacent to IDP tent concentrations, a functioning hospital, and within NFZ-2, contrary to denials by the Sri Lankan Air Force.

The evidence gathered by the POE and UNOSAT indicates that the LLRC report does not adequately address the responsibility for shelling in the three NFZs. While the LLRC report concludes that it is difficult to ascertain the origin of artillery attacks, the government nonetheless has a duty to investigate the alleged abuses committed by Sri Lankan armed forces in the NFZs. Experiences in other post-conflict settings in relation to the use of force demonstrate that ascertaining the origin of shelling in the NFZs is not as impracticable as the LLRC suggests. A more thorough investigation potentially could determine what violations, if any, occurred, who committed them, and the extent to which officials in the government knew about or authorized such violations.

C. Attacks Against Humanitarian Objects

The LLRC report concludes that the Sri Lankan security forces did not deliberately target hospitals and other humanitarian objects in the NFZs. For instance, the report examined an attack against the Vallipunam Hospital and IDP camp nearby on January 21, 2009, which killed over 40 civilians. The LLRC concluded that the origin of the shells could not be accurately determined, but did note that the LTTE were positioned 500 meters away from the hospital.²⁵ The Commission also believed GSL statements that all patients had been moved from the Anandapuram Hospital before being fired upon by SLA forces, even though reports from aid workers and doctors indicated otherwise.²⁶ Finally, the LLRC found no definitive evidence that the GSL was responsible for the shelling of Puthukkudiyiruppu Hospital (PTK). The report relies on the testimony of two doctors from PTK stating that no shells hit the hospital and that they did not know from where the shells came. On the other hand, the report also mentions the testimony of a government official being treated at PTK who testified that he and his father-in-law were injured in a direct hit to the hospital and the shell likely came from government forces.²⁷

The LLRC report nevertheless concludes, “The Commission is satisfied, on a careful consideration of all the circumstances, that shells had in fact fallen on hospitals causing damage and resulting in casualties. However, the material placed before the Commission points to a somewhat confused picture as to the precise nature of events, from the perspective of time, exact location and direction of fire.”²⁸ The Commission called for “expeditious grant of appropriate redress” but only as a “humanitarian gesture” to “instill confidence in the reconciliation process.”²⁹

In contrast to the LLRC report, the POE report concludes that “Virtually every hospital in the Vanni, whether permanent or makeshift, was hit by artillery.”³⁰ The Panel found that the PTK

²⁵ LLRC Report, para. 4.119.

²⁶ LLRC Report, para. 4.121.

²⁷ LLRC Report, paras. 4.125-4.128.

²⁸ LLRC Report, para. 4.288.

²⁹ LLRC Report, para. 4.294.

³⁰ POE Report, para. 81.

Hospital was shelled every day from January 29 to February 4 most likely by the 55th Division of the SLA. The GSL claimed that no hospitals remained in the Vanni, but the POE report found that the UN and ICRC continuously updated the government on the whereabouts of medical facilities and make-shift hospitals in the region. The POE report also mentions that testimony by government doctors from these hospitals may not be accurate because they initially claimed that government forces repeatedly fired on their facilities but later changed their stories to reflect the GSL's position.³¹

Ultimately, both the LLRC and POE reports indicate that much uncertainty surrounds the extent and origin of shelling against hospitals and other humanitarian objects during the final months of the conflict. The LLRC did investigate several instances of such shelling, but its conclusion that attacks against hospitals simply represented a “confused picture” neglects the fundamental need to fully investigate potential violations of IHL.³² As these allegations implicate grave breaches of IHL, they merit full investigation and, if appropriate, prosecution of the responsible individuals.

D. “White Flag” Incident

The LLRC Report also fails to critically analyze or investigate the “white flag” incident, in which high level LTTE leaders were allegedly shot despite assurances from the GSL that they could safely surrender. While the circumstances surrounding the incident remain uncertain, the POE concluded that the LTTE leadership intended to surrender.³³ However, the LLRC only mentioned the above incident in a few short paragraphs, citing testimonies from a general and a government agent dismissing the allegations.³⁴ The Department of State does not take a position regarding the allegations concerning the “white flag” allegations but notes that the discrepancy between the POE and LLRC reports merits further investigation.

E. Sexual and Gender-Based Violence

The POE Report briefly discusses allegations of sexual and gender-based violence by GSL security forces during the final days of the conflict. The Panel pointed to several videos that strongly suggest that women were raped or otherwise sexually assaulted before being executed, but did not make any definitive conclusions due to a lack of evidence.³⁵ The POE indicated that this lack of evidence is likely partially due to strong cultural stigmas in Sri Lanka that cause reports of sexual violence to go underreported.³⁶

The LLRC report does not address allegations of sexual and gender-based violence at the end of the war.

³¹ POE Report, para. 130.

³² LLRC Report, para. 4.288.

³³ POE Report, paras. 170-71.

³⁴ LLRC Report, paras. 4.234-4.3.237.

³⁵ POE Report, para. 153.

³⁶ POE Report, para. 152.

F. Supply of Humanitarian Relief

The LLRC acknowledges that food and medical supplies became scarce with the intensification of the conflict, but does not surmise that the GSL purposefully underestimated the number of civilians trapped in various combat zones “for the purpose of starving the civilian population as a method of combat.”³⁷ The report states that amounts of food aid were determined by the government in consultation with the World Food Program (WFP) and other humanitarian organizations and, therefore, these circumstances do not “warrant any possible inference that there was a deliberate intention to downplay the number of civilians in the NFZs for the purpose of starving the civilian population as a method of combat.”³⁸ However, the LLRC report also concludes that “the issue of medical supplies to civilians in the conflict areas during the final days of the conflict is a matter that requires further examination, given the humanitarian considerations involved.”³⁹

The LLRC’s characterization of the government’s role in food distribution contrasts with allegations that the POE found credible. According to the POE report, the GSL purposefully underestimated the number of civilians that remained in the conflict zone so as to justify sending less food and medical supplies into the zone (e.g. the government estimated that only 10,000 civilians remained in NFZ-3, whereas the UN estimated that 100,000 remained). The POE report also states that the Ministry of Defense systematically deprived persons in the conflict zone of humanitarian assistance by imposing extensive restrictions on convoy participants.⁴⁰ The GSL based its restrictions on the belief that the materials would be used to benefit the LTTE, but denial of items such as surgical equipment would have increased the suffering of wounded civilians and wounded LTTE belligerents and could only have had a humanitarian purpose, according to the POE.

While the circumstances surrounding the distribution of food and medical supplies into the conflict zone remain uncertain, the civilians who perished or were otherwise harmed in the Vanni because of a lack of humanitarian aid deserve a complete investigation into this matter, and the GSL should instigate an independent and impartial investigation into the government’s possible role in depriving civilians of humanitarian relief.

G. Establishment of NFZs 2 & 3

An important question the LLRC raises but leaves unanswered is why the GSL created a second and third NFZ after becoming cognizant that the LTTE would exploit such zones to launch attacks, to which the GSL would respond, putting civilians in harm’s way. The LLRC report recognizes a pattern in which the LTTE exploited the NFZs and civilians there to attack GSL forces and then force civilians to follow them to the next NFZ. This tactic of using human shields was expressly recognized in both the LLRC and POE reports. The LLRC report concludes, “The conclusions to be drawn from these representations is that the conduct of the LTTE, in gross violation of IHL obligations on the protection of civilians, radically transformed the very

³⁷ LLRC Report, para. 4.304.

³⁸ LLRC Report, para. 4.304.

³⁹ LLRC Report, para. 9.22.

⁴⁰ POE Report, para. 209.

character of the NFZ and made it an integral part of the LTTE's combat operations to achieve their military objectives."⁴¹ Despite its knowledge that the LTTE used NFZ-1 and the civilians therein as part of its military strategy and that the GSL would respond to attacks from the NFZ thereby harming civilians, the GSL unilaterally declared NFZ-2 on February 12, 2009 and NFZ-3 on May 8, 2009.

In its concluding statements, the LLRC expressly remarked that "The Sri Lankan experience has in fact given rise to a debate as to whether, 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."⁴² The LLRC does not make any recommendations regarding the GSL's decision to unilaterally create NFZs 2 and 3. Likewise, the POE report does not expressly address this issue, although the POE report does detail the creation of the NFZs and the significant civilians casualties incurred in NFZs 2 and 3. More needs to be done to investigate how and why the GSL decided to create NFZs 2 and 3 after it concluded that the LTTE used NFZ-1 as part of its military strategy and thereby endangered thousands of civilian lives.

H. Enforced Disappearances

The LLRC report states that the Commission is concerned about the number of reports alleging enforced disappearances during the conflict and after surrender or arrest. The report found credible allegations of abductions of at least 12 people in the Batticaloa district, 100 in Mannar, and 6 in Jaffna. The Commission found a "clear duty of the State to cause necessary investigations into such specific allegations and where such investigations produce evidence of any unlawful act on the part of individual members of the Army, to prosecute and punish the wrongdoers."⁴³ This impartial tone of the report's findings on the missing turns more partisan, however, when it concludes that such investigations are necessary "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."⁴⁴

Like the LLRC report, the POE report found a number of credible allegations of enforced disappearance. The Panel reported 32 instances of alleged disappearances in May 2009 alone, many of which involved groups of people rather than individuals.⁴⁵ The report recommended full investigation into and potential prosecution for allegations of enforced disappearance by the GSL during and immediately after the conflict.⁴⁶ An independent and impartial investigation into reports of enforced disappearance and any resulting prosecution and punishment would bring justice and closure to those affected by missing family members, and the GSL should immediately begin the investigations called for in the LLRC report.

⁴¹ LLRC Report, para. 4.274.

⁴² LLRC Report, para. 4.335.

⁴³ LLRC Report, paras. 9.23, 9.48 & 4.319.

⁴⁴ LLRC Report, para. 4.319.

⁴⁵ POE Report, para. 151.

⁴⁶ POE Report, Recommendation 2(B), p. 121.

I. Arrest/Detention Policy

The LLRC report makes a number of important recommendations regarding the GSL's detention policy that the government should implement as soon as possible. The report notes several instances in which LTTE detainees remain in detention without charges and in which next of kin were either not notified of a detainee's whereabouts or not allowed to visit. The report states that all next of kin should have the right of access to detainees. The LLRC report also states that no person should be detained outside authorized places of detention and that law enforcement authorities should follow legal provisions when taking persons into custody, such as issuing a formal receipt of arrest and providing details of the place of detention.⁴⁷ In an important recommendation, the LLRC concludes that "The 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."⁴⁸ The LLRC also recommends that an "Independent Advisory Committee 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 PTA."⁴⁹ All of these recommendations are important in ensuring that the rights of detainees are protected. The LLRC makes laudable recommendations about law enforcement procedures for detainees and their next of kin as well as calls for investigations into allegations of violations of those laws.

The Department of State is aware of approximately 228 detainees under investigation remaining in GSL custody and an additional 892 detainees remaining in rehabilitation facilities. The government has permitted international humanitarian organization access to some detention facilities where former LTTE combatants are detained, including the Boosa detention facility where approximately 200 detainees are held. The government does not provide access to any detention facilities operated by military intelligence, stating that none existed. International humanitarian organizations have also only been permitted to visit detainees in rehabilitation as they are released.

J. Videos Showing Evidence of Summary Executions

On May 23, 2011, the UN Special Rapporteur on extrajudicial, summary or arbitrary executions (SR) Christof Heyns released a report to the Human Rights Council 17th session that, in part, dealt with a video aired by Channel 4 in the United Kingdom. The video in question, provided by Channel 4 on November 30, 2010, is a longer version of the video aired by Channel 4 on August 25, 2009, that purportedly depicted Sri Lankan soldiers summarily executing bound prisoners.

The matter of the original, shorter version of the video is covered in detail in the Department of State's second report to Congress of August 2010. In summary, the GSL commissioned four experts to evaluate the authenticity of the footage, and ultimately found the footage inauthentic based on a number of factors. Philip Alston, the then-UN Special Rapporteur on extrajudicial, summary or arbitrary executions, commissioned a separate, independent group of forensic

⁴⁷ LLRC Report, para. 9.54.

⁴⁸ LLRC Report, para. 5.42.

⁴⁹ LLRC Report, para. 5.44.

experts to analyze the video. A January 2010 report by these experts concluded that there was strong evidence to suggest the video was authentic. Then-SR Alston contended that the video necessitated an impartial investigation into the question of whether war crimes had been committed.

The extended video investigated by SR Heyns contains additional executions and shows the faces of some soldiers. SR Heyns commissioned three experts to analyze the video, including an audio and firearms expert. As a result of that analysis, SR Heyns concluded that the extended video was authentic, and that it "...provides credible evidence that serious crimes have been committed within the context of the Sri Lankan civil war, which should together with any other available evidence be examined systematically and professionally by domestic investigators, as well as by an independent, international investigational body..."

The LLRC Report directly addresses the Channel 4 videos and concludes that its authenticity cannot be verified through available forensic information. The LLRC Report raises questions about the footage's authenticity stating that the Commission "finds that there are troubling technical and forensic questions of a serious nature that cast significant doubts about the authenticity of the video and the credibility of its content."⁵⁰ The Report commendably calls for the GSL to "institute an independent investigation into this issue."⁵¹ While the GSL has said that the Army court of inquiry would investigate the Channel 4 videos, the State Department is not aware of any action by the GSL to implement the LLRC's recommendation of establishing an independent investigation into the Channel 4 videos.

K. Child Soldiers

The LLRC recommends full investigations into the conscription of child soldiers by the LTTE and other political parties. Notably, the report calls for the Tamil Makkal Viduthalai Pulikal (TMVP), the GSL, and UNICEF to fully implement the 2008 Action Plan between the parties to release and reintegrate child soldiers. The LLRC also calls for large-scale projects to reintegrate, educate, and provide counseling for former child soldiers.⁵²

The LLRC report also makes an important accountability recommendation regarding the prosecution of recruiters of child soldiers: "In instances where there is *prima facie* evidence of conscription of children as combatants, any such alleged cases should be investigated and offenders must be brought to justice. In this regard, the complaints of alleged recruitment of children by illegal armed groups/groups affiliated with the LTTE or any political party should be investigated with a view to prosecuting the offenders to ensure that the practice would not occur in the future."⁵³

⁵⁰ LLRC Report, para. 4.374e.

⁵¹ LLRC Report, para. 4.377.

⁵² LLRC Report, para. 9.77.

⁵³ LLRC Report, para. 5.96.